The Enduring Relevance of the Poison Pill: A U.S.-Japan Comparative Analysis

Curtis J. Milhaupt & Zenichi Shishido*

Abstract

More than forty years after its invention, the poison pill defensive measure remains the subject of important judicial decisions and renewed academic debate concerning fundamental corporate governance questions, both in the United States, its country of origin, and in its adopted home of Japan. In this essay, we use the poison pill as a mirror, reflecting the evolution of corporate law, markets, and norms in the United States and Japan. The pill's journey from its inception in the United States and its subsequent (conceptual, but not technical) adoption in Japan to the present has taken place in markedly different corporate governance environments in the two countries. Yet today, in a period characterized globally by shareholder activism and ESG agitation, the divergent paths of the pill appear to be converging to some degree, a possibility highlighted by recent judicial decisions on anti-activist pills in the Delaware courts and the Japanese Supreme Court.

The essay begins by tracing the separate, path-dependent origins of the pill in the two countries, showing how distinctions in legal technology of the pill derive from some fundamental differences in corporate law mechanics and governance norms. Next, the essay juxtaposes the poison pill's near-death in Japan during the prevailing market environment in the 2010s with the contemporaneous apogee of the pill's potency in the Delaware Chancery Court's *Airgas* decision. The essay concludes by bringing the story of the pill's enduring relevance to the present day, focusing on the current academic debate about anti-activist pills in the United States and the controversial recent use of a modified version of majority-of-the-minority shareholder approval (MoM) for anti-activist pills in Japan.

* Milhaupt is the William F. Baxter-Visa International Professor of Law, Stanford Law School. Member, ECGI. Shishido is Professor of Law, Musashino University and Professor Emeritus, Hitotsubashi University. We thank Jeff Gordon, Gen Goto, Hidefusa Iida, Dan Puchniak and participants at the 5th Annual Winter Deals Conference for helpful comments on an earlier draft.

I. Introduction

In 2021, the Delaware Chancery Court invalidated the Williams Companies' "anti-activist" poison pill designed to stymie hedge fund campaigns against the board, whose features one prominent scholar likened to a shareholder vote suppression law.[1] Commentators countered that a pill with these features is needed to protect environmental, social, and governance ("ESG") interests jeopardized by well organized, financially driven activists.[2] Other commentators argued that these features are justified in order to protect managers of well-run firms from share-value-destroying "mistargeting" by activists.[3] Roughly contemporaneously, the Supreme Court of Japan upheld a pill-like stock-option plan, deployed by the board of directors of a small publicly traded company called Tokyo Kikai and approved by a majority of the minority shareholders, to frustrate a "creeping acquisition" by a foreign investment fund that had rapidly accumulated a significant percentage of the company's stock in the open market.[4] Shortly afterwards, the Supreme Court upheld two lower court decisions invalidating an anti-activist pill-like option plan with some features similar to the ones deployed in the Williams Companies' pill.[5] These Japanese judicial decisions, rendered not long after some scholars had written off the poison pill defense as a relic of dashed hopes for a market for corporate control in Japan,[6] set off a new flurry of debate about the terms under which the pill should be used in that country.[7]

---

1. *Williams Cos. S'holder Litig.*, No. CV 2020-0707-KSJM, 2021 WL 754593, at *1 (Del. Ch. Feb. 26, 2021); Jeffrey N. Gordon, *Corporate Vote Suppression: The Anti-Activist Pill in the Williams Companies Stockholder Litigation*, CLS BLUE SKY BLOG, Aug. 19, 2021, https://perma.cc/C53J-EKBC.
2. Caley Petrucci & Guhan Subramanian, *Pills in a World of Activism and ESG*, 1 CHI. BUS. L. REV. 417 (2022).
3. Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L.J. 411 (2022).
4. *In re* Tokyo Kikai, Saikō Saibansho [Sup.Ct.] Nov. 18, 2021, Rei 3 (ku) no. 1046, 1641 KINYŪ SHŌJI HANREI [KINHAN]] 48 (Japan). As discussed *infra* at notes 77-78 and accompanying text, the use of "majority of the minority" (MoM) shareholder approval to validate a defensive measure in the *Tokyo Kikai* case differs from its original use under Delaware law in the context of a controlling shareholder's cash-out of the minority shareholders. Besides the context in which it is used (takeover defenses versus minority squeeze outs), the denominator for MoM as used in *Tokyo Kikai* differs in two important respects from the Delaware version: first, the "minority" only excludes shares held by the acquirer/interested shareholder and incumbent directors, not shares held by entities supportive of incumbent management such as cross-shareholding partners; and it only includes "minority" shares actually voted, not all outstanding "minority" shares.
5. *In re* Mitsuboshi, Saikō Saibansho [Sup.Ct.] Jul. 28, 2022, Rei 4(kyo) no. 12, 461 SHIRYŌBAN SHŌJIHŌMU [SHIRYŌSHŌJI] 143 (Japan).
6. *See* Alan Koh, et al., *Land of the Falling "Poison Pill:" Understanding Japanese Defensive Measures on Their Own Terms*, 41 U. PA. J. INT'L L. 687, 688 (2020).
7. The co-authors of this essay participated in the ensuing debate. *See* Curtis J. Milhaupt and Zenichi Shishido, *Tokyo Kikai Seisakusho Jiken ga Teikishita Mondai to Shin J-Pill no Teian* [Problems Raised by the Tokyo Kikai Seisakusho Case and a Proposal for a New J-Pill], 2298 SHŌJIHŌMU 4 (2022).

More than forty years after its invention by Martin Lipton[8] and nearly twenty years after its adoption in Japan was first contemplated,[9] the poison pill defensive measure remains the subject of judicial decisions and academic debates concerning fundamental corporate governance questions, both in its country of origin[10] and in its (quasi-) adopted home of Japan.[11]

In this essay, we explore the enduring relevance of the poison pill at a moment of great introspection about the role of corporations in society—what Lipton, the pill's architect, refers to as the "New Paradigm."[12] The current moment, also reflected in a project by the British Academy on the "Future of the Corporation" and the Business Roundtable's (in)famous 2019 statement of corporate purpose,[13] is broadly characterized by ESG concerns, a focus on non-shareholder corporate stakeholders, and a call for corporations to identify a "purpose" beyond profits, one that addresses distributional and social welfare problems traditionally thought to be the province of governments.

This moment has arrived following significant changes in the corporate governance landscape since the invention of the pill in the 1980s. Institutional investors now collectively hold major stakes in virtually all U.S. public companies, and foreign institutional investors have significantly increased their ownership in Japanese equities. In both countries, activists have found new ways to bring about change in corporate boardrooms that rely far less frequently on takeovers and more commonly on campaigns to convince institutional investors to join them in challenging the business and financial strategies of incumbent management.

---

8. In a 1983 memo to clients that would serve as a precursor to formulation of the poison pill in its current form, Martin Lipton wrote "We believe a corporation has the absolute right to (1) have a policy of remaining an independent entity, (2) have a policy of refusing to entertain takeover offers, (3) reject a takeover bid, (4) take action to remain an independent entity and (5) guarantee its shareholders a right to retain an equity interest in the corporation even if someone is successful in obtaining control and forcing a second-step merger." Memorandum from Wachtell, Lipton, Rosen & Katz, Takeovers: The Convertible Preferred Stock Dividend Plan (June 20, 1983) (on file with authors).
9. *See* Curtis J. Milhaupt, *Prescribing the Pill in Japan?*, 2004 COLUM BUS. L. REV. 1 (2004) (introduction to symposium issue on the possible development of a poison pill defensive measure in Japan and its implications for Japanese corporate governance).
10. *See, e.g.*, Wachtell, Lipton, Rosen & Katz, TAKEOVER LAW AND PRACTICE 122 (2020): "Rights plans have long been the subject of active discussion and debate, and they continue to contribute significantly to the structure and outcome of most major contests for corporate control. This debate has only increased, as many companies have allowed their rights plans to expire, have affirmatively terminated their rights plans, have modified their rights plans with watered-down protections, or have agreed not to implement rights plans going forward absent shareholder approval or ratification within some period of time, generally one year."
11. *See infra* text at notes 24-30 for a discussion of Japan's adoption of the concept, but not the mechanics, of the U.S.-style poison pill.
12. Martin Lipton, *It's Time to Adopt the New Paradigm*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, Feb. 11, 2019, https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/.
13. *The Future of the Corporation*, BRITISH ACADEMY, https://perma.cc/5S3M-7P6Z; Business Roundtable, Statement on the Purpose of the Corporation, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

Complicating and deepening our exploration is the fact that the United States and Japan have arrived at this moment through different paths and are still at different points in the corporate governance cycle between shareholderism and stakeholderism.[14] While ESG is a global phenomenon, the perceived ills of unbridled shareholder capitalism are much more keenly felt in the United States than in Japan, whose postwar corporate governance model was heavily oriented toward long-term, stable relationships with employees, lenders, suppliers, and other business partners. The principal goal of the past decade of "Abenomics"[15] corporate governance reforms in Japan was to improve the efficiency of capital allocation, elevate managerial concern for financial returns, and jump start somnolent capital market discipline through investor engagement with portfolio companies. Thus, at a time when corporate protagonists in the United States began to profess concern for stakeholders and social issues, Japanese government policy and at least some segments of Japan's private sector began to embrace the tenets of shareholder primacy.

