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The Interplay of *Blasius* and *Unocal* – A Compelling Problem Justifying the Call for Substantial Change

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"Unlimited power is in itself a bad and dangerous thing." [FN1]

While hostile takeovers [FN2] have become the exception in recent years, they continue to play a significant role in the acquisition of publicly traded companies. [FN3] Inasmuch as hostile takeovers are by nature adverse to the management strategies and positions of target corporations, Delaware courts [FN4] have reviewed ***430** defensive measures implemented by interested boards with enhanced scrutiny. [FN5] Specifically, management decisions aimed at thwarting unfriendly contests for control are generally assessed under the two-prong standard announced in the landmark decision of Unocal Corp. v. Mesa Petroleum Corp. [FN6] before they will be accorded the protections of the deferential business judgment rule. [FN7] The cases decided by Delaware's Supreme Court and specialized Court of Chancery in the wake of Unocal have created a takeover jurisprudence that rounds out and purportedly refines the standards for reviewing the fiduciary duties of interested managers in this context. [FN8]

Over the years, numerous commentators have argued that the Unocal standard has been watered down to that of a dressed-up business judgment rule. [FN9] In Chesapeake Corp. v. Shore, [FN10] the ***431** Court of Chancery questioned the efficacy of a deferential application of the Unocal test and, in the process, delved into an interesting discussion of the interplay between the test announced in Unocal and the one created in Blasius Industries, Inc. v. Atlas Corp., another important Court of Chancery decision. [FN11] Blasius involved a target corporation whose board of directors, in response to an unfriendly bid, adopted defensive measures designed to repress the dissident shareholders' ability to elect a majority of the company's board. [FN12] Recognizing the prominence of the shareholder voting process, Chancellor Allen established a "compelling justification" standard for evaluating management decisions made with the "primary purpose" of interfering with the shareholder franchise. [FN13] While the standard of review created by the Blasius court has been described by the Delaware judiciary as "onerous" because of its demanding "compelling justification" showing, it has also, as a practical matter, been limited significantly to the atypical facts of that case.

Left unanswered by Blasius and the numerous cases decided thereafter was whether Blasius' "compelling justification" standard operated as a separate and distinct test from Unocal's standard of review or whether it simply served to augment Unocal's "reasonableness" prong for assessing the proportionality of managerial responses to perceived threats by hostile bidders. [FN14] Although the Delaware Supreme Court has held Unocal applicable to all defensive measures including those touching upon issues of corporate control, [FN15] it has also classified measures implicating the shareholder

franchise as strongly suspect, stating that such measures will pass muster only if justified by compelling reasons. [FN16] In theory, a unified approach that merges these two standards of review adequately safeguards the sanctity of the shareholder voting ***432** process. Indeed, Unocal rests upon the premise that preclusive and coercive measures will be struck down as inequitable. As discussed herein, however, the reluctance of the Delaware Supreme Court to protect rigorously the franchise while applying Unocal exposes the shareholder electorate to substantial manipulation and risk. When one considers that "matters involving the integrity of the shareholder voting process involve consideration[s] not present in any other context in which directors exercise delegated power," [FN17] this problem is magnified even further. This Article argues that the scope of Blasius' reach should be recalibrated to encompass those defensive measures having a "substantial effect" upon the ability of shareholders to exercise their franchise freely. This approach, whether applied in tandem with Unocal or as a freestanding doctrine, will empower courts with a practical framework for safeguarding this fundamental pillar of corporate governance.

Part I of this Article explores and defines hostile takeovers and, in the process, briefly discusses the different waves of hostile takeover activity in the United States. It next describes a sampling of common defensive measures adopted by corporate boards in response to hostile bidders. Finally, it identifies the inherent conflicts of interest accompanying board decisions adopting defensive measures in order to understand Delaware's displacement of the business judgment rule as the default standard for adjudging management's fiduciary duties in this context.

Part II focuses on the Unocal decision, and the two-prong test created therein, which has become the cornerstone of Delaware's hostile takeover jurisprudence. It next chronicles and discusses a number of subsequent cases leading up to Unitrin, Inc. v. American General Corp., [FN18] a case in which the Delaware Supreme Court revisited Unocal to explain and expand upon its holding. In addition to illustrating how courts apply Unocal in different factual settings, these cases highlight the judiciary's deferential application of that doctrine. This Part concludes with an analysis of the Blasius decision, which lays the foundation for the balance of this Article.

Part III begins with an in-depth overview of the Court of Chancery's decision in Chesapeake and proceeds to analyze that court's discussion of the interrelationship between the respective ***433** standards of Blasius and Unocal. Specifically, it uses Chesapeake as a model for exposing the policy concerns attributable to Delaware's reflexive application of Unocal. This Part predicts that, absent change, Blasius' basic legal tenets will continue to be suppressed as a practical matter, notwithstanding the Delaware judiciary's purported commitment to closely scrutinizing board actions touching upon the shareholder franchise.

This Article concludes in Part IV that the current approach misses the mark inasmuch as Delaware's corporate law rests on the precept that shareholders, as the owners of corporations, are entitled to decide, via their franchise, decisions affecting corporate control. Specifically, it argues that if inherently interested boards are going to implement defensive measures substantially compromising the shareholder franchise at such a critical time in the life of a corporation, directors should be required to demonstrate that their actions were truly necessary and in the best interests of the corporation and its shareholders. Because of the monumental import of the franchise and the heightened potential for directorial abuse in this setting, this Article advocates shifting the onus from the shareholders to the directors who are better suited to justify the merits of suspect defensive measures and have the most to

gain by suppressing the voices of dissidents. This Article posits that its substantial effect test will do just that.

I

Hostile Takeovers

A. Takeover Defined

A takeover is generally defined as a stock purchase offer in which the acquiror is seeking to buy a controlling block of stock in a target company. [FN19] The controlling block of stock usually enables the purchasing shareholder to elect the target's board of directors and to effectuate mergers. [FN20] This Article focuses on hostile takeovers, a subset of takeovers in which the bidder operates ***434** without the support of the target's current board of directors. [FN21]

B. A Brief History of Hostile Takeovers

Numerous waves of merger and acquisition activity have transcended the American economy. [FN22] The 1980s witnessed an explosion of acquisition practice, particularly with respect to hostile takeovers which dominated that decade. [FN23] While the hostile activity of the "Decade of Greed" [FN24] slowed considerably in the early 1990s as a result of "the after- effects of the October 1987 stock market crash, the collapse of the junk-bond market, and tight credit conditions, as well as other business and market factors," [FN25] that cooling off period was short-lived.

The latter half of the 1990s witnessed a resurgence of hostile bids that continues today, especially in light of the recent economic downturn that has left many companies trading at prices significantly below their bullish highs. [FN26] While the ruthless tenor that tainted hostile takeovers in the 1980s has lessened in degree, ***435** large-scaled initial hostile bids currently serve as a strategically potent option for acquiring companies. [FN27] As such, hostile takeovers remain very much alive as acquisition vehicles threatening the directorships of incumbent managers sitting on targeted boards.

C. Defensive Responses to Hostile Bids

As was the case in the 1980s, hostile takeovers continue to motivate directors of target boards to undertake strategies aimed at frustrating unwelcome suitors. The types of defensive measures that directors can implement in response to hostile bidders are as numerous as the creative board can imagine. In order to lay the appropriate foundation for this Article's analysis of the fiduciary duties of management in this setting, this Part focuses on two popular responses adopted by corporate boards.

1. Shareholder Rights Plans

A shareholder rights plan, commonly referred to as a "poison pill," is one of the most potent and common defensive measures utilized by corporate managers for deterring hostile bids. [FN28] While there are a number of different variations on the poison pill, the basic idea is that, upon the occurrence of a given triggering event (e.g., the announcement of an acquiror's tender offer or an acquiror's purchase of a given percentage of the target's shares), "rights" become operational to all target shares except

those held by the would-be acquiror. [FN29] These rights most commonly allow the shareholders of the target corporation to purchase, among other things, shares of the acquiror or target at a severely discounted price or sell their shares back to the target at a substantial premium. [FN30] The effect of triggering the poison pill renders the cost of proceeding with the acquisition so prohibitively expensive [FN31] that, as a practical matter, the acquiror is forced to initiate a proxy contest with the hope of gaining control ***436** of the target corporation. This will enable the acquiror to appoint new management, remove the rights plan, and go forward with its intended deal. [FN32]

2. Classified Boards

The standard corporate board in Delaware consists of directors who are each elected to one-year terms. [FN33] The significance of this from an acquiror's perspective is that the longest it would have to wait to elect the entire board of directors after gaining control of a company is one year. As a result, target corporations will often implement classified or staggered boards in which the terms of their directors are separated into three groups, each serving staggered terms of three years. [FN34] This structure ensures that it will take up to two years for an unwelcome acquiror to gain control of a given company's board and three years for an acquiror to dominate totally that board. [FN35] In this context, where an acquiror is seeking to proceed with an unfriendly transaction, such a delay can serve as a significant obstacle. [FN36]

D. The Business Judgment Rule

The business judgment rule has become the traditional standard used by courts for reviewing the actions of directors. [FN37] "A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." [FN38] "Under the business judgment rule, directors' decisions are presumed to have been ***437** made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." [FN39] Thus, a court's decision to apply this rule affords corporate management extreme deference and "[w]hen a court invokes the 'business judgment rule,' the defendant directors (or managers) almost always win." [FN40]

The protections of the deferential business judgment rule are not, however, absolute. A showing that a board breached its duty of good faith, loyalty, or due care is sufficient for rebutting the rule's presumption. [FN41] As a general matter, though, the business judgment rule protects the substance of most management decisions from second-guessing by courts. [FN42]

A board's decision to adopt defensive measures in response to an unfriendly contest for control is an example of a situation where the traditional business judgment rule does not apply as the default standard of review. [FN43] The rationale for this exception lies in the adversarial atmosphere of hostile takeovers and the inherent conflicts of interest attendant to defensive decisions made by directors facing alleged threats to control. [FN44] By definition, ***438** target boards in this setting stand opposed to an acquiror's desire to acquire their company. Consequently, there exists the danger that incumbent directors may be acting out of a concern to protect their own positions when responding to these threats. Thus, before a board's defensive measures will be afforded the protections of the business judgment rule, the directors must demonstrate that their actions comport with Unocal's two-prong standard. [FN45]

II

Unocal and its Progeny

Before the decisions of corporate boards will be accorded the protections of the business judgment rule in the context of hostile takeovers, directors must satisfy the two-step showing established by the Delaware Supreme Court in Unocal. [FN46] Referred to today as "enhanced judicial scrutiny," [FN47] Unocal requires that directors responding to hostile overtures for control demonstrate, first, that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" [FN48] and, second, that the "defensive measures [undertaken in response thereto were] reasonable in relation to the threat posed." [FN49] The purported impact of this standard in this area of the law has been extraordinary. [FN50]

A. Unocal Corp. v. Mesa Petroleum Co.

The dispute in Unocal centered on Unocal Corporation's ***439** (Unocal) initiation of a selective self-tender offer for its shares [FN51] in response to the commencement of a two-tier, front-loaded tender offer [FN52] aimed at achieving control of Unocal by a contingent of its minority shareholders-namely Mesa Petroleum Co., Mesa Asset Co., Mesa Partners II, and Mesa Eastern, Inc. (collectively "Mesa"). [FN53] The Delaware Supreme Court refused to adopt the Court of Chancery's "blanket rule" conclusion that a selective self-tender offer could never be permissible. [FN54] Instead, the Supreme Court framed the issues in Unocal as whether "the Unocal board had the power and duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise, and if so, [whether its selective self- tender offer was] entitled to the protection of the business judgment rule." [FN55] The court quickly concluded that boards of Delaware corporations were empowered to adopt defensive measures like the selective self-tender offer at issue in Unocal [FN56] and turned its attention to the standards for assessing the duties of corporate managers in this context. [FN57]

Not surprisingly, the court began with a discussion of the business judgment rule, [FN58] finding that while that standard of review ***440** was still applicable in the takeover setting, the defendant directors had to satisfy two initial showings in light of the "omnipresent specter" that the directors might be acting with an eye toward retaining their offices. [FN59] The court then announced the two-prong reasonableness-proportionality standard that has become the recognized test for assessing the defensive decisions of management. [FN60]

1. The Reasonableness Prong

Unocal's board argued that Mesa's two-tier tender offer posed a danger that threatened the interests of Unocal's non-Mesa shareholders. [FN61] The court found that the directors reasonably believed that the value of the company was "substantially above" the cash price offered to Unocal's shareholders by Mesa at the front end of its proposed deal. [FN62] Additionally, the debt-leveraged securities that Mesa intended to compensate the remaining Unocal shareholders with at the back end squeeze out merger were valued significantly below the cash price guaranteed at the ***441** front end. [FN63] The court noted that "such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the

transaction." [FN64] Accordingly, the court found that Unocal's directors had perceived Mesa's actions as a reasonable threat. [FN65]

