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COMMUNITIES AND THEIR CORPORATIONS: TOWARDS A STAKEHOLDER CONCEPTION OF THE PRODUCTION OF CORPORATE LAW*

Timothy P. Glynn†

Corporations are the dominant economic institutions of our time. Thus, whether viewed from a local perspective, a global one, or one that considers the interaction between the two, corporations will play a central role as we confront the challenges of the next several decades. One cannot begin to think about how to approach issues from climate change, to health care, to the consequences of a rapidly globalizing world, to the pressures on our democracy itself without considering whether and how to alter the legal norms that frame decision making by corporate actors.

The focus of our panel is stakeholder theory. Of course, stakeholder theories take many forms and, indeed, may address many different corporate constituencies, including workers, creditors, customers, and the communities within which firms operate. Yet we are all, in this general sense, stakeholder theorists. Since the purpose of the corporate form is to enhance social welfare,[1] how could it be

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* This Article is adapted from a presentation given on January 25, 2008 as part of Case Western Reserve Law Review's Symposium, *Corporations and Their Communities*. Drafts of the papers for the panel on stakeholder theory were submitted in the summer of 2008, before the current financial crisis occurred. Although much of what has transpired is relevant to the discussion of stakeholder governance, to help expedite the publication process, I have not made substantial edits reflecting these events. They do not alter my core claims regarding the production of corporate law—indeed, in my view, they strengthen them.

† Miriam T. Rooney Professor of Law, Seton Hall University School of Law. Thanks to Kathleen Boozang, Kent Greenfield, Crystal Olsen Glynn, Charles Sullivan, and Marc Poirier for their helpful comments on this Article, and Joseph Fischetti and Daniel Gottlieb for their research assistance. Thanks also to George Dent for his careful critique of my presentation. Finally, many thanks to the editors of the Case Western Reserve Law Review for the opportunity to participate in this Symposium and for their accommodations during the publication process.

[1] That the overall objective of corporate law is to advance social welfare or social efficiency is uncontroversial. *See, e.g.*, RENIER KRAAKMAN ET AL., THE ANATOMY OF

otherwise? The welfare of stakeholders beyond just management (directors and officers) and shareholders therefore is not only relevant but also central to the normative claims on all sides in the debate over how the corporation and corporate law ought to be structured.[2] The real dispute is over how corporate law can best achieve its larger social ends.

Those who favor the existing corporate law regime and those who favor reforms that empower shareholders—including my co-panelist, Professor George W. Dent, Jr.—argue that their approach to corporate law is better for both shareholders *and* other stakeholders.[3] Others, including Professor Kent Greenfield and me, are deeply skeptical that any corporate law regime that focuses almost exclusively on the relationships among managers and shareholders, and privileges their interests above all others, can sustain beneficial outcomes for unconsidered stakeholders and society as a whole.

Professor Greenfield proposes an alternative conception of substantive corporate law—one which integrates the interests of other stakeholders directly into corporate legal principles and firm governance structures.[4] Although I find Professor Greenfield's claims persuasive,[5] my aim in this Article is different. It is, in a sense, far less ambitious, since I do not propose particular changes in substantive corporate law reflecting a broader stakeholder vision.

CORPORATE LAW, A COMPARATIVE AND FUNCTIONAL APPROACH 17–19 (2004).

[2] *See id.*

[3] Defenders of the current law argue that, by shielding director decision making from direct shareholder control, directors are free to act in the best interests of the firm as a whole, and this results in decision making that benefits shareholders and other stakeholders over the long term. *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); *cf.* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). Professor Dent and other shareholder advocates argue, to the contrary, that recalibrating legal norms to provide more protection for shareholders will alter corporate behavior in ways that will ultimately serve these larger ends. *See, e.g.*, George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107 (2008) [hereinafter Dent, *Stakeholder Governance*]; George W. Dent, Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213, 1232–33, 1270–71 (2008) [hereinafter Dent, *Academics*].

[4] Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008) [hereinafter Greenfield, *Defending*].

[5] I also will not focus on Professor Dent's criticisms of these claims, since Professor Greenfield has offered his own responses. *See generally id.* I do want to emphasize, as Professor Greenfield has, that the kinds of stakeholder reforms we seek are neither "anti-capitalist" nor disguised forms of "socialism." Certainly, we call for government regulation, but so does Professor Dent and anyone else who thinks law—in this case corporate law—is essential for markets to work appropriately. Stakeholder theorists believe as other corporate scholars do, that corporations and markets can advance social welfare; we simply differ on how corporate law ought to be structured to further this goal.

Nevertheless, the issue on which I focus—corporate law's production—is central to understanding both the existing structure of American corporate law and how meaningful change might be achieved.[6]

Who makes corporate law matters. Local, state, and national communities have a stake in the corporations that operate within them. But while these stakeholder communities regulate the conduct of these corporations in many ways, they often do not make or enforce the corporate legal norms that frame the governance of these entities. On the contrary, states and, through its inaction, the federal government allow corporate promoters (that is, corporate managers) to choose the corporate law that governs their conduct. Because managers will select the law that favors their interests, states competing for corporate charters (most notably Delaware) craft corporate legal norms to appeal to managers, not to all firm stakeholders. Other states, seeking to retain such charters, have responded by enacting corporate legal norms likewise favorable to managerial interests.

Manager-captured production of corporate law therefore leads to substantive outcomes that favor managerial interests.[7] Whether this system also is beneficial to shareholder interests is the subject of the decades old race-to-the-bottom/race-to-the-top debate.[8] Here, I tend to

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[6] I am not the first to recognize this. Professor Greenfield has discussed the implications of how corporate law is produced in his other work, and has argued for a new choice-of-law regime similar to the one I propose. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 107–22 (2006); Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135 (2004). Others have addressed this issue as well. *See, e.g.*, Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41 (2005) [hereinafter Greenwood, *Markets and Democracy*]; Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL'Y REV. 381 (2005) [hereinafter Greenwood, *Democracy and Delaware*].

[7] I am not sure anyone really disputes this. What is disputed is whether managerial selection of corporate law is also beneficial to shareholders, other stakeholders, and society as a whole. *See infra* notes 8, 18.

[8] *Compare* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1509 (1992) [hereinafter Bebchuk, *Federalism*] (arguing that competition leads to rules biased towards managerial interests), *and* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665–66 (1974) (arguing that competition results in a "race for the bottom"), *with* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 915 (1982) (challenging Cary's analysis), *and* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. & ECON. & ORG. 225, 280–81 (1985) (arguing that competition results in a race to the top).

Race-to-the-bottom theorists contend that Delaware enacts rules attractive to managers and that market forces do not ensure that managers seek rules that maximize shareholder value. *See* Bebchuk, *supra*, at 1509; *see also* Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, *The Market for Corporate Law*, 3/1/06 J. INST. & THEORETICAL ECON. 134 (2006) (discussing forms

agree with Professor Dent that the race-to-the-bottom theorists have the better argument,[9] although, as Professor Greenfield has shown, relative to workers, both managers and shareholders have won (handily) over the last several decades.[10]

Beyond the race, other effects of this production system are clear. Manager choice results in the exclusion of other stakeholder interests from corporate law itself—protection of these interests therefore defaults to market forces and external legal regimes.[11] Even more troublesome, the current production system all but eliminates stakeholder voice in the making of this law. Corporations are creatures of law, but, bizarrely enough, their managers are not subject to normal political or regulatory constraints in terms of the central legal norms that frame their decision making.[12]

Until we alter the peculiar way in which corporate law is made in this country, genuine corporate law reform—whether the kind of transformative change Professor Greenfield advocates, more limited stakeholder-based reforms, the creation of greater shareholder protections, or some combination—will not occur. To achieve meaningful change, *we need to move towards a stakeholder conception of the production of corporate law.* As is the case in other areas of regulation, the communities within which firm activities have substantial effects should be the ones to make and enforce corporate legal norms.

That production drives substance should come as no surprise. Yet how exactly the current production regime emerged, how it now functions, and how it can and should be altered are worthy of further

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of managerial opportunism which lead to state rules contrary to shareholder interests). Race-to-the-top theorists do not dispute that managers select the law of their choice; rather they contend that market forces—the markets for managers, control, and products—drive manager interests to converge with those of shareholders. *See, e.g.*, Fischel, *supra*, at 919–20. Both sides have marshaled empirical evidence for their claims as to whether chartering in Delaware enhances firm value. *Compare* Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 555 (2000) (yes), *with* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1820–21 (2002) (no), *and* Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 57 (2004) (no).

[9] *See* Dent, *Stakeholder Governance*, *supra* note 3, at 1138–39.

[10] *See* Greenfield, *Defending*, *supra* note 4, at 1054–56; *see also* Greenwood, *Democracy and Delaware*, *supra* note 6, at 446–47 (making a similar argument).

[11] *See, e.g.*, Greenwood, *Democracy and Delaware*, *supra* note 6, at 381.

[12] *See, e.g.*, GREENFIELD, *supra* note 6, at 110, 119 (arguing that, in this way, corporate law is undemocratic); Greenwood, *Markets and Democracy*, *supra* note 6, at 41–42 (stating that corporate law is inconsistent with basic tenets of democratic theory); *cf.* Fredrick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 36–37 (2006) (discussing how unusual it is for sovereigns to forswear its regulatory authority over activity that occurs wholly or mostly within its territory).

exploration. Part I of this Article describes the basic structure of American corporate law and the unavoidable link between production and substance. I then consider how the internal affairs doctrine—the prevailing horizontal choice-of-law rule that provides that the law of the state of incorporation governs the relationships among directors, officers, and shareholders—facilitates the exclusion of all interests other than managers (and to a lesser extent shareholders) from corporate law making. Finally, I explore why the modern conception of the internal affairs doctrine is both largely unconsidered and deeply flawed.

Part II then develops the main thrust of my argument. I contend that states within which firms operate ought to make and enforce corporate legal norms. Put another way, at the most fundamental level, if local, state, and national communities are to have a stake in the corporations operating within them, they must have a voice in the creation and enforcement of corporate law. Because substance and production are necessarily linked, I begin by exploring why states other than the state of incorporation have an interest in making corporate law and the range of ways in which stakeholder communities might approach reform. Next, I show why abandoning strict adherence to the internal affairs doctrine is essential from the perspective of any jurisdiction seeking to utilize corporate law as a tool to protect stakeholders, and why an alternative choice-of-law regime that allocates law-making authority based on substantial operational and other contacts is both workable and preferable. Along the way, I will respond to some of Professor Dent's comments.

I. THE PRODUCTION OF CORPORATE LAW: COMMUNITIES AS STAKEHOLDER LAWMAKERS

In a globalized world, local, state, and national communities face enormous challenges in seeking to influence and regulate corporate behavior. One well-documented challenge arises from the ubiquitous nature of the firm. That is, a business firm potentially exists beyond the confines of any particular physical space or community. Indeed, it potentially exists everywhere: it can attract or direct capital, develop supply chains, sell products or services, and perform its operations all over the globe. This provides firms with leverage when they deal with the particular communities within which they operate. They can demand concessions—from government officials, employees, or others—in exchange for not leaving, for maintaining the size of its local presence, or otherwise. And this produces competition between jurisdictions to attract and retain corporate activity.

Although its ultimate efficiency is in dispute, this kind of interjurisdictional competition creates a race to the regulatory bottom, and the willingness of communities, workers, and others to agree to terms (concessions) they would not otherwise accept.[13] Appropriately then, the ubiquity of the corporation frames some of the discussion about the relationship between corporations and communities—something that is a recurring theme in this symposium.

