2006

Nonprofit Takeovers: Regulating the Market for Mission

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I. INTRODUCTION

A corporation that has long pursued a particular set of policies and programs is undergoing a struggle for control of its activities and, ultimately, its funds. Although in the past, incumbent board members have been reelected with little or no opposition, this year's election is different. Newcomers are running for the board on a platform that argues the incumbent board has not been sufficiently aggressive. Further, the newcomers claim that, if elected, they will improve the corporation by changing its methods and refocusing its mission, thereby achieving greater success. The newcomers also have been gaining voting power, buying up rights to vote in the upcoming elections. In response, the incumbents rush to portray the newcomers as dangerous insurgents who threaten the august reputation of the corporation, as well as its future prosperity. The parties ultimately end up in litigation over the methods the newcomers may use to garner control and those the incumbents may use to defend against the newcomers. In resolving these issues, the court intones a standard quite protective of the incumbents' position.

In reading this plot sketch, one might guess the particulars of this story relate to a transaction in the familiar for-profit market for corporate control. The board of a blue-chip for-profit corporate

* Associate Professor of Law, Brooklyn Law School; J.D., Harvard Law School; B.A., University of Pennsylvania. I am indebted to the Brooklyn Law School Summer Research Program, the Stanford/Yale Junior Faculty Forum, the BLS Faculty and Junior Faculty Workshops, and the able research assistance of Mason Allen, Libby Bakalar, Matthew Kelly, and Jennifer McGovern. I appreciate the comments of Jeff Reiser, Putnam Barber, Evelyn Brody, Michael Cahill, Ed Cheng, Steven Dean, James Fishman, Marion Fremont-Smith, Ronald Gilson, Sally Gordon, Susan Herman, Jason Johnston, Roberta Karmel, Robert A. Katz, Claire Kelly, Heidi Kitrosser, Debra Morris, Arthur Pinto, Jack Preis, David Reiss, Jayne Ressler, Anthony Sebok, Chris Serkin, Larry Solan, Madhavi Sunder, Daniel Tinkelman, Mark Tushnet, and the attendees at the 2005 ARNOVA panel at which I presented an earlier draft. Any remaining errors are, of course, my own.

giant is accused of stagnation in a proxy contest, tender offer, or both, and seeks refuge for its defenses within the relatively generous standards articulated in the Delaware courts' takeover defense jurisprudence. It may come as more of a surprise, however, that this story also provides the contours of a struggle for control that can and has occurred within nonprofit institutions. Furthermore, upon closer inspection, one observes that courts have been even more deferential in sheltering the defensive actions of incumbent nonprofit directors than they have of their for-profit counterparts.

This Article relates the tales of two such recent takeover attempts at the Sierra Club ("the Club") and the Royal Society for the Prevention of Cruelty to Animals (RSPCA or "the Society"). These examples demonstrate how nonprofit takeover attempts can be mounted. They also offer a glimpse at the courts' extremely deferential response to nonprofit incumbents facing takeovers. Ultimately, this Article argues that this stance is at odds with both the basic structures of governance these nonprofits have chosen and with some of the fundamental notions of how charity benefits our society.

Part II begins by offering initial insights into the concerns that takeover activity raises, both within targeted nonprofits and for society at large. After identifying these concerns, it then takes a step back to place nonprofit takeovers within the context of the various transactions by which nonprofit organizations can experience changes in control. This treatment reveals that the nonprofit transactional menu has somewhat different offerings than its for-profit analogue, particularly in the hostile transaction category. Mergers and purchases mediated through fiduciaries are available, as in for-profits. However, at least in those nonprofits with member-elected boards, changes in control also can be achieved by persuading existing members to vote in a new control group and often by the purchase of sufficient new memberships to outvote any opposition to an insurgency. Existing literature has considered friendly control transactions in the nonprofit sector but has not yet grappled with the theory and implications of hostile attempts at nonprofit takeovers, as this Article does. Cataloguing the range of transactions available to shift control of nonprofits sets the stage for an examination of these efforts in action, as well as an analysis and critique of fiduciaries' and courts' reactions to them.

Part III presents two recent real-world examples of nonprofit takeover attempts. These case studies offer a view of takeover activity at different stages and using distinct techniques. At the Sierra Club, members in favor of adding an anti-immigration plank to the Club's platform sought election to its board in order to see their goal implemented. Pro-hunting insurgents within the RSPCA engaged in a campaign to recruit new members and to mobilize them to push withdrawal of the Society's support for nationwide anti-hunting legislation. Despite these somewhat different strategies, the stories share a common reaction by the fiduciaries of the target nonprofits. Both sought to defend themselves and their organizations against what they perceived and decried as a wrongful attempt by insurgents to destroy their nonprofit organization and defeat its mission. Moreover, when challenged, the defensive measures taken by both sets of fiduciaries were met with considerable deference by reviewing courts.

Such a deferential, incumbent-protective standard of review is, of course, not the only alternative available to courts reviewing defenses deployed by nonprofit fiduciaries against takeover attempts or preparations. Part IV considers a variety of standards among which reviewing courts might choose, including incumbent-protective options like those used in *Sierra Club* and *RSPCA*, insurgent-protective standards that would enable most takeover activity and frustrate defending fiduciaries, and intermediate standards that would seek to distinguish destructive from healthy nonprofit takeover activity. Ultimately, this Article argues for an intermediate approach designed specifically for the nonprofit context in which these transactions take place.

The scrutiny courts apply to review defensive measures against nonprofit takeover activity should turn on the techniques employed by insurgents. Fiduciaries' attempts to frustrate insurgents seeking to persuade members—another governing constituency of the organization—that their plans are superior to those of incumbents should be reviewed rigorously. In contrast, when fiduciaries act to prevent the dilution or evasion of members' role in defining the organization's mission and activities, their defensive actions should be subject to more deferential review. This governance-protective standard would balance the nonprofit sector's rectitude for preserving original intent and mission and the value in allowing nonprofit mission to evolve in order to meet society's changing

needs. It also would reinforce the choice that nonprofits with voting members have made to use democratic governance processes.

Part V offers concluding thoughts on the larger lessons the limited phenomenon of nonprofit takeovers may teach. In particular, crafting a response to these high stakes conflicts reminds us of the crucial importance of mission in nonprofits and the challenges of defining and policing that mission in organizations with multiple stakeholders.

II. NONPROFIT TAKEOVER ACTIVITY EXPLAINED

Control of a for-profit corporation may be shifted via a spectrum of friendly to hostile transactions, and the relevant parties to these deals are well-understood and denominated. Further, the context in which these transactions take place can and has been explained as a functioning market for corporate control. Part II.B will use these for-profit terms and concepts to serve as a starting point for a catalogue of similarly friendly-to-hostile transactions that can be used to acquire control of a nonprofit corporation, the parties involved in them, and the context in which they operate. With this initiation, Part II.C will then explore in more detail the particular concern of this Article: the types of hostile transactions available to shift control in nonprofit corporations with member-elected fiduciaries.

Before turning to this transactional taxonomy, however, it is important to convey the gravity of the dangers nonprofit takeovers may pose to affected organizations, the nonprofit sector, and society at large. Although Part II.C will provide an accurate explanation of the means by which nonprofit takeover attempts may be mounted, its description is too abstract to communicate a sense of the real fears experienced by those at the helm of a targeted organization. Therefore, Part II.A offers some preliminary insights into the stakes of these conflicts, both for the targeted nonprofits and more generally.

A. The Potential Perils of Nonprofit Takeovers

As an initial matter, takeover activity within a nonprofit raises grave concerns for its leaders. These fears can go far deeper than superficial worries that they may be replaced. Directors, officers, and managers of a targeted nonprofit often will be genuinely afraid that their organization's mission will be impaired, if not betrayed, by a

takeover.[1] They do not see the insurgent individual, entity, or group as merely a potential investor in a market for mission control. Rather, they see the insurgents as dangerous ideological interlopers, intent on co-opting the nonprofit's resources, name, and reputation for purposes inimical to it. Moreover, the fact that a takeover may be a means by which to transform a nonprofit's mission illegitimately poses a significant risk beyond the bounds of the affected organization. It also raises concerns for the nonprofit sector's role in society. In order to understand nonprofit takeover phenomena and propose schemes for their regulation, it is critical to understand the seriousness of these potential perils.

Fiduciaries of a nonprofit faced with takeover activity view insurgents as desiring to transform their organization's mission illegitimately. The clearest, legally-binding statement of a nonprofit's mission can be found in the statement of purposes in its corporate charter.[2] Barring amendment of these purposes, any new control group can only make programmatic and policy changes only within the range of this mission. Thus, an insurgent group mounting takeover efforts or preparations generally can explain its plans as furthering the mission the nonprofit states in its charter.[3] This limitation often will be of little comfort to incumbents facing takeover activity, however, as the expressions of mission in corporate charters are typically quite broad. The sense of the nonprofit's appropriate mission espoused by its leaders will be more specific, shaped by the history of the organization, the trend in its policies and activities, and the plans and strategies its fiduciaries have laid out for it over time. Despite insurgents' ability to frame their plans for

1. Of course, leaders of a for-profit corporation might view the threat of a takeover in similar terms. They may view the goals of their organization more holistically than merely maximizing the bottom line and may fear the possibility that a takeover will betray their company's goodwill or corporate values. I thank Roberta Karmel for this insight.

2. *See, e.g.*, 15 PA. CONS. STAT. § 5306(a) (2005) ("Articles of incorporation . . . shall set forth . . . [a] brief statement of the purpose or purposes for which the corporation is incorporated."); WASH. REV. CODE § 24.03.025 (2005) ("The articles of incorporation shall set forth . . . [t]he purpose or purposes for which the corporation is organized."); REVISED MODEL NONPROFIT CORP. ACT § 2.02(b) (1987) ("The articles of incorporation may set forth . . . the purpose or purposes for which the corporation is organized . . . .").

3. It is also possible that an insurgent group would mount its takeover bid in tandem with a proposal to amend the charter's statement of purposes. However, statements of purposes are usually sufficiently general that this will not be necessary. Such a strategy also would increase the risk of triggering review of the use of prior-acquired assets, a risk insurgents likely would desire to avoid. *See infra* note 4 and accompanying text.

the nonprofit as within the technical terms of the charter, incumbent leaders may view these plans as a serious compromise of the organization's true mission—one that they have seen evolve firsthand.

These concerns about compromising the organization's true mission range from the pragmatic to the philosophical. On the most practical level, incumbents may fear that after a takeover, resources of the organization will be used by insurgents to advance goals different from, or even adverse to, the goals for which those resources were originally earned or donated. Such a change in asset use will deprive the nonprofit's original goals of needed funding and may irk past and discourage future donors. To some degree, this fear is an overreaction, as prior-acquired tangible assets may be safeguarded by legal limitations on changes in their use.[4] The name and goodwill of the organization, however, likely will not be. The nonprofit corporation is granted perpetual existence, with its purposes to be advanced in the ways directed by its fiduciaries. The value inherent in a respected nonprofit's reputation will be at the disposal of any validly selected new board—and this value may be substantial. If the target nonprofit's incumbents believe the programmatic or policy changes advocated by insurgents are in conflict with its mission, they have real reason to fear the appropriation of their nonprofit's name and reputation by insurgents. Finally, as the most identifiable leaders of their nonprofit organization, nonprofit fiduciaries may feel personal responsibility to protect the ideological territory the group has staked out for itself, and insurgents' plans may threaten the ability of the nonprofit to play this role.

In addition to the fears that takeover activity can provoke within individual nonprofits, if it functions as a vehicle for illegitimate transformation of mission, this phenomenon raises sector- and society-wide concerns as well. The crux of these concerns is, of

4. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003) ("A disposition to [a charitable] institution for a specific purpose . . . creates a charitable trust of which the institution is the trustee for purposes of the terminology and rules of this Restatement."); *see also* Iris J. Goodwin, *Donor Standing To Enforce Charitable Gifts: Civil Society vs. Donor Enforcement*, 58 VAND. L. REV. 1093, 1106–08 (2005) (noting that even unrestricted gifts are to be used for "purpose[s] consistent with the charity's mission" and that restrictions on charitable gifts generally last in perpetuity); Evelyn Brody, The Legal Framework for Restricted Gifts: The Cy Pres Doctrine and Corporate Charities 8–9 (Nov. 1, 2003) (unpublished manuscript, on file with author) (describing the varying approaches state law uses to require corporate charities to adhere to restrictions placed on restricted gifts).

course, the persistent and perplexing problem of distinguishing legitimate mission evolution from illegitimate failures in mission accountability.[5] Takeover activity may represent constructive evolution. If takeovers simply shift nonprofits' activities and policies in order to allow them to grow with the times and face novel problems in society, then takeovers support one of the important policy rationales for having (and privileging) a nonprofit sector. Part of the nonprofit sector's value, after all, lies in its ability to adapt to meet new challenges as our nation and our world changes.[6] Alternatively, though, takeover activity might be destructive. It might reroute the organization's financial and ideological resources to goals and actions contrary to those of its major stakeholders; or it might destroy or waste away those resources. The nonprofit sector is also respected and supported for its strength in preserving the values of founders[7] and the intent of donors,[8] serving the needs of its

5. *See* Evelyn Brody, *Accountability and the Public Trust*, *in* THE STATE OF NONPROFIT AMERICA 471, 476 (Lester M. Salamon ed., 2002) (noting the importance of faithfulness to mission as an aspect of nonprofit accountability as well as the difficulty of its application); Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 213 (2004) (describing the potential failure in accountability represented by illegitimate shifts in nonprofit mission). *Compare* MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 439–40 (2004) (arguing for a liberal application of cy pres and deviation doctrine to govern the amendment of nonprofit corporate purposes), *with* Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin and Trust in the Nonprofit Health Care Enterprise*, 5 YALE J. HEALTH POL'Y L. & ETHICS 1, 80–85 (2005) (putting forward a "mission primacy" approach to the mission accountability question under which directors of corporate nonprofits would be bound by law to follow the articulated mission of their organizations but would be given deference in their selection of means by which to do so), *and* Robert A. Katz, *Let Charitable Directors Direct*, 80 CHI.-KENT L. REV. 689, 695–98, 715–16 (2005) (asserting that nonprofit corporate directors should be given extensive powers to evolve their organizations' missions over time, while this authority should be restricted for trustees of charitable trusts).

6. *See, e.g.*, MICHAEL O'NEILL, NONPROFIT NATION 47 (2002) (noting the argument from political science theory that the nonprofit sector exists, in part, as a fount for social experimentation and development); James Douglas, *Political Theories of Nonprofit Organization*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 43, 48–49 (Walter W. Powell ed., 1987) (noting that one rationale put forward for the existence and benefits of the nonprofit sector is its ability to experiment and innovate in ways the government and the market cannot or will not).

7. *See, e.g.*, David Horton Smith, *The Impact of the Voluntary Sector on Society*, *in* THE NATURE OF THE NONPROFIT SECTOR 79, 82 (J. Steven Ott ed., 2001) (describing nonprofits' important role in value preservation).

8. *See, e.g.*, Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 1034–35 (2004) (noting and questioning the talismanic power of the concept of donor intent in charity law); Brody, *supra* note 4, at 1–2 (noting donor intent as "enshrined in the law as a lodestar").

beneficiaries and the public,[9] and inculcating participants with the capacity and skills to function in civil society.[10] If takeovers are used to undermine or dissipate these nonprofit contributions to society, they threaten the sector's ability to play these important roles. They also imperil the trust and respect the public has for nonprofits. If and when nonprofit takeovers do function destructively, their dangers do not remain confined to the organizations affected by them. Rather, they have the capacity to undercut the value of the nonprofit sector, to the detriment of society in general.

With these serious potential risks clarified, it is now appropriate to turn to an explanation of the means by which nonprofit takeovers can occur. Again, the for-profit analogues are an instructive starting point for this discussion.

B. Control Transactions in the For-Profit Sector

A vigorous market for corporate control, including takeover activity, has long been recognized as important to a well-functioning for-profit sector.[11] The product in this market is the ability to control

9. *See, e.g.*, LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 10–16 (2d ed. 1999) (identifying public benefit as one of the defining characteristics of the nonprofit sector and service provision as one of its four functions); Henry Hansmann, *Economic Theories of Nonprofit Organization*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 6, at 27, 28–33 (offering economic rationales for the nonprofit sector, including nonprofits' ability to provide public goods and goods subject to contract failure, which would otherwise be sub-optimally produced).

10. *See* SALAMON, *supra* note 9, at 17 (describing the creation and sustenance of social capital as one of the functions of the nonprofit sector); Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 571–78 (1998) (exploring the nonprofit sector's contributions to civil society and representative democracy); Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 865–86 (2003) (explaining the ability of nonprofits to contribute to civil society, particularly through their impact on members); THE NATURE OF THE NONPROFIT SECTOR, *supra* note 7, at 50–51 (describing the contributions of nonprofits to civil society as "pathways to participation" and "manifestations of community").

11. *See, e.g.*, John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1153 (1984) (noting the socially valuable function of the market for corporate control, though criticizing claims about the magnitude of this value as "overstated"); Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539, 1542–43 & nn.11–12, 1551 (1996).

The identification of the market for corporate control can be traced at least to the seminal work of Henry G. Manne. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); *see also* William J. Carney, *The Legacy of "The Market*

the assets and policies of for-profit corporations.[12] The individual or group with control over the assets and policies of a for-profit corporation can redeploy them to uses likely to result in higher profits.[13] Demand for control in this market is driven by the fact that any such successes will be enjoyed, in some significant part, by the individuals who obtain control. These successes may take the form of increased share price, greater compensation, or some combination of the two, and may be accompanied by beneficial reputational effects.[14]

Investors in the market for corporate control can acquire control of a corporation's business through a variety of transactions.[15] These investors might be individuals acting alone or in a syndicate. More realistically, however, they will be other for-profit corporations seeking to improve their own financial outlooks by a program of acquisition or consolidation.[16] Although myriad transactional forms

for Corporate Control" and Origins of the Theory of the Firm, 50 CASE W. RES. L. REV. 215, 225 (1999) (describing Manne's contribution as "creat[ing] the paradigm that has dominated discourse about the firm and corporate law for the remainder of the century, and shows every prospect of a long and vital life in the next"); Fred S. McChesney, *Manne, Mergers, and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 247–52 (1999) (describing Manne's three contributions to corporate scholarship as identifying the reasons for corporate mergers, perceiving mergers as shareholder protection devices, and linking share price with managerial efficiency).

Of course, Manne's insight builds on Berle's and Means's identification of the separation of ownership and control as the principal governance problem in the modern public corporation. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 233 (1932).

12. *See* Manne, *supra* note 11, at 112; Edward B. Rock, *Antitrust and the Market for Corporate Control*, 77 CAL. L. REV. 1365, 1370 (1989).

13. *See* Kahan & Klausner, *supra* note 11, at 1542; Manne, *supra* note 11, at 112–13.

14. *See* Manne, *supra* note 11, at 112–13.

15. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW § 7.2 (2000) (speculating that "[p]erhaps few other corporate transactions provide the participants with such different options to achieve the same basic result, and, accordingly, place such a premium upon form" as acquisition transactions); David W. Leebron, *Games Corporations Play: A Theory of Tender Offers*, 61 N.Y.U. L. REV. 153, 157 (1986) ("[T]he choice of [acquisition] procedure is largely within the hands of the acquiring corporation.").

For a survey of various friendly and unfriendly techniques for structuring change of control transactions, see MATTHEW BENDER & CO., 1–2 CORPORATE ACQUISITIONS AND MERGERS ch. 2 § 2.02 (2006) [hereinafter CORPORATE ACQUISITIONS & MERGERS] (explaining a range of negotiated acquisitions); *id.* ch. 2 § 2.03 (summarizing the legal issues arising out of tender offers, the principal type of hostile acquisitions); ROBERT A. CLARK, CORPORATE LAW §§ 11.1–.4, 13.1–.2 (1986).

16. *See, e.g.*, Paramount Commc'ns v. QVC Network, Inc., 637 A.2d 34, 37–41 (Del. 1994) (describing the terms and motivations behind a friendly transaction in control of Paramount Communications, which was concluded between Paramount fiduciaries and Viacom, and also describing the subsequent unfriendly and competing bid for control of

may be used to accomplish a for-profit change in control, for present purposes, the friendly and unfriendly archetypes should be separated and discussed.

In a friendly transaction, the acquirer negotiates with the management and/or board of directors of the corporation over which it seeks to acquire control, who act as the primary suppliers of control of the target corporation.[17] Control can be supplied through a sale of the target corporation's assets to the acquirer, which the acquirer can then redeploy as it prefers.[18] Alternatively, the acquirer can obtain control through a merger or consolidation of the target corporation with a corporation that the acquirer already controls.[19] Control of this survivor corporation will afford the acquirer its desired control over the target's assets and policies. The management of the target corporation may negotiate these transactions, but under corporate law, the target's board of directors will have to approve the deal in order for it to go forward.[20] In addition, depending on the structure of the transaction, the target's board may have to solicit and obtain approval by the target's shareholders in order for the transaction to proceed.[21]

Paramount mounted by QVC Network). Corporate acquirers, of course, are run by individuals, and the actions of corporations in the market for corporate control are frequently and often accurately seen as the actions of their powerful leaders. The actions of both Viacom and QVC in the facts leading up to the *Paramount* case, for example, are identified closely with their leaders, Sumner Redstone and Barry Diller. *Id.*

17. *See* GEVURTZ, *supra* note 15, § 7.3 (explaining that in sales of assets and mergers, "the board of directors plays a gatekeeping role, in that the board must approve the transaction before the shareholders of the target can vote upon it").

18. *See* JAMES D. COX ET AL., CORPORATIONS § 22.01 (1997) (describing the purchase of all or substantially all of a target's assets as "[t]he most basic form of acquisition").

19. *See id.* (identifying merger and statutory consolidation as alternatives to acquisition through purchase of assets).

