DELAWARE'S FRONTIER

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INTRODUCTION

This essay explores how institutional capacity limits the Delaware courts' role in the U.S. economy. Delaware's role in advancing important economic objectives, such as reducing poverty, creating jobs, fostering innovation, and spurring growth, is a topic of longstanding scholarly and policy interest. Traditionally, focus has centered on Delaware's place within the interstate competition for corporate charters,[1] or Delaware's position vis-à-vis the federal government—namely, Congress and the Securities and Exchange Commission—as the primary regulatory competitor.[2] That institutional competition is often seen as determining Delaware's room for maneuver in the policy landscape, with views differing as to whether the results benefit or harm the shareholders of U.S. companies.

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1. *See, e.g.*, Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12 AM. ECON. J.: MICROECONOMICS 60 (2020); Roberta Romano, *The State as a Laboratory: Legal Innovation and the State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006).

2. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

Our focus here is different. Rather than looking to institutional competition to understand the limits of Delaware's ability to guide corporate behavior, we study institutional capacity. Traditionally, scholars have approached corporate law through the lens of Berle's classic agency cost paradigm, and Delaware's capacity to adjudicate the separation of ownership and control has been largely assumed. But increasing calls to expand corporate law's aperture from a narrow occupation with the separation of ownership and control to a broader concern with stakeholder interests make questions of capacity more salient. Putting aside the question of the normative desirability of this broader frame, do the Delaware courts have the ability to assess third-party interests and protect them when appropriate?

In response, current scholarship offers little more than a gut check. Implicit in some commentary is the claim that stakeholder interests are a bridge too far. Others assume that stakeholder interests can be readily fed into the common law machine just like stockholder interests. We are not aware, however, of prior work that supplies a systematic explanation for why either view is correct.[3]

We offer here a framework for approaching the institutional capacity question in corporate law litigation. The framework draws on decision theory, a way of approaching adjudication that has been applied most familiarly in the regulatory and antitrust contexts.[4] Perhaps more than anything else, this approach highlights the challenges of decision-making under conditions of uncertainty. Expanding or altering the agency cost paradigm to include protections for stakeholder interests risks clouding the lens that the Delaware courts have used to navigate uncertainty for some time. We do not offer this claim, preliminary as it is, solely in the spirit of skepticism, dismissive of innovative policy proposals for addressing pressing social problems. Rather, we hope to focus attention on the institutional capacity question that underlies the ongoing substantive debate. Solutions for expanding institutional capacity in step with a broader remit for corporate law may exist, but they must be surfaced, debated, and refined. In short, if wider stakeholder interests are to be included within corporate law, it is time to get serious about judicial infrastructure.

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3. Perhaps the prior work closest to this essay is Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending It to ESG Oversight*, THE BUSINESS LAWYER (Sept. 2021), though our explicit focus here on institutional capacity is different.

4. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

The Delaware Courts Amidst Vibrant Private Ordering

We begin with the observation that corporate law disputes arise within an economic environment characterized by vibrant private ordering. It is often said that the Delaware General Corporation Law enables such private ordering, overseen by an equitable overlay supplied by the Delaware courts.[5] Companies are free to innovate new governance arrangements, and they do so with gusto—from exotic forms of dual class stock to arsenals of takeover defenses to thickets of different M&A structures and terms.[6] As a result, the governance of the modern corporation is both heterogeneous and dynamic.

Such legal innovations may not be unalloyed goods, but rather may pose important costs on the corporation and its constituencies. For instance, a defensive measure may go beyond simply protecting a company from an opportunistic raider to entrenching an underperforming board. In the litigation that often arises from the development of a new legal innovation, the trick for the court is understanding what the effects of the new device are for the parties to the dispute and, importantly, for the market more broadly.[7] In short, the court must make a decision under conditions of uncertainty.

