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 environmental, social, and corporate governance ("ESG"); corporate purpose; diversity; and benefit corporations. Yet change in actual legal rules has been slow to appear. Against that backdrop, two Delaware decisions of the 2020s suggest a significant adaptation in a more traditional part of corporate law. These decisions reinterpret key aspects of Unocal Corp. v. Mesa Petroleum Co., *a foundational case in the current corporate law paradigm. The first is the absorption into* Unocal *of what has been the separate (and more intense)* Blasius Industries, Inc. v. Atlas Corp. *standard of review of director acts impeding shareholder voting. The second is the narrowing of several* Unocal *elements that increase the likelihood that some director governance decisions, such as implementing or declining to redeem a poison pill, will fail judicial review. This Article examines the corporate law template that gave rise to* Unocal *and other standards of review, the changes in that template evidenced by recent Delaware decisions, and how these changes reflect a reshaped role for shareholders in the face of recent technological innovations and market changes.*

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INTRODUCTION

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, two Delaware decisions of the early 2020s present a larger change in a more traditional part of corporate law, dramatically reframing the role of *Unocal Corp v. Mesa Petroleum Co.*, a key case in the current corporate law paradigm.[6] In 2023, in *Coster v. UIP Cos.*, the Delaware Supreme Court confirmed the absorption into *Unocal* of what has been a separate (and more intense) *Blasius Industries, Inc. v. Atlas Corp.* standard of review of director acts impeding shareholder voting.[7] This displacement of *Blasius* was not surprising. Its result-oriented "compelling justification" standard had proved troublesome for years. Yet there was still widespread recognition that something more than *Unocal* review was necessary to protect the shareholder franchise as the ideological foundation for the broad delegation of power to boards of directors that is at the heart of Delaware corporate law. The *Coster* opinion sought to address this displacement of *Blasius* by reference to a "more muscular" *Unocal* that would be infused with "the spirit of *Blasius*" when applied to shareholder voting.

Equally important to the new *Unocal* was the decision 19 months earlier in *Williams Cos. Stockholder Litigation*, where the Delaware Supreme Court affirmed a decision of the Delaware Court of Chancery[8] that had incorporated shifts in

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1. *See, e.g.*, Elizabeth Pollman, *The Making and Meaning of ESG* at Abstract (Eur. Corp. Governance Inst. – L., Working Paper No. 659/2022), https://ssrn.com/abtract=4219857 [https://perma.cc/V58P-7WYJ]. *See generally* Dorothy Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021).

2. *See, e.g.*, Lucian A. Bebchuk & Robert Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 107 (2020).

3. *See, e.g.*, Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 3–4 (2022).

4. *See, e.g.*, Michael B. Doff et al., *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 114 (2021).

5. For example, some of the more promising threads of legal change in the stakeholder space might face pullbacks. *See, e.g.*, Chelsey Cox, *SEC Weighs Making 'Adjustments' to Controversial Climate Risk Disclosure Rule, Chairman Gensler Says*, CNBC (Feb. 10, 2023, 10:08 AM), https://www.cnbc.com/2023/02/10/sec-weighs-making-adjustments-to-controversial-climate-risk-disclosure-rule-chairman-gensler-says.html [https://perma.cc/YJ95-LT4Q] (reporting of possible adjustments to the SEC climate rules); Andrew Ross Sorkin et al., *An Activist Investor Takes on BlackRock Over E.S.G.*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/business/dealbook/blackrock-esg-activist-bluebell.html [https://perma.cc/T23K-4TMT] (accusing BlackRock of flip-flops on the use of coal in energy production).

6. 493 A.2d 946 (Del. 1985).

7. Coster v. UIP Cos., No. 163, 2022, 2023 WL 4239581 (Del. June 28, 2023). *See also* Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988)

8. No. 2020-0707-KSJM, 2021 WL 754593, at *2 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion).

Delaware law as to several key *Unocal* elements that had developed over the previous four decades. Each change increased the likelihood that some director governance decisions, such as implementing or declining to redeem a poison pill, will fail judicial review. These changes equip *Unocal* review to better play the role envisioned by *Coster*. Together these decisions define a new *Unocal*.

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*[9] (and two other Delaware decisions shortly thereafter—*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[10] and *Blasius*[11]) 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.[12] As it inserted a third "enhanced" level of judicial scrutiny between the two existing standards, the Court explained: "[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."[13] 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."[14]

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.[15] Hostile takeovers had exposed what came to

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The *Williams* affirmance was the first time the Delaware Supreme Court had provided approval of points that various Court of Chancery decisions had been developing over the previous twenty years. See *infra* Part II.B.

9. *Unocal*, 493 A.2d at 949.

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

11. 564 A.2d 651 (Del. Ch. 1988). Unlike the other decisions discussed here, *Blasius* was a decision by Delaware's Chancellor, later approved by the Delaware Supreme Court. *See infra* note 53 and accompanying text.

12. 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." *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.").

13. *Unocal*, 493 A.2d at 957.

14. 564 A.2d at 659.

15. 500 A.2d 1346, 1357 (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 Delaware Supreme Court on May 16, 1985, with the decision announced orally by the Court on the following day and the written decision followed about three weeks later. 493 A.2d at 946. *Moran* was argued on

be seen as an anomaly in Delaware corporate law. In traditional corporate combinations, such as mergers, Delaware statutes gave directors a veto. 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 a similar veto in tender offers as well, astute planners came up with something entirely new—a poison pill—that did exactly that. In approving a privately created change to a fundamental component of Delaware corporate law, *Moran* illustrated another, and often more important, principle—the state's recurring desire to protect director decision-making, even in a world of enhanced scrutiny. The ideological approaches of these two opinions were in some tension from the beginning. In Part I, this Article 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.

In Part II, this Article reviews Delaware takeover decisions made over the four decades preceding *Williams* and *Coster* 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 illustrations of private ordering. Section II.B focuses on the work of the Chancery judges, Delaware's judicial specialists in corporate law, in working through the troublesome overlap between *Unocal* and *Blasius*. *Blasius* had originally been designed as separate from and more exacting than *Unocal*, but it later evolved into an uncertain appendage to *Unocal*. *Coster*, decided in 2023, was the Supreme Court's first comprehensive treatment of *Blasius* and *Unocal* and affirmed *Unocal's* absorption of *Blasius*. In *Williams*, decided in 2021, the Supreme Court affirmed significant changes in various *Unocal* elements that are particularly relevant in the space that was being absorbed from *Blasius*. The result has been that *Unocal* will now be used in the part of the enhanced scrutiny space formerly left to *Blasius*—and with a different look than *Unocal* as we earlier knew it.

Lastly, Part III explores the explanations and implications for this seeming change of direction. It is possible to see these latest decisions as one-off cases reflecting the specific facts of the particular cases within the bounds of traditional takeover doctrine or as the Supreme Court rejiggering the Court of Chancery's two-decades-long development of the relationship between *Unocal* and *Blasius*. More broadly, these decisions may also reflect the larger changes that have taken place in the takeover space. In 1985, courts accepted dispersed shareholders' vulnerability to coercive bust-up takeovers in public corporations and freely permitted directors to act to block such deals.[16] Shareholder voting remained a somewhat esoteric space to be protected from director control, as acknowledged in *Blasius*, but the Supreme

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May 21, 1985, with a decision announced six months later. 500 A.2d at 1346. 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 writing *Moran*. The third member of the *Unocal* panel was Clarence Taylor, sitting by designation from the Delaware Superior Court. *Unocal*, 493 A.2d at 949. The third member of the *Moran* panel was Chief Justice William Christie. *Moran*, 500 A.2d at 1348.

16. *Unocal*, 493 A.2d at 955; *Moran*, 500 A.2d at 1355.

Court was prone to emphasizing how rare that would be.[17] 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 to voting at annual meetings but includes a much more expansive set of actions that form a part of the framework required to legitimize director power. By the time of *Williams* and *Coster*, these threads produced "the new *Unocal*," an enhanced scrutiny paradigm that had more of the balance originally suggested in *Unocal*, *Revlon*, and *Blasius*.

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.[18] Shareholders get to do only a few things—they vote, sell, and sue, but each is in carefully limited doses.[19] Courts apply fiduciary duties to constrain management's overreach, but the result is seldom to overturn core governance decisions. Those three sets of legal rules intentionally leave considerable room for the fourth foundation: private ordering. This Part introduces those four pillars immediately below and then shows how the takeover wars of the 1980s shaped the governance paradigm that is still dominant in today's corporate law world:

- First, 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.[20] 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.[21]
- Second, shareholders are essentially permitted to do three things—vote, sell, and sue—but only in very limited doses.[22] Together these are a means to restrain agency costs arising from directors having so much power.[23]
- Third, courts can constrain director decisions, usually by enforcing the fiduciary duties of care and loyalty they owe to

17. *See infra* Subsection I.C.3.

18. *See* DEL. CODE ANN. tit. 8, § 141 (2020). *See also* MODEL BUS. CORP. ACT § 8.01(b) (amended 2016) (AM. BAR ASS'N 1969).

19. *See* Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell and Sue*, 62 L. & CONTEMP. PROBS. 215, 216–18 (1999).

20. *See* tit. 8, § 141. *See also* MODEL BUS. CORP. ACT § 8.01(b) (amended 2016) (AM. BAR ASS'N 1969).

21. *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).

22. Thompson, *supra* note 19, at 216–18.

23. *See, e.g.*, Lund & Pollman, *supra* note 1, at 2573; Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 869–74 (2013).

shareholders. There is a predictable pattern to this litigation, as judges first defer to director decisions unless plaintiffs show a breach of duty. 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. Delaware statutes give directors the power to pick a merger partner, determine the terms of the combination, or say no to any unwanted offer.[24] Approval of the merger itself, like certain other fundamental corporate changes, differs in that statutes require that mergers must also be approved by a majority of shareholders.[25] This is one of the few items for which shareholder governance participation is required.[26] But the board remains in the driver's seat. 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

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24. *See* tit. 8, § 141(a) ("[B]usiness and affairs of [the] corporation . . . shall be managed by or under the direction of a board of directors."); tit. 8, § 251(b)(1) ("The board of directors . . . shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability." The agreement shall state, among other things, "the terms and conditions of the merger or consolidation . . . .").

