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In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Supreme Court limited judicial deference to universities. In *West Virginia v. EPA*, the Court reduced deference to administrative agencies. In *Coster v. UIP Cos., Inc.*, the Delaware Supreme Court narrowed deference to boards of directors, proclaimed a new standard of judicial review, and then seemingly retracted it. Common to these constitutional, administrative, and corporate law cases is unpredictability, uncertainty, and incoherence in the use and application of substantive standards of review. The resulting disarray is explicitly acknowledged by the very judges that formulate these standards of review—and those acknowledgments are evenly spread across the political map: Justice Sotomayor described constitutional standards of review as "perplexing;" Delaware's Chancellor McCormick proclaimed that "the struggle is real" in response to a development in corporate standards of review; and Justice Scalia attested that constitutional law's tiers of scrutiny are "no more scientific than their names suggest."

This Article develops a comprehensive theory that remedies the uncertainty, unpredictability, and incoherence of the courts' substantive standards of review. To that end, the Article advances a novel approach: it draws upon and synthesizes the lessons from judicial review carried out in both public and private governance contexts. While constitutional and administrative law, on the one hand, and corporate law, on the other, may appear to be far removed from each other, the role of judicial review in both is similar—it requires balancing among competing and overlapping sources of authority. The Article adopts this unified perspective to uncover and offer a remedy for the systemic shortcomings that plague our system of judicial review. Specifically, it shows that courts have created a haphazard conflation of standards of review, types of scrutiny, and kinds of deference. This conflation engendered doctrines that erroneously categorize standards of review on the basis of degree rather than kind. To fix this misclassification and the resulting incoherence, the Article looks under the hood of the substantive standards of review and provides a full conceptual and normative guide for the administration of claim-of-fact, scienter, and action scrutiny, and the corresponding epistemic, moral, and institutional deference. This Article also draws the distinction between *independent* and *auxiliary* standards of review and introduces the widespread, yet unacknowledged, use of *scrutiny modifiers*.

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Introduction

Public governance, set up by our constitutional and administrative laws, and private governance, set up by corporate law, place the judiciary in a similar position: The role of the judiciary is to review legal disputes ensconced in competing and overlapping sources of authority. In the domain of constitutional and administrative law, the courts have to make legal determinations in the shadow of structural struggles over control between the Legislative, the Executive, the Judicial, and the various states. In the domain of corporate law, the courts adjudicate disputes between owners, such as shareholders, outside investors, such as creditors, and managers, such as officers and directors. It is this shared judicial role that explains why, in both domains, substantive standards of review, tiers of scrutiny, and deference stand behind some of the most significant legal developments of our time.[1]

[1] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2168 (2023) (striking university affirmative action plans based on an articulation of scrutiny and deference: "It is true that our cases have recognized a 'tradition of giving a degree of deference to a university's academic decisions.' But we have been unmistakably clear that any deference must exist 'within constitutionally prescribed limits,' and that 'deference does not imply abandonment or abdication of judicial review,' Universities may define their missions as they see fit. The Constitution defines ours."); W. Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2610 (2022) (not allowing for Chevron deference because it is a "major questions case."); Coster v. UIP Cos., Inc., 163, 2022, 2023 WL 4239581, at *11-12 (Del. June 28, 2023) ("Unocal can also be applied with

This Article takes the novel approach of comparing, synthesizing, and theorizing the lessons of judicial review in both public and private governance. Common to judicial review in constitutional, administrative, and corporate law is unpredictability, uncertainty, and incoherence in the administration of substantive standards of review and the corresponding imposition of scrutiny and deference. And in both the public and private governance arenas, these fundamental problems in our substantive standards of review are explicitly acknowledged by the very judges that articulate them.[2] Indeed, that both the Supreme Court and the leading corporate courts are suffering from a similar ailment might appear surprising at first glance, but there are historical reasons for this parallel development. At inception, Supreme Court doctrines of judicial review were fueled by inspiration from corporate law.[3] Since the time of the Framers, however, our constitutional makeup and commercial dispositions have variegated. It is now time to draw on the lessons from both constitutional and corporate tiers of scrutiny, as well as administrative law's doctrines of deference, to construct a coherent theory that will guide the courts' provision of review, scrutiny, and deference. This Article proposes a conceptual and normative framework for moving this much needed reform forward.

When jurists and academics refer to levels or types of scrutiny, they typically denote and confound two separate elements. First, they refer to the degree to which judges should defer to the actors that they are reviewing. In constitutional law, this would often be expressed through questions about the degree to which the Supreme Court should defer to congressional judgments.[4] In corporate law, this would normally be expressed through questions about the degree to which the Court of Chancery should defer to the business judgment of a board of directors.[5] The second element that

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the sensitivity Blasius review brings . . . the court's review is situationally specific and is independent of other standards of review . . . Schnell and Blasius review, as a matter of precedent and practice, have been and can be folded into Unocal review . . ..").

2 Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting) ("The Court . . . limits its review . . . to rational-basis scrutiny . . . [t]hat approach is perplexing, given that in other Establishment Clause cases . . . this Court has applied a more stringent standard of review."); Coster v. UIP Cos., Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022). ("Suffice to say, the struggle is real."); United States v. Virginia, 518 U.S. 515, 567, 116 S. Ct. 2264, 2292, 135 L. Ed. 2d 735 (1996) (Scalia, J., dissenting) ("These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.").

3 Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006) (tracing the origins of judicial review to the English practice of corporate ordinances).

4 *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making,* 98 IOWA L. REV. 465, 472–79 (2013) (providing a rich discussion of Supreme Court deference to congressional fact finding).

5 Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 46 (Del. 1994) ("It is to be remembered that, in cases where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the

levels of scrutiny attempt to capture is the very object of deference itself. In both constitutional law and corporate law, respectively, we sometimes scrutinize congressional or board determinations of fact,[6] other times we scrutinize congressional or board motivations,[7] and yet other times we scrutinize compliance with required legal actions.[8] These objects of scrutiny may be tested loosely or stringently, and they may be coupled with high or low levels of deference.

Unjust and inefficient results arise when neither the Supreme Court nor the leading corporate courts correctly and transparently articulate which type of scrutiny and what kind of deference they are utilizing. Instead, courts typically refer to general "standards of review," which are, in fact, bundles of various types of scrutiny and kinds of deference. This Article looks under the hood of these vehicles of review and provides the needed vocabulary and theory to remedy this ailment. As tabularly presented below, scrutinizing claims-of-fact requires a decision as to the needed level of epistemic deference, scrutinizing scienter requires a decision as to the needed level of moral deference, and scrutinizing legal action requires a decision as to the needed level of institutional deference.

Scrutiny	Claim-of-Fact Scrutiny			Scienter Scrutiny			Action Scrutiny		
Deference	Epistemic Deference			Moral Deference			Institutional Deference		
Degree	Strict	Intermediate	Loose	Strict	Intermediate	Loose	Strict	Intermediate	Loose

This Article first defines, explains, and argues for each of these categories of scrutiny and deference, and then shows the explanatory and normative implications of this theory on the perplexing maze that is the law of corporate fiduciary duties.

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directors' decision.").

6 *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 82–83 (1981) ("The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence."); *see also* Morris v. Standard Gas & Elec. Co., 63 A.2d 577, 583 (1949) (explaining that the court will not generally second-guess a board of directors' factual determinations).

7 *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,* 63 U. CHI. L. REV. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."); *see also* Coster v. UIP Companies, Inc., 255 A.3d 952, 953 (Del. 2021) ("In this decision, we reverse the Court of Chancery on the conclusive effect of its entire fairness review and remand for the court to consider the board's motivations and purpose for the Stock Sale.").

8 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 757 (1986) (Stevens, J., concurring in the judgment) ("[T]he question is simply one of congressional process."); *see also* RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 854 (Del. 2015) ("We agree with the Court of Chancery's principal conclusion that the Board's overall course of conduct fails Revlon scrutiny.").

Epistemic deference has a few differing conceptions.[9] But as a general concept, it is the idea that sometimes we are justified in forming beliefs of fact (for instance, there will be a storm tomorrow) because a particular source said as much (for example, the local weather channel).[10] Judges scrutinizing claims of fact by others must decide the extent to which they want to exercise epistemic deference, if any. For instance, in constitutional law, a judge reviewing whether a university's determination that a certain admissions policy would support diversity, equity, and inclusion consistently with constitutional norms has to decide to what extent they are willing to defer to the school's understanding of the policy's impact on admission.[11] Similarly, in corporate law, judges scrutinizing a board's determination that losing tax benefits in the short-term is justified due to future benefits of market signaling have to decide the extent to which they trust the board's financial assessment.[12] In some occasions judges are very deferential regarding epistemic judgments, and in other occasions, less so.[13] At any rate, the exercise of scrutinizing claims of fact requires a decision as to the level of trust judges are willing to place in factual determinations by others.

In addition to scrutinizing claims of fact, judges often scrutinize scienter, or the relevant levels of knowledge, motivation, and intent. When judges scrutinize scienter, they must decide the extent to which they will be deferential towards the self-professed moral worthiness of the actors they are reviewing, if at all. In other words, moral deference is the idea that sometimes judges are justified in forming a belief that one acted without intent of harm, knowledge of wrongdoing, or clear disregard for others, simply because they said as much.[14] For example, in constitutional law, the

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[9] *See, e.g.*, Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1026–1029 (2006) (examining particular conditions that may suffice for the granting of authority); LINDA TRINKAUS ZAGZEBSKI, EPISTEMIC AUTHORITY: A THEORY OF TRUST, AUTHORITY, AND AUTONOMY IN BELIEF (2012) (defining and arguing for the function of epistemic deference in terms of autonomy and rationality).

[10] Concepts, as distinguished from conceptions, capture the generally agreed upon features of ideas. For a discussion of the distinction see Maite Ezcurdia, *The Concept-Conception Distinction*, 9 PHILOSOPHICAL ISSUES 187, 187–92 (1998); *see also* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHILOSOPHY 137, 164 (2002).

[11] *Compare* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2168 (2023) (recognizing deference but drastically limiting it), *with* Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 366, (2016) (affording a significant measure of deference).

[12] Kamin v. Am. Exp. Co., 383 N.Y.S.2d 807, 812 (Sup. Ct. 1976), *aff'd sub nom.* Kamin v. Am. Express Co., 54 A.D.2d 654, (N.Y App. Div. 1976).

[13] *Compare In re* Affiliated Computer Services, Inc. Shareholders Litig., No. 2821-VCL, 2009 WL 296078, at *10 (Del. Ch. Feb. 6, 2009) ("[T]he business decisions of the board are not subject to challenge because in hindsight other choices might have been made instead."), *with* Tornetta v. Musk, 250 A.3d 793, 800 (Del. Ch. 2019) ("In these circumstances, stockholder approval of the conflicted controller transaction, alone, will not justify business judgment deference.").

[14] This is different from what philosophers mean by "moral deference." In the philosophical context, moral deference is the idea that some actors, under certain conditions, ought to be treated as

Supreme Court may sometimes review a law passed by Congress for compliance with Due Process, and do so with deference to any "rational" or "legitimate" reason given for the law's tension with the Due Process Clause.[15] Other times, the Court is less deferential to the scienter of the relevant actor, and it requires a showing of an "exceedingly persuasive justification."[16] In corporate law, too, judges often defer to reasons given by a board of directors' judgment that they are complying with their fiduciary duties, so long as they are "rational."[17] Other times, however, judges reviewing the compliance of directors with their fiduciary duties choose to exercise less moral deference, and they instead check if the "primary motivation" had a "compelling justification."[18]

Aside from scrutinizing claims-of-fact and scienter, judges must also evaluate the legality of the actions taken by any relevant actors. That is, they must utilize action scrutiny. When judges scrutinize legal actions, they must decide to what extent, if any, they are willing to intervene in the actor's chosen action as the action that satisfies the relevant legal element. For example, Congress sometimes passes laws that are constitutionally uncertain, but the Supreme Court nonetheless decides that they are not the right institution to determine the constitutionality of that statute.[19] The Court may, for instance, decide that underenforcing a constitutional norm, and leaving further deliberation to either Congress or to state courts, may be the most appropriate course of action.[20] Other times, the Court may decide not to intervene with a federal agency's process for complying with a congressional directive, even in the face of constitutional challenges.[21] In yet other instances, the Court may decide to carefully

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experts in regard to questions of ethics. *See generally*, Max Lewis, *Moral Deference, Moral Assertion, and Pragmatics*, 23 ETHIC THEORY MORAL PRACTICE 5 (2020); Jonathan Matheson, *What's Wrong with Moral Deference?*, 18 FLA. PHILOS. REV. 1 (2019); David Enoch, *A Defense of Moral Deference*, 111 J. PHILOS. 229 (2014).

15 Richardson v. Belcher, 404 U.S. 78, 82 (1971) ("To find a rational basis for the classification created by s 224, we need go no further than the reasoning of Congress as reflected in the legislative history.").

16 United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action").

17 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'") (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

18 Coster v. UIP Companies, Inc., 255 A.3d 952, 953–54 (Del. 2021) ("[A]nd if the board, acting in good faith, approved the Stock Sale for the 'primary purpose of thwarting' Coster's vote to elect directors or reduce her leverage as an equal stockholder, it must 'demonstrat[e] a compelling justification for such action' to withstand judicial scrutiny.").

19 For the seminal work on the phenomena, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

20 *Id.*

21 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("In such a case, a court may not substitute its own construction of a statutory provision for a reasonable

scrutinize Congress's chosen directive as part of an effort to make sure that it is "narrowly tailored" to an acceptable congressional goal.[22] Institutional deference captures these instances when a court decides to defer to an actor's chosen action, if any such deference is exercised. Institutional deference is a deference justified due to a court's belief that the judiciary is not the right agent to intervene with a particular action. Corporate law utilizes institutional deference as well. For instance, Delaware courts will generally not second-guess the wisdom of a board of director's decision to undergo a risky business strategy.[23] Similarly, a Delaware court will not question a board's decision to divest or acquire assets, so long as they have done so using a "reasonable process."[24] Delaware courts often choose to exercise this heightened level of deference because they are judges and not business managers, and hence not the right institution to decipher the appropriate board action.[25] Other times, however, the Delaware courts will choose to exercise far less institutional deference, and they will instead investigate if a given transaction amounts to "fair dealing and fair price."[26]

This Article certainly does not quarrel with the notion that our nation's law of judicial review has been at least moderately, if not largely, successful, but it does want to advocate for a theory that both illuminates its merits and relieves its demerits. Understanding that our law of scrutinies is comprised of claim-of-fact, scienter, and action scrutiny, which correspond to epistemic, moral, and institutional deference, respectively, explains much of our law of judicial review.

Normatively, it helps us improve areas of the law that are as important and consequential as they are perplexing. Since these perplexities are not merely experienced by observers of the law, but are, instead, part of an explicit bafflement by the very judges that construct these doctrines, we are in dire need of a prudent ordering that corrects our law of substantive standards of review.[27] This is the essence and main contribution of this Article.

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interpretation made by the administrator of an agency.").

22 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions . . . provided the restrictions . . . are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

23 Houseman v. Sagerman, No. 8897-VCG, 2014 WL 1600724, at *7 (Del. Ch. 2014) ("[T]his Court has explained many times that so-called 'Revlon duties' require a board conducting the sale of a company to undertake that process reasonably.").

24 Morris v. Standard Gas & Elec. Co., 63 A.2d 577, 583 (1949).

25 *See id.* at 583-83; Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) ("Courts are ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard or, ex post, to judge appropriate degrees of business risk.").

26 Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995) ("Thus, the entire fairness standard requires the board of directors to establish 'to the court's satisfaction that the transaction was the product of both fair dealing and fair price.'").

27 Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May

Judges engaged in the adjudication of complex cases often utilize the rhetoric of "standards of review." When they do so, they capture, or attempt to capture, a defined set of scrutinies, and their matching types of deference. Collectively referring to and utilizing multiple bundles of scrutiny and deference is an extremely useful jurisprudential tool, but only if we understand the types of scrutiny and deference that we are using. By looking under the hood of our "standards of review," we can identify two distinct types of standards of review. First are independent standards of review, or standards of review properly-so-called. These are bundles of scrutiny and deference pairings that are themselves dispositive of the case in point. For example, in constitutional law, if a congressional statute is positively reviewed under rational basis review, or, in corporate law, if a board's corporate action is validated under the business judgment rule, the case has been decided. The second type of standards of review are those standards of review that are not themselves dispositive of any legal dispute. Instead, these standards of review guide the judge in using a different standard of review. We may call these standards of review "Auxiliary Standards of Review." For example, in corporate law, a review of a board's defensive measure in the context of a hostile takeover warrants a review under the *Unocal* standard of review.[28] Regardless of whether the *Unocal* review is positive or negative, however, the case is not settled.[29] Instead, a positive or negative *Unocal* review would warrant a review under the business judgment rule or the entire fairness standard, respectively.[30] Similarly, in constitutional law, a federal agency that argues for the authority and legality of its statutory interpretation, in some cases, has to first pass review under the "Major Questions Doctrine" before it can be assessed either under the deferential *Chevron* test, or under another less deferential standard of review.[31] In addition to the standard and auxiliary standards of review, judges often promulgate conduct rules that allow litigants to alter the applicable standard of review, if they commit to the appropriate process. For example, under current constitutional law, a federal agency may avoid the less deferential *Skidmore* test, and acquire *Chevron*

2, 2022).

