

The New Unocal

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American corporate law has remained remarkably stable for decades. The stakeholder movement of recent years has unleashed extensive discussions about ESG,¹ corporate purpose,² diversity,³ and benefit corporations.⁴ Yet change in actual legal rules has been slow to appear.⁵ Against that backdrop, the decisions by the Delaware courts in the *Williams Companies Stockholder Litigation* (hereinafter “*Williams*”) suggest a significant adaptation.⁶ The *Williams* decisions reinterpret parts of *Unocal Corp. Inc. v. Mesa Petroleum Co.*, a key case in the current corporate law paradigm.⁷ In doing so, they shifted Delaware law as to several key *Unocal* elements as developed over the last four decades in ways that increase the likelihood of some director governance decisions, such as implementing or declining to redeem a poison pill, failing judicial review. The ideological underpinning for this change is not, however, the reasoning of the stakeholder movement, which likewise has sought to alter the exercise of director power. Rather, this shift reflects Delaware’s embrace a reshaping of the role of shareholders in the face of recent technological innovations and market changes.

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¹ See, e.g. Elizabeth Pollman, The Making and Meaning of ESG, available at <https://ssrn.com/abstract=4219857>. See generally. Dorothy Lund and Elizabeth Pollman, *The Corporate Governance Machine*, 122 COLUM. L. REV. 2563 (2021), hereinafter “*Corporate Governance Machine*”.

² See e.g. Lucian Bebchuk & Robert Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

³ See e.g. Chris Brummer and Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).

⁴ See e.g. Michael B. Doff, James Hicks, and Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113 (2021).

⁵ For example, some of the more promising threads of legal change in the stakeholder space might face pullbacks. See e.g. reports of possible adjustments to the SEC climate rules <https://www.cnbc.com/2023/02/10/sec-weighs-making-adjustments-to-controversial-climate-risk-disclosure-rule-chairman-gensler-says.html>; Deal Book, NY Times December 7, 2022. “BlackRock draws an activist who wants Fink out” (accusing BlackRock of flipflops on use of coal in energy production).

⁶ In re the Williams Cos. S’holder Litig., 2021 WL 754593, at *4 (Del. Ch. Feb. 26, 2021) aff’d The Williams Companies, Inc. v. Wolosky, 264 A.3d 641 (Table) 2021 WL 5112495 (Del. Nov. 3, 2021). The text uses the plural for “decisions” since there were two—a trial court opinion by the Chancery Court and an affirmance by the Supreme Court accepting the reasoning of the opinion below.

⁷ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). As corporate law students quickly learn, the small state of Delaware sits at the center of American corporations law given the fact that all corporations can choose their place of incorporation and their governing law and about two-thirds of publicly traded corporations have chosen Delaware.

This article makes three contributions to understanding this evolution. First, it resets the frame for viewing the current Delaware governance paradigm that arose in response to the tight spot in which corporate management found themselves in the 1980s as hostile takeovers accelerated. *Unocal*⁸ (and two other Delaware decisions shortly thereafter—*Revlon*⁹ and *Blasius*¹⁰) are at the core of that paradigm. In those decisions the Delaware Supreme Court expressed dissatisfaction with the capacity of the traditional frame for judicial review to adequately deal with director decisions in takeovers.¹¹ “Our corporate law is not static, It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs”, the Court said as it inserted a third, enhanced level of judicial scrutiny in between the two existing standards.¹² The focus in each of these new cases was on giving room for shareholders to check the extensive power corporate law traditionally provides to directors. *Blasius* explicitly sets out the ideological foundation for this change—the shareholder franchise is “critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.”¹³

Understanding the current paradigm, however, turns on pairing that change in judicial review with another line of decisions, reflected in *Moran v. Household International, Inc.* argued before the Delaware Supreme Court just four days after the *Unocal* decision was announced.¹⁴ Hostile takeovers had exposed what came to be seen as an anomaly in Delaware corporate law. In traditional corporate combination such as mergers, Delaware statutes gave directors a veto over corporate combinations. Shareholders were required to approve mergers but nothing went to the shareholders without directors first having voted for it. In contrast, tender offers permitted changes of control without providing directors a veto. Desiring to gain a similar veto in tender offers as well, astute planners came up with something entirely new—a poison pill—that did exactly that. *Moran*’s approval of such private ordering to add such a fundamental governance change illustrates another, and often more important, principle of Delaware corporate law – the state’s recurring desire to protect the room for director decision-making, even in a world of enhanced scrutiny. The ideological approaches of these two opinions were in

⁸ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

⁹ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

¹⁰ *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

¹¹ Up until 1985, Delaware had divided all fiduciary cases between the deference of the business judgment rule or the intense judicial review requiring proof of entire fairness.

¹² *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985).

¹³ *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

¹⁴ *Moran v. Household Intern., Inc.*, 500 A.2d 1346 (Del. 1985)(approving a never before seen Rube Goldberg type governance contraption –the “poison pill” --as a permissible director action in response to a hostile takeover). *Unocal* was argued before the Supreme Court on May 16, 1985 with the decision announced orally by the court on the following day, May 17, 1985 and the written decision following about three weeks later. *Moran* was argued on May 21, 1985 with a decision announced six months later. Each of the decisions was heard by a three judge panel of the five member Supreme Court. Andrew G. T. Moore and John J. McNeilly sat on both panels with Moore writing the opinion in *Unocal* and McNeilly in *Moran*. The third member of the *Unocal* panel was Clarence Taylor sitting by designation from the Delaware Superior Court and for the *Moran* panel was Chief Justice William Christie.

some tension from the beginning. Part I notes the equal importance of both principles in the development of Delaware law, and the inconsistency that frequently followed in trying to balance both principles.

Secondly, this article reviews Delaware takeover decisions made over the four decades preceding *Williams* against the backdrop of these two parts of the post-takeover paradigm. It concludes that except for a few cases, the deference to directors won out, at least in decisions by the Delaware Supreme Court and particularly in cases relating to poison pills, the anomaly-busting illustration of private ordering. Part II focuses particularly on the threat and proportionality prongs of the *Unocal* standard that poison pills regularly passed in the early years of the takeover era, but which turned out to be shortcomings in the poison pills of the 2020s in *Williams*.

Part III explores how this seeming change of direction might best be explained. It is possible to see this latest decision as a one-off example, as deployment of a “nuclear weapon” of corporate governance (language specifically identified in the chancery decision) unlike anything seen before and not likely to recur.¹⁵ If so, the holding would not be representative of what defendants have to worry about in the usual scheme of takeovers. Yet that explanation misses the larger changes that have taken place in the takeover space. In 1985 courts accepted the vulnerability of dispersed shareholders in public corporations to coercive bust-up takeovers and freely permitted directors to act to block such deals. Shareholder voting remained as a somewhat esoteric space to be protected from director control as acknowledged in *Blasius*, but the Supreme Court was prone to emphasize how rare that would be. Since then, shareholders have moved from a one size fits all description to presenting in multiple institutional roles. Their governance role is no longer limited just to voting at annual meetings but includes a much more expansive set of actions which form a part of the framework required to legitimize director power. By the time of *Williams*, these threads produced an enhanced scrutiny paradigm that had more of the balance originally suggested in *Unocal*, *Revlon*, and *Blasius*, but which had not fully penetrated the early poison pill decisions of *Moran* and its progeny.

I. The Creation of the Contemporary Corporate Governance Framework in the 1980s Takeover Era

Modern American corporate law is built on four key foundations: Directors hold almost all of the entity’s decision-making power.¹⁶ Shareholders get to do only a few things—they vote, sell and sue, but each is in carefully limited doses.¹⁷ Courts apply fiduciary duties to constrain management’s overreach, but the result is seldom to overturn core governance decisions. Those three sets of rules of legal rules intentionally leave considerable room for private ordering. Part I introduces those four pillars immediately below and then shows how the

¹⁵ *Williams*, 2021 WL 754593, at *34.

¹⁶ See 8 Del. C. § 141. See also MODEL BUS. CORP. ACT § 8.01.

¹⁷ See Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell and Sue*, 62 L & CONTEMP. PROB. 215 (1999) (hereinafter “Vote, Sell and Sue”).

takeover wars of the 1980s shaped the governance paradigm that is still dominant in today's corporate law world:

- Rule #1 is that directors get to make governance decisions. This is reflected in § 141 of the Delaware General Corporation Law and in comparable sections of the corporate codes of every other American state.¹⁸ The business judgment rule, part of the common law in the United States since the mid-nineteenth century, provides broad judicial protection to these decisions if challenged.¹⁹
- Second, shareholders are essentially permitted to do three things—vote, sell, and sue—but only in very limited doses.²⁰ Together these are a means to restrain agency costs arising from directors having so much power.²¹
- Third, courts can constrain director decisions, usually by enforcing their fiduciary duties to shareholders of care and loyalty. There is a predictable pattern to this litigation as judges first defer to director decisions unless a breach of duty is shown. If shown, scrutiny shifts from deference to requiring entire fairness to be shown or one of three intermediate levels of review discussed in more detail below.
- Finally, In all of this, private ordering and markets matter a lot. Chief executive officers and other managers, although ostensibly subordinate to the directors in law, usually are first movers in corporate governance. Intermediaries in the shareholder space such as index funds, retirement plans, portfolio managers, activist funds, hedge funds and proxy advisors each push directors and officers. Employees, creditors, suppliers and other stakeholders use contract or public pressure to shape the decisions by those “inside” the corporate structure. These are the means by which market realities and private ordering dramatically shape corporate governance.

A. The Governance Anomaly at the Center of Takeover Law

Takeovers are a recurring part of American business driven by financial or strategic benefits that can be created by combining or rearranging business assets. Decision-making for takeovers fits within the core governance structure just described. Typically, managers and their advisors develop plans for a merger and present a plan to the board of directors. Section 141 gives the directors the power to pick a merger partner, determine the terms of the combination, or to say no to any unwanted offer.²² Approval of the merger itself, and other fundamental corporate changes differ in that statutes require that mergers must also be approved by a majority of

¹⁸ See 8 Del. C. § 141. See also MODEL BUS. CORP. ACT § 8.01.

¹⁹ See D. Gordon Smith, *The Modern Business Judgment Rule*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

²⁰ Vote, Sell and Sue *supra*, note 17.

²¹ See e.g. *The Corporate Governance Machine*, *supra* note 1; Ronald Gilson & Jeffrey Gordon, *The Agency Costs of Agency Capitalism: Investors and the Revolution of Governance Rights*, 113 COLUM. L. REV. 863 (2013) hereinafter “Agency Capitalism”.

²² See Del. C. Ann. § 141 (Business and affairs of the corporation shall be managed by or under the direction of board).

shareholders.²³ This is one of the few items for which shareholder governance participation is required.²⁴ Note that this shareholder vote will only occur if directors have chosen to put the merger forward, demonstrating clear directorial control over the gate through which all mergers must pass. If directors do not propose the merger, it will not happen.

This state of the world protected director decision-making on takeovers for decades. Shareholders could only vote on mergers when directors first approved them. Shareholders could elect different directors, usually on an annual basis, but coordination among numerous geographically-dispersed passive shareholders was difficult and dissident campaigns were costly with uncertain results. For example, staggered boards, common in American corporations through the first decade of the twenty-first century, usually permitted electing only one-third of the board at each annual meeting.²⁵ This required shareholders opposed to the current board to wage successful proxy campaigns over two election cycles in order to gain the necessary majority of director seats usually required to control director decisions, further increasing costs and risks.

This stable governance system started to change by the last third of the twentieth century. Technology and market changes made it possible for shareholders to more easily pursue their selling option, usually in response to a hostile bidder making a public tender offer at a premium price that could attract a majority of shares. The Williams Act, a 1968 amendment to the federal securities laws, extended disclosure obligations to tender offers.²⁶ Those rules, along with changing market conditions, cabined the threat of tender offers for a while, but by the 1980s the threat to target boards was again growing from the possibility of a majority of shareholders selling their shares without the incumbent board's consent.

The unfriendly tender offer, the takeover method of choice of that period, exposed what two successive Delaware chancellors, William Allen and then William Chandler, described as an “anomaly” in corporate law²⁷—directors had the power to block any merger that they did not like, but lacked the equal capacity to block an unwanted deal coming at them in the form of a tender offer.²⁸ Statutory amendments to the Delaware corporate law and a variety of board-initiated defenses reviewed under the traditional Delaware common law approach centered on the business judgment rule failed to stem management vulnerability. What ultimately worked for management was a new and untested governance mechanism—the poison pill—that

²³ See Del. C. Ann. § 251(b) & (c); see also Mod. Bus. Corp. Act § 11.04.

²⁴ Shareholders are also required to vote on the sale of substantially all asset, amendments to the articles, and dissolution. Del. C. Ann. §§ 242, 271, 275. Stock exchange listing requirements also require shareholder approval of issuances of new shares above a threshold. NYSE Listed Company Manual § 312.03(c).

²⁵ Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1009 (2010) (hereinafter “Embattled CEOs”)(describing a drop in the number of public companies with staggered boards from 44% to 16% in the second half of the first decade of the twenty-first century).

²⁶ Williams Act, Pub. L. No. 90-439, 82 Stat. 454.

²⁷ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 94-95 (Del Ch. 2011) (Chandler C.) quoting *TW Servs., Inc. v. SWT Acquisitions Corp.*, 1989 WL 20298, at *9-10 (De. Ch. 1989)(Allen, C.).