2. The Proportionality Prong

Unocal's purpose for adopting the selective self-tender offer in response to Mesa's offer was twofold. The board's objective was "either to defeat the inadequate Mesa offer or, should the offer still succeed, provide [a substantial percentage] of its stockholders, who would otherwise be forced to accept 'junk bonds', [sic] with [a significantly greater amount] of senior debt." [FN66] The court accepted the validity of the board's above noted justifications for its adoption of the selective self-tender offer. [FN67] Moreover, the court accepted the exclusion of Mesa from Unocal's selective self-tender. [FN68] If Mesa was permitted to participate in Unocal's offer to its shareholders, reasoned the court, Unocal would be "subsidizing" Mesa's greenmail threat by allowing Mesa to enjoy the premium offer of $54 per share. [FN69] Additionally, "Mesa could not, by definition, fit within the class of shareholders being protected from its own coercive and inadequate tender offer." [FN70] The court therefore had little trouble concluding that Unocal's selective self-tender offer was "reasonably related to the threats posed." [FN71]

3. The Business Judgment Rule

After finding Mesa's two-tier tender offer to be a reasonable threat and the Unocal board's defensive response to be proportional, the court stated that if Unocal's directors were independent, the business judgment rule would apply for the purpose of ***442** evaluating their decision. [FN72] The Delaware Supreme Court deferred to the Court of Chancery's determination that Unocal's decision to counter Mesa's strategy comported with the precepts of the business judgment rule and concluded with the familiar Delaware adage that the "[c]ourt [would] not substitute its judgment for that of [Unocal's] board." [FN73]

B. The Second Round of Cases

Unocal was clear in its announcement of an enhanced level of scrutiny for evaluating board decisions aimed at inhibiting hostile takeovers. What was unclear after Unocal, though, was the extent to which subsequent cases would interpret and apply that standard of review. This sub-Part explores a number of the important cases that followed Unocal and helped to shape its present doctrine. [FN74]

1. Moran v. Household International, Inc.

The Delaware Supreme Court decided Moran v. Household International, Inc. [FN75] a few months after Unocal. Moran involved another action in which the applicability of the business judgment rule was discussed against the backdrop of a threat to corporate control. In Moran, the directors of Household International, Inc. (Household) adopted a shareholder rights plan over the objections of one of Household's directors. [FN76] Unlike Unocal, the defensive measure at issue in Moran was "adopted to ward off possible future advances and not [as] a ***443** mechanism adopted in [response] to a specific threat." [FN77] After finding that the board's adoption of the rights plan was within the powers of Household's board of directors, [FN78] the court discussed the interplay of the business judgment rule and Unocal. [FN79]

With respect to the reasonableness prong of the Unocal test, the court began by noting the absence of any allegations of bad faith or entrenchment motives on the part of the defendant directors. [FN80] It then surmised that the Household board had "adequately demonstrated . . . that the adoption of the Rights Plan was in reaction to what it perceived to be the threat in the market place of coercive two-tier tender offers." [FN81] There was no allegation that Household's board had failed to act with proper business judgment in adopting the pill, nor was there any showing that the board had failed in its duty to properly inform itself of the issues accompanying the adoption of the poison pill in question. [FN82] Thus, the court easily found that the board had acted reasonably in adopting the rights plan in response to what it perceived as the prospective threat of coercive two-tier tender offers. [FN83] It next examined the second inquiry of the Unocal test. [FN84]

The court began its analysis of Unocal's proportionality prong by noting the coercive concerns of the directors that motivated their decision to adopt the shareholder rights plan. [FN85] It concluded that the adoption of the rights plan was "a proportionate response to the theoretical threat of a hostile takeover, in part, because it did not 'strip' the stockholders of their right to receive tender offers and did not fundamentally restrict proxy contests, ***444** i.e., was not preclusive." [FN86] The court emphasized that subsequent decisions by the board not to redeem the poison pill when presented with an actual offer would be subjected to Unocal analysis. [FN87] In other words, management's decision not to redeem the poison pill would itself constitute a defensive tactic that would require the directors to demonstrate under Unocal that they did not "arbitrarily reject the offer." [FN88] Thus, Household's proactive adoption of the poison pill was sustained by the court as comporting with Unocal's mandate. [FN89]

2. Revlon, Inc. v. MacAndrews & Forbes Holdings

Revlon, Inc. v. MacAndrews & Forbes Holdings [FN90] explores the duties of target boards where the sale of a company has become inevitable. In response to Pantry Pride, Inc.'s (Pantry Pride) desire to acquire Revlon, Inc. (Revlon), Revlon's board adopted a host of defensive measures aimed at stymieing Pantry Pride's efforts. [FN91] These defensive measures included a poison pill and repurchase program, both of which were initially found by the Supreme Court to be reasonable in response to the threat posed by Pantry Pride. [FN92]

After Pantry Pride raised its offer two times and Revlon's board authorized its management to initiate merger discussions with third parties, however, "it became apparent to all that the break-up of the company was inevitable." [FN93] Once it became certain that the company was for sale, the court found that "[t]he duty of the board had just changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." [FN94] Viewed under Unocal's rubric as developed more fully below, the board's failure ***445** to secure the best price reasonably available to all shareholders was violative of Unocal as a disproportionate response. [FN95]

Revlon's board identified Forstmann Little & Co. (Forstmann) as a suitable acquiror and eventually granted it a lock-up provision. [FN96] By virtue of the fact that the sale of Revlon had become inevitable, however, the court found that granting Forstmann a lock-up provision ran afoul with the fiduciary duties of Revlon's directors, which required them to act proportionately in ascertaining the best price reasonably available for the company's shareholders. [FN97] The court then turned to the no-

shop provision, which had similarly been enjoined by the Court of Chancery. [FN98] Like the lock-up provision, "[t]he no-shop provision, . . . while not per se illegal, [was found to be] impermissible under the Unocal standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder." [FN99] This holding established the important duty of directors to get the highest value reasonably available when facing inevitable changes in control. While the two opinions following immediately below help to define which changes in control require directors to seek the highest price for their shareholders in accordance with their fiduciary duties of good faith, loyalty, and due care, they also illustrate Delaware's varying applications of Unocal.

***446** 3. Paramount Communications, Inc. v. Time, Inc.

In Paramount Communications, Inc. v. Time, Inc., [FN100] Time, Inc. (Time) and Warner Brothers, Inc. (Warner) agreed to formalize plans for a merger of the two companies. [FN101] After both boards approved the merger [FN102] and proxy statements were disseminated to Time's shareholders for approval of the deal, [FN103] Paramount Communications, Inc. (Paramount) entered the fray with an "all-cash offer to purchase all outstanding shares of Time for $175 per share." [FN104] Despite the fact that Paramount's offer far exceeded Time's trading stock price, [FN105] Time's board viewed it negatively and declined to proceed with any negotiations on the purported basis that the offer was inadequate as to price and that its proposed combination with Warner was in the better interests of Time's shareholders. [FN106]

After a series of meetings in which Time met to evaluate Paramount's offer, "[t]he board's prevailing belief was that Paramount's bid posed a threat to Time's control of its own destiny and retention of the 'Time Culture' . . . [and] maintained its position that a combination with Warner offered greater potential for Time." [FN107] After Time and Warner restructured their deal to inhibit Paramount's pursuit, Paramount raised its negotiable offer to $200 per share. [FN108] When Time's board also rejected that premium as inadequate and not in the best interests of Time's shareholders when compared to the Warner deal, Paramount filed suit. [FN109] After affirming the Court of Chancery's finding that Revlon did not apply, the Supreme Court reviewed Time's defensive responses to Paramount's substantial (and negotiable) offers under the Unocal doctrine. [FN110]

***447** Time's board identified numerous threats posed by Paramount's all-cash, all-shares tender offer including: (1) inadequate value; (2) the possibility that shareholders would erroneously tender out of mistake or ignorance of the benefits that a Time-Warner merger would produce; (3) uncertainty arising out of Paramount's offer that "skewed comparative analysis" between the Warner and Paramount proposals; and (4) the timing of Paramount's offer, which Time argued was ostensibly designed to frustrate shareholder approval of the Warner transaction. [FN111] The court held that it could not find an absence of good faith on the part of Time's board in having perceived Paramount's offer as a threat and found that it had acted on a sufficiently informed basis. [FN112]

Turning its attention to Unocal's second inquiry, the court asserted that "[t]he obvious requisite to determining the reasonableness of a defensive action is a clear identification of the nature of the threat." [FN113] It then affirmed the Court of Chancery's conclusion that Time's restructuring of the Time-Warner deal was a reasonably proportionate response to the board's perception of Paramount's offer as a threat. [FN114] The court also found that Time's response to Paramount's offer "was not aimed at 'cramming down' on its shareholders a management-sponsored alternative, but rather had as its goal the

carrying forward of a pre-existing transaction in an altered form. Thus, the response was reasonably related to the threat." [FN115] The court noted that nothing precluded Paramount from targeting the combined Time-Warner entity after the consummation of the merger as further ***448** grounds supporting the proportionality of Time's response. [FN116] The Supreme Court's deferential application of Unocal in this case spawned a wealth of criticism labeling the court's acceptance of Time's "corporate culture defense" as the "just say no defense," meaning that corporate boards could more or less rebuff any unwelcome offer with ubiquitous and universally available justifications. [FN117]

4. Paramount Communications, Inc. v. QVC Network, Inc.

After Paramount failed in its attempt to acquire Time, [FN118] Paramount entered into a strategic alliance with Viacom, Inc. (Viacom) [FN119] in spite of inquiries from QVC Network, Inc. (QVC) about its possible interest in the company. [FN120] The merger agreement between Paramount and Viacom provided that Paramount would merge with and into Viacom resulting in the emergence of Viacom's CEO as the controlling shareholder of the combined entity. [FN121] The agreement also contained three defensive provisions, all of which were designed to inhibit competing acquirors like QVC from succeeding. [FN122] The first defensive measure was a no-shop provision, which limited Paramount's ability to deal with other potential acquirors. [FN123] The second provision contained a termination fee that obligated Paramount to pay Viacom $100 ***449** million in the event that the deal failed to be consummated. [FN124] The third and "most significant deterrent device" was a stock option agreement in which Viacom received an option to purchase nearly twenty percent of Paramount's outstanding stock at a fixed price should any number of triggering events come to bear. [FN125]

At issue between the parties in this case was whether the proposed Paramount-Viacom transaction constituted a sale of control within the meaning of Revlon. [FN126] The Supreme Court agreed with the Court of Chancery's finding that, indeed, the transaction involved a change in control implicating Revlon even though it appeared as if Paramount's actions were a strategic merger and not a sale. [FN127]

Unlike Time, where the court found Revlon to be inapplicable on the basis that Time's board was simply seeing through a preexisting strategic plan, the court in QVC held that "the effect of the Viacom-Paramount transaction, if consummated, [would have been] to shift control of Paramount from the public stockholders to a controlling stockholder, Viacom." [FN128] Accordingly, the court classified the transaction as a sale of control notwithstanding that it was accomplished through a merger and held Revlon applicable. [FN129]

The court next turned to its assessment of the Paramount board's decision to merge with Viacom and the defensive measures incorporated into the merger agreement. [FN130] Finding that the board had "[given] insufficient attention to the potential consequences of the defensive measures demanded by Viacom," [FN131] the court concluded that the stock option agreement contained "a number of unusual and potentially 'draconian' provisions." [FN132] With respect to the termination fee, the court found that while such a device was not per se unreasonable, the $100 million contingency***450** did not enhance Paramount's attractiveness to outside bidders, especially when coupled with the harshness of the stock option agreement. [FN133] The court concluded that the board's defensive actions were impermissibly disproportionate because they "inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC which had already expressed an interest in Paramount." [FN134] Thus, the

Supreme Court in QVC appeared to back off of the lenient review that it had exhibited in Time. This apparent retreat, however, was short-lived as demonstrated below.

