Networks of Heightened Scrutiny in Corporate Law

Reza Dibadj

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Networks of Heightened Scrutiny in Corporate Law

REZA DIBADJ*

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I. INTRODUCTION

This Article is a follow-up to a previous article, Networks of Fairness Review in Corporate Law (Fairness). After an overview of the fundamentals of the fairness standard and network theory, Fairness deployed network and statistical analyses to conduct an empirical study of the fairness doctrine as articulated by the Delaware Supreme Court and the Delaware Court of Chancery. It sought to address three questions: (1) whether the

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2. The Delaware Court of Chancery is the court of first instance for corporate matters. See Welcome to the Delaware Court of Chancery, http://courts.delaware.gov/Courts/ Court%20of%20Chancery/ (last visited Feb. 6, 2009). Delaware, of course, is the leading
putatively shareholder-friendly fairness standard actually helped plaintiffs; (2) whether the different articulations of the fairness standard—“entire fairness,” “intrinsic fairness,” and “inherent fairness”—reflect articulable differences; and (3) whether fairness cases exhibit a network topology where a disproportionately small number of cases (“hubs”) garner a disproportionately large number of citations. With respect to these three questions, *Fairness* concluded that: (1) In more than half of the cases, supposedly plaintiff-friendly precedent was interpreted in a defendant-friendly manner; (2) the jurisprudence is not precise enough to inform different standards of fairness; and (3) fairness case law exhibits a highly skewed distribution.

This initial analysis focused on the fairness standard for one principal reason: It is considered to be the most plaintiff-friendly standard of review, in marked distinction to the well-known business judgment rule (BJR) where the defendant is virtually guaranteed to win. But there are also four other prominent standards of heightened scrutiny in Delaware jurisprudence, each of which purports to protect plaintiffs beyond the BJR: *Unocal/Unitrin*, with respect to defensive measures in the face of change-in-control transactions; *Revlon*, in the context of auctioning a change-in-control; *Blasius*, where the shareholder franchise might have been violated; and the *Zapata* “two-step,” which sometimes requires a court to exercise its business judgment in the context of pre-suit demand. Despite the intuition of commentators that such standards get watered down, these standards had yet to be explored in a systematic fashion.


5. See id. at 26–28.

6. The BJR presumes that “in making a business decision the directors of a corporation acted on an informed basis . . . and in the honest belief that the action taken was in the best interests of the company.” Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

7. There is one prominent case where the Delaware Supreme Court found directors to have violated the BJR. See Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985).


12. See, e.g., Sean J. Griffith, *Daedalean Tinkering*, 104 Mich. L. Rev. 1247, 1262 (2006) (“Unocal was slowly eroded through lax application. *Revlon* was narrowed.”); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. Cal. L. Rev. 1189, 1204 (2002) (“Subsequent Delaware cases have dramatically reduced *Revlon*’s significance by making clear that if the directors of the firm decide not to sell, or if they prefer a stock-for-stock exchange with another public firm, *Revlon* is irrelevant.”).
Building on the work in *Fairness*, this Article seeks to perform a network analysis of these heightened standards of review. The discussion is structured into three principal sections. Part II outlines what these standards of review are and what they purport to do. Part III describes the empirical methods used—from data gathering to analysis to the display of results. It culminates in four network maps, one for each standard. Finally, Part IV considers the implications of the analysis with a focus on whether these heightened standards offer more than rhetorical solace to shareholder-plaintiffs.

**II. STANDARDS OF HEIGHTENED SCRUTINY**

State corporation codes, notably the Delaware General Corporation Law (DGCL), consist largely of default provisions. They are “enabling” statutes. As a consequence, much of the mandatory content of corporate law is articulated through courts expounding upon the fiduciary duties that corporate insiders have toward shareholders. As one Delaware jurist put it, “The ‘flesh and blood’ of corporate law is judge-made. It is the common law formulation of principles of fiduciary duties articulated on a case-by-case basis.” Judges analyze fiduciary duties using various standards of review; after all, a “judicial standard of review is a value-laden analytical instrument that . . . describes the task a court performs in determining whether action by corporate directors violated their fiduciary duty.” In theory, the stricter the standard, the more likely a

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13. See, e.g., Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL’Y 212, 216 (2005) (“State corporate law is in essence enabling, following a menu approach that permits firms to alter statutory defaults to fit their needs.”).


court should question the behavior of the defendant-insiders and find for plaintiff-shareholders. 17

The strictness of standards of review is bounded at one end by the BJR and at the other end by fairness. The BJR is not an interesting standard of review upon which to conduct an empirical analysis of case outcomes for the simple reason that defendants are virtually guaranteed to win. 18

The other extreme is fairness analysis—variously called “inherent fairness,” “intrinsic fairness,” or most commonly “entire fairness.” 19 While one might expect decisions that recognize fairness analysis to be friendly to plaintiffs, the empirical analysis in Fairness suggests that in the majority of cases where the fairness standards were discussed, the standard ended up not helping plaintiffs—either because the standard was deemed met by the defendants or because the standard was held inapplicable in the particular factual situation. 20

But beyond BJR and fairness, what about other standards of review? Between these two poles remain four other standards of heightened scrutiny, as embodied in five seminal Delaware cases: Unocal/Unitrin, Revlon, Blasius, and Zapata. Though well familiar to students of corporate law, the standard articulated in each case is nonetheless worth a brief explanation.