25. *See* tit. 8, § 251(c); *see also* MODEL BUS. CORP. ACT § 11.04(b) (amended 2016) (AM. BAR ASS'N 1969).

26. Shareholders are also required to vote on the sale of substantially all assets, amendments to the articles, and dissolution. tit. 8, §§ 242, 271, 275. Stock exchange listing requirements also require shareholder approval of issuances of new shares above a threshold. NYSE LISTED CO. MANUAL § 312.03(c), https://nyse.wolterskluwer.cloud/listed-company-manual [https://perma.cc/Q3LH-N2N8] (last visited Jul 29, 2023).

twenty-first century, usually permitted electing only one-third of the board at each annual meeting.[27] 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.[28] Those rules and 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 law[29]—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.[30] Statutory amendments to 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 defense lawyers and other deal planners invented and successfully defended in the Delaware courts as within a board's traditional governance powers.[31]

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 more effective defensive tactics that boards could deploy to block unwanted offers. Note that this protection was necessary for only a few things that shareholders get to decide under American corporation statutes. Because 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; a 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

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27. *See* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1007–09 (2010) (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).

28. Williams Act, Pub. L. No. 90-439, 82 Stat. 454, 454–57 (1968) (codified at 15 U.S.C. § 78n).

29. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 94–95 (Del. Ch. 2011) (Chandler, C.) (quoting TW Servs., Inc. v. SWT Acqs. Corp., No. CIV.A. 10298, 1989 WL 20290, at *9–10 (Del. Ch. Mar. 2, 1989) (Allen, C.)).

30. *Air Prods.*, 16 A.3d at 95.

31. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348–50 (Del. 1985).

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, using tactics such as getting rid of their cash and taking on unattractive amounts of debt,[32] selling their "crown jewel" assets,[33] or implementing various other defensive tactics.[34] Alternatively, states passed multiple "anti-takeover" acts in an effort to block hostile tender offers—sometimes two, three, six, or more separate statutes.[35] The board actions provided some protection against insurgents, but it usually came at considerable cost to the business and eventually left the target still vulnerable to the takeover.[36] The state statutes faced legal challenges as inconsistent with federal law, with mixed results at the U.S. Supreme Court.[37]

Corporate planners on the target side in the 1980s needed a defense that did not then exist. The ideal tool would: (i) block the remaining route under traditional governance rules that had permitted unilateral shareholder action to accept a hostile takeover; (ii) do so with minimal cost and disruption to the target company's business; and (iii) 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."[38] Looking back, the enduring stability the poison pill 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 a focus of 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 often 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.[39] Four of those characteristics

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32. *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1148 (Del. 1990) (Time, the target company, took on 7–10 billion dollars of additional debt to fund a combination with Warner, effectively avoiding a hostile takeover of Time by Paramount).

33. *See* City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 794 (Del. Ch. 1988) (target company sold its premier division to appear less attractive).

34. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 177–79 (Del. 1986).

35. *See* Amanda Acq. Corp. v. Universal Food Corp., 877 F.2d 496, 497–98 (7th Cir. 1989) (describing the mixed success of first, second, and third generations of statutes).

36. *See City Cap.*, 551 A.2d at 793 (upholding selling assets).

37. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 643 (1982); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 80–81 (1987).

38. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 95 (Del. Ch. 2011) (Chandler, C.) (quoting TW Servs., Inc. v. SWT Acqs. Corp., No. CIV.A. 10298, 1989 WL 20290, at *9–10 (Del. Ch. Mar. 2, 1989) (Allen, C.)).

39. Letter from M. Lipton to Clients (Nov. 21, 1985), *reprinted in* Robert B. Thompson, MERGERS AND ACQUISITIONS, LAW & FINANCE 222–27 (Aspen 4th ed. 2022)

describe "rights" to be issued pursuant to the plan. For example, each shareholder receives a "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.[40] Not surprisingly, there is no history of those rights being exercised to obtain such preferred stock.

Three of the other characteristics detail the "placeholder" purpose of this part of the 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.[41] 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," can now 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" rate will be even larger, significantly increasing the harm to the hostile bidder.[42]

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 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.[43] This is truly poison, and it is not surprising that there are only rare examples of a poison pill having been triggered.[44]

(paying attention particularly to Appendix A that defines 12 key terms) [hereinafter *Appendix A*].

40. *Id.* at 224–26 (defining "Exercise Price" and "Terms of Preferred Stock").

41. *Id.* at 226 (defining "Federal Income Tax Consequences" and "Accounting Consequences").

42. *Id.* at 224–25 (defining "Protection Against Squeeze Out" and "Protection Against Creeping Acquisition/Open Market Purchases").

43. 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.

44. *See, e.g.*, Moran v. Household Int'l., Inc., 500 A.2d 1346, 1352 (Del. 1985) (describing the trigger of the pill in a deal involving Crown Zellerbach); Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 604–07 (Del. 2010) (involving a tax setting that likely has limited applicability).

The most important transactional impact of the poison pill comes 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 minuscule sum (e.g., \$.01 per right).[45] 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

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 director action if challenged unless a showing of conflict or other director disability triggers a more intrusive review that requires the defendant to prove entire fairness.[46]

As takeovers began to heat up in the years before the appearance of the poison pill, some high-profile cases suggested the business judgment rule would apply absent the directors having a primary purpose to retain control or otherwise acting in bad faith.[47] The part of governance law that the Delaware Supreme Court in *Unocal* felt "must grow and develop"[48] was outside this obvious self-dealing (i.e., when insiders were on both sides of a transaction).[49] *Unocal* focused on the adjacent space of a takeover defense which presented the "omnipresent specter that a board may be acting primarily in its own interests rather than those of the corporation and its shareholders . . . ."[50] 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.[51]

Within a year, the Delaware Supreme Court announced a second type of enhanced scrutiny in response to takeovers. In *Revlon*, the Court determined that

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45. *See Appendix A*, *supra* note 39, at 225 (describing "Redemption").

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

47. 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); Panter v. Marshall Field & Co., 646 F.2d 271, 293 n.7 (7th Cir. 1981) (declining to move off business judgment deference absent bad faith "as long as it can be attributed to any rational business purpose"). The *Johnson* and *Panter* decisions are cited in *Unocal*, 493 A.2d at 954. The former was written by Collins J. Seitz, Jr., a former Chancellor of Delaware, then on the federal bench in the Third Circuit Court of Appeals. *Johnson*, 629 F.2d at 288.

48. *Unocal*, 493 A.2d at 957.

49. Such transactions had long triggered the more intense judicial review based on entire fairness. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

50. *Unocal*, 493 A.2d at 954.

51. *Id.* at 953, 955.

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.[52] Two years later, Chancellor Allen's decision in *Blasius* announced a third type of enhanced scrutiny when director action interfered with the shareholder vote.[53]

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.[54] 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.[55] This Section 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 a threat to the company's "corporate policy and effectiveness" and that the defensive 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.[56]

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52. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986). *Revlon* was decided by a three-judge panel of the Delaware Supreme Court that included Andrew Moore and John McNeilly, the pair of justices who had also decided *Unocal* and *Moran*. *Id.* at 175; *see also Unocal*, 493 A.2d at 949; Moran v. Household Int'l Inc., 500 A.2d 1346, 1348 (Del. 1985). *Revlon* was argued on October 31, 1985, about five months after oral arguments in *Unocal* and *Moran*. 506 A.2d at 173. The third member of the *Revlon* panel was Judge Bernard Balick from the Superior Court sitting by designation. *Id.* The "for sale" trigger has evolved somewhat since the initial case. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1149–51 (Del. 1989) (citations omitted) (declining "to extend *Revlon*'s application to corporate transactions simply because they might be construed as putting a corporation either 'in play' or 'up for sale' . . . [t]he adoption of structural safety devices alone does not trigger *Revlon*. Rather . . . such devices are properly subject to a *Unocal* analysis").

53. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("[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 Delaware Supreme Court subsequently embraced *Blasius's* approach. *See* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1129 (Del. 2003).

54. City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988).

55. *See* James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 349–75 (2018) (exploring pre-*Williams* development of *Unocal* and *Blasius*).

56. *Unocal*, 493 A.2d at 955.

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. The reality was less attractive. The $54 cash tender offer price would only be available for about 37% of the outstanding Unocal shares.[57] Mesa had already acquired 13% on the open market,[58] 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.[59] 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.[60] 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" and forced to receive the lower junk bond price for the entirety of its stake.[61] 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.[62]

Similarly, in *Moran*, the Delaware Supreme Court's first poison pill case (heard within a few days of the *Unocal* decision), the Court relied on the company's

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57. *Id.* at 949.

58. *Id.*

59. *See* DEL. CODE. ANN. Tit. 8, § 251(c) (2020) (requiring a majority vote by shareholders for a merger).

60. *Unocal*, 493 A.2d at 956.

61. *See* Frank H. Easterbrook & Daniel R. Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. L. 1733, 1739 (1981) (discussing prisoner dilemmas in a poison pill and takeover situation).

