

The Evolution of the Poison Pill

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One of the most important developments in corporate law occurred 40 years ago when the Delaware Supreme Court approved an early version of the poison pill, a potent anti-takeover device. The pill started as an untested, risky strategy to counter a particular type of potentially abusive tender offer. Over the ensuing decades, the poison pill evolved into an all-purpose antitakeover device that could effectively prevent almost any takeover, not just abusive ones.

Although hundreds of scholarly articles have been written about the poison pill, none has empirically examined the textual evolution of the device itself. The poison pill is simply a document, in the form of a contract, that spells out a mechanism for punishing a hostile bidder that engages in a hostile takeover. This Article uses a new database of the texts of 3,500 poison pills stretching back to the early 1980s to trace the evolution of the poison pill itself from its earliest beginnings to its modern form.

The analysis reveals that the poison pill was largely adapted from preexisting documents and did not emerge full-fledged at a particular point in time. Instead, the pill gradually evolved into its near-current form over a decade through innovations by multiple law firms. This challenges the standard narrative that the poison pill emerged from a single technological invention by one law firm. The revolutionary moment was not only the drafting of the document itself, but the Delaware Supreme Court's endorsement of the instrument.

This Article argues that the innovation was not so much a technical one, as is commonly believed, but a policy innovation. The Delaware Supreme Court's decision to validate the pill served essentially as a private antitakeover statute—it delegated to law firms the authority to enact and revise antitakeover law of the state through privately drafted contracts. This solved a problem of political gridlock in Delaware, where existing institutions were unable to provide a solution to the perceived problem of takeovers. This policy innovation may provide a roadmap for private law solutions to other public policy problems in corporate law.

INTRODUCTION

The emergence of the poison pill was one of the most important developments in modern corporate law.¹ This powerful antitakeover device, which originated in the takeover wars of the 1980s, reframed the landscape of hostile acquisitions.² The pill worked by imposing a devastating cost on any bidder that attempted to acquire a company against the will of the incumbent board. This gave corporate boards the ability to resist hostile takeovers, perhaps indefinitely, shifting the playing field from hostile bidders toward incumbent

1. The pill has been called “the decisive legal development of the hostile takeover era.” WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 588 (3d ed. 2009).

2. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549, 1568, 1572–78 (2014) (explaining that the poison pill has “transformed the tender-offer landscape”); Julian Velasco, *Just Do It: An Antidote to the Poison Pill*, 52 EMORY L.J. 849, 849 (2003) (“The single most significant development in the ever-changing world of hostile takeovers was the invention, approximately two decades ago, of the poison pill defense by New York attorney, Martin Lipton.”).

managers. Indeed, after forty years the poison pill is still the first line of defense for corporations that come under attack from hostile bidders.

The poison pill marked the dawn of a new era in corporate law and finance, with effects that reached far beyond the tactics of takeover battles. Because the poison pill made hostile takeovers economically impracticable, it impaired one avenue for shareholder discipline over boards—the market for corporate control.³ This shook the foundations of the burgeoning theory of the market for corporate control, which hypothesized the hostile takeover as a disciplinary force on corporate agents. The pill shifted the channels of influence over corporate governance from the markets to the proxy ballot box in ways that shaped how corporate law subsequently developed. Indeed, the poison pill warped the very fabric of the financial markets, in ways both seen and unseen.⁴

The dramatic effect of the pill started a series of economic and legal debates that have spanned generations, one that has been quite contentious from the start.⁵ One set of debates primarily addressed whether the pill increased or reduced shareholder value by examining whether managers used it primarily to enhance target bargaining power or instead to entrench incumbent managers.⁶ A second set of debates, mostly in the law review literature, addressed the pill's legality.⁷ A third set of articles proposed various versions of antidotes or ways around the pill, none of which achieved wide acceptance. The result of these studies reached a form of stalemate with no clear conclusions, and after a few decades the flood

3. The classic citation for this important point is Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965) (arguing that takeovers serve to discipline poorly performing management).

4. See ROBERT F. BRUNER, *THE POISON PILL ANTI-TAKEOVER DEFENSE: THE PRICE OF STRATEGIC DETERRENCE* 2 (1991) (describing the “latent influence” of the pill as “huge”).

5. The device elicits strong feelings. Arthur Fleischer once said, “People get so emotional when they talk about the pill . . . you’d think they were discussing sex, religion, or politics.” *Crown Zellerbach Postmortem: Dr. Lipton Says Operation Was a Success* . . . , CORP. CONTROL ALERT, Aug. 1985, at 7.

6. See, e.g., GREGG A. JARRELL & MIKE RYNGAERT, OFF. OF CHIEF ECONOMIST OF THE SEC. & EXCH. COMM’N, *THE EFFECTS OF POISON PILLS ON THE WEALTH OF TARGET SHAREHOLDERS* 2–3 (1986) (discussing the main lines of argumentation for and against poison pills and documenting a small decrease in price associated with pill adoption); Paul H. Malatesta & Ralph A. Walkling, *Poison Pill Securities: Stockholder Wealth, Profitability, and Ownership Structure*, 20 J. FIN. ECON. 347 (1988) (reporting negative effect of pill adoption on shareholder wealth); Michael Ryngaert, *The Effect of Poison Pill Securities on Shareholder Wealth*, 20 J. FIN. ECON. 377 (1988) (reporting negative effect of pill adoption on shareholder wealth, especially for firms subject to takeover speculation); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 196–98 (1991) (discussing negative effects of poison pill); Robert Comment & G. William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 J. FIN. ECON. 3, 3, 6 (1995) (finding that poison pills increase the premium to target shareholders but do not systematically deter acquisitions or serve to entrench managers). For a survey of studies on poison pills up to the year 2000 (which includes most of the influential studies), see John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 340–58 (2000). This literature on poison pills is a subset of the larger literature on takeover defenses. For a survey of the early studies of such enactments, see ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 60–75 (1993); JARRELL & RYNGAERT, *supra* note 6 (reduces shareholder wealth, at least for some firms); Ryngaert, *supra* note 6; Malatesta & Walkling, *supra* note 6 (negative effect on shareholder wealth).

7. See, e.g., Robert A. Helman & James J. Junewicz, *A Fresh Look at Poison Pills*, 42 BUS. LAW. 771, 774–88 (1987) (articulating factors that would determine whether a poison pill was valid, especially on anti-discrimination grounds); Bebchuk & Jackson, *supra* note 2, at 1553 (arguing that state rules validating poison pills are “preempted by the Williams Act”).

eventually ebbed. The case law or statutes of virtually all states validated the poison pill, so for good or for ill, the pill was here to stay.⁸

Missing from the debate, however, is an explanation of how such a dramatic transformation of public policy took place through the private practice of transactional lawyers. The standard origin story of the poison pill credits a single lawyer, Martin Lipton of Wachtell Lipton, with inventing a device—the rights plan or poison pill—that essentially “solved” a technological problem. The perceived technological problem was that hostile tender offers could circumvent management’s ability to evaluate and negotiate takeover proposals. Opponents of hostile takeovers argued that certain tender offers could put the shareholders of the target in a “prisoner’s dilemma” situation.⁹

The solution was an unprecedented legal device that used an intricate contract to give incumbent managers leverage against hostile bidders. According to the conventional wisdom, Lipton devised the poison pill as a technological solution to the hostile takeover. The story has passed into the realm of myth and legend, partly because of law firm marketing,¹⁰ and become a part of the folklore of corporate lawyers inculcated in law school. The way the story is told, the poison pill is indeed one of the most important innovations in finance and corporate law in the last century.¹¹

The conventional narrative of the poison pill as a private innovation solving a technological problem has largely painted over what was a quite complex and important path by which the pill evolved. The poison pill was indeed one of the most important developments in corporate law policy, but history reveals that the poison pill did not spring fully-grown from the typewriter of a particular person at a particular moment. Instead, the poison pill evolved from its initial prototype through various iterations by many M&A lawyers over a period of decades.¹² These changes were copied, scrutinized, edited, and recopied by thousands of deal participants over years.¹³ Some of these changes led to dead ends and extinct lineages, while others survived in the marketplace and themselves gave rise to later

8. It is worth noting that poison pills have had some international spread but despite the close legal relationship between the United States and the United Kingdom, pills are not permitted under the U.K. Takeover Code. See John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1736 (2007) (“Unlike their U.S. brethren, U.K. managers are not permitted to take any ‘frustrating action’ without shareholder consent, once a takeover bid has materialized. Poison pills are strictly forbidden . . .”).

9. Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1, 8 (2002) (characterizing hostile bids as “opportunistic attempts to buy assets *on the cheap*” and suggesting that tender offers incentivize a “stampede[]” of each shareholder choosing to tender even though the collective benefit of the shareholders would be greater if they did not).

10. Lipton has not been shy about claiming credit for the poison pill. See, e.g., Shira Ovide, *Marty Lipton: Why I Invented the Poison Pill*, WALL ST. J. (Dec. 29, 2010), <https://www.wsj.com/articles/BL-DLB-30356> (on file with the *Journal of Corporation Law*).

11. Ronald J. Gilson, *Lipton and Rowe’s Apologia for Delaware: A Short Reply*, 27 DEL. J. CORP. L. 37, 37 (2002) (“Martin Lipton has a strong claim to having devised the most important innovation in corporate law since Samuel Dodd invented the trust for John D. Rockefeller and Standard Oil in 1879.”); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 779 (calling the poison pill “one of the most important legal inventions”); Bebhuk & Jackson, *supra* note 2, at 1572–78 (explaining that the poison pill has “transformed the tender-offer landscape”); BRUNER, *supra* note 4, at 1 (“The poison pill is arguably the most significant corporate financial innovation of the 1980s and certainly the most controversial.”).

12. See, e.g., Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 921–22 (2019) (describing the evolution of the poison pill).

13. See *infra* Part II.

descendants. Only by the turn of the millennium were all the necessary pieces widely in place, with the pill reaching its near-current set of features.¹⁴

This Article tells this remarkable story of this document—the poison pill—that changed public policy through private law practice. This Article uncovers the hidden history of this device by examining the text of the document itself. The poison pill is simply a complex transactional legal document, and complex transactional legal documents are not crafted from scratch. Instead, they are copied from previous samples or forms (often called precedents or templates). The precedent documents serve as a starting place from which lawyers make edits that range from light to heavy, depending on the type of document and situation. The drafting lawyer’s choice of what to copy reveals a great deal about the process of producing the documents. In particular, the repeated copying of documents leaves behind the “fingerprints” that allow the reconstruction of a given document’s lineage or ancestry.

This Article uses these fingerprints to reconstruct the ancestry of poison pills from their 1984 inception (and predecessor documents) to the present. Analysis of a new dataset containing the full text of 3,500 poison pills uses the documents themselves to tell the story of their evolution hidden in the intricate set of boilerplate terms in the documents. Using computer analysis of the text together with statistical techniques initially developed to trace pathogen outbreaks in epidemiology, this Article reconstructs the “ancestral” relationships of the poison pills from the very beginnings through 2022. With the ancestral relationships of the poison pill texts reconstructed, this Article weaves together computer analysis with historical narrative from contemporaneous expert commentary, showing the evolution from the earliest texts of the pill to the present.

The story that emerges from the textual analysis together with the contemporaneous commentary is one that is much more reminiscent of an evolutionary process than an invention. The original versions of the poison pill were relatively small but important innovations to preexisting warrant agreements, which served as the textual source of the poison pill document. This innovation, though important, was modest in its technical aspects. The initial versions of the device did not serve as an effective technological solution to hostile takeovers. This is evident from the fact that the original versions of the poison pill, although publicly available, were not immediately adopted.¹⁵ Although the initial drafters aggressively promoted the new device, other law firms knew its effectiveness would depend on the policy decision of the Delaware courts.

What then was the pivotal moment that set corporate law onto its new path? It was the Delaware Supreme Court’s decision to validate the early version of the pill, which essentially placed judicial imprimatur on a privately drafted antitakeover statute.¹⁶ In the face of uncontrolled takeover activity and inaction from the Delaware legislature, the Supreme Court took the opportunity presented by this seemingly private innovation to circumvent legislative inaction and delegate the drafting to private lawyers. Lipton’s gambit provided cover for the Delaware judiciary to do what it needed to do to protect Delaware’s lucrative

14. See *infra* Part II.B.

15. The slow diffusion prior to the *Moran* decision was not for lack of information, but the risk associated with adopting the uncertain device. Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 L. & SOC. INQUIRY 423, 439 (1993); see *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985) (affirming the Chancery Court’s decision to allow poison pills).

16. Powell, *supra* note 15, at 438–39.

corporate chartering franchise.¹⁷ The court could validate the poison pill device—a ‘private’ contract—without risking its reputation by *overtly* making a broader policy pronouncement about takeover law.

This Article therefore argues that poison pill was not so much an ‘invention’ as a political solution that overcame a political impasse in Delaware over takeovers. In the face of legislative inaction, the Delaware Supreme Court essentially empowered companies to craft ‘do-it-yourself’ antitakeover statutes in the form of the poison pill. Delegating the task of writing antitakeover statutes to lawyers had advantages for Delaware. First, unlike with a statute, the legislature could avoid responsibility for a controversial decision, shifting blame to lawyers. Second, if the later versions of the pill had proved disastrous, the court could simply strike them down on their unique facts, attributing the infelicitous events to overreaching by private lawyers. In contrast, a poorly drafted antitakeover statute could have proved disastrous for Delaware’s chartering business.

Moreover, unlike a statute enacted by the legislature, companies could freely amend the provisions of the pill as defects are discovered or as appropriate for changing circumstances or in light of unanticipated events. This is where the second half of the story comes in: that Wachtell Lipton’s rival of the period, Skadden Arps, played a decisive role in developing the poison pill we know today. Originally an opponent of the poison pill,¹⁸ Skadden was the one that added the essential ingredient that transformed the initial prototype into the modern formidable modern poison pill.¹⁹ Over the years, other changes were introduced, but the Skadden version of the poison pill won out in the marketplace.²⁰ As a result, the poison pill text itself developed a life of its own, evolving organically over forty years in response to learning and external events.

This Article develops this argument in four parts. Part I provides the necessary background by introducing the poison pill of today, identifying the important features that developed along the way. Part II uses the new dataset to reconstruct the ancestry of the poison pill, tracing its evolution from its earliest beginnings through 2022. This ancestral tree lays the foundation for Part III, which describes what the ancestral evolution reveals about the poison pill, as well as the evolution of transactional legal documents more generally. Part IV develops the hypothesis that the Delaware Supreme Court’s decision validating the pill was a policy choice that effectively delegated to private lawyers the task of writing anti-takeover statutes.

I. THE MODERN POISON PILL

The modern poison pill, formally denominated a “stockholder rights plan,”²¹ is probably the single most effective means for a company’s management to resist a hostile

17. See, e.g., Stephen M. Bainbridge, *DExit Drivers: Is Delaware’s Dominance Threatened?*, 50 J. CORP. L. 823, 860–62 (2025) (describing Delaware’s reputation and the judiciary’s “strong incentives” to maintain it).

18. Powell, *supra* note 15, at 433 (explaining the rivalry between Wachtell and Skadden in the 1980s). Wachtell took the defense side while Skadden took the hostile bidder side. *Id.* Lipton found his personal rival in Joseph Flom of Skadden. *Id.*

19. See *infra* note 162 and accompanying text.

20. See *infra* note 192 and accompanying text.

21. *The 1980s Takeover Era and Lipton’s Stockholder Rights Plan*, LIPTON ARCHIVE, <https://theliptonarchive.org/1980s/> [<https://perma.cc/CC6T-V33V>] [hereinafter *The 1980s Takeover Era*] (stating that “the stockholder rights plan” is now “colloquially known as the ‘poison pill’”).

takeover. The poison pill creates stock purchase rights that remain inert until an acquiror crosses a stock ownership threshold, today typically set at 10–15%.²² Once an acquiror crosses the threshold and certain other requirements are met, the pill activates and unleashes economically devastating consequences for the acquiror by giving other stockholders the right to purchase highly discounted stock of the target or the acquiror.

The pill is widely perceived as a nearly insurmountable barrier to a raider buying through it,²³ making it “by far the most effective way for incumbent directors to block tender offers they disfavor.”²⁴ Not only is the pill effective, but it is nimble; incumbent managers of any company can deploy the pill on short notice and with no shareholder vote, meaning that every company effectively can deploy a pill at any time. They can also redeem the pill (deactivate it), giving them the freedom to negotiate with friendly bidders.

This Part gives some background to this device and an overview of the anatomy of the poison pill as it exists today. This Part provides the necessary background to understanding the history of how the pill developed later in this Article. It describes the terms of the pill, including the essential elements that evolved after the first poison pill emerged. This will provide the basis for seeing how the original version of the pill was vulnerable, as well as how it evolved over time into the formidable barrier it is today.

A. Background and Context

The poison pill traces its origins to the intense and unprecedented upheaval in financial market turmoil of the 1980s,²⁵ when the confluence of junk bond financing, leveraged buyouts, deregulation, and novel financial techniques created a takeover wave that swept over the landscape.²⁶ Among the most disruptive of these were the hostile tender offers, especially the specter of front-end loaded, two-tier offers that could coerce shareholders into tendering.²⁷ The hostile tender offers had the potential to destabilize corporate ownership so quickly that managers worried no company was completely safe. The concern was

22. See *id.* (stating that the relevant threshold percentage is historically 15%); see also Oliver Baum & Guhan Subramanian, *Redemption Mechanisms in Poison Pills: Evidence on Pill Design and Law Firm Effects*, 79 BUS. LAW. 1043, 1044 (2024) (describing typical thresholds as between 10% and 15%).

23. Guhan Subramanian, *Bargaining in the Shadow of PeopleSoft’s (Defective) Poison Pill*, 12 HARV. NEGOT. L. REV. 41, 42–43 (2007) (noting that the pill is generally perceived as a “show-stopper,” leaving only a proxy contest as an alternative); BRUNER, *supra* note 4, at 31 (“The main conclusion of this analysis is that the pill is an absolute deterrent; in virtually no instance would a raider acting rationally attack in the face of a pill.”)

24. Bebchuk & Jackson, *supra* note 2, at 1570.

25. *The 1980s Takeover Era*, *supra* note 21 (describing the 1980s as a period of “financial raiders” and abuse).

26. See Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 SCI. 745, 746 (1990) (explaining that antitrust deregulation, along with other factors like the “easy availability of internal and external funds,” paved the way for the takeover wave in the 1980s); Gheorghe Hurduzeu & Maria-Floriana Popescu, *The History of Junk Bonds and Leveraged Buyouts*, 32 PROCEDIA ECON. & FIN. 1268, 1268–70 (2015) (describing the rise of junk bonds in the 1980s and their use in leveraged buyouts).

27. See L. P. Scriggins & David Clarke, Jr., *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266, 266–67 (1984) (explaining that in front-end loaded, two-tier offers, an acquiror “typically,” in the first tier, “makes a cash tender offer for a stated amount of the target’s shares, such as fifty-one percent,” and, for the second tier, the acquiror “gives notice that it intends to follow this acquisition with a merger . . . in which the remaining shareholders will receive [securities] having a value substantially less than the cash paid for the first fifty-one percent,” which creates a “stampeding effect”); see also Lipton & Rowe, *supra* note 9, at 8 (explaining the theory behind the stampeding effect).

not limited to managers, however, as commentators and the business press fretted about the effect of uncontrolled takeovers on competitiveness of the United States economy.

The upheaval of this period led to the major cases that fill corporate law and M&A casebooks, such as *Unocal*,²⁸ *Revlon*,²⁹ *Paramount v. Time*,³⁰ and *Paramount v. QVC*,³¹ as well as state and federal legislative and regulatory enactments.³² The story of the poison pill is a part of this unique period but differs from these other developments according to the conventional account. Unlike these other watershed developments, the traditional story emphasizes the poison pill as a technological ‘invention’ that privately solved a public problem. This Part examines the history of the poison pill to assess the claim that a private innovation ushered in the new era.

The next section reviews the mechanics of the poison pill as it ultimately developed, as well as some of the changes that emerged along the way.

