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Disenfranchising Shareholders: The Future of *Blasius* After *Mercier v. Inter-Tel*

ABSTRACT. This Note analyzes the Delaware Chancery Court's recent decision in *Mercier v. Inter-Tel (Delaware), Inc.*, in which the court upheld against a *Blasius* challenge the Inter-Tel board's decision to postpone its imminent special meeting in order to prevent shareholders from voting down a merger with Mitel. It argues that *Inter-Tel* represents an attempt to limit *Blasius*'s compelling justification standard for board action interfering with the shareholder franchise to cases involving board entrenchment, and that such a limitation is misguided because it ignores the potential agency costs associated with a decision to postpone an imminent vote on a transaction. The Note concludes that outside of the entrenchment context *Blasius* should remain a default rule that shareholders can opt out of ex ante.

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INTRODUCTION

Since Chancellor Allen's seminal opinion in *Blasius Industries, Inc. v. Atlas Corp.*, it has been a bedrock principle of Delaware corporate law that when a board acts for the "primary purpose of thwarting" the exercise of the shareholder franchise¹ it is not entitled to the protection of the business judgment rule,² and instead must provide a compelling justification for its action.³ After declaring that "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests,"⁴ Chancellor Allen explained why the deferential business judgment rule, according to which courts presume that disinterested directors are informed as to the subject of a business decision and have made a good faith determination that the decision is in the best interests of the corporation,⁵ is inapplicable when the board acts for the primary purpose of interfering with the shareholder franchise.⁶ According to the Chancellor, "a decision by the board to act for the primary purpose of preventing the effectiveness of a shareholder vote inevitably involves the question who, as between the principal and the agent, has authority with respect to a matter of internal corporate governance."⁷ Such a decision, he continued, "does not involve the exercise of the corporation's power over its property, or with respect to its rights or

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1. 564 A.2d 651, 662 (Del. Ch. 1988).
 2. The canonical Delaware case articulating the business judgment rule is *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), which was overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
 3. *Blasius*, 564 A.2d at 661.
 4. *Id.* at 659.
 5. See *Aronson*, 473 A.2d at 812; E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 403 (1997) ("Decisions of directors which can be attributed to any rational business purpose will be respected if they are made by directors who are independent and act with due care and in good faith.").
 6. *Blasius*, 564 A.2d at 659-60.
 7. *Id.* There has been much debate about whether the board can be considered an agent of shareholders in the conventional legal sense. Compare *Unisuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317, at *6 (Del. Ch. Dec. 20, 2005) (describing the board as the agent of shareholders), with Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 33 (2002) [hereinafter Bainbridge, *Nexus*] (arguing that directors are not mere agents of the shareholders). The analysis of agency costs that appears throughout this Note remains applicable even if one rejects the legal characterization of the board as an agent, and even those who resist such a characterization recognize the general existence of a principal-agent problem. See, e.g., Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2006) ("[M]uch of corporate law is best understood as a mechanism for constraining agency costs.").

obligations; rather, it involves allocation, between shareholders as a class and the board, of effective power with respect to governance of the corporation.”⁸ The Chancellor concluded that a decision to alter this allocation of power, even if made in good faith, cannot be left to the board’s business judgment.⁹

Although the court in *Blasius* declined to adopt a rule of per se invalidity,¹⁰ application of the *Blasius* standard of review has virtually always sounded the death knell for the challenged action.¹¹ In *Mercier v. Inter-Tel (Delaware), Inc.*, however, Vice Chancellor Strine of the Delaware Chancery Court upheld against a *Blasius* challenge the Inter-Tel board’s decision to postpone its imminent special meeting in order to prevent shareholders from voting against a merger that the company had negotiated with Mitel.¹² The court first suggested that when the board interferes with a shareholder vote touching on matters of corporate control, its actions should not be evaluated under *Blasius* but instead should be subject to the *Unocal* reasonableness test, which is generally applicable to defensive action taken by the board in the context of a contest for corporate control, and which requires the board first to identify a legitimate corporate objective served by its action and then to show that it acted reasonably in relation to that objective.¹³ According to the court, the postponement in *Inter-Tel* survived *Unocal* scrutiny since it was a reasonable means of achieving the legitimate objective of preserving the deal for shareholders.

Because the Vice Chancellor recognized that the Delaware Supreme Court has continued to apply *Blasius* review even in circumstances implicating *Unocal*, he upheld the postponement under *Blasius* as well. Emphasizing that the directors were independent and did not expect to have a role in the surviving entity, the court held that the board had presented a compelling justification under *Blasius* when it postponed the meeting in order to give shareholders additional time to consider the merits of the transaction and to prevent them from irretrievably losing a deal that the disinterested board in good faith believed to be in the shareholders’ best interests.¹⁴

8. *Blasius*, 564 A.2d at 660.

9. *Id.*

10. *Id.* at 662.

11. See Michael B. Tumas & Michael K. Reilly, *Rethinking the Blasius Standard of Review: The Implications of Mercier v. Inter-Tel (Delaware), Inc.*, Potter Anderson & Corroon, Apr. 2008, at 1 n.3, http://www.potteranderson.com/assets/attachments/Rethinking_the_Blasius_Standard_of_Review.pdf.

12. 929 A.2d 786 (Del. Ch. 2007).

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

14. *Inter-Tel*, 929 A.2d at 819.

This Note analyzes the state of the *Blasius* doctrine after *Inter-Tel*. Part I reviews the basic structure of the doctrine. It identifies two broad categories of board action that have been found to trigger *Blasius* review: (1) acts designed to thwart the ability of shareholders to replace the incumbent board, which I refer to as entrenchment cases, and (2) acts designed to thwart a vote on a business transaction that requires shareholder approval as a matter of law. The first category goes to the heart of *Blasius*, but the second category has historically been within its scope as well.

Part II examines Vice Chancellor Strine's opinion in *Inter-Tel*, a case that falls into the second category. It argues that the opinion departs from traditional *Blasius* analysis in two ways. First, it openly seeks to replace *Blasius* with *Unocal* review in the context of a contest for corporate control. More subtly, it attempts, at a minimum, to confine *Blasius* to entrenchment cases. The combined effect of these two doctrinal changes would have been to effectively eliminate *Blasius* as a separate doctrine. When the board interferes with the shareholder franchise in a situation implicating control of the corporation, *Unocal* would govern. *Unocal* would completely displace *Blasius* in this context whether or not the board is allegedly motivated by a desire to entrench itself, although the outcome of *Unocal* review would be heavily influenced by the presence of such a motive.¹⁵ With respect to board action interfering with a vote that involves an ordinary business proposal rather than the composition of the board or control of the corporation, *Unocal* does not apply and, moreover, board entrenchment will not be at issue; thus, *Inter-Tel* suggests that the board's action would be evaluated under the business judgment rule.¹⁶ However, *Inter-Tel* cannot be read to completely nullify *Blasius* review because Vice Chancellor Strine expressly recognized that *stare decisis* foreclosed the possibility of replacing *Blasius* with *Unocal* in the corporate control context.¹⁷ Instead, the practical import of *Inter-Tel* is to quietly but substantially alter the content of *Blasius* review in nonentrenchment cases so that it bears little resemblance to the doctrine of strict scrutiny announced by Chancellor Allen two decades ago.

Part III offers a normative analysis of the court's decision in *Inter-Tel*. It argues that while the decision may seem reasonable *ex post* insofar as shareholders would have voted down the Mitel merger on the basis of potentially incomplete information but for the postponement, it is less

15. See *id.* at 811.

16. *Id.* at 811, 812 n.78 (expressing skepticism that adjournments of votes "not implicating director tenure or corporate control" should be subject to either *Blasius* or *Unocal* review).

17. *Id.* at 818.

defensible when certain ex ante agency cost considerations are taken into account. In particular, it suggests that a strong presumption against board action designed to thwart an imminent shareholder vote is an optimal default rule. Although such a rule imposes a monitoring cost on the firm by reducing the discretion of the board to respond to contingencies, it also reduces residual agency costs¹⁸ to the extent that there is a heightened risk of abuse or error when the board acts to disenfranchise shareholders in the context of a fundamental business transaction, assuming that courts may not always be able to detect such mismanagement.¹⁹ Even if it is uncertain whether on balance the reduction in residual agency costs outweighs the increase in monitoring costs, a benefit of such a default rule is that it may force the board to reveal ex ante the possibility that it might try to thwart a vote, and thereby enable shareholders to decide in advance whether to endow the board with this power.²⁰ Indeed, in *Inter-Tel* the board had initially sought shareholder authorization to postpone the vote in the event that approval of the merger appeared unlikely, and shareholders voted to deny that authorization.

I. AN OVERVIEW OF THE *BLASIUS* DOCTRINE

A. Board Action Designed To Entrench Itself

When directors act for the primary purpose of thwarting the ability of shareholders to determine the composition of the board, they bear the heavy burden of producing a compelling justification to defend their actions. Cases involving board entrenchment have historically formed the core of the *Blasius* doctrine.²¹ Although Chancellor Allen's discussion in *Blasius* of the allocation of

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18. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *infra* Part III.
 19. The agency cost analysis presented in this Note remains relevant notwithstanding the recent amendments to the Delaware General Corporation Law (DGCL) authorizing the board to adopt a dual record date structure. DEL. CODE ANN. tit. 8, § 213(a) (2010). Although these amendments, by enabling the board to set a later record date for voting eligibility purposes, may mitigate (but not eliminate) the dead vote problem, *see infra* Section II.A., they are permissive rather than mandatory, and moreover, the board may still have an incentive to postpone an imminent vote on a transaction in order to give arbitrageurs and others in favor of the deal more time to accumulate shares. *See infra* notes 95-98 and accompanying text.
 20. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989) (discussing the utility of penalty default rules).
 21. See, e.g., *Wis. Inv. Bd. v. Peerless Sys. Corp.*, No. Civ. A. 17637, 2000 WL 1805376, at *12 (Del. Ch. Dec. 4, 2000) (observing that “the typical *Blasius* case . . . involves entrenchment or control issues in which a clear conflict exists between the board and the shareholders”).

power between the principal and agent applied to all shareholder votes,²² he noted that the issue is particularly implicated in cases “deal[ing] with the question who should constitute the board of directors of the corporation.”²³ Within this category of entrenchment cases, there are three main subcategories of board action that have been found to impermissibly impede the exercise of the shareholder franchise. The first subcategory, and the one most analogous to the situation in *Inter-Tel*, involves board action that interferes with the election process in order to thwart an upcoming proxy contest or consent solicitation.²⁴ The second involves unilateral corporate governance changes designed to erect obstacles to shareholders seeking to replace the board at the next election.²⁵ The third type of entrenchment action that Delaware courts have on rare occasion invalidated is a share issuance designed to dilute a dissident shareholder.

1. Board Action Interfering with the Electoral Process

The first type of entrenchment case implicating *Blasius* involves board action that tinkers with the election process in order to frustrate an imminent vote to elect directors or otherwise thwart a dissident’s campaign to replace the board. It should be noted that shareholders’ right to elect directors is in the first instance statutory. The Delaware General Corporation Law (DGCL) requires that an annual meeting of stockholders be held for the election of directors.²⁶ The DGCL also bars a corporation from voting its own stock, a prohibition born out of concern that the incumbent board might vote treasury stock to perpetuate itself in office.²⁷

22. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988); see discussion *infra* Section I.B.

23. *Blasius*, 564 A.2d at 660.

24. A consent solicitation is the process by which shareholders take action outside of an annual or special meeting. Shareholders have the power to act by written consent unless the charter provides otherwise. DEL. CODE ANN. tit. 8, § 228(a) (2001).

25. See David C. McBride & Danielle Gibbs, *Interference with Voting Rights: The Metaphysics of Blasius Industries v. Atlas Corp.*, 26 DEL. J. CORP. L. 927, 930 (2001) (explaining that *Blasius* has been triggered when the board attempts to interfere with imminent shareholder action and when the proposed shareholder action is not imminent but the board’s action prevents shareholders from obtaining their objectives until the next election).

26. DEL. CODE ANN. tit. 8, § 211(b)-(c) (2001).

27. *Id.* § 160(c); see Robert J. Klein, Note, *The Case for Heightened Scrutiny in Defense of the Shareholders’ Franchise Right*, 44 STAN. L. REV. 129, 151 (1991).

Occasionally, however, boards have attempted to take action that, though not specifically prohibited by the DGCL, is nevertheless designed to thwart an imminent shareholder vote to replace them. Since even before *Blasius*, Delaware courts have been skeptical of such actions. The seminal case is *Schnell v. Chris-Craft Industries, Inc.*²⁸ In *Schnell*, the board amended its bylaws to advance the annual meeting date in order to provide a dissident less time to wage its proxy contest. The Delaware Supreme Court enjoined the board's action, finding that the board had "attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office."²⁹ Although the board's bylaw amendment did not run afoul of the letter of the DGCL, the court admonished that "inequitable action does not become permissible simply because it is legally possible."³⁰

Following *Schnell*, the Chancery Court in *Aprahamian v. HBO & Co.* enjoined the board's eleventh-hour attempt to postpone its annual meeting and avoid imminent defeat in a proxy contest.³¹ The court rejected the board's proffered justification that the postponement was intended to give shareholders time to consider the board's proposal to form a special committee to consider value-enhancing strategies for the corporation, reasoning that if the board were sincere in its desire to ensure a fully informed vote it would not have waited until the results of the election appeared ominous to postpone the meeting.³² Although both *Schnell* and *Aprahamian* predate *Blasius*, Chancellor Allen cited to both cases in his opinion, and one can safely assume they would be decided the same way under *Blasius*'s compelling justification standard.³³

While the formulation of the *Blasius* compelling justification standard focuses on the board's purpose, in practice Delaware courts will not engage in *Blasius* review if the board's action does not have a sufficient disenfranchising effect.³⁴ Thus, when the board changes the date of an annual meeting that is not imminent and in a manner that does not preclude a dissident from electing its slate, *Blasius* is inapplicable.³⁵ In addition, a board may adopt an advance

28. 285 A.2d 437 (Del. 1971).

29. *Id.* at 439.

30. *Id.*

31. 531 A.2d 1204 (Del. Ch. 1987).

32. *Id.* at 1207.

33. See *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 657, 661 (Del. Ch. 1988).

34. See *McBride & Gibbs*, *supra* note 25, at 930.

35. See *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, No. Civ. A. 15650, 1997 WL 305824, at *16 (Del. Ch. June 3, 1997) (holding that the board's decision to delay its annual meeting until after a vote on a merger agreement did not trigger *Blasius* review); see also *Stahl v.*

notice bylaw requiring shareholders to give the board advance notice of their intention to nominate a director or bring other business before a meeting,³⁶ even though such a bylaw is designed to function as an obstacle in the path of a dissident seeking to run a proxy contest. Although Delaware courts interpret these bylaws narrowly,³⁷ they are common among Delaware corporations and ordinarily do not raise disenfranchisement issues, provided that the board does not set a meeting date that would prevent a dissident from complying with the company's advance notice bylaw and thereby thwart its campaign to replace the board.³⁸

Thus, the board generally maintains its power to manage the electoral process. When the board acts with the primary purpose of thwarting an election in order to entrench itself, and its action has that effect, *Blasius* scrutiny will apply. But when the board's action does not frustrate an imminent vote and does not have the effect of preventing shareholders from electing an insurgent slate, the requisite entrenchment motive will be deemed lacking.

