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## THE REJECTED THREAT OF CORPORATE VOTE SUPPRESSION: THE RISE AND FALL OF THE ANTI-ACTIVIST PILL

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*As disciplinary takeovers are replaced by activist shareholder campaigns, managements may well want to turn to the “anti-activist pill” as shelter from the storm. The economic shock from the widespread shutdown to combat the Covid-19 pandemic produced dozens of so-called “crisis pills.” The defense of these pills as avoiding “disruption” and “distraction” of managements can be seen as a test run for broader use of poison pills to fend off shareholder activism. The Delaware courts, first Chancery and then the Supreme Court, rejected this managerial defense tactic in a way that clarifies the role of the poison pill in corporate governance. In the context of a hostile tender offer, the pill may be legitimated as protecting the statutory “two-step” for a merger: first, screening and negotiating by the board, followed by a shareholder vote on a proposed merger. Delaware’s board-centric model relies on another statutory mechanism—a director election contest—as the appropriate avenue for managerial accountability. Various elements of the poison pill—the cap on share ownership and a definition of “beneficial owner” that goes beyond “record owner”—have unfortunate side effects on election contests but are necessary to prevent unvetted shifts in*

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*control via tender offer or the gradual accumulation of stock (a “creeping tender offer”) either directly or with confederates. An anti-activist pill converts these side effects into its very mechanism, precisely to block a successful director election contest. An election contest is different from a tender offer in this critical respect: Success requires persuasion of a shareholder majority who will remain shareholders after the event. A low pill trigger reduces the activist’s economic incentives and can reduce its credibility; a capacious definition of beneficial ownership burdens its task of persuasion. The Delaware Courts’ reaffirmation of the legitimating role of the shareholder franchise is particularly important now, as the set of shareholder activists expands to include ESG activists who will use director election contests to propose broader conceptions of corporate purpose and shareholder value pursuit.*

I. Introduction .....	207
II. Shareholder Empowerment, but to What End(s)? .....	209
III. The Williams Companies Case .....	215
IV. The Pill: Origins and the Anti-Activist Renegade .....	223
V. The Renegade Theory of the Anti-Activist Pill .....	228
VI. Activism as “Mistargeting” .....	234
VII. Conclusion .....	245

## I. INTRODUCTION

The Covid-19 Crisis of 2020 precipitated adoption of “poison pills” by dozens of public companies on the ground that the sudden stock price drops that resulted from the pandemic’s economic turbulence would draw hostile takeover bids and a surge of opportunistic activism.<sup>1</sup> These fears proved unfounded and, in general, these “crisis pills”—most of which had a one-year term<sup>2</sup>—expired in due course. Nevertheless,

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<sup>1</sup> The moment is comprehensively described by Ofer Eldar & Michael D. Wittry, *Crisis Poison Pills*, 10 Rev. CORP. FIN. STUD. 204 (2021).

<sup>2</sup> *Id.* at 208 (finding that seventy-three percent of poison pills adopted during COVID-19 sunset after one year).

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these pills came to be seen as testing out new theories of managerial prerogative and new technologies of pill expansion. In particular, these pills seemed principally aimed not against a possible hostile bidder (the pill's original justification) but rather against shareholder activists who might challenge management's strategic or operational acumen—otherwise known as anti-activist pills. And at least some of the pills employed a very low ownership percentage trigger<sup>3</sup> and a capacious definition of “beneficial ownership” designed to disable an activist's capacity to build a shareholder consensus in favor of the activist's position.<sup>4</sup>

As this Article develops, the Delaware courts have rejected, at least for now, this effort to insulate management from shareholder challenge. But the stakes are not just management versus hostile bidders or hostile hedge funds. “Shareholder activism” is beginning to attract new players—environmental, social, and governance (ESG) activists who may contend for a different conception of shareholder value. Like the hedge fund activists, these new activists may explicitly challenge the company's preexisting business plan; management may well want to disrupt their activities as well. Because the pill operates by impeding the core mechanism of corporate governance—shareholder voting—an “anti-activist pill” is a barrier to all varieties of shareholder activism.

This Article proceeds as follows. Part II discusses “shareholder empowerment.” Part III describes *In re Williams Companies Stockholder Litigation*<sup>5</sup> and how it may mark the end of the anti-activist poison pill. Parts IV and V describe the origins of the poison pill and why the anti-activist pill is

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<sup>3</sup> *Id.* at 208 (finding pills in the sample had, on average, a twelve percent trigger compared to the historical conventional trigger of twenty percent). A more detailed examination of the authors' data reveals that pills that include “acting in concert” provisions, approximately a third (seven of twenty), have triggers of five percent or less.

<sup>4</sup> *See id.* (finding that many, though a minority, of “[t]hese pills . . . have provisions that specifically target activist investors acting in concert”).

<sup>5</sup> No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. Feb. 26, 2021) (McCormick, C.), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. Nov. 3, 2021) (unpublished table disposition) (mem.).

properly regarded as a renegade. Part VI responds to a novel defense of the anti-activist pill recently offered by Zohar Goshen and Reilly Steel on the grounds that activists' "mistargeting" may result in substantial losses of shareholder value and social wealth.<sup>6</sup> Activists, they say, are probably worse in this regard than hostile bidders, "raiders." Part VII concludes.

## II. SHAREHOLDER EMPOWERMENT, BUT TO WHAT END(S)?

These are boom times for shareholder empowerment in the large public corporation. While the core statutory feature of shareholder empowerment, shareholder voting for directors, has remained unchanged, the formal and informal avenues have multiplied over the past decades. Among the formal routes are annual say-on-pay-votes<sup>7</sup>; majority (as opposed to plurality) voting rules for directors<sup>8</sup>; expansion of proxy access

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<sup>6</sup> Zohar Goshen & Reilly Steel, *Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L. J. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3945764](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945764) (on file with the Columbia Business Law Review).

<sup>7</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") requires periodic non-binding shareholder votes on executive compensation. Dodd-Frank Wall Street Reform and Consumer Protection Act § 951, 15 U.S.C. § 78n-1 (2018). In addition to its effect on shaping executive compensation, the annual votes may also reflect shareholder (dis)satisfaction with managerial performance. See Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 103 (2018); Randall S. Thomas, Alan R. Palmiter & James F. Cotter, *Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1222 (2012).

<sup>8</sup> Majority voting matters primarily in the context of uncontested elections. Under the traditional plurality voting rule, a single vote could be sufficient to elect a director in an uncontested election. Shareholder proponents led a movement towards majority voting which has been largely successful over the past two decades. Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1125–27, 1147 (2016) (explaining that early adopters of majority voting already tended to be shareholder-friendly, but that the shift to majority voting by later adopting firms "led to more shareholder-friendly governance."); see

under Delaware law<sup>9</sup>; and, most recently, the adoption of “universal” proxy cards that will provide choice among all director nominees in a contested election.<sup>10</sup> These formal empowerment measures provide transmission conduits for the shareholder power that is inherent in the contemporaneous reconcentration of share ownership into the hands of institutional investors.<sup>11</sup> Before this institutional reconcentration, the principal and perhaps only effective mechanism for collective shareholder action was the tender offer, which achieved reconcentration through a radical change in the ownership of the firm. Shareholder power came from owning it all. Institutional reconcentration, which dramatically reduces the collective action costs of concerted shareholder engagement, opens many more routes for the expression of shareholder power while unlocking a diverse menu of shareholder objectives.

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also Yonca Ertimur, Fabrizio Ferri & David Oesch, *Does the Director Election System Matter? Evidence from Majority Voting*, 20 REV. ACCT. STUD. 1, 4 (2015) (finding abnormal positive returns around annual meetings taking up shareholder proposals to adopt majority voting).

<sup>9</sup> DEL. CODE ANN. tit. 8, § 112 (2021). Proxy access was expanded in Delaware in 2009. 77 Del. Laws 19 (2009). Section 113 also provides for expense reimbursement for proxy contests, as specified in a company’s by-laws. See DEL. CODE ANN. tit. 8, § 113 (2021).

<sup>10</sup> In November 2021, the Securities and Exchange Commission (SEC) adopted new rules “requiring parties in a contested election to use universal proxy cards that include all director nominees presented for election at a shareholder meeting.” Press Release, SEC, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections (Nov. 1, 2021), <https://www.sec.gov/news/press-release/2021-235> [<https://perma.cc/K29M-ZEKR>]; see Universal Proxy, Exchange Act Release No. 93,596, Investment Company Act Release No. 34,419, 86 Fed. Reg. 68,330 (Dec. 1, 2021) (to be codified at 17 C.F.R. pt. 240), This is a marked shift from the prior regime under which a proxy contestant had to circulate its own card. See generally Scott Hirst, *Universal Proxies*, 35 YALE J. REG. 437 (2018) (discussing the prior regime and the universal proxy alternative).

<sup>11</sup> See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 864–88 (2013) (discussing the history behind this governance change and its consequence).

So, shareholder empowerment, yes—but to what end? Spurred by “gadflies”<sup>12</sup> and various other governance entrepreneurs,<sup>13</sup> we have seen waves of governance activism,<sup>14</sup> designed to enhance board and managerial accountability. There have also been waves of “performance activism,” led principally by a specialized group of investment companies, styled as “hedge funds,” which have focused on the economic performance of public companies.<sup>15</sup> More recently we have seen what might be the rise of “ESG activism,” focusing specifically on climate change and opening the way to address other matters on the ESG agenda.<sup>16</sup>

Certainly, the most salient use of shareholder power has been towards the goal of increasing shareholder value. The case for governance activism is commonly framed in terms of its association with increases in various measures of

<sup>12</sup> Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 SO. CALIF. L. REV. 569 (2021).

<sup>13</sup> *E.g.*, SHAREHOLDER RIGHTS PROJECT, <http://www.srp.law.harvard.edu/index.shtml> [<https://perma.cc/MHY6-SCRB>] (last visited May 16, 2022) (focusing on declassifying boards); Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013) (focusing on the same).

<sup>14</sup> SULLIVAN & CROMWELL LLP, REVIEW AND ANALYSIS OF 2021 U.S. SHAREHOLDER ACTIVISM AND ACTIVIST SETTLEMENT AGREEMENTS 11 (2022), <https://www.sullcrom.com/files/upload/sc-publication-review-analysis-2021-US-shareholder-activism.pdf> [<https://perma.cc/76CZ-8X46>] (reporting a twenty-eight percent increase in shareholder activism campaigns in 2021 from 2020).

