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“JUST SAY NEVER?” POISON PILLS, DEADHAND PILLS, AND SHAREHOLDER- ADOPTED BYLAWS: AN ESSAY FOR WARREN BUFFETT

*Jeffrey N. Gordon**

INTRODUCTION

My topic is Buffett on mergers and acquisitions and how his sage advice on the importance of shareholder choice should be taken to heart by the Delaware Supreme Court, which will soon face far-reaching questions on the distribution of power between shareholders and the board of directors. Recent judicial decisions in other jurisdictions: (i) have declared that a board can maintain a poison pill in the face of a premium hostile bid, the power to “just say no;”¹ (ii) have validated the board’s adoption of a so-called “deadhand pill,” a poison pill that can be redeemed only by continuing directors;² and (iii) pointing in a different direction, have permitted shareholders to use their bylaw amendment power to constrain the adoption and maintenance of a poison pill.³ The dynamics of takeover practice are likely to produce cases presenting similar questions involving Delaware targets, and once again the Delaware Supreme Court will have the opportunity for influential rulings on the shape of corporate law. The poison pill has become the main vehicle through which a target board controls the firm’s exposure to a hostile bid; its use affects not only the scenarios that emerge after the making of a hostile bid, but pre-bid strategy as

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¹ *Moore Corp. v. Wallace Computer Serv.*, 898 F. Supp. 1089 (D. Del. 1995).

² *See Invacare Corp. v. Healthdyne Techs., Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997).

³ *See International Bhd. of Teamsters Gen. Fund v. Fleming Cos.*, No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2980 (W.D. Okla. Jan. 24, 1997), *stay refused*, No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2979 (W.D. Okla. Feb. 19, 1997), *appeal docketed*, No. 97-6035 (10th Cir. Feb. 6, 1997), No. 97-6132 (10th Cir. Apr. 25, 1997). The U.S. Court of Appeals for the Tenth Circuit certified the question of shareholder bylaw authority over poison pills under Oklahoma law to the Oklahoma Supreme Court, Case No. 90,185. Briefing was concluded Nov. 11, 1997. *See Appellee’s Answering Brief on Certified Question, International Bhd. of Teamsters Gen. Fund v. Fleming Cos.* (on file with the *Cardozo Law Review*).

well, including the initial decision whether to make a bid. Thus, each of these questions about the use and limits of the poison pill entails potentially far-reaching consequences for the market in corporate control.

What gives rise to trepidations about the Delaware Supreme Court's potential response is the tension between the increasingly apparent importance of a vibrant (if not unconstrained) market in corporate control to the remarkable recent national economic prosperity and the Delaware court's articulation of management protectionist positions whose extension could shut control markets down. Control markets are important because they potentiate the use of capital market signals, particularly stock price changes, in the monitoring of managerial performance; in turn, responsiveness to capital market signals makes the firm a more vigorous competitor in national and global markets. Although hardly perfect, capital market signals provide a better measure of the firm's economic performance than product market signals, the alternative. Stock prices quickly impound publicly available information about the firm's expected profits; if something happens that investors believe will affect a firm's profitability in two years, that will be reflected in today's stock price.⁴ By contrast, product market signals—profits or market share in a given year, including changes—are much more ambiguous measures of economic performance. Moreover, a formerly successful firm can survive many years of poor product market performance before its losses force it out of business. In other words, the firm's success or failure in adapting to a changing competitive environment will be much more rapidly reflected in stock price signals than product market signals.⁵

Alternative regimes of corporate governance matter because they provide different ways of forcing managers to respond to changing competitive conditions. A regime that uses capital market signals is likely to enhance the firm's competitiveness because of the clarity with which capital markets convey information about the firm's competitive position. This is not to say that an unconstrained control market that would maximize the firm's exposure to a hostile takeover bid would necessarily be best. Takeover markets are keyed to stock prices as the measure of comparative value.

⁴ This is a claim that fully admits the possibility of "noise trading" and the various anomalies that make the efficient market hypothesis an incomplete element of asset pricing.

⁵ For elaboration of these ideas, see Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1527-30 (1997).

But stock prices are noisy signals, both because of private information not revealed to markets for competitive reasons and because of volatility associated with heuristic errors and other sorts of information market imperfections. Thus, an unconstrained takeover market may risk too many costly errors. If those costs were borne solely by diversified capital suppliers—shareholders and bondholders—the possibility of mistake would be much less important. But the negative consequences may also be borne by participants in the firm, such as employees and the supplier-customer network within which the firm is situated, with limited diversification opportunities for firm-specific investments. Moreover, the potential dissipation of organizational capital, the misallocation of assets, and the social demoralization from an ill-conceived takeover impose social costs that may be consequential, at least in the aggregate of such transactions. Thus, one part of the corporate governance design problem is devising a regime that will encourage managerial responsiveness to the real economic information carried in stock prices while avoiding hair-trigger arbitrage transactions based on the gap between stock prices and alternative measures of value.

The effect of a governance regime is a function of both share ownership patterns and legal rules, and there are also important feedback mechanisms between ownership patterns and legal rules. The development of the takeover regime in the 1980s and early 1990s provides a useful illustration. The haphazard antitakeover measures of the early and mid-1980s—a combination of state laws, judicial decisions, and self-help by target management—provided on balance (and with hindsight) a useful checking mechanism that permitted most hostile bids to succeed but added some friction to the overall regime.⁶ By the end of the 1980s, however, the pressure of the anti-takeover movement had led to highly restrictive legal rules. The key legal changes were the 1987 U.S. Supreme Court decision in *CTS Corp. v. Dynamics Corp.*, which protected from Commerce Clause challenge state antitakeover measures that could be characterized as relating to a corporation's "internal affairs,"⁷ and the 1989 United States Court of Appeals for the Seventh Circuit decision in *Amanda Acquisition Corp. v. Universal Foods Corp.* in which a judge famous for his hostility to target defensive measures took a very narrow view of the preemptive effects

⁶ This is not to say that this mechanism led to the optimal number of hostile transactions or neatly separated out the desirable transactions (wealth-creating) from the undesirable ones; it is also reasonable to think that economically-motivated actors would have focused on transactions with the greatest perceived potential.

⁷ *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987).

of the Williams Act, the federal statute regulating tender offers.⁸ Many states adopted significant statutory barriers to hostile takeovers. Even Delaware, which faced the competing interests of would-be raiders and targets, and a bar that was heavily involved in takeover advice and litigation, produced a restrictive statutory and judicial legal regime.⁹ The growing restrictiveness of legal rules was, however, in significant measure offset by the rise of institutional investor activism, where stock price performance played a significant role in decisions by institutions to intervene against incumbent CEOs, to criticize complaisant boards, and to support premium takeover bids.¹⁰ Thus, the evolving ownership structure of large public corporations is a critical element in the overall governance regime and can play a crucial role in assuring the necessary managerial responsiveness to capital market signals.

Nevertheless, the legal rules matter. In particular, legal rules that would give management (and incumbent boards) unlimited power to reject a hostile bid would be highly undesirable. The potential for a hostile control transaction not only exposes management directly to the capital market, but it energizes and backstops other forms of managerial monitoring, including board-initiated actions as well as institutional investor activism. To assert that an independent board is a complete substitute for a functioning control market gives insufficient weight to the role that control markets play in stiffening director independence in evaluating managerial performance on capital market benchmarks. For example, the evidence is that management turnover was significantly more common in the era of frequent hostile takeovers (1984-88) than in the subsequent period of infrequent hostile takeovers (1989-94), and even more important, the decline in the turnover rate was significantly more notable among poorly performing

⁸ *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989) (Easterbrook, J.); see also Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981). Other courts have regarded *CTS* as requiring a balancing analysis that would prohibit, on Commerce Clause and preemption grounds, a state law that would make a public corporation "takeover proof." See *BNS v. Koppers Corp., Inc.*, 683 F. Supp. 458 (D. Del. 1988). The tension between these cases and *Amanda* is sketched in RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 1369-73, 1387-89 (2d ed. 1995).

⁹ See Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931 (1991).

¹⁰ See generally Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (forthcoming 1998).

firms.¹¹ Moreover, internal mechanisms of managerial accountability are often incomplete. Serious business problems are not necessarily easy to recognize, nor are the solutions to them. This is borne out by studies that show greater propensity for boards to remove senior managers in firms that are underperforming other firms in the industry sector than average firms in a declining sector.¹² Nor will boards or institutional shareholders necessarily be able to judge the value of a radical shift in the deployment of the firm's assets.

These various considerations argue for leaving open the realistic possibility for a hostile acquisition by a bidder who is prepared to underwrite its claims of superior management or better strategic vision with a significant market premium. Thus, what is at risk in upcoming decisions on the poison pill is a corporate governance regime that powerfully connects managerial tenure to competitive success, a regime that has been connected with a period of strong economic performance.¹³

The cause for grave concern is the increasingly managerialist stance of the Delaware Supreme Court in a series of recent takeover cases whose internal logic may produce judicial deference to even the most protectionist board decisions. Ironically, the legal protections against hostile takeovers have increased even while the misguided 1980s rhetoric about the threat of hostile takeovers to the economy has cooled considerably.¹⁴ In certain respects the Delaware Supreme Court's opinions are (characteristically) delphic, but the court's articulation of its positions may lend itself to a managerialist reading, one that becomes self-fulfilling. The court is

¹¹ See Wayne H. Mikkelson & M. Megan Partch, *The Decline of Takeovers and Disciplinary Managerial Turnover*, 44 J. FIN. ECON. 205, 206-07 (1977) (finding that between two periods, managerial takeover rate declined from 23% to 16%; for firms in bottom quartile of operating return on assets, turnover rate declined from 33% in the active takeover period to 17% in the less active period).

¹² See Randall Morck et al., *Alternative Mechanisms for Corporate Control*, 79 AM. ECON. REV. 842 (1989).

¹³ This is another way of saying that it is myopic to focus on the costs and benefits of particular hostile takeovers, even in the aggregate. The most important impact is systematic, the way that a credible threat of a hostile takeover leads managements to focus on capital market signals, which in turn leads firms to be highly adaptable to competitive market changes. Because there are no complete substitutes for hostile takeovers, shutting down that threat will also have systematic effects.

¹⁴ See, e.g., Wachtell, Lipton, Rosen & Katz, *Merger and Takeover Update* (Sept. 19, 1997) (publicly-disseminated firm memo, on file with author) ("Unlike the conglomerate merger wave of the 1960s and the highly-leveraged bust-up wave of the 1980s, much current merger activity is soundly based and appears to be having a positive effect on the economy.").

also adopting an increasingly formalist statutory analysis that reduces the scope of judicial monitoring of the board's fiduciary responsibilities. The cases that are particularly worrisome are *Unitrin, Inc. v. American General Corp.*,¹⁵ which sustained defensive use of a stock repurchase program despite the presence of an unredeemed poison pill, and *Williams v. Geier*,¹⁶ which permitted a majority shareholder group to cement its control through a dual class recapitalization. As I discuss below, *Unitrin* arguably expands board authority to resist a hostile bid through its decisions over both the circumstances and the tactics of resistance, and the case raises troubling questions about a board's ultimate capacity to "just say no." The concern raised by *Williams v. Geier* comes less from its substantive impact—abusive dual class recapitalizations are currently barred by NYSE, AMEX, and NASD rules¹⁷—than from its methodology, in which statutory form is exalted over fiduciary substance. Despite an outcome that permitted the controlling shareholder group to sell off substantial equity while retaining control,¹⁸ and despite the failure to obtain approval of the disinterested majority, the court applied business judgment review to the board's decisionmaking process and decided that compliance with the statutory requirements for charter amendment was sufficient.¹⁹ Fiduciary policing is hard, because it requires decisions of substantive fairness, but it is also essential, because expropriative actions can easily be crafted to cut sharp statutory corners.