B. The Basic Mechanics of the Pill

The poison pill is formally a “right,” which in terms of corporate securities is an instrument similar to an option or a warrant.³³ The device is implemented through a dividend of one right for each share of stock outstanding on the record date set by the board.³⁴ The terms of the rights are set out in a rights agreement, which is styled as a contract between a company and a third-party trust company, called the “rights agent.” The rights agent is not a true counterparty in the sense of having bargained for the terms of the rights agreement—it serves solely as a third-party agent. This “rights agreement” is, in effect, the poison pill itself as it sets forth the operative provisions.³⁵

Each right entitles the holder to purchase a fraction (typically 1/100th) of a share of a new series of preferred stock. The rights originally had a term of ten years, although the term could be longer or shorter.³⁶ The right allows the holder to purchase 1/100th of a share of preferred stock for an exercise price that is set at a price that in theory “approximates the board’s view of the long-term value of the company’s common stock.”³⁷ In practice, this price is typically a multiple of three to five times the current trading price.

28. *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946 (Del. 1985).

29. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

30. *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

31. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994).

32. Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 224 (2007).

33. Delaware law recognizes both “rights” and “options” in Section 157, although the terms are not defined further in the statute. DEL. CODE ANN. tit. 8, § 157 (2025). The Delaware Supreme Court has suggested that “right” is a broader term than “option.” See *Grimes v. Alteen*, 804 A.2d 256, 261, 264 (Del. 2002) (“The term ‘right’ has a plain English meaning that is broader than the term ‘option.’ A right is ‘[s]omething that is due to a person by just claim [that is] legally enforceable’ according to one dictionary definition; an option is more narrowly focused, requiring the power of choice.”).

34. The description of the rights plan in this Sub-part A comes largely from the Lipton & Steinberger treatise at pages H-6–H-9. See MARTIN LIPTON & ERICA H. STEINBERGER, TAKEOVERS AND FREEZEOUTS (2024). To avoid distracting citations to the same four pages of this treatise, footnotes to each sentence are omitted.

35. There is also a “Rights Certificate” which is typically attached as an annex to the agreement. See *id.* at H-52–H-54 (providing a form template for Rights Certificates).

36. The terms of recent rights plans have become much shorter, often a year or less, in large part in response to proxy voting guidance from institutional shareholder proxy advisory firms.

37. *Id.* at H-6.

The rights are not initially exercisable, and until they become exercisable, all further issuances of shares will also carry rights. They become exercisable on the tenth day after a person triggers them, which occurs when they cross a threshold of ownership (often 15%), or when they commence a tender offer that would result in crossing an ownership threshold (which may be different from the ownership threshold). At that point, the rights “detach” and become tradeable separately from the common stock.

The most important part of the modern pill is the ‘flip-in’ provision. Once an acquiring person crosses the ownership threshold (typically 10–15%), the rights ‘flip-in,’ which means they become the right to buy common stock at a deeply discounted price.³⁸ The flip-in provision entitles shareholders to purchase common stock with a value of two times the exercise price, which results in issuance of a large number of shares at a discount to market price. Importantly, the acquiror who triggered the rights is excluded from this bargain stock bonanza, because its rights become null and void after the rights are triggered. The result is massive dilution to the acquiror, both in percentage terms and in value terms. This is the primary “active ingredient” that makes the pill poisonous.

As an example of how the flip-in provision works to dilute the hostile bidder, consider a numerical example. A corporation has 100 million shares outstanding and has a poison pill with an exercise price of \$100 and a 20% trigger. If the flip-in provision were triggered when the price was steady at \$50, each of the eighty million rights not owned by the 20% shareholder would become the right to purchase \$200 worth of stock (four shares) for the \$100 exercise price. Upon exercise, 320 million shares would be issued (eighty million rights times four shares per right), for a total of 420 million outstanding. As a result, the acquirer would go from 20% ownership down to 4.762%, and the value of its shares would decrease from \$1 billion (20% times \$5 billion) to 4.762% of \$13 billion or approximately \$619 million.³⁹ This dilution is massive both on a percentage and value basis. As a result, an acquirer would not normally consider intentionally triggering a pill.

The modern pill also has a second, largely vestigial, active ingredient called the “flip-over” provision. If the acquiror enters into a merger or other business combination with the target after the rights are triggered, the rights “flip over” and become the right to buy common stock of the *acquiring company* at a discount.⁴⁰ The discount is computed similarly to that of the flip-in, meaning that rights holders can pay the exercise price to obtain common stock of the acquiror worth twice the exercise price. This flip-over provision produces massive dilution of the acquiring company to the benefit of holders of the rights. This provision is considered less important, especially in the presence of the flip-in provision but was the sole active ingredient in the original poison pill.

A later development of the poison pill was the exchange feature. Once the rights “flip-in,” the board has the option of exchanging each right for one share of common stock.⁴¹ This option of the board, which is available when a person has crossed the (usually 15%) ownership threshold but not the 50% ownership threshold, also excludes the acquiror from

38. *Id.* at H-2, H-6–H-7; see also Baum & Subramanian, *supra* note 22, at 1047 (explaining that a “flip-in” feature “provides all shareholders, other than the triggering shareholder, the right to buy shares of the target company at a deep discount (typically 50 percent of market value)”).

39. The \$13 billion value of the company is the original \$5 billion plus the \$8 billion in cash from the exercise of the rights (\$100 times 80 million rights or \$25 times 320 million shares).

40. LIPTON & STEINBERGER, *supra* note 34, at H-2; see also BRUNER, *supra* note 4, at 73.

41. LIPTON & STEINBERGER, *supra* note 34, at H-7.

the exchange, similar to the flip-in. The result of this is to massively dilute the acquiror like the flip-in provision, but with the advantage that the other shareholders do not need to affirmatively use cash to purchase the additional shares. This exchange feature is now considered essential to making the poison pill work effectively but was not present in the original version.⁴²

The pill does not prevent the board from entering into a friendly transaction, such as with a white knight. This is because the poison pill may be redeemed by the board at a nominal price at any time prior to an acquiror crossing the ownership threshold. The redemption of the rights deactivates them, which allows the board to proceed with a negotiated merger. The redemption of the rights is taken away from the board after an acquiror crosses the ownership threshold (possibly after a short delay, depending on the style of pill) to prevent an acquiror from redeeming the rights itself once it acquires control.

The active ingredients of the pill are the flip-in provision (with its exchange option) and the flip-over provision. The remainder of the pill is comprised of inert ingredients, mostly that preserve the effectiveness of the active ingredients against potentially dilutive transactions such as stock dividends, stock splits, issuances of other rights and warrants, and the like. These inert ingredients account for the vast majority of the textual bulk of the poison pill, as well as much of its perceived complexity. However, they largely mimic the terms of familiar warrant agreements, and this will play an important role in the story developed in Parts II and III.

C. The Important Advantages of the Pill

The pill has important advantages over other antitakeover devices, both in terms of the flexibility and potency it allows, as well as the unwanted side effects it doesn't have. First, managers of almost any company can deploy the pill quickly and without advance preparation. Unlike "shark repellent" charter amendments, it may be adopted without shareholder approval.⁴³ As a result, the pill is always lurking in the background of every corporate decision, because it can be deployed with lightning speed and great effect.⁴⁴ Every company effectively has a "shadow pill," which means it's not particularly relevant whether a company has adopted one or not; it can at any time.⁴⁵

42. The implementation of the exchange option poses challenges. It is now standard to empower the board to use a trust to implement this feature, after the difficulty experienced in determining who was entitled to receive the shares after the historic trigger of the Selectica pill. *See* *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 586–89, 593–94 (Del. 2010) (citing the namesake of the Selectica pill, wherein Versata began buying Selectica stock, threatening Selectica's net operating loss carryforwards, and Selectica responded by amending their poison pill threshold); *see also* Marc A. Alpert, Kessar Nashat & Garrett Lynam, *Rights Plans in a New Era: Recent Drafting Trends*, CORP. PRAC. NEWSWIRE, Jan. 2012, at 1, 5, <https://www.lexology.com/library/detail.aspx?g=48084cc7-ca99-42d9-a8c2-0544ae6b2cfe#> [<https://perma.cc/99TR-279V>] (explaining that Selectica used a trust to ensure that "the [poison pill] rights . . . were not held by Versata" and that "many . . . rights plans now specifically permit the board of directors to use a trust to facilitate the mechanics of an exchange.").

43. *See, e.g.*, Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 875 (2002) ("Compared to other defenses, the poison pill had several important advantages . . . [including that a] pill could be adopted by any company at any time without shareholder approval . . .").

44. Coates, *supra* note 6, at 286–87.

45. *Id.* at 277.

The poison pill can also potentially be “reloaded” if the initial round of dilution is insufficient, either because of the way the pill is drafted or because a provision is invalidated.⁴⁶ This means that the board can deploy a second round of dilution,⁴⁷ at least in some circumstances, making it difficult for an acquiror to predict what the pill will cost them. This makes the prospect of an acquiror intentionally triggering a weakened pill less likely, because the board can adopt another pill for a second round of dilution.

The pill also has advantages in terms of the effects it lacks compared to other anti-takeover provisions. The pill does not have voting rights, and its establishment does not affect the capital structure of the company, as would other preferred stock antitakeover issuances. Furthermore, the pill does not initially have adverse tax or accounting effects.⁴⁸ Thus, the board does not need to face a doomsday scenario before adopting the pill; it can adopt one proactively if desired without negative effects.

D. The Impact of the Pill

The poison pill has strong support from the Delaware judiciary, with the courts making it clear that a company has the right to deploy a pill.⁴⁹ After decades of uncertainty, Delaware law appears to have adopted the position that the board can “just say no” to redeeming a poison pill in response to an unwanted bidder, perhaps indefinitely.⁵⁰ Although there are poison pill features that are off limits⁵¹ and some limits are imposed by the board’s fiduciary duties,⁵² overall the board has extremely broad discretion in using this device when dealing with bidders.

The strong support in the judiciary has contrasted with relatively ambivalent evidence as to the economic effects of the pill. Overall, the studies have marshalled only weak and conflicting evidence that poison pill adoption has any significant effect on shareholder wealth.⁵³ One reason it is difficult to assess the stock price reaction of the pill is that every

46. See *Versata Enters.*, 5 A.3d at 588, 607 (holding that Selectica’s amendment to lower the threshold for their poison pill met the *Unocal* standard).

47. *Id.*

48. See LIPTON & STEINBERGER, *supra* note 34, at H-8–H-9 (discussing federal income tax consequences).

49. Indeed, it may even have a duty to do so. In one case, the Delaware Court of Chancery suggested that failure to deploy a poison pill against a large stockholder could support a breach of the duty of loyalty. See *La. Mun. Police Emps.’ Ret. Sys. v. Fertitta*, C.A. No. 4339, 2009 WL 2263406, at *8 n.34 (Del. Ch. July 28, 2009) (“To say that there is *no per se* duty to employ a poison pill . . . does not refute the conclusion that the board’s failure to employ a pill [in this case] supports a reasonable inference . . . that the board breached its duty of loyalty in permitting the creeping takeover.”).

50. See *Air Prods. & Chems., Inc., v. Airgas, Inc.*, 16 A.3d 48, 54, 129 (Del. Ch. 2011) (allowing the Board to retain a poison pill for over a year even in the absence of any threat beyond an offer deemed inadequate by the Board).

51. See *Quickturn Design Sys., Inc., v. Shapiro*, 721 A.2d 1281, 1293 (Del. 1998) (holding pill invalid for circumscribing board and director duties); see generally *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998) (discussing “dead hand” provisions).

52. See *Williams Cos. S’holder Litig.*, C.A. No. 2020-0707, 2021 WL 754593, at *29 (Del. Ch. Feb. 26, 2021) (discussing the invalidity of extreme features of a pill), *aff’d sub nom.* *Williams Cos. v. Wolosky*, No. 139, 2021, 2021 WL 5112495 (Del. Nov. 3, 2021).

53. Coates, *supra* note 6, at 271, 280–86 (describing the studies as “weak and inconsistent”).

company already has a “shadow” poison pill, because it can be adopted so quickly and easily.⁵⁴ Thus, the actual adoption of the pill means little to the financial markets.

The pill is widely perceived as a near-absolute barrier to a raider buying through it without redeeming it.⁵⁵ Although, in theory, a hostile bidder could still mount a proxy contest to replace the board, that is a protracted and likely uneconomical option for most bidders. Even this unattractive option is largely closed off in the case where the poison pill is combined with a classified board.⁵⁶ As a result of the potency of the poison pill, instead of bidders and targets battling over defensive tactics, the ‘main event’ has become the fiduciary question of whether the board is required to redeem a pill.⁵⁷ Thus, the battle is shifted from the boardroom and the marketplace to the courtroom.⁵⁸

However, the poison pill did not start out as the “main event” in takeover practice. Although the story of the pill is often told as if it had all the modern elements from the inception or “invention,” the truth is that the pill only evolved into a potent antitakeover device over time. The pill started out as an innovative but limited device in the mid-1980s and evolved over time into the device it is today. The next Part describes how that process of evolution occurred by reconstructing the ancestry of the modern pill and tracing its origins.

II. RECONSTRUCTING THE EVOLUTION OF THE POISON PILL

This Part begins to tell the story of how the poison pill evolved from its relatively modest original form into the formidable antitakeover device of today. The poison pill is simply a document, a text, which lawyers copied and recopied over time with (usually) small, experimental edits. These edits themselves were often copied, sometimes intentionally and sometimes inadvertently, to produce a process by which the first pill branched out into different forms. To examine its history, this Part examines the evolution of the text itself, showing how it changed over time as lawyers copied and recopied the document. The next Part weaves in contemporaneous expert commentary as the pill was developed, telling a richer story that complements the data analysis.

The analysis that follows employs a new dataset of over 3,500 pills, ranging from the earliest versions in 1984 until fully modern pills adopted in 2022. Using computer textual analysis and statistical techniques developed to trace viral outbreaks, this Part uncovers the many generations of the poison pill between the original and the several versions extant today. This analysis produced a full “family tree” of how the documents spread and evolved over time.

54. See *id.* at 286–91 (explaining that prior studies are flawed because they did not account for this “shadow pill” effect).

55. BRUNER, *supra* note 4, at 31 (“The main conclusion of this analysis is that the pill is an absolute deterrent; in virtually no instance would a raider acting rationally attack in the face of a pill.”).

56. Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Commentators*, 55 STAN. L. REV. 885, 899 (2002).

57. See, e.g., Subramanian, *supra* note 23, at 50–51 (where redeeming a poison pill would have been in the interest of a target’s shareholders). ‘Redeeming’ the poison pill means deactivating it. *Id.* at 42, 46.

58. Indeed, not only takeover defenses that operate in the shadow of the pill; corporate law itself operates in the shadow of the pill. We don’t observe a lot of corporate law because of the pill.

*A. Data Collection and Methodology**1. The Data*

The data for this study are the texts of over 3,500 poison pills spanning a roughly 40-year period, from the inception of the pill until 2022. The analysis used a computer program to compare the text of the poison pills word-for-word, generating measures of similarity among all the pills. The analysis then deployed a biological sequence algorithm developed to use genetic sequences from viruses to trace outbreaks. This technique is useful for reconstructing the poison pill ancestries because, like the genetic sequences of viruses, the text of the documents is copied repeatedly with relatively small changes that allow us to trace its origin, transmission, and evolution.

The analysis included the text of available poison pill documents filed through the EDGAR system (roughly those from 1997 to present).⁵⁹ The texts since 1997 were retrieved from the Securities and Exchange Commission's EDGAR database. To collect the document texts a computer script retrieved information from each filing from the SEC's EDGAR Index.⁶⁰ The script located each Exhibit 4 (the exhibit number under which poison pills are typically filed), and collected the text, removing HTML. To distinguish poison pills from other types of documents filed under Exhibit 4, the script then determined the number of times the term "Rights Agent" appeared in the document, retaining those where the term appeared more than 100 times. This is a term that is used hundreds of times in almost all rights agreements and provides a highly sensitive and specific marker for complete rights plans (as opposed to amendments to rights plans or other types of documents).⁶¹

The script collected the name of the company filing the poison pill, its CIK number, and the URL for each filing. In addition, the script collected the date of each document from the text of the document itself as well as from the filing date. The text contained multiple dates, the first date was used.⁶² If no date was contained in the text (as when a "form of" agreement is filed), the date of the filing was used. If the date collected from the agreement was later than the filing date, then the filing date was used.⁶³ As discussed below, the document dates are an important part of validating the phylogenetic tree to be constructed.

The poison pills from before 1997 (and especially before 1993) presented a difficult challenge, because they were usually not available electronically on EDGAR. Although some were available on EDGAR (because they were filed long after their execution date for various reasons), the vast majority were not. Fortunately, some sources of historical paper SEC filings are available.⁶⁴ These included several early pills from 1984, including

59. Companies filed on a voluntary basis from 1993 to 1997, so some poison pills came from EDGAR during this period as well.

60. The links to these files can be found on the SEC website, <https://www.sec.gov/Archives/edgar/full-index/> [<https://perma.cc/DES2-FXQ8>].

61. The screening heuristic was highly sensitive, but some texts were erroneously included and removed.

62. The most common scenario in which the document has multiple dates is when an agreement has been amended and restated. In such cases, the amendments are usually relatively small portions of the text so most of the text was established at the time of the original agreement. Hence, the earliest date is used.

63. This is because the agreement could not be dated later than the date it was filed with the SEC.

64. The additional documents came primarily from Westlaw's "SEC Paper Filings" database, which contains OCR versions and original PDFs of selected pre-EDGAR Filings. A number of documents were located

those of Crown Zellerbach, Household International, Colgate-Palmolive, and Johnson Controls.⁶⁵ Also included were some predecessor documents, including the convertible preferred stock dividend plan and preexisting warrant agreements from the era.⁶⁶ Many of these documents were only available in low-quality images and error-ridden optical character recognition scans, requiring painstaking cleaning and restoration by hand over a period of years.

A particularly valuable piece of information was the identity of the law firm involved in drafting each poison pill. Although law firms generally do not list their names in the notice provisions of poison pills (in contrast to many other agreements), the identities of the law firms for many of the early poison pills were available through a contemporaneous publication called "Corporate Control Alert." Where available, law firm identities were included in the data for poison pills from the earliest ones through the mid-1990s. After that, the law firm identities were less readily available and less useful, as the pills had ceased rapidly changing.

2. Pre-Processing

To prepare the documents for comparison, the text of each agreement was converted to lower case, and all punctuation and digits were removed. A set of stop words, defined as the 100 most common words in the corpus, also were stripped from the text. In addition, words that occurred in only one document in the corpus were also removed, as these are typically proper nouns, such as company names. Sometimes these are repeated many times, which artificially exaggerates the dissimilarity between documents. The removal of these words (especially the stop words) increased the processing speed significantly but did not materially affect the distance computations.⁶⁷

Within most documents, extraneous text was removed from the beginning and end of the document to increase comparability. Some documents appended exhibits of various lengths such as certificates of designation after the agreement and some did not, introducing noise in the analysis. Accordingly, text after the main agreement was removed by deleting text occurring after "in witness whereof" (all but 25 of the documents contained that phrase).⁶⁸ In addition, some documents contained tables of contents at the beginning and

using this resource to supplement the database. Another source is ThomsonOne, which has a sampling of particularly important older filings. Finally, a small number of historical filings not available through these services were purchased through the service of Wolters Kluwer, which maintains a repository of paper filings for a fee.

65. These early poison pills are significant for several reasons. The Crown Zellerbach pill was the first rights agreement and precedes all the documents in the database (other than precursor warrant agreements and preferred stock plans). Second, and importantly, the Household International pill was the subject of the landmark Delaware Supreme Court case *Moran v. Household International* that validated the poison pill as an antitakeover device. *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1357 (Del. 1985). As a result, the Crown Zellerbach or Household International pills likely served as an ancestor of later pills, a fact exploited in the construction of a phylogenetic tree below.

66. BRUNER, *supra* note 4, at 12 (describing the "convertible preferred stock dividend plan" as "the earliest version of the pill"). As is documented *infra*, the warrant agreement served as the precedent document for the first rights plans. See *infra* note 124 and accompanying text.

67. A test was performed by comparing 1000 random pairs of full documents against the same reduced documents. The correlation between distances based on the full documents and reduced documents was 0.996.

68. This phrase precedes the signature page in most legal documents. Thus, text after this phrase is limited to signatures and exhibits appended to the document.

others did not, so those tables of contents were stripped from the documents to increase comparability across the operative text of the agreements.

Some documents were removed, such as exact duplicates as well as near duplicate filings by the same company on the same date. Only complete poison pills were included, with shorter amendments being removed as they only contained parts of the pills.

The final document set consisted of 3,498 unique poison pills over a period beginning with the pre-1984 predecessor documents and concluding with the Twitter poison pill of April 15, 2022 (the cutoff for the data).