The Unocal/Unitrin standard focuses on what standard of review should apply to determine whether the actions of an incumbent board to ward off an insurgent’s attempted takeover pass judicial muster. 21 Noting the “omnipresent specter that a board may be acting primarily in

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17. See id. at 869 (“[S]tandards of review reflect significant value judgments about the social utility of permitting greater or lesser insulation of director conduct from judicial scrutiny.”).

18. As Delaware jurists themselves explain, the BJR “is not, functionally speaking, a standard of review at all. Rather, it is an expression of a policy of non-review of a board of directors’ decision when a judge has already performed the crucial task of determining that certain conditions exist.” Id. at 870.

19. The fairness standard applies:

[If] the challenged transaction arises in a context of self-dealing; that is, if the corporate fiduciaries have stood on both sides of the transaction and approved its terms. In that setting, because the fiduciaries charged with protecting the interest of the public shareholders have a conflicting self interest, those fiduciaries must establish the transaction’s “entire fairness” to the satisfaction of the reviewing court.


20. See Dibadj, Fairness, supra note 1, at 15–22.

21. See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953 (Del. 1985) (“Did the Unocal board have the power and duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise, and if so, is its action here entitled to the protection of the business judgment rule?”).
its own interests, rather than those of the corporation and its shareholders, as the Delaware Supreme Court went on to hold that:

If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on “constituencies” other than shareholders ([that is], creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.

This is the famous Unocal proportionality review, well-known to students of corporate law. Ten years later, Unitrin purportedly sought to clarify the Unocal standard. Somewhat unexpectedly, the Delaware Supreme Court held that the

Court of Chancery erred in applying the proportionality review Unocal requires by focusing upon whether the Repurchase Program [defensive maneuver used by incumbent board] was an “unnecessary” defensive response. The Court of Chancery should have directed its enhanced scrutiny: first, upon whether the Repurchase Program the Unitrin Board implemented was draconian, by being either preclusive or coercive and; second, if it was not draconian, upon whether it was within a range of reasonable responses to the threat American General’s Offer posed.

Note how, through Unitrin, the Unocal standard becomes more defendant-friendly. After all, the defensive maneuver no longer needs to be proportional—as long as it is not “draconian” and roughly reasonable, then it will pass muster.

22. Id. at 954.
23. Id. at 955 (emphasis added).
24. The second prong of the Unocal test—namely, analysis “within the ambit of the business judgment rule”—is puzzling and perhaps superfluous. After all, as one court has noted, “the application of the business judgment rule is really a conclusion that the board’s action was appropriate because no board resolution can withstand the enhanced scrutiny of Unocal and then prove to be irrational under the business judgment rule.” In re Unitrin, Inc. Shareholders Litig., Nos. 13656, 13699, 1994 WL 698483, at *5 (Del. Ch. Oct. 13, 1994).
25. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995) (emphasis added) (citation omitted). See also id. at 1388 (“[I]f the board of directors’ defensive response is not draconian (preclusive or coercive) and is within a ‘range of reasonableness,’ a court must not substitute its judgment for the board’s.”).
26. This transition might seem a logical stretch. Perhaps recognizing this concern, the Unitrin court attempts to justify its position by stating that “[a]n examination of the cases applying Unocal reveals a direct correlation between findings of proportionality or disproportionality and the judicial determination of whether a defensive response was draconian because it was either coercive or preclusive in character.” Id. at 1387. Cf. id.
One might next usefully conceive of Revlon and Blasius as special applications of the general principles discussed in Unocal/Unitrin. In Revlon, where “the break-up of the company” was imminent, the Delaware Supreme Court held that:

Selective dealing to fend off a hostile but determined bidder was no longer a proper objective. Instead, obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action. . . . Concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.

Put more colloquially, when a company is in “Revlon-land,” the board has a duty to auction the company to the highest bidder. For its part, in Blasius the Delaware Court of Chancery emphasized the “transcending significance of the franchise to the claims to legitimacy of our scheme of corporate governance.” More importantly for our purposes, it held that where a board takes “action designed for the primary purpose of interfering with the effectiveness of a stockholder vote” then “the board bears the heavy burden of demonstrating a compelling justification for such action.”

Finally, there is Zapata, which is a different creature. In the context of the often esoteric details of the procedural posture of derivative suits, the Zapata court asked “[w]hen, if at all, should an authorized board committee be permitted to cause litigation, properly initiated by a derivative stockholder in his own right, to be dismissed?” Recognizing the potential for members of the committee to be sympathetic to their colleagues on the board, Zapata announced its now famous two-part test:

at 1373 (“The enhanced judicial scrutiny mandated by Unocal is not intended to lead to a structured, mechanistic, mathematical exercise.”).

28. Id. (emphasis added).
30. Id. at 659.
31. Id. at 661 (emphasis added).
32. Zapata Corp. v. Maldonado, 430 A.2d 779, 785 (Del. 1981). The technical term for such a committee is the “Special Litigation Committee,” or SLC, which is:
[A] committee of one or more directors appointed by the board of directors of a Delaware corporation as a whole to evaluate the desirability of maintaining a derivative suit which has been brought on the corporation’s behalf by a shareholder without a demand having first been made on the board to take such action.
33. See Zapata, 430 A.2d at 787 (“[W]e must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members.”).
First, the Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions. Limited discovery may be ordered to facilitate such inquiries. The corporation should have the burden of proving independence, good faith and a reasonable investigation, rather than presuming independence, good faith and reasonableness.\(^\text{34}\)

If the defendants do not meet this first step, then the court denies the committee’s motion.\(^\text{35}\) If, however, the court finds “that the committee was independent and showed reasonable bases for good faith findings and recommendations, the Court may proceed, in its discretion, to the next step.”\(^\text{36}\) The second step, in turn, provides:

> The essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation’s best interests as expressed by an independent investigating committee. The Court should determine, applying its own independent business judgment, whether the motion should be granted. This means, of course, that instances could arise where a committee can establish its independence and sound bases for its good faith decisions and still have the corporation’s motion denied.\(^\text{37}\)

This test, sometimes informally called the “\textit{Zapata} two-step,” is especially notable for its second prong—a unique expression in Delaware jurisprudence where the court is asked to exercise its own business judgment.