But the challenge communities face in regulating corporations has another dimension. When considering the legal norms that frame firm governance, the corporation may be governed by the law of a jurisdiction in which it has few or no operational contacts. In other words, while communities struggle with how to regulate the corporate activities that affect them, they have allowed governance of corporate governance itself to be outsourced. The net effect of permitting corporations such an opt-out of state law is that states have, by and large, ceded control over development of a core set of legal norms that frame corporate behavior. Indeed, states have surrendered it to corporate managers themselves by letting them choose the law they favor. Because communities have a stake in how corporate law is produced, they need to take back the right to regulate these core decisions.

A. The Narrow Focus of American Corporate Law

The prevailing American view of corporate law is, by global standards, a narrow one. Again, the purpose of the corporate form is to enhance social welfare. In somewhat simplified terms, corporate law (or, more generally, entity law) usually purports to further this end by serving two kinds of functions. First, it establishes the legal form of the firm and its basic waivable or nonwaivable attributes, including, for example, its legal personhood, equity ownership structure, decisional structure, and limited liability.[14] Second, corporate law potentially addresses three sets of "value-reducing forms of opportunism" or agency problems resulting from the potentially conflicting interests among firm constituencies: the conflict between manager and shareholder interests; the conflict between controlling and noncontrolling shareholder (or shareholder group) interests; and the conflict between the firm (reflecting managerial and shareholder interests) and others who are currently

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[13] *See, e.g.*, Katherine Van Wezel Stone, *Labor and the Global Economy, Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 991–93 (1995) (discussing such interjurisdictional competition and its effects).

[14] *See* KRAAKMAN ET AL., *supra* note 1, at 2, 5–15.

viewed as outside the firm, including employees, creditors, customers, and society as a whole.[15]

Unlike many other countries, the modern American approach to corporate law focuses almost exclusively on the first two forms of opportunism.[16] The structure itself—i.e., legal personhood and limited liability—has important implications for other stakeholders. And there are exceptions on the margins, including veil piercing and enterprise entity doctrine; the duties owed to creditors in insolvency; and corporate constituency statutes in some jurisdictions that allow but do not mandate consideration of other constituencies, particularly in the change of control context.[17] But the remainder of the doctrine addresses the allocation of authority and accountability among managers and shareholders.

"Corporate law" for for-profit entities therefore is treated as almost exclusively concerning shareholder and manager relationships. This is the case regardless of the conceptual lens (contract, property, or agency) through which such doctrine is viewed. It is then reinforced by how corporate law is taught and discussed: for example, most Business Associations texts devote few pages to matters within the third category or the implications of corporate law for other constituencies. Treatment of other stakeholder interests is left to other courses, if treated at all.

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[15] *Id.* at 2, 22.

[16] *See id.* at 61–70 (discussing the various ways in which European countries in particular protect non-shareholder constituencies and stating that in the United States, the primary focus of corporate law is the manager-shareholder agency problem and to a lesser extent, the majority-minority shareholder problem). Professor Dent seems to assume that European nations are moving away from utilizing corporate law or corporate governance structures to protect the interests of non-shareholder stakeholders. *See* Dent, *Stakeholder Governance*, *supra* note 3, at 1116, 1141–43. European nations have increased protections for shareholders. However, stakeholder protections in corporate law and governance in Europe persist and, in some circumstances, are expanding. Despite the pressures, co-determination has held its ground, as have other, softer mechanisms for ensuring employee voice, such as work councils and consultation requirements. *See, e.g.*, ROGER BLAINPAIN ET AL., THE GLOBAL WORKPLACE, 301–14, 366–67, 416–22, 452–53 (2007). Indeed, as discussed below, the United Kingdom's recently enacted Companies Act mandates that company boards take into account a wide range of interests beyond those of shareholders in their decision making. *See infra* notes 108–109 and accompanying text; *cf.* Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 550–51 (2005) (arguing that continental Europe has embraced a model of corporate governance law that focuses on corporate responsibility and concern for stakeholders, and indicating that the UK is beginning to change its policies to favor this European model).

[17] *See, e.g.*, N.Y. BUS. CORP. LAW § 717(b) (McKinney 2003); Blair & Stout, *supra* note 3, at 303 n.144 (listing these statutes). *See generally* Katherine Van Wezel Stone, *Employees as Stakeholders Under State Non-Shareholder Constituency Statutes*, 21 STETSON L. REV. 45 (1991) (discussing such statutes and their implications for workers). Moreover, the securities regime is designed to protect not just those transacting in shares, but also others purchasing and selling "securities," including bonds and other nonequity instruments.

In excluding other stakeholders from explicit consideration or integration, American corporate law privileges the interests of shareholders and managers over all others. Managers have broad decision making authority, constrained (if that is the right word) only to ensure that the exercise of this authority furthers shareholder interests—shareholder wealth or welfare.[18]

It is true that existing doctrine mandates that firm managers act in the interests of the *firm*, not the shareholders directly. It is also the case that particular aspects of the prevailing doctrine—such as business judgment deference for board of director decisions—afford decision makers broad deference deciding how to further these interests. As a practical matter, then, these decision makers can and do consider the interests of other stakeholders in making their decisions. But they do not have to. And it would be an overstatement to suggest that decision makers could opt to serve other interests to the exclusion of shareholder interests.[19] Indeed, the obligation that directors serve the firm for the benefit of shareholders is broadly accepted in the literature, in practice, and in our corporate culture as the *central* decision making norm.[20] And it is what shareholder empowerment advocates, including Professor Dent, want.[21]

Thus, while the ends of corporate law are broad, its focus in this country is narrow. It largely excludes from explicit consideration the interests of other constituencies—workers, customers, creditors, and the local, state, and national communities within which corporations operate. It imposes on management and shareholders no affirmative obligation to consider the welfare of other stakeholders, and, in fact, directs corporate actors (albeit imperfectly) to prioritize the end of maximizing shareholder value over all other values. Protection of other interests from corporate decision making therefore is left almost entirely to forces outside of corporate law—bargaining, the market, and "external" legal regimes.[22]

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[18] *See, e.g.*, GREENFIELD, *supra* note 6, at 41–42.

[19] *Id.* The obligation to maximize share value (at least to the exclusion of other interests) is sharpened in the sale context. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[20] Greenwood, *Markets and Democracy*, *supra* note 6, at 49–50.

[21] *See* Dent, *Academics*, *supra* note 3, at 1273–74.

[22] *See, e.g.*, Greenwood, *Markets and Democracy*, *supra* note 6, at 45.

B. The Inherent Link Between Production and Substance: The Outsourcing of Corporate Law

1. Delaware's Domination and Capture: Production Determines Substance

This country's narrow brand of corporate law is produced in a peculiar way. Congress clearly has the power to federalize for-profit corporate law, but it has stopped short of doing so.[23] The federal government does maintain a robust securities regime, and the self-regulatory organizations it oversees also enforce rules that govern the public markets. It has, however, left most of the rest of corporate law to the states. As treated in much of the corporate federalism literature, federal actors traditionally have been reluctant to regulate the "internal affairs" of even publicly traded firms,[24] although they have strayed from this norm occasionally, particularly in times of popular discontent with corporate actors.[25] Thus, for now at least, almost all "substantive" corporate law remains state law.

At the state level, there is one dominant producer of internal corporate legal norms, at least for larger enterprises. About 60 percent of U.S. publicly traded firms are incorporated in Delaware—the nation's second smallest state—and hundreds of thousands of other, privately held entities are chartered there as well.[26] This is true even though a very small percentage of Delaware corporations are actually headquartered in the state or have major operations there.[27]

Delaware regulates the governance of Delaware chartered firms by, among other things, establishing the basic rights of shareholders and the fiduciary duties of corporate managers. However, Delaware's approach is largely enabling rather than regulatory, favoring private ordering and decisional discretion.[28] It is, therefore, strongly

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[23] *See, e.g.*, Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 597 (2003).

[24] *See id.* at 596–97.

[25] *See, e.g.*, Timothy P. Glynn, *Delaware's* VantagePoint*: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 102–04, 115 (2008).

[26] *See id.* at 97–98, 126–28; Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 391 (2003); *see also* DIV. OF CORPS., DEL. DEPT. OF STATE, 2005 ANNUAL REPORT 1 (2005), *available at* http://www.corp.delaware.gov /2005%20doc%20ar.pdf (stating there were more than 695,000 active entities in Delaware in 2005).

[27] *See* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 568 [hereinafter Bebchuk & Hamdani, *Vigorous Race*] ("Delaware, where approximately 58% of public companies incorporate, is the state of location for less than 0.9% of publicly traded companies.").

[28] *See generally* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 (2006) (discussing the norms underlying Delaware corporate law).

deferential to management.[29] This is apparent, for instance, in its business judgment rule jurisprudence, its permissive approach to the duty to monitor, and its hands off approach to shareholder ballot access. For this reason, Delaware's corporate law is favored by manager or director primacy advocates[30] and, more generally, proponents of deregulation, but it is criticized by shareholder rights advocates.[31]

The slant of Delaware law is unsurprising, given that its corporate-law decision makers are largely captured by managerial interests. Managers are the prime movers in determining where to incorporate or reincorporate, and managers can effectively block shareholder attempts to exit.[32] Delaware is now heavily dependent on its chartering and downstream corporate litigation industry. Indeed, Delaware receives about 25 percent of its revenue directly from charter-related fees and taxes,[33] and, when combined with the indirect revenue produced from its corporate-law litigation industry, the state's entity franchise may produce as much as *40 percent* of the state's revenue.[34]

All interested parties in Delaware have incentives to provide some—albeit minimal—legal protections for shareholders. For example, Delaware's corporate litigation bar would have less work if the state's corporate legal norms were entirely clear or entirely permissive. Because Delaware's judiciary delineates the outer boundaries of acceptable managerial conduct through a contextual common-law approach, domestic attorneys on both the plaintiff and defendant sides are kept busy.[35] Moreover, Delaware's common-law

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[29] *See, e.g.*, Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1963 (1991) ("[Delaware] corporate law [is] generally favorable toward management prerogative . . . ."); *see also* Bebchuk & Hamdani, *Vigorous Race*, *supra* note 27, at 599–601 (stating that Delaware law tends to favor management); Bebchuk, *Federalism*, *supra* note 8 (arguing that state competition leads to rules biased towards managerial interests).

[30] *See supra* notes 26, 29.

[31] *See generally* Bebchuk, *Federalism*, *supra* note 8, at 1435; William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (arguing that state competition results in a race for the bottom).

[32] Bebchuk & Hamdani, *Vigorous Race*, *supra* note 27, at 592.

[33] *See* DEL. ECON. & FIN. ADVISORY COUNCIL, REVENUE FORECAST tbl.2 (June 2006), *available at* http://finance.delaware.gov/defac/min_0606.pdf.

[34] Maureen Milford, *Delaware's Corporate Dominance Threatened*, NEWS J. (Wilmington, Del.), Mar. 2, 2008, at A, *available at* http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20080302/NEWS/803020319 (noting that when taxes from lawyers and others in Delaware's corporate-law industry are included, its charter-related business may account for 40 percent of state revenue).