C. Unitrin, Inc. v. American General Corp.

Ten years after Unocal, the Delaware Supreme Court revisited and expanded upon the Unocal doctrine in Unitrin, Inc. v. American General Corp. [FN135] In Unitrin, American General Corp. (American) proposed a cash for stock merger transaction with Unitrin, Inc. (Unitrin) in which American offered to buy all of Unitrin's outstanding stock at a thirty percent premium above its market price. [FN136] Unitrin's board heard presentations from financial analysts who opined that American's offer was "financially inadequate," [FN137] and its attorneys also cautioned that possible antitrust issues might arise as a result of the combination contemplated by the proposed deal. [FN138] After concluding that the offer was not in the best interests of its shareholders, Unitrin's board unanimously voted to reject American's offer [FN139] and further discussed the possibility of adopting a number of defensive measures. [FN140]

Upon receipt of Unitrin's rejection, American issued a press release announcing its offer. [FN141] Viewing American's announcement as a "hostile act designed to coerce the sale of Unitrin at an inadequate price," [FN142] Unitrin's board "unanimously approved the poison pill and the proposed advance notice bylaw that it had ***451** considered previously." [FN143] At a subsequent meeting, Unitrin's directors authorized a repurchase program for a considerable percentage of the company's outstanding stock which the board stated would assist non-tendering shareholders in preventing a business combination with American. [FN144]

After granting American's motion for pendente lite relief, the Court of Chancery certified an interlocutory appeal that was accepted by the Supreme Court. [FN145] The Supreme Court found that the Court of Chancery had correctly evaluated the board's decisions under Unocal, having determined that "the Board perceived American General's Offer as a threat and adopted the Repurchase Program, along with the poison pill and advance notice bylaw, as defensive measures in response to that threat." [FN146] Having reiterated Unocal's underlying foundation that corporate boards have an "'inherent conflict of interest' during contests for corporate control," [FN147] the court in Unitrin summarized Unocal's two-prong test as follows:

> [B]efore the board is accorded the protection of the business judgment rule, and that rule's concomitant placement of the burden to rebut its presumption on the plaintiff, the board must carry its own initial two-part burden:
> First, a reasonableness test, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and
> Second, a proportionality test, which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed. [FN148]

***452** The court next turned to the two inquiries required by Unocal. [FN149]

1. Reasonableness Prong

Unitrin's board stated that it perceived American's offer as "dangerous" because of its inadequate price and antitrust complications. [FN150] While the Court of Chancery classified these threats as "mild" because of American's supposed willingness to negotiate, it nevertheless determined that the board had reasonably concluded that American's offer posed a threat to Unitrin's shareholders and thus had satisfied the first prong of analysis. [FN151] The Supreme Court took no issue with this finding, instead focusing its attention on the proportionality of the defensive measures implemented by Unitrin's board in response. [FN152]

2. Proportionality Prong

The Court of Chancery examined each of the board's defensive responses to American's proposal separately. [FN153] After finding that the board had reasonably perceived American's premium offer to be inadequate, the court held that the "poison pill [was] . . . a proportionate defensive response to protect its stockholders from . . . [the] 'low ball' bid." [FN154] The Court of Chancery reached a different result, however, with respect to the board's implementation of the repurchase program. [FN155]

The Court of Chancery found that Unitrin's repurchase program was a disproportionate response to American's threat based on two factual findings. [FN156] First, the court found that the repurchase program was not "'necessary"' for protecting Unitrin's stockholders from American's "'low ball"' negotiating ***453** strategy. [FN157] Second, it found that the board's strategy was designed to reserve for itself the ultimate decision of whether to merge with American. [FN158] The latter finding was reached by the Court of Chancery in large part due to its conclusion that not participating in the repurchase program would increase the Unitrin directors' holdings from 23% to as much as 28% of the company's stock. [FN159] Assuming that 90% of Unitrin's shareholders voted in a proxy contest which was opposed by the 28% block held by the company's management, American, a 14.9% shareholder, would have had to carry approximately 65% of the remaining shareholders in order to replace Unitrin's directors and nearly 75% in order to successfully proceed with the merger. [FN160] The Court of Chancery concluded that Unitrin's adoption of the repurchase program made a proxy contest a "'theoretical' possibility that American General could not realistically pursue." [FN161] From that reasoning, the court found that the measure was a necessarily disproportionate and unacceptable response because it foreclosed as a practical matter American's ability to "proxy around" the board's defensive impediments by electing directors of its own. [FN162]

After a brief, yet thorough, discussion of Delaware's purported assiduousness regarding board decisions interfering with the shareholder franchise, [FN163] the Supreme Court in Unitrin turned to its review of the Court of Chancery's decision enjoining the board's repurchase program as a disproportionate response to the threats accompanying American's offer. [FN164] The Supreme Court found that notwithstanding the Court of Chancery's conclusion that the repurchase program provided Unitrin's shareholder directors with a practical veto over American's proposals, a proxy contest remained a "viable" option for American. [FN165] Finding that there was no record to support the Court of Chancery's ***454** determination that Unitrin's shareholder directors would reject an excellent offer out of a desire to protect their directorships, [FN166] Delaware's high court took issue with the Court of Chancery's "presumption" that the holdings of Unitrin's directors rendered them interested and impartial. [FN167]

Quoting Time, the court stated that "'[t]he obvious requisite to determining the reasonableness of a defensive action is a clear identification of the nature of the threat."' [FN168] It then identified three generally recognized types of accepted threats: (1) opportunity loss, [FN169] (2) structural coercion, [FN170] and (3) substantive coercion. [FN171] The court categorized American's threat to Unitrin as a form of substantive coercion insofar as Unitrin's board feared that the company's shareholders might accept American's offer out of "ignorance or mistaken belief" of their assessment of its inadequacy. [FN172]

***455** The Supreme Court then stated that Unocal, as expounded by its progeny, warranted an inquiry into whether the repurchase program, coupled with the poison pill, was impermissibly draconian (i.e., coercive or preclusive) and, if not, whether it fell within a "'range of reasonableness."' [FN173]

The court reasoned that the mere fact that a self-tender offer by a company may "thwart" a hostile bid does not render such an offer inherently coercive. [FN174] Furthermore, a nondiscriminatory self-tender offer "does not necessarily preclude future bids or proxy contests by stockholders who decline to participate in the repurchase." [FN175] Because the repurchase program at issue in Unitrin was available to all shareholders who were free to sell or refrain from selling, the Supreme Court held that the repurchase program was not coercive. [FN176]

The court next inquired into whether the repurchase program, [FN177] in light of the poison pill, was impermissibly preclusive. It began by reiterating its earlier conclusion that a proxy contest remained theoretically available to American even in the event that the repurchase program was fully carried out by Unitrin's board. [FN178] From this premise, the court, citing Unocal, stated that "[i]f the stockholders of Unitrin are 'displeased with the action of their elected representatives, the powers of corporate democracy' remain available as a viable alternative to turn the Board out in a proxy contest." [FN179] In other words, the Supreme Court emphasized its belief as to the ability of Unitrin's shareholders to exercise their franchise via a proxy contest as central to its finding of an absence of preclusion. The court remanded to the Court of Chancery the ultimate issue of deciding whether the adoption of the repurchase program, when the poison pill had already been in place, was preclusive and, if not, whether it circumscribed the range of reasonableness threshold articulated in QVC. [FN180]

***456** D. Blasius Industries, Inc. v. Atlas Corp.

As demonstrated above, Delaware courts applying Unocal have been quite deferential in their review of defensive measures by boards responding to hostile takeovers. [FN181] One supposed exception appears to have been in response to board action aimed at impeding an acquiror's ability to wage a successful proxy contest to replace incumbent directors via the franchise. As stated by the Supreme Court, Delaware courts "ha[ve] been and remain [ ] assiduous in [their] concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising shareholders." [FN182] This Part examines a decision by the Court of Chancery centering on board action designed to restrict the free exercise of the shareholders' right to elect directors via the voting process.

In Blasius Industries, Inc. v. Atlas Corp., [FN183] Delaware's Court of Chancery examined the sustainability of defensive measures aimed at frustrating the shareholder franchise. Blasius Industries, Inc. (Blasius), a minority shareholder of Atlas Corp. (Atlas), proposed that Atlas effectuate a leveraged

restructuring of the corporation that would facilitate a large one-time cash dividend to its shareholders. [FN184] Following a meeting between representatives from the two companies, Atlas' representatives initially viewed the proposal as infeasible. [FN185]

After attempts for further meetings by Blasius were rebuffed by Atlas, Blasius delivered to Atlas a signed written consent that would have, among other things, "amend[ed] the Atlas bylaws to . . . expand the size of the board from seven to fifteen members--the maximum number under Atlas' charter, and . . . elect[ed] eight named persons to fill the new directorships." [FN186] Viewing Blasius' solicitation as "an attempt to take control of the Company," Atlas' board amended the company's bylaws to increase its size by two directors and appointed two individuals to fill the newly created positions. [FN187] This, of course, ensured that even if Blasius succeeded in its proxy solicitation, it would have been able to appoint only seven of Atlas' fifteen directors. Blasius responded ***457** by filing suit to reverse these actions. [FN188]

The record revealed that by increasing the size of Atlas' board, the present directors assured "that they were thereby precluding the holders of a majority of the Company's shares from placing a majority of new directors on the board through Blasius' consent solicitation." [FN189] The Court of Chancery placed heavy emphasis on the fact that Atlas' board was "principally motivated" by the intent to frustrate Blasius' proxy solicitation and to prevent Blasius from electing a majority of new board members. [FN190] Stated differently, the court found that Atlas' addition of two directors to its board precluded Blasius from electing a majority of directors, which, as a practical matter, impeded it from going forward with its restructuring proposal. [FN191]

Chancellor Allen stated that boards of directors may take defensive actions having the effect of defeating a threatened change in corporate control "when those steps are taken advisedly, in good faith pursuit of a corporate interest, and are reasonable in relation to a threat to legitimate corporate interests posed by the proposed change in control." [FN192] The court then discussed why the traditional business judgment rule did not apply to defensive decisions aimed at interfering with the shareholder franchise, ***458** even if taken with due care and in good faith. [FN193]

After commenting that "[t]he shareholder franchise [was] the ideological underpinning upon which the legitimacy of directorial power rests," [FN194] the Chancellor surmised that "[a]ction designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority." [FN195] Having concluded that board decisions designed to displace the shareholders' right to vote could not be reviewed under the traditional business judgment rule, [FN196] the Court of Chancery discussed its refusal to apply a per se rule invalidating all board actions primarily intended to frustrate the shareholder franchise. [FN197] The court stated that the Atlas board's only justification for its actions was that "[it knew] better than the shareholders what [was] in the corporation's best interest." [FN198] This rationale was quickly dismissed by the court as "irrelevant" when the defensive measure in question centered on the ability of shareholders to affect the composition of a company's board of directors. [FN199] Despite the board's good faith belief that Blasius' proposal was detrimental to the interests of Atlas and its shareholders, [FN200] the court opined that the board's defensive actions ***459** should have been channeled in alternative directions (e.g., informing shareholders of their views with the hopes of persuading them to reject the proposal). [FN201] "But there is a vast difference," wrote the court, "between expending corporate funds to inform the electorate and exercising power for the primary purpose of foreclosing effective shareholder action." [FN202]

Hence, the court concluded that board action "done for the primary purpose of impeding the exercise of stockholder voting power . . . . [requires] the board [to] bear [ ] the heavy burden of demonstrating a compelling justification for such action." [FN203] Working from this framework, the Chancellor found that because the board's actions effectively deprived Atlas' shareholders of the opportunity to decide for themselves the success of Blasius' action, the board, even if acting in good faith, breached the duty of loyalty it owed to the company's shareholders. [FN204]

While the "basic legal tenets" of the Court of Chancery's decision in Blasius have been accepted by the Supreme Court, [FN205] its holding has been limited considerably based on the facts of that case. [FN206] Specifically, the Delaware Supreme Court in Stroud v. Grace [FN207] held that Unocal applied to any defensive measure touching upon issues of control, irrespective of whether the measure in question implicated voting rights. [FN208] The court in Stroud stated that in evaluating cases where board action touches upon the shareholder voting process, a court must not ignore Blasius ***460** but must "recognize the special import of protecting the shareholders' franchise within Unocal's requirement that any defensive measure must be proportionate and 'reasonable in relation to the threat posed."' [FN209] The Supreme Court in Stroud concluded that a "board's unilateral decision to adopt a defensive measure touching 'upon issues of control' that purposefully disenfranchises its shareholders is strongly suspect under Unocal, and cannot be sustained without a 'compelling justification."' [FN210] This pronouncement notwithstanding, it remains unclear as to when Blasius' compelling justification test must be used within the framework of the Unocal doctrine, and under which circumstances it should be used as a separate standard of review. [FN211]

III

Chesapeake as a Model for Review

In Chesapeake Corp. v. Shore, [FN212] the Court of Chancery tackled the interrelationship between the Unocal and Blasius standards of review and, in the process, questioned the legitimacy of "substantive coercion" as a basis for justifying defensive responses to hostile bids. [FN213] This Part analyzes the claims of the parties in Chesapeake and the complexity that necessarily accompanies a court's decision to apply either of the two aforementioned standards of review.