20. *See, e.g.*, CAL. CORP. CODE § 1101 (West 2000) (requiring the board of directors of each party to a merger to approve the merger agreement); DEL. CODE ANN. tit. 8, § 271 (2001) (requiring the board of directors of selling corporation to approve its sale of all or substantially all assets); *see also* COX ET AL., *supra* note 18, §§ 22.05, 22.12 (describing state statutory authorizations of sales of all or substantially all assets, mergers, and consolidations requiring board approval).

21. In general, corporate statutes require shareholders of both the acquirer and target corporations to approve merger transactions. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(c); N.Y. BUS. CORP. LAW § 903 (McKinney 2005). However, in a control transaction accomplished through purchase of all or substantially all of the target's assets by the acquirer, statutes typically require only the target's shareholders to approve. *See, e.g.*, DEL. CODE ANN. tit. 8, § 271(a) (requiring only the board of directors of selling corporation to approve its sale of all or

In unfriendly transactions, often called takeovers or hostile takeovers,[22] the shareholders of the target corporation—rather than its management and board of directors—act as the suppliers of control. The acquirer obtains control over the assets and policies of the target corporation by obtaining a working majority of shares to vote for its candidates for the board. This working majority may be secured by persuading the target's existing shareholders to grant the acquirer proxies to vote their shares in favor of the acquirer's slate of directors in a proxy contest.[23] Alternatively, the needed majority may be obtained by the acquirer's purchase of shares from the target's existing shareholders in a tender offer.[24] These techniques of persuasion and purchase also may be used together to amass the necessary votes. However the new majority is composed, when it votes to transfer control from incumbent directors to the acquirer-supported candidates, these new directors can appoint new management and set about plans to use their newfound control to alter the corporation's policies or redeploy its assets as they see fit.[25]

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substantially all assets); *see also* COX ET AL., *supra* note 18, § 22.02 (noting this distinction in governance process necessary to approve the varying types of friendly acquisition transactions).

Of course, in many cases, state corporate law will not be the only relevant authority. Exchange listing standards requiring a shareholder vote to approve changes in control will prompt publicly-traded for-profit corporations to obtain such approval regardless of state law requirements. *See, e.g.*, NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 312.03(d) (2006) (requiring shareholder approval "prior to an issuance that will result in a change of control of the issuer").

22. A hostile takeover is a "takeover that was not approved or recommended by the management or directors of the target company." CORPORATE ACQUISITIONS & MERGERS, *supra* note 15, at 1–app. 5E, Glossary of Takeover Terms.

23. *See, e.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 654–55 (Del. Ch. 1988) (describing efforts by substantial shareholder to change control over the target corporation through consent solicitation seeking shareholders' consent to a bylaw change, which would increase the size of the target's board and facilitate election of a new majority of directors); Carrie Kirby, *PeopleSoft Board Targeted*, S.F. CHRON., Jan. 27, 2004, at B1 (describing Oracle's nomination of five candidates for the board of PeopleSoft to run against candidates favored by incumbents because, if elected, these candidates could have changed PeopleSoft's position on a proposed takeover by Oracle).

24. *See* GEVURTZ, *supra* note 15, §§ 7.2.3, 7.3 (explaining how a tender offer can be used to acquire control of a target corporation "without approval from—and, indeed, over the opposition of—the target's board of directors," and noting that a purchase of most or all of a target's stock from its shareholders is "the vehicle of choice for a 'hostile take-over'").

25. Acquirers will engage in purchases of control when they believe the policies of a target corporation can be revised or the use of its assets can be varied to achieve gains sufficient to make the costs of the change of control transaction worth bearing. *See* CLARK, *supra* note 15, § 13.2.1 (surveying the various reasons why acquirers might engage in tender offer acquisitions: gains from management, synergy, monopolization, managerial benefits, or looting

C. Control Transactions in the Nonprofit Sector

A robust market for control has not been recognized as important, or even existent, in the nonprofit sector.[26] But the ability to control the assets and policies of nonprofit organizations is a product for which there is some demand.[27] The structure of nonprofit organizations and the legal restrictions on the use of their assets for private benefit prevent personal profit from driving the demand for control of nonprofits. The fundamental legal quality of the nonprofit form, the "nondistributional constraint," prohibits the

gains); Leebron, *supra* note 15, at 160–62 (explaining the various types of self-interest that acquirers pursue through their acquisition transactions). Which type of transaction acquirers will choose depends on a variety of factors, including, importantly, the relative costs of friendly and unfriendly alternatives.

26. *See* Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 489 (1996) ("No market for corporate control exists in the nonprofit organization."); Greaney & Boozang, *supra* note 5, at 2 (noting "charitable corporations' lack of shareholders and market for corporate control"); Henry Hansmann, *The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?*, 39 CASE W. RES. L. REV. 807, 821 (1989) ("Moreover, even in nonprofits with members there is no possibility of disciplining managers through a market for corporate control, since unlike business corporations nonprofits have no stockholders with a right to both net assets and control."); Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 227–28 ("[I]n the nonprofit world, owners are not well-defined; their voting rights are questionable or non-existent; charitable goals are ambiguous . . . . [T]here is no market for corporate control . . . ."). I, too, have noted the absence of a precise nonprofit corollary to the for-profit market for corporate control. *See* Brakman Reiser, *supra* note 10, at 850 n.86 ("However, neither the efficient capital structure nor the efficient market for corporate control rationale translates well to the nonprofit context.").

It is prudent at this point to note some of the limitations on this Article's scope. First, although nonprofit organizations may be organized as unincorporated associations, charitable trusts, or nonprofit corporations, MARILYN E. PHELAN, NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS, AND ASSOCIATIONS § 1:03 (2000), the nonprofit takeover phenomena explored herein occur only in nonprofits using the corporate form. Thus, future references to nonprofits and nonprofit organizations denote this type of organization. Furthermore, the subject of this Article is confined to takeover activity and responses to it in public benefit nonprofit corporations—traditional charities organized to pursue some public, or other-regarding, purpose—rather than nonprofit corporations organized primarily to pursue the interests of their members or for religious purposes. *See* REVISED MODEL NONPROFIT CORP. ACT § 17.07 (1987) (defining public benefit nonprofit corporation). Finally, although all fifty states and the District of Columbia have their own nonprofit pronouncements and precedents, the balance of this Article will advocate reforms to nonprofit law generically. This is possible because, unless otherwise noted, the underlying law either has not yet been articulated or is substantially similar across jurisdictions.

27. *See* Brody, *supra* note 26, at 466 ("Because no individual may claim a nonprofit's surplus, nor can anyone sell interests in a nonprofit, control over nonprofit assets and operations becomes the strongest rights that exist in such an organization.").

use of a nonprofit organization's profits for the benefit of its directors, officers, or members.[28] Rather, profits must be reinvested in the organization itself and in production of its mission.[29] However, control transactions do occur in the nonprofit sector, although the motivation for them is different. Rather than responding to a personal profit incentive, acquirers of a target nonprofit seek control in order to impose their views of how best to achieve the mission of the organization, which often will permit them the practical ability to reconceptualize what that mission should be.

Despite the unlikelihood of personal financial enrichment through obtaining control of a nonprofit, various types of entities, individuals, and groups stand to gain from securing the power to direct or redirect a nonprofit's mission and assets. Those in control of a potential acquirer may believe that annexing the assets of a target nonprofit will improve the acquirer's efficiency, profitability, or ability to serve its own mission. A potential individual acquirer may believe, out of a sense of social entrepreneurship, that her vision of how to set the policies or deploy the assets of a target nonprofit will best achieve the charitable purposes the target pursues. A potential acquirer group may feel that the mission of a target nonprofit has strayed from its appropriate precincts, or the group may feel that the target's mission and programs for pursuing it have become stale and need to evolve in order to address contemporary needs. In any of these situations, control over the target nonprofit will be a prize demanded on its own, without the need for personal profit to motivate potential acquirers.

As in the for-profit context, potential nonprofit acquirers can use a range of transactions to attain control of their targets. In fact, the range of options for nonprofit control transactions is slightly wider than that in the for-profit context. Still, a continuum of friendly to unfriendly types of transactions can be observed.

28. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (coining the term "nondistributional constraint" to describe this prohibition and identifying its role in an economic rationale for the nonprofit sector); *see also, e.g.*, CAL. CORP. CODE §§ 5410, 5049 (West 2005) (prohibiting such distributions to members); REVISED MODEL NONPROFIT CORP. ACT §§ 1.40, 13.01 (prohibiting payments from nonprofit corporations to their "members, directors, or officers").

29. *See* Hansmann, *supra* note 28, at 838.

Friendly control transactions occur in nonprofits in much the same way that they do in for-profits. The target nonprofit's board of directors and management act as the supplier of control. A potential acquirer must negotiate with the target's board and management to reach acceptable terms for a purchase and sale of assets, merger, or consolidation, and the directors ultimately must approve any such transaction.[30] In nonprofits that opt for a governance structure with member-elected fiduciaries, these members will generally also be required to approve friendly transactions in control.[31] When a nonprofit has selected a self-perpetuating board as its governance structure, however, the board will be the only internal body required to approve friendly changes in control.[32] Moreover, even when external parties must approve a friendly transaction in control, the board alone can initiate consideration of any such deal.[33]

30. *See* REVISED MODEL NONPROFIT CORP. ACT §§ 11.03, 12.02 (requiring board approval of a nonprofit corporation's plan of merger and sale of assets other than in the regular course of business); *see, e.g.*, UTAH CODE ANN. §§ 16-6a-1101 to -1202 (2000).

31. *See* REVISED MODEL NONPROFIT CORP. ACT §§ 11.03, 12.02 (requiring, when a nonprofit corporation has members, that its members approve a merger or sale of assets by the lesser of two-thirds of the votes cast or a majority of the voting power); *see, e.g.*, MASS. GEN. LAWS ANN. ch. 180, §§ 8A, 10 (West 2005) (requiring that two-thirds of a nonprofit's members approve any sale, lease or exchange of substantially all of its assets, merger, or consolidation of those nonprofits with members).

32. Sometimes governmental authorities must be notified of or approve friendly control transactions, but governmental involvement will depend on the jurisdiction and form of the transaction. *See* REVISED MODEL NONPROFIT CORP. ACT §§ 11.02(b), 12.02(g) (requiring attorney general to be given notice of proposed nonprofit mergers and sales of assets outside the regular course of business); *see, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW §§ 510, 511, 907 (McKinney 2005) (requiring court approval for sale of all assets and mergers by nonprofit corporations).

33. Friendly nonprofit acquisitions have been the subject of some academic discussion. *See, e.g.*, Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1113 (2001) (arguing for the removal of obstacles to such transactions as a way to encourage "[s]trategic, mission based restructuring"); Dana Brakman Reiser, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care Systems*, 53 RUTGERS L. REV. 979, 988–89 (2001) (reviewing the effects of various types of friendly nonprofit affiliations and acquisitions). Reports of particular nonprofit mergers also sometimes analyze the potential benefits of nonprofit merger activity. *See, e.g.*, Donald Haider, *Common Bonds*, 2004 STAN. SOC. INNOVATION REV. 68, 69 (providing a case study of a merger between two job training organizations); Donald H. J. Hermann, *Religious Identity and the Health Care Market: Mergers and Acquisitions Involving Religiously Affiliated Providers*, 34 CREIGHTON L. REV. 927, 937–45 (2001) (surveying the effects of mergers of religiously affiliated nonprofit hospitals); Edward F. McArdle, *Health Law*, 53 SYRACUSE L. REV. 629, 666–68 (2003) (critiquing a determination that the proposed merger of two nonprofit hospitals did not require court approval or notice to the attorney general, despite

In unfriendly or hostile nonprofit control transactions, a potential acquirer looks to a group or entity other than current fiduciaries to supply it with the control it desires. This dynamic can occur only in those nonprofit corporations with member-elected fiduciaries. As mentioned above, nonprofit corporations must choose one of two systems for composing their boards of directors.[34] They

possible reductions in health services in the facilities' service area); Nicole Wallace, *Two Animal-Protection Groups Plan to Merge in 2005*, CHRON. PHILANTHROPY, Dec. 9, 2004, at 33 (describing merger plans of the Humane Society of the U.S. and the Fund for Animals).

Conversions—whereby a nonprofit is transformed into a for-profit entity—have been addressed particularly often. There are numerous critics of conversions, many of whom would deem them anything but "friendly," and who question when these transactions are appropriate for nonprofit organizations and whether they can be accomplished without lapses by their fiduciaries. *See, e.g.*, John D. Colombo, *A Proposal for an Exit Tax on Nonprofit Conversion Transactions*, 23 J. CORP. L. 779, 781 (1998) (proposing an "exit tax" on hospital conversions in order to facilitate regulatory interest in such transactions, safeguard community interests in charitable assets, and standardize governmental use of conversion proceeds); John F. Coverdale, *Preventing Insider Misappropriation of Not-for-Profit Health Care Provider Assets: A Federal Tax Law Prescription*, 73 WASH. L. REV. 1, 6–7 (1998) (surveying evidence of insiders' private enrichment and misappropriation of charitable assets during the period of unregulated nonprofit conversions); Phill Kline, Robert T. Stephan & Reid F. Holbrook, *Protecting Charitable Assets in Hospital Conversions: An Important Role for the Attorney General*, 13 KAN. J.L. & PUB. POL'Y 351, 369 (2004) (raising the concern that in conversions "the community served by the hospital system risks losing large sums of charitable healthcare benefits, which have been entrusted to the community for its residents' access and use"); Lawrence E. Singer, *The Conversion Conundrum: The State and Federal Response to Hospitals' Changes in Charitable Status*, 23 AM. J.L. & MED. 221, 231–32 (1997) ("While never explicitly stated as a motivation for sale or conversion, a review of recent sales and conversions suggests that the pursuit of personal gain by executives and/or board members may influence the desire to sell or convert a not-for-profit hospital."); *id.* at 248–50 (favoring enhanced regulatory oversight of nonprofit conversions to counter the inherent conflict of interest that directors face in studying and implementing such transactions). Yet, in structure, conversion transactions are friendly; the board, generally alone, supplies control to the acquirer. *See* James D. Standish, *Hospital Conversion Revenue: A Critical Analysis of Present Law and Future Proposals To Reform the Manner in Which Revenue Generated from Hospital Conversions is Employed*, 15 J. CONTEMP. HEALTH L. & POL'Y 131, 132–33 (1998) (describing five variants of conversion transaction, all of which require board assent: asset purchase and sale, merger, joint venture, lease, and restructuring); James J. Fishman, *Checkpoints on the Conversion Highway: Some Trouble Spots in the Conversion of Nonprofit Health Care Organizations to For-Profit Status*, 23 J. CORP. L. 701, 714–15 (1998) (laying out similar categories of conversion transactions); Kevin F. Donohue, *Crossroads in Hospital Conversions—A Survey of Nonprofit Hospital Conversion Legislation*, 8 ANNALS HEALTH L. 39, 41 (1999) (similar).

In contrast to the array of scholarship available on friendly nonprofit control transactions, commentators have yet to recognize and analyze the other, less friendly, transactions by which control of a nonprofit organization may be obtained. The balance of this Article will concentrate on this category of transactions and the implications of reactions to them by nonprofit fiduciaries and the courts.

34. *See* Brakman Reiser, *supra* note 10, at 829–30, 843–844.

can opt to empower directors themselves to appoint their successors, creating a self-perpetuating board,[35] or they can choose to define a group of members who will elect the board.[36] In nonprofits that choose a member-elected board, the members can supply control to a potential acquirer without the participation and acceptance of directors or management simply by voting for an acquirer's proposed directors in a contested election.

The nondistributional constraint might be expected to frustrate hostile takeovers of nonprofits, as it mandates the absence of saleable equity shares in a nonprofit corporation.[37] Presumably, the direct sale of membership voting rights, like that of shareholder voting rights, is also restricted.[38] Thus, a potential acquirer of control of a nonprofit corporation cannot secure a majority simply by purchasing the votes of existing members as it would purchase the shares (and thus the votes) of shareholders in a for-profit tender offer. However, techniques of both persuasion and purchase remain available to those seeking to obtain control of nonprofit corporations with member-elected boards.

A potential acquirer of control over a nonprofit corporation with a member-elected board can utilize persuasion by engaging in a

35. *See id.* at 829–30.

36. *See id.* at 829.

37. *See* Hansmann, *supra* note 28, at 838 ("[A] nonprofit corporation is distinguished from a for-profit (or 'business') corporation primarily by the absence of stock or other indicia of ownership that give their owners a simultaneous share in both profits and control.").

38. Although nonprofit corporate statutes do not expressly state a prohibition on the sale of members' voting rights, such a prohibition may be inferred from a variety of sources. *See* REVISED MODEL NONPROFIT CORP. ACT § 7.27(c) (1987) (authorizing a nonprofit corporation "to reject a vote, consent, waiver, or proxy appointment" if the corporation, "acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the member"); *id.* § 7.30 (limiting the enforceability of voting agreements for public benefit corporations to cases where such agreements have "a reasonable purpose not inconsistent with the corporation's public or charitable purposes").

In the shareholder voting context, courts' attitudes toward vote-buying have softened slightly over time. *Compare* Macht v. Merchants Mortgage & Credit Co., 194 A. 19, 22 (Del. Ch. 1937) (rejecting shareholder proxies that had been purchased with cash because such purchase suggested fraud and was contrary to public policy), *and* Douglas R. Cole, *E-proxies for Sale? Corporate Vote-Buying in the Internet Age*, 76 WASH. L. REV. 793, 819 (2001) ("[T]he common law approach to vote-buying was a regime of per se illegality."), *with* Schreiber v. Carney, 447 A.2d 17, 22–26 (Del. Ch. 1982) (refusing to apply a bright-line rule to invalidate shareholder proxies purchased for cash where such purchase had been disclosed and the challenged transaction had passed with a substantial majority), *and* Cole, *supra* at 824–31 (identifying *Schreiber* as a seminal case and noting that recent Delaware cases have loosened the historic prohibition on shareholder vote-buying).

reasonable facsimile of a for-profit proxy contest. The potential acquirer would propose a slate of board candidates to the member electorate along with a pitch to persuade voting members to support such candidates and their platform.[39] This persuasive endeavor might take various forms. A potential acquirer might argue that its candidates would run the organization more efficiently, thus maximizing its ability to achieve its mission. It might suggest that the current board has veered from the appropriate mission of the organization and that the insurgent slate would preserve the mission that the donors and members intended. It might even argue that the mission of the organization has been too narrowly pursued, and that the new candidates would assist the nonprofit in evolving to meet current challenges. Whatever the tack, if the acquirer can persuade a majority of the members voting to believe that the challengers will pursue the members' preferences to a greater degree than will the incumbents and to vote accordingly, the acquirers' candidates will obtain a majority of directors' seats.[40] Thus, the acquirer can secure its desired control without participation by the board of directors or current management.

Perhaps surprisingly, even without saleable equity shares, a route to purchase control of a nonprofit with a member-elected board also will often be available to potential acquirers. It depends on the individual nonprofit's definition of membership. In a nonprofit with voting members, the articles of incorporation or bylaws define the class of voting members.[41] The authority of organizations to define their own membership criteria confers considerable autonomy on individual nonprofits to demarcate the class of persons sufficiently

39. Nonprofit corporate statutes provide for member election of directors when members exist. *See, e.g.*, REVISED MODEL NONPROFIT CORP. ACT § 8.04.

40. In a nonprofit corporation with a member-elected board, a majority or even plurality vote of the members will suffice to elect a slate of directors. *See id.* (providing for election of all directors at annual meetings by vote of the members); *id.* § 7.23 ("[T]he affirmative vote of the votes represented and voting (which affirmative votes also constitute a majority of the required quorum) is the act of the members"). It is worthy of note, however, that nonprofits may choose to use staggered board structures. *See id.* § 8.06 (permitting nonprofits to stagger directors' board terms); *see, e.g.*, IOWA CODE § 504.806 (Supp. 2006) (similar). In nonprofits that take this route, would-be acquirers will require greater time and patience for a takeover through contested director elections to succeed.

41. *See* REVISED MODEL NONPROFIT CORP. ACT § 6.01 ("The articles or bylaws may establish criteria or procedures for admission of members."); *see, e.g.*, IOWA CODE § 504.601 (Supp. 2006) (permitting nonprofit corporations to define the class of their voting members in either their articles of incorporation or bylaws).

involved with the organization to be assigned a role in its governance. Despite this wide potential scope to set out qualities or positions that entitle individuals to member status, many nonprofits opt for clarity and ease of administration and simply bestow membership on those who make a certain monetary contribution to the organization—and not necessarily a substantial one.[42] When this is the case, a potential acquirer can purchase, or arrange to have its supporters purchase, a sufficient number of memberships to overpower any prior member opposition to its proposed slate of directors, and thereby vote in a new leadership.

This purchase route would appear subject only to the limitation of the acquirer's ability to recruit participants in the takeover and to fund them. In a nonprofit with a member-elected board and membership determined solely by monetary contribution, an acquirer could finance the purchase of a limitless number of memberships in order to achieve a majority vote and thereby secure control. In contrast, in the for-profit context, the pool of authorized and outstanding shares is limited, and additions to it are determined solely by the directors.[43] A potential acquirer seeking to purchase shares sufficient to obtain control must bargain with existing shareholders or, perhaps, negotiate with the board to obtain and

42. *See, e.g.*, Bylaws of Lions Blind & Charity Fund, Inc. art. I, § 2, http://lbcfundinc.org/bylaws.pdf (requiring General Members, who participate in the director selection process, to make a capital contribution of at least $200 each for this privilege); Constitution and Bylaws of Hands Four Dancers of Ithaca, www.hands4dancers.org/Constitution_an.ylaws_rev.1.doc (last visited Nov. 8, 2006) (entitling "[a]ll persons interested in dance and music . . . to become members of HFDI upon payment of dues," currently set at $10, and thereby granting rights to vote for directors and officers); Seattle Community Network Association Membership Levels, http://www.scn.org/scna/membership.html (last visited Nov. 8, 2006) (listing donation levels required to become a voting member starting at $25 per year); *see also* Peter Panepento, *Behind the Numbers*, CHRON. PHILANTHROPY, Aug. 4, 2005, at 33 (describing the use of fee-based membership criteria at various nonprofit organizations, though not specifying whether memberships referenced were mere labels or conferred governance powers).