[35] *Cf.* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 687–99 (2002) [hereinafter Kahan & Kamar, *Myth*] (discussing the benefits Delaware and the Delaware Bar enjoy from Delaware's domination); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205,

approach gives its judges the ability to calibrate the state's legal norms to stave off the biggest threat to Delaware—the danger that, in periods of popular discontent with corporate actors, corporate law might be federalized.[36] In other words, Delaware and the corporate managers who prefer its regime need cover. If Delaware law were to be perceived as too unfriendly to shareholders, its chartering franchise might be in jeopardy. This fear looms large in the state and, according to some commentators, at times has had a direct impact on its decision making.[37] It therefore counsels in favor of establishing legal norms that provide some balance, while maintaining a regime that generally favors managerial prerogatives.

Thus, managers primarily and shareholders secondarily, along with the Delaware corporate bar, have some potential influence on the state's corporate legal norms. Almost completely excluded from the creation of Delaware corporate law are other corporate stakeholders, including employees, customers, creditors, and the communities within which corporations operate. Within Delaware, corporate-law matters are shielded from other political influences in the legislative process and, more importantly, in its courts, where corporate law doctrine is primarily created and entirely enforced.[38] Moreover, because the vast majority of firms chartering in Delaware do not operate there, most of the costs of the corporate governance regime the state maintains are externalized to other jurisdictions.[39] Delaware's legal decision makers therefore have little incentive to consider or protect other interests or stakeholders in their state corporate law.

Finally, popular discontent with corporate actors has occasionally spurred calls for federalization of corporate law. However, to this

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1232–36, 1246–48 (2001) [hereinafter Kahan & Kamar, *Price*] (same).

[36] *See, e.g.*, Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1588–89 (2005); *see also* Roe, *supra* note 23, at 594–98 (stating that the principal threat to Delaware's primacy comes not from other states but from the federal government).

[37] *See, e.g.*, Jeffrey D. Hern, *Delaware Courts' Delicate Response to the Corporate Governance Scandals of 2001 and 2002: Heightening Judicial Scrutiny on Directors of Corporations*, 41 WILLAMETTE L. REV. 207, 215–24 (2005); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 644–62 (2004); Kahan & Rock, *supra* note 36, at 1618 n.173; Roe, *supra* note 23, at 617–18, 643; Thomas A. Roberts et al., *Director Liability Warnings From Delaware*, BUS. & SEC. LITIGATOR, Feb.2003, at 1.

[38] *See, e.g.*, MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 45 (stating that labor's influence over corporate law production in Delaware is weak); Kahan & Rock, *supra* note 36, at 1592–94; Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 473 (1987).

[39] *See* GREENFIELD, *supra* note 6, at 114.

point, these calls have focused, by and large, on providing greater protection of shareholder interests, rather than the interests of other constituencies. Even in the post-Enron period, when the fate of Enron employees' jobs and investments in the firm made headlines and the disparities in compensation between high-ranking officers and others attracted heavy criticism, the debate over corporate-law reform at the federal level did not move beyond measures aimed at protecting shareholders and the securities markets. Thus, while Delaware occasionally feels the heat from Washington, such heat tends to focus on shareholder protection.

As a result, no matter how important the impact of corporate decision making may be for all stakeholders, the existing regime puts the law of corporate governance beyond the reach of all except managers and, to a far lesser extent, shareholders—as long as the firm has been chartered in Delaware. This is what Professor Greenfield describes as the undemocratic nature of corporate law: other stakeholders have virtually no political influence over it.[40]

2. The Internal Affairs Doctrine and the Spread of the Delaware Brand

The corporate-law regime Delaware maintains would not matter very much if it did not apply directly or indirectly elsewhere. But it does. Again, the federal government could take corporate law production away from Delaware, but it has not done so. Similarly, it has not enacted choice-of-law rules that dictate which state law governs disputes within business entities.

This leaves states to determine whose law applies. In most circumstances, Delaware and other states adhere to the internal affairs doctrine, a horizontal choice-of-law rule that provides that the law of the state of incorporation governs the relationships between the firm, its shareholders, and firm management. Despite some important exceptions,[41] this doctrine is widely respected both within and outside of the jurisdiction of incorporation. It finds support in a special provision in the Second Restatement of Conflicts,[42] and it has been extended to govern the internal affairs of other business entities.[43] As

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[40] *Id.* at 110.

[41] *See, e.g.*, CAL. CORP. CODE § 2115 (West 1990 & Supp. 2006); N.Y. BUS. CORP. LAW §§ 1317–20 (McKinney 2003).

[42] RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 302 (1971) [hereinafter RESTATEMENT] (providing that the law of the state of incorporation will be applied to corporate rights and liabilities "except in the unusual case" where some other state has a more significant relationship to the occurrence and the parties).

[43] Glynn, *supra* note 25, at 132 (observing that LLC statutes in New York, California, and

a result, Delaware law governs the internal affairs of a Delaware-chartered firm even if the firm has no operational, equity investor, or other ties to the state. The decision of where to charter a corporation therefore allows managers to opt out of local corporate legal norms without exiting the jurisdiction.

In addition, other states, responding to the ability of home-state firms to opt out by chartering elsewhere, typically have chosen to follow Delaware's lead in permissiveness.[44] This is not because states are seeking to compete against Delaware for a slice of the national chartering market. As other scholars have demonstrated, few other states have the ability or desire to engage in such competition.[45] Rather, it is because in-state interest groups who pay attention, including local attorneys who gain some benefit from local chartering, have pushed for Delaware-like corporate legal norms and sometimes other measures—such as anti-taker protections—to combat the threat of losing charters to Delaware.[46] As I will discuss below, it is also because other in-state constituencies rarely push back against such norms.

The cumulative result is the triumph of private ordering over public mandates. Through the chartering decision, corporate promoters can opt out of internal regulation by any state in which the firm has substantial operations and where other firm stakeholders (including shareholders) have far greater political power. And other states' near universal response to this opt-out threat has been to soften corporate-law mandates in favor of Delaware-style permissiveness. The result is that the corporate legal regime Delaware maintains—its brand—is spread far and wide.

This phenomenon is at the center of the race-to-the-bottom/race-to-the-top debate in corporate law on which much ink has been spilled.[47] Shareholder advocates criticize the substantive regime that has emerged as insufficient to address the agency problems inherent in manager-shareholder and controlling-shareholder/minority

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most other states expressly provide that charter-state law governs internal affairs of LLCs); Larry Ribstein & Maureen O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 664–65 (stating that the IAD has been applied in partnerships and other non-corporate business associations that were not traditionally state creations).

[44] *See, e.g.*, Kahan & Kamar, *Price*, *supra* note 35, at 1222.

[45] *See id. See also generally* Bebchuk & Hamdani, *Vigorous Race*, *supra* note 27; Kahan & Kamar, *Myth*, *supra* note 35.

[46] *See, e.g.*, Kahan & Kamar, *Price*, *supra* note 35, at 1221–22 n.74; *see also* Ribstein & O'Hara, *supra* note 43, at 680–81 (discussing the role of local lawyers in pressing for state law to retain corporate charters).

[47] *See supra* note 8 and accompanying text.

shareholder relationships. Some call for legal reform through federal mandates.[48] Yet too little attention has been paid to the conceptual underpinnings of the legal framework that facilitates this race—the internal affairs doctrine itself—and whether and when states ought to adhere to it.

3. From Production to Substance and Vice Versa: Beyond the Internal Affairs Doctrine

The internal affairs norm emerged early as a quasi-jurisdictional doctrine.[49] The basic idea was that other states had limited power to regulate a foreign corporation because the entity was viewed as an agent or creature of the foreign state.[50] That made sense at a time at which corporate charters often were granted for particular purposes and few incorporated enterprises engaged in activities crossing state lines.[51] Indeed, states typically required domestic corporations to maintain economic ties with the state,[52] and chartering states applied their own law as a matter of territorial sovereignty.[53]

Over time, as the conception of the for-profit corporation changed dramatically, and firms operated more frequently across borders, the doctrine quietly transformed into what it is today—a horizontal choice-of-law rule.[54] Under the modern doctrine, promoters of most for-profit entities are free to choose where to charter the enterprise. Among the implications of the chartering decision,[55] the most significant is that the state chosen will govern the firm's internal affairs. Thus, like various contractual choice-of-law regimes, the internal affairs rule is premised in large part on party autonomy and predictability.[56] And, importantly, this is all the doctrine is. Because the chartering state may have no other connection to the firm's operations or relationships, its regulatory authority over the firm's internal affairs is derived exclusively from the promoters' selection of the state.

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[48] *See, e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793 (2006); Lucian Arye Bebchuk & Allen Ferrell, *Federal Intervention to Enhance Shareholder Choice*, 87 VA. L. REV. 993, 1002–04 (2001).

[49] *See* Tung, *supra* note 12, at 45.

[50] *See id.* at 44–54.

[51] *See id.* at 47.

[52] *See id.*

[53] *See id.* at 54–55.

[54] *See id.* at 44–46; *see also* Ribstein & O'Hara, *supra* note 43, at 665.

[55] The chartering decision has other implications, including subjecting the firm and, potentially, firm principals to personal jurisdiction in the chartering state.

[56] *See, e.g.*, RESTATEMENT, *supra* note 42, § 302, cmt. g (discussing how the rule furthers the expectations of the parties); *see also* Ribstein & O'Hara, *supra* note 43, at 665 (stating that the internal affairs doctrine is a contractual choice-of-law rule).

Yet, even among contractual choice-of-law regimes, the internal affairs doctrine is exceptional. Under the doctrine, the state of incorporation is simply assumed to have a strong interest in regulation, and, but for the application of an explicit exception or a finding that the matter does not involve internal affairs, courts almost never consider the countervailing regulatory interests of other states.[57]

In contrast, in most other contexts, states typically employ choice-of-law frameworks that take into account not only the extent of the connections between the parties and the chosen state, but also the relative interests of potentially interested states.[58] For example, many states apply Section 187 of the Restatement when parties have contractually agreed upon a choice of law.[59] Under Section 187 and similar approaches, choice-of-law clauses are presumptively enforceable, but enforcement is limited by two conditions.[60] First, a court will not enforce the parties' choice of law if neither the parties nor the transaction has a "substantial connection" with the chosen state and "there is no other reasonable basis for the parties' choice."[61]

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[57] *See, e.g.*, RESTATEMENT, *supra* note 42, § 302(2) (suggesting it would be the unusual case in which the interests of another state would have a more significant relationship justifying application of its law rather than the law of the state of incorporation); *id.* cmt. g (noting that, in the absence of a local statute to the contrary, the law of the state of incorporation has been applied almost invariably to matters addressing shareholders, directors, and officers).

[58] *See, e.g.*, *id.* § 6. Section 6, which articulates the Restatement's general choice-of-law principles, provides as follows:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Later sections of the Restatement call for application of the law of the state with the "most significant relationship," which is to be determined under the principles of Section 6. *See* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE 32–33 (2006). A plurality of states have adopted the Restatement approach; others tend to apply various types of interest analyses which likewise take into account relevant connections and interests. *See id.* at 63–65.

[59] *See* Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 tbl.1 (2006); Symeon C. Symeonides, *Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1997).

[60] RESTATEMENT, *supra* note 42, § 187(2).

[61] *Id.* § 187(2)(a).