Precisely because the pill's journey from its inception to the present in the United States and Japan has taken place in markedly different corporate governance environments, we use the pill as a mirror, reflecting the evolution of corporate law, markets, and governance norms in the two countries. We focus somewhat more on Japan's experience because it is less familiar to readers, using the U.S. experience principally as a foil for comparative analysis. But we hope that even readers well versed in the legal doctrine and market environment surrounding the U.S. poison pill's evolution will glean insights in what Ron Gilson memorably referred to as "reflections in a distant mirror," in which "[o]ne learn[s] about one's own system from the choices made by others."[16]

The essay proceeds in four parts. Part II provides a brief narrative on the separate origins of the poison pill in the United States and Japan, showing how distinctions in the legal technology of the pill derive from some fundamental differences in corporate law mechanics and governance norms in the two countries. Part III juxtaposes the near-death experience of the poison pill in Japan in the prevailing 2010s market environment with the apogee of the pill's potency in the Delaware Chancery Court's 2011 *Airgas* decision. Part IV brings the story of the pill's enduring relevance to the present day—a period reflecting the culmination of significant changes in the respective corporate governance environments, and a revival of academic debate about the pill, in both countries. Part V concludes by highlighting some key takeaways from the comparative analysis.

II. The Pill's Origin in Two Parts

A. The Pill's U.S. Origins and Controversy

The origins of the poison pill and its validation by the Delaware judiciary in *Moran v. Household International*[17] are well known, but it is useful to recall the controversy this

14. *See* Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 HARV. BUS. L. REV. 1 (2022).

15. Abenomics is the term coined to describe former Prime Minister Abe's three-part plan to revitalize the Japanese economy: fiscal stimulus, expansionary monetary policy, and structural/regulatory reform.

16. Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 COLUM. BUS. L. REV. 203, 203 (1998).

17. *Moran v. Household Int'l*, 490 A.2d. 1059 (Del Ch. 1985), aff'd, 500 A.2d 1346 (Del. 1985).

novel legal instrument generated at the time. Reflecting on this controversy highlights the contingent nature of the pill's origin, and underscores that the pill's now deep imprint on the fabric of U.S. corporate governance was not foreordained, at least in its current form.

It is worth noting at the outset that the Delaware judiciary's role as arbiter of the poison pill's validity in *Moran* was not etched in Mount Olympus; the judiciary came into this role by default. Congress could have legislated the validity of takeover defenses when it passed the Williams Act, or subsequently amended the statute to do so. But takeover defenses are highly technical and of low political salience to national lawmakers most of the time, and Congress never took action. State legislatures entered the fray with "constituency statutes" and other anti-takeover legislation, but their importance was vastly overshadowed by Lipton's novel invention, which interposed a formidable barrier to the launching of a tender offer or accumulation of a control block of shares even before the state anti-takeover statutes would be implicated. In the face of Congressional silence, it fell to the Delaware judiciary to opine on the validity of the pill, since the country's most important corporations are incorporated in the state.

For this task, the Delaware courts used the only tool at their disposal, the business judgment rule (elevated somewhat at the threshold in its *Unocal* incarnation as an "intermediate standard" of review). Given that in *Unocal v. Mesa Petroleum Co.* the Delaware Supreme Court had rejected Frank Easterbrook and Daniel Fischel's board passivity thesis in the face of a takeover bid,[18] the die was cast to find the adoption of the poison pill a valid exercise of a board's business judgment as long as a modicum of a "threat" to the corporation could be plausibly articulated by the board, and provided the pill did not foreclose the possibility of a successful tender offer or replacement of the board.

The SEC filed an *amicus* brief in *Moran*, arguing that precluding shareholders from the opportunity to consider a tender offer was contrary to the spirit of the Williams Act.[19] The SEC *amicus* brief argued that the "Household board has, by this plan, usurped the shareholders' right to control who will manage the company" and declared that the "interposition of management as the sole authority for determining whether a tender offer should go forward is not a substitute for a "vigorous 'market approach' in which shareholders decide."[20] After the *Moran* decision, validating the board's exclusive role in the adoption of the pill, the Commission directed staff to prepare a concept release exploring whether regulation of poison pills would be appropriate, and specifically to consider whether a shareholder vote should be required before the adoption of a poison pill.[21] The subsequent concept release highlighted

18. *See Unocal v. Mesa Petrol. Co*., 493 A.2d 946, 955 n. 10 (Del. 1985), *citing* Frank Easterbrook & Daniel Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733, 1750 (1981) (proposing that when confronted with a tender offer, a board "should relax, not consult any experts, and let the shareholders decide"). Curiously, in this footnote, the Delaware Supreme Court declares that board passivity in the face of a hostile bid "is clearly not the law of Delaware." Of course, the Court is creating the law of Delaware on a board's proper response to a hostile bid in this very opinion—had they agreed with Easterbrook and Fischel as a matter of corporate doctrine and policy, board neutrality would have become the law of Delaware, as it did in the U.K. Takeover Code.

19. Brief for the SEC as Amicus Curiae supporting Appellants, *Moran v. Household Int'l*. *See* Mark J. Roe, *Delaware's Competition*, 117 Harv. L. Rev. 588, 604-05 (2003) (discussing the latent competition between the Delaware judiciary and federal law reflected in the *Moran* decision).

20. SEC Amicus Brief, *supra* note 19 at 29.

21. Daniel L. Goelzer, Remarks to Maryland State Bar Association Section of Corporation,

examples of both investor and Congressional insistence on shareholder approval, and concluded that "[m]any concerns regarding poison pill plans might be resolved if these plans are subject to stockholder approval."[22] The SEC's potential regulatory intervention, however, never came to fruition.

For its part, the Delaware Supreme Court laconically deflected the plaintiff's critiques of Household's poison pill in its *Moran* decision. It brushed off the fact that there was no statutory authorization for issuance of a shareholder rights plan with the pill's distinctive features, quoting from its *Unocal* opinion: "[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs. Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited."[23] The Court similarly professed to be untroubled by the plaintiff's argument, echoing the SEC's *amicus* brief, that the poison pill effected "a fundamental transfer of power from the stockholders to the directors." The Court's response was simply that "there is little change in the governance structure [of the corporation] as a result of the adoption of the Rights Plan." The Delaware Supreme Court declared the pill valid without shareholder input. Therefore, it was—and remains to this day.

B. Japan's Adaptation of the Pill

The modern history of Japanese defenses against hostile acquisitions began in 2005 with the *Nippon Broadcasting* case,[24] although the defense used by the target company was a stock option issued to a white knight, rather than a poison pill. The Tokyo High Court issued an injunction against the issuance of the stock option,[25] based on traditional Japanese judicial doctrine—the "primary purpose rule," under which a new issuance of shares to a particular shareholder is only permissible if the primary purpose is to raise capital (as opposed to entrenching management). The decision was significant because previously, Japanese courts had generally rejected injunctive relief in similar cases.[26] Although the target company argued that the bidder's acquisition would destroy corporate value, in part by severing its relations with firms in its

Banking and Business Law 25 (Jan. 15, 1986), https://perma.cc/3PXS-K47Z.

22. SEC, Concept Release on Takeovers and Contests for Corporate Control, 17 CFR 240, at 28100. The release noted instances of corporations adopting a poison pill despite apparent lack of majority shareholder support, a "Shareholders Bill of Rights" adopted by the Council of Institutional Investors declaring that shareholders have a right to vote on poison pills, and a bill in Congress providing for such a right. *Id*. at 28099.

23. *Moran v. Household Int'l*, 500 A.2d at 1351 (1985) (quoting *Unocal*).

24. Livedoor v. Nippon Broad., Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 23, 2005, Hei 17 (ra) no. 429, 1899 HANREI JIHŌ [HANJI] 56 (Japan).