<sup>15</sup> *See* LAZARD, Q1 2022 REVIEW OF SHAREHOLDER ACTIVISM (2022), <https://www.lazard.com/media/452060/lazards-q1-2022-review-of-shareholder-activism-vff.pdf> [<https://perma.cc/T83N-78A6>] (showing hedge fund activist waves over the 2019-2022 period).

<sup>16</sup> RICHARD J. GROSSMAN, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLC, ACTIVISM LANDSCAPE CONTINUES TO EVOLVE (2021), [https://www.skadden.com/-/media/files/publications/2022/01/2022-insights/activism\\_landscape\\_continues\\_to\\_evolve.pdf](https://www.skadden.com/-/media/files/publications/2022/01/2022-insights/activism_landscape_continues_to_evolve.pdf) [<https://perma.cc/Q5B8-KXS9>] (predicting an uptick in ESG activism campaigns); *see also supra* notes 75–76 (discussing ESG activism regarding ExxonMobil).

shareholder value.<sup>17</sup> So is the case for performance activism.<sup>18</sup> In fostering better control of “managerial agency costs,” governance and performance activism purports to deliver value for the shareholders. A contentious battle has raged over whether performance activists have pursued *short-term* shareholder value maximization at the expense of *long-term* value maximization.<sup>19</sup> A different sort of objection is that this sort of shareholder activism is misguided: that such shareholder interventions based on incomplete information are likely to disrupt managers’ pursuit of shareholder value maximization.<sup>20</sup>

The most recent turn in the debate is that at least a significant fraction of shareholders may not want managers to pursue shareholder value maximization. The most radical perspective is that shareholders prefer that managers take stakeholder interests into account, a balance that takes seriously shareholders’ non-pecuniary pro-social interests.<sup>21</sup>

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<sup>17</sup> For the claim that collections of better governance terms may increase value, see Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107, 108–09 (2003); cf. Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009) (presenting evidence, without concluding, “that entrenching provisions bring about or help maintain lower firm valuation”).

<sup>18</sup> E.g., Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1730 (2008) (“We find that the market reacts favorably to activism, consistent with the view that it creates value.”); Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1087, 1154 (2015) (finding no support for the “myopic-activists” claim that activist hedge-funds negatively affect long-term firm value). *But see* Martijn Cremers, Saura Masconale & Simone Sepe, *Activist Hedge Funds and the Corporation*, 94 WASH. U. L. REV. 261, 264 (2016) (arguing that hedge-fund activism negatively affect long-term firm value).

<sup>19</sup> These arguments are canvassed in MARK J. ROE, *MISSING THE TARGET: WHY STOCK-MARKET SHORT-TERMISM IS NOT THE PROBLEM* (2022).

<sup>20</sup> Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 770–72 (2017); Goshen & Steel, *supra* note 6 (manuscript at 3).

<sup>21</sup> Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 250–51, 271 (2017); Eleonora Broccardo, Oliver D. Hart & Luigi Zingales, *Exit v. Voice*

An intermediate perspective is that shareholders' conception of "shareholder value" would exclude gains that derive from the imposition of externalities, for example, pollution that is not unlawful under applicable law but that might give rise to tort liability if exposed.<sup>22</sup> Yet a different perspective drives from "stewardship activism," which would constrain own-firm shareholder value maximization in favor of portfolio value maximization.<sup>23</sup> This perspective would minimize the firm's contribution to systematic costs and risks, most notably associated with financial stability and climate change.<sup>24</sup>

The issue is simply one of power: whether shareholders should have the power to influence, perhaps even change, the management of the firm, and further, even to modify the objective function of firm within a framework that acknowledges the essentially economic mission of the firm. Core organizational law—the statutory framework that provides the basis for the corporation's existence and specifies its internal governance—channels control over the corporation's decision-making and action through the board.<sup>25</sup> Agents of the corporation act through power delegated by the board.<sup>26</sup> The statutory framework also specifies a process of director succession, namely annual elections.<sup>27</sup> Unless otherwise specified in the company's charter, the

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38 (Nat'l Bureau of Econ. Rsch., Working Paper No. w27710, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3679703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679703) (on file with the Columbia Business Law Review).

<sup>22</sup> See Jeffrey N. Gordon, *Systematic Stewardship*, J. CORP. L. (forthcoming 2022) (manuscript at 51), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3782814](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814) (on file with the Columbia Business Law Review); cf. Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L. J. 709, 711 (2019) (arguing that corporations have a duty to obey the law even at the expense of shareholder value).

<sup>23</sup> See Gordon, *supra* note 22 (manuscript at 5).

<sup>24</sup> See *id.* (manuscript at 3, 9).

<sup>25</sup> DEL. CODE ANN. tit. 8, § 141 (2021).

<sup>26</sup> *Id.* § 142.

<sup>27</sup> *Id.* §§ 141(d), 211(b).



shareholders' initiative and plebiscitary authority are quite limited under the prevailing Delaware law.<sup>28</sup>

This means that fundamental disagreements about the corporation's performance and conduct are necessarily channeled through election contests over composition of the board. Given the set up, there is no other way. This means proxy contests, including a credible threat of a proxy contest, in which groups of shareholders may take opposing positions under a majority rule system. A tender offer may offer an alternative since tendering shares in effect replaces the vote; but to insist in effect on an unanimity rule effectuated through an "any and all" tender offer would be an extraordinary change to our present set up.<sup>29</sup> Whatever the feasibility of insisting on such an approach by performance activists, it would rule out interventions by ESG activists.

Thus, it is now clear why the Delaware Supreme Court's affirmance<sup>30</sup> of the Chancery Court's invalidation of an anti-activist pill in *In re Williams Companies Stockholder Litigation*<sup>31</sup> is such an important moment in shaping the corporate governance environment. Chancellor McCormick's trenchant opinion stands for the proposition that any pill designed to forestall an election contest will necessarily fail the applicable tests.<sup>32</sup> This is because the risk that shareholders "would vote erroneously out of ignorance or

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<sup>28</sup> *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238–39 (Del. 2008) (holding that a shareholder-adopted bylaw requiring pill redemption is invalid because of conflict with section 141(a), the board's power to manage); *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1194 (Del. 2010) (finding a presumption in favor of charter over bylaw, amendable by shareholders, in a case of ambiguity).

<sup>29</sup> Delaware law is likely to regard a partial bid for a fifty-one percent majority as structurally coercive because the price offered to the tendering fifty-one percent will be at a market premium. This means that the target board can engage in preclusive defensive measures. *See Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985).

<sup>30</sup> *Williams Cos. v. Wolosky*, 264 A.3d 641 (Del. Nov. 3, 2021) (unpublished table disposition) (mem.).

<sup>31</sup> *In re Williams Cos. S'holder Litig.*, No. 2020-0707-KSJ, 2021 WL 754593 (Del. Ch. Feb. 26, 2021 (McCormick, C.)).

<sup>32</sup> *See id.*

mistaken belief” is not a cognizable “threat” that would justify such an inhibitory action.<sup>33</sup> As a result, a pill is permissible only for its previously-established use—to block a unilateral control shift, either through a public tender offer or through gradual accumulation of shares through open market purchases, a “creeping” tender offer.

### III. THE WILLIAMS COMPANIES CASE

At the outset of the Covid-19 crisis, The Williams Companies adopted a “stockholder rights plan” designed to forestall an activist challenge to management’s running of the company during a period of economic uncertainty.<sup>34</sup> The pill contained two far-reaching elements. The first was a five-percent ownership trigger.<sup>35</sup> A party reaching that threshold would face an immediate dilution of its equity interest through a “flip-in” provision<sup>36</sup> and, in the event of a follow-up merger, would face further dilution through a “flip-over” provision.<sup>37</sup> The second element was a sweeping definition of “acting in concert” for the purposes of determining “beneficial ownership.”<sup>38</sup> The definition included acting “in parallel” or simply acting “towards a common goal” as pertains not just to “changing” but also “influencing control of the Company.”<sup>39</sup> The “acting in concert” concept was further broadened to include “daisy chain” connections: parties who were acting in concert with one party who was, in turn, acting in concert with

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<sup>33</sup> *Id.* at \*2.

<sup>34</sup> *Id.* at \*4–5, 9.

<sup>35</sup> *Id.* at \*10.

<sup>36</sup> *Id.* at \*1. A “flip-in” provision allows other existing shareholders to acquire additional stock of the target at a discount. *Flip-Over Strategy*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/deals/flip-over-strategy/> [https://perma.cc/6B4X-T7RB] (last visited May 16, 2022).

<sup>37</sup> *In re Williams Cos. S’holder Litig.*, 2021 WL 754593, at \*11. A “flip-over” provision allows shareholders of the target to buy the acquirer’s stock at a discount. *Flip-Over Strategy*, CORP. FIN. INST., *supra* note 36.

<sup>38</sup> *In re Williams Cos. S’holder Litig.*, 2021 WL 754593, at \*10–11.

<sup>39</sup> *Id.* at \*10.

another party.<sup>40</sup> This aggressive provision could be lifted from the criminal conspiracy playbook associated with serious crimes like money laundering.<sup>41</sup> Institutional investors seem brought into this cabal merely through buying company shares in anticipation of a challenge to management, including, but not limited to, via proxy contest.

The beneficial ownership definition was further embellished by inclusion of synthetic ownership of the Company stock that was the “underlying” security in a total return equity swap, which is cash-settled.<sup>42</sup>

A comprehensive opinion by Chancellor McCormick enjoined the pill, principally through an application of the *Unocal/Unitrin* framework.<sup>43</sup> The Chancellor found that the vague, omnibus threat that appeared to motivate the board to adopt the pill did not justify the pill’s extreme provisions.<sup>44</sup> The board had identified three threats:

[T]he desire to prevent stockholder activism during a time of market uncertainty and a low stock price . . .  
[;] the apprehension that hypothetical activists might pursue ‘short-term’ agendas or distract management from guiding [the Company] through uncertain times; and . . . the concern that activists might stealthily and rapidly accumulate over 5% of [the Company’s] stock.<sup>45</sup>

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<sup>40</sup> *Id.* at \*11.

