Enron's results, and the firm did not want the public to see the extent of its profits. So, still gaming the system, it booked $1 billion of pot as a reserve against potential liability, without actually showing the reserve in its published financials.[7]

In a legal regime of form without substance, an opportunistic actor can exploit the system in much the same way as Enron's traders and accountants. In such a world, all law is rules-based and literally interpreted, and there are no backstop interpretive controls in the form of principles[8] (to use the accountants' term) or standards (to use the lawyers' term).[9]

There is a family resemblance between these tales from Enron and the terms and operation of Delaware's bedrock doctrine of independent legal significance (ILS). ILS also elevates form over substance and invites gaming. In its classic form, where ILS operates as a rule of statutory interpretation,[10] it is almost unique in its disavowal of substance. With ILS, the state court effectively announces that no body of substantive principles informs certain applications of the legislature's corporate code, inviting transaction planners to exploit the literal word at will. As with Enron and power provision to California, the gamers are those in a position to invest in expertise. As at Enron,

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7. *Id*.

8. *See* Sarbanes-Oxley Act of 2002, Pub. No. 107-204 § 108(d), 116 Stat. 745 (calling on the Securities Exchange Commission to conduct a study of "principles-based" accounting in response to dissatisfaction with gaming of rules-based treatments in recent years).

9. For the classic description of the interplay of rules and standards in American jurisprudence, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

10. *Hariton v. Arco Elec. Inc.*, 182 A.2d 22 (Del. 1962), *aff'd*, 188 A.2d 123 (Del. 1963), is the classic case. There Delaware rejected the doctrine of de facto merger. Under the doctrine, a sale of assets followed by a liquidation that leaves the shareholders of the selling firm in the same place that a conventional merger would have left them, is treated as a merger de facto, with the result that the shareholders of the selling firm receive statutory appraisal rights as if the transaction had been structured

stance intervenes over form.[15]

Second, Delaware's regime of form over substance is not absolute. Delaware law holds out a possibility of ex post substantive scrutiny for some of the transactions that game its code under ILS. Breaches of fiduciary duty remain a possibility even where ILS formalizes the statutory framework and prevents statutory policies from constraining gaming. A minority shareholder fobbed out of appraisal rights in a case like *Hariton v. Arco Electronics*[16] still may be able to package a process complaint in the framework of majority-to-minority fiduciary duty.[17]

Third, statutory ILS and Delaware transactional gaming should be distinguished from the more extreme versions at Enron because, historically, statutory ILS has held a central place in Delaware's competitive position in the charter market. *Federal United Corp. v. Havender*,[18] in which ILS made its first appearance, was more than just a preferred stock case in which the Delaware Supreme Court used ILS to open a loophole for rights stripping.[19] The case also signaled that Delaware would not subscribe to the antimanagerial approach outlined in Berle and Means'

trine of fiduciary protection of minority shareholders.[22] *Havender*, in effect, said that Berle and Means' antimanagement program would not influence the policy of the state of Delaware. Berle and Means had singled out the courts, including those of Delaware, as a redoubt of equitable intervention that protected against laxity in the drafting of corporate codes and charters and subsequent transactional gaming. *Havender*, in containing judicial discretion to police transactions for unfairness, falsified that description.[23]

Delaware's move to form over substance paid dividends in the post-war charter market. Roberta Romano's study of firms reincorporating to Delaware during the period 1960-1982 shows that firms moved to Delaware in search of a cost-reductive, stable legal regime, and were about to either go public, promulgate antitakeover measures, or position themselves as actors in the mergers and acquisitions market.[24] The stability on offer did not come from a state-of-the-art statute—Delaware always has preferred to stick with its old form of code, changing it incrementally as the need arises. Nor, in those days, before the blockbuster merger and acquisition cases of the 1980s,[25] did Delaware offer a thick case law on mergers and takeovers. What the firms preferred was Delaware's formalism. Under Delaware's early case law, a reincorporating firm concerned about takeover defense found a nearly bulletproof zone of discretion: Defensive tactics could be sustained on a formal showing of a threat to company policy with no further judicial review.[26] Firms planning activities as acquirers, in turn, preferred ILS and Delaware's emphatic rejection of the de facto merger doctrine: ILS assured them that the courts would not disturb cost-effective reverse triangular acquisition structures.[27] Of course, fiduciary law regarding mergers and takeovers changed rapidly in the late 1970s and 1980s, limiting management's zone of discretion. Takeover defenses came under *Unocal* review;[28] cases like *Singer*[29]

22. *Id*. at 196-203.

23. William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 766-67 (2001).

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and *Weinberger*[30] brought protection for minority shareholders in