Washington Law Review

Volume 96 | Number 3

10-1-2021

The Federal Option: Delaware as a De Facto Agency

Omari Scott Simmons

THE FEDERAL OPTION: DELAWARE AS A DE FACTO AGENCY

Omari Scott Simmons*

Abstract: Despite over 200 years of deliberation and debate, the United States has not adopted a federal corporate chartering law. Instead, Delaware is the "Federal Option" for corporate law and adjudication. The contemporary federal corporate chartering debate is, in part, a referendum on its role. Although the federal government has regulated other aspects of interstate commerce and has the power to charter corporations and preempt Delaware pursuant to its Commerce Clause power, it has not done so. Despite the rich and robust scholarly discussion of Delaware's jurisdictional dominance, its role as a de facto national regulator remains underdeveloped. This Article addresses a vexing question: Can Delaware, a haven for incorporation and adjudication, serve as an effective national regulator? Following an analysis of federal chartering alternatives, such as the Nader Plan, the Warren Plan, the Sanders Plan, and other modes of regulation, the answer is yes, but with some caveats and qualifications. Delaware's adequate, if imperfect, performance as a surrogate national regulator of corporate internal affairs argues against the upheaval of the existing corporate law framework federal chartering would bring. Even in the contemporary moment where longstanding concerns about corporate power, purpose, accountability, and the uneasy relationship between corporations and society are amplified, Delaware can continue to perform an important agency-like role in collaboration with federal regulators and regulated firms. A deeper examination comparing the merits of federal corporate chartering with Delaware's de facto agency function illuminates the potential of existing and future reforms. This Article concludes that federal chartering proposals have an important impact despite not being adopted for centuries. First, federal chartering proposals encourage policymakers to look beyond the status quo toward greater hybridization in regulatory design. Second, elements of previous federal chartering proposals have historically become successful "à la carte" reforms or part of other successful reform measures. Third, federal chartering proposals provide value as a bargaining tool where the threat of more intrusive federal regulation makes other reform methods more palatable to diverse corporate constituencies.

INTRODUCTION 937
I. DELAWARE AS A DE FACTO AGENCY 940
A. Corporate Lawmakers 941
B. Delaware's Institutional Dynamics 942
C. Federal Lawmaking 944
D. The Agency Analogy 945
II. THE FEDERAL CHARTERING DEBATE 950
A. The Recurrence of Federal Corporate Chartering Proposals 950

*Howard L. Oleck Professor of Business Law & Director, Business Law Program, Wake Forest University School of Law. I would like to thank Sid Shapiro, Brett McDonnell, and all participants in the Organizations and Social Impact Workshop. I would like to thank Brian Lewis, Graham Pitman, Lanie Summerlin, and Chris Taylor for their valuable research assistance.

B. The Academic Debate 955
C. Corporate Power, Shareholders, and Stakeholders............959
D. Political Economy 963
1. The Contemporary Moment 963
2. Supply and Demand Dynamics of Corporate Reform ..965
III. FEDERAL CHARTERING PROPOSALS 968
A. The Nader Group Report of 1976......................................968
B. The Warren Plan (The Accountable Capitalism Act of 2018) 970
C. The Sanders Plan (Corporate Accountability and Democracy Plan) 971
IV. THE EFFICACY OF FEDERAL CHARTERING VERSUS DELAWARE'S DE FACTO AGENCY STATUS 971
A. Implementation and Logistical Challenges 972
B. Politicization of the Internal Corporate Structure 973
C. Adversarial Versus Cooperative..974
D. Additional Concerns...975
1. Proliferation of Social Enterprise Statutes....................975
2. Rise of Impact Investing and ESG Factors...................976
3. Evolving Expectations for Corporate Managers...........979
4. Risk of Capital Migration 980
5. Political Considerations..981
E. Special Circumstances that May Warrant Federal Chartering...981
1. Successful Experimentation with Social Enterprise Statutes 981
2. Significant Government Support or Bailouts 982
3. Amnesty for Corporate Entities...................................985
V. ALTERNATIVES TO FEDERAL CHARTERING 985
A. Federal Licensing 985
B. Federal Corporate Code..986
C. Incremental Corporate Legislation 987
D. External Federal Stakeholder Regulation...........................987
E. State Social Enterprise Statutes...988
F. Market Constraints 988
G. Self-Regulation..990
VI. IMPLICATIONS 991
A. The Shape of Future Corporate Governance Reform.........992
B. The Value of Federal Corporate Chartering Proposals 992
1. Looking Beyond the Status Quo Toward Greater Hybridization in Regulatory Design............................992
2. Discrete and Severed Elements from Corporate Chartering Proposals Are Sometimes Adopted 994
3. Functioning as a Bargain Tool.....................................994
CONCLUSION 994

INTRODUCTION

Despite over 200 years of deliberation and debate, the United States has not adopted a federal corporate chartering law. Delaware is the "Federal Option"[1] for corporate law and adjudication, and the contemporary federal chartering debate is, in part, a referendum on Delaware's role. Although the federal government has regulated other aspects of interstate commerce and has the power to charter corporations and preempt Delaware, pursuant to its Commerce Clause power, it has not done so. Despite the rich and robust scholarly discussion of Delaware's jurisdictional dominance, its role as a de facto national regulator remains underdeveloped.[2] This Article addresses a vexing question: Can Delaware, a haven for incorporation and adjudication, serve as an effective national regulator? Following an analysis of alternatives, including the Nader Group Report of 1976,[3] the Accountable Capitalism Act of 2018 (the "Warren Plan"),[4] and the Corporate Accountability and Democracy Plan (the "Sanders Plan"),[5] the answer is yes, but with some caveats and qualifications. Delaware's adequate, if imperfect, performance as a surrogate national regulator of corporate internal affairs argues against the upheaval of the existing corporate law framework federal chartering would bring—even in the face of longstanding concerns about corporate power, purpose, and accountability. A deeper examination comparing the merits of federal corporate chartering with Delaware's de facto agency function illuminates the potential of existing and future reforms.[6]

1. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 605 (2002).

2. Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1467 (2008); William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 586 (2012); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683–84 (2005); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1612 (2005); Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 221 (2015).

3. RALPH NADER, MARK GREEN & JOEL SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR FEDERAL CHARTERING OF GIANT CORPORATIONS (1976).

4. S. 3348, 115th Cong. (2018).

5. *Corporate Accountability and Democracy*, BERNIE SANDERS, https://berniesanders.com/issues/corporate-accountability-and-democracy/ [https://perma.cc/ER76-GYSL?type=image].

6. ROBERT L. HEILBRONER, MORTON MINTZ, COLMAN MCCARTHY, SANFORD J. UNGAR, KERMIT VANDIVIER, SAUL FRIEDMAN & JAMES BOYD, IN THE NAME OF PROFIT 264 (1972) ("[L]ittle is gained when we delude ourselves as to the ease with which human society can be restructured. The cause of reform, not to mention that of constructive revolution, is too important to be nurtured on anything but the truth."); Donald E. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L.J. 71, 88 (1972).

Common and convenient arguments against federal chartering include: (1) the political opposition argument; that is, federal chartering is impractical given the inevitable pushback from powerful interest groups, such as corporate managers;[7] (2) the economic argument; that is, unintended costs and consequences will likely outweigh benefits;[8] and (3) status quo sufficiency arguments; that is, "if it ain't broke, don't fix it."[9] While these responses are relevant, a deeper consideration of the merits of federal corporate chartering in the contemporary context is warranted.

Historically and today, the driving force behind federal chartering proposals has been concern about both corporate power and making large corporations, particularly management, more accountable to shareholder and stakeholder interests.[10] Proponents view the abuse of corporate power as a meta-problem, requiring a deep structural, federal-charter-based remedy.[11] Even putting aside the potential implementation challenges of federal chartering, substantive federal reforms have been and can be achieved without it. Federal chartering is simply one method along a continuum, which includes: (1) federal licensing; (2) a comprehensive federal corporate code; (3) incremental federal corporate regulation;[12] (4) external federal stakeholder regulation;[13] (5) state social enterprise

7. *See* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1499–508 (1992); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987).

8. *See, e.g.*, Roberta Romano, *The State Competition Debate in Corporate La*w, 8 CARDOZO L. REV. 709, 720–25 (1987) (arguing that Delaware's success in the chartering market results from Delaware's superior ability to minimize transaction costs); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L., ECON., & ORG. 225, 281 (1985) (arguing that national corporate chartering would impose a welfare loss on shareholders because the federal government cannot offer transaction-specific assets as hostages to safeguard the investments of firms).

9. For example, a recent publication authored by Marcel Kahan uses the status quo sufficiency argument by asserting "Delaware law works at least tolerably well, so why take a chance and replace it with some unknown federal rules." Marcel Kahan, *The State of State Competition for Incorporations*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 105, 127 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

10. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933); NADER ET AL., *supra* note 3.

11. *See infra* Part II.

12. Examples include federal reforms that affect internal corporate affairs such as executive compensation, auditing, board composition, and board committees. *See infra* Part V.

13. Examples include federal regulatory statutes that address stakeholder concerns outside the corporate law context, such as labor, antitrust, banking, and environmental law. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78mm). For the 1933 Act, see Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C.

statutes; (6) market forces; and (7) self-regulation.[14] In the absence of federal chartering, these other reform methods can be combined and configured in multiple ways to creatively address manager, shareholder, and broader stakeholder interests. They are also more politically feasible than a federal corporate chartering regime.

Part I of the Article discusses Delaware's function as a de facto agency, focusing on its unique institutional dynamics and relationship to federal regulators. Part II analyzes the longstanding federal chartering debate from several perspectives: historical, academic, political, economic, and interest-group dynamics. Part III examines three contemporary federal chartering proposals: the Nader Group Report of 1976; the Accountable Capitalism Act of 2018 (the "Warren Plan")[15]; and the Corporate Accountability and Democracy Plan (the "Sanders Plan").[16]

Part IV explores the possible efficacy of a future federal chartering regime. First, it describes implementation challenges, the politicization of internal corporate affairs, and the adversarial versus cooperative relationship a federal chartering regime envisions between the federal government and state law regimes like Delaware. Next, it points to other barriers in the contemporary context: the rise of impact investing, evolving expectations for corporate managers, risk of capital migration, and political considerations. Finally, despite its position that federal chartering is not suited to the contemporary context, it identifies three scenarios where, in theory, federal chartering may be warranted: (1) if state benefit-corporation statutes become a blueprint (i.e., state laboratory argument); (2) if companies adopt federal charters as a condition of receiving a federal bailout or other significant government support; and (3) if companies adopt a federal charter as a mechanism to receive amnesty from severe penalties and sanctions.

Part V explores alternatives to federal chartering: federal licensing, a comprehensive federal corporate code, incremental federal corporate legislation, external federal stakeholder regulation, state social enterprise statutes, market forces, and self-regulation. It predicts that contemporary federal chartering proposals or an expansive federal corporate code will not be adopted. Nevertheless, the mere threat of their adoption may influence negotiation and compromise, bringing regulators, corporate

---

§§ 77a-77aa); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69); Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

14. *See* L. E. Birdzell, Jr., *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations*, 32 BUS. LAW. 317, 318 (1976).

15. S. 3348, 115th Cong. (2018).

16. *See Corporate Accountability and Democracy*, *supra* note 5.

managers, and other constituencies to coalesce around less intrusive forms of regulation as alternatives. Hence, the more likely regulatory responses are incremental encroachment on Delaware law and more robust external federal stakeholder regulation. Self-regulation (e.g., environmental, social, and governance (ESG) initiatives) will also play a prominent role and mollify public fervor for more intrusive federal regulation.

Part VI illustrates the implications of the contemporary federal chartering debate. Despite dim prospects of adoption, the federal chartering debate prompts a more robust discussion of alternatives and possibilities beyond the status quo. Delaware's effectiveness as a de facto agency, coupled with other available forms of corporate regulation, renders contemporary proposals for mandatory or even voluntary federal chartering premature and superfluous. Nevertheless, contemporary federal chartering proposals reflect a longstanding tension between the exercise of corporate power and broader stakeholder concerns. This tension underlies the important trend of hybridization in regulatory design as well as corporate practice to accommodate the interests of multiple corporate constituencies with diverse motives.[17] The contemporary ESG focus and proliferation of social enterprise statutes are an outgrowth of this trend toward hybridization. The emergent ESG landscape is pressuring federal, state, and firm self-regulatory regimes to accommodate broader stakeholder concerns. Despite not being adopted for centuries, federal chartering proposals have an important impact in the contemporary context. First, federal chartering proposals encourage policymakers to look beyond the status quo toward greater hybridization in regulatory design. Second, elements of previous federal chartering proposals have historically become successful "à la carte" reforms or part of other successful reform measures. Third, federal chartering proposals provide value as a bargaining tool where the threat of more intrusive federal regulation makes other reform methods more palatable to diverse corporate constituencies.

I. DELAWARE AS A DE FACTO AGENCY

Delaware's dominance as a premier jurisdiction for corporate chartering and adjudication is well established. Over 60% of U.S. publicly traded corporations are incorporated in Delaware, making it the nation's

17. *See, e.g.*, Omari Scott Simmons, *Judging the Public Benefit Corporation*, *in* 20 THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 354, 354–55 (Benjamin Means & Joseph W. Yockey eds., 2018) (illustrating how ESG and public benefit corporations reflect this hybridization trend).

corporate capital.[18] Consequently, "[t]he aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the [Delaware General Corporation Law and Delaware common law precedents] as a de facto national corporate law."[19] Moreover, "[f]or at least half a century the Delaware courts have been the de facto 'national' U.S. corporate law courts."[20]

A. Corporate Lawmakers

Lawmakers supply the service of law and regulation to corporate constituents. Law is created in different ways—through the legislative process, the judicial process, and adoption of norms and customs—each having its own challenges.[21] In the corporate governance context, law and regulation suppliers are not monolithic and may have separate agendas.[22] The primary suppliers are Delaware (primarily Delaware state courts and

---

18. *See* Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, CLS BLUE SKY BLOG (Aug. 3, 2015), https://clsbluesky.law.columbia.edu/2015/08/03/the-delaware-delusion/ [https://perma.cc/TWE3-XNAK] (discussing Delaware's dominance in the corporate law market).

19. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMPAR. L. 329, 331 (2001) (discussing distribution of shareholding within a country). "The aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the [DGCL] as a de facto national corporate law." *Id.* at 350. *See generally* Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865 (2014).

20. John Armour, Bernard S. Black & Brian R. Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1398 (2012). Armour, Cheffins, and Black comment on the ubiquitous nature of Delaware law:

> Delaware law is a central part of the business law curriculum in most major U.S. law schools. The official comments accompanying the Model Business Corporations Act (MBCA), a model law followed by twenty-four states, frequently refer to Delaware cases to provide examples to explain the drafters' choices. Courts in other states often cite and follow Delaware case law when their own case law is sparse. Courts in MBCA states sometimes cite Delaware jurisprudence in preference to decisions from other MBCA states.