62. *Unocal*, 493 A.2d at 957–58. The defensive tactic was that if Mesa's first step was successful, the company would immediately buy back the remaining 49% of the shares 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. *Id.* at 951. 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). *Id.* 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 preexisting market price before the Mesa offer was made. *Id.*

vulnerability to such coercive techniques 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.[63]

In subsequent Delaware 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 a disproportionate response—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 the Court's 1989 decision in *Paramount Communications, Inc. v. Time, Inc*.[64] Within that case the Court chose to speak to another case applying *Unocal* that had not come before the high court, *City Capital Associates v. Interco, Inc*.[65] The directors' task in showing a threat in *Interco* was significantly harder than it had been in *Unocal* because they lacked the same structurally coercive elements—the bid was an all-cash-for-all-shares offer—initially offered at a 50% premium over market price and thereafter twice increased.[66] 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.[67]

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 could afford the board leverage to extract a more valuable deal for shareholders.[68] But the Chancellor also recognized Delaware limits as to what constitutes a threat in the setting of a noncoercive offer: "[T]here may come a time when a board's fiduciary duty will require it to redeem the rights and to permit the shareholders to choose."[69] More directly, the Chancellor said:

> 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

63. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1357 (Del. 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, homing in on the unprecedented characteristics of the director action. *Id.* at 1348–57. 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. *Id.* at 1351, 1357. 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.

64. 571 A.2d 1140, 1141–55 (Del. 1989).

65. 551 A.2d 787, 790–91 (Del. Ch. 1988).

66. *Id.* at 792, 794 (describing increases in bid price).

67. *Id.* at 789–91, 797 (accepting "[t]he value of the *Interco* restructuring [as] inherently a debatable proposition").

68. *Id.* at 797–98.

69. *Id.* at 798.

> 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 corporate law.[70]

In *Paramount v. Time*, the Time board's use of a defensive tactic—changing its acquisition of Warner from a merger (that would require the vote of Time shareholders) to a tender offer to Warner shareholders, which could be done by the Time directors alone—was challenged as depriving the Time shareholders of the substantially higher value they would have received from Paramount as compared to the deal with Warner.[71] The Court took the opportunity to rebuff *Interco* as a "narrow and rigid construction of *Unocal*."[72] It described the plaintiffs' argument as a

> fundamental misconception of [the Delaware Supreme Court's] standard of review under *Unocal* principally because it would involve the court in substituting its judgment as to what is a "better" deal for 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 such approach as not in keeping with proper *Unocal* analysis. *See, e.g.*, *Interco*, 551 A.2d 787 and its progeny . . . .[73]

Over time, cases filled in the application of the *Unocal* test consistently with the evolution suggested by the opinion in *Paramount v. Time*; i.e., protecting the space for director decision-making prevailed over enhanced scrutiny of that same decision-making.

By the time of *Unitrin Inc. v. American General Corp.* in 1995, the "threat" prong had been expanded in ways that gave more room for defensive tactics: for example, substantive coercion (that the target shareholders might accept a hostile offer because of ignorance or mistaken belief) had been accepted as a threat.[74] In addition, the "proportionality" prong seemed to have been loosened as well. "Draconian," "coercive," and "preclusive" were included as measures of what would make a response disproportional, and if none of these were shown, the proportionality review shifted to a focus on whether the defenses were within the "range of reasonableness."[75] So long as shareholders had one route to pursue, closing off other stockholder avenues to oppose director defensive tactics could still pass the *Unocal* test.[76] 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 fiduciary duties" and repeated the Court's admonition from earlier

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70. *Id.* at 799–800.

71. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1141–42 (Del. 1989).

72. *Id.* at 1153.

73. *Id.* (citing City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 787 (Del. Ch. 1988).

74. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1384–85 (Del. 1995).

75. *Id.* at 1387–88.

76. *Id.* at 1384.

cases that the "courts will not substitute their business judgment for that of the directors."[77]

A quarter century after the beginning of the enhanced scrutiny era, Chancellor Chandler's *Air Products & Chemicals, Inc. v. Airgas, Inc.* opinion acknowledged the continuing applicability of the Delaware 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*.[78] As to the threat prong, Chandler voiced real doubt about substantive coercion, which had come to occupy a significant space in the "threat" universe.[79] 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 at this point in time—under existing Delaware law, it apparently does.[80]

A bit further into the opinion, he acknowledged 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* . . . .[81]

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.[82] 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 stockholders' desire to accept it."[83]

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 that 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 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

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77. *Id.* at 1386, 1388.

78. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 94–97, 114–16 (Del. Ch. 2011).

79. *Id.* at 96–101. The Chancellor agreed with the criticism of substantive coercion expressed in earlier decisions but noted "that is not the current state of our law." *Id.* at 101.

80. *Id.* at 56–57.

81. *Id.* at 57.

82. *Id.*

83. *Id.* at 58.

shareholders, or they could run a proxy contest at the next annual meeting, which would require extensive funding and securing a majority of votes.[84] 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.[85] 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,[86] Revlon's board negotiated a sale to a private equity bidder who might have had a greater need for experienced management in the cosmetics business.[87] 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.[88] The Court opined that this new context "significantly altered the board's responsibilities" under *Unocal*; more specifically, its decision 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.[89]

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 the bounds of *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's directors had a *Revlon* duty to get the best price for Time (i.e., the 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

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84. *Id.* at 115–23. The bidder had, in fact, run such a contest at the prior annual meeting and won, electing their entire slate of directors available for election at that meeting. *Id.* at 115. However, given the staggered board in place, the shareholders could only elect one-third of the board, an insufficient amount to change corporate policy. *Id.*

85. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986). Justices McNeilly and Moore, who had decided the *Unocal* case, were on the three-judge panel in *Revlon* alongside another Delaware judge sitting by designation. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985); *Revlon*, 506 A.2d at 175.

86. The power of the poison pill was not yet settled at this time—the *Moran* opinion was still weeks away from being handed down. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (decided Nov. 19, 1985).

87. *See Revlon*, 506 A.2d at 178–79 (describing Revlon's negotiations with Forstmann and the investment group Adler & Shaykin).

88. *Id.* at 178.

89. *Id.* at 182.

stock-for-stock merger with Warner (with Time as the surviving entity) would involve Time issuing Warner shareholders more than 60% of Time's 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.[90] Time shareholders who each owned a small fraction of a large publicly traded media company before the deal would continue to own a small 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 because 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.[91] 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*.[92] 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.[93] 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 directors to make a perfect decision in pursuing the best price but only that they make a reasonable decision.[94] In *Lyondell Chemical. Co. v. Ryan*, for example, the plaintiffs sought to use the absence of the board having done a market check as a *Revlon* failure.[95] There was no competing offer, simply a board decision to go forward with a persistent bidder willing to offer a blowout price at a price substantially higher than its own initial bid.[96] The trial court had determined that the board was independent and not

90. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1151 (Del. 1989).
91. Paramount Commc'ns, Inc. v. QVC Networks, Inc., 637 A.2d 34, 46–48 (Del. 1994).
92. *Compare id.* at 49–50, *with Paramount v. Time*, 571 A.2d at 1142.
93. *Paramount v. QVC*, 637 A.2d at 43.
94. *Id.* at 45.
95. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009).
96. *Id.* at 237–39, 244.

motivated by self-interest or ill will and any possible claim of breach of care was blocked by the company's exculpation provisions 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.[97] Emphasizing language in previous *Revlon* decisions that there is no single blueprint that a board must follow to meet *Revlon*[98] and that "[d]irector decisions must be reasonable, not perfect,"[99] the Supreme Court found that the directors met their *Revlon* duty even in the absence of conducting an auction or an explicit market check.[100] *Revlon* remains a challenging burden in some settings, but there is a significant opportunity for planners to sidestep its application by agreeing to stock-for-stock deals or relying on process to occupy a broader role when there is no second bidder and a blowout price.[101]

3. Blasius

Like *Revlon*, the third leg of enhanced scrutiny—*Blasius*—offered plaintiffs the potential to move to a much more demanding standard of review than *Unocal* or the business judgment 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.[102] 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.[103] 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.[104] A new 9% 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.[105] 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.[106]

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97. *Id.* at 239–40.

98. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989).

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

100. *Id.* at 243–44 ("[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.").

101. *See, e.g.*, C & J Energy Servs., Inc. v. City of Miami Gen. Employees', 107 A.3d 1049, 1053 (Del. 2014) (Outside of hostile bid setting, "[w]hen a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal, [the Court] cannot conclude that the board likely violated its *Revlon* duties").

102. MM Cos, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) ("In *Blasius*, the Chancellor then applied that compelling justification standard of enhanced judicial review in examining a board's action to expand its size in the context of a contested election of directors, exactly what the Liquid Audio board did in this case.").

103. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659–60 (Del. Ch. 1988).

104. *Id.* at 653.

105. *Id.* at 653–54.

106. *Id.* at 655–56, 670 n.7.

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.[107]

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.[108] 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.[109] 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.[110] His answer was that Delaware cases and sound legal principles *require* that the *Unocal* rule *not* be applied in such a setting.[111] His reason was foundational to corporate law—the central importance of the franchise to the scheme of corporate governance. Director actions impeding that foundational shareholder role required "closer scrutiny" than that provided by *Unocal*.[112] He declared that "the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests," and "the exercise of power by [directors] over vast aggregations of property that they do not own."[113] From the beginning, *Blasius* was intended to block a subset of board actions that *Unocal* would permit.[114]

Allen put his discussion of the shareholder franchise and its role in corporate governance within the larger frame of shareholder governance: "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."[115] 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 avenue of their governance rights (selling), Allen

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107. *Id.* at 656. This would leave the current management in control until at least the next annual meeting when directors would be elected. *See also* DEL. CODE. ANN. tit. 8, § 211(b) (2020) ("[A]n annual meeting of stockholders shall be held for the election of directors.").

108. *Blasius*, 564 A.2d at 658.

109. *Id.* at 659.

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

111. *Id.*

112. *Id. But see* 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).

113. *Blasius*, 564 A.2d at 659.

114. *Blasius* followed in the lineage of *Schnell v. Chris-Craft*, a takeover case from the early 1970s—before the enhanced duty regime appeared. 285 A.2d 437 (Del. 1971). *Schnell* is still cited today for its embrace of the broad equitable principle that an "inequitable action does not become permissible simply because it is legally possible," thus offering equitable relief more generally without proving any of the enhanced scrutiny requirements. *See, e.g.*, Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *4 (Del. June 28, 2023) (quoting *Schnell*, 285 A.2d at 439).