2. Corporate Governance Changes Designed To Entrench the Board

The second type of board entrenchment with which *Blasius* is concerned involves midstream unilateral corporate governance changes that prevent a dissident from proximately electing its slate. Typically this involves board action to reinforce the company's structurally ineffective staggered board. A staggered, or classified, board is one in which directors are divided (usually) into three classes, with each director serving a three-year term and one class of

Apple Bancorp, Inc., 579 A.2d 1115, 1123 (Del. Ch. 1990) (holding that *Blasius* was not triggered when the Apple Bancorp board, in response to a simultaneous tender offer and proxy contest, set the annual meeting date for later than it had originally planned).

36. Absent an advance notice bylaw, shareholders can bring any matter that is "proper" for shareholder action before an annual meeting without notice. DEL. CODE ANN. tit. 8, § 211(b) (2001).
37. See *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335 (Del. Ch. 2008); *Levitt Corp. v. Office Depot, Inc.*, No. 3622-VCN, 2008 WL 1724244 (Del. Ch. Apr. 14, 2008).
38. See *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 913-14 (Del. Ch. 1980) (invalidating the board's decision to set a date for the annual meeting sixty-three days in the future in the face of a bylaw requiring that a dissident notify the board of his intention to nominate directors seventy days in advance of the annual meeting). In some circumstances the board may also have an affirmative obligation to waive a preexisting advance notice bylaw to allow a tardy dissident to present its slate. See *Hubbard v. Hollywood Park Realty Enters.*, No. 11779, 1991 WL 3151, at *12 (Del. Ch. Jan. 14, 1991); Klein, *supra* note 27, at 161-62.

directors up for election each year.³⁹ The default rule under the DGCL is that directors on a staggered board can be removed only for cause.⁴⁰ Therefore, assuming the staggered board is effective, it operates as a potent takeover defense by forcing any bidder seeking control of the board to wait and win two annual elections.⁴¹ For a staggered board to be an effective takeover defense, however, there must be a provision in the company's charter that prohibits shareholders from amending the bylaws to increase sufficiently the size of the board and then filling the empty seats. Similarly, the staggered board should be established in the company's charter rather than in its bylaws; otherwise a dissident can run a proxy contest to amend the bylaws and declassify the board.⁴² If any of these conditions is not satisfied, then the company's staggered board will not be an effective takeover defense, in which case the board may try to remedy these defects unilaterally, as in the cases discussed below. However, such unilateral action by the board is potentially in tension with the spirit of the DGCL, which allocates to shareholders an essential veto power concerning the decision to adopt a staggered board by providing that, if it is not established in the charter or initial bylaw, it can only be subsequently adopted through a charter amendment or a shareholder-adopted bylaw, each of which requires a shareholder vote.⁴³

Indeed, the Delaware courts have implicitly interpreted this provision of the DGCL broadly by applying *Blasius* review to board action that attempts to fortify a structurally ineffective staggered board without shareholder approval. *Blasius* itself involved such an attempt. After learning of Blasius's intention to solicit shareholder consents to amend Atlas's bylaws and increase the size of its staggered board from seven to fifteen members (the maximum allowable under Atlas's charter) in order to fill the newly created positions and elect a majority slate, the Atlas board responded by increasing the size of the board by two seats

39. See DEL. CODE ANN. tit. 8, § 141(d) (Supp. 2008).

40. *Id.* § 141(k)(1) (2001).

41. Shareholders might rationally adopt an effective staggered board because it forces potential acquirers to negotiate with the board, particularly if the company has a poison pill in place as well. This allows the board to manage a process, such as an auction, with the goal of selling the company to the highest bidder. See, e.g., Mark Gordon, *Takeover Defenses Work. Is That Such a Bad Thing?*, 55 STAN. L. REV. 819, 830 (2002). But see Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 937-39 (2002) (finding that companies with an effective staggered board sell themselves less frequently and generate lower expected returns for shareholders).

42. Shareholders have the power to amend the bylaws under section 109(a) of the DGCL. DEL. CODE ANN. tit. 8, § 109(a) (2001).

43. *Id.* § 141(d) (Supp. 2008).

and filling them with directors who would not be up for election at the next meeting. Because the expansion was designed to prevent Blasius from taking control of the board through its consent solicitation,⁴⁴ the court invalidated the board's action.⁴⁵

In *MM Companies, Inc. v. Liquid Audio, Inc.*, the Delaware Supreme Court invalidated a similar though less preclusive act by the Liquid Audio board.⁴⁶ Liquid Audio's bylaws provided for a five-person staggered board consisting of three classes of directors. MM Companies announced its intention to nominate candidates to fill the two seats that were up for election and to submit a proposal to amend the bylaws (which required a supermajority vote of shareholders to amend) to increase the size of the board by four members and elect four of their nominees to fill the newly created seats, and thereby obtain control of the board. When it became clear that MM's nominees would be elected to the two seats up for election, the board amended the bylaws to increase the size of the board from five to seven and proceeded to fill the two vacancies. Unlike the situation in *Blasius*, this would not impact MM's ability to obtain control of the board if its bylaw passed,⁴⁷ but was instead designed to minimize the impact of the election of MM's nominees to the board by diluting their presence.⁴⁸ The Delaware Supreme Court nevertheless found that *Blasius* applied since the board acted for the primary purpose of interfering with the effective exercise of the shareholder franchise,⁴⁹ and held the board's action invalid.⁵⁰

44. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 655 (Del. Ch. 1988).

45. A more blatant case of impermissible disenfranchisement is *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997), in which the ITT board, in response to Hilton's announced plan to commence a tender offer coupled with a proxy contest, spun off ninety-three percent of the company's assets into a new corporation with a staggered board. The court, applying Delaware law, held that ITT's unilateral attempt to classify the board violated *Blasius*. *Id.* at 1349, 1352. See also *Chesapeake v. Shore*, 771 A.2d 293 (Del. Ch. 2000) (enjoining, under *Blasius*, the board's decision, after learning of a dissident's plan to amend the company's bylaws and declassify the board, to preemptively amend the bylaws to eliminate the ability of shareholders to remove directors without cause, eliminate shareholders' ability to fill vacancies on the board, and most importantly to require a supermajority shareholder vote to amend the bylaws in the future).

46. 813 A.2d 1118 (Del. 2003).

47. Liquid Audio's charter did not cap the size of the board at nine directors, so if MM's bylaw had passed, the board would have had eleven directors, of whom six would have been MM's nominees. *Id.* at 1124.

48. *Id.* at 1125.

49. *Id.* at 1131-32.

50. As Professors Kahan and Rock argue, whether or not *Blasius* and *Liquid Audio* were rightly decided depends in part on whether shareholders intended for the staggered board to be

Notwithstanding the decisions in *Blasius* and *Liquid Audio*, reasonable corporate governance changes that make it only marginally harder for a dissident to replace the board will not be evaluated under *Blasius*.⁵¹ This is consistent with the approach that courts take in the electoral process context⁵² – in practice, they do not invoke *Blasius* when the effect of the board’s action is not sufficiently disenfranchising⁵³ – and reflects judicial recognition of the heavy burden that a board bears in attempting to demonstrate a compelling justification for its actions once *Blasius* has been triggered.⁵⁴

3. Share Issuances Designed To Disenfranchise a Dissident

The final type of board action that has rarely but occasionally been found to impermissibly interfere with the potential exercise of the shareholder franchise to replace the board involves share issuances that dilute the voting power of a dissident.⁵⁵ Issuing shares is fundamentally different from board action that tinkers with the election process or corporate governance changes designed to entrench the board in that the former involves what is ostensibly a business decision within the domain of section 141 of the DGCL, which empowers the board to manage the business and affairs of the corporation.⁵⁶ Indeed, the

ineffective: “[I]f one interprets the adoption of the staggered board as a shareholder commitment to a governance structure that requires winning two contested elections in order to gain control, then the board’s actions can be justified as protecting and implementing that structure, albeit with a certain tardiness.” Marcel Kahan & Edward B. Rock, *Precommitment and Managerial Incentives: Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment*, 152 U. PA. L. REV. 473, 510 (2003).

51. See *In re Gaylord Container Corp. S’holders Litig.*, 753 A.2d 462, 469, 486-87 (Del. Ch. 2000) (declining to apply *Blasius* review to various corporate governance changes, including eliminating the ability of shareholders to act by written consent or call a special meeting).
52. See *supra* notes 34-38 and accompanying text.
53. See McBride & Gibbs, *supra* note 25, at 930.
54. See *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996) (explaining that *Blasius* has been “applied rarely” because of its potency).
55. Cases involving stock issuances intended to entrench management might be seen as doctrinally distinct from *Blasius* cases. See Marcel Kahan & Edward Rock, *How To Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 731 (2009) (describing the stock issuance cases and the cases following *Blasius* as “[t]wo overlapping lines of Delaware cases”). But subsequent cases evaluating challenges to dilutive share issuances have specifically invoked *Blasius*, albeit in upholding the board’s action. See *infra* notes 58-59.
56. DEL. CODE ANN. tit. 8, § 141(a) (2001).

DGCL specifically authorizes the board to issue stock.⁵⁷ Because even a share issuance that dilutes the voting power of a dissident can often be justified by reference to its capital-raising benefits,⁵⁸ Delaware courts are generally reluctant to subject share issuances to the rigor of *Blasius* review.⁵⁹

When a decision to issue shares is made hastily and does not actually raise capital for the corporation, however, courts are more likely to find an impermissible purpose.⁶⁰ In *Condec Corp. v. Lunkenheimer Co.*, Condec made a tender offer for Lunkenheimer and, when it appeared that a majority of shareholders were going to tender, Lunkenheimer negotiated a stock purchase agreement under which it issued 75,000 shares to U.S. Industries in exchange for 75,000 shares of the latter's preferred stock.⁶¹ The purchase agreement was contingent on a subsequent sale of substantially all of Lunkenheimer's assets to U.S. Industries.⁶² Noting that the share issuance "brought no money into the Lunkenheimer treasury," the Chancery Court concluded that the board's primary purpose was to disenfranchise Condec by diluting its voting power and thus enjoined the share issuance.⁶³ However, *Condec* appears to be the

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57. *Id.* § 151(a). The board's ability to issue shares is limited by the New York Stock Exchange and NASDAQ rules, which require a shareholder vote if the board issues twenty percent or more of its outstanding common or voting shares, other than as part of a public offering. NASDAQ, INC., NASDAQ STOCK MARKET RULES, EQUITY R. 5635(a)(1) (2010), available at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Fdequityrules%2F>; N.Y. STOCK EXCH., INC., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 312.03(c) (2010), available at <http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp%5F1%5F4&manual=%2Fnlcm%2Fsections%2Fnlcm%2Fsections%2F>.
58. See Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm*, 36 LOY. U. CHI. L.J. 1111, 1181 (2005); McBride & Gibbs, *supra* note 25, at 939.
59. See, e.g., *Glazer v. Zapata Corp.*, 658 A.2d 176, 183-84 (Del. Ch. 1993) (declining to apply *Blasius* to a stock issuance that diluted the holdings of a dissident on the ground that the issuance was the outgrowth of a long-term plan to raise new capital for the corporation).
60. When a corporation issues high-vote stock the board may have trouble arguing that its primary purpose is to raise capital. See *Packer v. Yampol*, No. C.A. 8432, 1986 WL 4748 (Del. Ch. Apr. 18, 1986). The New York Stock Exchange rules prohibit companies from issuing high-vote shares if they already have a class of shares listed on the exchange. See N.Y. STOCK EXCH., INC., *supra* note 57, § 313.00.
61. 230 A.2d 769, 772-73 (Del. Ch. 1967).
62. *Id.* at 774-75.
63. *Id.* at 777.

exception that makes the rule: legitimate capital-raising share issuances, even if dilutive, do not trigger *Blasius*.⁶⁴

B. Board Action Designed To Thwart a Vote on a Transaction

This Note has thus far examined *Blasius* in the context of board entrenchment, which is its archetypal form. But Chancellor Allen's discussion in *Blasius* of the allocation of power between the board and shareholders extended beyond entrenchment cases. According to the Chancellor, this allocation is implicated "*in every instance in which an incumbent board seeks to thwart a shareholder majority.*"⁶⁵ Chancellor Allen presumably did not mean that boards are bound to adhere to the will of shareholders whenever they express it, as through a precatory proposal recommending that the board take a certain action or adopt a particular policy,⁶⁶ or that certain business decisions are not within the purview of the board's exclusive authority even if a majority of shareholders disagrees with the board.⁶⁷ But when the board acts to thwart a vote on a matter on which the DGCL or the corporation's charter or bylaws entitles shareholders to vote, the principles underlying *Blasius* remain applicable.

There is a dearth of case law concerning the application of *Blasius* to votes on transactions. The leading case is *Wisconsin Investment Board v. Peerless Systems Corp.*⁶⁸ *Peerless* involved an annual meeting at which shareholders were

64. See Kahan & Rock, *supra* note 55, at 733.

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

66. Because of the ease with which shareholders can include precatory proposals on the company's proxy statement under Rule 14a-8, see 17 C.F.R. § 240.14a-8 (2009), such proposals have become a popular avenue for proposing corporate governance and social responsibility changes.

67. An unresolved issue in Delaware is whether shareholders have the power to adopt a bylaw requiring the board to eliminate its poison pill, which is a common takeover defense among public companies. See Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835 (1998); *supra* note 7 and accompanying discussion. A poison pill gives shareholders the right to purchase a certain number of shares of preferred stock in the company. This right becomes a right to purchase common stock in the company at a discount to the then-prevailing market price upon the occurrence of a triggering event, typically defined to be the acquisition of a specified percentage of the company's stock. Rights held by the bidder, upon the purchase of such shares, become non-exercisable. As such, the bidder would suffer significant dilution if it proceeded with a tender offer.