[27] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting) (expressing perplexity and disagreement regarding the state of the law); and Craig v. Boren, 429 U.S. 190, 211–12, (1976) (Stevens, J., concurring) (same).

[28] Chesapeake Corp. v. Shore, 771 A.2d 293, 330 (Del. Ch. 2000) (explaining that the *Unocal* standard applies in the hostile takeover context).

[29] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1377 (Del. 1995) ("We note that the directors' failure to carry their initial burden under Unocal does not, ipso facto, invalidate the board's actions. Instead, once the Court of Chancery finds the business judgment rule does not apply, the burden remains on the directors to prove 'entire fairness.'").

[30] *Id.*

[31] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2609-11 (2022) (holding that under certain "major questions" conditions the Court must "hesitate" before treating a federal agency as deserving of deference. Thereby, the major questions doctrine becomes a threshold question that must be decided before either *Skidmore* or *Chevron* are applicable, if at all).

deference, if it exercises a formal Notice & Comment process (or another formal process).[32] Likewise, in corporate law, a conflicted board's corporate action may "shift back" from the entire fairness standard to the business judgment rule if the relevant transaction was preapproved by fully informed and disinterested directors or shareholders.[33] We may refer to these judicially crafted procedures for pre-selecting a standard of review as "Scrutiny Modifiers."

This typology of Standards of Review, Auxiliary Standards of Review, Scrutiny Modifiers, and the scrutiny-deference pairings reveals the hidden but necessary architecture of judicial review. In particular, this Article utilizes this typology to explain and improve the complex web of doctrine that is the judicial review of corporate fiduciary duties. It is worth lingering, for a moment, on the methodological approach employed by this transition from theory to doctrine. A showing of the strength and normative prowess of a theory, as applied to a concrete set of doctrines, both substantiates and exemplifies the usefulness and truthfulness of its claims. In principle, however, it is not necessary to provide a honed-in analysis of one legal field. Alternatively, one could construct the application stage widely, and provide an analysis of multiple legal domains that rely on specialized doctrines of judicial review (for instance, constitutional law, corporate law, and criminal law). The disadvantage of this approach would be its shallow nature. By focusing "only" on the judicial review of corporate fiduciary duties (a topic which itself is very far-reaching), this Article substantiates its jurisprudential claims by providing explanatory and normative applications and improvements that are practice ready. In other words, this Article provides a novel theory of substantive standards of review that also provides jurists with immediate benefits. This methodological approach is, of course, far from being new or controversial.[34] That said, it is worth addressing it explicitly, as it seldom does, and as the ebbs and flows of academic fashions can, at times, befog the general readership.

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[32] Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("[W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking . . . do not warrant Chevron-style deference."); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 212-13 (2006) (explaining that *Skidmore* survived *Chevron* and identifying the existence or lack of the Notice and Comment process as guiding the Court to either).

[33] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-13 (Del. 2015).

[34] *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (developing a new understanding of contract negotiation through a focus on divorce law and negotiations); *see also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (coining and developing the well-known and cross-doctrinal concept of "acoustic separation" and substantiating the concept through criminal law).

Concretely, a proper understanding of standards of review, scrutiny types, and their corresponding categories of deference, clarifies and ameliorates the "Business Judgment Rule"[35] (or, corporate law's "Rational Basis Test"[36]), the "Entire Fairness Standard"[37] (or, corporate law's "Strict Scrutiny"[38]), the so-called "intermediate standards of review" (known as the *Unocal* and *Revlon* standards),[39] and the recently refurbished *Blaisus* test[40] (corporate law's version of a "compelling justification" based review, which is akin to the judicial review of sex and gender discrimination).[41] Additionally, this typology of scrutinies explains the *MFW*[42] and *Corwin*[43] cleansing doctrines, which delineate processes for switching from one standard of review to another. Building on these explanatory revelations, I propose a number of systematic changes to Delaware's law of corporate fiduciary judicial review.

This Article proceeds in three parts. Part I lays out the argument for the theory of substantive standards of review advocated by this Article and integrates the wisdom of both constitutional and corporate judicial review, as well as the lessons of deference in administrative law. This Part presents the jurisprudential distinctions and doctrinal uses of all scrutiny and deference pairings, independent and auxiliary standards of review, and scrutiny modifiers. Parts II and III apply this novel theory of substantive standards of review to corporate law's five standards of review, and to corporate's law two categories of scrutiny modifiers, respectively. These Parts explain the enigmatic state of the law, provide recommendations for its improvement, and substantiate the truth and validity of the new substantive standards of review framework developed in this Article. A brief Conclusion follows.

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35 *See, e.g., In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009) ("The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'").

36 *See, e.g.,* Johnson v. Robison, 415 U.S. 361, 361–62, (1974) (applying the rational basis test).

37 *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995).

38 Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[S]trict scrutiny . . . means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

39 *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (describing the *Unocal* and *Revlon* standards of review as intermediate standards of review).

40 *See* Coster v. UIP Companies, Inc., 255 A.3d 952, 953–54 (Del. 2021).

41 United States v. Virginia, 518 U.S. 515, 531 (1996) (articulating this standard of review). Both standards of review look at primary motivations and justifications.

42 Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1240–41 (Del. 2012) (explaining the *MFW* doctrine as providing steps for controlling shareholders to secure business judgment rule, rather than enhanced, review).

43 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-13 (Del. 2015) (explaining the doctrine as providing steps for directors and officers to secure business judgment rule, rather than enhanced, review).

I. Scrutiny, Deference, and Standards of Review

Behind the curtain of our standards of review is an opulent but disorganized deck of doctrines. This Part raises the curtain and brings order by presenting a novel theory of substantive standards of review. I first show the proper distinctions between scrutiny and deference and argue for their coherent pairings. I then explain how scrutiny and deference pairings get bundled together into a set that we call a standard of review. As part of this discussion, I show that some standards of review are merely auxiliary rather than independent, and that we must also understand second-order rules that allow litigants to modify the chosen scrutiny-deference pairings.

A. Distinguishing Scrutiny and Deference

Scrutiny is the very inquiry or examination that is being undertaken. When we say that we are scrutinizing a matter, we mean that we are inspecting and evaluating it. It is natural to refer to "levels" or "tiers" of scrutiny, as the law often does, because judges can decide to adjust their vigilance in the course of their various examinations.[44] But when we do so, we tend to conflate scrutiny with deference.[45] Deference refers to the act of yielding to another's judgment, opinion, or chosen action. When judges defer to the judgment of a litigant, it may appear very similar to when judges exercise a lower level of scrutiny. But looks are deceiving, and this is far from a mere distinction of language. When we exercise a low level of scrutiny, we do not necessarily defer to anyone's judgment. Conversely, when we defer to someone's judgment, we have not necessarily mitigated our attentiveness. Outside of our preconceived legal notions, this relationship between scrutiny and deference should be intuitive: recall back to when you were a child yearning for a snow day. You deferred to the weather channel's prediction, but you most certainly examined your chances with great heed.

Indeed, any weight or gradation that a judge may choose to utilize may be assigned to either scrutiny or deference, or both. While we typically think of scrutiny and deference levels as having an inverse relationship, this is not always the case. For example, a judge may choose to use a heightened level of scrutiny, and yet still couple that with a high degree of deference to one of the litigants. This is not merely a theoretical possibility, but a practiced reality. For instance, in constitutional law,

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[44] *See generally*, R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. 973, 975 (2021) (providing a comprehensive analysis of levels of scrutiny in constitutional law).

[45] *See, e.g.*, Melendez v. City of New York, 16 F.4th 992, 1028 (2d Cir. 2021) ("[L]ess deference scrutiny applies."); Romer v. Green Point Sav. Bank, 27 F.3d 12, 16 (2d Cir. 1994) ("[A]lthough interim orders ordinarily are reviewed with considerable deference, greater scrutiny is required."); Williams v. BellSouth Telecommunications, Inc., 373 F.3d 1132, 1137 (11th Cir. 2004) ("[H]ere we apply a level of deference (and conversely, scrutiny).").

judges evaluating a prisoner's claim that they were discriminated against on the basis of race must use strict scrutiny, and they must simultaneously be deferential towards the managers of the prison in regards to prison operations.[46] As explained by Justice O'Connor, "deference to the particular expertise of officials managing daily prison operations does not require a more relaxed standard here."[47] The constitutional law practice of exercising deference in the face of heightened scrutiny is widespread, and it has raised strong normative objections.[48] Professor Daniel Solove argues, for instance, that this practice, in all of its iterations, is inconsistent with liberalism.[49] More recently, Professor Jonathan Adler raised serious concerns about this practice in the context of scientific findings by federal agencies.[50] Another contemporary objection was raised by Professor Lindsay Wiley and Professor Stephen Vladeck, who argue that the use of deference in the evaluation of public health crises, such as COVID-19, is unfounded.[51] The normative issues with this exercise of deference are also entrenched in surprising avenues of our constitutional roadmap. As demonstrated by Professor Anna Lvovsky, a particularly troubling line of cases and legal practices provides deference to police officers in the face of Fourth Amendment challenges.[52] Yet, in other contexts, the practice of simultaneously exercising deference and heightened scrutiny in constitutional law has also been at the center of constitutional progress. For example, as we learn from Professor Lawrence Sager, Supreme Court deference to Congress or state courts is a doctrinal tool for a collaborative interpretation of the Constitution.[53] The Court systematically underenforces constitutional norms, such as equal protection norms, and this is an invitation for Congress or state courts to exercise their obligation to enforce such norms to their fullest extent.[54] Professor Sager shows that this is the essence of Justice Brennan's reasoning in *Katzenbach v. Morgan*, a landmark decision solidifying Congress's power to defend equal protection rights against harm by the states.[55] Further yet, deference has been a doctrinal tool for liberal goals in other constitutional circumstances as well. For instance, as of shortly before the writing of this Article, the Supreme Court exercised deference towards public university's admission policies

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[46] Johnson v. California, 543 U.S. 499, 500 (2005).

[47] *Id.*

[48] *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 943 (1999); Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 267-70 (2022).

[49] Solove, *supra* note 48, at 946.

[50] Adler, *supra* note 48.

[51] *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case against "Suspending" Judicial Review*, 133 HARV. L. REV. FORUM 179, 190 (2020).

[52] Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

[53] Sager, *supra* note 19, at 1263 ("This vision of shared responsibility for the safeguarding of constitutional values encourages close scholarly and judicial attention to the principles which govern or ought to govern the collaboration.").

[54] *Id.*

[55] *Id.* at 1229–33.

when they do so in an effort to facilitate diversity and inclusion.[56] During this Article's writing process, however, the Supreme Court mostly took away this deference, in an effort to disallow the policy of affirmative action.[57]

The afore teaches us two important points about deference and scrutiny. First, untangling deference from scrutiny is an essential step towards understanding them. Levels of scrutiny are not necessarily coterminous with levels of deference. Second, the normative perplexations of scrutiny and deference are neither contingent on circumstances nor predicated on the vagaries of politics.

The same can also be demonstrated in the realm of corporate law, although in a more spurious manner. On first inspection, corporate standards of review, and their respective attitudes towards scrutiny and deference, are straightforward: "Avoiding a crude bifurcation of the world into two starkly divergent categories—business judgment rule review reflecting a policy of maximal deference to disinterested board decision making and entire fairness review reflecting a policy of extreme skepticism toward self-dealing decisions—the Delaware Supreme Court's *Unocal* and *Revlon* decisions adopted a middle ground."[58] To summarize even further, the business judgment rule will always be deferential, the entire fairness standard will never be deferential, and there are two intermediate categories of review that fall somewhere in-between. Even setting aside, for the moment, the fact that we now actually have an additional standard of review (if not two),[59] the reality of corporate decisions and practice does not prescribe to such a symmetry between levels of scrutiny and levels of deference. Consider, for instance, the following adjudicatory precept from the Delaware Supreme Court's lodestar decision in *Paramount Communications Inc. v. QVC Network Inc.*:

> Although an enhanced scrutiny test involves a review of the reasonableness of the substantive merits of a board's actions, a court should not ignore the complexity of the directors' task in a sale of control. There are many business

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[56] *See, e.g.*, Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 366 (2016) ("[T]he decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.") (Citing Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 310 (2013)); Grutter v. Bollinger, 539 U.S. 306, 308 (2003) ("The Court defers to the Law School's educational judgment that diversity is essential to its educational mission . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

[57] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2168 (2023) (reducing deference to universities).

[58] *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010).

[59] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022) (addressing *Blasius* review as an independent standard of review and stating that *Schnell* might also be an independent standard of review). For a full discussion of this development see *infra* Section II.E.

> and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decision-making body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made *a reasonable* decision, not *a perfect* decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness (emphasis in the original).[60]

In other words, just like constitutional law actors, directors enjoy deference even in the face of heightened scrutiny.[61] Furthermore, it is entirely unclear, at first glance, if this deference is different from the deference exercised under a business judgment rule review. Moreover, the corporate standards of review recently got even murkier. A recent Delaware Supreme Court decision, also discussed in detail in the following Part, announced that even a positive review under the entire fairness standard is not always dispositive of the case, and some cases must also be analyzed under the *Blaisus* test.[62] This makes explicit one of two things: either that even the test which is supposed to have the least amount of deference, does not always admit of the highest level of scrutiny, or vice versa. To add to the confusion, in the same breath the Supreme Court of Delaware also said that there are currently no clear boundaries between the *Blaisus* test and the *Unocal* test, which is a level of scrutiny that is purported to be intermediate and more deferential than the entire fairness standard.[63] This is, of course, not to say that nothing is captured by referring to "intermediate standards of review" as admitting of different types of deference than the business judgment rule or the entire fairness standard. In fact, in many important ways that will be revealed below, these doctrines do capture important, thoughtful, and incrementally designed balancing of scrutiny and deference. But it does show that, in corporate law too, we cannot simply refer to levels of deference and levels of scrutiny in tandem.

Is the asymmetry between gradations of scrutiny and intensity of deference mere unjustifiable inconsistencies in both constitutional law and corporate law? Not so. While we can conclude that we need to find an alternative mechanism for depicting deference and scrutiny, we should resist the urge to discard these doctrines en masse. There are profound reasons standing behind decades of intentionally slow and steady

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[60] Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994).

[61] *See also*, Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 668 (2013) (providing alternative evidence for the claim that deference to directors is exercised even in the face of heightened scrutiny).

[62] *See Paramount Communications Inc.,* 637 A.2d at 46–47.

[63] Coster v. UIP Companies, Inc., 255 A.3d 952, 963 (Del. 2021) (explaining that the Court will not consider the boundaries between the two doctrines).

developments in our law of scrutinies. If we find the hidden blueprint, we may notice that what appears to be inconsistent and confused references to levels of scrutiny and deference turn out to capture important sensitivities to a complex world. This Part shows exactly that. Much, but certainly not all, of our law of scrutiny and deference is coherent and worthwhile, but only if we distinguish scrutiny and deference as a difference in kind rather than degree.

This Part fills this void by explaining the various kinds of scrutiny and types of deference that are being utilized in the judicial review of both constitutional law and corporate law. This Part shows that we have three pairings of scrutiny and deference types: Claim-of-Fact Scrutiny and Epistemic Deference, Scienter Scrutiny and Moral Deference, and Action Scrutiny and Institutional Deference. Each of the following Subsections presents one of these parings, in this order. Together, this theory of substantive standards of review helps identify both the hidden wisdom and the deficiencies of our law of scrutinies and deference.

1. Claim-of-Fact Scrutiny and Epistemic Deference

Judges often scrutinize claims of fact, and when they do so, they weigh the extent to which they should exercise epistemic deference. It is commonplace for judges to defer to a legislature that "undertakes to act in areas fraught with medical and scientific uncertainties,"[64] or for judges to declare that they "do not believe this court can substitute its concept of wisdom for that of the directors,"[65] or for the judiciary to explain that "the reasonableness standard, however, does not permit a reviewing court to freely substitute its own judgment for the directors' judgment."[66] The practice of deferring to beliefs of fact is widespread and influential, yet seldom dissected.[67] It is therefore important to take a sober look at what we mean by both claim-of-fact scrutiny and epistemic deference, and how they differ from other kinds of scrutiny and deference.

