THE INESCAPABLY EMPIRICAL FOUNDATION OF THE COMMON LAW OF CORPORATIONS

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ABSTRACT

Common law adjudication has always involved the formulation of legal standards by judges based on assumptions about how the world works. In this essay, which was delivered as the keynote address for the Second Annual Law and Business Program Conference at Vanderbilt University Law School, the author focuses on the importance of empirical facts in the evolution of the common law of corporations. Using doctrinal examples drawn from recent cases, the essay demonstrates that many important standards in corporate law rest on factual intuitions that are not case-specific, but which instead involve more general understandings about how human beings behave in various market and institutional settings. As a result, the author argues that it is more, rather than less, important for corporate law judges to seek to acquire knowledge about real-world behavior, to expose their reasoning openly, and to be willing to change course if experience and evolutions in the commercial world suggest that modifications in prior doctrine are warranted.

In the moments allotted to me today, my focus will be on the role that empirical facts play in the making of the common law of corporations.[1] Given time constraints, the discussion that follows can only touch the surface of what, at least to me, is an interesting and important topic—and one that too many judges and litigators slight.

But, in the course of this talk, I will show that the day-to-day decisions made by the Delaware Court of Chancery judges in corporate law cases turn on assumptions about how the world works. I will also note—but not delve into—some of the serious institutional barriers that limit the ability of judges to assess the reliability and validity of new empirical research, and to apply that research to the task of common law decision making. These barriers inevitably cause the common law of

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[1]This essay was delivered as the keynote address for the Second Annual Law and Business Program Conference at Vanderbilt University Law School on March 22, 2002. No attempt has been made to incorporate case law developments since that date. I thank Andrew H. Lippstone, Esquire, Michael J. Rinaldi, Esquire, and Karlis P. Johnson for their invaluable help, and my colleagues Jack B. Jacobs and William B. Chandler III for their useful feedback.

corporations to be somewhat out of sync with the prevailing academic thinking about the reality of the commercial world. This is not necessarily a bad thing, because it is socially useful that the common law evolve carefully and on the basis of a view of the world that has a firm foundation; otherwise, the legitimacy of the law is diminished.

These barriers also pose a danger. If judges become too wedded to previous judicial conceptions of reality, they may resist accepting different conceptions that have evolved in a dynamic marketplace. Instead of shaping a common law that fits the circumstances of the market as they exist here and now, judges may be tempted to adhere to precedent rigidly, lest they be seen as engaged in unprincipled (and somewhat daunting) acts of lawmaking.

As I hope to show, judges involved in the process of applying the common law of corporations cannot escape making normative judgments about what the law should be on the basis of imperfect knowledge about how the world in fact operates.[2] A recognition of this reality brings with it concomitant responsibilities. Chief among these are the duties to expose one's reasoning as openly as possible, to undertake with care the application of doctrines made in previous contexts to new ones, and to be willing to abandon previous decisions if they no longer best advance the public interest.[3] As a less case-specific matter, judges must also engage actively with those aspects of the world most affected by their decisions. In the corporate law, this means that judges must try to keep up with emerging developments in such areas as capital markets, shareholder activism, SEC regulations, and transactional structures, through active interaction with transactional planners, the print media, and corporate law scholarship.[4]

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[2]This proposition is hardly a novel one, as any reader of Cardozo, Holmes, or Dworkin knows. *See generally* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). It is well-known, for example, that the United States Supreme Court often grapples with factual questions far beyond the experience of seasoned jurists. In a relatively recent case, for example, the Court addressed the issue of whether walking was fundamental to the sport of golf. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). In that case, the Court engaged in a free-wheeling factual inquiry unconstrained by the record below, or deference to the trial judge's fact findings. *See* Frederick Schauer, *The Dilemma of Ignorance:* PGA Tour, Inc. v. Casey Martin, 2001 SUP. CT. REV. 267 (2002).

[3]For a deep and instructive reflection on the duty of judges to expose their reasoning and decide cases in a principled manner, see the classic work of Dworkin, *supra* note 2, *passim*.

[4]It bears noting that in the fast-moving context of a takeover case involving an application for a preliminary injunction, the judge's ability to procure real-world knowledge during the actual process of adjudication is limited by extreme time pressure. The process of mastering case-specific information—i.e., the record—is challenging all by itself. Therefore, the knowledge that the judge possesses before the hearing must, realistically, take on some greater importance in the adjudication of these matters.

As is usually my bent, I will talk about my topic in the context of some specific examples. The examples will illuminate the inescapably normative and empirical task of the common law corporate judge, and the challenges she faces.

To start, let me assume that the examples arise under the Delaware law of corporations, a law of some modest importance in the American scheme of corporate governance. Our corporation law, like that of most other American states, has a structure that entrusts a great deal of policymaking authority in the courts. Delaware's statute, the Delaware General Corporation Law (DGCL), is broadly enabling, and thus permits corporations to engage in virtually any otherwise lawful act, subject generally only to the requirement that the acts be accomplished in the manner specified by the statute. The statute is often of critical importance in determining cases, and the statutorily required methods of implementation act to safeguard stockholder rights in important transactions, such as mergers,[5] by requiring stockholder assent.

Nonetheless, it is largely true that the statutory law alone gives corporate directors an enormous amount of leeway to act. To the extent that the statute alone was the only constraint on directorial discretion, much of what we know as the law of corporations in America simply would not exist. Put differently, Delaware's enabling statute is premised on its use within a system of corporate law that uses the common law of fiduciary duties as an additional restraint on director action. This fiduciary restraint enables stockholders to benefit safely from the flexibility of the DGCL's enabling approach because the common law limits the ability of directors to abuse that flexibility for their own self-interest at the stockholders' expense.