Judicial Limitations Under Conditions of Uncertainty

The basic elements of decision theory provide a useful way to approach the court's task in this setting.[8] A decision theoretic approach to the judicial enterprise is, of course, a functional simplification of many aspects of adjudication—the path dependency of precedent falls from view, for instance. So, we do not offer this approach as a comprehensive framework for understanding how Delaware courts reach their conclusions. Rather, decision theory highlights the important issue that uncertainty presents in

5. Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 882 (2005) (noting that "equitable principles of fiduciary duty would be an overlay to and a constraint on the statutory powers of directors was not innovative, it was part of the longstanding operation of our law").

6. For recent analyses of legal innovation in the mergers and acquisitions (M&A) market, which is an arena of primary concern in U.S. corporate governance, see Matthew Jennejohn, Julian Nyarko & Eric Talley, *Contractual Evolution*, 89 U. CHI. L. REV. 901 (2022); Guhan Subramanian & Caley Patrucci, *Deals in the Time of Pandemic*, 121 COLUM. L. REV. 1405 (2021).

7. Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499 (2002).

8. For work in the antitrust context that uses decision theory to similar effect, see David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001) (applying the decision theory framework to tying and technological innovation).

corporate law litigation.

Where outcomes are uncertain, decision theory posits that optimization is possible by first calculating (1) the benefits of correct decisions, (2) the costs of incorrect decisions, and (3) the probabilities of those benefits and costs being realized.[9] One then combines those cost and benefit calculations, weighted by the probabilities of their occurrence, to calculate net expected values for each available choice. The decision with the greatest expected value—i.e., the choice whose likely outcomes result in the greatest net benefit—is then the option that should be pursued.

Of course, at times, calculating that expected value is easier said than done. A useful way to think of the challenges that a court may have in calculating the probable effects of its decisions may be Frank Knight's classic differentiation between "uncertainty" on one hand and "risk" on the other.[10]

In common parlance, risk arises from any uncertainty about the future, but Knight distinguishes situations in which the distribution of potential outcomes is quantifiable ("risk") from situations in which the distribution of potential outcomes is unquantifiable "because the situation dealt with is in a high degree unique" ("uncertainty").[11] In other words, "risk" is predictable, and "uncertainty" is not.

Knight pins the hope of eventually transitioning from uncertainty to risk on repeated experimentation. It is the chance to "secur[e] the same degree of homogeneity in the instances classed together" that allows the decision-maker to discern patterns and, eventually, probabilities.[12] It is that proclivity for initiating and navigating that experimental process that sets the entrepreneur apart and allows them to convert a landscape fraught with uncertainty into risk.

Implicit in Knight's perspective is a stable model—or heuristic—that the decision-maker can use to compare the events that are emerging through that experimental process.[13] One must have a theory with which to interpret the events unfolding in the landscape. Without such a lens, it becomes impossible to perceive emerging trends, which appear only as a stream of uninterpretable novelty.

Of course, even with a stable model with which to approach the

9. For classic introductions, see generally JAMES O. BERGER, STATISTICAL DECISION THEORY AND BAYESIAN ANALYSIS (1985); HOWARD RAIFFA & ROBERT SCHLAIFER, APPLIED STATISTICAL DECISION THEORY (1961).

10. *See* FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 214 (1921) (differentiating between risk and uncertainty).

11. *Id*. at 229.

12. *Id*. at 216.

13. *Id*.

strategic environment, decision-making can still be challenging, though perhaps for more mundane reasons. Even in a decision landscape characterized by risk, rather than uncertainty, it is possible for the sheer volume and velocity of information to overwhelm a decision-maker.[14] Writing in the administrative law context, and borrowing a concept from Clay Shirky, Wendy Wagner defines "filter failure" as agencies' inability to process the vast amount of information developed in the regulatory process.[15] While Wagner focuses on the role "filter failure" plays in agency capture,[16] it is the predicate condition for that capture—the barrage of information that overwhelms agency information processing capacity—which is relevant here.