Building upon the framework first articulated in \textit{Fairness}, this Article seeks to perform an empirical analysis of the cases that comprise these four standards of heightened scrutiny to address the following principal question:

\begin{enumerate}
\item Do cases that discuss these heightened standards of review actually employ these standards to help plaintiffs?
\end{enumerate}

As in \textit{Fairness}, a secondary and more mechanical question also emerges:\(^\text{38}\)

\begin{enumerate}
\item Does the case law that has evolved around these heightened standards exhibit a skewed distribution?
\end{enumerate}

Before discussing the results, however, it is important to outline the empirical methods through which the analysis has been conducted.

\(^{34}\) \textit{Id.} at 788.

\(^{35}\) \textit{See id.} at 789.

\(^{36}\) \textit{Id.}

\(^{37}\) \textit{Id.} (emphasis added) (footnote omitted).

\(^{38}\) \textit{Fairness} discussed a third question surrounding the linguistic consistency of the adjectives \textit{inherent, intrinsic,} and \textit{entire}. \textit{See Dibadj, Fairness, supra note 1, at 22–26.} This question is inapplicable in the context of the standards analyzed in this Article.
III. EMPIRICAL METHODS

To address these two questions, this Article performs an empirical analysis of Delaware cases that discuss the \textit{Unocal}/\textit{Unitrin}, \textit{Revlon}, \textit{Blasius}, and \textit{Zapata} standards. As with empirical work generally, three steps frame the effort: gathering the data, analyzing it, and displaying the results.

First, a universe of cases was defined and its features collected. References to these five cases were searched in all opinions of the Delaware Supreme Court and Delaware Court of Chancery that are available electronically on LexisNexis.\textsuperscript{39} Cases that did not entail the judicial review of fiduciary duties of corporate insiders were excluded.\textsuperscript{40}

For each case, two subsets of data are collected. The first set helps to describe the case itself: its name, the date it was decided, the courts that decided it, whether the portion of the opinion referring to \textit{Unocal}/\textit{Unitrin}, \textit{Revlon}, \textit{Blasius}, or \textit{Zapata} helped the plaintiff or the defendant,\textsuperscript{41} and the phase of litigation during which the opinion arose.\textsuperscript{42} A case that discusses more than one standard appears separately in the analysis for each standard.\textsuperscript{43} Table 1 provides an overview of the universe of cases analyzed.

<table>
<thead>
<tr>
<th>Cases</th>
<th>Unocal/Unitrin</th>
<th>Revlon</th>
<th>Blasius</th>
<th>Zapata</th>
</tr>
</thead>
<tbody>
<tr>
<td>Del. Supreme Court</td>
<td>26 19%</td>
<td>16 14%</td>
<td>7 12%</td>
<td>6 20%</td>
</tr>
<tr>
<td>Del. Court of Chancery</td>
<td>108 81%</td>
<td>101 80%</td>
<td>51 88%</td>
<td>24 80%</td>
</tr>
<tr>
<td>Total</td>
<td>134 100%</td>
<td>117 100%</td>
<td>58 100%</td>
<td>30 100%</td>
</tr>
</tbody>
</table>

\textsuperscript{39} More specifically, the Author combined the “DE Supreme Court Cases from 1790” and “DE Court of Chancery Cases from 1814” libraries. Of course, the most recent cases that actually employ one of the standards date from the 1980s. See Table 1.

\textsuperscript{40} Notably, are instances where the cases were referenced in the context of class certifications, settlements, or unincorporated associations.

\textsuperscript{41} The cases that are defendant-friendly are subdivided into two categories: those in which the court noted that the standard of heightened scrutiny is inapplicable, and those in which the standard was held applicable but met by the defendants.

\textsuperscript{42} For instance, the phase of litigation requires determining whether the case concerns a preliminary injunction or temporary restraining order, a motion to dismiss, summary judgment, or a decision after trial.

\textsuperscript{43} For example, a case that discusses both \textit{Revlon} and \textit{Unocal/Unitrin} will appear once in each analysis.
This table accords with intuition along both its horizontal and vertical dimensions: Those familiar with Delaware jurisprudence will recognize Unocal/Unitrin and Revlon jurisprudence as more common than the more esoteric Blasius and Zapata standards, as well as the fact that the Chancery Court adjudicates the bulk of corporate law cases.  

The second subset of data describes the interrelationships among cases by creating an $N \times N$ matrix for each standard that lists the cases both vertically and horizontally. Every time a case in a row cites another case as part of its analysis of the relevant standard of review, an indication is made in the column corresponding to the cited case.

Once the data has been gathered, the second step is to analyze it. As discussed in some detail in Fairness, network theory has enjoyed recent successes in conceptualizing the topology of systems in the physical and social sciences, but has so far been vastly underutilized in the law. The underlying principle behind network theory is surprisingly simple: to understand the relationships among entities, be they, for example, people, countries, or molecules. The theory has already made inroads into scientific discourse; it is only beginning to emerge as a tool in legal analysis. Put simply, legal actors or cases might occupy nodes and be

44. See, e.g., Veasey & Di Guglielmo, supra note 15, at 1401 (“Delaware corporate jurisprudence is authoritatively framed, in part, by a discrete number of decisions of the Delaware Supreme Court. It is also framed, in part, by a plethora of Delaware Court of Chancery decisions . . . .”).