One of the dangers of fiduciary duty review was recognized early by the law of corporations. If judicial review of director conduct is highly intrusive and situation-specific, directors may be inhibited from taking risks. The idea that a law-trained judiciary would, as a general matter, hold

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For a thoughtful perspective by one excellent judge regarding the various means by which judges can usefully and appropriately expand their knowledge of information about the world, see Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L. REV. 539 (1994). In particular, I embrace Judge Weinstein's view that notwithstanding some of the problems that arise when judges seek out knowledge, "[r]isk-for-risk . . . a thinking, informed judge is far less dangerous than one pickled in his own, ever-so-ethical views." *Id.* at 562. *Cf.* George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's* Sua Sponte, Ex Parte *Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291 (1998) (reviewing the ethical rules bearing on judicial efforts to learn potentially case-relevant information about the world).

[5]DEL. CODE ANN. tit. 8, § 251 (2001) (requiring stockholder approval of certain mergers).

directors liable for "unreasonable" business decisions was quickly ruled out. Instead, the law of fiduciary duty soon embraced the business judgment rule, to protect the decisions of disinterested directors acting in good faith from judicial intrusion.[6]

At the same time, however, the law recognized that conflicts of interest could compromise the ability of directors to act faithfully—i.e., loyally—towards the corporation. In particular, the law of corporations saw a special danger in transactions in which a member of the management or the board stood on the other side from the corporation. To deal with these situations, the corporate law of the late twentieth century developed means to assess what level of deference to give to conflict transactions. For example, where a conflict transaction was approved by a vote of disinterested stockholders or directors, earlier law suggested that the business judgment rule could protect the transaction.[7] In the absence of such protections, the interested director would have to prove entire fairness or the transaction would be invalidated.[8]

As the law developed, the outcome of corporate law cases more and more turned on common law rules founded on empirical assumptions about human behavior and the fairness-enhancing features of certain board and transactional structures. That is, cases turned not so much on disputed case-specific facts—such as the subjective motivations of the directors—but rather on the law's view about the proper effect to be given to undisputed case-specific facts—such as whether a board was comprised of a majority of independent directors. For example, take the judicial judgment that the approval of a conflict transaction between a corporation and non-controlling stockholder by a board majority of independent directors is likely, in the typical case, to produce a fair result and therefore to justify the application of the business judgment rule. This judgment is based largely on non-case-specific factual assumptions about board behavior, which in turn becomes the basis for a general rule that disposes of particular cases. In the venerable terms set forth by Professor Kenneth

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[6]*See generally* William T. Allen, *The Corporate Director's Fiduciary Duty of Care and the Business Judgment Rule under U.S. Corporate Law in* COMPARATIVE CORPORATE GOVERNANCE: STATE OF THE ART AND EMERGING RESEARCH 307 (Klaus J. Hopt et al. eds., 1998).

[7]Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58-59 (Del. 1952) (ratification by disinterested stockholders obviates all attacks on a transaction except for claims of waste); Puma v. Marriott, 283 A.2d 693, 696 (Del. Ch. 1971) (approval of conflict transaction by a board comprised of a majority of independent directors invoked business judgment rule protection).

[8]*Gottlieb*, 91 A.2d at 58.

Culp Davis, these so-called "legislative facts"[9] are incredibly important in the resolution of corporate fiduciary duty cases.[10]

To illustrate this point more specifically, let us proceed from that backdrop to some real world problems. To give the talk some consistency, all the issues will involve a subsidiary corporation, Submissive, with a majority stockholder, Dominator. Dominator owns eighty-one percent of Submissive's shares. All of the problems are ones relevant to the resolution of cases under Delaware law right now, in 2002.

At each stage, I intend to point out the underlying empirical and normative foundations relevant to a judge faced with deciding the cases. In particular, I note how shifting the facts slightly will implicate possibly

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[9]"[L]egislative facts are those facts that transcend the particular legal dispute and have relevance to legal reasoning and the fashioning of legal rules." David L. Faigman, *'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991) (citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942); FED. R. EVID. 201(a) advisory committee's note).

As the work of John Monahan and Laurens Walker has pointed out, the term "legislative facts" creates some confusion. As a practical matter, they show that judicial assumptions about the world are often treated as a species of law, rather than fact, finding. Because such assumptions do not usually turn on evidence specific to the parties before the court, Monahan and Walker believe they should be treated more like conclusions of law. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485-88 (1986); *see also* Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988) (examining the use of social science research data to prove contested facts in judicial proceedings). In another work, they dilate on the reality that courts often make assumptions about the world, not to shape a new legal rule, but to set the larger, factual context in which a specific dispute is to be decided. They call this sort of assumption a "social framework." Laurens Walker & John Monahan, *Social Framework: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987).

I do not delve into the nuances of this nomenclature. Suffice it for today's purposes to say that both "legislative facts" as defined by Davis and "social frameworks" as defined by Monahan and Walker are used by courts making and/or applying the common law of corporations.

[10]I am by no means the first Delaware judge to make this observation. My colleague Vice Chancellor Jack B. Jacobs, for example, confronted this reality in his lucid comments on John C. Coates, IV's article, *Empirical Evidence on Structural Takeover Defenses: Where Do We Stand?*, 54 U. MIAMI L. REV. 783 (2000). *See* Jack B. Jacobs, *Comments on Contestability*, 54 U. MIAMI L. REV. 847 (2000). In his commentary, Vice Chancellor Jacobs notes that reliable real world evidence about the effect of takeover defenses might lead to better legal rules, but acknowledges the practical barriers to both scholars' generation of such evidence and the courts' use of it to decide cases. *Id.* Chancellor William B. Chandler III has also dilated on the empirical foundations of the common law of corporations, and the need for judges to be open-minded in revisiting these foundational assumptions based on new evidence. *See generally* William B. Chandler III, *On the Instructiveness of Insiders, Independents, and Institutional Investors*, 67 U. CIN. L. REV. 1083 (2000). Former Chancellor William T. Allen has also counseled for a similarly forthright and appropriately tentative and contextual approach to the formulation of the common law of corporations. *See generally* William T. Allen, *Ambiguity In Corporate Law*, 22 DEL. J. CORP. L. 894 (1997).

case-dispositive legal doctrines—doctrines that reflect an empirical judgment about how the world works. Let's begin.

