THE HOLES IN MAJORITY VOTING

Mary Siegel*

* Professor of Law, Washington College of Law, American University. A.B., Vassar College, 1972; J.D., Yale University, 1975. The research for this article was supported by research funds from the Washington College of Law. The author is indebted to the invaluable research assistance of Graham McCall, J.D. 2011, Washington College of Law, and Celia McLaughlin, J.D. 2011, Washington College of Law.

INTRODUCTION

Recently, shareholder activists have successfully persuaded a number of state legislatures[1] and the writers of the Model Business Corporation Act (MBCA)[2] to alter their respective corporate statutes to permit changes in the voting norm for the election of directors. Instead of electing directors only by a plurality of shares, some corporate statutes were amended to permit majority voting. Regardless of one's view about the wisdom or folly of this significant change,[3] many legislatures have, at least for now, facilitated some form of a majority-voting system. This Article therefore examines the next generation of issues: are there holes in the statutory schemes designed to enable majority voting that undermine the victory that shareholders thought they had won?

The answer, of course, is yes. Both the corporate statutes and the fiduciary duties of directors can operate in ways that blunt the intended effects of majority voting. In order to

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[1] It is difficult to state precisely how many states have addressed majority voting. Thirteen states explicitly contemplate increasing the voting threshold for electing directors (Cal., Conn., Del., Fla., Ga., Ind., Mo., N.D., Tex., Utah, Va., Wash., and Wyo.). Twelve states have specific bylaw provisions providing for greater shareholder voting requirements, although these greater voting requirements are not limited to director elections (Ariz., Ark., Colo., Haw., Mont., Neb., N.H., Or., S.C., Tenn., Vt., and Wis.). Finally, other states have implicitly contemplated majority voting through changes in their statutes that, while not specifically referencing a change to majority voting, have been adopted to facilitate majority voting (Mass., Md., Me., N.J., and Okla.). *See, e.g.*, N.J. STAT. ANN. § 14A:2-9 (West 2003) (providing that a shareholder-enacted bylaw can prohibit directors from repealing or amending the bylaw); *id.* at § 14A:6-3 (providing that director resignations contingent upon the failure to receive the requisite vote can be made irrevocable).

[2] The Corporate Laws Committee of the American Bar Association writes the Model Act.

[3] *See* William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 472 & n.75 (explaining the policy issues on both sides of the majority-vote debate from the perspective of the Corporate Laws Committee).

understand how majority voting can be undermined, it is first necessary to understand the system that majority voting seeks to replace, namely, plurality voting. Under plurality voting, once a quorum is established, those candidates with the most votes win. Thus, if there is an uncontested election of directors in a plurality-voting scheme, not only are all candidates guaranteed to win regardless of how few votes they receive, but withheld votes[4] also have no direct impact.[5] Since this uncontested slate will normally be nominated by some or all of the existing directors,[6] the existing directors, rather than the shareholders, effectively select the composition of the board of directors. While its undemocratic character is apparent, plurality voting exists primarily to prevent failed elections, thereby assuring that every seat on the board is filled.[7]

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[4] Proxy cards give shareholders the option of marking either the "for all" box next to the list of nominees or the "withhold authority" option for some or all of the nominees. *Id.* at 466. If, however, a shareholder votes by proxy but does not specify how her shares are to be voted, shares are automatically voted in favor of the board-nominated slate. *Id.* at 466 n.35. As MBCA section 10.22 gives effect to a vote against a candidate, Securities Exchange Commission (SEC) regulations would require corporations in states following this provision of the Model Act to provide shareholders the opportunity to vote on the proxy card against a candidate. *See* 17 C.F.R. § 240.14a-4(b)(2) (2010).

[5] Sjostrom & Kim, *supra* note 3, at 467.

[6] *See id.* at 460. Since the passage of Sarbanes-Oxley, the NYSE and NASDAQ stock exchanges have passed rules requiring that director nominations be made by independent directors. *See* NYSE Listed Company Manual § 303A.04 (requiring a listed company to have a nominating/corporate governance committee composed solely of independent directors that sets forth in a written charter provision the criteria it considers in making nominations); NASDAQ Marketplace Rule 4350(c)(4) (requiring board nominees to be selected by either a majority of independent directors or a nominating committee composed solely of independent directors).

[7] Sjostrom & Kim, *supra* note 3, at 472 & n.75 (explaining that the Corporate Laws Committee retained a plurality standard because of concerns that open seats would be left on the board). A failed election is undesirable because the board may not have the requisite amount of directors left to constitute a quorum in order to make business decisions. *See* Vincent Falcone, Note, *Majority Voting in Director Elections: A Simple,*

Seeking to impact the selection and election of directors more directly, shareholders embarked on two different campaigns: a change in the nomination process so that shareholders can nominate board candidates ("proxy access") and a change in the voting system to require a majority, rather than a plurality, vote. While the battle over proxy access has raged on at the federal[8] and state[9] levels, shareholders often have been more successful in obtaining one of two forms of heightened voting (hereinafter "majority voting"): "plurality-plus" or "true majority."[10] In a plurality-plus system, plurality remains the rule but candidates failing to win a majority of the votes must tender their

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Direct, and Swift Solution?, 2007 COLUM. BUS. L. REV. 844, 856–57 (2007) (describing less obvious problems with failed elections as the inability to comply with listing standards, breaches of employment agreements, the triggering of "change of control" provisions in credit agreements, and altering the consequences of a staggered board, among others).

[8] Initial efforts by the SEC to mandate proxy access were met with strong opposition from the business community on the basis that the issue should be left to state law. *See* Falcone, *supra* note 7, at 852. After years of contentious deliberation, the SEC finally approved proxy access to become effective on November 15, 2010. *See* 75 Fed. Reg. 56,668 (Sept. 16, 2010). However, on October 4, 2010, the SEC stayed issuing its proxy-access mandate pending resolution of a lawsuit filed by the Business Roundtable and U.S. Chamber of Commerce alleging that the new rules were "arbitrary, capricious and not in accordance with the law . . . ." *Business Roundtable*, Order Granting Stay, S.E.C. File No. S7-10-09 (Oct. 4, 2010), *available at* http://www.sec.gov/rules/other/2010/33-9149.pdf; *see also* Advisory Memorandum of Wachtell, Lipton, Rosen & Katz, "SEC Stays Proxy Access—For Now" (Oct. 4, 2010), *available at* https://acrobat.com/app.html#d=DCLuPmkx89AI5XzCFMSkXA.

[9] In 2009, both Delaware and the Model Act adopted some form of proxy access. *See infra* Part III.B for a further discussion of the implementation and subsequent impact of proxy access on majority voting.

[10] Shareholders have been increasingly successful in mounting majority-vote campaigns from the initial push in 2007 up until present day. *Compare* Sjostrom & Kim, *supra* note 3, at 462 (noting that at least fifty-two percent of S&P 500 companies had adopted some form of majority voting as of February 2007), *with* Joann S. Lublin, *Calpers, Apple at Odds on Corporate Governance*, WALL ST. J., Dec. 22, 2010, at B2 (citing the California Public Employees' Retirement System as claiming that over sixty-nine percent of S&P 500 companies had adopted some form of majority voting as of December 2010).

resignations. Thus, unlike the traditional plurality system, shareholders who withhold support from candidates in a plurality-plus system can impact those election results: candidates are legally re-elected but those candidates who do not receive a majority of votes must tender their resignations.[11] Moreover, this system spares the corporation from the negative effects of a failed election.[12] In contrast, true majority-vote systems require candidates to get more votes in favor than withheld or against, or the candidate will not legally be elected.[13] Like plurality-plus voting, majority-plus systems build upon true majority voting by requiring a candidate to resign upon failing to garner the requisite majority vote.[14] Thus, by withholding their votes, shareholders can veto the candidates nominated by the board. Moreover, the existence of this shareholder veto power may cause boards to seek input from large shareholders regarding potential nominees. Since shareholders can impact directly any contested election of directors, these majority-vote systems apply only in uncontested elections.[15]

[11] Sjostrom & Kim, *supra* note 3, at 480–81.

[12] *See* Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1290 (2009).

[13] *Id.* at 1289.

[14] *See* Sjostrom & Kim, *supra* note 3, at 482 (explaining that in addition to changing the vote threshold to a majority of votes cast, majority-plus systems mandate a resignation in order to ensure that incumbent directors failing to receive a majority vote cannot remain on the board indefinitely under the state's holdover rule); *see also infra* Part I.C for further discussion of the holdover rule.

[15] *See, e.g.*, N.D. CENT. CODE ANN. § 10-35-09(3) (West 2007). Other states go further in restricting majority-voting schemes. The Model Act, Connecticut, North Dakota, Utah, Virginia, Washington, and Wyoming restrict the implementation of plurality-plus voting schemes to public corporations. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-809 (West 2009). California and North Dakota require cumulative voting to be prohibited by charter or bylaw before majority voting is permitted. *See, e.g.*, CAL. CORP. CODE § 708.5(b) (West 2006).

Keeping in mind that majority voting focuses only on the election, but not the selection, of candidates,[16] Part I of this Article delineates the numerous ways that the statutory schemes that grant majority voting can also undo or weaken that system of voting. Similarly, Part II discusses how a board's action taken pursuant to its fiduciary duties can undermine majority voting. Part III examines those issues that will next impact the majority-voting movement. While this Article exposes the holes in majority voting, readers should consider that most boards will likely be reluctant to exploit these myriad holes.[17] The existence of these holes, however, serves as a cautionary note to shareholders and offers a tempting array of tools for directors.

I. THE STATUTE GIVETH AND THE STATUTE TAKETH AWAY

A. How do Corporate Statutes Enable Majority Voting?

Since no corporate statute mandates majority voting, the threshold question is how difficult it will be for shareholders to effectuate a change from plurality to majority voting. The easiest path to majority voting is if the statute provides for majority voting as the default rule, which will operate in the absence of any contrary action by the shareholders or the directors. Only five states, however, provide majority voting as the default rule.[18] Since plurality voting is the traditional

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[16] *See infra* Part III.B for a discussion of the role proxy access plays in the majority-vote context.

[17] *See, e.g.*, Sjostrom & Kim, *supra* note 3, at 488–89, 489 nn.176–77; *cf.* MBCA § 10.22(a)(2) cmts. (cautioning that directors would likely be hesitant to fill a vacancy with a failed director due to their duties towards shareholders).

[18] Alabama, Alaska, Illinois, New Mexico, and South Dakota have majority voting as the default rule for all transactions in which shareholders are entitled to vote. Claudia H. Allen, *Study of Majority Voting in Director Elections* (Feb. 20, 2006), *available at* http://www.ngelaw.com/files/upload/majoritystudy111207.pdf. These statutes, however, do not specifically address voting in director elections.

default rule, the efficacy of majority voting depends on how shareholders can change from this default rule to majority voting: does the corporate statute allow shareholders to opt for majority voting without board approval? Twenty-three statutes require a charter amendment to authorize majority voting,[19] and North Dakota similarly requires a charter amendment to eliminate cumulative voting, which then automatically switches that corporation's default rule to true majority voting.[20] Of these twenty-four statutes, only three—those of Minnesota,[21] North Dakota,[22] and Ohio[23]—permit such charter amendments without board approval, while the other twenty-one states require the board to recommend that their shareholders amend the charter to authorize majority voting either through a bylaw[24] or

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[19] Ariz., Ark., Colo., Haw., Iowa, Idaho, Ky., Mass., Me., Mich., Minn., Miss., Mont., N.C., Neb., N.H., Ohio, Or., S.C., Tenn., Vt., Wis., and W. Va.

[20] North Dakota provides that the default only changes for uncontested elections in public corporations, subject to specific details limiting a failed director's term to ninety days. N.D. CENT. CODE § 10-35-09 (2007). Majority voting in some alternative form could be implemented without eliminating cumulative voting, but would still require a charter amendment. *See id.* § 10-19.1-39(1).

[21] While a board recommendation is not needed, only a shareholder who owns at least three percent of the voting power of shares can propose a charter amendment in a Minnesota corporation. The shareholders' ability to amend the charter without board approval applies to any topic, not just to majority voting. MINN. STAT. ANN. § 302A.135 (West 2004).

[22] Similar to Minnesota, a board recommendation is not needed in a North Dakota corporation if a shareholder who owns at least five percent of the voting power proposes a charter amendment on any subject matter that is allowed by statute to be amended by charter. *See id.* § 10-19.1-19. Accordingly, shareholders accounting for five percent of the voting power in a publicly-held corporation can effectuate majority voting unilaterally by eliminating cumulative voting from the charter.

[23] While a board recommendation is not needed, a charter amendment without a board recommendation requires approval from two-thirds of the corporation's voting power in an Ohio corporation. As is the case in Minnesota or North Dakota, the ability of shareholders to amend their corporate charter in Ohio without board approval is not limited to majority voting. OHIO REV. CODE ANN. § 1701.71(A)(1) (West 2002).

[24] Ariz., Ark., Colo., Haw., Mass., Mont., Neb., N.H., Or., S.C., Tenn., Vt., and Wis.

through the charter.[25] Thus, in these twenty-one states, the board holds the trump card: despite legislative permission for majority voting, the board of directors can block the required charter amendment necessary to authorize majority voting.

Since boards usually hold the trump card on charter amendments, some corporate statutes have sought to enable majority voting directly through the corporate bylaws. Such statutory authorization that bypasses the charter does not, however, necessarily mean that shareholders, rather than their directors, have the requisite power needed to implement majority voting unilaterally. For example, directors retain their blocking power if the statute enables only the board to enact a majority-voting bylaw, as in Georgia and Oklahoma.[26] On the other hand, nineteen states, including Delaware, allow for shareholders to enact majority-voting bylaws without prior charter approval.[27]

Thus, the initial viability of majority voting is dependent on the corporate statute creating one of the following three schemes: majority voting serves as the default rule (five states); shareholders have the ability to amend their corporate charter without board approval (three states); or shareholders have the power, without prior charter approval, to implement a majority-voting scheme through a

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[25] Iowa, Idaho, Ky., Me., Mich., Miss., N.C., and W. Va.

[26] GA. CODE ANN. § 14-2-728 (2008) (limiting to directors the ability to adopt majority-voting bylaws); OKLA. STAT. tit. 18, § 1013(A) (2004) (granting to directors the sole power to adopt, amend, or repeal bylaws while making no mention of shareholders having that same right).

[27] Cal., Conn., Del., Fla., Ind., Kan., La., Md., Mo., N.J., Nev., N.Y., Pa., R.I., Tex., Utah, Va., Wash., and Wyo. Fourteen of these states allow for both shareholders and directors to adopt majority-voting bylaws (Cal., Conn., Del., Fla., Ind., La., N.J., Nev., R.I., Tex., Utah, Va., Wash., and Wyo.). All of these nineteen states allow for majority voting to be implemented through a charter amendment as well. Seven of these states (Cal., Conn., Ind., Utah, Va., Wash., and Wyo.), as well as North Dakota, follow the Model Act in requiring a charter amendment to change the threshold from plurality to majority voting, but permit a plurality-plus system to be created in the bylaws. See *supra* notes 10 and 11 and accompanying text (describing different forms of majority voting).

shareholder-enacted bylaw (nineteen states). In contrast, directors will hold the trump card if the statute requires a board recommendation for a charter amendment to implement majority voting, either directly or by eliminating cumulative voting to trigger a majority default (twenty-one states) or if majority voting can be implemented only through a bylaw enacted by the directors (two states). These numbers certainly weaken claims that shareholders have effectuated a true change from plurality to majority voting.