The filter failure issue is mundane only in the sense that it typically can be addressed through adequate resourcing. A fully supported court with its staff and infrastructural needs met should be able to process the information load it is asked to bear. With respect to policy salience, however, the filter failure issue is not mundane at all. The U.S. judiciary regularly encounters periods of under-funding, and courts' simple ability to parse the information presented to them in litigation cannot be taken for granted.[17]

In a non-trivial class of situations, these two types of problems—model uncertainty and filter failure—can combine in a perfect storm of sorts. Courts may be unmoored from conceptual foundations and out to sea in an ocean of complex, often conflicting data. As will be discussed in Part III below, this may not mean that judicial decision-making is irretrievably dysfunctional. Rather, the point is more subtle. Making effective decisions in such an uncertain environment may require a different institutional logic and design than what has prevailed in Delaware for decades.

The Stable Model of Late 20th Century Corporate Law

Courts adjudicating corporate governance disputes within that tumultuous environment apply a standard model—or theory of how the

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14. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010).

15. *See id*. (defining filter failure).

16. *Id*. at 1325. Wagner argues that filter failure causes "information capture," a specific type of agency capture. The main distinction between information capture and other forms of agency capture is that it affects agencies across the board, including those that diligently try not to be overly responsive to regulated industries. *Id*. at 1326.

17. Measures taken by state bar associations to shore up dramatically reduced budgets during the 2008 financial crisis and its aftermath provides an example of the issue. *See* Robert J. Derocher, *Crisis in the Courts: Bars Take Steps to Stave Off Judicial Funding Cuts*, 34 BAR LEADER (May-June 2010), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/may_june/courtcrisis/ [https://perma.cc/9UA6-ULDA].

market operates—to understand how new forms of private ordering affect the interests of litigating parties. That model is the agency cost paradigm that is, as noted above, rooted in Berle's classic work.[18] The agency cost paradigm is the lens through which disputes are viewed, and, while the particular subjects and landscapes within the frame change from lawsuit to lawsuit, the lens itself is more or less stable. That stability allows the court, and, more broadly, the actors and advisers in the corporate governance ecosystem, to parse the information presented in litigation.

The central focus of the agency cost paradigm is the conflict created when one person acts on behalf of another. In the context of corporate law, the directors are viewed as agents of the shareholders, who are conceived as principals. For many, the function of corporate law is to minimize the total agency costs inherent in the relationship between directors and shareholders. One mechanism for reducing these agency costs is corporate fiduciary law, which demands that directors act in alignment with the interests of shareholders.

The Delaware courts present corporate fiduciary law with admirable simplicity: directors and officers owe duties of care and loyalty, and, depending on the facts and circumstances of the case, the courts apply one of three standards to evaluate compliance with these duties: the business judgment rule, enhanced scrutiny, and entire fairness.[19] The business judgment rule protects corporate directors from liability for honest mistakes in cases where the directors actually made a business decision,[20] the directors inquired into, were reasonably informed about, and deliberated on their decision,[21] the directors were disinterested with regard to the decision,[22] and in making the decision, the directors were unbiased and motivated by the

18. *See generally* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

19. The Delaware courts describe the duties of care and loyalty as the "standard(s) of conduct" ("what directors are expected to do") and the business judgment rule, enhanced scrutiny, and entire fairness as the "standard of review" ("the test that a court applies when evaluating whether directors have met the standard of conduct"). *In re* Trados Inc. S'holder Litig. (Trados II), 73 A.3d 17, 35–36 (Del. Ch. 2013).

20. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) (stating that the business judgment rule "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act").

21. *See, e.g.*, Beard v. Elster, 160 A.2d 731, 737 (1960) ("If the question of value, which was the issue to be determined on remand, fell under the developed facts into a field in which reasonable men, fully informed, could well differ in opinion, then the sound business judgment rule required the court to approve the plan.").