Assume that Dominator wishes to sell an asset to Submissive. The Submissive board has nine directors, five of whom have no relationship to Dominator and are, therefore, considered independent directors. The other four board members are managers of Dominator. The Submissive board meets twice, collectively, to consider the asset sale, having previously delegated to Submissive's chief financial officer (who does not work for Dominator) the job of negotiating the sale price. At the second meeting, the independent board majority approves the sale after receiving a report from the CFO that the price is fair to Submissive and a confirming fairness opinion from a qualified financial outfit. Accept that the board has received all material facts bearing on this decision. The four conflicted directors recuse themselves from the vote, but have been present at both meetings. The independent board majority never meets separately to approve the sale.

A derivative suit is filed. The statute is not particularly helpful to the judge in resolving the case, because under the DGCL, the approval of the disinterested directors satisfies section 144.[11] Thus, the judge is left to apply the common law of corporations to the really hard questions. Namely, is demand excused? Does the business judgment rule apply? I'm not going to answer those questions, but instead will identify some of the normative and empirical factors bearing on the answers.

I will start with an obvious concern. Dominator is a majority stockholder. Nagging at the judge will be a concern that the Submissive board is going to be unduly responsive to Dominator, and that even the independent directors will be subtly influenced by the fact that Dominator has the voting power to unseat them the next time around. On the other hand, the judge will consider that the independent directors were only making a modest director's fee and were persons of some means and reputation. Would such persons approve an unfair transaction if they did not believe in good faith that it was beneficial to Submissive?

Still, the judge is troubled by the fact that the independent directors did not meet separately to consider the transactions. She is worried that the presence of the Dominator-affiliated directors may have chilled discussions that would have occurred outside their presence. The fact that the CFO's career ultimately turns on Dominator's will is also bothersome because it was he who negotiated the price. The judge recognizes that negotiations often turn out differently, not simply because of the value of the asset at

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[11] DEL. CODE ANN. tit. 8, § 144 (2001) (setting forth the statutory rules regarding conflict transactions).

stake, but because of the relative skill and fortitude of the dueling negotiators.

But then again, these independent directors formed a majority of the board. They had strength in numbers; they could block the deal. This should have bucked them up. They were not in a position to be as bullied. And why should the corporate law be so nit-picking? The minority stockholders bought stock knowing that they were, to some extent, dependent on the good faith judgment of independent directors to protect them in these situations. As important, the judge also knows that if she gives no deference to the independent board majority, she may be undercutting the incentive that majority stockholders, like Dominator, have to elect independent directors.

Confronted with all of these concerns, the judge must choose. She cannot equivocate. She must forge a path based on the best information she has, realizing that the case must be decided and, even more, that the rule she articulates will influence corporate planners as they structure future transactions.

Just this relatively common scenario suffices to expose the numerous empirical and normative assumptions that influence corporate law judging. Is the desire of a typical independent director to continue to serve on the board too insubstantial to bear on the independent director's ability to say no to a majority stockholder? Does the average independent director have sufficient integrity, information, and motivation to resist overreaching by a majority stockholder? Put bluntly, is there such a thing as a truly "independent" director who can act only in the best interests of the corporation and its non-controlling stockholders?

Assuming that there are such things as truly "independent" directors, when and to what extent are we willing to trust their judgment? Is there some basis to believe that we should defer (i.e., give business judgment rule deference) to decisions made by a board comprised of a majority of independent directors, but not those made by a board minority? Do we believe that deference should only be given if the independent directors are empowered to act on their own, with the active advice of financial and legal advisors, and without participation and involvement by insiders?

These issues raise interesting psychological and sociological questions. What are the motivations that drive most directors? Are independent directors likely to behave in a more trustworthy and effective manner when they are in the majority? Or specifically charged as a separate committee to act only for the minority?

The judicial decisions that address the application of the business judgment rule in cases like these therefore invariably rely on empirical intuitions to answer these type of questions. Judges are not entirely

comfortable with this reality, but it is undeniably true.

Another reality is that most of the case law dealing with these questions lacks citations to empirical research. Sociological and psychology journals are typically not presented to my court in cases like these.[12] Expert witnesses do not appear to testify about the effect that different structures have on the ability of independent directors to act as a proxy for arm's-length bargaining. Instead, the judges are asked to apply their own judgment about these matters, based largely on their own idiosyncratic views and those embraced in previous judicial decisions.

Let us return to our original real world questions. Is demand excused? Does the business judgment rule standard of review apply? In view of the difficult nature of some of these questions, it might not surprise you that a practitioner would find what is arguably a split in the Delaware authority.

Using *Aronson v. Lewis*,[13] a good defense lawyer would contend that the plaintiffs could not proceed with a derivative suit. Why? Because *Aronson* presumes that a board majority comprised of independent directors is capable of objectively considering a demand to sue a controlling stockholder like Dominator.[14] This presumption in *Aronson* is expressly designed to track the structural operation of the business judgment rule.[15] *Aronson* thus embodies the notion that a transaction—like an asset sale—between a controlling stockholder and a subsidiary may qualify for business judgment rule protection so long as it is approved by an informed, independent board majority. *Aronson* takes a view of human nature that says that directors without conflicting financial ties can resist a majority stockholder, at least when those directors comprise a majority of the

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[12]The absence of such proof in most cases is, of course, not surprising. In most common law corporate cases, the parties are content to litigate based on the existing legal rules. Moreover, the odds of any particular case resulting in a sharp directional change in legal doctrine are small. The skillful litigator will therefore likely focus her efforts on more traditional tasks, like the presentation of a compelling factual story supporting her clients' victory, and the crafting of legal briefs that show why recognized legal principles compel a favorable outcome, or should be extended a bit to produce one. The academic literature does, however, contain examples of scholarship applying psychological and sociological research to the behavior of corporate boards. For recent examples, see Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002); James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333 (2001). For a more venerable example, see Robert J. Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 U. MICH. L. REV. 1 (1981).