Id. at 1398–99. William T. Allen, former Chancellor of the Delaware Court of Chancery, describes Delaware's preeminence:

> My speculation is that the entrepreneurs and venture capitalists that choose Delaware have it right. The IPO market and the secondary market trust the system of the Delaware corporation law to be systematically fair. That, of course, doesn't mean that all market participants will approve each element of the system—or each court ruling or statutory amendment. Any particular decision may generate disagreement, disapproval or dissent, but year upon year the system taken as a whole plausibly balances deference to management's need for broad discretion in deploying the firm's capital with protection of shareholder basic interest . . . . In doing so, Delaware law provides an outstanding public service to the nation.

William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, CORP. EDGE (Div. of Corps., Dover, Del.), Fall 1997, at 3 (on file with author). The Corporate Edge was a quarterly newsletter published by the Delaware Department of State's Division of Corporations. The newsletter went out of print in 2001.

21. *See generally* Francesco Parisi, *Sources of Law and the Institutional Design of Lawmaking*, 19 J. PUB. FIN. & PUB. CHOICE 95 (2001).

22. Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 323 (2009).

its General Assembly) and the federal government (primarily the Securities & Exchange Commission (SEC) and Congress). Additional suppliers of corporate regulation include other government agencies, such as the Internal Revenue Service (IRS), and self-regulatory organizations (SROs), such as the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), and the National Association of Securities Dealers (NASD).[23]

This Article focuses on two lawmaking bodies—Delaware and the federal government. Traditionally, Delaware law has governed corporate internal affairs, while the SEC has addressed external issues of securities trading and disclosure. Their interaction and separate spheres of influence often "determine whose interests and which ideas dominate American corporate law."[24] Note that "[t]he dominant ideas and interests in Delaware [may] differ from those in Washington."[25] The list of suppliers or lawmakers noted above reflects the scope of traditional corporate law and does not address the entire matrix of business regulation.[26] There is an important distinction between traditional corporate law and laws affecting corporations, which include other types of regulation, such as labor, antitrust, and environmental laws.[27]

B. Delaware's Institutional Dynamics

Unique institutional features bolster Delaware's de facto agency role. Its judiciary—that is, the Delaware Court of Chancery and the Delaware Supreme Court—is the primary corporate lawmaking body; its General Assembly plays a secondary role.[28] In addition, institutional alignment

---

23. The SEC is accountable to Congress, and SROs are indirectly controlled by the SEC. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 598–600 (2003). SRO rules are subject to approval by the SEC. 15 U.S.C. § 78s(b)(1).

24. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2494 (2005).

25. *Id.*

26. *See* ROBERT CHARLES CLARK, CORPORATE LAW 30–32 (1986) (distinguishing between traditional corporate law and other laws affecting corporations). Examples of other laws affecting corporations include other types of regulation, such as environmental, labor, health, and safety regulations. *Id.*

27. *Id.*

28. Former Governors of Delaware succinctly explained Delaware courts' lawmaking role:

> Delaware's judiciary is a crown jewel of the State. Delaware's courts, and in particular its Court of Chancery, enjoy a reputation of excellence in the nation and around the world. The Court of Chancery's expertise in corporate law is recognized as preeminent in the nation, having been developed over the course of "thousands of opinions interpreting virtually every provision of Delaware's corporate law.

Brief for Former Governors of the State of Delaware as Amici Curiae in Support of Petitioner at 4, Carney v. Adams, 592 U.S. __, 141 S. Ct. 493 (2020) (No. 19-309) [hereinafter Brief for Former among key state actors and a stable political climate contribute to its competitive advantage.[29] For example, the relationship between the Delaware corporate bar, the General Assembly, the Division of Corporations, and the judiciary is collaborative.[30] Influential groups, such as the state judiciary and the local bar, maintain a robust "collegial interaction," and the General Assembly pays deference to the corporate bar.[31] Few legislative pressures disrupt the development of law, and stakeholder groups—unions, environmental groups, and local communities—exercise little pressure.[32]

Delaware is often criticized for what observers call a pro-management bias, reflected in its law.[33] However, appointed judges in its "plaintiff-driven system are not as sensitive to interest-group pressures."[34] For example, Delaware Supreme Court and Court of Chancery judicial officers are selected by a bipartisan judicial nominating commission and are ultimately appointed by Delaware's Governor for twelve-year terms.[35]

Governors of Delaware] (citation omitted) (quoting William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. L. 351, 354 (1992)).

29. Brief for Former Governors Delaware, *supra* note 28, at 9–10 ("The consistency that Delaware furnishes in pronouncing the *de facto* corporate law of the United States has been a significant benefit to American businesses seeking capital in the domestic and international markets." (citing Simmons, *supra* note 2, at 239 ("Delaware corporate law functions as a common language or *lingua franca* among domestic and foreign firms, investors, bankers, and legal advisors."))).

30. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1940 (1998); *see also* Simmons, *supra* note 22, at 324–25; E. Norman Veasey, "*I Have the Best Job in America*," 13 DEL. LAW. 21, 23 (1995) (asserting that the Delaware Supreme Court has "excellent relations with the other two branches of state government"). E. Norman Veasey, the former Chief Justice of the Delaware Supreme Court, commented on Delaware's cooperative atmosphere:

> Delaware's size as the "small wonder" gives us an enormous advantage, particularly when coupled with the intelligence, approachability, cooperation and integrity of our public office holders. All three branches of government in Delaware are keenly aware of the reputation of the judicial branch of government and of the enormous contribution that the judicial branch makes to Delaware's economy and to the well-being of our citizens. Delaware's judicial branch must, however, continuously explain and justify its processes to the other two branches and to the citizenry. We are making that effort. But, we need the help of the organized Bar, and we need for the other two branches of government to examine, advise, hear and support us.

Id. at 22.

31. *See* Cary, *supra* note 7, at 692 ("[Delaware has] in microcosm the ultimate example of the relationship between politics, the bar, and the judiciary. . . . [I]t is clear that Delaware may be characterized as a tight little club in which the corporate bar cites unreported decisions before the courts in which they practice.").

32. *See id.*

33. Schwartz, *supra* note 6, at 74–75.

34. Simmons, *supra* note 22, at 325.

35. Del. Exec. Order No. 4, (2001) https://archivesfiles.delaware.gov/Executive-Orders/Minner/Minner_EO04.pdf [https://perma.cc/3K99-SS8B]. In theory, twelve-year

In addition, the State Constitution mandates a political balance on the Delaware Supreme Court and the Court of Chancery.[36] Such independence arguably gives court opinions more legitimacy than some legislative outcomes. Delaware is largely insulated from populist concerns that are palpable at the national level, except to the extent that the federal government makes state lawmakers aware of their potential encroachment on state law.[37] Due to these contextual factors, managers and shareholders are the primary interest groups influencing Delaware corporate lawmaking. The federal government can be viewed as another.[38] Recently, similar to other states, Delaware has responded to stakeholder concerns by adopting a public benefit corporation statute.[39] The widespread adoption of state social enterprise statutes has implications for the contemporary federal chartering debate: forestalling greater federal encroachment and potentially weakening the argument for federal chartering.

C. Federal Lawmaking

Compared to Delaware, federal government lawmaking is more pluralistic and involves more interest groups that reflect stakeholder and populist concerns.[40] However, it demonstrates some reluctance to directly regulate a corporation's internal affairs and to alter existing power relationships between managers and shareholders.[41] Instead, it prefers to use more moderate forms of regulation, such as disclosure, potentially to prevent and to mollify political backlash from powerful corporate

---

appointments limit the impact of electoral swings on judicial decision-making. Also, twelve-year terms and the prospect of not being reappointed may serve as a compromise to life tenure that may lessen accountability. For a critique of life tenure for federal judges, see Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006).

36. *See* DEL. CONST. art. IV, § 3.

37. *See* Roe, *supra* note 24, at 2501.

38. Simmons, *supra* note 22, at 325.

39. DEL. CODE ANN. tit. 8, §§ 361–68 (West 2021).

40. *See* Roe, *supra* note 24, at 2518–19. Mark Roe describes the broader interests implicated at the federal level:

> More goes on in Washington than wider coalition possibilities. Public-regarding policymakers in Washington see themselves as custodians for the overall health of the American economy; accordingly, they could conclude that tight managerial accountability—beyond that which even interests institutional investors—would be best for the economy. The Council of Economic Advisors influences the President, the GAO writes reports, and the SEC often proposes rules that managers and institutional investors dislike. Of course, we shouldn't naïvely think that interests don't influence these players too, but the interests differ from Delaware's, and sometimes the public-policy players have enough slack to be able to act on their ideological preferences.

Id. at 2503.

41. *See* Simmons, *supra* note 22, at 328.

constituencies.[42]

The federal government may be more likely to address populist concerns, but increased interest-group pluralism does not necessarily negate manager and shareholder influence. Even if lawmakers enact more laws and regulations, the degree of enforcement determines their impact.[43] Passing public-regarding reforms may differ from earnestly pursuing the public interest.[44] Knee-jerk and ad hoc responses and cosmetic, largely symbolic measures can be used to mitigate outrage from sometimes less-informed corporate constituencies.[45]

D. The Agency Analogy

Given its institutional dynamics and its influence on U.S. corporate law, Delaware—particularly its judiciary—functions like a de facto agency. One observer describes Delaware's agency-like role as follows:

> [The Chancery] is an exceptional court because it can be fairly described this way: as a governmental entity, directed by expert decision makers and assisted by a cadre of government-supervised enforcement attorneys, armed with substantial rulemaking and adjudicating authority over the conduct and disclosure of transactions within its jurisdictional compass, and charged with using that authority to regulate a broad field of economic activity. Because Chancery sees and has the power to regulate a vast amount of M&A activity, its perspective is not episodic or narrow, but constant and, if not complete, very substantially representative. In all of these respects, it resembles a regulatory agency.[46]

Typically, agencies function as rule makers with an eye to the future; they solicit comment from those who will be affected by regulations and the adoption of broader rules.[47] By contrast, courts, as rule makers, look to the past and are mostly constrained to apply rules to situations with specific actors.[48] Accordingly, the "rules resulting from [administrative] rulemaking are generally thought to be more effective regulatory instruments—because their benefits and costs in the mine run of cases are

42. *Id.*

43. *Id.* at 329.

44. *Id.*

45. *Id.*

46. Savitt, *supra* note 2, at 586.

47. *Id.* at 586–87.

48. *Id.*

more thoroughly examined before adoption."[49] The Delaware Court of Chancery is able to operate as a de facto agency because of its deep expertise and wide exposure to relevant law. Therefore, it can issue more future-minded and forward-looking decisions without focusing only on the parties before the court. Like an agency issuing regulations, it issues dicta and pronouncements to influence future transactions.[50]

The idea of courts serving as a regulatory agency is not far-fetched since the federal courts implement the antitrust laws using common law methodology.[51] Some agencies such as the National Labor Relations Board (NLRB) rely exclusively on adjudication to develop and enforce regulation.[52] Most agencies (e.g., Federal Trade Commission (FTC)) use adjudication to some extent when adopting new or revised regulatory policy.[53] Some academics assert the tort law system, driven by private plaintiffs, has regulatory effects.[54] Despite the similarities between courts and agencies, there is a salient point of differentiation. All federal regulatory schemes are monopolies that companies cannot opt out of. By contrast, companies choose whether or not to incorporate in Delaware. One must concede that Delaware in this respect is unique.

Delaware's sustained function as a de facto agency is contingent upon a continuous wealth of cases (e.g., fiduciary duty) before its courts rather than litigation in different jurisdictions.[55] According to one observer, "[e]ach case lost to another state is a lost opportunity to expand and refine Delaware fiduciary law. And because the courts of other states necessarily have less experience applying Delaware law, out-of-Delaware cases may be more opaque to defendants trying to predict and manage transactional risk."[56] Delaware offers network benefits, such as providing litigants with

49. *Id.* at 587.

50. *See id.* at 588–89; David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1854–55 (2001).

51. *See, e.g.*, Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349 (2013); R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Address at the Fordham Corporate Law Institute Thirtieth Annual Conference on International Antitrust Law and Policy (Oct. 23, 2003), https://www.justice.gov/atr/speech/common-law-approach-and-improving-standards-analyzing-single-firm-conduct [https://perma.cc/CR2Y-SLZY] ("I will focus on how a common law approach to antitrust has led [the United States] toward an objective, transparent and economically based standard for assessing single firm conduct.").

52. *See generally* Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

53. *See, e.g.*, Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969) (explaining the FTC's use of adjudication when revising regulations).

54. Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54, 54–58 (1999).

55. Savitt, *supra* note 2, at 598.

56. *Id.* at 599.

similar standards, that generate predictability for business planning.[57]

Delaware's de facto agency role and lawmaking function do raise concerns and criticisms. Some historic and contemporary critics assert that Delaware judges cannot be impartial because local interest groups, focused on securing lucrative corporate franchise fees and legal work, promote a pro-management ideology.[58] These critiques, however, ignore structural safeguards designed to mitigate politicization and promote greater independence; for example, the bipartisan judicial nominating commission for selection, political balancing, and twelve-year term appointments.[59]

Completely eradicating all politicization of the judiciary would be a tall task, but scholars acknowledge that certain measures can mitigate the influence of politics and ideology on judicial decision-making.[60] Public choice scholars contend regulatory agencies are composed of self-seeking individuals.[61] But they often ignore the role of formal and informal norms in agencies that may deter self-interest or one-sidedness. For example, professionalism is a key disciplining norm for agencies as well as courts.[62] By nature, courts are more apolitical than agencies yet not immune from interest group pressures or ideology.[63] However, professionalism, in part,

---

57. *See id.* at 577–85.

58. Bebchuk, *supra* note 7, at 1499–508; Cary, *supra* note 7, at 666; Macey & Miller, *supra* note 7, at 472.

59. *See* Brief for Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Petitioner at 3, Carney v. Adams, 592 U.S. __, 141 S. Ct. 493 (2020) (No. 19-309) ("[T]he Framers of the Delaware Constitution of 1897 established a partisan balance requirement providing that no more than a bare majority of the state's 'law judges' be members of the same political party . . . . These provisions have functioned to minimize the role of politics in Delaware's judicial selection process, protecting public confidence in the integrity of the judiciary and avoiding single party entrenchment."); *Id.* at 24 ("To foster judicial independence, Delaware judges serve lengthy 12-year terms, potentially giving governors the ability to shape the composition of the bench long after their time in office. The partisan balance requirements further ensure that the governor of a state whose citizens hold a wide range of views cannot structure a judiciary with a predominant or homogenous judicial philosophy.").

60. Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV 319, 355 (2012).

61. *See generally* James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications, in* THE THEORY OF PUBLIC CHOICE-II 11 (James M. Buchanan & Robert D. Tollison eds., 2009).

62. *See* Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464–65 (2012).

63. In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, the Supreme Court held:

> Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this

deters judicial officers from being ideologues because their reputation, which they presumably care about, is determined by the degree of professionalism they exhibit. Delaware judicial officers ascribe to a salient professionalism norm given the reach and impact of their decisions.

In any case, administrative agencies are far from a panacea for corporate problems. Federal regulation has its limitations. Although the views of regulated industries are relevant to the lawmaking process, they often prove determinative, crowding out the views of less organized but important interest groups. Even worse, agencies may be captured by the industries they regulate.[64] Inevitably, their effectiveness relies on industry expertise, information, and cooperation.[65] Even assuming agencies are staffed by virtuous public servants with no ambitions to secure lucrative jobs in industry, they are still dependent on political bodies like Congress for appropriations. These concerns are not reasons to abandon the regulatory process or to suggest that it lacks benefit. Instead, they stand as a reminder of its inherent limitations.