²⁸ *Id.* at 95.

defense lawyers and other deal planners invented and successfully defended in the Delaware courts as within a board's traditional governance powers.²⁹

B. The Rube Goldberg-like Machine (the Poison Pill) that Solved this Anomaly

With the increase of hostile takeovers in the 1980s, targets were looking for a more effective defensive tactics that boards could deploy to block unwanted offers. Note that this protection was necessary for only the few things that shareholders get to decide under American corporation statutes. Since mergers could not advance to a shareholder vote without prior board approval, the board needed little protection against statutory mergers or purchase and sale of assets; staggered board effectively neutered the most obvious shareholder route to using their voting power to replace the board. But something more was needed to block shareholders collectively selling against the wishes of their board, as had been occurring in hostile tender offers.

Insiders tried multiple strategies. Boards acted to make themselves less attractive targets, such as getting rid of their cash and taking on unattractive amounts of debt,³⁰ selling their "crown jewel" assets,³¹ or implementing various other defensive tactics.³² Alternatively, states passed multiple "anti-takeover" acts in an effort to block hostile tender offers, sometimes two, three, six or more separate statutes.³³ The board actions provided some protection against insurgents but usually at considerable cost to the business and eventually left the target still vulnerable to the takeover.³⁴ The state statutes faced legal challenges as inconsistent with federal law, with mixed results at the U.S. Supreme Court.³⁵

Corporate planners on the target side in the 1980s needed a defense that did not then exist. This ideal tool would: (i) block the remaining route under traditional governance rules that would permit unilateral shareholder action to accept a hostile takeover; (ii) with minimal cost and disruption to the target company's business; (iii) that would survive judicial review. Chancellors Allen and Chandler were clear in how they viewed this chapter of corporate governance history: the poison pill "was born 'as an attempt to address the flaw (as some would see it) in the corporation law giving boards a critical role to play in the merger context but no role to play in tender offers.'"³⁶ Looking back, the enduring stability the poison pill

²⁹ Moran v. Household International, Inc., 500 A.2d 1346 (Del. 1985).

³⁰ See, e.g., Paramount, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990) in which Time, the target company, took on \$7-\$10 billion of additional debt to fund a combination with Warner, effectively avoiding a hostile takeover of Time by Paramount).

³¹ See City Capital Associates Ltd. Partnership v. Interco Inc., 551 A.2d 787 (Del Ch. 1988) (target selling its premier division to appear less attractive).

³² See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

³³ See Amanda Acquis. Co. v. Universal Food Corp., 877 F.2d 496 (7th Cir. 1989) (describing the mixed success of first, second and third generation of statutes).

³⁴ See City Capital Associates Ltd. Partnership v. Interco Inc., 551 A.2d 787 (Del Ch. 1988)(upholding selling assets)

³⁵ See e.g. Edgar v. MITE Corp., 457 U.S. 624 (1982); CTS Corp. v. Dynamics Corp. of America 481 U.S. 69 (1987).

³⁶ Air Products and Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011)(Chandler, C.) (quoting TW Servs., Inc. v. SWT Acquisitions Corp., 1989 WL 20298, at *9-10 (Del. Ch. 1989) (Allen, C.)).

introduced is the most important development of a half-century of modern takeover law; the extent to which it will survive in the current market and legal environment is the focus on this article.

Consider the complexity and opaqueness of this solution that produced such a change in corporate governance. It is almost universally described today as a poison pill, but its formal description is a “Share Purchase Rights Plan.” Wachtell Lipton, the law firm that was among the most visible in developing this defense, offered a dozen factors to explain the plan.³⁷ Four of those characteristics describe the “rights” to be issued pursuant to the plan. For example, each shareholder receives a current “right” to buy 1/100th of a preferred share of the company. Would a shareholder exercise this right? Not a chance, as can be seen by looking at the price specified to exercise the right and the benefits that would be received in return. If shareholders were to exercise the right, they would receive approximately the value of one share of common stock. The purchase price as specified in the plan to exercise this right, i.e. three to five times the current market price of a common share (that would provide the exact same rights), is steep.³⁸ Not surprisingly, there is no history of those rights being exercised to obtain such preferred stock.

Three of the other described characteristics of the preferred share part of the plan detail the “placeholder” purpose of this part of plan: the rights will have no voting rights, will have no income tax or accounting consequences, and will not require registration with the Securities and Exchange Commission.³⁹ These parts of the pill are best viewed as a “feint” or misdirection as to the core purpose of the pill.

The “poison” in the plan is buried in two other plan characteristics. Upon a triggering event, usually defined as a party acquiring a certain percentage of the target’s stock, the “rights” to buy preferred stock morph into something much more damaging to the bidder. The target shareholders, excluding the bidder with a “toehold”, now can pay the specified exercise price and receive common shares equal to two times the exercise price. Given that the exercise price may be three to five times the actual price of the shares, the number of shares that can be purchased at this friendly “two for the price of one ” will be even larger, significantly increasing the harm to the hostile bidder.⁴⁰

The bidder suffers harm in three separate ways. The bidder’s toehold, the percentage of shares the bidder has already purchased (often 15% in the early days), will have been greatly diluted

³⁷ Wachtell, Lipton, Rosen & Katz, Share Purchase Rights Plan (Nov. 21, 1985) reprinted in Robert B. Thompson, *MERGERS AND ACQUISITIONS, LAW & FINANCE* (Aspen 4th Ed. 2022) at 222, particularly Appendix A that identifies and defines 12 key terms.

³⁸ *Id.* See the “Exercise Price” and “Terms of Preferred Stock” paragraphs in the Appendix A.

³⁹ *Id.* See the “Federal Income Tax Consequences” and the “Accounting Consequences” paragraphs of the Appendix A.

⁴⁰ *Id.* See the “Protection Against Squeeze out” and the “Protection Against Creeping Acquisition/Open Market Purchases” paragraphs of the Appendix A.

by the newly issued shares when the plan is triggered. The dollar value of the bidder's investment in the target will have likewise declined dramatically. If the bidder were interested in continuing the takeover despite the dilution, the funds necessary to purchase 51% of the company would increase because of the issuance of so many additional shares.⁴¹ This is truly poison, and it is not surprising that there are only rare examples of a poison pill having been triggered.⁴²

The most important transactional impact of the poison pill come from one other characteristic that is easy to miss among the poison and the fakes. There is a redemption right granted to the target board to kill these rights by the corporation's payment of a miniscule sum (e.g. \$.01 per right).⁴³ This channels all subsequent negotiations involving a hostile bid into a bargaining setup that the target board can control, giving back to the target board the bargaining position it would have in a friendly merger.

C. Enhanced Scrutiny in a Takeover Setting and the Arc of its Development in Three Related Spaces

The success of the poison pill in providing the protection desired by target planners required that this complex and opaque defensive action survive litigation alleging the directors had breached their fiduciary duties in implementing the pill (or in refusing to redeem it). The legal landscape changed noticeably between the earliest introduction of poison pills by transaction planners and the time their legality was first decided. Delaware courts had long maintained the "business judgment" presumption, i.e. deferring to directors action if challenged unless a showing of conflict or other director disability triggered the court's move to a more intrusive review that required the defendant to prove entire fairness.⁴⁴

As takeovers begin to heat up in the years before the appearance of the poison pill, some high profile cases suggested the business judgement rule would apply absent the directors having a primary purpose to retain control or otherwise acting in bad faith.⁴⁵ The part of governance law that the Supreme Court in *Unocal* felt "must grow and develop"⁴⁶ was outside this obvious self-

⁴¹ The bidder's cost of obtaining the additional capital could be partially offset by the additional assets the company would have received for the exercise of the rights, limited by the discounted price per share.

⁴² One occurred at the advent of poison pills. See *Moran v. Household Intern., Inc.*, 500 A.2d 1346, 1352 (Del. 1985) (describing the trigger of the pill in a deal involving Crown Zellerbach) while another involved a tax setting that likely has limited applicability. See, *Versata Enterprise, Inc. v. Selectica, Inc.*, 5 A. 3d 586, 604-607 (Del. 2010).

⁴³ See the "Redemption" paragraph of the Appendix A to the Shareholder Rights Plan supra note xx.

⁴⁴ See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

⁴⁵ *Johnson v. Trueblood*, 629 F.2d 287, 292-93 (3d Cir. 1980) (applying business judgment deference to defensive tactics absent a showing of sole or primary motive to maintain control); *Panther v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981) (declining to move off business judgment deference absent bad faith "so long as it can be attributed to any rational business purpose"). Both of these decisions are cited in *Unocal*. The former was written by the former Chancellor of Delaware, then on the federal bench).

⁴⁶ *Unocal*, 493 A.2d at 957.

dealing (i.e. when insiders were on both sides of a transactions).⁴⁷ *Unocal* focused on the adjacent space of a takeover defense which presented the “omnipresent specter that a board may be acting in its own interest rather than those of the corporation and its shareholders.”⁴⁸ In this newly defined space, *Unocal* inserted two preconditions that directors must satisfy before a defensive tactic gains the protection of the business judgment rule—the existence of a threat to corporate policy because of another person’s (i.e. the bidder’s) stock interest and the proportionality of the board’s defensive response to that threat.⁴⁹

Within a year, the Delaware Supreme Court announced a second type of enhanced scrutiny in response to takeovers. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Court determined that once a company was for sale, director action would be subject to a different version of enhanced scrutiny that examined whether the directors satisfied their duty to get the best price for shareholders.⁵⁰ Two years later, Chancellor Allen’s decision in *Blasius Inc. v. Atlas Corp* announced a third type of enhanced scrutiny when director action interfered with the shareholder vote.⁵¹

These new standards heralded a new day in Delaware corporate governance. Chancellor Allen’s praise of *Unocal* in 1988 as “the most innovative and promising case in our recent corporation law” seemed an apt description at the time.⁵² Over time, however, the impact of each of these three illustrations of intermediate scrutiny lessened in terms of what was effectively required to pass judicial review, an arc most visible in case law as to poison pills over succeeding decades.⁵³ This part traces the development of judicial review in each of the three spaces.

1. *Unocal*

The simple two-part test introduced in 1985 focused on defendant directors having to prove the existence of threat to the “corporate policy and effectiveness” and then that the defensive

⁴⁷ Such transactions had long triggered the more intense judicial review based on entire fairness. See generally *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

⁴⁸ *Unocal*, 493 A.2d at 954.

⁴⁹ *Id.* at 953, 955.

⁵⁰ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *Revlon* was decided by a three judge panel of the Supreme Court that included Andrew Moore and John McNeilly, the pair of justices who had also decided *Unocal* and *Moran*. *Revlon* was argued on October 31, 1985 about five months after oral arguments in *Unocal* and *Moran*. The third member of the *Revlon* panel was Judge Bernard Balick from the Superior Court sitting by designation.

The “for sale” trigger has evolved somewhat since the initial case. See generally *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990).

⁵¹ *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (noting that “[Delaware] authorities, as well as sound principles, suggest that the central importance of the franchise to the scheme of corporate governance, [requires that, [where the board acts to impede the shareholder franchise], [the Unocal] rule not be applied and that closer scrutiny be accorded to such transaction”). The Supreme Court subsequently embraced *Blasius*’s approach. *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1129 (Del. 2003).

⁵² *City Capital Associates Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 796 (Del. Ch. 1988).

⁵³ See James D. Cox & Randall S. Thomas, *Delaware’s Retreat* 42 DEL. J. CORP. L. 323 (2018) (exploring pre-Williams development of *Unocal* and *Blasius*).

tactics adopted by the board in response to that threat were proportional to the threat. As to the first step, the court noted this proof would be materially enhanced, as in *Unocal* itself, by the approval of the defensive tactics by a board comprised of a majority of outside and independent directors who acted in conformance with their duties of good faith and reasonable investigation.⁵⁴

The facts of *Unocal* presented a fairly easy case for the target directors. T. Boone Pickens, an independent wildcatter from west Texas, sought to take over Unocal, one of America's largest integrated oil companies, via a two-step hostile tender offer. At first glance, the offer (made through Pickens's company Mesa Petroleum) seemed very attractive to Unocal shareholders: cash per share equal to a 35% premium over Unocal's market price at any time in recent years. Reality was less attractive. The \$54 cash tender offer price would only be available for about 37% of the outstanding Unocal shares. Mesa had already acquired 13% on the open market and the two blocks together would boost Mesa above 50%, permitting it to execute a follow-on cash out merger without the votes of any other shareholders. The cash out merger in the acquisition's second step would leave the non-Mesa shareholders with "junk bonds" in exchange for their remaining Unocal shares, i.e. a promise to pay a sum in the future which was heavily subordinated to other debt. Because the chances of repayment on the junk bonds in bankruptcy were slim, the bonds themselves were likely worth much less than their \$54 face value.

This meant that the blended value of the combined payments could well be less than the prior market price. A rational investor with that information might reject the offer, but would face a prisoner's dilemma—if a sufficient number of other shareholders tendered into Mesa's offer, providing it the requisite 37% to attain a majority position, the rational shareholder would be "cashed out," forced to receive the lower junk bond price for the entirety of its stake. This structural coercion of shareholders from this two-tier-front loaded tender offer easily counted as a threat under *Unocal*. The board's response that blocked this arm-twisting looked to be proportional, with the Court needing only a few paragraphs to uphold the defensive tactic.⁵⁵

Similarly, in *Moran*, the Delaware court's first poison pill case (heard within a few days of the *Unocal* decision) the Court, relied on the company's vulnerability to such a coercive techniques

⁵⁴ *Unocal*, 493 A.2d at 955.