[13]473 A.2d 805 (Del. 1984).

[14]*Id.* at 816.

[15]*Id.* at 814-15.

board.[16]

By contrast, there is arising case law—in particular, *Kahn v. Tremont*[17] and *Emerald Partners v. Berlin*[18]—that *arguably*—and I underscore arguably—adopts a very different rule. Under *Tremont* and *Emerald Partners*, it can be asserted with a straight face that an asset sale by Dominator to Submissive will always be subject to entire fairness review, regardless of the composition of the Submissive board.[19] In this conception, the majority stockholder simply holds too much structural and practical sway over Submissive to fully trust any internal corporate proxies for arm's-length bargaining. As a result, the fact that the Submissive board was comprised of a majority of independent directors would not invoke business judgment rule protection; instead, at most, it would shift the burden to the plaintiffs to prove unfairness.[20] Likewise, if the independent directors had actually negotiated the price as a special committee with its own advisors, it would only be subjected to this less significant burden-shifting effect.[21]

To those of you who still teach doctrinal law and its litigation implications, you will note that *Aronson* and *Tremont/Emerald Partners* combine to produce a potentially confusing result. The *Aronson* test has two prongs.[22] The first prong supposedly tracks the structural operation of the business judgment rule.[23] Under that first prong, as traditionally applied, the plaintiffs would lose, because the independent board majority

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[16] *Id.*

> [I]t is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director. It is the care, attention and sense of individual responsibility to the performance of one's duties, not the method of election, that generally touches on independence.

Id. at 816.

[17] 694 A.2d 422 (Del. 1997).

[18] 787 A.2d 85 (Del. 2001).

[19] *Tremont* and *Emerald Partners* arguably extend the reach of *Kahn v. Lynch*, 638 A.2d 1110 (Del. 1994), which is discussed *infra* pages 509-10. The scope of the *Lynch* doctrine remains uncertain. In a recent opinion, Chancellor Chandler read *Emerald Partners* as extending *Lynch* only to situations involving either a squeeze out merger or a merger between two corporations under the control of a single controlling stockholder. Orman v. Cullman, 794 A.2d 5, 20 n.36, & 23 n.40 (Del. Ch. 2002). This narrower reading is consistent with the earlier decision in *In re* General Motors Class H Stockholders Litigation, 734 A.2d 611, 617 (Del. Ch. 1999) (reading *Lynch* as a special rule for certain, but not all, transactions involving controlling stockholders).

[20] *Emerald Partners*, 787 A.2d at 94-95; *Tremont*, 694 A.2d at 428.

[21] *Emerald Partners*, 787 A.2d at 95; *Tremont*, 694 A.2d at 430.

[22] *Aronson*, 473 A.2d at 814.

[23] *Id.* at 814-16.

would be presumed capable of suing Dominator.[24]

But *Tremont/Emerald Partners* complicates the application of *Aronson*'s second prong, which is a safety valve permitting a derivative plaintiff to not make a demand if he can show with particularity that the board decision under attack (in this case, the asset sale) is not entitled to business judgment rule protection.[25] This is usually done by a particularized showing that the transaction resulted from a breach of fiduciary duty.[26] The second prong is useful to permit a plaintiff to show that some factor not accounted for solely by board structure (e.g., gross negligence by the independent directors) creates such a real fear of liability on the part of the disinterested directors that they cannot impartially consider a demand.[27] But note how the *Tremont/Emerald Partners* formula plays into the second prong analysis in a very different way. Because those cases can be read to apply the entire fairness standard to the asset sale, simply because Dominator was a majority stockholder and irrespective of the independent board majority at Submissive, their import may be to excuse demand under the second prong of *Aronson*.

The origins of this doctrinal tension illuminate the importance of legislative facts in the development of the common law of corporations. The *Tremont/Emerald Partners* line of reasoning emerges out of a prior series of cases addressing squeeze-out mergers in which a majority stockholder proposed to acquire the rest of the shares of a controlled subsidiary for cash or stock.[28] There was a split in authority in the court of chancery about how to address such transactions. One school of thought (which can be thought to be more traditional) was that a negotiated merger between a majority stockholder and a controlled subsidiary could qualify for business judgment rule treatment if: (1) the subsidiary board was comprised of a majority of independent directors; (2) a special committee of the subsidiary's independent directors was empowered to negotiate and veto the merger; or (3) the merger was subject to approval by a majority of the disinterested subsidiary stockholders.[29]

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[24] *Id.*

[25] *Id.* at 815.

[26] *Aronson*, 473 A.2d at 815.

[27] *Id.* at 817 ("In Delaware mere directorial approval of a transaction, absent particularized facts supporting a breach of fiduciary duty claim . . . is insufficient to excuse demand.").

[28] This line of cases includes: Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); and Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952).