When we are scrutinizing claims of fact, we are scrutinizing descriptive statements about the state of the world.[68] These factual statements may take a number of different forms. For instance, factual statements may be a priori, which are statements that are knowable independently of experience (for example, 'all bachelors are unmarried'),

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[64] Marshall v. United States, 414 U.S. 417, 427 (1974).

[65] Morris v. Standard Gas & Elec. Co., 63 A.2d 577, 583 (Del. Ch. 1949).

[66] *Firefighters' Pension Sys. Of City of Kansas City, Missouri Tr. V. Presidio, Inc.*, 251 A.3d 212, 250 (Del. Ch. 2021).

[67] *See, e.g.*, Solove, *supra* note 48, at 959 ("in an age where factual and empirical evidence is becoming more integral to the interpretation of the Constitution, the current practice of deference is having a profound effect on the outcomes of judicial decisions.").

[68] *See generally Facts*, STANFORD ENCYC. PHIL (Last updated October 16, 2020) https://plato.stanford.edu/entries/facts/ (providing an introductory synopsis on facts and descriptive claims).

or a posteriori, which are statements that are not knowable independently of experience (for example, 'bachelors have been disproportionately taxed, as compared to married people, in the U.S.').[69]

Additionally, any claim of fact, whether a priori or a posteriori, may be sensitive to probability, or not. For example, we may say 'bachelors are *most likely* unmarried' or '*On the balance of the evidence*, bachelors have *likely* been disproportionately taxed, as compared to married people, in the U.S.'[70] In philosophical circles, there are rich debates about the nature and value of these types of descriptive claims.[71] For our jurisprudential purposes, suffice it to say that litigants making claims of facts may utilize any of these general categories of claims of fact, and that the courts will therefore have to scrutinize them. It is sometimes difficult to distinguish claims of facts from either normative claims or legal claims, or both.[72] For illustration, consider the statement 'punishing the innocent is most often wrong.'[73] We may understand this statement as a description of the world, or we may understand this statement as referring to whether such punishment should or should not be exercised.[74] Additionally, we may understand the statement as merely speaking to whether the legal status of such punishment is likely to be valid.[75] Many academics and jurists, in a variety of legal contexts, have tackled the law, fact, and value distinction.[76] These debates have shown that there are sometimes unclear lines of demarcation.[77] That said, we do not need to settle these debates in order to recognize the simple fact that, at the very least, factual claims, both scientific and pedestrian, are encountered by judges and juries on a daily basis.

With clarity as to what factual claims are, we can begin to adequately understand how such claims come before a court, and how a court begins to properly assess these claims. When courts scrutinize claims of fact, rather than legal claims, they are engaged in a fact-finding exercise. Note, however, that this investigative exercise is often not cleanly bifurcated for the trier. For instance, imagine that a judge has to evaluate a board of directors' claim that issuing a certain dollar amount of no par-

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[69] This is a slightly modified example of an example found in *A Priori Justification and Knowledge,* STANFORD ENCYC. PHIL. (Last updated May 6, 2020), https://plato.stanford.edu/entries/apriori/#ExamIlluDiffBetwPrioPostEmpiJus.

[70] *See generally Epistemic Utility Arguments for Probabilism,* STANFORD ENCYC. PHIL. (Last updated Nov. 6, 2020), *https://plato.stanford.edu/entries/epistemic-utility/.*

[71] *Id.*

[72] *See, e.g.*, Ronald Allen & Michael Pardo, The Myth of the Law-Fact Distinction, 97 NW. U. L. REV. 1768, 1771-78 (2003) (providing a comprehensive analysis of the law and fact distinction).

[73] This is a modified example of an example found in *A Priori Justification and Knowledge, supra* note 69.

[74] *Id.*

[75] *Id.*

[76] *See, e.g.*, Ronald Allen & Michael Pardo, *supra* note 72.

[77] *Id.*

value stock dividends was lawful. To do so, the judge must unpack at least two separate claims. First, the judge must scrutinize the factual claim by the board that the issued stock was worth the dollar amount the board claimed it is worth.[78] Second, a judge must determine whether the dollar amount complies with the laws regarding formal distribution constraints.[79] It is the first kind of claim that claim-of-fact scrutiny is concerned with, even when such claims are not separately and explicitly presented as such.

To scrutinize claims of fact, judges utilize many tools and are only constrained by the laws of evidence, procedure, and human imagination. As explained above, the level of scrutiny a judge may use, or the level of diligence that a judge chooses to exercise in their factual investigation, may differ from case to case.[80] At any rate of scrutiny, one of the most often used tools available to judges scrutinizing facts is the use of deference.[81] It is therefore important to pinpoint exactly what kind of deference could even conceivably aid in the investigation of factual claims.

For deference to aid in the investigation of facts, it must have epistemic value. This is true by definition, as to have epistemic value is to have the ability to support truth-seeking activities.[82] If a type of deference does not assist in the finding of an accurate description of the world, it does not have epistemic value. Hence, it is deference with epistemic value, or, in short, epistemic deference, that we are interested in when we are engaged in a fact-finding activity. To prescribe the use of epistemic deference, without more, however, is a rather empty recommendation. We therefore must also provide a description of what epistemic deference may or may not amount to. In other words, we must sketch out the contours of epistemic deference. For our jurisprudential reasons, however, we do not need to engage in the nitty-gritty conceptual debates that are internal to these rough contours. Essentially, our work as legal scholars and practitioners in this context behooves us to understand epistemic deference as a concept, but not its detailed realization as a conception.[83] This is so because we want to facilitate a coherent understanding of epistemic deference that still accommodates reasonable disagreements amongst jurists regarding particular instances of epistemic deference.[84]

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[78] DEL. CODE. ANN. tit. 8., § 173 (2022). ("[I]n the case of shares without par value being declared as a dividend, such amount as shall be determined by the board of directors").

[79] DEL. CODE. ANN. tit. 8., § 170 (2022).

[80] *See* Kelso, *supra* note 44 and accompanying text.

[81] *See, e.g.*, Solove, *supra* note 48 and accompanying text.

[82] For a general review of Epistemology *see Epistemology,* STANFORD ENCYC. PHIL. (Last updated April 11, 2020), *https://plato.stanford.edu/entries/epistemology/*.

[83] *See supra* note 10 and sources cited therein.

[84] *Id.*

Epistemic deference, as a general concept, is the idea that triers of fact (either judges or juries) are, in some cases, justified in believing a claim-of-fact made by another.[85] The key to a proper exercise of epistemic deference is knowing which cases bring about such justification.[86] We can describe all such cases as situations in which the actor to whom we are deferring to is an epistemic authority on the subject.[87] For instance, judges systematically treat boards of directors as experts in matters concerning the financial impact of a dividend issuance.[88] Similarly, in constitutional law, federal courts systematically treat federal environmental agencies as experts in the study and regulation of emissions.[89]

It is important, at this juncture, to highlight the difference between the commitment to the reality that claim-of-fact scrutiny and epistemic deference exist, and the commitment to the proposition that they exist for a good reason. This Section proves and delineates the existence of the claim-of-fact scrutiny-epistemic deference pairing, but it does not pass judgment on its worth in particular situations. Indeed, the concept of epistemic deference may justifiably prove counterintuitive to some, as in many instances of daily life, we have a base moral instinct that those to whom we defer as experts should be held to a "higher," non-deferential, standard. For example, we typically hope that our doctors would utilize evidence-based best practices when operating on our loved ones, and we are dedicated to holding them to it. The law, however, is careful not to conflate enhanced duties with enhanced scrutiny, especially when there is a need to exercise epistemic deference. As explained by the Delaware Court of Chancery, "*even* directors who are experts are shielded from judicial second guessing of their business decisions by the business judgment rule (emphasis added)."[90] To be sure, the exercise of epistemic deference, or the granting of epistemic authority, can at times be normatively undesirable. For instance, it could very well be the case, as Professor Adler argues, that exercising epistemic deference, in the context of heightened scrutiny and scientific findings by agencies, is objectionable.[91] It may also be the case that those instances of constitutional law

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85 *See supra* note 9 and sources cited therein.

86 *Id.*

87 *Id.*

88 *See, e.g.*, Kamin v. Am. Exp. Co., 383 N.Y.S.2d 807, 812 (Sup. Ct. 1976), *aff'd sub nom.* Kamin v. Am. Express Co., 54 A.D.2d 654, (N.Y App. Div. 1976).

89 *See, e.g.*, Club v. U.S. E.P.A., 793 F.3d 656, 666 (6th Cir. 2015) ("[W]e turn to the second step of the Chevron analysis. Here, EPA's interpretation seems eminently reasonable. In its direct final rule, the agency indicated that emissions from other "upwind" States.").

90 *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 128 (Del. Ch. 2009). While one early case seemed to suggest that expert directors could be held to a higher standard of care, this possibility was rejected by the Delaware Courts. *See* Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 844 (Del. Ch. 2011), *judgment entered sub nom. In* re Metro Storage Int'l LLC v. Harron (Del. Ch. 2022) ("[F]or purposes of a care claim, directors also generally are not held to a higher standard based on their special knowledge or expertise.").

91 *See* Solove, *supra* note 48.

epistemic deference identified by Professor Solove are incompatible with liberalism.[92] But it doesn't mean that epistemic deference is not a part of the law, and it doesn't mean that epistemic deference is never normatively attractive. The key is to understand how to tell the difference between the good and the bad, and in order to do so, we must first understand how claim-of-fact scrutiny and epistemic deference differ from other types of scrutiny and deference.

2. Scienter Scrutiny and Moral Deference

Facts are not the only object of dispute that comes before a court. Judges and juries must also evaluate scienter.[93] When reviewing the scienter of a litigant, one must decide whether, and to what extent, you can trust or defer to the testimony of the very person whose scienter you are evaluating. For instance, in Equal Protection jurisprudence, the Supreme Court will often evaluate whether the motivations behind a law had "discriminatory racial purpose."[94] Similarly, in corporate law, courts will, when the issue arises, evaluate whether the "sole" motivation of the directors was to depress the shareholder franchise.[95] Scrutinizing mental states is a difficult task, and the inescapable exercise of considering self-testimony on scienter is phenomenologically circular, but it is also a robust and widespread part of the practice of law. We must therefore understand what scienter scrutiny is and why it is different from claim-of-fact scrutiny. Subsequently, we can understand that the deference that aids in the investigation of scienter is of moral rather than epistemic nature.

When we refer to scienter, or mens rea in the criminal law context, we depict the motivations, attitudes, or mental states that are responsible for the actions we are evaluating.[96] In its simplest form, evaluating scienter requires an investigation into a single person's mental state at the relevant time. In more complicated iterations, we investigate the scienter of a collective.[97] For example, constitutional law adjudication often investigates the motivations of state legislatures, and corporate law adjudication will frequently investigate the motivations of the board of directors as a whole.[98] There

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92 *Id.*

93 The only time scienter need not be evaluated is when dealing with a strict liability cause of action. For a comprehensive analysis of the costs and benefits of strict liability in the business law context see Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 82-97 (2003).

94 Washington v. Davis, 426 U.S. 229, 245 (1976).

95 Coster v. UIP Companies, Inc., 255 A.3d 952, 962-63 (Del. 2021).

96 *See generally The Epistemic Condition for Moral Responsibility,* STANFORD ENCYC. PHIL. (Last updated Oct. 4, 2022), *https://plato.stanford.edu/entries/moral-responsibility-epistemic/.*

97 *See, e.g.,* Michael T. Jones, *Where to Point the Finger: Omnicare's Attempt to Rectify the Collective Scienter Debate,* 57 B.C.L. REV. 695, 695 (2016) (discussing the scienter of a corporation as a collective).

98 *See, e.g.*, English v. Gen. Elec. Co., 496 U.S. 72, 84 (1990) ("The Court defined the pre-empted field, in part, by reference to the motivation behind the state law."); *see also In re* Family Dollar

are multiple ways to conceive of scienter. One way to understand scienter is as a physical event, just like the "rising of the sun," that needs to be investigated factually, and only factually.[99] On the other end of the spectrum, one could understand scienter as something that is subjective and necessarily involving of a value judgment.[100] Other conceptualizations of scienter fall somewhere in between.[101] Again, we need not resolve these metaphysical debates for our jurisprudential purposes. Instead, it is sufficient if we acknowledge that even if scienter is in some way factual and objective, the manner by which such facts are ascertainable by judges and juries is of a different kind from investigations of brute facts such as "how many dollars are in a particular bank account."[102] Metaphysical nature notwithstanding, the practical reality of investigating scienter, particularly that of a collection of individuals, is a different kind of exercise. When jurists are called upon to discern between conscious disregard and gross negligence, they cannot merely rely on the observation of occurrences.[103] Instead, the jurists are called upon to evaluate whether the relevant actions admit of a certain degree of culpability, or not.[104] This appraisal of culpability is a moral judgment, and that is regardless of whether it is an objective or subjective value judgment.[105]

The tools available for the evaluation of scienter are plentiful. One of these tools, of particular importance for our purposes, is the exercise of deference. Note, however, that this deference must be different from the epistemic deference that is utilized when scrutinizing claims of fact. Here, we do not defer to the litigant because we think that they are an epistemic authority on degrees of culpability. For instance, if we defer to a board of directors' testimony that their assessment of a business decision was negligent but not grossly negligent, we would not be doing so because we think that they know the difference between simple and gross negligence better than a seasoned judge.[106] Instead, when we exercise such deference, we do so because we have normative or moral reasons to do so. This is so as the exercise of deference, in this case, is for reasons which are not factual, but rather a reflection of our doctrinal

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Stores, Inc. Stockholder Litig., CV 9985-CB, 2014 WL 7246436, at *12 (Del. Ch. 2014) ("it is helpful to consider first the Board's general motivations during the sale process.").

99 *See, e.g.*, DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM (Oxford University Press, 2011).

100 *See, e.g.*, Camil Golub, *Is there a Good Moral Argument against Moral Realism?*. 24 ETHIC THEORY MORAL PRAC. 151, 164 (2021).

101 *See supra* note 96.

102 *Id.*

103 This is of particular importance in the context of corporate law, as the difference between gross negligence and conscious disregard marks the scienter difference between the duties of care and loyalty, respectively. *See infra* notes 108-110 and accompanying text.

104 *Id.*

105 *Id.*

106 This is of course not a judgment against the skills of directors. It is simply doubtful that directors, who are business experts, are also experts in such nuanced case law. Surely, there are exceptions.

decision to heed self-testimony about culpability under certain conditions. For instance, we may decide to defer to director testimony that they intended to benefit the corporation, and not harm existing shareholders, if we do not have reasons to suspect that other directors in like circumstances would have acted with a conflict of interest in such a scenario.[107]

The separability and independence of epistemic and moral deference can also be demonstrated by how judges utilize both simultaneously, even when doing so pulls the decision in two opposite directions. Consider, for illustration, the Delaware Court of Chancery decision in *In re Emerging Communications*. The relevant part of the decision starts with the observation that a transaction advanced by the controlling shareholder and the board of directors was not entirely fair, but that there is also an effective exculpation clause cleansing director violations of the duty of care.[108] In Delaware, duty of care violations require the scienter of gross negligence, and duty of loyalty violations require the scienter of conscious disregard, or knowing or intentional conduct.[109] The Court was thus assessing whether the directors can be held liable under a fiduciary duty theory by examining whether the scienter of the directors was sufficiently high so as to warrant a duty of loyalty (conscious disregard or higher) violation rather than the exculpated duty of care violation.[110] Aside from the controlling shareholder and the director that acted "in concert"[111] with the controlling shareholder, the only director that was found to have had the requisite level of scienter was the director with the "specialized financial expertise."[112] The Court held that, unlike his non-expert peers, the expert director did have the requisite level of culpability. As the Court explained, while "divining the operations of a person's mind is an inherently elusive endeavor," we can lean on expertise as evidentiary reason to deduct at least conscious disregard on the part of the expert director.[113] Can this disparate treatment of expert and non-expert directors be understood consistently with the fact that Delaware also expressly provides expert directors with "deference"?[114] It can, but only if we understand the difference between moral and epistemic deference. Expert directors still continue to receive epistemic deference when we evaluate claims of fact, but this deference will not translate into moral

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[107] McMullin v. Beran, 765 A.2d 910, 923 (Del. 2000) (discussing that in assessing director independence, Delaware courts apply a subjective "actual person" standard to determine whether a "given" director was likely to be affected in the same or similar circumstances).

[108] *In re* Emerging Communications, Inc. Shareholders Litig., No. Civ.A. 16415, 2004 WL 1305745, at *38 (Del. Ch. 2004).

[109] *Id.*

[110] *Id.* at 39-43.

[111] *Id.* at 39.

[112] *Id.* at 40.