⁵⁵ *Unocal* at 957-58. The defensive tactic was that if Mesa's first step was successful, the company would immediately buyback the remaining 49% of the share's for senior debt securities that would likely provide those shareholders much more than they would receive via Mesa's junk bonds in the second step of the Mesa offer. When this defense (and the new senior debt that it would add to the Unocal set of obligations) caused Mesa to walk away (as intended), the shareholders were left with nothing beyond the preexisting Unocal shares (since the Unocal buyback of the company's 49% was expressly conditioned on the completion of the first step of the Mesa offer that would have been pulled once the defense was in place). To appease unhappy shareholders, Unocal then agreed to buy 50 million shares with no conditions, providing shareholders some liquidity, but not necessarily increasing the value of the Unocal stock beyond the market price preexisting before the Mesa offer was made.

and declared the board's exercise of an informed, good faith judgment as sufficient to satisfy the *Unocal* test, (even when there was not yet such a specific hostile offer in place).⁵⁶

In subsequent Supreme Court cases the focus of *Unocal* review shifted to contexts that widened the breadth of what constituted a "threat" and narrowed the space of what would be considered disproportionate— with the result that poison pills (and sometimes other defensive tactics) could pass *Unocal* for almost any decision directors made. This is particularly visible in *Paramount Communications, Inc. v. Time Inc.* in 1989 and particularly how the high court in that case dealt with a *Unocal* case that the Supreme Court didn't get to decide, *City Capital Associates v. Interco, Inc.*⁵⁷ After *Unocal*, the federal Securities and Exchange Commission passed Rule 14d-10 that prevented the disparate payment tiers as in the *Unocal* facts and the structural coercion that followed.⁵⁸ Target boards would have to look elsewhere to show the required threat. The directors' task in *Interco* was significantly harder because the hostile bid was an all-cash for all-shares offer—initially offered at a 50% premium over market price and had thereafter twice increased. The target board had months to pursue alternatives, ending up with a heavily debt-financed restructuring (much of it with highly subordinated debt) that ostensibly provided a similar face value but quickly led to bankruptcy and the company's inability to pay the shareholders nearly half of what the restructuring promised.

Chancellor Allen recognized that the requisite threat could go beyond the structural setting of *Unocal* and that even noncoercive bids could constitute a threat—an active negotiator with effective power to refuse a proposal may afford the board leverage to extract a more valuable deal for shareholders. But the Chancellor also recognized Delaware limits as to what constitutes a threat in the setting of a noncoercive offer-- "there may come a time when board's fiduciary duty will require it to redeem the rights and permit the shareholders to choose."⁵⁹ More directly, the Chancellor said:

To acknowledge that directors may employ the recent innovation of poison pills to deny shareholders the ability effectively to choose to accept a noncoercive offer after the board had a reasonable opportunity to explore or create alternatives, or attempt to negotiate on the shareholders' behalf, would it seems to me, be so inappropriate with widely shared notions of appropriate corporate

⁵⁶ *Moran v. Household Intern., Inc.*, 500 A.2d 1346, 1357 (1985). Most of the opinion focuses on whether the "rights" issued by the board to block shareholders receiving tender offers was so different from traditional financial rights issued by corporations as to be beyond the authority of boards provided by the statute, honing in on the unprecedented characteristics of the director action. Here the court simply repeated a key line from *Unocal* about corporation law not being static and approved the new defenses for blocking shareholders from considering tender offers. Importantly, for future cases, the Court emphasized the central importance of the Board's obligation to redeem the pill in the face of an actual offer which was as yet not in evidence in *Moran. Id.* at 1354-55, 1357.

⁵⁷ *City Capital Associates Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 787 (1988).

⁵⁸ 17 CFR § 230.14d-10.

⁵⁹ *City Capital*, 551 A.2d at 798.

governance as to threaten to diminish the legitimacy and authority of our corporate law.⁶⁰

The Delaware Supreme Court did not have the opportunity to review *Interco* as the appeal was withdrawn,⁶¹ but shortly thereafter in *Paramount Communications, Inc. v. Time Inc.* the high court made clear its disapproval of the *Interco* reasoning.⁶² In *Paramount v. Time*, a central claim was that a challenge to the Time board's use of a defensive tactic-- it changed its acquisition of Warner from a merger (that would require vote of Time shareholders) to a tender offer to Warner shareholders which could be done by the Time directors alone, thereby denying the Time shareholders of the substantially higher value they would have as received from Paramount as compared to the deal with Warner.⁶³ The Court took the opportunity to rebuff *Interco* as a "narrow and rigid construction of *Unocal*".⁶⁴ It described plaintiffs' argument as a:

...fundamental misunderstanding of [the Delaware Supreme Court's] standard of review under *Unocal* because it would involve the Court in substituting its judgment of value of what is a 'better' deal than that of the corporation's board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject that approach as not in keeping with proper *Unocal* analysis. See, e.g., *Interco*, 551 A.2d 787, and its progeny...⁶⁵

Over time, cases filled in application of the *Unocal* test consistent with the evolution suggested by the opinion in *Paramount v. Time*—protecting the space for director decision-making prevailed over enhanced scrutiny of that same decision-making. By the time of *Unitrin* in 1995, for example, the "threat" prong had been expanded in ways that gave more room for defensive tactics: Substantive coercion (that the target shareholders might accept a hostile offer because of ignorance or mistaken belief) had been accepted as a threat.⁶⁶ In addition the "proportionality" prong seemed to have been loosened as well. "Draconian" became a measure of what would make a response disproportional. By the time of *Unitrin*, the terms preclusive and coercive had been added to further define what would be disproportional. So long as shareholders had one route to pursue, closing-off of other stockholder avenues to oppose

⁶⁰ *Id.* at 799-800.

⁶¹ The case had been appealed after the Chancery decision enjoining the poison pill discussed below, but was withdrawn shortly thereafter on motion of the parties, a common scenario that follows settlement. *Interco, Inc. v. City Capital Associates Ltd. Partnership*, 1998 WL 149260, 556 A.2d 1070 (Del. 1998). It was a volatile time for hostile takeovers as Drexel Burnham, one of the most prominent firms funding junk bonds such as the *Interco* deal, and its more visible member, Michael Milken were facing federal criminal investigations.

⁶² *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990). The three judge panel in *Paramount* included Justices Moore (who sat on *Unocal*, *Moran*, and *Revlon* and wrote the first and third), Henry Horsey, and Randy Holland, then fairly new to the Court.

⁶³ *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990).

⁶⁴ *Id.* at 1153.

⁶⁵ *Id.* at 1153.

⁶⁶ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

director defensive tactics could still pass the *Unocal* test.⁶⁷ The Court in *Unitrin* explicitly noted the proportionality discussion was a response to “a need of the board of directors for latitude in discharging its duties” and repeated the Court’s admonition from earlier cases that the “courts will not substitute their business judgment for that of the directors.”⁶⁸

The *Airgas* opinion by Chancellor Chandler a quarter century after the beginning of the enhanced scrutiny era, as he completed more than twenty years interpreting Delaware corporation law, acknowledged the continuing applicability of the Supreme Court’s earlier views of enhanced scrutiny under *Unocal*’s threat and proportionality prongs and the space for director decision-making as acknowledged in *Moran*.⁶⁹ As to the threat prong, Chandler voiced real doubt about substantive coercion that had come to occupy a significant space in the “threat” universe. In contrast to structural coercion, substantive coercion would include shareholder ignorance that could lead to shareholders making a bad decision. In the Introduction to the *Airgas* decision, the Chancellor wrote:

Although I have a hard time believing that inadequate price alone (according to the target’s board) in the context of a non-discriminatory, all cash, all shares, fully-financed offer poses any “threat”—particularly given the wealth of information available to Airgas stockholders as this point in time”—under existing Delaware law it apparently does.⁷⁰

A bit further into the opinion, he acknowledges that, “in my personal view, Airgas’s poison pill has served its legitimate purpose... [giving] the Airgas board over a full year... to inform its stockholders about its view of Airgas’s intrinsic value and Airgas’s value in a sale transaction... *more time than any litigated poison pill in Delaware history....*”⁷¹ But the Chancellor acknowledged that the Supreme Court had expressed a different view and that the chancery court could not substitute its business judgment for that of the target board.⁷² Based on *Paramount* and *Unitrin*, a board that has “a good faith, reasonable basis to believe a bid is inadequate may block that bid using a poison pill, irrespective of stockholder’s decision to accept it.”⁷³

Chancellor Chandler’s application of proportionality in *Airgas* is also telling as to the evolution of the Delaware Supreme Court’s approach over the last 40 years. So long as one avenue of shareholder action remains open, it would be difficult to find there is a preclusive or coercive action that is draconian and sufficiently disproportional to violate the *Unocal* standard. In this part of the *Unocal* analysis, the Chancellor addressed two paths available to shareholders that

⁶⁷ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

⁶⁸ *Id.* at 1388.

⁶⁹ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 115-116 (Del. Ch. 2011).

⁷⁰ *Id.* at 56-57.

⁷¹ *Id.* at 57 (emphasis in the original).

⁷² *Id.*

⁷³ *Id.* at 58.

would permit them to assert their view on the takeover: they could call a special shareholders' meeting to remove the Airgas board, requiring a two-thirds vote of the shareholders, or they could run a proxy contest at the next annual meeting which would require extensive additional time and funding and securing a majority of votes..⁷⁴ So long as one avenue was open, the poison pill defense remained standing.

2. *Revlon*

Five months after *Unocal*, the Delaware Supreme Court significantly expanded the range of enhanced scrutiny in its *Revlon* decision.⁷⁵ There, the directors of the well-known cosmetics firm facing a hostile bid from Ronald Perelman had initially adopted a poison pill. When that defense and a subsequent repurchase of shares did not ward off the bidder,⁷⁶ Revlon's board negotiated a sale to a private equity bidder who might have a greater need for experienced management in the cosmetics business.⁷⁷ This deal included a variety of new defensive tactics, including one that provided the favored bidder a right to purchase two divisions of Revlon at a bargain price.⁷⁸ The Court opined that this new context "significantly altered the board's responsibilities under" *Unocal*; more specifically, its decisions to sell the company made the question of defensive measures moot and changed the board's duty to one of getting the "best price" reasonably available, a substantially heavier obligation than the ordinary *Unocal* test.⁷⁹

This new standard, soon labeled with the name of the case that gave it birth, is triggered by a subset of director actions in a takeover context —when the board has decided not necessarily to mount a defense, but to put the company up for sale. That demanding standard remains in place, but subsequent case law identified two methods by which directors can avoid coming within *Revlon* (assuming they can persuade the other company with whom they are negotiating to go along.)

First, target directors have considerable room to structure a friendly combination so that it will not trigger *Revlon* duties. In *Paramount v. Time*, Paramount had made a much higher bid for Time shares, topping the value of Time's pending deal to combine with Warner. When Paramount argued that Time directors had a *Revlon* duty to get the best price for Time (i.e. the

⁷⁴ 16 A.3d at 124 (In the absence of closing off the chance for shareholders, the director acts survived enhanced scrutiny) The bidder had, in fact, had run such a contest at the prior annual meeting and won, electing their entire slate of directors available for election at that meeting. However, given the staggered board in place, the shareholders could only elect one-third of the board, an insufficient amount to change corporate policy without a second proxy campaign the following year).

⁷⁵ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Justices McNeilly & Moore, who had decided the *Unocal* case, were on the three judge panel in *Revlon* alongside another Delaware judge sitting by designation.

⁷⁶ The power of the poison pill was not yet settled at this time—the *Moran* opinion was still weeks away from being handed down.

⁷⁷ *Revlon*, 506 A.2d at 184.

⁷⁸ *Id.*

⁷⁹ *Id.*

much higher Paramount offer), the Delaware Supreme Court found the deal outside the *Revlon* trigger because Time's board had not abandoned its continued existence. Time's stock for stock merger with Warner (in which Time as the surviving entity) would involve Time issuing Warner shareholders more than sixty percent of Time shares, as well as providing half of the board seats for the Warner directors, and installing the Warner CEO as co-CEO in the new enterprise. But even so, the court noted that the board had not abandoned its long-term strategy of combining media with entertainment and had not put the company up for sale.⁸⁰ Time shareholders who owned a small fraction of a large publicly traded media company before the deal would continue to own a smaller fraction of a publicly-traded media company (albeit one that was considerably larger.) The change was not significant enough to bump up director duties.

Revlon continues to apply in cash for stock deals, since shareholders no longer have an interest in a continuing business. It can also apply even in a stock for stock merger as illustrated in a subsequent case involving Paramount's later efforts (after losing out on Time) to pursue a merger combining entertainment content such as movies and the distribution channels through which such content could be made available to the public. Paramount's CEO negotiated a combination with a favored partner, Viacom, and invoked defensive tactics to resist a subsequent higher bid from QVC—in other words, taking Time's position in the context of *Paramount v. Time* and following Time's strategy which had been ruled outside of *Revlon*. The Paramount-Viacom deal was similar to the Time-Warner transaction, combining the assets of the two media companies with Paramount's CEO becoming the CEO of the new company. But there was an important difference. Sumner Redstone owned a controlling block of Viacom sufficient to ensure that he would own a majority of the votes in the combined company after a stock for stock merger; as a result the Paramount shareholders, unlike the Time shareholders in the prior deal, would be relegated by the deal to a minority position now at the mercy of the acts of a controlling shareholder. This loss of the last opportunity for Paramount shareholders to receive a control premium triggered their directors' heightened *Revlon* duties to get the "best price." Planners seeking to avoid such duties can limit their deals to stock for stock combinations without a controlling shareholder.