In addition, a court may refuse to uphold the parties' choice of law if it would be contrary to a fundamental policy of another state that has a "materially greater interest" than the chosen state and the other state "would be the state of applicable law in the absence of an effective choice of law by the parties."[62]

Thus, states give contractual choice-of-law in the internal affairs context special treatment. But there is no constitutional compulsion to do so. Contrary to the claims of the Delaware Supreme Court,[63] the internal affairs doctrine does not have a constitutional dimension. Although, as I will discuss below, there may be dormant Commerce Clause limitations on the margins, individual states have broad discretion to decide whether and how to apply choice-of-law rules to firm activities occurring within the state or otherwise affecting state interests.[64] A few states, most notably California, already recognize limitations on the internal affairs doctrine,[65] and the Restatement articulation of the doctrine expressly acknowledges that it is not absolute.[66] Thus, for example, to protect local shareholders or other interests, a state could choose to apply a choice-of-law analysis to corporate internal affairs more akin to Section 187.[67] Indeed, as I discuss elsewhere, Delaware is very much aware of the genuine threat such inroads into the internal affairs norm pose to the benefits of its domination in the chartering market.[68]

Even more fundamentally, however, by its very conception, the modern internal affairs doctrine does not apply to state regulatory initiatives designed to protect constituencies other than managers and

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[62] *Id.* § 187(2)(b); *see also* Mark Kantor, *The Scope of Choice-of-Law Clauses*, 119 BANKING L.J. 724, 726 (2002) (discussing application of § 187(2)); Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 619–28 (2005) (discussing important cases decided by the courts applying § 187).

[63] VantagePoint Venture Capital Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113–18 (Del. 2005).

[64] *See infra* notes 68–72 and accompanying text; Glynn, *supra* note 25, at 115–17; Ribstein & O'Hara, *supra* note 43, at 716–21; Tung, *supra* note 12, at 42 n.29.

[65] *See supra* note 41 and accompanying text.

[66] *See* RESTATEMENT, *supra* note 42, § 302(2); *see also id.* cmt. g (discussing when other states might have a greater interest in regulating and noting that the incorporating state's interest in regulating is weakest when the corporation has little or no contact with the state).

[67] *Cf.* Ribstein & O'Hara, *supra* note 43, at 726.

[68] In its decision in *VantagePoint Venture Capital Partners LLP v. Examen, Inc.*, 871 A.2d 1108, 1113–18 (Del. 2005), the Delaware Supreme Court responded to this threat by claiming that California and other states are constitutionally bound to apply Delaware law to Delaware corporations (regardless of the location of their shareholders or operations). Although the decision is doctrinally weak, the court's aim was not so much to persuade as to deter other states from abandoning the internal affairs norm, and to create the appearance of ongoing interjurisdictional conflict that might convince federal lawmakers to step in and mandate adherence to the internal affairs norm. *See* Glynn, *supra* note 25, at 136–43.

shareholders.[69] Again, the modern basis for the doctrine is the chartering parties' choice of law. But the parties to the explicit or implicit "corporate contract" are managers and shareholders, not other stakeholders. Put another way, relationships between these stakeholders and the firm, managers, and shareholders fall outside of the scope of the explicit or implicit agreement embodied in the chartering decision on whose law governs.

Of course, this is reflected in modern choice-of-law doctrine. Although there are a few areas where the doctrine is muddled, such as in the veil piercing context,[70] as a general matter relationships between the firm—manager and shareholder interests—and employees, customers, creditors, and other "third parties" are not governed by the law of the state of incorporation.[71]

The point is that the internal affairs doctrine is tethered to a narrow conception of the role of corporate law—that is, that corporate law is a form of private law regulating primarily the relationships among managers and shareholders. If one conceives of corporate law more broadly, as potentially serving, protecting, or integrating the interests of other stakeholders, the internal affairs doctrine is unhelpful in determining which state's law should govern in a context in which such laws potentially conflict.[72]

Thus, what I suggest here is considered too rarely. States' adherence to the internal affairs doctrine is not only voluntary with regard to manager and shareholder relationships, but also simply inappropriate when corporate law serves other regulatory interests.

That leads to the question, raised by other commentators, why states other than Delaware continue to adhere to the internal affairs doctrine.[73] We have seen that it is not because the doctrine is a constitutional imperative, as Delaware would like to have us believe. Nor is it because there has been some kind of deeply considered

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[69] *Compare* RESTATEMENT, *supra* note 42, § 301 ("The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties."), *with id.* §§ 302–310.

[70] *Cf.* Greenwood, *Democracy and Delaware*, *supra* note 6, at 425 (stating that most states apply the state of incorporation when addressing limited liability issues and discussing how this approach is deeply flawed).

[71] *See, e.g.*, RESTATEMENT, *supra* note 42, § 301; *id.* § 302(1) ("Issues involving the rights and liabilities of a corporation other than those dealt with in § 301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.").

[72] *See, e.g.*, GREENFIELD, *supra* note 6, at 109.

[73] *See generally* Tung, *supra* note 12, at 39 (addressing the puzzle of the internal affairs doctrine); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480 (2002) (discussing the widespread adherence to the internal affairs doctrine).

judgment about the doctrine's efficiency—that is, some generalized agreement among state lawmakers and, more importantly, their citizens, that the norms it produces are optimal or superior.

Rather, it is because the modern bases for the doctrine have been *largely unconsidered* by lawmakers and reformers. During the early days of incorporation choice, state legislatures did not resist judicial adherence to the internal affairs rule, opting instead for regulatory substitution (i.e., other legal measures to control corporate behavior).[74] Later, history and tradition, bolstered by stare decisis and reflexive judicial deference to precedent or Delaware, have played a role.[75] For example, despite intervening, dramatic changes in conflicts theory and methodology, most courts in recent times have adhered to the internal affairs doctrine without any discussion.[76]

Beyond this, the continued preeminence of the doctrine reflects who has paid attention to corporate law and who has not. Corporate promoters obviously prefer to have the choice the internal affairs doctrine affords, and local corporate counsel have been able to further their interests without crossing managerial ones by pressing for local substantive corporate law reform that tracks Delaware's permissiveness.[77] Although there are some counter-examples, shareholder advocates typically have been most concerned with the agency problems in publicly traded firms and, for understandable reasons, have focused on federalization as the alternative to Delaware in this context.[78] Most of the time, the production issue has been ignored by everyone else, largely because of the prevailing, narrow conceptualization of the role of corporate law itself.[79] In other words, because corporate law is simply assumed to be concerned *only* with manager and shareholder relationships, other constituencies and interest groups—although greatly concerned about the effects of corporate behavior—have largely overlooked how and where corporate law is produced.

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[74] *See* Tung, *supra* note 12, at 89–92 (regulatory substitutes included antitrust, blue sky, and labor regulation).

[75] *Cf. id.* at 96–97 (discussing institutional inertia).

[76] *See, e.g.*, P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 17–18 (1985).

[77] *See supra* note 35 and accompanying text.

[78] In light of the prevailing state-law regime, since the New Deal, federal law has been the primary source of investor protection. *See generally* Bebchuk & Hamdani, *supra* note 48, at 1794–1822. Shareholder advocates are skeptical of state law not only because of Delaware's domination, but also because of the prevailing pro-management responses in other states, such as anti-takeover statutes. I discuss this concern in Part II.A.

[79] This is reinforced by how corporate law is taught: while Delaware's domination may bubble to the surface in class discussions, how often do corporate-law professors question—indeed even discuss—the internal affairs doctrine?

In this way, substance has determined production. The prevailing, narrow view of the role of corporate law has not only constrained the view of its regulatory functions, but has also facilitated the passive acceptance of the peculiar way in which the body of law is produced. Once one considers the possibility that corporate law is something more than a set of terms governing private relationships among managers and shareholders, the internal affairs norm seems, at minimum, nondispositive and, at most, entirely inappropriate.

II. STAKEHOLDER PRODUCTION OF CORPORATE LAW: CORPORATE FEDERALISM PROPERLY CONCEIVED

The substance and production of corporate law are necessarily linked. How corporate law is produced determines the substance of corporate legal norms; and the prevailing narrow conception of what corporate law is (or is concerned with) bolsters the internal affairs norm that sustains this system of production.

This link has not been ignored. Powerful interest groups come to Delaware's defense—and the defense of the internal affairs doctrine—because they prefer the substantive outcomes the current regime produces.[80] Shareholder advocates critical of Delaware's brand recognize that reform will not occur there, at least not without greater external pressure. While those who have tumbled to the production issue have tended to push for federal regulation,[81] rather than pressing for other states to take a more active role, they recognize that changing where and how corporate law is produced is necessary for reform.

Yet the relationship between substance and production is even more profound when one considers the interests of other stakeholders. As it stands, they have no voice in the making of corporate law. They have no influence in Delaware, and, by facilitating opt-outs, the internal affairs doctrine ensures that their ability to affect corporate legal norms elsewhere is frustrated. Unsurprisingly then, the interests of other stakeholders are almost entirely foreign to corporate legal norms.

The federal government could preempt this field and create a federal chartering regime—something both shareholder advocates and other stakeholder theorists have advocated. But, to date, it has chosen

[80] *See* Glynn, *supra* note 25, at 140–42. The U.S. Chamber of Commerce and other industry groups have been active in internal affairs litigation. For example, in support of a petition for certiorari, they argued that the internal affairs doctrine is a constitutional mandate. *See* Brief for Technology Network as Amici Curiae Supporting Petitioners, Moores v. Friese, 549 U.S. 821 (2006) (No. 05-1590).

[81] *See supra* note 78 and accompanying text.

not to regulate corporate internal affairs. And, indeed, were federal lawmakers to consider such preemption, powerful interest groups such as the U.S. Chamber of Commerce would line up to defend Delaware, as they have when Delaware's preeminence has been threatened in the past.[82] Thus, meaningful corporate-law reform, particularly reform that alters corporate governance structures to internalize the interests of other stakeholders, likely must begin elsewhere.

For such reform to occur, state lawmakers have to abandon blind adherence to the internal affairs doctrine. In other words, in addition to substantive reforms to corporate law applicable to domestically chartered firms, states will have to eliminate opt-outs by extending such reforms to foreign firms operating within the jurisdiction. In place of the internal affairs doctrine, states could adopt a choice-of-law regime consistent with the general approach to regulatory conflicts reflected elsewhere in the Second Restatement. Some corporate-law reforms might create the kind of direct conflicts with the law of other jurisdictions that would suggest limiting application to foreign firms whose primary operational or equity investor presence is within the state.[83] In other circumstances, however, where no such direct conflict exists, states with lesser contacts might also apply their own law. Such a regime not only would be essential from the perspective of the jurisdiction seeking to utilize corporate law as a tool to protect in-state stakeholders and workable from a choice-of-law perspective, but also is consistent with the norms of federalism.

A. Corporate Law as a Regulatory Device

Before addressing how such a new approach to corporate-law production might work, it is worth briefly considering the regulatory interests it might serve. The Delaware Supreme Court has taken the position that no state other than the state of incorporation has an interest in regulating corporate internal affairs.[84] Obviously, this position is self-serving. But it is also absurd.

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[82] *See* Glynn, *supra* note 25, at 139–41.

[83] *See, e.g.*, Ribstein & O'Hara, *supra* note 43, at 664.

[84] *See* VantagePoint Venture Capital Partners LLP v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("Under the Commerce Clause, a state 'has no interest in regulating the internal affairs of foreign corporations.' Therefore, this Court has held that an 'application of the internal affairs doctrine is mandated by constitutional principles, except in the "rarest situations,"' *e.g.*, when 'the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce.'" (citations omitted)).