[113] *Id.*

[114] Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 844 (Del. Ch. 2011), *judgment entered sub nom. In re* Metro Storage Int'l LLC v. Harron (Del. Ch. 2022).

deference when we are evaluating the requisite level of scienter. A similar tug and pull between epistemic and moral deference can also be observed in constitutional law. Recall the example of race-based discrimination in prisons.[115] The Court has expressly refused to relax the use of strict scrutiny, even though the Court was also compelled to provide prison operators with "deference."[116] Using the distinction between epistemic and moral deference, we can understand the Court's holding: While prison operators may be deserving of epistemic deference on the subject of daily prison operations, they are not deserving of any moral deference when they disparately treat different racial groups. This is what allowed the Court to maintain its protective operation of strict scrutiny.[117]

Thus, claim-of-fact and scienter scrutiny track epistemic and moral deference, respectively. But our analysis does not end here. In addition to reviewing the claims and motivations of litigants, courts must also evaluate the litigants' actions. As the following Subsection shows, this evaluative exercise presents an additional scrutiny-deference pairing. This pairing is the last piece of the puzzle.

3. Action Scrutiny and Institutional Deference

Imagine a business that has a lot of useful intellectual property. This business has patents that allow it to make electric cars that are easier to charge and that can drive for longer distances per charge, as compared to competing businesses. Unfortunately, this business is poorly managed by directors that have made questionable decisions. An investor is consequently attempting to take over this business by buying enough shares to replace the directors. The directors in our example, however, will not go down without a fight: they are attempting to scare off the investor by adopting various contractual mechanisms that would diminish the value of the investment in the event of a successful takeover. An existing shareholder is unhappy with the directors' decision to shoo away the investor, and so they decide to pursue a derivative suit against the directors.[118] When evaluating this set of events, a court would not only have to scrutinize claims of fact by the directors (for example, a claim that "repelling a hostile acquirer would provide a positive market signal to be reflected in the share prices") and the scienter of the directors (for instance, whether the motivation of the directors was to benefit the corporation and the shareholders, or merely to fortify their job security), the court would also have to evaluate whether, even assuming the motivations and factual claims are as pleaded by the directors, the action of adopting

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[115] *See* discussion in *supra* notes 46-47 and accompanying text.

[116] *Id.*

[117] *Id.*

[118] This is a simplified fact pattern of a hostile takeover attempt and litigation. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 28 (Del. Ch. 2010) ("I will review Jim and Craig's adoption of the Rights Plan using the intermediate standard of enhanced scrutiny, typically referred to as the Unocal test.").

these contractual mechanisms was appropriate as compared with other available choices.[119] As this example demonstrates, the exercise of scrutinizing a chosen action is different from evaluating claims of fact and scienter. It is therefore important to first articulate precisely what is different about this kind of scrutiny, and then explain the type of deference that such scrutiny might call for.

A litigant's chosen action is the manner by which a litigant chooses to satisfy the elements of a law, other than the scienter element.[120] For example, consider the law that requires directors to adopt a reasonable "process" for dealing with an inevitable sale of a company.[121] The part of the law that requires the board to adopt a certain process represents the actions required of the board. If the law also requires that the chosen process be the fruit of a certain kind of motivation, that would be the part of the law that represents the scienter requirement.[122] Distinguishing actions and claims of fact presents a somewhat more difficult knot to untangle— but this knot is by no means Gordian. Since all laws require the satisfaction of elements, we can begin by using formalism to weave-out the action and claim-of-fact distinction. Factual claims assist a litigant in supporting their element-concerning arguments, but they are not, strictly speaking, required. Matters are less intuitive when we transition from formalities to function, at least on first glance. If the function of factual claims is to explain why a given action was chosen, or whether a specific mental state is inferable, we may be tempted to collapse claims-of-fact into either our action or our scienter scrutiny. The key, however, is to notice that a judge or jury may find that a valid action and motivation were undergone by a litigant, and yet disapprove of all claims of fact by the same litigant. Conversely, the judge or jury may accept all factual claims by the litigant, and yet still disapprove of the chosen action or motivation, or both.[123] In other words, claims of fact are functionally persuasive but neither necessary nor sufficient for the evaluation of both action and scienter. The separability of action and claim-of-fact is also reflected practically and doctrinally. For example, in constitutional law, a regulation of speech would be examined by looking at the "stated purpose" of the law (scienter scrutiny) and whether the regulation was "narrowly tailored to serve a significant governmental interest" (action scrutiny). Simultaneously and very often, but not inevitably, this analysis will be aided by looking at various factual claims regarding what would be the content-based impact of such a law, what are the law's

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[119] *Id.* at 33.

[120] Elements are the essential parts of the law that must be addressed by a litigant.

[121] Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 36 (Del. 1994) ("We further hold that the conduct of the Paramount Board was not reasonable as to process.").

[122] *See, e.g.*, *In re* Family Dollar Stores, Inc. Stockholder Litig., CV 9985-CB, 2014 WL 7246436, at *12 (Del. Ch. 2014) (articulating motivation as a necessary part of the legal analysis).

[123] For example, this type of analysis is often undergone when a court rejects or accepts a summary judgment.

alternatives, and what would be the impact of the law's alternatives (claim-of-fact scrutiny).[124]

Just like its claim-of-fact and scienter counterparts, action scrutiny can be evaluated by many tools, and deference is one of them. The deference that assists in the examination of action, however, is neither epistemic nor moral. Epistemic deference allows us to better discover whether certain facts are true or not, but it doesn't by itself help us bridge from knowledge to action.[125] Moral deference allows us to ascertain whether a certain level of mental culpability is met, but it doesn't tell us what actions an adequate mental state might bring.[126] Instead, just like epistemic deference requires an identification of epistemic authority, and moral deference identifies the litigant's self-testimony as a moral authority, a deference that aids in the choosing of an action is a deference that tells us who is the correct actor or institution to choose a given action. In other words, action scrutiny is helped by institutional deference, which requires an identification of institutional authority. For example, in corporate law, courts often defer to the business "processes" of directors because they are judges and not business professionals.[127] Business professionals, Delaware judges explain, are the right people for making business judgments.[128] It is not only this general law of fiduciary duties that demonstrates institutional deference, it is also its exceptions. Consider, for instance, the exception found in the case of a board's special litigation committee's petition to dismiss a derivative suit.[129] In this case, the court will not only hear the testimony of the board, it will also make "its own" business judgment.[130] There are competing justifications to this exception,[131] but our precise understanding of the deference involved—institutional deference—provides a far more straightforward explanation: While courts are not generally the right institution to decide on business processes, they are a perfectly suitable institution when deciding on a business process that is also a litigation process. A similar illustration can be found in constitutional law. Recall Justice Brennan's opinion in *Katzenbach*

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[124] McCullen v. Coakley, 573 U.S. 464, 478-82 (2014); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

[125] *See supra* Section I.A.1.

[126] *See supra* Section I.A.2.

[127] Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994).

[128] *Id.*

[129] Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981) (citing Neponsit Investment Co. v. Abramson, 405 A.2d 97, 100 (Del. 1979)).

[130] *Id.*

[131] *Compare* Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763, 784 (2013) ("Thus, special litigation committees operating under the Zapata rule are consistent with the policy of organ law, and do not need to be modified.") *with* Rickey L. Matejka, *Zapata Corp. v. Maldonado: Restricting the Power of Special Litigation Committees to Terminate Derivative Suits*, 68 VA. L. REV. 1197 (1982) (arguing that it is justified due to a balancing of interests).

v. Morgan, where the Court held that Congress may adopt a law, under the enforceability provision of the Fourteenth Amendment, that invalidates state laws requiring English literacy of voters.[132] The main justification offered by Justice Brennan is that while the Court may or may not have found the state law to be unconstitutional if it examined it directly, Congress may nonetheless enforce the equal protection norm to a further extent.[133] As part of his pathbreaking analysis of underenforced constitutional norms, Professor Sager teaches us that this is an instance of institutional deference.[134] Utilizing the terms advanced in this Article lend further support to this conclusion. It is neither epistemic nor moral deference that can support the notion that the Supreme Court of the United States should defer to Congress on matters of equal protection. There is neither a reason to think that the intentions of legislatures are more egalitarian than those of the justices nor is there a reason to think that legislatures are better studied in the subject of constitutional equal protection. We can, however, find strong reasons for why we would want the institution representing the political process to have the ability and obligation to be active in the enforcement of equal protection.[135] Since it is institutional deference that the Court is practicing, it should not be a surprise that this analysis came under Section 5 of the of the Fourteenth Amendment. After all, Section 5 deals with enforceability *actions* permitted by Congress.[136] Indeed, and as we now know, action scrutiny pairs with institutional deference.

Prior to concluding, it is important to underscore the flexibility of institutional deference across different doctrines. The reasons we may conclude that a certain institution is worthy of institutional deference are pluralistic and doctrine specific. For example, in corporate law, the reasons standing behind institutional deference to corporate directors are often of an economic nature.[137] We often defer to the institution of directors because of our judgment on how to distribute, encourage, and discourage risks in the firm.[138] A different particularized justification for institutional deference can be extracted from constitutional law. In the constitutional context, the Supreme Court will often defer to Congress for structural rather than economic

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[132] *See* Sager, *supra* note 19.

[133] *Id.*

[134] *Id.*

[135] For example, this proposition and its limits is the center of the discussion in one of the most influential books on judicial review see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press, 1980).

[136] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[137] For a robust and one of the seminal discussions of the topic, see generally FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard University Press, 1991).

[138] *Id.*

reasons. These justifications stem from foundational commitments to facets of our political makeup, such as the separation of powers.[139]

In sum, unpacking standards of review reveals a rich and complex world that unsnarls into the scrutiny-deference pairings of claim-of-fact scrutiny and epistemic deference, scienter scrutiny and moral deference, and action scrutiny and institutional deference. A proper utilization of our law of scrutinies requires an understanding of these parings and their uses. It doesn't follow, however, that the law is always wrong in bundling these pairings together into general, or even vague, standards of review. The following Section presents and assesses the various packaging options.

B. Bundling Scrutiny and Deference

While standards of review are comprised of various concrete scrutiny types and deference kinds, neither academics nor practitioners are typically specific in their references to them. Instead, jurists tend to generally refer to standards of review or scrutinies, even when they have a specific meaning in mind.[140] This is neither necessarily bad nor unique to the law of scrutinies. For instance, we tend to refer to "rights" generally, but, as Wesley Newcomb Hohfeld taught us, we are really attempting to denote very concrete iterations of rights, claims, duties, powers, entitlements, immunities, liabilities, disabilities, and privileges (to put it crudely).[141] Collectively referring to a sum of various parts, when done correctly, is a useful tool both in and outside the law. For instance, one doesn't need to know or refer to the specific engine, gear, and tires on their Honda Civic in order to conclude that the car would suffice for the purposes of commuting from home to work. On the other hand, and as shown in the preceding Section, conflating scrutiny, deference, and standards of review is profoundly problematic when we are attempting to understand and improve the more important and impactful facets of our flaw. Returning to our analogy, we may indeed have to understand the engine and tires of our car if we plan a trip through sufficiently difficult terrain and weather conditions. We must therefore resist the urge to either wholesale reject or blanketly accept all aggregative and vague references to scrutinies and standards of review. Instead, we must identify those instances in which the bundling or packaging of scrutiny-deference pairings are appropriate and useful.

This Section delineates these useful instances in two subsections. First, this Section demonstrates that general standards of review, or scrutiny-deference bundles, can be useful either as a collection of dispositive norms of review ("Independent Standards

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[139] *See, e.g.*, ELY *supra* note 135.

[140] *See* discussion and sources cited in *supra* note 45 and accompanying text.

[141] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

of Review") or as a collection of scrutiny-deference pairings that can aid, but not itself resolve, a legal dispute ("Auxiliary Standards of Review"). Second, this Section demonstrates that the law utilizes second-order norms for deciding which scrutiny-deference bundle, or standard of review, to apply in the first place. These rules may be called "Scrutiny Modifiers," as they prescribe conduct that a litigant may follow in order to modify or alter the applicable bundle of scrutiny and deference pairings. For each of these cases, this Section shows that these overlooked uses of scrutiny-deference bundles are deeply entrenched in our legal permaculture and practice, as is evident by concrete and everlasting doctrines in both constitutional law and corporate law.

1. Independent and Auxiliary Standards of Review

Standards of review are often swiftly divided into loose, strict, and intermediate categories.[142] But as we now know, this is a misleading and ineffective way to categorize our review doctrines. Tiers of scrutiny and levels of deference do not change in tandem, and it is scrutiny-deference types, rather than degree, that explain our adjudicatory precepts. Instead, standards of review are a genus that bifurcates into two species: independent and auxiliary. Independent standards of review, or standards of review properly so-called, or, simply, standards of review, are those standards of review that can alone decide a legal dispute. For example, if directors of a corporation fail to pass a business judgment rule review, the breach analysis is over, and we can conclude that they have violated their fiduciary duties.[143] Similarly, in constitutional law, a congressional law that fails to pass a rational basis review is invalidated without a need for further analysis.[144] Unlike independent standards of review, auxiliary standards of review are not dispositive in and of themselves. These standards of review necessitate a review by yet another standard of review. For instance, the adoption of anti-takeover measures by boards of directors requires a review under the *Unocal* standard of review.[145] But a positive or negative finding under the *Unocal* standard still requires further review under the business judgment rule or the entire fairness standard, respectively.[146] Similarly, in constitutional law, a review of a federal agency action under the major questions doctrine would still require review under either *Skidmore* or *Chevron*.[147] There are pros and cons to choosing between utilizing independent and auxiliary standards of review. We therefore must first carefully describe the differences between the two and, secondly, sketch out the normative principles for the decision.

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[142] *See* sources cited in *supra* notes 36-41 and accompanying text.
[143] *Id.*
[144] *See, e.g.,* Johnson v. Robison, 415 U.S. 361, 361–62, (1974).
[145] Chesapeake Corp. v. Shore, 771 A.2d 293, 330 (Del. Ch. 2000).
[146] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1377 (Del. 1995).
[147] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2609-11 (2022).

Distinguishing independent and auxiliary standards of review merits further elaboration. The reason for this honed-in dissection is that not all standards of review are entirely independent or entirely auxiliary. Instead, it is better to think of independent and auxiliary standards of review as two ends of a spectrum. This is the case because certain standards of review are dispositive for a negative finding but not a positive finding, or vice versa. For illustration, consider both the business judgment rule and the rational basis test. While a negative finding by the two is dispositive, a positive finding is not. A board of directors or Congress may be found to be in compliance under the business judgment rule or the rational basis test, respectively, and yet still receive negative review under the entire fairness or strict scrutiny, respectively. To be sure, in many or even most cases, the very fact that a court chooses to use the business judgment rule, or the rational basis test, means that other standards of review are excluded.[148] That said, the essential point is that in these examples a negative review is necessarily dispositive but a positive review does not always necessitate the end of the analysis.[149] An illustration of the independent-auxiliary ambit can also be found on the other end of the spectrum. In corporate law, for example, the entire fairness review is generally said to be the "strictest" standard of review, and a positive finding under such test is generally understood to be dispositive of a case.[150] But this is not always the case: sometimes a positive finding under entire fairness still necessitates a review under another standard of review—a standard of review called *Blasius*.[151] While one may quarrel with this development on normative grounds,[152] it provides yet another proof that, as a matter of description, the boundaries between independent and auxiliary standards of review are not always clear. It is therefore important to maintain the course-and-scope based understanding of independent and auxiliary standards of review, so as to uphold both doctrinal flexibility and practicality. This is akin to other fundamental and spectrum-based legal concepts such as "rules vs. standards"[153] and "property rules vs. liability rules."[154]

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[148] That is because the courts will be selecting which of the alternative standards of review they would like to use and not use.

[149] It is conceivable, for example, that the Court will first check if at least compliance with the business judgment rule is met, before proceeding to check compliance with the entire fairness standard. *See infra* Section II.A.

[150] Golden Cycle, LLC v. Allan, No. Civ.A. 16301, 1998 WL 276224, at *6 (Del. Ch. 1998).

[151] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022).

[152] *See infra* Section II.A.

[153] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L.J. 557 (describing and modeling the tradeoff between rules and standards in law design); *see also* Tomer Stein, RULES VS. STANDARDS IN PRIVATE ORDERING, 70 BUFFALO L. REV. (forthcoming in 2023), available at SSRN: https://ssrn.comsce/abstract=4059591.

[154] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (providing the seminal analysis of the distinction).

Deciding between the employment of independent or auxiliary standards of review requires an understanding of the pros and cons of each. The use of auxiliary standards of review provides the trier with a guiding principle, or a preliminary investigative tool, through which to decide on the best dispositive bundle of scrutiny and deference. This is useful in cases in which there is uncertainty regarding the appropriate independent standard of review. In other words, we can begin our recipe of this choice by noting that the use of an auxiliary standard of review, when done correctly, provides courts with the benefit of a clear and workable tool for deciding on the appropriate bundle of scrutiny and deference pairings. But the use of auxiliary standards of review is not costless. It imposes adjudication costs on both the litigating parties and the court. The use of an auxiliary standard of review means that there are more arguments and evidence to produce, respond to, and review. We can therefore understand the choice between using only an independent standard of review or also adding an auxiliary standard of review as a balancing of uncertainty regarding scrutiny and deference bundles on the one end and adjudication costs on the other end.

