The Response of Mergers and Acquisitions Attorneys to Neoliberal Legal and Policy Developments in the 1980s

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My paper explores the responses of attorneys to policy developments and legal cases that allowed mergers and acquisitions to flourish in the 1980s. Following the election of Ronald Reagan, his administration implemented neoliberal policies that led to an explosion in M&A during his presidency. Some lawyers aimed to enrich their firms by assisting in these historically large M&A deals, while others invented tactics to stop their clients from being bought out. These attorneys' roles in the M&A boom of the 1980s have not been widely discussed in existing academic literature, so my paper demonstrates the ways they benefited from and contributed to the movement.

The 1980s harbored some of the most prominent developments in modern American capitalism. This period featured the implementation of neoliberal policies like deregulation, financialization, the loosening of antitrust enforcement, and a reduction of government intervention in economic affairs. Because of these policies, a phenomenon known as mergers and acquisitions proliferated. Also known as M&A, the term refers to two types of transactions involving corporations attempting to acquire other corporate entities and absorb them into their businesses. Mergers occur when two companies combine with each other. These transactions tend to be more amicable and often involve the evaluation of stock prices, assets, and existing employee considerations in determining what parts of the original companies will exist in the new one. One famous example of a merger is when Exxon and Mobil joined forces to become Exxon Mobil on November 30, 1999. On the other hand, acquisitions are when one company offers to buy another. These involve similar considerations to mergers but are often marked by significant tensions between the aspiring purchaser and the company to be acquired; as such buyouts are not always welcome. This is best evidenced by the advent of "hostile takeovers"—a term coined to describe fiercely contested acquisitions that "corporate raiders," aggressive CEOs looking to expand their companies, often undertook. A prominent example of an acquisition is when Facebook bought Instagram in 2012 for one billion dollars.[1] During the 1980s, the number and value of mergers and acquisitions greatly increased.[2] The intent of this paper is to explore what allowed this to happen. Specifically, it evaluates how legal developments and attorneys enabled mergers and

[1] Evelyn M. Rusli, "Facebook Buys Instagram for $1 Billion," *DealBook*, April 9, 2012, sec. Business Day.

[2] Institute for Mergers, Acquisitions & Alliances, "United States —M&A Statistics," IMAA, accessed September 23, 2022.

acquisitions to gain prominence. To answer this query, this paper argues that in the 1980s, neoliberal developments in the United States legal and policy spheres, bolstered by Ronald Reagan's election, allowed enterprising attorneys to facilitate more valuable transactions in the field of mergers and acquisitions.

Because mergers and acquisitions became so prominent, an entire field of law arose that was devoted to addressing the legal considerations of these transactions. In the last several decades, there has been a lot of literature focused on mergers and acquisitions in law journals, academic journals, and popular books written by journalists. This adds a unique element to the existing scholarship on M&A law because of its discussion of how attorneys and law firms handled the ever—increasing complexity and volume of M&A transactions. There are not readily accessible bodies of scholarship devoted to analyzing the dealings of these lawyers. Rather, there tends to be scholarship that focuses on developments in mergers and acquisitions law through the lens of court cases and policies.[3] These pieces rarely discuss the roles of attorneys and law firms in bolstering the field of M&A. Thus, this project will dive into how attorneys like Marty Lipton and Joe Flom made fortunes off the mergers and acquisitions industry throughout the 1980s while addressing the conditions that led to their firms' success.

This paper is important because it offers a comprehensive analysis that delves into the rise of mergers and acquisitions in the 1980s that expands upon the academic literature on the subject. To accomplish this objective, the paper offers insights into this nascent phenomenon while tying together sources that often present unique perspectives in their analyses of mergers and acquisitions at the time. This is especially applicable to the portion of the paper devoted to the responses of mergers and acquisitions attorneys to legal developments in the 1980s, as there is not a significant body of existing academic scholarship covering this topic in depth. The prominent academic literature surrounding M&A often focuses on the proliferation of hostile takeovers, leveraged buyouts, and deregulation during the "Fourth Merger and Acquisition Wave" of the 1980s and generally focuses on the economic and financial implications of it.[4] While the paper does discuss this extensively, the introduction of the contributions made by attorneys to bolster the M&A wave in the 1980s is novel. To contribute to this portion of the scholarship, intertwining the sometimes emotionally charged stories that accompanied the M&A boom, the statistics that evidenced its existence, and, most importantly, the legal and policy changes that occurred during the 1980s is crucial.

In this paper, there are four sections that delineate the impact that the legal field and its participants had on mergers and acquisitions in the 1980s. The first section concerns the historical background that led to the rise of M&A throughout the 1980s. This section notes the impact of the election of Ronald Reagan and how the application of his administration's neoliberal, market—oriented ideology impacted the existing structures of the economy to be more amenable to mergers. Because of the distrust of government intervention in enforcing antitrust law and trends of

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[3] John T. McNeilly Jr. and Andrew G.T. Moore II, "Unocal Corp. v. Mesa Petroleum Co." (1985).; John T. McNeilly Jr. and Andrew G.T. Moore II, "Revlon, Inc. v. MacAndrews & Forbes Holdings" (1985).; John T. McNeilly Jr., Andrew G.T. Moore II, and Andrew D. Christie, "Moran v. Household Intern., Inc." (1985).; Henry Ridgely Horsey, "Paramount Communications, Inc. v. Time Inc.," accessed September 21, 2022.; United States Department of Justice, "1982 Merger Guidelines" (Department of Justice, June 25, 2015).; United States Department of Justice, "1984 Merger Guidelines" (Department of Justice, June 25, 2015).