[29] *In re* Trans World Airlines, Inc. Shareholders Litig., No. 9844, 1988 Del. Ch. LEXIS 139 (Del. Ch. Oct. 21, 1988). *See also* Puma v. Marriott, 283 A.2d 693 (Del. Ch. 1971) (explaining that when the Marriott Corporation exchanged large amounts of its stock for shares

Another court of chancery view was based on some prior supreme court precedent.[30] Under this view, a squeeze-out merger posed special dangers of overreaching by the majority.[31] In essence, this strain of thought was premised on the notion that when an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power. Lurking in the back of the directors' and stockholders' minds is the fear that the gorilla will be very angry if he does not get his way. As a result, we cannot fully trust the traditional protective devices that the law uses to validate interested transactions. At most, we will give the majority stockholder some credit if he uses these devices by shifting to the plaintiff the burden to prove unfairness. Worth noting is that this approach also implicitly involves a judgment about the utility of the statutory appraisal remedy—the fact that minority stockholders have this protection at their disposal is not seen as significant enough to give them the backbone to vote no.[32]

When the issue came to the Delaware Supreme Court in *Kahn v. Lynch*,[33] it resolved the issue in favor of the 800-pound gorilla theory. The 1994 ruling in *Lynch* created what many viewed as a special rule for going private transactions involving controlling stockholders. Observe that the adoption of this theory requires little in the way of case-specific fact findings. The important case-specific facts are simply uncontested ones about the nature of the transaction, and the controlling stockholder's contractual and voting authority. What, of course, determined the outcome were non-case-specific factual judgments. How does the typical independent director react to a going private offer by a controlling stockholder? How significant is it that a controlling stockholder who, for example, owns thirty-nine percent, has the effective power to block other

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in other corporations owned by Marriott family members holding 46% of the corporation's stock, the business judgment rule applied because a majority of the board which approved the transaction was independent).

[30]*See* Rosenblatt v. Getty Oil Co., 493 A.2d 929. (Del. 1985).

[31]*See* Citron v. E.I. Dupont de Nemours & Co., 584 A.2d 490 (Del. Ch. 1990).

[32]The appraisal remedy in § 262 is based on a plaintiff-friendly fair value standard. *See* DEL. CODE ANN. tit. 8, § 262 (2001); *see also* Agranoff v. Miller, 791 A.2d 880 (Del. Ch. 2001) (discussing this reality). But the remedy's utility for small holders is compromised by a variety of other factors, which have been well described elsewhere. *See, e.g.*, Jack B. Jacobs, *Reappraising Appraisal: Some Judicial Reflections*, Speech at 15th Annual Ray Garrett, Jr. Corporate and Securities Law Institute, Northwestern University School of Law (Apr. 27, 1995) (on file with the author); Randall S. Thomas, *Revising The Delaware Appraisal Statute*, 3 DEL. L. REV. 1 (2000).

[33]638 A.2d 1110 (Del. 1994).

options, but not to cash out the minority?[34] If the controlling stockholder owns a majority of shares, does its practical ability to compel the merger at some later point, even if the independent directors say no now, prevent the independent directors from approximating arms-length bargaining? How will minority stockholders react to being given veto power over a going private merger? Will the possibility of later bad acts by the controlling stockholder chill their free will? Or will the availability of judicial relief if such bad acts transpire comfort them and permit them to say no, especially since appraisal is available if the merger prevails over their objections?

In the *Tremont* and *Emerald Partners* cases, the *Lynch* doctrine was *arguably* extended from the unique context of a going private transaction to address any transaction involving a controlling stockholder, on the one side, and another controlled corporation, on the other. This arguable extension occurred without discussion of whether a transaction potentially less important to a majority stockholder (such as the sale of a modest-sized asset) should be subject to the same rules as a squeeze-out merger. It is this potential extension that causes the most direct doctrinal tension with *Aronson*.[35]

The *Lynch* doctrine has also produced tension with another body of precedent. In a prior line of authority, the Delaware courts held that a majority stockholder who made an independent tender offer for the minority's shares had no duty to pay a fair price so long as the tender offer was not structured in a coercive way.[36] By independent, I mean that the tender offer was not made in connection with any negotiated agreement with the subsidiary board.

Of course, *Lynch* turns on the arguably contrary premise that a going private offer by a majority stockholder is inherently coercive. Under *Lynch*, even when the majority stockholder subjects itself to a special committee veto and a majority of the minority vote, it remains subject to the entire fairness standard.

At present, there is an active and lively debate about these two lines of authority. In two recent cases, the court of chancery has held (in the context of a preliminary injunction proceeding) that going private offers by majority stockholders conditioned on a majority of the minority tender were

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[34]This was the situation in *Lynch*. *Id.* at 1113-14.

[35]An attack on a going private merger by stockholder plaintiffs would involve individual claims outside the reach of *Aronson*, which addresses derivative claims.

[36]Solomon v. Pathe Communications Corp., 672 A.2d 35, 39-40 (Del. 1996); Lynch v. Vickers Energy Corp., 351 A.2d 570, 576 (Del. Ch. 1976), *rev'd on other grounds*, 383 A.2d 278 (Del. 1977); *In re* Ocean Drilling & Exploration Co. Shareholders Litig., No. 11,898 (consolidated), mem. op. at 6-7 (Del. Ch. Apr. 30, 1991).

not likely to be subject to the entire fairness standard.[37] In both cases, the court held that the majority stockholder had no duty to pay a fair price and that the offer was not coercive. Allow me to identify this line of authority by the name of the first of these decisions, *Siliconix*.[38] You should also be aware that in the wake of the ruling to deny an injunction against the procession of the tender offer in *Siliconix*, the minority stockholders of Siliconix in fact rejected the offer.

In one way or another, the common law of corporations will have to grapple with the keen tension between *Lynch* and *Siliconix*. A new evolution will be required that will create a more stable equilibrium. When this new evolution occurs, my intuition is that the judiciary's thinking will turn most importantly on larger empirical claims about the commercial world, rather than on any case-specific fact findings. Will the rule of *Lynch* be tested against the real world experience since *Lynch* was decided? For example, if there is empirical evidence that going private transactions negotiated by special committees have been advantageous to minority stockholders, will that play into the ruling? If there is empirical evidence that minority stockholders (as per the recent example in *Siliconix*) in fact will reject going private offers, will this not bear on the shaping of the legal rule? Is it, on balance, better that there be an opportunity to accomplish going private transactions using relatively firm safe harbors? Or, by contrast, is it better to ensure that all such transactions receive close judicial scrutiny, thus potentially reducing the number of such transactions that occur? Put simply, the resolution of this doctrinal tension will require common law judges to make normative value judgments based on empirical assumptions about the world—i.e., legislative facts.