25. In Japan, stock options were deregulated in 2001, principally so they could be used as incentive compensation, although legal experts anticipated their use in a poison pill. The Ministry of Economy Trade and Industry started a working group to study the reasonable use of stock options for defensive purposes, leading to speculation about the advent of the poison pill in Japan. During this formative period, Ronald Gilson raised a cautionary note about the use of the poison pill in a country without independent directors or sophisticated corporate law courts. *See* Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21 (2004).

26. Injunctive relief was granted only where fund raising could not plausibly be claimed to be the "primary purpose" of the stock issuance to a friendly shareholder. For a rare example, *see e.g.*, *In re* Inageya and Chujitsuya, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Jul. 25, 1989, Hei 1 (yo) no. 2068/2069, HANREI JIHŌ 1317 [HANJI] 28 (Japan).

business group, the High Court ruled that such an issue should be evaluated by shareholders and the market rather than the judiciary.

Shortly after the High Court's decision in *Nippon Broadcasting*, the Japanese Ministry of Economy Trade and Industry and the Ministry of Justice jointly published soft law Takeover Guidelines, which counseled that although defensive measures are permitted for protecting and promoting "corporate value," the effect of a specific acquisition on corporate value should be assessed by the shareholders, and therefore, defensive measures should be adopted based on the will of shareholders.[27] The Takeover Guidelines also granted that, at least in principle, a poison pill defense can be consistent with Japanese corporate law doctrine and its emphasis on shareholder equality. This was important to the pill's Japanese development because the device must discriminate against an unwanted shareholder (from the incumbent board's perspective) in order to function as a defense.

The combined effect of the Tokyo High Court's *Nippon Broadcasting* decision and publication of the Takeover Guidelines, which took place almost simultaneously in the spring of 2005, was to introduce the poison pill into Japan—at least as a conceptual matter.[28] But the pill as transplanted into the Japanese host (the "J-Pill") differed conceptually from the graft validated under Delaware law (the "D-Pill") in two crucial ways. First, while the board has sole discretion to adopt and exercise the D-Pill without shareholder approval, the J-Pill contemplates approval by shareholders.[29] Second, in Japan, the theoretical justification for use of the poison pill defense is grounded in the broad concept of protection of "corporate value,"[30] rather than the board's fiduciary duty to protect shareholders and promote shareholder value under Delaware law.

These distinctions in the pill's approval and theoretical justification derive from major differences in the corporate law and governance norms in the two countries. In the United States, particularly in Delaware, while shareholder value maximization is both the principal objective of corporate law and the prevailing (if controversial) social/market norm, director primacy remains the basic corporate law operating principle, under which directors make all but the most fundamental business decisions without shareholder input.[31] Thus, defenders of the board's unilateral control over the D-Pill can draw upon some deeply rooted principles. By contrast, in Japan, where emphasizing the interests of non-shareholder stakeholders (especially employees) has been the prevailing social norm in the post-war period,[32] under the Companies Act

27. MINISTRY OF ECONOMY, TRADE AND INDUSTRY AND MINISTRY OF JUSTICE, GUIDELINES REGARDING TAKEOVER DEFENSE FOR THE PURPOSES OF PROTECTION AND ENHANCEMENT OF CORPORATE VALUE AND SHAREHOLDERS' COMMON INTERESTS (2005), at 3, 6. [Takeover Guidelines]. The board can adopt a defensive measure if there is a procedure by which the shareholders can eliminate it. *Id*.

28. Delaware doctrine, particularly *Unocal* and its progeny, heavily influenced the zeitgeist surrounding the development of defensive measures in Japan. *See* Curtis J. Milhaupt, *In the Shadow of Delaware: The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005).

29. The principle that the poison pill should be approved by shareholders was subsequently affirmed by the Japanese Supreme Court. Steel Partners v. Bulldog Sauce, Saikō Saibansho [Sup.Ct.] Aug. 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215 (Japan).

30. The Takeover Guidelines define "corporate value" as "[a]ttributes of a company, such as assets, earning power, financial soundness, effectiveness, and growth potential, etc., which contribute to the interests of the shareholders." Takeover Guidelines, *supra* note 27, at 2.

31. Del. Code Ann. Tit. 8, §141(a).

32. The stakeholder orientation of Japanese firms in the postwar period can be characterized

shareholders actually decide a much broader range of issues than the default rules provide for under Delaware law.[33] Thus, shareholder primacy over the J-Pill may appear odd to the uninitiated, but is consistent with the thrust of the Companies Act. Nonetheless, shareholder power is the "law on the books" in Japan. Shareholder muscle-flexing has not been a major factor in Japanese corporate governance practice—until recently, as we discuss in Part IV.[34]

Of course, a fundamental question can be raised about Japan's gravitation toward a modified version of the D-Pill: Why follow Delaware's approach to defensive measures? Even if Japanese policymakers sought to adopt a "global standard" in the development of defensive measures, another, arguably more fitting "global standard" was available—the U.K. Takeover Code.[35] The U.K. approach to takeovers has many

---

as a "company community" model, in which managers, inside directors and employees share a common identity, and complementary institutions such as the main bank system and cross-shareholding among group firms provided incentives to work for the benefit of the firm, and insulated it from outside influence. *See* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 201-217 (2000). Employee interests as corporate stakeholders were strengthened by a series of judicial decisions developing an "abusive dismissal rule," which made it very difficult to dismiss employees, even when the firm is in financial distress. *See* Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture and the Rule of Law*, 37 HARV. INT'L L.J. 3, 44-45 (1996). Recently, the view that the interest of the company means the interest of shareholders has become influential, and a Tokyo High Court decision in a management buyout (MBO) case declared that directors owe their fiduciary duty to the shareholders as a whole. *In re* Rex Holdings S'holder Litig., Tōkyō Kōtō Saibansho [Tokyo High Ct.] Apr. 27, 2013, Hei 23 (ne) no. 2230, 2214 HANREI JIHŌ [HANJI] 162 (Japan).

33. *See* Zenichi Shishido, *The Incentive Bargaining of the Firm and Enterprise Law: A Nexus of Contracts, Markets, and Laws, in* ENTERPRISE LAW: CONTRACTS, MARKETS, AND LAWS IN THE US AND JAPAN 1, 28, n. 100 (Zenichi Shishido ed., 2014). *See also* Gen Goto, *Legally Strong Shareholders of Japan*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 125 (2013-14).

34. Ultimately, in both Japan and the United States, shareholders play a pivotal role in the poison pill: shareholder approval is effectively required for adoption of the J-Pill under prevailing judicial doctrine and market practice. The board may have unilateral control over the adoption of the D-Pill, but a board seeking to maintain the pill in the face of a tender offer or committed activist campaign can be voted out of office by shareholders in a proxy contest. The real distinction lies in the makeup and objective functions of the respective shareholder bases. In Japan, "shareholder primacy" in the law masks considerable investor deference to management in reality. In the United States, "director primacy" operates in service of a deeply engrained shareholder wealth maximization norm.

35. *See* Milhaupt, *In the Shadow of Delaware*, *supra* note 28 (highlighting the U.K. approach as an attractive alternative). "The [U.K.] Code [on Takeovers and Mergers] is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework within which takeovers are conducted." THE PANEL ON TAKEOVERS AND MERGERS, TAKEOVER CODE, (2023). It is administered and enforced by the Panel on Takeovers and Mergers, an independent body with supervisory authority to carry out certain regulatory functions in relation to takeovers. Adoption of the U.K. approach would thus require the establishment of a Japanese Takeover Panel. Some Japanese commentators see this as an obstacle to the adoption of a Japanese equivalent of the Takeover Code, although it is not obvious why a functional Takeover Panel would be more difficult to create than a Delaware-esque sophisticated body of judicial doctrine on takeover defenses.

supporters in Japan because of its clear, rule-based framework and its strong signal of concern for minority shareholder protection, an influential narrative in Japan.[36] At the same time, however, the Code's clear rules do not provide a target board with discretion to block a bid that is unacceptable to the larger community of company stakeholders (particularly employees and affiliated firms), which is a definite drawback for incumbent Japanese corporate managers. Beyond this practical disadvantage of the U.K. approach, Delaware law holds a powerful intellectual attraction for Japanese corporate scholars, practitioners, judges, and government officials, many of whom have studied in U.S. masters of law programs.[37] It is thus unsurprising that when faced with a new policy problem, Japanese policymakers turned to the "global" standard with which they were most familiar.