3. Dissimilarity Computations

The analysis used a computer program to compare the texts word-for-word, creating a 3,498 x 3,498 distance matrix of the documents. The analysis in this paper uses pairwise distances calculated using Levenshtein distance, also called edit distance. The edit distance is the number of insertions and deletions (and sometimes substitutions) necessary to transform one text into another.⁶⁹ The edit distance measure is similar a legal redline and to what would be displayed in Microsoft Word's "Track Changes" feature. If one counted the total number of words marked in Track Changes, divided by the total number of words in both documents, one would obtain the normalized "edit distance" measure used here. This is a straightforward measure of distance between two documents that is more intuitive and readily interpretable to a legal audience than other measures.

Choosing a distance measure can involve weighing many competing factors.⁷⁰ Even a reasonable choice of distance measure may not accurately reconstruct the ancestral tree accurately if it doesn't have certain properties.⁷¹ Edit distance provides a good measure for reconstructing the poison pill ancestry because the documents are almost all closely related, word-for-word. In similar text phylogeny settings, normalized edit distance has been shown to perform well.⁷² The edit distance gives a measure for how many word "edits" or changes were made between two documents.⁷³ This distance is presumed to be inversely proportionate to the probability one document was copied from another (documents copied from one another tend to have fewer edits between them).⁷⁴

69. See DAN GUSFIELD, *ALGORITHMS ON STRINGS, TREES, AND SEQUENCES: COMPUTER SCIENCE AND COMPUTATIONAL BIOLOGY* 216 (1997).

70. See Guilherme D. Marmerola et al., *On the Reconstruction of Text Phylogeny Trees: Evaluation and Analysis of Textual Relationships*, PLOS ONE 1, 5–8 (2016) (discussing various measures and the advantages and disadvantages of each).

71. See Nancy Retzlaff & Peter F. Stadler, *Phylogenetics Beyond Biology*, 137 THEORY BIOSCI. 133, 134–36 (2018).

72. See Marmerola et al., *supra* note 70, at 17.

73. Although edit distance often compares each character, in this Article's analysis the text is tokenized by words rather than characters.

74. In most biological models, raw distances are transformed according to a model of evolution, such as Jukes-Cantor model used for substitution of nucleotides. See generally T.H. Jukes & C.R. Cantor, *Evolution of Protein Molecules*, in 3 MAMMALIAN PROTEIN METABOLISM 21 (Hamish Munro & James Boyd Allison eds., 1969) (providing the Jukes-Cantor model). There are a variety of reasons why this is helpful, for example to correct for the fact that multiple substitutions may have occurred at the same site over time, meaning that two sequences are even more distant than a simple distance comparison occurs. Such a model is lacking for legal documents, however, so these refinements are left for future work as discussed later in the paper.

Edit distances were computed using the basic dynamic programming algorithm for computing the longest common sequence of documents, and the edit distance derived therefrom. Edit distances were normalized to the interval between 0 and 1 by dividing the number of edits (insertions and deletions) by the sum of the word counts in the two documents. As a technical matter, this scaling takes away the metric properties of the distance (such as the triangle inequality) but reduces the effect of differing document lengths on the distance matrix.⁷⁵

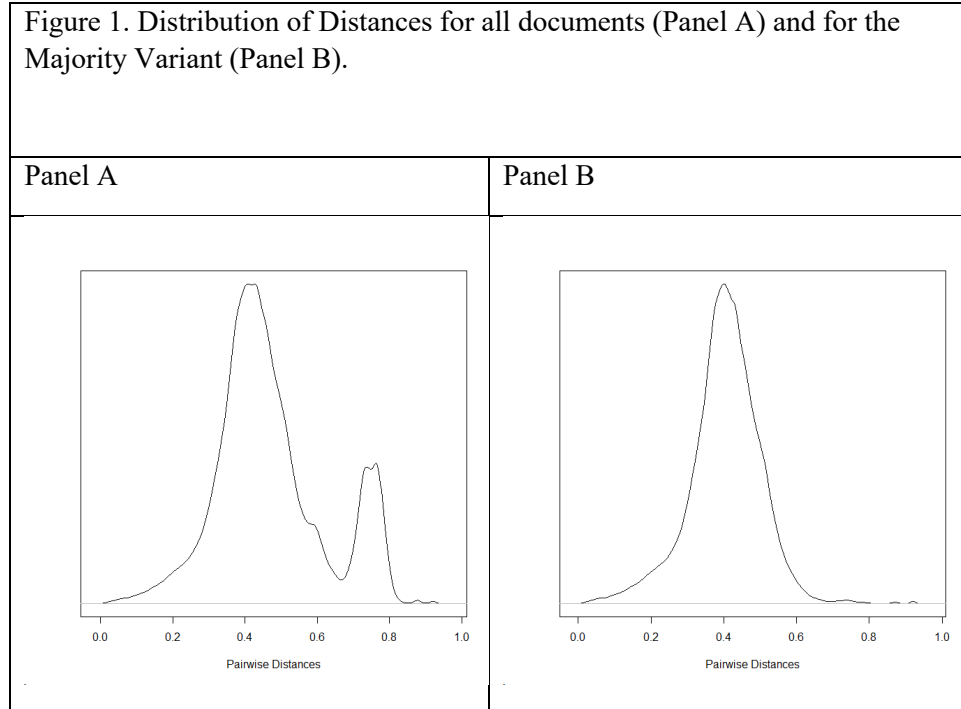
Figure 1 shows plot for the pairwise edit distances for all documents (Panel A). The distances in Panel A have a multimodal distribution (more than one peak) that clearly suggests multiple separate distributions. The reason for this is that within the set of documents there is a majority textual variant (the “Majority Variant”) and a handful of minority textual variants.

First, there is a minority variant text that uses a quite different textual form. This version dominates among Canadian pills but is also used in a small fraction of U.S. pills (less than 5%). This Article refers to this variant as the “Separation Time” version, because it uses that defined term instead of the “Distribution Date” term used in most pills. Another variant textual version, which this Article calls the “Major Part” version (similarly because of a unique definition in that version), is a subvariant of the main version, but distinctive enough to constitute a subgroup. The “Major Part” originated in 1986 and reemerged in 1996 but has become largely extinct. Finally, there are the Canadian poison pills (which are largely overlapping with the “Separation Time” version), and the more recent NOL poison pills (discussed further below), which each have their own distinctive clusters.

Once these variants are taken out and the results limited to the Majority Variant, as depicted in Panel B, the distribution approaches normality with a slight negative skew.⁷⁶ This is true within each of the variants, even though the distance measure is bounded in between 0 and 1. The majority version had higher internal similarity (mean pairwise distance of 0.40 and standard deviation of 0.096) compared with each minority version. For example, the mean pairwise distance of the Separation Time version was 0.55 and the standard deviation was 0.19. Thus, the minority variants are more diverse than the majority text.

75. Various approaches exist to mapping edit distances onto the [0,1] interval for analysis purposes. The computation of a distance measure specifically designed for legal documents should be a priority for future research in this area.

76. The negative skew is likely the result of near duplicate documents.



4. Poison Pill Ancestry Construction

This Part uses the distance matrix described above to reconstruct the ancestral relationships of the documents in a tree form. This “ancestry,” or “family tree” is the output of an algorithm that uses the distance matrix to best reconstruct the ancestry that is consistent with the distances between documents. This complete ancestry then allowed for examination of the documents’ evolution over multiple generations. The goal is to recover from the pairwise distances the branching structure of this tree, in molecular biology referred to as the *topology* of the tree of ancestors and descendants. In the context of these legal documents, the tree represents the likely patterns of copying in the drafting process.

The use of biological genetic sequence methods to reconstruct textual relationships may seem unusual but it is widespread in the textual criticism field of stemmatics (also called stemmatology). The use of these techniques exploits the parallels between the biological evolution and the evolution of manuscript texts.⁷⁷ Indeed, methods from evolutionary biology have been deployed in areas as disparate as the lineage of artifacts, copying of multimedia entities, computer viruses, plagiarism, and of course, stemmatic analysis of manuscripts.⁷⁸ The techniques in this paper most closely the “text phylogeny” approach of

77. See Matthew Spencer et al., *Phylogenetics of Artificial Manuscripts*, 227 J. THEORETICAL BIOLOGY 503, 503–504 (2004).

78. See Marmerola et al., *supra* note 70, at 4 (describing “the use of phylogeny trees” in various fields, including archeology, name phylogeny, and multimedia phylogeny).

Marmerola et al.⁷⁹ The nature of the textual phylogeny here drives the choice of method for reconstructing the ancestral relationships.

Methodologies for constructing ancestries from genetic data break down into two broad categories—phylogenetic trees and networks.⁸⁰ In phylogenetic trees, the ancestral nodes are treated as unobserved (in other words, not in the dataset), and therefore observed sequences are only the terminal (or ending) nodes.⁸¹ Network methods, on the other hand, allow observed sequences to be both ancestors and descendants in the inferred ancestral structure.⁸² Thus network methods are useful where observed sequences can be ancestors of others.⁸³ Because of the widespread use of precedents in transactional drafting, it is likely that many of the observed poison pills were ancestors of others, and therefore a network method is more appropriate.

This analysis uses one of the primary network methods for reconstructing ancestral relationships from pairwise distances—the minimum spanning tree method.⁸⁴ The minimum spanning tree is related to a set of problems with long history in combinatorial optimization.⁸⁵ A minimum spanning tree is an acyclic graph that connects the vertices (here documents) with the minimum summed edge weight (here distances between the documents). In this context, the minimum spanning tree offers a possible ancestral relationship based on minimizing the total distances of the derived tree. In this way, minimum spanning trees are frequently used in molecular epidemiology to determine the ancestry of pathogens.⁸⁶

There are a variety of limitations to the use of minimum spanning trees. In most phylogenetic analysis minimum spanning trees would produce misleading topologies because there are generally ancestral nodes that are not observed in the data (common ancestors of the observed data). Thus, it has been observed that minimum spanning trees sometimes underperform compared to other methods when used on biological sequences.⁸⁷ However, the primary reason for this underperformance is that minimum spanning tree methodology does not infer missing nodes, and the approach actually had higher compatibility when all nodes are sampled. In this context, a high percentage of the nodes are sampled, because so many of the poison pills are publicly available, although in the earlier years, a lower percentage are available.

79. See *id.* (“[T]o re-create the history and evolutionary process of a given set of near-duplicate text documents . . .”).

80. Emmanuel Paradis, *Analysis of Haplotype Networks: The Randomized Minimum Spanning Tree Method*, 9 *METHODS ECOLOGY & EVOLUTION* 1308, 1308–09 (2018).

81. *Id.*

82. *Id.*

83. See *id.* (“[I]f some observed sequences may be ancestral to others, a network approach is more appropriate, in which case these sequences will be associated with the internal nodes of the network.”).

84. See *id.* at 1309 (an analysis using a more traditional phylogenetic tree approach, specifically neighbor joining, produced similar results).

85. See, e.g., R. L. Graham & Pavol Hell, *On the History of the Minimum Spanning Tree Problem*, 7 *ANNALS HIST. COMPUTING* 43, 43 (1985) (explaining the minimum spanning tree problem).

86. See, e.g., Stephen J. Salipante & Barry G. Hall, *Inadequacies of Minimum Spanning Trees in Molecular Epidemiology*, 49 *J. CLINICAL MICROBIOLOGY* 3568, 3568 (2011) (“Minimum spanning trees (MSTs) are frequently used in molecular epidemiology research to estimate relationships among individual strains or isolates.”).

87. Insa Cassens, Patrick Mardulyn & Michel C. Milinkovitch, *Evaluating Intraspecific ‘Network’ Construction Methods Using Simulated Sequence Data: Do Existing Algorithms Outperform the Global Maximum Parsimony Approach?*, 54 *SYSTEMATIC BIOLOGY* 363, 371 (2005).

As mentioned above, the poison pill data differs from most phylogenetic studies of evolution in that most of the poison pill ancestors are likely present in the database. In studies of evolution, usually those ancestors' sequences are not directly available because the ancestors are extinct, and thus their genetic sequences must be inferred. This makes the poison pill application more similar to the study of a pathogenic outbreak, where the ancestors and descendants are sampled and available for analysis. Thus, the minimum spanning tree approach is preferable because it does not "make up" ancestral documents to shorten the tree or impose an artificial bifurcating structure on the tree (minimum spanning trees can be multifurcating). Thus, this paper uses a minimum spanning tree to reconstruct the ancestry of the set of documents.⁸⁸

Another difference between the typical biological sequence analysis and the poison pill application is that in this dataset, dates are available for the documents (which typically are not available for reconstructing phylogenies in biology). Fortunately, a technique for precisely this application exists in epidemiology, a spanning tree that constrains the nodes to follow the date structure.⁸⁹ This method, developed to track the spread of epidemics, allows the use of the date information from the genetic sequences to improve the reconstruction of ancestral relationships.

A final issue is the question of which document should serve as the ancestor of the tree. The poison pill example provides the fortuitous opportunity to compare from a known ancestor. The first rights plan was Crown Zellerbach, implemented in 1984.⁹⁰ The second rights plan was that of Household International, which was also put in place in 1984 and validated by the Delaware Supreme Court in 1985.⁹¹ The fact that the Delaware Supreme Court validated that pill for the first time makes it likely subsequent text descended from that ancestor text. Thus, the analysis below will treat the Household International pill as the common ancestor or (the "root" or "outgroup") when relevant for the tree-building analysis.

5. Validating the Tree

The analysis constructed two trees, one without using the pill dates and one using the pill dates. The first ancestry tree was built without the date information to assess the

88. The algorithm for building the tree was that of Prim (1957) implemented in R's igraph Package. The minimum spanning tree still has the limitation that there can be multiple optimum trees for a given distance matrix and there is no statistical measure of credibility, so ideally a minimum spanning network with bootstrapping approach would be used to determine the credibility of individual ancestral relationships. However, given the large number of documents in this study (~3000), bootstrapping would be computationally prohibitive. Furthermore, given the distance measure used the problem of edges with the same lengths is far reduced in this study as compared with many biological uses of spanning trees, where equidistant measures are sometimes used. See Salipante & Hall, *supra* note 86 (proposing a systematic approach to MST estimate utilizing a bootstrapping metric); see also R. C. Prim, *Shortest Connection Networks and Some Generalizations*, 36 BELL SYS. TECH. J. 1389 (1957) (providing Prim's algorithm for MSTs).

89. See T. Jombart et al., *Reconstructing Disease Outbreaks from Genetic Data: A Graph Approach*, 106 HEREDITY 383 (2010). This is implemented using the SeqTrack package in R.

90. See *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985) (referencing the "recent takeover of Crown Zellerbach, which has a similar Rights Plan, by Sir James Goldsmith.").

91. See generally *id.* (holding directors were authorized to adopt rights plan, that the plan did not usurp rights of stockholders to receive tender offers by changing the fundamental structure of the corporation and that the plan was a legitimate exercise of business judgment).

performance of the tree. Here, the ancestry of the documents is inferred solely from the distances between the documents meaning the performance of the tree in recovering the true ancestry is unknown. One way to test whether the tree performs better than random is to use the document dates to test its performance. In most phylogenetic contexts, the dates of the ancestors are not available. Here, however, we have *approximate* dates that the documents diverged from their ancestors. The dates are approximate because, for reasons discussed below, the dates may not reflect the actual date of document drafting.

This initial version of the tree, because it uses only the distance matrix as an input and not the document dates, allows use of the document dates can be used as test data, with the understanding that the tree will not recover the dates exactly. If the tree is building ancestry randomly (i.e., performing badly), the ancestor of each node would be dated earlier only at random (50%).

Table 1 presents some results on how the tree performed with respect to the dates of the ancestors relative to the descendants.⁹² Although there are numerous date inconsistencies, the tree clearly reconstructs the nodes better than a null model, in which the leaves would have an equal probability of being dated earlier or later than the vertex to which they connect. In addition, the “out-of-order” ancestor-descendant time differences are significantly closer to zero on average than are the “in order” relationships. This suggests that relatively minor date issues may account for many of the out-of-order relationships.

Table 1. Validating the Tree Against Date Constraints.*	
Consistent	2387 (69.0%)
Inconsistent	1073 (31.0%)
Total	3460
Note: In addition, there were 39 leaf nodes that had the same date as their ancestor. Those documents, mostly duplicates, were excluded as they are neither consistent nor inconsistent.	

The Table reveals that the tree performs significantly better than random in organizing the documents from a chronological perspective. This means that the tree can recover the ancestry of documents to a reasonable extent with only distance information even without any information about their dates.⁹³ Having validated the minimum spanning tree

92. Because the minimum spanning tree is not directional, a root node must be chosen. The root node used was Crown Zellerbach, but using Household International produced the same result.

93. However, the tree infers a significant number of apparently “out-of-order” documents, so some explanation of that phenomenon is appropriate. The seemingly out-of-order documents may reveal more about the way the documents are drafted than about the spanning tree methodology. In many cases a document with a later date (currently labeled as inconsistent) could be the ancestor of a document with an earlier date, as when the later dated document had been drafted years before and only signed and dated later. M&A practitioners report that it is

methodology, the next step is to construct an ancestral tree using the full set of information, including the date information.⁹⁴ This addresses one common criticism of using biological methods on textual data.⁹⁵

B. The Ancestry of the Pill

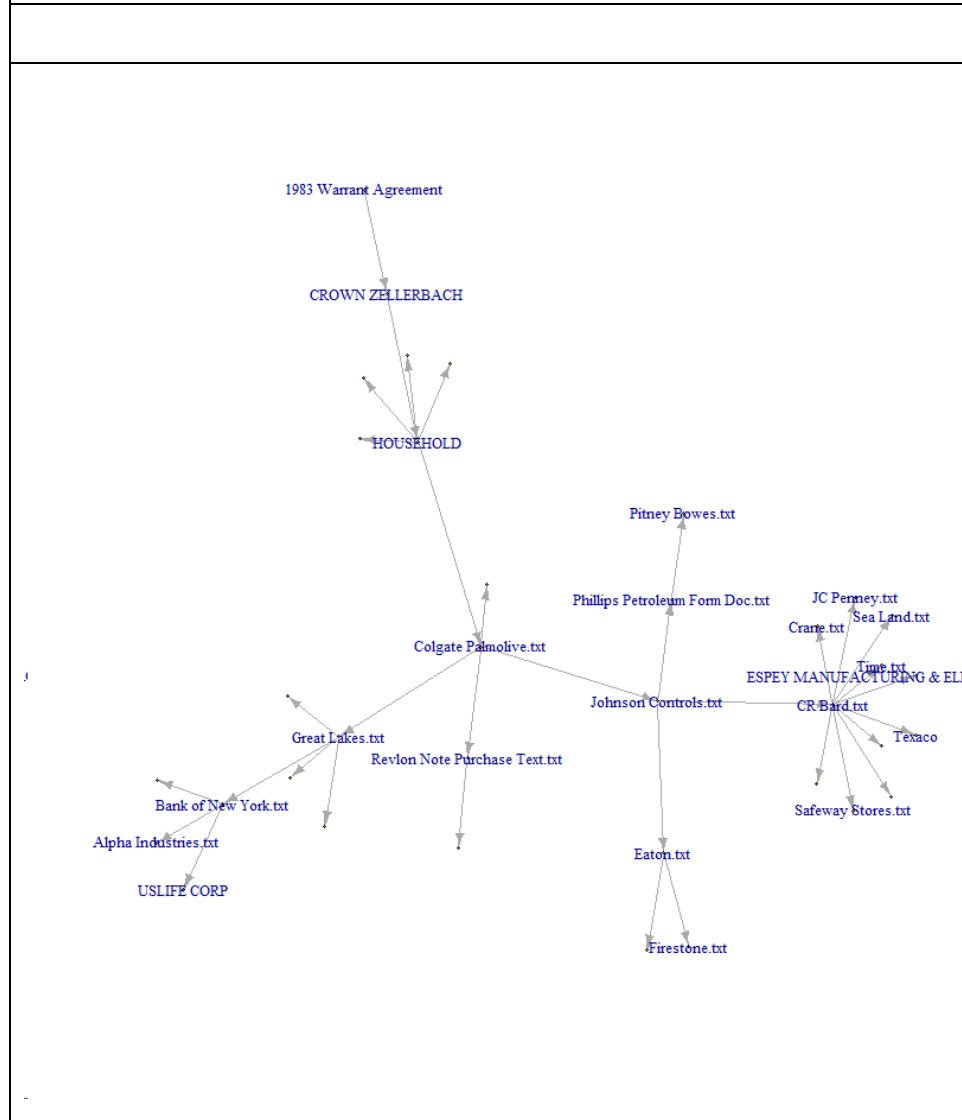
Figure 2 shows the inferred ancestry of the earliest poison pills, as reconstructed by the minimum spanning tree. This Figure shows all poison pills within four inferred generations of the Household International pill. Each poison pill is labeled with the name of the company involved (except the ancestor warrant agreement at the top). The arrows point in the direction of time, so that a particular document's arrow points from the ancestor to the descendant(s). That means to follow the likely path of descent, you follow the path of the arrows from one poison pill to another.

common for companies to maintain a pre-drafted "shelf" poison pill that is only deployed when needed. *See, e.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *see also* ARTHUR FLEISCHER JR., ALEXANDER R. SUSSMAN & HENRY LESSER, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 5.01 (4th ed., 1990). In this case, the date on the later poison pill could be years after the true date on which it "descended" from its ancestor. Accordingly, the earlier poison pill could have been drafted on the basis of the "later" precedent document. Second, in many cases the documents with later dates are "restatements" of previously drafted documents by the same company that are based off older forms. Third, for the early poison pills, the actual ancestors of many of the documents are likely missing because EDGAR filing was not mandatory until 1997. In that case, a document with an earlier date may be assigned by the tree as the descendant of a document with a later date, when in fact both documents descended from a common (but unobserved) ancestor. Fourth, the out-of-order documents may reveal that some law firms are using form-based drafting rather than precedent-based drafting. In that event, there is a common ancestor (the form) that is not observed in the database, forcing the tree to connect extant documents in the database in random orders. The "form" explanation calls for using traditional techniques for biological tree construction, such as neighbor joining methods, that allow for the creation of ancestor nodes that are not extant in the data.