The issue is how these cases and the judicial attitudes that surround them will bear on the three unresolved questions concerning the scope of the poison pill. A further tightening of the already highly protectionist legal rules governing takeovers risks genuine damage to the corporate governance regime that enhances economic competitiveness. Even Delaware would suffer from this outcome.

¹⁵ 651 A.2d 1361 (Del. 1995).

¹⁶ 671 A.2d 1368 (Del. 1996).

¹⁷ See Exchange Act Release No. 34-35121 (Dec. 19, 1994), 58 SEC Doc. 1179 (1994-95) (order granting approval to rule changes for NYSE, AMEX, and NASDAQ that prohibit "disparate reduction" of voting rights by measures including, but not limited to, time-phased voting plans (as in *Williams*), capped voting plans, issuance of super voting stock, or an exchange offer entailing the issuance of limited voting stock).

¹⁸ The recapitalization provided for a "tenure voting plan," whereby all shares would initially receive 10 votes, which would be lost on transfer and regained only after a three-year holding period. The family group controlled approximately 50% of the stock. Assuming a reasonable level of turnover, most of the non-family stock would carry only one vote. This means that the family could reduce its equity stake much below 50% and still retain majority control, including the power to fend off a hostile bid.

¹⁹ See *Williams*, 671 A.2d at 1381-83, 1384 n.35 (Del. 1996).

I. WARREN BUFFETT ON SHAREHOLDER CHOICE

These poison pill questions are ultimately about the appropriate distribution of power between shareholders and the board. Like many legions of grateful investors, I turn to Warren Buffett for wisdom on these matters. My text is not from the set of essays that Professor Cunningham has so skillfully arranged, but rather from remarks Buffett prepared for another occasion, a famous 1985 conference on takeovers at Columbia Law School, later published in a book called *Knights, Raiders, and Targets*.²⁰

The dilemma that Buffett addressed is the problem of shareholder choice in imperfect capital markets. His conclusion is that, despite the problems that shareholder choice entails, the alternative—unconstrained managerial power—is even less desirable. Buffett's starting point is that shareholders should have the final word on how to dispose of an offer to buy the company. Referring to his first stock purchase in 1942, at age eleven, of three shares of Cities Service, he said:

I wanted to see that little piece of paper that said I was the owner of Cities Service Company, and I felt that the managers were there to do as I and few other co-owners said. And I felt that if anybody wanted to buy that company, they should come to me And I felt that it was essentially like buying an interest in a grocery store—that if someone came to the manager of a grocery store and said that he wanted to make an offer for it, I should hear about it and make the decision whether or not to sell. The hired hands were to run the operations but not to make ownership decisions.²¹

In addition to the logic that an owner should make this sort of decision, Buffett adds, "I [also] had this idea that some sort of economic Darwinism would work and that if offers were made, it was the invisible hand working and that would improve the breed of managers."²² But then Buffett finds himself troubled by what he perceives in markets:

[O]ver a good many . . . years, the very best managed companies I know of have very frequently sold in the market at substantial discounts from what they were worth that day on a negotiated basis. It isn't just the weak managements or the companies that

²⁰ KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER (John C. Coffee, Jr. et al. eds., 1988).

²¹ *Id.* at 13.

²² *Id.*

are not meeting their potential that are vulnerable to takeovers because of market disparities from negotiated business value.²³

In a colloquy at the 1985 conference that I remember vividly, he referred to the arbitrage possibilities between stock market values and asset values as driving hostile takeovers. Buffett continues:

The trouble is, everybody is acting rationally. If you have a very well managed company that is selling in the market at 50% of what it's worth because most companies are selling at 40% of what they are worth, the shareholder who gets an offer for 70% to 80% of what it's worth should make the decision to sell and go into something else that's well-managed and selling at the 50% figure.²⁴

This troubles Buffett because, as he puts it, "I don't know any way in the world to avoid revolving-door ownership of businesses when there is no cultural or regulatory restriction operating and when you are dealing with auction markets that periodically are going to price securities at far less than negotiated prices."²⁵

Buffett has a second problem:

[E]ssentially the people who end up buying businesses in this environment many times do so for very good reasons; [but in other cases] . . . purchases reflect the megalomania of people who, through natural selection based on political skills or hunger for power, move to the top of organizations. And people behave very differently with corporate money frequently than they behave with their own money.²⁶

And Buffett has a third problem: that the consideration used to pay for these acquisitions is often a "phony currency."

In the late sixties, when the medium of exchange for acquisitions was much more equity-oriented, the operator who could paint the most deceptive mirage for a while in terms of what his company was worth had the best piece of paper to acquire with. . . . Now it's become much more debt-oriented, and the fellow who is willing to borrow the most money and the fellow who really is the best at selling the junk bonds . . . has got the edge.²⁷

This bothers him, he says, because of what the "casino society"—Keynes' phrase—may lead to: "When the capital development of a

²³ *Id.*

²⁴ *Id.* at 13-14.

²⁵ *Id.* at 14.

²⁶ *Id.*

²⁷ *Id.* at 15.

country becomes a by-product of the activities of a casino, the job is likely to be ill done.”²⁸

But in the end, Buffett comes out, uncomfortably, where he began—for shareholder choice:

Someone has to have the ability to make the decision on selling a business, and it's going to be the shareholders, it's going to be the management, or it's going to be the government or some combination thereof. You notice I don't include the board of directors, because my experience overwhelmingly has been that the boards of directors (there are exceptions) tend to go along with what management wants. So I put them in the management classification. And managements are usually going to resist sale, no matter how attractive the price offered. They will advance all sorts of high-sounding reasons, backed up by legal and investment banking opinions, for rejection. But if you could administer sodium pentothal, you find that they, like you or me, simply don't want to be dispossessed—no matter how attractive the offer might be for the owner of the property. Their personal equation is simply far different from that of the owners. If they can keep the keys to the store, they usually will.

When I get through, my heart belongs to the shareholders

...
29

How have these remarks from a decade ago held up? Buffett's skepticism about the allocative efficiency of stock markets is one of his abiding themes. If that skepticism were a stock, its value would have increased (though not at the compound rate of Berkshire Hathaway), as exemplified by even so important a progenitor of the efficient market hypothesis as the late Fischer Black, who, in his Goldman Sachs days, came to believe that stock prices were right, “within a factor 2 of value, *i.e.*, the price is more than half of value and less than twice value. The factor of 2 is arbitrary, of course.”³⁰ And Black also came to believe that so-called “noise trading” could move prices substantially away from allocative values for significant periods of time.³¹

Buffett's concern that a raider could acquire a target for a bargain price has been addressed, however. Courts have given managements great latitude to devise purportedly value creating alternatives to a hostile bid, such as stock repurchases or restruc-

²⁸ *Id.* (quoting J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* ch. 12 (1936)).

²⁹ *Id.* at 15-16.

³⁰ Fischer Black, *Noise*, 41 J. FIN. 529, 533 (1986) (citation omitted).

³¹ *But see, e.g.*, Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575 (1991) (questioning evidentiary support for existence of noise trading).

turings. The invention of the poison pill has been even more important, giving target management significant leverage in contending with a bid that is plausibly inadequate. These developments in combination have pushed premiums from the 30% range to as high as 60%, often even higher.³² In other words, the target shareholders are now getting the negotiated price for the company. But trading his shareholder hat for his czar-of-the-universe hat, Buffett may not think it is a good thing that premiums are so high. Note that he refers to the difference between the stock market price and the negotiated price for a company—and that he does not say that the negotiated price necessarily represents intrinsic value. He would not draw that conclusion, because often the negotiated price is the result of managerial megalomania on the other side.

This tension seems to me to reflect an arguable weakness in Buffett's analytic system. He sees the world as an owner of particular firms—and a nonowner of others—not as a diversified stockholder. He will be shrewd enough to own shares in the firm where managers hold out for full price, but not in the firm that is overpaying, and so may not care about legal rules that look to maximize shareholder wealth overall; indeed, he should fight to protect his right to take money from a free-spender. But if one consequence of what might be called "last dollar auctions" is to create a rickety financial structure for the new combination, then the benefit to the fortunate shareholders of the target may be outweighed by increased risk of private and social losses of business failure. The bankruptcies of the overleveraged Federated Department Stores and Macy's come to mind.³³ Something like this may justify the Delaware Supreme Court's recent cases involving "merger of equals," in which transactions that are obviously sales nevertheless escape the rigors of *Revlon*.³⁴ In some very non-Buffettian worldview, where large public firms are owned by indistinguishable shareholder masses—"a large, fluid, changeable and changing market,"³⁵ to use Chancellor Allen's phrase—the allocation of the

³² See Gordon, *supra* note 9, at 1948-50 (collecting evidence on shareholder gains).

³³ See LOUIS LOWENSTEIN, *SENSE AND NONSENSE IN CORPORATE FINANCE* 30-51 (1991). *But see* Steven N. Kaplan, *Federated's Acquisition and Bankruptcy: Lesson and Implications*, 72 WASH. U. L.Q. 1103 (1994) (finding substantial value created by the acquisition of Federated; little value destroyed by the bankruptcy process).

³⁴ *Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³⁵ *In re Time Inc. Shareholder Litig.*, C.A. No. 10670, 1989 WL 79880, at *21 (Del. Ch. July 14, 1989); *accord* *Arnold v. Society for Sav. Bancorp*, 650 A.2d 1270 (Del. 1996); *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 47 (Del. 1993) (adopting language).

merger gains does not matter; it is just shifting dollars from one pocket to another of the same shareholder. What does matter is a transaction structure that makes sense, in a business combination that the boards think will create value, even if a shareholder of the notional target is deprived of the chance to put his stock out for bid.

Perhaps this is the way to understand the otherwise puzzling Delaware Supreme Court case, *In re Santa Fe Pacific Corp. Shareholder Litigation*,³⁶ which held that despite the presence of two active bidders, the board was not under an obligation to seek the highest value reasonably available for shareholders.³⁷ It seems that if the favored bidder and the target have a merger agreement in which the consideration received by target shareholders is bidder stock, then—without any examination of comparative assets or revenues—the transaction will be deemed a merger of equals rather than a sale. This opens the way for the target board to take all sorts of “non-draconian” measures to assure the victory of the favored bidder. The use of stock as consideration at worst dilutes one of the shareholder groups; it does not drain cash or produce a debt-laden wounded elephant like Time-Warner. But—and here is the advantage of the Buffett focus on shareholders—it does not necessarily lead to the most efficient business combinations either. In *Santa Fe Pacific*, Union Pacific was certainly willing to pay top dollar³⁸—in cash, not the stock that Buffett is so often suspicious of—and maybe because it believed that a Union Pacific combination with Santa Fe dominated the Burlington Northern alternative favored by Santa Fe Pacific management.

The greatest distance between Buffett’s observations and the current state of Delaware law lies in Delaware’s insistence that the board, in whose selection the CEO plays a major role, is nonetheless an independent arbiter of defensive tactics in the heat of a takeover battle. Unless a board is obviously supine or visibly dominated, or contaminated by some side deal with one of the combatants, its decisions will receive a high degree of deference from the Delaware courts. In the intervening decade since Buffett’s remarks, director independence has become the mantra of corporate governance reformers—indeed it is often offered as a substitute for the hostile takeover in assuring managerial accountability (mistak-

³⁶ 669 A.2d 59 (Del. 1995).

³⁷ See *id.* at 70-71.

³⁸ See *id.* at 64.

only, as I argued above).³⁹ The increasing influence of institutional investors has added some heft to the call for director autonomy. It would be interesting to hear from Buffett whether he is still as disbelieving of directors as a useful check on managers fighting against dispossession—or whether he sees the board as a new decisionmaker, better even than the shareholders. I suspect not. His heart still belongs to the shareholders. He is one, after all.