22. *See, e.g.*, Aronson, 473 A.2d at 816 ("The requirement of director independence inhers in the conception and rationale of the business judgment rule."); Bayer v. Beran, 49 N.Y.S.2d 2, 6-7 (Sup. Ct. 1944) (noting that the business judgment rule "yields to the rule of undivided loyalty," so that "personal transactions of directors with their corporations . . . as may tend to produce a conflict between self-interest and fiduciary obligation, are, when challenged, examined with the most scrupulous care").

welfare of the corporation. If a shareholder plaintiff "rebuts" the business judgment rule by proving a breach of the duty of care or proving that the directors acted in self-interest, the burden shifts to the defendant directors to prove the "entire fairness" of the transaction. The business judgment rule is the most deferential standard for directors, and the entire fairness standard is the most demanding. "Enhanced scrutiny" occupies a middle ground—it is more searching than the business judgment rule and less demanding than entire fairness—in cases where directors face an inherent conflict of interest, such as when directors institute defensive tactics that prevent shareholders from responding to a hostile takeover.

Even a cursory reading of judicial opinions from Delaware reveals, however, that this simple framing obscures a great deal of nuance in fiduciary regulation. For example, the Delaware courts often refer to special duties that derive from the general obligations of care and loyalty, such as duties of disclosure or candor,[23] oversight,[24] and good faith,[25] as well as actions for waste,[26] gift,[27] and usurpation of corporate opportunity.[28] Thus, the landscape of fiduciary law in Delaware is much more complicated than the simple frame implies.

In summary, Delaware corporate law might be considered a more or less coherent system that encompass a variety of subsystems—i.e., discrete doctrines—developed over the years to classify and police agency costs, which come in a number of flavors.[29] This internal complexity provides the

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23. *See*, *e.g.*, Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998) ("The duty of directors to observe proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty and good faith.").

24. *See*, *e.g.*, Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (describing the "the necessary conditions predicate for director oversight liability").

25. *See*, *e.g.*, *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66-67 (Del. 2006) (describing "intentional dereliction of duty, a conscious disregard for one's responsibilities" as "a legally appropriate, although not the exclusive, definition of fiduciary bad faith").

26. *See*, *e.g.*, Saxe v. Brady, Del. Ch., 184 A.2d 602, 610 (1962) ("[W]hether what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid.").

27. *See*, *e.g.*, Michelson v. Duncan, 407 A.2d 211, 217 (Del. 1979) ("The essence of a claim of gift is lack of consideration").

28. *See*, *e.g.*, Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 154-55 (Del. 1996) ("The corporate opportunity doctrine, as delineated by *Guth* and its progeny, holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.").

29. The systemic property of modern corporate governance is thoughtfully captured in Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021) (providing a systemic account that looks across a broad range of public and private institutions, and not only U.S. state fiduciary law).

courts with ready options for analyzing new privately ordered innovations that the market produces.

Perhaps an extension of the lens metaphor might clarify the relationship between the system and its constituent parts. At times, the flood of novel information presented to the court in litigation may be like too much light coming through the aperture or motion too swift to be captured with accuracy in a frame. In photography, however, the solution to such issues is not to discard the lens entirely but rather to more finely calibrate the instrument—to, for instance, change the focal length of the lens by selecting a new f-stop. The doctrinal richness of Delaware's jurisprudence provides such opportunity for calibration without abandoning the lens altogether. Thus, the standard model is not static—doctrines adjust to contend with new developments, like a photographer fiddling with lens settings—while the essential contours of the framework remain consistent.

The Consistency of Caremark

The so-called *Caremark* doctrine occupies a small but conceptually important space within Delaware corporate fiduciary law. It represents a "class of cases in which director liability for inattention is theoretically possible [because] a loss eventuates not from a decision but, from unconsidered inaction."[30] Chancellor Allen, author of the *Caremark* decision, suggested that this sort of claim is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[31]

Although the original decision rested on the notion of "unconsidered inaction" and made several references to the duty of care, Chancellor Strine subsequently reasoned that "the opinion articulates a standard for liability for failures of oversight that requires a showing that the directors breached their duty of loyalty by failing to attend to their duties in good faith."[32] The Delaware Supreme Court followed Chancellor Strine's lead in *Stone v. Ritter*, holding that directors would be liable for breach of the duty of loyalty when "the directors [completely] fail[] to implement any reporting or information system or controls or . . . having implemented such a system or controls, consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[33] In a recent decision, Chief Justice Strine offers a succinct summary of the *Caremark* doctrine: "If *Caremark* means anything, it is that