[4] David Faulkner, Satu Teerikangas, and Richard J. Joseph, *The Handbook of Mergers and Acquisitions* (Oxford: Oxford University Press, 2012), 23.

deregulation and financialization, more acquisitions and debt—financed M&A transactions occurred. Due to this, mergers and acquisitions exploded in the 1980s. These developments created the need for attorneys and judges to interpret the legality of these transactions and the legal maneuvers surrounding them. The next section deals with the laws and policies that undergirded M&A activity. Four crucial Delaware Supreme Court decisions validated various facets of M&A transactions—each of them allowed for more work to be done in that arena. The paper then explores the policy changes in the fields of antitrust and merger enforcement as well as the larger narrative propagated by Reagan's officials surrounding the field of antitrust law. The sources in this portion of the section prove that neoliberal elements appeared in the laws and policies concerning M&A. The third section examines the legal and policy developments that allowed attorneys and law firms to make large profits assisting in M&A transactions. Joe Flom and his firm Skadden, Arps, Slate, Meagher, and Flom, Marty Lipton's rival, had a proclivity for assisting corporate raiders in attempting hostile takeovers, and he developed a reputation for being a preeminent attorney in that realm. Marty Lipton and his firm, Wachtell, Lipton, Rosen & Katz, also responded to the M&A boom. Lipton devised the shareholder rights plan, or "poison pill," to protect shareholders against unwanted hostile takeovers.[5] This invention reflected the necessity of such a maneuver for Lipton's clients, and it demonstrated the sentiment expressed by some figures during the time that mergers and acquisitions were a major threat. Each of these cases represents a different approach taken by attorneys and their clients toward mergers and acquisitions, and their responses reflected the profound impact that contemporary law and policy had on the field. The conclusion suggests the lasting implications of the legal and policy developments for the present day.

In order to understand how mergers and acquisitions became a notable field during the 1980s, it is imperative to understand the historical background of neoliberalism that led to its proliferation. The main catalyst was the election of Ronald Reagan in 1980, which ushered in an era of tax cuts, union busting, and mass consumerism that ensued from the implementation of market—friendly neoliberal policies. Neoliberalism, which undergirded the economic philosophy of the Reagan administration, ". . . is a creed that prizes free trade and the free movement of capital, goods, and people. It celebrates deregulation as an economic good that results when governments can no longer interfere with the operation of markets."[6] Gerstle also points out that those ". . . principles deeply shaped American politics during the heyday of the neoliberal order."[7] Additionally, neoliberal ideology also advocates for "…liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights" and state intervention in markets being kept to a bare minimum.[8] These policies represented a nascent form of capitalism that starkly departed from the Keynesian consensus of strong state intervention into economic affairs that prevailed after World War II. Consequently, this neoliberal surge led to several important consequences. One of these was the popularization of "Reaganomics," which spurned strict antitrust enforcement in favor of corporate takeovers and mergers. According to one of the principal architects of Reagan's economic programs, William Niskanen, Reagan's 1981 Program for

[5] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.
[6] Gary Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford: Oxford University Press, 2022), 5.
[7] Gary Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (Oxford: Oxford University Press, 2022), 5.
[8] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 2.

Economic Recovery, which was one of the first demonstrations of Reaganomics, ". . . had four major policy objectives: (1) reduce the growth of government spending, (2) reduce the marginal tax rates on income from both labor and capital, (3) reduce regulation, and (4) reduce inflation by controlling the growth of the money supply."[9] This platform encapsulated the goals of Reaganomics; the third point in particular was pertinent to the administration's attitude toward mergers and acquisitions.

The Reagan administration gave two significant rationales for the lax attitude towards mergers. The first reason they claimed antitrust enforcement should not prevent mergers was that mergers and acquisitions created more efficient companies. William L. Baldwin claimed that "Members of the Reagan administration, along with Chicagoans, have repeatedly asserted that the sole appropriate goal of antitrust policy is to promote economic efficiency, thus denying the validity of sociopolitical goals earlier espoused by the courts, Congress, and previous administrations. . ."[10] While Baldwin argued that mergers do not necessarily promote efficiency,[11] the claims of Reagan and the Chicagoans, or Chicago school economists who are ". . . generally associated with a conservative approach to antitrust enforcement that espouses faith in efficient markets and suspicion regarding the merits of judicial intervention to correct anticompetitive practices,"[12] should be taken at face value. The Reagan Administration and the Chicago School were united in their embrace of neoliberal ideology, and their shared focus on economic efficiency through the maximization of available capital in the marketplace led to their belief in M&A as a positive force. Additionally, the Reagan Administration distrusted government intervention in certain facets of the economy, and merger enforcement was certainly one of them. A demonstration of this can be seen in the 1982 and 1984 Merger Guidelines that were published under the auspices of the Reagan Administration, as they both state that ". . . mergers generally play an important role in a free enterprise economy. They can penalize ineffective management and facilitate the efficient flow of investment capital and the redeployment of existing productive assets. While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral."[13] This is an important display of how Reagan's neoliberal ideology reverberated in his Administration's policy. As his Administration did not believe in significant intervention in market affairs, it followed that their attitude toward breaking up mergers would be similarly hands—off. A *Washington Post* piece published by Peter Behr in 1988 offered further evidence for this, as it cited Andrew J. Strenio, the then commissioner of the Federal Trade Commission, as stating that there was a forty percent drop in work devoted to merger enforcement and a 320 percent increase in merger filings since the 1980s.[14] Behr also wrote that "to the president's supporters, the change in antitrust policy is a triumph of the administration's battle to control

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[9] William A. Niskanen, "Reaganomics," Econlib, accessed October 10, 2022, https://www.econlib.org/library/Enc/Reaganomics.html.