43. *See, e.g.*, DEL. CODE ANN. tit. 8, § 151(a) (2005) ("Every corporation may issue 1 or more classes of stock . . . and such designations . . . shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation."); *see also* GEVURTZ, *supra* note 15, § 1.4.1(4) (explaining that the articles of incorporation must specify "the total number of shares of stock a corporation may issue").

purchase a new issue of shares.[44] In this sense, potential acquirers of control of nonprofits have a wider range of options than those seeking control over for-profit entities.

* * *

In sum, as in the for-profit context, various mechanisms exist for transferring control of nonprofit organizations, and not all of these transactions are friendly. Often, the entities, individuals, and groups that desire control over the assets and policies of a target nonprofit will negotiate with the target's fiduciaries to supply it. If incumbent fiduciaries do not welcome such changes, however, other constituencies of target nonprofits sometimes will offer would-be acquirers an alternative source of control. In nonprofit corporations with member-elected fiduciaries, those who seek to seize control can achieve their goals through members, using techniques of persuasion and purchase.

Importantly, however, nonprofit takeover activity is not merely another transactional form needing academic description. It also can have serious normative implications for individual organizations, the nonprofit sector, and society at large. The next Part offers some real-world examples of when, where, and how unfriendly nonprofit control transactions have been attempted and fiduciaries' and courts' responses to them. The facts of these scenarios and the strongly held ideals of those on either side of them illuminate the issues raised by nonprofit takeovers in ways even an elegant theory of their possibility cannot communicate.

III. NONPROFIT TAKEOVER ACTIVITY IN ACTION

This Part relates the stories of takeover attempts and preparations recently experienced by two major nonprofit organizations: the Sierra Club and the Royal Society for the Prevention of Cruelty to Animals. After introducing the organizations and their relevant histories and governance structures, it describes the techniques employed by those who sought to wrest control from incumbent leaders—each of which primarily exemplifies one variant of the

44. While conceptually possible, this scenario seems far-fetched since the very directors who the acquirer seeks to go around using a hostile transaction would have to be convinced to issue the new shares.

hostile takeover strategies explained above. These techniques inspired significant defensive actions by the incumbent leaders in both organizations. The gravity with which these defenses were undertaken, as well as their magnitude, illustrates the incumbents' genuine angst over the impact a successful takeover would have on the missions of their organizations. Similarly, the quite hostile judicial reactions to these nonprofit takeover efforts, especially the deferential standard employed to review the defensive measures utilized by incumbents, suggest that the potentially dangerous impact of these transactions is not lost on reviewing courts.

A. Showdown at the Sierra Club

The Sierra Club was incorporated in California in 1892 by John Muir, a Scottish-American conservationist, and nearly 200 charter members.[45] Early on, the Club devoted itself to protecting and expanding the parks and forests of the nascent national park system, especially those in California and the far West.[46] It also began traditions of planning and operating nature outings and of publishing books and periodicals addressing nature and conservation.[47] Over time, the Club also became involved with environmental activism, supporting local and national policies in line with its agenda.

The Club currently is incorporated as a nonprofit public benefit corporation under California law,[48] with a member-elected board of fifteen directors serving staggered three-year terms.[49] Voting membership is open to anyone who files an application, pays annual dues, and is interested in advancing the Club's purposes.[50] These purposes, as stated in its bylaws, are

45. *See* Highlights of the Sierra Club's History, http://www.sierraclub.org/history/timeline.asp (last visited Nov. 8, 2006) [hereinafter Sierra Club History]; Sierra Club, Sierra Club Articles of Incorporation: Original Version (1892), http://www.sierraclub.org/policy/articles.asp [hereinafter Sierra Club Articles of Incorporation].

46. *See* Sierra Club History, *supra* note 45.

47. *See id.*

48. *See* Sierra Club Articles of Incorporation art. 2 (1981), http://www.sierraclub.org/policy/articles_current.asp.

49. *See* Bylaws and Standing Rules of the Sierra Club, bylaws 4.8, 5.1, 5.6, 5.7, 5.8 (2006), http://www.sierraclub.org/policy/bylaws.pdf [hereinafter Sierra Club Bylaws].

50. *See id.* bylaw 4, § 1.

> to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.[51]

In addition to these stated purposes, the Club has declared itself to have a public policy mission and has committed all levels of its programs to influencing public, private, and corporate policies.[52]

As the Club's purposes and mission statement are broadly drawn, it should come as no surprise that disputes have arisen regarding appropriate policy objectives and priorities. The Club prides itself on embracing a "democratic" model for sorting through these predictable conflicts.[53] Ballot questions raising issues of importance may be posed to the membership by the board of directors, the president, or upon member petition.[54] In addition, conflicts over Club policy may be resolved through board elections. The structure and bylaws of the Club permit board candidates to be nominated by petition or by a board-appointed Nominating Committee.[55] Any attempt to take over the Club must be waged over time because the board utilizes staggered terms;[56] however, a sustained program of supporting candidates can shift the control dynamic of the organization.

Over the past decade, the Sierra Club has experienced a series of attempts to obtain control over its policies through ballot questions

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51. *Id.* bylaw 2.2.

52. *See* Sierra Club Purposes and Goals, http://www.sierraclub.org/policy/goals.asp (last visited Nov. 8, 2006).

53. *See* Sierra Club Bylaws, *supra* note 49, bylaws 4, 5, 11 (dealing with membership, board of directors, and ballots of the club, respectively); *see also* Stephen G. Greene, *Hostile Takeover or Rescue? Sierra Club's Board Candidates Fight to Shape the Group's Future*, CHRON. PHILANTHROPY, Apr. 15, 2004, at 24.

54. *See* Sierra Club Bylaws, *supra* note 49, bylaws 11.1–11.2. To obtain a vote on a ballot question by petition, the request for the vote must be supported by the number of members in good standing equaling at least two percent of the number of members who cast ballots in the last election. *See id.* bylaw 11.2; *see also id.* bylaw 11.4 (stating that ballot questions are decided by a majority of the ballots cast so long as this number equals or exceeds a majority of votes required for a quorum); *id.* SR. 11.2.1(f) (requiring a signer to be "a member of the Club in good standing for at least sixty days" and to "have signed within six months of the date of submission of the signed petition" for a ballot question).

55. *See id.* bylaws 5.2–5.3. Petition candidates may reach the ballot by obtaining signatures from one-twentieth of one percent of the membership, but not less than one hundred nor more than five hundred members. *See id.* bylaw 5.2.

56. *See id.* bylaws 5.1, 5.7.

and contests for the board of directors.[57] The most volatile of these began following a 1996 board resolution that adopted a neutral stance on U.S. immigration policy. In response, members of the Club formed Sierrans for U.S. Population Stabilization (SUSPS) to "advocate a return to traditional (1970–1996) Sierra Club population policy,"[58] which supported the stabilization of the U.S. population through various mechanisms, including the reduction of immigration levels, in order to improve the country's environmental status.[59] In 1998, SUSPS introduced its first ballot question, advocating that the Club return to a stance supporting immigration limits on environmental grounds.[60] After the question was defeated by the Club membership,[61] the Club board again resolved to remain neutral on the immigration question.[62] SUSPS then changed its

57. Early efforts included a few successful director nominations by the John Muir Sierrans ("JMS"), a group of former Club leaders, and other members who believe the Club has become too weak in its support of conservationist causes and who advocate a return to grassroots organizing, nominated five petition candidates. *See* Leora Broydo, *Mutiny at the Sierra Club*, MOTHER JONES, Nov. 3, 1998, *available at* http://www.motherjones.com/news/feature/1998/11/sierra.html ("The renegades call themselves the John Muir Sierrans. They say they are a 'grassroots network of Sierra Club leaders who advocate stronger stances on conservation issues,' and they say the club is investing too much in inside-the-beltway tactics while starving environmental campaigns that members are keen on supporting."); Eric Brazil, *Sierra Club Legend Tries to Regain Control; Ex-Leader Brower Runs for President*, S.F. EXAMINER, May 21, 1999, at A1 ("[Brower] sounds his recurring theme: 'no more club cop-outs . . . . Anyone who knows [Sierra Club history] knows the same and unnecessary destruction wrought by compromise.'"); *see also* Michael Dorsey et al., Letter to the Editor, MOTHER JONES, Jan. 5, 1999 (disputing Broydo's characterization of the conflict at Sierra Club and asserting that the JMS faction within the Club was a valuable part of its diversity). When the JMS candidate for Club President lost in 1999, however, the group's activity slowed. *See Nation and World News: San Francisco; Environmentalist Quits Sierra Club's Board*, ST. LOUIS DISPATCH, May 20, 2000, at 20.

58. About SUSPS, http://www.susps.org/info/about.html (last visited Nov. 8, 2006); *see also* History of SUSPS, http://www.susps.org/history/history.html (last visited Nov. 8, 2006) [hereinafter SUSPS History] (detailing SUSPS's history and activities).

59. *See* Sierra Club Population Policies, http://www.sierraclub.org/policy/conservation/population.asp (last visited Nov. 8, 2006) [hereinafter Sierra Club Population Policies] (noting that in 1978, the Sierra Club board adopted a policy that urged Congress to review U.S. immigration policies and practices, but with a view that international migration was only a small part of the world population problem).

60. *See* SUSPS History, *supra* note 58.

61. *See id.*; *see also* CENTER FOR NEW COMMUNITY, HOSTILE TAKEOVER: RACE, IMMIGRATION AND THE SIERRA CLUB 6 (2004), http://www.buildingdemocracy.org/reports/hostiletakeover.pdf (last visited Nov. 8, 2006) (reporting that sixty percent of the Sierra Club's membership voted against the proposal).

62. *See* Sierra Club Population Policies, *supra* note 59. The Club board also put forward a ballot question in the next election seeking to increase the number of signatures necessary to

tactics and began endorsing petition candidates in Club board elections.[63] The new course slowly began to show success; SUSPS-endorsed candidates had won three board seats by 2003.[64]

SUSPS was poised to make its boldest gains yet in the 2004 election. If three additional candidates backed by SUSPS were elected, they and other reform-minded directors would have sufficient board seats to press the immigration question.[65] The three SUSPS-backed candidates boasted impressive professional and

obtain a ballot question by petition. *See* SUSPS History, *supra* note 58. However, the Club membership voted this measure down. *See id.*

63. *See* Miguel Bustillo & Kenneth R. Weiss, *The Nation; Election Becomes a Fight over Sierra Club's Future; Animal-Rights Activists and Anti-immigration Advocates Are Teaming in a Bid To Control the Board, to the Dismay of Traditionalists*, L.A. TIMES, Jan. 18, 2004, at A1; Michelle Nijhuis, *Que Sierra, Sierra; Immigration Controversy Engulfs Sierra Club Board Election*, GRIST, Mar. 1, 2004, *available at* http://www.grist.org/news/maindish/2004/03/01/nijhuis-sierra/.

64. *See* Sierra Club Yearly Election Results, http://www.susps.org/info/election_results.html (last visited Nov. 8, 2006) (noting a win by SUSPS-endorsed candidate Ben Zuckerman in 2002 and a double victory for Doug LaFollette and Paul Watson in 2003); *see also* Plaintiff's Second Amended Complaint for Injunctive Relief Under Corporations Code Section 5617; Declaratory Relief; Breach of Fiduciary Duty; and Unfair Business Practices Under B&P Section 17200 at 4, Club Members for an Honest Election v. Sierra Club, No. 429277 (Cal. Super. Ct. Oct. 14, 2004) [hereinafter Plaintiff's Second Amended Complaint] ("By 2003 JMS and SUSPS had been successful in gaining a voice on the board. Six of the fifteen, or 40%, of the sitting directors at the end of 2003 (Ed Dobson, Force, Hanscom, LaFolette, Watson, Zuckerman) were endorsed by either JMS or SUSPS."); Nijhuis, *supra* note 63.

65. *See* Ben Adler, *Sierra Club Votes for Its Future*, NATION, Apr. 13, 2004, *available at* http://www.thenation.com/doc/20040426/adler (describing the SUSPS website's encouragement of supporters to "vote for its slate in the election"); Bill Berkowitz, *Sierra Club Shenanigans*, DISSIDENT VOICE, Feb. 19, 2004, http://www.dissidentvoice.org/Feb04/Berkowitz0219.htm ("Three of the candidates are being supported by a group called SUSPS . . . . [A]ll of whom have had little to do with the Sierra Club in the past."); Adam Werbach, *Anti-Immigration Coalition Seeks Control of Sierra Club*, IN THESE TIMES, Mar. 9, 2004, *available at* http://www.inthesetimes.com/site/main/article/402/ ("If the three candidates backed by Sierrans for U.S. Population Stabilization are elected this year, the immigration-control faction will have enough votes on the 15-member board to move the issue.").

Reports on the support provided to the candidates by SUSPS varied. *See* Terence Chea, *Immigration Debate Divides Sierra Club as Factions Vie for Control*, MILWAUKEE J. & SENTINEL, Feb. 29, 2004, at 24 ("Past and present Sierra Club leaders say the anti-immigrant faction has teamed up with animal rights activists in an attempt to hijack the 112-year-old organization and its $100 million annual budget."); Nijhuis, *supra* note 63 ("SUSPS helped all three candidates gather signatures . . . . However, the candidates have repeatedly stated that they are running independently of one another.").

environmental credentials.[66] Two of the candidates, Richard Lamm and Frank Morris, specifically espoused the SUSPS position that the Club should adopt (or re-adopt) a policy in support of population control, including limits on immigration.[67] The third candidate, David Pimentel, mentioned his great concern with the environmental impact of the rising U.S. population in his candidate ballot statement.[68] His only specific statement on the Club's immigration policy, however, evinced agreement with its neutral stance.[69]

The actions of SUSPS fit neatly into the model of an unfriendly bid for control of a nonprofit corporation with a member-elected board. SUSPS, as insurgents, sought to obtain control of the Club in order to change its policies on immigration. The SUSPS actions were hostile and can be viewed as a takeover attempt because the insurgents looked to the Club's members to supply them with the desired control rather than negotiating with current fiduciaries. In particular, the strategy of supporting candidates to oppose incumbent directors in the Club's annual election exemplifies the

66. *See* First Amended Complaint for Injunctive Relief; Declaratory Relief; Unfair Business Practices Under B & P Sections 17200; Violations of Corporations Code Sections 5520, 5523, 5615; Bylaw 5.4; Standing Rules 5-2-6(2), 5-2-6(3), and 5-2-9 at exhibit B, Club Members for an Honest Election v. Sierra Club, No. 429277 (Cal. Super. Ct. Mar. 15, 2004) [hereinafter First Amended Complaint] (reproducing the candidate ballot statements of Richard Lamm, Frank Morris, and David Pimentel for the 2004 Club board election, which include information on their credentials). Richard Lamm was a former governor of Colorado, a public policy professor at the University of Denver, and a member of the Conservation Foundation's board of directors. *See id.* Frank Morris was a retired professor and former executive director of the Congressional Black Caucus Foundation. *See id.* David Pimentel, a tenured Professor of Ecology at Cornell University who had written scores of articles on agriculture and pest control also had served on the board of the National Audubon Society. *See id.*

67. *See* First Amended Complaint, *supra* note 66, at exhibit B (reproducing Lamm's and Morris's candidate ballot statements for the 2004 Club board election, which include information on their positions in support of population control); Sierra Club, Board of Directors Candidate Forum: All Candidates and their Responses (on file with author) [hereinafter Board of Directors Candidate Forum] (expressing candidates Richard Lamm's and Frank Morris's positions that the Club should not remain neutral on immigration issues).

68. *See* First Amended Complaint, *supra* note 66, at exhibit B (noting in Pimentel's candidate ballot statement that since the election of President Carter, in his opinion the last "really good environmental President . . . the USA has grown by 80 million persons and this growth is accelerating rather than diminishing.").

69. *See* Board of Directors Candidate Forum, *supra* note 67, at 9 (answering a question on whether the Club's neutral position on immigration should be changed by stating, "Currently, I hold a neutral position on immigration. I feel that there are far more important environmental problems than immigration . . . .").

persuasive variant of nonprofit takeover tactics. SUSPS insurgents appealed to existing members for their votes, hoping that they could persuade sufficient members to support insurgent candidates.[70] The insurgents would achieve the change in control they desired if the voting results delivered a board majority willing to revisit the Club's immigration policy.

The response by the Sierra Club's incumbent leadership to the SUSPS actions likewise demonstrates the concerns that nonprofit takeover activity can raise within a targeted organization. Despite their environmental and political qualifications, the Club's leadership feared that the SUSPS-backed candidates had ties to extreme anti-immigration groups with nativist and racist tendencies.[71] If elected, they feared these candidates and the new majority they would join would seriously damage the Club and its reputation through their pursuit of restrictions on U.S. immigration. Thus, the incumbents moved quickly to take defensive action.

During a January 30, 2004 telephonic meeting, the board approved two motions intended to combat the threat posed by SUSPS candidates.[72] The first authorized and instructed the Club's staff to (1) add an "urgent election notice" to the ballot materials to

70. Although the main SUSPS tactic was an attempt to persuade existing Sierra Club members, SUSPS also appears to employ some purchase tactics. In addition to "encourag[ing] Sierra Club members to sign up with SUSPS in order to support [their] efforts," SUSPS asks those who are not currently Club members to "sign up with SUSPS and also join the Sierra Club to support our efforts in the annual Spring election." SUSPS Homepage, http://www.susps.org (last visited Nov. 8, 2006).

71. *See* Adler, *supra* note 65; Felicity Barringer, *Bitter Division for Sierra Club on Immigration*, N.Y. TIMES, Mar. 16, 2004, at A1; Glen Martin, *Sierra Club Vote Backs Status Quo; Sound Defeat for Dissident Slate Seeking Strict Immigration Control*, S.F. CHRON., Apr. 22, 2004, at A1. For an exhaustive review of the candidates' alleged links with extreme anti-immigration groups, see CENTER FOR NEW COMMUNITY, *supra* note 61. For a refutation of them, see Sierra Democracy Homepage, http://www.sierrademocracy.org (last visited Nov. 8, 2006), especially its links on Internal Power Struggle and FAQ.

72. *See* Sierra Club, Briefs of Action of a Meeting of the Board of Directors 2–3 (Jan. 30, 2004) (on file with author) [hereinafter Briefs of Action of a Meeting of the Board of Directors] (transcript of telephonic meeting). Prior to consideration of these motions, the board considered endorsing a slate of candidates or signaling support for Committee-nominated candidates only. *See id.* at 1–2. Ultimately, it passed only a motion stating the board's position that information describing the Nominating Committee's selection criteria, provided to Club members in their ballots, was sufficient to apprise members of the qualifications of Committee nominees. *See id.* An alternative motion proposed by Director LaFollette failed. *See id.* It would have reaffirmed the impropriety of Club expenditures in support or in opposition to individual candidates and struck an introductory statement from the ballot, as appearing to favor Committee candidates. *See id.* at 1.

be sent to Club members, (2) request that individual chapter and group newsletters print the notice, and (3) send emails to members following up on the notice and encouraging them to vote in the election.[73] The urgent election notice stated:

> This year there is an unprecedented level of outside involvement and attention to the Club's Board of Director's election. Outside, non-environmental organizations have endorsed candidates in the Club's Board elections. Several outside organizations have endorsed Club Board candidates and are urging their supporters to join the Club as a means to influence club policy in line with their non-environmental agendas.
>
> Those outside groups that may be attempting to intervene in the Club's Board of Director's elections include:
>
> Center for American Unity – VirginiaDare/Vdare.com collective that includes "white nationalist writers." [sic]
>
> Coloradans for American Immigration Reform
>
> Federation for American Immigration Reform
>
> Fur Commission USA
>
> Limitstogrowth.com
>
> HempflagUSA.org – promotes marijuana legalization
>
> National Alliance – "ideology from a white racial perspective"
>
> National Immigration Alert (NumbersUSA)
>
> People for the Ethical Treatment of Animals (PETA)
>
> Project USA
>
> Social Contract Press
>
> Southern Poverty Law Center

73. *See id.* at 2.

White Politics Inc./Overthrow.com

> The Sierra Club has become an even more influential and effective voice in American Society over the last decade. Now it appears that non-environmental groups are trying to take advantage of the Club's open and democratic nature to influence the composition of our Board of Directors and our policies.
>
> Faced with this threat, the Board of Directors urges every member of the Club [to] act to ensure that the Sierra Club remains faithful to its environmental mission and principles. Please cast your vote in this year's election as a means of demonstrating to outside groups that they cannot influence our organization. Vote for candidates whose positions reflect your values and vision for the future of the Sierra Club. Vote for candidates whose experience matches what you believe the Club needs. Vote for candidates endorsed by Club leaders who you trust. . . .
>
> Democracy really does work—but only if we all vote. Help maintain the Sierra Club's tradition as America's preeminent democratic and grass roots advocate for the environment.[74]

The board's other motion approved a recent action taken by the Club's Inspectors of Election, which had permitted an article by Drusha Mayhue to be printed in some Club chapters' newsletters.[75] The article was critical of two SUSPS-supported, then-current directors, as well as SUSPS-backed petition candidates in the upcoming election, and described their efforts as a threat to the Club and its mission.[76]

The dire warnings authorized by the board illustrate the incumbents' fears that the insurgents' "non-environmental" objectives would displace or damage the Club's mission. Distributing such a notice in addition to the election materials, and providing multiple routes for doing so, was itself an extreme unprecedented step. Further, the language of the notice speaks in imposing terms, citing the "threat" posed by outsiders attempting to "influence" the organization and disrupt its commitment to "its environmental mission and principles."[77] Likewise, the Mayhue article spoke

74. *Id.* at 2–3.