68. No. Civ. A. 17637, 2000 WL 1805376 (Del. Ch. Dec. 4, 2000). The only other case on point prior to *Inter-Tel* is *In re MONY Group, Inc. Shareholder Litigation*, 853 A.2d 661 (Del. Ch. 2004), which, despite adopting a somewhat narrow reading of *Peerless*, confirmed the general applicability of *Blasius* to votes on transactions. See *infra* Subsection II.B.3.

to vote on a board proposal to increase the number of shares available for issuance through the company's option plan. When it appeared that the proposal was likely to be defeated, the company's CEO adjourned the meeting for thirty days without closing the polls, as permitted by the company's bylaws.⁶⁹ At the reconvened meeting the proposal passed by a slim margin.⁷⁰ The plaintiff, an institutional shareholder, brought suit claiming, *inter alia*, that the board impermissibly interfered with the shareholder franchise, and moved for summary judgment.⁷¹

Chancellor Chandler first found that the primary purpose behind the adjournment was to interfere with the shareholder vote in an effort to secure passage of the proposal, and that such interference triggered *Blasius* review. He rejected the board's alternative explanation that the purpose of the adjournment was to increase voter turnout, in part based on trial testimony indicating that the adjournment was intended to give the board more time to solicit "yes" votes.⁷² The board argued that *Blasius* was nevertheless inapplicable because, unlike the typical entrenchment case in which directors have an inherent interest in retaining their jobs, the Peerless board was disinterested with respect to the vote. Chancellor Chandler rejected this narrow reading of *Blasius*, explaining that "[t]he derivation of board power from shareholders, as well as the allocation of power with respect to governance of the corporation, are broad structural concerns within the corporate form that are present in any shareholder vote."⁷³

Having found *Blasius* applicable, the Chancellor then assessed a number of proffered justifications and defenses for the adjournment. He rejected the board's argument that no disenfranchisement occurred because the vote was subsequently held. The later vote, he reasoned, was not dispositive since it was not clear whether the ratification was fairly effected in light of the plaintiff's allegation that the board solicited "yes" votes during the adjournment. Chancellor Chandler also dismissed, citing *Schnell*, the board's argument that the adjournment should be upheld since it was legally consistent with the company's bylaws.⁷⁴ Finally, the Chancellor rejected the board's lesser-evils argument that the alternative to an adjournment would have been to let the

69. *Peerless*, 2000 WL 1805376, at *3-4.

70. *Id.* at *1.

71. *Id.*

72. *Id.* at *11.

73. *Id.* at *13. Chancellor Chandler also noted that, although the record was unclear, there was some evidence that Peerless directors stood to gain from the option issuance. *Id.*

74. *Id.* at *15.

shareholders vote down the proposal and then submit it for a new vote, which would have been costlier than adjourning the vote, concluding that cutting costs was “not a compelling reason to forego the legally required procedures.”⁷⁵ Because the procedural posture of the case involved a motion for summary judgment against the board, the Chancellor declined to determine “as a matter of law” that Peerless could not articulate a compelling justification to support the adjournment.⁷⁶ Nevertheless, he emphasized the “deep judicial suspicion” of actions designed to thwart a vote even when the board has no clear conflict of interest, and concluded that the board faced a “difficult road ahead.”⁷⁷

Peerless thus makes clear that the scope of *Blasius* is not limited to entrenchment cases and encompasses board action designed to thwart a shareholder vote to approve a business decision. It is important, however, not to overstate this point. The DGCL rarely requires that shareholders ratify transactions entered into by the board. Moreover, the most fundamental business transaction on which shareholders are entitled to vote under the DGCL, a merger,⁷⁸ can often be structured to avoid a vote, at least of the acquirer’s shareholders.⁷⁹ In a direct merger the acquirer’s shareholders need not vote provided that, inter alia, the acquirer does not issue more than twenty percent of its common shares in connection with the merger.⁸⁰ Thus, an acquirer can avoid a shareholder vote by including a sufficient amount of nonstock consideration in the purchase price. Moreover, regardless of the amount of stock consideration, an acquirer can also avoid a vote of its shareholders if it structures the transaction as a triangular merger, in which it merges the target corporation into a wholly owned subsidiary of the acquirer. Because the acquirer (as opposed to its subsidiary)⁸¹ is not a party to the merger and therefore not a “constituent corporation,” its shareholders need not

75. *Id.*

76. *Id.* at *19.

77. *Id.*

78. See DEL. CODE ANN. tit. 8, § 251(c) (Supp. 2008). Shareholder approval is also required for a sale of substantially all assets of the corporation. *Id.* § 271(a) (2001).

79. The target will not be able to avoid a vote of its shareholders because each share of stock outstanding immediately prior to the merger will not be an identical outstanding share of the surviving corporation once the target stock is converted into the merger consideration. See *id.* § 251(f) (Supp. 2008).

80. See *id.*

81. Note that the subsidiary’s shares are owned by the parent corporation rather than by public stockholders.

vote.⁸² Delaware is more formalistic and less solicitous of shareholder voting rights in this respect than are other states.⁸³

Not only can the board structure a merger to avoid a shareholder vote, it can also, consistent with *Blasius*, take actions designed to thwart a transactional vote required by the NYSE or NASDAQ but not by the company's charter or bylaws or the DGCL. A prominent case on point is *Paramount Communications, Inc. v. Time Inc.*⁸⁴ Time had entered into a stock-for-stock reverse triangular merger with Warner according to the terms of which Warner would merge into a wholly owned subsidiary of Time, with Warner emerging as the surviving corporation.⁸⁵ In the hope of busting up the Time-Warner merger, Paramount launched a hostile tender offer to purchase all of Time's shares.⁸⁶ In response, the Time board decided to abort its previously negotiated merger with Warner and instead make a cash tender offer for a majority of Warner's shares, to be followed by a back-end merger.⁸⁷ Although the board's decision to restructure the original transaction, which required a vote of Time shareholders under the NYSE rules but not under the DGCL,⁸⁸ was motivated by a concern that Time shareholders would not authorize the share issuance, the court upheld it as a reasonable defensive measure under *Unocal*,⁸⁹ without citing to *Blasius* once. A subsequent case expressly declined to apply *Blasius* in the context of a vote required by NASDAQ but not by the DGCL or the company's governing documents.⁹⁰ This distinction appears to be predicated on the fact that voting rights conferred by the rules of a stock exchange, unlike voting rights that emanate from the DGCL or the corporation's charter or bylaws, are not "constitutional" but instead arise from an external contract

82. See *id.* § 251(c). A triangular merger in which the acquirer issues more than twenty percent of its common stock will, however, require a vote under the rules of the NYSE and NASDAQ. See *supra* note 57.

83. See, e.g., CAL. CORP. CODE §§ 1200(e), 1201(a)-(b) (West 1990 & Supp. 2010).

84. 571 A.2d 1140 (Del. 1989).

85. *Id.* at 1146.

86. *Id.* at 1147.

87. *Id.* at 1148. A back-end merger refers to a situation in which a controlling shareholder merges the company with itself or another controlled entity and thereby eliminates the stockholdings in the company of the minority shareholders.

88. *Id.* at 1146.

89. *Id.* at 1154.

90. See *Lennane v. ASK Computer Sys.*, CIV. A. No. 11744, 1990 WL 154150, at *7-9 (Del. Ch. Oct. 11, 1990) (holding that *Blasius* was not triggered when the ASK board refused to submit a share issuance in connection with an acquisition to a shareholder vote, as required by NASDAQ); *McBride & Gibbs*, *supra* note 25, at 934 & n.38.

between the corporation and the exchange which the board has the power to breach or terminate in its business judgment.⁹¹ However, to the extent that shareholders purchase shares in a corporation with the expectation that it will continue to list on the NYSE or NASDAQ, they will rationally assume that the company will continue to comply with the exchange's voting requirements. As such, confining *Blasius* to constitutionally mandated votes arguably frustrates shareholders' ex ante voting expectations.

Notwithstanding these caveats, the ultimate point remains: *Blasius* has historically not been strictly limited to entrenchment cases. Both *Peerless* and the expansive language in *Blasius* itself make clear that *Blasius* applies to transactions that require a shareholder vote as a matter of corporate law. This is true even when the board acts in good faith and is ostensibly disinterested in the outcome of the vote.⁹² It is against this doctrinal backdrop that Vice Chancellor Strine's opinion in *Inter-Tel* stands out as a departure. The next Part turns to a discussion of that decision.

II. *INTER-TEL V. MERCIER* AND ITS IMPLICATIONS

This Part begins by summarizing the Chancery Court's decision in *Inter-Tel*. It then argues that *Inter-Tel* cannot be reconciled with the traditional *Blasius* doctrine and instead must be read as an attempt to limit the doctrine's reach to entrenchment cases.

A. *The Decision in Inter-Tel*

The facts of *Inter-Tel* are as follows. A special committee of the board of *Inter-Tel* entered into a merger agreement with *Mitel* and a private equity fund. None of the members of the special committee had been promised a post-merger position with *Mitel*.⁹³ Nevertheless, Institutional Shareholder Services (ISS), a proxy advisory firm, recommended that shareholders vote against the deal. After it became clear that the company was not going to solicit enough affirmative proxies to approve the merger, the special committee, on the morning of the scheduled vote, decided to postpone the meeting and set a new record date. Under Delaware law, only shareholders who held their shares

91. *ASK Computer Sys.*, 1990 WL 154150, at *8.

92. See *Wis. Inv. Bd. v. Peerless Sys. Corp.*, No. Civ. A. 17537, 2000 WL 1805376, at *13, *19 (Del. Ch. Dec. 4, 2000).

93. *Mercier v. Inter-Tel (Del.)*, Inc., 929 A.2d 786, 795 (Del. Ch. 2007).

on the record date are entitled to vote.⁹⁴ The special committee's decision to postpone the imminent vote was motivated by its belief that the merger was in the best interests of shareholders and would be lost forever if they made the mistake of voting against it.⁹⁵ Beyond this general desire to preserve the deal for shareholders, the board advanced several specific justifications for the postponement.

First, a number of arbitrageurs had purchased shares after the record date that they would be unable to vote. Arbitrageurs are institutional investors that purchase shares of the target corporation in the market at a discount to the announced merger price in the hope that the deal will be consummated and they will be able to pocket the spread between the deal price and the pre-merger stock price. By postponing the vote and setting a new record date, the board argued that it was actually enfranchising these shareholders.⁹⁶ At the same time, setting a later record date increased the likelihood that the merger would be approved. This is because under Delaware law a merger must be approved by a majority of the *outstanding* shares.⁹⁷ Since shareholders who purchase shares in the market after the record date cannot execute proxies, there exists a dead vote problem: as the number of shares that have changed hands since the record date increases, so does the required percentage of "yes" votes (calculated as a proportion of all votes cast) needed to approve the deal.⁹⁸ In other words, when a vote requires a majority of outstanding shares as opposed to a majority of voting shares, every share sold after the record date is equivalent in effect to a "no" vote. Moving the record date closer to the date of the actual vote mitigates this dead vote problem by decreasing the number of shares that will have changed hands during the period after the record date.

In addition to the "enfranchisement" justification for postponing the vote and setting a new record date, the board presented several other arguments in defense of the postponement. ISS had indicated that it might recommend the merger if Inter-Tel's financial condition worsened.⁹⁹ Because Inter-Tel's tracking reports suggested that the company was likely to fall short of its earnings projection for the quarter, postponing the vote to allow for the release

94. At the time, section 213(a) of the DGCL authorized the board to fix a record date between ten and sixty days before the date of an annual or special meeting. DEL. CODE ANN. tit. 8, § 213(a) (2001).

95. *Inter-Tel*, 929 A.2d at 797.

96. *Id.* at 795.

97. DEL. CODE ANN. tit. 8, § 251(c) (Supp. 2008).

98. This assumes that shareholders who have sold their shares since the record date, and thus no longer have an economic interest in the transaction, do not vote.

99. *Inter-Tel*, 929 A.2d at 795.

of this information might cause ISS to recognize the attractiveness of the deal price and change its recommendation.¹⁰⁰ Similarly, the mergers and acquisitions (M&A) market was beginning to “lose its froth” due to the decline in the availability of credit, and the board believed that shareholders and ISS would benefit from additional time to evaluate the merger in light of these developments, all of which made it unlikely that either Mitel and its private equity co-acquirer or any other potential bidder would be able to top the current deal price.¹⁰¹ Finally, a large shareholder of Inter-Tel had recently filed proxy materials proposing a recapitalization as an alternative to the merger, and the board wanted to give shareholders time to evaluate his proposal.¹⁰² As it happened, after the postponement the company announced lower than expected earnings, ISS changed its recommendation, and shareholders approved the merger at the rescheduled special meeting.¹⁰³

A small shareholder of Inter-Tel sought a preliminary injunction against the Mitel merger on the ground that the board acted for the primary purpose of thwarting the ability of Inter-Tel shareholders to vote against the merger.¹⁰⁴ In evaluating the plaintiff’s *Blasius* claim, Vice Chancellor Strine expressed reluctance towards applying *Blasius* in nonentrenchment cases.¹⁰⁵ Thus, the Vice Chancellor suggested that outside of the context of a vote for directors or on a matter involving issues of corporate control, neither *Blasius* nor even *Unocal* reasonableness review should apply.¹⁰⁶ With respect to action taken by the board to thwart a shareholder vote touching on matters of corporate control, such as the postponement at issue in *Inter-Tel*, Vice Chancellor Strine believed that *Unocal* rather than *Blasius* was the proper test. Under *Unocal*, which generally applies to defensive action taken by the board in the context of a contest for corporate control, the board would first need to identify a legitimate corporate objective served by the postponement, and then would have to show that it acted reasonably in relation to that objective and that the postponement did not preclude shareholders from exercising their right to vote on the merger.¹⁰⁷ According to the Vice Chancellor, the postponement passed

100. *Id.* at 796.

101. *See id.* at 794, 796.

102. *Id.* at 796, 798.

103. *Id.* at 802-03.

104. *Id.* at 788, 804-05.

105. *Id.* at 808; *see also* Kahan & Rock, *supra* note 55, at 735 (noting that *Inter-Tel* “tried to limit the *Blasius* standard to director elections”).

106. *Inter-Tel*, 929 A.2d at 812 n.78.

107. *Id.* at 810-11.

muster under *Unocal*. It was a reasonable means of achieving the legitimate objective of preserving a deal that the disinterested special committee in good faith believed was in the best interests of shareholders, and it did not preclude shareholders from rejecting the merger at the rescheduled meeting.¹⁰⁸

Because Vice Chancellor Strine recognized that Delaware Supreme Court precedents continued to apply *Blasius* even in circumstances implicating *Unocal*, he went on to uphold the postponement under *Blasius* as well. The Vice Chancellor presented two alternate paths to sustaining the board's action under *Blasius*. He first reasoned that *Blasius* was inapplicable because the board's primary purpose was not to disenfranchise shareholders but rather to give them more time to deliberate.¹⁰⁹ Alternatively, he found that even if *Blasius* had been triggered, the special committee's desire to preserve the Mitel deal for shareholders constituted a compelling justification.¹¹⁰

B. *Inter-Tel* as a Narrowing of the *Blasius* Doctrine

This Section argues that Vice Chancellor Strine's reasoning in *Inter-Tel* separately attempts to alter the traditional *Blasius* doctrine in two principal ways. First, it openly seeks to replace *Blasius* with *Unocal* review when the board takes defensive action in the context of a control contest, whether or not the board is motivated by an entrenchment purpose. Second, it represents an attempt, at a minimum, to confine *Blasius* to entrenchment cases. The aggregate effect of these modifications would be to eliminate *Blasius* as a separate doctrine in the following manner. When the board interferes with the exercise of the shareholder franchise within the context of a potential change in control of the corporation, *Unocal* rather than *Blasius* would govern regardless of whether the board is alleged to have an entrenchment motive, although the presence of such a motive would be a significant determinant of the outcome of *Unocal* review.¹¹¹ Outside of the corporate control context, however, *Unocal* is inapplicable. Moreover, board entrenchment is ipso facto not a concern when the matter to be voted on is an ordinary business proposal that does not implicate a possible change in corporate control or in the composition of the board. As such the Vice Chancellor's analysis suggests that board interference

108. *Id.* at 817-18.