With this in mind, it should therefore be unsurprising that courts sometimes look for mechanisms to pre-decide the appropriate standard of review but without increasing adjudication costs. As the following subsection shows, courts have been able to develop scrutiny-deference doctrines that accomplish exactly that. These doctrines operate by providing prospective litigants with a conduct guide.

2. Scrutiny Modifiers

Courts have developed secondary rules that allow litigants to alter or pre-select the applicable standard of review. A notable illustration in constitutional law can be extracted from the doctrines governing the review of federal administrative agencies. Some agency interpretations are reviewed under the so-called *Skidmore* test and others are reviewed under the more deferential *Chevron* test.[155] Importantly, the Supreme Court has articulated a conduct that a federal agency can follow in order to avoid *Skidmore* and select *Chevron* review: the federal agency may do so by following a formal Notice & Comment period for its interpretations of congressional laws, or otherwise follow another acceptable formal process.[156] Corporate law utilizes much the same doctrinal tools. For instance, both boards of directors and controlling shareholders can avoid entire fairness review and select a business judgment rule review by following the specific informed consent process instructed by the *Corwin* and *MFW* doctrines, respectively.[157]

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[155] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[156] *Id.*

[157] *Id.*

Understanding scrutiny modifiers in terms of their effect on scrutiny-deference bundles reveals their benefits and proper uses. A scrutiny modifier is a prescription of action. Since litigants following the steps of a scrutiny modifier are acting in a manner that a court has essentially approved, the prescription by a court of a scrutiny modifier allows the court to pre-resolve matters of action scrutiny. In other words, complying with a scrutiny modifier leaves the court with a less demanding task: the scrutiny of claims of fact and scienter, but not action. For illustration, compare *Skidmore* and *Chevron*. When deciding between these two standards of review, a court is deciding whether to be deferential to an agency's interpretation of a congressional law.[158] *Chevron* provides immediate deference to an agency's interpretation, and *Skidmore* guides the judges to decide on the level of deference on a case-by-case basis.[159] In a line of cases, often called "Chevron Step Zero," the court has articulated the scrutiny modifier by which *Chevron* review replaces *Skidmore*: if a Notice & Comment or another formal process is followed.[160] Understanding that scrutiny modifiers concern action scrutiny swiftly reveals the purpose and function of Chevron Step Zero. The action of exercising the Notice & Comment process is the lynchpin of the analysis because the court is mostly concerned with institutional rather than epistemic or moral deference. When a court reviews an agency's interpretation of a congressional law, the court's main task is deciding if Congress intended to delegate this interpretative authority to the federal agencies.[161] Deciding whether the agency's interpretation is within the range of matters delegated by Congress is a question of the process or division of labor between Congress and the federal agencies. It is therefore not surprising that A. following the appropriate action generally provides the courts with sufficient reasons to be highly deferential. After all, the main issues to scrutinize have been resolved; And B. that not following the prescribed action does not entail that no deference will be exercised. While the scrutinizing of federal agency action is still open ended, the courts may still have reason to provide epistemic and moral deference to the agencies. Indeed, the focal point of *Skidmore* review and deference is "experience and informed judgment."[162]

We can therefore step back and understand the proper role of scrutiny modifiers as doctrinal mechanisms for the pre-resolution of action scrutiny. When a court is confident that it can articulate how such actions should look like, these mechanisms may be superior to auxiliary standards of review as they point to the appropriate bundles of scrutiny and deference without increasing adjudication costs.

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158 *Id.*
159 *Id.*
160 *Id.*
161 Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189-91 (2006).
162 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Together, this Part showed that general references to standards of review or scrutinies are really attempts to denote Claim-of-Fact Scrutiny and Epistemic Deference, Scienter Scrutiny and Moral Deference, and Action Scrutiny and Institutional Deference. Furthermore, this Part demonstrated that understanding the uses and value of these scrutiny-deference pairings does not only help us untangle doctrinal vagaries in our law of scrutinies, it also allows us to coherently bundle these parings together into Standards of Review, Auxiliary Standards of Review, and Scrutiny Modifiers. The following Part further substantiates this novel theory of substantive standards of review by demonstrating its far reaching and essential contributions to the field of corporate law.

II. The Case of Corporate Law: Unpacking the Quintet of Judicial Review

This Part bridges theory and doctrine. Our general law of scrutinies is in disarray, and the standards of review governing fiduciary duties in corporate law are no exception. The primary purpose of this Part is twofold: First, this Part further substantiates the theory of substantive standards of review presented in Part I by showing that it helps explain and demystify all the standards of review found in Delaware corporate law. Second, this Part leverages the insights of our theory of substantive standards of review in order to provide concrete recommendations for the improvement of the laws governing the review of fiduciary duty violations. Structurally, this Part addresses each of Delaware's quintet of judicial review, which include the Business Judgment Rule, the Entire Fairness Standard, *Unocal*, *Revlon*, and *Blasius*— in that order.[163]

A. The Business Judgment Rule

In order to understand the business judgment rule, we must first acknowledge the fiduciary duties of directors and officers. Directors and officers owe both a duty of care and a duty of loyalty to the corporation.[164] The duty of care requires directors and officers to act in a reasonably informed manner or to undertake a reasonable process in their decision making.[165] To violate the duty of care, directors and officers must have the scienter of at least gross negligence.[166] The duty of loyalty requires directors and officers to act in good faith and without a conflict of interest.[167] To violate

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[163] This Part focuses on Delaware law rather than the corporate laws of other states because Delaware is the leading provider of corporate law in the United States.

[164] Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[165] *Id.* at 368.

[166] *Id.* at 369.

[167] Sometimes courts refer to the "triad" of fiduciary duties, as some, but certainly not most, scholars and practitioners, bifurcate the duty of good faith and the duty of loyalty. This is inaccurate. *See Id.* at 370 ("although good faith may be described colloquially as part of a "triad" of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an

the duty of loyalty, directors and officers must have at least the scienter of conscious disregard.[168]

Enter the business judgment rule. One line of cases articulates the business judgment rule to mean that directors and officers are "presumed" to act "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company."[169] Another line of cases articulates the business judgment rule to mean that judges reviewing business decisions will be extremely deferential and will not second-guess the board's decision unless the board was not reasonably informed, or did not act in good faith, or without a conflict of interest.[170] As a result of these competing articulations, corporate law scholars and practitioners have greatly debated the meaning of the business judgment rule.[171] While some understand the rule to be a doctrine of judicial review, others see it as merely an articulation of the duties of care and loyalty.[172] On the one hand, the business judgment rule seems to merely require judges to be deferential when reviewing business decisions.[173] On the other hand, the business judgment rule seems to positively require conduct from directors and officers.[174] Professor Bainbridge, for instance, provides an explanation of the business judgment rule as an "abstention doctrine." According to this theory,

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independent fiduciary duty that stands on the same footing as the duties of care and loyalty.").

168 *Id.* at 369-70.

169 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del.1984)).

170 The leading example of this line of case is Kamin v. Am. Exp. Co., 383 N.Y.S.2d 807, 812 (Sup. Ct. 1976), *aff'd sub nom.* Kamin v. Am. Express Co., 54 A.D.2d 654, (N.Y App. Div. 1976) ("The directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions which will have an impact on profits, market prices, competitive situations, or tax advantages.").

171 *See, e.g.*, Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law,* 62 FORDHAM L. REV. 437 (1993) (arguing that the business judgment rule provides judges with a review doctrine that intentionally does not equate with the laws that communicate to directors and officers how to exercise their fiduciary duties); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VANDERBILT L. REV. 83 (2004) (arguing that the business judgment rule is best understood as a set of conditions that, if satisfied, guide the judges to refrain from reviewing business decisions for fiduciary violations); R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1339 (1993) ("In fact, the business judgment rule can be thought of as a statement of the circumstances (informed basis, good faith, honest belief) under which a court will not substitute its judgment for that of directors, either to hold them liable or to invalidate a transaction they have approved."); Julian Velasco, *Fiduciary Judgment Rules*, 62 WM. & MARY L. REV. 1397, 1414-21 (2021) (conceptualizing the business judgment rule as a shareholder protection mechanism).

172 For a comprehensive introduction and analysis of these approaches see Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287 (1994).

173 *See, e.g.*, Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 46 (Del. 1994).

174 *See Gevurtz supra* note 172, at 292 ("These courts and writers apply concepts of ordinary negligence to identify conduct that breaches the directors' duty of care.").

the business judgment rule is a doctrine that allows judges to avoid rather than engage in the review of business decisions (in the context of duty of care claims), unless the plaintiff rebuts the presumption of good faith.[175] Professor Eisenberg argues for a different conceptualization.[176] According to Eisenberg's theory, corporate law utilizes a divergence between standards of conduct and standard of review.[177] Standards of conduct tell parties how to act and standards of review tell judges how to decide cases.[178] To translate into criminal law and general legal theory vocabulary, corporate law employees "acoustic separation."[179] Building on the distinction between standards of review and standards of conduct, Eisenberg understands the business judgment rule to mean that if the director or officer made an active decision, that is reasonably informed, with subjective good faith, and without a financial interest in the subject matter of the decision, then the courts will review the business decision with deference and will only interfere if the decision was not "rational."[180] Another important conceptualization of the business judgment rule has been put forth by Professor Gevurtz.[181] Professor Gevurtz argues that we can either understand the business judgment rule as a mere tautology or as a misguided conduct rule.[182] According to Professor Gevurtz, the business judgment rule is a tautology if it is understood to mean that "directors are not liable for their decisions unless there is a reason to hold the directors liable" and it is a misguided conduct rule if it is understood to mean that directors and officers can escape liability unless their negligence is higher than the ordinary negligence imposed on other professionals (e.g., doctors and lawyers).[183]

Implicit in these debates is the assumption that if a rule articulates a set of actions, it is not a doctrine of scrutiny. But as my theory of substantive standards of review shows, this is a false assumption. Recall the frequent, yet thus far overlooked, use of scrutiny modifiers.[184] These doctrines bundle scrutiny-deference pairings in order to articulate conduct that would allow litigants to pre-select their desired standard of review.[185] In other words, we do have doctrines of review that articulate sets of actions. The two are not incompatible. Utilizing these insights, we can resolve the business judgment rule debates in a Solomonic fashion. It is best to understand the business judgment rule as two separate rules. First, the business judgment rule is often utilized

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[175] See *Bainbridge supra* note 171, at 87.
[176] *See Eisenberg supra* note 171.
[177] *Id.* at 438.
[178] *Id.*
[179] *See* Meir Dan-Cohen, *supra* note 34.
[180] *See* Eisenberg, *supra* note 171, at 441-42.
[181] *See* Gevurtz, *supra* note 172.
[182] *Id.* at 288.
[183] *Id.*
[184] *See supra* Section I.2.
[185] *Id.*

as a scrutiny modifier rather than as a standard of review. Courts use the business judgment rule in order to articulate conduct that paves a path for litigants to select their standard of review. This reflects the line of cases that says that if a director or officer was reasonably informed, acted in good faith, and without a conflict of interest, they would be reviewed under the business judgment rule, and if they were not, their actions would be reviewed under the entire fairness standard.[186] Second, the business judgment rule is utilized as an independent standard of review. This reflects the line of cases that promulgates the business judgment rule as a highly deferential standard of review that ends a dispute in the event of a negative review.[187] This understanding of the business judgment rule as both an independent standard of review and as a scrutiny modifier avoids the pitfalls of understanding this rule as a conduct rule, while at the same time maintaining its' conduct inducing nature. This conceptualization is also a more accurate reflection of case law. Not only does this understanding of the business judgment rule reflect the lines of cases above, we can also pinpoint an almost explicit recognition of this structure. Under the *Zapata* test, which is operable in the context of a special litigation committee's petition to dismiss a derivative suit, the Supreme Court of Delaware explained that judicial review should proceed in two distinct steps: first, a court should determine if the committee acted in accordance with the business judgment rule. Second, the court should exercise "its own business judgment."[188]

Normatively, this newly found understanding of the business judgment rule calls for the following recommendation. Courts should be clearer as to when they are using the business judgment rule as a standard of review and when they are using it as a scrutiny modifier. Lack of nomenclature is the likely culprit for the lack of doctrinal development in this area. Without our conception of a scrutiny modifier, judges were likely pressured to avoid an explicit recognition of the action inducting nature of the business judgment rule because, as the objections above demonstrate, a doctrine of review should not be a conduct rule defining the scope of the duties of care and loyalty.

Unpacking the business judgment rule, it is a two-headed bundling of all our scrutiny-deference parings. In its scrutiny modifier form, the business judgment rule articulates a mechanism for directors to pre-resolve action scrutiny by making their business decision in a certain manner. In its standard of review form, the business

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[186] This dual nature understanding of the business judgment rule is nearly explicitly adopted by the courts. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993), decision modified on reargument, 636 A.2d 956 (Del. 1994) ("The rule operates as both a procedural guide for litigants and a substantive rule of law." (citing Aronson v. Lewis, Del.Supr., 473 A.2d 805, 812 (1984))).

[187] *Id.*

[188] *See* discussion and sources cited in *supra* notes 129-131 and accompanying text.

judgment rule scrutinizes claims-of-fact and scienter with high degrees of epistemic and moral deference, respectively, and scrutinizes actions with the utmost institutional deference.

B. The Entire Fairness Standard

The entire fairness standard is a standard of review that the courts will use to evaluate claims of fiduciary duty violations by directors, officers and controlling shareholders, whenever the underlying business decision was made without good faith or in the face of a conflict of interest.[189] This standard requires courts to determine if the transaction represented "fair dealing and fair price." The phrase "fair dealing and fair price" is not to be understood as predicating two separate legal elements. Instead, "all aspects of the issue must be examined as a whole since the question is one of entire fairness."[190] Put formally, "fair dealing and fair price" is a hendiadys— a figure of speech "in which two terms separated by a conjunction work together as a single complex expression."[191] It is, at this point, unsurprising to the readers of this Article that a hendiadys also sits at the backdrop to constitutional standards of review of congressional actions: the hendiadys of "Necessary and Proper."[192] Indeed, the intuitive similarities between the entire fairness standard and strict scrutiny have surfaced to the written words of Delaware corporate law decisions.[193] Beyond that, the entire fairness standard was, until very recently, thought to be the strictest standard of review in corporate law.[194] It therefore astonished the Delaware Chancellors when the Supreme Court of Delaware held that directors can be found in breach of their fiduciary duties even if they pass entire fairness review.[195]

But this decision is not unexpected. Quite the opposite, a careful and precise recasting of the entire fairness standard in terms of the theory of substantive standards

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[189] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995).

[190] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

[191] Samuel L. Bray, *'Necessary AND Proper' and 'Cruel AND Unusual': Hendiadys in the Constitution*, 102 VIRGINIA LAW REVIEW 687, 688 (2016).

[192] *Id.* at 734.

[193] *See, e.g.*, *Solomon v. Armstrong*, 747 A.2d 1098, 1112 (Del. Ch. 1999), aff'd, 746 A.2d 277 (Del. 2000) ("sufficiently plead allegations of lack of care or disloyalty will invoke entire fairness's strict scrutiny") and *Golden Cycle, LLC v. Allan, CIV.A.* 16301, 1998 WL 276224, at *6 (Del. Ch. May 20, 1998) ("which would apply a standard of entire fairness or strict scrutiny").

[194] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022) ("[T]he court held that the Stock Sale satisfied the entire fairness standard. Having found that the Stock Sale satisfied Delaware's most rigorous standard of review, the court entered judgment in favor of the defendants and declined to reach Coster's alternative arguments under intermediate standards of review. On appeal, the Delaware Supreme Court adopted this court's post-trial factual findings but concluded that the court committed a category error by evaluating the Stock Sale under the entire fairness standard only.").