Secondly, in some specific settings, the process aspects of *Revlon* review may dominate the substantive question of best price. Subsequent *Revlon* cases have noted that *Revlon*'s enhanced scrutiny does not require a directors make a perfect decision in pursuing best price but only that they made a reasonable decision.⁸¹ In *Lyondell*, for example, the plaintiffs sought to use the absence of the board having done a market check as a *Revlon* failure. There was no competing offer, simply a board decision go forward with a persistent bidder willing to offer a blowout price at a price substantially higher than its own initial bid.⁸² Where the trial court had

⁸⁰ *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 47 (Del. 1994).

⁸¹ *Paramount Communications, Inc. v. QVC Networks, Inc.*, 637 A.2d 34, 45 (Del. 1994).

⁸² See *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

determined that the board was independent and not motivated by self-interest or ill will and any possible claim of breach of care was blocked by the company's exculpation pursuant to § 102(b)(7), the only remaining issue was whether the directors had breached their duty of loyalty by failing to act in good faith.⁸³ Emphasizing language in previous *Revlon* decisions that there is no single blueprint that a board must follow to meet *Revlon*⁸⁴ and that "[d]irector decisions must be reasonable not perfect",⁸⁵ the Supreme Court found that the directors met their *Revlon* duty even in the absence of conducting an auction or an explicit market check.⁸⁶ *Revlon* remains a challenging burden in some settings, but there is significant opportunity for planners to sidestep its application by agreeing to stock-for-stock deals or when there is no second bidder and a blowout price permits process to occupy a broader role.⁸⁷

3. *Blasius*

Like *Revlon*, the third leg of enhanced scrutiny—*Blasius*—offers plaintiffs the potential to move to a much more demanding standard of review than *Unocal* or the business judgement rule. *Blasius* required defendants to prove a "compelling justification" for the defensive tactic if the directors' primary purpose in acting was to frustrate the stockholder franchise.⁸⁸ In *Blasius*, Chancellor Allen was presented with a defensive tactic that would seemingly pass *Unocal*—actions taken in good faith by the directors that were reasonable in relation to threats posed by a shareholder's proposed change in control.⁸⁹ The Atlas Corporation's recently-hired CEO had overseen a business restructure that included selling three of its five divisions and closing its once important uranium operations. A new nine percent shareholder--backed by junk bond financier Drexel Burnham-- came to Atlas, pushing a leveraged restructuring with borrowing that would fund large cash distributions to shareholders. The challenger soon upped the ante, launching a written consent effort to get a majority shareholder vote to expand the board from 7 to 15 members and fill the 8 new seats with directors who would support their plan. The directors responded with immediate action to add and fill two board seats. Given the 15 member cap on the maximum number of directors in the company's charter, that would not leave enough vacant slots to provide the insurgents an immediate majority, even if they were successful in their consent effort.⁹⁰

⁸³ See *id.* at 239.

⁸⁴ *Barkan v. Amisted Indus., Inc.*, 567 A.2d at 1286.

⁸⁵ *Lyondell*, 970 A.2d at 243 (citing *QVC*, 637 A.2d at 45).

⁸⁶ *Id.* (noting that "[w]here... the issue is whether the directors failed to act in good faith, the analysis is very different [from *Revlon*], and the existing record mandates the entry of judgment in favor of the directors").

⁸⁷ See, e.g. *C & J Energy Services, Inc. v. City of Miami Employees' ...Trust*, 107 A. 3d 1049, 1053 (Del. 2014) (outside of hostile bid setting, board decision to test market through a passive market check and give the stockholders a fully informed, full opportunity to vote to accept the deal does not support a likely *Revlon* violation.)

⁸⁸ *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659-60 (Del. Ch. 1988) (*cited in* *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003)).

⁸⁹ *Id.*

⁹⁰ *Id.* at 656. This would leave the current management in control until at least the next annual meeting when directors would be elected.

From the facts, Chancellor Allen concluded that the board acted not out of a self-interested motive, but rather because of a threat that the proposed recapitalization would cause great injury to the company. He recognized that *Unocal* and other Delaware cases permitted defensive actions by a board to stop a threatened change in corporate control, so long as the board acted in good faith and met the *Unocal* requirements.⁹¹ He posed the question of whether the *Unocal* standard would also take in entrenchment acts designed for the primary purpose of interfering with the effectiveness of a stockholder vote.⁹² His answer was that Delaware cases and sound legal principles require that the *Unocal* rule not be applied in such a setting.⁹³ His reason was foundational to corporate law—the central importance of the franchise to the scheme of corporate governance, thus requiring “closer scrutiny” for such transactions than that provided by *Unocal*.⁹⁴ He declared that “the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests and the exercise of directors over the vast aggregations of power that they do not own.”⁹⁵ From the beginning, *Blasius* was intended to block a subset of board actions that *Unocal* would permit.⁹⁶

Allen put his discussion of the shareholder franchise and its role in corporate governance within the larger frame of shareholder rights: “Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock...or they may vote to replace incumbent board members”.⁹⁷ In *Blasius*, the context was the shareholder voting part of the analysis. A few months later in *Interco*, which arose in the context of shareholders using the other example of their governance rights, Allen repeated the same necessary connection between shareholder roles and director legitimacy: “To acknowledge that directors may employ the recent innovation of ‘poison pills’ to deprive shareholders of the ability effectively to choose to accept a noncoercive offer, after the board has had a reasonable opportunity to explore or create alternatives, or attempt to negotiate on the shareholders’ behalf, would, it seems to me, be so inconsistent with widely shared notions of appropriate corporate governance as to threaten to diminish the legitimacy and authority of our corporation law.”⁹⁸

⁹¹ *Id.* at 659.

⁹² *Id.* Most acts in the takeover space, until that time, had been designed to stop shareholder selling into a hostile tender offer.

⁹³ *Id.* (emphasis added).

⁹⁴ *Id.* But cf. *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 278, 285 (Del. Ch. 1989) (rejecting the view that *Blasius* requires an exception to *Unocal*, within the court’s finding that the primary purpose was not met).

⁹⁵ *Id.*

⁹⁶ *Blasius* followed in the lineage of *Schnell v. Chris-Craft*, a takeover case from the early 1970s before the enhanced duty regime appeared. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971). *Schnell* is still cited today for its embrace of the broad equitable principle that an act does not become permissible simply because it is legally possible, thus offering equitable relief more generally without proving any of the enhanced scrutiny requirements.

⁹⁷ 564 A.2d 651, 659.

⁹⁸ *Interco*, 551 A.2d 787, 799-800.

The Delaware Supreme Court was slow to do very much with *Blasius*. The *Interco* litigation that arrived on Chancellor Allen's desk soon after *Blasius* was announced got much more attention from the high court, as previously discussed. In the decade or so after *Blasius*, the Supreme Court discussions of that holding centered around identifying contexts in which it would not apply, and these were contexts atypical of the takeover setting that generated the development of the *Unocal* and *Revlon* space. Its 1992 decision in *Stroud v. Grace*,⁹⁹ for example, is frequently cited for a footnote that *Unocal* does not render *Blasius* meaningless.¹⁰⁰ Yet *Stroud* was hardly about *Blasius*; the Court held that neither *Unocal* nor *Blasius* applied to *Stroud's* facts -- management already controlled fifty percent of the company's shares. Further, the court found that the plaintiffs had "utterly failed" in proving their claim challenging board actions. Similarly, in 1996, the Supreme Court decided *Williams v. Geier*,¹⁰¹ declaring that the burden of demonstrating a compelling justification is very high with the result being that *Blasius* is "rarely applied".¹⁰² There, too, the fact pattern strayed from the typical takeover setting where management seeks to protect themselves against contrary actions by a disaggregated body of shareholders capable of exercising majority control. Like *Stroud*, the action was taken by a board that already controlled the majority of shares, leaving shareholders with little voting power to be protected.¹⁰³

Unitrin, decided the year before *Williams v. Geier*, captures the application of this narrow view of *Blasius* applied in the context of a traditional takeover. There, the board defended against shareholder challenges to director actions that included a poison pill and issuance of additional shares to incumbent directors. The Supreme Court began its opinion with a reference to the key point of *Blasius* as the special import of protecting the shareholder franchise (albeit attributing it to *Unocal*).¹⁰⁴ It then disposed of that specialness with a conclusory statement, without analysis, that *Blasius* does not apply in the absence of a primary purpose to interfere or impede with the vote. A *Unocal* analysis occupies the remainder of the opinion, ending with no violation found.¹⁰⁵

In the absence of any specific guidance from the Supreme Court on what was needed to satisfy the *Blasius* trigger of "primary purpose", subsequent chancery decisions gravitated toward a *Blasius* meaning that dovetailed with what the *Unitrin* court found to be determinative to its *Unocal* analysis—the viability of a possible proxy contest even given the board's actions. Here the *Unitrin* court focused on the 42% of shares owned by institutional shareholders, concluding that "it is hard to imagine a company more readily susceptible to a proxy contest concerning a

⁹⁹ *Stroud v. Grace*, 606 A.2d 437 (Del. 1992).

¹⁰⁰ *Id.* at 92, footnote 3.

¹⁰¹ *Williams v. Geier*, 671 A.2d 1368 (Del. 1996).

¹⁰² *Unitrin*, at 1376.

¹⁰³ *Id.* at 1371.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

pure issue of dollars.”¹⁰⁶ The Chancery Court’s conclusion that the defensive steps would require the insurgents to out poll the incumbent directors by up to 3-1 margin was “de minimis” in that setting.¹⁰⁷ Blasius’s primary purpose came to be associated only with defenses that left no free voting, even if a proxy fight had become more difficult and less likely to succeed.¹⁰⁸

Even in *MM Companies, Inc. v. Liquid Audio, Inc.*, the one Delaware Supreme Court case explicitly applying and affirming *Blasius* (on facts very similar to *Blasius* itself),¹⁰⁹ the Court repeats the conclusory statement from *Geier*, “[a]ccordingly, ... *Blasius*... is rarely applied.”¹¹⁰ As in *Geier*, there is no explanation and the antecedent to “accordingly” is not present, leaving little clue for the reach intended for *Blasius*.

4. *The Pattern in the Arc of Enhanced Scrutiny*

The pattern of enhanced scrutiny before *Williams*, as described above, suggests that *Unocal*, over time, has provided directors with substantial room to take defensive actions. “Threat” was broadly construed; “proportionality” generally could be met if shareholders had at least one path to express their opposition, even if expensive and difficult. *Revlon* and *Blasius* certainly impose more severe standards that directors must meet. But *Revlon* only applies to a subset of takeovers, sometimes giving planners room to avoid it if they wish. *Blasius*’s standard appears so outcome-determinative that courts seldom employed it and found it difficult to meld *Blasius* with *Unocal* in a way that would be consistent with *Blasius*’s origins. The next part explores the extent to which the *Williams* decision changes this and the extent to which the opinion recognizes the melding of the different parts of enhanced scrutiny, particularly *Unocal* and *Blasius*.

II. The *Williams* Decision Against the Arc of Enhanced Scrutiny Review

Williams does not fit neatly within the arc of judicial review just described. The issues at the core of the case are familiar enough: directors and managers of a public corporation worried about their vulnerabilities to shareholder angst at a time of economic uncertainty—the initial appearance of the Covid pandemic followed by a worrisome energy price-based market decline.¹¹¹ The *Williams* Companies directors responded in a way that has become second-nature in the context of modern American corporate law: they adopted a poison pill.¹¹² That

¹⁰⁶ *Id.* at 1383 (quoting a board argument).

¹⁰⁷ *Id.* at 1381, footnote 27.

¹⁰⁸ See *Third Point LLC v. Ruprecht*, 2014 WL 1922029 (Del. Ch. 2014) at *16 (giving possible explanations for why *Blasius* rarely applied); *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 335-36 (Del. Ch. 20210) *aff’d* 15 A.3d 218 (Del. 2011) (if owner can effectively run a proxy contest the pill would not work the type of disenfranchisement that both invokes *Blasius* review and almost invariably signals a ruling for the plaintiff.”)

¹⁰⁹ *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003) The facts also involved an effort to increase the number of directors.

¹¹⁰ *Id.* at 1130.

¹¹¹ *In re the Williams Cos. S’holder Litig.*, 2021 WL 754593, at *4 (Del. Ch. Feb. 26, 2021).

¹¹² *Id.* at *8-9.

defense narrows dramatically the range of successful tactics available to bidders hostile to target managers, forcing insurgents into a negotiating space that directors effectively control. In *Williams* the challenge was something of a new setting for poison pills—unrest generated by shareholder activism.¹¹³ The Delaware Chancery Court struck down the defensive tactic on the basis of *Unocal*, something the Court had done before, but usually without being affirmed by the Supreme Court. In the most visible prior Chancery cases invalidating poison pills, for example, the Supreme Court had either rejected the trial court's approach, relied on non-*Unocal* reasoning, or the trial court had subordinated its own view of the case citing prior rulings of the Supreme Court.