No one genuinely disputes that regardless of where a firm is incorporated, a state has an interest in regulating firm activities that have a substantial impact within its borders. How could corporate law, which frames the firm's decision making that determines these activities, not also be a legitimate subject of local regulation? Corporate law is simply another regulatory tool, and, given its centrality, a potentially powerful one.[85] The question then is not whether states other than the state of incorporation have an interest in regulating, but, rather, when lawmakers ought to utilize corporate law to further regulatory ends instead of relying exclusively on external legal regimes. My position is that, if it is the most efficient or effective way to achieve a given regulatory goal, states should consider directly regulating how firms with sufficient local ties are governed and other matters falling within the traditional sphere of internal affairs.

One goal might be protecting local minority shareholders from insider abuse or oppression. To the extent adequate protection cannot be achieved through local blue sky regulation or other "external" regimes (i.e., common-law fraud), a state could seek to further this interest by regulating corporate internal affairs directly. A number of states, including California, already apply various shareholder protections to foreign corporations with substantial local ties, albeit, for the moment, usually in the closely held context.[86]

A state also has an interest in protecting other firm stakeholders—employees, creditors, customers, communities—within the jurisdiction. Lawmakers might conclude that, to advance this interest, reform designed to produce transformative change in corporate governance is necessary. Professor Greenfield offers such a proposal: he argues that social welfare can be enhanced through integrating stakeholder interests directly into corporate governance through board representation and altering the baseline decisional norm to enhance the welfare of the firm as a whole, rather than shareholder value alone.[87]

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[85] *Cf.* Greenwood, *Markets and Democracy*, *supra* note 6, at 47–48 (discussing how corporate law drives firm decision making, and how reform of corporate law would alter firm decisions).

[86] *See* CAL. CORP. CODE § 2115 (West 1990 & Supp. 2006) (applying aspects of California's corporate code to foreign corporations with substantial operational or equity ownership ties to the state). California also has applied its insider trading law to publicly traded foreign corporations. *See* Friese v. Superior Court, 36 Cal. Rptr. 3d 558 (Cal. Ct. App. 2005), *review denied*, No. S141028, 2006 Cal. LEXIS 3559 (Mar. 15, 2006), *cert. denied*, Moores v. Friese, 549 U.S. 821 (2006).

[87] *See generally* GREENFIELD, *supra* note 6, at 123–85; Greenfield, *Defending*, *supra* note 4, at 1054–55.

Yet, even short of such transformative change, regulation that implicates internal affairs can be a valuable regulatory tool for protecting the welfare of other stakeholders. Put differently, lawmakers might consider altering corporate law to address the third type of agency problems discussed in Part I.A (firm opportunism vis-à-vis nonshareholders) in ways other than the direct representation model or altering significantly the norm of enhancing shareholder wealth. Some of these approaches also might be implemented to protect stakeholder interests that cannot be protected through board representation.

Consider, for example, how corporate-law reform might serve more modest goals, such as enhancing legal compliance or ensuring that firms internalize costs otherwise borne by nonshareholder stakeholders. The legal structure described in Part I.A counsels managers to place shareholder interests in the firm (perhaps along with their own) above all others.[88] Managers therefore operate the firm not for the benefit of all stakeholders, but rather to maximize the firm's surplus to split between themselves and the shareholders. The size of the surplus—not the overall wealth the firm has produced or its impact on social welfare—is the one and only bottom line.[89]

Except on the margins, corporate law does not prevent managers from increasing the surplus by externalizing costs onto other stakeholders. On the contrary, assuming such externalization increases the surplus, the legal framework suggests that this is precisely what managers are supposed to do.[90] Protection of stakeholder interests other than those of managers and shareholders is left to outside forces: either nonlegal forces, including bargaining and the market, or external legal regimes. Where lawmakers conclude that bargaining and market forces do not provide a sufficient check against the negative externalities of surplus-producing firm activities,[91] they regulate firm conduct in a variety of ways—e.g.,

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[88] Indeed, Professor Dent and other shareholder advocates criticize the current regime because, in their view, it does not do a good enough job of ensuring management actually maximizes shareholder value.

[89] *See, e.g.*, Greenwood, *Markets and Democracy*, *supra* note 6, at 41–42.

[90] *See, e.g.*, LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 49–65 (2001) (discussing the impact of limited liability on corporate decision making); Greenwood, *Markets and Democracy*, *supra* note 6, at 46–48.

[91] My focus is on how lawmakers should regulate corporations. Space concerns prevent me from delving too deeply into whether and when the conduct of corporate actors ought to be regulated. As Professor Greenfield has argued, we are well past the point where we can assume that bargaining and unregulated market forces will protect other stakeholders adequately. *See* Greenfield, *Defending*, *supra* note 4, at 1059–61. Although we certainly disagree on both the amount and type of regulation of corporate conduct that is needed, Professor Dent does not dispute that some regulation is necessary, both to protect shareholders and to protect other stakeholders. I do take issue with Professor Dent's suggestion that employees are in a better

through employment and labor law, health and safety regulations, and environmental protections.

Yet, critically, the norms that lead decision makers to externalize in the first place also lead them to act in ways that may limit the effectiveness of such external regulation. With maximizing the surplus as the goal, management is likely to comply with external legal mandates only to the extent that the costs of noncompliance exceed the costs of compliance.[92] This incentive to comply minimally is further exacerbated by limited liability, which caps the potential costs of noncompliance and allows cost avoidance through firm structuring, thereby creating incentives to take excessive risks.[93]

In addition, the substance and effectiveness of external legal mandates are directly affected by the current corporate-law regime in other ways. Under the *Caremark*[94] and *Stone*[95] line of cases, directors have no meaningful duty to establish monitoring systems that might otherwise root out and correct illegal or other socially harmful conduct within the enterprise—not even one enforceable by shareholders. Moreover, because it implicates internal corporate arrangements, many states apply the chartering state's corporate veil-piercing and enterprise entity doctrine,[96] which, if too protective of corporate actors, may aid in the defeat of local policy preferences. Finally, there is a feedback loop that puts enormous pressure on the ability of our regulatory institutions to sustain their checks on corporate behavior over time. In service of only the interests of shareholders and themselves, and free to decide under the business judgment presumption how this end is to be achieved, management can use the firm's considerable wealth to influence the substance and enforcement of the very external legal mandates that might otherwise protect other stakeholders. Such influence occurs not only on the front

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position than shareholders to protect themselves. He mentions labor unions at various points, but, of course, as Professor Greenfield notes, a very small percentage of the labor force is unionized in this country. *See* Greenfield, *Defending*, *supra* note 4, at 1060. As for individual employees, for a host of reasons, many face significant bargaining disadvantages. *See, e.g.*, GREENFIELD, *supra* note 6, at 41–71 (discussing the relative position of workers and shareholders in the firm); *see also* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1389 n.28 (2008) (citing literature).

[92] *Cf.* GREENFIELD, *supra* note 6, at 73–74 (discussing the view that as long as the expected penalties from illegality are less than profits, the corporation should act illegally).

[93] Greenwood, *Markets and Democracy*, *supra* note 6, at 88 ("If regulatory schemes seek to make firms internalize costs they would otherwise externalize, but business law allows them to decline the resulting liability, the regulatory scheme fails.").

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

[95] Stone v. Ritter, 911 A.2d 362 (Del. 2006).

[96] *See, e.g.*, Greenwood, *Democracy and Delaware*, *supra* note 6, at 425.

end, but also through downstream pressure on regulatory decision making or litigated challenges that chip away at the protections provided.[97]

Perhaps a recalibration of the existing legal norms that Delaware currently establishes to provide greater protection against manager-shareholder agency problems in publicly traded firms would ameliorate aspects of this problem. Even if that is true, however, such changes would not alter the basic incentives to externalize costs and resist regulation or regulatory compliance. Indeed, those who contend that reducing manager-shareholder agency problems that prevail in publicly traded firms will result in both greater returns *and* better treatment of other stakeholders have not explained why privately held firms lacking such problems often do not act consistent with this model.[98]

Of course, not all firm decision makers aim for minimal compliance, seek to maximize externalization, succumb to limited liability's moral hazard, or otherwise behave in ways harmful to other stakeholders or their communities. But such socially responsible behavior occurs despite corporate law, not because of it. And those with a preference for operating their firms in a more socially responsible way face substantial pressures in competitive markets to act otherwise.[99]

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[97] It is worth noting that while the interests of managers, shareholders, and other stakeholders sometimes may overlap, when powerful forces such as the U.S. Chamber of Commerce or the Business Roundtable push on behalf of "American business interests" for particular substantive outcomes, the record demonstrates that they are doing so in the interest of managers first and shareholders second, not in the interest of other stakeholders. *See, e.g.*, Stephen Labaton, *Businesses Seek New Protection on Legal Front*, N.Y. TIMES, Oct. 29, 2006, at A1; Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38 (discussing the U.S. Chamber of Commerce's successful litigation strategies on behalf of business interests); *see also* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850–65 (2005) (arguing that the powers of directors disproportionately outweigh the powers of shareholders).

[98] The examples are too numerous to catalogue. *See* Brian Cheffins & John Armour, *The Eclipse of Private Equity*, 33 DEL. J. CORP. L. 1, 5–6 (2008) (listing frequent criticisms of private equity, including elimination of jobs); Michael C. Jensen, *Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61, 68 (Sept.–Oct. 1989) (indicating that the three constituencies of a leveraged buy-out association are the partners, the managers with substantial equity stakes, and institutional investors); Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1200–01 (2007) (arguing that without government intervention, firms will seek to externalize costs when faced with market competition).

But, for the same reason, egregious ones are easy to find. *See, e.g.*, David Barstow and Lowell Bergman, *A Family's Fortune, a Legacy of Blood and Tears*, N.Y. TIMES, Jan. 9, 2003 at A1; Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES, Sept. 23, 2007, at A1; *see also* Steven Pearlstein, *Private Equity's Bottom Line for Workers*, WASH. POST, Apr. 4, 2007, at D1.

[99] *See* GREENFIELD, *supra* note 6, at 93 (pressure in competitive markets for goods and services); MITCHELL, *supra* note 90, at 51–52 (pressure to maximize profit in the short term).

When lawmakers determine that existing external regulation is insufficient to protect other stakeholder interests, they have a number of options. For instance, they could seek to reduce noncompliance by increasing enforcement efforts or imposing greater sanctions. Yet corporate-law reform—which addresses decision making and management obligations directly—may be a more efficient or effective way of serving the same end. Altering corporate legal norms might, for example, impose fewer enforcement costs, promote self-regulation, reduce information costs for regulators, or alter the decision making norms that frustrate efforts to protect the interests of stakeholders.

What might such corporate-law reforms look like? There are many mechanisms for facilitating greater internalization of stakeholder interests.[100] I will briefly mention a few possibilities, although my aim in this Article is not to advocate for any particular type of reform. Rather, it is to suggest that, once the veil of the internal affairs norm is lifted, state lawmakers can explore various options for integrating stakeholder interests into corporate law. Unlike a representation model, most of these other approaches would protect stakeholder interests without altering the norm of enhancing shareholder profit. Moreover, while some clearly cross into what is traditionally considered internal affairs, others might simply be viewed as expanding familiar external regulatory devices. Each has its own set of benefits, costs, and enforcement issues that lawmakers would have to balance carefully before deciding whether and how to implement it. The unifying idea underlying each type of reform (individually or in some combination) is to enhance protection for other stakeholders by altering incentives, decision making processes, or the participants.

For example, in various contexts, scholars have advocated enhancing corporate disclosure or information sharing requirements to protect nonshareholder stakeholder groups and other interests.[101] Although publicly traded firms are already subject to robust disclosure obligations, these obligations are limited in scope, since they are designed to protect securities holders and do not apply to

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[100] *Cf.* KRAAKMAN ET AL., *supra* note 1, at 23–70 (discussing a range of strategies for addressing agency problems).