B. Once Majority Voting Has Been Enacted, Who Can Repeal It?

If a corporate charter has been amended to permit majority voting, the board will be unable, unilaterally, to undo that amendment as all substantive charter amendments require shareholder approval. On the other hand, when the statute permits majority voting to be implemented through a bylaw, the board's power is not so easily dismissed. Whether a board can repeal such a bylaw depends on two factors: who enacted the bylaw—directors or shareholders—and whether the non-enacting group has the power to revoke the other's bylaws. While Georgia and Oklahoma[28] permit only directors to enact bylaws, out of the nineteen states noted above that allow shareholders to implement majority-voting bylaws directly, five permit only shareholders to enact these bylaws.[29] The remaining fourteen states permit both shareholders and directors to enact majority-voting bylaws.[30]

Corporate statutes have provided inconsistent protection to shareholder-enacted bylaws. Only four of the five states that permit only shareholders to enact majority-voting

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[28] Although Georgia permits only directors to enact a majority-voting bylaw, the statute allows shareholders to repeal it. GA. CODE ANN. § 14-2-1020(b) (2008) (restricting, however, shareholders' ability to amend a majority-voting bylaw). Oklahoma does not permit shareholders to either implement or repeal bylaws, unless otherwise provided in the charter. *See* OKLA. STAT. tit. 18, § 1013(A) (2004).

[29] Kan., Md., Mo., N.Y., and Pa.

[30] *See supra* note 27.

bylaws restrict directors from altering bylaws generally, unless otherwise provided in the bylaw or charter.[31] The fifth state in this group, Pennsylvania, permits directors to alter or repeal such bylaws.[32] Pennsylvania is thus at one end of the spectrum, joined by Louisiana and Rhode Island, in permitting directors to alter or repeal majority-voting bylaws. On the opposite end of spectrum are eight states, including Delaware: while these states otherwise allow directors to amend bylaws, their statutes specifically deny these powers if the targeted bylaw is a shareholder-enacted majority-voting bylaw.[33] As a result, states following the Delaware model preclude directors from amending a shareholder-enacted majority-voting bylaw. California and three other states fall in between the Delaware and Pennsylvania models by providing that the board can amend bylaws unless otherwise provided in the charter or bylaws.[34] Thus, in order to prevent the board from undoing the shareholder-enacted voting scheme, a shareholder-enacted bylaw in states that follow the California model must specifically preclude the board from amending or repealing this bylaw.

[31] Kan., Md., Mo., and N.Y.

[32] In Pennsylvania, directors do not have the general power to adopt, amend, or repeal bylaws unless expressly provided by the bylaws. 15 PA. CONS. STAT. ANN. § 1504 (West 1995). The statute lists, however, certain statutory provisions that are committed expressly to the shareholders for purposes of adopting or amending bylaws and therefore cannot be changed by directors; the provision setting the voting standard in director elections is not among those listed. *Id.*

[33] Conn., Del., Fla., Ind., Utah, Va., Wash., and Wyo. Twelve other states require charter permission for shareholders to enact a majority-voting bylaw, but specifically prohibit directors from repealing such a bylaw once enacted. Ariz., Ark., Colo., Haw., Mont., Neb., N.H., Or., S.C., Tenn., Vt., and Wis.

[34] CAL. CORP. CODE § 211 (West 1977); *see also* N.J., Nev., and Tex. (allowing for the majority vote bylaw itself to restrict directors' power to alter or repeal the bylaw); *cf.* La., R.I. (providing that while directors have the power to alter shareholder-enacted bylaws unless otherwise provided in the charter or bylaws, such power is subject to the power of shareholders to change or repeal any bylaw so made).

Furthermore, majority voting is not assured even when a statute, charter, or bylaw prohibits directors from repealing a majority-voting bylaw enacted by shareholders. Since almost half of the state legislatures allowing for shareholder-enacted majority-voting bylaws deny directors the power to repeal such a bylaw,[35] boards that are permitted to enact bylaws[36] may act strategically and enact a majority-voting bylaw themselves. In so doing, directors doubly benefit: they not only gain approval from shareholders who support majority voting, but the directors have also assured themselves the opportunity to repeal, unilaterally, their own bylaw. As a result, directors could earn shareholder support by enacting a majority-voting bylaw and keep it in place only as long as the directors agree with the expected outcome of an election; if they anticipate unfavorable news, the directors could repeal their bylaw so that the upcoming election operates under plurality voting. Thus, while states have afforded corporations the ability to implement majority-voting schemes, many statutes still allow for directors to undo easily the shareholders' desired voting scheme.

C. If a Director Has not Received the Requisite Majority Support, is the Director Precluded from Serving on the Board?

The discussion above examines both whether shareholders have the unilateral power to enact majority voting and whether that power, once exercised, is protected from board encroachment. The next issue is whether a majority-vote provision produces the expected result—namely, preventing a candidate who does not receive a

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[35] Ariz., Ark., Colo., Conn., Del., Fla., Haw., Ind., Mass., Mont., Neb., N.H., Or., S.C., Tenn., Utah, Vt., Wash., Wis., and Wyo.; *cf.* Kan., Md., Mo., and N.Y. (providing that directors do not have the power to adopt, amend, or repeal any bylaws unless otherwise provided in the charter or bylaws).

[36] Delaware permits the corporate charter to confer on the board the power to adopt, amend, or repeal bylaws. DEL. CODE ANN. tit. 8, § 109(a) (2010); *see supra* Part I.A. Most corporate charters so provide. *See* Sjostrom & Kim, *supra* note 3, at 472.

majority vote from actually serving as a director. Once again, there are holes in the statutory schemes that do not necessarily effectuate this shareholder mandate. One hole involves those statutes that do not tie the director's failure to receive the requisite vote to an irrevocable resignation. Six corporate statutes explicitly contemplating some version of majority voting fail to state that a director's resignation in response to an upcoming majority-vote election is irrevocable if the director does, in fact, fail to receive majority support.[37] On the other hand, eleven states and the Model Act permit corporations to elect in either their charter or bylaws whether a director's resignation will be irrevocable.[38] Only two states—New Jersey and Texas—mandate that a director's resignation tendered upon failing to garner a majority vote must be irrevocable.[39] Therefore, with the exception of corporations electing an irrevocability provision, as well as corporations in New Jersey and Texas that mandate such irrevocability, a director failing to receive the requisite vote can nevertheless change her mind about resigning simply by withdrawing her resignation.[40]

Furthermore, even when a candidate tenders her resignation—even one that is irrevocable—the board may utilize a second hole in the statutory scheme embodied in the "holdover rule" to keep an incumbent director on the board despite having failed to garner a majority vote.[41] The purpose of the holdover rule is to enable boards to work with a full complement of directors.[42] In its most basic version,

[37] Ala., Alaska, Cal., Ill., N.D., and N.M.

[38] Conn., Del., Fla., Ga., Ind., Md., Me., Okla., Utah, Wash., and Wyo.

[39] N.J. STAT. ANN. § 14A:6-3 (West 2009); TEX. BUS. ORGS. CODE ANN. § 21.4091 (West 2007).

[40] Shareholders, however, may not be the only constituent unhappy about this hole in the majority voting scheme; incumbent directors who are candidates for re-election might prefer an irrevocable resignation to protect themselves from potential shareholder suits alleging that such directors breached their fiduciary duties to the corporation by resigning. *See* Sjostrom & Kim, *supra* note 3, at 475 & n.98.

[41] *See* Falcone, *supra* note 7, at 844, 858 (arguing that the holdover rule is "utterly incompatible with a majority voting regime").

[42] *See id.* at 844, 856–58.

adopted by fourteen states,[43] the holdover rule requires the failed director to continue to serve until a successor is "elected and qualified."[44] Therefore, this form of the rule will dilute the intended effects of majority voting by keeping in office a director who has failed to earn the requisite votes until there is either a special or regular election for a replacement.[45] The Model Act and eight states have responded to this undermining of majority voting by permitting the failed candidate to hold over only for ninety days.[46] Delaware and nine other states provide a different

[43] Ala., Alaska, Cal., Colo., Fla., Ga., Ill., La., Md., Mo., N.J., N.M., N.Y., and Tex.

[44] CAL. CORP. CODE § 301(b) (West 1989) ("Each director, including a director elected to fill a vacancy, shall hold office until the expiration of the term for which elected and until a successor has been elected and qualified."). The Model Act and twenty-two states further qualify the standard holdover rule by adding, "Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies *or until there is a decrease in the number of directors*." MBCA § 8.05(e) (2005) (emphasis added); *see also* Ala., Ark., Fla., Ga., Haw., Iowa, Idaho, Ky., Mass., Me., Miss., Mont., N.C., Neb., N.H., Or., S.C., S.D., Tenn., Vt., Wis., and W. Va. The MBCA and eight of these states establish an alternative holdover rule for corporations that elect to be governed by the statute's specific majority-voting bylaw provision. *See infra* note 46 and accompanying text.

[45] The holdover rule affects only incumbent director nominees. Under a scheme that requires a majority vote to be elected, a *non-incumbent* director failing to receive a majority vote would not holdover because she was never elected to the board in the first place. To get around this issue, the board could ask a retiring director to resign in advance of the upcoming election so that it could fill the vacancy with its choice of nominees. The replacement would then have incumbent status and be protected by the holdover rule in the event he failed to receive a majority vote. *See* Sjostrom & Kim, *supra* note 3, at 484. An incumbent candidate failing to receive a majority vote in a plurality-plus system would continue to serve as a director by virtue of having actually been reelected—as opposed to as a result of the holdover rule—assuming the board rejected the director's resignation. *See* J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-examined*, 62 BUS. LAW. 1007, 1047 (2007) (analyzing the Pfizer board policy).

[46] MBCA § 10.22(a)(2) (limiting the maximum time a director who fails to receive a majority vote can continue to serve to "the earlier of (i)

solution to the problem posed by the basic holdover rule by creating some exceptions: the director must hold over "until such director's successor is elected and qualified *or until such director's earlier resignation or removal*."[47] While the removal exception to the holdover rule is too fraught with procedural difficulties to be much help to shareholders,[48] the resignation exception has the potential to be shareholder friendly. Delaware provides that a resignation can be effective, if specified ahead of time, "upon the happening of an event or events."[49] A plain reading of Delaware's statutory language suggests that a director's resignation contingent upon the failure to receive a majority vote would become effective as soon as the votes are tallied to reveal the

90 days from the date on which the voting results are determined . . . or (ii) the date on which an individual is selected by the board of directors to fill the [vacancy]"); *see also* Cal., Conn., Ind., N.D., Utah, Va., Wash., and Wyo.

[47] DEL. CODE ANN. tit. 8, § 141(b) (2010) (emphasis added); *see also* Ariz., Kan., Mich., Minn., Nev., Ohio, Okla., Pa., and R.I.

[48] While nine states provide an exception to the holdover rule if a director is removed from office (Cal., Conn., Del., Ind., N.D., Utah, Va., Wash., and Wyo.), removing a director is difficult, as it requires statutory authority to call a shareholder meeting. Who has authority to call a shareholder meeting varies among states. In Delaware, for example, shareholders have the power to call a special meeting only if the bylaws explicitly grant this power. DEL. CODE ANN. tit. 8, § 211(d) (2009). Under the Model Act, shareholders with a minimum of ten percent of the corporation's voting power have this ability, with the proviso that the charter can increase this minimum up to twenty-five percent. MBCA § 7.02(a)(2). Additionally, shareholders must be able to garner a majority of outstanding shares in support of the removal. Section 141(k) of the Delaware Code requires the vote of a majority of outstanding shares then entitled to vote. Finally, shareholders may also be required to show cause for the removal. While Delaware section 141(k) provides that directors can be removed without cause, if the board is classified, cause must be shown. Similarly, MBCA section 8.08(a) allows directors to be removed with or without cause, but the charter can require removal only be for cause. Most boards in a public corporation are classified. *See* Sjostrom & Kim, *supra* note 3, at 473 n.88.

[49] DEL. CODE ANN. tit. 8, § 141(b) (2010).

lack of requisite support.[50] Therefore, the holdover rule would not allow the director who resigned to remain in office until a successor could be elected and qualified.[51]

While Delaware's statutory provisions may seem to facilitate majority voting by neutralizing the holdover rule, directors still have a powerful tool at their disposal to undermine shareholder intent. To date, most majority voting has been implemented through board-enacted bylaws or policies in which boards have reserved the right to reject a failed candidate's proffered resignation.[52] In so doing, board acceptance of the resignation becomes "the event" that gives content and effect to the resignation.[53] For example, Intel Corporation's majority-voting bylaw provides that if a director is not elected, the director must tender a resignation to the board, and the board will decide whether to accept or reject that resignation.[54] Thus, board discretion to reject the

[50] Because resignation is a voluntary act, a bylaw can only mandate the advance tendering of a resignation if the director candidate agrees to resign prior to the resignation becoming effective. *See* Frederick H. Alexander & James D. Honaker, *The Nuts and Bolts of Majority Voting* 2 (Dec. 7, 2006), http://www.mnat.com/assets/attachments/113.pdf [hereinafter *Nuts and Bolts*]. Delaware amended section 141(b) to allow for candidates to agree ahead of time to tender an irrevocable resignation so that the board can later force the failed director to honor the advance resignation. *Id.*; *see* Frederick H. Alexander & James D. Honaker, *Amendments Adopted to the Delaware Corporation Law*, 21 CORP. COUNS. WEEKLY, July 26, 2006, at 3, *available at* http://www.mnat.com/assets/attachments/87.pdf.

[51] *See* Verret, *supra* note 45, at 1048 ("If, as in the GE bylaw, automatic resignation is required, then the holdover rule is inapplicable.").

[52] *See infra* Part I.D for a discussion of the consequences of implementing majority voting through board policy.

[53] Legislative history behind amendments to Delaware section 141(b) to facilitate majority voting suggests board acceptance of an irrevocable resignation is required before the resignation becomes effective. Alexander & Honaker, *supra* note 50, at 3; *see* 75 Del. Laws 306 (2006).

[54] Sjostrom & Kim, *supra* note 3, at 482; *see infra* Part II.B.1 (discussing a recent Delaware decision upholding a board's invocation of its business judgment to reject a failed director's resignation). The board may, for example, conclude that the negative votes were directed at a particular corporate policy, rather than at the director, and may therefore choose to reject the failed candidate's resignation but change the policy.

resignation tendered by a failed director can circumvent the holdover rule's exception for resignations.