[10] William L. Baldwin, "Efficiency and Competition: The Reagan Administration's Legacy in Merger Policy," *Review of Industrial Organization* 5, no. 2 (June 1, 1990): 165,.

[11] William L. Baldwin, "Efficiency and Competition: The Reagan Administration's Legacy in Merger Policy," *Review of Industrial Organization* 5, no. 2 (June 1, 1990): 165—166.

[12] Ianni Drivad, "Reassessing the Chicago School of Antitrust Law," University of Chicago Law School, June 4, 2019.

[13] United States Department of Justice, "1982 Merger Guidelines" (Department of Justice, June 25, 2015).; United States Department of Justice, "1984 Merger Guidelines" (Department of Justice, June 25, 2015).

[14] Peter Behr, "WAVE OF MERGERS, TAKEOVERS IS A PART OF REAGAN LEGACY," *Washington Post*, October 30, 1988.

government regulation and is a victory for conservative faith in free markets."[15] These contemporary statements demonstrated Reagan officials' insistence on deregulation and lent credence to their laissez—faire attitude toward mergers and acquisitions.

Another effect of Reagan's neoliberal policies in the economic and legal spheres was the developments prioritizing deregulation and financialization allowing mergers and acquisitions to flourish. Deregulation can be broadly defined as the impulse to reduce the constraints of legal boundaries preventing certain types of transactions in the economy from occurring, while financialization is described by Thomas I. Palley as "a process whereby financial markets, financial institutions and financial elites gain greater influence over economic policy and economic outcomes."[16] In the 1980s, the Reagan Administration and the United States government made a concerted effort to be more amenable to takeovers and mergers through the invocation of free—market ideology and the use of deregulation and financialization. A 1985 *New York Times* article corroborates this: "American business has gone heavily into debt to pay for its multi—billion dollar takeovers… with this boom in corporate debt (being financed by) less—than—investment grade ''junk bonds''"[17] This fits right in with the process of financialization, as corporations being able to obtain financing from dubious sources to carry out takeovers is heavily emblematic of the philosophy during this era.[18] Reagan officials defended this practice, and they insisted that mergers should not be hindered, in fact they should be encouraged even if those undertakings utilized criminal financing. His economic advisors balked at Federal Reserve Chairman Paul Volcker's attempts to limit the usage of junk bonds and applauded a year of merger records in which twenty—four M&A transactions were valued at over one billion dollars.[19] Therefore, Reagan's government gave its stamp of approval to some of the most impactful transactions in the decade, which affected countless workers, industries, and companies.

Because of these factors, mergers and acquisitions exploded in the 1980s. Before the decade, there was a surge in M&A in the late 1960s, with a peak of 6,107 transactions in 1969, according to the International Mergers and Acquisitions Association.[20] However, transactions began to decline in the 1970s, with 2,100—2,200 transactions a year occurring in the latter half of the decade.[21] After the era of stagflation and Reagan's election, the volume of mergers and acquisitions skyrocketed. From 1980 to 1989, the number of transactions increased from 1,889 to 6,919, representing a 266% increase.[22] Not only did the number of M&A transactions

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[15] Peter Behr, "WAVE OF MERGERS, TAKEOVERS IS A PART OF REAGAN LEGACY," *Washington Post*, October 30, 1988.

[16] Thomas I. Palley, "Financialization: What It Is and Why It Matters," *Political Economy Research Institute*, WorkingPaper Series, 153 (November 6, 2007): 1.

[17] Leonard Silk, "THE PERIL BEHIND THE TAKEOVER BOOM," *The New York Times*, December 29, 1985, sec. Business.

[18] A prominent example of this is the financial services firm Drexel Burnham Lambert, whose chairman Michael Milken ended up in deep legal trouble for financial crimes. The firm was known for its association with elite clients, and it provided low—grade bonds to companies wishing to acquire others frequently.

[19] Leonard Silk, "THE PERIL BEHIND THE TAKEOVER BOOM," *The New York Times*, December 29, 1985, sec. Business.

[20] Institute for Mergers, Acquisitions & Alliances, "United States —M&A Statistics," IMAA, accessed September 23, 2022.

[21] Institute for Mergers, Acquisitions & Alliances, "United States —M&A Statistics," IMAA, accessed September 23, 2022.

[22] Institute for Mergers, Acquisitions & Alliances, "United States —M&A Statistics," IMAA, accessed September 23, 2022.

increase, but their value and complexity increased as well: “the merger and acquisition game exploded from 1565 deals in 1980, having a combined value of $33 billion, to 4323 deals valued at $204.4 billion in 1986."'[23] The IMAA cited the value of M&A transactions at 373.17 billion dollars in 1987, 586.05 billion dollars in 1988, and 466.09 billion dollars in 1989.[24] The value of transactions increased over 1300 percent, encapsulating the frenzy of the era. Meanwhile, leveraged buyouts, which are acquisitions financed by debt incurred by companies, went from three billion dollars in 1980 to sixty billion dollars in 1989, which demonstrates the effect of financialization well.[25]

Knowing about the mechanisms that allowed mergers and acquisitions to gain prominence and legal recognition is essential to understanding the M&A explosion in the 1980s. Reagan—era neoliberal policies seeped into all aspects of American legal and policy—related developments at the time. Without the right climate for M&A, which included deregulation, a lack of antitrust enforcement, increased reliance on debt financing through “junk bonds”, and the stated logic of increasing efficiency and corporate effectiveness, there would not have been a reason for the frenzy of court decisions affirming the legality of M&A and laws supporting its components.[26] If this climate was not made possible, Marty Lipton and Joe Flom might have been typical lawyers in a forgettable field for the rest of their careers.