[195] *Id. See also* Olenik v. Lodzinski, 208 A.3d 704, 715 (Del. 2019) ("The most rigorous standard of review—entire fairness.").

of review advanced by this Article relieves this perplexation and tills this fresh doctrinal soil. When a court analyzes whether a transaction admits of fair dealing and price, they are investigating whether the transaction is a result of an appropriate process given the particular financial and transactional environment, whether the directors and officers executed this process in earnest, and whether the value given is roughly commensurate with the value taken.[196] To put precisely, a judge evaluating "fair dealing and fair price" is engaged in claim-of-fact and action scrutiny and low levels of epistemic and institutional deference, respectively. This is so as the main task of a judge evaluating the entire fairness of a transaction is evaluating the actions that brought about a given transaction, and the factual claims of the litigants regarding whether the available alternatives would or would not have brought about a sufficiently better or "fairer" value.[197]

Importantly, note that the entire fairness review does not alter or direct the judge's scienter scrutiny. This is the key to understanding why a director can violate their fiduciary duties even if they pass an entire fairness review. Absent a change to our default bundling of scrutiny and deference, the business judgment rule is the lay of the land.[198] This means, as explained above, that our scienter scrutiny remains coupled with strong moral deference.[199] Consequently, a judge evaluating a transaction under entire fairness has evaluated a transaction with strong moral deference, even if they have greatly reduced their epistemic and institutional deference. We can therefore see yet another clear illustration of why confusing degrees of scrutiny and types of scrutiny muddles our understanding of the law. Thinking only in terms of degrees of scrutiny would indeed lead to conclusions incompatible with the idea that a director can violate their fiduciary duties even if they pass an entire fairness review. Recognizing the scrutiny-deference pairings, however, immediately shows us that we have, in fact, not relaxed our moral deference. It thus becomes a natural conclusion that there will be instances in which evaluating the same transaction but with less moral deference would lead to a finding of breach. This is exactly the sort of judicial review that the Supreme Court of Delaware utilized when it held that there are situations in which entire fairness review would not be sufficient, and that a different review of the board's "motivations" is necessary.[200] The standard of review utilized to make this analysis, the new and

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196 *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 710-14 (Del. 1983) (providing a fair dealing and fair price analysis).

197 *Id.* at 712 ("[T]urning to the matter of price, plaintiff also challenges its fairness. His evidence was that on the date the merger was approved the stock was worth at least $26 per share.").

198 Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994) ("[U]nder normal circumstances . . . The business judgment rule embodies the deference to which such decisions are entitled.").

199 *See supra* Section I.A.3.

200 Coster v. UIP Companies, Inc., 255 A.3d 952, 959–60 (Del. 2021) ("[T]he court also held that its entire fairness analysis was the end of the road for judicial review . . . In our view, the court

refurbished *Blasius* test, is provided with its own Section below.[201]

Our theory of substantive standards of review also alleviates any qualms one might have regarding the finality, or lack thereof, of the entire fairness standard. Recall that the distinction between independent and auxiliary standards of review is one of degree.[202] Generally, the entire fairness standard would indeed act as an independent standard of review. A negative review under entire fairness will always be dipositive of a case, and a positive review under entire fairness will *almost* always be dispositive of a case.[203] But standards of review are, after all, merely bundles of scrutiny-deference pairings.[204] There will therefore be a subset of situations in which a positive entire fairness review would still need to be followed by a standard of review that delineates less moral deference.[205] The entire fairness standard thus remains very much an independent standard of review—on the balance of things.

C. Unocal

The *Unocal* standard of review is invoked in the context of hostile takeovers and the adoption of defensive measures to repeal such unwanted takeover attempts.[206] Hostile takeovers occur when the board of directors of a corporation that is subjected to a potential ownership takeover (the "target corporation") does not support the takeover attempt.[207] Boards of directors may take many different steps to deter or prevent takeovers they do not support.[208] For example, boards may adopt various contractual mechanisms that would render any successful takeover attempt financially imprudent.[209] The most famous of such contractual mechanisms are the various

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bypassed a different and necessary judicial review where . . . the court should have considered . . . that the board approved the Stock Sale for inequitable reasons, or in good faith but for the primary purpose of interfering with Coster's voting rights and leverage as an equal stockholder without a compelling reason to do so.").

[201] *See infra* Section II.E.

[202] *See* discussion and sources cited in *supra* notes 152-154.

[203] *See* discussion and sources cited in *supra* notes 189-195.

[204] *See supra* Part I.

[205] *See* discussion and sources cited in *supra* notes 191-195.

[206] Chesapeake Corp. v. Shore, 771 A.2d 293, 330 (Del. Ch. 2000).

[207] *Id.*

[208] On normative grounds, there are important and influential debates on whether the operability of these contractual mechanisms is desirable. *See, e.g.*, Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002); *see also* Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence & Policy*, 54 STAN. L. REV. 887 (2002) (providing empirical evidence that shareholders of target corporations are worse-off as a result of effective staggered boards).

[209] For helpful background information and comprehensive analysis of defensive measures see Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633 (2012).

iterations of the poison pill.[210] Flip-in poison pills, for illustration, deter would be acquirers by issuing other existing shareholders the right to purchase, at the event of a merger, additional stocks at a large discount.[211] This deters acquirers because it means that any value to be gained by the takeover will be diluted away.[212] When Delaware courts are reviewing such director actions, the *Unocal* standard of review is triggered.[213] *Unocal* operates in two steps. The first step unfolds in two prongs: First, "the board must establish: (1) that it had reasonable grounds to believe that the hostile bid for control threatened corporate policy and effectiveness; and (2) that the defensive measures adopted were reasonable in relation to the threat posed."[214] In order to meet the second prong, the board must establish that the defensive measure was neither coercive nor preclusive, and that it falls within the range of reasonableness.[215] The second step of *Unocal* review demands that a failure to meet *Unocal* review will be followed by an entire fairness review and that a successful review under *Unocal* will be followed by a business judgment rule review.[216]

It is this very linkage between *Unocal* on the one hand, and the business judgment rule and entire fairness standard on the other hand, that has been criticized in an important and influential article written by William Allen, Jack Jacobs, and Leo Strine, Jr., former Chancellor and Vice Chancellors of the Court of Chancery of the State of Delaware (and in the case of Jack Jacobs and Leo Strine, Jr. also former Justice and Chief Justice of the Delaware Supreme Court).[217] I respectfully disagree. Armed with our newly found understanding of "auxiliary standards of review," we are able to resurrect the normative prowess of *Unocal* and explain its durability.

Recall the benefits of utilizing an auxiliary standard of review in lieu of an independent standard of review only.[218] Auxiliary standards of review impose additional costs of adjudication, but they provide the benefit of a tool designed to resolve uncertainties regarding which independent standard of review to

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[210] For a comprehensive explanation of how poison pills operate, see Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 146-52 (2016).

[211] *Id.*

[212] *Id.*

[213] Chesapeake Corp. v. Shore, 771 A.2d 293, 330 (Del. Ch. 2000).

[214] Chesapeake Corp. v. Shore, 771 A.2d 293, 330 (Del. Ch. 2000) (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995), and Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 44–45 (Del. Ch.), *aff'd sub nom.* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998)).

[215] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

[216] *Id.* at 1377.

[217] William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law,* 26 DEL. J. CORP. L. 859, 883 (2001) ("But one aspect of the Unocal and Unitrin cases is problematic: their linkage of the intermediate scrutiny reasonableness review standard to both the business judgment and the entire fairness standards of review.").

[218] *See supra* Section II.B.1.

implement.[219] Board defensive measures in the hostile takeover context indeed bring about exactly the sort of borderline and uncertain cases that call for an auxiliary standard of review. When a director has to decide whether to support or object to a takeover attempt that would also threaten their position as a director, there is an "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[220] On the other hand, there is also a fear that the would-be acquirer is a deleterious interloper or an undesirable corporate raider.[221] In the words of Vice Chancellor J. Travis Laster "The resulting structural conflict muddies the waters for purposes of judicial review."[222] In other words, the hostile takeover context is one in which corporate law's twin pillars—shareholder primacy and director primacy—do battle.[223] Formally, this is a context in which the correct balance of agency and principal costs is unclear absent idiosyncratic analysis.[224] While these are cases in which we may want to reduce agency costs, the costs associated with the divergence of interest between the directors and the corporation, we are also conscious that tipping the scale too far would impose undue principal costs—the costs associated with ill-motivated or ill-informed shareholder exercises of power.[225] We therefore may have reasonable doubts regarding whether we want to scrutinize with high epistemic, moral, and institutional deference (bundled as the business judgment rule) or with low institutional and epistemic deference (utilizing the entire fairness standard).[226] The value of *Unocal* as an auxiliary standard of review thus resides in its ability to prescribe judges the right proportion of epistemic and institutional deference. This understanding of the *Unocal* standard provides the jurisprudential backdrop to the "proportionality" based understanding of intermediate standards of review advocated by Professor Gilson and Professor Kraakman,[227] by rejecting the requirement of decisive "functionality"[228] that some may

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[219] *Id.*

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

[221] Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting,* 132 YALE L.J. 411, 430 (2022) (describing the costs associated with such events).

[222] J. Travis Laster, *Revlon Is A Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 8 (2013).

[223] That is, it amounts to a focal point of debate between those who prioritize shareholder rights and those who prioritize the granting of managerial expertise.

[224] Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance,* 117 COLUM. L. REV. 767, 796-82 (2017).

[225] *Id. See also* Goshen & Steel, *supra* note 221 (arguing that often it is activist investors rather than corporate raiders that pose the greater risk to the value of the firm).

[226] *See supra* Section II.B.

[227] Ronald J. Gilson and Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 274 (1989) ("Our analysis of how an effective proportionality test might function demonstrates that the Delaware courts have room to carve out a workable intermediate standard of review.").

[228] William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law,* 56 BUS. LAW. 1287, 1297 (2001) ("[O]ur fundamental guidepost is an emphasis on functionality. To be functional, a standard of review should: (i) provide judges with a practical

impose on standards of review. The longevity of *Unocal* and its continuing applicability today bodes well with its usefulness as an auxiliary to the finding of the appropriate independent standard of review.

D. Revlon

The *Revlon* standard of review is triggered in the following three situations: 1. Inevitable sale, reorganization, or break-up of the company;[229] 2. "Where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company;"[230] and 3. When a merger or acquisition will induce a change of control that would not otherwise protect minority shareholders from controlling shareholders.[231] The keystone element triggering *Revlon* overlaps all of these three scenarios—the target's board is no longer fighting to ward off a sale or other fundamental change in the ownership structure. The board is considering and selecting one or more possible sales or fundamental changes. Once it is established that one of these fact patterns is present, we employ the *Revlon* standard of review.[232] The content of the *Revlon* standard of review, as shown below, is prima facially mysterious and perplexing. This Section utilizes our theory of substantive standards of review to provide a guide for eliminating these perplexations and to set the ground for adequate developments in *Revlon* and related doctrines.

To begin, *Revlon* implicates an "*obligation* to seek the best value reasonably available for the stockholders (emphasis added)."[233] This is baffling as, once again, a standard of review is not a standard of conduct. This part of *Revlon* review thus resembles the review-conduct issues plaguing business judgment rule jurisprudence.[234] Indeed, the Delaware courts have continuously referred to *Revlon* review as imposing a "*Revlon* duty" to find the best value available to the stockholders.[235] But directors and officers

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and logical framework to determine whether corporate directors have fulfilled their duties in a particular context and the appropriate remedies if they have not.").

229 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (describing the inevitable break-up of the company as a sufficient condition to trigger *Revlon* review).

230 Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989).

231 Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1994). These are situations in which a corporation did not have a controlling shareholder before the merger but will have a controlling shareholder after the merger, and there are no "devices protecting the minority stockholders." *Id.* at 42.

232 *Id.*

233 *Id.* at 46.

234 *See* discussion and sources cited in *supra* notes 171-173 and accompanying text.

235 J. Travis Laster, *Revlon Is A Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 25 (2013) (citing Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) and Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34, 44 (Del. 1993)).

only have the duties of care and loyalty,[236] and *Revlon* does not truly create a separate and independent duty out of thin air. As pointedly explained by Vice Chancellor Laster, *Revlon* changes "not the standard of conduct but the standard of review."[237] Elaborating further on *Revlon* qua standard of review, while the board of directors is charged with finding the best value, the court will still not interfere or second-guess a board's process for, or decision on, the best possible alternative available, so long as the board has adopted a reasonable process and decision.[238] The addling nature of *Revlon* is double edged. It is unclear, without more, how is *Revlon* different from *Unocal* on the one hand or the entire fairness standard on the other.

The solution advocated by Vice Chancellor Laster is to acknowledge that *Revlon* is not distinguishable from *Unocal.*[239] Per this approach, *Revlon* and *Unocal* are equivalent, and they sit between the business judgment rule and entire fairness. Succinctly, corporate standards of review ratchet-up from "gross negligence, to reasonableness, to fairness."[240] While there is strong caselaw-based evidence to support this approach, Vice Chancellor Laster himself admits that the law is unclear on this point.[241] Indeed, taking advantage of the arsenal created by the theory of substantive standards of review developed in this Article brings forward a better understanding of *Revlon*—both normatively and descriptively.

First, *Revlon* is easily distinguishable from *Unocal*. *Revlon* is an independent standard of review and *Unocal* is an auxiliary standard of review.[242] Both a positive and a negative review under *Revlon* are dipositive of a case, but neither a positive nor a negative review under *Unocal* are dispositive of a case.[243] There are also good reasons to keep the independent and auxiliary state of *Revlon* and *Unocal*, respectively. The normative part of Vice Chancellor Laster's argument that *Revlon* and *Unocal* should be collapsed into one builds on Professor Sean Griffith's important analysis of "last period problems" in negotiated acquisitions.[244] A last period analysis proceeds as follows: In order to determine whether directors and shareholders will likely collaborate with each other or cheat one another, we must

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[236] *See* Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[237] *See J.* Travis Laster, *supra* note 235, at 26.

[238] *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010).

[239] *See* J. Travis Laster, *supra* note 235, at 19 ("*Revlon* instead calls upon a court to determine whether the directors' decisions fell within a 'range of reasonableness'— precisely the same standard applied under *Unocal*. Neither decision imposes affirmative conduct obligations. Both applied an intermediate standard of review now recognized as enhanced scrutiny.").

[240] *Id.* at 27.

[241] *Id.* at 53-54.

[242] For a discussion of *Unocal* as an auxiliary standard of review, *see supra* Section II.C.

[243] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1377 (Del. 1995).

[244] *See* J. Travis Laster, *supra* note 235, at 15-18; Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1941-47 (2003).

investigate whether they are going to interact together for a roughly indefinite duration, for a certain and fixed number of times, or for the last time.[245] If the interactions between the directors and the shareholders are roughly indefinite, we have good reasons to believe that they would be able to cooperate effectively. When both directors and shareholders know that they have to live with each other for "a while," they will develop dominant strategies that enforce and reward cooperation.[246] For instance, they may adopt a "tit-for-tat" strategy, or, in other words, a strategy that rewards an eye for an eye and answers kindness with kindness.[247] If, however, the directors and shareholders are interacting for the last time, we can expect that neither one will want to act cooperatively, as there will no longer be an opportunity to respond to defection.[248] The same result may follow if the directors and shareholders are interacting for only a fixed number of times, as neither one will want to be the last to act cooperatively and they will each therefore reason back to non-cooperative strategies.[249] If we conceive of both hostile takeover scenarios and *Revlon* scenarios as a "final period," we may indeed be tempted to review both with an equal standard of review.[250] But while *Revlon* scenarios are certainly the final period (and that is true by definition[251]), defensive measures and hostile takeovers are not necessarily so. Quite the opposite, if the directors succeed in their protective efforts, the shareholders and the directors are to continue their interactions for a roughly indefinite duration. To be sure, hostile takeovers may be the final period if the acquisition is going to be successful. But for a judge to adopt a standard of review that presupposes a final period problem would be akin to putting the cart before the horse. This is why, as also explained above, the *Unocal* standard developed with the nuanced capacity of an auxiliary standard—a refinement that is both unnecessary and costly in *Revlon* scenarios.[252]

Separately, and secondly, *Revlon* is distinguishable from the entire fairness standard, but the first is not simply "less strict" than the second. Instead, we must look under the hood and compare the two standards of review by examining their scrutiny-

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[245] *See* Stein, *supra* note 153 at 21-23.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] This is a result of a debatable game theoretical phenomena known as "reverse induction." *See id.* at 22-23.

[250] *See* J. Travis Laster, *supra* note 235, at 15-18.

[251] That is so because *Revlon* is defined to be triggered only when a company break-up or fundamental change is inevitable.