45. $N$, of course, represents the total number of cases within each of the four standards: 134 for Unocal/Unitrin, 117 for Revlon, 58 for Blasius, and 30 for Zapata.

46. More than half of the cells in the matrix will necessarily remain empty: The diagonal is empty because a case cannot refer to itself; moreover, a case cannot refer to a case that occurs later in time.

47. See Dibadj, Fairness, supra note 1, at 7–11.

48. See, e.g., James H. Fowler et al., Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court, 15 POL. ANALYSIS 324, 325 (2007) (“At its core, network analysis maps and measures relationships between, for example, people, groups, computers, or information.”).


connected to each other via arcs. The ensuing graph represents the topology, or configuration, of the network, thus providing a visual representation of aspects of the law in a way that can fruitfully complement the grid-like outlines with which all lawyers are familiar.

The advantages of network theory aside, there is a practical difficulty in that spreadsheets and other conventional software programs are unfortunately not designed for network analysis. As a consequence, the data in the spreadsheet was reformatted and fed into Pajek, specialized software designed to analyze large-scale networks.\(^{\text{51}}\) The topology of the network is specified by two data subsets: The first supplies the characteristics of the nodes (vertices) in the network; the second defines the arcs (lines) emanating from citing case to cited case. Pajek processes these data points and generates graphs, as well as some mathematical metrics that capture the principal features of the network.

Third, and finally, the network analysis needs to be displayed in a user-friendly manner. To try to achieve aesthetically pleasing images, the output of the network analysis was fed into specialized graphical software\(^{\text{52}}\) able to generate graphs in scalable vector graphics (SVG).\(^{\text{53}}\) The results of these efforts are represented visually using four network diagrams, one for each of the four standards.\(^{\text{54}}\) A circular node, proportional in size to the frequency with which it is cited, represents each case. Nodes are color coded: Blue nodes represent cases where the analysis of the heightened standard was employed in a plaintiff-friendly manner; red or yellow nodes, where the heightened standard was used to support a defendant-friendly conclusion. Yellow denotes situations where a standard of heightened scrutiny was discussed but not applied; red, where the court applied a standard of heightened scrutiny, but determined that the defendants had met it.

Interrelationships among cases are shown using arcs. Black lines depict citations, with a directional arrow from citing case to cited case. For the sake of completeness, the network diagrams also include light

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51. Pajek, developed at the University of Ljubljana, Slovenia, has emerged as a leading network analysis package. See [Pajek Wiki](http://pajek.imfm.si/doku.php) (last visited Feb. 6, 2009).

52. Unfortunately, the graphical output from the network analysis software is difficult to read. For example, diagrams are off-center and have awkward aspect ratios.

53. Traditional bitmap images that are readable by most Windows based programs cannot be accurately scaled to different display sizes. As a consequence, SVG images were generated and outputted to the familiar portable document format (PDF).

54. Figure 1 displays *Unocal/Unitrin*, Figure 2 *Revlon*, Figure 3 *Blasius*, and Figure 4 *Zapata*. See infra pp. 17–18.
grey lines to depict arcs citing cases that themselves do not discuss the standard in question but which articulate principles upon which the citing case relies on in its analysis of the standard—perhaps predictably, the latter cases tend to be older cases predating the heightened standard, but grappling with kindred issues.\textsuperscript{55}

The graphs (Figures 1–4) depict a two-dimensional network layout as generated using the Kamada-Kawai spring embedder algorithm, familiar to network analysts.\textsuperscript{56} Insights into the two questions that drive this Article emerge from these graphs and the metrics generated by the network analysis software.

\section*{IV. FINDINGS}

At this point, it is perhaps worth repeating the two questions that drive this Article:

(1) \textit{Do cases that discuss these heightened standards of review actually employ these standards to help plaintiffs?}

(2) \textit{Does the case law that has evolved around these heightened standards exhibit a skewed distribution?}

This Part addresses each question.

\subsection*{A. Do Standards of Heightened Scrutiny Actually Help Plaintiffs?}

This Article addresses this question using both basic statistics and visual inspection of the network topologies. Each source provides a set of insights.

First, and most simply, the number of cases in which courts used standards of heightened scrutiny in a plaintiff-friendly manner can be compared to those in which courts discussed fairness standards but where the standard ended up not helping the plaintiff. This latter category is further subdivided into two subcategories: cases in which the standard was discussed but not applied and cases in which the standard was discussed and applied in a plaintiff-friendly manner.

\textsuperscript{55} These cases, linked to the network via light grey lines, are not included in the statistical analyses because they are not cases that themselves have deployed the standard in question. They are included, however, in the network maps, so the reader will be able to see not only the network of cases specifically analyzing the heightened standard but also the cases upon which these cases have relied.

\textsuperscript{56} For a discussion of Kamada-Kawai, see \textit{Wouter De Nooy et al., Exploratory Social Network Analysis with Pajek} 16–17 (2005).
was applied and deemed met by the defendants. Table 2a provides a summary of the outcomes.