The *Williams* decision stands out because the Chancery Court struck down the poison pill defense on the basis of *Unocal* reasoning and the Supreme Court affirmed.¹¹⁴ The Chancery Court's opinion by then-Vice Chancellor Kathaleen St. Jude McCormick reflected a merging of *Blasius* and *Unocal* principles that had been evolving over the prior two decades in ways that differed from the early decisions based on *Unocal*. Section A summarizes the learning of the previous part and the small likelihood of *Unocal* or *Blasius* leading to the invalidation of a poison pill under prior Delaware law, with a focus on the decisions of the Delaware Supreme Court. Section B sets out a series of twenty-first century efforts by the judges of the Delaware Chancery Court to work through in more detail the confusing interaction of *Unocal* and *Blasius*, decisions that provide the foundation for *Williams*. Section C identifies specific ways in which the application of the *Unocal* test in *Williams* differs from early *Unocal* cases.

A. The Small Likelihood in a pre-Williams world of Unocal Review Leading to Invalidations of Poison Pills by the Supreme Court

A poison pill flunking the judicial review standard prescribed by *Unocal* had been an aberration in Delaware Supreme Court jurisprudence prior to *Williams*. Three examples illustrate this trend. In *City Capital Associates v. Interco, Inc.* discussed above, the Chancery Court struck down the poison pill under *Unocal* and the appeal was dismissed at the request of the parties before the Supreme Court heard the case.¹¹⁵ Within a few months of the *Interco* opinion, the Supreme Court decided *Paramount v. Time*, where the Court used its written opinion (in what was not a poison pill case) to sharply criticize and effectively erase the Chancellor's holding in *Interco*.¹¹⁶ A decade later, two cases ruled on litigation involving poison pills where planners

¹¹³ *Id.* at *3.

¹¹⁴ *The Williams Companies, Inc v. Wolosky* (Del. Nov. 3, 2021).

¹¹⁵ *See City Capital Associates Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 787 (Del. Ch. 1988). A month after *Interco*, retired Delaware Supreme Court Justice William Duffy, sitting on the Chancery bench, enjoined a pill in another case, citing *Interco's* reasoning. *Grand Metro Pub.. Ltd. Co. v. Pillsbury Co.* 558 A.2d 1049, 1059-60 (Del Ch. 1988).

¹¹⁶ *See Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del. 1990). The uproar in Delaware in response to these Chancery opinions is vividly described by then Vice-Chancellor Strine in Leo E. Strine, Jr., *The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path to Takeovers Clear*, in *CORPORATE LAW STORIES*, (J. Mark Ramseyer, Ed. Foundation Press 2009) 243, 275 (quoting renowned takeovers lawyer Marty Lipton's

had expanded the original pill so as to prevent or slow newly elected directors' action to redeem a pill.¹¹⁷ In the two cases the Chancery Court had struck down the defensive tactic for two separate reasons—first as a breach of *Unocal*, and second as impermissibly constricting the board's broad statutory authority to make governance decisions for the corporation.¹¹⁸ The Supreme Court, hearing only the second of these two Chancery cases, affirmed based only on the statutory ground of interfering with the board authority under Section 141, but did not take up the *Unocal* argument.¹¹⁹ In *Airgas*, a poison pill survived the Chancellor's *Unocal*-based conclusions that "there seems to be no threat here" and that the board's defensive tactic were "assuredly preclusive in the everyday common sense meaning of the word."¹²⁰ These points yielded to the Supreme Court's decisions in *Moran*, *Paramount*, and *Unitrin* holding the power to decide about inadequate hostile tender offers ultimately lies with the board, not the shareholders.¹²¹

Even if the search is expanded to look at *Unocal*'s use to block any defensive tactics, not just poison pills, there was little to see in the Supreme Court's jurisprudence. The most noticed case, *Omnicare, Inc. v. NCS Healthcare, Inc.*, was decided by the Delaware Supreme Court en banc in a 3-2 decision on reasoning that has not persuaded other courts.¹²² The majority's conclusion reflected a typical *Unocal* worry, that the target board's defensive tactics would force target's public shareholders to accept a merger that was less attractive than an alternative.¹²³ Yet on the facts of the case, the argument is irrelevant. Unlike the typical public corporation—where the shareholders to be protected from the board's coercion are dispersed owners with a majority of the votes giving them the actual decision-making power to make the deal decision—there was a controlling owner in this case, with two of four directors owning about sixty-five percent of the voting stock.¹²⁴ It is hard for the public shareholders to be coerced when they lack the actual power to make decisions, especially as the only shareholders who actually could make the decision had already willingly agreed to vote for the deal in order

comment that "Delaware...lured companies with a promise that the business judgment rule would govern corporate law. It's obvious that the state has reneged.")

¹¹⁷ See *Carmody v. Toll Brothers, Inc.* 723 A.2d 1180 (Del. Ch. 1998). This meant that the pill could only be removed by the directors who had adopted it, even after they had been replaced.

¹¹⁸ See 8 Del. C. § 141. In this case it was a newly elected board's authority to decide on whether to redeem or not.

¹¹⁹ See *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998).

¹²⁰ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 57, 120 (Del. Ch. 2011).

¹²¹ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 55 (Del. Ch. 2011).

¹²² See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

¹²³ See *id.* at 935-36. NCS, the target, was a company recovering from significant financial distress and had been exploring opportunities for sale. When NCS's board approved a deal with Genesis, two NCS directors who together controlled sixty-five percent of the voting stock simultaneously executed an agreement to vote for the deal when it would be presented at the shareholders' meeting. This and other inducements were prompted in order to induce Genesis's increasing its price for NCS, a change benefiting the public shareholders as well as the two controllers. These agreements were challenged under *Unocal* after another bidder came forward with a higher bid almost two months after the controlling shareholders had signed their agreement. *Id.*

¹²⁴ *Id.* at 919.

to induce a higher price.¹²⁵ This reliance on the alleged coercion of public shareholders, who had no power to decide the matter, when it permits the controlling shareholders to walk away from their deal they had expressly made to entice a higher price from a bidder, is a weak use of *Unocal* principles.¹²⁶

B. Chancery's 21st Century Efforts to Rethink the Early Unocal and Blasius learning.

The vagueness and ambiguity of the *Blasius* and its interaction with *Unocal* stimulated a much more robust analysis by the Chancery judges in the early 21st century than is visible in the Supreme Court's jurisprudence. After the end of his term as Chancellor, William Allen, the author of *Blasius*, joined two then current members of the chancery bench (Leo Strine and Jack Jacobs) in a law review article that acknowledged that post-*Blasius* case law had "exposed analytical difficulties in determining the proper scope of the 'compelling justification' test" and led to an "unintended competition" between the *Unocal* and *Blasius* standards of review.¹²⁷ The judges noted Delaware decisions had begun "gradually to 'fold' the *Blasius* standard into *Unocal*, effectively making the former a subset of the later."¹²⁸ The judges support of such a unification, as Strine had written in an opinion the year before, seemed designed to insure a unification would "infuse *Unocal* with the spirit of *Blasius*,"¹²⁹ which would require a court to apply *Unocal* "with a gimlet eye out for inequitably motivated electoral manipulation or for subjectively well-intended board action that has preclusive or coercive effects."¹³⁰

In 2007, then Vice Chancellor Strine provided perhaps the most complete takedown of *Blasius* and again argued for a unified standard under *Unocal*, this time with more specificity in how that standard should be adapted. His opinion in *Mercier v. Inter-Tel* cogently observed how "[t]he great strength of *Blasius* – its reminder of the importance of the director election process and the barrier the decision draws to the bizarre doctrine of 'substantive coercion as to the question of who should constitute the board--—came along with some overbroad language that rendered the standard of review articulated in the case too crude a tool for regular employment."¹³¹ He recognized the solution required a standard that would forgo testing via "compelling justification", but without raising concerns originally addressed to the early *Unocal*

¹²⁵ *Id.* at 936.

¹²⁶ The was the point of the two dissenting judges. See *id.* at 944-45. The majority's reasoning has been criticized in a subsequent Delaware cases. See *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1016 n. 68 (Del. Ch. 2005) (detailing that "the Supreme Court decision in [*Omnicare*] represents, one senses, an aberrational departure from that long accepted principle"); *Jewel Companies, Inc. v. Pay Less Drug Stores NW., Inc.*, 741 F.2d 1555 (9th Cir. 1984).

¹²⁷ William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW, 1287, 1313 (2001).

¹²⁸ *Id.* at 1316. The judges noted the origins of *Blasius* and *Unocal* in different contexts—proxy contests versus hostile tender offers, but their practical overlap particularly after *Paramount v. Time*. *Id.* at 1313.

¹²⁹ *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000).

¹³⁰ *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000). The final quote is repeated in the *FUNCTION OVER FORM* article at p. 1316.

¹³¹ *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 805-806 (Del. Ch. 2007).

rule “that [*Unocal*’s] standard and the related *Revlon* standard were being denuded into simply another name for business judgment review.”¹³²

His embrace of *Unocal* included key differences from earlier Supreme Court case law. First, he would exclude from this revised standard any tolerance of the concept of “substantive coercion.”¹³³ Cases such as *Paramount v. Time* and *Unitrin*, of course, had accepted substantive coercion as sufficient for meeting the threat prong of *Unocal* in the context of director acts to block shareholders responding to a tender offer.¹³⁴ This ban on substantive coercion that Strine was proposing would apply only to the director election process, leaving director authority that would permit them to block shareholder action to tender into a hostile offers (as in *Paramount v. Time*) in an uncertain state. Further, he would reject dicta in *Blasius* that suggested its application was to all shareholder voting in favor of only covering board action applying to director elections.¹³⁵ (*Unitrin*, which also had accepted the substantive coercion argument, presented such a context.)¹³⁶ Second, Strine wanted to tinker some of the element of *Unocal*. He worried that *Unocal*’s early history may have led to too much emphasis on the word “threat”¹³⁷ and suggested requiring instead that directors be required to identify a legitimate corporate objective, that they have the burden of persuasion that their motivations were proper and not selfish, and that their actions were reasonable in relation to their legitimate objective and not preclusive or coercive.¹³⁸

Pulling these threads together, Vice Chancellor Travis Laster, in a series of opinions, has shown how director positional conflict in *Blasius* cases shows up as well in *Revlon* and other settings where enhanced scrutiny would be appropriate.¹³⁹ The principles emerging from each of these threads has meant there was a much richer and developed body of law available at the time of

¹³² *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007).

¹³³ Strine credits Allen in *Blasius* for having understood the coming conflict between director authority and enhanced scrutiny, writing “what was core to *Blasius* was that the judiciary not accept the doctrine of substantive coercion as a justification for director conduct affecting the election process.” *THE STORY OF BLASIUS*, supra note xx at 290.

¹³⁴ Strine’s characterization of substantive coercion had moved from “interesting” in 2001 in *Chesapeake* to “bizarre” in 2007 in *Mercier*. Compare supra notes xx and yy.

¹³⁵ *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 808 (Del. Ch. 2007) (“the reasoning of *Blasius* is far less powerful when the matter up for consideration has little or no bearing whether the directors will continue in office.”)

¹³⁶ See infra Part I; Strine’s discussion later in the *Mercier* opinion of shareholder voting on a merger as impacting proxy fights suggests enhanced scrutiny could apply in a *Unitrin* context, at least for *Revlon* purposes. *Id.* at 812.

¹³⁷ *Id.* at 811.

¹³⁸ *Id.* at 810 (“If for some reason the fit between the means and end is not reasonable, the directors would also come up short.”)

¹³⁹ See, *Reiss v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011) (discussing directors facing proxy contest and final stage transactions as other places where enhanced scrutiny applies). See also, *Pell v. Kill*, 135 A.3d 764, 785-786 (Del. Ch. 2016) (same); *Johnston v. Pedersen*, 28 A.3d 1079, 1090 (Del. Ch. 2011) (the shift from “reasonable” to “compelling” requires that the board establish a closer fit between means and ends”).

Williams than in the early days of *Unocal*, *Revlon*, and *Blasius*, reasons that could suggest an adaption of earlier principles.

C. Departures in Williams from Several Well-Established Unocal Elements

The *Williams* decision is notable not just because of its difference in result from previous Supreme Court cases, as discussed in the previous part, but also for the specific ways in which it departed from several parts of the *Unocal* jurisprudence that had been present over the prior decades. Three examples stand out here.

1. An Abstract Threat As Insufficient to Satisfy Unocal's First Prong

The Chancery Court in *Williams*, following the two prong structure of *Unocal*, first focused on the threat. *Unocal* had said directors could satisfy the threat by showing their good faith and reasonable investigation and that such proof is “materially enhanced” by demonstrating the independence of the deciding directors.¹⁴⁰ In *Williams* the court noted that such showings would be insufficient if there were not a legitimate threat.¹⁴¹ From director testimony at trial, the Court identified three possible threats to be evaluated, each characterized as “quite general” and “purely hypothetical.”¹⁴² The first ground, concern of shareholder activism in general, was found insufficient in light of four cases that supported poison pills implemented in response to concrete actions.¹⁴³ The Court found the second, fear of short-termism, could rise to the level of cognizable threat, but hypothetical versions as in this case would not.¹⁴⁴ For the third, the Court was willing to assume the possibility of a threat (for purposes of getting to *Unocal's* proportionality prong), but the Court’s analysis of these gap-filling pills could not mask its real concern about their substance.¹⁴⁵ The court noted that if gap-filling justified a pill, “then all Delaware corporations subject to the federal disclosure regime would have a ready-made basis for adopting a pill.”¹⁴⁶ The opinion found that such an “omnipresent” justifications for a pill would constitute “a dramatic turn in Delaware law” as viewed by the Court and inconsistent with enhanced scrutiny.¹⁴⁷

Despite the long history of poison pill cases, including those cited by *Williams*, as to courts viewing poison pills as situationally specific defenses,¹⁴⁸ the origins of “threat” in *Moran* are

¹⁴⁰ See *In re the Williams Cos. S’holder Litig.*, 2021 WL 754593, at *22 (Del. Ch. Feb. 26, 2021) (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (1985)).