Finally, boards have the statutory power to circumvent majority voting regardless of the holdover rule. Even if a director's resignation is accepted, the board has the ability to fill vacancies unless the charter or bylaws provide otherwise.[55] Boards can use this statutory power to fill vacancies and eviscerate the majority-voting scheme simply by filling the vacancy created by the director's resignation with that same director. As a result, North Dakota explicitly prevents directors from filling a vacancy on the board with the same candidate who failed to garner the requisite vote.[56] In contrast, the Model Act[57] and a majority of states contemplating majority voting permit this practice.[58] The

See, e.g., Dollar Tree, Inc., Current Report (Form 8-K) (Sept. 3, 2009) (rejecting failed candidate's resignation but reversing its prior decision to keep its board classified); Pulte Homes, Inc., Current Report (Form 8-K) (June 2, 2009) (rejecting failed candidates' resignations but changing board's position on its classified structure and poison pill).

[55] DEL. CODE ANN. tit. 8, § 223(a)(1) (2010) (boards can fill vacancies unless otherwise provided in the charter or bylaws); MBCA § 8.10(a)(2) (boards can fill vacancies unless the charter provides otherwise). Statutes permit directors to fill a vacancy by majority vote of the remaining directors, even if those directors do not constitute a quorum. *Id.* at § 223(a)(1); MBCA § 8.10(a)(3). While shareholders under the Model Act have the power to fill vacancies, MBCA § 8.10(a)(1), such power is rarely exercised because of the obstacles surrounding shareholder votes. *See supra* note 48.

[56] N.D. CENT. CODE § 10-35-09(2)(c) (West 2007). Shareholders in North Dakota could, of course, elect a candidate who previously failed to garner majority support.

[57] *See* MBCA § 10.22 cmt. (2006) ("In the exercise of its power under section 10.22(a)(2), a board can select as a director any qualified person, which could include a director who received more against than for votes."); *cf.* Travel Ctrs. of Am. LLC, Amended and Restated Limited Liability Company Agreement, Exhibit 3.2 (Form S-1) (June 16, 2007) (filling vacancies with failed candidates in an LLC majority-vote election).

[58] Statutes that do not follow the MBCA generally do not impose limits on whom the board may appoint to fill a vacancy. *See, e.g.*, DEL. CODE ANN. tit. 8, § 223 (establishing procedures for who has the power to fill vacancies while remaining silent on which candidates would be eligible to serve).

Corporate Laws Committee explained that, despite the negative potential impact on majority voting, it chose to give the board unrestricted flexibility in order to prevent harm to the corporation.[59] As a result, board strategy in states following the Model Act would likely differ from board strategy in Delaware due to the differences in their respective statutory holdover rules: boards in states following the Model Act would be more likely to reinstate a failed director through the power to fill vacancies, while a Delaware board would simply reject the failed candidate's resignation.

D. Board Policies

A final hole in majority voting schemes is not "statutory" per se. Rather, the hole consists of a board's ability to implement majority voting through board policy, thereby bypassing the relevant statutory, charter, and bylaw provisions. Although corporate statutes do not require policies, the listing requirements of the New York Stock Exchange mandate that boards of listed corporations implement governance guidelines or policies.[60] Many corporations have used such policies to implement some form of majority voting. In fact, a study done in 2007 found that forty-two percent of the corporations surveyed instituted some form of majority voting through their board policies alone while another twenty-eight percent used a combination of policies and bylaws.[61] The ease with which the board,

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[59] *See* MBCA § 10.22 cmt. (2006) ("Among other things, this power permits a board to respond to the use of section 10.22(a)(2) as a takeover device or to prevent harm to the corporation resulting from a failed election.").

[60] Sjostrom & Kim, *supra* note 3, at 484 n.154, 485 n.157.

[61] Allen, *supra* note 18, at (i). The remaining thirty percent adopted only bylaws. *Id.* Compared to the original study conducted in 2006, corporations trended towards utilizing bylaws (or a combination of bylaws and policies) as an implementation tool instead of relying solely on board policies. *See id.* (noting a thirty-seven percent increase from 2006 to 2007 in the number of companies surveyed that incorporated a bylaw as part of its majority voting scheme); *cf. supra* note 10 (demonstrating an increase

acting alone, can both adopt[62] and repeal[63] its policies accounts for the popularity of this method of implementing majority voting. Since boards cannot change the default voting threshold from a plurality to an actual majority standard through board policies in Delaware, which requires that change to be made through the bylaws or charter,[64] or in a state following the Model Act, which requires a charter amendment,[65] board policies can implement only a plurality-plus scheme.[66]

A key element to almost every board policy that implements majority voting is the right the board reserves to reject a failed director's resignation.[67] Perhaps the best known of these majority-voting policies was adopted by Pfizer, Inc. and became known as the "Pfizer Model."[68] This model implements a plurality-plus system of voting and gives the Corporate Governance and Nominating Committee the power to review the failed director's resignation and recommend to the board whether to accept the tendered

from 2006 to 2010 in the percentage of S&P 500 corporations implementing some form of majority voting).

[62] Sjostrom & Kim, *supra* note 3, at 485.

[63] *See* Unisuper v. News Corp., No. 1699-N, 2005 WL 3529317, at *4 (Del. Ch. Dec. 20, 2005) (clarifying, however, that under certain circumstances in which a board policy is relied upon in consideration for a shareholder vote, a valid contract could exist, thereby inhibiting the board's traditional authority to repeal policies at will).

[64] DEL. CODE ANN. tit. 8, § 216 (2007); *see supra* note 27 (listing other states that require either a bylaw or charter amendment to change the vote threshold from a plurality to a majority of votes cast).

[65] MBCA § 7.28(a); *see also supra* notes 19–20 (listing other states that require a charter amendment to change the vote threshold from a plurality to a majority of votes cast).

[66] While procedural considerations may provide the impetus for choosing a board policy as the best vehicle for implementing majority voting, boards may also appreciate the substantive limitation of the plurality standard because failed directors, despite tendering a resignation, may holdover by virtue of legally having been re-elected. *See supra* Part I.C.

[67] Sjostrom & Kim, *supra* note 3, at 486.

[68] *Id.* at 480.

resignation.[69] Moreover, the policy affords the Committee members unlimited discretion to "consider any factors they deem relevant."[70] Other policies delineate the standards by which the board will evaluate a failed director's resignation. For example, Berkshire Hathaway implemented plurality plus through a board policy and listed six factors that the board would consider when reviewing a failed director's resignation.[71] Significantly, none of these factors requires the board to have a compelling reason to reject the proffered resignation. In contrast to implementing majority voting solely through board policy, Intel Corporation took a hybrid approach to achieve a majority-plus scheme: first, the board passed a bylaw altering the vote threshold to a majority of votes cast;[72] and second, the board adopted a governance policy that requires a director who fails to receive a majority vote to tender an irrevocable resignation, but empowers the

[69] *See id.* The Pfizer Model provides via board policy that a director failing to receive a majority vote shall "promptly tender his or her resignation following certification of the vote." *Id.* "Thereafter, the Board will promptly disclose their decision whether to accept the Director's resignation offer (and the reasons for rejecting the resignation offer, if applicable) in a press release to be disseminated in the manner that company press releases typically are distributed." *Id.* Recently, Pfizer's bylaws were amended to provide that in an uncontested election, a director must receive more votes "for" than "against" (as opposed to "for" rather than "withheld"), and the policy now makes reference to the bylaw and uses the same language. Therefore, the model currently used by Pfizer is better characterized as a hybrid bylaw-policy approach. *See* Bylaws of Pfizer, Inc. (Apr. 22, 2010), *available at* http://media.pfizer.com/files/investors/corporate/bylaws.pdf.

[70] Corporate Governance Principles of Pfizer, Inc., *available at* http://media.pfizer.com/files/investors/corporate_governance/cg_principles.pdf.

[71] The listed standards include: (i) any stated reasons why shareholder withheld votes from such director; (ii) any alternatives for curing the underlying cause of the withheld votes; (iii) the director's tenure; (iv) the director's qualifications; v) the director's past and expected future contributions to the Company; and (vi) the overall composition of the board, including whether accepting the resignation would cause the Company to fail to meet any applicable SEC or NYSE requirements. *See* Falcone, *supra* note 7, at 865 n.84.

[72] Sjostrom & Kim, *supra* note 3, at 481–82.

Corporate Governance Committee to decide whether to accept the proffered resignation without listing factors to be considered.[73]

When viewed together, the implementation of majority voting through board policies, coupled with the standard delineated in those policies by which the board evaluates whether to accept the resignation of the director who failed to garner a majority vote, can undermine the availability and effectiveness of majority voting. The major hole is that a board can repeal its policies easily and without any shareholder input.[74] As is the case with director-adopted bylaws,[75] a board can adopt a majority-voting system through its policies to garner support from its shareholder activists, while retaining the trump card to repeal the policy at will.[76] A less obvious problem involves those policies that permit the board to reject the failed director's resignation solely based on the board's business judgment, rather than on some higher standard.[77] If board policies permit directors to reject a resignation for any reason, and if courts abide by the review standards that boards choose for themselves, the

[73] Falcone, *supra* note 7, at 864. Additionally, the policy gives the board the opportunity to clarify, for purposes of Delaware's holdover rule, that a director's resignation is not effective unless both the director fails to receive the requisite majority vote and the remaining directors formally accept the resignation. Bd. of Dirs. Guidelines on Significant Corporate Governance Issues of Intel Corp., *available at* http://files.shareholder.com/downloads/INTC/1029372728x0x296285/9078AF7A-E7C3-4621-9E81-38229B5723C3/Board_Dir_Guidelines.pdf; *see also supra* Part I.C (discussing when a resignation effectively trumps the holdover rule, both in theory and in practice).

[74] Sjostrom & Kim, *supra* note 3, at 486.

[75] *See supra* Part I.B for a discussion of when directors are able to repeal unilaterally a majority-voting bylaw.

[76] Sjostrom & Kim, *supra* note 3, at 488.

[77] *See, e.g.,* Nabi Biopharmaceuticals, Current Report (Form 8-K) (May 26, 2010) (rejecting the resignation tendered by a candidate who, after failing to garner a majority vote, resigned pursuant to a board policy). *See infra* Part II.B.1 for a discussion of whether courts do or should respect the standard for reviewing resignations memorialized by a board in its majority-voting policy.

board has wide latitude to eviscerate majority voting at will.[78]

II. TRUE TO THEIR WORD: THE LANGUAGE DEFENSE TO CLAIMS OF FIDUCIARY BREACHES

A. Introduction

Part I explained that some majority-voting statutory schemes create the opportunity for the board to enact a majority-voting policy or bylaw and then repeal it, or even repeal a shareholder-enacted majority-voting bylaw, reject the resignation tendered by the failed candidate, or fill the vacancy created by the failed candidate with the same candidate. Despite statutory authority for each of these actions, the directors' conduct must also be consistent with their fiduciary duties. Therefore, when shareholders challenge the board's conduct, the question arises whether the court would likely review the board's decision under the deferential business judgment rule or under more stringent monitors, bearing in mind that the degree of scrutiny that a court applies to such a decision is often outcome-determinative.[79] While courts have a wealth of experience with voting issues in general, the recently-enacted majority-voting schemes have thus far generated only one Delaware case that deals directly with this issue: the Delaware Supreme Court's ruling in *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*[80] Thus, apart

[78] *See generally* Sjostrom & Kim, *supra* note 3, at 487 (reasoning that majority voting systems involve little more than "smoke and mirrors").

[79] *See* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("It is often of critical importance whether a particular decision is one to which the business judgment rule applies or the entire fairness rule applies. It is sometimes thought that the decision whether to apply the business judgment rule or the entire fairness test can be outcome-determinative.").

[80] 1 A.3d 281 (Del. 2010) (en banc) [hereinafter *Westland Supreme Court*]. In *Kistefos AS v. Trico Marine Svcs., Inc.*, No. 4497-CC, 2009 WL 1124477 (Del. Ch. Apr. 14, 2009), the directors and shareholders, under court supervision, agreed to a compromise: instead of deciding in advance whether the directors' contention that the proposed shareholder bylaw was

from *Westland*, we are left to speculate as to the kind of factors and issues that might inform a court's decision when it reviews a case involving board conduct that undermines majority voting. Certainly, court precedents that have triggered different standards of review, as well as the governance document that houses the majority voting, are at least two of the issues that will be relevant in determining the standard of review.

Thus far, Delaware courts have articulated three different standards of review that might be applicable when board conduct undermines the efficacy of majority voting.[81] At one end of the spectrum is the deferential business judgment rule, which is the traditional standard of review applied to board decisions.[82] The articulation of the business judgment rule in *Aronson v. Lewis* is well known: it is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[83] A plaintiff can rebut the

contrary to the corporation's charter and Delaware law, shareholders were allowed to vote on a proposed bylaw that would require directors who failed to get a majority vote to step down immediately and create a vacancy on the board. The issue became moot because the bylaw was not approved by the required number of shareholders. *See* Proposal 12 of Trico Marine Services Form DFAN 14A (June 30, 2009), *available at* http://www.sec.gov/Archives/edgar/data/921549/000110465909041038/a09-17352_1dfan14a.htm; *cf.* N. Fork Bancorporation, Inc. v. Toal, 825 A.2d 860 (Del. Ch. 2000) (holding that withheld votes were considered voting power present for purposes of determining the results of a shareholder vote for directors under a majority-voting scheme).

81 There are additional tests, such as entire fairness, that would not be applicable to the issues raised by majority voting, because this test normally applies to a financial conflict-of-interest. *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993) (applying entire fairness in the context of a stock repurchase offered only to shareholders who were also employees); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (applying entire fairness in the context of a conflict-of-interest freeze-out merger).

82 *See* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (noting that courts will apply the business judgment rule's presumption absent allegations of "fraud, bad faith, or self-dealing").

83 473 A.2d 805, 812 (Del. 1984).

presumption only by producing evidence that directors breached their fiduciary duty of either care or loyalty.[84] As this is a difficult burden for plaintiffs to overcome,[85] the business judgment rule is a very board-friendly standard of review.

Further along this spectrum is the "enhanced business judgment rule," created by the Delaware Supreme Court in *Unocal v. Mesa Petroleum*[86] to review a board's unilateral adoption of defensive tactics.[87] The court reasoned that because of the "omnipresent specter that a board may be acting primarily in its own interests," the court would apply a standard of review higher than the traditional business judgment rule.[88] In contrast to the business judgment rule where plaintiff shoulders the burden of proof, the *Unocal* standard of review places the initial burden of proof on the board to prove not only that it had reasonable grounds for believing that there was a threat to the corporation, but also that its defensive action was reasonable in relation to the threat posed.[89] In *Unitrin, Inc. v. American General Corp.*,[90] the Delaware Supreme Court further required that the

[84] *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). If plaintiff rebuts the presumption, the burden shifts to the defendant directors usually to prove the entire fairness of the transaction. *Id.* (citing *Nixon*, 626 A.2d at 1376, and *Weinberger*, 457 A.2d 710).

[85] *See id.* at 361 ("The rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'" (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971))).

[86] 493 A.2d 946 (Del. 1985).

[87] Williams v. Geier, 671 A.2d 1368, 1377 (Del. 1996) (reasoning that *Unocal* applies only "when a board unilaterally (i.e., without stockholder approval) adopts defensive measures in reaction to a perceived threat"); *see also* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356–57 (Del. Ch. 1985) (applying the *Unocal* standard of review to a board defensive measure taken as a precautionary measure and not in response to a specific perceived threat).