I would suggest that Buffett's principle of shareholder choice includes a wrinkle that may not be immediately apparent: shareholders should also want the power to choose a regime that maximizes the negotiating position of the board, even if it might entail surrendering the immediate power to accept a tender offer. In other words shareholders might well believe that a regime in which a potential offeror had to negotiate first with the board as agent of the shareholders might result in a higher price than one in which the offeror could go directly to the shareholders—i.e., that shareholders could rationally approve of the nonpreclusive use of poison pills, depending on their confidence in the faithfulness of the board. Of course, shareholders would also want the power to withhold or withdraw this power. So, Buffett's conception of shareholder choice should be understood to cover when shareholders will make decisions. What is particularly appealing about shareholder choice as a guiding principle in close cases under corporate law is that it is doctrinally defensible and consistent with general corporate law ideology, yet also connects up to the capital market signals of competitive performance.

II. JUST SAY NO?

Perhaps the most important unresolved question in American corporate law concerns the ultimate power of the board of a Delaware corporation to block an unwanted takeover bid. In the present transactional and doctrinal landscape, this breaks down into two questions: first, what is the board's power to use a poison pill to hold off a hostile bid for so long as the incumbent board thinks desirable?; second, what is the board's power to use the pill to block a hostile bid that a future board might think desirable? The first is the just say no defense; the second might be described as "just say never."⁴⁰ The second defense arises because hostile ac-

³⁹ The current debate about board composition has become a staple of business journalism. See, e.g., Adam Bryant, *The Search for the Perfect Corporate Board*, N.Y. TIMES, Aug. 3, 1997, § 3 at 1.

⁴⁰ Marcel Kahan suggested this coinage.

quirers now often couple a conditional tender offer with a proxy contest or consent solicitation seeking a board change that would lead to redemption of the poison pill. Delaware has relatively sturdy strictures against directly thwarting the shareholder franchise,⁴¹ so an incumbent board cannot indefinitely postpone its replacement by a determined shareholder majority. This gives rise to the so-called “deadhand pill,” which seeks to thwart a hostile bid by purporting to vest shareholders with preclusive rights that cannot be redeemed except by “continuing directors.” Thus the very act that would make it practically possible to redeem the pill—replacing the board—would make it legally impossible.

Although the Delaware Supreme Court has not yet explicitly addressed the question, many argue that a board can now use the poison pill to implement a “just say no” defense against a hostile takeover.⁴² This means that the shareholders’ only recourse in the face of a board’s flat refusal to redeem the poison pill is to replace the directors. In doctrinal terms, the basis for this argument is the interpretive gloss that *Paramount Communications, Inc. v. Time Inc.*, (“*Time*”)⁴³ and *Unitrin* have added to the enhanced judicial scrutiny of defensive tactics articulated in *Unocal Corp. v. Mesa Petroleum Co.*⁴⁴ Under *Unocal* the board must demonstrate both that the takeover bid created “reasonable grounds for believing that a danger to corporate policy and effectiveness existed”⁴⁵ and that the defensive measure adopted was “reasonable in relation to the threat posed.”⁴⁶ *Time* expanded the set of legally cognizable threats to include the possibility that shareholders “might elect to tender into [an all] cash offer in ignorance or mistaken belief of the

⁴¹ See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 n.11 (Del. 1993); *Stroud v. Grace*, 606 A.2d 75 (Del. 1992); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). But see *Kidsco Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch. 1995), *aff’d*, 670 A.2d 1338 (Del. 1995); *Stahl v. Apple Bancorp, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,412 (Del. Ch. Aug. 9, 1990).

⁴² See, e.g., Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857 (1993); Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence*, 19 J. CORP. L. 583 (1994); Irwin H. Warren & Kevin G. Abrams, *Evolving Standards of Judicial Review of Procedural Defenses in Proxy Contests*, 47 BUS. LAW. 647, 648 (1992); Wachtell, Lipton, Rosen & Katz, *The Poison Pill—Some Current Observations* (March 10, 1997) (publicly-disseminated firm memo, on file with author) (“The basic legality of the pill is settled in all major states and its use in effectuating a just-say-no defense has been confirmed by the courts.”). But see GILSON & BLACK, *supra* note 8, at 893-95 (suggesting matter is open).

⁴³ 571 A.2d 1140 (Del. 1989).

⁴⁴ 493 A.2d 946 (Del. 1985).

⁴⁵ *Id.* at 955.

⁴⁶ *Id.* at 958.

strategic benefit which a business combination with Warner might produce."⁴⁷ In then evaluating the proportionality of Time's defensive tender offer for Warner, the court declared that a defensive measure that "preclud[ed] Time's shareholders from accepting the [Paramount] tender offer or receiving a control premium in the immediately foreseeable future"⁴⁸ was not disproportionate. This is because under the statutory delegation of managerial power to the board, the board is empowered to make "the selection of a time frame for the achievement of corporate goals" and is "not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."⁴⁹

Thus, the court sustained the Time tender offer for Warner despite its preclusive effects on Paramount's alternative strategy for Time, relying on the Chancellor's determination that the Time tender offer did not preclude a Paramount offer for the combined Time-Warner company (the financial challenge of which would have made the highly leveraged \$25 billion buyout of RJR Nabisco seem like a utility financing). But the supreme court did not pick up the Chancellor's distinction between the Time tender offer and a refusal to redeem a poison pill, "which by definition is a control mechanism and not a device with independent business purposes."⁵⁰ Thus *Time* opened these questions: If a target could protect its deliberately conceived acquisition plan, why not a well thought out plan for internal growth and independence? If a defensive measure like the Time tender offer, entailing massive debt and a major revamping of business plans, is a proportionate response, why not a continuing poison pill, which entails much less

⁴⁷ *Time*, 571 A.2d at 1153. Warner was, of course, the merger partner favored by Time's management. Paramount sought a business combination with Time that would leave out Warner.

⁴⁸ *Id.* at 1154.

⁴⁹ *Id.*

⁵⁰ *In re Time Inc. Shareholder Litig.*, C.A. No. 10670, 1989 WL 79880, at *30 n.22 (Del. Ch. July 14, 1989). The Supreme Court also specifically disapproved *City Capital Assoc. v. Interco*, 551 A.2d 787 (Del. Ch. 1988), in which the Chancellor had said that use of a poison pill to implement a "just say no" defense would "be so inconsistent with widely shared notions of appropriate corporate governance as to threaten to diminish the legitimacy and authority of our corporation law." *Id.* at 799-800. It is possible to read the disapproval of *Interco* more narrowly, as pertaining only to its assertion that inadequate value was insufficient to constitute a threat under *Unocal*. See Ronald J. Gilson, *The Fine Art of Judging: William T. Allen*, 22 Del. J. Corp. L. (forthcoming 1997), but the very way the supreme court misunderstood the Chancellor's position in *Interco*—asserting that the case substituted the court's judgment for the board's, when in fact the case is protecting shareholder choice—suggests that the supreme court may disapprove of judicial intervention to protect shareholder choice against board action, that, like the poison pill, quashes it.

disruption to the business plan that the target board is trying to protect?⁵¹

Unitrin pursued these questions in two ways. First, it did indeed expand the business circumstances that could give rise to a legally cognizable concern about shareholder mistake. In *Time* the target board's putative concern was that shareholders would mistake the value of the prospective creation of an unprecedented media conglomerate. In *Unitrin* the board was permitted to address the concern that shareholders would mistake the value of business as usual, i.e., the target's long term prospects as an independent company. Second, *Unitrin* arguably relaxed judicial scrutiny in proportionality review. *Unocal* had declared that a target may not resist a perceived threat by "draconian means,"⁵² though under *Unocal* a board presumably must still show that a non-draconian measure is proportional to the threat. *Unitrin* defines "draconian" tactics as either "preclusive or coercive," but then goes on to say that the board satisfies its burden merely by showing that a non-preclusive, noncoercive tactic is within "the range of reasonableness."⁵³ In other words, except for screening out preclusive or coercive tactics, this formulation may significantly circumscribe a reviewing court's scrutiny of defensive tactics.⁵⁴

The supreme court in *Unitrin* did not directly address whether the target's retention of a poison pill is "preclusive," and the implications of the case are complicated by the chancery court's mishandling of proportionality review. In *Unitrin*, the target board had implemented two principal defensive strategies: first, the initial adoption of a poison pill, and second, an open market purchase program for up to 20% of the target's stock. The chancery court sustained adoption of the pill; this ruling was not appealed, so the issue of the pill never came to the supreme court. Adoption of a pill at the outset of a control contest is concededly proportional to the threat of an over-hasty shareholder response to an allegedly "low ball bid,"⁵⁵ given the many ways in which a target board can bargain for or otherwise create additional value for shareholders.

⁵¹ See Gordon, *supra* note 9, at 1941-48.

⁵² *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

⁵³ See *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1387-88 (Del. 1995).

⁵⁴ The meaning of *Unitrin's* reformulation of the *Unocal* test is not altogether clear. The court's definition of "preclusive" points in two different directions: "mathematically impossible or realistically unattainable." *Unitrin*, 651 A.2d at 1389. The latter is obviously a more important standard to sustain in administering a system of fiduciary duties, since many things may well be theoretically (or mathematically) possible that are in fact unattainable.

⁵⁵ *Id.* at 1376.

But the *Unitrin* court did not address the circumstance of a pill that is left in place indefinitely, as an obdurate just say no defense.⁵⁶

The supreme court decision focused instead on the chancery court's injunction against completion of the repurchase program, and it turned out that the chancery court seriously misunderstood the implications of the repurchases. Various members of the target board were substantial shareholders, holding at the outset nearly 23% of the target stock. The chancery court conjectured that the purpose of the open market purchases was to raise the ownership percentage of this insider group to above 25%, which the chancery court at one point (incorrectly) thought would give the group a veto block under the target's charter.⁵⁷ Eventually the chancery court focused on the implications of the repurchase program for a proxy battle, significantly overstating the likely effects on the outcome from a marginal increase in the insider group's ownership percentage.⁵⁸ Perhaps most tellingly, the chancery court failed to understand the significance of the insider group's financial interest: in turning down the bid, they were passing up a 30% premium on an investment of approximately \$100 million; in giving shareholders who did not agree with their assessment of the firm's value an exit option through the repurchase program at the bid price, they were risking dilution of their economic stake.⁵⁹ It was in the con-

⁵⁶ The supreme court was aware of the potential preclusive effects of an unredeemed poison pill. See *id.* at 1389 n.25.

⁵⁷ See *American Gen. Corp. v. Unitrin*, Civ. A. No. 13699, 1994 WL 512537, at *5 (Del. Ch. Aug. 26, 1994). The basis for the issuance of a temporary restraining order against the repurchase program was the court's belief that under the target's charter, a group with more than 25% shareownership would have "absolute veto power" over a business combination. The charter provision apparently required 75% only for mergers not approved by the board, which meant that a successful proxy battle to replace directors would eliminate an alleged veto block, a fact that the chancery court apparently did not grasp. Compare *In re Unitrin Shareholders Litig.*, Civ. A. Nos. 13656, 13699, 1994 WL 698483, at *3 (Del. Ch. Oct. 14, 1994) with *Unitrin*, 651 A.2d at 1380 n.26. Nevertheless, the focus of the chancery court's opinion is on the way the repurchase program will make the proxy battle more difficult. See *Unitrin Shareholders*, 1994 WL 698483, at *9.

⁵⁸ Compare *Unitrin Shareholders*, 1994 WL 698483, at *9 with *Unitrin*, 651 A.2d at 1381. Among the factors that the supreme court relied upon in deciding that the repurchase program did not unduly restrict the bidder's opportunity for a successful proxy contest was the ownership pattern of target stock: 20 institutions held 33% of the target's stock; in all, institutions held 42% of the target's stock. "That institutions held a high percentage of [the target's] stock is not as significant as the fact that the relatively concentrated percentage of stockholdings would facilitate a bidder's ability to communicate the merits of its position." *Unitrin*, 651 A.2d at 1383 n.33.