30. *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996).
31. Caremark, 698 A.2d at 967.
32. Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003).
33. Stone, 911 A.2d at 372 (Del. 2006).

a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty."[34]

The *Caremark* doctrine at first glance seems to invite a court to undertake a particularly far-ranging inquiry, but it enjoys the same stability as the standard model. In a *Caremark* inquiry, the Delaware courts have distinguished between "the board's oversight of the company's *management of business risk* that is inherent in its business plan from the board's oversight of the company's *compliance with positive law*—including regulatory mandates."[35] While liability could theoretically flow from a lack of oversight in either context, "[f]ailure to monitor compliance with positive law, including regulatory mandates, is more likely to give rise to oversight liability."[36] Thus, when Delaware courts evaluate a board's alleged breach of fiduciary duty under *Caremark*, they are usually outsourcing the question of third-party harm to another institution. Questions of whether, for instance, antitrust violations or fraud were committed at a company are addressed through different lenses, which are often in the hands of entirely different operators, such as an executive branch agency. The subsidiary analysis of whether a board breached its oversight duties, a question that falls within the standard agency cost framework, piggybacks on the regulatory state. To extend the running analogy even further, it is like two photographers working in tandem at a shoot. That division of labor, if imperfect at times, preserves the essential integrity of the agency cost framework when applied in the oversight context.

The EESG Frontier

How does expanding fiduciary duties to include expanded third-party interests affect the standard model on which the Delaware courts have relied to parse an uncertain environment? Of course, a key part to answering that question is the magnitude of any proposed departure from the agency cost framework. Here, we simply note that proposals vary, with some situating employee, environmental, social and governance (EESG) concerns within *Caremark* in a way that is largely consistent with its traditional application, and others that outline more ambitious proposals for including stakeholder interests within the fiduciary duties of corporate boards.[37] It is the latter,

34. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

35. *In re* Clovis Oncology, Inc. Derivative Litig., 2019 WL 4850188, at *10 (Del. Ch. Oct. 1, 2019).

36. *In re* Facebook, Inc. Sec. 220 Litig., 2019 WL 2320842, at *14 (Del. Ch. May 31, 2019).

37. *Compare*, *e.g*., Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1896-97 (2021) (arguing that "new" EESG concerns fit within

more ambitious, projects that extend the consideration of stakeholder interests beyond the simple lawful operation of the corporation to broader notions of prudence or morality that interest us here. Those proposals relax the standard assumption that the predicate question of whether the corporation has engaged in wrongful behavior affecting third-party stakeholders is typically not decided by the Delaware courts, but rather by other institutions.

In an ambitious expansion of *Caremark* (or other doctrine within the fiduciary duty toolkit), stockholder and stakeholder interests are now wrapped into a single inquiry, which no longer takes its cues from the regulatory state. Here, the problem is not simply the quantity or speed of the information that the court must parse (which will, of course, be significant in this setting). Rather, the issue akin to what Daniel Farber refers to as "model uncertainty"—i.e., a basic ambiguity about which model, or theory, should be applied in a particular regulatory setting.[38] In short, the court no longer has a stable guide with which to understand the market.

A court experiencing model uncertainty is relatively unmoored and decision-making becomes, by necessity, more experimental. The court is no longer making modest doctrinal adjustments to square new market development with them; rather, the court becomes deeply engaged with the process of articulating the new paradigm itself. This mode of adjudication is not unfamiliar to either the U.S. judiciary's or even Delaware's experience.[39] Nevertheless, it comes with a significant potential tradeoff, to the extent that refashioning the Delaware courts' fundamental model interferes with their ability to swiftly and accurately process information in the courts' traditional realm. That is, heightened model uncertainty may well increase the likelihood of filter failure. Were the Delaware courts a sleepy backwater, the potential costs of such a tradeoff might be minimal. But the Delaware courts are no such thing, and interfering with the normal operation of the system poses real and significant possible downsides.