[88] *Unocal*, 493 A.2d at 954.

[89] *Id.* at 954–55.

[90] 651 A.2d 1361 (Del. 1995).

board's defensive measure be neither coercive nor preclusive.[91]

While the *Unocal* standard of review is somewhat more demanding for directors than the deferential business judgment rule, the Delaware Chancery Court in *Blasius Industries, Inc. v. Atlas Corp.*[92] created a third standard of review that is unquestionably onerous. In *Blasius*, the court held that board conduct that has the primary purpose of thwarting the exercise of the shareholder vote must pass a compelling justification test even if the board acts carefully and in good faith.[93] Concern for the sanctity of the shareholder franchise caused the court to require the board to demonstrate a compelling justification for its conduct when the board is motivated to disenfranchise its shareholders.[94] In adopting the compelling justification standard of review instead of *Unocal*, the court in *Blasius* reasoned that "[o]ur authorities, as well as sound principles, suggest that the central importance of the [shareholder voting] franchise to the scheme of corporate governance, requires that, in this setting, [the *Unocal*] rule not be applied

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[91] *Id.* at 1389–90. In other words, the board may not "cram[] down" its decision to oppose a third party tender offer on its shareholders or completely preclude the third party from gaining the control it seeks. *Id.* at 1387 (citing Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154–55 (Del. 1990) (finding that the Time board's defensive response was reasonable because it was not aimed at forcing its shareholders to accept a management-sponsored alternative and because it did not prevent Paramount from making another offer and therefore was not coercive or preclusive)).

[92] 564 A.2d 651 (Del. Ch. 1988).

[93] *Id.*

[94] *Id.* at 659–60 (refusing to apply the business judgment rule because "matters involving the integrity of the shareholder voting process involve consideration not present in any other context in which directors exercise delegated power"). The court also rejected a rule that would automatically invalidate such board conduct and instead chose the compelling justification standard. *Id.* at 661–62 (explaining that because the court could not foresee all the settings in which a board may in good faith seek to thwart a shareholder vote it would not impose a per se rule against such action).

and that closer scrutiny be accorded to such transaction."[95] In *MM Companies, Inc. v. Liquid Audio, Inc.*, the Delaware Supreme Court held that the compelling justification standard of *Blasius* was indeed the appropriate standard of review if the board's primary purpose is to thwart the shareholder franchise.[96]

The compelling justification standard is virtually impossible to satisfy.[97] As a result, the Delaware Chancery Court in *Mercier v. Inter-Tel, Inc.*[98] proposed a modification of the *Blasius* standard of review, modeling it after *Unocal*'s enhanced business judgment rule.[99] The court in *Mercier* reasoned that the essence of *Unocal* is that the board must identify a proper purpose for its actions, and then it must act reasonably in relation to that purpose.[100] Therefore, *Mercier* proposed to modify the *Blasius* test to impose *Unocal*-type requirements on boards who are motivated to disenfranchise

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[95] *Id.* at 659.

[96] 813 A.2d 1118, 1131 (Del. 2003)..

[97] Only one case has ever satisfied the compelling justification test. *See* Mercier v. Inter-Tel, Inc., 929 A.2d 786, 819 (Del. Ch. 2007) and discussion *infra* notes 98–106 and accompanying text; *see also* Schnell v. Chris-Craft Indus., 285 A.2d 437 (Del. 1971) (permitting a court to invalidate, per se, board action where the board engages in legal but inequitable conduct). Courts have applied the *Schnell* doctrine where boards "deliberately employ[] various legal strategies either to frustrate or completely disenfranchise a shareholder vote." Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992).

[98] 929 A.2d 786 (Del. Ch. 2007). In *Mercier*, the board rescheduled a shareholder meeting in order to provide the shareholders with more time to consider a proposed merger before they voted on the proposal. *Id.* at 798. It was likely that the shareholders would have rejected the merger had the vote proceeded as scheduled—a result that the board did not believe was in the shareholders' best interests. *Id.* at 797. The shareholders later approved the merger at the rescheduled meeting. *Id.* at 803.

[99] *Id.* at 810 (proposing that "the standard of review that ought to be employed in this case is a reasonableness standard consistent with the *Unocal* standard"). Despite this critique, the chancery court in *Mercier* acknowledged that *Blasius* was the applicable standard as the chancery court had no power to overrule the Delaware Supreme Court's decision in *MM*. *Id.* at 819.

[100] *Id.* at 807.

their shareholders: the board would bear the initial burden not only of identifying a legitimate corporate objective served by its decision but also of showing that its decision was reasonable in relation to its objective and was neither preclusive nor coercive.[101] In essence, *Mercier* argued that while matters involving the shareholder franchise merit special attention, *Unocal*,[102] rather than *Blasius*, is a better framework because the *Blasius* test is self-defeating.[103] Thus, the standards of review range from the deferential business judgment rule at one end of the spectrum, to the *Blasius* compelling interest test at, or just shy, of the other end of the spectrum, with *Mercier* urging the repeal of the *Blasius* test in favor of a *Unocal*-based monitor.[104]

B. Policies, Bylaws, or Charter Amendment: Does it Matter?

1. Board Policies

As noted above,[105] boards have wide latitude to enact board policies as long as these policies do not conflict with the corporation's bylaws, charter, or any contract with its

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[101] *Id.* at 810 (also requiring that the board show that its motivation was proper and not selfish).

[102] *See id.* at 807 ("The origins of *Unocal* as a standard of review addressing takeover defenses has probably led to too much emphasis on the word 'threat' in the test. The core of *Unocal*'s utility really rests in the burden it asserts on directors to: (1) identify the proper corporate objectives served by their actions; and (2) justify their actions as reasonable in relationship to those objectives.").

[103] *Id.* at 788 (stating that the *Blasius* standard was an "after-the-fact label placed on a result" and that a "genuine standard of review that is useful for the determination of cases" should be employed). Nevertheless, the *Mercier* court found that, even if the *Blasius* standard applied, the board had a compelling justification moving the meeting. *Id.* at 818–19 (finding that the primary purpose of the board was not to disenfranchise the stockholders but to give them more time to deliberate before voting).

[104] *See supra* note 81.

[105] *See supra* Part I.D.

shareholders.[106] This latitude, however, is not unlimited.[107]

[106] *See, e.g.*, Superior Vision Servs., Inc. v. Reliastar Life Ins. Co., No. 1668-N, 2006 WL 4782393, at *5 (Del. Ch. Aug. 25, 2006) ("[The shareholder] does, however, have a contractual right that allows it to prevent implementation of the corporate dividend policy adopted by the board").

[107] In *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998), for example, the Delaware Supreme Court held that the board's policy violated the statutory mandate that vests management of the corporation in the board of directors. *Id.* at 1292 (invalidating the policy under Section 141(a), which confers on the board full power to manage and direct the affairs of a Delaware corporation). The reason for this holding was that the board amended its shareholder rights plan by adopting a delayed redemption provision, which delayed for six months the ability of a newly-elected board to redeem the corporation's poison pill. *Id.* at 1291–92. The Delaware Supreme Court reasoned that since the amendment precluded the board from exercising its full management prerogatives during this six month period, the board's policy was invalid. *Id.*; *see also* Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1193–95 (Del. Ch. 1998) (denying the corporation's motion to dismiss because the shareholders had stated a "cognizable" claim both under *Blasius* and *Unocal*). Similarly, other cases involved a board contract, rather than a board policy, that impinged on the board's ability to fulfill its fiduciary duties. *See, e.g.*, Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) (involving a contract with a bidder that involved a no-shop provision, a termination fee, and a grant of stock options to the acquiror); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003) (invalidating a provision requiring the board to submit the merger to a shareholder vote even if the board later determined that the merger was not in the best interests of the shareholders); *see also* San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc., 983 A.2d 304, 306, 315 (Del. Ch. 2009) (reading a provision in an indenture agreement that "prevent[ed] the [board of directors] from 'approving' as 'continuing directors' persons nominated by stockholders in opposition to the slate nominated by the incumbent directors" to mean that "approval" did not mean "endorsing" a dissident slate of directors because such a construction would have an "eviscerating effect on the stockholder franchise [and] would raise grave concerns"). The reasoning of these two cases, which invalidated those aspects of the contract that precluded the board from being able to fulfill its fiduciary duty, would doubtlessly apply to any board policy with a similar preclusion. Indeed, in *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), the Delaware Supreme Court used this same logic to invalidate a shareholder proxy expense reimbursement bylaw that did not provide the board with a fiduciary out. Within these broad parameters, a board may include whatever it chooses in its policies.

Incontrovertibly, the board may enact a majority-voting policy, and recent studies have shown that use of a policy alone or in combination with a bylaw remains the most popular way to institute majority voting.[108] Moreover, since only a charter or bylaw legally can change the default rule from plurality to majority voting, board policies can effectuate majority voting only with a plurality-plus system.[109] In reliance on this policy, shareholders may forego enacting their own majority-voting bylaw. The question will be whether the shareholders can sue on contract or fiduciary grounds if the board repeals, contravenes, or even follows its policy, such as a policy that allows the board unlimited discretion to reject the resignation of a failed candidate.[110]

If a board's policy is valid, courts will normally defer to the board's judgment if it later rescinds that policy. For example, in *In re General Motors (Hughes) Shareholder Litigation*,[111] the Delaware Chancery Court noted that one board resolution could amend or even rescind another board resolution or policy,[112] as board policies do not bind the board.[113] Similarly, the Delaware Chancery Court, in *Perlegos v. Atmel Corp.*,[114] reasoned that "[i]t is an elementary principle of corporate law that if the board has the power to adopt resolutions or policies, then it has the power to rescind them."[115]

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[108] *See supra* Part I.D.

[109] *See supra* Part I.D.

[110] *See, e.g.*, *Westland Supreme Court*, 1 A.3d 281 (Del. 2010) (en banc) (holding that a board's plurality plus voting policy allowed the board to exercise complete discretion over whether to accept or reject the resignation of a director who failed to receive a majority of the vote); *see also* discussion *infra* Part III.B.

[111] No. Civ.A. 20269, 2005 WL 1089021 (Del. Ch. May 4, 2005).

[112] *Id.* at *3 n.34; *cf.* Perlegos v. Atmel Corp., No. Civ.A. 2320-N, 2007 WL 475453, at *26 (Del. Ch. Feb. 8, 2007) (finding that the power to call a special meeting, as allowed by the bylaws, included the power, consistent with fiduciary duties, to rescind or cancel the special meeting).

[113] *Hughes*, 2005 WL 1089021.

[114] No. Civ.A. 2320-N, 2007 WL 475453 (Del. Ch. Feb. 8, 2007)

[115] *Perlegos*, 2007 WL 475453, at *26 (citing Unisuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at *5 (Del. Ch. Dec. 20, 2005)); *see*

While dicta in these cases could be read to preclude shareholders from contesting a board's repeal of its policy, *Unisuper v. News Corp.*[116] gives shareholders a modicum of leeway in challenging a board's contravention of its policy. Defendant, News Corp., proposed a reorganization plan that would reincorporate News Corp., then an Australian corporation, in Delaware, subject to a shareholder vote.[117] Two Australian corporate governance organizations met with News Corp. to discuss the proposed reorganization because they were concerned with a number of issues, including the board's power under Delaware law to institute a poison pill without shareholder approval.[118] These negotiations culminated with a board policy stating that any poison pill adopted by the board would expire after one year unless a majority of the shareholders voted to extend it.[119] The board included details of this policy both in a press release as well as in a letter to all shareholders and option-holders.[120] Following the announcement of this information, News Corp. shareholders voted to approve the reorganization.[121] Shortly after the shareholders approved this reorganization, a hostile bidder threatened to take over News Corp. In

also Charles Nathan, *Implementation of Majority Voting: The Devil in the Details*, 14 CORP. GOVERNANCE ADVISOR 3, 4–5 (2006) ("As a general matter a board policy is not subject to shareholder approval nor is it considered 'binding.' As a result, the board policy is subject to amendment or deletion by the board at any time.").

[116] No. 1699-N, 2006 WL 3529317 (Del. Ch. Jan. 20, 2006).

[117] *Id.* at *2.

[118] After the first round of negotiations, News Corp. refused to adopt the Australian corporate governance organizations' proposals in the new corporate charter and terminated negotiations. *Id.* The Australian Securities Exchange Listing Rules prevent the use of poison pills. *See* Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010).

[119] *Unisuper*, 2005 WL 3529317, at *2. However, following a press release issued by one of these organizations stating its view that the reincorporation would result in the loss of significant shareholder protections, and a subsequent rise in institutional investor opposition to the reincorporation, News Corp. agreed to further negotiations. *Id.*

[120] *Id.* at *2.

[121] *Id.* at *3.

response, the board adopted a poison pill.[122] One year later, the board voted to extend the poison pill in contravention of the specific board policy that it would not extend the poison pill without shareholder approval.[123]

While rejecting the shareholders' claim that the board had breached its fiduciary duties,[124] the court refused to dismiss either shareholders' breach of contract claim or their claim for promissory estoppel.[125] The court noted that while board policies are "typically revocable by the board at will,"[126] here there was evidence of a contract: the shareholders would vote for the reorganization in reliance on the board's policy that it distributed in its press release and letter to the shareholders. The court reasoned that "if a board enters into a contract to adopt and keep in place a resolution (or a policy) that others justifiably rely upon to their detriment, that contract may be enforceable, without regard to whether resolutions (or policies) are typically revocable by the board at will."[127]

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[122] *Id.* The board announced its adoption of the poison pill in a press release, which stated that "it might or might not implement the Board Policy depending on whether it deemed the policy 'appropriate in light of the facts and circumstances existing at such time.'" *Id.*

[123] *Id.*

[124] *Id.* at *9 (dismissing the breach of fiduciary duty claim because plaintiff failed to allege any facts that suggested a violation of the duties of loyalty, good faith, or due care).

[125] *Id.* at *5 ("Whether plaintiffs will be able to adduce evidence in support of their allegations is for another day. But for now, it is sufficient that they have alleged the existence of an agreement, the existence of valuable consideration (their vote in favor of the reorganization), and that the board intentionally breached the agreement."); *id.* at *8. The Court also dismissed plaintiffs' claims for negligent misrepresentation and equitable fraud. *Id.* at *9.

[126] *Id.* at *5. The court reasoned, "[I]f the board has the power to adopt resolutions (or policies), then the power to rescind resolutions (policies) must reside with the board as well." *Id.*

[127] *Id.* The board next attempted to invalidate its agreement with the shareholders on grounds that the contract was unenforceable as a matter of law because it required the board to refrain from fulfilling its fiduciary duties if the facts so required. *Id.* at *7. The court rejected this argument on multiple grounds: (1) the court distinguished between those cases, like

While the shareholders' contract and promissory estoppel claims in *Unisuper* withstood a motion to dismiss, the court dismissed the shareholders' claim that the board breached its fiduciary duties.[128] Since most cases will not involve the extensive negotiations and public representations that were present in *Unisuper*, boards will generally retain the power to repeal valid board policies without incurring liability either for contract or for fiduciary claims. Therefore, if boards can repeal or contravene their policies without incurring liability, shareholders cannot expect much success when a board *follows* its policy, such as a policy that grants the board a discretionary check on election results. Certainly, shareholders would now lose the contract claim with which they had had some success in *Unisuper*, and would be left only with whether the board breached its fiduciary duties when it followed its policy.