### Table 2a

**Case Outcomes**

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Unocal/Unitrin</th>
<th>Revlon</th>
<th>Blasius</th>
<th>Zapata</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff-friendly</td>
<td>35</td>
<td>26%</td>
<td>20</td>
<td>17%</td>
</tr>
<tr>
<td>Defendant-friendly</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Standard not applied</td>
<td>46</td>
<td>34%</td>
<td>45</td>
<td>38%</td>
</tr>
<tr>
<td>Standard applied and met</td>
<td>36</td>
<td>27%</td>
<td>46</td>
<td>39%</td>
</tr>
<tr>
<td>Total defendant-friendly</td>
<td>82</td>
<td>61%</td>
<td>91</td>
<td>78%</td>
</tr>
<tr>
<td>Neither</td>
<td>17</td>
<td>13%</td>
<td>6</td>
<td>5%</td>
</tr>
</tbody>
</table>

Consistently across standards, discussion of the standard ended up helping the plaintiffs only about a fifth to a quarter of the time, in a tight band ranging from seventeen percent for *Revlon* to twenty-six percent for *Unocal/Unitrin*. Also, except for the relatively few cases comprising the *Zapata* standard, a majority of the cases discussing the other standards ended up not helping the plaintiffs. As one might expect, given that fairness is considered to be the most plaintiff-friendly standard, these standards of heightened scrutiny look even bleaker for plaintiffs. By comparison, consider that in thirty-eight percent of entire fairness cases, the standard was used in a plaintiff-friendly manner, whereas in fifty-three percent of the cases it was used in a defendant-friendly manner.

Table 2a also shows the defendant-friendly cases split into two subcategories. The first, and most prevalent, is for the court to note that the standard is inapplicable. For example, a court might argue that *Blasius* does not apply because the primary motive of the board was not to impede the shareholder franchise. Or, a court might argue that *Revlon* duties are

57. And even the *Zapata* standard only ended up helping plaintiffs 23% of the time. The big difference is the relatively large percentage of cases (37%) that mention the *Zapata* two-step, but end up not takings sides—most often, the court is simply expounding on what the standard means. See, e.g., Aronson v. Lewis, 473 A.2d 805, 813–14 (Del. 1984).

58. See supra text accompanying notes 6–7.

59. “Entire fairness” is the predominant label under which fairness cases are decided, comprising 335 out of 442 (76%) of fairness cases. The pattern for fairness cases overall is strikingly similar: 38% are plaintiff-friendly whereas 53% are defendant-friendly. See Dibadj, *Fairness*, supra note 1, at 15.

60. See, e.g., Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996) (“We can find no evidence to support Williams’ claim that the Defendants’ primary purpose in adopting the Recapitalization was a desire to impede the Milacron stockholders’ vote.”); Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 285 (Del. Ch. 1989) (“In any event,
not relevant because there is no breakup of the company or change in control. Similarly, *Unocal* can be conveniently sidestepped by concluding that there is no threat. A more general technique is simply to note that these standards of heightened review are nothing special, and then proceed to basic duty of loyalty analysis. Along these lines, Vice Chancellor

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61. See, e.g., Paramount Commc’ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (“If, however, the board’s reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation’s continued existence, *Revlon* duties are not triggered . . . .”); Ivanhoe Partners v. Newmont Mining Corp., 533 A.2d 585, 603 (Del. Ch. 1987) (“But *Revlon* duties arise only where circumstances make it inevitable that the company will be sold to one of the bidders competing to acquire it. That is not the situation here.”).  

62. The language to elude *Revlon* duties emphasizes whether shareholders will have a say after the transaction. As one court observes: Delaware law also requires that once a change of control of a company is inevitable the board must assume the role of an auctioneer in order to maximize shareholder value. This duty, however, does not apply to stock-for-stock strategic mergers of publicly traded companies, a majority of the stock of which is dispersed in the market. Krim v. Pronet, Inc., 744 A.2d 523, 527 (Del. Ch. 1999) (footnote omitted). Similarly, in the words of another opinion: Delaware law requires that once a change of control of a company is inevitable the board must assume the role of an auctioneer in order to maximize shareholder value. There is a “change of control” if shareholders lose a further opportunity to participate in a change of control premium. This duty, however, does not apply to situations where control of the company rests with a single controlling shareholder instead of the public. It is not appropriate to extend the so-called *Revlon* duties to that circumstance because public shareholders have no control premium and no opportunity to lose. McMullin v. Beran, No. 16493, 1999 WL 1135146, at *3 (Del. Ch. Dec. 1, 1999) (footnotes omitted).  

63. See, e.g., Moran v. Household Int’l, Inc., 500 A.2d 1346, 1350 (Del. 1985) (“[H]ere we have a defensive mechanism adopted to ward off possible future advances and not a mechanism adopted in reaction to a specific threat. . . . [I]n reviewing a pre-planned defensive mechanism it seems even more appropriate to apply the business judgment rule.”); Stroud v. Grace, 606 A.2d 75, 79 (Del. 1992) (“We agree that *Unocal* was inapplicable. The board was not under a threat to its control and its decision to recommend the Amendments to the shareholders was not defensive.”).  