The recent Supreme Court case *Carney v. Adams*[66] underscores Delaware's role as a de facto regulator.[67] The Third Circuit ruled that Delaware's judicial political balancing provisions were unconstitutional.[68] Specifically, the decision addressed the constitutionality of article IV, section 3 of the Delaware Constitution, which provides, in relevant part, that (1) courts in Delaware cannot have more than a bare majority of justices from one political party (the Bare Majority Provision); and (2) the justices of the Supreme Court, the Superior Court, and the Court of Chancery must all be members of one

> political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. 837, 865–66 (1984).

64. *See* Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 624 (2010).

65. Donald E. Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125, 1129–30 (1976); Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 U. ILL. L. REV. 1131, 1134–35 (2013).

66. 592 U.S. __, 141 S. Ct. 493 (2020).

67. Adams v. Carney, No. CV 17-181-MPT, 2018 WL 2411219 (D. Del. May 23, 2018), *aff'd in part, rev'd in part sub nom.* Adams v. Governor of Del., 922 F.3d 166 (3d. Cir. 2019), *cert. granted sub nom.* Carney v. Adams, __ U.S. __, 140 S. Ct. 602 (2019) (No. 19-309), *vacated and remanded*, *Carney*, 141 S. Ct. 493.

68. *Adams*, 922 F.3d at 169.

major political party or the other (the Major Party Provision).[69]

A U.S. Supreme Court Brief from Former Governors of the State of Delaware as Amici Curiae in Support of Petitioner counters that the "impact of Delaware's constitutional commitment to political balance has been profound."[70] It points out that "[c]ross-party judicial appointments are a rarity in the federal courts" but not in Delaware.[71] This brief articulates the potential consequences of striking down Delaware's judicial political balancing provisions:

> Without the draw of Delaware's specialized, nonpartisan judiciary, entities may choose to incorporate in different jurisdictions throughout the country, thereby irreparably fragmenting the nation's currently unified corporate law. The consistency that Delaware furnishes in pronouncing the de facto corporate law of the United States has been a significant benefit to American businesses seeking capital in the domestic and international markets.[72]

The brief adds: "Should the articulation of corporate law become scattered across numerous jurisdictions, reconsolidation would be difficult or impossible."[73] Further it acknowledges that "[t]he loss of Delaware's status as the center of United States corporate law, anchored by a specialized, nonpartisan judiciary, would harm Delaware-incorporated businesses nationwide."[74]

In reaching its conclusions, the Third Circuit made the blanket determination that judicial figures cannot be policymakers.[75] It ignored "characteristics that cause [Delaware's judicial lawmaking] to resemble the legislative process" and a de facto agency.[76] They include, inter alia, a skeletal statutory corporate law framework that leaves the fundamental rights and obligations of stockholders and directors to be "supplied by judges, performing their traditional roles of making and applying common

---

69. *Id.* at 170–71 (describing the Bare Majority Provision and the Major Party Provision); *see* Adam Liptak, *Supreme Court to Decide if a State Can Consider Political Affiliation in Appointing Judges*, N.Y. TIMES (Dec. 6, 2019), https://www.nytimes.com/2019/12/06/us/supreme-court-political-affiliation-judges.html [https://perma.cc/YV4M-XS5G].

70. *See* Brief for Former Governors Delaware, *supra* note 28, at 5.

71. *See id.* at 5–6.

72. *See id.* at 9 (citing Simmons, *supra* note 2, at 239).

73. *See* Brief for Former Governors Delaware, *supra* note 28, at 10.

74. *Id.*

75. Adams v. Governor of Del., 922 F.3d 166, 169 (3d. Cir. 2019), *cert. granted sub nom.* Carney v. Adams, __ U.S. __, 140 S. Ct. 602 (2019) (No. 19-309), *vacated and remanded*, Carney v. Adams, 592 U.S. __, 141 S. Ct. 493 (2020).

76. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1075, 1079 (2000).

law."[77] Delaware's judiciary is entrusted with the creation of corporate law and policy and functions as a de facto agency.[78] The legitimacy of the U.S. corporate governance system, of which Delaware is an integral part, largely hinges on the perception that it is largely apolitical, less biased, and fair, even to non-prevailing parties.[79] In Delaware, the legal environment is stable, contributing to and reinforcing a stable climate for investment and business planning. The apparent lack of politicization and flip-flopping that characterize other jurisdictions make Delaware a more attractive venue for resolving corporate disputes. Recently, the U.S. Supreme Court dismissed the *Adams* case on standing grounds, keeping Delaware's judicial balancing provisions intact but leaving questions regarding their constitutionality unresolved.[80]

II. THE FEDERAL CHARTERING DEBATE

Major U.S. corporations are global in scope and impact, but the laws under which they are created and acquire their legal character are mostly local. From this tension emerges the desire to subject them to federal law. The longstanding federal corporate chartering debate is, in essence, a referendum on the legitimacy of Delaware's shared role in U.S. corporate governance. It raises crucial questions about such reform objectives as (1) limiting the power of corporations within society; and (2) ensuring corporate managers exercise their power with greater accountability for shareholder and stakeholder interests.

A. The Recurrence of Federal Corporate Chartering Proposals

Despite over two centuries of debate, federal corporate chartering proposals have not become law.[81] Their advancement exhibits an

---

77. Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take that Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 879 (2005).

78. *Id.* Other Chancery Court features are administrative in nature. For example, "[w]ithout the need for a live controversy, the Court of Chancery may hear applications to validate defective corporate acts, order the Delaware Secretary of State to accept the filing of certain instruments, declare stock issuances to be effective, and order the holding of stockholder meetings or director elections." Brief for Former Governors of Delaware, *supra* note 28, at 13–14.

79. For a general discussion of the concept of legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1827 (2005). *See also* Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185 (2009).

80. Carney v. Adams, 592 U.S. __, 141 S. Ct. 493, 503–04 (2020) (Sotomayor, J., concurring).

81. Although beyond the scope of this Article, banking is regulated at both the federal and state levels. Federal bank chartering is employed in the banking context where the Office of the Comptroller of the Currency (OCC) has extensive powers over banking practices. In 1863, Congress

interesting pattern. They arise when public sentiment and concern "mounts about the concentration of corporate economic and political power."[82] They often coincide with periods of economic turmoil and social upheaval, when other types of corporate reform legislation are passed.

At the 1787 Constitutional Convention, James Madison twice proposed, albeit unsuccessfully, that the Constitution expressly authorize Congress to grant corporate charters where public goods so require and where a single state authority may not be competent.[83] States initially managed corporations through short-term, state-issued charters, which maintained corporate compliance under threat of nonrenewal.[84] However, corporate power significantly strengthened with the expansion of domestic and interstate markets.

Advocacy for federal incorporation in the 1880s contributed, in part, to

---

created the OCC as part of the National Currency Act to regulate and charter national banks. *See* Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668 (repealed 1864). In 1864, the National Bank Act replaced the National Currency Act. *See* Act of June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.). The OCC has multiple objectives including ensuring the soundness of the national banking system. *See generally* Howard H. Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565 (1966) (discussing the history of the National Banking Act); Larry Yackle, *Federal Banks and Federal Jurisdiction in the Progressive Era: A Case Study of* Smith v. K.C. Title and Trust Co., 62 U. KAN. L. REV. 255 (2013).

82. Schwartz, *supra* note 65, at 1126.

83. *See* MARSHALL B. CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 183 (1990); *see also* CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM 32 (2005) ("[In the eighteenth and nineteenth century,] [c]itizens and elites recognized . . . that permitting the existence of large organizations that were primarily responsive only to owners, and not to the public, was a fateful act."). Federal chartering received at least brief consideration during the Constitutional Convention, however. *See* Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 944 n.19 (1952); Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 412 (1997). There was an Incorporation Committee, but apparently it did little. *See* Mark, *supra*, at 412. When Benjamin Franklin proposed that the federal government be granted the power to cut canals, James Madison moved that an amendment be made to provide the power "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of the individual States may be incompetent." *Id.* (quoting DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 724 (Charles C. Tansill ed., 1927)). Rufus King, chair of the Incorporation Committee, argued that the proposed power was "unnecessary" and that the states "will be prejudiced and divided into parties." Mark, *supra*, at 412. The proposed amendment failed, by a vote of three states in favor and eight against. *Id.*

84. *See* Charlie Cray, *Using Charters to Redesign Corporations in the Public Interest*, *in* THE BOTTOM LINE OR PUBLIC HEALTH 303 (William H. Wiist, ed., 2010). Corporate charters originally defined a corporation's purpose, and when a corporation violated (or acted outside of) its stated purpose, the state legislature could dissolve the corporation. *See generally* Kent Greenfield & D. Gordon Smith, *Debate: Saving the World with Corporate Law?*, 57 EMORY L.J. 947 (2008).

the adoption of the Sherman Antitrust Act ("Sherman Act").[85] In addition to the passage of the Sherman Act, Congress passed the Tillman Act of 1907[86] to restrict corporate power by limiting corporations and banks from making federal campaign contributions.[87] By the twentieth century, Progressive Era reformers perceived "bigness" as a threat to democratic institutions, and a federal incorporation framework, although never adopted, was perceived as a potential solution.[88]

Twenty different corporate chartering-related bills were introduced in Congress between 1903 and 1914;[89] none became law. Presidents Theodore Roosevelt, Howard Taft, and Woodrow Wilson all voiced support for a federal corporate chartering or licensing scheme in their annual State of the Union Addresses.[90] In his first address to Congress in

---

85. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7); *see* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 117 (1999) ("[T]he Sherman Act deliberations involved discussions of federal incorporation, [but] the final statute left the primary power to charter corporations with the states."); *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 63, 85–99 (1956) (discussing the strong sentiments against monopolies implicated in corporation law and analyzing the legislative history of the Sherman Act).

86. 2 U.S.C. § 441b(a).

87. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a)).

88. In 1898, Congress established the Industrial Commission to investigate and propose national policy on various industrial and commercial issues. *See* Act of June 18, 1898, ch. 466, 30 Stat. 476. In 1902, the Commission's final report suggested federal chartering may limit corporate "bigness." U.S. INDUS. COMM'N, FINAL REPORT OF THE INDUSTRIAL COMMISSION, H.R. DOC. NO. 57-380, at 643, 651 (1st Sess. 1902) ("Federal supervision, under some form, which may control the combinations doing an interstate business, is therefore of chief importance. . . . [If supervision alone fails to curb corporate abuses,] it may be wise for the Congress to enact a Federal incorporation law."); *see also* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160, 180 (1982) ("On January 7, 1910, Taft sent a message to Congress calling upon it to pass a federal incorporation law. The vagueness of certain parts of the Sherman Law, the conflicting interpretations handed down in different federal courts, the interstate nature of big business all called for new means to control unlawful suppression of competition while reassuring honest businessmen of the legitimacy of their actions."). At the 1899 Chicago Conference on Trusts, William Jennings Bryan, the 1896 and 1900 Democratic presidential candidate, endorsed federal chartering. *See* Urofsky, *supra*, at 165–66. Bryan's federal chartering proposal required a federal charter for companies to do business outside their home state of incorporation, which would only be granted if the firm met strict capitalization and business policy requirements, and the firm was not a monopoly. *See id.* at 166. If a corporation attempted to create a monopoly or violated any other federal chartering rules, then their charter would be revoked. *Id.*

89. FED. TRADE COMM'N, UTILITY CORPORATIONS, S. DOC. NO. 70–92, at 32–51 (1st Sess. 1934). *See* CLINARD, *supra* note 83, at 183.

90. Roe, *supra* note 24, at 602. For a broader discussion of presidential endorsements of federal chartering, see Joel F. Henning, *Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come?*, 21 DEPAUL L. REV. 915, 919 (1972), and Comment, *A Federal System of Licenses and Charters*, 25 GEO. L.J. 700, 704 (1937) (exploring Theodore Roosevelt's strong support of federal

1901, Teddy Roosevelt stated, "the Government should have the right to inspect and examine the workings of the great corporations engaged in interstate business."[91] He proposed a new Bureau of Corporations as an extension of the Department of Commerce, while Congress simultaneously considered a federal incorporation bill.[92] Roosevelt was a major proponent of federal incorporation, expressing his support for federal chartering in a 1905 message to Congress:

> Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by [S]tate action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations—that is, by the [N]ational [G]overnment.[93]

Ironically, Roosevelt is indirectly responsible for Delaware's dominance. His criticism encouraged then-Governor of New Jersey Woodrow Wilson to promote the Seven Sisters legislation, which contributed to the migration of firms from New Jersey to Delaware.[94]

President Taft directed his Attorney General to draft a federal licensing bill,[95] which was endorsed by the *Wall Street Journal* in 1908 and presented to Congress in 1910.[96] Federal chartering and federal licensing

---

incorporation and Woodrow Wilson's endorsement of federal licensing). *See also* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 26–29 (1990) (discussing the appeal of federal incorporation as a response to the argument that "the rise of big business was national in character, and thus required a national government response").

91. President Theodore Roosevelt, State of the Union Address (Dec. 3, 1901).

92. H.R. REP. NO. 57-3375 (1903).

93. Dorrance Dibell Snapp, *National Incorporation*, 5 ILL. L. Rev. 414, 415 (1910–1911) (quoting President Theodore Roosevelt, Address to Congress (Dec. 3, 1905)).

94. *See* Sarath Sanga, The Origins of the Market for Corporate Law 3 n.11 (March 20, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503628 [https://perma.cc/253G-RJHB] ("In 1913, Woodrow Wilson, then governor of New Jersey, proposed the 'Seven Sisters Act,' effectively outlawing the trust and holding company."); Cary, *supra* note 7, at 664 ("Delaware, seeking new sources of revenue, copied very largely from the New Jersey act to establish its own statute. Then in 1913, at the insistence of Governor Woodrow Wilson, New Jersey drastically tightened its law relating to corporations and trusts with a series of provisions known as the seven sisters. Since Delaware did not amend its statute, it took the lead at that time and has never lost it . . . ." (footnotes omitted)); *see also* E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 167 (2004) (explaining how Woodrow Wilson's Seven Sisters Act created a migration from New Jersey to Delaware).

95. *See* Urofsky, *supra* note 88, at 180.