Fiduciary claims are obviously more viable if courts apply a heightened review to a board's majority-voting policy under *Blasius*, *Mercier*, or *Unocal*. *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*,[129] however, rejects an enhanced standard of review in this context. In *Westland*, the Axcelis board enacted a plurality-plus policy

QVC, *Omnicare*, and *Quickturn*, which invalidated contracts because the board used its contract to entrench itself and keep power from its shareholders, and the case at hand, where the board's agreement empowered shareholders, and (2) the principles of agency law, which dispense with fiduciary duties to fill the gaps in the contractual relationship between the shareholders and the board when that contract is explicit. *Id.* at *8 ("Where the principal makes known to the agent exactly which actions the principal wishes to be taken, the agent must act in accordance with those instructions."). As the chancery court summarized: "It makes no sense to argue that the News Corp. board somehow disabled its fiduciary duties to shareholders by agreeing to let the shareholders vote on whether to keep a poison pill in place. This argument is an attempt to use fiduciary duties in a way that misconceives the purpose of fiduciary duties . . . . Fiduciary duties cannot be used to silence shareholders and prevent them from specifying what the corporate contract is to say." *Id.*

[128] *Id.* at *9–10 (stating that plaintiffs did not allege facts that supported a breach of any fiduciary duty).

[129] *Westland Supreme Court*, 1 A.3d 281 (Del. 2010) (en banc).

that gave the board discretionary power to accept or reject resignations tendered by those incumbent directors who fail to receive majority support.[130] Although all three directors seeking reelection failed to receive a majority of the votes cast, these candidates nevertheless remained directors because the other members of the board rejected the candidates' resignations.[131] Plaintiff Westland sued under Section 220(c) of the Delaware General Corporate Law, seeking a court order to permit inspection of the corporation's books and records.[132] As Section 220(c) requires a stockholder to establish a "proper purpose" for an inspection,[133] plaintiff claimed that its purpose was to investigate possible management wrongdoing.[134]

The Delaware Chancery Court dismissed plaintiff's action.[135] While holding that investigation of suspected wrongdoing by the board would constitute a proper purpose to inspect the corporate books and records, the court reasoned that plaintiff failed to provide any credible evidence of mismanagement or wrongdoing.[136] Plaintiff contended that the board's rejection of the proffered resignations satisfied its evidentiary burden, claiming that the board must offer a compelling reason under *Blasius* for having interfered with the shareholder vote, or alternatively, that the board must justify its conduct under *Unocal* because its decision to reject the resignations was a defensive tactic designed to defeat a change in control.[137] The chancery court concluded that plaintiff failed to demonstrate any credible basis showing that the board's decision to reject the resignations was defensive or animated by entrenchment

[130] *Id.* at 283; *see also infra* Part III.A.

[131] *Westland Supreme Court*, 1 A.3d at 284.

[132] *Id.* at 285.

[133] *Id.*

[134] *Id.*

[135] City of Westland Police & Fire Ret. Sys. v. Axcelis Tech., Inc., No. 4473-VCN, 2009 WL 3086537 (Del. Ch. Sept. 28, 2009) [hereinafter *Westland Chancery Court*].

[136] *Id.* at *4.

[137] *Id.* at *5.

motives.[138] Furthermore, the chancery court rejected plaintiff's claim that the board's exercise of discretion under its policy itself warrants heightened scrutiny:

> The Plaintiff's position would require this Court to accept the theory that mere shareholder reliance upon a board-enacted governance policy could effectively rewrite the voting provisions contained in a corporation's by-laws [sic]. The Axcelis By-laws [sic] provide for director election by plurality vote, and the interposition of the Board's discretionary review required by the Policy cannot change that fact simply because the shareholders who chose to withhold their votes wish it to be so.[139]

To explain its reasoning, the chancery court outlined the sequence of events that had triggered the board's policy: a sufficient number of shares withheld support from the candidates, who then tendered their required resignations to the board; the board, in turn, rejected these resignations. This logic led the chancery court to conclude that when the board rejected the resignations, instead of thwarting the shareholders' vote, "the Board effectuated the results of a valid shareholder election."[140]

Shredding the last morsel of plaintiff's argument, the chancery court added that if the shareholders had wanted to be rid of these three directors, they ought to have waged a proxy fight.[141] In other words, the chancery court made quite plain that the board-enacted plurality-plus policy gave the Axcelis shareholders no right to expect that when they withheld support from the candidates, those candidates would actually not continue to serve. The chancery court

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[138] *Id.* ("There is no support in the record of any entrenchment motive. Only the Plaintiff's bare accusations suggest such a motive, and mere accusations are insufficient. The Plaintiff has not shown why the Court should suspect that the independent, outside director members of the Board were motivated to perpetuate the Three Directors in office.").

[139] *Id.* at *6.

[140] *Id.*

[141] *Id.*

concluded that "[a] poor strategic choice cannot be the basis of a Section 220 action."[142]

In an *en banc* decision, the Delaware Supreme Court affirmed the chancery court's ruling.[143] The supreme court agreed with the chancery court that while plaintiff had stated a proper purpose, plaintiff failed to meet its burden under Section 220 to show some evidence of management misconduct,[144] reasoning that the board's rejection of the failed directors' resignations by itself was insufficient to provide a credible basis of management misconduct.[145] Moreover, when plaintiff urged the court to apply a *Blasius* standard to the board's rejection of the directors' resignations,[146] the Delaware Supreme Court rejected this argument on the theory that it "improperly attempts to shift to Axcelis Westland's burden to establish a 'proper purpose' for a Section 220 inspection."[147]

After rejecting the *Blasius* standard, the Delaware Supreme Court concluded that the business judgment rule should apply:

> The less-than-majority shareholder vote may be viewed as a judgment by the holders of a voting majority that those director-candidates were no longer suitable to serve (or continue to serve) as directors. Correspondingly, the Board's decision not to accept those resignations may be viewed as a contrary, overriding judgment by the Board. At stake, therefore, is the integrity of the Board decision overriding the determination by a shareholder majority. Stated differently, the question arises whether the directors, as fiduciaries, made a disinterested, informed business judgment that the best interests of the corporation require the

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142 *Id.*

143 *Westland Supreme Court*, 1 A.3d 281 (Del. 2010) (en banc).

144 *Id.* at 290.

145 *Id.* at 288.

146 *Id.*

147 *Id.* at 289.

> continued service of those directors, or whether the Board had some different, ulterior motivation.[148]

In dicta, the Delaware Supreme Court delineated a path that future plaintiffs can use to gain access to the corporate books and records when a board rejects a failed candidate's resignation pursuant to a board-adopted plurality-plus policy. Instead of alleging management misconduct, plaintiffs should allege that their purpose for instituting a Section 220 action is to investigate the suitability of directors to continue in office.[149] In that case, the board's rejection of the tendered resignations pursuant to a board policy would constitute sufficient credible evidence for inspection purposes:

> Where, as here, the board confers upon itself the power to override an exercised shareholder voting right without prior shareholder approval (as would be required in the case of a shareholder-adopted by-law or a charter provision), the board should be accountable for its exercise of that unilaterally conferred power. In this specific context, that accountability should take the form of being subject to a shareholder's Section 220 right to seek inspection of any documents and other records upon which the board relied in deciding not to accept the tendered resignations . . . a showing that enough stockholders withheld their votes to trigger a corporation's (board-adopted) 'plurality plus' policy satisfies the . . . requirement that "a stockholder must establish a credible basis to infer that a director is unsuitable, thereby warranting further inspection."[150]

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[148] *Id.* at 291.

[149] *Id.* at 289. Because Plaintiff Westland had not offered the directors' suitability as its purpose for attempting to inspect Axcelis' books and records, the supreme court would not allow Westland to inspect the books and records. *Id.*

[150] *Id.* at 291 (quoting *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810, 817–18 (Del. Ch. 2007).

In other words, plaintiff Westland would have been able to inspect Axcelis' corporate books and records had it claimed its purpose was to determine the suitability of directors to serve on the board.

Thus, while the Delaware Supreme Court denied plaintiff Westland access to the corporate books and records, the court opened the door to virtually all other similarly-situated claims.[151] Its dictum was its compromise: on the one hand, in support of the board, the court rejected the applicability of either *Blasius* or *Unocal* in this context; on the other hand, in support of the shareholders, the court paved the way for shareholders to inspect the corporate books and records when a board rejects a resignation tendered pursuant to a unilaterally-enacted board policy. Such inspections, rather than a *Blasius* or *Unocal* standard of review, would provide the path to hold the board "accountable for its exercise of that unilaterally conferred power."[152]

In sum, the cases considering board policies apply some scrutiny to determine whether a board policy is valid under Delaware law.[153] Once a court determines that a board policy is valid, however, courts largely permit boards free reign. Absent an unusual fact pattern that will support a contract claim, the board may contravene or rescind its policy without judicial interference. *Unisuper* and *Westland* imply that where there is a valid board policy, courts will place the initial burden on plaintiff to prove either a contractual reliance or a proper purpose to inspect the corporate books and records.[154] Claims that the board breached its fiduciary duties in rejecting directors' proffered resignations under a

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[151] The corporation could defeat an inspection demand by proving that despite plaintiff's proffer of a proper purpose, its true purpose was improper, or that plaintiff did not need the requested information, or that a shareholder's access must be limited by the need to protect confidential information. *Id.* at 290 (citing Pershing Square, L.P. v. Ceridian Corp., 923 A.2d 810, 818 (Del. Ch. 2007)).

[152] *Westland Supreme Court*, 1 A.3d at 291.

[153] *See supra* note 107.

[154] *Westland Supreme Court*, 1 A.3d at 291; Unisuper v. News Corp., No. 1699-N, 2006 WL 3529317, at *5 (Del. Ch. Jan. 20, 2006).

unilaterally-enacted board policy thus far have only theoretical viability. The almost complete freedom that boards have to implement and change their policies is the key reason that shareholders may object to majority-voting policies being housed in a board policy.[155]

2. Bylaws

While board policies may still be the most widely used vehicle for implementing majority voting, corporations increasingly have begun to utilize bylaws as an implementing tool.[156] Given this trend, the question is whether shareholders are any better protected by a majority-voting scheme implemented, in whole or part, through a board-enacted bylaw instead of a board policy. While shareholders are always empowered to adopt, amend, and repeal bylaws,[157] directors enjoy identical bylaw rights in states like Delaware only if the charter explicitly so provides.[158] Since most corporate charters give directors bylaw rights,[159] shareholders and directors traditionally have

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[155] Nathan, *supra* note 115, at 4–5.

[156] *See supra* note 61.

[157] *See* MBCA § 10.20 background (noting that at common law, the power to adopt, amend, and repeal bylaws was vested solely in shareholders).

[158] DEL. CODE ANN. tit. 8, § 109(a) (2010) (noting that giving directors the same bylaw rights, however, does not diminish the power of shareholders to adopt, amend, or repeal bylaws); *see supra* Part I.B for a discussion of different variations on a board's power to alter and amend bylaws. Courts originally adhered to the common law principle that the entity with the power to adopt rules has an implied and complimentary power to amend or repeal them, absent specific statutory or charter provisions to the contrary. *See, e.g.*, Renn v. U.S. Cement Co., 73 N.E. 269 (Ind. App. 1905); Underhill v. Santa Barbara Land, 28 P. 1049 (1892); *cf.* Perlegos v. Atmel Corp., No. Civ.A. 2320-N, 2007 WL 475453 (Del. Ch. Feb. 8, 2007) (reasoning that as with board policies, if directors were empowered through the bylaws to call a special meeting, they were implicitly empowered to rescind that call).

[159] Sjostrom & Kim, *supra* note 3, at 472 (noting that while Delaware requires the corporate charter to expressly allow for directors to amend bylaws, most Delaware corporations provide for such a power).

concurrent powers to adopt, amend, and repeal bylaws. Furthermore, much like governance policies, directors have wide latitude about the content of their bylaws, so long as the content does not conflict with state law or any provision in the corporation's charter.[160] Thus, in states that permit the default plurality threshold in director elections to be altered through a bylaw, usually either directors or shareholders can unilaterally enact a majority-voting bylaw.[161] As the power to enact also generally includes the power to repeal, shareholders are in a vulnerable position if their directors pass a majority-voting bylaw and subsequently repeal or amend it, much like the board-policy context.

In contrast to a majority-voting board policy, however, shareholders have several additional arguments that a majority-vote plan housed in the legally distinct bylaw form should afford them greater protection from board action that undermines majority voting. Bylaws "are generally thought of as having a hierarchical status greater than board resolutions," meaning that board resolutions must yield to bylaws when the two conflict.[162] Additionally, bylaws are viewed as more formal declarations of company policy applicable to a wider scope of persons, affairs, and situations.[163] Courts have long considered a bylaw to

[160] *See* Crown EMAK Partners, LLC v. Kurz, 99 A.2d 377 (Del. 2010) (invalidating a bylaw that reduced the size of the board from five to three as inconsistent with Delaware's statutory holdover rule and rules governing removal of directors); *see also* Pricket v. Am. Steel & Pump Corp., 253 A.2d 86 (Del. Ch. 1969) (noting that where a bylaw, as amended, conflicts with a provision of the charter, the bylaw is void).

[161] *See supra* Part I.A and accompanying notes for a discussion of those states that allow for majority voting to be implemented through bylaw provisions.

[162] Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1080 (Del. Ch. 2004).

[163] *See* Hayes v. Can., Atl. & Plant S.S. Co., 181 F. 289, 295–96 (1st Cir. 1910). As one commentator noted, "[A]s a pure legal matter, a board adopted by-law may be altered by a board just as easily as a board policy. However, the more formal nature of a by-law means that it will probably be psychologically, if not legally, more challenging for a board to change it." Nathan, *supra* note 115, at 5.

constitute a contract between the corporation and its shareholders.[164] Against this backdrop, shareholders might argue that they have vested rights in the content of a bylaw, thereby affording them a contract claim if the board repeals or amends its bylaw.

These additional arguments did not, however, persuade the Delaware Chancery Court in *Kidsco Inc. v. Dinsmore*[165] that shareholders have a vested right in the contents of a bylaw. In *Kidsco*, the court reasoned: "[T]his Court has held that where a corporation's by-laws [sic] put all on notice that the by-laws [sic] may be amended at any time, no vested right can arise that would contractually prohibit an amendment."[166] Thus, if a charter provision of a Delaware corporation affords directors the ability to amend or repeal bylaws unilaterally, any bylaw adopted by them is subject to the caveat that directors can alter this contract at will.[167]

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[164] Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 926 (Del. 1990).

[165] 674 A.2d 483 (Del. 1995).