Under Reagan, legal and policy developments arose that solidified mergers and acquisitions into the heart of American corporate law. Four impactful cases in the Delaware Supreme Court affirmed the legality of mergers and acquisitions in wider circumstances in addition to legal challenges to them—bolstering the M&A law industry and cementing M&A into the framework of the American economy.[27] The Delaware Court is notable for writing precedent—setting legal decisions in corporate law, so these cases were immediately impactful in the mergers and acquisitions sphere and have continued to influence the field of M&A. On the policy side, the 1982 and 1984 Merger Guidelines propped up such transactions, and officials frequently opined about their rationales behind these decisions.[28]

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[23] Walter Adams and James W. Brock, *Dangerous Pursuits: Mergers and Acquisitions in the Age of Wall Street* (New York: Pantheon, 1989), 11, quoted in Mark Glick and Andrew Abere, “Mergers and Acquisitions in the Age of Wall Street: An Assessment,” *NYLS Law Review* 35 (January 1990): 1102—1103.

[24] Institute for Mergers, Acquisitions & Alliances, “United States —M&A Statistics,” IMAA, accessed September 23, 2022.

[25] Michael L. Goldstein, “M&A Volume: On Trend.,” *Black Book —Capital Markets Quarterly*, June 21, 1989, 46—50.

[26] Leonard Silk, “THE PERIL BEHIND THE TAKEOVER BOOM,” *The New York Times*, December 29, 1985, sec. Business.

[27] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985); John T. McNeilly Jr. and Andrew G.T. Moore II, Revlon, Inc. v. MacAndrews & Forbes Holdings (Delaware Supreme Court November 1, 1985); John T. McNeilly Jr., Andrew G.T. Moore II, and Andrew D. Christie, Moran v. Household International., Inc. (Delaware Supreme Court November 19, 1985); Henry Ridgely Horsey, Paramount Communications, Inc. v. Time Inc. (Delaware Supreme Court July 24, 1989.

[28] United States Department of Justice, “1982 Merger Guidelines” (Department of Justice, June 25, 2015).; United States Department of Justice, “1984 Merger Guidelines” (Department of Justice, June 25, 2015).

The first significant court case that led to an eventual uptick in the mergers and acquisitions law industry was *Unocal v. Mesa (1985)*,[29] decided on May 17, 1985. It concerned Mesa Petroleum, an oil company controlled by the noted corporate raider T. Boone Pickens and its hostile takeover offer of Unocal, another oil company. Mesa conducted a front—loaded two—tier tender offer for Unocal, which Unocal felt was inadequate because of its usage of highly volatile junk bonds. Because of this, Unocal's shareholders did not want to receive compensation from their company's buyout in these risky securities.[30] In response, Unocal's board of directors executed a self—tender, in which shareholders sold their own stock and bought it back for seventy to seventy—five dollars a share, well above the fifty—four dollars a share offered by Pickens,[31] to make the company expensive enough that it would be out of reach to Pickens. The Delaware Court of Chancery originally affirmed Mesa's offer, nullifying the self—tender, but after an appeal to the state Supreme Court, it ruled that the Mesa offer was not permissible under state law.[32] Although the Court believed that takeovers were generally permissible, there were circumstances in which shareholders could contest them—namely, if there was a threat to the business and the action taken in response to it was reasonable in its "relation to the threat posed."[33] They believed Unocal's decision to self—tender was rational under the duress of a potential shakeup. This decision emboldened attorneys like Marty Lipton, who became famous for his "poison pill" defense against hostile takeovers.[34] This decision also sparked a facet of the mergers and acquisitions law industry that aimed to prevent hostile takeovers rather than assist in completing them.[35] While it may seem that this was antithetical to the M&A—friendly principles espoused by neoliberal doctrine, there would not have been such a decision if mergers and acquisitions had not grown so quickly in the first place.

While cases like *Unocal* prevented potential hostile takeovers, others helped facilitate them. One such case was *Revlon v. MacAndrews (1985)*, decided on November 1, 1985.[36] The background of the case concerned Ron Perelman, the notorious aspiring corporate raider and CEO of Pantry Pride, Inc., and his attempt to take over Revlon, Inc. In its attempt to thwart the takeover, Revlon partnered with Forstmann Little & Co, a private equity firm, and directed them to buy Revlon out if

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[29] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985).

[30] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) at 950. The court also noted that "On April 8, 1985, Mesa, the owner of approximately 13% of Unocal's stock, commenced a two—tier 'front loaded' cash tender offer for 64 million shares, or approximately 37%, of Unocal's outstanding stock at a price of $54 per share. The 'back—end' was designed to eliminate the remaining publicly held shares by an exchange of securities purportedly worth $54 per share. However… Mesa issued a supplemental proxy statement to Unocal's stockholders disclosing that the securities offered in the second—step merger would be highly subordinated, and that Unocal's capitalization would differ significantly from its present structure. Unocal has rather aptly termed such securities 'junk bonds'".

[31] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985).

[32] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985).

[33] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985).

[34] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.

[35] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.

[36] John T. McNeilly Jr. and Andrew G.T. Moore II, Revlon, Inc. v. MacAndrews & Forbes Holdings (Delaware Supreme Court November 1, 1985).

their board felt the company was under threat of being acquired by Pantry Pride.[37] The Delaware Court of Chancery ruled against Revlon, stating that they "found that the Revlon directors had breached their duty of care by entering into the foregoing transactions and effectively ending an active auction for the company. The trial court ruled that such arrangements are not illegal per se under Delaware law, but that their use under the circumstances here was impermissible."[38] The implications of this ruling were massive. Due to the Court's decision to prohibit Revlon from using a "white knight," or backup company, to buy them out and sell the shareholders back their stock in the face of an unwanted takeover, a flurry of hostile takeovers erupted after this point.[39] Emboldened by the narrowing of circumstances in which it was considered permissible to push back against an acquisition, corporate raiders like Ron Perelman pursued aggressive expansion tactics and changed the American business landscape permanently. It also reflected the philosophy toward mergers present under the Reagan Administration. The discouragement of corporate directors from seeking refuge against companies seeking to capture a significant portion of the market fit perfectly with the "free—market", profit—maximizing ideology of neoliberalism.