94. Of course, there is a tradeoff in using the date information. To the extent that errors in dates were responsible for overly pessimistic assessment in Table 1, it is possible that date data may introduce errors in the tree.

95. *See* Christopher J. Howe, Ruth Connolly & Heather F. Windram, *Responding to Criticisms of Phylogenetic Methods in Stemmataology*, 52 *STUD. ENG. LITERATURE* 51, 58–59 (2012) (addressing the criticism in arguing that it oversimplifies the conflicts where a text has greater than one affiliation in a tree).

Figure 2. The Earliest Rights Agreements.



The Figure starts at the top, with the 1983 Warrant Agreement that predated all the pills in the database. This warrant agreement was not a poison pill, but a financing agreement unrelated to hostile takeovers. However, this document shares substantial text with the first poison pill, Crown Zellerbach, which the algorithm determines is the warrant agreement's descendant. Crown Zellerbach, in turn, leads to Household International, which was the first rights agreement validated by the Delaware Supreme Court. Given the

prominence of Household International, it's not surprising that almost all subsequent pills branched off from it.

Thus, Household International was the ancestor of almost all the subsequent poison pills, at least to a degree. Most of the immediate descendants of Household were dead ends with no further descendants, and drafters did not continue copying Household International directly. Instead, Household's descendant Colgate-Palmolive, adopted just a month after Household in October of 1984, was the first true branching point, which led to multiple lineages. Even more branching occurred with Colgate's descendant Johnson Controls (November of 1984), which led to at least three different lineages as shown in the figure.

It was the descendant of Johnson Controls, CR Bard adopted in October of 1985, where the poison pills truly began to diverge into different lineages with substantial numbers of descendants. Recall that the Delaware Supreme Court's decision in Household International was in November of 1985, and thus CR Bard was a handy and recent precedent document available right on that date. One immediate descendant of CR Bard, which is Sea-Land (adopted in December of 1985), will turn out to mark an important substantive change in the pill that will figure prominently in the analysis below.⁹⁶

The thousands of pills that descended indirectly from Household International took various paths through intermediate ancestors. One way of looking at the importance of these various intermediate ancestors is to tabulate how many pills descended from a particular pill. All the pills descended (at least indirectly) from Crown Zellerbach and Household International. Although a few dead-end pills branched directly off of Household (unlabeled in the Figure), and some longer lineages branched off of Colgate-Palmolive, the lineage through Johnson Controls/CR Bard gave rise to the vast majority of later pills. This is the main branch of the family tree.

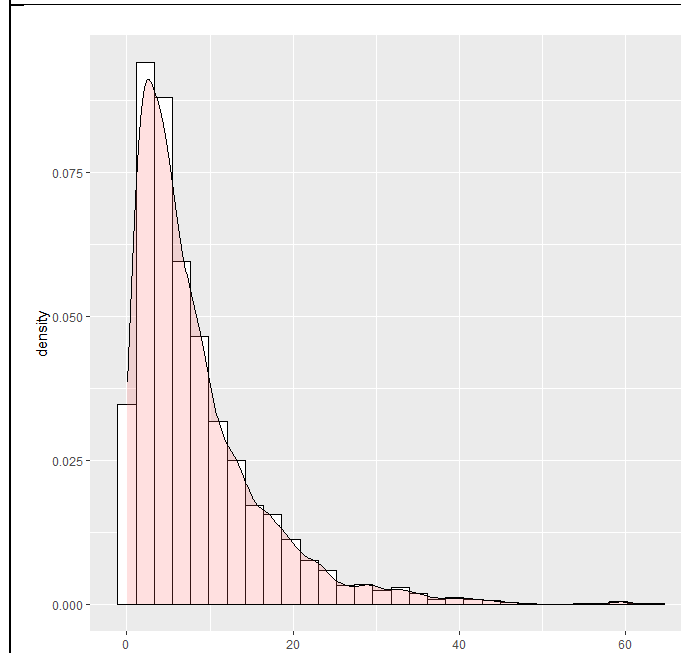
Soon thereafter this main branch split into two parts: a larger part following Skadden's Sea Land pill and a smaller part following Wachtell's Crane pill. This split gave rise to the two great families of poison pills, one for each of the two major law firms that dominated the pill business of the time. This great bifurcation in the poison pills will be explained in the next Part with the help of contemporaneous commentary.⁹⁷

To examine the speed of change of the pills from generation to generation, one can look at the textual differences between each ancestor and its direct descendant(s). Figure 3 sets the stage by showing the distribution of differences (in the 0 to 1 interval) between documents and their ancestor/descendant. In other words, this Figure shows how commonly poison pills have various levels of differences between them and their ancestors.

96. The two models (one using dates and one not using dates) disagree about whether Johnson Controls or CR Bard is the major splitting point. The undated tree has CR Bard as the major splitting point, with Sea Land and Crane as the two divergent paths, whereas the dated version has Johnson Controls splitting off to Phillips Petroleum and CR Bard as the two divergent paths.

97. *See infra* Part III.B (discussing bifurcation).

Figure 3. Distribution of Differences Between Ancestors and Descendants.

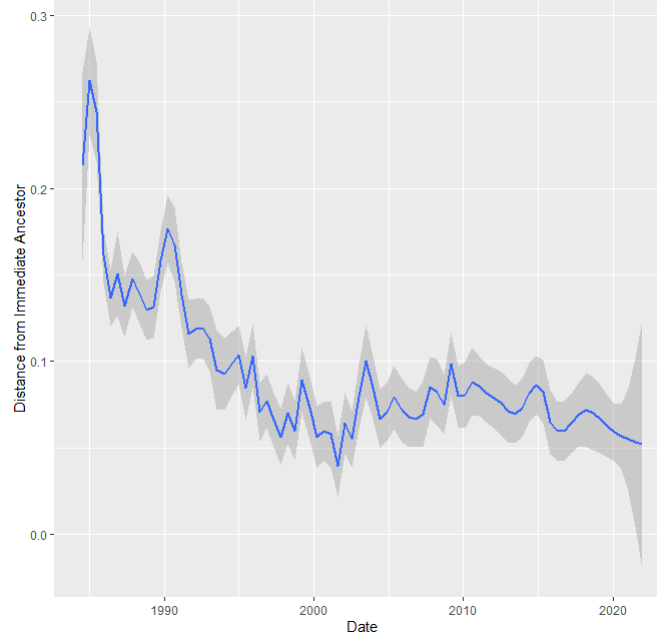


In general, the documents are quite similar to their immediate ancestor, with the vast majority less than 10% different and almost all less than 20% different. Thus, the pills are typically not heavily edited from generation to generation. Indeed, this chart may overstate the edits in each generation, as not all pills are present in the database, so some ancestor-descendant relationships likely include multiple generational steps.

But the distance between ancestors and immediate descendants has likely changed over time, as depicted in Figure 4. There, one can see how the distances of documents from their immediate connection in the tree generally declined from 1984 to 2022. Large changes occurred from generation to generation in the earliest years of the poison pill during the 1980s. The changes from generation to generation decreased into the 1990s and became roughly constant (and small) from 2000 onwards. The evolution of the pill appears to have markedly slowed at that point, as it crystallized into a roughly constant form.⁹⁸ One caveat is that not all pills prior to 1997 were available, so it's possible the distances in the earlier pills appear exaggerated.

98. As we will see below, however, a constant form does not mean convergence on a single form, as the pills formed into two larger groups and a number of smaller groups.

Figure 4. Distance from Immediate Ancestor/Descendant Over Time.



The data in the chart depict a lowess smooth with span of 0.05, generated from the distances from each document to its immediate ancestor.

The chart may hold some insights as to how documents change in response to external events, judicial decisions, or learning about the poison pills. If exogenous events occur that cause changes to agreements, then the distance between a document and its earlier immediate connection should increase as of that date and following the date (until the ancestor documents themselves are generally after the date of the event so that both documents reflect the relevant change).

Initially, the pills show significant variation from generation to generation, but after that initial froth settled down, the plot does not show obvious evidence of disruptions in the drafting of poison pills. There appears to be a slightly increased distance from precedents centered on the Financial Crisis around 2009–2010. This latter increase could reflect the spread of NOL poison pills around that time, capped by the *Selectica v. Versata* decision that validated NOL pills.⁹⁹ Overall, any changes over time seem relatively modest compared to the overall drift over generations.

The data show a rapid pace of evolution in the early years of the poison pill, until around 1990 or so when they settled into more crystallized form. In particular, as discussed above, there was a point at which the two major lineages of the poison pill diverged in late 1985 and early 1986. The next Part tells the story of how the two major law firms involved

99. *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 608 (Del. 2010).

in the poison pill accounted for the two different lineages, and why the initial laggard ultimately became dominant.

III. INTEGRATING THE QUANTITATIVE AND QUALITATIVE HISTORY OF THE POISON PILL

The empirical analysis of the pill documents in the previous Part revealed that the poison pill emerged primarily¹⁰⁰ from a single source, the Household International/Crown Zellerbach pills. But it also revealed that those documents themselves drew heavily from preexisting warrant agreements. The analysis further showed that early in the development of the poison pill, there was a bifurcation between two broad textual variants of the pill. This Part will tell the story of this development from the perspective of expert commentary contemporaneous to these events, as well as later retrospective.

A. Origins: A Rainy Night in 1982

The origins of the poison pill are typically traced to Martin Lipton's convertible stock dividend plan in 1982.¹⁰¹ In this origin story, as it was vividly recollected in a ten-year retrospective, the saga began in Houston on "a rainy night in July 1982."¹⁰² As part of his representation of El Paso Company, Lipton developed the first iteration of a convertible preferred stock dividend plan to defend the company in its fight against Burlington Northern.¹⁰³

These plans were designed to thwart takeovers by issuing convertible preferred stock as dividends to the shareholders. In the event of an acquisition or offer for a threshold amount, the stock was redeemable at the highest prices paid by the bidder, protecting against two-tiered offers.¹⁰⁴ The device also had a flip-over feature intended to protect against squeeze outs.¹⁰⁵

This convertible preferred tactic played a role in threatened takeovers of Bell & Howell, ENSTAR, Lenox, Superior Oil, and Warner.¹⁰⁶ Only some of these plans actually progressed beyond the proposal stage. Superior Oil withdrew its proposed convertible preferred, with disagreement among commentators as to whether it was effective or not.¹⁰⁷

100. The word "primarily" is used because, as detailed below, some of the minority variants of the pill arguably came from separate sources, such as other warrant agreements and not from the Household pill.

101. The following analysis is informed extensively by a very valuable resource on the history of mergers & acquisitions, a publication called *Corporate Control Alert*. *Corporate Control Alert* provided contemporaneous commentary by and for experts in mergers and acquisitions, often with the commentary of the lawyers and bankers involved in the matters. The publication began with No. 1 of Volume 1 in March 1984 and continued throughout the developmental period of corporate law.

102. *A Household Name*, CORP. CONTROL ALERT, April 1995, at 6.

103. BRUNER, *supra* note 4, at 12; *see also* JARRELL & RYNGAERT, *supra* note 6, at 1 n.1 (noting that Lipton "was helping El Paso defend against a hostile bid").

104. Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (Mar. 1, 1983), *reprinted by* LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/253-Memo-by-Martin-Lipton-on-Tuesday-March-1-1983.pdf> [<https://perma.cc/6VMY-4DQZ>] (regarding fair pricing provisions).

105. *Id.*

106. *Superior Oil: When to Spit Out the Poison Pill*, CORP. CONTROL ALERT, Mar. 1984, at 3.

107. *Id.* Another account describes how the issuance angered the large stockholder Howard Keck, who filed suit and began a proxy campaign, leading management to back down. *See* Chase deKay Wilson, *Marty Lipton's Poison Pill*, 3 INT'L FIN. L. REV. 10, 11 (1984) (describing the Superior Oil poison pill).

Only ENSTAR, Bell & Howell, and Warner/Chris Craft actually issued the preferred stock.¹⁰⁸ It was in connection with these contrivances that the term “poison pill” emerged, with the coining of the term often credited to Martin Siegel, an investment banker with Kidder Peabody who worked alongside Lipton in developing defenses.¹⁰⁹

These early convertible preferred plans carried significant drawbacks that prevented other law firms from adopting them widely. The preferred stock would have undesired effects on the balance sheet and capital structure of the company plus could have adverse tax and accounting implications. In addition, doubts arose as to the legality of the plans. They were not tested in court and were supported mainly by a high-profile and controversial law review note anonymously written by a law student who had worked at Wachtell.¹¹⁰ Another takeover lawyer described the early version of the poison pill as a “soon-to-be-court-vetoed sham.”¹¹¹

The breakthrough that overcame the obstacles of the preferred stock approach came in July 1984, when Lipton released a new “Warrant Dividend Plan” in a memo to clients.¹¹² The name was changed to soon afterward to refer to “rights” instead of “warrants” to allay concerns about stock exchange listing rules.¹¹³ Lipton’s rationale for moving to the rights plan was that this would raise fewer legal issues than the preferred stock approach, though the latter had not actually been invalidated by a court.¹¹⁴

The rights approach was an advance on the preferred stock dividend for several reasons. The preferred stock predecessors were clumsy implementations that caused unwanted side effects. The rights plan didn’t require a shareholder vote, it didn’t affect the company’s capitalization, and it didn’t have accounting or tax consequences.¹¹⁵ The fact that no shareholder vote was required was a major advantage over “shark repellent” measures, the strongest of which require amendments to the corporate charter (and a shareholder vote).¹¹⁶ The lack of a shareholder voting requirement was especially propitious as the perception

108. See *id.*; Robert A. Ragazzo, Note, *Protecting Shareholders Against Partial Tiered Takeovers: The ‘Poison Pill’ Preferred*, 97 HARV. L. REV. 1964, 1964 n.2 (1984) (“Of these five corporations, Bell & Howell, Enstar, and Warner actually issued variants of such preferred stock.”).

109. See *A Household Name*, *supra* note 102, at 7. The term first came to prominence in a Wall Street Journal article in 1983. See Frank Allen & Steve Swartz, *Lenox Rebuffs Brown-Forman, Adopts Defense*, WALL ST. J., June. 16, 1983, at 2. Interestingly, this newspaper account does not merely say Siegel coined the term “poison pill,” it actually says that Siegel was then credited with “[d]evelopment of the plan.” *Id.* This distinction does not generally come out in Lipton’s accounts of the early development, where Siegel is only credited with the moniker “poison pill.” *Id.*

110. See *infra* note 144.

111. See *Superior Oil: When to Spit Out the Poison Pill*, *supra* note 106, at 3 (reporting that attorneys competing with Lipton described the poison pill as such).

112. *The Warrant Dividend Plan: An Easier Pill to Swallow?*, CORP. CONTROL ALERT, July 1984, at 1.

113. Lipton also issued a memo about a “warrant dividend plan” in 1982. See Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target’s Boardroom: Old Battles, New Attacks and the Continuing War*, 60 BUS. L. 1369, 1372 n.9 (2005).

114. *The Warrant Dividend Plan: An Easier Pill to Swallow?*, *supra* note 112, at 1–2.

115. BRUNER, *supra* note 4, at 13.

116. Shark repellents are typically charter or bylaw amendments that make it more difficult for a hostile acquirer to take over a company. See Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 780 (1982) (noting that a “supermajority shareholder vote” is a usual provision of any type of shark repellent).

had developed that institutional shareholders would no longer automatically support shark repellent charter amendments.¹¹⁷

On July 19, 1984, Crown Zellerbach adopted the first version of the new “warrant dividend plan,” which by then was referred to as a “rights agreement.”¹¹⁸ Household International followed shortly behind, less than a month later.¹¹⁹ The Household pill served as the successful test case in court and was the textual ancestor for most of the thousands of pills that would follow.

Where did the text of these new instruments come from? Although the poison pill was a new type of document, few transactional documents are created from scratch; instead, they are adapted from other agreements that have already been tested in the marketplace.¹²⁰ One might imagine the new plan was derived from the text of the previous convertible preferred stock device, especially given that they had some similar purposes and features. However, the computer analysis of the text of the documents shows that they are only about 10% similar, with only very small segments in common. Instead, the textual bulk of the poison pill came from elsewhere. Thus, although the convertible preferred dividend plan was a predecessor and an inspiration for the rights plan, it was not the progenitor.

The analysis showed that the majority of the pill text was actually copied largely from warrant agreements of the era. A comparison of a draft 1985 warrant agreement for Capital Cities Communications, drafted by Wachtell Lipton, showed the documents were 73% similar. In other words, at least 73% of the Crown Zellerbach rights agreement was taken verbatim from the warrant agreement in use at the time. A redline-style comparison of the two agreements shows large multi-page segments that are word-for-word nearly identical other than changing the word “warrants” to “rights.” Warrant agreements provided a suitable base for the new poison pill, as warrants and rights are essentially equivalent instruments, and the warrant agreement provided the necessary roles for the “warrant agent” (now called a “rights agent”) and the antidilution provisions essential to prevent acquirers from doing an end run around the rights.

Although some sophisticated deal lawyers likely realized at the time that the rights agreement had been mostly copied from existing warrant agreements, the sheer bulk and apparent complexity of the document appeared to overwhelm others. The Chancery Court in *Household* noted the complexity as part of the pill’s design when it decided the first

117. See *Shark-Repellents: If You Don't Have Them, Be Careful About Trying Them*, CORP. CONTROL ALERT, June 1984, at 5 (explaining that experts had concluded institutional shareholders were turning against these deterrents); see also, *Basics of Takeover Response: No Blackbook, No Casual Conversations*, CORP. CONTROL ALERT, Aug. 1984, at 1–2 (Lipton noting that shark repellents continue to be approved at high rates, but risk marking a company as a vulnerable takeover target if they fail). But an IRRC study found that institutions were indeed generally voting against these provisions. See *New Study: Most Institutional Investors Voted Against Anti-Takeover Proposals in 1984 Proxy Season*, CORP. CONTROL ALERT, Oct. 1984, at 1–2.

118. See *While Wachtell's New Pill Goes Down Easily at Crown Zellerbach, Skadden Brands It 'Illegal and Inequitable' at Household International*, CORP. CONTROL ALERT, Aug. 1984, at 1–2.

119. *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1063 (1985) (noting that the Household International poison pill was adopted on August 14, 1984).

120. WHITE & WILLIAMS LLP, *The Dangers of Transactional Precedent – The Times They Are-A-Changing*, JD SUPRA (Mar. 14, 2019), <https://www.jdsupra.com/legalnews/the-dangers-of-transactional-precedent-95962> [<https://perma.cc/2LVB-BWS4>] (discussing how attorneys “rely on templates or precedential deal documents collected over many years”).

opinion on the new plan.¹²¹ Even later commentary, with the benefit of years of perspective, has described the text as “impenetrable.”¹²² In fact, however, the vast majority of the seemingly exotic provisions were simply housekeeping and antidilution provisions taken almost word-for-word from the well-worn and widely understood provisions of warrant agreements. The active ingredients added to transform the warrant into the rights plan were relatively succinct.