III. The Poison Pill is Dead! Long Live the Poison Pill!

A. The J-Pill is Dead!

After the *Nippon Broadcasting* case and release of the Takeover Guidelines, a period of trial and error ensued to implement the poison pill in Japan. A key development in this period was the *Nireco* case,[38] in which a company sought to adopt a poison pill "on a clear day" (before a hostile bidder appeared) with features similar to the D-Pill—a free allotment of warrants to all record shareholders at the time of its adoption, exercisable into additional shares of the company upon the occurrence of a triggering event—the acquisition of 20 percent or more of the shares by any person.

However, there was one essential difference between the *Nireco* pill and the D-Pill, a flaw that doomed its utility as a defensive measure: the warrants were not transferable with the underlying shares to which they were attached.[39] Upon a triggering event, the Nireco warrants could be exercised only by record holders of shares on the date the warrants were issued. Therefore, the pill would discriminate, not only against the bidder, but also against ordinary shareholders who purchased shares after the warrants were issued. Japanese lawyers have never attempted to create a pill with transferable warrants because there is no specific authorization for such an instrument in the Companies Act, and under an informal but widely recognized "prohibition principle" in Japanese law, if an action is not specifically authorized by statute, it is deemed to be prohibited.[40] The Tokyo District Court enjoined Nireco's issuance of the warrants

36. *See* Mark J. Roe and Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 HARV. BUS. L. REV. 233 (2021).

37. The role of familiarity and intellectual attraction to legal transplantation is also evident in earlier periods of Japanese legal reform. For example, following the Meiji Restoration (1868), the Japanese government sent scholars to England, France and Germany to study their legal systems. The scholar sent to France ultimately proved to be the most influential upon his return, and Japan adopted a code-based system heavily influenced by the French Civil Code, but with additional influences of German and English law.

38. *In re* Nireco, Tōkyō Kōtō Saibansho [Tokyo High Ct.] June 15, 2005, Hei 14 (ra) no. 942, 1900 HANREI JIHŌ [HANJI] 156 (Japan).

39. Early versions of the poison pill with rights that could not be transferred with the underlying shares were enjoined by U.S. federal courts. *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252 (S.D.N.Y. 1985) (New Jersey law); *Unilever Acquisitions Corp. v. Richardson-Vicks, Inc.*, 618 F. Supp. 407 (S.D.N.Y. 1985) (Delaware law).

40. Moreover, it is widely believed that the Tokyo Stock Exchange, which engages in ex ante review of the adoption of defensive measures by listed firms, would not approve a poison

on several grounds, the most obvious being the economic harm to shareholders caused by non-transferability of the warrants.[41] The additional grounds on which the court enjoined adoption of the pill (lack of shareholder input and inadequate structures to prevent the board from arbitrarily refusing to redeem the pill) indicated that in contrast to *Moran*'s forgiving application of *Unocal* in reviewing a pill adopted on a clear day, the Japanese courts would apply scrutiny to a board's justification for adoption of a clear-day pill.

After the *Nireco* case, most J-Pills took the form of a "pre-warning" [*jizen keikoku*] pill. This is simply a public statement by a company that unless a prospective bidder provides certain specified information about the bid and keeps it open for a specified period for consideration by shareholders, the company will issue stock options whose exercise conditions discriminate against the bidder. Thus, a technical difference in the transferability of stock options under U.S. and Japanese corporate law gave rise to a third distinction between D- and J-Pills: the D-Pill is an enforceable legal instrument that discriminates against an unwanted bidder, while the J-Pill is a simple declaration of intent to discriminate against an unwanted bidder. This may, however, be a distinction without a major difference. Even a simple declaration of intent to discriminate operates as a shadow pill, deterring large accumulations of shares and providing incumbent management with time to negotiate with the bidder or consider alternative courses of action.[42]

A subsequent Supreme Court decision in *Steel Partners v. Bulldog Sauce*[43] appeared to shut down the nascent market for corporate control in Japan, which had appeared to be opened by the *Nippon Broadcasting* case. In 2007, Steel Partners, a U.S.-based investment fund, launched an all shares, cash tender offer at a substantial premium for a listed, small-capitalization condiments maker called Bulldog Sauce. The target company's board defended against the tender offer by issuing a free allotment of stock options (exercisable by Steel Partners only for their cash equivalent at the bid price)[44] to all shareholders, subject to shareholder approval. The Supreme Court rejected Steel Partner's request for injunctive relief. It reasoned that whether an acquisition of management control by a specific shareholder will damage corporate value should be decided by the shareholders themselves, to whom the profits of the firm belong. Moreover, 83.4 percent of all voting shares—nearly all of the shares other than those held by Steel Partners—had approved the defense.[45]

---

pill with transferable options or warrants.

41. *Nireco*, *supra* note 38.

42. The deterrent effect of the "pre-warning" pill derives from the fact that a shareholder who disregards the target company's public statement of required terms for an acquisition of shares beyond the threshold risks having its ownership stake diluted if the board proceeds to request shareholder approval of an option plan that discriminates against the unwanted bidder. However, whereas the dilutive feature of the D-Pill is triggered automatically once the share ownership threshold is crossed, in Japan the board still has to authorize the dilutive stock option issuance after the threshold is crossed and (if the board follows standard, recommended practice) submit the issuance to shareholder approval.

43. *Bulldog Sauce*, *supra* note 29.

44. This step was taken as a response to the potential argument that the pill violates the principle of shareholder equality of the Japan Companies Act. Kaisha-hō [Companies Act], Act no. 86 of 2005, art. 109 (Japan), translated in Japanese Law Translation [JLT DS]), https://www.japaneselawtranslation.go.jp/en/laws/view/3206/en#je_pt2ch2sc1at6 [https://perma.cc/DQ5S-AYCH] (Japan).

45. *Bulldog Sauce*, *supra* note 29.

The *Bulldog Sauce* decision sent a jolt to investors, particularly the foreign investment community, by reinforcing the market perception that hostile takeovers are simply not possible in Japan. The decision showed that a "just say never" defense against an all shares, all cash tender offer is not only legally permissible, but also feasible if a company strengthens its cross-shareholding network of friendly, stable shareholders. Any perception that the Supreme Court's holding was limited in its application to a foreign financial bidder or a bidder perceived as a greenmailer was dispelled by a subsequent episode involving a contest for corporate control between two Japanese companies in the same industry. Oji Paper, a major paper producer, was forced to abandon a hostile bid for its smaller competitor Hokuetsu Paper, after target company management maneuvered fiercely to obtain the backing of friendly shareholders, and reaction to the bid demonstrated that Japan's social climate remained unmistakably hostile to hostile takeovers.[46]

After these episodes, the use of defensive measures by Japanese firms began a steady decline. The number of listed companies with defensive measures (98 percent of which are pre-warning pills) peaked at 574 in August 2008 and fell to 387 in October 2018.[47] Arguing that the pre-warning pill is unnecessary and ineffective as a defense in Japan, as well as costly to maintain in the face of institutional investor resistance, the decline prompted a group of commentators to conclude that "Japan's 'poison pill' . . . is heading toward extinction."[48]

B. Long Live the D-Pill!

About the same time that Japanese firms were abandoning their transplanted version of the poison pill, dramatic confirmation of the D-Pill's power in the hands of the board of directors came in the Delaware Chancery Court's 2011 *Airgas* case,[49] which *The Wall Street Journal* called one of the "potentially most significant legal decisions of a generation."[50] Air Products had launched a $60 per share, all-cash, all-shares hostile tender offer to acquire Airgas. Airgas had a poison pill and a classified board of nine directors. Air Products had successfully nominated a class of three independent directors to the Airgas board at the annual shareholders meeting in September 2010. But Airgas's staggered board meant that in order to remove the pill, Air Products would have to successfully nominate at least two additional directors at the next annual shareholders meeting.[51] Air Products raised its bid several times before making its "best and final offer" of $70 per share on December 9, 2010. The Airgas board

46. *See e.g.*, *Tekitaiteki M&A Shippaigono Seishigyōkai* [The Paper Industry After the Failure of a Hostile M&A] GOO BLOG: ENTRANCE FOR STUDIES IN FINANCE, (2008) [https://perma.cc/BD5Q-RMEL]; Shintaro Katsura, *Chuken Chusho Seizōgyō no Gijutsu, Kanri, Senryaku—Seishigyōkai Saihen to Oji, Hokuetsu no TOB Mondai no Kōsatsu* [Technologies, Management and Strategies of Small and Medium Companies: An Analysis of the Reorganization of the Paper Industry and the Case of the Oji-Hoketsu Takeover Bid], 13 NIHON SEISANKANRI GAKKAI RONBUNSHI 105 (2007).

47. Koh, et al., *supra* note 6, at 728-29.

48. *Id*. at 688.

49. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

50. Gregory Corcoran, *The Airgas Decision: Long Live the Poison Pill*, WALL ST. J. (Feb. 17, 2011, 11:42 AM) https://perma.cc/QXZ3-835F.

51. Air Products' attempt to amend the Airgas bylaws to accelerate the date of the next annual shareholders meeting failed. *Airgas, Inc. v. Air Prods. and Chems., Inc.*, 8 A.3d 1182 (Del. 2010).

(including the three Air Products nominees elected to the board), backed by the opinions of three independent financial advisors that the bid price was inadequate, again rejected the offer and maintained the poison pill to prevent the tender offer from reaching the Airgas shareholders. Air Products sued to enjoin the pill.

As framed by Chancellor Chandler in the Delaware Chancery Court, "the case pose[d] the following fundamental question: Can a board of directors, acting in good faith and with a reasonable factual basis for its decision, when faced with a structurally non-coercive, all-cash, fully financed tender offer directed to the stockholders of the corporation, keep a poison pill in place so as to prevent the stockholders from making their own decision about whether they want to tender their shares—even after the incumbent board has lost one election contest, a full year has gone by since the offer was first made public, and the stockholders are fully informed as to the target board's views on the inadequacy of the offer?"[52]

Prominently noting that he was "constrained" by Delaware precedent,[53] Chandler answered this question in the affirmative. Despite his obvious discomfort with the result, Chandler concluded that the Airgas board had met its burden under *Unocal* to articulate a legally cognizable threat and that maintaining the poison pill defense in the face of Air Product's bid fell within *Unitrin*'s range of reasonable responses proportionate to that threat.

A Wachtell memo to clients underscored the ruling's affirmation of the decisive role of the board (*sotto voce*: particularly where the board is staggered) and the longevity of the pill in contests for control:

> The Chancellor could not have been clearer that 'the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors.' And it is up to directors, not raiders or short-term speculators, to decide whether a company should be sold: 'a board cannot be forced into *Revlon* mode any time a hostile bidder makes a tender offer that is at a premium to market value.' The Chancellor concluded: 'in order to have any effectiveness, pills do not—and can not—have a set expiration date.'[54]

In closing, Wachtell delivered a terse *coup de grace* to critics of the defensive measure: "The poison pill lives."[55]

Once again, with these radically different outcomes, the poison pill proved to be a mirror reflecting underlying corporate governance realities in the two countries. In Japan, weak market pressure and little social sentiment in favor of hostile bids complemented judicial blessing of a pill approved by shareholders, many of which in the post-war period have placed greater emphasis on maintaining business ties to the target company and its incumbent management than maximizing financial returns on their shares. In the United States, director primacy, even in potential disagreements with shareholders about the value of the company's shares, found affirmation under controlling Delaware corporate law doctrine. Concomitantly, the shareholder

52. *Airgas*, *supra* note 49, at 54.

53. "Trial judges are not free to ignore or rewrite appellate court decisions. Thus. . . I am constrained by Delaware Supreme Court precedent to conclude that defendants have met their burden under *Unocal* to articulate a sufficient threat that justifies the continued maintenance of Airgas's poison pill. . . . In my personal view, Airgas's poison pill has [already] served its legitimate purpose." *Id*. at 57.

54. Memorandum from Wachtell, Lipton, Rosen & Katz, Delaware Court Reaffirms the Poison Pill and Directors' Power to Block Inadequate Offers (Feb. 16, 2011).

55. *Id*.

franchise would come to assume even greater importance in Delaware's poison pill doctrine, as it became clear that the ability to determine the composition of the board in a proxy contest would be the shareholders' only realistic avenue to challenge an incumbent board's power over the pill.[56]

IV. The Pill in an Era of Activism and ESG

The poison pill lives. But today, in the United States it increasingly lives in different form as compared to its *Airgas* heyday. And it lives on in Japan, proving that reports of its demise were greatly exaggerated. Market developments and shifting corporate governance norms in the United States and Japan over the past decade are prompting a reevaluation of the function of the poison pill in the two countries, reinvigorating scholarly debates about the role of this defensive mechanism in an era of activism and ESG.[57]

A. The D-Pill's Evolution and Ensuing Debate

In the United States, since the 1990s there has been a steady shift from hostile takeovers by bidders seeking to acquire control over a target company to activist interventions by hedge funds challenging incumbent corporate management, and the shift has accelerated over the past decade.[58] The D-Pill is evolving in response to this market shift, with the increasing prevalence of anti-activist features, such as low share ownership triggers and acting-in-concert provisions that broaden the definition of beneficial ownership in determining whether a shareholder has crossed the threshold.

The *Williams Companies* decision[59] in 2021 was the Delaware judiciary's first ruling on an anti-activist pill. In March of 2020, the board of the Williams Companies responded to an all-time low in the company's stock price in the COVID-19 market drop by adopting a poison pill with a (i) 5 percent trigger; (ii) definition of beneficial ownership that included synthetic securities; and (iii) definition of "acting in concert" that would capture parallel conduct in the absence of an agreement or understanding, with a "daisy chain" concept that could aggregate the actions of unrelated parties, even

56. *See Airgas*, *supra* note 49, at 122, n.480 ("Our law would be more credible if the Supreme Court acknowledged that its later rulings have modified *Moran* and have allowed a board acting in good faith (and with a reasonable basis for believing that a tender offer is inadequate) to remit the bidder to the election process as its only recourse. The tender offer is in fact precluded and the only bypass of the pill is electing a new board.").

57. Ofer Eldar, et al., *The Rise of Anti-Activist Poison Pills* 3, (Eur. Corp. Governance Inst., Working Paper No. 689, 2023), https://perma.cc/S6PC-WLMT (arguing that "the customization of poison pills [to target activists] and the central role of hedge funds in corporate governance calls for a re-evaluation of the function of the poison pill and its broader impact on corporate practices"); Yo Ota, *Mitsuboshi Jiken no Kakukettei nikansuru Bunseki to Kentō—Nihonban Urufu Pakku ga Tsukitsukeru Kadai* [An Analysis and Examination of Each Court Decision in the Mitsuboshi Case—Problems Raised by Japanese Wolf Packs], 2307 SHŌJI HŌMU 23 (2022) (examining the judicial decisions rendered in response to the first anti-activist pill in Japan; pointing out the risk of wolf packs and problems with Japan's 5 percent ownership disclosure rule); Milhaupt & Shishido, *supra* note 7 (criticizing the use of MoM to authorize the use of the poison pill against a creeping acquisition and recommending unilateral board authority to adopt a poison pill against a structurally coercive bid).

58. Eldar et al., *supra* note 57, document the shift.

59. *Williams Cos.*, *supra* note 1.

those unaware of one another's existence. "Passive investors" were excluded from the definition of "acquiring persons" who could trigger the pill; however, "passive" was defined very narrowly and might potentially exclude even shareholders expressing views on routine corporate governance matters.

The Delaware Chancery Court enjoined the pill, applying its familiar *Unocal* analytical rubric of threat and proportionality. The court held that two of the threats proffered by the board: (i) the general threat of shareholder activism and (ii) the threat that an activist could cause disruption by pursuing a short-term agenda, were not legally cognizable because there were no activist pressures facing the company at the time the pill was adopted. In fact, testimony revealed that the board was responding to fears of a proxy contest and shareholder pressure, which are not recognized as legally cognizable threats under Delaware takeover jurisprudence. Although the court did not definitively rule on the third proffered threat—a "lighting strike attack" mounted by a shareholder who rapidly accumulates shares, it accepted the threat for purposes of the first prong of the *Unocal* analysis. However, the court held that even if the threat of a lightning strike attack existed, the pill's unusual features, described above, were not proportionate to the threat.[60]Having flunked the *Unocal* test, the pill was enjoined. The Delaware Supreme Court affirmed the decision without issuing a separate opinion.

The dawn of anti-activist pills in the United States has sparked academic debate about their validity and role in corporate governance. On one side of the debate, Jeff Gordon compares anti-activists pills to vote suppression attempts by red state politicians.[61] He views the Williams Companies pill as jeopardizing the nascent movement to consider non-shareholder interests reflected in the Business Roundtable's 2019 statement of corporate purpose and Lipton's "New Paradigm," writing, "an empowered anti-activist pill would operate not just against the hedge fund activists, the villains du jour, but also against ESG activists, just now gaining influence. . . . Indeed, judicial validation of the anti-activist pill could kill off ESG activism just as it gets a head of steam."[62]

Echoing Gordon's concerns but reaching diametrically opposing views on the value of an anti-activist pill, Caley Pretrucci and Guhan Subramanian tap into concerns about "sophisticated and coordinated activists" whose interests may conflict with ESG-related corporate governance objectives involving a broad set of stakeholders.[63] They offer a set of guidelines for pills in an era of activism and ESG whose stated objective is to "protect[] the corporation's long-term value and prevent[ ] activist plays motivated by extracting value from other constituencies."[64] Their proposed guidelines would produce a pill that has many features identical to the one deployed by the Williams Companies, but with less expansive acting-in-concert provisions.