Even on a more technical and mundane level, this is still true. Let us try to wake up our finance colleagues for a moment. Even under the *Siliconix* line of cases, there is the possibility for judicial action invalidating the offer if the independent offer is somehow coercive. Determining what is coercive, however, as a practical matter cannot turn on a judicial judgment about the subjective motivations of any particular class of target stockholders. It must turn instead on generalized judgments about how minority stockholders are likely to behave when confronted with a tender offer structured in a particular way in a particular context. Assume,

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[37] *In re* Aquila Shareholders Litig., No. 19,237, 2002 Del. Ch. LEXIS 5 (Del. Ch. Jan. 3, 2002); *In re* Siliconix Inc. Shareholders Litig., No. 18,700, 2001 Del. Ch. LEXIS 83 (Del. Ch. June 19, 2001). For an earlier oral ruling to the same effect, see *In re* Life Techs., Inc. Shareholders Litig., No. 16,513 (consolidated), mem. op. (Del. Ch. Nov. 24, 1998).

[38] *Aquila*, 2002 Del. Ch. LEXIS 5, at *16; *Siliconix Inc.*, 2001 Del. Ch. LEXIS 83, at *58-*59.

for example, that Dominator—who remember owns 81% of Submissive's shares—makes an offer to purchase all of Submissive's shares so long as at least a majority of the minority tenders its shares. Assume also that Dominator does not promise what it will do to the minority if it obtains only a bare majority. That is, Dominator reserves the right—if it obtains enough shares to give it over ninety percent of the stock—to consummate a later merger under section 253[39] at any time it wishes and on unspecified terms. In a later section 253 merger, the minority's only remedy will be appraisal, assuming full disclosure by Dominator of the material facts.[40]

The question becomes whether the offer structure is coercive—a question whose answer could be thought to turn, to a large extent, on legislative facts. Start with the notion that some respected scholars believe that tender offers are inherently more coercive than votes, a view associated with, among others, Lucian Bebchuk. The logic of Bebchuk's work suggests that a tender offer structure, like the one Dominator is using, might cause even target stockholders with a higher reservation price to tender, irrespective of their view that the price is inadequate.[41] The Bebchuk view would incline towards a legal ruling that would consider this form of tender offer coercive, especially if the later availability of appraisal in a section 253 squeeze-out is (again) factually determined to be of little influence in giving the minority the opportunity to exercise free will.

Under this perspective, however, the outcome might tilt towards Dominator if he restructured his offer. For example, if Dominator structured the tender offer so that stockholders would be asked to make two independent decisions. One would be to tender. The second would be to simply vote on whether the offer would proceed. Assume Dominator agreed not to proceed with the offer unless a majority of the minority both tendered and voted yes. As Bebchuk sees the way the world works, this modified structure would give the minority a free choice (putting aside the psychological fears of retribution on which the *Lynch* 800-pound gorilla doctrine rests).

But before a future court adopts the Bebchuk view, must it deal with the actual outcome in *Siliconix*? That case involved an offer conditioned

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[39]DEL. CODE ANN. tit. 8, § 253 (2001).

[40]*In re* Unocal Exploration Corp. Shareholders Litig., 793 A.2d 329 (Del. Ch. 2000), *aff'd*, Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).

[41]*See, e.g.*, Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002); Lucian Bebchuk & Oliver Hart, *Takeover Bids v. Proxy Fights in Contests for Corporate Control*, Discussion Paper No. 336, John M. Olin Center For Law, Economics, and Business, Harvard Law School (Oct. 12, 2001); Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695 (1985).

on a majority of the minority that would bring the offeror to over ninety percent, with no binding promise from the offeror about what he would do with the remaining stockholders who did not tender. The court found this offer structure non-coercive,[42] a judgment arguably borne out by the actual behavior of the Siliconix stockholders.

Assume yet another modification. In this variation, Dominator conditions the procession of its offer on a majority of the minority tendering, but promises in a binding way to consummate a section 253 merger at the same price immediately thereafter. This was, by and large, the structure in the *Aquila* case. In view of the behavior of the Siliconix stockholders in a more coercive environment, does this promise—which ensures that hold-outs will be treated equally with those who tender—render the modified Dominator offer *incontestably* non-coercive? I venture no answer, but suggest again that the answer turns on legislative facts. That is, the case turns on a judicial decision about how the world works, a judicial decision that necessarily involves empirical assumptions. These are the sorts of decisions in which judges have the most need to be informed by social science research and other generalized data about real world behavior.

The arguable inconsistencies that I have identified in the corporate common law are not indicative of any crisis in Delaware law. To the contrary, they illustrate the dynamism inherent in the common law process of adjudication.[43] Discrete cases arise that call on judges to make difficult empirical and normative judgments under time pressure. The appeal of various arguments will tug and pull on judges addressing slightly different factual contexts differently, as a result of the disparate world views of the judges involved, the variant arguments and evidentiary records in the cases, the mood set by the current market environment, and recent commentary on

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[42] *Siliconix*, 2001 Del. Ch. LEXIS 83, at *62.

[43] Professor Schauer states:

> In ways that Holmes identified more than a century ago, the path of the common law is a path consisting of empirical assessment, behavioral speculation, and normative analysis far more than it is a path of logical deduction or any other form of distinctively legal reasoning. Once we recognize that the common law at its heart is a process in which what had previously been thought to be the rules are modified in the process of application, we recognize as well that this is not and cannot be a process that is entirely rule-based. Rather, like any rule-making or rule-remaking process, it is a process in which determining what the rule should be on the basis of knowledge about the state of the world and knowledge about the nature of human behavior in response to rules is of the essence.

Schauer, *supra* note 2, at 38-39.

the state of the law.[44] A certain amount of tunnel vision is involved in the completion of any complex task. Therefore, judges may decide legal issues within a channel of decisional authority and factual evidence cited by the litigators, a channel that might, in any particular case, be too narrow.