[252] An important and related argument advocating for a uniformity in the application of "enhanced" or "intermediate" standards of review calls for application of either *Unocal*/*Revlon* on the buyer side of an acquisition. *See* Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443 (2019). The argument presented in this Section functions as an objection to this line of thinking as well: We should not review buy-side and sell-side boards of directors under similar standards. Buy-side boards are not acting under final period conditions.

deference pairings. As fully explained above, the entire fairness standard utilizes a holistic examination of "fair dealing and fair price."[253] This legal hendiadys alters our default dispositions of claim-of-fact and action scrutiny by decreasing the epistemic and institutional deference given to boards of directors.[254] In comparison, *Revlon*'s review is focused on whether the board sought the "best value," a review which is accompanied with the directive to not "second-guess" the board's method for achieving best value, or to otherwise not require any particular "blueprint" for seeking said value.[255] Untangling this *Revlon* standard, the court is seeking to establish a standard of review that has less institutional deference than the business judgment rule, but more institutional deference than the entire fairness standard. On this front, I agree with Vice Chancellor Laster's ordering of "gross negligence, to reasonableness, to fairness."[256] *Revlon* review will accept a litigant's chosen process for the selling of a company so long as it is reasonable as compared to the alternatives, and these are processes that may not be tolerated under a fairness review. But the same middle-of-the-road approach cannot be carried over to the claim-of-fact scrutiny and epistemic deference vertical. This is due to reasons stemming from both textualism and purposivism. From a textualist perspective, "best" is a higher threshold than "fair."[257] From a purposivist perspective, while we tolerate the inherent linguistic and analytical difficulties of referring to the *Revlon* standard of review as a "duty,"[258] this tolerance is not a license to ignore the wisdom and intentionality emanating from this word choice. This word choice is strong, and it indicates a desire to grant boards less epistemic deference when it comes to value. Importantly, however, it is worth noting that *Revlon* review does not completely eliminate epistemic deference with regards to value. In its origin, *Revlon* review seemed to require even less deference, as we can learn from its historical requirement of "best

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253 Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

254 *Id.*

255 Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) ("There is only one Revlon duty—to '[get] the best price for the stockholders at a sale of the company.' No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control. As we noted in Barkan v. Amsted Industries, Inc., 'there is no single blueprint that a board must follow to fulfill its duties.'" (citing Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989))).

256 *See* J. Travis Laster, *supra* note 235.

257 *Compare Best*, Merriam-Webster, https://www.merriam-webster.com/dictionary/best (Last visited Jan. 30, 2023) ("[E]xcelling all others."), *with Fair*, Merriam-Webster, https://www.merriam-webster.com/dictionary/fair (Last visited Jan. 30, 2023) ("[N]ot very good or not very bad; of average or acceptable quality.").

258 *See* discussion and sources cited in *supra* notes 233-238.

price,"[259] but the walk-back to "best value"[260] reinstated some tolerance for epistemic deference regarding the consideration received.

E. Blasius (and Schnell)

The latest standard of review to congeal and complete our quintet of judicial review is *Blasius*,[261] as articulated by the recent *Coster* decision.[262] Prior to presenting this standard of review, it is important to note that a June 2023 development in the *Coster* case has cast doubt as to whether *Blasius* will be treated as an independent standard of review after all.[263] The latest decision seems to indicate that the courts may treat *Blasius* as a mere variation of *Unocal*.[264] The following thus first discusses *Blasius* as an independent standard of review and then discusses its alignment with the *Unocal* standard. The *Blasius* standard of review unfolds in two steps. First, the court must determine if the directors interfered with an existing shareholder's voting or other statutory right due to the sole motivation of entrenching themselves.[265] If the answer to this first question, which represents an integration of the *Schnell* test,[266] is yes, it is a per se violation of the duty of loyalty.[267] If the answer is no—there are other motivations involved—the court must determine whether the board's "primary motivation" was to interfere with the existing shareholder's voting or other statutory rights.[268] If the answer to this question is yes, the board will only survive judicial review if it can demonstrate a "compelling justification" for its actions. Alternatively, if the answer to this question is no, the court will analyze the board's actions under the

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[259] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.").

[260] Flannery v. Genomic Health, Inc., CV 2020-0492-JRS, 2021 WL 3615540, at *22 (Del. Ch. Aug. 16, 2021) ("In the event Revlon applies, the Individual Defendants' fiduciary duties required them to act reasonably to obtain the best value reasonably available to stockholders.").

[261] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660-62 (Del. Ch. 1988).

[262] Coster v. UIP Companies, Inc., 255 A.3d 952, 961-63 (Del. 2021). The usage of the verb "articulate" is to avoid expressing an opinion whether the *Coster* decision restated or effectively amended the *Blasius* standard, which is outside the scope and interest of this Article. This Article is the first (or amongst the concurrent firsts) scholarly works to provide a fulsome analysis of the *Coster* decision, and we can expect that, by the time of publication, a disagreement will emerge regarding the novelty of the *Coster* decision.

[263] Coster v. UIP Cos., Inc., 163, 2022, 2023 WL 4239581, at *11-12 (Del. June 28, 2023) ("Unocal can also be applied with the sensitivity Blasius review brings . . . the court's review is situationally specific and is independent of other standards of review . . . Schnell and Blasius review, as a matter of precedent and practice, have been and can be folded into Unocal review . . ..").

[264] *Id.*

[265] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022).

[266] *Id.*

[267] *Id.*

[268] *Id.* at *10-11.

standard of review that would have applied absent the *Blasius* standard (i.e., the business judgment rule, entire fairness standard, *Unocal*, or *Revlon*).[269] Importantly, a finding that the board acted in good faith is neither dispositive on the primary purpose clause nor on the compelling justification clause.[270]

This development in Delaware's corporate standards of review raises many open and confusing questions. It is exactly in this context that Chancellor Kathaleen St. J. McCormick, delivering an opinion on remand from the Delaware Supreme Court, wrote "suffice to say, the struggle is real."[271] There are two main issues created by this articulation of the *Blasius* standard. The following demonstrates that utilizing the scrutiny framework suggested by this Article helps solve both of them.

First, it may appear wrong to create a standard of review that can find a director liable even if they pass entire fairness review.[272] This perplexity has already been alleviated above in Section II.B. Essentially, it is incorrect to use general references to levels of scrutiny and to hastily conclude that the entire fairness standard is "the strictest."[273] Instead, we look under the hood and accurately decipher the applicable scrutiny-deference pairings.[274] These are differences in kind rather than degree.[275] As we learned above, the entire fairness standard does not significantly alter the default scienter scrutiny and moral deference norm.[276] *Blasius* thus fills a gap and provides a doctrinal tool for the exercise of reduced moral deference by investigating the board's motivations and justifications with a discerning eye.[277]

Second, it is prima facially unclear how to distinguish *Blasius* and *Unocal*. The Delaware Supreme Court expressly did not address how the two standards fit together.[278] The Court of Chancery of Delaware explicitly stated that the connection

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[269] Coster v. UIP Companies, Inc., 255 A.3d 952, 962 (Del. 2021). *See also* MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003).

[270] Coster v. UIP Companies, Inc., 255 A.3d 952, 954 (Del. 2021).

[271] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022).

[272] *See supra* Section II.B.

[273] *Id.*

[274] *See supra* Part I.

[275] *Id.*

[276] *See supra* Section II.B.

[277] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022) ("The compelling-justification test has been described colorfully as calling for the court to view the directors' explanations with a gimlet eye." (citing Pell v. Kill, 135 A.3d 764, 787 (Del. Ch. 2016))).

[278] Coster v. UIP Companies, Inc., 255 A.3d 952, 963 (Del. 2021) ("Although Coster relied on this Court's decision in Liquid Audio, she did not argue that a Unocal analysis should follow after review under Blasius. Thus, we will not consider the impact of Unocal review on this case. We also decide this appeal on how the parties have framed it—a Schnell/Blasius review. Further, the

between the two is in need of clarification.[279] And, later, the Delaware Supreme Court seemed to indicate it would be better to fold the two standards together.[280] Before proposing a solution, it is worth lingering on why the border between the two standards appears blurry. Imagine, for illustration, that an investor has acquired 2% of company A. The board of directors is concerned that this share purchase might be a sign of things to come, but they are not yet certain. The following month, the same investor buys an additional 2% of the company. At this juncture, the board is fairly confident, but not certain, that a takeover attempt is forthcoming. The board thus decides to ward-off this investor by adopting advanced notice bylaws—bylaws designed to impose onerous procedural requirements on shareholders attempting to nominate and replace directors.[281] A court scrutinizing this board decision may, on the one hand, treat this scenario as an adoption of an antitakeover measure demanding *Unocal* review. On the other hand, a court may review this board decision as an attempt to run interference with an existing shareholder's voting right—a scenario warranting *Blasius* review. When placed in a similar situation, the Court of Chancery has side stepped the issue by stating that "enhanced scrutiny" applies, "whether labeled as *Unocal* or *Blasius*."[282] But at the same time, the same opinion also cited the *Chesapeake* opinion for the proposition that "in reality, invocation of the *Blasius* standard of review usually signals that the court will invalidate the board action under examination. Failure to invoke *Blasius* typically indicates that the board action survived (or will survive) review under *Unocal*."[283] It is therefore both imperative and outcome determinative to continue the "project suggested by Mercier v. Inter-Tel (Del.), Inc., where then-Vice Chancellor Strine urged that the *Blasius* and *Unocal* standards be brought 'together in a workable manner.'"[284] The scrutinies framework suggested by this article provides exactly that. First, building on *Unocal's*

parties have not asked us to revisit how Schnell/Blasius and Unocal should fit together in future cases.").

279 Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022) ("Perhaps this movement will further inspire renewed interest in the project suggested by Mercier v. Inter-Tel (Del.), Inc., where then-Vice Chancellor Strine urged that the Blasius and Unocal standards be brought 'together in a workable manner.' 929 A.2d 786, 809 (Del. Ch. 2007). There, the Vice Chancellor lamented 'the widely known reality that our law has struggled to define with certainty the standard of review this court should use to evaluate director action affecting the conduct of corporate elections.'").

280 Coster v. UIP Cos., Inc., 163, 2022, 2023 WL 4239581, at *11-12 (Del. June 28, 2023).

281 As recently noted by Professor Lawrence A. Cunningham, advance notice bylaws are "the hottest front in the takeover battles." *See https://corpgov.law.harvard.edu/2022/10/23/the-hottest-front-in-the-takeover-battles-advance-notice-bylaws/.*

282 Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc., CV 2021-1089-LWW, 2022 WL 453607, at *15 (Del. Ch. Feb. 14, 2022).

283 *Id.* at *14 (citing *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000)).

284 Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022).

function as an auxiliary standard of review,[285] we should expand the result of a negative *Unocal* finding as follows: A negative *Unocal* finding warrants either entire fairness review or *Blasius* review, depending on whether the court should be diminishing its epistemological and institutional deference or its moral deference, respectively. Interference with voting or other statutory rights (such as the books and records inspection right), would warrant a transition to *Blasius* and interested acquisition transactions would warrant a transition to the entire fairness standard. Second, we should treat *Blasius* as an independent standard of review. Both a positive and a negative *Blasius* finding should be dispositive of a case. This will avoid the creation of circularity or doubling-up of auxiliary standards where *Unocal* points to the business judgment rule, the entire fairness standard, or *Blasius* and *Blasius* subsequently points back to the same. As part of this improvement, the so-called *Schnell* test[286] can be formally collapsed into one inquiry: Was the primary motivation of the board to interfere with an existing shareholder's voting or other statutory right, and if so, did it have a compelling justification? It is, at any rate, impracticable, and really, analytically impossible, to imagine scenarios where the board's sole motivation was to interfere with a shareholder's voting or other statutory right and yet have a compelling justification to do so.

The scrutiny framework suggested by this Article thus generates profound and systematic improvements to the quintet of judicial review governing fiduciary duties. These improvements are both normatively necessary and doctrinally rooted. Therefore, analyzing the quintet of judicial review through the lens of this new scrutiny framework also provides enormous predictive and explanatory advantages. As this Part II showed, these normative and descriptive rewards run the gamut from the aged business judgment rule to the adolescent *Blasius* review. The following Part completes this project by analyzing and suggesting improvements to corporate law's scrutiny modifiers.

III. Scrutiny Modifiers in Corporate Law

Corporate law supplements its quintet of judicial review with two categories of scrutiny modifiers: those governing directors and officers and those governing controlling shareholders. Together with the scrutiny modifier that was unearthed in the above discussion of the business judgment rule,[287] judicial review of fiduciary duties utilizes three separate doctrines that allow litigants to pre-select the applicable standard of review. This Section explains and provides recommendations for the improvement of both of these additional scrutiny modifiers.

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[285] *See supra* Section II.C.

[286] Coster v. UIP Companies, Inc., No. 2018-0440-KSJM, 2022 WL 1299127, at *8 (Del. Ch. May 2, 2022).

[287] *See supra* Section II.A.

A. Director & Officer Cases

When directors and officers plan to enter into transactions that, upon a fiduciary duty lawsuit, they suspect will likely be reviewed under the entire fairness standard, they may utilize a procedure to secure a business judgment rule review.[288] They may do so by either acquiring approval of a majority of fully informed and disinterested directors or by acquiring approval of fully informed and disinterested shareholders.[289] Additionally, as was confirmed in the *Corwin* decision, such approvals will also bring under the fold of the business judgment rule any transactions that would have otherwise been subject to either a *Revlon* or *Unocal* review.[290] There is also precedent holding that these approvals will equally ratify transactions that would have been subject to *Blasius* review,[291] but these decisions have come before the articulation of *Blasius* in the *Coster* decision.[292] Reviewing this doctrine through the scrutinies framework developed in this Article, we are, first, able to identify this doctrine as a particularized use of a scrutiny modifier, and, secondly, able to raise serious objections to the use of this ratification doctrine in the *Blasius* context.

This ratification or cleansing doctrine is a scrutiny modifier because it allows directors and officers to pre-select a standard of review. In other words, the courts have prescribed a set of actions—the two approval avenues—that would allow the directors and officers to choose a business judgment rule review.[293] It is important to identify this doctrine as a scrutiny modifier. This is so as it allows us to understand that the courts have not imposed any new duties or obligations on directors, nor have they modified their standards of review. Instead, the courts have articulated a set of actions that allows them to pre-resolve matters of action scrutiny and institutional deference.[294]

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[288] Marciano v. Nakash, 535 A.2d 400, 405 (Del. 1987) ("On the other hand, approval by fully-informed disinterested directors under section 144(a)(1), or disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule.").

[289] *Id.*

[290] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-13 (Del. 2015).

[291] Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996) ("Williams begins her attack on the grant of summary judgment by questioning the trial court's choice of the "more lenient standard of Unocal" to review the Board's actions, rather than the "heightened standard of scrutiny" used in Blasius Industries v. Atlas Corp., Del.Ch., 564 A.2d 651 (1988). We hold that neither standard is implicated here because there was no unilateral board action. Here, there was stockholder approval of the Amendment."); *Stroud v. Grace*, 606 A.2d 75, 92 (Del. 1992).

[292] *See supra* Section II.E.

[293] *See supra* Section I.B.2.

[294] *See* Marciano v. Nakash, 535 A.2d 400, 405-06 (Del. 1987).

There are objections to this doctrine.[295] These objections raise various arguments regarding the economics and impact of such a doctrine.[296] While these objections may or may not be correct, it is also important to ask a preliminary question: Is this use of scrutiny modifier at least internally consistent with Delaware's quintet of judicial review?

As to the entire fairness, *Unocal*, and *Revlon* doctrines, the answer is yes, but as to the *Blasius* doctrine, the answer is no. To understand why, recall our unpacking of the various standards of review.[297] Common to the entire fairness standard and both the *Unocal* and *Revlon* standards of review is the fact that they comprise of various bundles of claim-of-fact and action scrutiny on the one hand, and epistemological and institutional deference on the other.[298] Since scrutiny modifiers prescribe and pre-resolve matters concerning action scrutiny, it is at least conceivable that utilizing such a doctrine can alter the applicability of these standards of review. This also translates into practical terms: informed and disinterested votes of either the institute of managers and/or investors ought to be given deference. But *Blasius* operates differently: it is concerned with scienter scrutiny and moral deference.[299] It therefore does not make internal structural sense to utilize a scrutiny modifier to ratify away its applicability. Again, translating into practical terms: we have no reason to think that other directors or shareholders are better than the courts at discerning amongst mental states of culpability.[300] This also bodes well with the holding that *Blasius* may sometimes be applicable even after entire fairness review.

While the afore *Corwin* doctrine is the most direct and intuitive example of a director and officer scrutiny modifier, it is likely not the only one. *Caremark* and the "duty to monitor" progeny of cases provide another candidate, albeit a muddied one.[301] As a

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[295] *See, e.g.*, Itai Fiegenbaum, *Taking Corwin Seriously*, 26 LEWIS & CLARK L. REV. 791 (2022) (raising strong objections to this doctrine in the friendly takeover context).

[296] *Id.*

[297] *See supra* Part II.

[298] *Id.*

[299] *See supra* Section II.E.