115. *Blasius*, 564 A.2d at 659.

repeated the same necessary connection between shareholder governance 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.[116]

The Delaware Supreme Court was slow to do very much with *Blasius*. In the decade or so after *Blasius*, the Supreme Court's discussions of that holding centered around identifying contexts in which it would *not* apply in contexts that were themselves atypical of the takeover setting that generated the development of enhanced scrutiny review. The Court's 1992 decision in *Stroud v. Grace*, for example, is frequently cited for a footnote that *Unocal* does not render *Blasius* meaningless.[117] Yet *Stroud* was hardly about *Blasius*; the Court held that neither *Unocal* nor *Blasius* applied to *Stroud's* facts—management already controlled 50% of the company's shares.[118] Further, the Court found that the plaintiffs had "utterly failed" in proving their claim challenging board actions.[119]

Similarly, the Court's 1996 decision in *Williams v. Geier* declared that the burden of demonstrating a compelling justification was very high, with the result being that *Blasius* is "rarely applied."[120] There, too, the fact pattern strayed from the typical takeover setting where management seeks to protect itself 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.[121]

Unitrin, decided the year before *Geier*, captures the application of this narrow view of *Blasius* in the context of a traditional takeover. There, the board defended against shareholder action that would reverse a management decision.[122] The Delaware Supreme Court began its opinion with reference to the key point of *Blasius* as to the special importance of protecting the shareholder franchise.[123] It then disposed of that impulse with a conclusory statement, without analysis, that *Blasius* does not apply in the absence of a primary purpose to interfere with or

116. City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 799–800 (Del. Ch. 1988).
117. Stroud v. Grace, 606 A.2d 75, 96 n.3 (Del. 1992).
118. *Id.* at 79.
119. *Id.* at 90.
120. Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996).
121. *Id.* at 1371.
122. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1366–70 (Del. 1995).
123. *Id.* at 1378–79.

impede the vote and slid into a pure *Unocal* analysis that occupied the remainder of the opinion, ending with no violation found.[124]

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 Court 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. 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 pure issue of dollars."[125] The Chancery Court's conclusion that the defensive steps would require the insurgents to outpoll the incumbent directors by up to a three-to-one margin was "de minimis" in that setting.[126] *Blasius's* primary purpose came to be associated only with contexts in which there was no path to a proxy victory, leaving out defenses that made proxy fights more difficult and less likely to succeed.[127] 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), the Court repeated the conclusory statement from *Geier* that "*Blasius* . . . is rarely applied."[128] As in *Geier*, there was no explanation, leaving unclear the *Blasius* decision's reach.

4. The Arc of Enhanced Scrutiny

The pattern of enhanced scrutiny before *Williams* and *Coster*, 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 employ it and have found it difficult to meld with *Unocal* in a way that would be consistent with *Blasius's* origins. The next Part explores the extent to which the *Williams* and *Coster* decisions change this and the extent to which the opinions recognize the melding of the different parts of enhanced scrutiny, particularly *Unocal* and *Blasius*.

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124. *Id.* at 1378–79, 1391. The focus is on the "viability" of a proxy contest, even if more problematic for the bidder. If not mathematically impossible or realistically unattainable the defensive action would pass the second prong of *Unocal* so long as it was within the range of reasonableness. *Id.* at 1388–89.

125. *Id.* at 1383 (quoting a defendant argument).

126. *Id.* at 1391 n.27.

127. *See* Third Point L.L.C. v. Ruprecht, No. CIV.A. 9469-VCP, 2014 WL 1922029, at *16 (Del. Ch. May 2, 2014) (giving possible explanations for why *Blasius* rarely applied); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 335–36 (Del. Ch. 2010), *aff'd,* 15 A.3d 218 (Del. 2011) ("[If the] rights plan is not unreasonable in the sense that its trigger is at such a reasonable threshold that the 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.").

128. MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003).

II. The *Williams* and *Coster* Decisions Against the Arc of Enhanced Review

Williams and *Coster* represent a significant change in the judicial review just described. In *Coster*, the Delaware Supreme Court spelled out the displacement of the *Blasius* "compelling justification" standard of review by a standard based on *Unocal* for challenges to director acts impeding the shareholder franchise, albeit one that quoted with approval the Court of Chancery's description of the new combined test as a more "muscular" *Unocal* said to encompass "the spirit animating *Blasius*."[129] *Williams*, affirmed by the Delaware Supreme Court 19 months before, had already provided a key illustration of the new *Unocal's* capacity to reach further than earlier iterations of *Unocal*. There, the Court of Chancery struck down a poison pill, something that previous Chancery judges had done. But this decision, unlike the others, gained the affirmance of the Supreme Court on the basis of *Unocal*.[130] In the most visible prior Chancery Court cases invalidating poison pills, for example, the Delaware Supreme Court had either rejected the trial court's approach,[131] or relied on non-*Unocal* reasoning,[132] or the trial court had subordinated its own view of the case because it was bound by prior rulings of the Delaware Supreme Court.[133]

This Part frames this change by looking at three central points. 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 Court of Chancery to work through in more detail the confusing interaction of *Unocal* and *Blasius*, decisions that provide the foundation for *Coster* and *Williams*. Section C identifies specific ways in which the application of the new *Unocal* test, framed by *Coster* and *Williams*, differs from earlier Delaware Supreme Court cases.

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129. Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *8, *11–12 (Del. June 28, 2023) (quoting Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000)).

130. *See* Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion). The opinion was by then-Vice-Chancellor Kathaleen St. Jude McCormick, who was soon elevated to Chancellor on May 6, 2021. *Judicial Officers*, DEL. CTS.: CT. OF CHANCERY, https://courts.delaware.gov/chancery/judges.aspx [https://perma.cc/8H9C-YER2] (last visited July 28, 2023).

131. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1989) (rejecting City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 799–800 (Del. Ch. 1988)).

132. *See* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291–93 (Del. 1998). The Chancery Court's invalidation of a poison pill centered on *Unocal*. *See* Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 37 n.47 (Del. Ch.), *aff'd sub nom.* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998). But Quickturn appealed on alternative grounds based on interference with the board's statutory authority to manage the corporation. 721 A.2d at 1291. The Supreme Court of Delaware affirmed on this ground. *Id.* at 1293.

133. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 100–01 (Del. Ch. 2011).

A. *The Small Likelihood in a Pre-*Coster *and* Williams *World of* Unocal *Review Leading to Invalidations of Poison Pills by the Delaware 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* and *Coster*. 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 Delaware Supreme Court heard the case.[134] Within a few months of the *Interco* opinion, the Delaware 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*.[135] A decade later, two cases ruled on litigation involving poison pills where planners had expanded the original pill so as to prevent or slow newly elected directors' action to redeem a pill.[136] In these two cases, the Chancery Court had struck down the defensive tactic discussing two possible 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.[137] The Delaware Supreme Court, hearing only the second of these two Chancery Court cases, affirmed based on the statutory ground of interfering with the board authority under § 141 but did not take up the *Unocal* argument.[138] In *Airgas*, a poison pill survived the Chancellor's *Unocal*-based conclusions that "there seem[ed] to be no threat" and that the board's defensive tactics were "assuredly preclusive in the everyday common sense meaning of the word."[139] These points yielded to the Delaware 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.[140]

Even if the search is expanded to look at *Unocal's* use to block any defensive tactics, not just poison pills, there is little to see in the Delaware 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

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134. *See* City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 790–91 (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. Co. v. Pillsbury Co., 558 A.2d 1049, 1059–60 (Del. Ch. 1988).

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

136. *See* Carmody v. Toll Bros., 723 A.2d 1180, 1189–90, 1195 (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. *Id.* at 1184, 1191 (explaining the "dead hand" feature of a rights plan).

137. *See* DEL. CODE ANN. tit. 8, § 141(a). In *Carmody*, it was a newly elected board's authority to decide on whether to redeem or not. 732 A.2d at 1190–92.

138. Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292–93 (Del. 1998).

139. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 57, 120 (Del. Ch. 2011).

140. *Id.* at 55.

reasoning that has not persuaded other courts.[141] The majority's conclusion reflected a typical *Unocal* worry—that the target board's defensive tactics would force the target's public shareholders to accept a merger that was less attractive than an alternative.[142] 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, there was a controlling owner in this case, with two of four directors owning about 65% of the voting stock.[143] It is hard for public shareholders to be coerced when they lack the actual power to make decisions, especially as the only shareholders who could make the decision had already agreed to vote for the deal in order to induce a higher price.[144] This reliance on the coercion of public shareholders—who had no power to decide the matter—when it permitted the controlling shareholders to walk away from the deal they had expressly made to entice a higher price from a bidder was a weak use of *Unocal* principles.[145]

B. Chancery's Twenty-First Century Efforts to Rethink the Early **Unocal** *and* **Blasius** *Learning*

The vagueness and ambiguity of *Blasius* and its interaction with *Unocal* stimulated a much more robust analysis by the Chancery judges in the early twenty-first century than is visible in the Delaware Supreme Court's jurisprudence. After the end of his term as Chancellor, William Allen, the author of *Blasius*, joined Leo Strine and Jack Jacobs, two then-current members of the Chancery bench, in authoring a law review article acknowledging 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.[146] The judges noted Delaware decisions had begun "gradually to 'fold' the *Blasius* standard into *Unocal*, effectively making the former

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141. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 917, 939 (Del. 2003).

142. *See id.* at 935–36. NCS, the target, was a company recovering from significant financial distress and had been exploring opportunities for sale. *Id.* at 921. 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. *Id.* at 918–19, 933. 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. *Id.* at 924–27. 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.* at 919, 926–27.

143. *Id.* at 919.

144. *Id.* at 936.