Chesapeake involved two corporations in the specialty packing industry, each having similar strategic interests in acquiring the other. [FN214] Following Shorewood Packing Corporation's (Shorewood) acquisition of a small percentage of Chesapeake Corporation's (Chesapeake) stock, Shorewood's CEO and Chairman, Marc Shore, initiated two meetings with Thomas H. Johnson, Chesapeake's CEO, that "went nowhere." [FN215] After obtaining the approval of Shorewood's board, Shore informed Johnson of his company's intention to acquire Chesapeake for a forty-one percent premium over the company's market price. [FN216] Johnson responded ***461** that his company was not for sale [FN217] and Chesapeake's board unanimously rejected Shorewood's offer as inadequate. [FN218]

At a subsequent meeting between Johnson and Shore, Johnson expressed Chesapeake's interest in acquiring all of Shorewood's shares at a forty percent premium [FN219] and cautioned Shore that Chesapeake was virtually takeover proof. [FN220] Shorewood's board viewed the offer as so grossly inadequate that it did not seek additional financial advice. [FN221] The board then met by phone to consider a host of defensive bylaw changes, [FN222] the most controversial of which was a proposed supermajority bylaw amendment requirement that would have made it significantly more difficult for

insurgents to eliminate, among other things, the company's staggered board structure. [FN223] Shorewood's directors identified price inadequacy and substantive coercion as the two threats posed by Chesapeake's offer warranting the adoption of these defensive measures. [FN224]

***462** Undeterred, "Chesapeake commenced a tender offer for all the shares of Shorewood . . . [and] indicated that it intended to acquire any Shorewood shares remaining after closing the tender offer at the same price in a back end merger." [FN225] Chesapeake also initiated a proxy solicitation aimed at circumventing Shorewood's poison pill and amending Shorewood's bylaws to remove the company's staggered board structure and unseat the present board of directors. [FN226] That same day, Chesapeake sought an injunction by the Court of Chancery enjoining the Shorewood board's adoption of the defensive bylaws. [FN227]

Shorewood's directors challenged Chesapeake's tender offer as inadequate in price and on the basis that it posed the risk of stockholder confusion. [FN228] Shorewood also countered Chesapeake's proxy solicitation with one of its own that identified all of the issues that the board feared its stockholders might overlook in contemplating Chesapeake's offer. [FN229] One week before the case was scheduled to begin and after less than 1% of Shorewood's shareholders had tendered their shares to Chesapeake, Shorewood's board reduced the supermajority bylaw's voting provision from 66 2/3 % to 60%. [FN230]

At trial, Chesapeake sought a declaration that the bylaw provision was "invalid because [it] was intended to and ha[d] the effect of disenfranchising Chesapeake and precluding it from conducting a successful Consent Solicitation." [FN231] Not surprisingly, Chesapeake and Shorewood disagreed over whether the Blasius ***463** or Unocal standard of review applied. [FN232] While Chesapeake advocated the applicability of Blasius' "compelling justification" standard, arguing that the board's "primary purpose in adopting the Supermajority Bylaw was to interfere with or impede the exercise of the shareholder franchise," [FN233] Shorewood argued that Unocal's two-prong inquiry was the governing standard because its decision to adopt the bylaw was a defensive one made in response to Chesapeake's hostile bid. [FN234] Cognizant of Blasius' exacting standard, the court recognized the reality that "whether it applies comes close to being outcome-determinative in and of itself." [FN235]

The court then embarked on a detailed discussion of the interrelationship between Blasius and Unocal. [FN236] Addressed by the court in Chesapeake was the lack of clarity in Delaware caselaw as to whether the Unocal doctrine operated independently of Blasius or whether Blasius' compelling justification showing should be merged into Unocal's proportionality prong for defensive actions touching upon the shareholder voting process. [FN237] Based on the Supreme Court's decisions in Stroud and Unitrin, the Court of Chancery concluded that Unocal was the proper standard for assessing the board's adoption of the supermajority bylaw [FN238] and reasoned that to the extent that the bylaw was adopted for the "primary purpose" of interfering with the shareholder franchise, the bylaw could not survive review under Unocal absent a compelling justification. [FN239]

The court began its analysis by critiquing the threat of substantive coercion, [FN240] noting that the ubiquity of the threat in this context "without a serious examination of the legitimacy of that defense would undercut the purposes the Unocal standard of review was established to serve." [FN241] It next turned to the inconsistency ***464** of Shorewood's claims. Shorewood first argued that Chesapeake's offer posed the threat of substantive coercion because of the risk that its shareholders might not understand the inadequacy of the acquiror's bid. [FN242] That assertion, however, was belied by

Shorewood's attempt to justify its actions as not preclusive on the basis that its shareholders were sophisticated ones who could always come out in force to "proxy around" the company's defenses. [FN243]

While the Court of Chancery found sufficient evidence substantiating the price inadequacy threat relied on by Shorewood's board, [FN244] the court found the directors' substantive coercion threat to be unsupported. [FN245] The court noted that initial Shorewood board meetings were "devoid" of any mention of that threat. [FN246] More fundamentally, because Shorewood's directors admitted that they had disseminated all of the business information that they believed the company's shareholders could not understand, "[t]he most the . . . directors [were] able to credibly say [was] that stockholders [would] never understand the relevant information as deeply as directors do." [FN247] In rejecting this threat, the court also relied on the fact that eighty percent of Shorewood's ***465** stock was held by management and institutional investors and thus, the board would presumably have been able to dispel any misperceptions or confusion. [FN248]

While Shorewood's directors reduced the supermajority bylaw's voting provision from 66 2/3 % to 60%, "[t]he board . . . never considered whether it was reasonably practicable for Chesapeake or any other third party opposed by the board to win under these rules" [FN249] or "whether Chesapeake's lack of success in soliciting tenders should lead it to reconsider whether any supermajority voting requirement was needed." [FN250] Thus, on the day Shorewood's board adopted "the final Supermajority Bylaw, the board never assessed whether the supposed threat of confusion still existed." [FN251]

In discerning whether the supermajority bylaw was a proportionate and non- preclusive response, the court noted that while Unitrin required the defendant- board members to show "that it [was] 'realistically' attainable for Chesapeake to prevail in [the] consent solicitation to amend the Shorewood bylaws," [FN252] the Shorewood board had "simply made no judgment" as to this inquiry. [FN253] The 66 2/3 % supermajority bylaw requirement made it "mathematically impossible" for an acquiror like Chesapeake to succeed in a consent solicitation not supported by the Shorewood board assuming a 90% shareholder turnout. [FN254] With respect to the amendment lowering the supermajority bylaw requirement to 60%, the court found that the board had, once again, "ignored whether Chesapeake could 'realistically' attain the necessary votes to amend the Shorewood bylaws if the Shorewood board ***466** continued to oppose that endeavor." [FN255]

The court likened the requisite disinterested majorities to those of "sham elections in dictatorships" [FN256] and noted that "[t]he defendants ha[d] presented no reliable evidence to suggest that Chesapeake or any other insurgent could achieve such a high level of support in the face of management opposition." [FN257] To wit, the court found the supermajority bylaw to be preclusive. That finding notwithstanding, however, the court additionally held that the supermajority bylaw did not fall within a range of reasonableness. [FN258]

The court viewed "[t]he more important proportionality problem [as being] the fact that the Supermajority Bylaw [was] an extremely aggressive and overreaching response to a very mild threat." [FN259] In light of the protective measures already in existence and thus available to Shorewood's board, [FN260] the court found that the board never considered the "less extreme and more

proportionate options" of adopting a more "aggressive communications plan" or attempting to negotiate with Chesapeake for a higher bid. [FN261]

Instead, the board adopted a supermajority bylaw that [could] only be surmounted by obtaining over eighty-eight percent of the disinterested votes, assuming a ninety percent turnout. Yet the board has been unable to demonstrate that such an outcome can be achieved. Ironically, its primary argument in that regard is that Shorewood's stockholder base is overwhelmingly comprised of sophisticated and highly mobilized stockholders who will turn ***467** out in droves. These, of course, are the very same stockholders who are, the defendants say, unable to sort out the issues and make a rational judgment for themselves. [FN262]

The court had little trouble concluding that the board had acted outside of a range of reasonableness and thus, had failed to meet its Unocal burden. [FN263]

In distinguishing the case at hand from Unitrin, the Court of Chancery in Chesapeake noted that Unitrin emphasized the need to defer to corporate board decisions adopting defensive measures, but "in no way suggest[ed] that the court ought to sanction a board's adoption of very aggressive defensive measures when that board ha[d] given little or no consideration to relevant factors and less preclusive alternatives." [FN264]

The Chesapeake court also invalidated the board's actions under Blasius. Finding that the Shorewood directors had "clearly acted" to compromise the shareholders' ability to freely exercise their franchise, [FN265] the court found that the board's belief that it, as opposed to the shareholders, knew better what was best for the company "provide[d] no legitimate justification at all." [FN266] This, compounded by the fact that the dangers presented by Chesapeake's offer were "mild," prevented Shorewood's board from providing a compelling justification for the adoption of the bylaw. [FN267]

IV

The Interrelationship Between Unocal and Blasius

As recognized by Chancellor Allen, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy ***468** of directorial power rests." [FN268] The court in Chesapeake explored the extent to which Blasius was "viable as a standard of review independent of Unocal in a case where Unocal would otherwise be the [governing] standard of review." [FN269] This Article has articulated Delaware's justification for displacing the traditional business judgment rule as the default standard for evaluating those situations where the interests of corporate management and shareholders have a heightened potential for divergence. [FN270] In theory, Unocal and its progeny create a takeover jurisprudence mindful of the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders" when assessing the fiduciary duties of directors implementing defensive measures. [FN271] In practice, however, one must be suspicious of a standard where the "just say no" defenses of corporate culture [FN272] and shareholder mistake [FN273] suffice under Unocal's supposed enhanced scrutiny as justifications for rejecting the offers and substantial premiums of unwelcome suitors. This skepticism, of course, is only made worse by the ubiquitous and universally available nature of these claims. [FN274]

With respect to defensive actions infringing upon the shareholder franchise, the concerns attributable to the judiciary's deferential application of Unocal are compounded even further. No time is more critical throughout a corporation's life than when it is the subject of takeover efforts. While Unocal provides that the fiduciary duties owed by directors to the shareholders obligate them to respond proportionately to perceived threats, the ultimate decision on matters involving corporate control is one reserved for the shareholders as a matter of right. [FN275]

***469** Unocal acknowledges the omnipresent specter that directors responding to unwelcome bids may be acting with entrenchment motives. Consistent with that, Blasius reflects a recognition that defensive measures implicating the shareholders' voting rights present even greater potential for abuse and concern. "'The theory of our corporation law confers power upon directors as the agents of the shareholders; it does not create Platonic masters."' [FN276] Accordingly, board actions that shield directors from the shareholder electorate are presumptively suspect and must be scrutinized with an eye toward the pervasive concerns originally articulated in Unocal and Blasius and subsequently espoused by the Supreme Court in Stroud and Unitrin. While these and other opinions contain numerous passages indicating that Delaware courts already do this, [FN277] in practice, this has not been the case.

In Stroud and Unitrin, for example, the Supreme Court purported to infuse Blasius' "basic legal tenets" [FN278] into Unocal's two-prong inquiry when assessing director action touching upon the shareholder franchise. Recall that Stroud held Unocal applicable in all situations where a board takes defensive measures in reaction to a perceived threat irrespective of whether the action touches upon issues of control. [FN279] Stroud sought to reconcile the interrelationship between Blasius and Unocal by merging Blasius' mandate into Unocal's proportionality inquiry, thereby appearing to stand for the principle that "strongly suspect" measures of this sort would pass muster under Unocal only if ***470** mitigated by a compelling justification. [FN280]

On its face, this coordinated approach seems sufficient for protecting the sanctity of the shareholder franchise in a manner consistent with the policy concerns articulated by both the Supreme Court in Unocal and the Court of Chancery in Blasius. [FN281] Indeed, "[i]n application, the 'preclusiveness' or 'coerciveness' inquiry under Unocal/Unitrin and the inquiry into the board's 'primary purpose' under Blasius, are not easily separable." [FN282] The effectiveness of this approach, however, only goes as far as the judiciary's collective willingness to fulfill Unocal's directive. [FN283] It is the Supreme Court's failure to apply that doctrine forcefully that fuels this Article's call for change. [FN284]

The Court of Chancery observed in Chesapeake that Unitrin "seem[ed] to go even further than Stroud in integrating Blasius' concern over manipulation of the electoral process into the Unocal standard of review." [FN285] Unfortunately, the Supreme Court's bark in Unitrin appears to have been greater than its bite. After espousing notions of the court's "assiduous[ness] in its concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising shareholders" [FN286] and citing to Stroud's adoption of Blasius' "'basis legal tenets,"' [FN287] the Supreme Court in Unitrin proceeded to assess the target's adoption of the repurchase program and other defenses without ever citing to Blasius or mentioning its compelling justification standard again. [FN288] This was so in spite of the fact that the dissident shareholder ***471** in that case would have had to procure the votes of nearly sixty-five percent of the company's non-management shareholders to replace Unitrin's board and roughly seventy-five percent to proceed with its merger plans. [FN289] It is one thing to state, as the Supreme Court did in Stroud, that defensive actions touching upon the shareholder franchise will be

assessed under a heightened Unocal standard demanding a compelling justification before they will pass muster as reasonably proportionate. It is quite another for the court, after purportedly merging Blasius' compelling justification standard into the Unocal test, to simply pass over the heightened showing as if it was never there. [FN290]

Even assuming as correct the Supreme Court's finding in Unitrin that a proxy contest remained a "viable" alternative for American, one would think that Blasius' "basic legal tenets" would have at least warranted some discussion by the court considering the large percentage of non-director shareholders that the insurgent would have had to carry in order to prevail. The Court of Chancery in Chesapeake noted that the supermajority bylaw in question in that case made it "mathematically impossible" for the insurgent to wage a successful proxy contest that was not supported by management. Does that mean that those situations falling somewhere on the spectrum between "viable" and "impossible" will be found by courts to pass muster under Unocal? If management can simply acquire a significant voting block in its company (e.g., over twenty-five percent like the directors in Unitrin) and still not be found to have precluded an unwelcome bidder from prevailing in a consent contest, the current approach advanced by the court in Stroud and Unitrin is not strong enough. Because Unocal is not being applied "with a gimlet eye out for inequitably motivated electoral manipulations or for subjectively well-intentioned board action that has preclusive or coercive effects," [FN291] this Article surmises that the "Unocal/Unitrin analytical framework [fails to] adequate[ly] capture the voting franchise concerns that animated Blasius." [FN292]

***472** The policy considerations consistently lauded by the Supreme Court more than justify adherence to that court's purported commitment to protecting the shareholder franchise--if anything, they demand it. Unfortunately, it is the reluctance of the courts to protect rigorously the shareholder voting process within the framework of Unocal that necessitates a divergent approach from the one currently advanced by the court in Stroud. [FN293] Specifically, the judiciary's unwillingness to do little more than proclaim its "assiduous . . . concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising shareholders" begs the question of whether Blasius' compelling justification standard should be bifurcated from Unocal's two-part showing for assessing those defensive actions touching upon the shareholder franchise.