¹⁴¹ *Id.* (“If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat merited a response, will not be enough to save the board.”)

¹⁴² *Id.* at *29. The Court discussed differences between the actual threat gleaned from the testimony and those threats as articulated in the deal documents.

¹⁴³ *Id.* at *30-32.

¹⁴⁴ *Id.* at *33.

¹⁴⁵ *Id.* at *34.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (invoking the omnipresent specter that had initially characterized the *Unocal* analysis, (even if it seldom resulted in defensive tactics failing the test).)

¹⁴⁸ *Id.*

decidedly different. In that first case validating poison pills under the *Unocal* reasoning, the Court noted that the defense was not “adopted in reaction to a specific threat” but rather to ward off “possible” and unspecified future attacks. The Court, in *Moran*, was clear that the generic nature of the threat “[did not] result in the Directors losing the protection of the business judgment rule.”¹⁴⁹ Instead, the court found it would be “even more appropriate” to apply the business judgment rule.¹⁵⁰ Such language communicates the broad space left to director actions to act under *Moran* that carried forward to subsequent Delaware decisions, such as *Paramount v. Time*. Even as courts moved to a situation-specific review, the overall approach did not seem to change in terms of deference by judges to board decisions. *Williams* suggests a standard much more susceptible to judicial invalidation than *Moran*.

2. Substantive Coercion Loses its Support

The *Williams* litigation decision also suggests a significant change in another part of the threat analysis as to the extent to which it includes what was long known as substantive coercion. In *Paramount v. Time*, the Supreme Court’s 1989 decision which reined in Chancellor Allen’s broad use of *Unocal* in poison pills, the Supreme Court embraced substantive coercion—the possibility that even with full disclosure, shareholders can and will make an erroneous decision, a threat that directors could use to justify defensive tactics. Subsequently, the idea had a significant role in Delaware law.¹⁵¹ *Paramount’s* rebuke of *Interco’s* “narrow and rigid construction of *Unocal*” indicated a desire to go beyond a threat description that already included substantive coercion. In 1995, the Supreme Court in *Unitrin* accepted the target board’s reliance on substantive coercion finding that defensive tactics would survive *Unocal* review.¹⁵² By the time of Chancellor Chandler’s summary of Delaware takeover law in *Airgas* in 2011, he acknowledged more recent chancery court cases attempting to cut back on the then hardened concept of substantive coercion.¹⁵³ Chandler was essentially arguing that if provided with adequate information, shareholders should be permitted to make a decision about a takeover transaction. Yet here is where Chandler acknowledges that “until the Supreme Court rules otherwise” this limited view of threat was not the current state of Delaware law.¹⁵⁴

Even so, a significant shift was underway, as discussed in the immediately preceding section. *Williams* shows how far the Delaware courts have moved as to substantive coercion, threat and proportionality. In the fifth paragraph of that opinion, the Vice-Chancellor rejected two of the three plaintiff-asserted threats as contrary to the “tenet of Delaware law that directors cannot

¹⁴⁹ *Moran v. Household Intern., Inc.*, 500 A.2d 1346, 1350 (Del. 1985).

¹⁵⁰ *Id.* The court observed preplanning for hostile takeovers would improve management decision-making.

¹⁵¹ See *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 n. 17 (Del. 1989).

¹⁵² *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1374 (Del. 1995).

¹⁵³ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 100 (2011) (citing *Chesapeake v. Shore*, 771 A.2d 293, 324–25 (Del.Ch. 2000) for the proposition that “because the threat is defined as one involving the possibility that stockholders might make an erroneous investment or voting decision, the appropriate response would seem to be one that would remedy that problem by providing the stockholders with adequate information”).

¹⁵⁴ *Id.* at 100-01.

justify their actions by arguing that, without board intervention, the stockholders would vote erroneously out of ignorance or mistaken belief.”¹⁵⁵ Later in the “threat” part of the opinion, McCormick repeats that quote (that was drawn from an opinion by Vice Chancellor Travis Laster in *Pell v. Kill*).¹⁵⁶ The *Williams* opinion then repeats a similar observation penned by Leo Strine while vice chancellor that the argument that “directors know better than the stockholders about who should be on the board is no justification at all.”¹⁵⁷ *Williams* shows the little support left for substantive coercion and the cases on which it is based, at least in the context of shareholder voting.

In deciding *Williams* and voting to affirm the Chancery opinion, the Supreme Court faced a strong set of Chancery opinions that were notably different from Supreme Court opinions of the early takeover period. Where the *Interco* standard of review had been criticized by the Supreme Court in *Paramount* as illustrating the fundamental misconception of involving the Delaware courts in substituting judicial judgment of what is a better deal for that of the board of directors (i.e. a too intense standard of review), the worry in *Williams* was that plaintiff’s argument would produce too lenient a threat standard that would provide directors of every publicly-held Delaware corporation with a omnipresent justification legitimizing a poison pill.¹⁵⁸

3. *More Space for Proportionality based not on Preclusion or Coercion but Range of Reasonableness*

The new look of the Delaware approach to *Unocal* also appears where the *Williams* opinion discusses proportionality. Shortly after *Unocal*, the proportionality part of the test was built out with the Court inserting a “draconian” requirement as a descriptive measure of what would not be proportional, and “coercive and “preclusive” were added as illustrations. “Realistically attainable,” something more than a mere mathematical possibility or hypothetically available, also appeared to fill out the meaning.¹⁵⁹

In the application of these standards to actual cases, the facts were seldom sufficient to show a breach of *Unocal*’s second prong. One contrary (but partial) example was in *Airgas*, where Chancellor Chandler assessed the target board’s defensive tactic under the “realistically attainable” standard as to whether the insurgents could remove the Airgas board at a special meeting of stockholders.¹⁶⁰ As the Court analyzed the math, to get the 67% of the votes required for such action, insurgents would have to get 85% of the 75% held by unaffiliated

¹⁵⁵ See *In re the Williams Cos. S’holder Litig.*, 2021 WL 754593, at *2, *30 (Del. Ch. Feb. 26, 2021) (quoting *Pell v. Kill*, 135 A.3d 764, 788 (Del. Ch. 2016)).

¹⁵⁶ *Id.* at n. 308 (quoting *Pell v. Kill*, 135 A.3d 764, 788 (Del. Ch. 2016)).

¹⁵⁷ *Id.* (quoting *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 811 (Del. Ch. 2007)).

¹⁵⁸ See *id.* at *32.

¹⁵⁹ See *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1388-89 (1995); *Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 604-607 (Del. 2010).

¹⁶⁰ *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 120 (Del. 2011). This would, in turn, have permitted new directors to redeem the poison pill and complete their acquisition.

stockholders likely to vote, a seemingly insurmountable task. One of the experts told the judge he had never seen such a hurdle exceeded in his forty-six years in the industry.¹⁶¹

Finding this result as “assuredly preclusive”, however, did not mean that defendants had failed to meet the proportionality prong. Chandler cited the Supreme Court’s very recent opinions in *Selectica* and a decision in another part of the *Airgas* litigation that *Airgas*’s defenses would not be preclusive if there were another realistic route to obtaining control “at some point in the future.”¹⁶² In *Airgas*, the Chancellor found there was such a route i.e. running a proxy contest at the next annual meeting when Air Products could elect the one third of the directors then up for election by a simple majority of shareholder votes.¹⁶³ The *Selectica* and first *Airgas* opinions cited above suggest no limits on how long shareholder democracy could be delayed and still come within *Unocal*. This “as long as one avenue remains open” standard suggests that the proportionality standard under *Unocal* would reliably protect directors from losing hostile campaigns—at least for the Supreme Court until *Williams*.

When the proportionality prong of *Unocal* was built out to add additional illustrations, the Delaware Supreme Court added that if a defensive measure had not been proven to be either preclusive or coercive, it still must cross one more hurdle—it must be within the “range of reasonableness.”¹⁶⁴ The additional language dates from *Paramount* and *Unitrin*, but without enough clarity to know when it might make a difference. By the time of *Chesapeake* in 2000, Vice-Chancellor Strine found the defendants’ defensive tactic (raising the percentage of shareholder vote needed to amend) had both failed preclusiveness and separately failed the range of reasonableness, even if it were not preclusive. By the time of *Williams*, the range of reasonableness could carry the case by itself (proportionality having not been challenged in that case).

The range of reasonableness becoming more important in *Williams* and the narrowing of the breadth of acceptable threat discussed above expand the range of conduct that can fail *Unocal*. Chancellor Allen opinion in *Interco* illustrated how a “mild” threat broadened the range of defensive actions subject to challenge under *Unocal*. *Paramount v. Time*’s harsh treatment of *Interco* signaled less range for proportionality. *Chesapeake* returned such balancing to the *Unocal* analysis and *Williams* shows an explicit tightening of the connection between “threat” and “proportionality”.¹⁶⁵ The result was to remove much of the traditional insulation that the

¹⁶¹ *Id.* at 117. Then Vice-Chancellor Strine went through a similar mathematical analysis in *Chesapeake*.

¹⁶² *Id.* at 115. See *Versata Enterprise, Inc. v. Selectica, Inc.*, 5 A. 3d 586, 604-607 (Del. 2010); *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 5 A.3d 1182, 1190 (Del. 2010).

¹⁶³ *Id.* at 121.

¹⁶⁴ See *id.* at 92-93 (citing *Unitrin*, 651 A.2d at 1367, while also restating the test from *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)).

¹⁶⁵ As the Court said, “with new purposes comes new considerations” for this string of analysis of director defensive tactics in takeovers involving publicly held corporations *Id.* at *38.

early *Unocal* rule interpretations had provided to defendant defensive tactics under both prongs of *Unocal*.

While there had not much supporting Supreme Court precedent for such a tightening in the publicly held space, there was one interesting case where the issue had arisen in the context of a closely held corporation. This was the high-profile case of craigslist and its three shareholders. On one side were two individuals with a majority of shares who wanted to continue to run the iconic corporation in their traditional public-facing way. On the other side was eBay, holding a minority of shares and pushing for a change in direction more receptive to their business approach.¹⁶⁶ Unlike the more common setting for enhanced scrutiny in public companies, there was no hostile bidder and no effort of the board to thwart a majority of shareholders making a control decision. But in the new *Unocal* world, this close corporation precedent applied to a public setting helped define a new space that was outside of the range of reasonableness, outside proportionality, and outside the *Williams* court's view of corporate democracy so as to get the poison pill invalidated. The Supreme Court affirmed without adding any additional comment.¹⁶⁷

III. Explaining the New *Unocal*

Unocal's enhanced scrutiny in *Williams* looks significantly different than the *Unocal* of *Paramount*, *Unitrin*, and *Airgas*.¹⁶⁸ Some facts about the case, and some language in the opinion, suggest a narrower change in the law. This may simply be a one-off case involving more one-sided facts than in previous cases decided under *Unocal* i.e. the nuclear weapon of defensive tactics as argued by the defendants with language picked up in the opinion.¹⁶⁹ That kind of case would have particular appeal to the judges sitting on Delaware's Court of Chancery. Its members take pride in the court's origin as a court of equity, with its jurisdiction derived from that of the English Court of Chancery at the time of American independence.¹⁷⁰ The result may simply be a case with egregious facts that can perhaps be best explained with such core equitable reasoning as the driving force.

Other explanations reflect on the evolving case law discussed in Part IIB and draw on something larger happening in the corporate governance space. Corporate governance in the twenty-first century is not the same as it was at the dawn of the modern takeover era. Facts have changed on the ground. Importantly, shareholders are different than they once were: a few decades ago

¹⁶⁶ eBay domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 28 (Del. Ch. 2010).

¹⁶⁷ See The Williams Companies, Inc., v. Wolosky, 264 A.3d 641 (Table) 2021 WL 5112495 (Del. Nov. 3, 2021).

¹⁶⁸ See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (1985); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (1989); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (1995); *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. 2011).

¹⁶⁹ See *In re the Williams Cos. S'holder Litig.*, 2021 WL 754593, at *4 (Del. Ch. Feb. 26, 2021) (noting that the director who pushed for this pill described poison pills as "the nuclear weapon of corporate governance,") a comparison later embraced by the Court in describing how "the Plan increases the range of Williams' nuclear missile" by a considerable distance." *Id.* at 35).

¹⁷⁰ See *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (1971).

‘mom and pop’ individual shareholders comprised most of the shareholding in the public markets; shares today are largely in the hands of large institutions. These institutions have more sophisticated managers and have access to more information. It is not at all surprising that these institutional shareholders play a different role in governance via a vis directors and managers than their individual predecessors; it makes logical sense that standards of review such as *Unocal* would need to adapt to reflect these new realities.