75. *See id.* at 3.

76. *See* First Amended Complaint, *supra* note 66, at exhibit D.

77. *See* Briefs of Action of a Meeting of the Board of Directors, *supra* note 72, at 3.

pointedly of the insurgents' intent to "hijack" the agenda and assets of the Club in order to pursue "narrow, personal, one-issue agendas" that "widely differ[] from the Club's historic conservation mission."[78] After launching their attacks on the motives of insurgent candidates, the notice and article reminded members of their own ability to defeat the takeover threat using the votes guaranteed to them by the Club's democratic governance structure.[79]

A number of Club members concerned with the SUSPS efforts viewed the board's actions as insufficient to safeguard the mission of the Club. Some formed groups like "Groundswell Sierra" to resist the SUSPS-supported candidates.[80] In addition, three Club members entered the board race as petition candidates[81] but declared in their ballot statements that they did not, in fact, seek election to the Club board.[82] Later called the "fake candidates" by Lamm, Morris, Pimentel, and their supporters during litigation,[83] these candidates used their statements to urge members to vote for contenders other than the SUSPS-supported petition candidates.[84] Taken together, the defenses erected in response to the insurgents were quite significant.

78. *See* First Amended Complaint, *supra* note 66, at exhibit D. The urgent election notice and Mayhue article mentioned the possibility that the insurgents were using purchase tactics as well, noting that some outside organizations were urging their supporters to join the Club. Still, the primary focus was on identifying for members the danger posed by the insurgents' persuasive tactic, nominating candidates interested in furthering "non-environmental" positions. *See* Briefs of Action of a Meeting of the Board of Directors, *supra* note 72, at 2.

79. *See* Briefs of Action of a Meeting of the Board of Directors, *supra* note 72, at 3; *see also* Drusha Mayhue, *Outside Interests Push To Hijack Sierra Club*, SIERRA CLUB CRIER, Feb. 2004, *reprinted in* First Amended Complaint, *supra* note 66, at exhibit D.

80. *See* Groundswell Sierra, Background: 2005 Election for the Sierra Club's Board, http://www.groundswellsierra.org/background.php (last visited Nov. 8, 2006) (describing the organization's founding in 2004 to "mobiliz[e] Sierra Club members and publiciz[e] background on the outside candidates seeking control of the Sierra Club Board" at that time).

81. *See* First Amended Complaint, *supra* note 66, at exhibit B; Plaintiffs' Complaint for Injunctive Relief; Declaratory Relief; Unfair Business Practices Under B & P Section 17200: and Breach of Fiduciary Duty at 5-10, Lamm v. Fahn, No. 4428679 (Cal. Super. Ct. Feb. 9, 2004) [hereinafter Plaintiffs' Complaint, Lamm v. Fahn].

82. *See* First Amended Complaint, *supra* note 66, at exhibit B (reproducing statements of Dees, Berry and Herz).

83. *See* Plaintiffs' Complaint, Lamm v. Fahn, *supra* note 81, at 5–10.

84. *See* First Amended Complaint, *supra* note 66, at exhibit B (reproducing statements of Dees, Berry and Herz). For example, Morris Dees's statement explicitly named Lamm, Morris and Pimentel; Phillip Berry's statement asked members to "vote for only Nominating Committee candidates, including Aumen, O'Connell and Renstrom"; and Barbara Herz's

SUSPS wanted to dismantle these defenses, so Lamm, Morris and Pimentel filed suit for relief.[85] The Sierra Club's official policy of neutrality in its director elections was the centerpiece of the plaintiffs' arguments. The bylaws' default position prohibits the use of Club resources to support or oppose candidates and bans candidate advertising from Club publications.[86] The bylaws further dictate that articles or messages "about candidates" may appear in the Club's national (or other) publications during the election season only if all candidates are offered an opportunity to participate.[87] Lamm, Morris, and Pimentel asserted that the actions of the Club, through its board, officers, and staff, had flown in the face of this neutrality policy. Thus, they sought an injunction against further distribution of the urgent election notice and against inclusion of the fake candidates on official election ballots.[88] In addition, they requested a declaration affirming that Club resources could not be used to distribute messages regarding candidates without the equal opportunity for participation by all candidates.[89]

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statement advised that supporting Nominating Committee candidates was "the wisest course in this election." *Id.*

85. *See* Plaintiffs' Complaint, Lamm v. Fahn, *supra* note 81, at 1.

86. *See* Sierra Club Bylaws, supra note 49, SR. 5.6.1(a)(iii) (setting a default rule that Club resources are not to be used to support particular candidates, though the default may be varied by resolution or other provision in the bylaws or standing rules); *id.* SR. 5.6.1(d) (prohibiting advertising for or against any candidates in Club publications); *see also id.* SR. 5.6.1(f) (prohibiting candidates from discussing their candidacies at meetings if they have traveled to those meetings at Club expense).

The Lamm et al. complaint described the Club bylaws as prohibiting distribution of candidate materials "at Club expense." Plaintiffs' Complaint, Lamm v. Fahn, *supra* note 81, at 3. Recent available versions of these bylaws do not contain this precise language. *See* Sierra Club Bylaws, *supra* note 49; *see also* Sierra Club, Bylaws and Standing Rules of the Sierra Club (July 20, 2005) (on file with author); Sierra Club, Bylaws and Standing Rules of the Sierra Club (May 24, 2005) (on file with author). The current and available bylaws all do, however, contain provisions establishing a general requirement of Club and board neutrality in the election process, as cited above.

87. *See* Sierra Club Bylaws, *supra* note 49, SR. 5.6.1(c). The Bylaws make an exception for "routine articles or messages" and explain that "[a]n article or message is 'routine' if it (A) does not mention the fact that the author or subject is a candidate, (B) does not mention the election, (C) relates to the candidates' performance of duties in an elected or appointed Sierra Club capacity, (D) is timely for Club purposes, and (E) is sent or published only to members who would normally receive similar articles or messages." *Id.*

88. *See* Plaintiffs' Complaint, Lamm v. Fahn, *supra* note 81, at 13, 16–17.

89. *See id.* at 15–16. The complaint also claimed breach of fiduciary duty and unfair business practices, all based on the same factual assertions. *See id.* at 13–14.

Lamm, Morris, and Pimentel eventually dropped the case under pressure,[90] but it was picked up by another group of Club members, organized as Club Members for an Honest Election (CMHE), which soon filed its own complaint.[91] This challenge included a demand for an injunction against counting member votes and seating any candidates in the election until after the court decided the case, as well as disqualification of the so-called fake candidates.[92] The court denied CMHE's request for a preliminary injunction, finding that a post-election challenge would suffice.[93]

The election thus went forward, resulting in record-setting voter turnout and a decisive victory by Nominating Committee candidates. Whereas in the past, ten percent or fewer of the Sierra Club's members typically voted in annual elections, the 2004 election attracted participation by over twenty-two percent of its members.[94]

90. *See* Request for Dismissal at 1, Lamm v. Fahn, No. 4428679 (Cal. Super. Ct. Feb. 17, 2004). This pressure derived from the Club's threat to invoke California's anti-SLAPP Act. This statute provides for fee-shifting and a special motion to strike "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue," unless the plaintiff is deemed probable to prevail. CAL. CIV. PROC. CODE § 425.16(b) (West 2005).

The original plaintiffs' concerns may have been warranted. Although the new plaintiff ultimately was permitted to litigate the election results, the Club succeeded in striking some of the claims against it under the anti-SLAPP Act, and it secured a partial recovery of attorneys' fees and costs. *See* Order Granting Sierra Club's Motion to Recover Attorney's Fees and Costs, Club Members for an Honest Election v. Sierra Club at 2–3, No. 04-429277 (Cal. Super. Ct. May 27, 2005).

91. *See* Plaintiff's Complaint, for Injunctive Relief; Declaratory Relief; Unfair Business Practices Under B & P Sections 17200; Violation of Corporations Code Sections 5520, 5523, 5615; Bylaw 5.4; Standing Rules 5-2-6(2), 5-2-6(3), and 5-2-9, Club Members for an Honest Election v. Sierra Club, No. 04-429277 (Cal. Super. Ct. Mar. 3, 2004). This Complaint was first amended later that month and amended again the following September. *See* First Amended Complaint, *supra* note 66; Plaintiff's Second Amended Complaint, *supra* note 64.

92. *See* First Amended Complaint, *supra* note 66, at 11–16; Statement of Decision and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment at 5–6, Club Members for an Honest Election v. Sierra Club, No. 429277 (Cal. Super. Ct. Feb. 22, 2005) [hereinafter Statement of Decision and Order].

93. *See* Order Granting Sierra Club's Special Motion to Strike in Part and Denying in Part and Denying Plaintiffs' Application for Preliminary Injunction at 2–3, Club Members for an Honest Election v. Sierra Club, No. 429277 (Cal. Super. Ct. June 11, 2004).

94. *See* Felicity Barringer, *Establishment Candidates Defeat Challengers in Sierra Club Voting*, N.Y. TIMES, Apr. 22, 2004, at A18; Terence Chea, *Sierra Club Rejects Takeover*, LONG BEACH PRESS-TELEGRAM, Apr. 22, 2004, at A1; Martin, *supra* note 71, at A1; Sierra Club, 2004 National Board of Directors Election Results (on file with author) [hereinafter Election Results] (stating that the Club received back 171,616 of the 757,058 ballots it sent to members).

Moreover, Nominating Committee candidates prevailed by margins of nearly ten to one.[95] Faced with these numbers, CMHE filed an amended complaint seeking to unseat the elected Nominating Committee candidates.[96]

The complaint proceeded on dual tracks. It argued that the Club had violated its own bylaws and California statutes by sending the urgent election notice and permitting publication of the Mayhue article.[97] Further, it alleged that two Club directors had breached their fiduciary duties by voting in favor of these measures.[98] Again, the plaintiff's argument turned on what it viewed as the Club's obligation to remain neutral on election matters. In particular, the plaintiffs claimed the Club's distribution of the urgent election notice and the Mayhue article, each implicitly or explicitly critical of SUSPS-supported candidates, violated the Club's internal election rules against the use of Club resources to distribute messages about candidates during election season.

The court's decision imposed little if any substantive scrutiny on the board's chosen defensive measures. The court agreed with the plaintiffs that the Club board was obligated to follow the internal election rules expressed in its bylaws, but it deferred entirely to the board's judgment on the meaning of those rules.[99] The court's designation of the board as the "final authority" on these matters suggests that the board could fund or publish any statement about select candidates, so long as the board itself deemed such statements as outside the category of statements "'about' candidates."[100] This finding—that the bylaws' equal opportunity position applied only if the board did not authorize deviation from it—significantly bolsters the discretion afforded to the board in interpreting the Club's

95. *See* Douglas Fischer, *Faction Opposing Immigration Loses Sierra Club Vote*, OAKLAND TRIB., Apr. 22, 2004; Martin, *supra* note 71, at A1; Election Results, *supra* note 94.

96. *See* Plaintiff's Second Amended Complaint, *supra* note 64, at 22. The complaint specifically named Nick Aumen, Jan O'Connell, David Karpf, Sanjay Ranchod, and Lisa Renstrom, who were all elected to the board by the membership. *Id.* at 2. It also named Greg Casini, who was appointed by the board after Aumen resigned. *Id.* The complaint requested that the court unseat and replace Casini, along with the other four elected Committee candidates still on the board at the time of the suit's filing. *Id.* at 22.

97. *Id.* at 18–19.

98. *Id.* at 20.

99. *See* Statement of Decision and Order, *supra* note 92, at 8.

100. *Id.*

election rules in the context of a takeover.[101] As such, the court held that the board had the authority to determine that the urgent election notice and Mayhue article "were authorized efforts to inform the Club membership about attempts by outside groups to influence the election," rather than prohibited election-season publications about candidates.[102] Thus, summary judgment for the Club defendants was warranted.[103]

Finally, the court considered and rejected the plaintiffs' claims that the directors' defensive actions violated their fiduciary obligations to the Club.[104] The court did not view the "threat that outside, non-environmental organizations posed to the Club's election processes" as posing a potential conflict of interest for directors, despite the fact that the incumbent directors had been elected by the Club election process and supported current candidates.[105] Rather, the court saw the takeover activity simply as a legitimate threat to the organization, in response to which the directors might take action.[106] Having rejected the possibility of a conflict of interest, the court inquired only as to whether the directors undertook their defensive measures with sufficient information. Finding they had, the court held that their actions warranted the protection of the deferential business judgment rule and were legally valid.[107]

SUSPS continued its efforts to change the Club's immigration policies by running candidates in the 2005 board election, but these efforts again were stymied. Freed from concerns about litigation, the

101. *See id.* The court did not, of course, create this ability to deviate *sua sponte*. The Club bylaw prohibiting funding the support or opposition of candidates begins with the phrase "[w]ithout authorization of the Board of Directors." *Id.* (quoting Sierra Club Bylaws at Standing Rule 5-2-6(3)(a), though the language appears in Standing Rule 5.6.1(a)(iii) of the current version of the Bylaws and Standing Rules).

102. *Id.* In support of the board's interpretation of its actions, the court noted a board resolution passed in 1997. This resolution stated that nothing in its election rules would "prohibit the Club from informing the membership of any attempt by non-Club entities to influence its election." *Id.* at 9.

103. *See id.* at 9. Moreover, the court explained that the statutory violations CMHE asserted were of discretionary, not mandatory, provisions of the corporate code and thus not actionable. *See id.*

104. *See id.* at 10–11.

105. *Id.* at 10.

106. *See id.* at 10–11.

107. *See id.* at 11. As noted earlier, the Club also received a partial award of attorneys' fees and costs. *See supra* note 90.

Club took actions similar to those in the prior year's board fight but seemed to take the SUSPS threat less seriously.[108] Ultimately, none of the candidates SUSPS supported received substantial support.[109] As currently composed, the board heavily favors a neutral stance on the immigration question.[110] This fact, combined with the *Sierra Club* court's deferential, incumbent-protective decision, seems likely to hinder any future SUSPS takeover activities.[111]

This may seem to be the right outcome, or of little consequence, if one interprets the facts to suggest that the Club membership agrees with the incumbents' position. After all, members strongly rebuffed SUSPS candidates' 2004 and 2005 election bids. Further, when SUSPS put forward another pointed ballot question advocating stricter U.S. immigration policy in 2005, it again lost resoundingly.[112] Club members instead overwhelmingly voted to

108. *See* Felicity Barringer, *Sierra Club Revisits Issue of Immigration*, N.Y. TIMES, Apr. 13, 2005, at A17 ("Last year, the debate was tainted with allusions to racism and character assassination, and although a taste of that vitriol was evident in interviews with the chief combatants, the comments and the contest this year have a pro-forma feel."); *see also* Glen Martin, *San Francisco: Sierra Club Revisits Immigration Battle*, S.F. CHRON., Apr. 13, 2005, at B1; *Sierra Club Stance*, PITTSBURGH POST-GAZETTE, Apr. 11, 2005, at A16; Kenneth R. Weiss, *Sierra Club Members Vote To Stay Neutral in the Immigration Debate*, L.A. TIMES, Apr. 26, 2005, at B3.

Groundswell Sierra, the group some Sierra Club members organized to oppose the SUSPS-supported candidates in 2004, did take some additional steps in 2005, including working with outside partners. For example, it asked Moveon.org to activate its network to send email requests to its supporters affiliated with the Sierra Club to vote only for "experienced Sierra Club candidates" that would not support anti-immigration policies. E-mail from MoveOn.org to Linda Feldman (Mar. 31, 2005, 15:02) (on file with author).

109. *See* Weiss, *supra* note 108, at B3; Sierra Club, Board of Directors 2005 Official Election Results (2005), http://www.sierraclub.org/bod/2005election [hereinafter 2005 Official Election Results]; *see also* Terence Chea, *Sierra Club May Tackle Immigration*, VENTURA COUNTY STAR, Apr. 9, 2005, at 6 (noting candidates in 2005 election with SUSPS support).

110. *See* Weiss, *supra* note 108, at B3 ("[T]he governing board of the 750,000-member club is now aligned 12 to 3 against any kind of immigration crackdown. Those numbers . . . would make it impossible for immigration-control advocates to wrest control of the club . . . for at least two more annual elections.").

111. An appeal on procedural grounds resulted in an affirmance of the trial court's orders. *See* Club Members for an Honest Election v. Sierra Club, 40 Cal. Rptr. 3d 818, 820 (2006), *cert. granted*, 139 P.3d 1169 (Cal. 2006).

112. *See* Weiss, *supra* note 108, at B3; *see also* 2005 Official Election Results, *supra* note 109; Groundswell Sierra Homepage, http://www.groundswellsierra.org (last visited Nov. 8, 2006).

remain neutral on the immigration question.[113] Of course, at least the election results might be viewed skeptically, as the board was permitted to take actions to frustrate the candidacies of SUSPS-supported nominees.

Even if the incumbent-protective standard applied in the *Sierra Club* case achieved the right outcome for that organization, one may still question whether the adoption of such a deferential standard might unacceptably chill the efforts of potential insurgent groups within other nonprofits. This Article will turn to this question of the best standard of review for general application to nonprofit takeover situations in Part IV. First, however, it will recount another and somewhat different example of nonprofit takeover activity, which produced similarly hostile responses from incumbent fiduciaries and the reviewing court.

B. Entryism at the Royal Society[114]

Another useful case study of nonprofit takeover activity can be drawn from the recent experience of the United Kingdom's Royal Society for the Prevention of Cruelty to Animals. Although many U.S. nonprofits have undoubtedly undergone takeover attempts, the RSPCA battle offers an example of the use of purchase tactics by insurgents and has the advantages of being pitched, highly publicized, and ultimately the subject of a written judicial opinion. Further, UK charity law is similar enough to that of the United

113. *See* Weiss, *supra* note 108, at B3; *see also* 2005 Official Election Results, *supra* note 109; Sierra Club, Planet Newsletter: Population Ballot Question (2005), http://www.sierraclub.org/planet/200502/election_background.asp; Groundswell Sierra Homepage, *supra* note 112.

114. Entryism is defined as "a political tactic in which an organisation or group enters a larger organisation in an attempt to gain recruits, gain influence, or to take control of the larger organisations' structure." SourceWatch, Entryism, http://www.sourcewatch.org/index.php?title=Entryism (last visited Nov. 8, 2006). Entryism has also been used disapprovingly to refer to "the activity of joining a political party with the secret intention of changing its principles and plans." Cambridge Dictionaries Online, Cambridge Advanced Learner's Dictionary, http://dictionary.cambridge.org/define.asp?key=25937&dict-CALD (last visited Nov. 8, 2006); Freesearch, Entryism, http://www.freesearch.co.uk/dictionary/entryism (last visited Nov. 8, 2006); *see also* Jane Kelly, *Princess Anne and Me—And Why I Despair of the RSPCA*, DAILY MAIL (London), May 1, 2001, at 11 ("The [RSPCA] has accused [Richard Meade] of 'entryism', a deliberate attempt to infiltrate and change the society from within, rather similar to Militant Tendency's moves within the Labour Party.").

States to make the RSPCA story understandable to Americans and an appropriate counterpart to the Sierra Club story.[115]

The RSPCA was founded in 1824 as the world's first animal protection society.[116] It was incorporated by The RSPCA Act, a special act of Parliament in 1932, with objectives "to promote kindness and to prevent or suppress cruelty to animals and to do all such lawful acts as the Society may consider to be conducive or incidental to the attainment of those objects."[117] Today, the Society has over 35,000 members[118] and engages in a wide range of animal protection activities.[119] These include (1) organizing and operating a corps of inspectors and animal care officers that rescue abused and distressed animals, (2) maintaining a number of animal hospitals and clinics, (3) running a large program to find new homes for abandoned or victimized animals, and (4) conducting education and advocacy around various animal welfare issues.[120]

The original 1932 RSPCA Act, its later amendments, and the RSPCA Rules together provide the governance structure for the Society.[121] The main governing body these authorities create is the

115. Trustees of charities in the UK are deemed fiduciaries and held to standards of conduct accordingly. *See* Michael Carpenter, *Strategy or Management by Trustees*, *in* CHARITIES, GOVERNANCE AND THE LAW: THE WAY FORWARD 122, 126–27, 137–38 (Debra Morris & Jean Warburton eds., 2003); *see also* John T. Hall & Rowan Ferguson, *Case Study: University of Anyplace: Strategic Legal Risk Review*, 27 J.C. & U.L. 119, 121 (2000).

The UK's law of charities bears sufficient resemblance to that applicable in the United States and makes the RSPCA example a reasonable one. However, the important differences between the law and regulation of charities in the two countries should not be discounted. A fuller discussion and comparison of these differences might be useful, but is beyond the scope of this Article.

116. *See* Royal Society for the Prevention of Cruelty to Animals (RSPCA), *About the RSPCA–History*, http://www.rspca.org.uk (follow "ABOUT THE RSPCA" hyperlink) (last visited Nov. 8, 2006).

117. Royal Society for the Prevention of Cruelty to Animals Act, 1932, 22 & 23 Geo. 5, c. 39, § 4 (Eng.) [hereinafter RSPCA Act of 1932].

118. *See* RSPCA, TRUSTEES' REPORT AND ACCOUNTS 5 (2005), *available at* http://www.rspca.org.uk (follow "ABOUT THE RSPCA" hyperlink; then follow "Trustees Report and Accounts" hyperlink; then follow "Trustees Report and Accounts" hyperlink) (reporting 35,108 adult RSPCA members at end of 2005).