<sup>41</sup> See, e.g., *United States v. Morelli*, 168 F.3d 798, 798 (3d Cir. 1999); Robert J. Rush & Frank R. Scarpetti, *Russian Organized Crime: The Continuation of an American Tradition*, 22 *DEVIANT BEHAV.* 517, 527 (2001) (discussing daisy chain in the context of white-collar crime); John Braithwait, *Challenging Just Deserts: Punishing White Collar Criminals*, 73 *J. CRIM. L. & CRIMINOLOGY* 723, 754 (1982) (“A potentially simple transaction is intentionally concealed by a round robin or daisy chain arrangement through a series of intermediary transactions.”).

<sup>42</sup> *In re Williams Cos. S’holder Litig.*, 2021 WL 754593, at \*10–11.

<sup>43</sup> See *id.* at \*2 n.9, 40 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) and *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995)).

<sup>44</sup> *Id.* at \*26.

<sup>45</sup> *Id.* at \*2.

The Chancellor simply rejected the first two purported threats out of hand, as “contrary to the tenet of Delaware law that directors cannot justify their actions by arguing that, without board intervention, the stockholders would vote erroneously out of ignorance or mistaken belief.”<sup>46</sup> The Chancellor also held that even assuming the validity of the third threat, the Williams pill was “not proportional.”<sup>47</sup>

The Williams pill expired on its own terms in March 2021, a year after its adoption.<sup>48</sup> Yet, the defendants pursued an appeal to the Delaware Supreme Court.<sup>49</sup> Perhaps the spur for the appeal was the award of \$9.5 million in attorney’s fees.<sup>50</sup> But the Williams pill is a management wish list of tools to suppress the possibility of an activist challenge. In particular, it is designed to hunt down and kill off “wolfpacks,” those aggregations of activist investors that purportedly respond to one another’s call to create the appearance, if not the fact, of a high level of shareholder dissatisfaction.<sup>51</sup> In this case, it was worth seeing if the Supreme Court would grant a wolfpack hunting license.

In one sense, the extreme nature of the Williams poison pill would have predicted for ready affirmance of the Chancellor’s opinion. Indeed, the Delaware Supreme Court affirmed “on the basis of and for the reasons assigned by the Court of Chancery in its Memorandum Opinion.”<sup>52</sup> But this result was not foreordained, and it came at a moment when the shareholder-centric model of corporate governance is under scrutiny, if not attack. The Business Roundtable has

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jeff Montgomery, *Williams Cos. Says Toss of Del. Poison Pill Tilted Playing Field*, LAW360 (Oct. 20, 2021, 4:40 PM), <https://www.law360.com/articles/1432798/williams-cos-says-toss-of-del-poison-pill-tilted-playing-field> (on file with the Columbia Business Law Review).

<sup>49</sup> *Williams Cos. v. Wolosky*, 264 A.3d 641 (Del. Nov. 3, 2021) (unpublished table disposition) (mem.).

<sup>50</sup> See Montgomery, *supra* note 48.

<sup>51</sup> See *In re Williams Cos. S’holder Litig.*, 2021 WL 754593, at \*11, 33 (discussing “wolfpack” provision in the Williams poison pill).

<sup>52</sup> *Williams Cos.*, 264 A.3d at 641.

issued a statement that is widely interpreted to deprioritize the interests of shareholders in favor of stakeholders.<sup>53</sup> Managerial and political elites have pushed for “new paradigms,”<sup>54</sup> “common sense” principles,<sup>55</sup> and “inclusive capitalism.”<sup>56</sup> Asset managers have issued statements supportive of a broad conception of the corporate “purpose.”<sup>57</sup>

The case against activism flies under two flags. The first, the traditional approach, is that activist pressures lead firms

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<sup>53</sup> See Press Release, Bus. Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’* (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/RHP2-DTMP>] [hereinafter “Business Roundtable Press Release”] (“Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”). For a criticism of the meaningfulness of these statements, see Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 126 (2020) (arguing that the Business Roundtable statement “should be viewed as mostly for show rather than the harbinger of a major change.”).

<sup>54</sup> See Martin Lipton, *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 11, 2017), <https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/> [<https://perma.cc/L69Z-TYAP>] (“The ‘New Paradigm’ is an emerging corporate governance framework that derives from the recognition . . . that short-termism and attacks by short-term financial activists significantly impede long-term economic prosperity.”).

<sup>55</sup> Ira M. Millstein Ctr. for Glob. Mkts. & Corp. Ownership, *Commonsense Principles of Corporate Governance 2.0*, COLUM. L. SCH., <https://millstein.law.columbia.edu/content/commonsense-principles-20> [<https://perma.cc/KP57-3UL3>] (last visited May 16, 2022) (including as signatories CEOs of large public companies and large institutional investors).

<sup>56</sup> COAL. FOR INCLUSIVE CAPITALISM, <https://www.coalitionforinclusivecapitalism.com/> [<https://perma.cc/9ZWS-ZWE4>] (last visited May 16, 2022) (partnering with leaders on “initiatives to make capitalism inclusive and its benefits more widely and equitably shared”).

<sup>57</sup> See, e.g., Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), <https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/> [<https://perma.cc/J3D6-LWPZ>] (stating that society demands companies “serve a social purpose”).

to think about the short term rather than the long term.<sup>58</sup> Managers who are busily fighting off activists (or acting preemptively to avoid such a confrontation) are short-changing investments (e.g., R&D) that will produce greater value in the long run in order to demonstrate superior short-term results that will keep the activists at bay.<sup>59</sup> This is bad from the perspective of both long-term shareholders and society because of the sacrifice of long-term economic growth.<sup>60</sup>

The second, more recent attack on activism is that its focus on shareholder value heightens income and wealth inequality.<sup>61</sup> Managers who are concentrating on delivering the highest returns for shareholders will hold down employee wages, which suppresses wage growth.<sup>62</sup> Moreover, executives are partly, sometimes principally, paid through stock-based compensation, which means that increasing shareholder returns may in itself exacerbate income inequality.<sup>63</sup> Additionally, because the distribution of public share ownership is skewed to the top ten percent and even the top one percent,<sup>64</sup> success at increasing stock values will exacerbate wealth inequality.<sup>65</sup>

<sup>58</sup> See John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 1 ANNALS CORP. GOVERNANCE 545, 572 (2016).

<sup>59</sup> *Id.* at 574–76.

<sup>60</sup> *Id.* at 576. For a discussion of the empirical evidence, or lack thereof, supporting the long-term economic case against activism, see Holger Spamann, *Indirect Investor Protection: The Investment Ecosystem and its Legal Underpinnings*, 14 J. LEGAL ANALYSIS (forthcoming 2022) (manuscript at 23 n. 91), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3707249](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707249) (on file with the Columbia Business Law Review).

<sup>61</sup> Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1942 (2017).

<sup>62</sup> *Id.* at 1942–41.

<sup>63</sup> See *id.* at 1925–26.

<sup>64</sup> Jared Bernstein, *Perspective, Yes, Stocks Are Up. But 80 Percent of the Value Is Held by the Richest 10 Percent*, WASH. POST (Mar. 2, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/03/02/perspective-on-the-stock-market-rally-80-of-stock-value-held-by-top-10/> [<https://perma.cc/856W-NHQS>].

<sup>65</sup> See generally Leo Strine, *supra* note 61.

These concerns have taken on national political valence. Before the 2020 election, an influential senator proposed a semi-federalization of corporate law.<sup>66</sup> President Joseph R. Biden, Jr. has publicly called out the disparity between productivity growth and wage growth as the disconnect “between the success of our economy and the [workers] who produce that success.”<sup>67</sup> It was thus not inconceivable that the Delaware Supreme Court would have seen advantage in preempting potential federal encroachment on state corporate law through a doctrinal move that might relieve some pressure. Delaware has a history of judicial turnaround<sup>68</sup> and

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<sup>66</sup> Senator Elizabeth Warren introduced the Accountable Capitalism Act, S. 3348, 115th Cong. 2018 (2018). Senator Warren re-introduced the legislation in 2020. S.3215, 116th Cong. (2020).

<sup>67</sup> President Joseph R. Biden, Jr., Address at Cuyahoga Community College: Remarks by President Biden on the Economy (May 27, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/27/remarks-by-president-biden-on-the-economy-2/> [<https://perma.cc/NY78-JLPZ>].

<sup>68</sup> For example, the series of cases attempting to govern freeze-out mergers and going-private transactions and then refashioning the appraisal remedy and appropriate fiduciary standards, beginning with *Singer v. Magnavox*, 380 A.2d 969 (Del. 1977) and culminating with *Weinberger v. UOP*, 457 A.2d 701 (Del. 1983), which refashioned the appraisal remedy to avoid prior opportunistic use of “Delaware block” and heightened fiduciary standards at a time when federalization of corporate law was under discussion. See Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 27–30, 29 tbl.1 (2009).

legislative measures<sup>69</sup> that seem calibrated to address such hydraulics.<sup>70</sup>

Moreover, the Delaware courts have a history of slapping down actors who they see as misusing the Delaware system. This is surely at least a partial explanation for decisions like *Corwin v. KKR Financial Holdings*<sup>71</sup> and *In re Trulia, Inc. Stockholder Litigation*<sup>72</sup> that target plaintiffs' lawyers and the several appraisal decisions that have drained the juice out of appraisal arbitrage pursued by hedge funds.<sup>73</sup> Given these factors, it would have been a surprise, but not a shock, for the Delaware Supreme Court to have reversed the Chancery Court decision in the *Williams* case in whole or in part in the course of broadening the occasions for use of the poison pill and expanding the range of permitted features.

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<sup>69</sup> See, e.g., 77 Del. Laws 19 (2009) (codified at DEL. CODE ANN. tit. 8, § 112) (adopting shareholder proxy access legislation at a time of concerted proposals for a federal proxy access mandate). In June and July 2009, only a couple of months after Delaware's amendments, the SEC proposed rules related to proxy access. See Proxy Disclosure and Solicitation Enhancements, Securities Act Release No. 9052, Exchange Act Release No. 60,280, Investment Company Act Release No. 28,817, 74 Fed. Reg. 35,076 (proposed July 17, 2009) (to be codified at 17 C.F.R. pts. 229, 239, 240, 249, 270, 274); Facilitating Shareholder Director Nominations, Securities Act Release No. 9046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 74 Fed. Reg. 29,024 (proposed June 17, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, 279).

<sup>70</sup> See Roe, *supra* note 68.

<sup>71</sup> 125 A.3d 304, 306 (2015) (holding that disinterested majority shareholder approval in an arm's length merger provides a basis for dismissing a suit seeking post-closing damages before discovery and other litigation elements that create settlement value). For a discussion of *Corwin* and its implications, see James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 337 (2018).