[166] *Id.* at 492. In addition to the corporate charter's empowerment of the directors to amend and repeal bylaws unilaterally, the bylaw at issue expressly provided that "the Board of Directors may by the affirmative vote of a majority of the entire Board . . . amend or repeal these By-laws [sic] . . . ." *Id.* (citing TLC By-law Section 7.8). The Delaware judiciary has ruled only once that a bylaw amendment, enacted in accordance with state law and the company charter, impaired a vested right created through such bylaw and was therefore invalid. *See id.* at 492 n.6 (citing Salaman v. Nat'l Media Corp., No. 92C-01-161, 1992 WL 808095 (Del. Super. Ct. Oct. 8, 1992)). The court noted the commentary of one authoritative treatise that "the only 'vested right' left is that specified in [DEL. CODE ANN. tit. 8, § 394]," which prohibits a statutory charter amendment from "[taking] away or [impairing] any remedy . . . against any corporation or its officers for any liability which shall have been previously incurred." *Id.* at 492 (quoting ILL FOLK, WARD & WELCH, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 394.2.2).

[167] *See id.* at 492. Additionally, for purposes of preemptively thwarting any shareholder challenge based in contract, boards may choose to insert a clause into the bylaw explicitly stating that the provision can be amended at any time. *See id.* at 492–93 (citing Roven v. Cotter, 547 A.2d 603, 608 (Del. Ch. 1988) ("[W]here a corporation's by-laws [sic] put all on notice that the by-laws [sic] may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.")).

As shareholders are unlikely to succeed in challenging a board's decision to alter or repeal a majority-voting bylaw based on a contract claim, shareholders are left to argue the larger point previously posed when majority voting was housed in the board's policy: what standard of review will a court apply when a board amends or repeals a majority-vote plan housed in a board bylaw? Somewhat surprisingly, courts seem to pay short shrift to the legal form of the substantive provision at issue, focusing almost exclusively on the facts of the case surrounding the directors' actions. While some cases involving directors amending or repealing bylaws to the detriment of shareholders have applied *Unocal/Unitrin*[168] or *Blasius*,[169] the heightened standards of

[168] In *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch. 1995), shareholders claimed that the board breached its fiduciary duties when it amended a bylaw that effectively delayed a special meeting of shareholders to vote on the current board membership. First, the Court rejected shareholders' "entrenchment motive" claim because the board would ultimately be replaced when either its preferred takeover transaction occurred, or, if an alternative takeover transaction could not be arranged, by the shareholders at the special meeting that had been delayed by twenty-five days. *Id.* at 493. Second, shareholders' "entire fairness" claim was rejected because the directors, as shareholders, had more to gain by maximizing the share price of the offer than they did in potential consulting fees from the acquiring corporation, and exercising due care in amending the bylaw did not require the board to review the alternative bid first. *Id.* at 493–94. Finally, shareholders argued that the business judgment rule did not protect the board's decision to amend the bylaw under either the *Unocal / Unitrin* or *Blasius* standards. After rejecting the *Blasius* "compelling justification" standard as inappropriate under the circumstances, the Court settled on *Unocal / Unitrin* but found the amendment to pass the reasonableness test because the directors were motivated by a desire to allow shareholders to consider their preferred offer free from distraction of a concurrent proxy contest as well as to have a process in place to yield the highest possible value if the preferred offer was rejected. *Id.* at 496–97. The Court then found the amendment to be a proportional response because it only delayed, but did not preclude, a shareholder vote. *Id.* at 497.

[169] In *MM Companies v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003), the court struck down the board's attempt to amend or repeal its own bylaw to increase the size of the board under a *Blasius* standard of review. *Id.* at 1131–32. The court applied such a high standard "because the primary purpose of the Board's action was to interfere with or impede the

review were driven by the facts of the case, as opposed to the court determining that bylaw form inherently deserved some degree of enhanced scrutiny.

In the majority-vote context, shareholder concerns would most likely arise when a board either amends its bylaw from a majority standard back to plurality[170] or adds a clause reserving the right to reject a mandatory resignation.[171] Because the primary purpose of these maneuvers might change the results of the shareholder vote without completely disenfranchising shareholders, it is unlikely that the court would apply a *Blasius* review to such conduct. *Unocal/Unitrin* is also unlikely to be applied outside of a hostile takeover bid.[172] By process of elimination, the

effective exercise of the shareholder franchise in a contested election for directors." *Id.* at 1131 (citing Stroud v. Grace, 606 A.2d 75, 92 n.3 (Del. 1992)). Alternatively, a court could apply the *Schnell* doctrine, a per se rule born out of the Court's equitable powers, as opposed to a heightened standard of review. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 430, 439 (Del. Ch. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible."). In *Aprahamian v. HBO & Co.*, 531 A.2d 1204 (Del. Ch. 1987), the court reasoned that the incumbent directors' otherwise legal maneuver to delay their anticipated ousting from the board was inequitable under the *Schnell* doctrine because plaintiff shareholders had already waged an expensive proxy contest that could become void if the meeting was not held according to schedule. *Id.* at 1208–09.

[170] In so doing, incumbent directors fearful of not clearing the majority threshold in an upcoming vote could remain on the board by virtue of the holdover rule. *See supra* Part I.C. Likewise, directors could achieve the same result by repealing the bylaw altogether, thus reverting to the default plurality rule.

[171] Similarly, the board could add in specific factors it would consider in reviewing a resignation.

[172] While a court is always free to apply the *Schnell* doctrine when it deems the board's conduct to be inequitable, the harsh result makes it a little-used doctrine that a court will utilize only in an extreme case. The two most common areas where the courts have applied the *Schnell* doctrine include situations where the meeting date is moved to thwart an anticipated proxy fight or an advance-notice provision makes a proxy fight impossible to wage. *See* Mary Siegel, *Going Private: Three Doctrines Gone Astray*, 4 N.Y.U. J.L. & BUS. 399, 412–15 (2008) [hereinafter Siegel, *Going Private*]. Similar to the fact pattern in *Aprahamian*, the board could revert to the plurality default standard upon realizing that a proxy contest

deferential business judgment rule applied in Westland remains.[173] While the court's decision was premised on the fact that the board had expressly reserved in its policy the power to reject resignations, nothing from the court's analysis suggests a willingness to apply a different standard to a board's similar decision to amend or repeal a majority-voting bylaw.[174] Either way, the impact of majority voting can be blunted by the directors' business judgment.

Thus, while shareholders' arguments may be slightly stronger and a bit different from those in the context of a board policy, case law does not provide shareholders comfort that they will be successful in challenging a board's maneuvering of its own majority-voting bylaw. In contrast to board-enacted bylaws, however, Delaware courts have typically found shareholder-enacted bylaws more sacrosanct.[175] Moreover, the Delaware legislature has

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had been waged to garner a majority of withheld or "against" votes to force the incumbents' resignation. Shareholders able to afford the cost of waging a proxy contest, however, are much more likely to do so to place a preferred non-incumbent nominee on the board, in which case majority voting would be inapplicable due to the contested nature of the election.

[173] Similarly, the business judgment rule would likely be the applicable standard if the board filled a vacancy created by a candidate's failure to earn the requisite vote with that same candidate.

[174] *See supra* Part II.B.

[175] In *Hollinger International, Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 1994), the board of directors challenged bylaw amendments adopted unilaterally by the controlling shareholder, himself a director, as a defensive measure to prevent the underlying corporate assets from being sold. While the court held the amendments to be in compliance with Delaware General Corporate Law, it ultimately struck down the provisions as inequitable. *Id.* at 1080 (relying on *Schnell*). As Vice Chancellor Strine notably wrote, "Although it is no small thing to strike down bylaw amendments adopted by a controlling stockholder, that action is required here because those amendments complete a course of contractual and fiduciary improprieties." *Id.* at 1081. Even though courts may give more deference to a shareholder bylaw in general, courts are hesitant to uphold bylaws that stray too far from traditional board process issues. *See* CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 234–35 (Del. 2008) (reminding shareholders that they are prohibited from passing bylaws that dictate the content of substantive board decision making without including a fiduciary out).

expressly granted shareholders the power to adopt majority-voting bylaws.[176] While directors generally are permitted to amend or repeal shareholder-enacted bylaws,[177] the Delaware legislature and seven other states have statutorily shielded shareholder-enacted majority-voting bylaws from board interference.[178] Absent such explicit statutory protection, courts are most likely to uphold the actions of directors in amending or repealing shareholder bylaws if the statute or corporate charter and bylaws do not otherwise limit such power.[179] Thus, in the limited number of relevant states lacking any means of statutory protection,[180] shareholders' only guaranteed remedy is to re-adopt or re-amend a majority-vote bylaw.[181]

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[176] DEL. CODE ANN. tit. 8, §§ 141(b), 211 (2010). *See supra* note 1 and accompanying text for a description of other states that have similarly allowed for substantive shareholder-enacted bylaws pertaining to majority voting.

[177] *See supra* Part I.B. The Delaware Court of Chancery has suggested, in dicta, that directors are on firmer ground to amend shareholder-enacted bylaws, as opposed to repealing them altogether. *See* Gen. DataComm Indus., Inc. v. Wis. Inv. Bd., 731 A.2d 818, 821 n.1 (Del. Ch. 1999).

[178] DEL. CODE ANN. tit. 8, § 216 (2007); *supra* note 33 (listing other states that have majority-voting provisions similar to Delaware's).

[179] *See General DataComm*, 731 A.2d at 821 n.1 (noting the "significant legal uncertainty" as to "whether, in the absence of an explicitly controlling statute, a stockholder-adopted bylaw can be made immune from repeal or modification by the board of directors").

[180] Out of the nineteen states identified *supra* note 27 as allowing for shareholders to implement directly a majority-voting bylaw, seven of those states (Kan., La., Md., Mo., N.Y., Pa., and R.I.) are silent as to whether shareholders have the affirmative right to restrict directors from amending or repealing such a shareholder-enacted bylaw. *See supra* Part I.B. Thus, shareholders in these states are at risk that their bylaw will be repealed by the board.

[181] In Delaware, a charter provision allowing for directors to amend or repeal bylaws does not restrict the shareholders' ability to do the same. DEL. CODE ANN. tit. 8, § 109(a) (2010); *see* Stephen M. Bainbridge, *Who Can Amend Corporate Bylaws*, PROFESSORBAINBRIDGE.COM, (Jan. 5, 2006, 11:05 AM), http://www.professorbainbridge.com/professorbainbridgecom/2006/01/who-can-amend-corporate-bylaws.html ("As noted, MBCA § 10.20(b)(2) authorizes the board to adopt, amend, and repeal bylaws

3. Charter

Where no statutory protection exists for a majority-voting bylaw, shareholders' only practical option left is to embed a majority-vote provision in the charter. Security comes with a price, however. As previously noted, a charter amendment is the most difficult path that shareholders can forge, because it most often requires directors to recommend the amendment, and then the requisite number of shares to approve the majority-vote provision.[182] Neither factor is ever a given because neither party can compel the other to act. Therefore, shareholders can only pressure directors to make such a recommendation and hope that the charter amendment garners enough shareholder support to pass. The outcome provides the security that is lacking when the legislature has left shareholders vulnerable to directors undermining a majority-voting bylaw because a charter provision cannot be repealed or amended without shareholder consent.[183]

III. WHERE DOES THE MAJORITY-VOTING MOVEMENT GO FROM HERE?

A. Shareholders Must Decide, Not Rely

The continuous discourse on majority voting over the last five years has revealed the strengths and potential downsides to majority voting. This discussion allows informed shareholders to make a clear choice: they can

unless 'the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.' In the absence of such a restriction, however, the board apparently retains its power to amend or even repeal the bylaw. If the board does so, the shareholders' remedies presumably are limited to readopting the term limit amendment, this time incorporating the necessary restriction, and/or electing a more compliant board.").

[182] *See supra* Part I.A; Nathan, *supra* note 115, at 5. Minnesota, North Dakota, and Ohio, however, allow shareholders to enact charter amendments without board approval.

[183] *See supra* Part I.A.

operate under board-enacted majority-voting schemes, or attempt to enact their own. From the shareholders' perspective, board-enacted plans are beneficial in that they implement some form of majority voting quickly, but the board's normal reservation of a discretionary check on the election results potentially makes the majority-voting scheme illusory. Alternatively, shareholders can attempt[184] to adopt a majority-voting scheme giving themselves the power to reject board-nominated candidates. Moreover, if shareholders so choose, they can protect their majority-voting plan by excluding their board from any post-election review; the price for such exclusion is the elimination of the safety net that ameliorates the purported dangers of majority voting.[185]

Parts I and II have exposed both the obvious and the subtle lacunae in majority voting. Part I made clear that statutory schemes vary widely in the number of obstacles they throw at shareholders who desire to enact, and keep

[184] As noted above, shareholders whose corporation is governed by one of the twenty-one legislative schemes that grants directors the power to block shareholder implementation of majority voting will not have the choice to unilaterally enact majority voting. *See supra* notes 24–25 and accompanying text.

[185] Drawing from the conclusions made in Parts I and II, shareholders in a state similar to Delaware should be able to craft and unilaterally implement a majority-voting bylaw that: (i) changes the plurality default threshold to a majority of votes cast; (ii) forces the unreviewable resignation of the director nominee, effective immediately upon failure to secure a majority vote; and (iii) emphasizes shareholders' power to fill vacancies created by failed elections and removes or restricts the board's default vacancy filling powers to selecting only individuals who were not rejected by the shareholders in a majority-vote election. *See supra* note 55 and accompanying text. Of course, restricting the board's vacancy-filling powers cannot ultimately prevent the board from replacing the failed director with a candidate who subscribes to the same views that were grounds for the shareholders' rejection of the failed director in the first place. While *CA* held that the shareholders' proxy expense reimbursement bylaw was invalid without a fiduciary out, *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 234–35 (Del. 2008), that holding was premised on the requirement for the board to expend corporate funds. In the case of majority voting, a shareholder bylaw would not need any fiduciary-out clause.

intact, majority voting. Similarly, Part II diffused almost all expectations that shareholders will be able to sue the board successfully on contract or fiduciary grounds after shareholders have chosen to defer to board policies or board bylaws that not only operate according to board discretion, but also can be repealed solely by the board. Paraphrasing the chancery court in *Westland*, shareholders cannot sue simply because they made a poor strategic decision to rely on board policies or board bylaws that allowed their directors a discretionary check on the results of the shareholders' vote.[186] Armed with information about the holes in majority voting, those shareholders whose corporations are incorporated in the nineteen states that allow shareholders directly to enact their own majority-voting bylaw,[187] as does Delaware,[188] are free to decide their own fates.

Boards, of course, may not so easily cede their current control over majority voting, and have attempted to fortify their position by using the federal proxy rules. Federal Proxy Rule 14a-8(i)(10) permits a corporation to exclude from its proxy materials a proposal that has already been "substantially implemented."[189] Thus far, in the context of a board-enacted plurality-plus provision, the SEC has not accommodated directors: the SEC, by rejecting a request for a no-action letter, indicated that it does not view plurality-plus voting and majority voting to be functional equivalents.[190] As a result, Rule 14a-8(i)(10) will not permit a corporation operating pursuant to a plurality-plus plan to exclude from its proxy materials a proposal for a majority-voting bylaw. It remains to be seen, however, whether directors could preempt a shareholder majority-voting bylaw

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[186] *Westland Chancery Court*, C.A. No. 4473-VCN, 2009 WL 3086537, at *6 (Del. Ch. Sept. 28, 2009) (arguing that "[a] poor strategic choice cannot be the basis of a Section 220 action").