While this approach is tempting at first blush, the mere act of severing Blasius from Unocal does nothing to ensure that courts will opt for that doctrine as opposed to the Unocal one. Indeed, if Delaware courts are diffident as a collective body about applying Unocal with the spirit of Blasius under the approach advanced by Stroud, why would they suddenly choose to apply Blasius as a free standing test all unto itself? The answer, this Article submits, is that against the backdrop of Blasius' current "primary purpose" holding, they would not. [FN294] As such, this Article advocates recalibrating the scope of Blasius' standard of review to envelop those defensive actions implemented by corporate boards having a substantial effect upon the ability of shareholders to exercise their franchise freely. [FN295]

***473** It is true that Blasius' holding has been limited to board actions taken with the "primary purpose" of compromising the shareholders' ability to vote. [FN296] The defendant directors before the Court of Chancery in Blasius, however, did not dispute that they were principally motivated by the desire to foreclose the dissident's ability to elect a majority of the board. [FN297] Unlike the facts before the court in Blasius, "[t]he line between board actions that influence the electoral process in legitimate ways

. . . and those that preclude effective stockholder action [in the typical case] is not always luminous." [FN298] Considering that directors in Delaware are protected from being required to engage in self-flagellation when faced with the prospect of litigation over allegedly wrongful corporate conduct, [FN299] the preliminary threshold for Blasius' mandate in the majority of cases is even harder to clear. The ability of corporate boards, with the assistance of sophisticated counsel and advisors, to craft the nuances of most transactions to circumvent Blasius' current reach only exacerbates this reality. [FN300] The exacting primary purpose showing under Blasius, therefore, is, as a practical matter, inherently unascertainable for the vast majority of plaintiff--shareholders who are alleged to have been aggrieved in this setting. [FN301] That being said, why ***474** should the reach of Blasius' protective doctrine be confined solely to the narrow facts of that case?

Accepting the stature of the shareholder franchise as the "ideological underpinning upon which the legitimacy of directorial power rests," [FN302] few could disagree with Chancellor Allen's recognition that "matters involving the integrity of the shareholder voting process involve consideration[s] not present in any other context in which directors exercise delegated power." [FN303] In order to give teeth to the Supreme Court's proclamation that the shareholder franchise will be respected as the cornerstone of corporate democracy, Blasius' compelling justification standard must be expanded to apply to more situations than just those where a defendant-board admits that it was acting with the primary motivation of disenfranchising its shareholders. After all, "[a]bsent confessions of improper purpose, the most important evidence of what a board intended to do is often what effect its actions have." [FN304]

It is not this Article's intent to subject defensive measures having a de minimis or tangential impact on the voting rights of shareholders to a compellingly stringent review. Instead, only those defensive measures having a "substantial effect" on the shareholder franchise should be assessed under Blasius' demanding test. [FN305] Assume a scenario similar to the one in Chesapeake but involving a larger and more widely traded target in which management owned a smaller percentage of the company's stock and the supermajority bylaw amendment provision required approval by sixty percent of the company's shareholders. Although the board would be unable to demonstrate that its defensive actions ***475** did not have an "effect" on the shareholders' ability to vote freely, one could imagine a court finding that its actions did not have a "substantial effect" on the shareholder franchise depending on the circumstances surrounding the dissident's ability to prevail in a proxy contest. By way of contrast, had this Article's substantial effect test been available at the time of Unitrin, the repurchase program adopted by Unitrin's board would have arguably warranted review under Blasius' demanding inquiry notwithstanding the Supreme Court's finding that a successful proxy remained a "viable" possibility for American.

While Delaware courts have voiced their reluctance to apply Blasius because of its "onerous" burden, [FN306] the preeminance of the franchise in Delaware's corporate governance heirarchy justifies subjecting presumptively suspect defensive measures to careful scrutiny. This Article is cognizant of the arguably wide range of defensive measures that its substantial effect approach would reach. That being said, it is this Article's position that if inherently interested directors are going to implement measures substantially compromising the franchise at the time of a corporation's most important transaction, it is better to apply a more exacting standard protecting shareholders than a deferential one favoring directors. After all, if defensive measures substantially impacting the franchise are truly necessary for safeguarding the best interests of the corporation and its shareholders, who better situated than the directors to justify those measures? In light of the foregoing, therefore, this Article submits that

its substantial effect test will better facilitate protections for shareholders in conformity with the "ideological underpinning upon which the legitimacy of directorial power rests." [FN307]

Conclusion

The policy concerns underlying this Article's call for an expanded reading of Blasius for those defensive actions having a substantial effect upon the shareholder franchise are consistent with those which the Delaware judiciary already purports to acknowledge and accept. The compelling justification threshold of judicial review in Blasius recognizes that directors serve at the behest of shareholders as their agents and, to that end, seeks to ensure that directorial actions compromising the shareholders' ***476** collective voices in this context will be assessed under a significantly heightened standard of review.

On its face, merging Blasius' compelling justification standard into the second prong of Unocal, as contemplated by the Delaware Supreme Court in Stroud, addresses the fundamental concerns substantiating Blasius' standard of review in the first place. [FN308] The judiciary's reluctance to apply Unocal with the "spirit of Blasius," however, is where this approach inevitably falls apart. [FN309] As such, this Article has opined that its expanded approach is both warranted and necessary for protecting the aforementioned pillars of corporate governance upon which Delaware's renowned jurisprudence rests. [FN310]

This approach does not foreclose and/or set forth a standard that cannot be met by target boards whose defensive actions have a "substantial effect" on the communicative voices of shareholders. Instead, it simply ensures that when suspect measures substantially infringe upon the ability of shareholders to control their corporation's destiny, the inherent conflict of interest concerns that motivated Unocal and Blasius will be adequately taken into account and provided for. This, the Delaware judiciary already professes to do. Readjusting Blasius' reach will empower courts with a more workable framework for actually doing so.

[FNa1]. B.B.A., Pace University, 1998; J.D., Hofstra University School of Law, 2001. While this manuscript was drafted during the author's clerkship with the Delaware Court of Chancery, the views expressed herein do not necessarily reflect those of that court. The author wishes to express his gratitude to the Honorable William B. Chandler III, the Honorable John W. Noble, and the Honorable Leo E. Strine, Jr., for their invaluable comments and insights. The author additionally acknowledges with appreciation the helpful assistance of Kenneth Horton, Timo Rehbock, and Julian Velasco on earlier drafts. Finally, and most notably, the author dedicates this Article to his fiancée, Loneve Humbert, whose unwavering love, example, and support made the publication of this manuscript a reality.

[FN1]. Alexis de Tocqueville, Democracy in America, in We, the People: Great Documents of the American Nation 482, 484 (Jerome B. Agel ed., 1997).

[FN2]. For a definition and discussion of hostile takeovers, see infra Part I.A.

[FN3]. As of the turn of this century, strategic mergers have become the predominant vehicle for effectuating complex business acquisitions. See Pamela A. Vlahakis, Takeover Law and Practice 2000, PLI 799, 809 (Nov. 2000). By no means, however, has the importance of hostile takeovers diminished. To the contrary, powerful companies including IBM, Pfizer, Vodafone, and Bank of New York, made hostile bids for competitors at the end of the 1990s. See id. For a discussion of the different waves of hostile takeovers and the current climate of hostile takeover activity in the acquisition market, see infra Part I.B.

[FN4]. This Article focuses exclusively on Delaware corporate law. Delaware has become "the dominant choice as state of incorporation for the largest U.S. companies" for reasons including "a preference for Delaware law." Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. Cin. L. Rev. 1061, 1061 (2000) (explaining "the role of the Delaware courts as central to Delaware's dominance of the market for corporate charters"); see also Leo Herzel & Laura D. Richman, Forward to 1 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations and Business Organizations F-1, F-6 (3d ed. 1998) ("The economies of scale created by the high volume of corporate litigation in Delaware contribute to an efficient and expert court system and bar."); 1 Dennis J. Block et al., The Business Judgment Rule: Fiduciary Duties of Corporate Directors 3 (5th ed. 1998) ("[T]he Delaware court system often is viewed as 'the Mother Court of corporate law."') (quoting Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1343 (7th Cir. 1990), rev'd on other grounds, 500 U.S. 90 (1991)).

[FN5]. See infra Part I.D. (discussing the inherently divided interests of directors in this context and the rationale for displacing the traditional business judgment rule as the default standard of judicial scrutiny).

[FN6]. 493 A.2d 946 (Del. 1985). For a discussion of the landmark Unocal decision, see infra Part II.A.

[FN7]. See Lyman Johnson, The Modest Business Judgment Rule, 55 Bus. Law. 625 (2000).

[FN8]. For a discussion of Unocal and its progeny, see infra Part II.

[FN9]. See, e.g., Ronald J. Gilson & Bernard S. Black, The Law and Finance of Corporate Acquisitions 849 (1995). Gilson and Black state that:

> Unocal and [its progeny] can be read to suggest that ... review [under that test] is primarily a formal, rhetorical instruction rather than a substantive standard of review. On this view, the new standard ... serves chiefly to signal judicial concern and to invite planners to proceed with their defenses only after constructing a record that demonstrates reasonableness and articulates a "threat."

Id. (citation omitted). See also Jeffrey N. Gordon, "Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett, 19 Cardozo L. Rev. 511, 515-16 (1997); Mark J. Loewenstein, Unocal Revisited: No Tiger in the Tank, 27 J. Corp. L. 1, 2-4 (2001); Robert B. Thompson & D. Gordon Smith, Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers, 80 Tex. L. Rev. 261, 262 (2001). Moreover, because the Delaware Supreme Court has significantly compromised the enhanced level of review for board action touching upon the shareholder franchise, this Article opines that Blasius' threshold showing should be expanded to ensure

that suspect measures substantially infringing on the shareholder voting process will be strictly scrutinized. See infra Part IV.

[FN10]. 771 A.2d 293 (Del. Ch. 2000).

[FN11]. 564 A.2d 651 (Del. Ch. 1988).

[FN12]. For a discussion of the Blasius decision, see infra Part II.D.

[FN13]. See Blasius, 564 A.2d at 66l.

[FN14]. As articulated by the Court of Chancery in Chesapeake, "[b]ecause the [Blasius] test is so exacting--akin to that used to determine whether racial classifications are constitutional--whether it applies comes close to being outcome-determinative in and of itself." Chesapeake, 771 A.2d at 319- 20.

[FN15]. See Stroud v. Grace, 606 A.2d 75, 82 (Del. 1992).

[FN16]. See id. at 92 n.3.

[FN17]. Blasius, 564 A.2d at 659.

[FN18]. 651 A.2d 1361 (Del. 1995).

[FN19]. More specifically, a takeover is defined as:

> [A]n attempt by a bidder (raider) to acquire control of a subject company (target) through acquisition of some or all of its outstanding shares. Most commonly, takeover bids are made directly to shareholders of the target as a cash tender offer or as an exchange offer of raider securities for target stock.

1 Martin Lipton & Erica H. Steinberger, Takeovers & Freezeouts § 1.01[2] (2002).

[FN20]. See id.

[FN21]. Lipton and Steinberger define "hostile takeovers" as "offer[s] made directly to target shareholders, without management approval." Id. They continue:

> The takeover process is fundamentally a process of bargaining and negotiation. As bidders develop new and more aggressive techniques to make any corporation a potential target and to increase their ability to consummate the acquisitions they attempt, target corporations counter with new defensive techniques designed for the most part to increase the bargaining position of the board of directors. No takeover defense technique (other than concentrating the voting securities in friendly hands) has ever made a [Delaware] corporation acquisition-proof. Defensive techniques have, however, increased the leverage of the board of directors in finding a better deal.