<sup>72</sup> 129 A.3d 884, 887 (Del. Ch. 2016) (rejecting proposed class action settlement providing only unimportant additional disclosure prior to shareholder vote but including a global release of possible fiduciary claims). For a discussion of *Trulia* and its implications, see Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603 (2018).

<sup>73</sup> See Wei Jiang, Tao Li & Randall Thomas, *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. REV. 2133, 2147–54 (2020) (discussing appraisal decisions).



Nevertheless, such a move would amount to a major wrench to the Delaware corporate governance system. It would require a re-basing of the rationale for the poison pill, which operates through discrimination against particular common shareholders and whose core legitimacy has been premised on the ultimate power of the shareholder franchise.<sup>74</sup> Moreover, an empowered anti-activist pill would operate not just against the hedge fund activists—the villains de jour—but also against ESG activists, just now gaining influence, as reflected in the recent ExxonMobil contest.<sup>75</sup> Indeed, judicial validation of the anti-activist pill could kill off ESG activism just as it gets a head of steam.<sup>76</sup>

Giving in to the pressures would be short-termist. Having just said no to anti-activist pills, the Delaware Supreme Court (and the friends of Delaware) should hold to principles that stabilize and vindicate Delaware's approach to corporate governance over the long term. The anti-activist pill is simply outside the core legitimating principles of Delaware law, which reside in protection of the shareholder franchise. Unlike the original pill, which was designed to restore the board to its traditional structural role in vetting proposed mergers, the anti-activist pill is designed to protect the board against shareholder pressure expressed through director elections. The Court, which has on many occasions insisted on the importance of the shareholder franchise, including quite

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<sup>74</sup> See e.g., Martin Lipton, *Pills, Poll, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1037, 1054, 1056 (2002).

<sup>75</sup> Chris James and his small investment startup, Engine No. 1, successfully pursued a climate proxy campaign that led to shareholders electing three directors to Exxon's board. Saijel Kishan & Joe Carroll, *The Little Engine That Won an Environmental Victory over Exxon*, BLOOMBERG, (June 9, 2021, 1:19 PM), <https://www.bloomberg.com/news/articles/2021-06-09/engine-no-1-proxy-campaign-against-exxon-xom-marks-win-for-esg-activists> [<https://perma.cc/M4BJ-8YZQ>].

<sup>76</sup> See Matt Levine, Opinion, *Exxon Lost a Climate Proxy Fight*, BLOOMBERG, (May 27, 2021, 12:55 PM) <https://www.bloomberg.com/opinion/articles/2021-05-27/exxon-lost-a-climate-proxy-fight> [<https://perma.cc/293E-MDAC>] (describing interaction between ESG activist and asset managers).

recently,<sup>77</sup> should feel comfortable in putting an end to this aberrant turn in corporate governance.<sup>78</sup>

#### IV. THE PILL: ORIGINS AND THE ANTI-ACTIVIST RENEGADE

The “shareholder rights plan” that came to be known as the “poison pill,” or simply “the pill,” was forged in the fires of the takeover wars that erupted in the 1970s and early 1980s.<sup>79</sup> In the struggle for control over large companies, bidders wielded the tender offer, which became a legitimate and

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<sup>77</sup> *Coster v. UIP Cos.*, 255 A.3d 952, 960–61 (Del. 2021) (remanding a decision on whether to cancel a stock sale to the Chancery Court with instructions that “if the court decides that the board acted for inequitable purposes or in good faith but for the primary purpose of disenfranchisement without a compelling justification, it should cancel the Stock Sale”).

<sup>78</sup> In an analysis of the shareholder welfare effects of the adoption of “crisis pills” (approximately fifty adoptions from March 2020 through May 2020), Eldar and Wittry show that for firms with the greatest exposure to the crisis (as reflected in stock price decline) and a “meaningful stake increase,” subsequent adoption of a pill produced economically significant returns, 12.7% on the adoption day and 24% in the 10-day window including adoption day. Eldar & Wittry, *supra* note 1, at 207, 209–10. Firms that did not experience a “meaningful stake increase” prior to the adoption of a pill did not experience positive returns upon the adoption of crisis pills. *Id.* at 209. From this Eldar and Wittry infer that pill adoption could create value by permitting undistracted managerial attention to the difficult matters at hand. *Id.* at 205, 207. Putting aside the small “n” problem, a reasonable interpretation might go otherwise: Pill adoption in these circumstances was the harbinger of a possible future bid at a premium to the market price, because the main utility of the pill these days is to permit a target to orchestrate a competitive bidding process in a consensual environment. Activism should be considered disruptive only if there is a credible threat of a successful proxy battle; but the *Williams* court rejects a cognizable threat in such circumstances. See *In re Williams Cos. S’holder Litig.*, No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. Feb. 26, 2021) (McCormick, C.).

<sup>79</sup> See, e.g., Marcel Kahan & Ed Rock, *How I Learned To Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 873–75 (2002) (the history and formation of the poison pill); Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931 1937–48 (1991) (discussing the same); John V. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 275–76 (2000) (discussing the ubiquity of the pill).

common tactic around the time of the enactment of the Williams Act in 1968 and the follow-on SEC regulations.<sup>80</sup> Target management's defensive measures were limited, sometimes consisting of measures, such as asset dispositions or acquisitions designed to make the target less attractive to the hostile bidder,<sup>81</sup> that also disrupted the target's prior business plan and that may well have reduced target shareholder value.

The pill ingeniously combined two elements. First was the set of Delaware corporate finance statutes that established the board's power to issue "rights" to purchase shares<sup>82</sup> and then to prescribe the terms of "blank check" preferred stock.<sup>83</sup> Second was the just-inaugurated (in *Unocal Corp. v. Mesa Petroleum Co.*)<sup>84</sup> power of the board to adopt defensive measures that would discriminate against a shareholder who made an unwanted bid.<sup>85</sup> But the pill persisted because it solved a certain structural problem while not undermining core principles of Delaware corporate governance.

The statutory set up relating to mergers contemplated a two-step process: first, agreement by the board to a merger proposal and its terms; second, a subsequent shareholder vote on the merger agreement.<sup>86</sup> It turned out that the board's prerogative depended upon a friction: the collective action costs of shareholder override given the dispersed ownership of

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<sup>80</sup> In 1960, there were 8 tender offers, while there were 107 in 1966. 113 CONG. REC. 9339 (1967) (statement of Sen. Harrison A. Williams).

<sup>81</sup> See Lipton, *supra* note 74, at 1043.

<sup>82</sup> DEL. CODE ANN. tit. 8, § 157(a)–(b) (2021) (permitting the issuance of rights to acquire stock).

<sup>83</sup> *Id.* § 151(a), (g) (conferring the board authority to specify terms of a new class of stock). The flip-over pill hands out "flip over" rights in a discriminatory way but can be avoided by a patient acquirer who, after obtaining control, gradually accumulates the balance of the target's stock through open market purchases. The acquirer cannot avoid the discriminatory impact of a flip-in pill, especially since the target board can issue successive poison pills. See *Versata Enters., Inc. v. Selectica*, 5 A.3d 586, 606 (Del. 2010) (allowing pill "reloading").

<sup>84</sup> 493 A.2d 946, 957–58 (Del. 1985).

<sup>85</sup> *Id.*

<sup>86</sup> Del. Code Ann. tit. 8, § 251 (2021).

a large public corporation. The key element of the hostile takeover was the control entrepreneurs' ability to overcome this friction through a tender offer to obtain at least a majority of shares so as to be able to remove directors or to prevail at the next annual meeting. By imposing a severe economic penalty for crossing a particular sub-control threshold, the pill blocked the tender offer as a form of structural work around. Another critical feature, however, was the retention by the board of the power to redeem the pill before a party crossed the ownership threshold. This element induced the would-be acquirer to negotiate with the board. Thus, the post-pill board had approval rights over merger terms prior to shareholder action, restoring the structural status quo.

The initial justification for the reestablishment of this status quo was the "threat" that particular bids presented to the shareholders, whose inability to coordinate required intervention of the board. The initial threat, pivotal in both *Unocal* and *Moran v. Household International, Inc.*,<sup>87</sup> was the structural coercion inherent in a front-loaded two-tier bid, in which the bid structure could induce tendering even by shareholders whose reservation price was above the bid price. On the assumption that your own vote was not pivotal, the rational response to such a bid was to tender, even if you believed the offer was too low, because if it turned out that the offer succeeded, you would at least receive a mix that included the higher front-end consideration rather than entirely the lower back end.<sup>88</sup>

With the assist of capital market developments, bidders turned to "any and all" cash offers which were designed to avoid the objection of *Unocal*. The pivotal case is *Paramount Communications, Inc. v. Time, Inc.*, decided in 1989, in which the Delaware Supreme Court held that such a bid could nevertheless be subject to a preclusive defensive tactic.<sup>89</sup> This

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<sup>87</sup> 500 A. 2d 1346, 1338–39 (Del. 1985).

<sup>88</sup> See Jeffrey N. Gordon, *The Story of Unocal v. Mesa Petroleum: The Core of Takeover Law*, in CORPORATE LAW STORIES 227 (J. Mark Ramseyer, ed., 2009) (explaining prisoner's dilemma of a front-loaded two-tier bid).

<sup>89</sup> *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1142 (Del. 1989).

paved the way for a target's invocation of a "just say no" defense in the refusal to redeem a pill when confronted with an all cash, all shares bid.<sup>90</sup> The case is commonly regarded as having embraced a theory that "substantive coercion"—a bid whose apparent appeal can misdirect shareholder judgment—is the "threat" that justifies such measures.<sup>91</sup> The notion of "substantive coercion" is introduced only in a footnote, however.<sup>92</sup> Rather, the court framed its opinion in terms of protecting board prerogative: "Plaintiffs' position represents a fundamental misconception of our standard of review under *Unocal* principally because it would involve the court in substituting its judgment as to what is a 'better' deal for that of a corporation's board of directors."<sup>93</sup>

In short, the case stands for Delaware's "board-centric" approach when it comes to mergers and acquisitions. The board can authorize target defense tactics against a share purchase offer made to shareholders in which formally the company is a bystander *because actions that would result in a merger ought to be vetted by the board in the first instance*. The subsequent cases that establish the need for a "fiduciary out" in a merger agreement rest on the distinctive role of the target board in initiating and superintending a merger.<sup>94</sup> The subsequent cases that bar pill provisions that would limit the authority of post-proxy contest directors focus on the

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<sup>90</sup> See Gordon, *supra* note 79, at 1941 (discussing implications of *Time*).