109. *Id.* at 818-19.

110. *Id.* at 819.

111. See *id.* at 811 (explaining that an entrenchment purpose would remain impermissible under *Unocal* analysis).

with a shareholder vote outside of the corporate control context should be evaluated under the business judgment rule rather than *Blasius*.¹¹²

However, *Inter-Tel*'s attempt to completely abolish *Blasius* as a separate standard of review cannot be read as having a binding legal effect because Vice Chancellor Strine recognized that Delaware Supreme Court precedents prevented him from collapsing *Blasius* into *Unocal* in the corporate control context.¹¹³ Instead, the more doctrinally significant impact of *Inter-Tel* is to subtly but substantially alter the form of *Blasius* review in nonentrenchment cases in a manner that bears a closer resemblance to the business judgment rule than to the rigorous scrutiny that *Blasius* has traditionally entailed.

This Section concludes by considering whether such a narrowing of the *Blasius* doctrine finds precedential support in the Chancery Court's 2004 decision in *In re MONY Group, Inc. Shareholder Litigation*,¹¹⁴ a decision upon which Vice Chancellor Strine relied in his opinion in *Inter-Tel*. It argues that *In re MONY* and *Inter-Tel* are distinguishable on the facts, and that the result in *In re MONY* is potentially, though not necessarily, consistent with preexisting *Blasius* doctrine. Nevertheless, both cases clearly reflect a level of discomfort with applying *Blasius* outside of the entrenchment context. Part III argues that this discomfort is unwarranted.

1. Replacing *Blasius* with *Unocal* in the Context of a Control Contest

The first way in which Vice Chancellor Strine's opinion in *Inter-Tel* departs from traditional *Blasius* analysis is his assertion that *Unocal* rather than *Blasius* should be the proper standard of review for defensive actions that interfere with the shareholder franchise in the context of a contest for corporate control. The Vice Chancellor and two other members of the Delaware judiciary, Justice Jack Jacobs of the Delaware Supreme Court and Chancellor Allen himself, made this argument several years ago in an article published in the *Business Lawyer*.¹¹⁵ The crux of the argument is that the circumstances implicating *Blasius* also typically involve hostile tender offers, and thus the disenfranchising action is also a defensive action subject to *Unocal*.¹¹⁶ Moreover, they argued that the difficulty in applying *Blasius* stems from the

112. See *id.* at 811, 812 n.78.

113. *Id.* at 818.

114. 853 A.2d 661 (Del. Ch. 2004).

115. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001).

116. *Id.* at 1312.

predicate question of whether the board has acted for the primary purpose of disenfranchising shareholders. The first prong of *Unocal* review functions as a proxy for this primary purpose test by requiring directors to point to a legitimate corporate objective that their actions are intended to serve; the second prong of *Unocal* prohibits actions that are preclusive or coercive and thereby proscribes actions that have the effect of precluding shareholders from exercising the franchise.¹¹⁷ Based on this reasoning, Vice Chancellor Strine and his co-authors consider *Unocal* “adequate to capture the voting franchise concerns that animated *Blasius*, so long as the court applies *Unocal* ‘with a gimlet eye out for inequitably motivated electoral manipulations or for subjectively well-intentioned board action that has preclusive or coercive effects.’”¹¹⁸

To the extent that this “gimlet eye” is sufficiently discerning, the Vice Chancellor’s proposal to replace *Blasius* with *Unocal* in the context of a contest for corporate control may be merely a matter of semantics.¹¹⁹ But given that *Unocal* review is by nature far more deferential than *Blasius* review, the two standards may lead to different outcomes in particular cases.¹²⁰ Indeed, the Delaware Supreme Court specifically rejected this doctrinal merging in *Liquid Audio*.¹²¹ *Liquid Audio*, moreover, is arguably a case in which the board’s action was not preclusive under *Unocal* because the expansion of the board did not prevent a dissident from gaining control of the board, but nevertheless had the effect (and purpose) of frustrating shareholders’ voting rights.¹²² Thus, there appears to be more at stake than mere semantics and doctrinal niceties in the Vice Chancellor’s attempt to collapse *Blasius* into *Unocal* in the context of defensive action during a control contest.

117. *Inter-Tel*, 929 A.2d at 807-08; Allen et al., *supra* note 115, at 1313-14.

118. Allen et al., *supra* note 115, at 1316 (quoting *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000)).

119. See *id.* at 1312 (“[I]t is difficult to unearth or even imagine a case that would be decided differently if the analysis were conducted under the *Blasius* rather than the *Unocal* standard.”).

120. See Bradley R. Aronstam, *The Interplay of Blasius and Unocal—A Compelling Problem Justifying the Call for Substantial Change*, 81 OR. L. REV. 429, 476 (2002) (noting the Delaware judiciary’s “reluctance to apply *Unocal* with the ‘spirit of *Blasius*’”).

121. *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1131 (Del. 2003).

122. Annette Simon, Note, *MM Companies, Inc. v. Liquid Audio, Inc.: An Attempt To Clarify the Blasius-Unocal Framework*, 52 U. KAN. L. REV. 1153, 1173 (2004).

2. Limiting *Blasius* to Entrenchment Cases

Vice Chancellor Strine was explicit in advocating the application of *Unocal* rather than *Blasius* to board action designed to thwart a shareholder vote in the context of a control contest, but he was constrained by Delaware Supreme Court precedents rebuffing prior attempts to eliminate *Blasius* as a stand-alone doctrine. His second and, I suggest, more important achievement in *Inter-Tel*, limiting the scope of *Blasius* to entrenchment cases, was accomplished more furtively by introducing two traditionally inapplicable inquiries to the *Blasius* analysis: the good faith and independence of the board. A closer look at the part of the court's opinion upholding, on two alternate bases, the postponement under *Blasius* makes it clear that the Vice Chancellor was applying a severely watered-down version of the *Blasius* test, one that bears a closer resemblance to the deferential business judgment rule than to the traditional *Blasius* doctrine.

As discussed above, Vice Chancellor Strine first reasoned that *Blasius* was inapplicable because the board's primary purpose in postponing the meeting was not to disenfranchise shareholders but rather to give them more time to make an informed decision.¹²³ But this reasoning confuses the threshold question of whether *Blasius* has been triggered with the secondary question of whether the board has presented a compelling justification sufficient to satisfy *Blasius*'s strict scrutiny. As Part I explained, although the formulation of the *Blasius* test is framed in terms of the board's purpose, as a practical matter courts have focused on the effect of the board's action rather than on its internal mental processes. Thus, courts do not apply *Blasius* review when the board's action does not have a sufficiently disenfranchising effect, regardless of whether an inquiry into the board's purpose might reveal a design to erect certain barriers in the path of a proposed shareholder action.¹²⁴ The corollary is that, in determining whether *Blasius* review is appropriate, courts will not entertain arguments concerning the alleged good intentions of the board when the effect of the board's action is sufficiently disenfranchising. Traditionally, such a disenfranchising effect has been found, and *Blasius* has thus been triggered, when the board postpones an imminent vote in order to preempt a particular outcome.¹²⁵ Any potential justifications for the postponement have only factored in at the second stage of the analysis.

123. *Mercier v. Inter-Tel (Del.)*, Inc., 929 A.2d 786, 818-19 (Del. Ch. 2007).

124. See *supra* notes 34-38 and 51-54 and accompanying text.

125. See, e.g., *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1123 (Del. Ch. 1990).

Thus, to the extent that the board's "purpose" is relevant to the determination of whether *Blasius* review is triggered in the first place, it is only with respect to the narrow question of whether the immediate intended effect of the board's action is to preclude shareholders from voting a certain way, which was undeniably the case in *Inter-Tel*. Vice Chancellor Strine's analysis, by contrast, looks to the board's "purpose" at a higher level of generality. When he concludes that the board's primary purpose was not to disenfranchise shareholders, what he really means is that the postponement was motivated by a legitimate business purpose; in other words, that the board's motive was pure. Indeed, he emphasizes throughout the opinion that the board acted in good faith.¹²⁶ However, the good faith of directors, that is, their belief that disenfranchising shareholders is in the best interests of the corporation, has traditionally not been relevant to *Blasius* review. In *Blasius* itself the court enjoined the board's action even though it found that the board acted in good faith, concluding that action designed to interfere with a shareholder vote "involves a determination of the legal and equitable obligations of an agent towards his principal," which is a question that "a court may [not] leave to the agent finally to decide so long as he does so honestly and competently."¹²⁷

While Vice Chancellor Strine's first approach to evaluating the board's actions under the *Blasius* umbrella introduced an element of good faith to the *Blasius* analysis,¹²⁸ his alternate holding—that even if the postponement did trigger *Blasius* review, the special committee's desire to preserve the Mitel deal constituted a compelling justification—focused on another traditionally irrelevant consideration: director independence.¹²⁹ At several points in the opinion the Vice Chancellor emphasized that none of the directors on the special committee had any personal interest in the consummation of the transaction;¹³⁰ even *Inter-Tel*'s CEO had nothing in his severance package that would lead him to prefer a cash-out merger with Mitel over an alternative transaction or no transaction.¹³¹ In holding that, even if *Blasius* applied, the board had presented a compelling justification, Vice Chancellor Strine again stressed the board's independence:

126. *Inter-Tel*, 929 A.2d at 812 n.78, 814.

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

128. See Justin Nemunaitis, On Good Faith and the Future of *Scienter* in Delaware Corporate Law 14 (Mar. 28, 2008) (unpublished article), available at <http://ssrn.com/abstract=1114347>.

129. *Inter-Tel*, 929 A.2d at 819.

130. *Id.* at 795, 805.

131. *Id.* at 813.

[C]ompelling circumstances are presented when *independent* directors believe that: (1) stockholders are about to reject a third-party merger proposal that the independent directors believe is in their best interests; (2) information useful to the stockholders' decision-making process has not been considered adequately or not yet been publicly disclosed; and (3) if the stockholders vote no . . . the opportunity to receive the bid will be irretrievably lost.¹³²

The Chancery Court's decision in *Peerless*, however, implies that the application of *Blasius* review does not turn on the disinterestedness of directors.¹³³ More generally, the independence of the board has traditionally not been part of the *Blasius* inquiry and is arguably inapposite given the inherent conflict of interest that *Blasius* identified as being present when the board, even if independent and otherwise disinterested, acts to reallocate power away from shareholders.¹³⁴ Moreover, a showing of director independence does not alter the standard of review under two of Delaware's other doctrines of heightened scrutiny—*Revlon*, which requires the board to seek the best price for shareholders once it decides to sell control of the company,¹³⁵ and *Unocal*, which applies to defensive actions in the context of a contest for corporate control.¹³⁶ One might ask why a showing of independence does not end the inquiry and insulate directors from liability in these two contexts. The plain answer is that the possibility of subtle conflicts of interest¹³⁷

132. *Id.* at 819 (emphasis added).

133. *Wis. Inv. Bd. v. Peerless Sys. Corp.*, No. Civ. A. 17637, 2000 WL 1805376, at *19 (Del. Ch. Dec. 4, 2000).

134. *See also* Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 658-59 (2007) (arguing that the business judgment rule is inappropriate in *Blasius* cases precisely because the interests of shareholders conflict with those of directors with respect to voting rights).

135. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *see also* *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994) (holding that a board's *Revlon* duties are triggered whenever public stockholders would lose control of the corporation as a result of the proposed transaction); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005) (applying *Revlon* to actions by an independent board in the context of a sale of control).

136. Under *Unocal* analysis, director independence will not lower the standard of review but will enhance a showing of reasonableness. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1375 (Del. 1995); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

137. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 170 (2009) (suggesting that shareholder voting on mergers is necessary because the risk of director abuse is heightened in an end-game scenario).

and the costs of board error¹³⁸ in the context of change of control transactions render the deferential business judgment rule inadequate to constrain agency costs.¹³⁹ This greater potential for abuse and error is part of what animated *Blasius* as well.¹⁴⁰

Although good faith and independence are traditionally irrelevant for the purposes of *Blasius*, they are relevant to another familiar standard of review in Delaware law: the business judgment rule.¹⁴¹ Under the business judgment rule, which applies to the vast majority of business decisions that boards make, courts will not interfere with the actions of disinterested directors and will presume that the directors were informed as to the subject of the business decision and made a good faith determination that it was in the best interests of the corporation.¹⁴² Thus, based on a closer reading of *Inter-Tel*, it becomes clear that although Vice Chancellor Strine purported to apply *Blasius*, he was really applying a far more deferential test, something akin to the business judgment rule. This is the central accomplishment of *Inter-Tel*: it represents a major step towards limiting *Blasius* to entrenchment cases.¹⁴³

Although the bulk of Vice Chancellor Strine's analysis was devoted to the *Unocal/Blasius* distinction, the true practical import of the decision is confining *Blasius* to the entrenchment context in the manner described above. This is so for two reasons. First, as discussed above, the distinction between *Unocal* and *Blasius* is to some extent, though to be sure not entirely, one of form rather than substance.¹⁴⁴ Thus, merely replacing *Blasius* with *Unocal* would not in itself have been sufficient to allow Vice Chancellor Strine to conclude that the postponement in *Inter-Tel* passed muster under *Unocal* without his further conclusion that postponing an imminent vote was a nonpreclusive and reasonable means of preserving the Mitel merger.¹⁴⁵ And this conclusion was

138. See *QVC*, 673 A.2d at 43, 45 (emphasizing the significant economic consequences of a merger in which shareholders stand to lose their last opportunity to receive a control premium for their shares).

139. See *infra* Part III.

140. See Velasco, *supra* note 134, at 658-59.

141. See *supra* note 5 and accompanying text.

142. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

143. The Vice Chancellor made it clear that he would not entertain an argument that the board acted in good faith if its purpose was one of entrenchment. *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 811 (Del. Ch. 2007) ("The notion that directors know better than the stockholders about who should be on the board is no justification at all.").

144. See *supra* notes 118-122 and accompanying text.

145. *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810-11 (Del. Ch. 2007).

clearly informed by the Vice Chancellor's view that postponing a vote in order to preserve a transaction that the board in good faith believes to be in the best interests of shareholders is a permissible exercise of the board's authority to manage the business and affairs of the corporation. Thus the actual outcome of the *Unocal* analysis in *Inter-Tel* did not turn on the doctrinal differences between *Unocal* and *Blasius* review so much as on the Vice Chancellor's belief that outside of the entrenchment context the policy rationales underlying *Blasius* are not implicated. The second reason why Vice Chancellor Strine's attempt to collapse *Blasius* into *Unocal* is of limited practical effect is that the Vice Chancellor explicitly recognized that Delaware Supreme Court precedents prevented him from doing so. By contrast, the Vice Chancellor was able to confine *Blasius* to entrenchment cases by quietly altering the content of *Blasius* analysis without formally purporting to do so.