[101] *See, e.g.*, Mitchell F. Crusto, *Endangered Green Reports: "Cumulative Materiality" in Corporate Environmental Disclosure After Sarbanes-Oxley*, 42 HARV. J. ON LEGIS. 483 (2005) (environmental impact); Mary L. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795 (1989) (chemical exposure and toxicity); David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137 (2007) (social, environmental, and governance information).

privately held entities.[102] As others have detailed, broader disclosure mandates for other matters may create various efficiencies,[103] alter decision making norms, and create incentives to improve internal controls and auditing procedures.

Another possible method of protecting stakeholder interests and enhancing compliance with external legal mandates is by providing various corporate actors with the tools or incentives to monitor firm activity, prevent or correct illegal conduct, or otherwise protect stakeholder interests. Such "deputization" also can come in a wide variety of other forms. For example, the gatekeeper approach reflected in the Sarbanes-Oxley Act,[104] including up-the-ladder reporting obligations for attorneys and the enhanced role of independent auditors, could be expanded to perform broader functions, such as ensuring compliance with environmental, employment, or health and safety standards.[105] In addition, lawmakers could impose vicarious liability on high-ranking corporate officers for the firm's tort or tort-like statutory violations. As I have argued elsewhere, such a regime would counteract limited liability's moral hazard by ensuring that at least one person within the firm internalizes tort risks so that the firm will monitor, prevent, and spread such risks in a more socially optimal way.[106] Furthermore, as Professor

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[102] *See, e.g.*, KRAAKMAN ET AL., *supra* note 1, at 79 (stating that, unlike in other countries, closely held firms have no duty to publicly disclose their financial statements).

[103] *See supra* note 101. It is well-known that these efficiencies may include lowering external monitoring costs and addressing informational asymmetries. *See* Monsma & Olson, *supra* note 101, at 140–41. Disclosure therefore potentially facilitates market-based and regulatory accountability and, by addressing asymmetries, reduces the need for other types of regulation.

[104] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (codified in scattered sections of 15 U.S.C.).

[105] For a discussion of the role of gatekeepers in the securities context, see John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301 (2004); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003) (discussing the gatekeeping function of attorneys in the wake of Enron and other corporate scandals). Scholars have argued that independent gatekeeper monitoring can improve legal compliance in other contexts. *See, e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 378–83 (2005).

[106] Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329 (2004). Although I cannot provide a full account here, in the article I demonstrate why, given their unique role, high-ranking officers are the firm's most efficient risk bearers: they are best situated to monitor and avoid risks, and to implement efficient levels of risk spreading among customers, shareholders, and insurers. And such officer liability, unlike shareholder liability, cannot be evaded through judgment proofing techniques. I also detail in the article why, contrary to Professor Dent's claims, *see* Dent, *Stakeholder Governance*, *supra* note 3, at 1132–33, such a regime would not result in unduly cautious behavior. Professor Dent proposes that corporate officers be subject to a duty of care. *See id.* I am not sure to whom this duty would run. If it runs to third parties, it would be a new form of personal supervisory liability—under current law, the entity (as the principal), not its

Greenfield has suggested, shareholders or others could be given standing to enjoin or void corporate acts that violate the law.[107] Even board representation by certain kinds of shareholders—e.g., institutional investors with long-term investment horizons—might further the interests of some nonequity stakeholders, albeit imperfectly.

Lawmakers might also consider a number of what I loosely characterize as process-oriented reforms. For example, lawmakers unsatisfied with the vacuous *Caremark/Stone* duty to monitor might impose an independent, generalized duty on the board of directors to establish and maintain reasonable monitoring and compliance systems to prevent and correct unlawful or tortious conduct. Such a duty might be enforceable by the shareholders, the attorney general, or others. A more dramatic reform would be the creation of consultation or participation requirements that would give stakeholders a voice in firm decision making processes, particularly if they are combined with disclosure obligations and other mandates. Such participation could be achieved in a variety of ways short of board representation, including mandatory consultation with works councils or community representatives on decisions or planning that materially affect the relevant stakeholder groups.[108] Finally, corporate law could impose on board members duties to consider other interests besides shareholders in fulfilling obligations to enhance the wealth or success of the firm. This approach is reflected in the director duty to promote the success of any company established in the U.K. Companies Act of 2006:

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of

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individual supervisors, normally is liable for negligent supervision. Although I would go further, such a proposal would move the current regime in the direction of what I propose. If Professor Dent is simply arguing that the duty to act with care in operating the corporation (for the benefit of it shareholders) be enhanced, this would not reduce limited liability's moral hazard because, again, it may be in the best interest of the firm and its shareholders to externalize onto others as many costs as possible.

[107] GREENFIELD, *supra* note 6, at 94–101.

[108] Consultation requirements with works councils and other worker representatives are mandated under European Union law and the law of a number of European Union countries. These include, with regard to certain enterprises, ongoing duties to consult with worker representatives, as well as obligations triggered by the contemplation of certain large-scale changes in the enterprise. *See* BLAINPAIN ET AL., *supra* note 16, at 301–14, 366–67, 416–22, 452–53. Others have proposed additional ways to give workers voice in important firm decisions. *See, e.g.*, Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Non-Binding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871 (2007).

> the company for the benefit of its members [shareholders] as a whole, and in doing so have regard (amongst other matters) to—
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> > (a) the likely consequences of any decision in the long term,
> >
> > (b) the interests of the company's employees,
> >
> > (c) the need to foster the company's business relationships with suppliers, customers and others,
> >
> > (d) the impact of the company's operations on the community and the environment,
> >
> > (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> >
> > (f) the need to act fairly as between members of the company.[109]

The U.K. Companies Act does not abandon shareholder primacy; however, unlike American-style constituency statutes, it imposes a legally enforceable obligation on the board to consider non-shareholder interests in the decision making process.

Again, these ideas are tentative: my point is that there are many ways in which lawmakers might utilize corporate law to address the third category of agency problems now left entirely to external legal regimes. Convinced that one or more of these approaches are necessary or superior to others in serving underlying ends, lawmakers outside of the state of incorporation would have a strong interest in regulating, whether or not corporate internal affairs are implicated.

A serious objection to such proposals is the fear of unintended consequences. Professor Dent argues that managers might utilize stakeholder-based reforms in their local jurisdictions to further their own interests or otherwise exacerbate the manager-shareholder agency problem.[110] As he notes, this criticism has been lodged against state anti-takeover regimes and American-style constituency states.[111] It is also one reason why shareholder advocates have traditionally preferred federalization of corporate law to state-level reform.

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[109] Companies Act, 2006, c. 46, § 172 (Eng.).

[110] *See* Dent, *Stakeholder Governance*, *supra* note 3, at 1139–40; *see, e.g.*, ROE, *supra* note 38, at 45 (suggesting this possibility).

[111] Dent, *Stakeholder Governance*, *supra* note 3, at 1139–40.

Although this is a legitimate concern, it extends only to application of local law to firms—most notably publicly traded ones—in which there are significant agency problems arising from the "separation of ownership and control." It is not a genuine risk in many other, privately held firms. Furthermore, the problem of managerial entrenchment already exists, both in Delaware (where business judgment deference and available defensive measures against takeovers are spacious enough that managers often can reach the same result as, say, under a corporate constituency statute or anti-takeover provision) and in other jurisdictions. In other words, this is a persistent problem under the current regime; it is not one unique to how corporate law would be produced under my proposal. Nor would abandoning the internal affairs doctrine necessarily make the problem worse—on the contrary, shareholders likely would have a greater voice in the fashioning of corporate law outside of Delaware, and could press for greater protections.

Nevertheless, I agree with Professor Dent that the risk of managerial opportunism always remains. This risk counsels caution and a careful weighing of interests and vulnerabilities of all stakeholders, including shareholders. With regard to stakeholder-based reforms specifically, where it arises, the threat of managerial opportunism could be alleviated in a number of ways, including by counterbalancing greater stakeholder protections with greater shareholder protections. As Professor Dent notes, the U.K. Companies Act attempts to strike this balance,[112] and similar measures could be included in other types of stakeholder-based reforms.[113]

In conclusion, corporate law is one tool—and a powerful one—available to lawmakers to achieve regulatory objectives. The corporate legal norms that affect decision making in firms whose operations have significant local effects are an appropriate subject of local regulation, whether or not such norms implicate internal affairs. In the next section, I will address circumstances in which the exercise of regulatory authority is most appropriate at the federal level. Otherwise, states within which firms are operated or shares are owned have compelling reasons to make corporate law—to address the effects of firm decision making on workers, customers, creditors, the environment, and, yes, shareholders, too. This is true whether firms are chartered locally or elsewhere.

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[112] *Id.* at 1129 n.98.

[113] For example, to counterbalance stakeholder representation on the board of directors, shareholders could be given more meaningful voting rights in electing their board representatives.

B. Production: Towards a New Corporate Federalism

States have an interest in regulating corporate activity within their borders, and, in some circumstances, lawmakers may conclude that this interest extends to matters within corporate law itself. To engage in such regulation, however, states will have to abandon strict adherence to the internal affairs doctrine. Instead, they should approach conflicts of law in this context as they would other legal doctrines that address the behavior of corporations or principal corporate actors.[114]

States' utilization of corporate law itself to further important local regulatory interests would be a significant change in the American context. But, of course, there is nothing new about tying the exercise of regulatory authority over the corporation to the location of its activities. That is how corporations were allowed to operate for much of this country's history.[115] Moreover, this is consistent with prevailing choice-of-law doctrine with regard to most corporate activity. If one considers the universe of regulation of corporate conduct, very little of it clearly falls within the internal affairs carve-out.[116]

As typically applied, the internal affairs doctrine is an outlier.[117] Its fixed and nearly automatic application of the law of the state of incorporation is contrary to conflicts theory following the "conflicts revolution," as a result of which states abandoned strict, content- and circumstances-blind conflicts rules in favor of methodologies that take into account the interests and policies of all states of contact.[118] Moreover, by deferring to a state with no operational or other contacts with the corporation, the doctrine runs counter to the standard approach to conflicts resolution in which the locus of the activity to be regulated and its effects are primary factors in determining which state ought to exercise regulatory authority.[119] Indeed, seemingly

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[114] *See, e.g.*, GREENFIELD, *supra* note 6, at 111–12, 122 (arguing that corporate law should be subject to conflict rules for corporate governance consistent with the rules applicable in other areas); Greenwood, *Democracy and Delaware*, *supra* note 6, at 416–17.

[115] *See* Tung, *supra* note 12, at 46–47, 54–55.

[116] *See* Ribstein & O'Hara, *supra* note 43, at 694–95.

[117] *See, e.g.*, Tung, *supra* note 12, at 39 (stating that "the internal affairs doctrine is remarkable").

[118] *See* Kozyris, *supra* note 76, at 16–17 ("In the new conflicts calculus, the interests and policies of the forum state, especially the protection of forum domiciliaries, weigh heavily in favor of applying its law—the 'lex fori.' Fixed, single-factor, content-blind, forum-neutral rules are supposed to be particularly obnoxious because they defer automatically and totally to one legal system in disregard of the interests and policies of the other states of contact. The lex incorporationis is precisely such a rule.").