Returning to the legal status of defensive measures utilized by corporations in response to hostile takeovers, *Moran v. Household International (1985)*,[40] decided on November 19, 1985, upheld the usage of a novel plan crafted by Martin Lipton, of Wachtell, Lipton, Rosen & Katz, called the shareholder rights plan, or "poison pill."[41] This plan, as explained by Lipton in a memo to his firm's clients, allowed shareholders to buy back a portion of their preexisting stock at a discount, decreasing the stock price of their company and making it less attractive to potential bidders.[42] Lipton was frustrated with the lack of broad effectiveness in warding off unwanted acquisition bids for his clients, so he devised this plan that he believed would garner support from the Delaware courts.[43] Responding directly to the *Unocal* decision made a few months earlier, in which the court invoked the *business judgment rule*[44] to analyze Revlon's response to Pantry Pride's takeover attempt, the Delaware Court used the same rule to uphold the usage of the poison pill by Household International.[45] The court stated that the plan was approved "in part because it was designed to ward off future

[37] J John T. McNeilly Jr. and Andrew G.T. Moore II, Revlon, Inc. v. MacAndrews & Forbes Holdings (Delaware Supreme Court November 1, 1985).

[38] John T. McNeilly Jr. and Andrew G.T. Moore II, Revlon, Inc. v. MacAndrews & Forbes Holdings (Delaware Supreme Court November 1, 1985).

[39] Institute for Mergers, Acquisitions & Alliances, "United States —M&A Statistics," IMAA, accessed September 23, 2022.

[40] John T. McNeilly Jr., Andrew G.T. Moore II, and Andrew D. Christie, Moran v. Household International., Inc. (Delaware Supreme Court November 19, 1985).

[41] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.

[42] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.

[43] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d. Lipton described these measures as ". . . litigation, charter amendments, legislation (state takeover laws), counter tender offers, and structural (capitalization) changes such as placements of blocks of voting securities and the warrant dividend plan".

[44] According to the Delaware Supreme Court, the business judgment rule is a ". . . presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."

[45] John T. McNeilly Jr., Andrew G.T. Moore II, and Christie, "Moran v. Household International, Inc." (1985).

takeovers and was not enacted in response to a *specific* takeover bid."[46] The approval of the poison pill was significant for WLRK and Marty Lipton, as the Court's defense of the plan enabled the firm to conduct more business. When asked during a 2019 interview when he considered himself a leader in the field of mergers and acquisitions law, Lipton stated that "I would say mid—'80s with the poison pill more than anything else. I was a known quantity, and people were calling who didn't know me but just from reputation were seeking representation in takeover situations."[47] This was reflected in the firm's prestige and financial position, as Wachtell raked in 1.4 million dollars in profits per partner[48] in 1987 and 1988, which was the highest among law firms in the United States.[49] *Moran* enabled Wachtell's success, and Lipton invoked it as one of the major Delaware corporate law cases that supported his firm's rise. The verdict in *Moran v. Household International* thus *greatly* impacted United States corporate law after its decision.[50]

The last Delaware Supreme Court decision that factored into the expansion of mergers and acquisitions law in the 1980s was *Paramount Communications, Inc. v. Time Inc (1989)*.[51] Decided on July 24, 1989, this case concerned Paramount Communications' offer to buy out Time Inc., which had already agreed to a 15—billion—dollar merger with Warner Inc. in March of that year. Time's board took a litany of defensive measures to thwart the takeover, and Paramount took them to court because they believed that the conditions of their potential acquisition were insufficient to warrant such actions.[52] The court disagreed, stating that "Paramount's tender offer was reasonably perceived by Time's board to pose a threat to Time and that the Time board's 'response' to that threat was, under the circumstances, reasonable and proportionate."[53] The Court also applied the principles from *Unocal* in stating that Paramount posed a reasonable threat to Time's merger and invoked *Revlon* in writing that Time's board of directors was merely acting in accordance with the business judgment rule, finding that their board acted in good faith (meaning that they were concerned with the long—term survival of their company) and not solely for financial gain. This decision further placated corporate shareholders, who felt threatened by the aggressive raiders in the M&A movement, and lent credence to attorneys like Marty Lipton, whose business prospects depended on the outcomes of such decisions.

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[46] John T. McNeilly Jr., Andrew G.T. Moore II, and Andrew D. Christie, Moran v. Household International., Inc. (Delaware Supreme Court November 19, 1985).

[47] Martin Lipton, Interview with Marty Lipton, interview by Jessica C. Pearlman, American Bar Association, September 2019.

[48] Rosemary Clancy and John O'Connor, "A Guide to Our Methodology," *The American Lawyer*, May 2008. Profits per partner, or PPP, is a common measure of the strength and prestige of law firms by rankings such as the Vault and *AmLaw* rankings. It can be useful to evaluate a firm's financial success in tandem with its overall revenue, as firms like Wachtell that are not particularly large can showcase their prowess by generating a lot of revenue relative to their size.

[49] Stephen Labaton, "Law Firm Incomes Surging On Deals and Tax Work," *New York Times*, July 5, 1988, sec. Business.

[50] Martin Lipton, Interview with Marty Lipton, interview by Jessica C. Pearlman, American Bar Association, September 2019.

[51] Henry Ridgely Horsey, "Paramount Communications, Inc. v. Time Inc.," accessed September 21, 2022.