64. For example, as the Chancery Court has recently observed: Once a board of directors determines to sell the corporation in a change of control transaction, its responsibility is to endeavor to secure the highest value reasonably attainable for the stockholders. This obligation is a contextually-specific application of the directors’ duty to act in accordance with their
Leo Strine’s recent observations are telling. For example, in a recent case, he underlined that “some of the prior Unocal case law gave reason to fear that that standard, and the related Revlon standard, were being denuded into simply another name for business judgment rule review.”65 Similarly, in the context of Blasius analysis, he observed that:

[The trigger for the test’s application—director action that has the primary purpose of disenfranchisement—is so pejorative that it is more a label for a result than a useful guide to determining what standard of review should be used by a judge to reach an appropriate result. As a result, decisions in the wake of Blasius tended to involve threshold exertions in reasoning as to why director action influencing the ability of stockholders to act did not amount to disenfranchisement, thus obviating the need to apply Blasius at all.66

The second, less common, method is for a court to acknowledge the applicability of the standard but then argue that it has been met. The shift from Unocal to Unitrin, for instance, makes this quite convenient: It is much easier to argue that the incumbent board has not been “draconian” than to argue the “proportionality” of its response.67 Another is to emphasize the discretion Zapata putatively gives judges as to whether to apply the second step,68 and then simply side with the defendants after the first step.69

A further inquiry involves asking whether these results depend upon the phase of litigation. To address this question, cases were categorized into four phases: preliminary injunction or temporary restraining order, motion to dismiss, summary judgment, and post trial.70 Table 2b summarizes the results.

fiduciary obligations, and there is no single blueprint that a board must follow to fulfill its duties. Rather, the board’s actions must be evaluated in light of the relevant circumstances to determine whether they were undertaken with due diligence and in good faith.

Blackmore Partners, L.P. v. Link Energy LLC, 864 A.2d 80, 85 (Del. Ch. 2004) (footnotes omitted). See also Malpiede v. Townsend, 780 A.2d 1075, 1083 (Del. 2001) (“In our view, Revlon neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply.”).

65. Mercier v. Inter-Tel, Inc., 929 A.2d 786, 810 (Del. Ch. 2007) (footnote omitted).

66. Id. at 806 (emphasis added) (footnotes omitted).

67. See supra notes 21–26 and accompanying text.

68. See supra notes 32–37 and accompanying text. This position, of course, conveniently ignores the court’s emphasis that the second step provides “the essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation’s best interests as expressed by an independent investigating committee.” Zapata Corp. v. Maldonado, 430 A.2d 779, 789 (Del. 1981).

69. See, e.g., Kaplan v. Wyatt, 484 A.2d 501, 520 (Del. Ch. 1984) (“I find it unnecessary to proceed to the discretionary, second-step analysis authorized by Zapata.”).

70. Zapata cases are not analyzed in this fashion for the simple reason that they virtually all concern a motion to dismiss in the context of derivative litigation.
As an aside, it is interesting to note the unusually large number of preliminary injunction cases. This phenomenon is due to the fact that these standards typically emerge in the context of impending mergers, and by the time a merger is consummated, it is virtually impossible to “unscramble the eggs.”

Next, the statistical capabilities of the Pajek network analysis software were used to see whether a statistically significant correlation between phase and outcome exists. Rajski’s information indices were computed, in both symmetrical and asymmetrical versions, with the results displayed in Table 2c.

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71. For example, the percentage of cases in the motion to dismiss and summary judgment categories are similar in *Fairness*. However, the percentage of cases in the preliminary injunction category is far less, with a concomitantly higher percentage in the post-trial category. See Dibadj, *Fairness*, supra note 1, at 17.

72. Metro-Goldwyn-Mayer Inc. v. Transamerica Corp., 303 F. Supp. 1344, 1348 (S.D.N.Y. 1969). See also Phillips v. Insituform of N. Am., Inc., No. 9173, 1987 WL 16285, at *11 (Del. Ch. Aug. 27, 1987) (“Given the great difficulty, and perhaps practical impossibility, of returning a merged corporation to its original constituent corporations, a preliminary injunction is the conventional remedy when a shareholder establishes that a proposed merger is likely to be found to be in violation of law or of the board’s fiduciary obligations.”).

73. As one book on network analysis summarizes the methodology:

Rajski’s indices measure the degree to which the information in one classification is preserved in the other classification. It has three variants: a symmetrical version (represented by C1→C2) in the output of Pajek, and two asymmetrical versions, which indicate the extent to which the first classification can be predicted by the second (C1→C2) or the second classification can be predicted by the first (C1←C2).

De Nooy et al., *supra* note 56, at 50–51. Here, phase is denoted by C1 and outcome as C2.
TABLE 2C
RAJSKI’S INFORMATION INDICES

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<th>Revlon</th>
<th>Blasius</th>
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<tr>
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<td>0.0298</td>
<td>0.0398</td>
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<tr>
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<tr>
<td>Phase ↔ Outcome</td>
<td>0.0546</td>
<td>0.0594</td>
<td>0.0736</td>
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Rajski’s indices are low, indicating that the outcomes are all but independent of phase.\(^{74}\)

Beyond statistical calculations, the network topologies offer additional insight. First, visual inspection of the maps shows a large number of defendant-friendly cases, as represented by yellow and red nodes. The large nodes\(^ {75}\) are, predictably enough, the canonical cases themselves which gave birth to the standards—*Unocal*, *Unitrin*, *Revlon*, *Blasius*, and *Zapata*—as well as important cases interpreting these standards, such as *Paramount Communications Inc. v. QVC Network Inc.*\(^ {76}\) and *Paramount Communications, Inc. v. Time Inc.*\(^ {77}\). These hubs are the cases discussed in a typical class on corporate law. Not discussed, however, are the large number of relatively uncited defendant-friendly cases which, in their aggregate, are what really tells us how useful each standard might be to plaintiffs. Put simply, we do not talk about the plethora of smaller red and yellow nodes which pepper the diagrams. By focusing on the large nodes, perhaps we are missing the overall picture.