[119] *See, e.g.*, RESTATEMENT, *supra* note 42, § 6 (general principles); *id.* § 6 cmt. f ("In general, it is fitting that the state whose interests are most deeply affected should have its local

recognizing the anomalous character of the internal affairs norm, the drafters of the Restatement hedged both in Section 302 itself and in its adjoining comments.[120] My proposal is simply that states treat internal affairs no differently than other subjects of local regulation.

The continuing prevalence of the internal affairs doctrine also is not the product of a neutral assessment of its efficiency as a horizontal choice-of-law norm.[121] It is instead the result of both cognitive deficiencies and interest group dynamics. Those who have paid the closest attention tend to benefit from either the substantive outcomes or the chartering business it produces; others have largely failed to consider its implications or viable alternatives.[122]

Indeed, the doctrine's most ardent defenders—Delaware and representatives of groups who favor managerial prerogatives—have powerful incentives to ensure continued, strict adherence to it.[123] The internal affairs norm has served as a particularly effective deregulatory device: framed in neutral terms, facially consistent with norms of federalism, largely taken for granted by generations of lawyers and judges, and one step removed from potentially controversial aspects of underlying substantive law, the doctrine has covertly marginalized the influence of other constituencies over corporate law.[124] To date, the only persistent threat to those who benefit from the current regime has been vertical—federalization—rather than horizontal.

There is good reason to be skeptical of claims that the internal affairs doctrine is either necessary or more efficient than the alternatives. Nevertheless, I will address the various arguments its supporters offer for retaining the internal affairs doctrine. In a nutshell, they contend that the state-to-state competition the doctrine facilitates enhances legal innovation that improves efficiency; the

law applied."); *id.* § 145 (torts); Greenwood, *Democracy and Delaware*, *supra* note 6, at 417.

[120] Section 302 of the Restatement (stating the basic internal affairs rule) expressly contemplates that the law of the state of incorporation will not apply when another state has a greater regulatory interest. Comment e to this Section recognizes that other states may have a strong interest in regulating internal affairs and indicates that the incorporating state's interest is particularly weak when it has no operational or other contacts with the firm. RESTATEMENT, *supra* note 42, § 302 cmt. e.

[121] Daniel Greenwood has made a similar argument: corporate law and the way in which the internal affairs doctrine frames and constrains it is political rather than economic. Greenwood, *Markets and Democracy*, *supra* note 6, at 45; *see also* Tung, *supra* note 12, at 38 (stating the internal affairs doctrine's development depended on a "fortuitous sequence of events" driven by ideology, interest group influences, and inertia).

[122] *See supra* Part I.B.3.

[123] *See supra* notes 26–34 and accompanying text.

[124] *See* Greenwood, *Markets and Democracy*, *supra* note 6, at 86 ("When corporations choose corporate law, the result is not freedom of citizens, but freedom from citizens.").

certainty and uniformity it provides are necessary for firms to function; and the Constitution prohibits other states from regulating corporate internal affairs. Upon examination, none of these arguments is persuasive.

1. Legal Innovation

Race-to-the-top theorists in particular have hailed the internal affairs doctrine and the resulting current corporate-law production regime as enhancing efficiency by facilitating legal innovation. They argue that state-to-state competition creates incentives to improve legal doctrine and enforcement mechanisms because market forces will ensure that managers opt, through the chartering decision, for the law that maximizes firm value.[125]

Putting aside the complexity of the race-to-the-bottom/race-to-the-top debate, the reality is that the internal affairs doctrine stifles all but one kind of genuine legal creativity. As should come as no surprise, because chartering is controlled by managers, the innovation resulting from state-to-state competition has been almost exclusively in one direction. There is only one kind of "buyer" in the market for corporate law, and it should not be any surprise that the resulting product manifests creativity only in satisfying those buyers' interests. This has resulted in relative uniformity across jurisdictions—a permissive regime akin to Delaware's that largely favors default terms, private ordering, and deference to managerial decision making. Indeed, states seeking to retain charters of locally-based firms or otherwise cut into Delaware's market share have utilized even more manager-friendly doctrinal carrots—including anti-takeover statutes.[126] Shareholder advocates have long recognized this phenomenon, challenged the claims that interjurisdictional competition produces efficient corporate legal norms,[127] and advocated federal reform in response.[128]

Even more profoundly, regardless of who has the better argument in the race debate, the internal affairs doctrine all but eliminates the possibility of wide-scale corporate-law reform designed to address other stakeholder interests—reforms that might ultimately lead to

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[125] *See supra* note 8.

[126] Nevada's attempts to cut into Delaware's market share through manager-friendly legal norms are a well-known example. *See, e.g.*, Nevada Corporate Planners, Inc., *16 Reasons to Incorporate in Nevada*, http://www.nvinc.com/IncorporateInNevada.htm (last visited Feb. 15, 2009). Delaware, however, enjoys other unique advantages that make it difficult for Nevada and other states to compete. *See, e.g.*, Glynn, *supra* note 25, at 99–102.

[127] *See supra* note 31.

[128] *See supra* note 78 and accompanying text.

more efficient internal arrangements.[129] Certainly, one can argue against such reforms on their merits, but that does not justify a regime that allows managers alone to determine whether such reforms will even be considered. The bottom line is that the ability of managers to opt out of any corporate legal regime they do not like ensures that experimentation that they perceive as, on balance, less favorable to them—as opposed to the firm as a whole—will not take hold on any wide scale.

Moreover, because of the internal affairs doctrine and Delaware's unique advantages in the market for charters, Delaware's decision makers can focus primarily on the threat of federalization. Even in times of popular discontent with corporate actors, such as post-Enron, they have largely succeeded in limiting such intervention. This is one reason why the Delaware Supreme Court has claimed that the internal affairs doctrine is constitutionally mandated and industry groups have pressed for federal prohibitions on state corporate-law enforcement efforts. They want to eliminate the second front—the possibility that other states might innovate in other directions.[130] Competition in creative law does not appear to be much of a value in this context.

The regime that would result from abandoning strict adherence to the internal affairs doctrine is, in fact, more consistent with the dynamic potential of federalism and the competition that it should encourage. First, such a regime would facilitate local experimentation in corporate firm forms and structures that at least account for the interests of stakeholders—including shareholders—who do not control the chartering decision.[131] Experimentation is already occurring on the margins,[132] but it cannot take hold on a wider scale until managers of firms operating locally do not have the ability to opt-out by foreign charter. States would have the ability, for example, to test different corporate-law arrangements to determine which are most efficient at internalizing social costs and other stakeholder interests while promoting shareholder returns.

Moreover, abandoning the internal affairs doctrine would produce a more genuine and robust state-federal dynamic than the Delaware-Washington interaction that currently prevails. As in other

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[129] *See* GREENFIELD, supra note 6, at 117 ("As long as the internal affairs doctrine applies, changes in corporate governance will be unavailable. Fewer regulatory options will usually result in less efficient and more costly regulation and will move the end result away from what is best for general welfare.").

[130] *See* Glynn, *supra* note 25, at 134.

[131] *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 997–1001 (2001) (discussing the normative values of federalism that the U.S. system of dual sovereignty serves, including local experimentation).

[132] *See, e.g.*, N.D. CENT. CODE § 10-35 (2007).

areas of the law, different states can function as laboratories within which new approaches to law and regulation are fashioned, tested, and improved or abandoned.[133] If and when it chooses to regulate, the federal government can adopt the models that work. Moreover, successful state reform can prod reluctant or captured federal actors into action.[134] Furthermore, as in other areas, if state experimentation fails—becoming overly burdensome, contrary to national policy, or otherwise more appropriately regulated at the national level—federalization would remain the safety valve.

This approach to the production of corporate law also would make corporations more democratically accountable—reflecting not only another norm of federalism, but also a basic tenet of democratic theory.[135] An enormous amount of corporate law in this country is made by ten Delaware jurists, almost completely unaccountable to the vast universe of the stakeholders corporate law affects.[136] Basic democratic principles suggest that those primarily affected by corporate activity ought to have a voice in how corporations behave.[137] The point is not that the corporation is a democracy; rather, it is that, as creations of law, corporations and their governance ought to be subject to more direct democratic oversight. Currently, they are not. Indeed, the basic premises of corporate law are not even subject to much democratic debate.[138] Abandoning strict adherence to the internal affairs doctrine guarantees no particular substantive outcome. But the prospect of stakeholder-generated regulation over corporate decision making would make those who govern corporations more accountable to the communities within which their enterprises have a significant impact.

2. Certainty and Uniformity

A second objection to abandoning strict adherence to the internal affairs doctrine is that, under an alternative choice-of-law regime, corporate actors would be subject to uncertain and potentially conflicting legal obligations.[139] Other horizontal choice-of-law

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[133] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[134] *See, e.g.*, Gretchen Morgenson & Patrick McGeehan, *Wall Street Firms Are Ready to Pay $1 Billion in Fines*, N.Y. TIMES, Dec. 20, 2002, at A1 (discussing how New York's pressing for Wall Street reform pushed the SEC to participate in the resolution).

[135] Greenwood, *Markets and Democracy*, *supra* note 6, at 41–42.

[136] Delaware's corporate law is largely made, modified, and enforced by its five Chancellors and five Supreme Court Justices. *See* Glynn, *supra* note 25, at 98.

[137] *See, e.g.*, GREENFIELD, *supra* note 6, at 110, 119; Greenwood, *Markets and Democracy*, *supra* note 6, at 41–42.

[138] Greenwood, *Markets and Democracy*, *supra* note 6, at 48.

[139] *See, e.g.*, GREENFIELD, *supra* note 6, at 111.

regimes, it is argued, would open up the possibility of more than one state seeking to regulate internal firm relationships, which may produce both conflict between jurisdictions who seek to impose their own forms of corporate law on a firm and great uncertainty among corporate participants regarding whose legal mandates apply.

This concern is legitimate but exaggerated,[140] and not substantively different than the concerns that drive all law affecting multistate players in a country with at least fifty-one jurisdictions.[141] First of all, such a regime may create far less uncertainty than it first appears. For example, it is not a problem for the vast majority of entities, which are closely held firms whose operational and equity investor contacts are concentrated within a single jurisdiction. While managers in this context might prefer application of the corporate law of some other state, they would know ex ante the extent to which such application is unlikely under an alternative choice-of-law framework.

Also, firms with substantial operations or equity investor interests in different states can reduce uncertainty through planning. For example, if a firm is concerned that the law of the state in which its operations are concentrated might conflict with that of its state of incorporation, it can reincorporate in the former jurisdiction, thereby eliminating the conflict. While managers might prefer to incorporate elsewhere (say, in Delaware), uncertainty or potential conflict can be avoided in this way, which suggests the real concern is something more substantive. In addition, to the extent a firm might face multiple states' imposing truly conflicting corporate law obligations, it can operate in one or more of the jurisdictions through separately incorporated subsidiaries.[142]

Moreover, corporate decision makers can still remove operations and activities from a jurisdiction that might seek to impose conflicting legal norms. This threat of exit itself or the threatened refusal to enter is also a check against lawmakers imposing overzealous regulation in the first place. Of course, opting out via physical exit is far more costly than simply chartering elsewhere, but the opportunity to remove operations provides firms with a means of avoiding conflicting legal obligations and a meaningful check against what they perceive as excessively burdensome regulation.[143]

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[140] Again, it is exaggerated by those who have powerful incentives to promote continued adherence to the doctrine. *See Glynn*, *supra* note 25, at 140 (noting that, despite claims to the contrary by Delaware and industry groups, the regulation at issue in recent internal affairs doctrine cases creates little risk of lingering interstate conflict or uncertainty).