Approaching the question from a more shareholder-centric perspective, Zohar Goshen and Reilly S. Steel[65] argue that current Delaware pill jurisprudence—allowing incumbent management to maintain the pill to block a raider seeking to acquire control of the firm, but preventing its use to stymie an activist campaign by a hedge fund[66]—

60. *Id.* at 74-78.

61. Gordon, *supra* note 1.

62. *Id.*

63. *See generally* Petrucci and Subramanian, *supra* note 2.

64. *Id*. at 438-39.

65. Goshen and Steel, *supra* note 3.

66. This is how Goshen and Steel interpret the Chancery Court's *Williams Companies* decision.

is backwards. They draw this conclusion based on the argument that activists pose a greater threat to shareholder value and the economy than raiders, because activists are more prone to "mistargeting," or mistakenly agitating for financial or operational changes at firms that only *appear* to be underperforming. While Goshen and Steel base their argument on concerns for shareholder value alone rather than broader ESG considerations, the doctrinal effect would likely be to endorse pills with features of the sort proposed by Petrucci and Subramanian.

B. The Revivified J-Pill and Debate

For many years since its inception, the J-Pill has been largely orphaned from legal practice in the United States, due to the various differences in the J-Pill's features and judicial doctrine discussed above. But developments in Japanese corporate governance that quietly percolated under the surface for nearly two decades have recently culminated in a market environment that has substantially increased the relevance of the J-Pill, both as an antitakeover defense and as a safeguard against activists.

By the turn of the twenty-first century, stock ownership by "outsiders" exceeded that by "insiders" in listed Japanese firms, and the gap has been expanding ever since.[67] Fallout from the global financial crisis accelerated dissolution of cross-shareholding by banks. In their place, foreign institutional investors increased their collective share ownership to more than 30 percent of total market capitalization by 2013.[68] The second Abe administration (2012-20) placed high priority on corporate governance reform, with a focus on enhancing the efficient use of capital and increasing financial returns to shareholders. A Stewardship Code (adopted in 2014) encouraged institutional investors to engage with the management of companies in their portfolios and a Corporate Governance Code (adopted in 2015) encouraged companies to unwind cross-held shares[69] and discouraged the use of defensive measures. Supported by ISS recommendations, foreign and domestic institutional investors urged their portfolio companies to dissolve cross-holdings and voted against the implementation and renewal of defensive measures. The number of companies with defensive measures declined to 244 in 2022,[70] a 50 percent drop since 2008.

How does ESG figure into the current Japanese corporate governance and poison pill landscape? Japan obviously arrives at this moment of introspection about the purpose of the corporation and concern for a broad array of corporate stakeholders via a very different route from that of the United States. As noted, Japanese corporate governance in its postwar heyday was centered around concerns for certain non-shareholder interests—core employees, as well as banks and business partners, most of

Whether *Williams Companies* should be read to signify that hedge fund activism can *never* be a cognizable threat for purposes of *Unocal* is of course an open question.

67. *See* Hideaki Miyajima, *Perspectives for Corporate Governance Reform in Japan*, RES. INST. OF ECON. TRADE AND INDUS. (Nov. 25, 2014) (defining "insiders" as major and regional banks, life and non-life insurance firms, and business corporations; "outsiders" as foreigners, individuals, investment trusts, and pension trusts).

68. JAPAN EXCHANGE GROUP, 2020 SHARE OWNERSHIP SURVEY, at 4, tbl. 3, https://perma.cc/HY3Q-PV8K (2020).

69. The recent reclassification of the Tokyo Stock Exchange also encourages the dissolution of stable, cross-shareholding: listing on a new "Prime Market" requires maintaining specified levels of liquidity in tradable shares to meet the needs of institutional investors. *See* NIKKEI, Oct. 17, 2022, at 1.

70. [Current State of Introduction of Anti-Takeover Measures], MARR, April 27, 2022, https://www.marr.jp/menu/ma_practices/ma_propractice/entry/36453#.

which belonged to the same *keiretsu* corporate network. But ESG in its current guise is also a new phenomenon in Japan, as Japanese managers were not accustomed to pushback on the environmental impact or business practices of their companies, or DEI considerations. ESG activism is becoming increasingly influential in Japan and is a source of angst for Japanese managers. For example, Sumitomo Shoji abandoned a coal plant in Australia under pressure from activists, and food giant Ajinomoto has faced demonstrations against animal testing. Shareholder proposals by ESG activists are gaining substantial support from institutional investors.[71] At the same time, attention to ESG concerns is to some degree pushing against the previously described thrust of Abenomics reforms to elevate concern for shareholder returns and more effective use of capital.

As a result of this mélange of developments, Japanese listed companies have become more vulnerable to hostile takeover attempts and activist campaigns, particularly since the market is home to many undervalued, high-quality small-capitalization companies. There have been several successful, entirely domestic hostile takeovers in recent years involving Japanese bidders and target companies.[72] Foreign and domestic activists are making use of the shareholder-friendly dimensions of Japanese corporate law, particularly its expansive shareholder proposal rights.[73] In 2020, Japan was home to the second largest number of activist campaigns (66), after the United States.[74]

This activity is increasingly generating litigation, an additional sign of change in Japanese corporate governance norms.[75] Among these cases, the Japanese Supreme

71. Shareholder proposals requiring major companies such as Mitsubishi Shoji and J-Power to create and disclose business plans in accordance with the Paris Agreement obtained more than 20 percent support at their respective shareholders meetings in June 2022. More than 40 percent of the major institutional investors supported these shareholder proposals. *See* NIKKEI, Oct. 15, 2022, at 16.

72. *See e.g.*, [Itochu's acquisition of Descante], NIKKEI (March 14, 2019), https://perma.cc/3LSB-9YUT; Takusui Wakai & Yoshikatsu Nakashima, , [Colowide's acquisition of Otoya], ASAHI SHIMBUN (Nov. 4, 2020), https://perma.cc/CS66-JHF2); [Nitori's acquisition of Shimachu], NIKKEI (Nov. 13, 2020), https://perma.cc/T2XX-SUEEhttps://perma.cc/PUA3-R3HG; [SBI's acquisition of Shinsei Bank], ASAHI SHIMBUN (Dec. 11, 2021),); Oisix's acquisition of Shjdax, NIKKEI, Oct. 25, 2022, https://perma.cc/3J5Z-QTRB.

73. Joseph Lee & Mizuki Suma, *The Future of Japanese Corporate Governance: Participation, Sustainability and Technology*, (Oct. 11, 2022), at 14-16 https://perma.cc/SG36-TPUE.

74. *Shareholder Activism in 2020*, ACTIVIST INSIGHT (Jan. 2021), https://perma.cc/JSS4-ZJS3.

75. Four post-bid J-Pills were litigated in 2021: *In re* Nippo Sangyo, Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 22, 2021, Rei 3 (ra) no. 138, 446 SHIRYŌBAN SHŌJIHŌMU [SHIRYŌSHŌJI] 130 (Japan) (the board exercised a pre-warning pill that had been approved by shareholders in response to a tender offer for up to 27.57 percent of the target company's shares by a business corporation. The court denied injunctive relief.); *In re* Nihon Asia Group, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Apr. 23, 2021, Rei 3 (ra) no. 798, 446 SHIRYŌBAN SHŌJIHŌMU [SHIRYŌSHŌJI] 154 (Japan). (the board adopted, and subsequently exercised, a pre-warning pill against an all-shares tender offer by an investment fund without shareholders' approval. The court issued injunctive relief.); *In re* Fuji Kosan, Tōkyō Kōtō Saibansho [Tokyo High Ct.] Aug. 10, 2021, Rei 3 (ra) no. 1593, 1630 KINYŪ SHŌJI HANREI [KINHAN] 16 (Japan). (the board adopted, and subsequently exercised, a pre-warning pill, which by its terms would be effective if approved by shareholders within two weeks, against a tender offer by an investment fund. The court denied injunctive relief.); *In re Tokyo Kikai*, *supra* note 4 (the board adopted and exercised a pre-warning pill after obtaining MoM approval, in response to an investment fund that purchased almost 40 percent of the target company's shares in the market. The court denied injunctive

Court's decision in *Tokyo Kikai* is the most significant (and potentially troubling) from a doctrinal standpoint. In that case, the board of a small-cap printing machine company listed on the Tokyo Stock Exchange responded to the rapid accumulation of shares by a foreign investment fund by obtaining approval from a majority-of-the minority shareholders ("MoM") for the adoption of an option plan that discriminated against the fund. MoM had previously been upheld by Japanese courts in transactions involving controlling shareholder freezeouts of minority shareholders—the same type of transaction in which its use has been endorsed by the Delaware courts.[76] But MoM has never been used for approval of defensive measures in Delaware, and its transplantation into Japanese poison pill doctrine seems problematic, particularly because the modified version of MoM adopted in *Tokyo Kikai* is extremely friendly toward the incumbent board.[77] Moreover, given that Japanese courts do not engage in careful review of the independence of board committees that recommend the use of defensive measures, this version of MoM would appear to provide considerable leeway to incumbent management to insulate themselves from capital market pressure when faced with an unwanted shareholder overture.[78] This is particularly true for small-capitalization companies in Japan, which still tend to have sizable percentages of stable,

relief.)