<sup>91</sup> See, e.g., *Air Prods. and Chem., Inc. v. Airgas, Inc.*, 16 A.3d 48, 98, 108–109 (Del. Ch. 2011) (Chandler, C.); Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, J. APPLIED CORP. FIN., Winter 2019, at 8, 18.

<sup>92</sup> *Paramount*, 571 A.2d at 1153 n.17 (discussing the concept as introduced in Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW., 247, 267 (1989)).

<sup>93</sup> *Id.* at 1153.

<sup>94</sup> See *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 47 (1993) (finding that deal protection provisions in a merger agreement "may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the [target] directors from carrying out their fiduciary duties under Delaware law").

“fundamental importance” of the board’s responsibilities in “negotiating a possible sale of the corporation.”<sup>95</sup>

In creating “board centrism” in the case of mergers, the Delaware courts did not establish a self-perpetuating board or “Platonic masters.”<sup>96</sup> Just the opposite: Business disputes are to be channeled through the corporate governance machinery in which director elections are the means by which shareholders can exert control over the direction of the firm. Indeed, the shareholder franchise has been accepted as a cornerstone principle of the legitimacy of director authority. In the famous phrasing of Chancellor Allen in *Blasius*, “The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. . . . [I]t is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.”<sup>97</sup>

In this respect, shareholder activism reflects the *triumph* of Delaware’s board-centric governance. Like a hostile bidder, an activist takes its proposal initially to the board. If rejected, the activist’s next move is different: not a tender offer but a proxy contest; not generally even a contest for a majority of board seats, but a short-slate contest for a serious voice in the boardroom and perhaps an alternative strategic plan. Because an activist starts with only a small percentage of the company’s stock and no intention to obtain a control block, the activist ultimately must persuade the large institutional owners that are the majority owners of most large public corporations. Such persuasion requires communication with other shareholders and can lead to communication among shareholders who are trying to assess the arguments and

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<sup>95</sup> *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291–92 (Del. 1998); *see also Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180, 1191 (Del. Ch. 1998) (Jacobs, V.C.) (redeeming the pill essential to board’s power to “achieve a business combination”).

<sup>96</sup> *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (Allen, C.).

<sup>97</sup> *Id.* at 559.

rebuttals of the activists and the insurgents. The core of shareholder governance is debate and deliberation.<sup>98</sup>

Reflection on *Moran* reminds us of how far the anti-activist pill deviates from the original justification for a pill's extraordinary discrimination against a stockholder.<sup>99</sup> The plaintiff objected that the twenty percent trigger in the Household pill "fundamentally restricts stockholders' right to conduct a proxy contest."<sup>100</sup> The court's response was that while the threshold would "deter" some proxy efforts, it would not necessarily "frustrate[]" them.<sup>101</sup> In other words, the impediments to waging a proxy battle were a regrettable (but not fatal) side effect of the pill's protection against the threat of a coercive bid.

## V. THE RENEGADE THEORY OF THE ANTI-ACTIVIST PILL

By contrast, in an anti-activist pill, the regrettable side effect is precisely the point. That is, the activist has no plan to push through a merger with a hostile bid, coercive in one way or another. Rather, the activist is pursuing a change in the corporation's business plan and perhaps board representation

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<sup>98</sup> See Edward Rock & Marcel Kahan, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 965–967 (2019).

<sup>99</sup> *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985). Until *Unocal* and then *Moran*, no Delaware case had permitted the discrimination against a shareholder that is the heart of a pill. The citation to *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964) and other cases entailing "greenmail" are inapt. See *Moran*, 500 A.2d at 1354 (citing *Cheff*, 199 A.2d at 548). The "discrimination" in such cases runs *in favor of* the greenmailer, who in any event has consented to the transaction; the potentially discriminated-against parties are the remaining shareholders. They are both the shareholder majority (so can discipline the errant officers and directors) and are purportedly *benefited*, not injured, by the disparate treatment, which rids the corporation of a raider whose plan would purportedly reduce shareholder value. The discrimination in an anti-activist pill is targeted against the activism proponent and, through its inhibition of proxy contests, undermines the very mechanism that legitimates its use. Its point is entrenchment.

<sup>100</sup> *Moran*, 500 A.2d at 1355.

<sup>101</sup> *Id.*

and is using the possibility of a proxy contest—a *contested election of directors*—to promote this objective. The very point of the activist pill is to disrupt the possibility of a proxy contest, for without that credible threat, the activist has no power. Without a credible threat of a proxy contest, the shareholder activist is a kibitzing gadfly.

A low ownership trigger of course reduces the prospects for success in a proxy contest. A low trigger means the activist can immediately command fewer votes; more shareholders must be persuaded. A low trigger also caps the activist's skin in the game, which could undercut the activist's credibility with the shareholders it must persuade as well as limiting the activist's economic upside, which is tied to share appreciation.<sup>102</sup> But as the recent Exxon-Mobil proxy contest illustrated, a low threshold does not necessarily make a successful proxy contest unattainable.<sup>103</sup> For the largest corporations, with market capitalizations in the tens or hundreds of billions of dollars, serious skin in the game begins below five percent.<sup>104</sup>

The evil genius in the anti-activist pill is the effort to disrupt shareholder communication through an overbroad definition of “beneficial owner.” The definition of “beneficial ownership” in the section 13(d) regulations focuses on having or sharing “voting power” and/or “investment power” and that

<sup>102</sup> See Gilson & Gordon, *supra* note 11, at 902–04 (discussing how activists gain credibility); see also Rock & Kahan, *supra* note 81, at 923–25 (discussing the importance of pill thresholds to activists if not necessarily hostile bidders).

<sup>103</sup> Engine No. 1, the initiator of the proxy contest, owned 0.02% of Exxon-Mobil's stock. Kishan & Carroll, *supra* note 75.

<sup>104</sup> Compare Alexandra Stevenson & Brain X. Chen, *Icahn Amps Up Pressure on Apple, but His Stake Limits His Leverage*, N.Y. TIMES: DEALBOOK, (Oct. 24, 2013, 9:48 AM), <https://dealbook.nytimes.com/2013/10/24/icahn-tries-new-tack-to-stir-things-up-at-apple-his-own-web-site/> (on file with the Columbia Business Law Review), with Chuck Jones, *Carl Icahn Sold Apple Too Soon & It Cost Him \$3.7B*, FORBES, (Nov. 10, 2017, 8:18 PM), <https://www.forbes.com/sites/chuckjones/2017/11/10/carl-icahn-sold-apple-too-soon-it-cost-him-3-7b/?sh=75c2b2a82cea> [https://perma.cc/D8XR-VHJL] (earning \$2 billion profit while pushing for subsequently executed stock buybacks; maximum ownership percentage approximately 0.5%).



acquisition of beneficial ownership through a “group” requires parties to “agree to act together.”<sup>105</sup> The added concept of parallelism—acting towards a common goal chain-linked to parties you may not know—expands the idea of “sharing” power and “agreement” without discernible boundaries. This afternoon, perhaps 30,000 people will have acted in parallel to buy tickets to a Yankees game with the common purpose of influencing the outcome through simultaneous cheering (or perhaps booing), and many will buy tickets and go precisely because they know others are acting in the same way. So, under the activist pill definitions, they may be “acting in concert.” Playing with the definition in this way is sport, but imposing a risk on a financial fiduciary of substantial dilution of a portfolio position because of a shallow interaction will chill communication.

Notice the reinforcing interaction between the low pill triggers and the capacious definition of beneficial ownership. A low pill trigger is an immediate impediment because it reduces the prospective activist’s potential upside. The all-inclusive definition of beneficial ownership is an impediment because it makes organization and success in a proxy contest more difficult. Yet the two reinforce one another, perversely: The lower the pill trigger, the greater the need to bring along other shareholders for success in a proxy contest. Yet as such organizational activity becomes more widespread, the greater the risk that other shareholders will be snared as “beneficial owners.” With a low pill trigger, the activist will necessarily

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<sup>105</sup> 17 C.F.R. §§ 240.13d-3(a), 13d-5 (b)(1) (2021). The SEC has recently proposed amending the rules issued under section 13(d) of the 1934 Securities Exchange Act in a way that could substantially broaden the prior definition of “beneficial owner” to encompass the acting in concert provisions of the Williams pill and similar versions. *See* Modernization of Beneficial Ownership, Securities Act Release No. 11,030, Exchange Act Release No. 94,211, 87 Fed. Reg. 13,846, 13,868–69, 13,877 (proposed Mar. 10, 2022) (to be codified at 17 C.F.R. pts. 232, 240). Although it seems accepted by practitioners that Delaware courts would accept the current SEC definition of beneficial ownership as used in a pill trigger, the capacious definition of the proposed rule ought not be acceptable in Delaware “pill” law because of its disruptive effects on the shareholders capacity to organize a proxy contest.

depend upon various forms of parallel and common behavior for success; yet it is those actions that present serious risks of economic harm to shareholders who could be found to be “beneficial owners” under the activist pill’s definition. “The features of an anti-activist pill are not separately impediments to a proxy contest; the low pill threshold and the high risks of communication or even common behavior and purpose are designed to work together to provide protection and insulation.”<sup>106</sup>

To recap: The original “poison pill” was designed to restore the structural status quo in the board’s plenary power to vet and approve mergers in which the company would be acquired. It has been repurposed as an anti-activist pill for an altogether different (and illegitimate) purpose: to disrupt the capacity of a shareholder activist to mobilize the election machinery to resolve a disagreement over business strategy.<sup>107</sup>

This difference becomes apparent in considering one of the essential features of a pill: the board’s reserved redemption right. Until the parties cross the beneficial ownership

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<sup>106</sup> Jeffrey N. Gordon, *Corporate Vote Suppression: The Anti-Activist Pill in The Williams Companies Stockholder Litigation*, CLS BLUE SKY BLOG (Aug. 19, 2021), <https://clsbluesky.law.columbia.edu/2021/08/19/corporate-vote-suppression-the-anti-activist-pill-in-the-williams-companies-stockholder-litigation/> [<https://perma.cc/W6UA-KQLE>].