96. *Id.* ("On January 7, 1910, Taft sent a message to Congress calling upon it to pass a federal incorporation law. . . . Attorney-General George W. Wickersham soon afterward presented a draft to the chairmen of the House and Senate Judiciary Committees, who sponsored it as the Clark-Parker bills (S. 6186 and H. R. 20142)."); *see also* RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 67 (1976).

are not the same. Although chartering and licensing have some similar characteristics and goals, as discussed later in Part V, there are important distinctions. Federal chartering effectively means that state chartering will either cease for certain corporations or will be superseded. Meanwhile, federal licensing does not eliminate the need for state charters, but imposes additional requirements on companies engaged in interstate commerce. The 1904 Democratic, 1908 Republican, and 1912 Democratic platforms each included different federal corporate chartering or licensing proposals.[97]

The federal incorporation debate rekindled in the 1930s, when the New Deal produced significant reforms, particularly federal securities laws.[98] The post-World War II era witnessed an explosion of legislation and reform that subsumed the corporate chartering debate to some extent. The 1970s witnessed another resurgence of the debate. Consumer advocate Ralph Nader and others argued that federal chartering would promote corporate democracy, personal liability for management, stricter antitrust requirements, and enhanced disclosure standards regarding social, environmental, and economic impacts.[99] During the first decade of the twenty-first century, two massive pieces of federal regulation, Sarbanes-Oxley[100] and Dodd-Frank,[101] subsumed the federal chartering discussion.[102]

Recently, U.S. Senators Elizabeth Warren and Bernie Sanders both proposed federal corporate chartering. In keeping with the historical pattern, public concern about corporate concentration and power[103] is

97. *See* Cray, *supra* note 84, at 303.

98. The primary federal securities laws include the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj. *See* Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 342–47 (1988); Schwartz, *supra* note 65, at 1126–27.

99. Schwartz, *supra* note 65, at 1127.

100. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

101. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7, 17, 15, 18, 22, 31, and 42 U.S.C.).

102. *See* MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 191–224 (2018).

103. *See* Kiran Stacey, Kadhim Shubber & Hannah Murphy, *Which Antitrust Investigations Should Big Tech Worry About?*, FIN. TIMES (Oct. 28, 2019), https://www.ft.com/content/abcc5070-f68f-11e9-a79c-bc9acae3b654 (last visited Aug. 27, 2021) (summarizing all recent calls to break up big tech and the current related ongoing investigations); Andy Kessler, *Antitrust Can't Catch Big Tech*, WALL ST. J. (Sept. 15, 2019, 3:56 PM), https://www.wsj.com/articles/antitrust-cant-catch-big-tech-11568577387 [https://perma.cc/78KH-KHEV] (discussing how the House Judiciary Committee is the latest group to open an antitrust investigation against big tech, joining forty-eight state attorney generals, the Justice Department, and the Federal Trade Commission).

currently amplified by a global health pandemic and widespread racial unrest.[104] All of society's institutions have come under increased scrutiny, especially corporations' role in, and accountability for, economic and social outcomes.[105] Whereas previous cycles of corporate reform and regulation strengthened the hand of shareholders and contributed to greater shareholder voice, the contemporary focus targets corporate accountability for environmental, social, and governance (ESG)-related outcomes.[106] In this environment, the power of celebrated companies like Facebook and Alphabet have become the subject of heightened regulatory scrutiny following years of relatively lax oversight.[107]

B. The Academic Debate

Delaware's jurisdictional dominance is one of the most debated topics among corporate law scholars.[108] Traditional accounts in the academic

---

104. Lucy Colback, *The Role of the Corporation in Society*, FIN. TIMES (July 10, 2020), https://www.ft.com/content/482a8435-c04c-4be8-9856-941e7ecf128a [https://perma.cc/7RRV-EF44].

105. *See* Tracy Jan et al., *Corporate America's $50 billion promise*, WASH. POST (Aug. 23, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/ (last visited Sept. 18, 2021); Paul Roberts, *Costco and Boeing, Commit Tens of Millions to Social Justice Programs*, SEATTLE TIMES (Aug. 28, 2020), https://www.seattletimes.com/business/local-business/two-of-washingtons-biggest-companies-costco-and-boeing-commit-tens-of-millions-to-social-justice-programs/ [https://perma.cc/5K7E-Q4HV]; Jeffrey Sonnenfeld, *CEOs Lead America's New Great Awakening*, WALL ST. J. (Apr. 15, 2021), https://www.wsj.com/articles/ceos-lead-americas-new-great-awakening-11618505076 (last visited Sept. 18, 2021).

106. Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1342–43 (2019).

107. *See* Raymond G. Lahoud, *Facebook Faces Lawsuit Alleging Discrimination Against U.S. Workers*, 11 NAT'L L. REV. (Dec. 10, 2020), https://www.natlawreview.com/article/facebook-faces-lawsuit-alleging-discrimination-against-us-workers [https://perma.cc/H2CA-8M8G]; *see also* Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/4795-N4KR].

108. *See* Cary, *supra* note 7, at 666 (asserting state competition is a race-to-the-bottom benefiting management, sometimes at the expense of shareholders, and that this state of affairs demands a greater federal role); *see also* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256 (1977) (asserting state competition is a race to the top benefiting shareholders); Bebchuk & Hamdani, *supra* note 1, at 556 (asserting Delaware has a monopoly on out of state charters); Fisch, *supra* note 76, at 1064 (asserting Delaware sustains its advantage through judge-made corporate law); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) [hereinafter Kahan & Kamar, *Myth*] (asserting Delaware is the only state to truly compete for incorporations); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1208 (2001) [hereinafter Kahan & Kamar, *Price Discrimination*] (asserting Delaware employs price

literature overwhelmingly focus on and at times overstate potential domestic threats, such as interstate competition and federal preemption via a comprehensive corporate code.

En route to determining whether corporate federalism results in optimal corporate law, most of the debate surrounding Delaware's dominant position in state charter competition is based on race-to-the-top versus race-to-the-bottom theories.[109] Generally, race-to-the-top theories contend that the high quality of Delaware law attracts promoters, managers, and investors.[110] Race-to-the-bottom theorists assert that to attract incorporating firms and lucrative franchise fees, Delaware and other states adopt minimal standards that limit manager accountability at the expense of shareholders.[111] These theories are simplistic and do not accurately describe state charter competition, especially where it is not robust for large, publicly traded corporations.[112]

In the 1970s, Ralph Winter and William Cary were leading voices in this vigorous debate. For Winter, state competition spurs a race-to-the-top, where manager and shareholder interests eventually converge because managers realize that promoting shareholder wealth lessens the likelihood of bankruptcy and takeover, which threaten their incumbency.[113] This model generally assumes an efficient market and the

---

discrimination through franchise taxes and litigation-intensive substantive law); Kahan & Rock, *supra* note 2, at 1578 (asserting that Delaware and the federal government complement each other by working on the areas the other cannot regulate as effectively); Roe, *supra* note 24, at 2494 (asserting the relationship between Delaware and federal actors is more important than any state-to-state race); Roe, *supra* note 23, at 590 (asserting there can be no pure state-to-state race because of the threat of federal intervention); Simmons, *supra* note 2 (asserting that the greatest threat to Delaware's preeminence is not domestic but foreign competition).

109. Theories of regulatory competition (e.g., race-to-the-top) reflect the Tiebout Model of regulatory competition but did not originate among corporate law scholars. *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (predicting competition between states will lead to an efficient match between demands of citizens for public goods and public goods supported by the state).

110. Race-to-the-top theories presume manager and shareholder interests converge in the long run because managers realize promoting shareholder wealth lessens the likelihood of bankruptcy and takeover, which threaten managerial incumbency. This model, of course, assumes an efficient market and the absence of other confounding factors. *Cf.*, *id.*

111. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 557, 559 (1933) (Brandeis, J., dissenting in part) ("Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. . . . The race was one not of diligence but of laxity." (footnotes omitted)); Cary, *supra* note 7, at 663 ("Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards. This unhappy state of affairs[] stem[s] in great part from the movement toward the least common denominator . . . .").

112. Kahan & Kamar, *Myth*, *supra* note 108, at 684 ("[T]he very notion that states compete for incorporations is a myth. Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.").

113. *See* Winter, Jr., *supra* note 108, at 275–76.

absence of other confounding factors.[114]

Alternatively, Cary contended that reliance on incorporation fees for revenues led Delaware to “race for the bottom” with other states, adopting laws that favored managers over shareholders.[115] His deep and incisive critique extended to proposing federal legislation to establish a Federal Minimal Standards Act that would preempt Delaware’s influence.[116] Adherents of the race-to-the-bottom view expressed skepticism that market dynamics would result in optimal corporate legislation.[117] Cary was particularly critical of Delaware lawyers and judges, who, he asserted, could not be trusted to operate consistently in the national interest.[118] His proposed remedies fell short of federal chartering but significantly influenced the federal chartering debate.[119]

Research illustrates that competition between states is not robust and suggests that Delaware targets large, publicly traded corporations rather than less lucrative chartering market segments; for example, small and medium-sized enterprises.[120] Moreover, other states’ franchise fee structures reveal they do not have the same economic incentives to

---

114. Winter’s race-to-the-top theory did not originate among corporate law scholars and was influenced by the Tiebout Model of regulatory competition. *See, e.g.*, Tiebout, *supra* note 109, at 418 (predicting competition between states will lead to an efficient match between demands of citizens for public goods and public goods supported by the state).

115. *See* Cary, *supra* note 7, at 664.

116. *Id*. “[I]n my opinion the time has come for us to consider a Federal Minimum Standards Act. There has been a deterioration of corporate standards, and I think it is safe to say that Delaware has been the sponsor and the victim of this unhappy denouement. . . . [T]here has been a race for the bottom.” William L. Cary, *Summary of Article on Federalism and Corporate Law*, 31 BUS. LAW. 1105, 1105 (1976).

117. *See, e.g.*, Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545 (1984) (arguing that there are major defects in the current laws controlling corporate governance, that the market for charters prevents the states from correcting these problems, and that the American Law Institute’s Corporate Governance project should be adopted as the solution); Detlev Vagts, *The Governance of the Corporation: The Options Available and the Power to Prescribe*, 31 BUS. LAW. 929 (1976) (arguing that only federal action can improve and simplify corporate law); Note, *Federal Chartering of Corporations: A Proposal*, 61 GEO. L.J. 89 (1972) (arguing that the chartering market has caused states to abdicate their responsibilities to govern corporations, and that federal chartering is the solution); Stanley A. Kaplan, *Fiduciary Responsibility in the Management of the Corporation*, 31 BUS. LAW. 883 (1976) (arguing that federal law on fiduciary duties of management is preferable to state law, and that Delaware statutory and case law is over-favorable to management.); Richard W. Jennings, *Federalization of Corporation Law: Part Way or All the Way*, 31 BUS. LAW. 991 (1976) (arguing that because of the market for charters, only federal law can adequately regulate managerial misconduct).

118. *See* Cary, *supra* note 7, at 687–88.

119. NADER ET AL., *supra* note 96, at 69.

120. Kahan & Kamar, *Price Discrimination*, *supra* note 108, at 1209 (“Delaware uses its uniquely structured franchise tax to charge a higher incorporation price to public corporations than it does to nonpublic corporations, and that among public corporations, it charges a higher price to larger corporations than it does to smaller ones.”).

compete for corporate charters as Delaware.[121]

A common theme in the academic literature is the tension between the respective roles of the federal government and the state of Delaware in the regulation of internal corporate affairs.[122] However, "[f]rom a global perspective, this approach is shortsighted because the destinies of Delaware and the nation are intertwined in the face of the common threat of global competition" and potential corporate migration to foreign jurisdictions.[123] Regardless of differences in scope—external trading and disclosure versus internal affairs—federal securities laws and state corporate law share a historical core concern: investor protection.[124] In the contemporary context, the scope is expanding to address broader stakeholder concerns.[125] From a functional standpoint, U.S. corporate

121. *See* Kahan & Kamar, *Myth*, *supra* note 108, at 687 ("Other than Delaware, no state structures its taxes to gain from incorporations or stands to reap substantial benefits from legal business by attracting incorporations.").

122. *See* Kahan & Rock, *supra* note 2, at 1576 ([T]he possibility of federal preemption constitutes a threat to Delaware, but this threat is significant only in times—such as during the recent corporate scandals—when systemic change is seen as generating a significant populist payoff.").

123. Simmons, *supra* note 2, at 221; *see also* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1422 (2020) ("While judges may be more hesitant to extend the internal affairs doctrine to corporations incorporated in foreign nations, the doctrine has been extended enough to enable foreign nations to effectively compete with Delaware for corporate charters." (footnotes omitted)); Christopher M. Bruner, *Leveraging Corporate Law: A Broader Account of Delaware's Competition* 4 (Univ. of Ga. Sch. of L., Legal Studies Research Paper No. 2020-29, 2020), https://ssrn.com/abstract=3530397 [https://perma.cc/9TEQ-YW7A] ("[T]he attractions of Delaware business entities have not gone unnoticed internationally, and in this context Delaware faces considerable competition from a range of jurisdictions—perhaps notably various British Overseas Territories such as Bermuda, the British Virgin Islands, and the Cayman Islands, another category of sub-sovereign jurisdictions active in global corporate and financial services.").

124. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b). Many other sections of the securities laws explicitly refer to investor protection. *See* Securities Act of 1933 § 7, 15 U.S.C. § 77g; Securities Exchange Act of 1934 § 12(b), 15 U.S.C. § 78l(b); National Securities Markets Improvement Act of 1996 § 106(a), 15 U.S.C. § 77b. The securities laws mention the phrase "investor protection" or "protection of investor" over two hundred times. Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 212 (2013).

125. For example, the Dodd-Frank Act's CEO Pay Ratio Rule now requires most reporting companies to provide new disclosures of the median employee's pay and a ratio comparing the CEO's compensation with this value. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), http://www.sec.gov/news/pressrelease/2015-160.html [https://perma.cc/3BMZ-EXBF]; Pay Ratio Rule, 80 Fed. Reg. 50,104, 50,150 (Aug. 18, 2015) (codified at 17 C.F.R. §§ 229, 240, 249 (2021)) ("[W]hile neither the statute nor the related legislative history directly states the objectives or intended benefits of the provision, we believe . . . that [the Pay Ratio Rule] was intended to provide shareholders with a company-specific metric that can assist in their evaluation of . . . executive compensation practices."). *But see* Press Release, Senator Bob Menendez, Menendez Applauds SEC Movement on Disclosing CEO-to-Worker Pay Ratios (Sept. 18, 2013), https://www.menendez.senate.gov/news-and-events/press/menendez-applauds-sec-movement-on-disclosing-ceo-to-worker-pay-ratios [https://perma.cc/LH6P-SPKX] ("We have middle class Americans who have gone years without seeing a pay raise, while CEO pay is soaring. This

governance is a mixed system involving the interaction of state law competition with federal intervention (or the threat thereof).[126] According to domestic and international observers, "Delaware's key contribution to U.S. corporate governance is the production of substantially judge-made corporate law—a public good providing dynamic guidance to multinational firms and practitioners as well as a deterrent for wayward business behavior."[127] By "routinely deciding these business disputes, Delaware courts—through well-established precedents—influence domestic and foreign courts as well as corporate stakeholders worldwide."[128]

C. Corporate Power, Shareholders, and Stakeholders

Accountability remains the threshold issue in corporate governance. In *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means address its two dimensions: (1) the internal minimization of agency costs resulting from the separation of ownership and control between diffuse shareholders and managers, and (2) the external abuse of

---

simple benchmark will help investors monitor both how a company treats its average workers and whether its executive pay is reasonable."). In August 2012, the SEC issued a conflict minerals reporting requirement—in fulfillment of Dodd-Frank § 502—aimed at protecting human rights in Africa. The rule requires publicly traded companies and foreign issuers using conflict minerals—like gold, tantalum, tin, etc.—to disclose their usage to the SEC to determine whether any of their products contain conflict minerals. *See* Fatima Alali & Sophia I-Ling Wang, *Conflict Minerals Disclosure Requirements and Corporate Social Responsibility*, CPA J. (July 2018), https://www.cpajournal.com/2018/07/18/conflict-minerals-disclosure-requirements-and-corporate-social-responsibility/ [https://perma.cc/NVK3-8ZPG] ("In the quest to improve corporate responsibility efforts and support the global trend of addressing human rights and supply chain risks, advocates of sustainability have turned their focus to the area of conflict minerals."). Public Benefit Corporation statutes are another example of stakeholder influence. *See* David A. Katz & Laura McIntosh, *The Corporate Form for Social Good*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 24, 2019), https://corpgov.law.harvard.edu/2019/05/24/the-corporate-form-for-social-good/ [https://perma.cc/55VL-ATLF] ("State legislation allowing the establishment of benefit corporations—for-profit companies with a stated public purpose—has become widespread over the past decade. This increasingly available corporate form provides a mandate, and a safe harbor, for corporate leaders to pursue societal good along with shareholder profits.").