Taking Experimentation Seriously

Model uncertainty introduces a critical limit to the Delaware courts'

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the traditional *Caremark* analysis), *with* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1458-71 (2020) (arguing for an expanded purview for Caremark that considers stakeholder interests to an extent beyond the current regime).

38. Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901 (2010).

39. For instance, Delaware corporate law was in significant extent transformed in the last third of the 20th century, with Chancellor Allen's influential tenure a useful marker of the phenomenon. Epochal legal change is no stranger to Delaware. The point we make here, however, is that sea changes should not be taken for granted, and some effort in managing them is well spent.

role in U.S. corporate governance. Delaware's primacy arises, in part, from a stable analytical lens, around which the courts have built their expertise and a broader ecosystem has coalesced.[40] Destabilizing that lens risks the regular operation of the system. Calls to depart from the stable framework must, at least, explain and prescribe how the system can adjust effectively.

The challenge, while daunting, is not insurmountable. We note that experimentalist forms of adjudication have been deployed to navigate model uncertainty in a variety of other settings, both public and private, in the United States and elsewhere.[41] Purpose-built for high uncertainty environments, experimentalist institutions embrace a pragmatic, iterative analytical process that gathers information, designs prototypes, and revises based on ongoing learning with stakeholders.[42] Perhaps such an approach to corporate law litigation would allow the Delaware courts to navigate the process of reconstituting its analytical lens to include stakeholder interests within its remit, eventually producing a new coherent vision.

Whether experimentalism is the right road for Delaware to take and what would be required to implement it are large questions. To the extent stakeholder interests are normatively desirable in corporate law, we think exploring those questions further is worthwhile. In short, while substantive questions might lead the discussion, questions regarding institutional infrastructure should not be far behind.

CONCLUSION

Fiduciary law is an elegant check on corporate decision-making tailored

40. In an especially thoughtful analysis of Delaware's success, the eminent litigator, William Savitt, notes that a key factor is the social network of expert lawyers that have clustered around the Court of Chancery. William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 573 (2012).

41. For a definitive treatment of experimentalism in legal institutions, focused on constitutional law, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). For other applications in a variety of legal contexts, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. 65 (2015); Tim Wu, *Intellectual Property Experimentalism by Way of Competition Law*, 9 COMPETITION POL'Y INT'L 30 (2013); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010). This literature's origins are found in Sabel's pioneering work on economic organization. *See generally* MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1984); Charles F. Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*, 46 HUM. RELS. 1133 (1993); Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 835 (1994).

42. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 446 (2009); Matthew C. Jennejohn, *Collaboration, Innovation, and Contract Design*, 14 STAN. J.L. BUS. & FIN. 83 (2008).

to ensure that the directors and officers who exercise discretion over a corporation's resources do not act opportunistically.[43] By expanding the remit of the Delaware courts from this focus on opportunism to broader notions of prudence or morality, proposals to consider EESG under the *Caremark* framework or other fiduciary doctrines invite consideration of institutional capacity: do the Delaware courts have the ability to assess third-party interests and protect them when appropriate? In this essay, we express concern over the "model uncertainty" that inevitably would follow from such a shift in the courts' focus.

Overall, our theme evokes the jurist, Leo E. Strine, Jr., to whom this symposium issue is dedicated. At once, we highlight the analytical prowess of the Delaware courts, to which Vice Chancellor, Chancellor, and finally Chief Justice Strine contributed with such well-deserved acclaim. At the same time, we also identify a fundamental limit to the Delaware courts' reach, which recalls the circumspect wisdom we have encountered when interacting with the former Chief Justice. We hope that combination will continue to serve the Delaware courts and, by extension, the constituents of U.S. companies well into the future.

43. D. Gordon Smith, "Firms and Fiduciaries," *in* CONTRACT, STATUS, AND FIDUCIARY LAW 293 (Paul B. Miller & Andrew S. Gold, eds., 2016).