<sup>107</sup> The net-operating loss (NOL) poison pill, capping existing shareholders who hold five percent of a company to an additional increase of one-half a percent of ownership, validated in *Versata Enters., Inc. v. Selectica*, 5 A.3d 586, 588 (Del. 2010) is a one-off. Because of the peculiarities of the federal tax regime governing net operating loss carryforwards, the very act of acquiring five percent or more of a company’s stock could cause harm. Such an acquisition in combination with stock purchases by other shareholders could subject the company to an unwanted (by anyone) “ownership change.” See Yona A. Kornsgold, Note, *Beginner’s Luck That Hertz: Bankrupt Companies and the Trap for Retail Investors*, 2021 COLUM. BUS. L. REV. 915, 949 & n.136 (explaining the mechanics and tax implications of an ownership change for the purposes of net operating losses). A pill designed to forestall a “creeping” tender offer is designed to protect the structural primacy of the board in negotiating mergers or a change in control that is foreseeably a prelude to a merger. See *Yucaipa Am. All. Fund II v. Riggio*, 1 A.3d 310, 313 (Del. Ch. 2010) (Strine, V.C.).

threshold, the board has the capacity to redeem the pill. Notice how differently this functions in the context of a potential hostile bid versus a proxy contest. In the case of the bid, the board's redemption right serves as the mechanism to channel merger proposals for board vetting: If the board approves, friendly negotiations ensue and the board redeems the pill. The pill (or "shadow pill")<sup>108</sup> can be used by the board to facilitate negotiations among several competing friendly bidders; the pill guarantees that none of the bidders can steal a march through a tender offer. The pill and its redemption enable the board to vet all possible mergers and orchestrate the competition.

How would this work in the case of the anti-activist pill? Well, obviously, it wouldn't. "We want to challenge your control of the corporation because you have made strategic and operational mistakes. Please give us permission to acquire more stock to give us greater economic upside and permission to enlist other shareholders in this venture." Really? It is the misfit of the redemption right that emphasizes how the anti-activist pill is an illegitimate effort to supplant the shareholders' core corporate governance rights. The pill does not work without a redemption right; it becomes a dead-hand pill squared. As Chancellor Chandler observed, the pill on its face is preclusive; it is the viability of a proxy contest that could lead to its redemption that is its saving grace.<sup>109</sup> Yet it is the very point of an anti-activist pill to interfere with prospects for a successful proxy contest by a party that is not seeking a merger.<sup>110</sup>

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<sup>108</sup> A "shadow pill" is the ever-present threat that a board can enact a poison pill as soon as a bidder emerges. Coates, *supra* note 79, at 286–87 (2000).

<sup>109</sup> *Air Prods. & Chems., Inc. v. Airgas*, 16 A.3d 48, 122 n.480 (Del. Ch. 2011) (Chandler, C.) ("The tender offer is in fact precluded and the only bypass of the pill is electing a new board. If that is the law, it would be best to be honest and abandon the pretense that preclusive action is *per se* unreasonable.").

<sup>110</sup> In the Delaware doctrinal framework regarding the pill, the shareholder capacity to run a proxy contest that could replace a recalcitrant board with one that might redeem the pill is crucial to a determination that the pill is not impermissibly "preclusive." *Unitrin, Inc. v. Am. Gen. Corp.*,

In the case of proxy contest initiated by a hostile bidder the point of which is to replace incumbents with directors likely to favor the proposed acquisition, the bidder's needs to acquire a significant block of stock or to promote deliberation among the shareholders are both low. If the bidder couples its proxy contest with a conditional cash tender offer, virtually the only issue for the other shareholders is the bid's adequacy. The shareholders do not need to be persuaded on potential private benefits extraction by a new controller, or the desirability of a new business plan, or board room dynamics. By contrast, in a proxy contest waged by an activist, these are very real issues; they will arise at all stages in the run up to an actual proxy battle as an activist considers its strategy, and an anti-activist pill is aimed against the necessary deliberation among shareholders. The actions that make a proxy contest feasible trigger the pill's economic penalty.

Thus, it is clear: The goal of the anti-activist pill is to preclude challenges to the board's power, entrenchment *per se*. This is vote suppression, corporate style. Under current conceptions of Delaware law, it cannot stand. There is no "compelling justification" that would sustain such an action. Chancellor McCormick was surely right that the Williams pill fails under *Unocal* as a disproportionate response. But as Chancellor Allen wrote in *Stahl v. Apple Bancorp, Inc.*, *Blasius* is the right standard for a pill, like the anti-activist pill in this case, that "represent[s] action taken for the primary purpose of interfering with the exercise of the

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651 A.2d 1361, 1389–90 (Del. 1995); see *Versata Enters., Inc.*, 5 A.3d at 601 ("A defensive measure is preclusive where it 'makes a bidder's ability to wage a successful proxy contest and gain control . . . realistically unattainable'" (quoting *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1195 (Del. Ch. 1998) (internal quotation marks omitted))). The goal of the anti-activist pill is to eliminate the "realistic attainability" of a proxy contest success and thus is inherently preclusive. Moreover, the validity of such a pill, which changes the fundamental nature of share ownership, may be open to challenge under DEL. CODE ANN. tit. 8, § 151(a) (2021), which seems to require a charter amendment to change the voting power of common stock.

shareholders' right to elect directors."<sup>111</sup> The importance of the shareholder franchise was recently underscored by Chief Justice Seitz in *Coster v. UIP Cos.* in an opinion that fully embraced *Blasius* and its progeny: "[T]o invoke *Blasius* the challenged board action 'only need[s] to be taken for the primary purpose of interfering with or impeding the effectiveness of the stockholder vote in a contested election for directors.'"<sup>112</sup> This is indeed the objective of the anti-activist pill in the *Williams* case. If anything, the Delaware Supreme Court should be forthright in its defense of shareholder democracy.

## VI. ACTIVISM AS "MISTARGETING"

A recent article by Zohar Goshen and Reilly Steel mounts a defense of anti-activist pills on the grounds that activists are likely to "mistarget" firms—"mistakenly shaking things up at firms that only appear to be underperforming"—and thereby will reduce shareholder and social wealth.<sup>113</sup> Activists, they say, are probably worse than hostile bidders—"raiders."<sup>114</sup> A hostile bidder, because it seeks one hundred percent of the company, has strong incentives to "invest more in information and to take only prudent risks."<sup>115</sup> Once it acquires one hundred percent of a firm, a hostile bidder will have full access to the firm's information and thus can reverse shake-up plans that are revealed to be unwise.<sup>116</sup> An activist has a much smaller stake, less than ten percent, and so will be more aggressive with a lower "hurdle rate," and even after successful activism will have insufficient information to update prior plans.<sup>117</sup> Goshen and Steel regard the *Williams*

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<sup>111</sup> *Stahl v. Apple Bancorp, Inc.*, No. 11510, 1990 WL 114222, at \*7 (Del. Ch. Aug. 9, 1990) (Allen, C.) (unpublished).

<sup>112</sup> *Coster v. UIP Cos.*, 255 A.3d 952, 962 (Del. 2021) (citing *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (2003)).

<sup>113</sup> Goshen & Steel, *supra* note 6 (manuscript at 3) (emphasis omitted).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (manuscript at 4).

<sup>117</sup> *Id.* (manuscript at 3–4).

case as incorrectly decided<sup>118</sup> and argue that the case should be cabined as pertaining only to an extreme pill, one that combines *both* a low ownership trigger point and a broad acting-in-concert provision. Goshen and Steel endorse a notion of proportionality that would trade off the level of trigger points against the breadth of acting-in-concert provisions.<sup>119</sup>

The main analytic move in the article is to explain away the persistent pattern of positive returns on average to shareholder activism (approximately seven percent)<sup>120</sup> and, more importantly, the general support of shareholder activism by large institutional investors and the proxy advisors, who have strong incentives to observe the performance of specific activists and activism targets in repeat play.<sup>121</sup> To transform the authors' conjecture about the appearance of underperformance into a baseball analogy: The shareholder activists consistently convert homeruns and grand slams into singles and doubles. The fans think they are seeing an effective offense only because they cannot observe the missing fireworks that the displaced managers would have delivered.

In justly acclaimed prior work, one of the authors argued that the permissible set of governance arrangements ought to include those that protect the "idiosyncratic vision" of the entrepreneur.<sup>122</sup> This becomes a justification for favorable attitudes toward controlling owners and dual class common stock, classified boards, and other management-protective elements that are often found in today's initial public offerings.<sup>123</sup> "Mistargeting," however, seems to assume that every CEO—who advanced their way up the corporate

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<sup>118</sup> *Id.* (manuscript at 51).

<sup>119</sup> Goshen & Steel, *supra* note 6 (manuscript at 56–57).

<sup>120</sup> *See, e.g.,* Brav et al., *supra* note 18.

<sup>121</sup> *Id.* (manuscript at 6–9, 12, 26).

<sup>122</sup> Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 594 (2016) ("[W]e argue that controlling shareholders' rights play, and should play, a critical role in corporate law.").

<sup>123</sup> *Id.* at 598–605.

hierarchy—could be a Henry Ford, that every struggling firm could be an Apple, and that corporate law, in an effort to avoid shareholder mistakes (“principal costs”), should suppress a particularly effective mechanism of managerial accountability: the proxy contest.<sup>124</sup>

In comparing activism and a hostile bid, the article seems founded on some misapprehensions about the irrevocability of a prior mistargeting. In the case of activism, if the target’s management and board disagree with the activist’s proposal, presumably they will resist the proposal consistent with their fiduciary duty to shareholders.<sup>125</sup> The activist’s recourse is to initiate a proxy contest (or the threat of one) with a “short

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<sup>124</sup> Indeed, Henry Ford was soon outstripped by the managerial genius of Alfred Sloan at General Motors (GM), who was subject to oversight by the DuPont family blockholders. *See generally* ALFRED P. SLOAN, JR., MY YEARS WITH GENERAL MOTORS (1963); Anthony Patrick O’Brien, *How To Succeed in Business: Lessons from the Struggle Between Ford and General Motors During the 1920s and 1930s*, 18 BUS. & ECON. HIST. 79 (1989). Goshen and Steel’s further claim is to connect the outsized growth of superstar firms to unaccountable CEOs. *See* Goshen & Steel, *supra* note 6 (manuscript at 16–17). The dominance of GM in its period of highest growth points in a different direction as does the prodigal son story of Steve Jobs and the roaring success of post-Jobs Apple. Bill Gates divested himself of a control block in Microsoft. Jeff Bezos has retained significant stock ownership but not control of Amazon. Mark Zuckerberg (Meta Platforms) and Larry Page and Sergey Brin (Alphabet) use dual class common stock to secure control, which is achieved through the shareholder consent to a particular charter term in an initial public offering, not an anti-activist pill. More generally, the account of superstar firms that account for a disproportionate share of growth, Goshen & Steele, *supra* note 6 (manuscript at 33–34), points to deeper changes in the marketplace rather than a flourishing of idiosyncratic vision that needs the protection of an anti-activist pill. David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, Q. J. ECON. 645, 649–51 (2020) (describing various characteristics of the “superstar firm”).