[52] Henry Ridgely Horsey, "Paramount Communications, Inc. v. Time Inc.," accessed September 21, 2022.

[53] Henry Ridgely Horsey, "Paramount Communications, Inc. v. Time Inc.," accessed September 21, 2022.

Each of these decisions represented a court—sponsored development that further reflected the implications of Reagan—era ideology on mergers and acquisitions law. *Unocal v. Mesa (1985),* while denying the noted corporate raider T. Boone Pickens' desire to take over another company in the moment, clarified the rules for when hostile takeovers *were* permissible.[54] This simultaneously made way for more takeovers to occur while also building up the practices of attorneys who assisted management in takeover defenses, like Marty Lipton's. *Revlon v. MacAndrews (1985)* approved a controversial takeover, demonstrating the variety of situations in which courts thought it was permissible to engage in a hostile takeover.[55] This enabled more acquisitions to occur, and it is perhaps the most obvious reflection of how Reaganite ideology seeped into the Delaware Supreme Court. *Moran v. Household International (1985)* and *Paramount v. Time (1989)* upheld a legal maneuver intended to counteract this, the poison pill, which displays the multifaceted nature of M&A and the desperation of certain corporate leaders to take a stand against the hard—charging "corporate raiders".[56] Because of these decisions, law firms and attorneys scrambled to assist clients engaged in mergers and acquisitions transactions, leading to an uptick in the M&A industry in the 1980s.

In addition to court cases that determined the rules surrounding corporate takeovers during the 1980s, policy changes occurred that demonstrated the impact of Reagan's ideology on the law. The 1982 and 1984 Merger Guidelines were notable in that they sought only to prevent mergers that were anti—competitive and encouraged most other mergers, stating that they were helpful for the overall efficiency of the economy.[57] Not only did the guidelines represent a shift from earlier years in which the regulations for mergers were more stringent, but officials in the Department of Justice, Federal Trade Commission, and other regulatory agencies whose jobs were to approve or deny mergers professed beliefs that were far more radical than those seen in the new guidelines. This shift in beliefs among Reagan officials affected how M&A were treated during the time. In 1983, Robert Sherrill documented the backgrounds of several Reagan Administration officials who were tasked with regulating M&A activity. These figures included William Baxter, the Assistant Attorney General of the Antitrust Division, who could 'envision a world' in which 100 conglomerates literally own everything—each holding 1 percent of every market" and John Shad, SEC Chairman, who claimed that "acquisitions are often more efficient than internal growth."[58] Shad also recommended that corporations snap up "major competitors, customers, and suppliers. . . for it is generally within these groups that the greatest operating advantages can be realized through a merger."[59] The attitudes of these men toward mergers and acquisitions were unapologetically supportive. These attitudes informed the aforementioned policy changes in the 1982 and 1984 Merger Guidelines

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[54] John T. McNeilly Jr. and Andrew G.T. Moore II, Unocal Corp. v. Mesa Petroleum Co. (Delaware Supreme Court May 17, 1985).

[55] John T. McNeilly Jr. and Andrew G.T. Moore II, Revlon, Inc. v. MacAndrews & Forbes Holdings (Delaware Supreme Court November 1, 1985).

[56] John T. McNeilly Jr., Andrew G.T. Moore II, and Andrew D. Christie, Moran v. Household Intern., Inc. (Delaware Supreme Court November 19, 1985); Henry Ridgely Horsey, Paramount Communications, Inc. v. Time Inc. (Delaware Supreme Court July 24, 1989).

[57] United States Department of Justice, "1982 Merger Guidelines" (Department of Justice, June 25, 2015).; United States Department of Justice, "1984 Merger Guidelines" (Department of Justice, June 25, 2015).

[58] Robert Sherrill, "The Decline and Fall of Antitrust," *Nation*, March 19, 1983, Points of View Reference Center.

[59] Robert Sherrill, "The Decline and Fall of Antitrust," *Nation*, March 19, 1983, Points of View Reference Center

and emboldened corporate executives along with their deal support[60] to undertake record—breaking M&A transactions in the 1980s.

Additionally, the Reagan Administration cut personnel in areas related to M&A regulation. Between 1981 and 1987, the number of attorneys in the Antitrust Division was cut by forty—four percent, and the agency's full—time staff (including economists, paralegals and clerical/secretarial support), was reduced by thirty—nine percent.[61] Further personnel reductions were planned to reduce it to little more than half of what it was when President Reagan took office in 1981.[62] This led to the Justice Department challenging only twenty—eight of the approximately 10,000 merger applications filed during the 1980s.[63] Professor Eleanor Fox stated that most of these complaints "were settled upon the filing of a complaint along with a consent decree, requiring only minor divestiture or other obligations."[64] The policy of the Reagan administration was thus clear: decrease the ability of government agencies to challenge mergers and acquisitions transactions and laud any such activity as beneficial for the economy regardless of its implications.

Because of the ideology promoted by Reagan and the ensuing permissiveness toward mergers and acquisitions along with the decline in antitrust enforcement, policy changes during the 1980s played an instrumental role in bolstering M&A activity. The 1982 and 1984 Merger Guidelines showed the increasing tolerance of the Reagan administration in determining what a legal merger constituted. Moreover, Reagan Era officials favored the establishment of conglomerates and mega—corporations. Finally, the Reagan Administration's attitude toward mergers and acquisitions proved to be drastic yet consistent with its belief in neoliberal mantras of market efficiency and corporate expansion.