⁵⁹ The economic effects for nonselling shareholders of open market repurchases are complex. See Jeffrey N. Gordon & Lewis A. Kornhauser, *Takeover Defense Tactics: A Comment on Two Models*, 96 YALE L.J. 295, 301-06 (1986); see also Marcel Kahan, *Jurisprudential and Transactional Developments in Takeovers* (1997) (working paper, on file

text of these errors of judicial scrutiny that the supreme court sustained the repurchase program as "within a range of reasonableness," despite the chancery court's ruling that it was "not necessary" in light of the poison pill. Moreover, in the instructions on remand, the chancery court was told to consider whether a measure "was limited and corresponded in degree or magnitude to the degree or magnitude of the threat (*i.e.*, assuming the threat was relatively 'mild,' was the response relatively 'mild?')." ⁶⁰ This instruction is very much consistent with the proportionality review as it had been understood before *Unitrin*. Thus the *Unitrin* proportionality formulation may only be a caution against a court's substituting its judgment for the board's in a close case, not a change in the standard. This view is supported by the subsequent case of *In re Santa Fe Pacific Corp. Shareholder Litigation*, ⁶¹ which reversed the dismissal of a complaint where the alleged target defenses were not, by the standards of prior cases, coercive or preclusive and thus required a factual proportionality showing. ⁶²

The first (and only) post-*Unitrin* case directly to address the just say no question under Delaware law is *Moore Corp. Ltd. v. Wallace Computer Services*, ⁶³ an especially remarkable case because nearly 75% of the Wallace shareholders tendered into an offer that was thwarted by the target board's retention of a poison pill. *Wallace* started in a familiar way: a series of overtures by a would-be strategic acquiror, rejection by the target management, and eventually an announcement of an all-cash tender offer at a 27% premium over the market price, conditioned on redemption of the poison pill and other impediments to a business combination. The tender offer was coupled with a proxy solicitation to replace one third of the target's classified board. The target board refused the overture on the grounds that the offer was "inadequate" and stood behind the bulwark of a previously-enacted poison pill. The Delaware federal district court sustained the target's retention of the poison pill. Following *Unitrin*, the *Wallace*

with author) (calculating financial consequences to outside director shareholders in *Unitrin*).

⁶⁰ *Unitrin*, 651 A.2d at 1389.

⁶¹ 669 A.2d 59 (Del. 1995) (Veasey, Ch. J.).

⁶² *Accord* *Uni-Marts, Inc. v. Stein*, CIV.A. Nos. 14713, 14893, 1996 WL 466961 (Del. Ch. Aug. 12, 1996) (Allen, C.) (requiring board justification for tactics unlikely to be regarded as coercive or preclusive); *Kidsco Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch.) (close examination of reasonableness of 25 day postponement of shareholder meeting), *aff'd* 670 A.2d 1338 (Del. 1995).

⁶³ 907 F. Supp. 1545 (D. Del. 1995).

court found a legally cognizable threat in the risk that shareholders would mistakenly tender into a low-ball offer, particularly since the target "had finally begun to reap the financial benefits"⁶⁴ of prior technology investments. The court then made the crucial move: retention of a poison pill with a 20% trigger was not "coercive or preclusive" because it would not significantly impair the acquirer's chances of success in the proxy contest.⁶⁵ The question left hanging after *Unitrin* was: does the potential for shareholder exercise of "the powers of corporate democracy"⁶⁶ to install a board that can eventually redeem a poison pill thereby render a pill nonpreclusive? *Wallace* answers yes, that because a successful proxy contest was possible, a hostile offer, even if inhibited, was not precluded by the target's pill.

Thus, *Wallace* goes considerably beyond *Unitrin* in two important respects. First, it declares that incumbent management can in fact adopt and maintain a strategy that will preclude a takeover bid so long as the board remains in office, i.e., it can just say no. Even if shareholders have overwhelmingly voted through an uncoerced tender decision in favor of the offer, the offeror must undertake the additional expense of a proxy contest in which shareholders must vote in new directors.⁶⁷ This conclusion seems inconsistent with the limitations on the use of the poison pill in *Moran v. Household International, Inc.*,⁶⁸ which sustained use of the pill because it did not "strip[] stockholders of their rights to receive tender offers" or "fundamentally restrict[] proxy contests."⁶⁹ The very point of an unredeemed pill is to block the shareholders' ability to receive and accept tender offers, as the outcome in *Wallace* demonstrates.

⁶⁴ *Id.* at 1563.

⁶⁵ *See id.* at 1562.

⁶⁶ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985) ("If the shareholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.") (citing *Aronson v. Lewis*, 437 A.2d 805, 811 (Del. 1984)); *accord* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978) (Powell, J.).

⁶⁷ There may be some room for debate as to how far this extends *Unitrin*. Although the supreme court did not address the poison pill, its concern was for the preclusive effect of the stock repurchase program, given a poison pill already in place. But the facts in *Unitrin* suggest that the chancery court believed that the repurchase program was preclusive even if the pill were redeemed, because of the 25% veto block that the repurchases would create. Nor did the supreme court address the *Wallace* circumstance of obdurate failure to redeem over a long period of time despite an expression of overwhelming shareholder preference for the hostile bid.

⁶⁸ 500 A.2d 1346 (Del. 1985).

⁶⁹ *Id.* at 1357.

Second, *Wallace* does not attend to the “facts and circumstances” approach of *Unitrin* in evaluating the proportionality of the pill. In considering whether the target’s stock repurchase program was reasonable, *Unitrin* addressed the cumulative effects of all the target defense tactics, including the supermajority articles provision, in the context of the target’s share ownership structure.⁷⁰ As the court weighed the effects of the stock repurchases on the proxy contest, it registered not only the high percentage of institutional ownership but, more significantly, its concentration, because a “relatively concentrated percentage of stockholdings would facilitate a bidder’s ability to communicate the merits of its position.”⁷¹ The court also took into account that the target board mounting this defense was heavily invested in target stock, which of course would reduce the “omnipresent specter that a board may be acting primarily in its own interests,”⁷² and since the bulk of the insider stock was held by outside directors receiving no substantial compensation from the target, there were few private benefits of control. Thus, the cumulative effects of the defensive tactics would effect *only* a low-ball offer, a “show me the money” defense. The court adopted the target’s position that “it is hard to imagine a company more readily susceptible to a proxy contest concerning a pure issue of dollars.”⁷³

By contrast, the *Wallace* court paid no attention to the context in which the poison pill operated. The cumulative effect of the pill on top of a staggered board was much more powerfully preclusive than a pill alone. A would-be acquirer would have to remain committed to the transaction through at least two proxy contests, bearing the expense of proxy solicitation and the significant direct and opportunity costs of uncertainty over a multi-year period. Moreover, unlike in *Unitrin*, the board in *Wallace* did not hold substantial stock, so the acquirer would know that it was facing a board with interests that were not congruent with public shareholders. Indeed, after winning an initial proxy contest, the acquirer withdrew shortly before the filing deadline on the second proxy contest.⁷⁴ Finally, in *Wallace*, the acquirer already demonstrated

⁷⁰ “Where all of the target board’s defensive actions are inextricably related, the principles of *Unocal* require that such actions be scrutinized collectively as a unitary response to the perceived threat.” *Unitrin*, 651 A.2d at 1387.

⁷¹ *Id.* at 1383 n.33.

⁷² *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

⁷³ *Unitrin*, 651 A.2d at 1383.

⁷⁴ See Steven Lipin & Larry M. Greenberg, *Moore Drops Bid to Acquire Wallace Computer*, WALL ST. J., Aug. 7, 1996, at A3.

substantial shareholder support for the offer, as reflected in the 75% conditional tender. On the usual assumption that 10% of an issuer's stock is simply inert, this raises the shareholder approval level for the hostile offer past 80%. In short, even assuming that retention of a pill is not inherently preclusive, under the approach employed by the Delaware Supreme Court in *Unitrin*, *Wallace* is an incorrectly decided case.⁷⁵

A recent chancery court case, *In re Gaylord Container Corp. Shareholders Litigation*⁷⁶ supports the view that proportionality review should take into account the cumulative effects of target defense measures and the distribution of share ownership. In light of shark repellent bylaw and charter amendments compounded by 20% stock ownership by corporate insiders, a poison pill could well have an illegitimate preclusive effect, the court said. "[T]he board's unilateral adoption of the shareholder rights plan is subject to enhanced scrutiny, and that scrutiny must consider the effect of the rights plan in combination with the amendments."⁷⁷

So how does a Buffettian view of shareholder choice help resolve these questions about the board's power to refuse a hostile bid? First, this view would look skeptically at permitting a board to shield itself behind a poison pill, to just say no, with shareholder suffrage as the only recourse against such measures. The cognitive assumptions are contradictory. If shareholders are prone to mistakes in evaluating a hostile bid, why are they suddenly wiser in deciding how to vote in the related proxy battle presenting the same issue? The contradiction becomes painfully obvious in *Unitrin*, where the court relies upon the sophistication of institutional investors to demonstrate why a proxy context is not precluded, while at the same time accepting the board's assertion that such shareholders have to be protected from mistakenly tendering. The Delaware courts have never offered a justification of a preference for control changes through elections rather than markets, and the differential possibility of shareholder mistake does not seem like a promising starting point. In the end, the position collapses to an ultimately unsatisfying formalism—"the statute gives the board power to make all the decisions until it is no longer the board"—

⁷⁵ *Wallace* seems inconsistent with *Wells Fargo & Co. v. First Interstate Bancorp*, Civ. A., Nos. 14696, 14623, 1996 WL 32169 (Del. Ch. Jan. 18, 1996) (Allen, C.), which rejects dismissal of a complaint alleging disproportionate defense tactics. The Chancellor suggests that even if dismissal were appropriate in the case of break up fees and stock options, "the effect of the rights plan, however, plainly is a different order of magnitude." *Id.* at *6.

⁷⁶ C.A. No. 14616, 1996 WL 752356 (Del. Ch. Dec. 19, 1996).

⁷⁷ *Id.* at *3.

which of course squeezes out the court's role as a fiduciary duty monitor of actions that are concededly within the board's statutory power.⁷⁸ Moreover, relying solely on shareholder suffrage gives the board incentives to take various measures to evade elections. The resulting board behavior has been unseemly.⁷⁹ Imagine if Congress and the President did not like the polling data and so put off the regularly scheduled elections until voters could reconsider the wisdom of their choices. More globally, a position that limited shareholder choice to shareholder voting may excessively burden the market in control, since it requires an acquirer who is willing to incur the expense of a proxy battle, to adhere to a particular time frame associated with a firm's shareholder meetings, to submit to an additional regulatory regime, and risk additional costs and opportunity costs through the board's evasion and delay.

A Buffettian view of shareholder choice would also look realistically at the way a board uses the election machinery to maintain its position. Even if the exercise of shareholder franchise is special—perhaps such an act has more legal manna because, unlike potential or even actual tender decisions, it is specifically contemplated by the corporate statutes—one election should be enough. In the case of a classified board, for example, once shareholders have signaled their judgment through a proxy contest and have replaced one class of incumbent directors, indefinite retention of a poison pill is no longer reasonable.⁸⁰ This is a minimalist role for a fiduciary duty counterweight to the risks of managerialism.

III. THE DEADHAND PILL—"JUST SAY NEVER"

Institutional ownership and activism have somewhat reduced the effectiveness of the just say no defense. This manifests itself not so much in actual election contests in which a poison pill is eventually redeemed, but in the responses to unwelcome takeover bids by boards that anticipate this vulnerability. The board initially resists and holds out for a higher bid, but eventually the acquisition

⁷⁸ This formalism also seems checked by the equal but opposite assertion: that since the offer is addressed to the shareholders, not the corporation, the board has no power to intervene.

⁷⁹ Compare *Gintel v. Xtra Corp.*, C.A. No. 11422 (Del. Ch. Feb. 27, 1990), *Aprahamian v. HBO & Co.*, 531 A.2d 1204 (Del. Ch. 1987), and *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906 (Del. Ch. 1980) with *Stahl v. Apple Bancorp, Inc.* 579 A.2d 1115 (Del. Ch. 1990); *MAI Basic Four, Inc. v. Prime Computer, Inc.*, CIV.A. No. 10868, 1989 WL 63900 (Del. Ch. June 13, 1989).