From this analysis, it is fair to say that standards of heightened scrutiny, unlike the business judgment rule where the defendant is virtually guaranteed to win, are not outcome determinative. But, to an even greater extent than fairness standards, they are far from plaintiff-friendly.\(^ {78}\) It is, of course, difficult to judge a priori the merits of each individual case and the incentives to bring suit. However, the very fact that heightened standards of review favor plaintiffs only a quarter to a

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74. Tables A1–A3, which appear in the Appendix, provide more detail on case outcomes by phase for each standard. These tables also suggest little correlation between phase and outcome. See infra p. 26.

75. The size of the node is proportional to the number of citations it receives, or in network parlance, its “indegree.”


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

78. See supra notes 57–59 and accompanying text.
fifth of the time seems instructive.79 Much like the standards explored in Fairness, these standards of review can hardly be considered robust checks on insider behavior.80 Given these results, the suggestion that investors “seem to consider the Delaware courts’ decisions to be inconsequential as regards shareholders’ wealth and, by implication, largely indeterminate of the outcome of future cases,”81 seems soberingly plausible. The bottom line is simple: Heightened standards of review are of limited help to plaintiffs. A cynic might be forgiven for thinking that, much like the fairness standards, they are little more than elegant rhetorical flourish.

B. Does the Case Law Exhibit a Skewed Distribution?

The second question the analysis seeks to address is whether there are disproportionately few cases that receive a disproportionate majority of the citations, in a manner similar to findings in previous studies of legal citation patterns.82 Interestingly, the results from analyzing legal systems

79. One might conceivably argue that the relevant cases are simply those where the standard was applied in a plaintiff-friendly manner, versus those where the standard was applied and met by the defendant. Under this analysis, 35 out of 71 (49%) of the Unocal/Unitrin cases, 20 out of 66 (30%) of the Revlon cases, 14 out of 21 (67%) of the Blasius cases, and 7 out of 11 (64%) of the Zapata cases would be plaintiff-friendly. See supra Table 2a. However, this analysis does not capture the number of times the putatively plaintiff-friendly standard was discussed but, conveniently for the defendant, not applied. See supra notes 59–66 and accompanying text.

80. These findings fit within the broader reality of limiting judicial review in corporate law. See, e.g., J. Robert Brown, Jr., The Irrelevance of State Corporate Law in the Governance of Public Companies, 38 U. RICH. L. REV. 317, 318 (2004) (“Over time, state courts interpreted the [fiduciary] duties in a manner that left little substance.”); Dibadj, Delayering, supra note 2, at 532 (“[L]ost amid this sea of reform is one basic and surprisingly overlooked fact: the traditional base of corporate law—fiduciary obligations—has been eviscerated.”).


82. See, e.g., Post & Eisen, supra note 50, at 570–79 (providing citation analysis of cases by New York Court of Appeals and United States Court of Appeals for the Seventh Circuit finding a very small number of cases receiving a disproportionate number of citations, whereas the majority of cases were cited very infrequently); Frank B. Cross et al., The Reagan Revolution in the Network of Law 10 (June 2006), available at http://ssrn.com/abstract=909217 (“The distribution of citation references is highly skewed. Only two percent of the total number of decided United States Supreme
are consistent with those of scientists studying physical phenomena; namely, that “some nodes are more highly connected than others are. . . . There are a few nodes with many links.”83 Across these applications, a standard measure in network theory measures this phenomenon simply and elegantly: “indegree,” which calculates the number of citations (arcs) a case (node) receives.84

Unsurprisingly, the indegree of nodes within each of the four networks reveals a highly skewed pattern. For example, 96 of the 134 Unocal/Unitrin cases, 84 of the 117 Revlon cases (72%), 40 of the 58 Blasius cases (69%), and 19 out of the 30 Zapata cases (63%) receive one or fewer citations. By contrast, across all four networks, the top 5% of cases receive approximately half of the citations. Figures 5a through 5d present the results graphically.

The results are consistent with those in Fairness: Though the network topologies were slightly more skewed there,85 overall patterns are strikingly similar.

Inspecting the network maps themselves confirms the statistical analyses. There exists a small number of highly cited cases (large vertices) and a large number of cases that are either never or rarely cited (small vertices). Network theorists call these highly cited cases “hubs.” There is one subtle difference, however, with the fairness topologies. In Fairness, the famous plaintiff-friendly hubs (blue vertices) tended to overshadow the large number of uncited or rarely cited defendant-friendly cases (yellow and red vertices). Put another way, the overall topology of the networks was more defendant-friendly than their hubs would suggest.86 In the present analysis, however, while the overall network topologies are clearly defendant-friendly, very often the hub cases are defendant-friendly as well. This difference is largely driven by the fact that several of the seminal cases articulating these heightened standards of

83. Strogatz, supra note 49, at 274. These networks typically exhibit what mathematicians call “power-law” distributions where a small number of nodes have many arcs connecting them to other nodes, but the vast majority of nodes have exponentially fewer connections. Theorists often label these networks as “‘scale-free,’ by analogy with fractals, phase transitions, and other situations where power laws arise and no single characteristic scale can be defined.” Id. See also Post & Eisen, supra note 50, at 551–52, 568.

84. See De Nooy et al., supra note 56, at 189 (“The popularity or indegree of a vertex is the number of arcs it receives in a directed network.”).

85. Eighty-nine percent of the inherent fairness cases, eighty-one percent of the intrinsic fairness cases, and seventy-two percent of the entire fairness cases received one or fewer citations. The top 5% of cases in these fairness networks received from 39%–61% of the citations, respectively. See Dibadj, Fairness, supra note 1, at 26.