The culmination of the previous developments led to a boom in mergers and acquisitions. All of these transactions inevitably required attorneys and law firms to deal with the ever—changing legal landscape surrounding the field. Lawyers helped assist with mergers as well as hostile takeovers and "played both sides" in the latter instance. Law firms helped corporate raiders take over companies in some cases while defending others against unwanted acquisitions in others, fully reflecting the spectrum of responses to the M&A boom. Two firms and their superstar attorneys represented these divergent responses: Joe Flom and his law firm Skadden, Arps, Slate, Meagher & Flom became prominent for assisting in many of the largest takeovers of the 1980s, while Martin Lipton of Wachtell, Lipton, Rosen & Katz gained renown in the legal world for defending clients against takeovers. The differing philosophies of Flom and Lipton were emblematic of the larger debate surrounding the rise of mergers and acquisitions. Additionally, they brought their firms enduring success in the mergers and acquisitions law industry. This demonstrates the breadth of responses seen in the legal community to M&A developments, and it signified how the application of

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60 David Pan, "M&A Support: What, When, How, and Why," Succession Resource Group, May 18, 2021. Deal support generally refers to the investment bankers, lawyers, and other advisors retained by corporations when engaging in transactional affairs.

61 Walter Adams and James W. Brock, "Reaganomics and the Transmogrification of Merger Policy," *The Antitrust Bulletin* 33, no. 2 (June 1, 1988): 314.

62 Walter Adams and James W. Brock, "Reaganomics and the Transmogrification of Merger Policy," *The Antitrust Bulletin* 33, no. 2 (June 1, 1988): 314.

63 Walter Adams and James W. Brock, "Reaganomics and the Transmogrification of Merger Policy," *The Antitrust Bulletin* 33, no. 2 (June 1, 1988): 314

64 Walter Adams and James W. Brock, "Reaganomics and the Transmogrification of Merger Policy," *The Antitrust Bulletin* 33, no. 2 (June 1, 1988): 314, quoted in "Scales Tip Against Antitrust Statutes," *Insight* (June 15, 1987): 12.

diverging viewpoints still brought each attorney great support due to the overall explosion of M&A.

In the 1980s, Joe Flom transformed Skadden Arps from a decently prominent law firm into a legal behemoth, and he did this by capitalizing on the nascent mergers and acquisitions movement. Between 1980 and 1985 the number of lawyers in the firm jumped from 205 to 526 and between 1985 and 1990 it doubled again.[65] Skadden worked on more big mergers and acquisitions than any other law firm[66] These included the 1985 takeover of Revlon by Ron Perelman, which was affirmed as legal in the *Revlon v. Pantry Pride* case and opened the floodgates to many hostile takeovers afterward, and RJR Holdings' 1989 buyout of Nabisco, which was a deal worth over twenty—five billion dollars.[67] Perelman was not just a Skadden client, but a friend of Flom's and an archetypal corporate raider. Marty Lipton once told a banker on Perelman's team that he shouldn't "waste his time" as "Pantry Pride will *never* get Revlon."[68] Perelman not only got Revlon, but proceeded to celebrate by eating "beggar's purses," or beluga and crème fraîche—stuffed morsels costing fifty dollars a pop by the dozen, and interrogating a Revlon director to understand why he wanted to stop Perelman's takeover.[69] Joe Flom was also an ardent supporter of mergers and acquisitions activity, stating that "one can argue about the social impact of mergers, but they will thrive so long as there are economic dislocations or anomalies which they can effectively address and those anomalies will continue to be created, providing for additional activity."[70] He also believed the merger movement helped equip the American economy for the future[71] and even petitioned the judge who was to decide Michael Milken's sentence for violating securities laws by stating that "he demonstrated great acumen and punctilious concern for what was ethical" and was "too original and too unconventional to function in the highly regulated environment of the securities business where there are an overabundance of rules."[72] Flom's defense of the man who pioneered junk bonds and caused the proliferation of leveraged buyouts is striking, and it reflected the degree of success that mergers and acquisitions law brought to Flom and his firm.

Skadden and Joe Flom's ventures into the field of mergers and acquisitions law represented the purest response to the laws undergirded by the neoliberal philosophy of the Reagan Administration. Because of the emphasis on deregulation and market—oriented beliefs espoused by Reagan during the 1980s, there were greater opportunities than ever to undertake M&A transactions. These often—required significant legal assistance, resulting in Flom becoming a highly successful

[65] Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 110.
[66] Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 106—107.
[67] Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 106—107.
[68] Quoted in John Weir Close, *A Giant Cow—Tipping by Savages: The Boom, Bust, and Boom Culture of M&A by John Weir Close*, 1st ed. (New York: St. Martin's Press, 2013), 98.
[69] John Weir Close, *A Giant Cow—Tipping by Savages: The Boom, Bust, and Boom Culture of M&A by John Weir Close*, 1st ed. (New York: St. Martin's Press, 2013), 93—98.
[70] Quoted in Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 226.
[71] Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 227.
[72] Quoted in Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1995), 225—226.

attorney that turned his law firm into a billion—dollar company by assisting aspiring corporate raiders.