126. Simmons, *supra* note 2, at 221; *see also* Bebchuk, *supra* note 7, at 1499–508 (recognizing the potential of federal intervention as a detriment to state law competition and international competition); Kahan & Rock, *supra* note 2, at 1578 (proposing state and federal regulation complement each other by regulating in areas where the other cannot).

127. Simmons, *supra* note 2, at 221.

128. *Id.* at 222; *see also* Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 786 (2009); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 212 (2011) ("The judicial opinions that result from frequent litigation benefit all members of the Delaware network, because such opinions provide firms with interpretive guidance on matters of Delaware corporate law.").

corporate power at the expense of society at-large.[129] The first, shareholder-centric dimension has dominated the corporate governance debate in the United States for the past fifty years, while U.S. scholars have only relatively recently accepted the latter, stakeholder dimension,[130] which reflects a populist uneasiness with concentrations of corporate power, the lack of accountability for negative externalities, and broader stakeholder concerns.[131] Proponents of federal chartering see it as a mechanism to make the exercise of corporate power more accountable.

Historically, "[l]egal debates over corporate social responsibility stretch from the 1930s to the twenty-first century."[132] The academic discussion can be traced to the Berle–Dodd debate of the 1930s,[133] but amidst contemporary social, economic, and political upheaval, scholars, policymakers, and the public are paying renewed attention to stakeholder concerns.[134] Skeptics contend that "stakeholderism" is either shareholder

129. *See* BERLE, JR. & MEANS, *supra* note 10, at 11–13, 17–18.

130. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–41 (2001) (asserting the most prominent global corporate governance paradigm is shareholder wealth maximization). *But see* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 680 (2006) (defining "stakeholder" as any group of individuals impacted by corporate actions, regardless of whether such group desires corporate profit maximization); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1274 (1999) (asserting corporate decisions often implicate non-shareholder concerns).

131. In discussing the populist uneasiness with growing corporate power, one scholar noted:

> The progressive alternative, which is derived from the stakeholder theory of the corporation, suggests that corporate managers' underlying social obligations are more extensive than maximizing shareholders' wealth within the confines of the law. Specifically, progressive scholars contend that directors . . . ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment.

Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 716 (2002); *see also* Simmons, *supra* note 22, at 333; BERLE, JR. & MEANS, *supra* note 10, at 11–13, 17–18 (examining the consequences of separation of corporate ownership and control).

132. C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78 (2002).

133. *See, e.g.*, Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (arguing that corporate managers should be legally compelled to make decisions benefiting all stakeholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (countering Berle by arguing that corporate managers only owe a duty to their shareholders to maximize stock price); Adolf A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (countering Dodd by arguing that in practice corporate managers affect more than just their stockholders and should be under legal control).

134. *See* Lucian A Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL. L. REV. 91, 91–92 (2020); Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction. A Comment on "*The Illusory Promise of Stakeholder Governance*" by Lucian Bebchuk and Roberto Tallarita* (Eur. Corp. Governance Inst. L. Working Paper, Paper

primacy under another name or a creative attempt to limit the accountability and broaden the discretion of directors.[135] They believe that the current corporate law regime offers no incentives to promote stakeholder welfare against shareholder concerns.[136] They also argue attempts to do so could hurt stakeholders by reducing the incentives for direct, external stakeholder-focused regulation.[137] Skepticism about director incentives, stakeholder claims, and corporate actions to address them raises relevant and salient points. However, such speculation is not an adequate defense of the status quo.[138]

Stakeholder proponents fall along a continuum. At one end, they contend that the concentration of corporate power and adoption of a myopic perspective upholding shareholder primacy requires an aggressive overhaul of the existing corporate law framework.[139] They view it and

---

No. 522/2020, 2020), https://ssrn.com/abstract=3617847 [https://perma.cc/Z96Z-2Z38]; *see also* Martin Lipton, *Directors Have a Duty to Look Beyond Their Shareholders*, FIN. TIMES (Sept. 18, 2019), https://www.ft.com/content/6e806580-d560-11e9-8d46-8def889b4137 (last visited Aug. 27, 2021); Jessica C. Pearlman, *COVID-19 Pandemic Highlights Need for Stakeholders to Be Considered*, A.B.A.: BUS. L. TODAY (Apr. 15, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/covid-stakeholders/ (last visited Aug. 27, 2021) ("[T]he interconnectivity of various aspects of the economy [—workers, firms, investors and governmental officials—] is more apparent now during our current global [COVID-19] health crisis. . . . This interconnectivity means we are all the stakeholders. Short-termism hurts us all. We cannot focus on short-term profits alone over the long-term health of the business or over the needs of employees, the needs of the planet, or the needs of the community to be able to get back to health.").

135. *See, e.g.*, Bebchuk & Tallarita, *supra* note 134, at 91.

136. *See generally id.*

137. *Id.* at 100 ("[W]ith corporate leaders having incentives not to benefit stakeholders at shareholders' expense, . . . delegating the guardianship of stakeholder interest to corporate leaders would not be supported, but rather impeded by the force of economic incentives. . . . [A]ccepting stakeholderism would be substantially detrimental to shareholders, stakeholders, and society.").

138. *See generally* Richard W. Painter, Board Diversity: A Response to Professor Fried (Apr. 11, 2021) (unpublished manuscript), https://ssrn.com/abstract=3824245 [https://perma.cc/Q6T3-REQ9].

139. *See* Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1772–73 (2006) (explaining the short-term approach to investment); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1283 (2002) (explaining the collapse of Enron in terms of risk-prone policy, short-term decision-making); Martin Lipton, Theodore N. Mirvis & Jay W. Lorsch, *The Proposed "Shareholder Bill of Rights Act of 2009"*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2009), https://corpgov.law.harvard.edu/2009/05/12/the-proposed-shareholder-bill-of-rights-act-of-2009/ [https://perma.cc/2YWF-PS9W] ("Short-termism is a disease that infects American business and distorts management and boardroom judgment."); Robert G. Eccles, Leo E. Strine, Jr. & Timothy Youmans, *Purpose with Meaning: A Practical Way Forward*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 16, 2020), https://corpgov.law.harvard.edu/202 0/05/16/purpose-with-meaning-a-practical-way-forward/ [https://perma.cc/P8SS-N7PC] ("If companies and institutional investors are serious about responsible, sustainable wealth creation in a manner fair to all corporate stakeholders, . . . [then it] will require a new governance form that makes a company's obligations to fulfill its purpose enforceable.").

Delaware's de facto agency status as an impediment to stakeholder governance.

At the other end, proponents contend that stakeholder governance, involving a balancing of interests, is consistent with existing corporate law frameworks, particularly the business judgment rule.[140] From this perspective, corporate law does not mandate shareholder primacy. Instead, it provides a broader continuum of options for director decision-making and considers balancing interests a vital part of the managerial role.[141] Within this framework, directors' decisions can balance stakeholder interests and receive business judgment rule protection.[142]

In essence, shareholder and stakeholder approaches reflect a tension between two visions of corporate governance: a tight focus on investor return and a panorama that encompasses all constituencies affected by the corporate entity. One can find support for either approach in existing case law.[143]

---

140. Martin Lipton, Steve Rosenblum and William Savitt summarize this argument:

> Stakeholder governance is fully consistent with well-established principles of corporate law and the existing fiduciary duty framework for directors. The directors of a corporation have a fiduciary duty to promote the success and value of the corporation, and the means and time horizon for achieving such goals are within the purview of the board's business judgment. Furthermore, the exercise of balancing competing interests and risks to pursue the best interests of the corporation is the very core of business judgment, and the decisions of unconflicted directors, acting upon careful deliberation, will be fully protected by the business judgment rule.

Martin Lipton, Steven A. Rosenblum & William Savitt, *Some Thoughts for Boards of Directors in 2020: A Mid-Year Update*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 2, 2020), https://corpgov.law.harvard.edu/2020/07/02/some-thoughts-for-boards-of-directors-in-2020-a-mid-year-update/ [https://perma.cc/5Q9W-EX7A]; *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 733 (2005); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

141. Blair & Stout, *supra* note 140, at 305 ("[A] broad interpretation of the business judgment rule that permits directors to sacrifice shareholders' interests to those of other corporate constituencies 'ties the hands' of shareholders in public corporations in a fashion that ultimately serves their interests as a class, as well as those of the other members of the corporate coalition.").

142. Jessica C. Pearlman, *Interview with Marty Lipton*, 75 BUS. LAW. 1709, 1719 (2020) ("There's no statute in Delaware that says the board of directors has a fiduciary duty to maximize value for the shareholders.").

143. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("Although such considerations [of other corporate constituencies] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, . . . directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation

D. Political Economy

1. The Contemporary Moment

The present political moment, characterized by broad calls to address a global pandemic, racial injustice, socio-economic inequality, corporate concentrations, and ESG factors will likely result in corporate reform.[144] The more challenging question is what form will it take. One can argue that corporate governance is inherently political. The vast power of corporations, vested in a bureaucracy led by a small management group, affects society in myriad ways.[145] Thousands of routine corporate decisions have significant and far-reaching public impacts but are often anonymous and largely insulated from external second-guessing.[146] The robust data set of history makes clear that corporate power should be a matter of public concern.[147] The checks on a corporation's economic

---

for the benefit of its residual claimants."). *But see* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985) (Directors can consider the "impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)"); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 112 (Del. Ch. 2011) (quoting *Paramount Commc'ns*, 571 A.2d at 1150) (outside a change of control, "a board of directors 'is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover.'"); TW Servs., Inc. v. SWT Acquisition Corp., Nos. CIV. A. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) ("[D]irectors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other 'corporate constituencies.' . . . There is a time, however, when the board's duty becomes more targeted and specific and its range of options becomes narrower.").

144. Martin Lipton, Steve Rosenblum, and William Savitt discuss the far-reaching effects of recent socio-political events:

> Indeed, the codependencies and interconnectedness between stakeholder well-being and corporate well-being have been elucidated by the systemic shock from the COVID-19 pandemic. That shock has prompted not only an economic and social reset, but also a governance reset insofar as it has underscored the logic and benefits of ESG and stakeholder governance—not only in terms of reputational capital, but also in terms of the impact on operations, corporate culture, employee morale, customer and supplier relationships and other building blocks of corporate value.

Lipton et al., *supra* note 140; Martin Wolf, *How Covid-19 Will Change the World*, FIN. TIMES (June 16, 2020), https://www.ft.com/content/9b8223bb-c5e4-4c11-944d-94ff5d33a909 [https://perma.cc/67PQ-WJER]; Colback, *supra* note 104; Kathryn Dill, *CEOs and Big Businesses Speak Out on Racism, Police Violence*, WALL ST. J. (June 2, 2020, 10:53 AM), https://www.wsj.com/articles/ceos-and-big-businesses-speak-out-on-racism-police-violence-11591050109 [https://perma.cc/EC3J-5XMF].

145. *See* Walter Frick, *The Conundrum of Corporate Power*, HARV. BUS. REV., May–June 2018, https://hbr.org/2018/05/the-conundrum-of-corporate-power [https://perma.cc/44L8-8LUD].

146. Schwartz, *supra* note 65, at 1128–29; *see also* Bayless Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U. L. REV. 38, 46 (1960).

147. Ronald Alsop, *Corporate Scandals Hit Home*, WALL ST. J. (Feb. 19, 2004, 10:39 AM), https://www.wsj.com/articles/SB107715182807433462 [https://perma.cc/FD73-PE4R] (discussing

power include, inter alia, competition, profits, political intervention, and public consensus or sentiment.[148]

Historically, proponents of federal chartering have come from both stakeholder and shareholder constituencies. Diverse stakeholder constituencies sought federal chartering to address a range of corporate problems, such as firm concentration, employee disempowerment, and corporate political activity, and to promote disclosure of economic, social, and environmental impacts.[149] Shareholder constituencies sought it as a way to enhance corporate democracy and managerial accountability through reforms, such as cumulative voting, eliminating staggered boards, and nonvoting shares.[150] Changes in the law to enhance shareholder voice over the past twenty-five years have strengthened their hand, particularly for institutional investors, and may have eliminated a strong base of support for federal chartering.[151]

Although federal chartering has been proposed for more than two centuries, other, less intrusive methods of regulation have prevailed. Why? Does this historical failure dim prospects for success in the current climate? The short answer is yes. In the continuum of regulatory measures to address corporate governance (Fig. 1), self-regulation is at one end and complete government control at the other. Within this context, federal chartering for some observers is a bridge to greater government control and command of business enterprises, making it a less feasible political option.[152]

---

the public's distrust of corporations following waves of accounting scandals starting in the early 2000s); Philip Augar, *Corporate Scandals Demand a Shake-Up in the Boardroom*, FIN. TIMES (Apr. 14, 2017), https://www.ft.com/content/570b60b2-1ece-11e7-b7d3-163f5a7f229c (last visited Aug. 27, 2021) ("In the past few years, scandal has affected many businesses in the FTSE 100, such as BP, BAE Systems, GlaxoSmithKline, HSBC, Tesco and Rolls-Royce, and elsewhere such as Toshiba, Volkswagen and Wells Fargo."); Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html [https://perma.cc/8XME-WCEL] (discussing recent three billion dollar settlement by Wells Fargo following discovery of fraudulent employee activity from 2002 to 2016).

148. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 52–59 (1954).

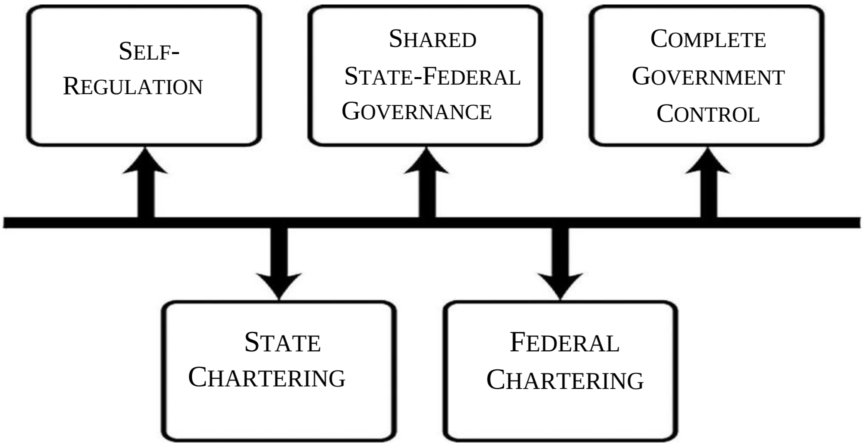
149. *Id.*

150. Schwartz, *supra* note 65, at 1127–28.

151. *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 657–58 (2010) (explaining proponents of shareholder empowerment gained significant political traction after the 2008–2009 financial crisis).