The new instrument made enormous waves in the M&A community, and shortly after the pill’s adoption by Household International, Skadden challenged the device in the Court of Chancery on behalf of dissenting Household board member John Moran.¹²³ The SEC originally opposed the pill, filing an amicus brief in the appeal to the Supreme Court, and continued to oppose it for some time.¹²⁴ At the time the Household pill was litigated, the SEC’s chief economist took the position that two-tier offers were not a significant threat, and sided with Skadden over Wachtell in arguing the pill was legally and economically problematic.¹²⁵ The economic study was strongly contested by other researchers,¹²⁶ but was consistent with a general SEC skepticism of antitakeover provisions at the time.¹²⁷

In mid-1984, Wachtell had staked out a daring position as the only firm advocating for the use of the poison pill.¹²⁸ Lawyers at other firms, such as Skadden and Cravath, were not recommending the pill in 1984.¹²⁹ Indeed, only two companies not advised by Wachtell adopted the pill in 1984.¹³⁰ Skeptics raised questions not only about the pill’s validity, but also about its effectiveness. On validity, there were questions under Delaware corporate law and federal securities law. On effectiveness, skeptics pointed out that the pill would not actually prevent a hostile acquirer from taking control of a company because the flip-over provision required a second-step merger.¹³¹ Indeed, exploiting this vulnerability would be the very tactic that Sir James Goldsmith used to outmaneuver the initial version of the pill.

121. See *Moran v. Household Int’l, Inc.*, 490 A.2d 1059, 1066 (1985).

122. See William J. Carney & Leonard A. Silverstein, *The Illusory Protections of the Poison Pill*, 79 NOTRE DAME L. REV. 179, 211 (2003) (“Few documents are as impenetrable as a rights plan, with its elaborate definitions (often buried within the text) and its antidilution and antidestruction provisions, much less its extraneous matter, such as rights to purchase preferred stock that will never be exercised.”).

123. See *While Wachtell’s New Pill Goes Down Easily at Crown Zellerbach, Skadden Brands It ‘Illegal and Inequitable’ at Household International*, *supra* note 118, at 1–2.

124. See Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (July 14, 1987), reprinted by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/305-A-Second-Generation-Share-Purchase-Rights-Plan-dated-July-14-1987.pdf> [<https://perma.cc/LS7T-GXE8>].

125. See *SEC Study Defends Two-Tier Offers; Wachtell, Lipton Disputes Findings*, CORP. CONTROL ALERT, Nov. 1984, at 6–7 (describing a study and commentary of SEC Chief Economist Gregg Jarrell).

126. See *Use New SEC Poison Pill Study with Caution: Pills May Not Be as Bad as It Says*, CORP. CONTROL ALERT, May 1986, at 1–3.

127. The advocacy was so ardent that the SEC occasionally made mistakes. In 1984 it had to walk back a study on shark repellents that had shown a negative effect when errors were discovered. See *Don’t Believe Everything You Read, Even If the SEC Wrote It*, CORP. CONTROL ALERT, Dec. 1984, at 8.

128. See deKay Wilson, *supra* note 107, at 10.

129. See *Warrant Dividend Plans—the Household Trial and Beyond*, CORP. CONTROL ALERT, Nov. 1984, at 5–6.

130. See *1985—The Year of the Poison Pill*, CORP. CONTROL ALERT, Oct. 1985, at 2–4. Southwest Forest, advised by Andrews & Kurth, adopted a flip-over rights plan. Jerrico, advised by Cleary Gottlieb, adopted the back-end plan form of the pill.

131. See *Warrant Dividend Plans—the Household Trial and Beyond*, *supra* note 129, at 6.

Despite these doubts, the Court of Chancery litigation resulted in the provisional validation of the device in 1985. With a potential appeal looming, in the interim, legal advisers were cautious and guarded, with few saying they would recommend the pill as a matter of course.¹³² Great Lakes, advised by Sullivan & Cromwell, initially adopted a back-end plan version of the pill in mid-1985.¹³³ But most firms were reluctant until the decision by the Supreme Court of Delaware in November of 1985.¹³⁴ The Delaware Supreme Court affirmed the Chancery's decision in November 1985, that the use of the pill was a "legitimate exercise of business judgement by Household."¹³⁵

The *Household* court's decision was notable in that the ineffectiveness of the original pill was part of the rationale for its validity. The court did not appear to believe that the poison pill was a very potent deterrent, particularly in light of Goldsmith's outmaneuvering the device, and that seemed to factor into its decision.¹³⁶ The irony is that the early pill's vulnerabilities laid the foundation for the Household decision. Had the pill been potent from its inception, it is possible it would have been invalidated by the Household Court and faded away. This apparent strategic decision by Lipton played a significant role in easing the path for the poison pill in the courts.

After the Supreme Court's decision, the pill rapidly proliferated. Even Skadden, the pill's opponent in *Household*, in less than a month after the decision, sent out a "several-hundred-page" binder to its clients with its own pill and encouraged them to consider its adoption.¹³⁷ After *Household*, the number of poison pills surged in 1986, remaining elevated until 1989, before declining in the early 1990s.¹³⁸ Although there were challenges to novel provisions later and some back-and-forth with the courts,¹³⁹ the pill went instantly from a questionable nostrum to the standard prescription for takeover threats.¹⁴⁰

132. See *Poison Pill Warrants*, CORP. CONTROL ALERT, Jan. 1985, at 8–10.

133. *Great Lakes Puts Price on Its Head—and Gets It; Irel Says Lollipop a Trifle*, CORP. CONTROL ALERT, Nov. 1985, at 3. S&C advised on two back-end plans in 1985, for Great Lakes and Kidder, Peabody. See 1985—*The Year of the Poison Pill*, *supra* note 130, at 3–4.

134. In one of the more unusual appearances of legal scholarship, a student note in the Harvard Law Review appeared in 1984 supporting the validity of the previous (preferred stock) version of Lipton's poison pill. See Ragazzo, *supra* note 108, at 1964. Lipton mailed the note out to clients to encourage them to adopt the later version. See *Harvard Law Review Note Deems Poison Pill 'Legitimate'*, CORP. CONTROL ALERT, Sep. 1984, at 10–11. The memo did not disclose the identity of the author. The authorship of the note became controversial as the author was a summer associate at Wachtell. See Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1095 (1986). This apparently was enough to cause Joseph Flom of Skadden to complain to the Dean of Harvard Law. *Id.*; see also David Margolick, *Law Journal is Caught in Corporate Crossfire*, N.Y. TIMES (Sep. 24, 1984), <https://www.nytimes.com/1984/09/24/business/law-review-is-caught-in-corporate-crossfire.html> (on file with the *Journal of Corporation Law*).

135. See *Moran v. Household Int'l, Inc.*, 500 A. 2d 1346, 1348, 1357 (Del. 1985).

136. *Delaware Supreme Court Opens Poison Pill Floodgates*, CORP. CONTROL ALERT, Dec. 1985, at 8.

137. *The Skadden Flip-Over*, CORP. CONTROL ALERT, Jan. 1986, at 1.

138. Comment & Schwert, *supra* note 6, at 12–13.

139. For example, dead hand and slow hand poison pills, which were invalidated by the Delaware courts. See *infra* Part III.C.2. Later the Williams poison pill invalidated provisions of a poison pill. *In re Williams Companies S'holder Litig.*, 2021 WL 754593, at *40 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos., Inc. v. Wolosky, 264 A.3d 641 (Del. 2021).

140. BRUNER, *supra* note 4, at 2 ("[T]he pill is widely regarded as the most effective anti-takeover defense available.").

B. The Great Bifurcation of the Pill

Although the *Household* decision was the end of the first chapter from a legal perspective, it was just the beginning of the evolution of the poison pill. The flip-over pill validated by the *Household* decision had serious weaknesses as a general antitakeover device. As noted in the decision itself, James Goldsmith demonstrated the vulnerability when he deliberately triggered Crown Zellerbach's pill in May 1985, but took no action to initiate a second-stage merger.¹⁴¹ As a result, the pill was harmless to Goldsmith, but put Crown Zellerbach in a bind because the pill was then irredeemable and limited their ability to bring in a more congenial alternative suitor.¹⁴² Goldsmith ended up acquiring control at a price about \$1 less than his tender offer price.¹⁴³

The contemporaneous criticism of the poison pill was harsh.¹⁴⁴ Lipton's rival described Crown Zellerbach as the deal that "destroyed the Wachtell pill."¹⁴⁵ Although Lipton was adamant the pill fulfilled its purpose, some speculated whether this episode would be the end of the pill.¹⁴⁶ Lipton responded that the pill was designed to avert two-tier bids and give the target time, and that it succeeded in this goal.¹⁴⁷ That rolling back of expectations was accurate, in that the initial version of the pill wasn't designed to be a general antitakeover device, but rather a protection against the two-tier tender offers of the time. But this is also a recognition that the poison pill capable of functioning as a potent anti-takeover device had not yet been developed.

In addition, various law firms and investment banks were devising supposed "antidotes" to the pill. Fried Frank had developed a proposed antidote and laid it out in a memorandum.¹⁴⁸ Later, Bruce Wasserstein proposed another.¹⁴⁹ Drexel had publicly identified several flaws with the original flip-over pill that might make it ineffective, especially if a bidder was willing to forego the second stage merger.¹⁵⁰

The true potency of the flip-over pill was not so much the mechanism itself but the uncertainty about how the intricate terms of the device would work and how the courts would react. The instrument itself was perceived as being complex, which created many avenues for unexpected events to occur. Bruner quotes one lawyer as saying, "An important deterrent value of a poison pill is that it is almost impossible for any raider to understand

141. *The Short-And Wildly Profitable-Life Cycle of an IPO*, CORP. CONTROL ALERT, Feb. 1985, at 6.

142. *Id.*

143. *Crown Zellerbach Postmortem: Dr. Lipton Says Operation Was a Success . . .*, *supra* note 5, at 6. The flip-over provision can have bite if the acquirer needs a merger or other business combination with the target in order to access its cash or assets, for example to service acquisition debt.

144. *Id.* at 1 (describing the defense of Crown Zellerbach as "preposterous" and prompting "a loud chorus of criticism from M&A professionals").

145. *A Household Name*, *supra* note 102, at 7.

146. *Crown Zellerbach Postmortem: Dr. Lipton Says Operation Was a Success . . .*, *supra* note 5, at 1, 6-7.

147. *Id.*

148. *Poison Pill Warrants*, *supra* note 132, at 8-9.

149. *Mixed Reviews for Wasserstein's Variation on Old Pill Antidote*, CORP. CONTROL ALERT, Nov. 1985, 3-4.

150. *Poison Pill Warrants*, *supra* note 132, at 9-10. It is worth noting that other lawyers thought these vulnerabilities not so important, especially at Skadden which was arguing against the pill in the *Household* case. *See id.*

how it will work.”¹⁵¹ Another stated that “no one is certain how they will work if they are triggered, and the uncertainty is part of their cachet.”¹⁵² As the Chancery Court noted in *Household*, “[i]ndeed, its very complexity is designed to create uncertainty on the part of a potential acquiror.”¹⁵³ It also creates potential barriers to shareholder coordination even outside the tender offer context.¹⁵⁴

Eventually, however, the deterrent power of complexity and uncertainty faded as an obstacle to determined takeovers and a new poison pill was necessary. Ironically, after the *Household* decision in which Wachtell’s intrepid move triumphed over Skadden’s reticence, it was Skadden that forged ahead in developing the modern poison pill. The flip-over plan that was validated in *Household* couldn’t prevent a hostile raider from taking control of a target. The true potency of the poison pill would come from the pure ‘status’ flip-in plan, which would be triggered simply by a raider exceeding a specified ownership threshold.

The first status flip-in plan was that of Sea-Land on December 11, 1985.¹⁵⁵ This new version, adopted in a takeover battle with Harold Simmons, was devised by Blaine Fogg at Skadden and Joel Cohen at Davis Polk.¹⁵⁶ Sea-Land settled with Simmons, which averted a Delaware decision over the legality of the flip-in provision.¹⁵⁷ Skadden began rapidly churning out status flip-in pills after the Sea-Land one, and other firms began to copy the Sea-Land pill’s text. This pill would ultimately become the ancestor of the largest textual variant of poison pills, as discussed more fully below.

Wachtell Lipton initially avoided the status flip-in, clinging to the existing mechanism despite its limitations. There were several reasons for this. First, the original idea was to prevent front-end loaded offers and ensure that bids would be for all shares and for cash.¹⁵⁸ With the advent of Drexel’s junk bond acquisition financing, Lipton saw the advent of junk bond bust-up takeovers as replacing the two-tier bootstrap bust-ups in 1984.¹⁵⁹ That was a

151. BRUNER, *supra* note 4, at 5 (internal quotations omitted).

152. *Is There a Black Hole in Some Poison Pills?*, CORP. CONTROL ALERT, May 1986, at 1. This remark was a comment on an apparent “black hole” in some pills, which was a drafting glitch that could “give away more than the company was worth.” *See id.* (quoting Richard Dailey). It is telling that the defense of the provision was essentially that nobody can predict what could happen, and this is a feature rather than a bug. *See id.* at 3.

153. *Moran v. Household Int’l Inc.*, 490 A.2d 1059, 1066 (Del. Ch. 1985).

154. *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 550–51 (explaining how ambiguity about what activities might trigger a broadly-worded pill create barriers to effective shareholder voice).

155. *See* Malatesta & Walkling, *supra* note 6, at 354 (“The first flip-over plan containing an ownership flip-in provision was adopted by Sea-Land in December 1985.”). Malatesta & Walkling used the term “ownership flip-in” to describe a status flip-in, that is, a flip-in provision that triggers when the acquirer meets a certain threshold percentage of shares. *Id.* Others use the term “status flip-in.” *See, e.g., The 1980s Takeover Era, supra* note 21 (describing a “status flip-in” as a flip-in provision that activates “simply because a bidder crossed a certain ownership threshold without board approval” (internal quotations omitted)).

156. *See Pill Credited for Keeping Simmons at Bay, but Sea-Land’s in Hot Water*, CORP. CONTROL ALERT, Feb. 1986, at 1–2.

157. *The Poison Pill Avalanche*, CORP. CONTROL ALERT, Feb. 1986, at 8.

158. *Id.* At this time, the warrant dividend plan was seen as something different from a “poison pill,” which term was used to refer to the preferred stock plan. *See The Warrant Dividend Plan: An Easier Pill to Swallow?*, *supra* note 112, at 3 (distinguishing the warrant dividend plan from the “poison pill”).

159. *Drexel’s ‘Junk-Bond Bust-Up Takeover’ Seen as Replacing ‘Two-Tier Bootstrap Bust-Ups’*, CORP. CONTROL ALERT, Sep. 1984, at 9. A much less known fact is that Drexel was also marketing its own versions of

primary focus of the plan. Second, Wachtell lawyers described the status flip-in as unnecessary given other defenses to creeping acquisitions.¹⁶⁰ Third, it was perceived as risky as well as risky from a legal perspective, because the reasoning of Household would not necessarily apply to a flip-in provision.¹⁶¹

Some other prominent law firms saw the risks differently. Davis Polk thought the *Unocal* decision, which blessed the discriminatory tender offer, was “adequate authority” for the discriminatory flip-in.¹⁶²

Meanwhile, the back end pills dried up after the *Household* decision, because they were perceived to have a number of disadvantages.¹⁶³ One of these was an SEC no-action letter that suggested these plans could be tender offers subject to the tender offer rules.¹⁶⁴ The back-end pills were still important, however, because they provided a sort of inspiration for the flip-in provision,¹⁶⁵ and they also evolved into the Sullivan & Cromwell version of the poison pill, which continues as its own distinct ‘species.’

It is important to note that although Skadden’s advance with the status flip-in was the most important advance in the pill, it was more audacity than innovation. Wachtell had already recognized the value of the flip-in and had developed a version of it a year prior to the Sea-Land pill (and prior to the *Household* decisions). This happened in November of 1984, when Lipton added a self-dealing version of the flip-in for a pill drafted for Johnson Controls.¹⁶⁶ This flip-in was triggered by self-dealing transactions, rather than the “general” or “status” flip-in that was triggered merely by crossing an ownership threshold. The idea was that this could prevent an end-run around the flip-over provision where no second-stage merger occurred, but self-dealing took place. Although this version of the flip-in would prevent self-dealing transactions by a hostile raider, it was perceived as failing to address one of the largest threats at the time, the payment of greenmail.¹⁶⁷

The self-dealing flip-in did not catch on widely with other firms. By early 1986, the majority of poison pills drafted by firms other than Wachtell had the status flip-in, although it is important to note that the majority of those were Skadden pills.¹⁶⁸ The two models associated with the two firms dominated the landscape, with most other firms going with

takeover defense strategies at the time. *Drexel Hawks Financial Techniques to Thwart Unsolicited Bids*, CORP. CONTROL ALERT, Oct. 1984, at 1, 3–4.

160. *The Poison Pill Avalanche*, *supra* note 157, at 8.

161. *Id.*

162. *Id.*

163. *Id.* at 9. The back-end pills were criticized for effectively requiring directors to “put a price on the company when the company is not for sale.” *Id.*

164. See Helman & Junewicz, *supra* note 7, at 776–77 (quoting an SEC no-action letter to Skadden which described “a ‘back-end’ Right Plan” as a “tender offer”).

165. The back-end plans, like the flip-in, discriminate between the bidder and the other shareholders in not allowing the bidder to exercise the plan’s exchange rights. See, e.g., *id.* at 773, 776–77 (describing back-end pills and noting their discriminatory nature, which led some states to ban them).

166. *The Poison Pill Avalanche*, *supra* note 157, at 7.

167. *Id.* at 7–8. The issue was that although the repurchase of shares for greenmail might fall within the self-dealing provisions, by selling the shares back the acquiror would not suffer any dilution. *Id.* at 8.

168. *Poison Pills—No Longer Just a Household Word*, CORP. CONTROL ALERT, Apr. 1986, at 6–9 (showing that, between February 1 and March 21 of 1986, all 22 of Skadden’s pills were flip-in, out of 28 total flip-in pills, and showing that, for the same period, none of Wachtell’s 14 pills were flip-in).

one or the other, tinkering around the margins with their own innovations.¹⁶⁹ The state of the art was clearly moving toward Skadden's status flip-in pill, and eventually most non-Wachtell pills had flip-ins. This accident of history—Skadden's decision to move forward with the risky flip-in model—would shape the text of many of the rights agreements for decades to come.

In 1986 clouds of doubt were gathering over the effectiveness of the flip-over. A leading publication in the M&A space asked whether the poison pill was a "quack remedy."¹⁷⁰ For one thing, the mechanism by which the flip-over would automatically bind the acquiror was never really set out, and probably wouldn't work.¹⁷¹ The flip-over purported to bind an acquirer to a contract to issue discount stock, simply by virtue of acquiring the target. In the context of the previous convertible preferred dividend plan, there was a plausible rationale for binding the acquirer because it was implemented in the company's charter¹⁷² and, therefore, in that context, had more standing to bind an acquirer. Probably in consideration of this potential defect, from the earliest beginnings of the preferred stock versions, the pills purported to require that the acquirer agree to the terms of the pill for any second-stage transaction to occur, effectively requiring the target board to require the acquirer to agree to the flip-over provision.¹⁷³

The emerging and more effective flip-in provisions were not free from legal risk. The flip-in trend was dealt a blow by the *CTS* decision, which invalidated a status flip-in,¹⁷⁴ and the *NL Industries* decision,¹⁷⁵ which invalidated a self-dealing flip-in.¹⁷⁶ Beyond fiduciary duties of the target board, the key issue was discrimination against the acquirer.¹⁷⁷ Under Delaware law, commentators noted that *Revlon* implicitly approved a discriminatory note purchase plan in dicta, but did not address the issue directly.¹⁷⁸ Similarly, *Unocal*

169. See *New Tally of Pills Shows Annual Meeting Threat Fails to Materialize, but Seventh Circuit Slams Pills*, CORP. CONTROL ALERT, June 1986, at 8.

170. *Pills: A Quack Remedy?*, CORP. CONTROL ALERT, Sept. 1986, at 1.

171. See, e.g., ALLEN, KRAAKMANN & SUBRAMANIAN, *supra* note 1, at 524 (rhetorically asking "[h]ow can the target's board create a right that requires a third party to sell its stock at half price to the target's shareholders? Well, we are not certain that it can be done . . .").