119. *See, e.g.*, *id.* at 5–14.

120. *See id.*

121. *See* Royal Society for the Prevention of Cruelty to Animals Act, 1958, 6 & 7 Eliz. 2, c. 23 (Eng.); Royal Society for the Prevention of Cruelty to Animals Act, 1940, 3 & 4 Geo. 6, c. 8 (Eng.); RSPCA Act of 1932, *supra* note 117; RSPCA Rules (2006), *available at* http://www.rspca.org.uk/servlet/BlobServer?blobtable=RSPCABlob&blobcol=urlblob&blob

Council, a twenty-five-person body of fiduciaries empowered to manage the Society and elected by the membership.[122] Membership is relatively open. Applicants must submit a form containing "a declaration of support for the objects of the Society," which form must be accompanied by the relevant fee.[123] The Council then, in its "absolute discretion," can accept the member and enter his or her name on the Society's registry of members.[124]

Although the RSPCA does not employ democratic rhetoric to the same degree as the Sierra Club, examples of the democratic ideal can be found in its organic documents and public materials. In the original RSPCA Act, the size of the membership and the fact that the governing body of the Society was elected by its members were stated as two of the principal justifications for granting it special incorporation legislation.[125] Trustees' Reports have been careful to point out that the RSPCA is "a membership charity" and at times have emphasized the rights of voice that members have at the Society's meetings.[126] Moreover, in the course of the conflict over takeover activities within the Society, its Chairman touted the group's "democratic" nature.[127]

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key=id&blobwhere=1116061668911&blobheader=application/pdf. Introductory text to the Rules explains:

> The 1932 Act made provision for the Society to have Rules and the original Rules are set out in the Schedule to the Act. The 1932 Act also made provision for the Society to make changes to the Rules in accordance with procedures set out in the Act. The 2006 edition contains the Rules, as amended by the Society since 1932 and, where necessary, confirmed by various Orders of the Charity Commissioners.

See id. at 2. Charities in England and Wales also are governed by two Charities Acts, those of 1992 and 1993. *See* Charities Act, 1993, c. 10 (Eng.); Charities Act, 1992, c. 41 (Eng.).

122. *See* RSPCA Rules, *supra* note 121, §§ 4–6. Fifteen Council members are directly elected by the Society's members. *See id.* § 6. The other ten are elected by groups of local branches organized into ten regions throughout the country. *See id.* §§ 5(1), 6(1), 6(6).

123. *See id.* §§ 3(1)(a), 3(2)(a). Ex-officio memberships are available to certain officers of the Society's branches and junior memberships may be offered to individuals under age 18, but these categories of membership do not entitle members to vote. *See id.* §§ 3(3), (5).

124. *See id.* §§ 3(1)(a), 3(2)(a).

125. *See* RSPCA Act of 1932, *supra* note 117, pmbl. ¶¶ 3, 4. The fact that its members and "others who sympathise with its objects" support the Society's work also was mentioned in this vein. *See id.* pmbl. ¶ 7.

126. *See* RSPCA, TRUSTEES' REPORT AND ACCOUNTS (2004) (on file with author). The 2005 Trustees' Report again stresses that the Society is "a membership charity," but does not describe members' rights of vote or voice. RSPCA, TRUSTEES' REPORT AND ACCOUNTS, *supra* note 118, at 5.

127. *See, e.g.*, Andrew Pierce, *Meade is Expelled from RSPCA*, TIMES (London), June 15, 2001, at 5 (quoting Malcolm Phipps, Chairman of the RSPCA, saying, "The RSPCA is a

The structure of the RSPCA also strongly indicates a commitment to representative and relatively open governance. In addition to electing their leaders, members are empowered to make their positions and opinions known. To this latter end, the Council is required to notice and hold a general meeting each year, at which the members are presented the Council's annual report on the Society and its financial statements.[128] At this meeting, the members adopt the financial statements and annual report "if thought fit."[129] Membership meetings also provide a forum at which Society members may debate resolutions they propose.[130] These resolutions are discussed and voted upon, provided proposed resolutions are submitted to the Council in advance and the Council does not deem discussion of them to be "detrimental to the interests of the Society."[131] Recently, these structures for member empowerment

democratic organisation but clearly concerted efforts to join the society for any overriding reason other than animal welfare makes a mockery of this democracy."); Mary Braid & Robert Verkaik, *Bloodsports: The Showjumper, the Author and a Fight for the Soul of the RSPCA*, INDEPENDENT (London), June 15, 2001, at 3 (similar); Stephen Rigley, *Olympic Rider Meade Is Expelled by RSPCA*, DAILY MAIL (London), June 15, 2001, at 11 (similar).

128. *See* RSPCA Rules, *supra* note 121, § 17; *see also* RSPCA Act of 1932, *supra* note 117, sched. § XVII (original statutory provisions).

129. *See* RSPCA Act of 1932, *supra* note 117, sched. § XVII. (original statutory provisions); RSPCA Rules, *supra* note 121, § 17. In addition, upon petition of at least five hundred members, extraordinary general meetings of the society may be called and, if properly called, must be noticed and held by the Council. *See* RSPCA Rules, *supra* note 121, §§ 19–20 (describing current requirements for calling and noticing extraordinary general meetings); *see also* RSPCA Act of 1932, *supra* note 117, sched. §§ XIX, XX. (originally requiring requisition of only 150 members for an extraordinary general meeting of the Society, describing original notice requirement for annual and extraordinary general meetings of the Society, and setting standards for notice by publication).

Early on, the Society's meetings were open to those even beyond the ranks of its members. Subscribers, who had made some monetary donations but had not secured membership, were welcome to attend annual and extraordinary general meetings, although only members could vote. *See* RSPCA Act of 1932, *supra* note 117, sched. § XXII. Under the current Rules, no provision is made for attendance by subscribers, but the Council is empowered "to invite persons who are not members of the Society to attend and speak." RSPCA Rules, *supra* note 121, sched. § XVII.

130. *See* RSPCA Act of 1932, *supra* note 117, sched. § XVII (original statutory provision); RSPCA Rules, *supra* note 121, § 17.

131. RSPCA Act of 1932, *supra* note 117, sched. § XVII (original statutory provision) RSPCA Rules, *supra* note 121, § 17. Interestingly, even after a resolution is passed at a Society meeting, members may request a poll of the entire membership on the issue; a resolution subjected to such a poll will not be deemed carried without receiving the votes of at least sixty percent of those members voting on the poll. *See* RSPCA Act of 1932, *supra* note 117, sched. §§ XXV–XXVII (original statutory provision); RSPCA Rules, *supra*, note 121, §§ 25–27.

have been tested in an effort to determine the Society's position on an extremely divisive issue in the United Kingdom: the continued advisability of permitting sport hunting with dogs.

Despite its storied history in the United Kingdom,[132] during the past several decades controversy has arisen over the wisdom of the continuing legality of hunting with dogs in general, and foxhunting in particular. After many decades of parliamentary debate over the issue,[133] it finally gained political traction after the Labour Party decisively won the general election in 1997.[134] The manifesto on which this victory was secured included promises to guarantee greater wildlife protection and to obtain "a free vote in Parliament on whether hunting with hounds should be banned."[135] Still, the

132. *See Three Centuries of Hunting Foxes*, BBC NEWS, Sept. 16, 1999, http://news.bbc.co.uk/1/hi/uk/422753.stm; Wikipedia, Fox Hunting, History, http://en.wikipedia.org/wiki/Fox_hunting#History (last visited Nov. 8, 2006). The general sport of hunting with dogs has roots in England even before the Roman invasion and was carried on throughout the Roman and Norman periods, through to the near-present day. *See* Fox Hunting, *supra*.

133. A 1970 bill to ban hare coursing passed the House of Commons but ran out of legislative time when a general election was called. *See Timeline: Hunting Row*, BBC NEWS, Feb. 17, 2005, http://news.bbc.co.uk/1/hi/uk_politics/1846577.stm. In addition, several bills to abolish or limit hunting with dogs were proposed during the 1990s, but they never made it through the parliamentary process to become law. *See id.*; *see also Hunting Bill Goes to the Dogs*, BBC NEWS, July 3, 1998, http://news.bbc.co.uk/1/hi/uk_politics/125475.stm (noting a hunting bill was withdrawn on fears it would be used to talk out other, more important bills); 223 PARL. DEB., H.C. (1993) 849, *available at* http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-04-27/Debate-1.html (reporting Tony Banks's testimony that following his 1990 effort to pass a bill banning foxhunting, a Private Member's Bill on the same subject was introduced but was defeated on its Second Reading).

134. *See* Warren Hoge, *Britons Back Labor Party; Conservatives Are Routed After 18 Years of Control*, N.Y. TIMES, May 2, 1997, at A1 ("The size of the Labor vote represented a stunning rebuke of the Conservatives, long one of Europe's most powerful parties, particularly at election time.").

135. Labour Party Manifesto of 1997 (1997), *New Labour Because Britain Deserves Better*, http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml ("We will ensure greater protection for wildlife. We have advocated new measures to promote animal welfare, including a free vote in Parliament on whether hunting with hounds should be banned by legislation."). This position was not taken without some controversy.

> The Labour Party's manifesto promised a "free vote in Parliament on whether hunting with hounds should be banned by legislation." But after 300,000 people demonstrated on London's streets, ministers appeared to backtrack. A Private Members' Bill to ban hunting was dropped after the Government refused to support it. But, when challenged on the issue late one evening in July, Mr. Blair swerved again. The sport would be banned "as soon as we possibly can," he affirmed.

Editorial, *Free the Fox Debate; Blair Should Set up an Independent Investigation on Hunting*, TIMES (London), Sept. 23, 1999, at 23.

road to a decision on the foxhunting question was long and bumpy. A bill banning hunting with dogs in England did not become law until November 2004,[136] with the ban ultimately taking effect in February 2005.[137]

Just as the anti-hunting movement was gaining momentum, the Society began an energetic campaign to advocate parliamentary adoption of a ban on hunting with dogs.[138] In 1996, the RSPCA

136. *See* Hunting Act, 2004, c. 37, §§ 1, 15 [hereinafter Hunting Act]; 426 PARL. DEB., H.C. (2004) 1518, *available at* http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo041118/debtext/41118-20.htm#41118-20_head0 [hereinafter Royal Assent]. After continued opposition in the House of Lords plagued passage of a hunting ban passed by the Commons, the Speaker invoked the limitations on the Lords' power to stymie legislation. *See* The U.K. Parliament, The Parliament Acts of 1911 and 1949, http://www.parliament.uk/works/parliament.cfm#parlacts (last visited Nov. 8, 2006). This action finally allowed the ban to become law. *See* Hunting Act, *supra*; Royal Assent, *supra*.

137. *See* Hunting Act, *supra* note 136; News Release, Department for Environment, Food and Rural Affairs, *Hunting Ban Starts Midnight Tonight*, Feb. 17, 2005 (on file with author). Various attempts to avoid the implementation of the ban through litigation were unsuccessful, and the ban is now in place. *See* Jackson v. Attorney General, [2005] UKHL (HL) 56, (2005) 4 All E.R. 1253 (dismissing appeal challenging lower court opinion that held that the Hunting Act had been validly made under the 1949 Act); Countryside Alliance & Others v. Attorney General, [2005] EWHC (Civ) 1677 (holding that the Hunting Act did not infringe any rights under the European Convention on Human Rights); *see also Hunt Campaign Loses Court Battle*, BBC NEWS, July 29, 2005, http://news.bbc.co.uk/1/hi/uk_politics/4728353.stm; *Hunting: What Happens Next?*, BBC NEWS, Feb. 19, 2005, http://news.bbc.co.uk/1/hi/uk_politics/4215765.stm; *Law Lords Stand by Ban on Hunting*, BBC NEWS, Oct. 13, 2005, http://news.bbc.co.uk/1/hi/uk/4337604.stm.

Scotland imposed a ban on hunting with dogs somewhat earlier, in 2002. *See* Protection of Wild Mammals (Scotland) Act, 2002, (A.S.P. 6), *available at* http://www.opsi.gov.uk/legislation/scotland/acts2002/20020006.htm.

138. The RSPCA did not always oppose hunting with dogs. *See* ARTHUR W. MOSS, VALIANT CRUSADE: THE HISTORY OF THE R.S.P.C.A. 151–52 (1961) (explaining that in 1957, the RSPCA Council noted that although the RSPCA did not condone hunting for sport, it declined to oppose fox hunting because it believed that alternative methods of killing foxes caused the animals more suffering); Andrew Pierce, *RSPCA to Oust Olympian Who Backs Hunting*, TIMES (London), Apr. 25, 2001 (stating that "three masters of foxhounds," among others, formed the RSPCA in 1824); *see also* Huntfacts.com, *Royal Society for the Prevention of Cruelty to Animals (RSPCA)*, http://www.huntfacts.com/RSPCA.htm (last visited Nov. 8, 2006) (relating in a web article critical of the Society's anti-hunting stance that "[w]hen the Labour government set up the Scott Henderson Inquiry [in the 1940s], the RSPCA supported the continuation of foxhunting. The Society's stance was that it disapproved of all hunting for sport, but it accepted that foxes must be controlled and that hunting was the least cruel method" and that Richard Martin, a founding member of the RSPCA, hunted on his Irish estate.). Yet, the Society came to embrace a position opposing hunting with dogs by 1976. *See* Kelly, *supra* note 114, at 11; League Against Cruel Sports, *About Us–History*, http://www.league.org.uk/content.asp?CategoryID=1635&ArticleID=1681 (last visited Nov.

joined the International Fund for Animal Welfare and the League Against Cruel Sports to form Campaigning to Protect Hunted Animals (CPHA), a group established to call on the government to keep its promise to end hunting with dogs.[139] In addition to CPHA's direct and grassroots lobbying efforts,[140] the Society's animal cruelty investigations and prosecutions of individual hunters during the 1990s often were perceived as part of the larger RSPCA anti-hunting agenda.[141]

As the Society's anti-hunting activity rose, pro-hunting individuals began to join the RSPCA and organize the recruitment of like-minded persons to join as well.[142] Most well known among these pro-hunting individuals was Richard Meade, an equestrian who had won three Olympic gold medals for the UK in the 1960s and

8, 2006). Other than adopting this policy stance, however, the RSPCA did not become particularly active on the hunting question until the 1990s.

The 1976 adoption of the policy opposing hunting with dogs also appears to have come by way of member insurgency. *See* Kelly, *supra* note 114 (describing how, fueled by the perception that the Council in the 1960s and early 1970s was dominated by hunters and hunt supporters, anti-hunting advocates established a Reform Group to work for a policy reversal); Huntfacts.com, *supra* (describing this process in a web article critical of the Society's anti-hunting stance); League Against Cruel Sports, *supra* (reporting the election of anti-hunting candidates to the Society's Council in 1970).

139. *See Campaigning To Protect Hunted Animals (CPHA)*, http://www.ifaw.org/ifaw/dfiles/file_60.pdf (last visited Nov. 8, 2006).

140. *See* INTERNATIONAL FUND FOR ANIMAL WELFARE, SUBMISSION FROM THE INTERNATIONAL FUND FOR ANIMAL WELFARE 9–10, 58 (2000), http://www.huntinginquiry.gov.uk/evidence/ifaw.pdf; RSPCA, SUBMISSION TO THE HUNTING INQUIRY (2000), http://www.huntinginquiry.gov.uk/evidence/rspca.htm.

141. *See, e.g.*, *Horsewhip Pair Cleared by Judge; Hunt Case Blast for RSPCA*, DAILY MAIL (London), July 15, 1993, at 25 ("Brian Toon, a spokesman for the Masters of Foxhounds Association . . . said: 'We know the RSPCA is opposed to hunting and cases such as this indicate to us the length the society appears to be willing to go in order to discredit hunting.'"); Benjamin Mancroft, *A Huntsman Hounded Over Badger-Baiting; Benjamin Mancroft Questions the Conviction this Week of a Hunt Master*, GUARDIAN (London), Sept. 4, 1993, at 23 ("It . . . looks increasingly as if the RSPCA has little interest in pursuing bona fide badger-baiters, preferring instead to waste money and court time in attempts to damage fox-hunters, who do more for animal welfare and conservation than most so-called animal welfare groups."); *see also* Huntfacts.com, *supra* note 138 (describing these RSPCA prosecutions of "prominent hunting people" in a web article critical of the Society's anti-hunting stance).

142. *See* Jason Lewis, *The Cunning Trick Tearing the RSPCA Apart in the Battle To Ban Foxhunting*, MAIL ON SUNDAY (London), June 1, 1997, at 18 ("Over the past year hunters and their backers have been enrolling in the Royal Society for the Prevention of Cruelty to Animals' regional groups—a concerted attempt to build up a fifth column inside the powerful charity.").

1970s.[143] Meade founded the Countryside Animal Welfare Group (CAWG) in 1996 and began contacting hunting enthusiasts and encouraging them to join the RSPCA.[144] CAWG soon recruited thousands of members, many of whom also became members of the RSPCA.[145] When another anti-hunting bill was proposed in 1997, Meade sought support for RSPCA Council candidates that would oppose it and urged CAWG supporters to "get involved with the valuable work of the RSPCA."[146] These tactics were characterized by their proponents as attempts to "change things [at the RSPCA] from within."[147]

The decision by hunting enthusiasts to join the RSPCA might strike those uninitiated to the UK foxhunting debate as bizarre—if not malevolent—on the theory that support for hunting must be fundamentally at odds with the goals and concerns of an animal

143. *See* Clive Aslet, *Horseman of the Apocalypse*, INDEPENDENT (London), June 17, 2001, at 27 (reporting that Meade won one gold medal in 1968 and two gold medals in 1972); Equestrianism, Equestrian News from Olympics 2004, http://www.equestrianism.net/olympics.html (last visited Nov. 8, 2006).

144. *See* David Hencke, *RSPCA Move To Block Hunt Takeover*, GUARDIAN (London), Apr. 15, 2000, at 1; Lewis, *supra* note 142, at 18; Marie Woolf, *Fox Hunters Plot To Hijack RSPCA's Annual Meeting*, INDEPENDENT (London), June 20, 1999, at 4. CAWG describes itself as follows:

> The Countryside Animal Welfare Group (CAWG) is a group of more than 5,000 members of the RSPCA who support the objects of the Society but who are concerned about the direction its policies have taken in recent years on a number of animal welfare issues.
>
> The Group was set up four years ago [in 1996] when the founding members formed the view that the Society's excellent work in preventing unnecessary suffering in domestic and other dependent animals was being compromised by the diversion of money and other resources to issues that centered more on "animal rights" than animal welfare. The founding members perceived that these policies were based on sentiment rather than reason and failed to take into consideration the special needs of animals in the wild.

THE COUNTRYSIDE ANIMAL WELFARE GROUP, SUBMISSION TO THE BURNS INQUIRY INTO HUNTING WITH DOGS (2000), http://www.huntinginquiry.gov.uk/evidence/cawg.htm [hereinafter CAWG].

145. *See* Kelly, *supra* note 114, at 11 ("[Richard Meade] says he has recruited about 5,000 new country members [to join the RSPCA], a last-ditch attempt to stop the society from becoming urban and radical."); *see also* Rob Evans & David Hencke, *Pro-hunt Alliance Funded RSPCA Infiltrator*, GUARDIAN (London), Apr. 28, 2001, at 6 ("[T]he Countryside Animal Welfare Group, set up five years ago, consists of 5,000 RSPCA members who want to make the charity support fox hunting.").

146. Lewis, *supra* note 142, at 18 (quoting a letter from Meade to CAWG supporters).

147. *Id.* (quoting an officer of the British Field Sports Society, an entity related to CAWG).

welfare group. But this is not the only way to interpret the CAWG members' actions. These pro-hunting individuals viewed themselves as hunters *and* animal welfare supporters.[148] As primarily residents of the countryside, they expressed a commitment to animal welfare and saw foxhunting as merely a well-established and humane method of destroying dangerous vermin. Thus, they saw their views as in line with the RSPCA's animal welfare agenda.

Still, like the SUSPS efforts at the Sierra Club, the actions by Meade and his compatriots can be viewed as an unfriendly bid for control of the policies of a nonprofit with member-elected fiduciaries. The insurgents sought to obtain control of the Society in order to change its anti-hunting policy. To do so, they looked to the Society's membership as the route to desired control, rather than negotiating with the Council. The CAWG bid for control primarily employed purchase techniques. The insurgents encouraged pro-hunting individuals and advocates to make new applications to join the Society.[149] By this route, Meade and his fellows looked to swell the ranks of RSPCA members with pro-hunting loyalists. Once accomplished, the insurgents could count on these new members' votes to achieve a change in the Society's anti-hunting policies, its incumbent anti-hunting leadership, or both. However, Meade and the CAWG insurgents were only able to pursue the early steps in this multi-part takeover strategy before defensive measures were invoked against them.

The RSPCA's 1999 annual member meeting became the venue for the first face-off in this takeover attempt. The agenda included a resolution, proposed by a Council member, that denounced parliamentary maneuvers to block adoption of anti-hunting legislation.[150] The resolution further requested that the government

148. *See* CAWG, *supra* note 144; *see also* EVIDENCE SUBMITTED BY THE WEST GROUP BRANCH OF THE SOMERSET AND AVON NATIONAL FARMERS' UNION TO THE COMMITTEE OF INQUIRY INTO HUNTING WITH DOGS (2000), http://www.huntinginquiry.gov.uk/evidence/nfuwest.htm; WRITTEN SUBMISSION TO THE BURNS INQUIRY PREPARED BY BASKERVILLE, HORGAN & PARTNERS EQUINE PRACTICE (2000), http://www.huntinginquiry.gov.uk/evidence/baskerville.htm.