<sup>125</sup> Perhaps they will be hampered by their inability to reveal to the marketplace the “hidden information” about an impending product launch or other ventures that would lose value upon premature disclosure because of loss of a first mover window. They could still claim the superiority of their plans in a general way and need not capitulate just because they cannot be fully revelatory.

slate” of director nominees.<sup>126</sup> “Success” then means board representation via a proxy contest or through a settlement in which management agrees to put a small number of new directors on the board. *The activist’s plans are not self-executing.* A new board member has access to material non-public information about the firm and has the customary fiduciary duties to consider that information in board decision-making. Insofar as the activist is directly represented on the board, the activist presumably is interested in delivering performance, for the sake of its own holdings and to preserve and enhance its reputation on which its business model of repeat activism depends. Moreover, as is increasingly common, the activist runs a short slate with highly-qualified independents, who are only thinly tied to the activist.<sup>127</sup> These directors have particular reason to take a fresh look at their initial assumptions in light of what they see on the inside.

Indeed, one of the most heralded cases of takeover defenses shows how inside information can change opinions. In *Air Products and Chemicals, Inc. v. Airgas, Inc.*, Air Products sought a combination with Airgas and made a premium offer.<sup>128</sup> Airgas rejected all overtures and stood behind a

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<sup>126</sup> Only rarely does the activist seek control. It is difficult to persuade shareholders to grant unfettered control to a shareholder with only five-to-ten percent of the stock. Indeed, a small group of activists that do engage deeply with the company are sometimes favorably reviewed by the opponents of most activism. See Martin Lipton, *The Trian/P&G Proxy Contest*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 11, 2017), <https://corpgov.law.harvard.edu/2017/09/11/the-trianpg-proxy-contest/> [<https://perma.cc/6N2H-3M36>]

<sup>127</sup> See LAZARD, CAP. MKTS. ADVISORY GRP., 2021 REVIEW OF SHAREHOLDER ACTIVISM 15 (2021), [https://www.lazard.com/media/452017/lazards-2021-review-of-shareholder-activism\\_vff.pdf](https://www.lazard.com/media/452017/lazards-2021-review-of-shareholder-activism_vff.pdf) [<https://perma.cc/VRD3-UMFP>] (reporting that over the 2018-2021 period, only twenty-five percent of directors named to boards through activism have been employees of the activist, with at least sixty percent having other public company board experience.)

<sup>128</sup> *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 86 (Del. Ch. 2011) (Chandler, C.) (quoting an Air Products press release, which stated that Air Products’ best and final offer of seventy dollars per share provided a sixty-one percent premium to Airgas’ closing price on the day before Air Products first announced an offer to acquire Airgas).



poison pill fortified by a classified board.<sup>129</sup> Air Products won a proxy contest to replace the three directors up for election.<sup>130</sup> The legal issue in the case was whether it was “proportional” to leave in place a poison pill despite a fully informed shareholder vote for new directors that was in effect a plebiscite on the proposed transaction.<sup>131</sup> It turned out that the new directors (the nominees of the “activist”) did their own due diligence, insisted on additional outside review, and with this is new information reversed their prior views about the adequacy of the Air Products offer.<sup>132</sup> Airgas remained independent.<sup>133</sup> This illustrates the point that there is no reason to assume that activist nominees will be a “potted plant” if they are elected to the board. If their exposure to non-public information shows them that management’s plan will produce much greater value than the activist’s alternative, why would we expect them not to act as appropriate fiduciaries?

The case of a hostile bid is quite different. The very act of acquiring one hundred percent of the target commits the raider to a particular course of action *regardless of what the raider discovers once they have access to non-public information*. This is because the raider is almost certainly financing the acquisition with bank borrowings or “high yield” bonds and will depend on the target’s excess free cash or the proceeds of a break-up to repay the debt. The very fact of the

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<sup>129</sup> *Id.* at 66–67, 70, 74, 76, 89.

<sup>130</sup> *Id.* at 71–72.

<sup>131</sup> *Id.* at 54, 92–93.

<sup>132</sup> *Id.* at 89–90.

<sup>133</sup> Airgas was eventually acquired by Air Liquide in 2016. Press Release, Airgas, Air Liquide, Air Liquide Completes Acquisition of Airgas (May 23, 2016), <https://www.airliquide.com/group/press-releases-news/2016-05-23/air-liquide-completes-acquisition-airgas> [<https://perma.cc/SJJ8-HQBQ>]. The case is heralded as showing the value of the pill. See Martin Lipton, *The Long-Term Value of the Poison Pill*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 18, 2015) (<https://corpgov.law.harvard.edu/2015/12/18/the-long-term-value-of-the-poison-pill/>) [<https://perma.cc/QE3S-YPXX>] (describing the acquisition of Airgas six years later at a price more than double the final rejected offer from Air Products).

leveraged acquisition to get one hundred percent ownership forecloses many possible alternative paths. By the time the raider sees the great recipe on the kitchen countertop, the china is already broken.

Goshen and Steel seem particularly concerned about firing CEOs “who are actually loyal and able,” regarding such firings as especially likely in the case of activism because of the limited information on which the activist proceeds.<sup>134</sup> It appears, however, that CEO turnover is in fact relatively uncommon in the case of an activist campaign, occurring in less than fifteen percent of cases within the first six months of the launch of campaigns between 2018 and 2021.<sup>135</sup> By contrast, it is highly likely that turnover will occur after almost every successful hostile bid. Even apart from the animus generally associated with a hostile transaction, this follows from the ubiquity of golden parachute agreements, which generally confer a financial bonanza on a CEO after a control transaction whether or not the CEO is formally fired.<sup>136</sup> CEOs commonly depart following takeovers, even friendly deals,<sup>137</sup> except in private equity take-privates.<sup>138</sup> Surely hostile bids will skew toward turnover, even if the hostile bidder comes to have “raiders regret.”

Goshen and Steel open with Bill Ackman and Pershing Square’s failed effort to resuscitate a lagging retailer, J.C. Penny and hedge fund star Eddie Lampert’s failure at

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<sup>134</sup> Goshen & Steel, *supra* note 6 (manuscript at 14) (citing Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 786–88 (2017)).

<sup>135</sup> LAZARD, *supra* note 130, at 16.

<sup>136</sup> See Albert H. Choi, Andrew C.W. Lund & Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting*, 73 VAND. L. REV. 223, 232–33 (2020).

<sup>137</sup> Julie Wulf & Harbir Singh, *How Do Acquirers Retain Successful Target CEOs? The Role of Governance*, 57 MGMT. SCI. 2101, 2107, 2112 (2011); Jay C. Hartzell, Eli Ofek & David Yermack, *What’s in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 41 (2004).

<sup>138</sup> Leonce L. Barger et al., *What Is the Shareholder Wealth Impact of Target CEO Retention in Private Equity Deals?*, 46 J. CORP. FIN. 186, 187 (2017).

Sears.<sup>139</sup> But Lampert came to own nearly fifty percent of Sears.<sup>140</sup> He was more a less successful Ronald Perlman (Revlon) than a prototypical hedge fund activist. The failure of many raiders in the halcyon days of hostile bids were notorious.<sup>141</sup> Those with long memories will recall the 1980s debacle of Robert Campeau's mash up of various retail chains that resulted in a massive retail bankruptcy of Federated Department Stores in the 1980s,<sup>142</sup> a debacle that outstrips Ackman's failure. Nearly half of all major U.S. corporations received a takeover bid in the 1980s.<sup>143</sup> Many of those corporations restructured to make themselves less attractive targets.<sup>144</sup>

Goshen and Steel also assert that activists will more casually, with less investigation, pursue activism campaigns because the lower cost of activism (a seven-to-ten percent position versus a one hundred percent bid) means that the activist has a lower "hurdle rate."<sup>145</sup> That argument seems not to consider how the two parties, activist versus raider, finance their respective transactions. In the halcyon days of hostile bids, raiders bought their five-to-ten percent toeholds, presumably with cash (like the activists) and relied heavily on

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<sup>139</sup> Goshen & Steel, *supra* note 6 (manuscript at 2).

<sup>140</sup> Michelle Celarier, *Eddie Lampert Shattered Sears, Sullied His Reputation, and Lost Billions of Dollars. Or Did He?* INSTITUTIONAL INV. (Dec. 3, 2018), <https://www.institutionalinvestor.com/article/b1c33fqdnhf21s/Eddie-Lampert-Shattered-Sears-Sullied-His-Reputation-and-Lost-Billions-of-Dollars-Or-Did-He> [<https://perma.cc/8GUL-4HRN>].

<sup>141</sup> See generally LOUIS LOWENSTEIN, *SENSE AND NONSENSE IN CORPORATE FINANCE* (1991).

<sup>142</sup> See Carol J. Loomis, *The Biggest, Looniest Deal Ever*, FORTUNE, June 18, 1990, at 48, 49.

<sup>143</sup> Mark L. Mitchell & J. Harold Mulherin, *The Impact of Industry Shocks on Takeover and Restructuring Activity*, 41 J. FIN. ECON. 193, 199 (1996).

<sup>144</sup> See *id.* at 199. The "hurdle rate" is "the rate of return [acquirers] need to make a target worth their substantial investment." Goshen and Steel, *supra* note 6 (manuscript at 3).

<sup>145</sup> See Goshen and Steel, *supra* note 6 (manuscript at 3–4).

debt financing to pay for the remainder of the acquisition.<sup>146</sup> The comparative required return-on-equity is a matter of conjecture. It is certainly the case that successful activists generate a portfolio of activist positions<sup>147</sup> both in the moment and over time, but that may result in successful activists developing skill in assessing potential interventions.