152. *See generally* Winter, Jr., *supra* note 108; *infra* note 186 (discussing failed federalization proposals).

Figure 1



2. *Supply and Demand Dynamics of Corporate Reform*

A supply-and-demand paradigm in which lawmakers supply law and regulation to corporate constituents elucidates lawmakers' incentives and how corporate constituents evaluate the efficacy of corporate reform services.[153] This analysis helps us to predict the form regulation may take. The "government as order-taker" analogy is too simplistic to account for the complex relationship between lawmakers and corporate constituents.[154] They exchange political capital, and the fact that it is less transparent than prices in other buyer/seller contexts does not undermine its importance.[155] Among corporate constituents like managers, political capital is an "intangible asset that provides corporations with long term value extending beyond an isolated policy issue [or dispute]."[156] Similarly, lawmakers are incentivized to maximize political capital by generating broad political support.[157] Arguments asserting that proposed regulation is efficient, inefficient, necessary, unnecessary, fair, or unfair

---

153. The exchange of political capital is not as fluid as the exchange of monetary currency. In the typical buyer-seller scenario, for example, the buyer, in theory, may choose other goods and services if in a position to do so. *See* Simmons, *supra* note 22, at 328–29.

154. *See id.* at 322 (quoting Sam Peltzman, *George Stigler's Contribution to the Economic Analysis of Regulation*, 101 J. POL. ECON. 818, 828 (1993)).

155. *Id.* at 329 (quoting Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1498 (2005)).

156. Fisch, *supra* note 155, at 1498 (describing a case study of FedEx to illustrate the various ways corporations buy and use political power); *see also* Simmons, *supra* note 22, at 329.

157. Simmons, *supra* note 22, at 329.

must also "show what is 'in it' for the political actors when they move" in a particular direction.[158]

On the surface, it seems rational for lawmakers to target the most lucrative consumer segment—that is, managers and institutional investors.[159] Yet the less visible credence characteristics of corporate reform allow lawmakers to satisfy many constituencies simultaneously.[160] Lawmakers have "a broader set of options to address populist outrage and market instability,"[161] which is salient because the perception of the corporation as a quasi-public institution has elevated the status of public opinion in the contemporary corporate governance discussion.

Even though the public opinion concept is imprecise, ascertaining general public sentiment is an informative exercise for boards, executives, and lawmakers alike. Public opinion functions as a crude measure of public legitimacy for corporate governance.[162] It tends to be cyclical and intense.[163] But it does not always "spring immaculately or automatically into people's minds"; it may be partially manufactured.[164] In and of themselves, citizen demands may not have a significant impact on corporate conduct, but such demands are more likely to be successful when coupled with lawmaker intervention or the threat thereof.[165]

Politics can disrupt markets, but it also has the power to mediate economic turmoil. Corporate scandals, social unrest, and severe "economic disruptions often change the distribution of political power and create opportunities for public policy entrepreneurs to rearrange things to

---

158. *See* Peltzman, *supra* note 154, at 824.

159. *Id.*

160. Simmons, *supra* note 22 at 330 ("Because credence characteristics make lawmaker motivations easier to camouflage, corporate constituents, particularly those with greater informational constraints, find it difficult to determine clear winners and losers. By the time these corporate constituents discern the impact of a particular regulation, public outrage has waned, only to reappear in the future.").

161. *See id.*; MEN-ANDRI BENZ, STRATEGIES IN MARKETS FOR EXPERIENCE AND CREDENCE GOODS 53 (2007).

162. As Adolf Berle asserts, "a modern American corporation understands well enough that it has a 'constituency' to deal with. If its constituents—notably its buyers—are unsatisfied, they will go to the political state for solution. Hardly any present-day board of directors or corporation management would take the position that it could afford to disregard public opinion—or would last very long if it did." BERLE, *supra* note 148, at 56.

163. *Id.* at 57 ("A disadvantage (not peculiar perhaps to a political as contrasted with an economic balancing force) is the fact that movements of public opinion tend to be sluggish in commencing, and extreme once they start. A situation has to be really out of hand before public pressure begins to assert itself, and when it does passions run high.").

164. MURRAY EDELMAN, THE POLITICS OF MISINFORMATION 53 (2001).

165. Mark Roe's description of "backlash" acknowledges the importance of broader public sentiment beyond the manager-shareholder constituency. *See* Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998); Simmons, *supra* note 22, at 331.

their advantage."[166] Diffuse constituencies, despite lacking organization, may nonetheless participate in the political process when they are provided with "free (and easy to digest, perhaps entertaining) information" and "political saliency, a major national issue that commands attention and motivates action in the absence of political organization."[167] The influence of social media has amplified this effect.

The present political moment is ripe for policy entrepreneurs. "For lawmakers, the pragmatic outcome to this scenario is a compromise among various interests, albeit slanted to preserve a broad coalition of support, thereby maximizing lawmaker utility."[168] Therefore, "the corporate regulatory framework . . . is laden with policies that seem economically inefficient and resemble a placebo rather than a cure." Meanwhile "[e]fficient [or fair] regulation may lack political appeal, and at times, merely symbolic or inefficient policies have more political utility."[169] To limit the backlash generated by economic shocks, scandals, and social unrest, seemingly "inefficient legal structures may arise and survive, despite the fact that they could not withstand a normal efficiency [or fairness] critique."[170] Strategic inefficiency, on balance, may be a net positive. Its political value is not diminished by the fact that the amount of political backlash averted from corporate entities or the necessary amount of political accommodation cannot be measured with any degree of precision.[171] Lawmakers' pursuit of self-interest and maximization of political utility may actually benefit shareholder and stakeholder constituencies.[172] From this perspective, reform outcomes in practice are not simply zero sum, but can include win-win and lose-lose scenarios among multiple stakeholders.

---

166. SAM PELTZMAN, THE ECONOMIC THEORY OF REGULATION AFTER A DECADE OF DEREGULATION, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 58 (William C. Brainard & George L. Perry eds., 1989).

167. *Id.* at 51–52.

168. Simmons, *supra* note 22, at 323.

169. *Id.*

170. *See* Roe, *supra* note 165, at 217 (1998) ("The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.").

171. *See id.* at 240.

172. *See id.* at 238 n.40 (expressing doubt over whether executive compensation fits this pattern because excessive CEO pay might simply be an agency cost, not a necessary feature to firm productivity).

III. FEDERAL CHARTERING PROPOSALS

A. *The Nader Group Report of 1976*

Whereas Winter and Cary dominated the academic debate regarding charter competition in the 1970s, Ralph Nader and his co-authors Mark Green and Joel Seligman brought chartering proposals into the mainstream political discussion. Their 1976 report, *Constitutionalizing the Corporation: The Case for Federal Chartering of Giant Corporations*,[173] cited a range of justifications, including: (1) costly market and nonmarket impacts;[174] (2) oligopolistic company behaviors negatively affecting consumers;[175] (3) externalities, such as environmental pollution;[176] (4) claims that Delaware had sold its law to the largest corporations in exchange for substantial franchise fees;[177] (5) insubstantial corporate statutes; and (6) the oligarchic rather than democratic features of large company governance.[178] Admittedly, proponents knew that addressing these problems would require not just federal chartering, but a robust and prescriptive chartering statute containing a variety of provisions to influence the internal governance of large corporations.[179] The Nader group proposal had four substantive sections targeting corporate governance, disclosure, corporate monopoly, and an Employee Bill of Rights.[180] It would apply to corporations with

173. Simmons, *supra* note 22, at 365; Robert M. Smith, *Nader Group Urges the Federal Chartering of Big Corporations*, N.Y. TIMES (Jan. 25, 1976), https://www.nytimes.com/1976/01/25/archives/nader-group-urges-the-federal-chartering-of-big-corporations-five.html [https://perma.cc/NR9Y-2NE6]; Ralph Nader & Mark Green, *Corporate Democracy*, N.Y. TIMES (Dec. 28, 1979), https://www.nytimes.com/1979/12/28/archives/corporate-democracy.html [https://perma.cc/FAC4-C5A6].

174. Smith, *supra* note 173 ("Because our largest corporations have such costly market and non-market impacts, large companies are 'effectively private governments huge oligopolies [that] dominate industry, restrict consumer choice' and force the 'consumption' of air pollution and poisonous substances.").

175. *Id.*

176. *Id.*

177. *Id.* ("Because the present chartering system has failed. 'Delaware, in cornering the charter market, has effectively sold its law in order to charter the largest corporations and to reap substantial franchise fees.'").

178. *Id.* ("Because the management of large companies more closely 'resembles an oligarchy than a democracy,' since in practice the major executives of the companies control the boards of directors rather than the reverse. The report quotes Prof. Bayless Manning, a noted student of corporate law, who said: 'We have nothing left but our great empty corporation statutes—towering skyscrapers internally welded together and containing nothing but wind.'").

179. *Id.*; *see* Nader & Green, *supra* note 173.

180. NADER ET AL., *supra* note 3, at 86–326. Nader and other federal chartering proponents also hoped that their federal chartering proposal would become part of the democratic party platform in an election year. *Id.*

U.S. revenues more than $250,000,000 "in any one of the previous three years, or employ[ing] more than 10,000 persons in the United States in any one of the previous three years and, in either case, . . . listed on a national securities exchange or held of record at least 2,000 American shareholders."[181]

One feature was a full-time, independent board to monitor the corporation.[182] It required nine directors, each representing a particular constituency: employee welfare, consumer protection, environmental protection and community relations, shareholder rights, compliance with law, profits and financial integrity, purchasing and marketing, management efficiency, and planning and research.[183] The proposal went beyond enhanced financial disclosures to include social impact-related disclosures.[184] The Employee Bill of Rights called for free speech, privacy, and discrimination protections,[185] and the corporate monopoly sections sought to discourage future concentrations and undo existing concentrations by means that included divestiture.[186]

Ralph Nader was skeptical of both corporations and government. He promoted the concept of public citizens, or "people who devote all or substantially all of their time to public interest activities."[187] They operate as a third way to constrain large corporations. Public citizens are often public-interest lawyers who function as private attorneys-general, pushing government to hold corporations accountable by imposing sanctions and

---

181. *Id.* at 391.

182. *Id.* at 86–214.

183. *Id.*

184. *Id.* at 215–99.

185. *See id.* at 321.

186. *Id.* at 384–89. On April 2, 1980, the Corporate Democracy Act was introduced in the U.S. House of Representatives. H.R. 7010, 96th Cong. (1980). It did not propose a federal chartering mechanism and followed a federal minimum standards approach closer to that advocated by William Cary. *See id.* Congressman Benjamin Rosenthal (D-NY) was the primary sponsor. *Id.* There were seven co-sponsors: Frank Thompson Jr. (D-NJ); Ted Weiss (D-NY); Robert Kastenmeier [D-WI]; John Conyers Jr. (D-MI); Charles Rangel (D-NY); William Clay (D-MO); Don Edwards (D-CA). *Id.* It was read and then assigned to three committees: Commerce, Judiciary, and Education & Labor, but no actions were taken in any committee. *Id.* That same year, on April 16, 1980, another corporate reform bill was introduced in the U.S. Senate: the Protection of Shareholders' Rights Act of 1980. S. 2567, 96th Cong. (1980); *see also Protection of Shareholders' Rights Act of 1980: Hearing on S. 2567 Before the S. Subcomm. on Sec. of the Comm. on Banking, Hous., & Urb. Affs.*, 96th Cong. 39–53 (1980) (statement of Ralph K. Winter, Jr., Masur, Professor of Law, Yale University) (testifying to the challenges of federal chartering). This bill did not contain a federal chartering option but did follow an approach more akin to William Cary's federal minimum standards. *See* S. 2567. Similar to the Corporate Democracy Act of 1980, the bill did not advance in committee and was never enacted. *See S.2567 - Protection of Shareholders Rights Act of 1980*, CONGRESS.GOV, https://www.congress.gov/bill/96th-congress/senate-bill/2567/actions?r=18&s=1 (last visited Sept. 23, 2021).

187. Schwartz, *supra* note 6, at 73.

prohibitions that a government agency might be reluctant to address.[188] Unlike other approaches, the public-citizen concept shows little deference to, or faith in, government actors. Instead, it recognizes that government and its regulations may actually strengthen the hand of large corporations. Nader, in essence, proposed tools for self-help and protection in the public interest.[189]

B. The Warren Plan (The Accountable Capitalism Act of 2018)

On August 15, 2018, Senator Elizabeth Warren introduced the Accountable Capitalism Act (S. 3348) (ACA),[190] which mandates federal chartering.[191] Some of its ideas originated with the Nader Group.[192] Its proposed federal chartering regime is intended to limit state law—that is, Delaware's influence—regulating the internal affairs of large, powerful corporations; all companies, public and private, with $1 billion in revenues would have to secure a federal charter.[193] To an extent, its provisions resemble the benefit-corporation statutes that proliferate in over thirty states, requiring management to consider and balance stakeholder and financial concerns.[194] In these other state jurisdictions, promoters, investors, and managers can choose benefit-corporation status among a range of entity options. However, under the ACA, a benefit corporation-like federal charter is mandatory for certain large corporations.[195] Additional provisions under the ACA would give workers a greater voice in corporate management; allow employees to elect at least 40% of corporate directors; require 75% of directors and shareholders to approve political expenditures; and prohibit directors and officers from selling company shares within five years of receiving them or within three years of a company buyback.[196] The bill was introduced, referred to committee, and no further action was taken. Coincidentally (or not), it was introduced in advance of a presidential election.

188. *Id.*

189. *Id.*

190. S. 3348, 115th Cong. (2018).

191. *Id.*; *see also* Letter from Cornell Univ. L. Sch. to Sen. Elizabeth Warren (Aug. 15, 2018).

192. *See generally* Smith, *supra* note 173.

193. Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018, 7:01 PM), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687 [https://perma.cc/UXA7-A43B].

194. *Compare* S. 3348, *with* DEL. CODE ANN. tit. 8, §§ 361–368 (2020), *and* CAL. CORP. CODE §§ 14600–14631 (2019).

195. S. 3348 § 4.

196. *Id.*; *see also* Letter from Cornell Univ. L. Sch. to Sen. Elizabeth Warren, *supra* note 191.