145. *See id.* at 944–45 (Veasey, C.J. & Steele, J., dissenting). The majority's reasoning has been criticized in subsequent cases. *See, e.g.*, In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1016, 1023 n.68 (Del. Ch. 2005) ("The recent [Delaware] Supreme Court decision in *Omnicare* represents, one senses, an aberrational departure from that long-accepted principle.") (citation omitted); Monty v. Leis, 193 Cal. App. 4th 1367, 1374 (2011) ("We decline to follow *Omnicare*.").

146. 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).

a subset of the latter."[147] The judges' support of such a move, as Strine had written in an opinion the year before, seemed designed to ensure a unification would "infuse our *Unocal* analysis with the spirit animating *Blasius*,"[148] 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."[149]

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 (Delaware), Inc.* cogently observed:

> The 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.[150]

He recognized the solution required a standard that would forgo testing via "compelling justification" without raising concerns originally addressed to the early *Unocal* rule "that [*Unocal's*] standard and the related *Revlon* standard were being denuded into simply another name for business judgment review."[151]

His embrace of *Unocal* included key differences from earlier Delaware Supreme Court case law. First, he would exclude from this revised standard any tolerance of the concept of "substantive coercion."[152] 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 from responding to a tender offer.[153] He would reject dictum in *Blasius* that suggested its more intense scrutiny should apply to all stockholder voting, focusing more narrowly on board action applying to director elections.[154] *Unitrin*

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

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

149. *Id.*; Allen et al., *supra* note 146, at 1316.

150. Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 805–06 (Del. Ch. 2007).

151. *Id.* at 810.

152. *Id.* at 818. 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." Strine, Jr., *supra* note 139, at 290.

153. Strine's characterization of substantive coercion had moved from "interesting" in 2001 to "bizarre" in 2007. *Compare Chesapeake*, 771 A.2d at 324–29, *with Mercier*, 929 A.2d at 806, 811, 818.

154. *Mercier*, 929 A.2d at 808 ("[T]he reasoning of *Blasius* is far less powerful when the matter up for consideration has little or no bearing on whether the directors will continue in office."). *See also In re* AMC Entertainment Stockholder Litigation, No. 2023-0215-MTZ, 2023 WL 5165606, at *24–26, *44 (Del. Ch. Aug. 11, 2023) (approving a

presented a broader voting context where the Delaware Supreme Court skipped past any application of *Blasius*.[155] More generally, Strine in *Mercier* sees the preclusive and coercive elements added to *Unocal* since its initial appearance as giving "courts the tool to answer" the key *Blasius* question.[156] Strine also wanted to tinker with some of the other elements of *Unocal*. He worried that *Unocal's* early history may have led to too much emphasis on the word "threat"[157] and suggested requiring instead (i) that a board be required to identify a legitimate corporate objective; (ii) that it bear the burden of persuasion that its motivation was proper and not selfish; and (iii) that its actions were reasonable and not preclusive or coercive in relation to its legitimate objective.[158]

Pulling these threads together, Vice-Chancellor Travis Laster, in a series of opinions, has shown how director positional conflict in *Blasius* cases also shows up in *Revlon* and other settings where enhanced scrutiny would be appropriate.[159] The principles emerging from each of these threads meant there was a much richer and more developed body of law available at the time of *Williams* and *Coster* than in the early days of *Unocal*, *Revlon*, and *Blasius*, leading to the changes discussed in the following Section.

C. The Delaware Supreme Court's Embrace of the New **Unocal** *in the 2020s*

The Delaware Supreme Court's opinion in *Coster* and its affirmance of the Chancery Court's decision in *Williams* show the high court's distinct movement away from the early *Unocal* law described in Section II.A to incorporate the Chancery-led evolution described in Section II.B. The new *Unocal* depends on change brought about by each of the two recent cases that are discussed separately below. *Coster* shows the substitution of a revised *Unocal* reasonableness standard

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settlement agreement in a case raising a challenge to director action affecting shareholder voting on a non-director election matter). Vice-Chancellor Zurn applied an "enhanced scrutiny" test requiring directors to demonstrate their actions were reasonable in relation to their legitimate objective, drawing on language from *Mercier* but less severe than the standard in *Coster*. *Id.* at 29–32 (quoting *Mercier*, 929 A.2d at 808).

155. *See supra* Subsection I.C.1.

156. *Mercier*, 929 A.2d at 808 n.61.

157. *Id.* at 807.

158. *Id.* at 810–11 ("If for some reason, the fit between the means and end is not reasonable, the directors would also come up short."). Strine is careful in framing his suggested changes. He noted *Liquid Audio* "can be read as signaling the Court's recognition" that a clearer *Blasius* approach was necessary and that "one can read" *Liquid Audio* as suggesting that *Unocal's* test can be "ratcheted up to a form of strict scrutiny." *Id.* Consistent with this "directional impulse" he asserts the standard ought to be a "reasonableness standard consistent with *Unocal*." *Id.* at 809–10. Recognizing that then-existing Delaware precedent continued to refer to a compelling justification standard, he applies both his revised approach and the less preferred compelling justification. *Id.* at 809–13. Both lead him to the same result; the compelling justification analysis takes just four paragraphs. *Id.* This frame provides a guide for changes that show up in *Coster* and *Williams* as discussed in Part II.

159. *See* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457–58 (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, 784–85 (Del. Ch. 2016); Johnston v. Pedersen, 28 A.3d 1079, 1090 (Del. Ch. 2011) ("[T]he shift from 'reasonable' to 'compelling' requires that the board establish a closer fit between means and ends.").

(generally following the Chancery Court's jurisprudence described in Section II.B above) for cases that were previously decided under a *Blasius* compelling justification rubric. *Williams* illustrates the different treatment that several traditional *Unocal* elements receive in this new world.

1. Displacing Blasius's *Compelling Justification Review in Favor of Reasonableness Review*

Previous Delaware Supreme Court decisions used *Blasius* to review challenges to directors' actions said to impede shareholder voting. The Court had recognized the possible overlap with *Unocal* review triggered by director defensive tactics more generally, recognizing both tests could be triggered in the same fact situation.[160] The Court in *Liquid Audio* referred to "*Blasius* within *Unocal*," but the *Blasius* test to be applied was still the "compelling justification" standard which likely would dominate any parallel *Unocal* reasonableness analysis. By the time of *Coster*, the Delaware Supreme Court was willing to go considerably farther, generally following the Court of Chancery decisions discussed in Section II.B above.

First, the Court in *Coster* was clear that *Unocal* review should be applied where *Blasius* previously held sway: "Experience has shown that *Schnell* and *Blasius* review, as a matter of precedent and practice, have been and can be folded into *Unocal* review to accomplish the same ends—enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control."[161] The result, as stated by the Court, was to permit *Unocal* to "subsume the question of loyalty that pervades all fiduciary duty cases . . . and thus address issues of good faith as were at stake in *Schnell*."[162]

This shift away from *Blasius* turned on the Court's explicit recognition (as reflected in the case law described in Section II.B above) that the *Blasius* justification "turned out to be unworkable in practice."[163] The Court quoted extensively from the "different approach" of *Chesapeake Corp. v. Shore* and from the Chancery Court's jurisprudence of the previous decade, discussed in Section II.B.

In *Coster*, the Court was clear that this *Unocal* review that would subsume *Blasius* would be different than the *Unocal* of old. The Court referenced a "more muscular *Unocal*"[164] and a *Unocal* reasonableness review that would be applied "with greater sensitivity."[165] Overall, *Coster* provided a clarity not present in prior

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160. Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *8 (Del. June 28, 2023) (citing Stroud v. Grace, 606 A.2d 75, 92 n.3 (Del. 1992)).

161. *Id.* at *11.

162. *Id.* (quoting Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 807 (Del. Ch. 2007).

163. *Id.* at *9.

164. *Id.* at *10.

165. *Id.* at *12 ("Applying *Unocal* review in this case with sensitivity to the stockholder franchise is no stretch for our law."). *See also id.* at *11 ("Whether labeled as *Unocal* or *Blasius* . . . [review would be taken] 'with a special sensitivity.'") (quoting Strategic Inv. Opportunities L.L.C. v. Lee Enters., Inc., No. CV 2021-1089-LWW, 2022 WL

Delaware Supreme Court cases, adopting the developing views from the Chancery cases beginning in 2000. The result is a different (and stricter) standard of review in those cases than in *Unocal* of earlier times.

2. Departing from Several Well-Established Unocal *Elements*

While *Coster* provided a revised statement of the standard of review that would forgo compelling justification in favor of a *Unocal* reasonableness approach, *Williams* provided a separate contribution to the new *Unocal* in a detailed analysis of specific elements of the reasonableness space. In several important respects, *Williams* departs from various parts of *Unocal* jurisprudence that had been present over the prior decades. Three examples stand out here.

a. 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.[166] In *Williams*, the court noted that such showings would be insufficient if there were not a legitimate threat.[167] From director testimony at trial, the court identified three possible threats to be evaluated, each characterized as "quite general" and "purely hypothetical."[168] The first ground, general concern about shareholder activism, was found insufficient in light of four cases that supported poison pills implemented in response to concrete actions.[169] The court found the second ground, fear of short-termism, could rise to the level of a cognizable threat, but hypothetical versions, as in this case, would not.[170] For the third ground, 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.[171] The court noted that if gap-filling justified a pill, "then all Delaware corporations subject to the federal

453607, at *15 (Del. Ch. Feb. 14, 2022)); *id.* at *10 (citing *Mercier*, 929 A.2d at 810) (discussing *Mercier's* use of "greater sensitivity" in the new *Unocal*).

166. *See* Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *22 (Del. Ch. Feb. 26, 2021) (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion).

167. *Id.* ("If the threat is not legitimate, then a reasonable investigation into the illegitimate threat, or a good faith belief that the threat warranted a response, will not be enough to save the board."). *See also* Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *12 (Del. June 28, 2023) (applying *Unocal* with sensitivity to the stockholder franchise is "no stretch for our law.").

168. *Williams*, 2021 WL 754593, at *29 (discussing the differences between the actual threat gleaned from the testimony and those threats as articulated in the deal documents).