Of course, such a narrowing cannot be squared with either *Peerless* or the expansive language in *Blasius* itself. Vice Chancellor Strine attempted to distinguish *Peerless* on the theory that in *Peerless* the vote could be resubmitted to shareholders at any time even if they voted it down, whereas the Mitel merger would be lost forever if shareholders voted against it.¹⁴⁶ This is true, but it is not clear which way it cuts. The reason that the option plan in *Peerless* could be continuously resubmitted to a shareholder vote is that it was an ordinary business proposal, unlike the Mitel merger. One might think that the sanctity of the shareholder franchise would be particularly implicated in the context of a vote on a fundamental transaction such as a merger. Thus, as the Vice Chancellor seemed to recognize,¹⁴⁷ *Inter-Tel* is difficult to reconcile with *Peerless* or *Blasius*.

3. *Inter-Tel* and *In re MONY*

Although the reasoning in *Inter-Tel* represents a break from *Peerless* and *Blasius*, it does find some, though only partial, precedential support in the Chancery Court's 2004 decision in *In re MONY Group, Inc. Shareholder Litigation*.¹⁴⁸ In *In re MONY*, the MONY board decided to postpone the vote on its merger with AXA and move back the record date after fifty-two percent of the company's shares had changed hands since the original record date.¹⁴⁹ Vice Chancellor Lamb found that the board's decision to change the record date was

^{146.} *Id.* at 811 n.78.

^{147.} *Id.*

^{148.} 853 A.2d 661 (Del. Ch. 2004).

^{149.} *Id.* at 669.

motivated by its belief that a later record date would make shareholder approval more likely since arbitrageurs that had purchased shares after the original date could be expected to favor the deal.¹⁵⁰ Although the Vice Chancellor recognized that *Blasius* is not limited to cases involving director elections, he believed that it should only be applied outside of that context “in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter and to thwart what appears to be the will of a majority of the stockholders, as in [*Peerless*].”¹⁵¹ Vice Chancellor Lamb distinguished *Peerless* on the ground that the CEO of *Peerless* was interested in the option plan and that at the time of the adjournment the option plan faced imminent defeat.¹⁵² By contrast, the Vice Chancellor found that the *MONY* directors were disinterested with respect to the merger vote and acted out of a good faith belief that the approval of the merger was in the best interests of shareholders, and indeed did not thwart the will of the *MONY* shareholders who, at the time, supported the transaction.¹⁵³ He thus declined to apply *Blasius* and upheld the postponement under the business judgment rule.¹⁵⁴

Vice Chancellor Strine relied on *In re MONY* in his opinion in *Inter-Tel*. The two cases are distinguishable, however, in two ways. First, the extent of the turnover in shares that occurred after the record date in *In re MONY* created a more significant dead vote problem than in *Inter-Tel* and arguably presented a more compelling justification for postponement.¹⁵⁵ Second, and more important from a doctrinal perspective, the vote in *In re MONY* was arguably not imminent when the board decided to postpone it. The *MONY* board issued a press release a week before the special meeting disclosing its decision to postpone, at which time the vote tally indicated that shareholders supported the merger.¹⁵⁶ By contrast, the *Inter-Tel* board postponed the meeting at the eleventh hour and only when it was clear that the merger was not going to be approved.¹⁵⁷ Although this might seem to be a difference

150. *Id.* at 672.

151. *Id.* at 674.

152. *Id.* at 674 n.51. The court in *Peerless* did not actually determine that the CEO was not disinterested with respect to the option plan. *Wis. Inv. Bd. v. Peerless Sys. Corp.*, No. Civ. A. 17637, 2000 WL 1805376, at *13 (Del. Ch. Dec. 4, 2000).

153. *In re MONY*, 853 A.2d at 677.

154. *Id.*

155. See *supra* notes 96-98 and accompanying text.

156. *In re MONY*, 853 A.2d at 671.

157. *Mercier v. Inter-Tel (Del.)*, Inc., 929 A.2d 786, 797 (Del. Ch. 2007).

merely in degree, the imminence of shareholder action is often determinative of the outcome of the *Blasius* analysis.¹⁵⁸ Thus, the timing of the postponement in *Inter-Tel* constitutes an important difference from the facts of *In re MONY* for *Blasius* purposes and undermines any suggestion that *In re MONY* qualifies as controlling precedent.¹⁵⁹

This is not to suggest that *In re MONY* was necessarily decided correctly on the facts. The imminence of the vote at the time of the postponement is a proxy for whether the postponement has a sufficient disenfranchising effect to trigger *Blasius*, that is, whether the postponement thwarted the outcome of the vote that otherwise would have transpired. This determination presents a difficult line-drawing problem. *In re MONY* is a close case because at the time of the postponement it was still uncertain whether the company would be able to obtain proxies representing a majority of the outstanding shares, and this uncertainty is what motivated the postponement. *Inter-Tel* is a much easier case because it was clear at the time of the postponement that the deal was not going to be approved. A disenfranchising effect, therefore, was ambiguous in *In re MONY* but quite clearly present in *Inter-Tel*.

Additionally, although *Inter-Tel* and *In re MONY* are factually distinguishable, *In re MONY*'s "faithless fiduciary" language unquestionably represents an unduly narrow reading of *Peerless*, and Vice Chancellors Lamb and Strine clearly express a similar reluctance towards applying *Blasius* to votes on transactions as to which the board is disinterested. Their reluctance seems to be rooted in a common belief that directors should be allowed to display favoritism toward a transaction that they have recommended for shareholder approval, and that a permissible manifestation of such favoritism is the protection of the transaction against shareholders' own voting myopia. Thus, in *In re MONY*, Vice Chancellor Lamb observed that a board may employ a variety of techniques designed to achieve a favorable outcome of a shareholder vote to approve a merger, including utilizing corporate resources to solicit proxies and publicize the board's views, and retaining counsel to defend its actions in court.¹⁶⁰ In *Inter-Tel*, Vice Chancellor Strine similarly noted that the board is not supposed to be neutral with respect to business matters that it submits to a shareholder vote,¹⁶¹ and reasoned that "[s]o long as the directors are motivated by a good faith belief that the proposal is in the stockholders' best interests, taking a short adjournment to gather additional votes in a fair

158. See *supra* notes 31-35 and accompanying text.

159. Vice Chancellor Strine conceded this point. *Inter-Tel*, 929 A.2d at 813 n.80.

160. *In re MONY*, 853 A.2d at 675-76.

161. *Inter-Tel*, 929 A.2d at 809.

way seems like the kind of business judgment the adjournment tool was designed to facilitate.”¹⁶²

More precisely, the Inter-Tel board’s decision to postpone the special meeting might be analogized to standard deal protections typically included in merger agreements, such as a termination fee¹⁶³ to be paid to the acquirer in the event that the target’s shareholders vote down the deal and the company consummates an alternative transaction.¹⁶⁴ Deal protections and a last-minute postponement are both designed to insulate a transaction by making it more costly or difficult for shareholders to reject the deal, and they thereby have a similarly prophylactic effect of deterring interlopers from submitting competing bids. It now appears that courts will determine the permissibility of deal protections by applying *Unocal* review,¹⁶⁵ which might suggest that *Unocal* is indeed the proper standard of review to be applied to a postponement of a vote on a business combination.

But neither Vice Chancellor Strine’s argument that directors are entitled to favor transactions that they submit for shareholder approval nor the analogy to deal protections and corporate spending is an entirely convincing justification for postponing an imminent vote on a transaction. The issue is not whether the board must remain neutral with respect to a business decision that it has submitted to shareholders; clearly Vice Chancellor Strine is correct that the board is entitled to be biased towards the transaction. Rather, the question is whether the board can manifest its bias by utilizing the voting procedures put in place by the DGCL and the company’s charter and bylaws to favor approval of the transaction. Indeed, in light of the board’s relatively free reign with respect to deal protections and its ability to use the corporate treasury to promote a particular transaction, there would seem to be no need to grant the board the additional power to manipulate the voting machinery in order to obtain its preferred outcome in a vote on that transaction. Part III presents an agency cost analysis to argue that such manipulation carries risks of abuse and

162. *Id.* at 812 n.78.

163. See WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 581-84 (2d ed. 2007).

164. It is relatively rare for a termination fee to be triggered by a “naked” no vote, even if the target does not consummate an alternative transaction during some specified tail period. However, a recent Chancery Court decision suggests that a target board is permitted to include such a trigger. See *In re Lear Corp. S’holder Litig.*, 967 A.2d 640 (Del. Ch. 2008) (Strine, V.C.).

165. See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003). Moreover, even in those circumstances where *Revlon* applies, the standard appears to be one of reasonableness. See *In re Toys “R” Us, Inc. S’holder Litig.*, 877 A.2d 975, 980 (Del. Ch. 2005).

error, and concludes that there may be good reason to continue to apply *Blasius* scrutiny to board action interfering with the shareholder franchise even in nonentrenchment cases, and in particular to a decision by the board to postpone an imminent vote on a transaction.

III.A CRITICAL ANALYSIS OF *INTER-TEL*

One of the most surprising aspects of the court's decision in *Inter-Tel* is that the board had included on its proxy ballot a proposal that would give the board the authority to adjourn the meeting if there were insufficient votes in favor of the merger, and shareholders voted to deny the board this power.¹⁶⁶ Vice Chancellor Strine made this observation in his opinion but avoided the issue by noting that formally the special meeting was not adjourned because it was not convened in the first place; rather, it was postponed.¹⁶⁷

This Part begins with an introduction to agency theory. It then explains how shareholder voting can be seen as a way of reducing agency costs. It goes on to apply an agency cost analysis to demonstrate that shareholders might, as *Inter-Tel* shareholders did, rationally choose to deny the board the power to postpone an imminent vote. Finally, it argues that the law should presume that shareholders deny the board such power unless the charter provides otherwise, that is, unless shareholders explicitly waive *Blasius* review.

The analysis presented below is limited to postponements of imminent votes on transactions, and does not address the more typical application of *Blasius* to entrenchment cases. There are several reasons for limiting the scope of the argument in this way. First, as explained in Part II, the only practical effect of the decision in *Inter-Tel* is to significantly dilute the rigor of *Blasius* review in nonentrenchment cases since Vice Chancellor Strine's *Unocal* analysis was essentially dicta.¹⁶⁸ Second, the Vice Chancellor was quite explicit in stating that, even under his proposed *Unocal* test, board action interfering with the shareholder franchise for the purpose of entrenching the incumbent board would be impermissible.¹⁶⁹ Third, the proposition that allowing the board to thwart shareholder action seeking to replace the board would significantly

166. *Inter-Tel*, 929 A.2d at 804. Presumably under *Inter-Tel*'s bylaws neither the board nor the chairman had the power to adjourn a meeting. *Id.* at 804 n.38. This adjournment vote, moreover, was based on a majority of those voting and therefore the vote was not hindered by a dead vote problem.

167. *Id.* at 804.

168. See *supra* Subsection II.B.2.

169. *Inter-Tel*, 929 A.2d at 811.

increase agency costs is so axiomatic that it hardly seems worthy of a formal exposition. For these reasons, this Part focuses on the more difficult and interesting issue of whether *Inter-Tel* was correct to confine *Blasius* to entrenchment cases.

A. Agency Costs and the Case Against Postponement

1. Background on Agency Costs

The seminal work on agency costs and their relation to the ownership structure of the modern corporation is Michael Jensen and William Meckling's *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*.¹⁷⁰ In that article, Professors Jensen and Meckling developed a model for analyzing the costs associated with the separation of ownership and control within a firm, the key feature of the modern corporation in which the firm's principals—its shareholders—entrust control of the business to their agents—the directors of the corporation.¹⁷¹ I will briefly discuss that model before applying an agency cost analysis to shareholder voting and more specifically to the decision to prohibit the board from postponing an imminent vote on a transaction.

The central insight of agency theory is that the operating decisions of an agent, if left unchecked, are unlikely to mirror those that would maximize the welfare of the principal.¹⁷² This divergence results in part from the fact that the agent receives certain nonpecuniary benefits that do not accrue to the firm's principal.¹⁷³ These benefits include the various perquisites that agents enjoy, such as corporate jets and fancy offices.¹⁷⁴ The conflict between a principal and his agent also stems from the fact that the agent is typically a fixed claimant and thus has a far weaker incentive than the principal to maximize the residual

170. Jensen & Meckling, *supra* note 18.

171. As discussed previously, the agency analogy remains valid even though it is not clear that the board is, legally speaking, an agent of shareholders. *See supra* note 7. In addition, it should be noted that the principal-agent problem is less acute with respect to independent directors, although even they may have a reputational (or even financial) interest in their position on the board or professional or personal ties to the CEO that could lead them to pursue some of the non-value-maximizing business transactions discussed below.

172. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (1932).

173. Jensen & Meckling, *supra* note 18, at 312.

174. *See* Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1031 n.18 (1982) (defining agency costs to be “the decrease in a company’s value caused by the managers’ divergence from profit-maximization due to their concern for their own perquisites, leisure, and so forth”).

value of the firm.¹⁷⁵ This can lead the agent to expend insufficient effort on “creative activities such as searching out new profitable ventures”;¹⁷⁶ that is, the agent will not exert effort until the marginal cost of that effort equals the marginal revenue it produces because he captures only a portion, if any, of that revenue.¹⁷⁷ The divergent incentives of the agent and principal can also lead the former to seek to inefficiently expand the firm to an excessive size through “empire building,” in order to enhance his personal reputation or salary or to decrease his expendability.¹⁷⁸ As the separation of ownership and control increases, meaning as the agent’s fraction of the equity of the firm becomes smaller, his claim on the residual value of the firm falls and the divergence between his preferred activities and those that would maximize the value of the firm increases.¹⁷⁹ This is the principal-agent problem that in varying degrees “exists in all organizations,”¹⁸⁰ including between shareholders and officers and directors of a large corporation.

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175. See Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 277 (1986) (“Where management and risk bearing are separate, as in publicly held corporations, managers’ incentives to act efficiently are weak because they neither bear the costs nor reap the benefits of their actions.”); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 836-37 (1981) (arguing that management can act against the interests of shareholders in two ways: by being inefficient, i.e., exerting insufficient effort or acting carelessly, and by appropriating part of the corporation’s earnings through excessive perquisites or engaging in self-dealing).
176. Jensen & Meckling, *supra* note 18, at 313.
177. Market forces may successfully limit this second conflict between managers and shareholders. If managers can be replaced at little cost, then agency costs are likely to be lower. *Id.* at 328-29. More generally, the market for corporate control can constrain agency costs, since a company whose stock is undervalued due to an ineffective management team is susceptible to a tender offer or proxy contest. See Gilson, *supra* note 175, at 839-42. However, the prevalence of the poison pill, which as a practical matter requires a hostile bidder to couple its tender offer with a proxy contest to replace the board and redeem the pill, and the relative unattractiveness of proxy contests (dissidents typically only get reimbursed if they succeed in replacing the board) render the market for corporate control an imperfect mechanism for reducing agency costs. See *id.* at 843-45.
178. See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 179-80 (10th ed. 2007); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 627 (1989); see also Gary Gorton, Matthias Kahl & Richard J. Rosen, *Eat or Be Eaten: A Theory of Mergers and Firm Size*, 54 J. FIN. 1291, 1293 (2009) (discussing the possibility of inefficient defensive acquisitions when managers reap private benefits from retaining control of the corporation).
179. Jensen & Meckling, *supra* note 18, at 313.
180. *Id.* at 309.