86. See id. at 19–21.
Networks of Heightened Scrutiny

SAN DIEGO LAW REVIEW

Figure 5a: Indegree - Unocal/Unitrin

Figure 5b: Indegree - Revlon
Figure 5c: Indegree - Blasius

Figure 5d: Indegree - Zapata
Networks of Heightened Scrutiny
SAN DIEGO LAW REVIEW

review—notably Unocal and Unitrin—actually ended up using their newly articulated standards in a defendant-friendly manner.87

More broadly, both statistical and visual analyses confirm that Unocal/Unitrin, Revlon, Blasius, and Zapata networks display a highly skewed distribution similar to that found in other network studies.

V. CONCLUSION

This Article completes a two part series of articles that analyze the network topologies of Delaware corporate law. The present Article and Fairness, combined, have covered every major standard of heightened scrutiny: fairness—inherent, intrinsic, and entire; proportionality morphed into coerciveness and preclusiveness from Unocal to Unitrin; auctions under Revlon; compelling justifications under Blasius; and the Zapata two-step.

The results reveal several important patterns. First, and most technically, citation patterns in Delaware corporate law seem to exhibit a highly skewed distribution where a small number of cases are disproportionately cited and the bulk of the cases remain obscure. Perhaps reassuringly, this finding is consistent with that found across a number of emerging network studies. Second, the courts are not always linguistically consistent. Although this analysis is not relevant to the current study, Fairness showed that courts often use the terms “intrinsic,” “inherent,” and “entire” fairness inconsistently. It then hypothesized that these extra adjectives perhaps give a false sense of doctrinal precision and an allure of plaintiff-friendliness which belies the empirical reality.88 Third, and by far most significantly, these two articles have shown that even purportedly plaintiff-friendly standards actually end up not helping plaintiffs most of the time. To be sure, they are kinder to plaintiffs than the BJR, where the defendant is virtually guaranteed to win, but they are far from outcome determinative.

While the project has hopefully achieved the goals with which it set out, more research could possibly lie ahead. One path would be to analyze the skewed distributions across the seven networks that represent

87. See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (“On this record we are satisfied that the [defensive] device Unocal adopted is reasonable in relation to the threat posed, and that the board acted in the proper exercise of sound business judgment.”).

88. See Dibadj, Fairness, supra note 1, at 22–26.
heightened scrutiny in Delaware corporate law—inherent fairness, intrinsic fairness, entire fairness, Unocal/Unitrin, Revlon, Blasius, and Zapata—to determine whether they represent power law distributions or other highly skewed formations. Perhaps more significantly, creating network maps of Delaware’s jurisprudence has required the creation of a series of matrices that categorize the characteristics of cases and their interdependencies. This rich data set presents a wealth of possibilities, including the creation of graphical animations of how these networks have evolved over time. More generally, matrices lend themselves well to the techniques of linear algebra, suggesting that more insight might emerge from advanced mathematical analyses of the data set. And, needless to say, network theory, especially when it is combined with basic statistical analyses, can be used to map topologies of other areas of the law.

Already at this point, though, the project could foster a debate about how meaningful judicial review in corporate law actually is. With the help of these two articles, we now have an empirical foundation to begin discussing critical questions such as whether we need so many standards and whether they are meaningful. It has been well-known that the BJR is a defendant’s best friend. Fairness and the present Article, in addition, seem to suggest that even seemingly impressive standards that deviate from the BJR are not plaintiff-friendly most of the time. As such, they too present a limited core upon which to protect shareholders. As three current and former Delaware judges tellingly observe:

Additionally, the creation of more, rather than fewer, standards of review tends to create a false sense of doctrinal safety, encouraging boards to act in ways that, although enabling their actions to fall into the right categorical box, does not necessarily create the result most genuinely protective of the interests of stockholders.

The empirical results support their observation: Ironically, the proliferation of standards of review in Delaware corporate jurisprudence may serve to camouflage how defendant-friendly the jurisprudence actually is.

Two paths for reform emerge. One would simply say that corporate law should not worry about fiduciary duties, and should really devolve to a specialized form of contract law designed simply to facilitate economic

89. Perhaps the patterns are actually Weibull distributions, as Seth Chandler suggests in his study of Supreme Court citation patterns. See Chandler, supra note 50, at 15. A complementary approach might be to analyze the network using rate equations from statistical physics, to determine whether the probability of attachment to a node is linear with node degree—as in a power law distribution—or sub-linear. See P.L. Krapivsky & S. Redner, Rate Equation Approach for Growing Networks, in STATISTICAL MECHANICS OF COMPLEX NETWORKS 3, 4–7 (R. Pastor-Satorras et al. eds., 2003).

90. Allen et al., supra note 14, at 869.
exchanges. The logical extension of this argument would be to do away with the facade of fiduciary duties and simply devolve to setting default rules for arms-length contracts. Another would argue the opposite: that it is precisely because fiduciary duties have been so watered down that we have had to impose layers upon layers of mandatory regulation, notably securities laws, to protect shareholders from corporate insiders. As such, we must simplify the standards and converge to a small number of standards that have bite. Regardless, the status quo is long on rhetoric, but short on protection.

91. For a discussion of this point of view, see Mark J. Roe, Corporate Law’s Limits, 31 J. LEGAL STUD. 233, 262–63 (2002).
93. See Dibadj, Delayering, supra note 2, at 470, 472.
94. See also William W. Bratton & Joseph A. McCahery, The Equilibrium Content of Corporate Federalism, 41 WAKE FOREST L. REV. 619, 691 (2006) (“[T]he genius of Delaware lawmakers lies in their ability to generate a thick fiduciary law without at the same time imposing a significant compliance burden.”).
APPENDIX

TABLE A1

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TABLE A3

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