76. Although MoM is not yet widely used in Japanese corporate practice, it was recommended as a means of improving fairness in minority shareholder freezeouts in MINISTRY OF ECON., TRADE AND INDUS., FAIR M&A GUIDELINES ENHANCING CORPORATE VALUE AND SECURING SHAREHOLDERS' INTERESTS 42-44 (Jun. 28, 2019). But why was MoM transplanted for use in takeover defenses in Japan? One possible answer is "the power of narrative" in corporate law, *see* Roe & Shapira, *supra* note 36—specifically in the Japanese context, the attraction of the concepts of "minority shareholder protection" and "global" (i.e., Delaware) standards to an audience of Japanese legal practitioners.

77. *See supra* note 4. MoM for the approval of takeover defenses may be argued to have a surface-level parallel in the U.K. Takeover Code. Under the U.K. Takeover Code, 50 percent of the voting rights of shareholders unaffiliated with the offeror must approve an offer that would result in the offeror gaining more than 30 percent of the voting rights of the company. *See* THE PANEL ON TAKEOVERS AND MERGERS, THE TAKEOVER CODE (13th ed. 2021), Rule 36.1. But approval is initiated by the offeror, not by incumbents, and partial offers require the consent of the Takeover Panel. The entire bid process is overseen by an independent body in the form of the Takeover Panel. This institutional structure finds no parallel in Japan, where a significant number of shareholders are friendly toward management and the courts do not strictly evaluate the independence of special committees in proposing the adoption of defensive measures.

78. By mid-2022, Tokyo Kikai shares had lost more than half of their market value since the decision. In Milhaupt & Shishido, *supra* note 7, we argue that shareholder approval of the J-Pill in all circumstances, the currently prevailing judicial doctrine and practice in Japan, is not optimal from a corporate governance perspective. Rather, we argue that a Japanese board should have unilateral authority to adopt a J-Pill in the face of a creeping acquisition or other structurally coercive bid; shareholder approval should only be used when a bid exposes disagreement between some shareholders and incumbent management over the intrinsic value of the firm—what U.S. scholars have referred to as "substantive coercion." Otherwise, structurally coercive bids from which shareholders genuinely need protection, and disagreements over firm value, which, consistent with Japanese judicial rulings should be decided by shareholders, could easily be confused by the courts, as they apparently were in the *Tokyo Kikai* case. If all bids are deemed "coercive" (regardless of the reason), incumbents will easily obtain shareholder approval for defensive measures via the modified version of MoM. *See* Milhaupt & Shishido, *supra* note 7; *see also supra* note 3.

friendly shareholders among the public float.[79] At the very least, the *Tokyo Kikai* decision would appear to incentivize the (re)establishment of a friendly shareholder base, at a time when government policy and market pressure are moving in the opposite direction.

In a loose parallel to the *Williams Companies* decision, in 2022 the Japanese Supreme Court affirmed an injunction against an anti-activist pill issued by a small-cap electric wire manufacturer called Mitsuboshi.[80] After an investment fund had purchased 7 percent of the voting stock of Mitsuboshi, the board implemented a "post-bid warning pill"[81] with a 20 percent trigger and an acting-in-concert provision. Having deemed a group of other investors to be acting in concert with the investment fund, and calculating their combined ownership to exceed the 20 percent threshold, the board exercised the pill with the approval of a slight majority of all shareholders (not simply MoM). The Osaka District Court issued injunctive relief for the plaintiffs, and the Osaka High Court affirmed. The courts reasoned that the Mitsuboshi pill excessively restricted plaintiffs' shareholder rights, such as transferring shares, making shareholder proposals, and calling special shareholder meetings. Moreover, the Mitsuboshi board's process for determining that the investors were acting in concert with the investment fund was deemed to be arbitrary. The Supreme Court affirmed. The *Mitsuboshi* decision may have a salutary effect on future J-Pill practice because the courts did not rubber stamp the approval of the shareholders; they reviewed the actual effect of the pill on shareholders' rights and required due process to identify investors acting in concert with the interested shareholder.

There are still many unanswered questions about the operation and role of the J-Pill in a new era of exposure to the market for corporate control, as well as activism of both the financial and ESG varieties. Two of the most important are the boundaries of legitimate use of the pill and, more fundamentally, whose interests the J-Pill should protect.

Although, as we have seen, the Takeover Guidelines and judicial decisions established some rules on legitimate use of the J-Pill, the boundaries are not yet clearly defined.[82] The spate of pill litigation in 2021 unsettled market expectations in this

79. Stable and cross-shareholding has not declined significantly at small and medium-sized companies. *See* Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications*, *in* CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 79 (Masahiko Aoki et al. eds., 2007).

80. *In re Mitsuboshi*, *supra* note 5. There are two major differences between the pills at issue in the *Mitsuboshi* and *Williams Companies* cases. First, the Mistuboshi pill trigger was 20 percent, versus 5 percent for Williams Companies. Second, a majority of the shareholders approved the exercise of the Mitsuboshi pill. The Williams Companies pill was not put to a shareholder vote.

81. As previously discussed, most poison pills in Japan have taken the form of a "pre-warning" pill, i.e., a non-legal instrument adopted on a "clear day" when no bidder is on the horizon. Due to the rise of activism in Japan, poison pills are increasingly adopted by boards when a bidder (or significant shareholder of concern) is already present. These pills are still of the non-legal "warning" variety in that they serve as a precursor to the issuance of stock options that discriminate against the bidder/shareholder of concern. We use the term "post-bid warning" to distinguish these pills from clear day pills.

82. The Ministry of Economy, Trade and Industry recently formed a study group to reevaluate the Takeover Guidelines in view of developments and open questions emerging since the Takeover Guidelines were adopted in 2005. Emblematic of the changing environment, the revised guidelines are expected to take a neutral stance on the market for corporate

regard. One established rule is that shareholder approval of the J-Pill is necessary at some point, but it is not clear whether shareholder approval is required at the adoption stage, upon exercise, or both.[83] Also uncertain is the required form of shareholder approval—a vote that includes or excludes the interested shareholder/acquirer? Are clear-day adoptions entitled to greater judicial deference than *ex post* adoptions? How carefully will courts review the independence of special committees and to what extent will expert opinions be taken into consideration as evidence of due process in the adoption of a pill?[84] Moreover, after the *Mitsuboshi* Supreme Court decision, which enjoined a pill that had been approved by a majority of all shareholders, the legally acceptable substantive terms of the pill have become an important issue: To what extent can a pill restrict an interested shareholder's exercise of its rights as a shareholder? How low can the triggering ownership threshold be? And how much discretion can the board exercise in identifying shareholders who are acting in concert?

At the most basic level, the fundamental purpose of the J-Pill is not yet clear. Several judicial decisions and the Takeover Guidelines indicate that the pill's purpose is to protect "corporate value," which means the interest of shareholders as a whole. But this is a vague concept that provides a target board wide discretion to balance the interests of stakeholders. Since to date there is no Japanese version of the *Revlon* rule, one major subject of debate on a fundamental issue is whether a board is legally bound to accept the highest offer where there are competing bids for the firm.[85]

***

In the new era of shareholder activism and ESG considerations in both countries, a measure of convergence between the D-Pill and the J-Pill is now conceivable. As we have seen, a major distinction between the D-Pill and the J-Pill is that the latter requires (or at least is premised upon) shareholder approval. The precise features of an anti-activist pill that would survive a judicial challenge under Delaware's takeover jurisprudence is still an open question in the United States.[86] Moreover, attention in the U.S. may be turning from the poison pill to a potentially more potent shield against activists seeking board seats—advance notice bylaws—which potentially raise their

---

control, for example, by using the expression "unsolicited bid" in place of "hostile takeover."