149. The CAWG campaign also used persuasive tactics to a degree. At times, it appealed to existing RSPCA members to support changing the Society's anti-hunting policy in addition to its attempts to augment the Society's membership with pro-hunting loyalists. However, purchase tactics were the main techniques CAWG employed and the ones to which the Council responded defensively.

150. *See* Woolf, *supra* note 144, at 4.

revise parliamentary procedure to reduce the effectiveness of such blocking methods.[151] Pro-hunting members also proposed motions for discussion at this meeting. Rather than calling directly for a change of the Society's position opposing hunting with dogs, these resolutions portrayed the Society as riven by an internal struggle between traditional animal welfare supporters and animal rights activists. Perhaps the most strident of these resolutions asked members to vote to agree on the detrimental nature of "the growing influence within the society of persons with extreme views of animal rights."[152] It called upon members to reject any efforts to exclude from membership those "persons who . . . are deeply concerned about animal welfare, [and] are part of a substantial body of opinion which holds differing views as to the human relationship with animals" and to request that the Council cease spending on lobbying and instead concentrate on practical efforts to improve animal welfare.[153] If passed, the second resolution would have directed the Council to bring to the attention of charity regulators the "intrusion" of animal rights activists into the Society and their attempts at subverting its "traditional objects."[154]

CAWG vigorously campaigned to convince its followers who were also RSPCA members to attend the annual meeting to oppose the Council's motion and support the resolutions proposed by the pro-hunting faction.[155] Days before the meeting, newspapers in London anticipated that up to seven hundred CAWG members would attend the Society's annual general meeting—over twice the typical expected RSPCA member attendance.[156] Ultimately, the more than five hundred pro-hunting supporters who attended the meeting

151. *See* Charles Clover & Charlie Methven, *Pro-hunt RSPCA Members Denied "Extremist" Vote*, ELECTRONIC TELEGRAPH (U.K.), June 25, 1999, http://www.telegraph.co.uk/htmlContent.jhtml?html=%2Farchive%2F1999%2F06%2F25%2Fnrspca25.html.

152. *Id.*

153. *Id.*

154. *Id.* Another motion called for changes to the procedures for electing Council members. *See id.*

155. *See* Carol Burns, *RSPCA Is Expecting Disruption*, LEICESTER MERCURY (U.K.), June 23, 1999, at 23 ("Members of pro-hunting organisation Countryside Animal Welfare Group plan to use their voting power at Saturday's meeting to force the [RSPCA] to back down on its anti-blood sports policy.").

156. *See* Dawn Alford & Andrew Penman, *Sorted: Outfox These Hunt Plotters; RSPCA Sabotage*, MIRROR (U.K.), June 25, 1999, at 8; Clover & Methven, *supra* note 151. Woolf, *supra* note 144, at 4.

were only able to debate and vote down the Council's resolution opposing the procedural maneuverings of pro-hunting Members of Parliament.[157] The Council refused to accept the other resolutions for discussion on grounds that they could "be detrimental to the interests of the Society."[158] Still, the pro-hunting members were able to achieve a partial victory, soundly defeating the Council-proposed anti-hunting resolution by member vote.[159]

After this meeting, the Council's alarm about the pro-hunting faction within its membership intensified, prompting the Council to undertake defensive measures. The Society suspended membership applications by hundreds of people in the months following the 1999 meeting, a move an RSPCA spokeswoman later described as motivated by concern over "the damage being done to the society as a result of CAWG's activities."[160] Soon after, the Council "took the unusual step" of seeking input from the courts on its plans to cull those it suspected of pro-hunt leanings from its membership rolls.[161] In the press reports of the impending case, Meade and CAWG were often accused of engaging in "entryism"[162]—a disapproving British term for joining a political party or group with the secret intention of changing its positions.[163] The Society's official statements at the

157. *See* Clover & Methven, *supra* note 151; *Hunt Issue Raises RSPCA Hackles*, BBC NEWS ONLINE, June 26, 1999, http://212.58.226.61/1/low/uk/379013.stm; *The 1999 RSPCA Annual General Meeting*, WATCHDOG NEWSL., Sept. 1999, at 6 (on file with author).

158. RSPCA Rules, *supra* note 121, § 17. The RSPCA Rules specifically grant the Council the right to refuse to accept member-submitted motions on these grounds. *See id.*

159. *See* John Arlidge, *Pro-hunt Lobby Wins RSPCA Vote*, OBSERVER, June 27, 1999.

160. Hencke, *supra* note 144, at 1; *see also* Rob Evans & David Hencke, *Olympic Star Expelled as Hunt Lobby Loses Battle for RSPCA*, GUARDIAN (London), June 15, 2001, at 3 (quoting internal RSPCA document expressing concerns that a "surge in membership applications in response to the campaigns run by Richard Meade . . . have damaged the best interests of the charity").

161. *See* Hencke, *supra* note 144, at 1 (quoting an RSPCA spokeswoman who confirmed that "[t]he RSPCA has started proceedings in the high court to seek guidance on the way in which membership applications are to be handled and to clarify the relevant position of the society's constitution").

162. *See, e.g.*, Kevin Maguire, *Pro-hunting Judges Cry off RSPCA Legal Fight*, GUARDIAN (London), Nov. 17, 2000, at 6 ("The RSPCA claims it is the victim of entryism, and senior figures have privately accused the CAWG, led by Olympic equestrian Richard Meade, of attempting a coup."); Charlotte Raven, *Thank God for Peter Mandelson: Hunters Fall at First Fence*, GUARDIAN (London), Jan. 30, 2001, at 9 ("[Members of CAWG] plan[ned] . . . to infiltrate the larger body until there were enough of them to force it to change its position . . . . Insane as this clearly is, you have to give points for the crazy audacity of using entryism to turn something into its opposite.").

163. *See supra* note 114.

time, as well as the drastic steps taken by the Council, demonstrate the Council's fear of the threat that the pro-hunting group's "organised infiltration" posed to the Society.[164]

In its request for an advisory judicial decision, the RSPCA specifically sought counsel on whether it could lawfully adopt (1) a Membership Policy ("Policy") that would enable it to remove or exclude from membership those persons who had joined or sought to join the Society in order to change its anti-hunting stance and (2) a Membership Scheme ("Scheme") for implementing this Policy in an administratively efficient fashion.[165] The Scheme excluded from membership various categories of applicants or current members based on characteristics suggesting the applicant or member desired to join or had joined the Society in order to change its anti-hunting policy. For example, the Scheme would preclude from membership those individuals who applied using a form provided by CAWG or an associated campaign.[166] The Council asked the court to confirm both that the Society's own rules would permit adoption and implementation of these defenses and that adopting them would be within the range of acceptable conduct for charity fiduciaries.[167]

As in the *Sierra Club* case, the judicial response was deferential to the takeover concerns of the incumbents. The decision noted the democratic nature of the Society's governance structure;[168] yet, it focused on the discretion over matters of membership conferred on the Council under the RSPCA's internal rules. In reviewing the proposed Policy, the court pointed to at least three different sets of discretionary powers over membership that these rules grant the

164. Adam Lusher, *Olympic Champion in Court Fight over RSPCA Hunt Ban*, SUNDAY TELEGRAPH (London), Nov. 12, 2000, at 1 (quoting Charlotte Morrissey, of the RSPCA, who also explained the Society was asking the court "to clarify what charities should do if they believe they are subject to a damaging infiltration"); *see also* Hencke, *supra* note 144, at 1 (quoting the RSPCA's spokeswoman who cited concerns about CAWG activities within the RSPCA).

165. *See* Royal Soc'y for the Prevention of Cruelty to Animals v. Att'y Gen., [2001] UKHRR (Ch) 905, (2002) 1 W.L.R. 448, 451.

166. *See id.* at 464, 467–68.

167. *See id.* at 451. Although the Society's action was in the nature of a request for an advisory decision, an adversarial hearing of the issues did occur. *See id.* at 453–60 (describing the roles of the Attorney General, Richard Meade, and two applicants whose applications were being held in abeyance, all as parties defendant).

168. *See id.* at 452 (citing the members' ability to "elect the council," "speak and express their views" at membership meetings and in polls, and "vote in new members of the council who will adopt different policies" if they disagree with the Council's actions or approach).

Council. First, since completed membership applications are deemed to establish applicants as members only when they are accepted, and because such acceptance is at the absolute discretion of the Council, the court found that the Council had broad freedom to accept or deny initial membership applications.[169] In addition, the court found that the Council's "power to refuse and/or to return any membership subscription at any time if the council shall be of the opinion that it would not be advisable to accept or retain it" provided the Council a route to eliminate a member's status during the period of membership.[170] Finally, the Council could exercise its power to expel members using an explicit expulsion process.[171]

The court held that each of these powers was separately available to the Council, so that it might use the refusal/return power to strip members of their memberships at any time, without recourse to the express provision on expulsion.[172] The refusal/return power, however, was exercisable only upon compliance with the explicit procedural safeguards its terms delineated: full consideration of the issue by the Council, including a hearing of the relevant member's views and passage of a Council resolution effecting the revocation of membership.[173] Assuming these requirements were met, the Society's internal rule structure would permit implementation of the proposed defensive Policy.[174]

The court then moved to the question of whether adoption of the Policy would comply with Council members' obligations as charity trustees. In finding that the Policy met these obligations, the court employed a fiduciary standard requiring the Council to exercise its powers "for the purposes for which they are conferred in what *they* consider to be the best interests of the society" and in good faith.[175] The judge did not blindly accept the Council's view that excluding from membership those who sought to reverse the

169. *See id.* at 456–57, 460.

170. *Id.* at 456, 459–61 (discussing RSPCA Rule § 3(7)); *see also id.* at 453–55 (describing the predecessor rules extending this power to the Council and stretching back to at least 1932).

171. *See id.* at 456–57, 460–62 (discussing RSPCA Rule § 28).

172. *See id.* at 460–61.

173. *See id.* at 461.

174. *See id.* at 460–61.

175. *See id.* at 464–65 (emphasis added).

Society's anti-hunting policy was in its best interest.[176] Yet, he accepted that the Council did "ha[ve] grounds (rightly or wrongly)" for embracing the views it had, as well as for advocating the adoption of the Policy.[177] Thus, despite an obvious lack of enthusiasm for the substance of the Council's decision, the judge upheld the Policy as adopted honestly and in the good faith belief that it would serve what the Council viewed as the best interests of the Society.[178]

In contrast, the judge rejected the Council's proposed Scheme for implementing its Policy.[179] Under the Scheme, if an applicant fell within any of the categories identified with the pro-hunting campaigns, his or her application could be conclusively refused, and the applicant could be excluded from membership for the following two years.[180] Likewise, if a current member fell within the categories identified, life membership could be revoked upon return of the member's subscription fee, or an annual member could be refused renewal.[181] The court recognized the difficulty of investigating the reasons behind every membership application received,[182] but it interpreted the Society's rules to require the Council's membership-related powers to be exercised on an individual rather than categorical basis, and to provide substantial procedural safeguards for members and applicants.[183]

176. *See id.* at 464 (noting the force of the argument that the Council had exaggerated or overestimated the damage to the Society from the pro-hunting campaigns and questioning whether removing pro-hunting members would in fact ease the tensions the hunting issue had caused within the Society).

177. *Id.* at 464 (noting the Council's view that the Policy was in the Society's interest because it would dampen organized pro-hunt activity against the RSPCA and keep "troublemakers" out of the organization).

178. *Id.* at 465–66. The court also found the Council's implementation of the Policy not to interdict the guarantees of individual free speech under the UK Human Rights Act. *See id.* at 466–67.

179. *See id.* at 468.

180. *See id.* at 467–68.

181. *See id.* at 457, 467–68.

182. *See id.* at 467.

183. *See id.* at 468–69. The level of procedural safeguards required varies by context. The Council may refuse to accept initial applications for membership using the categories of exclusion as prima facie evidence of grounds for rejection, but it must inform applicants of this practice, invite them to state whether they fall into these categories, and give any reasons why they should be admitted as members regardless. *See id.* at 468–69. Life or annual members who would be stripped of membership or have their membership renewals refused are entitled to greater procedural protection. *See id.* at 468. The Council must consider fully, in each individual member's case, whether it would be "inadvisable" to continue the membership at

Because the judge grounded his decision regarding the Scheme on an interpretation of the Society's internal rules, his decision did not evaluate the Council's choice to adopt the Scheme in relation to any particular standard of fiduciary conduct. The judge did criticize the Council's singular focus on the hunting issue[184] and noted the practical and potentially large costs of any scheme to implement the Policy.[185] In fact, he suggested the benefits of stripping membership would rarely, if ever, justify the costs of complying with the necessary procedures to do so.[186] Still, these doubts appear to surface from a pure utilitarian calculus rather than a concept of fiduciary obligation or the requirements of charity law. The decision falls short of suggesting that such defenses could not lawfully be adopted. Instead, it informs fiduciaries of the appropriate range of considerations they should evaluate in order to successfully craft and implement defenses of this type.

The court's fairly deferential, incumbent-protective response to the allegations of a takeover attempt at the RSPCA heartened the Council. On the heels of the court's decision, the Council rejected five hundred membership applications from applicants it believed sought to join the Society to oppose its anti-hunting position.[187] Moreover, after considering its legal options, the Council decided to

issue. *See id.* Moreover, each member must be given the opportunity to respond to any allegations against him. *See id.* at 469.

184. *See id.* at 467–68 (questioning whether the "single factor" of a desire to oppose the Society's anti-hunting policy or participation in a campaign should "justif[y] th[e] extreme course" of denying or revoking membership and noting that countervailing circumstances should be borne in mind).

185. *See id.* at 469–70 (specifying the potential for the Society to lose the future gifts and legacies of entire classes of possible members, which donations are a much more important source of income to the Society than are membership dues, as well as the serious and detrimental public image and reputation effects mass exclusions could have on the RSPCA).

186. *See id.* at 469.

187. Matthew Beard, *RSPCA Battles To Oust Pro-hunting Olympian*, INDEPENDENT (London), Apr. 26, 2001, at 12 ("[T]he society rejected 500 membership applications from people accused of being part of an infiltration campaign by pro-hunt supporters."); Pierce, *supra* note 138 (noting that the RSPCA had turned down 500 membership applications); Robert Verkaik, *'Rumpole' Comes out of Retirement for RSPCA Case*, INDEPENDENT (London), June 13, 2001 ("In April, the society announced that it had rejected 500 of 600 applications that had been held in abeyance after the court's ruling."); Jo Willey, *Showjumper's Shock over Possible RSPCA Ban*, PRESS ASS'N NEWS, Apr. 25, 2001 ("The society barred 500 people it claimed were pro-hunt infiltrators earlier this month after a judge granted it permission to bar pro-hunt campaigners it believed were 'infiltrators' trying to change its policy on blood sports.").

expel Meade from the ranks of its members.[188] After an expensive and highly public inquiry, the Council expelled him in June 2001.[189] Meade has continued to advance his position that he and other hunting supporters were wrongly excluded from participation in framing the Society's hunting stance.[190] Concern over the hunting issue has continued to cause conflict within the RSPCA, including an unsuccessful Council run by a hunting enthusiast[191] and backlash from some members after the appointment of an anti-hunting activist and former MP as the Society's new Chief Executive.[192] Yet, with the support of the *RSPCA* holding, the Council is unlikely to reconsider its position that it must defend the Society's "democracy"[193] from future perceived infiltrations.

* * *

188. Andrew Pierce, *Meade Will Not Fight RSPCA Ban*, TIMES (London), May 7, 2001 (explaining that the RSPCA Council sent Richard Meade an eighty-four-page summons requesting that he appear at a disciplinary hearing on May 27); Pierce, *supra* note 138 ("The RSPCA will today begin unprecedented moves to terminate the membership of its most prestigious supporter, Richard Meade . . . ."). Perhaps the Council did take some of the judge's concerns to heart; it did opt to expel Meade, rather than stripping his membership using the refusal/return rule procedures outlined in the judge's decision. *See* Braid & Verkaik, *supra* note 127, at 3; *Olympic Horseman Expelled by RSPCA*, JOURNAL (U.K.), June 15, 2001, at 12.

189. *See* Pierce, *supra* note 127, at 5 ("At a private hearing in London, the 25-strong council of the animal charity expelled Mr. Meade . . . ."); Braid & Verkaik, *supra* note 127, at 3; Evans & Hencke, *supra* note 160, at 3; Tom Kelly & Vanessa Allen, *RSPCA Expels Showjumper for Supporting Fox Hunting*, PRESS ASS'N NEWS, June 15, 2001; *Olympic Horseman*, *supra* note 188, at 12.

190. *See* Braid & Verkaik, *supra* note 127, at 3 ("Yesterday [Richard Meade] insisted that the society was stifling the right to express an opinion."); Danny Kemp, *Meade Blames 'Militants' for RSPCA Expulsion*, PRESS ASS'N NEWS, June 15, 2001 (discussing a number of Richard Meade's concerns about his expulsion).

191. *See* James Morrison, *The Gameshow Host, Her Neighbour the Huntsman and a Crowd Baying for Blood*, INDEPENDENT (London), Mar. 10, 2002, at 5 ("The 59-year old farmer [Alex Mason] hopes to be voted on to the [RSPCA's] 25-strong ruling council in an attempt to challenge its longstanding opposition to blood sports."); *RSPCA Snubs Fox Hunt Supporters*, GLOUCESTERSHIRE ECHO (U.K.), July 1, 2002 (noting that Mr. Mason's run was unsuccessful).

192. *See* Richard Alleyne, *New RSPCA Chief Promises To Provide a Stronger Edge*, DAILY TELEGRAPH (London), Oct. 22, 2002, at 12 ("[H]ours after her acceptance, a dispute broke out over whether her employment moved the society further away from animal welfare and towards political campaigning.").

193. *See* Pierce *supra* note 127 (noting the RSPCA Chairman's widely quoted statement that "[t]he RSPCA is a democratic organization but clearly concerted efforts to join the society for any overriding reason other than animal welfare makes a mockery of this democracy").

The Sierra Club and RSPCA experiences illustrate the deeply-felt concerns on all sides of nonprofit takeover activities.[194] Insurgent groups fight avidly to move or restore the target nonprofit to what they view as the appropriate policies to support its mission. Incumbent fiduciaries see their obligation as no less than defending their organization and its mission from ruin. Such concerns require that judicial review of nonprofit takeover defenses be carefully drawn to address the needs of affected organizations and the nonprofit sector generally. Ad hoc responses to the exigencies of particular takeover battles are inadequate in this context. The next Part considers various approaches courts might take to regulate this highly imperfect market for mission control.[195]

194. Certainly these high-profile takeover attempts are not the only situations in which an individual or group has engaged in an unfriendly nonprofit takeover attempt. Nonprofit corporations with member-elected boards of all sizes and types can, and undoubtedly have, experienced attempts to modify their programs and policies by replacing board personnel or altering the composition of the membership entitled to elect them. *See, e.g.*, Brennan v. Minn. Soc'y for the Blind, 282 N.W.2d 515 (Minn. 1979) (holding invalid a bylaw attempting to terminate the society's membership structure, which directors passed in order to thwart a feared takeover attempt); Park Slope Jewish Ctr. v. Congregation B'nai Jacob, 686 N.E.2d 1330 (N.Y. 1997) (describing a longstanding battle between factions of a synagogue waged, in part, through attempts to alter membership composition); Complaint at 1–7, Olson v. Auto. Club of S. Cal., No. BC244326 (Cal. Super. Feb. 1, 2001) (claiming incumbent directors of auto club were frustrating election bids of insurgent candidates who sought to move the Club to advocate reductions in gasoline taxes and automobile registration fees); Editorial, *Dissidents at Dartmouth*, WALL ST. J., Sept. 1, 2006, at A14 (describing the success of petition-nominees in gaining seats on Dartmouth's partially member-elected Board of Trustees and claiming incumbents' response has been an attempt to alter Board composition policy). There is also a long history of cases brought to resolve disputes within churches and among their members. *See, e.g.*, Baker v. Fales, 16 Mass. (1 Tyng) 488 (1820); Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378 (1981). As reviewing takeover activity within these organizations may raise unique constitutional and other issues, this article brackets the question of takeovers in the religious context.

195. Of course, judicial review of defenses is not the only means by which the law might regulate nonprofit takeover activity. Rather than proceeding directly to court, frustrated insurgents or nervous incumbents might contact the attorney general for guidance or support. In such instances, however, the approach taken by courts to reviewing defenses could provide a useful framework for attorney general advice or action.

Alternatively, legislation, or some other rules-based effort, might be launched at the problem. State legislatures or attorneys general might draft more specific rules to regulate nonprofit membership or elections. A rules-based approach might also be promulgated by self-regulatory organizations. Such statutes or rules could describe proper and improper activities for insurgents and incumbents in takeover situations, thereby obviating or reducing the need for case-by-case judicial review. At the moment, however, there seems to be neither the political will nor the private resources to support such a rulemaking effort.

IV. SELECTING A STANDARD OF REVIEW FOR NONPROFIT TAKEOVER DEFENSES

The legal limitations, if any, on the defensive strategies incumbent nonprofit fiduciaries may use to frustrate takeover attempts will channel the conduct of those facing such efforts and should mesh with the values and policies underlying nonprofit law. Even though few takeover attempts will be characterized by sufficient rancor and resources to wind up in court, those that do will provide valuable guidance for directors of smaller, more resource-strapped or litigation-shy organizations. Further, the standard courts impose for the conduct of directors in this context forms part of the larger picture of the responsibilities these fiduciaries owe to their nonprofits and their various stakeholders. To the greatest extent possible, this picture should be consistent and rational, and should reinforce the ideals of the nonprofit sector.