[300] *Id.*

[301] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) ("In order to show that the Caremark directors breached their duty of care by failing adequately to control Caremark's employees, plaintiffs would have to show either (1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of"); Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) ("[T]he Caremark standard for so-called 'oversight' liability draws heavily upon the concept of director failure to act in good faith."); Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019) ("Under Caremark and this Court's opinion in Stone v. Ritter, directors have a duty 'to exercise oversight' and to monitor the corporation's operational viability, legal compliance, and financial performance."); In re Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL

starting point, it is important to note that the so-called "duty to monitor" is not an independent duty.[302] There are only two fiduciary duties: the duty of care and the duty of loyalty (which itself encompasses the duty of good faith).[303] In the *Caremark* decision itself, monitoring cases were held to be cases in which the board either failed to install information, reporting, and other monitoring systems or cases in which the board did install such systems but failed to operate or respond to them adequately.[304] Either way, monitoring cases were understood, at least arguably, as duty of care claims, which require the scienter of gross negligence.[305] Subsequent cases changed that. Monitoring cases are now understood as duty of loyalty cases.[306] The impact of this "monitoring slide" is both twofold and cuts in opposite directions. First, the scienter requirement for monitoring cases is, consequently, conscious disregard or higher.[307] This makes proving monitoring cases harder, but not impossible,[308] to prove in court. Second, monitoring cases are no longer exculpable offenses. This is because duty of loyalty violations (except for certain corporate opportunity violations)[309] are not exculpable, but duty of care violations are generally exculpable.[310] In addition, this doctrinal slide created the possible interpretation that while monitoring cases are clearly fully ensconced within the duty of loyalty, "red flag" cases could also be brought under the duty of care.[311] As understood by many until January 2023, red flag

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4059934, at *26 (Del. Ch. Sept. 7, 2021) ("Our Supreme Court's recent decision in Marchand addressed the contours of a Caremark prong one claim when the company is operating in the shadow of 'essential and mission critical' regulatory compliance risk.").

302 Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1377 (Del. 1995).

303 *Id.*

304 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

305 *Id.* at 971-72.

306 Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006) ("[T]he Caremark standard for so-called 'oversight' liability draws heavily upon the concept of director failure to act in good faith."); Marchand v. Barnhill, 212 A.3d 805, 809 (Del. 2019).

307 *Id.*

308 For instance, law firms noted an upward trend in successful *Caremark* claims in 2021. *See* Edward B. Micheletti & Ryan M. Lindsay, *The Risk of Overlooking Oversight: Recent Caremark Decisions from the Court of Chancery Indicate Closer Judicial Scrutiny and Potential Increased Traction for Oversight Claims,* Skadden (Dec. 15 2021), *https://www.skadden.com/insights/publications/2021/12/insights-the-delaware-edition/the-risk-of-overlooking-oversight.*

309 *See* DEL. CODE. ANN. tit. 8., §102(b)(7) (2022) ("[S]uch provision shall not eliminate or limit the liability of: (i) A director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders"); DEL. CODE. ANN. tit. 8., §112(17) (2022) ("Every corporation created under this chapter shall have power to . . . Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders.").

310 DEL. CODE. ANN. tit. 8., §102(b)(7) (2022).

311 Oklahoma Firefighters Pension & Ret. Sys. v. Corbat, No. 12151-VCG, 2017 WL 6452240, at *1 (Del. Ch. Dec. 18, 2017) ("[W]here the directors are informed of potential unlawful acts in a way

cases are situations in which a director or officer saw or should have seen a sufficiently glaring issue, but, with gross negligence, chose to disregard it.[312] This interpretation of the law is no longer possible, as a recent case held that red flag cases too must be brought under the duty of loyalty only (that is, these cases require the scienter of bad faith or more).[313] The act of distinguishing monitoring and red flag cases is as analytically dubious as it is practically challenging. Suffice it to say, generally, that red flag cases capture "springing" obligations –those obligations that are triggered by the existence of a red flag,[314] whereas monitoring cases capture failures to actively establish monitoring systems that would target "mission critical" elements of the relevant business.[315] Fact patterns that would fall somewhere in between include acts of ignoring red flags raised by a monitoring system, or ignoring red flags that point to a fault in the monitoring systems. The task of explaining the "monitoring slide" thus requires both an explanation of the original duty-bifurcation of monitoring and red flag cases, and an explanation of the January 2023 cancelation thereof.

The original doctrinal movement can be partly explained by the scrutiny modifier concept. The Delaware courts were attempting to capture the notion that if a director were to put a monitoring system in place, they would be willing to be more deferential. This is evident by the disparate treatment of monitoring and red flag cases and is the mirror image of the "springing" distinction. Put simply, if a director were to take on the action of installing a monitoring system, they were able to preselect conscious disregard rather than gross negligence as the minimum scienter requirement.[316] But notice that this goal was sought in an irregular manner. Instead of changing the scrutiny-deference pairings, or the particular levels of any scrutiny or deference type, the courts decided to change the applicable fiduciary duty from the duty of care to the duty of loyalty.[317] This was not necessary. For instance, the courts could have carefully examined their standards of review and simply held that they

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that puts them on notice of systematic wrongdoing, and nonetheless they act in a manner that demonstrates a reckless indifference toward the interests of the company, they may be liable for breach of the duty of care.").

312 *Id.*

313 *In Re* McDonald's Corporation Stockholder Derivative Litigation, 2021-0324-JTL, 2023 WL 407668, at *27 (Del. Ch. Jan. 26, 2023) ("Pleading red flags is not enough. The plaintiffs also must plead facts supporting an inference that Fairhurst acted in bad faith by consciously ignoring red flags.").

314 Andrew D. Appleby & Matthew D. Montaigne, *Three's Company: Stone v. Ritter and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad",* 62 ARK. L. REV. 431, 438 (2009).

315 *In re* Boeing Co. Derivative Litig., No. 2019-0907-MTZ, 2021 WL 4059934, at *26 (Del. Ch. Sept. 7, 2021). A recent decision articulated these fact patterns as the two "prongs" of the *Caremark* doctrine, but, curiously, did not continue to use the "mission critical" language. *See In Re* McDonald's Corporation Stockholder Derivative Litigation, *supra* note 313, at *10.

316 *See* Micheletti & Lindsay, *supra* note 308.

317 *Id.*

would exercise more scienter deference in their evaluation of monitoring cases. One possible explanation for this judicial maneuver was that the court wanted to balance the increased burden of persuasion with the making of monitoring violations non-exculpable.[318] Another possible explanation is due to a lack of judicial technology. It is very plausible, although admittedly not certain, that the courts would have used the scrutiny modifier and scienter deference route, if these tools were in existence at the time. This seems to capture the courts' desire to be more deferential in monitoring cases, and it accomplishes this goal without interfering with the delineation of the fiduciary duties themselves. At any rate, this would have been a highly questionable use of a scrutiny modifier, as scrutiny modifiers relieve action scrutiny and not scienter scrutiny. This analysis, however, runs counter to the most recent development in this long and unpredictable line of cases: It is now confirmed that Delaware will no longer require a different standard of scienter in red flag cases.[319] On the one hand, it is possible that the Delaware Court of Chancery is self-correcting and is choosing to stop injecting its uses of deference into its analysis of the relevant duty. If this is true, while red flag cases will be brought under the duty of loyalty, the courts might still exercise less moral deference than in other monitoring cases. On the other hand, it is possible that the Delaware Court of Chancery is simply not willing to be less deferential even when a monitoring system is not put in place. As this decision was adopted at the end of January 2023, as of the time of writing this Article, it is yet too early to tell how subsequent cases will choose to internalize this doctrinal development.

The interjection and altering of the duty elements themselves, rather than the review doctrines, is not an isolated incident. Recall, similar issues were discussed in the context of both the business judgment rule and the *Revlon* "duties."[320] Borrowing from the literature analyzing similar phenomena in the domain of torts, we may denote this maneuvering as a "dutification." In our context, these are instances in which the courts are attempting to accomplish their desired changes to the applicable review doctrines by shifting the discussion to the duty element. This is problematic because it conflates doctrines of review and standards of conduct. To be sure, it is conceivable that sometimes the courts may want to purposely and strategically introduce ambiguities between duties and standards of review.[321] This is the case in situations in which we think that such ambiguities could lead to a fine balancing between incentive structures and the fairness of judicial decisions.[322] But these

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318 *See supra* notes 309-310 and accompanying text.

319 *In Re* McDonald's Corporation Stockholder Derivative Litigation, 2021-0324-JTL, 2023 WL 407668, at *27 (Del. Ch. Jan. 26, 2023).

320 *See supra* Sections II.A. and II.D for the relevant business judgment rule and *Revlon* discussion, respectively.

321 *See Meir Dan-Cohen supra* note 34.

322 *Id.*

situations are the exception rather than the norm.[323] Therefore, another upshot of understanding the use of scrutiny modifiers in the context of director and officer cases is the ability to avoid corporate law's dutification problem. In particular, it provides us with a better understanding of the *Caremark* doctrine, and it provides a recommendation for its future development.

Building on the insights learned from this analysis of director & officer scrutiny modifiers, the following Section transitions to addressing controlling shareholder scrutiny modifiers.

B. Controlling Shareholder Cases

Controlling shareholders are subject to fiduciary duties,[324] and when they engage in a conflicted merger or other transaction that implicates those duties, they are generally subject to the entire fairness standard.[325] But controlling shareholders too may pre-select business judgment rule review. They may do so by satisfying the six elements of the *MFW* doctrine: "(i) the controller condition[ed] the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee [was] independent; (iii) the Special Committee [was] empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee [met] its duty of care in negotiating a fair price; (v) the vote of the minority [was] informed; and (vi) there [was] no coercion of the minority."[326] Importantly, these elements must be met before any "substantive economic negotiations begin."[327] In addition, a controlling shareholder may select to remain subject to the entire fairness review, but to shift the burden of persuasion to the plaintiff. They can do by receiving the appropriate approval by either the special committee of the board of directors, or the non-controlling shareholders, but not both.[328]

In comparing this scrutiny modifier to the scrutiny modifier concerning directors and officers, the most obvious and impactful difference is that while directors and officer can simply obtain the approval of either disinterested directors or disinterested shareholders, a controlling shareholder needs the approval of both, or else they

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[323] *Id.*

[324] Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994).

[325] *Id.* at 1115.

[326] Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc., 2021-1030-PAF, 2022 WL 17986515, at *11 (Del. Ch. Dec. 29, 2022) (citing Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014), overruled on other grounds by Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018)).

[327] *Id.* (citing Flood v. Synutra Int'l, Inc., 195 A.3d 754, 763 (Del. 2018)).

[328] Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1240–41 (Del. 2012).

would only be able to shift the burden of persuasion.[329] At least on first glance, it is unclear why the controlling shareholder scrutiny modifier is stricter than the director and officer scrutiny modifier.[330] Examining this question through the lens of the scrutinies framework suggested by this Article reveals a strong justification, and a call for a revision, of this scrutiny modifier doctrine.

When entire fairness review applies, it may be tempting to think that it is the same standard of review in both director and officer cases and controlling shareholder cases. After all, it goes by the same name. But as explained above, entire fairness is merely a bundle of scrutiny and deference pairings.[331] This bundle alters our claim-of-fact and action scrutiny and leans on low epistemic and institutional deference, respectively.[332] Once we have zoomed into the grant of epistemic and institutional deference, we can see that epistemic and institutional deference to shareholders is necessarily different from the deference to directors and officers. They are each a different institution, and they therefore each know different things. Returning to first principles, shareholders are the owners or residual claimants of the corporation, and directors have the obligation, and statutory right, to manage the corporation.[333] Thereby, the granting of epistemic and institutional deference to directors and officers stems from our recognition of their expertise in running a business, but the granting of epistemic and institutional difference to shareholders either stems from our ideals of commercial autonomy (we do not want to second-guess owners about what is good for their own business) or from our desire to facilitate a robust capital market, or both.[334] Recall, when we utilize a scrutiny modifier, we pre-resolve matters concerning action scrutiny and are therefore able to exercise strong institutional deference.[335] But since shareholders are not experts in running a business, the resolution of action scrutiny will only take you so far. We still have to account for our disposition towards epistemic deference. Unlike in the case of directors and officers, shareholders generally lack expertise,[336] and so the resolution of action scrutiny alone would not be a sufficient basis for maximizing all of our deference types. It is

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[329] *Cf.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-13 (Del. 2015)*, and* Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc., 2021-1030-PAF, 2022 WL 17986515, at *11 (Del. Ch. Dec. 29, 2022).

[330] In other words, on first glance, it is unclear why agency costs are treated as less harmful than controller principal costs.

[331] *See supra* Section II.B.

[332] *Id.*

[333] DEL. CODE. ANN. tit. 8., §141(a) (2022) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

[334] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 302 (6th ed., 2003); *see also* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[335] *See supra* Section I.B.2.

[336] *See* Goshen & Squire, *supra* note 224, at 786-88.

therefore not surprising that we would be more stringent in our requirements before we transition down to the business judgment rule.

The *MFW* doctrine, however, also adds a surprising element: the requirement of a showing that the special committee of directors met its duty of care when negotiating a fair price.[337] This addition seems superlative. If the scrutiny modifier resolved matters of action scrutiny, and in addition there is a need to prove that the duty of care was met through fair price, what is even left to scrutinize after all the requirements of the *MFW* doctrine are met? The Supreme Court of Delaware addressed this very issue when it held that this condition is met so long as "the Special Committee employed qualified legal and financial advisors and *indisputably* engaged in a deliberative process that *cannot rationally be characterized* as grossly negligent (emphasis added)."[338] The Court thus seems to want to avoid the obvious mistake of importing entire fairness scrutiny into the *MFW* scrutiny modifier.[339] To do so would be a mistake because it would mean that this doctrine tautologically states that a controlling shareholder can avoid entire fairness review by meeting entire fairness review. As succinctly stated by former Chief Justice Strine:

> But the entire point of the MFW standard is to recognize the utility to stockholders of replicating the two key protections that exist in a third-party merger: an independent negotiating agent whose work is subject to stockholder approval. If that standard injects the reviewing court into an examination of whether the Special Committee's good faith efforts were not up to the court's own sense of business effectiveness, the standard is without the very utility it was designed to accomplish, motions to dismiss will not be able to be granted, and controllers will therefore have no incentive to use the approach most favorable to minority stockholders.[340]

Delaware courts thus attempted to resolve this cannibalizing feature of the *MFW* doctrine by clarifying that the focus will be in the duty of care and gross negligence and not on fair price.[341] But this purported solution only shifts the problem from one end to the other. Focusing on the analytical structure of the *MFW* doctrine as a scrutiny modifier reveals why. The function, form, and purpose of a scrutiny modifier is to allow litigants to act in a manner that will allow them to pre-select a standard of review. In this case, the *MFW* doctrine is designed to allow controlling shareholders to modify their actions in order to select between the entire fairness standard and the

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[337] Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc., 2021-1030-PAF, 2022 WL 17986515, at *11 (Del. Ch. Dec. 29, 2022).

[338] Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756–57 (Del. 2018) (The Court added, "[t]o lard on to the due care review a substantive review of the economic fairness of the deal approved by a Special Committee, as the plaintiff advocates, is to import improperly into a due care analysis the type of scrutiny used in entire fairness review and in appraisal cases.").

[339] *Id.*

[340] *Id.* at 766-67.

[341] *Id.*

business judgment rule. It was therefore a relieving clarification to find out that this scrutiny modifier did not self-defeat by internalizing the entire fairness standard.[342] But to internalize the business judgment rule would be just as self-defeating. It would mean that this doctrine potentially applies the business judgment rule twice. First, the controlling shareholder would have to get the two preapprovals and prove a no duty of care violation via the business judgment rule, and second, if the controlling shareholder was successful on the first inquiry, the court will have to again scrutinize with the business judgment rule. This issue is all the more confounded by the fact that the court seems to be adding an enhanced burden of persuasion when it requires that the business judgment rule would be met "indisputably" and that "it cannot rationally be recognized" otherwise.[343] The *MFW* doctrine would thus be better served if the requirement that "the Special Committee [met] its duty of care in negotiating a fair price"[344] was wholesale eliminated. Understanding *MFW* as a scrutiny modifier shows that reinterpreting this requirement as requiring the business judgment rule rather than the entire fairness standard misses the point and simply relocates the problem.

The scrutiny framework suggested by this Article thus informs and improves corporate law's scrutiny modifiers. This Part showed that, by analyzing corporate law's quintet of judicial review and scrutiny modifiers through the lens of the new theory of substantive standards of review, we are able to understand the law better than before, as well as improve some of the most important and stubborn issues we encounter. This contribution is not only essential in and of itself, it also serves to substantiate the truth and importance of the novel theory developed by this Article.

Conclusion

The current understanding and practice of scrutiny, deference, and standards of review is in disarray, and this is by admission of the very judges that formulate and utilize these doctrines. This Article developed a systematic and cross-doctrinal solution to this problem. Our tradition of judicial review is deeply rooted in our constitutional, administrative, and corporate praxes. Yet these praxes grew separate, only leaving room for occasional learning by osmosis. Comprehensively accounting for the wisdom and drawbacks of each facilitated the novel theory of substantive standards of review proposed by this Article.

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[342] *Id.*

[343] Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756–57 (Del. 2018).

[344] *Id.*