Id. at § 1.01[1].

[FN22]. For an account of the history and trends of corporate mergers and acquisitions in the United States, see generally Malcolm Salter & Wolf Weinhold, Merger Trends and Prospects for the 1980's (1980), excerpted in Gilson & Black, supra note 9, at 12, 12-39.

[FN23]. See Laurence Zuckerman, Shades of the Go-Go 80's: Takeovers in a Comeback, N.Y. Times, Nov. 3, 1994, at A1 (observing that "predatory" hostile takeovers dominated acquisition practice in the 1980s, "when as much as 25 percent of all deals were hostile"). The heightened takeover activity of the 1980s was fueled largely by the ready availability of credit and capital that dominated that period. See 1 Arthur Fleischer, Jr. & Alexander R. Sussman, Takeover Defense § 1.01, at 1-3 (6th ed. Supp. 2002).

[FN24]. Stanley S. Arkin, Causality in Insider Trading, N.Y. L.J., Apr. 8, 1993, at 3.

[FN25]. Fleischer, Jr. & Sussman, supra note 23, § 1.01, at 1-3.

[FN26]. See Marcel Kahan & Edward B. Rock, How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law, 69 U. Chi. L. Rev. 871, 879 (2002).

[FN27]. See John Elsen, The Best of Times, Investment Dealers Digest, Oct. 16, 1995, at 14-15, reprinted in Samuel C. Thompson, Jr., Business Planning for Mergers and Acquisitions 19-20 (1997) (stating that "[t]he takeover is now considered somewhat of a model for hostile bids, with its blowout initial offer to keep out potential rivals, followed by a modest sweetener to make the deal friendly").

[FN28]. See Fleisher, Jr. & Sussman, supra note 23, § 5.01, at 5-5.

[FN29]. See id. § 5.01[B][1], at 5-7 to 5-9.

[FN30]. See id.

[FN31]. See id.

[FN32]. See id. § 5.02[B][1], at 5-21 to 5-23.

[FN33]. See Del. Code Ann. tit. 8, § 211(b) (2000) ("An annual meeting of stockholders shall be held for the election of directors. ..."); see also Balotti & Finkelstein, supra note 4, § 4.6, at 4-16 ("[T]he general rule is that the term of a director is one year unless the board is classified by having staggered terms pursuant to Section 141(d) of the General Corporation Law.").

[FN34]. See Del. Code Ann. tit., 8 § 141(d) (2000).

[FN35]. See id.; see also Balotti & Finkelstein, supra note 4, § 4.6, at 4-16 to 4-17.

[FN36]. As discussed previously, one of the few options available for an acquiror proceeding without the consent of current management is to "proxy around" the target's board with the hope of gaining control and appointing directors more favorable to the intended transaction. As such, classified boards inhibit the ability of acquirors to move quickly, thus deterring many bidders from pursuing hostile transactions.

[FN37]. For a comprehensive and in-depth discussion of the business judgment rule, see generally Block et al., supra note 4, at 18-104.

[FN38]. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (citing 8 Del. Code Ann. tit., 8 § 141(a) (2000)), overruled on other grounds Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[FN39]. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987) (citing Aronson, 473 A.2d at 812). When a court invokes the business judgment rule, it assesses the actions of corporate management not by looking at the outcome of a given decision, but instead with an eye toward the manner and procedure in which the decision at issue was made. See Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 n.17 (Del. 1994); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). In other words, the substance of board action under the traditional business judgment rule is virtually immune from second-guessing by courts after the fact. See Paramount, 637 A.2d at 45 n.17.

[FN40]. William A. Klein & J. Mark Ramseyer, Business Associations: Cases and Materials on Agency, Partnerships, and Corporations 323, 323 (3d ed. 1997).

[FN41]. See Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995); Paramount, 637 A.2d at 45 n.17; Aronson, 473 A.2d at 811-12.

[FN42]. See Cinerama, 663 A.2d at 1162; see also In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 967-68 (Del. Ch. 1996).

[FN43]. See Block et al., supra note 4, at 954; see also Fleischer, Jr. & Sussman, supra note 23, § 3.01, at 3-6 ("The traditional business judgment rule has been modified in Delaware ... as it applies to defensive actions by a target board to resist an unsolicited offer and to board actions in the environment of a sale of control of the company.").

[FN44]. The court in Unocal recognized that "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). It has become generally recognized that the "omnipresent specter" motivating the court in Unocal was entrenchment. See infra note 59.

[FN45]. See Unocal, 493 A.2d at 954-55.

[FN46]. See id.

[FN47]. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).

[FN48]. Unocal, 493 A.2d at 955. The court in Unocal stated that the directors could satisfy the reasonableness prong by making a showing of good faith and conducting a reasonable investigation. See id. "Furthermore," continued the court, "such proof is materially enhanced ... by the approval of a

board comprised of a majority of outside independent directors who have acted in accordance with the foregoing standards." Id. The Delaware Supreme Court noted a number of examples of coercive threats which included "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders ... the risk of nonconsummation, and the quality of securities being offered in the exchange." Id.

[FN49]. Id.

[FN50]. See Unitrin, 651 A.2d at 1373 ("The common law pronouncement in Unocal of enhanced judicial scrutiny, as a threshold or condition precedent to an application of the traditional business judgment rule, is now well known.").

[FN51]. A selective tender offer involves an offer to purchase stock from a restricted class of the target's shareholders. In a selective self-tender offer, therefore, a company excludes certain shareholders from its offer to repurchase its securities. For a discussion of Unocal's selective self-tender offer, see infra text accompanying notes 66-71.

[FN52]. For a discussion of the two-tier front-loaded tender offer initiated by Mesa, see infra text accompanying notes 61-65.

[FN53]. Unocal, 493 A.2d at 949.

[FN54]. Id. Ironically, the Securities and Exchange Commission (SEC) agreed with the Court of Chancery's bright line rejection of discriminatory self-tender offers, having amended its rules to prohibit issuer tender offers other than those available to all shareholders. See 17 C.F.R. § 240.13e- 4(f)(8) (2000).

[FN55]. Unocal, 493 A.2d at 953.

[FN56]. Id. As support for this conclusion, the Supreme Court relied on the "large reservoir of authority" granted to boards of directors which derive their powers from the Delaware General Corporation Law. See id. (citing Del. Code Ann. tit. 8, § 160(a) (2000)). The court later stated that "the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of the source." Id. at 954. This conclusion allowed the court to find that while Unocal's board still owed Mesa, a minority shareholder, the cornerstone duties of due care, good faith, and loyalty, the "destructive threat that Mesa's tender offer was perceived to pose ... [triggered] a supervening duty to protect the corporate enterprise, which includes the other shareholders, from threatened harm." Id. at 958.

[FN57]. See id. at 954.

[FN58]. See id. The court reasoned:

> When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders. In that respect a board's duty is no different from any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of

> business judgment. There are, however, caveats to a proper exercise of this function. Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders [in hostile settings], there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.

Id. (citation omitted).

[FN59]. See id. While Unocal itself fails to address precisely why directors have an inherent conflict of interest in this setting, extensive commentary and subsequent caselaw make clear that the omnipresent concern underlying the court's decision in that case was management entrenchment. See J. Travis Laster, Exorcizing the Omnipresent Specter: The Impact of Substantial Equity Ownership by Outside Directors on Unocal Analysis, 55 Bus. Law. 109, 112-16 (1999). The Unocal test places the burden on defendant directors to show that they acted reasonably in response to perceived threats. See Unocal, 493 A.2d at 955. Recall that because the business judgment rule presumes that management decisions are made on an informed basis and in good faith, the rule places the burden on plaintiffs to rebut that presumption. See supra Part I.D. The enhanced scrutiny of Unocal, therefore, defers this presumption and flips the initial burden of persuasion to defendants.

[FN60]. See Unocal, 493 A.2d at 954; see also supra text accompanying notes 48-49 (quoting Unocal's pronouncement of its two-prong standard).

[FN61]. The court found that "the threat posed was viewed by the Unocal board as a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail." Unocal, 493 A.2d at 956.

[FN62]. See id.

[FN63]. See id.

[FN64]. Id.

[FN65]. See id. at 956.

[FN66]. Id.

[FN67]. See id.

[FN68]. See id.

[FN69]. See id. The court defined the term greenmail as "the practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover." Id. at n.13.

[FN70]. Id. at 956.

[FN71]. Id.

[FN72]. See id. at 957 ("If the board of directors is disinterested, has acted in good faith and with due care, its decision in the absence of an abuse of discretion will be upheld as a proper exercise of business judgment."). For a more detailed discussion of the business judgment rule, see supra Part I.D. While outside its scope, this Article acknowledges the scholarly debate as to whether applying the business judgment rule after Unocal's two-part showing is necessary. See William T. Allen et al., Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law, 56 Bus. Law. 1287, 1311 (2001) ("[O]nce the target company board's defensive actions are found to satisfy or fail the Unocal [sic] test, any further judicial review of those actions under the business judgment [rule] is analytically and functionally unnecessary.").

[FN73]. Unocal, 493 A.2d at 958.

[FN74]. The depiction of caselaw that follows in this Part is intended to serve two purposes. First, these cases illustrate how courts apply Unocal's two-part showing in practice when faced with different factual threats and settings. Second, these cases identify the pragmatic reasons underlying the criticism that Unocal has been watered down to that of a dressed up business judgment rule.

[FN75]. 500 A.2d 1346 (Del. 1985).

[FN76]. See id. at 1348 n.2. For a discussion of poison pills, see supra Part I.C.1.

[FN77]. Moran, 500 A.2d at 1350. More specifically, Household's minutes revealed that its lawyer had recommended the defensive measure:

> [B]ased on his understanding that the Board was concerned about the increasing frequency of 'bust-up' takeovers, the increasing takeover activity in the financial service industry, ... and the possible adverse effect this type of activity could have on employees and others concerned with and vital to the continuing successful operation of Household even in the absence of any actual bust-up takeover attempt.

Id. at 1349.

[FN78]. See id. at 1353.

[FN79]. See id. at 1356.

[FN80]. See id.

[FN81]. Id.

[FN82]. See id.

[FN83]. See id.

[FN84]. See id.

[FN85]. See id. at 1357.

[FN86]. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387 (Del. 1995) (summarizing the holding of the court in Moran).

[FN87]. See Moran, 500 A.2d at 1354.

[FN88]. Id. The court viewed the actual adoption of the poison pill as having little effect on the structure of the corporation. See id. As stated by the court, "[t]he Board does not now have unfettered discretion in refusing to redeem the Rights. The Board has no more discretion in refusing to redeem the Rights than it does in enacting any defensive mechanism." Id.

[FN89]. See id. at 1357.

[FN90]. 506 A.2d 173 (Del. 1986).

[FN91]. See id. at 176-79.

[FN92]. See id. at 180-81. The threat relied on by Revlon's board was that Pantry Pride's offer was "grossly inadequate." Id. at 181.

[FN93]. Id. at 182.

[FN94]. Id.

[FN95]. See id. (stating that the board "no longer faced threats to corporate policy and effectiveness, or to the stockholders' interests, from a grossly inadequate bid. ... The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price from the stockholders at a sale of the company").

[FN96]. See id. In a typical lock-up transaction, the target issues considerable amounts of stock or contingent stock rights cheaply to a friendly third party (in this case Forstmann). See id. at 183. This is designed to make the acquisition more difficult and expensive for would-be acquirors because more shares have to be procured. See id.

[FN97]. See id. ("[T]he result of the lock-up was not to foster bidding, but to destroy it [to the detriment of Pantry Pride].").

[FN98]. See id. at 184. A no-shop clause is a common provision contained in an acquisition agreement that deters targets from seeking other bids for a specified period of time. See Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 97 (Del. Ch. 1999). An acquiror will often negotiate this type of agreement to restrict a target's ability to entertain other offers to the exclusion of its intended one. See id.

[FN99]. Revlon, 506 A.2d at 184. The court continued, stating that in certain circumstances, favoritism of a white knight might yield the highest bid for a company's shareholders once a sale has become inevitable, "but when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfil their enhanced Unocal duties by playing favorites with contending factions." Id.

[FN100]. 571 A.2d 1140 (Del. 1989).

[FN101]. See id. at 1146.

[FN102]. See id.

[FN103]. See id. at 1147.

[FN104]. Id.

[FN105]. At the time of Paramount's $175 offer, Time's shares were trading at $126 per share. See id. The market value of Time's stock skyrocketed to $170 per share less than a day after Paramount's announcement. See id.

[FN106]. See id.

[FN107]. Id. at 1148.

[FN108]. See id. at 1149. Recall that just prior to Paramount's opening offer of $175 per share, Time's stock was trading at $126 per share. See id. at 1147.

[FN109]. See id.

[FN110]. The Supreme Court rejected Paramount's claim that Revlon applied because of the absence of any evidence supporting the conclusion that Time and Warner's deal put the company up for sale. See id. at 1149-50. The court identified two circumstances where Revlon was implicated: first, where "a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company"; and second, "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company." Id. at 1150. The Supreme Court agreed with the Court of Chancery that Time's adoption of "structural safety devices alone [did] not trigger Revlon" but was instead subject to analysis under Unocal. See id. at 1151.