172. See Memorandum from M. Lipton to the Clients of Wachtell, Lipman, Rosen & Katz (Aug. 17, 1983), reprinted by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/264-Takeovers-Convertible-Preferred-Stock-Dividend-Plan-dated-August-17-1983.pdf> [<https://perma.cc/4GJX-ZUJU>] (in a memo to clients advocating adoption of a convertible preferred takeover plan).

173. *Id.* at 20–21 (providing that a corporation cannot engage in a second-stage transaction unless they accept a flip-over provision). This kludge is, in theory, what would make the flip over work. See, e.g., ALLEN, KRAAKMANN & SUBRAMANIAN, *supra* note 1, at 524–25 (explaining "[t]he reason these plans are supposed to work" is that they "purport to compel the target's board to put terms in any merger agreement").

174. *NYSE Is Surprise Winner in Poison Pill Sweepstakes, but Rule Change is in the Wind*, CORP. CONTROL ALERT, May 1986, at 9. The CTS case at this juncture was seen as a contest between Wachtell's flip-over and Skadden's status flip-in, with this stage of the case a victory for Wachtell with Skadden possibly suffering a "fatal blow." See *id.* at 9.

175. *Amalgamated Sugar Co. v. NL Indus. Inc.*, 644 F. Supp. 1229 (S.D.N.Y. 1986).

176. *Id.*

177. Other cases invalidating pills for discrimination were *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388 (9th Cir. 1988) (interpreting Colorado law); *R.D. Smith & Co. v. Preway Inc.*, 644 F. Supp. 868 (W.D. Wis. 1986).

178. See Helman & Junewicz, *supra* note 7, at 775 ("In *Revlon* . . . , the court in dicta stated that Revlon's Note Purchase Rights Plan, which provided note purchase rights to all shareholders except the person whose 20%

approved a discriminatory self-tender, lending some support to the idea of discriminatory defensive measures, but not an exact analogy to a poison pill.¹⁷⁹ After the Supreme Court's decision in *CTS v. Dynamics*, there was speculation that the pill might disappear, either because it was no longer necessary or because the antitakeover statute would make it overkill under *Unocal*.¹⁸⁰

The market had eventually spoken in favor of the flip-in, and Wachtell finally developed its own version, trumpeted as a “second generation” plan in a July 14, 1987 memo.¹⁸¹ However, once again, Wachtell developed a different version of the status flip-in, rather than adopting the already circulating Skadden version that was widely accepted. The new Wachtell provision incorporated a mechanism for bidders to call for a shareholder vote, perhaps inspired by the *CTS* decision,¹⁸² or by the push of public institutional investors to include votes on poison pills.¹⁸³ The first Wachtell status flip-in was implemented by MCA on July 15, 1987, then Foster Wheeler on September 22, but in the early months, not many companies adopted this new version of the pill.¹⁸⁴

This new “second generation” form for Wachtell that was first deployed in MCA appears as a discontinuity in the ancestry tree of the pill. About 15% of the text of the pill was changed from its nearest possible ancestors, marking a new textual variant. Yet, because this new version was deployed so late, the Skadden form had already eclipsed the new form in the marketplace. Although the MCA pill produced many descendants, a large fraction of them were Wachtell pills, and the Skadden form was more widely adopted.¹⁸⁵

The Great Bifurcation of the poison pills into the Wachtell and Skadden branches stemmed from the most important advance in the poison pill—the status flip-in. The flip-in provision is the most important part of the modern poison pill as everyone concedes today.¹⁸⁶ In contrast to its original boldness in developing the flip-over pill, Wachtell was a laggard in adopting the ownership flip-in. It only did so after many other firms, many

stock accumulation triggered the rights, was not unlawful. However, the court did not explicitly address the discrimination issue.”).

179. *Id.*

180. *CTS Decisions Sparks Debate over Future of Pills*, CORP. CONTROL ALERT, June 1987, at 1–3. This was suggested in the decision in the presence of a fair price amendment. *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 713 (7th Cir. 1986).

181. See Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (July 14, 1987), reprinted by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/305-A-Second-Generation-Share-Purchase-Rights-Plan-dated-July-14-1987.pdf> [<https://perma.cc/WC2Z-2CG9>] (in a memo to clients proposing a second generation rights plan).

182. *Wachtell, Lipton Embraces Flip-In Pill*, CORP. CONTROL ALERT, Aug. 1987, at 1.

183. See *Institutions Try to Poison Poison Pills*, CORP. CONTROL ALERT, Dec. 1986, at 1–3 (explaining that institutional investors put poison pill plans to a shareholder vote in the hopes of sending a “signal of disapproval” to boards that adopted poison pills).

184. *Wachtell, Lipton Embraces Flip-In Pill*, *supra* note 182, at 4 (reporting that MCA “has the new Wachtell, Lipton pill”); *New Pills Find Few Takers*, CORP. CONTROL ALERT, Oct. 1987, at 5–6 (reporting the same for Foster Wheeler).

185. The MCA pill's unique provisions became influential in Canada through its use in the second Canadian poison pill, that for Pegasus Gold. See Philip Anisman, *Poison Pills: The Canadian Experience*, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM (Theodor Baums, Klaus J. Hopt & Norbert Horn eds. 2000).

186. At this point, even Wachtell concedes that the flip-in is the “key feature” of the poison pill. See TAKEOVER LAW AND PRACTICE, WACHTELL, LIPTON, ROSEN & KATZ 141 (2023), <https://corpgov.law.harvard.edu/wp-content/uploads/2023/04/WLRK.28326.23.pdf> [<https://perma.cc/RW53-HA45>].

much less known for M&A, had already done so. Even when it did, it developed the “second generation” version with a shareholder referendum mechanism that did not win out in the marketplace and went extinct.

Competitors that had already used the flip-in without a shareholder referendum provision were quick to criticize the new version, with Stuart Shapiro of Skadden calling it “kind of silly.”¹⁸⁷ It was later remarked that later developments led “leading practitioners to drop the special-meeting procedure from subsequent versions of the pill.”¹⁸⁸ Experts at the time debated how these new provisions might work, with some saying they were unlikely to make any difference as they were not likely to be used.¹⁸⁹

By 1988, the market became comfortable with the legality of the flip-in, and by the end of 1988, all new pills had flip-in provisions.¹⁹⁰ Around this time, Wachtell flip-flopped on the flip-in, abandoning its “second generation” approach and embracing the “pure” status flip-in originally developed by Skadden. Although the “special meeting” flip-in procedure was used widely by Wachtell in 1988, almost no examples exist after 1989.

Wachtell continued to attempt to develop new antitakeover devices, however. On December 1, 1988, Lipton sent out a memo proposing “Share Price Protection Repurchase Rights,”¹⁹¹ which would later be renamed “Protect Preferred.”¹⁹² This device raced into oblivion, barely making a ripple in the M&A world. In fairness, the new device seemed to be calibrated toward the concerns expressed in the *Interco* decision,¹⁹³ which itself would later fade from memory after receiving disapproval from the Delaware Supreme Court.¹⁹⁴

Thus, the key move that distinguished the two firms was not any of these later developments, but Wachtell’s persistence in refusing to adopt Skadden’s status flip-in. The later adoption by Wachtell led to proliferation of Skadden’s version of the pill and reduced usage of Wachtell’s form. Why did Wachtell persist on this path, allowing Skadden to outmaneuver them at the game they invented? Although it was true that there was litigation risk associated with the pure status flip-in, even greater litigation risk had not deterred Wachtell from developing the original pill. Competitors at the time attributed the decision to “a few face-saving years of resisting it,” where “Marty didn’t like putting flip-ins in at a low percent because he hadn’t thought of it.”¹⁹⁵

These statements by competitors should be taken with a grain of salt; undoubtedly, Lipton had “thought of it.” Perhaps the explanation is simply that Wachtell had less to lose

187. *Wachtell, Lipton Embraces Flip-In Pill*, *supra* note 182, at 2.

188. Bebhuk & Jackson, Jr., *supra* note 2, at 1590.

189. *Wachtell, Lipton Embraces Flip-In Pill*, *supra* note 182, at 2–3.

190. *Canadian Corporations Start Popping Pills: Trend or Aberration?*, CORP. CONTROL ALERT, Dec. 1988, at 6.

191. Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (Dec. 1, 1988), *reprinted* by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/343-Share-Price-Protection-Repurchase-Rights-dated-December-1-1988.pdf> [<https://perma.cc/6KV9-AMGS>].

192. Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (Feb. 9, 1989), *reprinted* by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/349-Share-Price-Protection-Preferred-Stock-Protect-Preferred-dated-February-9-1989.pdf> [<https://perma.cc/XB6B-Q9XD>].

193. *City Cap. Assocs. v. Interco, Inc.*, 551 A.2d 787, 800, 804 (Del. Ch. 1988) (ordering redemption of a poison pill).

194. *See* *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1151, 1153–55 (Del. 1989) (holding that a board had no *Revlon* duty and upheld the board’s plan under the business judgment rule).

195. *A Household Name*, *supra* note 102, at 9.

before the *Household* decision, and Skadden had less to lose after. The poison pill innovation was likely to be one a relative upstart would devise,¹⁹⁶ and once *Household* was decided, Wachtell was the incumbent. The purpose of the unique shareholder referendum provisions was seen as mostly so Wachtell wouldn't be perceived as simply copying what its competitor Skadden had already created. The quirky Wachtell provisions were not adopted by many other law firms and soon abandoned by Wachtell itself. They quickly went extinct.

The Great Bifurcation identifies a twist in the conventional story that the poison pill was "invented" at a particular point in time. On the one hand, it is true that modern poison pills descend indirectly from Crown Zellerbach and Household (and from the warrant agreements that preceded them). However, when the original lineage branched into the Skadden branch and the Wachtell branch, the largest textual variant of later poison pills descended from Skadden's Sea-Land pill, not from Wachtell's "second generation" pills. As a result, the dominant textual form of the poison pill today traces back to the gamble Skadden took to implement the status flip-in in late 1985.

The fact that Skadden developed the first effective modern pill also raises the question as to what the original innovation was. As mentioned above, the original Crown Zellerbach pill shared 73% of its text verbatim with warrant agreements of the era. Most of this verbiage was present in the warrant agreement document that was the base for the original pills. The original poison pill was essentially a marked-up warrant agreement that served as a trial balloon for the Delaware courts. The impenetrable boilerplate textual bulk of the poison pill, often thought of as something new, was inactive filler material from the warrant agreement. The poison pill "active ingredient" added to the warrant agreement was the flip-over provision which at most plays a secondary role in the poison pill today. That active ingredient did, however, play a significant role in assessing the Delaware courts' receptivity to the approach of privately drafted antitakeover provisions.

The original poison pill is often described as "a radical innovation, not just some minor tinkering with corporate charters."¹⁹⁷ But in some ways, it was mere tinkering with a warrant. The technical breakthrough of Wachtell's original poison pill—and it was a genuine breakthrough—was not original textual provisions but the *idea* of using a warrant agreement (but called "rights") as the base form for the poison pill. This decision to use warrants but call them "rights," probably laid the foundation for the Delaware Supreme Court and the stock exchanges approving the poison pill. As Part IV argues, however, the technical aspects of the pill were not its most significant innovation.

The Great Bifurcation suggests that credit for the modern poison pill does not belong to a single person or law firm. By 1995 the legality of the pill (including the status flip-in) was so well accepted as to not need discussion, and over 1700 companies had adopted one, including most of the largest companies.¹⁹⁸ Although Wachtell originated the idea of using rights as an antitakeover device, Skadden is mainly responsible for the effective active

196. Powell, *supra* note 15, at 451 ("Wachtell Lipton and Skadden Arps, the two well-known specialist takeover firms, continued to design and implement a much higher proportion than other firms Lacking the stable client base of older established firms, newcomers may have to adopt a specialist strategy in order to attract clients and find their niche.").

197. WILLIAM H. STARBUCK, ORGANIZATIONAL REALITIES: STUDIES OF STRATEGIZING AND ORGANIZING 318 (2006).

198. *A Household Name*, *supra* note 102, at 10.

ingredient of the modern poison pill.¹⁹⁹ The poison pill is best regarded as a joint innovation by these two competitors.

C. Evolution of New Features

The evolution of the poison pill was not complete once the flip-in provision took place. Additional features continued to appear as the poison pill evolved. Some of the new innovations went extinct while others were widely adopted. This section briefly discusses some of the more important provisions, both dead ends and major avenues of innovation.

1. Exchange Feature

One of the important features that evolved later was the exchange feature (also called the exchange option). The exchange feature allows the company the option of exchanging one share of common stock for each right, instead of making the rights exercisable for cash. As discussed in Part I.A, the exchange feature was not included in the earliest pills but now is a standard provision considered essential to making flip-in feasible.

The exchange option solves a few problems. First, the absence of an exchange option requires shareholders to take affirmative action to exercise the rights but with the exchange option, the company can just cleanly effect an exchange. Second, the original flip-in approach requires the shareholder to pay cash to exercise the right, which may inhibit its effectiveness if some shareholders are liquidity constrained. Relatedly, without the exchange feature, the poison pill could wreak havoc not only on the bidder but also the target's capital structure because of a large equity issuance and cash infusion.²⁰⁰

The contemporaneous commentary credits Morgan Stanley managing director Joseph Fogg III with having invented the feature.²⁰¹ But what was first to have an exchange feature? The earliest pill in this database with an exchange feature was American Brands in December 1987. This was a document on which Morgan Stanley advised,²⁰² so this may in fact be the first exchange feature. Wachtell was the law firm involved,²⁰³ but the innovation is credited to Fogg, in multiple articles written roughly contemporaneously with the new feature.²⁰⁴

By 1988, the exchange feature had proliferated throughout the pills, finding its way into nearly one third of them. The feature spread throughout poison pills very rapidly in 1989 such that by December 1989, the exchange feature was described as "*de rigueur*" by

199. See *The 1980s Takeover Era*, *supra* note 21 ("Although Lipton had staked his own reputation on the validity of the flip-over rights plan, he continued to strike a cautious tone as to its more aggressive sibling—a pill that combined a flip-over provision as in Lipton's original pill with a more assertive flip-in provision."); see also *supra* note 156 and accompanying text.

200. For an example, see Subramanian, *supra* note 23, at 43–48 (describing how the triggering of the PeopleSoft pill would trigger a colossal equity issuance and massive cash infusion, along with potential chaos and "severe strain on the global capital markets").

201. *Second-Generation Pill Under the Hot Lights in Maine Court*, CORP. CONTROL ALERT, Dec. 1989, at 3.

202. *Santa Fe's Pill Amendments Derail Henley*, CORP. CONTROL ALERT, Feb. 1988, at 8.

203. *Id.*

204. *A Household Name*, *supra* note 102, at 10 ("An important contribution to the pill early on came from Joe Fogg of Morgan Stanley & Co., who invented the exchange feature common to pills today.").

Corporate Control Alert.²⁰⁵ This is an example of a rapid proliferation of a provision that appeared to solve a technical glitch with the original poison pill.

The exchange feature itself needed further refinement as exposed in the *Selectica* case. This case featured one of the few instances of a deliberate triggering of a poison pill, in this case the NOL pill of Selectica. The Selectica situation exposed a significant weakness in the modern poison pill. The stock was halted for a month on Nasdaq as the company and the rights agent attempted to determine how to implement the exchange.²⁰⁶ This resulted in a new trust implementation of the exchange feature, which is a refinement of the exchange procedure that makes it feasible.²⁰⁷

2. Dead Hand and Slow Hand Pills

One of the “dead-end” developments in the poison pill was the “dead hand” and “slow hand” (or delayed redemption) variations.²⁰⁸ These variations emerged to thwart the proxy fight as an end run around the pill. The dead hand pill allows only “continuing directors” to redeem the pill. The later “delayed redemption” version of the pill, which makes the pill non-redeemable for a period of time, was attributed to Cravath.²⁰⁹

Some versions were actually developed earlier than is often thought. The slow hand Skadden’s Sea-Land pill, which pioneered the status flip-in, was also the first poison pill in the dataset to have included a “continuing director” redemption provision. An early version of the dead-hand pill was questioned in a 1988 case in New York.²¹⁰ Still, these provisions later became popular until the late nineties, when a series of adverse Delaware cases caused them to disappear from the text of Delaware poison pills.²¹¹

3. Second Look Provisions

A more ambiguous (and ongoing) divide is in the so-called “second look” provisions. The early poison pills were designed to become irredeemable immediately upon trigger. By early 1986, other firms—most notably Skadden—were putting in “second look”

205. *Second-Generation Pill Under the Hot Lights in Maine Court*, *supra* note 201, at 3. Note that this is Joseph Fogg of Morgan Stanley, not Blaine Fogg of Skadden.

206. DANIEL E. WOLF & JOSHUA M. ZACHARIAH, KIRKLAND M&A UPDATE: POISON PILL PLUMBING 2 (2010), https://www.kirkland.com/files/MA_Update/032210.pdf [<https://perma.cc/XB6Z-5SD9>] (“In fact, the trading of Selectica’s shares on Nasdaq was halted for a month as the company and the rights agent struggled to resolve the practical implementation of the exchange.”).

207. *Id.* (“In light of these difficulties, some recent poison pills (e.g., Ford’s recent NOL pill) allow for the issuance of the exchange shares to a trust for the benefit of the entitled shareholders for subsequent distribution to such shareholders when the practical issues are resolved.”).

208. See Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 628 (2003) (explaining that these types of pills were designed to slow down a proxy contest).

209. *Second-Generation Pill Under the Hot Lights in Maine Court*, *supra* note 201, at 3.

210. See generally *Bank of New York Co., Inc. v. Irving Bank Corp.*, 528 N.Y.S.2d 482 (N.Y. Sup. Ct. 1988) (involving an amendment providing a dead hand).

211. See *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1293 (Del. 1998) (invalidating slow-hand pills); *Carmody v. Toll Bros.*, 723 A.2d 1180, 1192–95 (Del. Ch. 1998) (invalidating dead-hand pills). The academic literature on these pills is mixed, with some commentators opposing them and others seeing value. See, e.g., Stephen M. Bainbridge, *Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 J. CORP. L. 1 (2003) (arguing that dead-hand pills as valuable as precommitment strategies); Subramanian, *supra* note 208, at 628, 683–84.

provisions related to redemption.²¹² This would allow a board to redeem the pill for a period of time after an initial trigger, to provide more flexibility once the board had more information about a proposed acquisition. Wachtell generally did not recommend these provisions, reasoning that an acquirer could cross the threshold to pressure the board or put the company “into play.”²¹³

Modern poison pills remain split on these provisions. Baum and Subramanian make an argument that more sophisticated M&A firms tend to use “trip wire” provisions instead of last-look provisions.²¹⁴ Subramanian argued that Oracle should have considered intentionally triggering the PeopleSoft pill in part because of this “defective” provision.²¹⁵ However, the market has not converged on these provisions. Some firms use trip-wire provisions while other firms continue to use the second-look provisions.

4. Anti-Activist Pills

One of the more recent issues in the poison pill is the use of “anti-activist” poison pills. These pills are designed to respond to the threat of activist “wolf packs” and use concepts like “acting in concert” and “conscious parallelism” to expand the pill’s applicability beyond beneficial ownership.²¹⁶

It is interesting to note that although conscious parallelism came to the fore in poison pills recently, it was found in express terms as far back as 1989 in the Emulex pill. The concept was occasionally used throughout the decades but did not become salient until the last decade.

5. Triggering Thresholds and the NOL Pill

The triggering thresholds for poison pills steadily dropped over time. Initially, relatively high trigger thresholds were common. Skadden debuted a new approach in Boeing’s 1987 pill to allow the board to drop the flip-in threshold from the prevailing 20–30%.²¹⁷ Instead of simply dropping the threshold for all bidders, the new pill allowed the board to designate certain acquirers as an “adverse person” based on their attempts to have their shares repurchased as greenmail or to force restructuring or business disruption on the target.²¹⁸ Although this approach ultimately did not win out, it may have been the stepping stone to simply lowering the regular flip-in threshold to 15%, as happened later.

In fact, Skadden led the way lowering to lowering the general triggering threshold to 15%,²¹⁹ which became the standard threshold for a long period of time. In fact, by the

212. *The Poison Pill Avalanche*, *supra* note 157, at 8.

213. *Id.*

214. See Olivier Baum & Guhan Subramanian, *Redemption Mechanisms in Poison Pills: An Underappreciated Element of Takeover Defense*, CLS BLUE SKY BLOG (Sept. 28, 2023), <https://clsbluesky.law.columbia.edu/2023/09/28/redemption-mechanisms-in-poison-pills-an-underappreciated-element-of-takeover-defense/> [https://perma.cc/UY9W-HPKB].