For example, *Aronson* is viewed as a demand futility case. If demand futility was not in play for some reason, *Aronson* might not immediately be seen as relevant to whether an asset sale to Submissive was governed by the business judgment rule or the entire fairness standard.[45] Inevitably, however, the individual trees of the common law forest entangle, requiring further judicial forestry. Judges are not to be blamed for this reality; moments like these are integral—and usefully vital—to the evolution of the common law.

These moments cannot be expected to produce decisions that are always wise. What judges can aspire to is that these moments will result in decisions that are fully reasoned, that are candid in acknowledging the tensions that exist in the current status of the common law, and that reflect a willingness to update the common law on the basis of new information about the world. In these contexts, judges must hold thoughts tentatively,

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[44]My colleague, Chancellor Chandler, has articulated well some of the unique cultural factors that aid the Delaware courts in effectively making the common law of corporations. Among these critical factors is the continuing feedback that the Delaware courts receive about their decisions from affected constituencies, including corporate managers, investment banks, institutional investors, and, of course, the attorneys who represent their interests. *See* William B. Chandler III, *The Court of Chancery as Teacher of Corporate Law*, University of Pennsylvania Law and Economics Institute, Distinguished Jurist Lecture (Feb. 24, 2000). Chancellor Chandler aptly refers to this iterative process of communication as a "conversation." *Id.* at 3.

In the course of commenting on the "conversation," the Chancellor cited the example of the Delaware courts' continuing work in adjudicating the circumstances in and extent to which directors can defend against hostile takeover bids, often because transactional planners have reacted to previous decisions through innovations resulting in the need to apply the common law of fiduciary duties to new factual circumstances. This "'conversation' result[s] in still more refinements. But the blueprint is never quite complete. Legal indeterminacy persists, partly because of the limits of human perception and expression, and partly because of the dynamic, fluid nature of a free capitalist economy." *Id.* at 24-25. Later, he continued:

> I sit on a court subject to the elemental forces of nature, where every action generates a reaction. Our decisions are our actions, which are continuously met by reactions from both the Supreme Court and from the leaders of, and advisors to, the business world. But it is only through this clash of forces . . . that we achieve (we hope) a natural equilibrium, a balance in the law. And in my opinion, it is this sense of equilibrium, more than anything else, which supplies the essential stability and sense of principle that is so vital to corporate governance . . . .

Id. at 29.

[45]*But see Aronson*, 473 A.2d at 812 ("In our view the entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability. The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a).").

be careful to ponder the empirical foundations of the various choices before them, and—perhaps most importantly—be willing to revisit and abandon prior decisions, if necessary, to forge a sensible path forward.[46]

Because such moments do involve judicial judgments about how humans are likely to behave in particular contexts and the likely results of that behavior, candor about that reality is essential.[47] With that candor must come an active and engaged attitude towards information bearing on those underlying, and often insoluble, issues. While judges should not become easily enamored with academic fads, it is, on balance, well worth it for judges to seek out knowledge and test their instincts against the relevant social science literature.[48]

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[46]One easy example of a real world change that has a potential influence on the underpinnings of the corporation law is the emergence of active institutional investors. As others have noted, this phenomenon stresses the Berle and Means assumption that stockholders in public corporations were dispersed, not particularly well informed, and difficult to aggregate in an effort toward collective action. *See, e.g.*, Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes But Uncertain Benefits*, 25 J. CORP. L. 349, 350, 354 (2000) (noting the increase in concentrated voting power by institutional investors and commenting that this undermines the validity of the Berle and Means model of the public corporation).

[47]The *Aronson* case itself provides an example of this sort of candor:

> We recognize that drawing the line at a majority of the board [under the first prong of the demand futility test] may be an arguably arbitrary dividing point. Critics will charge that we are ignoring the structural bias common to corporate boards throughout America, as well as the other unseen socialization processes cutting against independent discussion and decisionmaking in the boardroom. The difficulty with structural bias in a demand futile case is simply one of establishing it in the complaint for purposes of Rule 23.1. We are satisfied that discretionary review by the Court of Chancery [under the second prong of the demand futility test] of complaints alleging specific facts pointing to bias on a particular board will be sufficient for determining demand futility.

Aronson, 473 A.2d at 815 n.8. This is an example of a court forging a sensible and workable rule, but with a candid appreciation of the limits of its own knowledge.

[48]Chancellor Chandler has made a similar observation. In commenting on the need for corporate law judges to avoid placing too much case-determinative weight on legal principles derived from empirical assumptions subject to real world contradiction, he stated:

> It is to the benefit of all that judges not become lazy by uncritically adopting theoretical constructs such as insider, independent, or institutional investors as proxies for a predetermined outcome. Sometimes those concepts are wonderful tools for communicating a point, and they may even have significant legal consequences. But we are better served, in my opinion, if we are open minded and willing to test our assumptions and question the applicability of conventional wisdom in each and every case.

Chandler, *supra* note 10, at 1096 (footnote omitted). *See also* Jason Scott Johnson, *The Influence of the Nature of the Firm on the Theory of Corporate Law*, 18 J. CORP. L. 213, 228-30, 239-40 (1993) (arguing that corporate law theory for too long rested on empirical assumptions lacking real world proof, and that corporate law theories that can be tested against observable facts are preferable, while recognizing that "[t]here has never been, and will never be, a final economic theory of anything").

The adjudicative process obviously hampers the judge's ability to put her hands on an unbiased, and sufficiently thorough, sample of the literature, much less to understand it fully.[49] The joyous and, at times, maddening complexity of the human experience confounds the ability of social science to describe the way things are with the certainty that is often achievable in some aspects of the natural sciences. Judges reviewing a skewed and incomplete body of difficult-to-understand social science articles whose composition is shaped largely by time-pressured personal research and citations by self-interested litigating adversaries must proceed with some hesitance. When possible, empirical evidence should be presented through live, expert testimony so that the judge can go beyond the cold page to an active dialogue with the social scientists on both sides of the question, aided by adversarial examinations.[50] Even when that

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[49]That judges are not likely to be exposed to a representative and unbiased selection of sources from which to identify legislative facts is a proposition I concede the truth of based on my own unrepresentative and potentially biased experience with and knowledge of the American litigation process. Interesting work commenting on this constraint on the common law's effectiveness includes: Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992); Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011 (1990); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988).