⁸⁰ In such a case, it would be appropriate to leave the pill in place only to give the board an opportunity to negotiate with the acquirer or to engage in an alternative transaction creating greater value.

becomes "friendly." This scenario has created pressure on defensive planners to neutralize the potential undercutting of the poison pill, leading to the addition of "continuing director" provisions that permit redemption of a pill only by the directors who adopted it (or their designated successors). Less extreme versions of such "deadhand pills" give the power to redeem also to directors receiving supermajority shareholder support (often the same percentage required in a merger vote) or simply provide a "cooling off period" during which only the continuing directors can redeem (typically 180 days).⁸¹

A version of the deadhand pill with a supermajority election provision was initially tested and found wanting under New York law in the late 1980s control contest for Irving Bank.⁸² The core of the court's objection in *Bank of New York v. Irving Bank Corp.* was the "illegal discrimination" between the power of a board that consisted of continuing directors (or those elected by supermajority) and a board otherwise validly elected by a plurality.⁸³ Such a purported limitation conflicted with statutory provisions calling for, in the absence of a contrary charter provision, plurality voting in director elections,⁸⁴ the board's management of the business of the corporation,⁸⁵ and board action by majority vote of a quorum of the board.⁸⁶ This decision, based on a statutory pattern similar to other states, including Delaware, stymied the use of a deadhand pill because its essence was discrimination between possible future boards. As a statutory matter, a board could of course issue nonredeemable rights, meaning rights that no board could redeem; many a corporate finance plan will entail the issuance of such rights. But the nonredeemability of the rights found in the typical poison pill would presumably be invalid under *Unocal* and *Moran* as an unreasonable barrier to all takeovers, since such rights would operate irrespective of the particulars of a given offer, and, in any event, would deprive the board of the flexibility that it would desire to respond to potential bidders. Probably

⁸¹ For a useful description of deadhand pills and an argument against them, see Shawn C. Lese, Note, *Preventing Control from the Grave: A Proposal for Judicial Treatment of Dead Hand Provisions in Poison Pills*, 96 COLUM. L. REV. 2175 (1996).

⁸² See *Bank of New York Co., Inc. v. Irving Bank Corp.*, 528 N.Y.S.2d 482 (Sup. Ct. 1988).

⁸³ See *id.* at 485.

⁸⁴ See N.Y. BUS. CORP. LAW § 614 (McKinney 1986).

⁸⁵ See *id.* § 701.

⁸⁶ See *id.* § 708.

no board could or would adopt a pill without optional redemption. The point of a deadhand pill is to overcome this weakness.

After *Irving Bank*, the deadhand pill fell into apparent desuetude.⁸⁷ It was not even mentioned in recent compilations of target defense tactics.⁸⁸ Desperation in the face of a hostile bid being the mother of invention, the device reemerged in late 1995 (in connection with the defense by Cordis against a hostile bid by Johnson & Johnson) as a tactic to thwart an imminent replacement of the board through a consent solicitation. Before an adjudication of such a pill's legality under Florida law, the incumbent Cordis board acceded to a somewhat higher bid by Johnson & Johnson.

A recent case sustaining the deadhand pill under Georgia law, *Invacare Corp. v. Healthdyne Technologies, Inc.*,⁸⁹ is likely to lead to new popularity of this defense measure even though the particular decision relies upon peculiar features of Georgia law. The acquirer (Invacare) initiated a hostile bid for the target (Healthdyne), a Georgia corporation, in January 1997, and, to remove the poison pill that was blocking its ability to proceed with a tender offer, added a proxy contest to replace the target's directors.⁹⁰ The target's poison pill contained a continuing director provision that meant even if the acquirer succeeded in electing its slate, the new directors could not redeem the pill.

Several important sections in the Georgia corporate code were implicated: first, section 801, which gives "all corporate powers" and the responsibility for managing "the business and affairs of the corporation" to the board, subject to charter provisions or shareholder-approved bylaws;⁹¹ second, section 624, which authorizes

⁸⁷ The deadhand pill figured in two other control contests involving Delaware corporations in the late 1980s, but related judicial decisions did not pass on the validity of such plans. See *Davis Acquisition Inc. v. NWA Inc.*, CIV.A No. 10761, 1989 WL 40845 (Del. Ch. Apr. 25, 1989) (180 day delayed redemption); *Prime Computer Inc. v. Allen*, 1988 WL 5277 (Del. Ch.) (waivable for an all cash, all shares offer), *aff'd*, 540 A.2d 417 (Del. 1988). Note that these are milder versions of the Healthdyne pill.

⁸⁸ See INVESTOR RESPONSIBILITY RESEARCH CTR., *CORPORATE TAKEOVER DEFENSES* (1993); Wachtell, Lipton, Rosen & Katz, *Mergers and Acquisitions and Takeover Preparedness: 1996 Update* (Apr. 1, 1996) (publicly disseminated firm memo, on file with author).

⁸⁹ 968 F. Supp. 1578 (N.D. Ga. 1997) (appeal pending).

⁹⁰ Healthdyne's board was not classified. As part of its defensive tactics, Invacare sought an amendment to the Georgia corporation code that would have made board classification the statutory default, effective immediately, subject to opt out by a board vote or by a one-time shareholder vote. After a furious lobbying battle, the legislation passed in the Georgia Senate, failed in the Georgia House, and was rejected by a conference committee. See *The Siege of Atlanta*, CORP. CONTROL ALERT, Apr. 1997, at 2.

⁹¹ GA. CODE ANN. § 14-2-801(b) (1994) provides:

the board to issue rights with respect to the corporation's shares, and give the board "authority to determine, in its sole discretion, the terms and conditions of the rights";⁹² and third, the provisions of the Georgia Fair Price Statute⁹³ and the Business Combination Statute⁹⁴ that call for the votes of "continuing directors" to approve, respectively, a transaction with an interested shareholder, and a bylaw amendment opting out of coverage.

The acquirer's argument was straightforward: that the continuing director provision limits the board's power, and is found neither in the charter nor in the bylaws adopted by the shareholders, and thus violates the statutory scheme. In sustaining the continuing director provision, the court in effect held that explicit statutory delegation (in section 624) to the board of discretion to set terms and conditions of a rights plan (limited only by a board's fiduciary duty to the corporation) controlled over a general statutory provision (section 801).⁹⁵ The court drew additional support

All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation, bylaws approved by the shareholders, or agreements among the shareholders which are otherwise lawful.

⁹² *Id.* § 14-2-624(c).

⁹³ *Id.* § 14-2-1111:

In addition to any vote otherwise required by law or the articles of incorporation of the corporation, a business combination shall be:

- (1) Unanimously approved by the continuing directors, provided that the continuing directors constitute at least three members of the board of directors at the time of such approval; or
- (2) Recommended by at least two-thirds of the continuing directors and approved by a majority of the votes entitled to be cast by holders of voting shares, other than voting shares beneficially owned by the interested shareholder who is, or whose affiliate is, a party to the business combination.

⁹⁴ *Id.* § 14-2-1133(b):

Any bylaw adopted as provided in subsection (a) of this Code section may only be repealed by the affirmative vote of at least two-thirds of the continuing directors and a majority of the votes entitled to be cast by voting shares of the resident domestic corporation, other than shares beneficially owned by an interested shareholder, in addition to any other vote required by the articles of incorporation or bylaws to amend the bylaws.

⁹⁵ See *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578, 1579 (N.D. Ga. 1997). Section 14-2-601 provides, in pertinent part:

Except as otherwise provided in Code section 14-2-602, all shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class; provided, however, that any of the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the shares, or the holders thereof, may be made dependent on facts ascertainable outside the articles of incorporation or any amendment thereto if the manner in which the facts shall operate upon the voting powers, designations, preferences, rights, qualifications, limitations, or restrictions of or on the

from the continuing director provisions of other takeover-related statutes, which showed that “the concept of continuing directors is an integral part of a takeover defense and is not contrary to public policy in Georgia.”⁹⁶

Crucial to the court’s reasoning was a particular reading of part of section 624(c) of the Georgia corporate code, and a related piece of legislative history:

Nothing contained in Code Section 14-2-601 [requiring equal treatment for all shareholders] shall be deemed to limit the board of directors’ authority to determine, in its sole discretion, the terms and conditions of the rights . . . issuable pursuant to this Code section. Such terms and conditions need not be set forth in the articles of incorporation.⁹⁷

The court construed the Official Comment to the statutory section to “reveal that the board of directors’ discretion to set the conditions of a rights plan is limited only by their fiduciary obligations to the corporation.”⁹⁸ The court gave short shrift to any possible fiduciary duty argument and asserted, conclusorily, that the continuing director feature “does not infringe on the shareholders’ right to elect a new board.”⁹⁹

By any fair reading of the statutes and cited legislative history, the court’s ruling is quite a stretch. Section 624 does indeed give a board broad power to issue various rights, options, and warrants, and the power to determine their terms and conditions. Rights may be issued even if the underlying shares necessary to exercise the rights have not been authorized, and may be made nontransferable and exercisable on the basis of extrinsic circumstances. Nevertheless, nothing in section 624 suggests that the board’s discretion exceeds the general constraints on board authority provided in section 801. Indeed, the specific override of section 601, which prescribes that rights shall attach equally to all shares and that the basis for contingent effects on the rights must be specified in the articles, but the absence of any override of section 801 buttresses this point.

shares, or the holders thereof, is clearly and expressly set forth in the articles of incorporation.

Id. § 14-2-601.

⁹⁶ *Invacare*, 968 F. Supp. at 1579. As the court seemed to recognize, the mention of a continuing directors feature in one statutory provision but not another also cuts in the direction of limitation.

⁹⁷ GA. CODE ANN. § 14-2-624(c).

⁹⁸ *Invacare*, 968 F. Supp. at 1580.

⁹⁹ *Id.* at 1581.

The court has distorted the legislative history of section 624(c), which was added in 1989, to counter *West Point-Pepperell, Inc. v. Farley, Inc.*,¹⁰⁰ in which the Georgia federal district court held that any poison pill—flipover or flip-in—violated Georgia corporate law. The Official Comment says the relevant statutory language of 624(c) “was intended to permit the approach of courts interpreting Delaware law [citing *Moran*], which have held that the board of directors is authorized to issue rights pursuant to shareholder rights plans.” In other words, the thrust of 624(c) was to make clear the board’s power to issue a poison pill, not to give the board uncabined discretion in its provisions. In context, the passage quoted by the court relating to the board’s discretion has a narrow focus: although section 601 imposes formal equality constraints and requires specification in the articles of the terms of rights and other securities, 624(c) permits the board to specify such terms in its discretion, without the need for an articles provision, subject to the board’s fiduciary duty. Nothing in this scheme suggests that the board now has superpower (a) to act beyond the other customary limits on board power, or (b) beyond the powers of a Delaware board.¹⁰¹

Regardless of whether *Invacare Corp. v. Healthdyne Technologies, Inc.* is correctly decided (the case is on appeal),¹⁰² and despite the importance in the opinion of the particular Georgia statutes, it has released a genie that is likely soon to appear in a Delaware case. How should a Delaware court decide the matter of a dead-hand poison pill? There are three different issues: the statutory power to adopt such a provision; the possible limitation on shareholder voting rights; and the board’s fiduciary duty.

A. Statutory Power

The statutory question precedes all others, because the board cannot act beyond its statutory power. It is not obvious where the board of a Delaware corporation gets the power to discriminate among different configurations of successor boards. As under New York law, Delaware directors are elected by a plurality of share-

¹⁰⁰ 711 F. Supp. 1096 (N.D. Ga. 1989).

¹⁰¹ Accord William E. Easton, *Some Distinctive Features of the Georgia Business Corporation Code*, 28 GA. ST. B.J. 101, 103-04 (1991) (analysis by member of state bar association drafting committee).