The courts' rulings in *Sierra Club* and *RSPCA* ostensibly deal with both the procedural and substantive dimensions of the takeover defense issue. On the procedural front, both courts hold that directors are required to comply with their nonprofits' internal election and membership rules in defending against takeover activity. To varying degrees, they then analyze fiduciaries' conduct to determine whether the incumbents in each scenario have indeed followed their own internal rules.[196] Although one might take issue with the *Sierra Club* court's extreme deference to the Club's directors on this question, this baseline of procedural compliance required by current law certainly is wise. It reminds nonprofit fiduciaries that their organizations are not fiefdoms, but legal entities governed by organic documents that impose real and mandatory limits on their actions. This "rule of law" lesson underpins the legitimacy of the fiduciary construct and bolsters member and public trust in individual organizations and the nonprofit sector by reminding them that fiduciary action cannot be entirely arbitrary. Thus, any standard developed to review defensive actions taken by

196. *See* Statement of Decision and Order, *supra* note 92, at 7–8 (finding that the Sierra Club board acted in accord with its own bylaws); Royal Soc'y for the Prevention of Cruelty to Animals v. Att'y Gen., [2001] UKHRR (Ch) 905, (2002) 1 W.L.R. 448, 462, 463–70 (finding that the Society's Rules confer upon the Council the right to reject applications for membership and remove current membership, and reviewing the Membership Policy and Scheme for compliance with the Rules' requirements for exercising those powers).

nonprofit fiduciaries should retain the baseline procedural requirement that they follow the internal rules of their own organizations.

But even if a board is found to comply with the election and membership processes imposed by its organic documents (and that incumbent fiduciaries may have written), there remains the substantive question of whether boards have breached their fiduciary obligations in their attempts to frustrate a current or brewing takeover attempt. When dealing with fiduciaries, technical compliance with legal rules, externally- or internally-imposed, is not the sole standard of conduct.[197] Such compliance is necessary, but for courts to uphold director actions taken to thwart a takeover, more may be required. The question of whether, and to what extent, the law imposes substantive limits on defensive actions remains open. Moreover, this question is much more difficult to resolve than the procedural one, as it is linked to the central and thorny issue of how and by whom nonprofit mission should be defined.

This Part begins consideration of this open question by evaluating three types of standards courts reviewing defensive actions by nonprofit fiduciaries could implement: incumbent-protective standards, insurgent-protective standards, and intermediate standards. Ultimately, it advocates the addition of an intermediate, governance-protective standard of review to the current baseline requirement of procedural compliance. Such a standard harmonizes the competing nonprofit policy goals of mission preservation and evolution, while reinforcing the democratic governance choice that nonprofits with member-elected fiduciaries have made.

A. Incumbent-Protective Standards

As the *Sierra Club* and *RSPCA* rulings aptly demonstrate, courts can apply incumbent-protective standards to review nonprofit

197. *See* Pepper v. Litton, 308 U.S. 295, 311 (1939) ("[A fiduciary] cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements."); Schnell v. Chris-Craft Indus., 285 A.2d 437, 439 (Del. 1971) (similarly noting that technical compliance with the law is not sufficient to show compliance with fiduciary obligations); Solar Cells, Inc. v. True N. Partners, LLC, No. 19477, 2002 Del. Ch. LEXIS 38, at 15–16 (Del. Ch. Apr. 25, 2002) ("These actions do not appear to be those of fiduciaries acting in good faith. As the Supreme Court and this Court have made clear, it is not an unassailable defense to say that what was done was in technical compliance with the law.").

takeover defenses. The most extreme of such standards would require procedural compliance alone—removing any threat of challenge to defensive actions, so long as they comply with the technical requirements of internal election or membership rules. Less extreme (though still deferential) substantive standards also would protect most attempts to frustrate insurgents' efforts. For example, one such standard might endorse director conduct in takeover situations so long as directors comply with internal rules *and* can cite a rational explanation for their actions. Placing the burden on insurgents to disprove the existence of such a rational explanation would make it even more difficult for them to challenge defensive actions successfully.

Although neither the *Sierra Club* nor the *RSPCA* court provided a general statement of the substantive standard to be employed in reviewing all directors' responses to nonprofit takeover activity, both decisions have a decidedly incumbent-protective cast. In *Sierra Club*, the court found no evidence of a conflict of interest that might elicit duty of loyalty-type concerns and a concomitant rigorous substantive standard of review.[198] Likewise, it found that the defendants were entitled to the protection of the deferential business judgment rule in reviewing their compliance with their fiduciary duties.[199] This standard of review precludes a court from engaging in a substantive review of directors' decisions, unless those decisions amount to gross negligence.[200]

In *RSPCA*, the court considered whether the Council members adopted the Membership Policy in compliance with their fiduciary obligations as charity trustees. The court described the substantive standard it employed as merely requiring the Council members to exercise their powers "for the purposes for which they are conferred in what *they* consider to be the best interest of the Society" and in good faith.[201] In applying this deferential and subjective standard, the court required the defendant fiduciaries to show only that they honestly believed they were acting in the Society's best interest. The court noted its own hesitations about the wisdom of the Council's

198. *See* Statement of Decision and Order, *supra* note 92, at 10.

199. *See id.* at 11.

200. *See* GEVURTZ, *supra* note 15, § 4.1.2(d) (characterizing Delaware's application of the business judgment rule as a gross negligence standard).

201. *Royal Soc'y for the Prevention of Cruelty to Animals*, 1 W.L.R. at 465 (emphasis added).

position, namely that it was important to exclude pro-hunt individuals from membership in the Society.[202] Still, the court upheld the Policy because it accepted that the Council members held this position honestly and in good faith.[203] The *RSPCA* court did strike down the Council's proposed Membership Scheme. However, this decision was based on a finding that the Scheme failed to comply with procedural safeguards set down by the Society's own rules, rather than on a finding of fiduciary breach.[204] Both the *Sierra Club* and *RSPCA* decisions exemplify an incumbent-protective approach. Their deferential style leaves fiduciaries considerable leeway to frustrate potential insurgents and internal factions engaged in takeover activity.

One explanation for the appeal of incumbent-protective standards is that they respond to the seemingly extreme nature of the changes in mission that insurgents in cases like *Sierra Club* and *RSPCA* desire to make. On initial observation, the intent to move the Sierra Club, a group associated with progressive political views, to an anti-immigration position may strike the observer as quite radical. Likewise, the intention of insurgents at the RSPCA to back away from the group's opposition to hunting with dogs may seem discordant with the ideals associated with an animal welfare society. The proponents of these positions can make arguments that cast them as appropriate evolutions of the general mission of the organizations: immigration stresses the ecosystem and should be limited, and hunting vermin with dogs is less harmful to these animals than other techniques required to control them. Yet, upon hearing the facts of the cases, one experiences a sense of sympathy for incumbent fiduciaries who claim they are protecting their groups from those who seek to destroy their ideals. Viewed in this light, incumbent-protective standards can appear quite attractive.

As such, incumbent-protective standards, which likely would prevent the revision of nonprofit missions through takeovers, seem to dovetail nicely with some of the established ideals of the nonprofit sector and nonprofit law. Charities have long been engaged in the

202. *See id.* at 464.

203. *Id.* at 464–65.

204. *See id.* at 468–70.

preservation of historic norms, values, and even objects.[205] "Voluntary action and voluntary organizations have played a major role in history in preserving values, ways of life, ideas, beliefs, artifacts, and other productions of the mind, heart, and hand of man from earlier times so that this great variety of human culture is not lost to future generations."[206] This ability to preserve and reinforce treasured values is one of the rationales for the existence and privileged status of the sector.[207] Given this solicitude for preservation, shielding nonprofit fiduciaries from change with an incumbent-protective standard seems fitting.

This concern for preservation is bolstered by, and perhaps related to, charity law's tradition of strong respect for original intent. In nonprofits organized as charitable trusts, trustees must follow the stated intentions and purposes of the donor long after the donor's contribution.[208] In fact, as one of the principal benefits of charitable trust status is perpetual life, this fidelity to original intentions and purposes theoretically will persist indefinitely.[209] When circumstances change such that charitable trustees desire to alter their trust's activities, those trustees must seek extraordinary permission to do so in court.[210] Courts, under the *cy pres* doctrine, will permit such change only if the donor's intended purposes have become impossible or highly impracticable to accomplish.[211] Moreover, traditionally, even if this high bar is met, any revised ends must come

205. *See* O'NEILL, *supra* note 6, at 36–37 (stating that anthropological work that has found associations arose even in ancient societies and often served to preserve the values of a group or tribe after it had experienced social change or dislocation).

206. Smith, *supra* note 7, at 82.

207. *See* O'NEILL, *supra* note 6, at 36–37, 42, 45 (noting that this strain of nonprofit theories developed in various disciplines); SALAMON, *supra* note 9, at 14–16 (describing the nonprofit sector's role in value guardianship as one of the four key functions of the nonprofit sector and linking this function to the sector's contributions to societal diversity); Lester M. Salamon, *The Resilient Sector*, *in* THE STATE OF NONPROFIT AMERICA 10, 10–11 (Lester M. Salamon ed., 2002) (similarly describing important expressive and value-guarding roles played by nonprofits); Smith, *supra* note 7, at 82–83.

208. *See* AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT ON TRUSTS §§ 365, 379 (4th ed. 1989) (explaining that charitable trusts may persist indefinitely and that charitable trustees are duty-bound to pursue their trusts' purposes).

209. *See id.*

210. *See* UNIFORM TRUST CODE § 413 (amended 2005), 7C U.L.A. 294 (Supp. 2006); RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

211. *See* UNIFORM TRUST CODE § 413; RESTATEMENT (THIRD) OF TRUSTS § 67.

"as near as possible" to those desired by the donor.[212] Today, *cy pres* and the desire to protect donor or original intent often exert influence over changes in the use of assets by nonprofit corporations as well.[213] The tendency of nonprofit law to protect original intent seems to augur well for adoption of incumbent-protective standards, which would enable present fiduciaries to avert changes advocated by insurgents.[214]

The downside of incumbent-protective standards is the damage they inflict on internal democracy within nonprofits with members. If an incumbent-protective standard were to become the established precedent, nonprofit directors facing takeover attempts essentially could take a no-holds barred approach to preventing such insurgencies. Incensed insurgents seeking mission change would be bereft of options to shift organizations from within. They could pursue their favored mission only by leaving the organization and joining alternative groups. One might not necessarily view this as an undesirable outcome; after all, this is precisely the situation faced by those who seek unsuccessfully to convince the leaders of nonprofits with self-perpetuating boards to transform their missions. However, the takeover phenomenon this Article addresses occurs only in nonprofits that have opted for a member-elected fiduciary structure.

212. RESTATEMENT (THIRD) OF TRUSTS § 67(d) ("In applying the cy pres doctrine, it is sometimes stated that the property must be applied to a purpose as near as possible to that designated by the terms of the intended trust."). Modern courts have moderated this extreme deference to the donor's intent but remain committed to finding purposes close to those in the donor's mind. *See id.* ("Increasingly . . . courts have recognized (as does the rule of this Section) that the substitute or supplementary purpose need not be the *nearest possible* but one reasonably similar or close to the settlor's designated purpose, or 'falling within the general charitable purpose' of the settlor.").

213. *See* Evelyn Brody, From the Dead Hand to the Living Dead 18–19 (Oct. 4, 2005) (unpublished manuscript, on file with author) (addressing enforcement of restricted gifts to corporate charities in the context of a discussion on donor standing); Brody, *supra* note 4, at 4–15 (exploring the ways courts and charity regulators have addressed the question of when and how corporate charities may change the use of their assets, including some applications of *cy pres* and other doctrines focused on preserving donor intent). One commentator has dubbed as "trust law parallelism" the adaptation of two trust law concepts to nonprofit corporate entities—obligating directors to adhere more closely to their organization's original mission and limiting the organization's ability to use unrestricted donations for newly adopted purposes. Katz, *supra* note 5, at 698–703.

214. Insurgents may make the argument that it is they who represent the established mission of the organization and that their takeover activity is designed to return the organization to its original purposes and activities. When arguing that their vision represents the original or established purposes of an organization, however, incumbents generally will have the powerful facts of current and recent practice on their side.

Allowing incumbents wide latitude to frustrate insurgents' bids for leadership positions undermines the idea of a democratic governance structure to which these nonprofits have explicitly committed.[215] Furthermore, the fact that frustrated insurgents can establish alternative groups does nothing to force the trapped assets inside a nonprofit toward what might be more desirable uses, if only a transformation of mission could legitimately be achieved.

B. Insurgent-Protective Standards

At the other extreme, courts considering the conduct of fiduciaries facing imminent or future takeovers might demand conformity with an insurgent-protective standard of substantive review. Beyond mere technical compliance with organizational rules, such standards would require courts to evaluate the merit of using these rules to frustrate members' ability to communicate or make changes to a nonprofit's policies and mission. Insurgent-protective standards likely would impose on directors the burden of persuading the court on this issue. These standards would empower takeover insurgents and warn off many incumbent directors' attempts to thwart them.

The most insurgent-protective standard possible would simply deem invalid any action by directors designed to frustrate takeover activity, essentially assigning directors an insurmountable burden of proof.[216] So long as the consequence of preventing takeover attempts or preparations was shown (or perhaps not disproved), directors would have no defense. This standard would ensure the courts' assistance to insurgents if they could provide evidence that directors had acted to stymie an immediate or looming takeover attempt. In addition, it would send a clear message to member-elected fiduciaries that they cannot use their control over the election or membership apparatus to prevent shifts in their nonprofits' missions. Of course, it also would be quite extreme, cutting off essentially all board

215. *See infra* Part IV.C (arguing for a standard that will prevent the choice of democratic nonprofit governance from operating as a mere sham and will hold nonprofits with member-elected boards to their frequent democratic rhetoric).

216. Easterbrook and Fischel advanced a rule similarly demanding "manager passivity" in the for-profit takeover context. 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, 1164, 1194–95 (1981). U.S. courts, however, have not adopted this kind of wholly insurgent-protective standard in the for-profit arena.

discretion in dealing with potentially serious threats to nonprofit organizations.

A less radical, but still highly insurgent-protective, standard could be adapted from that applied to for-profit directors' interference with the shareholder franchise under *Blasius* v. *Atlas Corp.* and its progeny.[217] In *Blasius*, the directors of a for-profit corporation adopted a bylaw that increased the size of the board and selected candidates to fill those interim vacancies, all to frustrate an attempt by a substantial shareholder to gain a board majority.[218] Both the passage of the director-enacted bylaw and the selection of interim directors were done in compliance with the internal rules of the corporation and statutory requirements for such action.[219] However, the Delaware Chancery Court voided the directors' action because it was taken "for the primary purpose of impeding the exercise of stockholder voting power," and the directors could not show a "compelling justification for such action."[220] The directors could not meet this high bar simply by arguing that they were more

217. *See* Blasius Indus. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (adopting a "compelling justification" standard for reviewing board actions undertaken primarily for the purpose of frustrating shareholder voting); *see also* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1128–31 (Del. 2003) (applying *Blasius* review within a consideration of takeover defenses).

In reviewing for-profit analogies, this Article focuses on Delaware, as it has the most highly developed case law on director responsibilities in the takeover context. *See* GEVURTZ, *supra* note 15, § 7.3 (noting the dominance of Delaware's takeover defense jurisprudence as a result of "Delaware's prominence as the state of incorporation of most of the companies involved in the major takeover battles."). For-profit takeover law from other nations may be another fertile source for insurgent-protective standards. For example, in the UK, incumbent directors are essentially prohibited from taking defensive action in response to external attempts to acquire their companies' shares. *See* TAKEOVER CODE, R. 21.1 (2006), *available at* http://www.thetakeoverpanel.org.uk/new/codesars/DATA%5Ccode.pdf (prohibiting incumbent boards from "tak[ing] action which may result in an offer or a bona fide possible offer being frustrated"). Interestingly, this available, insurgent-protective body of rules was not considered by the judge in *RSPCA*.

218. *See Blasius*, 564 A.2d at 654–55. The board justified its actions as necessary to prevent the shareholder from using the majority he might acquire through a consent solicitation to push through a leveraged recapitalization plan, which the board viewed as extremely dangerous. *Id.* at 655.

219. *See id.* at 653–56; Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 511 (2000) ("[The Atlas board's] defensive actions were consistent with the Delaware statute and Atlas's bylaws. Nonetheless, the Delaware court enjoined the action, opining that, although legal, the actions of the Atlas board unduly interfered with the shareholder voting process, and the board's action was therefore set aside." (citing *Blasius*, 564 A.2d at 663)).

220. *Blasius*, 564 A.2d at 661.

capable than shareholders of deciding on governance arrangements within their corporation.[221] This "compelling justification" standard is one of the most stringent forms of scrutiny for reviewing for-profit directorial action.[222]

The Delaware courts view this significant level of protection for shareholders' franchise as critical to maintaining the legitimacy of the corporate democracy.[223] Under the for-profit corporate governance structure, shareholders consent to control over their investments by directors and other fiduciaries and agents. This consent, however, is subject to the shareholders' power to replace directors (and, through them, officers and agents) during directorial elections. If the shareholders' will to replace a board can be thwarted by the very directors who fear ouster for anything less than a compelling reason, one of their few powers to hold directors accountable is seriously undermined.

One can easily imagine importing this standard to the nonprofit takeover defense context. Directors faced with a challenge to defensive actions they undertook to frustrate an insurgent candidate or faction might be required to show a compelling justification for their actions, at least, so long as those actions were taken primarily in order to interfere with the members' franchise. An argument by directors that they, rather than members, can best determine who should lead the organization or have access to control over its policies would fail to meet such a standard. Thus, this level of judicial protection would make most directorial actions to prevent member insurgency quite difficult to defend.

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221. *See id.* at 663.

222. *See* Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996) ("Blasius' burden of demonstrating a 'compelling justification' is quite onerous, and is therefore applied rarely."). It is worth noting that in several cases following *Blasius*, directors were able to avoid application of the stringent compelling justification standard. *See id.* (finding no evidence that the board's actions were taken for the primary purpose of impeding shareholder voting); Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992) (finding the *Blasius* "compelling justification" standard inapplicable where a majority of fully informed shareholders approved of the board's challenged action). Thus, *Blasius* is only a model for an insurgent-protective standard to the degree one believes it actually will be applied.

223. *Blasius*, 564 A.2d at 659 ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); *see also* Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 734 (1992) (noting that the Delaware courts, guided primarily by Chancellor William T. Allen of the Delaware Court of Chancery, have long been guided by the principle that "the legitimacy of corporate law greatly depends on shareholders retaining an effective vote").

Cases involving nonprofits also can provide examples of insurgent-protective standards. In *Fitzgerald v. National Rifle Ass'n of America*, Thomas Fitzgerald, an insurgent candidate, challenged actions that the nonprofit National Rifle Association's incumbent fiduciaries took to block him from access to the Association's electoral machinery.[224] It is unclear from the facts stated in the opinion whether Fitzgerald's candidacy was part of a larger takeover attempt or a single insurgent's desire to access the ballot. Whatever the circumstances, the federal district court viewed the defendants' actions as self-aggrandizing if not potentially disloyal.[225] Thus, it reviewed the directors' actions under a strict standard drawn from the duty of loyalty context and required them "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."[226] The court defended this rigorous standard of review as necessary to prevent corporate democracy from existing as a mere "pious fraud[]" and to avoid "[c]orporate elections becom[ing] hollow mockeries."[227] Applying this insurgent-protective standard to defensive actions by nonprofit directors would focus directors on the inherent conflict they face in a takeover situation and require them to consider the impact of their actions on the entire organization. Under such a standard, many defensive measures would be voided.

Perhaps the strongest argument in favor of insurgent-protective standards like those employed in *Blasius* and *Fitzgerald* is their strong support for the value of internal democracy. By limiting the actions directors may take to thwart takeover activity, these standards safeguard voting members' choice of how best to accomplish a nonprofit's mission. These standards permit aspiring fiduciaries to compete for the reins of a nonprofit, with members' votes determining the outcome. Thereby, insurgent-protective standards simultaneously rely upon and energize the democratic form of governance that nonprofits with voting members have selected.

Insurgent-protective standards also support another important nonprofit value: evolution. One of the major benefits of the nonprofit sector is the ability of the sector as a whole, and individual

224. Fitzgerald v. Nat'l Rifle Ass'n of Am., 383 F. Supp. 162, 165–66 (D.N.J. 1974).

225. *See id.* at 166.

226. *Id.* (quoting *In re* Brunner Air Compressor Corp., 287 F. Supp. 256, 263 (N.D.N.Y. 1968)).

227. *Id.*

groups within it, to innovate to meet changing societal problems and challenges.[228] "Where business and government, science and technology are active in the creation and testing of technological innovations, the independent voluntary sector specializes in the practical testing of social ideas."[229] This capacity for innovation is one reason to encourage nonprofits' existence in society and serves as an important justification for the many privileges they enjoy. However, for the nonprofit sector to continue innovating, its organizations often will need to evolve their focus over time.

Insurgent-protective standards of review allow for this kind of evolution. An insurgent-protective standard will grant incumbents only the narrowest reach to engage in defensive tactics on the level of individual organizations. Consequently, a group of members seeking to change the mission of a nonprofit often will be permitted to pursue this mission change through an adjustment in board personnel or membership composition. Thus, the existence of such an insurgent-protective standard may hearten potential insurgent innovators throughout the sector.

Yet insurgent-protective standards may go too far in supporting internal democracy at the expense of other important nonprofit values and constituencies. Recall that nonprofits are esteemed and privileged in our society not only for innovation, but also for preservation.[230] Insurgent-protective standards encourage insurgent groups to seize control of a nonprofit's leadership, after which they will have the power to alter its mission, perhaps fundamentally. To the extent that preserving original intent is a worthy goal for nonprofits, insurgent-protective standards leave incumbents little room to pursue it. Insurgent-protective standards can thereby put

228. *See* COMM'N ON PRIVATE PHILANTHROPY & PUB. NEEDS, GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR 42–43 (1975) (discussing the important role of nonprofits in "initiating new ideas and processes" and "developing public policy"); O'NEILL, *supra* note 6, at 47 (noting the argument from political science theory that the nonprofit sector exists, in part, as a fount for social experimentation and development); Douglas, *supra* note 6, at 47–49 (noting one rationale put forward for the existence and benefits of the nonprofit sector is its ability to experiment and innovate in ways the government and the market can or will not); *see also* FREMONT-SMITH, *supra* note 5, at 225–26 (arguing that charitable trust fiduciaries have an obligation to "assure the trust is meeting contemporaneous needs").