[141] *Cf.* Ribstein & O'Hara, *supra* note 43, at 664.

[142] *See* Greenwood, *Democracy and Delaware*, *supra* note 6, at 416.

[143] *See* Tung, *supra* note 12, at 37 (stating that the possibility of exit creates competitive pressure to reject regulation).

Just as the potential for uncertainty is overstated, so too is the need for uniformity. The prospect of the law of more than one jurisdiction governing internal arrangements or decision making would not necessarily leave corporate actors paralyzed by irreconcilable, conflicting obligations. As in other areas of regulation, many types of corporate-law reform would not create conflicts that would put decision makers in the untenable position of having to try to comply with truly inconsistent legal obligations. For example, if a state imposed on firms enhanced disclosure obligations, more searching exceptions to limited liability, or more robust duties to monitor, managers could comply with these requirements without violating duties imposed under the law of other states. Undoubtedly, there would be transaction costs associated with having to comply with varied legal obligations. While lawmakers ought to consider such costs in deciding what regulations to impose, the mere possibility does not make an alternative regime unworkable: in enterprises operating across state and national borders, corporate actors constantly navigate a web of different legal rules.

Ex ante predictability and uniform application are more critical with regard to those aspects of corporate law that establish firm governance structure or allocate certain decision rights and obligations among stakeholders. For example, corporate actors need to be able to predict with some confidence what law will govern who elects directors and to whom various duties may run. In this context, absent some ability to accommodate the regulation of other states, the law of one state should govern.

But this does not mean that strict adherence to the internal affairs doctrine is necessary. Again, the first line of defense is self-help: through chartering, firm structuring, and other risk management techniques, managers can reduce the probability that more than one state might subject the firm to truly inconsistent legal obligations. If that fails, or it is imperfect, choice-of-law norms buffered by principles of comity can reduce or eliminate this concern. For instance, the need for such predictability and uniformity counsels in favor of a state limiting application of its law regarding voting rights to firms whose primary operational or equity investor presence is within the state.[144] Moreover, it suggests that a state extend the reach of its law only to the extent necessary to serve the underlying regulatory purpose. Using Professor Greenfield's proposal as an

[144] *Cf.* Ribstein & O'Hara, *supra* note 43, at 664 (stating that such problems imply that only one rule should apply, but that rule could be the law of the corporation's base of operations, as is the case in some European jurisdictions).

example, suppose a state enacts a statute that mandates board representation for employees, and a foreign-chartered firm has its center of gravity for a firm's operations within the jurisdiction, but its shareholders are primarily located elsewhere. In such a circumstance, the state could apply its employee representation mandate but leave to another jurisdiction—i.e., where shareholder interests are concentrated or where the firm is incorporated—matters of allocation of rights between shareholders or shareholder groups.

My purpose is not to offer a comprehensive choice-of-law framework that addresses every potential corporate-law conflict. It is simply to suggest that, as is the case elsewhere in the law, choice-of-law principles that take into account the relevant regulatory policies, the relative interests of states, and the value of predictability and uniformity can provide a substitute framework that is both workable and, for the reasons stated above, better calibrated to reflect all of the relevant interests at stake than the internal affairs norm.[145] Such an approach would create application issues on the margins, particularly during a transition period, but so too does the internal affairs norm.[146]

Of course, because horizontal choice-of-law and comity principles are not constitutionally mandated, the potential for interstate conflict resulting from inconsistent application and regulatory overreaching remains. A state with a desire to protect local stakeholders but with few operational or investor contacts with the firm might seek to impose its preferred governance structure on the entire enterprise, despite the fact that this structure conflicts irreconcilably with that mandated by another jurisdiction with greater connections to the firm. Similarly, the state of incorporation may refuse to recognize the regulatory prerogatives of states with far greater operational or equity investor contacts with the firm, and act aggressively to ensure that its own law governs. Perhaps not surprisingly, Delaware has already behaved in this way. In various contexts, its courts have made clear that they will go to great lengths to defend the internal affairs norm and, consequently, the state's chartering enterprise, even if that means refusing to consider (much less respect) the regulatory prerogatives of other states with far greater operational and investor ties to the firm. Moreover, at least in theory, there may be some enterprises with

[145] Thus, for example, a regime which provides that the corporate law of the state of primary operations—perhaps in combination with the law of other states, provided these laws do not conflict or can be accommodated—is a viable and preferable alternative to the internal affairs doctrine.

[146] What falls inside and outside of the internal affairs doctrine has been the subject of recent litigation. *See* Glynn, *supra* note 25, at 134, 139–40.

operations and equity investor interests so dispersed that the exercise of exclusive law-making authority over corporate governance structures by any state might seem disproportionate to its regulatory interest.[147]

Yet, to the extent regulatory overreaching or interstate conflict becomes a problem that the states and firms cannot resolve themselves, *federalization* of corporate law, rather than privileging the state of incorporation, ought to be the primary remedy.[148] Again, this is consistent with the traditional norms of federalism: Congress should step in and address matters either truly national in scope or as to which conflicting state approaches might cause substantial disruption. What is not an appropriate remedy is to default to the law of the state of incorporation without considering the broader implications of allowing management to choose its own governing law.

3. Constitutional Limitations

If the federal government does not act, the question becomes whether the Constitution places any limits on states' authority to regulate corporate governance and internal affairs. It does, but only on the margins.

The Delaware Supreme Court's claim that the internal affairs doctrine itself is a constitutional imperative under the dormant Commerce Clause is specious.[149] Professor Jed Rubenfeld decimated this theory twenty years ago,[150] and, since then, I and others have detailed why Delaware's constitutional claims are doctrinally weak and otherwise evince serious overreaching.[151]

Like other constitutional doctrines,[152] the dormant Commerce Clause frames the outer boundaries of a state's authority to apply its own law, but there is tremendous space within which the state can

[147] GE might be one such firm, as Professor Dent suggests, *see* Dent, *Stakeholder Governance*, *supra* note 3, at 1117–18, 1139, although it depends on firm structure and how and where the firm and any subsidiaries are operated.

[148] *Cf.* Greenwood, *Democracy and Delaware*, *supra* note 6, at 416.

[149] The court recently reasserted this claim in *VantagePoint Venture Capital Partners LLP v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005). *See supra* note 68.

[150] *See generally* Jed Rubenfeld, *State Takeover Legislation and the Commerce Clause: The "Foreign" Corporations Problem*, 36 CLEV. ST. L. REV. 355 (1988).

[151] *See* Glynn *supra* note 25, at 117–22 (discussing the literature and why the Delaware Supreme Court's claims that the doctrine is a constitutional mandate are deeply flawed); *see also* Ribstein & O'Hara, *supra* note 43, at 716–21.

[152] The Due Process and Full Faith and Credit Clauses simply require that, to apply its own law to a dispute, a state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Allstate Ins. Co. v. Hague, 449 U.S. 302, 312 (1981).

operate. In a nutshell, under the balancing test set forth in *Pike v. Bruce Church, Inc.*,[153] a state regulation will be upheld unless it discriminates against interstate commerce or the burden it imposes on commerce is "clearly excessive in relation to the putative local benefits." This suggests that a state with which a corporation has few operational or equity investor connections might be prohibited from seeking to subject the entire firm to its corporate law, particularly in circumstances where that law created irreconcilable conflicts with the law of another jurisdiction with a substantially greater interest in regulating. But it falls far short of, and indeed provides no support for, the proposition that states with more robust connections to foreign firms cannot regulate their internal affairs.[154] As I argue elsewhere, the later Supreme Court cases invoking the dormant Commerce Clause (in dicta) in the context of challenges to state anti-takeover statutes do not alter this conclusion.[155]

Finally, consider how bizarre Delaware's proposed constitutional regime would be. After all, as Professor Fredrick Tung has suggested, states could require—as they once did—that every enterprise operating within the jurisdiction incorporate therein.[156] Moreover, it would be ironic if the dormant Commerce Clause imposed such a barrier, not only because the modern, interstate corporate enterprise did not exist at the time of the Constitution's enactment, but also because of the slender reed on which the chartering state's regulatory interests now hang.[157] Elevating the internal affairs doctrine to a constitutional mandate would, in many circumstances, privilege the prerogatives of a state with few or no operational or equity investor ties to the enterprise over all other states.[158] Indeed, while the Supreme Court has suggested that the state of incorporation has a regulatory interest in corporate internal affairs,[159] and Delaware frequently repeats the mantra,[160] no one has articulated with precision

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[153] 397 U.S. 137, 142 (1970).

[154] *See, e.g.*, Rubenfeld, *supra* note 150, at 357–58.

[155] *See* Glynn, *supra* note 25, at 117–23. *See also generally* Rubenfeld, *supra* note 150, at 358–76 (same).

[156] *See* Tung, *supra* note 12, at 37, 44 (observing that states have the power to apply monopolizing corporate law to firms operating within their borders).

[157] *See, e.g.*, GREENFIELD, *supra* note 6, at 108 (stating that incorporation in Delaware does not mean that the state has any interest at all in the firm). The Comments to Restatement § 302(2) are revealing in this respect.

[158] *See, e.g.*, Greenwood, *Democracy and Delaware*, *supra* note 6, at 413.

[159] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987) ("It is thus an accepted part of the business landscape in this country for States to create corporations, prescribe their powers, and define the rights that are acquired by purchasing their shares. A state has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.").

[160] *See, e.g.*, VantagePoint Venture Capital Partners LLP v. Examen, Inc., 871 A.2d 1108,

why that interest is unique or why it ought to outweigh (categorically or otherwise) the interests of other states with *far greater* connections to the firm and its stakeholders.[161]

Thus, the bottom line is that while states still usually abide by the internal affairs norm, they do so voluntarily. States can and—for the reasons stated earlier—should rethink their adherence to the doctrine. As in other areas of corporate regulation, firm risk management, choice-of-law principles, comity, and federalization are the principal safeguards against any interstate conflict that might result.

CONCLUSION

Corporate law drives corporate decision making. While we take for granted that states will regulate broadly firms that operate within them, we have, oddly enough, allowed corporate managers to opt out of local regulation by selecting the corporate law of their choice. This system of production has predictable results: it leads to substantive outcomes that favor managers, it ensures that corporate legal norms will further the interests of other stakeholders only to the extent that they do not vary significantly from managerial preferences, and it stifles genuine legal innovation. If corporations and corporate actors are going to be accountable to the communities most affected by their decisions, and if substantive corporate law is to have a genuine regulatory role, this must change. Stakeholder communities—communities within which firm activities have substantial effects—must make and enforce corporate law.

1112 (Del. 2005); McDermott, Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987).

[161] In stating that the state of incorporation has an interest in regulating internal affairs, the *CTS* Court—in addition to relying on history and tradition—refers to the interests of promoting stability and protecting investors. *See CTS Corp.*, 481 U.S. at 91. Yet it does not explain why these interests are uniquely linked to the chartering state or why another state's law might not also promote stability and investor protection (perhaps even to a greater extent). Moreover, it offers no genuine assessment of the relative strength of the chartering state's interest or whether this interest is meaningful when other states with far greater connections to the firm and its stakeholders seek to regulate. Indeed, in comment g to Section 302, the drafters of the Restatement concede that, although the rule presumes application of the law of the state of incorporation because it furthers factors of certainty, uniformity, and party expectations, where the corporation has little or no contact with the state of incorporation "some other state will almost surely have a greater interest than the state of incorporation in the determination of the particular issue." RESTATEMENT, *supra* note 42, § 302, cmt. g.