C. The Sanders Plan (Corporate Accountability and Democracy Plan)

Senator Bernie Sanders's "Corporate Accountability and Democracy" plan includes a federal charter mandate for U.S. corporations with over $100 million in annual revenue, at least $100 million in balance-sheet total, and all publicly traded companies.[197] This threshold is much lower than that of the Warren Plan.[198] The Sanders plan requires boards to "consider the interests of all of the stakeholders in a company—including workers, customers, shareholders, and the communities in which the corporation operates."[199] In addition to federal chartering, it seeks a range of measures to strengthen workers' power, including greater and more diverse employee representation on boards[200]; wealth-sharing with employees; promoting employee ownership of corporate enterprises; and banning stock buybacks. The plan is explicit in its attempt to shift the corporate balance of power away from managers and large shareholders toward workers and other stakeholders.[201]

IV. THE EFFICACY OF FEDERAL CHARTERING VERSUS DELAWARE'S DE FACTO AGENCY STATUS

Contemporary federal chartering proposals are strikingly similar. They rest on a perception that federalism—cooperation between the federal government and the states—has failed to create legal standards that hold managers sufficiently accountable to the corporations' constituencies.[202] They commonly address business concentration; strengthening the voice of shareholders through a range of governance mechanisms; promoting a broader stakeholder view of corporate governance, including, inter alia, mandating that managers balance the interests of corporate constituents,

---

197. Jens Dammann & Horst Eidenmüeller, *Taming the Corporate Leviathan: Codetermination and the Democratic State* 10–11 (Eur. Corp. Governance Inst., Working Paper, Paper No. 536, 2020), https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=3680769 [https://perma.cc/VTJ5-ZN4L].

198. *See id.* at 11 ("The Sanders proposal would cover all 3,437 public-traded corporations that were headquartered in the United States and included in the CRSP/Compustat Merged database for the year 2019, the most recent year for which data are available. By contrast, the Warren proposal would only extend to 1,235 entities, even though it also covers limited liability companies . . . .").

199. Sanders, *supra* note 5.

200. *See* Dammann & Eidenmüeller, *supra* note 197, at 12 ("Under Senator Warren's Accountable Capitalism Act, employees would elect 40% of all corporate directors. The Sanders proposal calls for employees to choose 45% of all corporate directors.").

201. Senator Sanders sponsored similar, though less expansive, legislation in 2019, which required employers who ordered the closing of a plant or facility to offer its employees an opportunity to purchase the closing facility through an employee stock-ownership plan or an eligible worker-owned cooperative. The bill was referred to the Committee on Banking, Housing, and Urban Affairs, but no further action was taken. *See* S. 1661, 116th Cong. (2019).

202. *See generally* Frank R. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459 (1938).

especially stakeholders; making provision for shareholders to advance the social aims of the corporation through derivative litigation; allowing private enforcement—private actions brought by non-shareholder constituencies—rather than relying on public enforcement agencies that may be "unwilling or simply too overburdened to do their job";[203] expanding employee rights and representation in governance;[204] creating more democratic governance procedures within the corporation; and providing enhanced disclosures related to stakeholder impacts.[205] These goals aim to check managerial power and increase managerial sensitivity to stakeholders' concerns.

Federal charter statutes akin to contemporary proposals like the Warren plan would unquestionably be disruptive. They would consistently apply one-size-fits-all federal standards to many large corporations. Their prescriptive approach diverges from the Delaware state law's enabling framework and from traditional spheres of state and federal influence (i.e., internal and external affairs).[206] At the extreme, they might completely undermine and displace Delaware's de facto agency status in regulating the internal affairs of large corporate enterprises. Corporate litigation might migrate from Delaware state courts, which have a well-established track record of resolving disputes between large, publicly traded companies, and move to federal district courts. Moreover, Delaware's economy and, to a lesser extent, other states' economies, would suffer a significant loss of franchise fees, especially from large, highly capitalized companies. Without them, Delaware and other states, via their legislatures, might lose incentives for long-term investment in state court systems.

A. Implementation and Logistical Challenges

Federal chartering proponents often envision a dual system: companies would incorporate in a state, but certain large companies would also be required to secure a federal charter. This approach could capture both large, private and listed companies, and federal corporate law would likely preempt state law. Recognizing implementation challenges, federal chartering proposals, such as the Nader Group Plan and the Warren Plan, suggested that Congress focus on immediate legislation addressing

203. Schwartz, *supra* note 65, at 1142.

204. Dammann & Eidenmüeller, *supra* note 197, at 12 ("Under Senator Warren's Accountable Capitalism Act, employees would elect 40% of all corporate directors.").

205. Schwartz, *supra* note 65, at 1142–43.

206. E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 43 (2009).

corporate power rather than drafting a comprehensive corporate code.

Under the Warren Plan, companies must comply or face serious penalties or sanctions, including, but not limited to, charter revocation.[207] A mandatory federal charter with the possibility of revocation is a harsh remedy with wide-ranging implications affecting customers, suppliers, and workers as well as management. Some type of pilot program involving a trial or control group of corporations may be necessary to test the plan's impact before wholesale implementation. Some companies may want the option to revert or reincorporate in another jurisdiction.

Contemporary federal chartering proposals envision a new federal apparatus to oversee chartering and enforcement. For example, the Warren Plan envisions the creation of an Office of U.S. Corporations, with the U.S. Department of Commerce and other agencies, particularly federal courts and the SEC, contributing to its enforcement.[208] Yet the enforcement details and dynamics of a stakeholder-influenced governance regime remain unclear under contemporary federal chartering proposals. Additionally, the Warren Plan's skeletal provisions leave open many questions regarding complexity, coordination, bureaucracy, and implementation. For example, would shareholders bring actions on behalf of stakeholder constituencies? Would stakeholders have the standing to bring private actions? Or both? Any law that would broaden the horizons of corporate law would require significant study and deliberation by a diverse set of represented interests. Through a special task force or acting through its committees, Congress could synthesize competing views and make recommendations.[209]

B. Politicization of the Internal Corporate Structure

Corporate influence undeniably raises political considerations for many constituencies and interests.[210] Federal chartering proposals raise difficult questions about how broadly or narrowly to conceive a corporation's constituency and accountability. A long-standing critique of stakeholder governance has been the potential politicization of the internal corporation (e.g., board composition) and resulting costs to shareholders. Compared to internally focused corporate law reforms, externally imposed stakeholder driven business regulations (e.g., environmental and labor regulation) receive less pushback and are viewed as the cost of doing

207. Accountable Capitalism Act, S. 3348, 115th Cong. § 9 (2018).

208. *Id.* § 3.

209. Schwartz, *supra* note 65, at 1159.

210. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1537–39 (2018).

business.[211]

No formula can precisely calculate how corporations factor their many, diverse stakeholder interests into firm governance. Their investor base is diverse even before stakeholder interests are added to the mix. However, the idea that focusing on diverse stakeholder interests will undermine shareholder interests is too simplistic. In some situations, yes, but on certain issues, their interests may converge. Millions of investors hold retirement accounts. They have an interest in stock returns as well as sustainable corporate practices that have long-term social, political, and economic impact on their quality of life.[212] To some observers, the market is the neutral, apolitical, measurable, and rational arbiter. Even if it is imperfect, speculative, and sometimes trendy, the singular goal of maintaining stockholder primacy seems more workable to them than accommodating wide-ranging stakeholder interests and vacillating political behavior. The lines between long term shareholder wealth maximization and broader stakeholder concerns are often blurred. Rigid attachment to a singular goal of profit maximization, no matter how imprecise, ignores the need for greater flexibility and hybridization to meet the demands of the contemporary context.

C. Adversarial Versus Cooperative

Federal chartering legislation assumes that cooperative federalism in the area of corporate governance is a failed experiment. Yet the absence of federal chartering does not preclude stakeholder influence through other mechanisms. From a political standpoint, decoupling the federal chartering option from other federal stakeholder-oriented measures may be (and has been) strategically useful for stakeholder advocates, especially given concerns about implementation and the paucity of evidence that federal chartering and federal adjudication will yield improved, if not mixed, results. Federal chartering is only one of many ways to influence corporate governance.[213] A fair assessment of the interplay between Delaware and the federal government requires acknowledging the

---

211. *See generally* Edward Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363 (2021) ("The public law aspects of corporate law . . . are primarily the domain of federal securities regulation. Investor protection, mandatory disclosure, board structure, regulation of material nonpublic information, and many other aspects of publicly traded corporations are regulated by, or under the supervision of, the U.S. Securities and Exchange Commission."); ROBERT CHARLES CLARK, CORPORATE LAW § 1.4 (1986) (distinguishing between traditional corporate law and other laws affecting corporations).

212. Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism* 20–22 (Univ. Pa. Inst. for L. & Econ., Research Paper No. 19-39, 2019).

213. *See* Birdzell, Jr., *supra* note 14, at 318.

possibility that it may yield benefits in the corporate governance arena.[214] With its enabling approach, Delaware may be able to respond to innovations with more nuance, whereas at the federal level, a one-size-fits-all approach with prescriptive rules might prevail. Even if the current federal-state regulatory framework is insufficient, it can be amended to better address concerns of multiple stakeholders.

D. Additional Concerns

Finally, the socio-political context in which modern federal chartering reform proposals operate is important for determining their efficacy. An interesting and related question is whether the argument for federal chartering is supported by today's legal, political, and business environment.

1. Proliferation of Social Enterprise Statutes

The present availability of social enterprise statutes in most U.S. jurisdictions may either undercut or support arguments in favor of mandatory federal chartering. States have created social enterprises, such as public benefit corporations in Delaware, to better address stakeholder concerns.[215] Some states have adopted a benefit corporation statute that resembles the model statute created by B Lab, a nonprofit corporation that has been instrumental in promoting benefit-corporation statutes nationwide and provides B-Corp certifications.[216] Other states like Delaware and Colorado have adopted benefit-corporation statutes that call for the consideration of stakeholder issues but still preserve a more shareholder-centric enabling framework.[217]

---

214. *Compare* Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 295–96 (2009) ("There are . . . potential gains from federal [corporate] law . . . including the likely higher level of expertise that would arise from a pooling of resources."), *with* Lawrence A. Cunningham, *The New Federal Corporate Law?*, 77 GEO. WASH. L. REV. 685, 692 (2009) ("If the portion of corporation law addressing primarily managers and shareholders were produced in Washington, [then constituencies lobbying for imposing laws on corporations through antitrust, bankruptcy, labor, tax, and environmental law] would come into direct play and into more direct political conflict.").

215. *See, e.g.*, Simmons, *supra* note 17, at 354–55.

216. A benefit corporation is an actual type of chartered entity, meanwhile a B-Corp is a certification issued by B-Lab to an existing entity. *About B Lab*, B LAB, https://bcorporation.net/about-b-lab [https://perma.cc/T74R-QFD9]; *see also* Simmons, *supra* note 17.

217. Simmons, *supra* note 17; *see also* Robert G. Eccles, Leo E. Strine & Timothy Youmans, *3 Ways to Put Your Corporate Purpose into Action*, HARV. BUS. REV. (May 13, 2020), https://hbr.org/2020/05/3-ways-to-put-your-corporate-purpose-into-action [https://perma.cc/97ZC-

Against this backdrop of state experimentation, a mandatory federal chartering regime seems superfluous, especially when Delaware and other jurisdictions already offer a menu of options to socially-minded enterprises. States implemented these stakeholder-oriented statutes in response to investor appetites and perhaps in fear of federal preemption or more intrusive regulation. Their proliferation can be characterized as a form of democratic experimentalism, where states serve as laboratories to identify better practices and determine a scalable model for multijurisdictional or national implementation.[218] As yet, states' experiences with social enterprises, particularly benefit corporations, remain nascent.[219] Arguably, more time and data are needed to observe their operation and the litigation surrounding them. In theory, the study of state experiences with benefit corporations might strengthen the case for future federal chartering proposals.

2. *Rise of Impact Investing and ESG Factors*

The rise of impact investing with an environmental, social, and governance (ESG) emphasis leverages nonregulatory means—for example, shareholder voice—to influence corporate practices and

---

5PHA] ("If the Business Roundtable supports conversion of their public companies to this model, their mere 'trust us, we care' words will become those of accountable leaders who embrace an enforceable obligation to others. But corporate leaders cannot succeed unless institutional investors, such as BlackRock, Fidelity, State Street, and Vanguard, and organizations like the Council of Institutional Investors also walk their talk on corporate purpose and on the value of stakeholders. These and other large investors have demonstrated that their voting clout can move the market. If they support public companies in converting to benefit corporation status, our corporate governance system can change for the better—fast.").

218. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Michael C. Dorf & Charles F. Sabel expound this idea in creating a new form of governance called "democratic experimentalism" where "power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems." Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998); *see also* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 14 (1997) (discussing the use of "collaborative governance" where failure and experimentalism is embraced).

219. While no Fortune 500 companies have yet reincorporated under Public Benefit Corporation (PBC) statutes, younger companies have adopted a benefit governance system. *See* Frederick Alexander, *Real Change in Real Time: Benefit Corporations See New Interest*, B THE CHANGE: S'HOLDER COMMONS (July 14, 2020), https://bthechange.com/real-change-in-real-time-benefit-corporations-see-new-interest-82918ba14048 [https://perma.cc/8ZZ4-9NDQ] ("[T]he shareholders of publicly traded Amalgamated Bank recently approved benefit governance at their annual meeting. Lemonade, an innovative insurance broker backed by SoftBank, Sequoia and other venture capital funds, completed the most successful IPO of 2020, rising 139% on its first day of trading (after pricing above the underwriters' range).").

policies. Institutional investors held only 6% of the U.S. equity market in 1950 and 37% by 1980.[220] Today, they hold an estimated 80%.[221] Observers contend that the movement for ESG investing originates from the UN Principles for Responsible Investment issued in 2004 under the leadership of Secretary Kofi Annan. Approximately two-thousand money managers signed on to the principles, including BlackRock, the Vanguard Group, UBS Group, State Street Global Advisors, and Fidelity.[222] The appetite and preference for impact investing continue to grow. It is especially popular among two large demographic groups: millennials (86%) and women (84%).[223] Millennials represent a potential $12-$30 trillion in future wealth assets.[224] To put that number into perspective, the S&P 500 today accounts for $20 trillion.[225]

Impact investing reflects some convergence between shareholder and stakeholder interests but falls short of perfect alignment given the need to balance financial return with social impact and inevitable intertemporal

---

220. *See* JANICE M. TRAFLET, A NATION OF SMALL SHAREHOLDERS: MARKETING WALL STREET AFTER WORLD WAR II 174, tbl.E.3 (2013) (chronicling the New York Stock Exchange's efforts to broaden the country's shareholder base during the Cold War); Brian Reid, *The 1990s: A Decade of Expansion and Change in the U.S. Mutual Fund Industry*, INV. CO. INST. PERSP., July 2000, at 1, 15 (explaining institutional investor equity ownership).

221. *See* Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INVS. (Apr. 25, 2017, 1:00 AM), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions [https://perma.cc/V53V-8LXD] (analyzing institutional ownership of companies).

222. These are the five largest investment management companies worldwide, together managing over $22 trillion dollars. Tim Lemke, *The 10 Largest Investment Management Companies Worldwide*, THE BALANCE (Aug. 6, 2021), https://www.thebalance.com/which-firms-have-the-most-assets-under-management-4173923 [https://perma.cc/6EE8-3KB7]; *Signatory Directory*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/signatories/signatory-resources/signatory-directory [https://perma.cc/4BH9-MWR8].