83. The view that the target board is not necessarily required to obtain shareholders' approval upon exercise of the pill if it was obtained at the time of its adoption has become influential. *See In re Nippo Sangyo*, *supra* note 75.

84. To date, Japanese courts only examine whether shareholder approval was obtained at some point. They do not carefully review the independence of the special committee that has recommended use of the defensive measure or related procedural aspects of the pill's implementation.

85. Although, as noted above, the corporate governance cycle in Japan is moving from stakeholderism towards shareholderism (*see supra* note 14 and accompanying text), there is still no clear legal authority on the issue of *Revlon* duties. However, a prominent Japanese corporate lawyer has argued that a norm has already been established that the highest bid should be given priority in a contested bid, citing recent cases, including Nitori's acquisition of Shimachu, *supra* note 72. Masakazu Iwakura, *Kyōgoteki Kōkaikaitsuke Jōkyō ni aru Taishō Jōjōkigyō no Torishimariyaku no Kōdōjunsoku・Kihan tō* [*Code of Conduct, Norms, Duties, Etc. of Directors of Listed Company Targets in Competitive Tender Offers*], 20 HITOSUBASHI HŌGAKU 11, 23 (2021).

86. *See* the various perspectives of Gordon, *supra* note 1; Petrucci & Subramanian, *supra* note 2; Goshen & Steel, *supra* note 3.

own issues about managerial attempts to frustrate the exercise of shareholders' rights.[87] One possible solution to balancing the board's interest in protecting against wolf pack activity and misguided or anti-ESG hedge fund activism, on the one hand, and the legitimate exercise of rights of all shareholders, on the other, is to require shareholder approval for anti-activist pills, as is the norm for all J-Pills.[88] Shareholder approval of anti-activist pills is consistent with the Oliver Hart and Luigi Zingales argument that shareholders should vote on questions of shareholder *welfare* maximization.[89] In any event, a recent study indicates that 30 percent of anti-activist pills in the United States already have a provision requiring shareholder approval.[90]

Thus far, there are no signs that anti-activist pills will be deployed to stymie ESG agitation in Japan. But this should not be ruled out. As our narration of the past several years of pill activity demonstrates, Japanese boards and legal practitioners, responding to a new market environment, seem to have telescoped a decade or more of U.S. pill developments, with the J-Pill rising from the dead to occupy an important place in contemporary Japanese corporate governance. The J-Pill's history is still very much a work in progress.

V. Conclusion

The poison pill's relevance endures in the United States where it was invented, and in Japan where it was transplanted conceptually, reflecting evolving dynamics in the two systems of corporate governance and raising important new questions for courts, activists, and scholars. Our comparative exploration of the poison pill generates several takeaways, some of which reinforce familiar themes in comparative corporate governance literature, others that are more surprising.

Beginning with the familiar points, first, the U.S.-Japan comparison reinforces the importance of early design choices and path dependence to differences in corporate governance across countries. The fundamental distinction between a pill under the unilateral control of the target company's board of directors (subject to its fiduciary duties) in the United States and one that is subject to approval by shareholders in Japan continues to powerfully shape the internal development of legal doctrine in the two countries. There was nothing foreordained, however, about these initial design choices. Some U.S. scholars rejected the validity of the pill altogether in its early days, and the SEC argued in favor of shareholder approval of the pill in the seminal *Moran*

87. Advance notice bylaws require any person (including a hedge fund) seeking to nominate a candidate for election to the board to provide considerable information about its identity and investors prior to a stated deadline. If the amount or type of information required places an unreasonable burden on the party seeking to make the nomination, the bylaw is likely to be subject to the demanding "compelling justification" standard of review established in *Blasius Indus., Inc. v. Atlas Corp*., 564 A.2d 651 (Del. Ch. 1988). Notice the parallelism between "advance warning" poison pills in Japan and advance notice bylaws in the United States. Both measures attempt to stop insurgents (or at least provide an early warning of their presence) through mandatory information disclosure.

88. This is a straightforward way to effectuate Jeff Gordon's position that the pill must preserve shareholder voting power. See *supra* note 1.

89. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare, Not Market Value*, 2 J. L. FIN & ACCT. 247 (2017).

90. *See* Ofer Elder, et al., *supra* note 57, at 34 Figure 1 (D).

case. Unilateral board power to wield the pill remains controversial to this day.[91] In Japan, shareholder approval of the pill was consistent with Japan's (ironically) more shareholder-centric statutory company law, but also with the U.K. Takeover Code, an approach to takeover defenses completely different from the one offered by the D-Pill, arguably one more consistent with Japanese legal culture. Realities of the political economy lent momentum to Japan's distinctive path, because the more straightforward approach offered by the Takeover Code would have provided fewer protections to incumbent managers.

Second, Japan's transplantation of the concept of the U.S. shareholder rights plan is a powerful illustration of the transmutation of globally attractive ideas in corporate governance. But it also demonstrates how these ideas are interpreted selectively and shaped by political economy forces in the adopting country. Despite the powerful draw of Delaware corporate law as a "global standard" for Japanese practitioners and scholars, the U.S. version of the pill turned out to be both infeasible under Japanese corporate law mechanics and undesirable from normative and political economy perspectives. As a result, the Japanese version of the pill is neither a legal instrument nor the exclusive province of the board of directors. Early in Japan's journey toward adoption of the concept of the poison pill, the judiciary and other legal professionals gravitated toward a *Unocal*-like framing of a board's fiduciary duties in deploying defensive measures. But this framing was coupled with the notion that the fairness of defensive measures is materially enhanced by shareholder approval. The form of shareholder approval recently endorsed by the Japanese Supreme Court in the *Tokyo Kikai* case—a version of MoM—was adapted from Delaware doctrine and has gained a following among some practitioners, tapping into a deep-seated attraction to the concept of "minority shareholder protection" in Japan. But MoM has never been used to validate defensive measures in Delaware, and even here, political economy realities may be driving Japanese practitioners' attraction to Delaware law, as the adapted form of MoM is highly protective of incumbent managers of Japanese firms with a base of stable shareholders. Thus, while Japan's experience with the poison pill demonstrates what Mark Roe and Roy Shapira call "the power of the narrative in corporate lawmaking,"[92] experience also shows that this narrative is highly malleable and susceptible to status quo bias.

More surprisingly, after following very different paths of development, it appears that the prospects for some measure of convergence between the D-Pill and J-Pill are rather high. Several factors are pushing in this direction. Most important is the globalization of new forms of investor activism, which are focused on leveraging the support of institutional investors to obtain board seats and influence management strategy, in contrast to the prior focus on hostile acquisitions. While hostile acquisitions may remain exceedingly difficult in Japan, incumbent managers cannot remain impervious to this new form of activism. This is particularly true given that a significant percentage of shares of listed Japanese companies are held by foreign institutions, and because the small market capitalization of many listed firms reduces the cost of acquiring an activist toehold.

Another factor propelling convergence between the D-Pill and the J-Pill is the rebalancing of board discretion and shareholder approval—in opposite directions—

91. *See* Charles Korsmo & Minor Myers, *What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 J. CORP. L. 389, 428-29 (2022) (arguing that a board's power to maintain a pill in the face of an offer at a premium to market price is no longer consistent with recent doctrinal developments in Delaware appraisal law; therefore, "*Airgas* is now bad law.").

92. Roe & Shapira, *supra* note 36.

under way in Delaware jurisprudence and legal commentary in Japan. In Delaware, the *MFW* decision[93] and its expanding universe of application signify enhanced judicial respect for shareholder approval as a check on board discretion. And as noted above, shareholder approval of anti-activist pills is on the rise in the United States. In Japan, by contrast, there is a slowly growing sense among some practitioners and scholars that shareholder approval of the poison pill in all circumstances may be problematic, and that clarifying the circumstances in which the adoption of a pill should be left to board discretion may be healthy from a corporate governance perspective.

Of course, our analysis does not necessarily predict strong-form convergence between the D-Pill and the J-Pill. The law of unanticipated consequences, continued aspects of institutional divergence, and shifts in social norms will continue to influence and possibly once again separate the trajectories of defensive measures in the United States and Japan, notwithstanding factors currently channeling them in similar directions.

One prediction, however, does seem safe given the history we have traced in this essay: the poison pill's relevance will endure, both in its U.S. home of invention and in its adopted home of Japan.

93. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).