229. Smith, *supra* note 7, at 80.

230. *See supra* text accompanying notes 205–07.

the value of nonprofit organizations' names and goodwill at substantial peril.

Finally, insurgent-protective standards will fail to consider and protect the interests of other valuable stakeholders in a nonprofit's mission. Nonprofits with members also have important constituencies in their directors and officers, staff, beneficiaries, donors, and even in the public at large. Directors and officers, obligated as fiduciaries to manage the operations of the organization to serve its best interests, may be uniquely qualified to consider the advisability of mission transformation. Staff, who work day-to-day in the trenches of the organization's programs, and beneficiaries, who receive its services, may be particularly well-positioned to evaluate its strategy and performance for consistency with its mission. Donors and the public, as direct and indirect supporters of the organization, also have a stake in how its mission should be fulfilled. Of these various groups, members may not always be appropriately singled out for primacy in determining whether an insurgency interested in shifting the mission should succeed. Highly insurgent-protective standards place this issue solely in members' discretion and, therefore, may go too far in pursuing the cause of internal nonprofit democracy.

C. Intermediate Standards

A third option is for courts to adopt some intermediate standard for reviewing the actions of nonprofit fiduciaries faced with takeover activity. Such standards would slant neither in favor of incumbents nor insurgents. They would impose some substantive review of fiduciaries' actions in such situations, with a meaningful but achievable burden either to challenge or defend them. Under such review, one would expect courts to sustain some directors' actions to hinder takeover activity and to strike down other such efforts. Both specific and general reasons favor the use of intermediate standards in the nonprofit context.

Several of the justifications for intermediate standards result from the specific situation of nonprofits that opt for member-elected fiduciaries.[231] The first of these arguments is structural. If nonprofits

231. These rationales for an intermediate approach to reviewing defensive tactics do not, of their nature, generalize to nonprofits using self-perpetuating board structures. Yet, this

are granted the choice by law to select a member-elected fiduciary structure for their internal governance, it is fair to demand that this structure be a legitimate choice rather than a sham. If a nonprofit opts to allow its members to elect its fiduciaries, the members should be empowered to do so. If incumbent directors are granted wide discretion to frustrate the ability of insurgents to reach the ballot, the power of members to elect representatives is illusory. A policy choice has been made to allow nonprofits to offer their adherents internal democracy; this choice should not be undermined by an overly lenient review of defensive tactics.

An intermediate approach will aptly reflect the sharing of power between electors and elected that a choice of member-elected fiduciaries represents. If a nonprofit corporation opts for this governance structure, its fiduciaries will not be permitted to act omnipotently to limit the power and choices of its members. Rather, defensive actions will be subject to real substantive scrutiny by a reviewing court and sometimes will not be sustained. Likewise, attempts at insurgency sometimes will succeed in avoiding or overcoming defenses, demonstrating the power of the members to select their nonprofit's leaders and to have input on the evolution of its mission.

The second argument for an intermediate approach is related to the structural argument and stems from the need to hold nonprofits that choose member-elected fiduciaries to the rhetoric they often employ about internal democracy. Of course, a nonprofit's mere decision to adopt a membership governance structure implicitly signals that organization's dedication to democracy. In addition, this choice of structure often is accompanied by rhetoric explicitly claiming this kind of commitment. Indeed, in the cases reviewed here, the nonprofits' selection of member-elected fiduciaries was accompanied by language in their organic documents and public relations materials stating their fundamentally democratic nature. If nonprofits use this kind of democracy-embracing rhetoric to differentiate themselves from other organizations with similar missions, at least some attempt should be made to hold them to their word. An intermediate approach will require nonprofits with

limitation should not detract from the force of these arguments since the hostile takeover issue will arise only in nonprofits with member-elected fiduciaries.

member-elected boards that utilize this sort of rhetoric to be true to it.

A third justification for an intermediate approach is even more specific to the types of organizations that often select member-elected over self-perpetuating fiduciaries. Many of these nonprofit organizations are engaged in political and social advocacy.[232] As such, they use their membership and their claimed accountability to their members as political capital. The ability of these organizations' leaders to point to thousands (or hundreds of thousands) of members who elect them adds gravitas to their calls for legislative action or for policy changes from government or the private sector. These claims to an empowered constituency of supporters are undermined if the incumbent leaders of the organization are able to insulate themselves and their positions from those who would advocate different policies. An intermediate approach will reinforce the message of accountability touted by advocacy groups and their leaders, and will make them accept its burdens as well as its benefits.

In addition to the justifications for an intermediate standard that arise from the peculiar circumstances of nonprofits choosing member-elected fiduciaries, a more general argument can be made in favor of such an approach. Intermediate standards recognize and attempt to harmonize the competing nonprofit values of mission preservation and mission evolution.[233] Incumbent- or insurgent-protective standards heavily favor one of these ideals over the other. Incumbent-protective standards tilt in favor of maintaining a nonprofit's original mission by protecting the desires and claims of fiduciaries in office; however, they likewise work to stifle growth and transformation of that mission over time. Insurgent-protective standards lionize mission evolution but simultaneously may fail to protect the intent of donors and other stakeholders in serving the nonprofit's original mission. Because they do not consistently bias toward one potential control group or the other, intermediate standards can be used to balance both the nonprofit sector's

232. *See* Panepento, *supra* note 42, at 33 (reporting the differences among membership criteria in many advocacy groups and describing the importance of membership figures in, *inter alia*, maintaining such groups' credibility in lobbying efforts).

233. *Cf.* Brody, *supra* note 5, at 483 (describing a parallel conflict in the *cy pres* context, between those who endorse a restrictive *cy pres* regime because it avoids "unfettered discretion by current trustees" and "those who believe, like Thomas Jefferson, that 'the land belongs to the living'").

rectitude for preserving original intent and the value in allowing nonprofit purpose to evolve in order to meet society's changing needs. They can put a brake on mission change without wholly foreclosing it and thereby force valuable incrementalism, which may be a good example for answering the larger questions about mission change in the nonprofit sector.

D. Articulating an Intermediate Standard

Despite these benefits, intermediate standards do not offer the level of predictability that standards with either a clear incumbent-protective or insurgent-protective bias provide. Thus, in crafting such a standard, it is important to identify clear signposts to guide the courts and to enable fiduciaries and insurgents to forecast how particular defensive actions will be reviewed. Moreover, these criteria should attempt to distinguish between constructive efforts at mission evolution and damaging attempts to dismantle valuable nonprofit enterprises.

1. A for-profit adaptation

An intermediate standard of review might be borrowed from the for-profit context, where the *Unocal* standard was developed to reconcile competing concerns in the context of tender offers.[234] In *Unocal v. Mesa Petroleum*[235] and its progeny, the Delaware courts adopted a multipart standard to review the actions of incumbent directors who implement takeover defenses.[236] First, directors must show that their actions are taken in response to a reasonably perceived threat.[237] Next, the directors hold the burden of proving that their responses are reasonable or proportional in light of this

234. The Delaware Supreme Court first recognized that review of takeover defenses required a standard less deferential than that used in duty of care cases and yet less rigid than the searing inquiry triggered by the duty of loyalty in *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964). The Court later articulated a more detailed intermediate standard in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). For a brief explanation of the competing policy interests and historical trends that culminated in the Delaware courts' articulation of the *Unocal* standard of review, see CLARK, *supra* note 15, at 584–85.

235. 493 A.2d at 946.

236. *See id.* at 955–58; Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1366–67 (Del. 1995) (elaborating upon the *Unocal* standard); *see also* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986) (applying the *Unocal* standard).

237. *See Unocal*, 493 A.2d at 955.

threat.[238] If the directors satisfy these two prongs, the courts apply the deferential business judgment rule standard of review. Courts will enjoin the defense only if the complaining shareholders can show that the directors failed to inform themselves, engaged in fraud, or lacked good faith; the substance of the transaction will not be further scrutinized.[239] On the other hand, if the directors cannot show they responded to a reasonably perceived threat in a proportional manner, their actions likely will be enjoined.

One could simply transfer this approach as a standard of review for nonprofit fiduciaries defending against hostile takeover activities.[240] To qualify for the business judgment rule's protection, incumbent fiduciaries could be required to prove that they acted in response to a reasonably perceived threat to their organization and that any steps they took were proportional. If they could not meet this burden, their actions would be deemed to breach fiduciary obligations. However, for-profit cases employing *Unocal*'s standard can look to the economics of deals to determine the threat that offers pose and the reasonableness of directors' defensive actions. Without the easy and singular metric of dollars, it would be difficult to follow the precedents of *Unocal*'s progeny in the nonprofit context.

Of course, one could take the lesson of *Unocal* more generally and demand that nonprofit directors responding to a takeover attempt defend their organizations in a proportional manner. Hefty defensive measures could be sustained only in circumstances where takeover activity posed a particularly serious threat. This standard, however, might offer less guidance to incumbent directors, insurgents, and their supporters than is desirable. Courts would need to examine the facts and circumstances of individual cases to

238. *Id.* ("If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed."). Years later, the Delaware courts answered the question of what defensive measures would fail the proportionality requirement of the *Unocal* standard of review. Defensive measures that have the effect of either coercing shareholders or precluding them from exercising their vote would be deemed draconian and therefore would be unreasonable (or disproportionate) per se. *See Unitrin*, 651 A.2d at 1377.

239. *Unocal*, 493 A.2d at 958 ("[U]nless it is shown by a preponderance of the evidence that the directors' decisions were primarily based on perpetuating themselves in office, or some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or being uninformed, a Court will not substitute its judgment for that of the board.").

240. One commentator already has called for application of a subset of for-profit corporate takeover law—so-called *Revlon* duties—to boards of directors of nonprofits approving conversion transactions. *See* Colin T. Moran, *Why Revlon Applies to Nonprofit Corporations*, 53 BUS. LAW. 373 (1998).

determine their consistency with a generalized proportionality approach.

Even if *Unocal* could be translated to the nonprofit environment, one must consider whether it should be adapted to this new context. This consideration should turn on whether the standard is designed to prevent the kinds of damage that nonprofit takeover activity threatens. In the for-profit sector, the *Unocal* standard guards against the twin perils that for-profit takeovers threaten to produce. On the one hand, for-profit acquirers may be energetic reformers intending to run the target and deploy its assets more effectively than current management, offering gains to the corporate entity. Under these circumstances, managerial overreaching is the threat posed by takeovers, as incumbents' defensive measures may be solely an expression of their base desire to perpetuate themselves in office. On the other hand, a for-profit takeover attempt may be the tool of an aggressive acquirer interested solely in deriving short-term value from a takeover transaction, regardless of the harm it will work on shareholders and other constituencies in the long run. In such situations, takeover transactions threaten legitimate corporate interests, and defensive measures may be warranted to protect corporate assets and shareholders. By requiring incumbent directors to demonstrate the threat posed by insurgents and the proportional nature of their responses, *Unocal*'s standard attempts to strike down defensive measures that represent managerial overreaching while permitting those measures that protect shareholder value. Thus, the claimed benefit of the for-profit market for corporate control—greater managerial efficiency through fear of takeovers—remains within reach.

The risks and benefits of nonprofit takeover activity, however, differ substantially from those in the for-profit context. Unlike in for-profit takeovers, managerial efficiency gains cannot reasonably be expected as a by-product of contests for nonprofit control.[241] Conducting a takeover of a nonprofit, after all, requires significant resources of time, expertise, and money. In contrast to the for-profit sector, where there are potentially immense profits to be gained for the leaders of successful takeover attempts, leaders of nonprofit

241. This is not to say that managerial efficiency is not a problem in nonprofit organizations. Rather, it is an acknowledgment that nonprofit takeover attempts are sufficiently rare that they will fail to serve as an effective deterrent against potential malfeasance by nonprofit fiduciaries.

takeovers must be satisfied with more psychic returns for their investments. While there are certainly those who, due to strongly held beliefs, will be willing to put their energies and personal fortunes into the process of attempting to acquire control of a nonprofit, such individuals are outside the norm. Individuals dissatisfied with their organizations' policies and programs are much more likely to take the cheaper and easier route of resigning and perhaps joining an alternative organization more closely aligned to their views. Furthermore, these contests for control—at least the hostile takeover activities discussed here—can only occur within a relatively small subset of nonprofits: those with member-elected fiduciaries. Since most nonprofits opt instead for self-perpetuating boards, hostile takeover attempts will not be a reliable means to correct excesses by nonprofit managers.

For these reasons, managerial efficiency simply is not a realistic goal of judicial limitations on defensive measures by nonprofit fiduciaries. Adopting the *Unocal* standard, which serves this end, would therefore be inappropriate.

2. A nonprofit-specific approach: The governance-protective standard

An intermediate standard unique to the nonprofit sector can be crafted to better reflect and react to the distinctive concerns raised by nonprofit takeovers. Here, the goal is not optimal promotion of managerial efficiency, but optimal allocation of power over mission in a nonprofit with voting members. The governance-protective standard will pursue this end.

In a nonprofit with voting members, it seems fitting that members should have some voice in how the organization's mission is defined, particularly when a conflict over mission arises in the context of a contested election or in a fight over access to membership itself. Yet members are far from all-powerful in nonprofit governance—even in nonprofits with member-elected fiduciaries. As infrequent contributors to the project of nonprofit management and governance, they may lack information, expertise, and perspective that fiduciaries, employees, or even beneficiaries may possess. Moreover, depending on the threshold requirements for membership, members may lack the level of dedication to the organization demonstrated by these other constituencies. The governance-protective standard will empower and count on members' voting rights when they are effective, but it also will

leverage the skill and commitment of fiduciaries when member voting will be ineffectual to safeguard the nonprofit enterprise. To strike this balance, the governance-protective standard differentiates between defensive actions taken in response to takeover techniques of persuasion versus techniques of purchase, rigorously reviewing the former while deferring to the latter.

Again, persuasive tactics try to convince the target nonprofit's members that the insurgents' vision of the organization is superior to that of the incumbents. The most sweeping persuasive tactic is a contest to obtain a majority of an organization's fiduciary positions. But insurgents also may look for members' support in more incremental contexts. They may seek members' votes to obtain fiduciary representation short of a majority. They may urge members to permit or refuse some action or transaction upon which members must vote. Or they may merely advocate that the membership pass or reject resolutions expressing a sense that certain organizational activities or policies should be undertaken or halted. In each of these situations, insurgents look to a group empowered by the nonprofit's governance structure—its members—to arbitrate the policy differences insurgents have with the current board. Moreover, they ask members to play this role using their constitutive voting rights. Courts should encourage this process of self-regulation of mission.

Thus, if insurgents are able to demonstrate that the tactics directors seek to defend against are persuasive, defensive reactions should be reviewed scrupulously. Directors in this situation should be able to engage in persuasion of their own, acting within the organization's election and membership rules to make their case to the membership. Attempts to block insurgents' access to the members or to frustrate members' ability to vote, however, rarely should be tolerated. As such, a court should undertake an independent review of incumbents' decision to engage in such defenses and their means of doing so. Only if this independent review determines that the board's actions are—despite their interference with the members' role—in the best interests of the organization should they be permitted to stand.[242]

242. If the defendants' actions in *Fitzgerald* were a defensive response to takeover activity, the court's denunciation of them can be seen as an application of this type of standard. The directors in that case refused to run Fitzgerald's advertisement of his candidacy in *The American Rifleman*, an NRA publication used to inform voting members of candidates for the Club's board of directors. Fitzgerald v. Nat'l Rifle Ass'n of Am., 383 F. Supp. 162, 163–64

The burden the governance-protective standard imposes on fiduciaries defending against persuasive takeover tactics is not intended to be entirely insurmountable, but it should be difficult for incumbents to meet. Defensive actions might be found to meet this rigorous test if they were necessary to prevent conversion of the organization's assets by insurgents or to protect non-member constituencies, but only if these goals are deemed by the court more important than members' desire for change *and* members cannot be counted on to weigh appropriately the needs of the organization's various stakeholders. If subjected to the governance-protective standard of review, the Sierra Club board's defensive reactions to the persuasive tactics of SUSPS likely would not have passed muster.

On the other hand, the governance-protective standard would grant greater latitude to nonprofit directors defending against takeover tactics that rely on the power of purchase. Recall that such tactics utilize the device of swelling membership ranks with new members in an attempt ultimately to shift the weight of the group's preferences in favor of insurgents' positions. This technique is facilitated by the often easy route to membership, requiring a contribution alone or coupled with generic support for an organization's aims. Once accomplished, a newly reconstituted membership will have the power to call on incumbents to change their policies to those favored by the insurgency, to support transactions or resolutions in keeping with insurgent positions, or to vote in insurgent candidates to replace incumbent fiduciaries. Rather than relying on the membership governance structure to arbitrate their policy differences with incumbents, insurgents using purchase tactics seek to go around the members—or at least sufficiently dilute their power—to dominate fiduciaries in office. Here, the governance alternative represented by the membership structure breaks down, and the board should be afforded greater freedom to protect the nonprofit and all of the stakeholders in its mission.[243]

(D.N.J. 1974). Thus, *Fitzgerald* desired to use a tactic of persuasion. By assigning the defendants the burden of proof and holding them to the standard of "fairness from the viewpoint of the corporation and those interested therein," *id.* at 166 (citation omitted), the court engaged in a rigorous review of the defensive measures and their impact on the organization and its stakeholders.

243. Applying a more stringent standard of review to defenses against purchase tactics than that advocated here would risk discouraging the use of membership governance structures altogether. If directors knew that their defenses to takeover activity pursued through purchase would be enjoined, more nonprofits might opt out of voting membership governance

Thus, courts considering the defensive actions of nonprofit fiduciaries faced with purchase-oriented takeover tactics should treat those actions more deferentially. Fiduciaries' actions still must comply with the election or membership rules articulated by their organic documents. Assuming they do so, defensive moves to prevent purchase tactics should be upheld so long as they are rationally connected to protecting the interests of existing members. If the membership's role in governance can be reinvigorated, then a dialogue on the policy issues dividing the incumbents and insurgents can go forward, and mission can, in many cases, be self-regulated. Directors should be permitted to take on this role only when members cannot be counted upon to guard the organization's mission and multiple stakeholders.[244]

Subjecting the RSPCA's response to CAWG's purchase tactics to the governance-protective standard of review likely would not have changed the outcome in that case. The Council, being able to state a rationale for its decision to exclude and remove pro-hunting applicants and members, would prevail in a challenge to its Membership Policy. And, its failure to comply with internal membership rules would have doomed its proposed Membership Scheme. Still, had the court articulated the governance-protective standard's nuanced approach to reviewing nonprofit fiduciaries' responses to takeover activity, it would have offered greater guidance to groups faced with a range of takeover tactics in the future.

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structures (or make the path to membership even more difficult than is often the case today) as a means to avoid the possibility of takeover by purchase. The governance-protective standard of review recommended here could provide reassurance to directors that while a membership governance structure does demand commitment to a real measure of internal democracy, it does not necessarily leave the organization's door open to any well-funded raider.

244. The governance-protective standard can also be seen to track freedom of association rights relevant in this context. By rigorously reviewing defensive measures taken in response to persuasive takeover activity, courts are enforcing the associational bargain between incumbent fiduciaries and the membership. *See* Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 900 (2002). When insurgents employ purchase tactics, however, deferential review of defenses is appropriate to permit associations to define and limit their membership in order to control the organization's expression. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). Of course, current freedom of association jurisprudence, especially as represented by the *Boy Scouts* case, has been challenged. One particularly relevant critique charges that the legal regime it imposes acts to thwart valuable cultural dissent. *See* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

Of course, persuasive and purchase tactics, and the defenses erected against them, may appear together. Courts should, however, do their best to distinguish the two types of takeover activity and apply the differential strands of the governance-protective standard to them, as described above. Doing so will encourage member-elected fiduciaries to engage with insurgents on the ultimate question of organizational mission and will encourage organizations to identify their members with care and precision, as members often will be the arbiters of how mission can and should change.

V. CONCLUSION

The offhand comment, and lament, has often been made that nonprofits are not subject to takeovers.[245] This Article takes issue with such conventional wisdom. Takeover activity can be found in the nonprofit sector. By necessity, it occurs by mechanisms different than the persuasion or purchase of a working majority of equity shares as seen in for-profit corporations. It also may not occur as frequently without the easy currency of shares to lubricate the takeover machinery. Furthermore, as defined here, nonprofit takeover activity can occur only in a limited type of nonprofits—those that opt to have member-elected fiduciaries. Court challenges to defensive tactics in response to this activity will occur only rarely.

Yet, takeover attempts do take place, and crafting a response to these high stakes conflicts reminds us of the centrality of mission and the complexities created by the multiple stakeholders in nonprofit organizations. Thus, it is worthwhile to explore the nonprofit takeover phenomenon and to articulate the appropriate legal standard to regulate it.

Nonprofit takeover activity highlights the tension between the treasured nonprofit values of mission preservation and mission evolution. An intermediate, governance-protective standard for reviewing nonprofit takeover defenses most appropriately resolves these tensions by channeling mission change through an incremental, dialogic process. Moreover, in doing so, this standard properly relies on the governance structure that nonprofits with voting members have chosen. Finally, creating an ordered legal framework for dealing with nonprofit takeover activity also provides

245. *See supra* note 26.

a partial answer to some of the most challenging and enduring questions in nonprofit law and policy: who should be empowered to change nonprofit mission, and how should they exercise this mission control?