¹⁰² Healthdyne has recently agreed to an acquisition proposal from Respironics, Inc., that may well moot the appeal. See *Respironics Agrees to Buy Healthdyne in Stock Transaction*, WALL ST. J., Nov. 12, 1997, at A6; see also *infra* note 152.

holders voting,¹⁰³ the board manages the business and affairs of the corporation,¹⁰⁴ and board decision is by a majority vote at a meeting at which a quorum is present.¹⁰⁵ These various statutory elements may be altered by the articles, or in some cases the bylaws, but a deadhand pill is unlikely to obtain shareholder approval as an articles amendment and, if adopted as a bylaw, would presumably be subject to both shareholder power¹⁰⁶ and the power of a successor board to amend bylaws.

Boards have the power to create committees that can exercise all the power of the board with respect to particular matters, but presumably a successor board could alter the committee structure of a prior board.¹⁰⁷ A deadhand pill establishes special director qualification: only certain directors will be qualified to exercise the power to redeem a pill. But director qualifications can be established only in the articles or the bylaws,¹⁰⁸ neither of which will be tactically available in the case of a deadhand pill. A deadhand pill gives voting rights to some directors and not others. But the power to create voting distinctions among directors appears to be available only in the case of a classified board and only when specified in the articles.¹⁰⁹ Otherwise, nothing in Delaware law suggests that some directors of a public corporation may be created less equal than other directors, and certainly not by unilateral board action. Delaware law contains nothing comparable to Georgia's "sole discretion" statutory provision on which to base an argument for extension of the board's customary power and the grant of superpower with respect to the fashioning of a pill.

A board may have some power to limit the discretion of a future board as an incidental consequence of a corporate contract. For example, a covenant in a loan agreement that restricts the corporation's right to issue dividends. But this power is subject to constraint. For example, a board cannot limit its discretion or the discretion of a future board to fire a chief executive officer or to enter into a contract where the potential damages upon the CEO's termination would be so large as to eliminate, as a practical matter,

¹⁰³ See DEL. CODE ANN. tit. 8, § 216(i) (Supp. 1996).

¹⁰⁴ See *id.* § 141(a).

¹⁰⁵ See *id.* § 141(b).

¹⁰⁶ See *id.* § 109.

¹⁰⁷ See *id.* § 141(c).

¹⁰⁸ See *id.* § 141(b); see also *Stroud v. Grace*, 606 A.2d 75 (Del. 1992).

¹⁰⁹ See DEL. CODE ANN. tit. 8, § 141(d).

that discretion.¹¹⁰ Such discretion-limiting agreements would trench on the board's statutory power to appoint and remove officers¹¹¹ and to direct the management of the corporation.¹¹² A continuing director provision is therefore objectionable in two important ways. First, this limitation of a future board's discretion is not incidental, but rather is the very point of the matter, as a way of protecting the current board's incumbency, and thus generally represents unwarranted interference with a future board's power to manage. Second, because the limitation will interfere with the future board's capacity to accomplish a business combination (because it cannot redeem the pill), it directly interferes with the future board's core statutory power to manage the business and affairs of the corporation in the best interests of the corporation and its shareholders. Such interference turns on its head the very rationale of the poison pill, which is to protect the board against alleged encroachments on that power from a hostile bid. A continuing director provision may make it impossible for a future board to "to select . . . a time frame for the achievement of corporate goals,"¹¹³ and in this way would violate deeply held norms of Delaware corporate law.

A final statutory objection is that the limitation violates the shareholder power to elect directors, because it makes the question of director provenance—who nominated the director—pivotal in defining the director's power. The continuing director provision is an attempt to use the board's prerogative of nominating director candidates as a way of ensuring their reelection (since only they will have the power to redeem a pill). This usurps the shareholders' electoral power. In short, the continuing director provision fails on many statutory grounds relevant to the power, and the constraints on that power, of the board of directors.¹¹⁴

¹¹⁰ See, e.g., *Grimes v. Donald*, CIV.A. No. 13358, 1995 WL 54441 (Del. Ch. Jan. 11, 1995).

¹¹¹ See DEL. CODE ANN. tit. 8, § 142(b).

¹¹² See *id.* § 141(a); see also *Chapin v. Benwood Found., Inc.*, 402 A.2d 1205 (Del. Ch. 1979); *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956).

¹¹³ *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989).

¹¹⁴ Presumably an invalid continuing directors provision is not enforceable, despite an arguable contract claim created by issuance of the pill to the corporation's shareholders. Under Delaware law, although *ultra vires* acts are not automatically invalid, a shareholder can seek to enjoin such acts, and the court "may, if all the parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract." DEL. CODE ANN. tit. 8, § 124(1). This is consistent with the Delaware supreme court's invalidation of a stock lock-up option given in violation of the board's fiduciary duty in *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994).

Although the statutory answer seems a straightforward negative, the Delaware Supreme Court has previously taken an expansive view of the board's statutory authority to fashion takeover defenses. The most prominent example is *Moran v. Household International, Inc.*,¹¹⁵ in which the court permitted use of the statutory power to issue rights in securities for corporate finance purposes as the basis for creating an anti-takeover measure, the flipover poison pill. The *Moran* court relied upon the evolutionary idea of corporate law articulated in *Unocal*: "[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."¹¹⁶ The statutory stretch in *Moran* merely permitted the board to use a statutory device beyond its purported purpose. The deadhand pill is more than a stretch; it directly violates several statutory norms.

B. Shareholder Voting

But even if the statutory question is not dispositive, the deadhand poison pill still runs afoul of structural concerns about shareholder voting and the board's fiduciary duties in facing a takeover bid. The framework for resolving both questions comes from *Unocal*, which applies whenever the board "adopts any defensive measure taken in response to some threat to corporate policy and effectiveness which touches on issues of control."¹¹⁷ The proportionality test is articulated somewhat differently for defensive measures that affect shareholder voting: unilateral board action that "purposefully disenfranchises shareholders" is "strongly suspect . . . and cannot be sustained with a 'compelling justification.'"¹¹⁸ It is hard to think that a deadhand pill *would not* be regarded as disenfranchising shareholders. In rejecting an unsolicited bid and in using the poison pill—a device unilaterally adopted by the board—to pretermite the shareholders' choice to tender to the hostile bidder, the board is challenging the shareholders either to accept the board's judgment, or, if they do not like it, to get a new board. This seems to be the strongest defense of the just say

¹¹⁵ 500 A.2d 1346 (Del. 1985).

¹¹⁶ *Id.* at 1351.

¹¹⁷ *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1144 (Del. 1990), *cited in* *Stroud v. Grace*, 606 A.2d 75, 92 n.3 (Del. 1992).

¹¹⁸ *Stroud*, 606 A.2d at 92 n.3. This is the upshot, or residue, of the doctrinal development of protection of shareholder voting rights following *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). See generally Morgan N. Neuwirth, Comment, *Shareholder Franchise—No Compromise: Why the Delaware Courts Must Proscribe All Managerial Interference with Corporate Voting*, 145 U. PA. L. REV. 423 (1996).

no position. An alternative view makes boards self-perpetuating and accountable only to the product market, and flatly contradicts *Unocal's* legitimation of target board defensive tactics: "If the shareholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."¹¹⁹ *Moran* also drew the line at a poison pill that "fundamentally restricts proxy contests."¹²⁰ The disenfranchisement in a deadhand pill comes in the board's unilateral decision that even in an election contest fought over the issue of the hostile bid, the shareholders will be powerless to elect a board that is both willing and able to accept the bid.¹²¹ Indeed, a continuing director provision corrupts the free choice that is bound up with the idea of voting: shareholders may be forced to vote for directors whose policies they reject because only those directors have the power to change them.¹²² Delaware courts have found disenfranchisement in cases where the timing of elections was manipulated.¹²³ To create a structure in which shareholder voting is either impotent or self-defeating is even greater disenfranchisement.

The deadhand pill infringes on shareholder franchise in a more subtle way, revealed by the context in which the matter has recently arisen. In the cases of both *Cordis* and *Invacare*, the boards were not classified, and thus in the absence of a deadhand pill, could have been replaced at the next election of directors.¹²⁴ But these situations are not accidents for which extraordinary board action is warranted. At this point, it is hard to believe that the board of a public company has not given a great deal of thought to "shark-proofing." Presumably the board is not classified because

¹¹⁹ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985).

¹²⁰ *Moran*, 500 A.2d at 1357.

¹²¹ It is, of course, no answer that reelected incumbent directors *might* change their view, or that the pill eventually expires. In particular, the coercive structure that may lead shareholders to reelect incumbents (because only they can redeem the pill) may well also give incumbents a false sense of the vindication of their policies.

¹²² This can happen in three ways: first, where the shareholders vote against the acquirer's slate because only continuing directors have the power to redeem the pill and accomplish a near-term transaction; second, where the shareholders vote only for some of the acquirer's candidates but for a majority of incumbent candidates for the same reason (and with the hope of sending a signal); and third, where in response to this strategic dilemma, the acquirer runs only a partial slate.

¹²³ See, e.g., *Schnell v. Chris-Craft Indus.*, 285 A.2d 437 (Del. 1971); *Aprahamian v. HBO & Co.*, 531 A.2d 1204 (Del. Ch. 1987).

¹²⁴ See, e.g., Wachtell, Lipton, Rosen & Katz, *Dead Hand Pill Upheld Under Georgia Law; Anti-Pill Bylaw Amendment Invalidated* (July 16, 1997) (publicly disseminated firm memo, on file with author) ("Rights plans that provide for redemption only by 'continuing directors' can be critical in takeover situations where the target company lacks a staggered board . . .").

the board has taken soundings and believes that a proposed charter amendment would fail—that shareholders would just say no. In other words, the non-classified board reflects an implicit shareholder choice about the desirable level of openness to a control shift. The deadhand pill is an effort to reverse that shareholder choice through a technique that is in fact more preclusive, because it survives beyond the two director elections of a classified board. So the deadhand pill infringes on the exercise of the shareholder franchise both in the immediate election in which it would operate and in establishing the terms of board succession. It is hard to imagine what sort of “compelling justification” would justify this disenfranchisement. Surely at some point the rationale about shareholder mistake runs out.

C. *Proportionality*

Beyond the issue of shareholder franchise, a deadhand pill is a defensive measure that is subject to analysis under the *Unocal* proportionality standards as rearticulated by *Unitrin*: whether its use is coercive or preclusive and, if not, whether its use is within the range of reasonableness. The continuing director feature is indeed coercive, as previously discussed. A shareholder who favors a control transaction may well be whipsawed into voting for the incumbents, because only they have power to accomplish it. The deadhand metaphor does not capture the intended effect. These directors want to use their ability to rule from beyond the grave (and to rule negatively) as a weapon to discourage shareholders from replacing them—a bid for literal, not just metaphoric, immortality. Since protection of shareholder choice against coercion has been the basis for judicial validation of the poison pill, it would be a bitter irony for the Court to sustain a deadhand pill that operates through such coercion.

The deadhand pill is also preclusive in that it makes a hostile bid “realistically unattainable.”¹²⁵ If the board has been able to just say no, and if an acquirer cannot maintain a proxy contest to install directors who can redeem the pill (thus opening the way for a transaction), a hostile bid is precluded. The acquirer’s only alternative is to elect a partial slate of replacement directors, and to hope that this shareholder signal combined with the new directors’ boardroom persuasiveness will change the minds of a sufficient number of continuing directors. Otherwise no transaction will be

¹²⁵ See *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1389 (Del. 1995).

possible.¹²⁶ This highly speculative avenue places a very large burden on a potential acquirer. Moreover, it bears repeating, the deadhand pill has precluded a hostile bid. At most the bidder now has a better chance to persuade the board—meaning to specially persuade the continuing directors—to do a consensual transaction.