[187] *See supra* note 27 and accompanying text.

[188] *See* DEL. CODE ANN. tit. 8, §§ 141b, 216 (2010).

[189] 17 C.F.R. § 240.14-8(i)(10) (2007).

[190] Hewlett Packard Co., SEC No-Action Letter, 2006 WL 39271 (Jan. 5, 2006); *see* Nathan, *supra* note 115.

proposal under Rule 14a-8(i)(10) by first adopting a board majority-voting bylaw.[191]

B. The Impact of Proxy Access

As noted above,[192] boards and shareholders have alternating roles under majority voting: first, the board nominates candidates; then, shareholders, through their vote, can express dissatisfaction with these candidates; and finally, the board usually can reject any failed director's tendered resignation or fill the vacancy created by accepting the resignation. Thus, if the failed candidate and the board supported a controversial policy, the board could fill the vacancy either with the same candidate or with another who similarly supported this policy.[193] In contrast with majority-voting's "subtractive" nature, proxy access has an "additive" power whereby shareholders can nominate their candidates.[194]

Delaware and the Model Act added permissive proxy access provisions in 2009,[195] and the SEC adopted mandatory

[191] *See Majority Voting: Don't Rush to Act*, NACD DIRECTORSHIP (Sept. 1, 2006), http://www.directorship.com/majority-voting-dont-rush-to-act/ ("[C]ompanies with governance policies will not necessarily ward off more restrictive bylaw proposals in the future. Nor are companies with a bylaw that can be amended by directors immune from proposals for a by-law that can be amended only by shareholders."). The SEC provided no insight into the question when it rejected HP's position that a plurality-plus voting policy substantially implemented a shareholder proposed majority vote bylaw. *See Hewlett Packard No-Action Letter*, 2006 WL 39271; *cf.* The Pep Boys, SEC No-Action Letter, 2008 WL 902892 (Apr. 2, 2008) (agreeing with Pep Boys position that it could exclude a shareholder proposal for a majority vote bylaw under Rule 14a-8(i)(10) because the board was concurrently including its own proxy proposal to amend the charter to require majority voting, as required by state law).

[192] *See supra* Part I.C–D.

[193] Falcone, *supra* note 7, at 880.

[194] *Id.* at 881.

[195] *See* 77 DEL. LAWS ch. 14 (H.B. 19) (2009) (adding sections 112 and 113 to provide for permissive proxy access rights as well as reimbursement of expenses), *available at* http://delcode.delaware.gov/sessionlaws/ga145/Chp014.pdf; MBCA §§ 2.06(c), 10.20(b)(2) (approved Dec. 12, 2009) (providing permissive authority for bylaws to enable proxy access and

proxy access in the summer of 2010.[196] Currently, the SEC has stayed its proxy access rules indefinitely.[197] If the SEC's proxy access rules become operative,[198] they would give shareholders the opportunity to nominate candidates for the board to run against those candidates nominated by the board. If both shareholders and directors each use their respective powers to nominate a slate of candidates, the election will be contested, which, in turn, will cause a reversion to plurality voting.[199] Thus, success in proxy access decreases the need for majority voting.

Nevertheless, should federal proxy access become effective, it would not nullify the need for majority voting. As not all corporations qualify under federal law for mandatory proxy access,[200] shareholders in some corporations will not be able to use their corporation's proxy

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reimbursement and restricting shareholders from denying directors the right to amend, repeal, or adopt other proxy access bylaws). In contrast to the normal permissive trend, as exemplified by Delaware's provisions, North Dakota mandates proxy access at the state level. *See* N.D. CENT. CODE § 10-35-08 (West 2007) (setting an ownership threshold of five percent of outstanding shares in order for a shareholder to be allowed proxy access for her desired nominees).

[196] *See supra* note 8 and accompanying text.

[197] *See id.*

[198] Under the SEC's stayed rules, a shareholder or group of shareholders would need to hold both investment and voting power of at least three percent of the company's voting stock continuously for at least three years in order to have mandatory proxy access. Once granted, shareholders are guaranteed at least one nominee with the potential to nominate up to twenty-five percent of the entire board. *See* Advisory Memorandum of Wachtell, Lipton, Rosen & Katz, "SEC Adopts Final Rules for Shareholder Proxy Access" (Aug. 25, 2010).

[199] Majority voting operates only if there is an uncontested election of directors. *See supra* Part I.A.

[200] The new proxy access rules will apply to companies currently subject to the Exchange Act proxy rules, including: (i) investment companies registered under Section 8 of the Investment Company Act of 1940; (ii) controlled companies and those who voluntarily choose to register a class of securities under Section 12(g); and (iii) smaller reporting companies, but on a delayed basis. Companies subject to proxy rules solely through having a class of debt registered under Section 12 of the Exchange Act are exempt. *See* 75 Fed. Reg. 56,668 (Sept. 16, 2010).

materials to nominate candidates. Furthermore, even when mandatory proxy access applies, there either may be no qualified shareholder[201] who chooses to nominate a candidate, or the board may prevent a contested election by including the shareholders' nominees on the board's slate of candidates.[202] Therefore, the development of majority voting remains important as there will always be corporations that do not have proxy access.

C. Judicial Review

As noted above,[203] *Westland* is the sole Delaware case to date addressing the board's effective reversal of the results of a shareholder election. Both the Delaware Chancery Court and the Supreme Court in *Westland* squarely rejected applying enhanced scrutiny to the board's rejection of the failed-candidates' resignations.[204] Indeed, some commentators who had been quick to conclude that shareholder challenges to a board's reversal of a shareholder election should be reviewed under the traditional business judgment rule[205] may feel vindicated by the *Westland*

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[201] *See supra* note 198. Even if an eligible shareholder wishes to nominate someone, the nominee may run afoul of the definition of "independent" for purposes of qualifying under the applicable securities exchange's rules.

[202] Alternatively, under amended Rule 14a-8(i)(8), a corporation can no longer exclude from its proxy statement shareholder proposals relating to proxy access unless the proposal conflicts with state law or Rule 14a-11. Therefore, a shareholder proposal could expand proxy access to a broader group of shareholders (e.g., by lowering the stock ownership threshold) or create alternative proxy access rights, but could not preclude qualified nominations from proceeding under Rule 14a-11 (e.g., by raising the stock ownership threshold).

[203] *See Westland* discussion, *supra* Part II.B.1.

[204] *Westland Supreme Court*, 1 A.3d 281, 289 (Del. 2010) (en banc); *Westland Chancery Court*, No. 4473-VCN, 2009 WL 3086537, *5 (Del. Ch. Sept. 28, 2009); *see also* discussion *supra* Part II regarding *Westland*.

[205] Falcone, *supra* note 7, at 878 ("Accordingly, courts would almost certainly apply deferential business judgment review to the board's decision . . . ."); Sjostrom& Kim, *supra* note 3, at 486–87 ("[P]resumably a board's decision not to accept a resignation would be treated like any other

decision. Moreover, the driving force of the chancery court's opinion was that the board acted within its authority,[206] and the supreme court modulated that logic only by expressing concern that the board's authority had been unilaterally bestowed.[207] As such, one can read *Westland* as offering little to suggest a different analysis might ensue if the majority-voting scheme were embodied in a board-enacted bylaw,[208] or if boards utilize other methods to effectively reverse a shareholder vote.[209] In each scenario, plaintiff would be relegated either to demanding inspection of the corporate books and records, or else suing the directors under the business judgment rule for breaching their fiduciary duties.

Plaintiffs will not fare well under either scenario. Knowing that shareholders post-*Westland* are likely to gain access to the corporation's books and records, boards—or their counsel—will likely create a paper trail to document the process by which the directors make the ultimately disputed decision. As such, despite the supreme court's

business decision and afforded business judgment rule protection."). *Contra*, Lawrence A. Hammermesh, *Court of Chancery Deals a Blow to Use of "Pfizer Type" Majority Voting Policies as a Mechanism for Shareholder Activism*, THE INST. OF DEL. CORP. & BUS. L. BLOG (Jan. 16, 2011), http://blogs.law.widener.edu/delcorp/2010/01/28/court-of-chancery-deals-a-blow-to-use-of-%E2%80%9Cpfizer-type%E2%80%9D-majority-voting-policies-as-a-mechanism-for-shareholder-activism ("[T]he remaining directors ought to be charged with carrying some burden (similar to enhanced scrutiny under *Unocal*) that their decision has been made in good faith and for a proper purpose.").

206 *Westland Chancery Court*, No. 4473-VCN, 2009 WL 3086537, at *6 (Del. Ch. Sept. 28, 2009).

207 *Westland Supreme Court*, 1 A.3d 281, 291 (Del. 2010) (en banc).

208 Hammermesh, *supra* note 205 ("[T]here is little in the opinion to suggest that the . . . standard of judicial review of the rejection of the resignation, would be treated any differently if the rejection followed a failure to achieve a majority vote required by a bylaw . . . .").

209 For example, since boards have the authority to repeal their own bylaws and policies, the *Westland* logic applies. Similarly, since boards have the power to fill a vacancy on the board, even with the failed candidate, *Westland*'s logic again applies. This analysis would be slightly different because the board's power to fill vacancies comes from the statute, rather than from a board policy. DEL. CODE ANN. tit. 8, § 223(a).

design, the compromise it crafted in *Westland* of denying enhanced scrutiny but permitting shareholders to inspect the corporate books and records will not make boards "accountable"[210] for overriding their shareholders' vote. Similarly, it will be a rare case that shareholders win if their challenge to a board's effective reversal of the shareholder election is reviewed under the traditional business judgment rule,[211] as shareholders would be required to show that the directors breached either their duty of care or of loyalty to the corporation.[212] Boards are simply too savvy to substantiate a violation of their duty of care by paying too little attention and time when dealing with an issue as sensitive as overturning the shareholder vote. Furthermore, since the remaining directors have no financial interest in the outcome and would presumably not satisfy the onerous definition of bad faith conduct,[213] the most likely issue is whether a majority of the board lacked independence. In order to lack independence, case law requires a majority of directors to be "beholden"[214] to the ousted director, but collegiality alone does not destroy independence.[215] Thus, it

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[210] *Westland Supreme Court*, 1 A.3d at 291 (stating that the shareholders' Section 220 right to seek inspection of books and records holds the board accountable for its "unilaterally conferred power" to reject a tendered resignation).

[211] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993); *e.g.*, Falcone, *supra* note 7, at 878 ("Accordingly, courts would almost certainly apply deferential business judgment review to the board's decision . . . .").

[212] *See Cede*, 634 A.2d at 361 (stating that the business judgment rule provides a strong presumption in favor of actions taken by the board that would only be overturned if the board were shown to be disloyal or uninformed (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971))).

[213] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64 (Del. 2006) (defining bad faith as "an intentional dereliction of duties, a conscious disregard of one's responsibilities").

[214] Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984).

[215] *Id.*; *see also* Falcone, *supra* note 7, at 876 n.134 (listing cases rejecting structural bias arguments). The difficulty of showing that directors are not independent is compounded in public corporations, where listing standards require a majority of independent directors. N.Y. Stock Exch. Listing Manual § 303A.

will be impossible for plaintiffs to prevail under the business judgment rule in all but the most unusual case, thereby rendering shareholders powerless to challenge a board's decision pursuant to its self-enacted policy even though that decision undermines the results of a shareholder election.

Those seeking to persuade Delaware courts to apply a higher standard of review to majority-voting issues might focus on *Westland's* central logic that the board was doing only what its policies and the corporate statute permit. A board's compliance with its policies, however, begs the question; [216] such compliance is merely the predicate to the ultimate question of whether this compliance satisfies the appropriate standard of review under Delaware law. Moreover, in reasoning that the board simply complied with its policy and the corporate statute, the *Westland* chancery court ceded the opportunity to set the appropriate standard of review. Nor did the *Westland* supreme court supply a satisfactory analysis for its rejection of the *Blasius* standard on the grounds that *Blasius* would, unquestionably, shift the burden of proof onto the board; that shift accompanies all review standards other than the business judgment rule, but is the effect, not the cause, for selecting a particular standard of review. Ultimately, both the chancery court and supreme court decisions in *Westland* were troubling because their analyses were mechanistic, rather than premised on any doctrinal review of whether board conduct that is both duly authorized by unilaterally-enacted policies or bylaws and that effectively reverses the results of the shareholder vote is simply a routine business decision worthy only of deferential treatment.

A mechanistic approach is not new to Delaware courts. In the past, these courts have initially approached difficult policy issues by finding refuge in the board's compliance with its policies or the corporate statute. For example, both in the

[216] *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938 (Del. 2003) (stating that stockholders "are entitled to rely on the board to discharge its fiduciary duties at all times").

areas of going private[217] and tender offer defensive tactics,[218] Delaware courts initially rebuffed plaintiffs' challenges and applied the business judgment rule on the premise that the board's conduct fully complied with all statutory requirements. The Delaware Supreme Court ultimately reversed itself in each of these scenarios, holding that a standard of review more demanding than the business judgment rule was, indeed, appropriate despite the board's compliance with the corporate statute.[219] Therefore, if it is so inclined, there is certainly precedent for the Delaware Supreme Court to reverse itself and fashion a monitor tailored to the majority-voting issue.

Such a reversal would require the Delaware Supreme Court to acknowledge that board conduct duly authorized by

[217] *See, e.g.*, David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30, 35–36 (Del. Ch. 1971) (applying the business judgment rule to a going private transaction and stating that the courts "should not impede the consummation of an orderly merger under the Delaware statutes"); Bruce v. E.L. Bruce Co., 174 A.2d 29, 30 (Del. Ch. 1961) (applying the business judgment rule to a going private transaction and stating that "absent fraud or a showing that the terms of the proposed merger are so unfair as to shock the conscience of the court it is the policy of the courts of Delaware to permit contracting corporations to take advantage of statutory devices . . . furnished by legislative act").

[218] *See, e.g.*, Kors v. Carey, 158 A.2d 136, 140–41 (Del. Ch. 1966) (applying the business judgment rule to a tender offer defensive tactic because the board's corporate repurchase of stock complied with Section 160 and there was no evidence that established fraud or misconduct); Cheff v. Mathes, 199 A.2d 548, 556–57 (Del. Ch. 1964) (applying the business judgment rule to a board's defensive tactic of a corporate repurchase of stock and finding that the corporation had exercised a "longstanding right" under Section 160 to buy and sell shares of its own stock).