169. *Id.* at *30–32 (discussing Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029 (Del. Ch. May 2, 2014); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011); Polk v. Good, 507 A.2d 531 (Del. 1986); Cheff v. Mathes, 199 A.2d 548 (Del. Ch. 1964)).

170. *Id.* at *33.

171. *Id.* at *34.

disclosure regime would have a ready-made basis for adopting a pill."[172] The opinion found that such an "omnipresent" justification for a pill "would constitute a dramatic turn in Delaware law" as viewed by the court and would be inconsistent with enhanced scrutiny.[173]

Though Delaware courts have long treated poison pills as situationally specific defenses,[174] in *Moran*, the Delaware Supreme Court had taken a decidedly different approach. In that first case validating poison pills under *Unocal*, the Court noted that the defense at issue was not "adopted in reaction to a specific threat" but rather to ward off "possible" and unspecified future attacks.[175] 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."[176] Instead, the Court found it would be "even more appropriate" to apply the business judgment rule.[177] Such language communicates the broad space left for director action under *Moran*, which carried forward to subsequent Delaware decisions such as *Paramount v. Time*.[178] Even as courts moved to a situation-specific review, the overall approach did not seem to change in terms of judicial deference to board decisions.[179] *Williams* suggests a standard much more susceptible to judicial invalidation than *Moran*.

b. Substantive Coercion Loses Its Support

Williams also suggests a significant change in another part of the threat analysis: the extent to which it will continue to include substantive coercion where there is the possibility that, even with full disclosure, shareholders can and will make erroneous decisions.[180] *Paramount's* rebuke of *Interco's* "narrow and rigid construction of *Unocal*" indicated a desire to expand a threat description that already included structural coercion.[181] In 1995, the Delaware Supreme Court in *Unitrin* accepted the target board's reliance on substantive coercion, finding that defensive tactics would survive *Unocal* review.[182] By the time of Chancellor Chandler's summary of Delaware takeover law in *Airgas* in 2011, he acknowledged more recent

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172. *Id.*

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

174. *Id.*

175. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350 (Del. 1985).

176. *Id.*

177. *Id.* (observing that preplanning for hostile takeovers would improve management decision-making).

178. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1153–54 (Del. 1989) (characterizing Paramount's argument that precluding stockholder acceptance of tender offer as unreasonable was a "fundamental misunderstanding of where the power of corporate governance lies. Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives").

179. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387 (Del. 1995) ("An examination of the cases applying *Unocal* reveals a direct correlation between findings of proportionality or disproportionality and the judicial determination of whether [the board's] defensive response was draconian because it was either coercive or preclusive in character."); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 100, 116 (Del. Ch. 2011).

180. *See Paramount v. Time*, 571 A.2d at 1153.

181. *Id.*

182. *Unitrin*, 651 A.2d at 1383–85.

Chancery Court cases attempting to cut back on the then-hardened concept of substantive coercion.[183] Chandler was essentially arguing that if provided with adequate information, shareholders should be permitted to make a decision about a takeover transaction. Yet Chandler acknowledged that "until the [Delaware] Supreme Court rules otherwise," this limited view of threat was not the current state of Delaware law.[184]

Even so, a significant shift was underway. *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 justify their actions by arguing that, without board intervention, the stockholders would vote erroneously out of ignorance or mistaken belief."[185] Later in the "threat" part of the opinion, McCormick repeats that quotation (drawn from an opinion by Vice-Chancellor Travis Laster in *Pell v. Kill*).[186] The *Williams* opinion then repeats a similar observation, penned by Leo Strine while he was Vice-Chancellor, that the argument that "directors know better than the stockholders about who should be on the board is no justification at all."[187] *Williams* shows there is 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 Court's opinion, the Delaware Supreme Court faced a strong set of Chancery opinions that were notably different from Supreme Court opinions of the early takeover period. The *Interco* standard of review had been criticized by the Supreme Court in *Paramount* as illustrating the fundamental misconception that Delaware courts could substitute their judgment for that of a board of directors (i.e., a too-intense standard of review). In contrast, the worry in *Williams* was that the plaintiff's argument would produce too lenient a threat standard that would provide directors of every publicly held Delaware corporation with an omnipresent justification legitimizing a poison pill.[188] The Delaware Supreme Court's decision in *Coster* quotes favorably *Mercier*'s quotation from *Blasius* where Chancellor Allen had criticized director arguments based on knowing better than stockholders.[189]

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183. *Air Prods.*, 16 A.3d 48, 100 (2011) ("[B]ecause 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.") (quoting Chesapeake v. Shore, 771 A.2d 293, 324–25 (Del. Ch. 2000)).

184. *Id.* at 101.

185. *See* Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *2 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion).

186. *Id.* at *30 (quoting Pell v. Kill, 135 A.3d 764, 788 (Del. Ch. 2016)).

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

188. *See id.* at *32.

189. *See* Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *10 (Del. June 28, 2023) (quoting *Mercier*, 929 A.2d at 811).

c. More Space for Proportionality Review Based Not on Preclusion or Coercion but Range of Reasonableness

An evolving Delaware approach to *Unocal* also is in evidence 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.[190] "Realistically attainable," something more than a mere mathematical or hypothetical possibility, also appeared to fill out the meaning.[191]

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.[192] 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 stockholders likely to vote, a seemingly insurmountable task.[193] One of the experts told the judge he had never seen such a hurdle exceeded in his 46 years in the industry.[194]

Finding this result as "assuredly preclusive," however, did not mean that the defendants had failed to meet the proportionality prong. Chandler cited the Delaware Supreme Court's then very recent opinions in *Versata Enterprises, Inc. v. Selectica, Inc*. and another part of the *Airgas* litigation, concluding that Airgas's defensives would not be preclusive if there were another realistic route to obtaining control "at some point in the future."[195] In *Airgas*, the Chancellor found there was such a route: running a proxy contest at the next annual meeting when Air Products, the would-be buyer, could elect one-third of the directors up for election by a simple majority of shareholder votes.[196] The *Selectica* and *Airgas* opinions do not specify how long shareholder democracy could be delayed and still come within *Unocal*.[197] 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 until *Williams*.

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190. *See supra* Subsection I.C.1.

191. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388–89 (Del. 1995); *see also* Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 604–07 (Del. 2010).

192. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 113–16 (Del. Ch. 2011). This would, in turn, have permitted new directors to redeem the poison pill and complete their acquisition. *Id.* at 96 ("One way around the pill was the 'proxy out'—bidders could solicit consents to remove the board and redeem the rights.").

193. *Id.* at 116–17.

194. *Id.* at 117. In *Chesapeake Corp. v. Shore*, then-Vice-Chancellor Strine applied a similar analysis. 771 A.2d 293, 324–29 (Del. Ch. 2000).

195. *Air Prods.*, 16 A.3d at 115. *See also Versata*, 5 A.3d at 604–07; Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1194–95 (Del. 2010).

196. *Air Prods.*, 16 A.3d at 120–21.

197. See *Versata*, 5 A.3d at 604–07; *Airgas*, 8 A.3d at 1190, 1195 n.18.

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."[198] 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, then-Vice-Chancellor Strine found the defendants' defensive tactic (raising the percentage of shareholder vote needed to amend the corporation's certificate) had both failed preclusiveness and separately failed the range of reasonableness, even if it was 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 rising importance of "range of reasonableness" and the narrowing breadth of acceptable threats expand the range of conduct that can fail *Unocal*. Chancellor Allen's opinion in *Interco* illustrated how a "mild" threat broadened the range of defensive actions subject to challenge under *Unocal*.[199] *Paramount v. Time's* harsh treatment of *Interco* signaled less range for proportionality. *Chesapeake*, in contrast, used the same "mild" threat language as *Interco* leading to a lack of proportionality, and *Williams* shows a similar tightening of the connection between "threat" and "proportionality."[200] The result was to remove much of the traditional insulation that the early *Unocal* rule interpretations had provided to defendant defensive tactics under both prongs of *Unocal*.

While there had not been much supporting Delaware Supreme Court precedent for director actions falling outside the range of reasonableness in the publicly held space, *Williams* relied on such an example decided by the Court of Chancery 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.[201] Unlike the more common setting for enhanced scrutiny in public companies, there was no hostile bidder and no board effort 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 and helped define a new space that was outside of the range of reasonableness, outside proportionality, and outside the

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198. *See Air Prods.*, 16 A.3d at 92–93 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995) (outlining the "reasonableness" portion of the *Unocal* analysis).

199. City Cap. Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 798 (Del. Ch. 1988).

200. Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *38 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion). 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.*

201. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010). The court discussed the two sides in a section entitled "Oil and Water." *Id.* at 7–8.

Williams court's view of corporate democracy so as to get the poison pill invalidated.

III. IMPLICATIONS OF THE NEW *UNOCAL*

Unocal's enhanced scrutiny in *Williams* and *Coster* looks significantly different than the *Unocal* of *Paramount*, *Unitrin*, and *Airgas*.[202] Some facts about the cases and some language in the opinions suggest a narrower change in the law. These may simply be one-off cases involving more one-sided facts than in previous cases decided under *Unocal*, e.g., the nuclear weapon of defensive tactics as argued by the defendants with language picked up in the opinion in *Williams* or a corporation's existential challenge that was a crucial fact for the court in *Coster*.[203] 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 the English Court of Chancery at the time of American independence.[204] 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 the evolving case law discussed in Sections II.B and C and draw on something larger happening in the corporate governance space. This Part explores both possible explanations. Against the backdrop of Parts I and II, the second explanation suggested above seems more likely. There was a time when courts were more worried about a greater vulnerability to shareholders in responding to hostile tender offers than in proxy fights and were more willing to give directors greater freedom in the use of defensive tactics in the first setting.[205] With the spread of poison pills to near universal use and the disappearance of

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202. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1155 n.18 (Del. 1989); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (1995); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 91–92 (Del. Ch. 2011).

203. Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *4 (Del. Ch. Feb. 26, 2021) (noting that the poison pill was described as "the nuclear weapon of corporate governance"), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion). This comparison was later embraced by the Supreme Court in describing how "the Plan increases the range of *Williams's* nuclear missile by a considerable distance . . . ." *Id.* at *35; Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *14–15 (Del. June 28, 2023) (referring to the company's existential crisis and the exceptional, unique circumstances of the case).

204. Andre G. Bouchard, *The Delaware Court of Chancery's 225th Anniversary*, 73 BUS. LAW. 953, 953–55 (2018). *See also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439–41 (Del. 1971).

205. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956–57 (Del. 1985); Unitrin, Inc. v Am. Gen. Corp., 651 A.2d 1361, 1379 (Del. 1995); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 94–95 (Del. Ch. 2011) (highlighting the "'anomaly' in [Delaware] corporation law"). *Compare* In re Volcano Corp. S'holder Litig., 143 A.3d 727, 743 (Del. Ch. 2016) (finding stockholder action by tendering has the same cleansing effect as a vote in favor of the merger and 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 Bros., 723 A.2d 1180, 1186 (Del. Ch. 1998) (finding that pills proved to be largely beneficial to shareholder interests and led to extreme reluctance to order redemption).

directors' use of structural coercion tools like two-step, front-end loaded tender offers, all takeover fights look more alike, regularly combining efforts that rely on the shareholder powers to vote and to sell with judicial standards of review that have also coalesced. *Unocal* and *Blasius*, which started out as separate standards of review for distinct settings, soon were bumping against each other in ways that caused difficulties for the Delaware courts.

As Section II.B relates, a series of twenty-first century Chancery Court decisions moved these two lines of cases closer together and under the *Unocal* label. In *Coster*, the Delaware Supreme Court provides its agreement for this shift and outlines how this new *Unocal* needs to reflect the sensitivity of *Blasius*. *Williams* provides a detailed and compelling example of what this revised *Unocal* looks like and how it differs from the traditional *Unocal*. *Williams* reflects a strong *Blasius* foundation even if it doesn't explicitly cite the case.[206] The Court's thrice-repeated admonition in *Williams* that directors cannot justify their defensive actions based on the argument of shareholder ignorance or that directors "know better" than shareholders[207] is based on "the ideological underpinnings of Delaware law,"[208] the foundational framework that comes straight from *Blasius* (and *Interco*).[209]

The new *Unocal* of *Coster* and *Williams* is also better able to respond to the changing role of shareholders in the twenty-first century. Corporate governance today is not the same as it was at the dawn of the modern takeover era.[210] Importantly, shareholders are different than they were a few decades ago. While "mom and pop" individual shareholders comprised most of the shareholding in the public markets in the mid-twentieth century, shares today are largely in the hands of large institutions. These institutions hold shares as intermediaries for individuals, often through employer-supported retirement plans. They 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 vis-à-vis directors and managers than their individual predecessors; it makes logical sense that standards of review such as *Unocal* would adapt to reflect these new realities.

A. **Williams** *or* **Coster** *as a "One-Off" Case*

1. The Nuclear Weapons Analogy: Existential Entity Crisis Explanations

A distinctive part of the *Williams* opinion is the "nuclear weapons" frame used to describe the defensive tactics in the case.[211] 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 sought to block a

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206. Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *11 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion). A Blasius claim had not been pled in *Williams.*

207. *Id.* at *2, *30, *33.

208. *Id.* at *30.

209. *See supra* Subsection I.C.3.

210. *See infra* Section III.B (discussing the changes in the makeup of the investor population and corporate governance).

211. *See Williams*, 2021 WL 754593, at *34.

particular hostile offeror bent on taking control.[212] 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.[213] Many investors focus on "influence" or intermediary strategies, not the direct frontal assault of prior takeovers. In this setting, poison pill 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 Chancery Court's decision in *Williams* 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.[214] 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.[215] In addition, the Williams pill had additional characteristics that made its reach "extreme."[216] 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.[217] The court concluded that the plan "increase[d] the range of Williams' nuclear missile by a considerable distance beyond the ordinary poison pill."[218] 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.[219]

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.[220] 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-off example. If so, in future cases, courts could return to equilibrium within the range of the traditional

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212. *See id.* at *20.

213. *See infra* Section III.B (discussing the changes in the makeup of the investor population).

214. *See Williams*, 2021 WL 754593, at *8.

215. *Id.* at *35 ("The other Delaware corporation to adopt a 5% trigger for a [non-net-operating-loss] pill did so in distinguishable circumstances—in the face of a campaign launched by an activist who held 7% of the company's outstanding shares at the time the pill was adopted.").

216. *Id.* at *1.

217. *Id.* at *11–13. 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. *Id.* at *12. However, in borrowing the three-part concept, the Williams Companies poison pill changed the conjunction connecting the three exceptions 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.

218. *Id.* at *35.

219. *Id.* at *37–38.

220. *Id.* at *1.

Unocal result. The existential crisis facing the corporation in *Coster* similarly presents facts that lend themselves to a one-off argument.[221]

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 Court best explained by equity. In 1971, for example, the Delaware Supreme Court in *Schnell v. Chris-Craft Industries* affirmed a Chancery Court decision that struck down a board's attempt to move up the date of the annual shareholders' meeting to repel an insurgent.[222] The substantive part of the opinion boiled down to one sentence: "[I]nequitable action does not become permissible simply because it is legally possible."[223]

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 involved craigslist, a corporation with three shareholders: two founders with a majority and eBay as a minority shareholder.[224] The case thus differs from the publicly held setting of the prominent *Unocal* and *Blasius* cases where fiduciary duties typically are used to check the acts of directors and managers. Such actors usually own only a small percentage of stock but are given control over the property of all the other shareholders, who have a majority of the ownership interests.[225] Delaware is one of the few states that lacks an "oppression" statute, usually used to protect minority shareholders in closely held entities. craigslist is such a company with only a few shareholders, no public market to sell shares, and hierarchical rules of corporate law that leave minority shareholders much more vulnerable if there is a falling-out among participants.[226] The Chancery Court in *eBay* turned to a 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,

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221. *See* Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *7 (Del. June 28, 2023).

222. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

223. *Id.* at 439.

224. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35–36 (Del. Ch. 2010).

225. *Cf.* Coster v. UIP Cos., 255 A.3d 952, 953–54 (Del. 2021). In *Coster*, the Delaware Supreme Court reversed the Chancery Court for failing to decide the *Blasius* question of enhanced scrutiny/compelling justification test. *Id.* at 953. The lower court found that one 50% shareholder who had control of the board had shown "entire fairness" in blocking the other 50% shareholder from seeking the appointment of a custodian. *Id.* On remand, in finding that a compelling justification also had been shown under *Blasius*, the Chancellor included a footnote supporting renewal of Strine's *Chesapeake*/*Mercier* project to bring *Blasius* and *Unocal* together in a workable manner. Coster v. UIP Cos., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 n.58 (Del. Ch. May 2, 2022) ("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."). The Delaware Supreme Court, in affirming the Chancellor's decision after remand, undertook such a renewal. *See* Coster v. UIP Cos., No. 163, 2022, 2023 WL 4239581 (Del. June 28, 2023).

226. *See* F. HODGE O'NEAL ET AL., O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 7.11 (2023).

but that may not signal a larger change in the law of publicly held companies. *Williams* may simply be one of those cases that arises when the planets are aligned and the facts are so one-sided that it does not tell us much about the law.[227] *Coster* also had a very visible equity component, with the case having previously been remanded by the Delaware Supreme Court for the Chancellor to consider further equitable review.[228] On remand, the Chancery Court found there was no relief under the equitable claims under *Schnell* as well as no relief under the *Blasius* claim, now folded into *Unocal*.[229]

B. **Williams** *and* **Coster** *as Reflecting* **Unocal's** *Capacity to Incorporate the Contemporary Corporate Governance Paradigm*

Explanations limited to nuclear weapons, existential corporate threats, 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 has made it much cheaper to create, access, and retain information relevant to corporate 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.[230] 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.[231] Such funds are essentially intermediaries holding the funds of individual Americans, often through plans sponsored by their employers to enable the employees to save for retirement

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227. *See Schnell*, 285 A.2d at 439.

228. Coster v. UIP Cos., Inc., No. 163, 2022, 2023 WL 4239581, at *4 (Del. June 28, 2023) ("In the first appeal, this Court did not disturb the Court of Chancery's entire fairness decision but remanded with instructions to review the Stock Sale under *Schnell* and *Blasius*. As explained in our first decision, while entire fairness is 'Delaware's most onerous standard of review,' it is 'not [a] substitute for further equitable review.'").

229. *Id.* at *5.

230. *See*, *e.g.*, Seth C. Oranburg, *A Little Birdie Said: How Twitter Is Disrupting Shareholder Activism*, 20 FORDHAM J. CORP. & FIN. L. 695, 707 (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*, UNIV. EDINBURGH SCH. LAW (May 8, 2014), https://www.research.ed.ac.uk/en/publications/social-media-and-shareholder-activism [https://perma.cc/ZR3P-3PZC] ("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.").

231. *See* Lucian Bebchuk & Scot Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 726 (2019).

or their children's college educations.[232] 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.[233] Activist funds, often hedge funds seeking above-average market returns, have specialized in identifying possible companies in which governance changes could produce additional shareholder value.[234] The activist funds have proven successful in getting the large intermediary funds to sometimes join them in pressuring directors for governance changes.[235]

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 twenty-first century has become more muscular. It now requires shareholder votes on compensation,[236] specifies the governing structures of boards of directors, requires the independence of directors serving on board committees,[237] and has added multiple requirements to give shareholders new entry points to governance.[238]

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:

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232. Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Era of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1383 (2014).