The final *Unocal/Unitrin* proportionality argument flows from what has preceded. Even if the deadhand pill's infringement on shareholder franchise, distortion of shareholder voting, and the inhibition of a hostile bid do not constitute "draconian" effects, they are nevertheless extraordinary. A defensive measure with these effects that violates previously well-accepted ideas of shareholder power—whose justification is that it saves the shareholders from themselves—simply falls outside the zone of reasonableness.

Some final words may be necessary to address the proportionality of the diluted deadhand pill, whose continuing director provision expires after a finite period of time (usually 120 days or 180 days in current practice), a "deadhand delay." All the statutory and effect-based objections to the regular deadhand pill apply to the diluted version, except that such a deadhand delay may not be "preclusive" of a hostile transaction. A determined acquirer perhaps will wait out the prescribed period. Nevertheless the diluted deadhand pill is not reasonable given its limited utility in advancing shareholder welfare and its extraordinary effects.

Some have defended the deadhand delay provision as giving a target board time to maximize shareholder value.¹²⁷ In fact, the deadhand delay is probably pointless for that purpose or positively harmful. Assume election of a new board, which has no interest in pursuing an alternative transaction to the acquirer's original proposal, whether a restructuring or business combination with a third party. Assume further that the original acquirer wants to proceed by a cash tender offer. The 180 day delay is unlikely to bring in new bidders who would not have otherwise appeared, given the publicity associated with such an open control contest. Moreover,

¹²⁶ The unsolicited transaction becomes possible only upon expiration of the poison pill. Presumably a board could "refresh" the pill at any time before being voted out of office. Such an action, including the duration of the pill, should be subject to separate scrutiny under *Unocal*.

A "diluted" version of the deadhand pill has been employed in some instances, limiting the continuing director prerogative to four months or six months following the director elections. See, e.g., *Davis Acquisition, Inc. v. NWA, Inc.*, CIV.A. No. 10761, 1989 WL 40845, at *1 (Del. Ch. Apr. 24, 1989) ("deferred redemption provision"). See also Martin Lipton, *The Poison Pill—Some Current Observations*, CORP. CONTROL ALERT, Apr. 1997, at 11.

¹²⁷ See Lipton, *supra* note 126.

upon the arrival of a new bidder, the original acquirer and the target can, in most circumstances, convert a cash tender offer into a stock-for-stock merger, and protect it through "merger of equal" rules that do not require a board to maximize shareholder value.¹²⁸ Knowledge of this possibility will discourage potential new bidders.

The key question may thus be whether the new board's fiduciary duties will be affected by the manner of the directors' nomination and election, in particular whether the acquirer is now to be regarded as the "controlling shareholder" of the target. On one view, the acquirer's relatively small stake (less than 20%, depending on the pill's trigger point) negates control, despite the acquirer's role in the election contest. If so (and assuming no control shift is involved in the stock swap), the parties could arrange a "merger of equals" insulated against rivals. The deadhand delay would be pointless.

Alternatively, the nomination of and campaigning for the new directors might make the acquirer a "controlling shareholder." This means the acquirer's negotiation of merger terms for the target would have to satisfy the "entire fairness" test, which means demonstrating "fair dealing" and "fair price."¹²⁹ This amply protects shareholder welfare and makes the deadhand delay unnecessary. If deemed a controlling shareholder, the acquirer might be best off if the new board simply redeemed the pill, permitting the acquirer to proceed by tender offer, which, in opening the field to potential competing bidders, provides an arms length market check of fairness. At this point, prospective competitors will have had sufficient notice; moreover, assuming that "entire fairness" applies, the new board could not redeem the pill without weighing the timing implications for prospective bidders even without a deadhand delay.

Finally, assume that a bidding contest quickly emerges. It is easy to imagine a scenario in which the board could usefully employ the power to redeem the pill in a discriminatory manner to extract the highest possible bid from the favored bidder—who may or may not be the original acquirer. Yet the deadhand delay may prevent the board from doing just that, and is thus positively harmful to shareholder welfare.¹³⁰ This particular scenario illustrates

¹²⁸ This assumes that the acquirer is a public company so that the merger would not constitute a shift in control. See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994).

¹²⁹ See, e.g., *Kahn v. Lynch Communication Sys., Inc.*, 638 A.2d 1110 (Del. 1994).

¹³⁰ It would be unrealistic to think that the board could save itself from this scenario by rushing into court to obtain an injunction against the effect of the deadhand delay.

why such a constraint on director power is properly suspect—and the general scenario shows why even the diluted deadhand pill is not reasonable given its minimal shareholder benefits and its extraordinary effects.

IV. BYLAW RESTRICTIONS ON POISON PILLS

The importance of the poison pill resides both in its preclusive power and in its deployability through unilateral board action. The extremely important issue made salient by two recent cases is the extent to which shareholders can amend the bylaws to restrain the board's use of the poison pill, either in particular cases or as a general matter. The pressure to test the limits of shareholder bylaw authority over poison pills arises now both because of judicial rulings that have augmented their preclusive effect, and because of the rise of institutional activism in the governance arena, particularly the willingness of activist institutions, especially labor union pension funds, to take the lead in proxy contests over governance changes.¹³¹ In the most important recent case, *International Brotherhood of Teamsters General Fund v. Fleming Cos.*,¹³² the Teamsters sought access to the management proxy for a shareholder resolution that would require the company to obtain shareholder approval before implementing a poison pill. The company sought to exclude the proposal as impermissibly trenching on the board's authority under Oklahoma corporate law, which is similar to Delaware law in relevant respects.¹³³ After deciding that the particulars of the proposal adequately respected the board's prerogatives, the court ordered the bylaw resolution included. In the aftermath of the decision, the board redeemed the poison pill;¹³⁴ the sharehold-

¹³¹ See, e.g., Joanne S. Lublin, 'Poison Pills' Are Giving Shareholders a Big Headache, *Union Proposals Assert*, WALL ST. J., May 23, 1997, at C1; Philip Scipio, *Binding Resolutions Are on the Way*, MERGERS & RESTRUCTURING, May 26, 1997, at 6; Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?* (Working Paper, Jan. 7, 1997) (on file with author).

¹³² No. Civ.-96-1650-A, 1997 U.S. Dist. LEXIS 2980 (W.D. Okla.), *stay pending appeal denied*, No. Civ.-96-1650-A, 1997 U.S. Dist. LEXIS 2979 (W.D. Okla. Feb. 19, 1997).

¹³³ Shareholder access to the management proxy is a creation of federal regulation of the proxy process under section 14(a) of the Securities Exchange Act of 1934, in particular Rule 14a-8, the shareholder proposal rule. 17 C.F.R. § 240.14a-8 (1996). As a basis for the exclusion of the proposal, the company particularly sought to invoke Rule 14a-8(c)(1), that the proposal was "under the laws of the registrant's domicile, not a proper subject for action by security holders." *Id.*

¹³⁴ This was not surprising, in light of the fact that a Teamsters-sponsored precatory resolution calling for the Fleming board to redeem the pill had passed with 65% of the vote at the prior annual meeting. See *An Attack on the Pill*, CORP. CONTROL ALERT, Mar. 1997.

ers nevertheless adopted the bylaw at the annual meeting.¹³⁵ The case is important in two respects: for its determination that a bylaw giving shareholders review authority over the board's adoption of a poison pill was within the scope of shareholder power under a law similar to Delaware's, and for its determination that such a bylaw proposal—which was binding rather than “precatory”—can be presented to shareholders through the shareholder proposal mechanism of the federal proxy rules, thereby providing shareholder activists with a low-cost way of submitting such matters to shareholder vote.¹³⁶

Pointing in a different way on this question is *Invacare Corp. v. Healthdyne Technologies*.¹³⁷ Although the Georgia corporate code seems to indicate that a shareholder adopted bylaw could restrain the authority of the board,¹³⁸ the court relied upon the statutory “sole discretion” purportedly given to the board over the terms of a poison pill to reject a bylaw that would require the board to eliminate the deadhand feature of the pill.¹³⁹ This case is less significant than *Fleming* because of the significant differences between the Delaware and Georgia corporate statutes.

The decision in *Fleming* is more likely to embolden activists for next year's round of annual meetings than to resolve the issue of shareholder power to restrain the board's adoption of poison pills. In a brief oral opinion from the bench,¹⁴⁰ the *Fleming* court focused only on resolving the alleged conflict between the board's

¹³⁵ See Gypsy Hogan, *Poison Pill Bitter to Fleming Voters*, DAILY OKLAHOMAN, May 1, 1997, available in 1997 WL 2446613 (bylaw approved by 60.5% vote of the 85.9% shareholder turnout).

¹³⁶ In the past, the SEC has permitted companies to exclude shareholder bylaw amendment proposals that raised “substantial” questions of shareholder versus board power under the applicable corporate law. See, e.g., Pennzoil Corp., SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 76,681 (Mar. 22, 1993). Subsequent to *Fleming* the SEC has apparently been more willing to let such by-law proposals proceed. See PLM Int'l, Inc., SEC No-Action Letter, 1997 LEXIS 575 (Apr. 28, 1997); *More Fallout from Fleming*, CORP. CONTROL ALERT, May 1997, at 2. See generally John C. Coffee, Jr., *Bylaws Barricades: Unions and Shareholder Rights*, N.Y. L.J., Mar. 27, 1997, at 5.

¹³⁷ 968 F. Supp. 1578 (N.D. Ga. 1997).

¹³⁸ GA. CODE ANN. § 14-2-801(b) (1994) provides:

All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, the board of directors, subject to any limitation set forth in the articles of incorporation, bylaws approved by the shareholders, or agreements among the shareholders which are otherwise lawful.

(emphasis added).

¹³⁹ See *supra* text accompanying notes 92-99 discussing Georgia poison pill statute.

¹⁴⁰ For an edited version of the transcript of the oral argument and court's statement from the bench, see CORP. CONTROL ALERT, Mar. 1997, at 9; for the Reporter's Transcript of Oral Arguments, see 1997 BANK & CORP. GOVERNANCE REP. 1061-76.

statutory power to fix the terms of "rights or options"¹⁴¹ and the power reserved to the shareholders to amend the bylaws,¹⁴² rather than the more basic tension between such shareholder power and the general power of the board to manage the business and affairs of the corporation. The court was also influenced by the board's renewal of the poison pill in the face of a contrary precatory shareholder resolution the previous year and by concerns about the pill as a possible entrenchment device affecting the marketability of shares. These concerns are unlikely to be shared by a Delaware court.

So how might a Delaware court in fact resolve this issue? There is no easy statutory resolution, because the statutes relating to shareholder bylaw authority and board power are linked through a recursive loop. Section 109, relating to bylaws, provides in pertinent part:

(a) [T]he power to adopt, amend, or repeal by-laws shall be in the stockholders entitled to vote, . . . provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend, or repeal by-laws upon the directors. . . . The fact that such power has been so conferred . . . shall not divest the stockholders . . . of the power, nor limit their power, to adopt, amend, or repeal by-laws.

(b) The by-laws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights and powers or the rights or powers of its stockholders, directors, officers, or employees.¹⁴³

Section 141(a), relating to the board, provides in pertinent part:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation . . .¹⁴⁴

¹⁴¹ See OKLA. STAT. ANN. tit. 18, § 1038 (West 1986).

¹⁴² See *id.* § 1013. The tension was resolved because the court read the proposed bylaw as operating only after the board had exercised its power to fix the terms of the right or options. In other words, section 1038 gave the corporation power to "create and issue" the rights or options, the terms of which were to be stated in the articles or board resolution. But since section 1013 gave the shareholders power to add bylaws "relating to the business of the corporation," ex post review was appropriate. The shareholders could not determine the terms of the rights or options but could determine whether rights or options on such terms could be issued.

¹⁴³ DEL. CODE ANN. tit. 8, § 109 (Supp. 1996).

¹⁴⁴ *Id.* § 141(a).