[50]There is an interesting body of literature regarding judicial absorption of legislative facts. One of the notable features of the litigation process that this literature points out is the reality that appellate courts (e.g., the United States Supreme Court) often receive evidence about legislative facts that was not presented at the trial level. *See generally* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) (discussing the increasing partisan distortion of empirical social science research in *amicus* briefs). Commentators have forcefully argued that judicial decisionmaking at all levels (i.e., both the trial and appellate levels) is improved if conflicting evidence about legislative facts is presented by both sides at trial. *See, e.g.*, Peggy C. Davis, *'There is a Book Out . . .': An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993). *See also* Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000) (discussing the use of legislative facts in appellate briefs, in view of the reality that such facts may not be in the trial record).

As a personal matter, I believe it to be extremely useful for the court to have an opportunity to engage in a direct back-and-forth with testimonial experts. This permits me to have the experts' aid in comprehending the literature that they have cited to me. Put bluntly, I can ask questions that begin with phrases such as "Is what you're getting at that . . ." or "Can what you're saying be captured in the following words?" As important, I can ask questions that can begin with the simple word "why?," which litigators tend to avoid. This process helps me translate academic language into the form of English I better understand. The fact that all of the cases tried before me require me to be the fact finder gives me a degree of freedom that is unavailable to judges conducting jury trials. Nonetheless, the *Daubert* hearings, now so common as a predicate to the admission of expert testimony, can permit jury trial judges some of the same opportunity. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (articulating standards for admissibility of expert testimony under the Federal Rules of Evidence).

technique is used to improve the judge's ability to assess empirical claims based on social science research,[51] common sense and modesty still counsel against the adoption of eternal verities supposedly premised on the latest in financial scholarship.[52]

These factors do not, however, weigh in favor of judicial isolation from information about the real world. Nor do they support acts of judicial obscurantism, in which judges rest their decisions on their "discovery" of rules of decision within prior precedents, thereby suppressing the empirical and normative foundations of their judgments. Neither option changes the fact that common law decisions rest on empirical assumptions by particular judges about how the world works, and normative choices reflecting those judges' beliefs about how best to address the reality they perceive.[53]

Corporate law judges cannot escape the obligation to make normative decisions based on our limited understanding of the functioning of the world. Our role necessarily requires us to make what some may view as mistaken choices. It is inevitable that we will sometimes come to the wrong conclusion, not always because our normative instincts are unsound, but instead because our ability to absorb all the information relevant to our judgments is compromised.

This inevitability does not, to my way of thinking, undermine the integrity of the common law. The essence of the common law is the good faith effort by impartial judges to articulate principled rules of law that fairly resolve disputes between members of our society, and that provide a workable incentive system for the procession of private activity, in all its

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[51]Of course, even when expert testimony is presented regarding legislative facts, the judge's role might involve some measure of guesswork. For example, in *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000), dueling experts testified about the likely turnout among various stockholder categories in a consent solicitation. They based their testimony on their own experience as proxy solicitors, with no corroborating production of empirical data, even from their own companies' files. *Id.* at 337. In view of the expedited nature of the case, I was forced to make the best judgment I could, while acknowledging the shakiness of the factual underpinnings of my ruling. *Id.* at 336. Despite the highly subjective nature of the testimony in that case, however, I still found the testimony helpful, for many of the reasons cited in *supra* note 50.

[52]Even Dworkin counseled modesty on the part of his idealized jurist, Hercules. Dworkin, *supra* note 2, at 1109.

[53]Sophisticated commentators on corporate law are keenly aware of the extent to which judges must forge common law rules based on "intuitions about underlying empirical conditions." Robert M. Daines & Jon D. Hanson, *The Corporate Law Paradox: The Case for Restructuring Corporate Law*, 102 YALE L.J. 577, 619 (1992) (noting that in the absence of firm empirical evidence, courts were required to shape the common law of the takeovers in the 1980s on this basis).

variegated manifestations.[54] That judicial efforts of this kind cannot produce perfect results does not mean that they do not produce good ones, or ones that are just in a deeper sense.[55]

That these efforts are never completed, but always involve a striving for facts of the type that you in the room have devoted your careers to finding, enhances, not detracts, from the vitality and legitimacy of the common law. Judges should not fear that a candid struggle with difficult questions of legislative fact will reveal to the public, for the first time, the reality that judges are fallible and that prior decisions can be wrong. Rather, they must build public confidence the hard way, by the principled and careful application of judgment to an uncertain and ever-changing world.[56]

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[54]Schauer, *supra* note 2, at 44 ("muddling through by a group of moderately intelligent, moderately electorally unaccountable, and moderately disinterested decision makers does not look nearly so bad when we compare it to the likely alternatives").

[55]*See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

[56]In this regard, see the important article of former Chancellor Allen on the role of the judiciary in addressing the complexities of corporate law cases:

> It is . . . important, in my opinion, that the citizens who willingly subject themselves to the rule of law understand what that process really is; understand when and why choice is unavoidable; understand that choices made have been made openly in an intellectually honest way and that the judicial process, as a whole, is subject to democratic control. If a case decision necessitates a difficult choice, that fact should be exposed and all choices made should be justified with good reasons. It is neither honest, nor I suppose intelligent, to attempt to hide choice when choice is compelled by circumstance. A judicial system that exposes its grounds — its real grounds, which may extend beyond a set of doctrinal expressions — is in the end, the better system of government.

Allen, *supra* note 10, at 901-02.