233. *See* Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 U. CHI. BUS. L. REV. 417, 422 (2022), https://businesslawreview.uchicago.edu/sites/default/files/2023-03/Subramanian_v1n15_417-439.pdf [https://perma.cc/K3ZE-9VSR]; Stephen J. Choi et al., *The Power of Proxy Advisors, Myth or Reality?*, 59 EMORY L. J. 869, 883–84 (2018).

234. 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 ST. J., https://www.wsj.com/articles/activist-takes-big-stake-in-salesforce-11674432531 [https://perma.cc/5Y6F-RJFC] (January 23, 2023, 9:48 AM).

235. Gilson & Gordon, *supra* note 23, at 897.

236. *See* Dodd-Frank Wall Street Reform And Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1899 (2010) (codified at 15 U.S.C. § 78n-1) ("Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders . . . shall include a separate resolution subject to shareholder vote to approve the compensation of executives.").

237. *See* 15 U.S.C. §§ 78j-1, j-3, j-4 (governing "Audit Requirements," "Compensation Committees," and "Recovery of Erroneously Awarded Compensation Policy," respectively); 17 C.F.R. § 240.13a-14 (2023) (officer certification of financial statements).

238. Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* 1–2 (Eur. Corp. Gov. Inst., Working Paper No. 579, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812642 [https://perma.cc/9Q85-FKT3] (discussing an example of "comply or explain").

1) the traditional governance rights provided by state law, which generally authorize directors to make most corporate decisions and empower shareholders to do only a few things via limited rights to vote, sell, or sue;[239]
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); and
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 corporation law permits staggered terms for boards with as few as one-third of board seats to be filled at any one annual shareholder meeting.[240] 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 gain control of the board of directors. Staggered boards and poison pills were foundations for successful defensive strategies for decades post-*Unocal*.[241] Then something unusual happened: institutional shareholders chose to flex their voting power against staggered board provisions, including making 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.[242]

Sometimes the change is seemingly hidden or even innocuous. Consider the federal requirement that shareholders' choices on director ballots include not just "for" or "against" but also "withhold."[243] How can a "withhold" vote affect anything when you can vote for or against it? But this new wording generated a new governance pattern as institutional investors provoked new bylaws in many public companies to provide for "majority voting."[244] Normal state law rules provide for plurality voting: whoever gets the most votes among votes cast wins; nonvotes or withheld votes don't count.[245] "Majority vote" provisions (the Pfizer version is the most well-known) typically provide that a candidate who gets a plurality but fails to

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239. *See supra* Part I.

240. Kahan & Rock, *supra* note 27, at 1009–10.

241. *See* Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 604 (Del. 2010) (combining classified boards and rights plans does not constitute a preclusive defense).

242. Kahan & Rock, *supra* note 27, at 1009.

243. 17 C.F.R. § 240.14a-4(b)(1)(i) (requiring "[a] box opposite the name of each nominee which may be marked to indicate that authority to vote for such nominee is withheld").

244. Kahan & Rock, *supra* note 27, at 1010.

245. *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 216(3).

get a majority must resign.[246] 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 the 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, 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 three interacting sources: (i) state law governance roles between directors and shareholders; (ii) 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 (iii) a set of private sector intermediaries that sometimes, but certainly not always, choose to take advantage of these enhanced shareholder governance levers. In addition, the three legs of the stool have become self-reinforcing. Delaware, for example, has amended its corporation code to permit bylaws requiring shareholder nominees for directors to be included on the company's proxy and providing for company reimbursement for shareholder efforts to elect directors, each in the aftermath of institutional shareholder activism and/or changes in federal law.[247] 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 represented a change in long-standing institutional behavior; until then, institutional shareholders often had just not voted.[248] This altered governance space, radically different than what was present when *Unocal*, *Revlon*, and *Blasius* were 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 the *Blasius* cases. First, *Williams* grounds its holdings on the central place of voting as the "ideological underpinning[] of Delaware law."[249] 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."[250]

Second, the *Williams* court's takedown of substantive coercion as a basis for satisfying *Unocal's* first prong draws directly on this foundation. The *Williams* opinion refers to "the tenet of Delaware law" that directors cannot justify their

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246. *See* PFIZER INC., CORPORATE GOVERNANCE PRINCIPLES 2 (2022), https://www.pfizer.com/sites/default/files/investors/corporate_governance/cg_principles.pdf [https://perma.cc/R6K8-YPKC].

247. DEL. CODE ANN. tit. 8, §§ 112, 113 (2020).

248. *See* Edelman, Thomas & Thompson, *supra* note 232, at 1395–96, nn.154–55.

249. *See* Williams Cos. S'holder Litig., No. 2020-0707-KSJM, 2021 WL 754593, at *30 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (unpublished table opinion).

250. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

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."[251] It later describes this same argument as "directly contrary to the ideological underpinnings of Delaware law."[252] What is interesting for the current discussion is the combination of these core ideas from *Blasius* to move past the substantive coercion that was once a core application of *Unocal*.[253] *Williams* reflects the migration of the *Blasius* analysis 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 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. Concerns over voting necessarily include other parts of corporate democracy, such as communications well in advance of the vote itself.[254] 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.'"[255] 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."[256] Vice-Chancellor (now Chancellor) McCormick then developed her own example of a 3% shareholder in a hypothetical *Williams* scenario with the shareholder proposing an ESG initiative and threatening to run a proxy contest if the board rejected the proposal.[257] 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.[258] 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.[259]

In such a new shareholder reality, the traditional *Blasius*/*Unocal* focus on shareholders electing a 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

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

252. *Id.* at *30.

253. *See id.* (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").

254. *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").

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

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

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

258. *Id.*

259. *Id.*

democracy of the same sort identified by Chancellor Allen in *Interco* and *Blasius* but occurring in a much more diverse way and using a variety of shareholder tools.

3. Clarifying the New Unocal

Williams and *Coster* show 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. Multiple Delaware judges, particularly Chancery judges, have recognized that *Blasius*'s "compelling justification" standard has proven too result-oriented to effectively sort out the cases where enhanced 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 threat and proportionality prongs are too reflective of the earlier takeover era when shareholders were more vulnerable to coercive tender offers from hostile bidders and courts accorded defensive actions more deference. The amazing success of poison pills in stopping almost all hostile tender offers dramatically shrunk the need for the original *Unocal*, with its broad threat and easy proportionality that provided a broad space for defensive tactics, to protect shareholders from coercive hostile tender offers. The practical merging of shareholder voting and selling now occurs in almost all takeovers, meaning use of the free-standing application of the original *Unocal* rule just to block tender offers has shrunk significantly, and the need to address *Blasius*'s legitimacy point is virtually constant.[260] The "who gets to decide when" question that can be so dominant in *Moran/Paramount/Unitrin* contexts loses a significant part of its primacy. Not only have shareholder selling and voting become more integrated, but the voting part has also 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. The plaintiff's choice in that case 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*. An effective shareholder capacity to vote (and sell) is fundamental to the foundation on which the legitimacy of director power rests. *Blasius* was explicitly designed to apply enhanced scrutiny in circumstances that would have satisfied the original *Unocal*.[261] Consistent with that frame, as *Unocal* shifted to absorb *Blasius*, the *Williams* opinion has moved away

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260. *See supra* Subsection I.C.3. *See also* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("[T]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); City Cap. Assocs. Ltd. P'Ship v. Interco Inc., 551 A.2d 787, 799–800 (Del. Ch. 1988) ("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.").

261. *See supra* Subsection I.A.3.

from some of the language used to describe threat and proportionality of the early *Unocal*. Intervening Chancery cases, as discussed in Part II.B, have noted the greater need to establish a "closer fit between means and ends" in order for *Unocal* to capture the spirit of *Blasius*.[262] Indeed, Professor Ann Lipton's reaction to *Coster* was to focus on whether Delaware will now confront more directly the tension between traditional *Unocal*/*Unitrin* review, which allows boards to block shareholder sales out of fear that shareholders will act out of ignorance, and *Blasius*, which does not allow boards to block shareholder out of the same fear.[263]

Similarly, 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. 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 communication in governance.

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

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

263. Ann Lipton, *So Long Blasius?*, L. PROFESSOR BLOGS NETWORK (July 1, 2023), https://lawprofessors.typepad.com/BUSINESS_LAW/2023/07/SO-LONG-BLASIUS.HTML [https://perma.cc/LA4C-TBTP]. This need for clarity is particularly important given the Chancery Court's decision, handed down a few weeks after *Coster*, suggesting that, when director actions are said to impede shareholder voting outside of the director election context, the appropriate form of enhanced scrutiny should be that directors demonstrate their actions were "reasonable in relation to their legitimate objective." *In re* AMC Ent. S'holder Litig., No. 2023-0215-MTZ, 2023 WL 5165606, at *24 (Del. Ch. Aug. 11, 2023). One commentator was quick to label this standard of review "Blasius Minus." John Jenkins, *Fiduciary Duties: Blasius Lives on as "Blasius Minus,"* DEALLAWYERS.COM (Aug. 22, 2023), https://www.deallawyers.com/blog/2023/08/fiduciary-duties-blasius-lives-on-as-blasius-minus [https://perma.cc/F8BB-HBJ8]. John Jenkins' commentary extended Professor Steven Bainbridge's characterization of the *Coster* holding as "Unocal Plus." Steven M. Bainbridge, *Delaware Merges* Blasius *and* Unocal*: Commentary on* Coster v. UIP Cos., Inc., PROFFESSORBAINBRIDGE.COM (July 2, 2023), https://www.professorbainbridge.com/professorbainbridgecom/2023/07/delaware-merges-blasius-and-unocal.html [https://perma.cc/7TMJ-NECP]. AMC seems closer to traditional *Unocal*, suggesting challenges to clarity in this new world remain.

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 rather 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 and 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 extended 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*, affirmed by the Delaware Supreme Court, and the Delaware Supreme Court's 2023 decision in *Coster* revisit that long-running debate and adjust the frame to reflect the experience with *Blasius* and *Unocal* since the 1980s and changes in corporate governance 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 identity, 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.[264]

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