[FN111]. See id. at 1153.

[FN112]. See id. at 1154.

[FN113]. Id. The court then quoted the Court of Chancery's statement that this inquiry "'requires an evaluation of the importance of the corporate objective threatened; alternative methods of protecting that objective; impacts of the 'defensive' action, and other relevant factors."' Id. (quoting Chancellor Allen below).

[FN114]. See id. at 1154-55.

[FN115]. Id.

[FN116]. See id. As a practical matter, however, the combination of Time and Warner foreclosed Paramount's ability to go forward with its strategic desire to acquire Time alone. Even assuming that the acquisition of the combined Time-Warner entity remained an attractive option for Paramount, the court did not address whether the shear enormity of the merged corporation precluded a company like Paramount from succeeding.

[FN117]. See, e.g., Robert B. Thompson, Shareholders as Grown-Ups: Voting, Selling, and Limits on the Board's Power to "Just Say No", 67 U. Cin. L. Rev. 999 (1999); Neil C. Rifkind, Note, Should Uninformed Shareholders be a Threat Justifying Defensive Action by Target Directors in Delaware?: "Just Say No": After Moore v. Wallace, 78 B.U. L. Rev. 105 (1998); Janet E. Kerr, Delaware Goes Shopping for a "New" Interpretation of the Revlon Standard: The Effect of the QVC Decision on Strategic Mergers, 58 Alb. L. Rev. 609 (1995); Robert A. Prentice & John H. Langmore, Hostile Tender Offers and the "Nancy Reagan Defense": May Boards "Just Say No" ? Should They be Allowed To?, 15 Del. J. Corp. L. 377 (1990); see also supra note 9.

[FN118]. See supra Part II.B.3.

[FN119]. See Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 36 (Del. 1994).

[FN120]. See id. at 38.

[FN121]. See id. at 43.

[FN122]. Id. at 39.

[FN123]. See id.

[FN124]. See id.

[FN125]. See id. The termination fee required Paramount to pay Viacom $100 million if "(a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction." Id. at 39.

[FN126]. See id. at 43-44.

[FN127]. See id.

[FN128]. Id. at 48.

[FN129]. See id.

[FN130]. See id. at 49.

[FN131]. Id.

[FN132]. Id.

[FN133]. See id.

[FN134]. Id.

[FN135]. 651 A.2d 1361 (Del. 1995).

[FN136]. Id. at 1368.

[FN137]. Id. at 1369.

[FN138]. See id.

[FN139]. See id.

[FN140]. See id.

[FN141]. See id. at 1370.

[FN142]. Id.

[FN143]. Id.

[FN144]. See id.

[FN145]. Id. at 1371. The Court of Chancery rejected the plaintiff's assertion that the repurchase program constituted a change in control from the company's public stockholders to the directors and, accordingly, refused to review the board's actions under Revlon. See id. The Court of Chancery also refused to accept American's alternative argument that the board's implementation of defensive measures constituted "self-dealing" that would have required the board to satisfy the heightened showing of "entire fairness." Id. at 1372.

[FN146]. Id. at 1372.

[FN147]. Id. at 1373.

[FN148]. Id. (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)) (emphasis in original). The court in Unitrin then stated that the satisfaction of Unocal's enhanced scrutiny standard as a condition precedent to the application of the traditional business judgment rule had become well known. See id. (citing as support for its assertion Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994); Stroud v. Grace, 606 A.2d 75 (Del. 1992); Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990); Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989); Ivanhoe Partners v. Newmont

Mining Corp., 535 A.2d 1334 (Del. 1987); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985)).

[FN149]. See id. at 1375.

[FN150]. See id.

[FN151]. See id.

[FN152]. See id. The court later segued into an examination of three general classifications of threats to corporate boards. For a discussion of these threats, see infra notes 169-71 and accompanying text.

[FN153]. See Unitrin, 651 A.2d at 1376.

[FN154]. See id. (summarizing the findings of the Court of Chancery below).

[FN155]. See id. at 1376-77.

[FN156]. See id. at 1376.

[FN157]. See id. Specifically, "[t]he Court of Chancery concluded that, although the Unitrin Board had properly perceived American General's inadequate Offer as a threat and had properly responded to that threat by adopting a 'poison pill,' the additional defensive response of adopting the Repurchase Program was unnecessary and disproportionate to the threat of the Offer posed." Id. at 1377.

[FN158]. See id. at 1376.

[FN159]. See id. at 1378.

[FN160]. See id. at 1380-83.

[FN161]. Id. at 1383.

[FN162]. See id.

[FN163]. See id. at 1379-80.

[FN164]. See id. at 1380.

[FN165]. Id. at 1383.

[FN166]. The Court of Chancery's "erroneous" conclusion was based on three findings: (1) the Court of Chancery's opinion that Unitrin's outside directors, who were also shareholders, would not vote their proxies in accordance with their own best economic interests as shareholders; (2) "the objective premise relied upon" by the court that Unitrin's directors needed the repurchase program to increase its absolute voting power in a proxy contest to twenty-five percent; and (3) what the Supreme Court found was the

incorrect conclusion that American would be unable to succeed in a proxy contest if the court failed to enjoin Unitrin's repurchase program. See id. at 1380-81.

[FN167]. See id. at 1380. Instead, the Supreme Court held outside directors holding substantial equity interests in a target company will act in their own economic interests and not in pursuit of the prestige and perquisites of their positions. Id. at 1380-81. For a cogent discussion of the impact of this "revolutionary aspect of Unitrin's holding," see Laster, supra note 59, at 116-34.

[FN168]. Unitrin, 651 A.2d at 1384 (quoting Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1990)).

[FN169]. See id. at 1153 n.17. The court defined "opportunity loss" as the risk that "a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management ... [or ... another bidder.]" Id. This type of threat is an example of the danger identified by the board in Time. See supra text accompanying note 107.

[FN170]. See Unitrin, 651 A.2d at 1384. The court defined "structural coercion" as "the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions." Id. This is the kind of threat identified by Unocal's board (i.e., a two-tier front loaded tender offer) as justification for instituting its selective self-tender offer. See supra text accompanying notes 61-65.

[FN171]. See Unitrin, 651 A.2d at 1384. The court defined "substantive coercion" as "the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value." Id. This appears to be the most ubiquitous of threats, seemingly available to all boards of directors who purportedly know the intrinsic value of their corporation better than anyone and always believe their company's stock price to be undervalued.

[FN172]. See id.

[FN173]. See id. at 1388 (citing Paramount, 637 A.2d at 45-46).

[FN174]. See id.

[FN175]. Id.

[FN176]. See id.

[FN177]. See id.; cf. supra notes 156-62 and accompanying text (discussing the Court of Chancery's contrary conclusion that a successful proxy consent solicitation was not a practical possibility).

[FN178]. See id.

[FN179]. See Unitrin, 651 A.2d at 1388 n.39.

[FN180]. See id. at 1389-90.

[FN181]. See supra text accompanying notes 75-180.

[FN182]. Unitrin, 651 A.2d at 1378.

[FN183]. 564 A.2d 651 (Del. Ch. 1988).

[FN184]. See id. at 654.

[FN185]. See id.

[FN186]. See id.

[FN187]. See id.

[FN188]. Id. at 657. When Atlas' investment banker concluded that Blasius' restructuring proposal would yield devastating harm to the short and long-term viability of the company, Atlas' board rejected Blasius' proposal and a proxy contest ensued in which Blasius sought the votes of Atlas' shareholders for adopting its plan. See id. After Blasius lost that contest, it sought to challenge the determination of the outcome. See id. While this Article does not address the Court of Chancery's affirmation of the results, the second half of the Blasius decision delves into the challenges and defenses relating thereto. See id. at 665-70.

[FN189]. Id. at 655.

[FN190]. See id. As mentioned above, the factual circumstances of Blasius were central to that court's holding:

> The conclusion that, in creating two new board positions ... and electing [the two new board members] to fill those positions the board was principally motivated to prevent or delay the shareholders from possibly placing a majority of new members on the board, is critical to [the court's] analysis of the central issue posed by [this case]. If the board in fact was not so motivated, but rather had taken action completely independently of the consent solicitation, which merely had an incidental impact upon the possible effectuation of any action authorized by the shareholders, it is very unlikely that such action would be subject to judicial nullification.

Id. (emphasis added).

[FN191]. See id. at 656.

[FN192]. See id. at 659 (citing, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)).

[FN193]. See id.

[FN194]. Id.

[FN195]. Id. at 660. Recall that by their nature, defensive measures in this context evoke the omnipresent concern that directors may be acting out of a desire to protect their own positions. This

concern is only exacerbated when the director action in question has an effect of substantially comprising the rights of shareholders to elect individuals to a corporation's board.

[FN196]. See id.

[FN197]. See id. at 660-62.

[FN198]. Id. at 663.

[FN199]. See id.

[FN200]. It was this lack of bad faith that prevented Chancellor Allen from relying on Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971), for invalidating the board's actions. See id. In Schnell, dissident shareholders of Chris-Craft Industries, Inc. (Chris-Craft) initiated a proxy contest to unseat and replace the company's directors. See Schnell, 285 A.2d at 439-40. The shareholders in Schnell sought to enjoin the actions of Chris-Craft's board in having, among other things, amended the company's bylaws to change the date of the company's annual stockholders' meeting which, as a practical matter, thwarted the dissidents' ability to prevail in the consent contest. See id. at 439. The court found that because the board had "attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of [the] dissident stockholders in the exercise of their rights to undertake a proxy contest against management," it had acted with "inequitable purposes contrary to established principles of corporate democracy." Id. While the defendant directors sought to justify their actions on account of their "ha[ving] complied strictly with the provisions of [Section 211 of the] Delaware Corporation Law in changing the by-law date," the court rejected this reasoning as misguided insofar as "inequitable action does not become permissible simply because it is legally possible." Id. (emphasis added).

[FN201]. See Blasius, 564 A.2d at 663.

[FN202]. Id.

[FN203]. Id. at 661 (emphasis added).

[FN204]. See id. at 663.

[FN205]. See Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992). The Supreme Court has moreover acknowledged the continued applicability of Schnell in this setting. See, e.g., Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1378 (Del. 1995).

[FN206]. See Stroud, 606 A.2d at 91-92. This limitation has been in large part due to Blasius' difficult "primary purpose" threshold showing. Considering that the defendant directors in Blasius admitted that they had intended to disenfranchise the shareholders by precluding them from electing a majority of Atlas' board, the court had little trouble concluding that they fell within the ambit of its primary purpose showing. In the far more common case where directors contest this issue, however, a court is left with the unenviable burden of trying to discern whether a defensive measure having the practical effect of

disenfranchising shareholders was adopted with the primary purpose of doing so. See Chesapeake Corp. v. Shore, 771 A.2d 293, 320 (Del. Ch. 2000).

[FN207]. 606 A.2d 75 (Del. 1992).

[FN208]. See id. at 82.

[FN209]. Id. at 92 (quoting Unocal).

[FN210]. Id.

[FN211]. See Allen, supra note 72, at 1316.

[FN212]. 771 A.2d 293 (Del. Ch. 2000).

[FN213]. See id. at 324-29.

[FN214]. See id. at 302.

[FN215]. Id.

[FN216]. See id.

[FN217]. See id.

[FN218]. See id. at 303.

[FN219]. See id.

[FN220]. See id. "As a Virginia corporation, Chesapeake [was] authorized to--and [did--have] in place iron-clad defenses, including a so-called 'dead- hand poison pill' and a staggered board." Id. Chesapeake's decision to never lower these defenses "effectively precluded Shorewood from presenting its offer to them." Id.

[FN221]. See id. at 304.

[FN222]. See id. at 305. The defensive bylaws contemplated and approved by Shorewood's board of directors included the following:

> [(1)] the elimination of the right of shareholders to call special meetings; [(2)] the elimination of the ability of stockholders to remove directors without cause; [(3)] the adoption of procedures regulating the consent solicitation process, which gave the board significant leeway to determine a record date; [(4)] the elimination of the stockholders' ability to fill board vacancies; and [(5)] the imposition of a supermajority voting requirement for stockholder-initiated bylaw changes.

Id. (emphasis added).

[FN223]. See id. The Shorewood board set the supermajority voting requirement for stockholder-initiated bylaw changes at 66 2/3 %. See id. This had the effect of rendering a successful proxy contest mathematically impossible for a shareholder owning 15% or less and proceeding without the support of management assuming a 90% voter turnout. See id. at 306. As will be more fully developed and discussed infra, the Shorewood board later modified the supermajority voting requirement to 60% against the backdrop of the imminent litigation in an attempt to paint the threshold as less preclusive. See id. at 314-15.