One reading of section 141(a) would give the board exclusive power to manage, unless otherwise provided in the articles, with the understanding that a charter amendment requires an initial board resolution, and thus board consent, to any limitations on its power.¹⁴⁵ But the proviso also permits variations “otherwise provided” in the chapter, which includes section 109, a broad source of shareholder power—but whose use cannot be “inconsistent with” the charter or the law, meaning—and here the circle starts again—section 141(a). Under prevailing modes of corporate statutory interpretation in Delaware, in which different statutes have “equal dignity” or “independent legal significance,”¹⁴⁶ nothing can be resolved about the scope of section 109(b) from the reference in section 141(a) to the articles alone, not the bylaws. The idea of a bylaw may be less clearly cabined than supposed¹⁴⁷ in light of the expansive description of section 109(b): “any provision . . . relating to the business of the corporation.”

So statutory formalism really runs out.¹⁴⁸ The Delaware court needs a theory to explain the appropriate boundary between shareholder power and the board’s authority—a theory presumably richer in normative appeal than “management wins.” A properly specified shareholder choice model offers a basis for that choice. One way to build the model is to ask, what would shareholders choose to have initiative power over? Ex ante, what power would rational shareholders delegate absolutely to a board of directors, and what power would they hold for themselves?

I have elsewhere argued that in devising standard corporate arrangements, shareholders would not want initiative power over discrete business decisions because of the risks of pathologies in shareholder voting and because of the chance that shareholders could use such initiative power to extract private gains.¹⁴⁹ Classic

¹⁴⁵ See *id.* § 242(b).

¹⁴⁶ See *Hariton v. Arco Elecs., Inc.*, 188 A.2d 123 (Del. 1963).

¹⁴⁷ Cf. *Gow v. Consolidated Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933) (bylaws deemed “expedient” for the corporation’s “convenient functioning”).

¹⁴⁸ Section 157, which governs the issuances of “rights” respecting stock, such as the poison pill, does not resolve the matter either. The section gives the corporation power to issue such rights and says that the terms of issuance should be set forth either in the articles or in a “resolution adopted by the board of directors providing for the creation and issuance of such rights.” DEL. CODE ANN. tit. 8, § 157. Nothing in section 157 takes away the shareholder bylaw authority contained in section 109 over such issuances as a “right or power” of the corporation or takes away the shareholder bylaw authority to constrain the directors’ power to vote on or adopt such a resolution. At most, section 157 may give the board agenda control over the proposed terms.

¹⁴⁹ See Jeffrey N. Gordon, *Shareholder Initiative: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 U. CIN. L. REV. 347 (1991).

examples would include decisions about whether to divest or acquire assets—where it is easy to imagine shifting coalitions of shareholders cycling among different business programs in a wasteful way—or decisions about specific customer-supplier relationships—where shareholder initiative could produce an inefficient system of logrolling.

In contrast are decisions about residual governance arrangements, meaning the local rules under which directors exercise the power delegated to them and the mode of accountability to shareholders. Such decisions are “residual” in the sense that many of the important governance questions will have been specified in the statute or will be explicitly allocated for resolution in the articles subject to a procedure which requires board initiative for change. Yet it is easy to understand that shareholders want a reserve authority over residual matters, as expressed in the power to amend bylaws. One potentially useful line between “discrete business decisions” and “governance” pertains to agenda-setting power over a specific business decision versus a structural shift that affects the board’s power in all transactions. Another potentially useful line is between overruling action taken by the board in the exercise of its authority and a procedure which specifies in advance a shareholder role before a governance-implicated action becomes effective. The potential pathologies of shareholder voting and rent-seeking arise principally from shareholder power to force a specific business decision on the board, rather than structural shifts. They arise much less frequently from shareholder review of action the board itself has proposed to take.

How would the general ideas of this shareholder choice model play out in the case of a proposed bylaw relating to a poison pill? First, it is important to recognize that adoption of the pill is generally not just an ordinary business decision—although it is often tied up with a business decision about how the corporation should negotiate with potential acquirors. The pill by intention and effect is also a governance measure, altering the balance of power between the shareholders and the board. This is seen vividly in the case of the deadhand pill, in which continuing director provisions are adopted exactly in circumstances in which the board is unable to obtain shareholder acquiescence to a charter amendment that would classify the board—a cognate governance change—but it applies more generally as well.

It would be very easy to write a charter amendment that gives the board exclusive power to receive and negotiate acquisition bids

for the company. Insofar as the pill is not locked into the articles, it may be categorized as a residual governance mechanism over which the shareholders have reserve authority through a bylaw amendment. Ironically, as a pill is given greater preclusive effect, the case in favor of its recognition as a governance measure rather than a business decision becomes stronger. That is, use of the pill ceases to be a business decision over how to maximize the value of the firm over some reasonable time period, but is a significant governance change affecting the shareholders' ability to rely on capital market signals to discipline managerial action.

So how might these two aspects of the poison pill—the discrete business decision and the governance change—be balanced in this model of shareholder choice? First, shareholders should be able to adopt a bylaw that would establish a shareholder mechanism as a precondition for the effectiveness of a pill, or for the amendment, repeal or waiver of an already existing pill. This presents no threat to the board's agenda control (and thus avoids the pathologies of shareholder voting), but respects shareholders' residual governance authority.

Second, a bylaw could also forbid the creation of a pill altogether, or limit its possible terms (no deadhand pills, for example), or prescribe conditions under which a pill could be implemented, for example, only if the pill provided for automatic redemption upon the making of an all cash, all stock bid at a particular percentage over the prior market price. This is a structural change applicable to all potential transactions, and follows the line between shareholders' engagement in decisionmaking in specific cases and establishing a general governance pattern.

Third, and more controversially, shareholders should also have the power to enact a bylaw that would in effect force redemption of an already existing poison pill or amendment of its terms, except in connection with a specific transaction. This too is a structural change and reflects the shareholders' residual governance power without directly involving shareholders in the specific business judgment entailed in fashioning a response to a particular hostile bid. Moreover, such power is necessary to give meaning to shareholder prerogative to adopt any bylaws relating to poison pills. If shareholder bylaws could affect pills only prospectively, then the board could simply adopt a pill in the face of the bylaw proposal. Similarly, if shareholder bylaws could relate only to

amendments of an existing pill, then the board might well be able to redeem the old pill and adopt a new one.¹⁵⁰

One practical question is whether the recognition of the applicability of shareholder power over bylaws to poison pills would lead to a radical change in the business and economic landscape. Would it pull out the control rods on the hostile acquisitions reactor? The answer is, "almost certainly not." If indeed poison pills provide a mechanism that enhances shareholder welfare—because of the negotiating leverage given the board in facing a potential acquirer—then there is every reason to believe that shareholder action would not drastically detoxify the poison pill. Under the shareholder choice model I have proposed, shareholders could not insist on the redemption of the pill to force a specific transaction. Changes could emerge only structurally, over time. Thus, shareholders would be drawn to consider the ultimate implications of a governance arrangement for the value of the firm. Undoubtedly there would be experimentation. It is easy to imagine that different stock ownership patterns, different industry sectors, and different levels of prior performance would produce different types of poison pills. It may be that the kind of pill that often emerges in negotiations between the board and shareholders is less extreme than the present model, but there is no reason to think shareholders would carelessly surrender the pill's advantages.

Recent shareholder votes on bylaw amendments regarding poison pills bear this out. In the Healthdyne/Invacare contest, shareholders voted to eliminate the deadhand provision of the target's pill.¹⁵¹ At the same time the shareholders rejected the acquirer's slate of replacement directors and, prior to the meeting, less than 20% of the stock had been tendered to the acquirer's offer. This response suggests that shareholders calculatively rejected the extremity of the target's governance change while also recognizing that the board's economic objections to the proposed bid

¹⁵⁰ For another consideration of these questions that points in some similar and some different directions, see John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605 (1997).

One important statutory question remains—whether the board can use its concurrent bylaw amendment authority to amend the shareholder bylaw relating to the pill. Section 109(a) indicates the priority of shareholder action in this regard, which is certainly required by the shareholder choice model. It is possible to cleverly word the shareholder bylaw to structure the board's exercise of its concurrent power in way that protects the shareholder priority. Professor Coffee illuminates these issues, *id.*, at 616-19.

¹⁵¹ This action would be effective only upon appellate reversal of the district court's rejection of such shareholder power. *See supra* text accompanying notes 90-102.

were well-founded.¹⁵² Similarly, in the case of May Department Stores a recent union-sponsored anti-poison pill bylaw amendment proposal was defeated in a shareholder vote.¹⁵³ Thus, in giving shareholders the right to choose the residual governance regime, we should not assume that shareholders will respond in economically irrational ways.¹⁵⁴ The shareholder choice model does not collapse into unfettered shareholder control over the business decisions involved in response to an unsolicited offer. It does, however, open up the opportunity for a conversation between shareholders and the board about the shape of governance mechanisms like the poison pill.

CONCLUSION

Each of these questions about the use and limits of the poison pill does indeed entail potentially far-reaching consequences for the market in corporate control. A decision sustaining the dead-hand pill, to permit "just say never" seems hardest to justify as a matter of prior Delaware law. It would also have a devastating impact on the control market and, ultimately, would have large scale economic effects. A decision permitting "just say no" also exceeds current Delaware law and would be the unhappy conse-

¹⁵² See, e.g., Michael E. Kanell, *Invacare Loses Battle to Wrest Control of Healthdyne Board; Shareholders Back Proposals That Could Lure Buyer*, ATLANTA J. & ATLANTA CONST., July 31, 1997, at F1, available in 1997 WL 3984533. Indeed, some months later, Healthdyne and Respiroics entered into an agreement for the acquisition of Healthdyne at \$24 a share in Respiroics stock as compared to Invacare's cash bid of \$15 a share. See Steven Lipin, *Raiders of a Lost Art: Hostile Bidders Fail More Often*, WALL ST. J., Nov. 14, 1997, at C1.

¹⁵³ See Fred Faust, *May Proxy Proposals Defeated; Shareholders Take Management's Side*, ST. LOUIS POST DISPATCH, June 10, 1997, at 14C, available in 1997 WL 3347046.

¹⁵⁴ This is consistent with the empiricial evidence on the poison pill, which shows that the effect of the pill on shareholder welfare may vary with, inter alia, ownership structure and board structure (the number of outside directors in particular). More generally, the range of shareholder wealth effects across firms from pill adoption strongly suggests that firm specific factors matter. See Robert Comment & G. William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 J. FIN. ECON. 3, 23-24 (1995) (collecting studies). Presumably shareholder decisions will be sensitive to these differences.

In passing, it is worth noting that recent work purporting to show that pill adoption increases shareholder welfare, see Comment & Schwert, *supra*, is highly questionable. This is because pill adoption now counts more as a "signal" than as "event." The board can put in a pill at any time; shareholders will have anticipated this possibility and so the board's actual decision is a signal either of a newly emerging takeover possibility or of strategic intentions, not an event that affects the shareholder's evaluation of the firm's susceptibility to takeover. The contrast is with a staggered board, whose presence will affect the firm's susceptibility to a hostile bid; moreover, adoption of a staggered board requires a shareholder vote and cannot be anticipated as a matter of course.

quence of a statutory formalism that eliminates the court's important role in fostering a sense of fiduciary duty in management's response to an unwelcome bid. At the very least, the Delaware court should not countenance the use of a poison pill that extends the power of management's refusal beyond the next election of directors.

Control over the poison pill through shareholder amendment of bylaws is a fresh legal question. Ironically, the shareholder effort to use the bylaw amendment process for this purpose may be provoked by the sense of a judicial failure in enforcing a sufficiently robust set of fiduciary duties for the board. Delaware law opens the way for such a shareholder role, if the bylaw measures in question are framed consistently with the shareholder power over residual governance arrangements. The Delaware courts should be able to work out the permissible limits as cases arise. This will generate new opportunities for shareholders and boards to work together to craft poison pill models that enhance the interests of the corporation and its shareholders.