215. Subramanian, *supra* note 23, at 52–56.

216. See Kahan & Rock, *supra* note 12, at 961–63 (describing those concepts).

217. *Skadden Arps’s New Pill Generates Interest, but Will Its Hair Trigger Stand Up in Court?*, CORP. CONTROL ALERT, Sept. 1987, at 1, 3.

218. See *id.*

219. Powell, *supra* note 15, at 442.

middle of 1989, most pills were at 20% and moving downward toward 15%.²²⁰ One commentator attributed this to the fact that Delaware's antitakeover statute, Section 203, used 15% as the threshold for an interested shareholder, which seemed to suggest that 15% was a legally relevant threshold.²²¹

After many years, the NOL poison pill culminated this process, dropping the triggering threshold to 5% for tax-motivated pills. These pills are designed to protect tax attributes and are set at 4.9% to prevent an "ownership change." For more general antitakeover pills, the thresholds have remained near 10–15%.

Other changes were made to triggering provisions of the poison pill. Gibson Dunn came up with a double trigger pill.²²² The pill had one trigger with less severe consequences, then another higher one with more severe consequences.²²³ This pill is occasionally used but not widespread in the marketplace.

D. Speciation of the Poison Pill: The Role of Law Firms

The previous sections have discussed the role of law firms as gathered from contemporaneous commentary to the development of the poison pill. This section uses the data collected from the text of agreements to examine the roles law firms played. For many of the earliest pills the publication Corporate Control Alert provided the law firms and investment banks advising on the pills. By comparing the text of those documents by law firm, this section illustrates how the influence of various firms changed over time. The results show that law firms largely drove the details of poison pills.

1. Wachtell and Skadden

The previous sections have detailed the interaction between the two major players in the 1980s poison pill arena—Wachtell Lipton and Skadden, Arps. Wachtell initiated the idea of a shareholder rights plan, and in that sense its pill is the precursor of all other rights plans. Indeed, the text of Wachtell's original pills (itself drawn from warrant agreements) continues to form the base of the text for most modern pills. However, the pill Skadden drafted for Sea-Land marked a departure from the previous Wachtell-dominated era. As discussed above, this was the first "status" or "ownership" flip-in pill that was triggered simply by crossing an ownership threshold.

The Skadden pill was soon copied by other law firms in addition to the many pills Skadden put in place itself. As a result, Skadden's version of the pill, which itself was adapted from Wachtell's pill, itself eventually eclipsed Wachtell's later version. Although Wachtell eventually put a pure status flip-in provision into their pills by then it was too late for Wachtell's pills to recapture the majority textual version. Tracing all of the pills backward to their origins demonstrates that more of them trace their ancestry to the Skadden branch than to the Wachtell branch.

220. *Flip-In Triggers*: ↓, CORP. CONTROL ALERT, Aug. 1989, at 1, 9–10.

221. *Id.* at 9.

222. Powell, *supra* note 15, at 442.

223. *Gibson, Dunn's Double Flip-In: Extra Protection or Just Extra Confusion?*, CORP. CONTROL ALERT, Oct. 1988, at 1, 7–8.

2. Sullivan & Cromwell

The most common variant of the poison pill other than those of Wachtell and Skadden originated from Sullivan & Cromwell (S&C). The S&C pill is sufficiently textually different from the Skadden/Wachtell cluster as to almost constitute a completely separate form. This lineage branched off from the other pills when S&C drafted pills for Great Lakes (May 1985) and Bank of New York (December 1985). The text is so different from the Skadden/Wachtell text, in fact, that the (undated) spanning tree struggles with where to locate these early S&C poison pills. The dated version forces it (by virtue of the date constraint) to branch off from Colgate-Palmolive, but this is somewhat arbitrary.

The S&C pill is notable because it is largely an original text, possibly derived from S&C's standard warrant agreements of the era. More broadly, the S&C pill also offers a clear illustration of path dependence in drafting. By a historical coincidence, most Canadian poison pills followed the S&C form, even though that form only accounts for a small fraction of the total American poison pills. Tracing the 142 Canadian poison pills back through the tree links their ancestry to S&C's early Bank of New York poison pill, and even earlier to its Great Lakes pill.

The reason for this seemingly unlikely result is likely that the first Canadian pill was adopted by Inco Ltd. on October 3, 1988, and S&C advised that company.²²⁴ Other Canadian pills copied this initial entrant into the copy, reproducing the form over and over. Thus, the happenstance of Sullivan & Cromwell advising on the first poison pill appears to have led to most of the pills adopting a minority version of the text. Eventually, poison pills largely faded from the Canadian market as regulatory reforms made them redundant.²²⁵ Still, the historical evolution of the Canadian pill was a very clear illustration of how path dependence in legal drafting can account for a larger portion of the text of transactional legal documents.

3. Cravath, Swaine & Moore

The other significant textual variant originated from Cravath. Of the pills adopted in 1986 for which law firm data was available all three of the variants that use the "Major Part" language were advised by Cravath—Time, Polaroid, and Ashland Oil.²²⁶ The Cravath variant is not as distinct from the Skadden/Wachtell pills as is the S&C pill, but is still distinctive enough to be regarded as a separate form. This minority variant continued in relatively continuous use until at least 2021.

4. Other Firms

A few other firms appear to have developed their own versions of poison pills. A pill adopted by Nortek, which was later used by Nashua, might be an independent source associated with Ropes & Gray. This variant appears to have split off from the Borg Warner

224. *Canadian Corporations Start Popping Pills: Trend or Aberration?*, *supra* note 190, at 1, 4.

225. Specifically, the benefits of the pill were largely written into the law in Canadian Securities Administrators' (CSA) 2016 amendments to the takeover bid regime under National Instrument 62-104. I am grateful to Professor Philip Anisman for this observation.

226. *Poison Pills: Aspirin for Corporate Headaches*, CORP. CONTROL ALERT, Dec. 1989, at 9. In addition, the 1997 pill for Airborne is a major part variant, and it references a 1986 pill that was a Cravath pill.

pill but is sufficiently different as to be called a separate species, and several other Ropes & Gray poison pills were modeled on it. Because not all of the early pills could be located, it's entirely possible some other unavailable pills were intermediate ancestors.

5. The Path Dependent Evolution of an Innovation

Earlier, Figure 2 showed the companies that adopted the earliest poison pills and the probable ancestral relationships among them. Below, Figure 5 shows a similar tree tracing the descent of early poison pills by the law firm that drafted them, rather than the names of the companies that adopted them. The Figure shows that firms have a strong preference for copying their own prior work product.

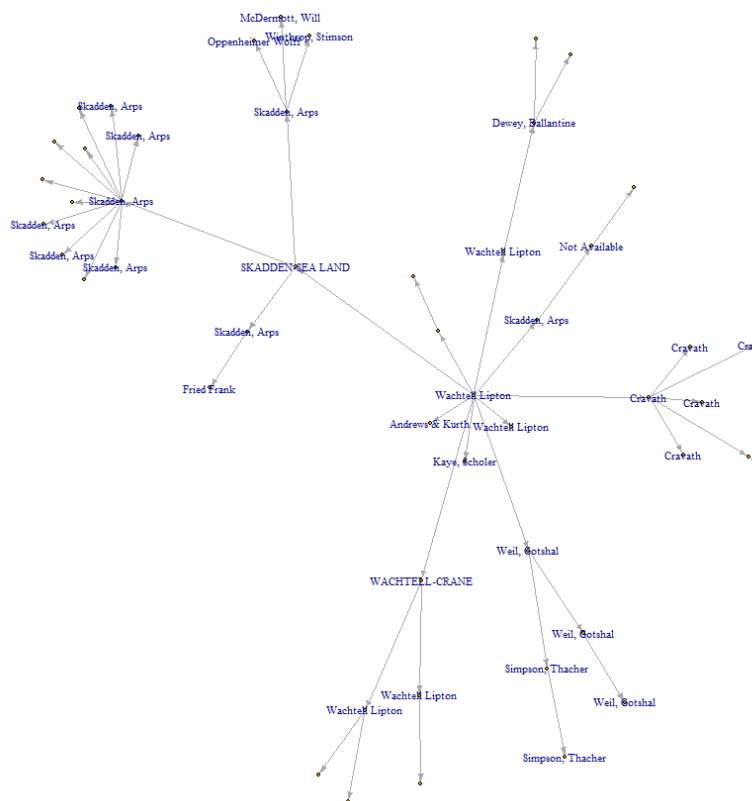
[illegible]

Figure 6 shows the same thing but labeled by the investment bank that advised on the poison pill. In contrast to the figure depicting the law firms, the identity of the investment bank did not have much effect on the form of the text. This confirms that the primary influence in the form of the poison pill is legal, not a financial one.

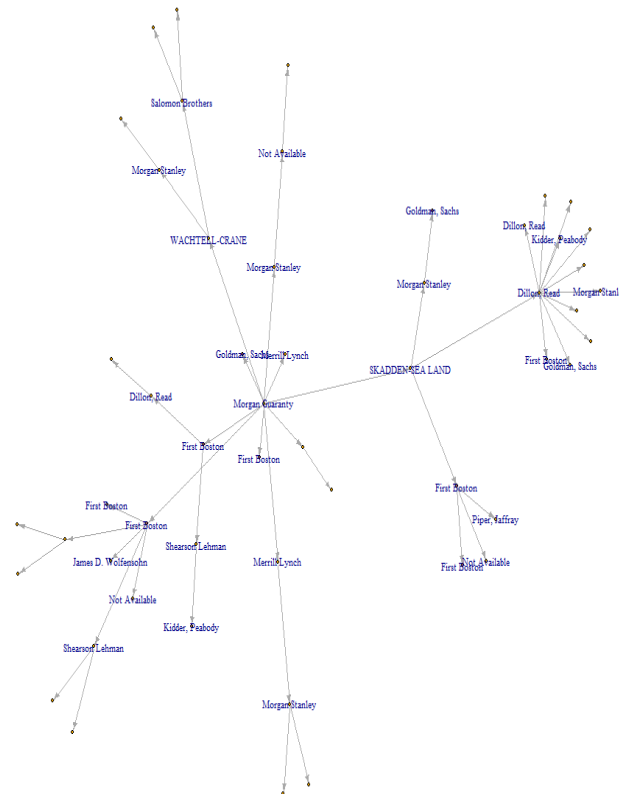
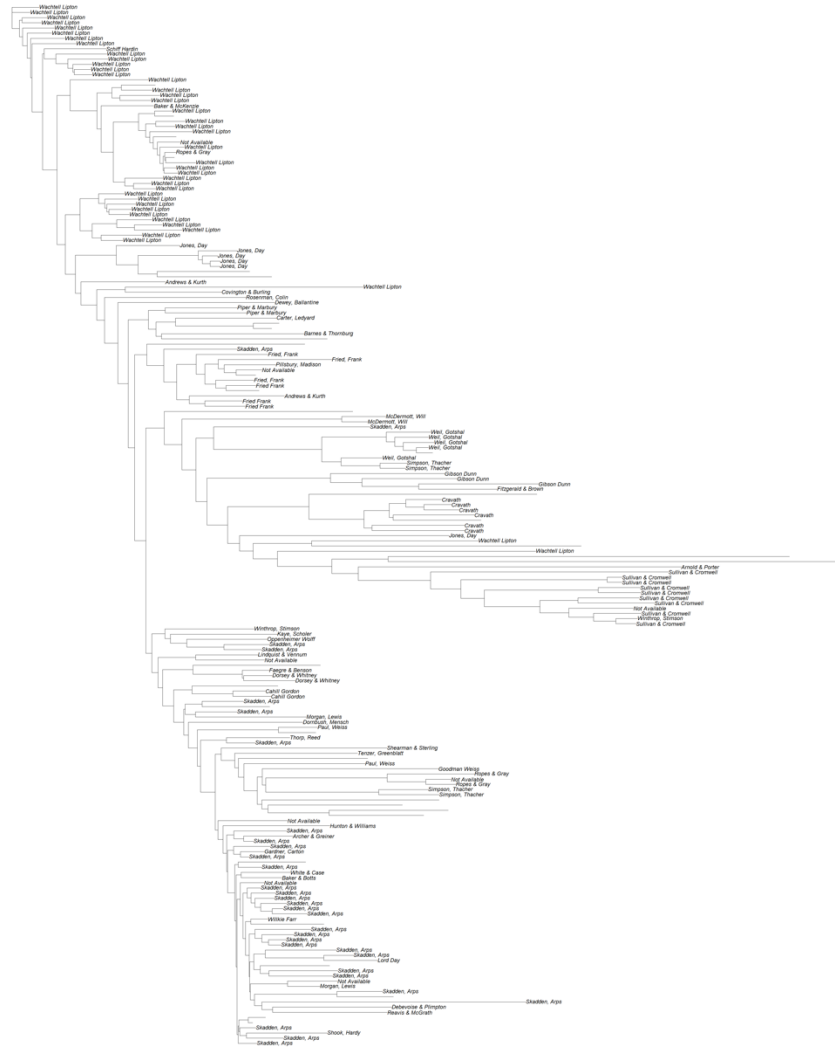


Figure 7 depicts the relationship among all pills before 1990 in a phylogenetic tree form, labeled by the law firm that advised on the pill. The lengths of the branches are proportional to the differences among the pills. For example, one can clearly see that Sullivan & Cromwell's pills are quite distinct from the others, whereas Skadden and Wachtell have distinct clusters but are based on similar forms.



The analysis in this Part has attempted to sketch a more nuanced depiction of the history of the poison pill and, in particular, the roles that Skadden and Wachtell played in

its evolution. The rivalry of the two firms is even depicted in sociology, organizational science,²²⁷ as well as mass market books.²²⁸ The conventional story is Household-centric, based on litigation—that Wachtell won and Skadden lost, with Skadden just copying the victor. From the perspective post-*Household* of advising clients, however, that conventional story is deeply flawed. Skadden played as much of a role in developing the modern poison pill as did Wachtell. Indeed, a greater role in some important ways.

Initially, virtually all poison pills were directly or indirectly copied from Wachtell's versions. As indicated above, a notable exception in this regard is Sullivan & Cromwell, which developed its own highly distinct form in 1985. However, after 1985, most firms other than Wachtell were using Skadden's form. This fact has been almost completely ignored in the modern literature on the pill, even though it was known by some commentators at the time. Even early on, careful and prominent studies of the poison pill credit Skadden with just "a popular variation" on the pill.²²⁹ In fact, there is a strong argument that Skadden developed the first working pill.

Path dependency played a large role in the evolution of the pill. As new features improved the pill, other firms copied the substance of the features into their own forms. However, the early adopters of the successful substantive features also saw increased use of their *forms*. In this sense, a selection process favored proliferation of certain forms of the inactive ingredients of the pill, even where the active ingredient was the reason for the use of that form. Thus, Skadden's introduction of the new features at the right time made its form predominate. This includes not just the active ingredients of the pill but also the inert "filler" text.

How did the simplistic narrative take hold that the poison pill resulted from a singular innovation by an "inventor"? The defects in the original pill and the role of Skadden in pushing the fix were both well known among experts at the time, but that memory faded. But the marketing of Wachtell Lipton and the absence of textual analysis created an origin story for the pill that didn't reflect the complex reality. Lipton has repeatedly described himself as the "inventor" of the pill. In a 1989 memorandum, Lipton described himself as the "progenitor" of "one of the all-time most successful legal-financial innovations," and proclaiming victory over enemies.²³⁰ This simple narrative was later largely accepted by academics and even competitors who didn't remember the original events. Lipton contributed some of the important elements of the original pill, but he was as much public-facing champion as an "inventor" of the modern poison pill.

E. Biological Analogies and Legal Documents

The fact that transactional legal documents are copied, edited and evolve over generations raises the argument for applying biological analogies to genetic evolution. The poison pill presents a unique opportunity to study this analogy, as the poison pill arose at a

227. See e.g., William H. Starbuck, *Keeping a Butterfly and an Elephant in a House of Cards: The Elements of Exceptional Success*, 30 J. MGMT. STUD. 885 (1993).

228. See MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 167–70 (2008) (discussing the rise of Skadden and Wachtell as competitors and describing their founding partners as "outliers").

229. Comment & Schwert, *supra* note 6, at 13.

230. See Memorandum from M. Lipton to the Clients of Wachtell, Lipton, Rosen & Katz (Jan. 10, 1989), reprinted by LIPTON ARCHIVE, <https://theliptonarchive.org/wp-content/uploads/348-Progenitors-Retrospective-The-Poison-Pill-at-Five-dated-January-10-1989.pdf> [https://perma.cc/P5NG-AS7T].

certain identifiable point in time. In addition, unlike many legal documents, the pill is a one-party agreement with no bargaining. This makes it easier to think of each drafted poison pill as having a single ancestor.²³¹

Tracing is made possible because the cost of drafting documents (transaction costs), force attorneys to rely on heuristics such as copying and pasting prior documents. The analysis in this paper leverages this incompleteness (and associated heuristics) to trace the evolution of the document itself. Transactional law is not known for rapid innovation, preferring predictability and precedent. The poison pill is one of the few instances in which corporate law was shaped by a radical internal development.

The word ‘evolution’ is chosen deliberately and self-consciously in this study. The analysis of the history of the document suggests the poison pill as we know it today is less of a single ‘invention’ and more of a development over time. The technology evolved over a period of decades, through a process of copying and pasting, similar to reproduction of DNA. Some lineages survived and spread, others died out.

The analogy is used self-consciously because evolutionary analogies are overused. A common criticism of applying biological sequence analysis to textual data is that edits to texts are not random in the same way as mutations are, and that true biological mutations do not get “undone.”²³² However, this ignores both that multiple mutations can occur at the same site in molecular biology, as well as the fact that even in biology some sites are more prone to mutations than others.²³³ More broadly, a process does not need to be driven by natural processes to be evolutionary in nature.²³⁴

The rationale for the biological evolution analogy is more methodological than theoretical, as it adds a potentially rich panoply of rigorous methodological resources to the study of transaction documents and possibly other legal documents. The evidence for the “drift” in the documents studied in this paper suggests that evolution of legal text may be closer to the neutral theory of evolution than to natural selection. There are *a priori* reasons to believe selection could be stronger in the legal context but also reasons it could be weaker. On the one hand, lawyers choose the edits (mutations) and they can also remove mutations present in a precedent agreement. In other words, there are mechanisms for removing mutations other than selection itself.

There are strengths and weaknesses to the biological analogy. At its most abstract level, evolution requires only variation and selection and can therefore represent many types of processes that are not molecular sequences.²³⁵ On the one hand, drafters are

231. The assumption that each poison pill is based on a single ancestor is a weakness of this approach, as it is possible that a single pill could copy from multiple sources. *See* Howe, Connolly & Windram, *supra* note 95, at 58. This is a common criticism of using biological methods on textual sources, but the same problem is present in biological analysis because of recombination and horizontal gene transfer, and methods can address it. *Id.* The boilerplate nature of the poison pill makes it likely most are copied from a single source, but it is not possible to exclude multiple sources.

232. *Id.* at 59–60 (internal quotations omitted).

233. *See id.* (“[I]t has been known for decades that, as with texts, mutations are not random in the sense of being equally distributed across all sites.”).

234. Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 219–20 (1950) (describing how profitability provides selection pressure in economics analogous to natural selection in biology).

235. *See* Retzlaff & Stadler, *supra* note 71, at 133 (“At the most abstract level, evolution can be seen as a consequence of the generation of variation and selection The very same construction applies to many other systems that are perceived as evolutionary.”).

probably likely to reject as precedents documents that have accumulated too many non-standard edits (mutations), especially deleterious ones. This process probably constrains somewhat the outer reaches of document evolution and is somewhat like natural selection. It is unknown how strong this selection effect is, but the phylogenetic tree should allow some estimation of whether aberrant documents tend to go extinct. An investigation of what characteristics tend to promote extinction of particular forms would illuminate much about the process of contracting.

The evolutionary analogy is not unique to poison pills; it has been applied in the context of bond indentures as well.²³⁶ As has been argued in the bond indenture context, deleterious mutations should eventually die out, while neutral ones can persist. And yet evidence suggests that deleterious mutations or “contractual landmines” continue to appear and replicate in documents.²³⁷

On the other hand, drafters have the opportunity to individually select or reject edits, which isn’t true at the genetic level. In a particular transaction, the drafter will likely detect and reverse many (but not all) of the non-standard edits in a precedent document as part of the drafting process. It is difficult to find an analogous biological process to this editing, at least outside Lamarckian inheritance.²³⁸

Seen another way, however, this editing process is consistent with standard evolutionary models of selection. The editing out of mutations could just be thought of as a reduction in the mutation rate (in biological terms), with a possible slight bias away from deleterious mutations (assuming the drafter tends to reverse bad edits in the precedent more than good ones). Thus, even these differences from the biological context do not really make the two problems qualitatively different.