There have been multiple issues during the *Unocal* era that have confused the sorting out as to which set of explanations is dominant. First, several of the new ideas now being applied in *Unocal* had their origins in the *Blasius* line of cases, a separate decision also dating from the early takeover period.¹⁷¹ *Williams* freely absorbs these *Blasius* ideas into what had originally been distinctly separate *Unocal* standard of review with a different trigger for enhanced scrutiny and different standards that must be met.¹⁷² Second, Delaware judges, early in the modern takeover era, were prone to treat tender offers as more susceptible to abuse by bidders (as compared to proxy fights, for example), effectively leading to more leeway for director defenses in that “selling” space, but rarely explicitly distinguishing the risks in the two settings.¹⁷³ Third, courts were not always clear in identifying the shareholders being protected. In *Unitrin*, for example, the Court, in the space of only a few paragraphs, shifted between presenting the facts within a familiar Delaware setting of shareholders so vulnerable to a coercive hostile bid as to justify director defensive tactics to declaring no shareholder vulnerability at all,¹⁷⁴ writing that “it is hard to imagine a company more readily susceptible to a proxy contest concerning a pure issue of dollars.”¹⁷⁵ Applying *Unocal* in this modern setting requires working through these inconsistencies.

This part explores both possible explanations. Against the backdrop of Parts I and II, the second explanation suggested above seems more likely. As the power of shareholders continues to evolve and grow, there is greater need to reconsider attention to limits on director power as they have repeatedly been deployed in the *Unocal* setting.

A. *Williams* as a “One Off” Case

¹⁷¹ See Part IB3 *supra*.

¹⁷² See Chancellor Allen’s initial description of *Blasius* as applying in a setting where sound principles required that *Unocal* not be applied. See text accompanying footnotes xx-yy, *infra*.

¹⁷³ See, e.g. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956-57 (1985); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1379 (1995); *Air Products and Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 94-95 (2011) (highlighting the “‘anomaly’ in [Delaware] corporation law). Compare *In re Volcano Corporation Stockholder Litigation*, 143 A.3d 727, 743-43 (Del. Ch. 2016),) *aff’d* without opinion 146 A.3d 697 Del. (2017) (stockholder action by tendering has the same cleansing effect as a vote in favor of the merger; rejecting concern that a first step tender as part of a second step merger is “more coercive than a stockholder vote in a one step merger) with *Carmody v. Toll Brothers, Inc.* 723 A.2d 1180, 1186 (Del. Ch. 1998) (the experience of courts in the second half of the 1980s that pills proved to be largely beneficial to shareholder interests led to extreme reluctance to order redemption).

¹⁷⁴ See *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1385 (Del. 1995).

¹⁷⁵ *Id.* at 1383.

1. *The Nuclear Weapons Analogy*

A distinctive part of the *Williams* opinion is the “nuclear weapons” frame that was introduced to describe the defensive tactics in the particular setting of this case. That description suggests something different than prior defensive tactics generally approved by the Delaware courts. First, the frame was aimed at shareholder activism in a different, more diffuse, context than the traditional takeover where defensive tactics were aimed at a particular hostile offeror bent on taking control.¹⁷⁶ As the set of investors in public companies has expanded and thickened, institutional investors now span a more diverse set of interests and have employed a much broader range of strategies. Many investors focus on “influence” or intermediate strategies, not the direct frontal assault of prior takeovers. In this setting, poison pills drafters seek a weapon that can be deployed earlier and against a broader range of tactics.

This can be seen in the pill in the *Williams* case and the way that pill differed from previous versions. First, this pill could be triggered earlier—when a shareholder’s ownership crossed the 5% level. When the pill idea was presented to the *Williams* board, its adviser, Morgan Stanley reported that only 2% of all pills had a trigger lower than 10% and that *Williams* was one of only two Delaware companies to ever utilize a 5% trigger.¹⁷⁷ In addition the *Williams*’ pill had additional characteristics that made its reach “extreme.” The 5% trigger covered not just registered owners but also beneficial shareholders and anyone “acting in concert,” which the court noted included not just others acting under express agreements but also parallel conduct via a “daisy-chain” concept.¹⁷⁸ The Court concluded that, “[i]n sum[,] the Plan increases the range of *Williams*’ nuclear missile by a considerable distance beyond the ordinary poison pill.”¹⁷⁹ This broader reach was seen as an attempt to cut off private communications in advance of proxy contests—when stockholders seek to take the temperature of other stockholders in advance of launching such an effort.¹⁸⁰

Overall, the Court described this pill as having a more extreme combination of features “than any pill previously evaluated,” not a characterization that any defender would welcome in evaluating its chances of prevailing in a proportionality setting.¹⁸¹ Thus, this result may simply reflect how far out on a limb the facts were as compared to previous cases. It may simply be a case of facts never seen before, which may not be seen again such that the case may be a one

¹⁷⁶ See *In re the Williams Cos. S’holder Litig.*, 2021 WL 754593, at *20 (Del. Ch. Feb. 26, 2021).

¹⁷⁷ *Id.* at *35. The other, in the court’s words, had “distinguishable circumstances.”

¹⁷⁸ *Id.* at *12-13. In going beyond individual actors to also include those acting in concert the poison pill was tracking federal tender offer language, including the regulation’s three exceptions. However, in borrowing the three part concept, the *Williams* Companies poison pill changed the conjunction connecting the three exception from “or” to “and” with the result that the poison pill exception likely became much smaller and the trigger for the poison pill more expansive. *Id.* at *13.

¹⁷⁹ *Id.* at *35.

¹⁸⁰ *Id.* at *37-38.

¹⁸¹ *Id.* at *1.

off example. If so, in future cases, courts could return to an equilibrium within the range of the traditional *Unocal* result.

2. *The Importance of Williams Being Decided by an Equity Court*

That the Court of Chancery is a court of equity can provide some support for this explanation. There have always been cases in Chancery best explained by equity. In 1971, for example, the Delaware Supreme Court in *Schnell v. Chris-Craft Indus., Inc.* affirmed a chancery decision that struck down a board's attempt to move up the date of the annual shareholders' meeting to repel an insurgent. The few paragraphs of the substantive part of the opinion boiled down to one sentence: "...[I]nequitable action does not become permissible simply because it is legally possible."¹⁸²

The argument that *Williams* is primarily an equity case may be supported by the court's reliance on the *eBay* decision in explaining the result. That decision, as previously discussed, involved craigslist, a corporation had three shareholders, two founders with a majority and eBay as a minority shareholder.¹⁸³ The case thus differs from the publicly held setting of prominent *Unocal* and *Blasius* cases where fiduciary duties typically are used to check the acts of directors and managers, actors usually with only a small percentage of stock who are given control over the property of all the other shareholders who have a majority of the ownership interests.¹⁸⁴ Delaware is one of the few states that lacks an "oppression" statute, usually used to protect minority shareholders in closely held entities with only a few shareholders where there is no market to sell shares and the hierarchical rules of corporate law leave minority shareholders much more vulnerable than in public corporations.¹⁸⁵ The chancery court in *eBay* turned to the broad equitable remedy in such a situation and the *Williams* opinion extends that equitable reasoning to a much larger public corporation. Equity is the common denominator, but that may not signal a larger change in the law of publicly held companies. *Williams* may simply be one of those cases that arise when the planets are aligned and the facts are so one-

¹⁸² See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 438 (Del. 1971).

¹⁸³ See *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1,35 (Del. Ch. 2010).

¹⁸⁴ Cf. *Coster v. UIP Companies, Inc.*, 255 A.2d 952 (Del. 2021), another closely held corporation case where the Supreme Court reversed the Chancery Court for failing to decide the question of enhanced scrutiny/compelling justification test under *Blasius* after finding that one 50/50 shareholder who had control of the board had shown the entire fairness triggered by conflict as to a defensive tactic to block the other 50% shareholder from seeking the appointment of a custodian. On remand, in finding that a compelling justification had been shown, the Chancellor included a footnote supporting renewal of Strine's *Chesapeake/Mercier* project to bring *Blasius* and *Unocal* together in a workable manner: "Suffice to say, the struggle [of Delaware law to define with certainty the standard of review that Strine had flagged in *Mercier*] is real. And the struggle is compounded by the possibility that *Schnell* might serve as an independent standard in this context." *Id* at *8, note 58.

¹⁸⁵ See F. Hodge O'Neal and Robert B. Thompson, O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS §7.11 (2022).

sided that it does not tell us much about the law.¹⁸⁶ That the Supreme Court did not write a separate opinion in affirming the Vice Chancellor's decisions may support that argument.¹⁸⁷

B. Williams as Reflecting the Reality of a New and Different Corporate Governance Paradigm for Unocal

Explanations limited to nuclear weapons or equity reflect the reality of the unusual nature of the particular context but would miss the larger move in corporate governance that is recognizable in the opinion.

1. Corporate Governance Changes Driven by Markets and Technologies

Since the early takeover days of the mid 1980s, technology has spawned dramatic changes in markets, including the emergence of a multiplicity of roles for shareholders in publicly held American corporations. Today, the explosion in cloud-based methods of gathering and storing information have made it much cheaper to create, access, and retain information relevant to valuation and governance. The internet and other forms of digital communication have made it much easier for shareholders to communicate with other shareholders, including about possible takeovers and other questions of corporate governance.¹⁸⁸ In turn, these changes have spawned new groupings for shareholders, including new specializations. Institutional investors, including mutual funds and index funds, have become the investment vehicles of choice for ordinary investors.¹⁸⁹ Such funds are essentially intermediaries holding the funds of individual Americans, often through plans sponsored by their employer to enable the employees to save for retirement or their children's college.¹⁹⁰ In turn, these intermediary funds often rely on specialists like proxy advisory firms to efficiently address the voting part of share ownership in such large intermediated holdings.¹⁹¹ Activist funds, often hedge funds seeking above average market returns, have specialized in identifying possible companies in which governance

¹⁸⁶ See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971).

¹⁸⁷ See *The Williams Companies, Inc v. Wolosky*, 264 A.3d 641 (Table) 2021 WL 5112495 (Del. Nov. 3, 2021) (affirming "on the basis of and for the reasons assigned by the Court of Chancery.")

¹⁸⁸ See e.g. Seth C. Oranburg, *A Little Birdie Said: How Twitter Is Disrupting Shareholder Activism*, 20 FORD. J. CORP. & FIN. L. 695 (2015) (Activists can now access virtually all shareholders and influence public opinion through social networks, relatively unencumbered by reporting requirements under SEC rules."); Remus Valson, *Social Media and Shareholder Activism* <https://www.research.ed.ac.uk/en/publications/social-media-and-shareholder-activism> ("Activist shareholders use a variety of tools and channels to engage with the management and with their fellow share owners. Increasingly, they are turning to electronic platforms, such as Twitter, LinkedIn, YouTube, blogs or dedicated electronic forums.")

¹⁸⁹ See Lucian Bebchuk and Scot Hirst, *The Specter of the Three*, 99 B.U. L. REV. 721 (2019).

¹⁹⁰ Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Era of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359 (2014), hereinafter "Intermediary Capitalism".

¹⁹¹ See Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHICAGO BUS. L. REV. 417, 422 (2022); Stephen J. Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors, Myth or Reality*, 57 EMORY L. J. 869 (2018).

changes could produce additional shareholder value.¹⁹² The activist funds have proven successful in regularly getting the large intermediary funds to sometimes join them in pressuring directors for governance changes.¹⁹³

This change in technology and markets, in turn, has changed corporate governance. Delaware governance has long been centered on director power, with judicial review in takeovers particularly focused on protecting shareholder decision-making in the relatively narrow space of annual proxy campaigns to elect or replace boards of directors. Such issues now occupy a relatively smaller segment of corporate governance. Federal law since the New Deal has focused on disclosure to shareholders, with an aim to improve shareholder decision-making more broadly than provided under state law. Federal law of the 21st century has become more muscular. It now requires shareholder votes on compensation,¹⁹⁴ specifies the governing structures of boards of directors including to require the independence of directors serving on board committees,¹⁹⁵ and has added multiple requirements to give shareholders new entry points to governance.¹⁹⁶

Thus, twenty-first century corporate governance can best be understood as a three-legged stool that depends on the interaction of three distinct sources of power:

- 1) the traditional governance rights provided by state law; these generally authorize directors to make most corporate decisions and empowers shareholders to do only a few things via limited rights to vote, sell or sue;¹⁹⁷
- (2) a series of federal law enhancements that reshape the state governance structure by providing an additional set of shareholder rights or additional governance standards that directors or officers must meet (without displacing the traditional state law governance rules);
- (3) a set of private actors, mostly in the shareholder space and empowered by recent technological and market innovations, who sometimes choose to exercise one or more of the traditional state law powers or the federally-provided levers to influence governance.

The catalytic role of the private actors is not all-encompassing and is sometimes difficult to see. Consider for example, the place of staggered boards in corporations. State corporations law permits staggered terms for boards with as few as one-third of board seats to be filled at any one annual shareholders' meeting. The practical result is that a hostile takeover would require an insurgent to run (and fund) successful proxy campaigns at two successive annual meetings to

¹⁹² Such activist investors are willing to make multiple billion dollar investments to pursue such a strategy. See, e.g., Lauren Thomas & Laura Cooper, Elliott Management Takes Big Stake in Salesforce, WALL STREET JOURNAL (January 25, 2023, 9:48 AM EST), <https://www.wsj.com/articles/activist-takes-big-stake-in-salesforce-11674432531>.