[219] In the *Singer-Tanzer-Weinberger* trilogy, the Delaware Supreme Court worked through the difficult issues relating to a conflict-of-interest freeze-out merger to forge a monitor tailored to that fact pattern. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Mary Siegel, *Tender Offer Defensive Tactics: A Proposal for Reform*, 36 HASTINGS L.J. 377, 404–07 (1985). Similarly, the Delaware Supreme Court reversed itself and applied "enhanced business judgment" to a board's enactment of tender offer defensive tactics. Unocal v. Mesa Petroleum, 493 A.2d 946, 954 (Del. 1985).

unilaterally-enacted bylaws or policies that effectively undermines the intended results of a shareholder election requires a hard look that is realistically unavailable under either the business judgment rule or in a Section 220 inspection.[220] Indeed, the Delaware Supreme Court in both *Unocal*[221] and in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[222] invoked the special sensitivity of those fact patterns and the directors' inherent conflict of interest as the reason to apply enhanced scrutiny. Since voting occupies a unique place in Delaware corporate jurisprudence,[223] the Delaware Supreme Court could use the rationale of *Unocal* and *Revlon* to apply enhanced scrutiny to board conduct that effectively undermines shareholder voting. If the supreme court does decide to reverse itself, courts will then need to consider directly whether the disputed board conduct falls within the rubric of thwarting the shareholder franchise, which would make *Blasius* applicable, or whether the directors acted defensively, which would make *Unocal* applicable.[224]

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[220] *See* discussion *supra* Part II.A regarding the business judgment rule; *see also* Steven M. Haas, *Delaware Supreme Court Addresses Majority Voting Standards in Director Elections*, THE HARVARD L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 28, 2010, 9:13 AM), http://blogs.law.harvard.edu/corpgov/2010/09/28/delaware-supreme-court-addresses-majority-voting-standards-in-director-elections/ (stating that a Section 220 demand to inspect the corporate books and records is normally a precursor to derivative litigation).

[221] *Unocal*, 493 A.2d at 954 ("[T]he omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders. For that reason, an 'enhanced duty' must be met at the threshold before the board receives the normal protections of the business judgment rule.").

[222] 506 A.2d 173, 180 (Del. 1986).

[223] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 n.2 (Del. Ch. 1988) ("Delaware courts have long exercised a most sensitive regard for the free and effective exercise of voting rights.").

[224] Indeed, the Delaware Chancery Court has previously held that whether a board has entrenchment motives is a question of fact. Goodwin v. Live Entm't, Inc., No. Civ.A. 15765, 1999 WL 64265, at *25 (Del. Ch. Jan. 25, 1999). As a result, the board's motives would not be offset by having the legal authority to act as it did. If a court determined that

On the other hand, instead of reversing, the Delaware Supreme Court might distinguish the *Westland* holding. Indeed, *Westland* may be a testament to the old adage that bad facts make bad law. If shareholders wanted to raise havoc about a board that effectively reversed the results of the shareholders' vote, the *Westland* plaintiffs certainly mounted only a feeble attack. Consider both the context of the case and how plaintiffs reacted to the facts. Axcelis' shareholders objected to their board's rejection of two takeover offers by SHI.[225] As a result, the shareholders withheld enough votes from the three incumbent candidates up for re-election to express the shareholders' dissatisfaction with the board.[226] The shareholder vote was on May 1, 2008, and the Axcelis board responded twenty-two days later with its decision to reject the candidates' resignations.[227] Had the shareholders been outraged by their board's decision, one would expect the shareholders to institute suit immediately so as to attempt to shorten the term of the three candidates whom the shareholders had not supported. Instead, Axcelis' shareholders watched the negotiations between Axcelis and SHI continue to play out.

Only after SHI put its acquisition of Axcelis on hold did plaintiff commence its action. Not only did plaintiff file a Demand to inspect Axcelis' corporate books and records,[228] rather than a challenge to the board's rejection of the

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Unocal was the proper standard of review, issues like the board's power from its policy and the statute then become probative as to whether the board reacted proportionately to the threat, as *Unocal* requires. *Unocal*, 493 A.2d at 954–55.

[225] *Westland Chancery Court*, No. 4473-VCN, 2009 WL 3086537, at *3 (Del. Ch. Sept. 28, 2009). The board found that the first proposal offering to buy Axcelis' shares for $5.20 per share failed to adequately compensate the shareholders. *Id.* at *1. The board rejected the second proposal of $6 per share because it thought that the transaction would not be in the shareholders' best interest and that exchange of confidential information would be required for the board to consider SHI's proposal further. *Id.*

[226] *Id.* at *2.

[227] *Id.*

[228] The board's rejection of the resignations was on May 23, 2008, and the shareholders' Demand was dated December 9, 2008. *Id.*

proffered resignations, but plaintiff also waited almost seven months after the election before filing suit. Furthermore, five of the seven categories in the demand had *nothing* to do with the board's rejection of the candidates; instead, only two categories involved the election while the other five related to the interactions between SHI and Axcelis.[229] Three days after plaintiff filed its Demand, Axcelis rejected it.[230] Plaintiff waited almost another four months to file its complaint,[231] which was now *eleven months after the shareholder election.* The complaint sought to enforce plaintiff's original Demand to inspect the corporate books and records, and of its four allegations, three related to Axcelis' dealings with SHI and only one related to the election issue.[232]

Thus, instead of plaintiff's complaint screaming with outrage over a board that had undermined the shareholder vote, the Axcelis board's rejection of the failed directors' resignations became merely a convenient hook on which to anchor plaintiff's claim that its demand to inspect the corporate books and records had been wrongly denied. Moreover, since three of the four counts related to the Axcelis board's rebuff of SHI's acquisition bids, it was clear that the loss of this opportunity to be acquired, rather than the Axcelis board's rejection of the shareholders' vote, was the source of plaintiff's fury. As such, *Westland* was hardly an ideal fact-pattern and context in which to challenge board conduct that undermines the intended results of majority voting.

If the *Westland* decision is read in light of its weak facts, the decision may be less than what it appears to be. A court that is disposed to take a hard look at board conduct that effectively eviscerates majority voting would have room to distinguish *Westland*. For example, what if the facts were not intertwined with rebuffed acquisition proposals, but

229 *Id.* at *3.

230 *Id.*

231 *Id.* at *4.

232 *Id.*

instead solely concerned a board overriding a shareholder vote for the election of directors? Alternatively, what if shareholders had not made a Section 220 Demand, but instead had brought suit challenging the board's rejection of the resignations as a breach of fiduciary duty? Other variables, such as a board's majority-voting bylaw (instead of a board policy), or the board repealing or amending (instead of following) its majority-voting policy or bylaw prior to the shareholder vote, might similarly give a court room to distinguish the *Westland* decision.

Distinguishing *Westland* may also be possible given that the Supreme Court in *Westland* indicated that it was uneasy about the effect of the Axcelis board's conduct. While the Delaware Chancery Court had emphasized the board's undeniable right to reject the resignations tendered by those incumbent directors who failed to receive majority support, the Delaware Supreme Court was concerned that the board had unilaterally seized this power for itself. Similarly, while the chancery court reasoned that the policy actually "effectuated the results of a valid shareholder election,"[233] the supreme court was sensitive to the fact that the board's conduct had the effect of overriding the results of the shareholder vote. Clearly, the Delaware Supreme Court was attuned to the implications of giving a board free reign to reverse the intended results of a shareholder election.

Thus, whether *Westland* ultimately gets reversed or distinguished, it is possible that this case will not serve as the ironclad rule on how Delaware courts will review board conduct that undermines majority voting. There are cases that are replete with language that courts, if they were so inclined, could employ to review the board's conduct under a standard more demanding than the business judgment rule. In fact, the court in *Blasius* said quite clearly that "the ordinary considerations to which the business judgment rule originally responded are simply not present in the shareholder voting context."[234] Moreover, as the Delaware

[233] *Id.* at *5.

[234] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. 1994).

Chancery Court in *Esopus Creek Value LP v. Hauf*[235] reasoned, "The duty of the courts to protect the shareholder vote is at its highest when the board action relates to the election of directors."[236] Courts could hold that the shareholder vote inherently deserves some level of protection because of *Blasius*' dual premises: the shareholder franchise is "the ideological underpinning upon which the legitimacy of directorial power rests,"[237] and who should be on the board of directors is simply not a matter of the directors' business judgment.[238] Therefore, when the board's conduct has the effect of reversing the result of a corporate election, the board would bear the burden of justifying its conduct; indeed, the Delaware Chancery Court in *In re MONY* noted that while *Blasius* is rarely invoked, it would be appropriate to apply *Blasius* when the board thwarts "what appears to be the will of a majority of the stockholders."[239] Given that the shareholder franchise has always merited special consideration under Delaware law, a shift away from the business judgment rule would be neither seismic nor unprecedented.[240] The question is whether this should be a

[235] 913 A.2d 593 (Del. Ch. 2006).

[236] *Id.* at 602.

[237] *Blasius*, 564 A.2d at 659; *see also* Preston v. Allison, 650 A.2d 546, 549 (Del. 1994) (arguing that a "stockholder's ability to participate in corporate governance through the election of directors is a fundamental part of our corporate law").

[238] *Blasius*, 564 A.2d at 659.

[239] *In re* MONY Grp., Inc. S'holder Litig., 853 A.2d 661, 674 (Del. Ch. 2004).

[240] In *MM*, the Delaware Supreme Court held that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied." MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003). In *Aprahamian v. HBO*, 531 A.2d 1204 (Del Ch. 1987), the chancery court held: "In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections. The business judgment rule therefore does not confer any presumption of propriety on the acts of the directors in postponing the annual meeting." *Id.* at 1206; *see also In re MONY*, 853 A.2d at 674 (noting that *Blasius* is used only "sparingly, and only in circumstances in which self-interested or faithless

small shift to *Unocal's* enhanced review or a larger leap to the *Blasius* standard of review.

The current *Blasius* standard, however, is a non-starter: it is nearly impossible for plaintiffs to invoke and totally impossible for defendants to pass. Proving that a board's primary purpose was to disenfranchise its shareholders when it effectively overturns a shareholder election is difficult, as boards will no doubt have many credible reasons for their action. Even if plaintiffs are successful in tripping *Blasius,* it is difficult to envision a scenario where defendants could pass the test. As the Delaware Chancery Court in *Mercier* stated, the compelling justification standard "echo[es] the almost impossible to satisfy standards used under the First and Fourteenth Amendments to address restrictions on political speech and governmental classifications based on race."[241] Phrased differently, once the *Blasius* test is tripped, boards face automatic failure.[242] Thus, the polarity of *Blasius* makes courts shy away from it in favor of a standard that permits a more nuanced review.

Therefore, whether through an expanded view of what constitutes a threat to corporate control[243] or through

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fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter and to thwart what appears to be the will of a majority of the stockholders.").

[241] Mercier v. Inter-Tel, Inc., 929 A.2d 786, 806 (Del. Ch. 2007) (stating that for this reason, the Delaware Supreme Court "rarely appl[ies]" the standard).

[242] Siegel, *Going Private, supra* note 172, at 422 ("Until the chancery court's recent decision in *Mercier v. Inter-Tel,* no case finding that the *Blasius* review was triggered had ever concluded that the directors had satisfied the compelling justification test. Moreover, while *Mercier* is the first case to find the directors had satisfied the compelling justification test, the decision pays only lip service to that test.").

[243] If a shareholder election ousts directors from the board pursuant to majority voting constitutes a threat to a corporation, then the board's conduct post election could be reviewed under *Unocal's* enhanced business judgment. The argument is if shareholders do not re-elect directors through majority voting, this shareholder conduct constitutes a threat to the board's continued service and policies. Viewed in *Unocal* language, the board's actions were a concerted effort to entrench themselves in control of the corporation. Unitrin Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995)

adoption of *Mercier's* proposed test[244] to review cases involving the board's interference with the shareholder franchise, all roads lead to using an adapted form of *Unocal's* enhanced business judgment rule: the directors would have the burden to advance both a legitimate corporate objective served by its decision, as well as persuasive arguments that their actions were reasonable in relation to that objective and did not preclude the stockholder vote.[245] Professor Hammermesh reached a similar conclusion:

> Perhaps a new doctrinal structure is needed. . . . [P]erhaps when a director fails to be reelected by a majority of the shares voting, and a previously submitted resignation thereby becomes effective, the remaining directors ought to be charged with carrying some burden (similar to enhanced scrutiny under *Unocal*) that their decision has been made in good faith and for a proper purpose. After all, choosing who should stay on as a director despite having failed to be reelected is not, as *Blasius* has pointed out, purely a matter of business judgment; rather, the matter is one at least partly within the domain of the stockholders' legal power.[246]

A shift from reviewing majority-voting issues under the business judgment rule to a *Unocal/Mercier* standard would be significant but not outcome-determinative for either plaintiffs or defendants. A *Unocal/Mercier* standard of review gives plaintiffs two benefits that they do not enjoy under the business judgment rule: it would shift the burden of proof from plaintiffs to the board and would enable the court to take a hard look at the board's conduct. On the

(*Unocal* applies when boards respond to a threat to control); *see also* Gantler v. Stephens, 965 A.2d 695, 705 n.23 (Del. 2009) ("Rejecting an acquisition offer, without more, is not a 'defensive action' under *Unocal*.").

[244] *Mercier*, 929 A.2d at 810–11.

[245] *Id.* at 810–11.

[246] Hammermesh, *supra* note 205.

other hand, since few boards have failed the *Unocal* test,[247] *Mercier* is likely to produce similar board-friendly results.

CONCLUSION

Faced with increased pressure from shareholders to implement some form of majority voting, most legislatures have responded by enabling shareholders, directors, or both to devise such a plan. Directors were out of the box quickly to enact board policies and bylaws to implement some type of majority voting. While creating the illusion that the shareholders had a meaningful voice in the election of directors, these plans inherently and deliberately left enough power to the directors to enable them to eviscerate the shareholders' decision if the board so chose. Thus far, the only Delaware Supreme Court case squarely on this issue has, in the context of a shareholder demand to inspect the corporate books and records, rejected a meaningful review of the board's decision.

The statutes, board conduct, and case law to date have thus exposed the holes in majority voting, thereby setting up the next generation of issues. Shareholders must decide whether to rely on board-implemented plans that reserve the trump card for directors, or enact their own majority-voting bylaws. Clearly, board plans protect against failed elections and other harm that might befall the corporation should the targeted directors be ousted from office. The downside to this safety net is that the board, rather than the shareholders, gets the last word on whether a targeted director loses her seat on the board. Shareholders must decide if the risks attendant to majority voting are

[247] *See* Bradley R. Aronstam, *The Interplay of* Blasius *and* Unocal, *A Compelling Problem Justifying the Call for Substantial Change*, 81 OR. L. REV. 429, 441 n.72 (2002) (criticizing *Unocal* and stating that it has been watered down to that of a dressed up business judgment rule); *see also* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986) (finding that a "coercive" self-tender was a disproportionate response under *Unocal*). *AC Acquisitions* is one of the very few cases in which a board action has ever failed the *Unocal* test.

significant enough to warrant ceding the ultimate power to their directors.

If the policy risks of a failed election are significant, shareholders would be more inclined to let boards play a role in reviewing shareholder elections if shareholders knew that courts would then take a hard look at the board's review if the shareholders challenge it. With the holes in majority voting exposed, and the sole Delaware Supreme Court case giving shareholders little comfort, one can expect a greater shift to shareholder-enacted majority voting plans in the future. Whether true majority voting results in improved corporate governance will, no doubt, be debated for many years to come.