In a sense, to compare the virtues of a disciplinary takeover with a disciplinary activist intervention is a quibble. A successful hostile bid typically requires a bid premium greater than a friendly deal and may exceed fifty percent.<sup>148</sup> That degree of underperformance is vanishingly rare in today's environment of high-powered stock-based compensation and the monitoring of hedge fund activists. Rather, the hostile bids we observe now are generally about the acquirer wanting access to resources held or developed by the target. Cadbury had developed its emerging market candy distribution chain, and Kraft Foods (2009) wanted that distribution channel for its snack food products.<sup>149</sup> Sanofi-Aventis (2010) highly prized Genzyme's biotechnology capacity and its orphan disease drug research and development.<sup>150</sup> Broadcom (2018) wanted to build a semiconductor powerhouse that it envisioned through

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<sup>146</sup> See Daniel J. Morrissey, *Defensive Tactics in Tender Offers—Does Anything Go?*, 53 TENN. L. REV. 103, 114–115 (1985). This alone means that hostile bids are a blunt instrument for managerial discipline. Among other factors, many firms do not generate steady cash flows that would make a heavily leveraged transaction feasible, much less wise.

<sup>147</sup> LAZARD, *supra* note 130, at 8.

<sup>148</sup> See B. Espen Eckbo, *Bidder Strategies and Takeover Premiums: A Review*, 15 J. CORP. FIN. 149, 154, 155 tbl.3 (2009).

<sup>149</sup> Dana Cimilluca, Ian Brat & Julie Jargon, *Cadbury Sour on Kraft Bid*, WALL ST. J. (Sept. 8, 2009, 12:01 AM), <https://www.wsj.com/articles/SB125230432582989903> (on file with the Columbia Business Law Review).

<sup>150</sup> Ben Hirschler & Toni Clarke, *Analysis: Rare Diseases Lure Sanofi, Other Big Drugmakers*, REUTERS (Aug. 3, 2010, 11:13 AM), <https://www.reuters.com/article/us-genzyme-sanofi-diseases/analysis-rare-diseases-lure-sanofi-other-big-drugmakers-idUKTRE6723R920100803> [<https://perma.cc/QDY5-F5P7>]; Michael J. de la Merced & Thomas Kaplan, *Sanofi Bid for Genzyme Turns Hostile, and No Sweeter*, N.Y. TIMES (Oct. 4, 2010), <https://www.nytimes.com/2010/10/05/business/global/05drug.html> [<https://perma.cc/JF2F-HZXA>]

a merger with Qualcomm.<sup>151</sup> Strategic considerations drove these hostile overtures; underperformance had nothing to do with it.

The nerve of the Goshen and Steel argument is that shareholders have been disserved by the rise of shareholder activism—shareholders have settled for too many singles and doubles.<sup>152</sup> Even if it had been validated by the *Williams* case, a “crisis pill” is a one-off side show because it focuses on exigent circumstances rather than a pervasive influence in the environment. Instead, the Goshen and Steel point is effectively: for the sake of the shareholders, we need a broad-gauge barrier to activism.<sup>153</sup> I find it hard to credit that general claim. As a group, shareholders over the past decade have done just great. Spectacular new firms, accounting for a large share of the increased market capitalization, have flourished, even in this age of heightened activism. Indeed, some of those firms have faced activist challenges themselves, for example, Apple (Icahn),<sup>154</sup> Netflix (Icahn),<sup>155</sup> Microsoft (ValueAct),<sup>156</sup> and now perhaps Amazon (Third Point).<sup>157</sup>

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<sup>151</sup> Ed Hammond & Ian King, *Mr. Tan Goes to Washington: The Undoing of a Tech Mega-Deal*, BLOOMBERG, (Mar. 15, 2018, 7:32 PM), <https://www.bloomberg.com/news/articles/2018-03-15/mr-tan-goes-to-washington-the-undoing-of-a-117-billion-deal> (on file with the Columbia Business Law Review).

<sup>152</sup> See *supra* notes 124–25 and accompanying text.

<sup>153</sup> *Id.* at 51.

<sup>154</sup> Maureen Farrell, *Carl Icahn Presses Apple to Buy Back Its Stock . . . Again*, WALL ST. J. (Feb. 11, 2015, 3:36 PM), <https://www.wsj.com/articles/BL-MBB-33147> (on file with the Columbia Business Law Review).

<sup>155</sup> David Benoit, *Icahn Exits Stage Right on Golden Netflix Trade*, WALL ST. J. (June 24, 2015, 11:32 AM), <https://www.wsj.com/articles/BL-MBB-38438> (on file with the Columbia Business Law Review).

<sup>156</sup> Maureen Farrell, *P&G, Apple, Microsoft: Activists Go Big with Small Stakes*, WALL ST. J. (Jan. 6, 2014, 9:25 AM), <https://www.wsj.com/articles/BL-MBB-13804> (on file with the Columbia Business Law Review).

<sup>157</sup> Juliet Chung, Cara Lombardo & Dana Mattioli, *Activist Investor Daniel Loeb Sees Roughly \$1 Trillion of Untapped Value in Amazon*, WALL ST. J. (Feb. 17, 2022, 10:44 AM), <https://www.wsj.com/articles/activist->

Moreover, we have developed governance strategies to protect and nurture entrepreneurs with “idiosyncratic vision” ranging from private market ownership to dual class common stock.

As per Gilson and Gordon, from a shareholder point of view, the risk of management’s “hyperopia” is just as great as the market’s “myopia.”<sup>158</sup> Instead of shutting down an accountability mechanism—for what this is what an anti-activist pill does—we propose a governance innovation, a director model that would buttress the board’s capacity to monitor and help the management team achieve success with directors who are “thickly informed, well-resourced, and high motivated.”<sup>159</sup> An anti-activist pill is “cheap talk”; it carries no useful information; it works by force of arms. By contrast, bringing on an “empowered director” is costly for the CEO (because of the threat to the CEO’s power) and thus the support of such a director can credibly convey the superiority of management’s strategy (vs. that of the activist) to the company’s majoritarian owners.<sup>160</sup> This is a better way for a public corporation without a controlling entrepreneur or hero CEO to pursue a strategy that the market may not yet appreciate than the deformation of corporate governance.

If there is a “crisis” in corporate governance, it arises from the social interests that the shareholder value model does not easily address. One idea that might be described as the “Davos

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investor-daniel-loeb-sees-roughly-1-trillion-of-untapped-value-in-amazon-11645048496 (on file with the Columbia Business Law Review).

<sup>158</sup> See Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0: An Introduction*, 74 *BUS. LAW.* 351, 354, 363 (2019).

<sup>159</sup> See *id.* at 353 (emphasis omitted).

Just because management says its long-term strategies are first best but just not (yet) appreciated by the market doesn’t make it so: the market may be myopic but management may be hyperopic. Directors under the current board model are generally not in position to evaluate and validate strategies that the market does not already understand, and the relevant parties, including the majoritarian institutional owners, understand this.

*Id.* at 358. For an approach based on relational investing, see Alon Brav, Dorothy Lund & Ed Rock, *Validation Capital*, 99 *TEX. L. REV.* 1247 (2021).

<sup>160</sup> *Id.* at 353.

consensus” is to invite managers and boards to balance the interests of stakeholders, which puts these elites in charge of various distributional decisions.<sup>161</sup> Another strategy is to let these concerns bubble up from the shareholders—shareholder activism of a particular sort—in which board seats are the values transmission mechanism. The ESG activism reflected in the successful proxy contest waged by Engine No. 1 vis-à-vis Exxon-Mobil is one such example.<sup>162</sup> But there could be many more opportunities as ESG funds are formed specifically with a “voice” agenda rather than a “screening agenda.” Moreover, some of the large asset managers are moving to devolve voting authority to their investors. BlackRock, for example, has reported that holders of nearly 40% of its \$4.8 trillion in equity assets are now eligible to select among different forms of devolved voting authority.<sup>163</sup> The universal proxy card will lower proxy contest costs and thus invite such contests by a broader group of shareholders.<sup>164</sup>

As I argued at the beginning of this Article, Delaware corporate law leaves plenty of room for firms to follow strategies that are not “profit maximizing” in the Milton Friedman sense and yet hold to the view that firms are economically focused organizations.<sup>165</sup> Director election contests are a natural way for shareholders to channel their beliefs into the operational decisions of the firm.

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<sup>161</sup> See, e.g., Ronald J. Gilson, *Corporate Governance Versus Real Governance* 10 (Stan. L. & Econ. Olin Working Paper No. 565, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4007324](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4007324) (on file with the Columbia Business Law Review).

<sup>162</sup> See *supra* notes 75–76 and accompanying text.

<sup>163</sup> BLACKROCK, *Working To Expand Proxy Voting Choice for Our Clients* <https://www.blackrock.com/corporate/about-us/investment-stewardship/insights/expand-proxy-voting-choice> (Feb. 23, 2022) [<https://perma.cc/W7Q7-62CB>].

<sup>164</sup> See *In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections*, WHITE & CASE LLP (Nov. 21, 2024), <https://www.whitecase.com/publications/alert/another-win-shareholders-sec-adopts-new-rules-universal-proxy-cards-contested> [<https://perma.cc/K5LV-7FTH>].

<sup>165</sup> See *infra* Part II.

Here is where the problems created by anti-activist pills become particularly acute. Regardless of the pill trigger threshold, expansions of “beneficial ownership” through acting-in-concert provisions are likely to ensnare most ESG activism. To achieve success, the ESG proxy contest initiator will necessarily go on a persuasion campaign. As noted above, a hostile bidder needs only the persuasive power of a premium bid to win a proxy campaign coupled with a conditional tender offer. The pill threshold may matter, because the toehold may represent the bidder’s profit, but a capacious definition of beneficial ownership does not. But for proxy contest initiators who are attempting merely to “influence” the control of the issuer but not to acquire the firm, persuasion on the merits and the capacity to let shareholders (voters) know that others are resonating to this persuasion seem essential. Who wants to follow Don Quixote off a cliff? Yet “beneficial ownership” provisions of most anti-activist pills will sweep in an ESG crowd no less than the villainous “wolfpacks.”

## VII. CONCLUSION

Shareholder voting is foundational to the legitimacy of corporate power. Shareholder voice may also come to be one way in which the corporation can successfully navigate the multiple pressures of a complex world. Shareholder activism is one channel through which the corporation comes to adapt to the economic dynamism of the environment. It will increasingly come to be a channel through which the corporation adapts to the socio-political dynamism of the environment as well. Anti-activist poison pills have no place in these dynamics.