[FN224]. See id. at 306. More specifically, the defendants first claimed that "the [Chesapeake] offer was grossly inadequate and thus Shorewood stockholders faced great harm if they sold their stock at that price." Id. The defendants then posited that there was an additional "danger that Shorewood stockholders would be confused about the intrinsic value of the company, fail to understand management's explanation as to why the market was undervaluing their stock, and mistakenly tender consents to Chesapeake to facilitate its unfair offer." Id.

[FN225]. Id. at 312.

[FN226]. See id.

[FN227]. See id.

[FN228]. See id. at 313. The court found that discussions of the substantive coercion threat originated at this meeting as opposed to the earlier ones claimed by Shorewood. See id.

[FN229]. See id.

[FN230]. See id. at 314.

[FN231]. Id. at 316. Shorewood countered that Chesapeake had become an "interested shareholder" for the purposes of Delaware's business combination statute and further claimed that Delaware law forbade shareholders "from amending their corporation's bylaws to eliminate a staggered board provision and then instilling a new board." Id. at 317. This Article focuses on the relevant standards of review for assessing the board's decision to adopt the supermajority bylaw. As such, this Article does not address the additional claims advanced by Chesapeake or the counterclaims put forth by Shorewood. For a discussion of those claims and counterclaims, see id. at 316-17.

[FN232]. See id. at 317.

[FN233]. Id.

[FN234]. See id.

[FN235]. Id. at 319-20.

[FN236]. See id. at 317-24.

[FN237]. For a more in-depth discussion of the interrelationship between Unocal and Blasius, see infra Part IV.

[FN238]. See Chesapeake, 771 A.2d at 323-24.

[FN239]. See id. at 324.

[FN240]. See supra note 171 (quoting the Delaware Supreme Court's definition of substantive coercion).

[FN241]. Chesapeake, 771 A.2d at 329. The court then quoted Professors Gilson and Kraakman's assessment of the need for "close judicial scrutiny of defensive measures" adopted in response to the threat of substantive coercion.

> [S]ubstantive coercion is a slippery concept. To note abstractly that management might know shareholder interests better than shareholders themselves do cannot be a basis for rubber-stamping management's pro forma claims in the face of market skepticism and the enormous opportunity losses that threaten target shareholders when hostile offers are defeated. Preclusive defensive tactics are gambles made on behalf of target shareholders by presumptively self-interested players. Although shareholders may win or lose in each transaction, they would almost certainly be better off on average if the gamble were never made in the absence of meaningful judicial review. By minimizing management's ability to further its self- interest in selecting its response to a hostile offer, an effective proportionality test can raise the odds that management resistance, when it does occur, will increase shareholder value.

Id. (alteration in original) (emphasis added) (quoting Ronald J. Gilson & Reinier Kraakman, Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. Law. 247, 274 (1989)).

[FN242]. See id. at 330.

[FN243]. See id. at 343.

[FN244]. See id. at 330-31 ("Although no one will ever point to the Shorewood board's actions as a model of how to analyze an acquisition bid, [the court was] persuaded that the board had sufficient, good faith reasons to conclude that [the offers] were inadequate from a price perspective.").

[FN245]. See id. at 332-33.

[FN246]. See id. at 306-07. In fact, the court found that "this threat appear[ed] to have emerged out of Shorewood's 'A Team' of advisors [at later meetings]." Id. at 332.

[FN247]. Id. at 308.

[FN248]. See id.

[FN249]. Id. at 315.

[FN250]. Id. at 316.

[FN251]. Id. at 333. "Indeed [, continued the court], it discussed no threats that day at all, relying on its prior determination of the threats posed by Chesapeake's offer." Id.

[FN252]. Id. at 334 (emphasis added). The Court of Chancery noted the Supreme Court's failure in Unitrin to strike down the target's repurchase program notwithstanding the fact that the majorities required by the acquiror in that case "exceed[ed] any margin ever achieved by President Franklin Roosevelt [and] seem[ed] to present a rather formidable and, one might daresay, preclusive barrier to the insurgent." Id. at 325-26.

[FN253]. Id. at 334.

[FN254]. Id. The court used this impossibility as evidence for illustrating "how blind the Shorewood board was to the relevance of whether the Supermajority Bylaw was preclusive. ..." Id.

[FN255]. Id. (quoting Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1389 (Del. 1995)).

[FN256]. Id. at 342.

[FN257]. Id.

[FN258]. See id.

[FN259]. Id. at 343. The court observed that:

> The board already had a poison pill in place that gave it breathing room and precluded the Tender Offer. The Defensive Bylaws had eliminated Chesapeake's ability to call a special meeting, at which a majority of a quorum could act. This forced Chesapeake to proceed through the slower route of a consent solicitation with the minimum support of a majority of the outstanding shares. The Shorewood board controlled, per the Defensive Bylaws, the record date. This guaranteed adequate time for communications and counter-solicitation efforts, as well as for the board to develop and consider strategic alternatives.

Id.

[FN260]. See id. (supporting the court's conclusion that the supermajority bylaw was a disproportionate response to the mild threat posed by Chesapeake's offer).

[FN261]. See id. Recall that Chesapeake had indicated its willingness to negotiate with Shorewood as to price and structure. See id. at 303.

[FN262]. Id. at 343.

[FN263]. See id. at 344.

[FN264]. Id. The court observed that the eighty-eight percent vote required of disinterested shareholders, unlike the Supreme Court's finding in Unitrin, was not "'realistically' attainable." Id. The court also focused on the sophisticated stockholder base of Shorewood's shareholders as compared to those in Unitrin, in addition to the absence of material financial interests on the part of the directors in Unitrin which were present in Chesapeake. See id. Finally, the court noted the "grossly insufficient" level of attention that the Shorewood board paid to the ramifications resulting from its decision to adopt the supermajority bylaw amendment and other defensive measures. See id.

[FN265]. See id. at 345 (citing Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996)).

[FN266]. Id.

[FN267]. See id.

[FN268]. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

[FN269]. Chesapeake, 771 A.2d at 317-18. The court in Chesapeake noted that the above question was one that had perplexed Delaware courts for over a decade. See id. at 317.

[FN270]. See supra Part I.D.

[FN271]. See Unocal Corp. v. Mesa Petroleum Corp., 493 A.2d 946, 954 (Del. 1985).

[FN272]. See Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1148 (Del. 1989).

[FN273]. See Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1384 (Del. 1995).

[FN274]. See Chesapeake, 771 A.2d at 329.

[FN275]. As stated by the Court of Chancery in Blasius:

> A board's decision to act to prevent the shareholders from creating a majority of new board positions and filling them does not involve the exercise of the corporation's power over its property, or with respect to its rights or obligations; rather, it involves allocation, between shareholders as a class and the board, of effective power with respect to governance of the corporation.

Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660 (Del. Ch. 1988).

[FN276]. Chesapeake, 771 A.2d at 319 (quoting Blasius, 564 A.2d at 663).

[FN277]. See, e.g., State of Wisconsin Inv. Bd. v. Peerless Sys. Corp., No. CIV. A. 17637, 2000 WL 1805376, at *7 (Del. Ch. Dec. 4, 2000) (observing that "[i]n the context of takeover defenses, the Delaware courts have forcefully written that board actions that affect the rights of shareholders to vote are deeply suspect"). As support for this assertion, the court in Peerless cited the Supreme Court's decisions in Unitrin, 651 A.2d at 1378 ("This Court has been and remains assiduous in its concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising stockholders.") and Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d at 34, 42

("Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights.").

[FN278]. Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992).

[FN279]. See id. at 82.

[FN280]. See id. at 91-92; see also Chesapeake, 771 A.2d at 320 (discussing the Supreme Court's analysis in Stroud).

[FN281]. Indeed, this approach has also been advocated in the widely circulated article co-authored by former Chancellor Allen and current Vice Chancellors Jacobs and Strine.
See Allen, supra note 72, at 1311-15.

[FN282]. See id. at 1314.

[FN283]. See id. at 1315 n.111 (reiterating that the authors' "recommendation that voting issues be reviewed under Unocal rests on the assumption that courts will apply that test with rigor and that the doctrine of Schnell v. Chris-Craft Indus., Inc. ... retains vitality.").

[FN284]. See infra notes 288-93 and accompanying text.

[FN285]. Chesapeake, 771 A.2d at 320-21 (emphasis added). The Court of Chancery observed that after discussing the overlap between Blasius and Unocal, the court in Unitrin "appeared to eschew any application of the compelling justification test" to its assessment of the defendant-board's defensive action. See id. at 321.

[FN286]. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1378 (Del. 1995).

[FN287]. Id. at 1378-79.

[FN288]. See Chesapeake, 771 A.2d at 321 (observing that despite preliminarily mentioning the import of Blasius, the Supreme Court in Unitrin "never cited to Blasius after that point in its opinion, never referenced or applied the compelling justification standard, and, to the contrary, emphasized the latitude a board of directors must be given to adopt reasonable defensive measures in its business judgment"). See generally Unitrin, 651 A.2d at 1878-91.

[FN289]. See Unitrin, 651 A.2d at 1380-83.

[FN290]. Allen, supra note 72, at 1316.

[FN291]. Chesapeake, 771 A.2d at 323.

[FN292]. Allen, supra note 72, at 1316.

[FN293]. Cf. Allen, supra note 72, at 1315 n.111; Chesapeake, 771 A.2d at 323 (stating that there would be less of a need for Blasius if Unocal were applied "with a gimlet eye out for inequitably motivated electoral manipulations or for subjectively well-intentioned board action that has preclusive or coercive effects").

[FN294]. See supra Part II.D (discussing Blasius and that decision's inherently unascertainable "primary purpose" showing).

[FN295]. The Court of Chancery recently observed that "Blasius does not only apply in cases involving hostile acquirers [sic] or directors wishing to retain their position against the will of the shareholders. ... The fiduciary duty of loyalty between a board of directors and the shareholders of a corporation is always implicated where the board seeks to thwart the action of the company's shareholders." State of Wisconsin Inv. Bd. v. Peerless Sys. Corp., No. 17637, 2000 WL 1805376, at *13 (Del. Ch. Dec. 4, 2000). Because this Article explores the interrelationship between Unocal and Blasius for those directorial decisions taken against unwelcome suitors vying for corporate control, the expanded "substantial effect" approach discussed herein should be limited to those managerial actions preventing shareholders from electing a dissident shareholder's directors. In other words, the position of this Article is only directed toward the more "typical Blasius case that involves entrenchment or control issues in which a clear conflict exists between the board and the shareholders." Id. at *12. That being said, this Article acknowledges that certain defensive measures may have a substantial effect on the shareholder franchise in subtle and less obvious ways (e.g., a $100 million termination fee depending on the particulars of a given case). Again, this Article's text is aimed at those defensive tactics compromising the shareholders' ability to wage a successful proxy contest.

[FN296]. See, e.g., Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996) (citing the Supreme Court's decision in Stroud).

[FN297]. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 655-57 (Del. Ch. 1988). As stated supra, the court further found that despite acting with the "primary purpose" of interfering with the shareholder franchise, the directors in Blasius had not acted in bad faith and, thus, did not fall within the purview of Schnell. See id. at 663.

[FN298]. Chesapeake, 771 A.2d 293, 320 (Del. Ch. 2000). Herein lies the "high degree" of overlap between the Unocal and Blasius tests and the quandary faced by courts in determining which level of scrutiny to apply to defensive actions touching on voting issues. See id. What's more, if a given defensive measure passes muster under Unocal as not preclusive or coercive, can one really state that such a measure is inequitable? Again, the call for expanding Blasius' showing is motivated by the reality that courts are not applying Unocal with the spirit of Blasius and Schnell. See supra notes 288-93 and accompanying text.

[FN299]. See Stroud v. Grace, 606 A.2d 75, 84 n.1 (Del. 1992).

[FN300]. While the same can be said about the abilities of many corporate planners and advisors with respect to most, if not all, corporate standards of review, pegging Blasius' threshold inquiry at the level of "primary purpose" makes the jobs of such counselors even easier.

[FN301]. See Chesapeake, 771 A.2d at 320.

[FN302]. Blasius, 564 A.2d at 659.

[FN303]. Id.

[FN304]. Chesapeake, 771 A.2d at 320. This is not a particularly novel concept in American jurisprudence. After all, it is generally accepted that one intends what one causes.

[FN305]. Theoretically, of course, measures adopted by boards in bad faith will be struck down under Schnell as inequitable. See Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971). Thus, the impact of this Article's approach reaches only those situations where notwithstanding that a board's conduct may have a substantial effect on the ability of shareholders to exercise their franchise freely, a court is unable to conclude that the directors proceeded with inequitable motives. Because, as stated previously, "the most important evidence of what a board intended to do is what effect its actions have," Chesapeake, 771 A.2d at 320, the "substantial effect" language advocated herein will help to mitigate the concerns emanating out of a watered down application of Unocal in this setting. See supra notes 287-92 and accompanying text.

[FN306]. See, e.g., Chesapeake, 771 A.2d at 320.

[FN307]. Blasius, 564 A.2d at 659.

[FN308]. See supra notes 278-81 and accompanying text.

[FN309]. See supra notes 288-93 and accompanying text.

[FN310]. See Blasius, 564 A.2d at 659.