An important part of molecular biology and systematics is the process of speciation. Previous work raised the topic of speciation in the context of merger agreements.²³⁹ However, analysis of speciation in those agreements was muddled because there were so many different forms and the text changed so much from generation to generation. The advantage of the poison pill date is that the forms themselves are highly standardized, change only modestly from generation to generation (see Figure 8), and yet accumulate over time. Thus, the poison pill text varies little between generations and shows speciation much more clearly. The biological analogy is stronger here than in the M&A context. The type of evolution here differs from that documented previously in merger agreements. Whereas merger agreements dominated by drift, here drift is less pronounced. The likely difference is the use of standard forms.

236. Clifford W. Smith, Jr. & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 123 (1979).

237. See generally Robert E. Scott, Stephen J. Choi & Mitu Gulati, *Contractual Land Mine*, 41 YALE J. ON REG. 307 (2024).

238. Lamarck’s theory of evolution theorized that changes come about through the choices or habits of organisms during their lifetime, rather than through external selection and extinction events. *Early Concepts of Evolution: Jean Baptiste Lamarck*, U.C. MUSEUM OF PALEONTOLOGY, <https://evolution.berkeley.edu/the-history-of-evolutionary-thought/1800s/early-concepts-of-evolution-jean-baptiste-lamarck/> [https://perma.cc/XVR5-TX8N].

239. See, e.g., Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 76–83 (2017).

The law and economics literature is conditioned to thinking in terms of evolutionary processes toward more efficient forms.²⁴⁰ However, the actual evolution of legal forms is often characterized as much by sensitivity to initial conditions, path dependence, and evolutionary accidents.²⁴¹ Moreover, an evolutionary process may be characterized by punctuated equilibria surrounded by periods of relative stasis.²⁴² The surviving forms at any given time are typically efficient only in a broad sense; they are not necessarily the most efficient because of these other aspects.

Aspects of each of these processes are visible in the evolution of the poison pill. The initial conditions of Wachtell's text (mainly in the form of inert textual boilerplate) survive in large part to the present. In this way, Wachtell's standard form warrant agreement (sensitivity to initial conditions). The evolutionary accident of Skadden's innovation of the flip-in pill and the subsequent path dependence of locking in Skadden's form is also notable. Finally, the original poison pill itself as well as both the Skadden innovation and the later NOL pill appear to provide examples of punctuated equilibrium where rapid changes occurred within a short period of time.

IV. A STORY OF PRIVATE LAW AND PUBLIC POLICY

The theme of the previous part was that the development of the technical details of poison pill more closely resembled an evolutionary process than a single 'invention.' But that does not mean there was not true visionary innovation at the inception of the poison pill—there is more to the story than a process of technical innovation and even evolution. It's a story of how a private law firm devised a contractual device as the solution to a seemingly intractable public-choice problem in Delaware.²⁴³ This Part adds private law-making as an aspect of that public choice theory, as exemplified by the story of the poison pill. The poison pill is unique in many ways, but this private law solution to a public policy problem might be the most important.

In the 1980s, Delaware faced an existential threat from the rise of hostile takeovers. Delaware was then, as it is now, heavily dependent on the revenue from its corporate chartering business.²⁴⁴ Managers and their allies lobbied for antitakeover legislation at the state

240. See Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641–42 (1996) (describing the “classical evolutionary paradigm” from law and economics theory).

241. *Id.* at 641–43.

242. *Id.* at 663–65. In the evolutionary literature, see Niles Eldredge & Stephen J. Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in MODELS IN PALEOBIOLOGY 82, 84 (Thomas J.M. Schopf ed., 1972) (arguing that the dominant theory of speciation in the 1970s assumed “that new species arise from the slow and steady transformation of entire populations” and explaining that, to the contrary, “[t]he history of evolution is not one of stately unfolding, but a story of homeostatic equilibria, disturbed only ‘rarely’ . . . by rapid and episodic events of speciation,” *i.e.*, “punctuated equilibria”).

243. This analysis focuses primarily on the State of Delaware because it was and is, by far, the most important state for shaping the development of corporate law in general and the poison pill in particular. During the mid-1980s, nearly half of NYSE firms were incorporated in Delaware, compared to the second-place state, New York, with less than 8%. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 478 (1987). The Delaware numbers have only grown since then. Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 81 n.13 (2008) (reporting more than half of NYSE and Nasdaq firms were incorporated in Delaware).

244. During this period, approximately 15% of the state's total tax collected came from franchise taxes collected from corporations and other entities organized in the state. ROMANO, *supra* note 6, at 6–7. Estimates are

and federal level but made little headway at either level. In 1984–1985, Congress was creating proposals to clarify how hostile tender offers should be treated, as well as the complex interaction between federal and state law, but the effort stalled.²⁴⁵ The courts and legislatures seemed unable to produce a solution that would satisfy the many constituencies.

One obvious move would be a state-level antitakeover statute that would provide insulation from the threat of hostile takeovers. By 1982, 37 states had enacted antitakeover statutes,²⁴⁶ but Delaware did not have one in place. However, this seemingly simple solution was constitutionally fraught at the time, and Delaware had just recently had its little-known Tender Offers Act invalidated.²⁴⁷ Then came *Edgar v. MITE*,²⁴⁸ which invalidated the first-generation statutes, potentially complicating Delaware's decision.

In addition to these potential constitutional obstacles, the Delaware legislature seemed hopelessly unable to act, with its numerous hurdles to enacting corporate legislation inducing a state of legislative paralysis. The corporate law of Delaware is the product of a unique public-choice environment that balances many interests.²⁴⁹ In addition to supermajority requirements for certain corporate legislation, Delaware has a unique agenda-setting role for the Council of the Corporation Law Section of the Delaware Law. Normally, legislation flows through this Council, which is intended to reflect the various interests in Delaware corporate law.

The Corporation Law Council didn't even release a draft of the statute that would become Delaware's antitakeover statute (Section 203) until November of 1987, and then loosely modeled its provisions on the already enacted statutes of New Jersey and New York.²⁵⁰ It is possible this took Delaware so long because such a bill required two-thirds of each chamber, and there were only 21 Senators, making it easy for a handful of Senators to block.²⁵¹ Delaware's corporate law was designed for continuity, but the moment required action. The process of checks and balances that protected Delaware from errors had become a morass in the face of rapid financial change.

that this is closer to 1/3 today, when one takes into account direct and indirect revenues from the franchise business. See Eric S. Klinger-Wilensky, William M. Lafferty & John P. DiTomo, *Thirty Years Later—Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on Proposed Amendment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 20, 2025), <https://corpgov.law.harvard.edu/2025/02/20/thirty-years-later-why-corporations-continue-to-choose-delaware-general-perspectives-and-thoughts-on-proposed-amendment/> [<https://perma.cc/N2D9-ZHFM>] (“Approximately one-third of Delaware's general revenue comes from corporate license fees and associated tax revenues.”).

245. *A Reprieve: No New Tender Offer Legislation Is Expected in 1985*, CORP. CONTROL ALERT, Jan. 1985, at 3–4 (describing the efforts of the Wirth Committee to develop legislative proposals, and the fact that the initiative had hit a roadblock).

246. See *Edgar v. MITE Corp.*, 457 U.S. 624, 631 n.6 (1982). See also Vincent F. Garrity, Jr., *Addendum: Post-Mite State Takeovers Statutes: Constitutional Issues and Recent Cases*, 42 BUS. LAW. 586, 586 (1986).

247. See *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 6 (S.D. Ind. 1978) (noting that the Delaware law is unconstitutional).

248. See generally *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

249. See William W. Bratton, *Delaware Law as Applied Public Choice Theory: Bill Cary and the Basic Course After Twenty-Five Years*, 34 GA. L. REV. 447, 454–75 (2000) (discussing various interest groups supporting Delaware law).

250. *Delaware Succumbs to Pressure and Proposes Takeover Statute*, CORP. CONTROL ALERT, Dec. 1987, at 1–2.

251. *Update: Delaware Bar Tinkers with Proposed Takeover Statute*, CORP. CONTROL ALERT, Jan. 1988, at 9; DEL. CODE ANN. tit. 8, § 203 (2025).

Lipton's poison pill supplied the politically feasible path forward in the midst of conflicting constituencies. The poison pill appeared to be a highly technological solution to a complex problem, in no small measure because of its complexity. The apparent complexity of the technology offered Delaware an opportunity to escape from the public choice impasse. Deferring to transactional planners is a hallmark for a state that wants to retain business entities chosen by transactional planners. Although the details of the poison pill appeared complex to judges and lawmakers, they likely knew that acquiescing in a privately crafted solution would be the most politically palatable solution. In this sense, the private terms of the poison pill could effectively become public policy. It was private lawmaking.

This idea of the poison pill as a form of private lawmaking was proposed decades ago by Powell.²⁵² The author observed that the poison pill was similar to previous examples of legal innovation, such as tax shelters, new types of property, new securities, and new forms of organization, all of which served as forms of "private lawmaking."²⁵³ The idea is that entrepreneurial, expert practitioners can devise new structures that, once approved by the courts, become institutionalized into law and practice, much like a statute.²⁵⁴

One of the strongest indications that lawyers considered the poison pill a policy proposal rather than a technology is the pattern of adoption. Poison pills were never a secret; they were filed with the Securities and Exchange Commission for everyone to see in all their details. Law firms could examine the pill, compare it with existing precedent and determine whether it solved the problem. But they didn't adopt it, at least initially. Wachtell was alone in using the pill even though the "technology" was fully revealed. If the poison pill was a technical solution, the innovation should have diffused through the law firm network following a typical diffusion pattern for new technologies, even if slowly at first. In the very same article where Powell describes the poison pill as a radical "innovation," he notes "[t]he slow diffusion of the poison pill was not due to inadequate information"²⁵⁵ This is evidence that sophisticated lawyers did not see it as some sort of technical solution, but rather a policy proposal that might be accepted or rejected.

In other words, law firms may have viewed the pill as effectively a solution pitched to the Delaware Courts through the mechanism of a privately drafted contract. Once the Delaware Supreme Court announced the *Household* decision, it adopted that policy proposal, effectively delegating to law firms the role of writing privately drafted antitakeover statutes through the medium of these instruments (subject, of course, to ongoing supervision). When the technical defects of the flip-over pill validated in *Household* became apparent, the development of new pills was undeterred. This is perhaps because the market perceived the court as signing off on a set of privately drafted antitakeover provisions, not merely one specific "breakthrough technology" validated in the case. In summary, the poison pill was essentially a policy proposal, using the Delaware judiciary rather than the legislature, in order to overcome potentially intractable political obstacles.

So, what role did the poison pill document itself play? The pill could be thought of as a teed up set of facts, an agenda set by private law practitioners in such a way that a court

252. Powell, *supra* note 15, at 429 (describing the poison pill as a form of private lawmaking).

253. *Id.*

254. *Id.*

255. *Id.* at 439.

decision would make policy.²⁵⁶ The pill served as a contrived contract designed to have sufficiently plausible complexity as to appear to be a technical solution, thereby making the Court's policy decision easier. In effect the detailed drafting of the poison pill dressed up a policy proposal as a matter of respect for private ordering, aligning with Delaware's guiding principles of "independent legal significance" and "form over substance."²⁵⁷

As a result, the effect of the Court's blessing of the poison pill was to judicially create a new antitakeover statute, one drafted by private parties rather than the legislature. This meshes with the understanding of some scholars who have seen that states that validate the poison pill are effectively enacted a new antitakeover statute.²⁵⁸ Indeed, after *Household*, commentators have noted that effectively all Delaware firms had a shadow poison pill in place,²⁵⁹ as if a new antitakeover statute had been enacted.

This perspective of the pill as private lawmaking is not entirely at odds with Lipton's apparent perspective, as well as that of other prominent M&A lawyers. Lipton had previously campaigned for statutory antitakeover protections, both at the state and federal level. Although he had some success in various states, no federal antitakeover relief came. Strikingly, Lipton referred to "Section 203 [as] in effect, a statutory pill," confirming (in inverted form) the argument in this paper that the pill was a form of judicially adopted antitakeover statute.²⁶⁰ Storied M&A lawyer Arthur Fleischer observed in 1985, "It was like someone had passed legislation. . . . Everyone was talking about it like it was some new corporate governance law."²⁶¹

In light of this inaction, the solution to the problem was Lipton's poison pill—a policy decision presented as a security, rather than as a bill. But the private innovation gave the Delaware courts the cover to make the decision to enact an antitakeover statute. Delaware eventually enacted Section 203 in 1987–88, but this is after the poison pill made state antitakeover statutes all but obsolete,²⁶² making it more palatable for legislators to enact the statute. The takeover statute made little difference when added to the poison pill,²⁶³ a further indication that the policy decision had already been made.

Although this Article has laid a lot of stress on the idea that the poison pill was not quite the *technological* innovation it has been given credit for, it was clearly a uniquely astute and bold *policy* innovation. It was not at all inevitable that the Court would bless the pill. The pill was an (accurate) political calculation about both the limits of the Delaware legislature and the potential of the Supreme Court as a way of breaking the logjam. Indeed,

256. Not dissimilar from the agenda setting role of litigants in other types of cases. See Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV., 690, 691–92 (1983) (analyzing the role of private citizens and private law in setting the agenda for public policy).

257. Developed from *Hariton v. Arco Elec. Inc.*, 182 A.2d 22, 26 (Del. 1962), *aff'd*, 188 A.2d 123 (Del. 1963); see also William W. Bratton, *Gaming Delaware*, 40 WILLAMETTE L. REV. 853, 855 (2004).

258. See Black, *supra* note 154, at 550.

259. See Coates, *supra* note 6, at 288.

260. See Lipton, *supra* note 10, at 15. Lipton apparently liked this enough to repeat the same text in another article. See Martin Lipton, *Pills, Polls and Professors Redux*, 69 U. CHI. L. REV. 1037, 1050 (2002).

261. *The Pill's Brief Run as a Show-Stopper*, CORP. CONTROL ALERT, Mar. 1985, at 4.

262. See, e.g., Bebchuk & Jackson, *supra* note 2, at 1568 (noting that corporate law casebooks indicate irrelevance of state antitakeover statutes after the poison pill).

263. See Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629, 634 (2016) (explaining that antitakeover statutes "added little, if anything, to the defensive arsenal of most firms" because of the poison pill).

the technical solution of the flip-over didn't even work very effectively as a purely technical matter without the flip-in and the exchange feature. It did, however, create enough uncertainty to effectively deter hostile bidders. Once the uncertainty was blessed by the courts, that was enough.

Delaware, a state dependent upon chartering revenues, had a strong incentive to implement a policy that would restrict takeovers, protecting its lucrative franchise. The question arises as to why the Delaware courts had the wherewithal to implement the policy while the legislature did not. It seems likely that the narrative of the poison pill as a private innovative solution is what made this possible. This conveniently allowed the Delaware courts to conceal the policy decision that had been made—rather than taking action, they could be seen as simply acquiescing to a technological advance. The Court could credibly argue that its hands were tied by the private ordering of the parties. And predictability and certainty in private contractual arrangements is Delaware's brand.

The statutory interpretation of the pill is also consistent with the textual evolution, or lack thereof, during the decades that followed. One might expect a new contractual document to undergo continuous change and indeed the pill did during its early years in 1985-1987. But after that, and especially in its "inert" provisions, the poison pill has changed little over the years. In this sense, the pill is different from merger agreements which have been documented to drift rapidly. Ironically, the older document (merger agreements) continues to drift while the new document (the pill) remarkably durable, even calcified. This makes the poison pill resemble statutory provisions further.

The private contractual packaging also helped Delaware avoid one of its key adversaries: the threat of federal challenges to antitakeover statutes on federal preemption or Commerce Clause grounds. A key distinction for preemption purposes has been made between whether the poison pill is a "private law innovation" or more like a statute.²⁶⁴ This probably reduced the risk of unconstitutionality. The pill was created during the *Edgar v. MITE* era, not yet the *CTS Corp v. Dynamics Corp* era. Ironically, in some ways, by delegating the antitakeover statute to companies, Delaware was able to have some of the characteristics of a first-generation antitakeover statute that had been struck down, namely the ability of the state to sign off individually on transactions. The difference was that instead of having an agency sign off as in the first-generation antitakeover statutes, the Delaware courts would sign off through reviewing the board's decision whether to redeem the pill.

The real legacy of the poison pill is that private attorneys can use innovation, or the appearance of it, to give cover to courts to make policy changes. This is especially likely in corporate law, where parties can craft contractual provisions that "serve up" the right facts to the court. The pill is analogous to policy entrepreneurship as in John Kingdon's work. There was a problem that needed a politically acceptable solution. Lipton provided that solution, opening the "policy window" that allowed the court to usher in a new era.

It is remarkable that the strategy of the poison pill—dressing up a policy decision as a contract—has not inspired transformation in other areas of corporate law. The widespread perception of the poison pill as a technological breakthrough may have prevented

264. Compare Guhan Subramanian, Steven Herscovici & Brian Barbeta, *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS. LAW. 685, 711 (2010) (arguing the poison pill is a "private law innovation") with Larry E. Ribstein, *Preemption as Micromanagement*, 65 BUS. LAW. 789, 792–96 (2010) (arguing the pill is not "merely a contract," but rather the product of the "interrelatedness of corporate contractual and statutory provisions").

practitioners from appreciating and copying the approach. Yet this approach may reemerge through other mechanisms, such as corporate bylaws.²⁶⁵ The increasingly contractual view of bylaws creates the opportunity for companies to tee up facts. Delaware's contractarian approach to bylaws opens new avenues for private writing of statutes, and those without shareholder approval. Indeed, with bylaws the possibilities are potentially even more expansive, as shareholders have the power to make them as well.

The policymaking route taken by the poison pill may suggest future avenues of private law solutions to public policy problems. Lawyers can find solutions that existing legislative institutions are unable to enact for political reasons, and tee up a contractual solution to the judiciary, bypassing the roadblocks of many legislatures. Whether this sort of policy innovation produces positive or negative outcomes demands further scrutiny.

V. CONCLUSION

The poison pill changed the course of M&A and more broadly affected the course of corporate law. It is a testament to the power of the pill that no poison pill had ever been intentionally triggered until 2008, when Versata triggered Selectica's NOL pill. But the reality is that the power of the initial poison pill was less of a technological innovation and more of a policy innovation. That policy innovation set in motion the evolutionary process of private ordering that effectively enabled the private authorship of antitakeover statutes in Delaware, and later in almost all other states.

The poison pill innovation was a teed-up set of facts at the right time to allow the Delaware Supreme Court to make an otherwise problematic policy decision in the face of legislative gridlock. In a sense, the real progenitor of the poison pill was the Delaware Supreme Court. The *Household* court could have declined to endorse the pill and, given the legislative gridlock of the time, it's unlikely the legislature would have saved it. Moreover, subsequent courts didn't need to acquiesce in the flip-in feature that Skadden and other firms pioneered. Wachtell's innovation was placing the right policy facts before the Court at the right time, and Skadden's innovation was pushing the essential flip-in piece when Wachtell had become bogged down in its own success.

The poison pill is often viewed as the best example of a legal innovation that changed landscape of corporate takeovers. But the tendency to regard the poison pill as a technical legal innovation has obscured the broader and possibly more important point. The pill was also an important policy innovation that took one bold law firm to initiate, and another to bring it to culmination. It was privately written antitakeover law, in which the courts later acquiesced over a period of time. Thus, the potential broader lesson is more important than a highly specific "invention" that solved a particular set of legal problems.

This way of understanding the pill's contribution might open avenues for private innovation making significant changes in the law. In particular, it shows the power of the policy innovation by private parties of teeing up the right set of facts to judges in the right jurisdiction, at the right time. The goal is to give policy makers the appearance of a technical solution that ties the court's hands, when the policy proposal actually empowers

265. This is already happening to some extent with "ex-ante governance" in bylaws. George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 611 (2016). The bylaws process of "shoehorning corporations into contract law" is analogous to the poison pill. *Id.*

courts to accomplish the change they desire to make. This reframes how legal innovation develops and provides a possible roadmap for other legal innovators in the future.