¹⁹³ *Agency Capitalism*, supra note xx.

¹⁹⁴ See Dodd-Frank Wall Street Reform And Consumer Protection Act, Sec. 951. Shareholder Vote On Executive Compensation Disclosures, Pub. L. No. 111–203, 124 Stat. 1899, codified at 15 U.S.C. §78n-1.

¹⁹⁵ See 15 U.S.C. §78j-1, j-3, j-4; 17 CFR Rule 13a-15 (officer certification of financial statements).

¹⁹⁶ “SEC Approves Nasdaq comply or explain”, August 26, 2021.

¹⁹⁷ See Part I infra.

gain control of the board of directors. Staggered boards and poison pills were foundations for successful defensive strategies for decades post-*Unocal*. Then something unusual happened. Institutional shareholders chose to flex their voting power against staggered board provisions, including to make known they would vote against directors who did not remove the provisions that had received shareholder support at an annual meeting. Within a fairly short period in the early twenty-first century, the number of companies with staggered boards shrank dramatically.¹⁹⁸

Sometimes the change is seemingly hidden or even innocuous. Consider the federal requirement requiring that shareholders' choices on a director ballot include not just "for" or "against" but also "withhold."¹⁹⁹ How can a "withhold" vote affect anything when you can vote for or against? But, this change spurred widespread changes, led by institutional investors, to change bylaws in many public companies to provide for "majority voting." Normal state law rules provide for plurality voting: whoever gets the most votes among votes cast wins; nonvotes or withheld votes don't count.²⁰⁰ "Majority vote provisions (with the Pfizer versions the most well-known) typically provide that a candidate who gets a plurality but fails to get a majority must resign."²⁰¹ Many of these provisions also permit the board to decline to accept the resignation, giving some room for directors to resist the message (albeit at a cost of possibly incurring additional shareholder activism). Overall, it provides a relatively low cost means for shareholders to express displeasure with the board, (over executive compensation or ESG etc.) without having to undertake the costs and complications of a full-fledged proxy campaign.

The result is that governance today is a combination of the state law governance roles between directors and shareholders, a deeper set of federal rules that do not displace state law but provide additional levers that shareholders can pull to participate in governance, and a set of private sector intermediaries that sometimes, but certainly not always, choose to take advantages of these enhanced shareholder governance levers. In addition, the three legs of the stool have become self-reinforcing. Delaware, for example, has amended its corporations code, to permit bylaws to require shareholder nominees for directors to be included on the company's proxy and to permit bylaws that provide company reimbursement for shareholder efforts to elect directors, each in the aftermath of institutional shareholders activism and/or changes in federal law.²⁰² In another example, two parts of the federal government (the Department of Labor and the Securities and Exchange Commission) combined to provide new space for governance by requiring that institutional shareholders must vote their shares held for beneficial owners. This changed long-standing institutional behavior, who until then often

¹⁹⁸ *Embattled CEOs*, supra note xx.

¹⁹⁹ SEC Rule 14a-4(b) ("withhold" box required).

²⁰⁰ See e.g. Del. Gen. Corp. Law § 216(3).

²⁰¹ See Pfizer Inc., Corporate Governance Principles 1-2 (2008), available at http://media.pfizer.com/files/investors/corporate_governance/cg_principles.pdf;

²⁰² Del. Gen. Corp. L. §§ 112, 113.

had just not voted.²⁰³ This altered governance space, radically different than what was present when *Unocal*, *Revlon*, and *Blasius* were first written, provides the platform that led to changes visible in *Williams*.

2. *Williams as Reflecting this New World*

Williams illustrates this recognition of a broadened shareholder governance paradigm and directly connects its application of *Unocal* to earlier ideas developed in *Blasius* cases. First, *Williams* grounds its holdings on the central place of voting as the “ideological underpinning[] of Delaware law.”²⁰⁴ Here, then Vice Chancellor McCormick is channeling Chancellor Allen’s earlier invocation in *Blasius*, where he said “the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests... it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.”²⁰⁵

Second, the *Williams* court’s takedown of substantive coercion as a basis of satisfying *Unocal*’s first prong, providing the first case with a Supreme Court affirmance of such a holding, draws directly on this foundation. The *Williams* opinion repeatedly identifies “the tenet of Delaware law” that directors cannot justify their defensive tactics by arguing that “without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief in an uncoerced, fully informed election.”²⁰⁶ What is interesting for the current discussion is that the cases cited for this “tenet” generally arose in a *Blasius* setting, not *Unocal* and that there are *Unocal* cases such as *Paramount* and *Unitrin* that embraced the “substantive coercion” that is being rejected in *Williams*.²⁰⁷ There are also prior Delaware opinions, such as *Stroud* and *Liquid Audio*, that suggest *Blasius* should be “rarely” applied.²⁰⁸ *Williams* reflects the migration of this *Blasius* line of opinions based on voting into the *Unocal* space, with as yet an unknown impact on the “rarely applied” part of the *Blasius* reasoning.

Third, in perhaps the broadest recognition of changes now visible in *Unocal*, the proportionality prong discussion in *Williams* makes clear that this ideological foundation is not just limited to the mere casting of ballots for directors at an annual meeting as in *Unitrin* or *Airgas*, but takes in a much broader set of shareholder actions. The concerns over voting necessarily include other parts of corporate democracy such as communications well in advance of the vote

²⁰³ See *Intermediary Capitalism*, supra note xx at 1395-96, nn. 154-155.

²⁰⁴ See *In re the Williams Cos. S’holder Litig.*, 2021 WL 754593, at *30 (Del. Ch. Feb. 26, 2021).

²⁰⁵ *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (1988).

²⁰⁶ *Williams*, 2021 WL 754593, at *2.

²⁰⁷ See *id.* at *30 (describing the “extreme manifestation of the proscribed we-know-better justification for interfering with the franchise”); see also *id.* at 33 (detailing how “short-termism and distraction concerns boil down to the sort of we-know-better justification that Delaware law eschews in the voting context”).

²⁰⁸ See Part II *infra*.

itself.²⁰⁹ Thus the court identifies the “most problematic” aspect of the Williams poison pill as its “broad language [that] sweeps up potentially benign stockholder communications ‘relating to changing or *influencing* the control of the Company.’”²¹⁰ The opinion here draws on the writings of Marcel Kahan and Ed Rock who worried that defensive tactics “threaten to chill the sort of shareholder interactions on which sound corporate governance depends and that decades of reform have sought to encourage.”²¹¹ Vice-Chancellor (now Chancellor) McCormick then developed her own example of a three percent shareholder in a hypothetical *Williams* scenario with the shareholder proposing an ESG initiatives and threatening to run a proxy contest if the Board does not accept the proposal.²¹² The opinion describes a pill that impacts such communication about an ESG proposal prior to any proxy contest as illustrating a “fatal flaw” of the pill.²¹³ Subsequent examples suggest the extension of protected shareholder communication to include private communications in advance of proxy contests that “take the temperature” of other stockholders in advance of any particular action.²¹⁴

In such a new shareholder reality, the traditional *Blasius/Unocal* focus on shareholders electing board of directors has become too narrow. The result can be seen in *Williams*. A full-fledged takeover fight for control of the board no longer fully occupies the governance space. Now there is a broader focus on corporate democracy, of the same sort identified by Chancellor Allen in *Interco* and *Blasius*, but occurring in a much more diverse way using a variety of shareholder tools.

3. Clarifying the New Unocal

Williams shows that *Unocal* review has absorbed the core points of *Blasius* and assumed *Blasius*’s place as the frame for Delaware judges to work out judicial review when the broad director powers at the core of Delaware law run up against the ideological underpinning that the shareholder franchise has necessarily provided for the existence of such broad powers. Such a shift seems overdue. Multiple Delaware judges, particular Chancery judges, have recognized that *Blasius*’s “compelling justification” standard has proven too result-oriented to effectively sort out the cases where judicial review is appropriate, as described in Part II. At the same time, the *Unocal* test as set out in its early applications has seemed too easy for directors to satisfy in today’s takeover battles. Both its original threat and proportionality prongs are too reflective of the earlier takeover era when shareholders were more vulnerable to coercive offers from hostile bidders and courts accord director defensive actions more deference. The amazing success of poison pills in stopping almost all hostile tender offers has dramatically

²⁰⁹ See *id.* at *20 (detailing how the pill “infringes on the stockholders’ ability to communicate freely in connection with the stockholder franchise, much of which occurs outside the context of proxy contests... [harming the] stockholders and not the Company”).

²¹⁰ *Id.* at *37.(quoting the trial transcript with the emphasis added by the Court).

²¹¹ Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 965 (2019).

²¹² See *Williams*, 2021 WL 754593, at *38.

²¹³ *Id.*

²¹⁴ *Id.* at *38.

shrunk the need for the original *Unocal* with its broad threat and easy proportionality. The practical merging of voting and selling now occurs in practically all takeovers so that the need to address *Blasius*'s legitimacy point is in virtually constant. The "who gets to decide when" that can be so dominant in a *Moran/Paramount/Unitrin* context loses a significant part of its primacy. Not only have shareholder selling and shareholder voting become more integrated, but the voting part has grown to include a much broader set of actors across a range of actions well beyond the actual casting of a ballot at an annual meeting.

While *Williams* responds admirably to deficiencies of the existing paradigm just identified, it does so in a way that risks confusion as to enhanced scrutiny going forward. *Blasius* is not mentioned once in the opinion, even though its ideological underpinning language is at the core of the Court's reasoning in *Williams*. The plaintiffs' choice not to include a *Blasius* claim in the complaint can't obscure that the fundamental question of judicial review is the legitimacy question raised by *Blasius*, that was explicitly designed to apply in circumstances that would have satisfied the original *Unocal*. Similarly, the *Williams*' opinion move away from prior language used to describe threat and proportionality of the early *Unocal* era needs to more clearly identify the ties of those early cases to contexts in which shareholders were perceived as more vulnerable than in today's takeovers. The modern setting has made those early holdings no longer a proper fit. The new *Unocal* will be usually be applied in a setting that is much closer to the original *Blasius* than to the original *Unocal* and the standard of review should reflect that difference. At the same time, as the overlap means there will be a greater need to establish a "closer fit between means and ends" as is commonly found in *Blasius* review.²¹⁵ There may also be a need to reconsider some aspects of *Blasius* in addition to the move away from "compelling justification." In both *Blasius* and *Liquid Audio*, there was no attention given to alternative channels available to the shareholders. For example, the shareholders in *Blasius*, if blocked from getting control via written consent at issue in the case, likely had the channel of acting at the next annual meeting.

The market and technological developments in the public corporation space since *Unocal* have broadly expanded the space in which shareholder governance takes place, such that voting cannot be the end all and be all for application of a *Blasius* type of enhanced scrutiny. A variety of various types of shareholder communication, often outside the actual proxy process, can trigger an enhanced scrutiny analysis. The broader set of covered actions should be paired with a more nuanced discussion of proportionality that will vary with the importance of the communication in governance.

Finally, in this list of clarity suggestions, the temptation of Delaware courts to sometimes overextend a good thing should be examined as to the new *Unocal*. There are times where the new *Unocal/Blasius* has been applied where it is not necessary and that can create confusion. In *eBay* and *Coster*, two cases previously discussed, the enhanced scrutiny of *Blasius* was applied

²¹⁵ *Johnston v. Pedersen*, 28 A.3d 1079, 1090 (Del. Ch. 2011).

to corporations with either two or three shareholders. There is no doubt that a majority or controlling shareholder can abuse corporate power in such a setting, but long-standing standard of review based on conflict that triggers entire fairness is better suited for that task. Delaware has never been particularly good at recognizing the special vulnerability of minority shareholders in a closely held setting where the absence of a market and the multi-dimensional interactions with the entity dramatically increase the potential for abuse to the minority after a falling out among the parties. Such settings are better addressed with standards of review that reflect the particular vulnerabilities of non-controlling investors in a closely held firm. Similarly there have been *Blasius* applications in publicly held firms where there is a controlling shareholder whose conduct can better be addressed through an entire fairness standard of review than trying to extend *Blasius* and the new *Unocal* to that setting.

Conclusion

The *Unocal/Blasius* space in Delaware takeover law has long bedeviled Delaware judges and litigants. The confusion can be traced back to two cases that came before the Delaware Supreme Court at virtually the same time in 1985 whose decisions point in conflicting directions. *Unocal* introduced an intermediate level of review that gave shareholders additional room to challenge director action in a takeover. In contrast, *Moran* declared the centrality of directors getting to make decisions for the entity extending to acceptance of a new-fangled defensive tactic, the poison pill that would protect companies against most takeovers. The Chancery Court's 2021 decision in *Williams Companies Stockholder Litigation*, affirmed by the Delaware Supreme Court, revisits that long-running debate and adjusts the frame to takeover practices that have developed since *Unocal* and *Blasius* were first decided. The reality of corporate governance today is that markets and technologies have fundamentally reshaped governance, particularly as to the identify, information, and resources of shareholders in American public companies and the broader strategies available to them. The new *Unocal* recognizes these changes and once again is bringing Delaware law current.²¹⁶

²¹⁶ Weinberger v. UOP, Inc., 457 A.2d 701, 712 (Del. 1983).