On the other side of mergers and acquisitions law stood Marty Lipton and his firm, Wachtell, Lipton, Rosen & Katz. As Joe Flom's archrival and frequent adversary in court, Lipton took a more reserved position on the efficacy of hostile takeovers and mergers. In his memo to his clients that introduced the shareholder rights plan, or poison pill, to them, Lipton stated that "we believe that a corporation has an absolute right to (1) have a policy of remaining an independent entity, (2) have a policy of refusing to entertain takeover proposals, (3) reject a takeover bid, (4) take action to remain an independent entity, and (5) guarantee its shareholders a right to retain an equity interest in the corporation even if someone is successful in obtaining control and forcing a second—step merger."[73] This position contrasts drastically with Flom's: Lipton's insistence that corporations had the right to remain independent in the face of hard—charging corporate raiders was a rather firm repudiation of the Reaganite ideology of M&A being universally beneficial. Due to this, the Chicago School figures in the world of corporate law repeatedly attacked Lipton leading up to the 1980s and beyond. After the publication of a law review in 1979 concerning takeover bids, Lipton said in an interview that it "immediately brought down the wrath of the Chicago School on me, all arguing that everybody knows that the sole purpose is to benefit the shareholders. Frank Easterbrook and Dan Fischel—two lawyers but also both economists—started to write articles attacking my article."[74] This prompted Lipton to explore options to assist his clients who also felt this way, and it worked out well for him and Wachtell. Before *Moran* was decided on November 19, 1985, Lipton told Gershon Kekst, the dean of the financial public relations community at the time, "Gershon, boy if this thing doesn't work, it's really going to blow up in my face."[75] When the decision came up upholding the legality of the maneuver, Lipton's work was vindicated.

In the 1980s, Wachtell became one of the most profitable law firms on the planet, and Lipton became a legend in mergers and acquisitions law. This occurred by countering the wave of neoliberal policy. Lipton's fights against unrestricted takeovers and mergers flew directly in the face of the predominant economic doctrine espoused by Reagan acolytes, but since so many figures in the business community also needed protection in that way, he became a major success. This came from countering Skadden and adding another element to the picture of how lawyers responded to mergers and acquisitions developments in the 1980s.

This section is directly influenced by the preceding historical occurrences described in the previous sections of the paper. Due to the Reagan Administration's endorsement of a philosophy that championed hyper—capitalist market economics and deregulation, laws and policies upholding the massive expansion in the size and scope of mergers and acquisitions transactions were able to be passed. As a result of this, lawyers working for firms that wanted to assist in (and profit from) the proliferation of such transactions responded to these developments with a host of new legal maneuvers that reflected these happenings in the field.

Exploring the historical situation surrounding mergers and acquisitions law is important due to M&A becoming one of the most prominent features of capitalism in the 1980s. To understand the Reagan era and the concomitant expansion of neoliberal

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[73] Martin Lipton, "Takeovers: The Convertible Preferred Stock Dividend Plan," n.d.
[74] Martin Lipton, Interview with Marty Lipton, interview by Jessica C. Pearlman, September 2019.
[75] John Weir Close, *A Giant Cow—Tipping by Savages: The Boom, Bust, and Boom Culture of M&A by John Weir Close*, 1st ed. (New York: St. Martin's Press, 2013), 66.

doctrine through American policy, law, and business, it is essential to understand how mergers and acquisitions came about through legal developments and how lawyers enabled the practice to expand from those new laws.

In particular, it is imperative to see how the championing of deregulation, a decline in antitrust enforcement, financialization, and free markets led to a massive uptick in mergers and acquisitions during the 1980s, and how this framework has continued to dominate the American political landscape ever since. The Court decisions laid out in the Delaware rulings, Reagan Administration merger policy, and lax antitrust enforcement led to the rise of mergers and acquisitions law, and it has only become more variegated and intricate. This altered the way that mergers and acquisitions has been treated by politicians, judges, attorneys, and corporate scions, who have gradually come to accept the inevitability and ubiquity of M&A transactions as such transactions continued to proliferate within the workings of American capitalism.

Currently, the field of mergers and acquisitions has continued to expand and grow, and many large law firms today have very lucrative M&A practices. Contemporary M&A battles, such as Elon Musk's acquisition of Twitter and the ongoing acquisitions of startups by larger technology companies, are also very prominent in the media. Furthermore, figures in the Biden Administration have stated opposition to the principles promulgated by the Reagan Administration regarding the role of mergers and acquisitions in the economy. Lina Khan, the current chairwoman of the Federal Trade Commission, made shockwaves in the legal world with the publication of a paper in the Yale Law Journal that critiqued Amazon's dominance in the marketplace, calling for an expansion of antitrust enforcement and invoking 1980s merger policies to explain Amazon's position.[76] Additionally, Jonathan Kanter, the United States Assistant Attorney General, is a part of the larger "New Brandeis" movement along with Khan, which holds that antitrust law should be focused on limiting the excessive concentration of power and keeping a proper market structure.[77] Also known as "hipster antitrust", which was coined in an August 2017 speech by Republican Senator Orrin Hatch,[78] the proponents of this movement often cite the decline in antitrust enforcement in the 1980s as the catalyst for the application of their views.[79] Hence, it is evident that Reagan—Era M&A and antitrust policy will remain relevant for those who wish to understand the future of M&A policy. Lastly, understanding the inner workings and implications of these transactions—like how they affect the market share of such companies and the larger reverberations they cause for workers and consumers—is made significantly easier if one has a strong understanding of the historical and legal background of mergers and acquisitions. This paper serves as a useful jumping—off point for grasping how the origins of modern—day M&A law and policy developed during the 1980s, which in turn enables one to apply that knowledge to analyze the ever—increasing and highly complex transactions that exist at the intersection of business, law, policy, and economics today.

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[76] Khan, Lina M. "Amazon's Antitrust Paradox." *Yale Law Journal* 126, no. 3 (January 2017).
[77] David Dayen and Alexander Sammon, "The New Brandeis Movement Has Its Moment," The American Prospect, July 21, 2021.; "A Brief Overview of the 'New Brandeis' School of Antitrust Law," Patterson Belknap Webb & Tyler LLP, November 8, 2018.
[78] Robinson Meyer, "How to Fight Amazon (Before You Turn 29)," The Atlantic, June 12, 2018.
[79] Gina Chon, "Breakdown: Antitrust's Hipsters Go Mainstream," *Reuters*, March 11, 2021, sec. Breakingviews Coronavirus.

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