Jensen and Meckling formalized their model by defining agency costs to be the sum of three components: monitoring costs, bonding costs, and the residual loss.¹⁸¹ Monitoring costs are expenditures by the principal designed to more closely align the activities of the agent with those that maximize the value of the firm.¹⁸² Bonding costs are expenditures that managers of a firm make as a way of committing to limit their activities in order to reduce the possibility that they may act contrary to the interests of shareholders.¹⁸³ The residual loss refers to the reduction in the value of the firm due to the divergence between the agent's actions and those that would maximize the welfare of the principal that remains even after the optimal level of monitoring and bonding costs have been incurred.¹⁸⁴

Monitoring costs and bonding costs differ only in the identity of the actor making the expenditure (the principal in the case of monitoring costs and the agent in the case of bonding costs); in either case the principal ultimately bears the cost in the form of a reduction in the earnings of the firm.¹⁸⁵ Moreover, because in a large corporation even bonding expenditures are made out of the corporate treasury rather than out of managers' own pockets, the distinction between monitoring costs and bonding costs is not particularly well defined or informative. As such, this Note will use the term monitoring costs to refer generally to costly governance mechanisms designed to reduce residual agency costs associated with the separation of ownership and control of the corporation.

Some monitoring costs are pecuniary and entail direct and tangible expenditures, whereas others may be more subtle. Common examples of pecuniary monitoring costs in large public corporations include analyst research reports and reports by corporate governance rating agencies, such as ISS, which are commissioned by shareholders to track the performance of boards and management teams of public companies.¹⁸⁶ The fees paid to an accounting firm to audit the company, fees paid to rating agencies, and the costs of independent directors are also examples of direct monitoring costs.¹⁸⁷ The use of performance-based compensation structures, such as stock and

181. *Id.* at 308.

182. *See id.*

183. *See id.*

184. *Id.*

185. *Id.* at 325.

186. *See* Easterbrook & Fischel, *supra* note 175, at 277-78.

187. *See id.*; Jensen & Meckling, *supra* note 18, at 325.

options, in lieu of a fixed salary is also a kind of monitoring cost.¹⁸⁸ A less obvious type of monitoring cost, to which I turn in the following Section, is shareholder voting. For the purposes of this Note, the most important monitoring costs, and indeed some of the most common, are contractual limitations on managerial discretion, which “impose costs on the firm because they limit [the manager’s] ability to take full advantage of some profitable opportunities,”¹⁸⁹ but also reduce the residual loss to the extent that managers might otherwise use that discretion to appropriate value from shareholders.

With this background, the following two Subsections apply Jensen and Meckling’s agency cost framework to two specific issues: shareholder voting generally and postponements of shareholder votes. These Subsections argue that voting and a prohibition on postponements of imminent votes are both governance mechanisms that entail monitoring costs but may reduce residual agency costs as well.

2. Agency Costs and Shareholder Voting

The existence of shareholder voting can itself be seen as the product of agency cost considerations. Although Delaware law gives the board considerable discretion to manage the business affairs of the corporation, the DGCL requires that shareholders approve certain fundamental transactions, principally mergers and sales of substantially all assets of the corporation.¹⁹⁰ A corporation may also decide to expand voting rights in its charter or bylaws. Given the presumptive benefits that flow from vesting corporate power in a central decisionmaker,¹⁹¹ one might ask why shareholders vote at all.¹⁹² The

188. See Jensen & Meckling, *supra* note 18, at 323. Incentive compensation is costly to the extent that it is dilutive for the company to issue stock instead of paying managers in cash.

189. *Id.* at 325.

190. DEL. CODE ANN. tit. 8, §§ 251(c), 271(a) (2001 & Supp. 2008).

191. See Bainbridge, *Nexus*, *supra* note 7, at 20-21 (arguing that a central body “capable of exercising fiat” reduces the coordinating costs associated with the “asymmetries of information and interests among the corporation’s various constituencies” and even among a single constituency—shareholders). Bainbridge recognizes that because of accountability concerns the board should not have unfettered authority and thus implicitly endorses shareholder voting. See *id.* at 32.

192. By posing the question this way I do not mean to ask why shareholders in particular, as opposed to employees or creditors, vote. Rather, I take as a premise, as does Delaware law, that shareholders as residual claimants have the proper incentives to monitor the board. See *infra* note 193. This premise has been criticized for failing to adequately consider the interests of other constituents of the firm. See, e.g., Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

best answer is that shareholder voting is an accountability mechanism: it allows shareholders to monitor the board and thereby reduces the residual agency costs associated with the separation of ownership and control.¹⁹³ This also explains why shareholder voting is confined to fundamental transactions (aside from the election of directors); these are the situations in which the potential for abuse and the costs of board error are likely to be the greatest.¹⁹⁴

Shareholder voting is thus a type of monitoring cost. It forces the company to expend resources in order to minimize the divergence between the board's actions and those that would maximize value for shareholders. These expenditures include the tangible costs of furnishing shareholders with a detailed proxy statement that complies with the proxy rules promulgated by the SEC pursuant to the Securities Exchange Act of 1934,¹⁹⁵ and the less tangible costs associated with directors diverting their attention away from business matters and towards preparing for the vote. In the case of a merger they also comprise the costs of drafting the merger agreement to account for (1) the possibility that shareholders may vote down the deal in favor of an alternative transaction, and (2) the inevitable delay between signing and closing that the vote imposes.¹⁹⁶ The former may include a termination fee to be paid to the acquirer if shareholders vote down the deal and the company enters into an alternative transaction within a specified period of time.¹⁹⁷ The latter includes the costs associated with the target's interim operating covenants, in which it promises not to undertake certain operational changes in the period between signing and closing without the acquirer's consent,¹⁹⁸ as well as the possibility that the target will suffer a material adverse change

193. See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 416 (1983) (“[R]eduction of agency costs is the most probable explanation for shareholders’ voting on fundamental corporate changes. Shareholders, as residual claimants, have the most to lose (or to gain) as a result of fundamental corporate changes.”); see also Thompson & Edelman, *supra* note 137, at 132-33 (arguing that voting reduces error costs associated with decisionmaking and allows principals to monitor their agents).

194. See Easterbrook & Fischel, *supra* note 193, at 416.

195. See 15 U.S.C. § 78n(a)-(c) (2006); 17 C.F.R. § 240.14a-3 (2009).

196. Even in the absence of shareholder voting the need for regulatory approval (such as antitrust approvals) might impose some delay between signing and closing, but submitting the deal to a vote usually substantially increases this delay.

197. See generally ALLEN ET AL., *supra* note 163, at 581-84 (discussing deal protections).

198. See, e.g., JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS 155 (1975); 2 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 13.03 (2009).

during that period¹⁹⁹ or otherwise fail to satisfy any of a number of closing conditions and thereby give the buyer the right to walk from the deal.²⁰⁰ The decision to give shareholders the power to vote in certain circumstances represents an a priori judgment by the Delaware Legislature and, to the extent that firms expand voting rights voluntarily, by corporations themselves that these monitoring costs are outweighed by the benefits they produce by reducing residual agency costs and that the net effect of shareholder voting is thus to reduce overall agency costs. This judgment is also implicit in Chancellor Allen's discussion in *Blasius* of the allocation of power between principal and agent.²⁰¹

3. Agency Costs Associated with Postponing a Vote

Just as agency costs help explain why shareholders vote on fundamental transactions, a similar agency cost analysis can be applied to a decision by shareholders to prohibit the board from postponing an imminent vote on such a transaction.²⁰² A rule that prevents the board from postponing a vote on a transaction imposes certain monitoring costs on the firm but also reduces residual agency costs. The board may have better information than shareholders about the benefits of the transaction, and a postponement might allow the board to disseminate that information to shareholders.²⁰³ If shareholders vote against the transaction without the benefit of that information, then the board will either need to submit the matter to a vote again, which is costly and takes time,²⁰⁴ or, in the case of a merger, shareholders may lose the deal forever, since a merger agreement typically

199. See Kenneth A. Adams, *Understanding "Material Adverse Change" Provisions*, M&A LAW., June 2006, at 3.

200. See 1 KLING & NUGENT, *supra* note 198, § 1.05.

201. This agency cost analysis might not explain Chancellor Allen's second argument that the shareholder franchise is the ideological underpinning of the board's authority and legitimates that authority. See Andrew C. Houston, *Blasius and the Democratic Paradigm in Corporate Law*, 17 DEL. J. CORP. L. 843, 848-50 (1992) (arguing that *Blasius*'s "legitimacy argument" rejects an explanation of shareholder voting as a mechanism for monitoring directors and instead rests on "a more general political or ethical theory").

202. One scholar has argued that the board has a fiduciary duty to facilitate successful shareholder votes even though they may lead to bad outcomes for the corporation. Ethan G. Stone, *Business Strategists and Election Commissioners: How the Meaning of Loyalty Varies with the Board's Distinct Fiduciary Roles*, 31 J. CORP. L. 893, 928-29 (2006).

203. See *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786, 796 (Del. Ch. 2007).

204. *But see Wis. Inv. Bd. v. Peerless Sys. Corp.*, No. Civ. A. 17637, 2000 WL 1805376, at *15 (Del. Ch. Dec. 4, 2000) (rejecting this justification for a postponement).

terminates once the target's shareholders vote it down.²⁰⁵ Each of these possibilities represents a potential monitoring cost.

On the other hand, a prohibition on such postponements may reduce residual agency costs because the board may be acting against shareholders' interests when it postpones an imminent vote on a transaction. This may be the case for two reasons, one benign and one less so.

The first reason why prohibiting the board from postponing an imminent vote on a transaction may reduce residual agency costs is that the board may in good faith think that a transaction is in shareholders' interests when in fact it is not. If this is the case, then shareholders incur at least two kinds of costs as a result of the postponement. The first type of cost is a consequence of the fact that the board will likely resolicit proxies after the postponement, a process which entails direct expenditures and, perhaps more importantly, distracts the board from overseeing the operations of the business. The second potential type of cost is that, at least in the case of a merger, arbitrageurs, who have a vested financial interest in the consummation of the transaction, may buy up shares in the company and the merger may get approved at the rescheduled meeting even if it is not in the interests of shareholders.²⁰⁶ This will hurt those shareholders who held on to their shares after the postponement. It will also hurt shareholders who otherwise would have held on to their shares but, sensing board misconduct, decided to abandon their investment and sell their shares in the market, where the purchasers are likely to include arbitrageurs.

The second reason why the postponement might impose a cost on shareholders is more blatant. The board might have a personal interest in the transaction, or it might be influenced by senior managers who have such an

205. See 2 KLING & NUGENT, *supra* note 198, § 15A.02.

206. In *Inter-Tel*, Vice Chancellor Strine found as a matter of fact that the reason the merger was approved at the rescheduled meeting was not because the base of eligible voters had changed but because shareholder sentiment with respect to the benefits of the merger had. 929 A.2d at 803. The argument that arbitrageurs would be willing to vote for a merger that does not maximize the long-term value of their shares ultimately rests on an empirical assumption, the confirmation of which is beyond the scope of this Note. But given the extremely short time horizons of their investments, there is reason to believe that the interests of arbitrageurs differ from those of buy and hold shareholders in material respects. Moreover, because the essential business model of merger arbitrage involves an attempt to exploit the price differential between the merger consideration and the company's stock price, it seems reasonable to assume that arbitrageurs are likely to be satisfied by locking in an immediate profit, particularly if the alternative is searching for a better acquisition, which could take a considerable amount of time. See generally Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1083-87 (2007) (discussing the possibility that hedge funds—of which merger arbitrageurs are a particularly short-term-focused subset—may be unduly influenced by short-term gains).

interest. For example, certain managers may support an inefficient merger if they expect to have a higher paying or more prestigious position in the surviving entity, or if that position offers greater job security because the combined entity will be larger and thus harder to take over.²⁰⁷ Managers, who tend to be less diversified than shareholders because much of their personal wealth is linked to the success of the corporation in the form of salary and incentive compensation,²⁰⁸ might also favor an inefficient merger with a firm in a different industry in order to diversify the corporation's income sources. In any of these scenarios, a postponement will again impose two kinds of costs on shareholders. First, the company will engage in costly resolicitation efforts. Second, because a postponement increases the voting power of persons supporting the transaction, including arbitrageurs, a transaction that is inefficient for any of the reasons stated above may nonetheless be approved at the rescheduled meeting even if the original shareholder base opposed the deal. In that case, the postponement will extract wealth from shareholders and transfer it to management or the board.²⁰⁹

This second way in which a postponement might be costly for shareholders, namely the possibility that the board may favor an inefficient transaction for self-serving reasons, arguably renders one of the justifications behind the postponement in *Inter-Tel* less convincing: the claim that setting a new record date actually enfranchises those shareholders who bought shares after the original record date.²¹⁰ The problem with this argument is that it proves too much. Every record date disenfranchises shareholders that subsequently purchase shares,²¹¹ but the board is never required to move the

207. See *supra* note 178 and accompanying text.

208. See Black, *supra* note 178, at 627.

209. Some of these examples might be said to involve entrenchment motives in the sense that they present situations in which directors or senior managers support a transaction that they expect will provide them with greater job security. However, for *Blasius* purposes this is a much more subtle and thus fundamentally different kind of entrenchment motive than exists when the board interferes with a shareholder vote to replace the board, rather than with a vote concerning a transaction. In the former situation, an entrenchment motive exists on its face. In the latter situation, by contrast, it may not be at all apparent that the board possesses such an entrenchment motive.

210. *Inter-Tel*, 929 A.2d at 795.

211. Record dates also create the potential for "empty voting" by enabling certain shareholders to attain voting rights that are disproportionate to their economic ownership of the corporation. See Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 629 (2008). Although in practice shareholders who sell after the record date are unlikely to vote, record dates will still alter the one-to-one ratio between economic interest and voting power by increasing the

record date to a subsequent time when doing so would be contrary to its interests. An example of a situation in which the board would be disadvantaged by pushing the record date back is a consent or proxy solicitation²¹² to remove directors, in which case a later record date increases the number of eligible voters and thereby makes it more likely that the dissident will execute consents or votes from a majority of outstanding shares.²¹³ Another example might be a proxy contest to elect a new slate. In that circumstance, while an early record date does not create a dead vote problem²¹⁴ because director elections are determined based on voting shares rather than outstanding shares,²¹⁵ shares may have moved into the hands of antimanagement activists after the record date. More generally, the board would not push back the record date for any vote on a transaction that the board favored and that appeared likely to succeed, provided that the vote required a majority of voting shares rather than a majority of outstanding shares. To the extent that a board might act out of self-interest, the selective ability to manipulate the record date can be seen as a tool of abuse.

Indeed, the Delaware General Corporation Law has been amended, effective August 2009, in a manner that further undermines the “enfranchisement” justification for postponing an imminent vote. Section 213(a) now permits the board to establish dual record dates—one for the purposes of determining the stockholders entitled to receive notice of the meeting and a second later date for determining the stockholders eligible to vote.²¹⁶ To the extent that this amendment empowers boards to preempt a significant dead vote problem *ex ante*, it eliminates any supposed need to allow them to use the postponement power to accomplish the same result *ex post*. In this respect, the amendment arguably reflects a preference for fixed rules

proportionate voice of shareholders that owned their shares on the record date and held on to them, at least if the vote is based on a majority of shares voting rather than outstanding.

212. The board is authorized to adopt a bylaw establishing the authority of the board, within ten days of the commencement of a consent solicitation, to set a record date, which must in turn be within ten days following the adoption of the resolution fixing the record date. DEL. CODE ANN. tit. 8, § 213(b) (2001); see Eric S. Robinson, *Defensive Tactics in Consent Solicitations*, 51 BUS. LAW. 677, 679 (1996).

213. See DEL. CODE ANN. tit. 8, §§ 141(k), 228(a) (2001). Because each of these actions requires a majority of the outstanding shares, an earlier record date exacerbates the dead vote problem and makes it less likely that the removal campaign will succeed. See *supra* notes 97-98 and accompanying text.

214. See *supra* notes 97-98 and accompanying text.

215. DEL. CODE ANN. tit. 8, § 216 (2001).

216. *Id.* § 213(a) (2010).

regarding the electoral process over ad hoc board action.²¹⁷ This preference might be a function of the latter's greater potential for strategic behavior, and parallels the argument for allowing shareholders to decide ex ante whether to permit or prohibit board postponements of imminent votes. I now turn to a model of that decision process and examine the conditions under which the reduction in residual agency costs that a prohibition on last-minute postponements entails might justify the incremental monitoring costs associated with such a prohibition.

B. Modeling Shareholders' Decision

If one assumes that a court may be unable to detect either subjectively well-intentioned postponements that are not in the interests of shareholders or postponements of transactions that are inefficient and in which the board has a hidden personal interest, then, in deciding ex ante whether to prohibit the board from postponing an imminent vote, shareholders must weigh the residual agency costs associated with a postponement against the monitoring costs that such a prohibition would entail. This decision can be modeled as follows:

Let $P(P)$ be the probability that the board will postpone an imminent vote. $P(P)$ will be a function of whether the opportunity to postpone a vote presents itself, which will in turn depend on the likelihood that the board enters into transactions that require shareholder approval, such as a merger. $P(B)$ is the conditional probability that, given that the board postpones a vote, the postponement imposes net costs on shareholders and is thus not in their interests. $P(B)$ is determined by the probability that the board incorrectly believes that the postponement is in the interests of shareholders, call this $P(M)$ to indicate the board's good faith mistake, and the probability that the board knows that the postponement is bad for shareholders but acts out of self-interest, call this $P(I)$. Thus, $P(B) = P(M) + P(I)$. $C(M)$ represents the cost to shareholders of a good faith mistake, and $C(I)$ is the cost to shareholders of the board's self-interest. As discussed above, $C(M)$ reflects the costs of resoliciting

217. Although section 213(a) permits the board to establish a new record date in the event of an adjournment, *see id.*, it says nothing about whether the board can use the adjournment or postponement power for the purpose of changing the composition of the stockholder voting base in order to thwart the outcome of an imminent vote. Indeed, the legislative history disclaims any intention to give the board greater flexibility to tinker with the voting process ex post, explaining that the "amendment is not intended to affect application of the doctrine expressed in *Schnell v. Chris-Craft Indus., Inc.*" H.B. 19, 145th Gen. Assem. (Del. 2009) (synopsis).

proxies, which include direct expenditures and the indirect costs associated with the distraction of the board and management from overseeing the business, as well as the possibility that the transaction, even if it is not in the interests of shareholders, may be approved at the reconvened meeting because of the increased presence of arbitrageurs.²¹⁸ $C(I)$ similarly encompasses the costs of resoliciting proxies and the incremental costs that shareholders incur when a postponement, by increasing the voting power of arbitrageurs, increases the likelihood of approval of an inefficient transaction in which management will appropriate wealth from shareholders. Let $P(D)$ represent the conditional probability that the court correctly detects that a postponement is not in the interests of shareholders; for simplicity, I assume that this probability of detection is independent of whether the board acts mistakenly but in good faith or out of concealed self-interest.²¹⁹ $P(ED)$ is the conditional probability that, given a beneficial postponement, the court erroneously identifies it as being against shareholders' interests; $P(ED)$ is thus a kind of false positive. Let L represent the costs that shareholders incur in litigating a postponement in court. These costs include attorneys' fees in challenging and defending the postponement, either or both of which may be borne by the corporation depending on the outcome of the litigation,²²⁰ as well as the opportunity costs associated with the distraction of management during the pendency of the litigation.²²¹ Further, assume that, either because shareholders have difficulty distinguishing good postponements from bad ones, or because there are so many shareholders with diverse views, in the absence of a rule prohibiting postponements some shareholder brings suit whenever the board postpones an imminent vote. B represents the net benefits of a postponement that is in the interests of shareholders, which may include the preservation of a deal that is in shareholders' best interests and would otherwise be lost (as was asserted to have been the case in *Inter-Tel*) or alternatively, even if the transaction would not be irretrievably lost, cost savings associated with not

218. See *supra* Subsection III.A.3.

219. In addition, some of these variables may not be independent of others. For example, the board may be more likely to postpone a meeting in bad faith if it perceives a lower probability of court detection. For simplicity, however, I assume all variables to be exogenously determined.

220. See DEL. CODE ANN. tit. 8, § 145(a) (2001) (authorizing the indemnification of directors provided that they acted in good faith); *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (discussing the potential for reimbursement of a shareholder's attorneys' fees under the common corporate benefit doctrine).

221. The Delaware Chancery Court's widely acknowledged efficiency and speed may reduce these costs to some extent. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002).

having to resolicit proxies.²²² Finally, C_D is the cost of drafting a charter amendment prohibiting the board from postponing an imminent vote.

The net benefits from such a charter provision are a function of the costs that it reduces and the benefits that it foregoes. The benefit that it foregoes is the ability of the board to postpone when it is in shareholders' interests to do so, discounted by the probability of the court erroneously enjoining the postponement. In expected value terms, this is expressed in equation (1) as follows:

$$(1) \text{ Benefits Foregone} = P(P) * [(1 - P(B)) * B] * (1 - P(ED)).$$

The costs that a prohibition on postponements reduces are litigation costs, which will not be incurred in the absence of a postponement, and the costs associated with a postponement against shareholders' interests that the court would fail to detect, less the costs of drafting the charter amendment. These costs can be further broken down as follows: let X represent the litigation costs of successfully challenging bad postponements. Thus, $X = P(D) * (P(B) * L)$. Let Y represent the litigation and corporate costs of bad postponements unsuccessfully challenged. Y is thus a function of the probability that a court fails to detect a postponement that is against shareholders' interests and of the probabilities, and associated costs, of good faith but inefficient postponements and postponements that are motivated by the board's self-interest. Y can be expressed as follows: $Y = (1 - P(D)) * [P(M) * (L + C(M)) + P(I) * (L + C(I))]$. Finally, let Z represent the litigation costs of challenging postponements that are in the interests of shareholders. Because these litigation costs are incurred regardless of whether the court erroneously identifies the postponement as being against shareholders' interests, Z is independent of $P(ED)$, the probability of a false positive by the court. Thus $Z = (1 - P(B)) * L$. The costs that a charter provision reduces are expressed in equation (2):

$$(2) \text{ Costs Reduced} = P(P) * [X + Y + Z] - C_D.$$

Shareholders should prefer the charter amendment provided that the costs it reduces exceed the benefits it foregoes; that is, provided that (2) > (1). If this inequality is satisfied, then the residual agency costs that are reduced by a prohibition on postponements exceed the monitoring costs that such a prohibition entails. As should be intuitive, a lower probability of court detection of bad postponements ($P(D)$), a higher probability of bad

222. See *supra* notes 203–205 and accompanying text.

postponements ($P(B)$), and higher litigation costs (L) all increase the attractiveness of a prohibition against postponements of imminent votes, while a higher probability of good postponements ($1 - P(B)$) and a lower probability of erroneous judicial invalidation of good postponements ($P(ED)$) reduce the appeal of such a prohibition. A very low overall probability of postponement ($P(P)$) also makes it less likely that shareholders would choose to prohibit postponements, since it will generally be inefficient to incur drafting costs to account for a remote contingency.

There is good reason to think that for many companies the costs reduced by a prohibition on postponements of imminent votes on transactions exceed the benefits foregone as a result of such a prohibition. The potential contingencies justifying an imminent postponement are likely to be few given that the board is free to postpone the meeting before the eleventh hour if it believes that shareholders would otherwise be acting without the benefit of all material information;²²³ thus both the probability of a good postponement ($1 - P(B)$) and the benefits from such a postponement (B) may be relatively low. At the same time, the potential for abuse and the ramifications of board error, represented in the model by the variables $P(M)$, $P(I)$, $C(M)$, and $C(I)$, may be significant, particularly in the context of a possible end-game situation such as a proposed merger. Indeed, it is presumably because of the magnitude of these two expected costs—board error and board self-interest—in the corporate control context that boards are not relieved of their *Revlon* duties, even when directors are ostensibly independent and stand to lose their jobs if the deal is approved.²²⁴ Similarly, the best explanation as to why Delaware law requires that shareholders vote to approve mergers is that there is a material risk that the board may enter into a suboptimal deal, whether in good faith or out of self-interest.²²⁵ Because a postponement increases the voting power of proponents of the transaction, including arbitrageurs, it magnifies the risk that such a merger will be consummated and thereby exacerbates the principal-agent problem.

In a sense, the pivotal variable in the model is $P(D)$, the probability that a court will correctly identify bad postponements. If the court is perfect at distinguishing postponements that are in shareholders' interests from those that are not, so that $P(D) = 1$, and assuming that the probability of false

223. See Stone, *supra* note 202, at 938-40 (distinguishing between a board's coordinating powers and its operating powers and arguing that fixed rules are more effective with respect to the latter because the contingencies are fewer and the potential for manipulation is greater).

224. See *supra* notes 135-139 and accompanying text.

225. See *supra* note 194 and accompanying text.

positives by the court ($P(ED)$) is zero, then equations (1) and (2), which represent the foregone benefits and reduced costs associated with a prohibition on last-minute postponements, can be rewritten as follows:

$$(1^*) \text{Benefits Foregone} = P(P) * [(1 - P(B)) * B]$$

$$(2^*) \text{Costs Reduced} = P(P) * [P(B)*L + (1 - P(B)) * L] - C_D = P(P) * L - C_D$$

Assuming further that it is certain that the board will attempt to postpone a vote, so that $P(P) = 1$, shareholders will rationally decide not to adopt a rule prohibiting postponements of imminent votes provided that $(1 - P(B)) * B > L - C_D$. This inequality indicates that if courts' policing capabilities are perfect then the only costs that a prohibition on postponements reduces are litigation costs (net of the costs of drafting the charter provision), and thus shareholders will opt to give the board the postponement power whenever there is any substantial probability that a postponement might allow the board to disseminate important information to shareholders concerning the merits of a transaction that shareholders would otherwise vote down.

Implicit in Vice Chancellor Strine's opinion in *Inter-Tel* is his belief that the probability that courts will detect postponements that are not in shareholders' interests ($P(D)$) is indeed fairly high. He suggests, for example, that "the powers of equity can police manipulative behavior"²²⁶ and that when a postponement is "tainted by . . . self-interest . . . principles of entire fairness could have bite."²²⁷ But in fact, there are reasons to think that the probability that a court will detect bad postponements may be low,²²⁸ particularly given the ease with which directors can argue that shareholders need additional disclosure in order to make a fully informed decision.²²⁹ In particular, one would expect courts to have difficulty distinguishing beneficial postponements from well-intentioned postponements that are in fact against shareholders interests, since this determination requires an inquiry into the merits of the transaction and arguably involves the kind of business judgment that lies

226. *Mercier v. Inter-Tel (Del.)*, Inc., 929 A.2d 786, 818 (Del. Ch. 2007).

227. *Id.* at 812 n.78.

228. Cf. Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 298 (2001) (arguing that in the context of entrenchment, judges will be unable to obtain the information needed to distinguish good entrenchment from bad entrenchment).

229. Cf. Klein, *supra* note 27, at 168 (cautioning that if courts accept a board's assertion that shareholders lack sufficient information concerning the subject of the vote as a justification for interfering with the shareholder franchise then "the flood gates will open to management manipulation of the election machinery").

beyond the scope of courts' expertise. Although courts might be relatively well equipped to detect bad faith postponements where the board has a patent interest in the transaction, certain more subtle conflicts, such as the possibility that otherwise disinterested directors may be influenced by senior managers who expect to have a position in the post-merger entity, may be harder for courts to identify. It is therefore questionable whether principles of equity or entire fairness review can bear the weight that the Vice Chancellor assumes they can.

At the very least, *Inter-Tel* shareholders apparently were not entirely satisfied with courts' policing capabilities. In voting against giving the board the power to adjourn the special meeting if the Mitel merger faced defeat, they implicitly performed the calculus presented above and concluded that the probability that a court would be able to detect a postponement that was not in shareholders' interests was not high enough to justify giving the board the adjournment power. The court thus substituted its *ex post* judgment of the relative costs and benefits of permitting a postponement for shareholders' *ex ante* judgment. It is possible that the court was correct from an *ex post* perspective. That is, *Inter-Tel* may very well have been a case in which there were net benefits from the postponement, which allowed the board to disclose its private information concerning the company's recent earnings decline and arguably prevented shareholders from losing a deal that was in their best interests. But such a case-by-case judicial approach entails error costs, and shareholders might, as in the case of *Inter-Tel*, find a fixed rule preferable to those costs.

To be sure, the *Inter-Tel* shareholders that voted against empowering the board to adjourn the special meeting if the merger faced defeat were not the same as the shareholders who voted to approve the merger at the rescheduled meeting. But this does not undermine the legitimacy or relevance of the initial vote to deny the board the adjournment power for two reasons. First, shareholders are constantly bound by voting decisions made by their predecessors. Indeed, any charter amendment binds shareholders who purchase shares in the corporation at a later date; the law presumes that subsequent shareholders purchase their shares with notice of preexisting charter and bylaw provisions. It seems reasonable to assume that *Inter-Tel* shareholders who purchased shares after the original record date (many of them sophisticated hedge funds and arbitrageurs)²³⁰ were also on notice of the vote to deny the board the adjournment power. Second, Vice Chancellor Strine specifically found as a matter of fact that the ultimate approval of the merger

230. *Inter-Tel*, 929 A.2d at 803, 815.

was attributable to shareholders who held shares on both record dates changing their minds about the merits of the merger, rather than to the different composition of Inter-Tel's shareholder base at the rescheduled meeting.²³¹ Given that the Vice Chancellor took pains to emphasize this point, it would seem odd to suggest that the vote to deny the board the adjournment power did not truly reflect the will of the relevant Inter-Tel shareholders.

Of course, the Inter-Tel board might have argued that when the shareholders voted against allowing the board to adjourn the meeting in order to preserve the merger they were inadequately informed about the benefits of the merger and thus the vote was fundamentally flawed. But this argument is misplaced. As the foregoing analysis has suggested, one of the principal benefits that shareholders give up when they prohibit the board from postponing an imminent vote is the possibility that the board has better information than do shareholders about the benefits of a transaction. As this Section has argued, shareholders might decide to deny the board the power to postpone an imminent vote with full knowledge of the possibility that the board might have a better sense than shareholders about the merits of the transaction. Thus, the mere fact that shareholders might have been inadequately informed about the benefits of the underlying merger does not prove that they were inadequately informed about the ex ante benefits and costs of allowing the board to postpone the vote. Moreover, this argument is particularly unconvincing given that the board was responsible for apprising shareholders of the potential benefits from endowing the board with the adjournment power. Ultimately, the decision in *Inter-Tel* is difficult to square with the shareholders' ex ante determination to deny the board the adjournment power.

C. Choosing a Default Rule

This Part has argued that shareholders might rationally decide ex ante to prohibit the board from postponing an imminent vote on a transaction. The question remains what the default rule should be in the absence of such an explicit prohibition. This Section argues that the traditional *Blasius* compelling justification standard, in its pure form rather than in its diluted post-*Inter-Tel* form, represents an optimal "penalty" default rule. The benefit of this rule is that it will induce the board to reveal up front to shareholders the possibility that it might postpone an imminent vote, and thereby enable shareholders to decide whether to grant the board the power to do so.

231. *Id.* at 817.

This Section then briefly discusses how the “imminence” of a vote on a transaction at the time of a postponement should be defined for the purposes of determining whether the postponement triggers *Blasius* review. It argues that imminence should be understood as a proxy for the requirement that the board’s action have a sufficient disenfranchising effect to trigger *Blasius*. Thus, a vote should be considered imminent if in the absence of a postponement shareholders would have voted against the transaction. So understood, imminence bears on the agency cost considerations presented in Section III.B. and should be a prerequisite to triggering *Blasius* review under the default rule. When it is ambiguous as to whether such a disenfranchising effect exists, however, *Blasius* should still be deemed to apply in order to reinforce the information forcing benefits of the penalty default rule and to prevent boards from using private information to circumvent that rule.

1. *The Justification for a Penalty Default*

Default rules exist to fill gaps in incomplete contracts. Professors Ayres and Gertner identify two distinct sources of contractual incompleteness with different implications for the optimal default rule. First, the transaction costs of contracting to account for a particular contingency might exceed the benefits of doing so.²³² If this is the case, then an optimal default rule might aim to replicate what the parties would have bargained for ex ante had transaction costs not been prohibitive.²³³ Contractual incompleteness might also result from one party strategically withholding information from the other.²³⁴ In this case, an efficient default rule should be set against the more informed party to give him an incentive to contract around the default rule and reveal information to the less informed party.²³⁵ Alternatively, contractual incompleteness might result from both parties withholding information from the court in order to shift the costs of contract formation to the court, in which case the default rule should again be set in such a way as to encourage the parties to contract around it.²³⁶

232. Ayres & Gertner, *supra* note 20, at 92.

233. *Id.* at 93. A “would have wanted” default may still be inefficient if it is more costly for courts to determine what the parties would have wanted than for the parties to contract explicitly. *Id.*

234. *Id.* at 94.

235. *Id.* at 97.

236. Ayres and Gertner argue that in this case a nonenforcement default is preferable because, although a penalty default set against one party to the contract will encourage that party to contract around the default, it might produce a windfall for the other party. *Id.* at 98. In the

It is unlikely that the transaction costs attendant to amending a corporate charter to either explicitly allow or prohibit board postponements of imminent votes would be prohibitively high. Certainly amending a charter entails some drafting costs as well as costs associated with holding a shareholder vote, such as the filing and distribution of proxy materials.²³⁷ Another contracting cost reflects the possibility that shareholders might make the wrong decision with respect to whether to prohibit such postponements if they lack adequate information concerning the variables relevant to the agency cost analysis presented above when voting on the charter amendment. However, extensive proxy disclosure should reduce this risk, and, assuming the board wants the flexibility to postpone an imminent vote, it has an incentive to inform shareholders of the arguments against such a charter amendment. Moreover, these costs are unlikely to exceed the costs that a court faces in trying to determine what the parties would have wanted. Although this Part has argued that shareholders might under certain conditions prefer to prohibit last-minute postponements, they might also choose to permit them if shareholders have sufficient faith in their board or in the court's detection capabilities such that the probability of a postponement that is against shareholders' interests ($P(B)$) and the associated costs of such a postponement ($C(M)$ and $C(I)$) are low, while the probability that the court will successfully detect and enjoin such postponements ($P(D)$) is high. Because the outcome of the agency cost analysis will depend on variables that differ across firms and that cannot be measured, even in relation to one another, without undertaking a fact-intensive inquiry into the quality of the particular board, courts are likely to find it difficult to determine what form a "would have wanted" default should take in any particular case.

But a strong argument can be made in favor of a penalty default rule that prohibits postponements of imminent votes on transactions. First, a clear default rule one way or the other finds support if you assume that the ex post costs to the court of determining whether a postponement is in the interests of shareholders likely exceed the ex ante contracting costs to the corporation. More specifically, the board presumably has better information than shareholders with respect to the possibility that it might postpone a vote in order to preserve a transaction. For one thing, the board can be expected to have private information regarding whether it is considering pursuing a business combination that will require shareholder approval. And, consistent

case of a pseudo-agency relationship between a board and shareholders, however, it is not clear what form a "windfall" would take. Thus, a penalty default set against the more informed party should work just as well as a nonenforcement penalty.

237. See *supra* text accompanying note 195.

with Vice Chancellor Strine's reasoning that boards cannot be expected to remain neutral with respect to transactions that they have authorized and submitted to a shareholder vote,²³⁸ boards will likely seek to reserve for themselves the ability to postpone a vote in order to preserve a transaction that shareholders are about to vote against. A penalty default rule encourages the board, inasmuch as it desires the flexibility that the postponement power provides, to reveal this possibility to shareholders, who can then perform the cost-benefit analysis presented above for themselves.

Such a default rule might take several forms. First, it could take the form of a per se rule against postponements of imminent votes. Such a per se rule might, however, run into problems in extreme cases if it prevents the board from discharging its duty under the federal securities laws and the state law duty of candor not to make materially misleading statements. For example, one can imagine a situation in which a target board signs a merger agreement with a force the vote provision that prevents the board from terminating the agreement even if it decides that the deal is no longer in the interests of shareholders.²³⁹ If, on the night before the meeting, the corporation discovers a new product that will triple the value of the company, the board may have a duty to update its prior recommendation of the deal.²⁴⁰ But it will not have time to do so unless it can postpone the meeting. This example, though stylized, arguably favors a default rule comparable to *Blasius's* existing compelling justification standard over a per se prohibition. But that standard should be given the teeth that it had prior to *Inter-Tel* and should only be deemed satisfied when it is entirely clear that, had shareholders foreseen the particular circumstances at hand or the contingency that ultimately arose, they would have opted to permit the board to postpone the vote. In particular, a showing that shareholders would benefit from additional disclosure should be insufficient to establish a compelling justification; the onus should be on the board to disseminate relevant information prior to the eleventh hour. If shareholders choose to waive a *Blasius* claim with respect to votes on a transaction then they should be permitted to amend the company's charter to

238. See *supra* note 161 and accompanying text.

239. The DGCL authorizes the use of force the vote provisions. See DEL. CODE ANN. tit. 8, § 146 (Supp. 2008).

240. Cf. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) (discussing the duty imposed by the securities laws to update prior statements that have become false or misleading).

explicitly permit the board to postpone imminent votes.²⁴¹ This result was forced on the shareholders of *Inter-Tel*.

2. *The Role of the Imminence Requirement*

The agency cost analysis presented in Section III.B. of this Note focused on a scenario in which a board postpones an imminent vote on a transaction. This Subsection will briefly comment on the role that the imminence requirement plays in that agency cost analysis, and on the meaning that imminence should be given in applying the default rule proposed in the previous Subsection to determine whether a particular postponement of a vote on a transaction triggers *Blasius* review.

The requirement that a vote be imminent at the time of the postponement in order to trigger *Blasius* review should be understood as merely a proxy for the general requirement, discussed in Part I, that the challenged action have a sufficiently disenfranchising effect. In the context of postponements, the idea is that the closer the postponement is to the date of the vote, the more likely it is that the postponement has the actual effect of preventing shareholders from voting down the transaction. When the postponement occurs far enough in advance of the date of the meeting, it may not be clear whether shareholders would have ultimately voted against the transaction in the absence of a postponement. Because *Blasius* is such a powerful doctrine, the Delaware courts have not applied it to board action that does not have the practical effect

241. Some commentators have suggested that companies should not be permitted to opt out of corporate law rules even via charter amendments approved by shareholders. This argument is premised on the assumption that any given shareholder is “unlikely to be pivotal” to the outcome of the vote and thus may rationally decide not to make the investment necessary to become fully informed as to the subject matter of the vote, and consequently may support even value-decreasing charter amendments proposed by management. See Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1836-37 (1989). However, others have criticized the conclusion that rational shareholder apathy will lead them to blindly support managers’ proposals. See Roberta Romano, Comment, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599, 1607-11 (1989) (arguing that voting in favor of management’s proposals is not the optimal strategy for uninformed shareholders, who would fare better by adopting a mixed voting strategy in which they only follow management some proportion of the time and thereby “tilt the election toward the informed” shareholders). Moreover, given the rise of shareholder activism and of proxy advisory services that make voting recommendations to shareholders, shareholders are unlikely to exhibit excessive deference to proposals by the board to waive *Blasius* claims as to votes on transactions. The decision of *Inter-Tel*’s shareholders to vote against giving the board the adjournment power confirms this.

of thwarting the outcome of a vote.²⁴² Thus, whether a vote is considered imminent for *Blasius* purposes should not turn on anything so formulaic as the precise amount of time between the postponement and the scheduled meeting but rather on whether it appears that, in the absence of a postponement, shareholders would have voted down the transaction that the board had recommended.

Understood in this way, imminence is indeed relevant to the agency cost analysis presented in Section III.B. When there is no reason to believe that shareholders were going to vote against the transaction prior to the postponement, both the potential costs ($C(M)$ and $C(I)$) and benefits (B) associated with the postponement are likely to be low. With respect to the possible costs of a postponement, these depend in part on the assumption that the increased voting presence of proponents of the transaction following the postponement (and the corresponding change in the record date) will actually affect the outcome of the vote. When the postponement has no such effect, these potential costs are less worrisome.²⁴³ On the other hand, the principal potential benefit of a postponement is that it may enable the board to preserve a beneficial transaction that shareholders would otherwise vote down on the basis of incomplete information. But if the transaction is likely to be approved even absent a postponement then this benefit is rather illusory. Therefore, when the postponement occurs sufficiently in advance of the date of the meeting and patently does not have the effect of thwarting the outcome of a shareholder vote, it is essentially a nonevent for the purposes of the agency cost calculus presented above. Given that there may be legitimate administrative reasons for such a postponement—for example, it may simply be more convenient to hold the meeting on a particular day—there is no reason to straightjacket the board by prohibiting postponements that do not have a disenfranchising effect and are thus plainly consistent with the use of the adjournment tool which the DGCL implicitly contemplates.²⁴⁴ Therefore, the “imminence” of the shareholder vote at the time of the postponement (as that term is defined above) should be a prerequisite to triggering *Blasius* review.

As acknowledged in the discussion of *In re MONY*, however, there is a difficult line-drawing problem in determining how to treat a postponement that may or may not have had the effect of thwarting the outcome of a

242. See *supra* notes 34-35 and 51-54 and accompanying text.

243. The potential costs of a postponement are also likely to be higher when the vote is imminent because the closer the postponement is to the actual vote the more likely it is that the board has already solicited proxies, and thus if the board decides to resolicit proxies the total proxy solicitation costs will be higher.

244. See DEL. CODE ANN. tit. 8, § 222(c) (2010).

shareholder vote.²⁴⁵ *In re MONY* itself is a good example. At the time of the postponement, a majority of executed proxies favored the transaction but the company had not yet secured a majority of the outstanding shares needed to approve the merger.²⁴⁶ On the other hand, the company still had a week to solicit proxies.²⁴⁷ Thus, it was uncertain whether the postponement actually had a disenfranchising effect in terms of thwarting the outcome of the shareholder vote that would have transpired in the absence of a postponement.

In close cases of this nature, the default rule should be that *Blasius* review does indeed apply. The reason is related to the justification for a penalty default rule presented in the previous Subsection. Insisting on ironclad proof that the postponement did have a disenfranchising effect might allow a board to strategically circumvent *Blasius* review by announcing the postponement at a time when the board believes, but it is not objectively manifest, that shareholders are going to vote against the transaction. This is a distinct possibility given that boards might have private information concerning the likely outcome of a vote to which courts may not be privy. For example, the board may have received negative signs from a large shareholder regarding its intended vote. Therefore, in order to reinforce the penalty default rule applying *Blasius* to postponements of votes on transactions and thereby encourage boards to seek explicit shareholder approval for such postponements ex ante, the “imminence” requirement should be deemed satisfied as long as there is both a substantial possibility that shareholders would have voted against the transaction in the absence of the postponement and evidence that foreclosing such an outcome was indeed the board’s purpose.²⁴⁸ Based on this standard, *In re MONY*, like *Inter-Tel*, was arguably wrongly decided.

CONCLUSION

This Note has argued that the *Blasius* doctrine encompasses two distinct categories of board action. The first involves board action taken for the primary purpose of preventing shareholders from determining the composition of the board. The second involves board action taken for the primary purpose of

245. See *supra* text accompanying note 159-160.

246. *In re MONY Group, Inc. S’holder Litig.*, 853 A.2d 661, 669 (Del Ch. 2004).

247. *Id.* at 671.

248. This inquiry into the board’s purpose is fundamentally different from *Inter-Tel*’s good faith analysis. See *supra* notes 125-126 and accompanying text. The only question should be the narrow one of whether the board’s immediate purpose is to prevent shareholders from voting against the transaction; whether the board believes that thwarting a shareholder vote is in the best interests of shareholders is irrelevant under the standard proposed herein.

thwarting a vote on a transaction on which shareholders as a matter of corporate law are entitled to vote. Although this second type of case is considerably rarer than the first, it has traditionally been within the purview of *Blasius*. The Delaware Chancery Court's recent decision in *Inter-Tel* threatens to substantially limit the application of *Blasius* in such nonentrenchment cases. This may be normatively undesirable depending on the assumptions one makes with respect to agency costs and the court's policing capabilities. As such, *Blasius* should continue to serve as a default rule that a corporation can opt out of *ex ante* through a shareholder vote. Whether the Delaware Supreme Court will endorse the limitations on the scope of *Blasius* that *Inter-Tel* imposes remains to be seen.