223. MORGAN STANLEY INST. FOR SUSTAINABLE INVESTING, SUSTAINABILITY SIGNALS 4, 8 (2017), https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-signals/pdf/Sustainable_Signals_Whitepaper.pdf [https://perma.cc/4SCZ-DDXB].

224. *See* Pippa Stevens, *Your Complete Guide to Investing with a Conscience, a $30 Trillion Market Just Getting Started*, CNBC (Dec. 16, 2019, 9:54 AM), https://www.cnbc.com/2019/12/14/your-complete-guide-to-socially-responsible-investing.html [https://perma.cc/MR37-97EZ] ("More than 2,250 money managers who collectively oversee $80 trillion in assets have now signed on to the United Nations-backed Principles for Responsible Investment."); *see also* Steve Chiavarone, *This Is How Millennials Are Shaping the New Economy*, CNBC (Sept. 2, 2019, 4:13 PM), https://www.cnbc.com/2019/09/02/this-is-how-millennials-are-shaping-the-new-economy.html [https://perma.cc/H69P-7U8G?type=image] ("According to Morgan Stanley, 84% of millennials cite investing with a focus on ESG (Environmental, Social and Governance) impact as a central goal."); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

225. Yashaswini Swamynathan, *The S&P 500 Is Worth $20 Trillion for the First Time*, BUS. INSIDER (Feb. 13, 2017, 6:42 PM), https://www.businessinsider.com/sp-500-market-cap-crosses-20-trillion-for-the-first-time-2017-2 [https://perma.cc/P6LF-NRJW?type=image].

choices and trade-offs.[226] Compared to federal chartering, it remains a less intrusive, stakeholder-influenced mechanism that falls within the market paradigm.

Decisions pertaining to ESG do not differ much from other decisions subject to the business judgment rule, provided some impact on, or link to, long-term value can be identified.[227] Such decisions "might include how corporations respond to climate change, how good they are with water management, implementing effective health and safety policies to protect against accidents, managing supply chains, [and] how they treat their workers."[228]

Some skepticism attaches to ESG efforts. A common critique is that they may reduce shareholder profits and limit director accountability.[229] Evidence of long-term value-performance gains would bolster and insulate most ESG-related decisions from challenge. In any case, some ESG proponents question whether money alone should be the driving force and want to shift from a financially motivated system of shareholder

---

226. *See* Robert J. Rhee, *Corporate Short-Termism and Intertemporal Choice*, 96 WASH. U. L. REV. 495, 507 (2018) ("Short-termism is sometimes characterized in broad brush strokes as the bane of corporate governance, creating a misleading impression that elevates long-term strategies as aspirational and short-term choices as suboptimal. Such characterization is too simplistic and misleading . . . . Managers routinely make intertemporal cost-benefit choices."); *see also* TIM KOLLER, MARC GOEDHART & DAVID WESSELS, VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 13 (6th ed. 2015) (noting the tradeoffs managers make between short-term profit and long-term value). While the interest of shareholders and stakeholders do not align perfectly, there has been some recent evidence suggesting the adoption of ESG standards has largely been driven by shareholders and proxy advisory firms. Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 IOWA J. CORP. L. 647, 679-81 (2016); Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May–June 2019, at 106, https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/5NBF-49M4].

227. CLARK, *supra* note 26, § 3.4 ("[T]he business judgment of the directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment—even for judgments that appear to have been clear mistakes—unless certain exceptions apply."); *see also* FRANKLIN A. GEVURTZ, CORPORATION LAW 290 (3d ed. 2000) ("The idea underlying the rule is that courts should exercise restraint in holding directors liable for . . . business decisions which produce poor results or with which reasonable minds might disagree. This seems to be a sensible notion. After all, business decisions typically involve taking calculated risks.").

228. Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259, 1291 (2019) (quoting Georg Kell, *The Remarkable Rise of ESG* (July 11, 2018, 10:09 AM), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=62ae7cab1695 [https://perma.cc/WJW3-4TZC]).

229. Gillian Tett, *Why ESG Investing Makes Fund Managers More Money*, FIN. TIMES (July 8, 2020), https://www.ft.com/content/1cfb5e02-7ce1-4020-9c7c-624a3dd6ead9 [https://perma.cc/4NLV-HHAM]; *see also* Feifei Li & Katrina Sherrerd, *Unlocking the Performance Potential in ESG Investing*, RSCH. AFFILIATES (Mar. 2018) https://www.researchaffiliates.com/en_us/publications/articles/659-unlocking-the-performance-potential-in-esg-investing.html [https://perma.cc/6P5G-QX4C] (explaining that empirical studies are inconclusive as to whether ESG actually impacts short-term value, but preliminary long-run evidence indicates value gain).

primacy to a broader, social-good, stakeholder-based system.

Critics also contend that the present narrative "greenwashes" or exaggerates commitment to environmental and social issues. They note the discrepancy between stated goals and their achievement and the lack of standard criteria to measure ESG effectiveness.[230] New measurement and data collection tools are emerging.[231] However, a looming question remains concerning the extent to which institutional investors will enforce company specific ESG goals.

3. Evolving Expectations for Corporate Managers

Today's directors are more professional, skilled, and effective than their predecessors, but their progress does not undermine arguments for federal chartering. From *Allis-Chalmers*[232] to *Caremark*[233] and to the present, expectations for how directors should carry out their oversight duties and general workload are evolving.[234] These changes reflect the

---

230. Stefanie Perrella, Julianne Recine & John Ward, *ESG and Private Funds*, BLOOMBERG L. 2 (2020), https://www.duffandphelps.com/-/media/assets/pdfs/news/esg-private-funds.pdf?la=en&hash=143DF4900047286846C0CD0B2E2A2A9BB54F5D8A [https://perma.cc/P7YH-GDYT].

231. *See, e.g.*, Lorie Konish, *Morgan Stanley Launches New Tool to Let Advisors, Investors Measure Sustainable Investing Goals*, CNBC (July 29, 2019, 10:30 AM), https://www.cnbc.com/2019/07/29/morgan-stanley-offers-new-tool-to-let-advisors-measure-esg-goals.html#:~:text=Morgan%20Stanley%20is%20offering%20a,Quotient%2C%20was%20announced%20on%20Monday [https://perma.cc/GE8C-2GHR]; *Measuring the Immeasurable: Scoring ESG Factors*, GOLDMAN SACHS, https://www.gsam.com/content/gsam/global/en/market-insights/gsam-insights/gsam-perspectives/2015/esg/qis-article.html [https://perma.cc/XD4J-X6QJ].

232. Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963).

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

234. *Compare Allis-Chalmers*, 188 A.2d at 130 ("On the contrary, it appears that directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong. If such occurs and goes unheeded, then liability of the directors might well follow, but absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."), *with In re* Caremark, 698 A.2d at 970 ("[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system . . . exists, and that failure to do so . . . may . . . render a director liable for losses incurred by non-compliance with applicable legal standards."), *and* Marchand v. Barnhill, 212 A.3d 805, 821 (Del. 2019) ("As with any other disinterested business judgment, directors have great discretion to design context- and industry-specific approaches, . . . [but] *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—*i.e.*, try—to put in place a reasonable board-level system of monitoring and reporting."). *See* E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441, 444, 446 (2003) ("[M]y personal view is that the expectations of directors . . . progressed in the thirty-plus years from *Allis-Chalmers to Caremark*."); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance From 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1436 (2005) (describing changes to standards of director conduct under state law as "evolving expectations."); *see also* E. Norman Veasey, *Counseling Directors in the New Corporate Culture*, 59 BUS. LAW. 1447, 1451 (2004).

interplay of federal and state law and illustrate how the federal government's regulation in a particular area can lead to or influence the development of law in Delaware. The *Caremark* decision, recognizing a duty to implement a system of controls, was made in the broader context of federal sentencing guidelines and increased federal guidance on accounting and other corporate control systems.[235]

Directors are expected to play a prominent role in decision-making and monitoring. They must dedicate more time; participate in audit, compliance, nominating, and compensation committees; follow more procedures; and reflect greater expertise and competencies than ever before.[236] The number of corporate disclosures and the passage of the Sarbanes-Oxley and Dodd-Frank Acts reflect increased federal encroachment and greater willingness to regulate the internal affairs of U.S. corporations.

These changes inform contemporary boardroom dynamics. Under an array of reforms and the influence of activist institutional investors,[237] directors use formal and informal mechanisms to ascertain the sentiments of their investor base and to avoid conflict where possible (e.g., director no-votes and litigation).[238]

4. *Risk of Capital Migration*

Federal chartering raises the risk that companies and capital will migrate to foreign jurisdictions. Delaware law and adjudication form an important part of the U.S. corporate governance system to which firms subscribe. The Delaware brand is world-renowned and from a global standpoint, enhances rather than diminishes the national reputation. It encourages, rather than discourages, foreign investment. From an investor and management standpoint, Delaware's predictability, political stability, and certainty are cherished virtues for business planning. To the extent that investment decisions are influenced by the legal environment, Delaware, as de facto regulator and forum for dispute settlement, is part of the U.S. legal environment.[239] Within this context, Delaware seems more of an asset than a liability.

---

235. Veasey & Guglielmo, *supra* note 234, at 1436–37.

236. *See* Jay W. Lorsch, *Understanding Boards of Directors: A Systems Perspective*, *in* 2 ANNALS CORPORATE GOVERNANCE 1 (Douglas Cumming & Geoffrey Wood eds., 2017).

237. Lin, *supra* note 210, at 1597–98.

238. Lisa M. Fairfax, *Government Governance and the Need to Reconcile Government Regulation with Board Fiduciary Duties*, 95 MINN. L. REV. 1692, 1710–11 (2011).

239. *See* Simmons, *supra* note 2, at 223–24; Strine, *supra* note 2, at 683–84; Savitt, *supra* note 2, at 586.

5. *Political Considerations*

William Cary's critique of Delaware's role as de facto regulator stemmed, in part, from the concern that the state's General Assembly and judiciary were captured and lacked the independence to render objective decisions in the national interest.[240] Ironically, this perspective does not adequately address similar interest group and capture concerns that resonate at the federal level. It also fails to acknowledge the strong incentives for Delaware actors to be perceived as apolitical and how the mere threat of federal encroachment may serve as a check.[241] The recent U.S. Supreme Court case, *Carney v. Adams*, draws attention to the political balancing that characterizes Delaware's courts and the importance of being perceived as apolitical in its de facto regulator function.

E. *Special Circumstances that May Warrant Federal Chartering*

Despite asserting that federal chartering is not merited at this particular historical moment, this Article does not hold that it should always remain impermissible. In certain circumstances, more intrusive structural mechanisms like federal chartering may be warranted.

1. *Successful Experimentation with Social Enterprise Statutes*

Democratic experimentalism, a facet of new governance theory, may eventually support federal chartering.[242] Under the classic state-laboratory argument, if benefit corporations were to grow in popularity and success, the states' benefit-corporation chartering regimes might serve as a model for a federal approach to chartering. Such an effort would be contingent upon corporate constituency preferences and political support that is unlikely in the current environment. Additionally, extensive litigation and longer-term data on benefit corporations are lacking. However, initial

---

240. See Cary, *supra* note 7, at 679–80.

241. Adams v. Carney, No. CV 17-181-MPT, 2018 WL 2411219, at *2 (D. Del. May 23, 2018), a*ff'd in part, rev'd in part sub nom.* Adams v. Governor of Del., 922 F.3d 166 (3d. Cir. 2019), *cert. granted sub nom.* Carney v. Adams, __ U.S.__, 140 S. Ct. 602 (2019) (No. 19-309), *vacated and remanded*, Carney v. Adams, 592 U.S. __, 141 S. Ct. 493 (2020) (arguing that Delaware's political balancing requirement should be maintained); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (finding a duty to implement a system of controls within companies following passage of federal sentencing guidelines).

242. Charles F. Sabel & William H. Simon, *Democratic Experimentalism* (Searching for Contemp. Legal Thought, Working Paper No. 14-549, 2017).

research indicates that such companies attract significant investment.[243]

The growth of benefit corporations will depend upon impact investment and whether impact investors migrate to them or opt for traditional corporate forms. To the extent that the existing corporate governance regime, composed of large, publicly traded corporations adopts ESG standards that incorporate stakeholder concerns, investors may not feel the need to seek out alternatives. Less support for state benefit corporation chartering translates as less support for federal chartering. From another vantagepoint, the proliferation of state benefit-corporation statutes may obviate the need for a federal chartering system. Under the present system, companies can voluntarily opt-in to benefit-corporation status, but it is not mandatory. Choice matters and the coexistence of benefit-corporation status among other entity types may better capture the preferences of promoters, managers, and investors.

2. Significant Government Support or Bailouts

Another instance where federal chartering might be mandated is when a large company receives a major benefit from the federal government, such as bailout funds—a loan, majority investment, or insurance.[244] Typically, a lender, investor, or insurer will want some type of return or premium in exchange, and the recipient company may lose some degree of control, be required to provide some type of assurance, or pay a premium.

Generally, bailouts "are socially desirable because Congress cannot anticipate the contingencies that would make possible an ex ante insurance system that regulates behavior and charges firms in advance for liquidity support."[245] However, they are "intensely controversial."[246] The primary policy goal underlying bailouts is stopping systemic risk, but we have no consensus definition of what amounts to a systemic risk.[247] Other implicated policies include fairness and limiting moral hazard and administrative cost. First, some observers contend that promoting fairness

243. Michael B. Dorff, James Hicks & Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations* 49 (Eur. Corp. Governance Inst., Working Paper No. 495/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433772 [https://perma.cc/5H8J-LX6J].

244. *See* Eccles et al., *supra* note 217 (suggesting companies be compelled to adopt PBC status in exchange for a federal bailout).

245. Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479, 482 (2015).

246. *Id.* at 496.

247. Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 446 (2011) ("Exactly what level of impact is unacceptable is a variable matter; one observer might judge a risk to be systemic, another not.").

is not a mere moral gesture but "lends legitimacy to the government action" and "constrain[s] government abuse and cronyism."[248] Political legitimacy plays an important role in the public's acceptance of bailout measures,[249] so their structure must be "clear and maximize political accountability."[250] Fairness requires "bailouts for ordinary individuals rather than corporations or those with political connections whenever possible."[251] Second, many scholars call for bailouts that limit the risk of moral hazard.[252] The reason "bailouts can create moral hazard [is] because firms that expect to be bailed out will be incentivized to engage in overly risky behavior because the downside risk is socialized, while the upside is retained."[253] Third, bailouts must factor in administrative cost. According to one observer, the government must "choose the most straightforward way to inject bailout funds into the system."[254] Doing so may cut against the fairness rationale because "as the number of bailout recipients increases, the government must [likely] spend more money on administrative costs."[255]

Consequently, bailouts may involve circumstances where more intrusive structural corporate governance restrictions and guidelines in the form of mandatory federal chartering are warranted. Consider the bailouts under the Troubled Asset Relief Program (TARP) during the Great

---

248. Anthony J. Casey, *Large Corporations Did Not Need a Bailout*, CLS BLUE SKY BLOG (April 14, 2020), https://clsbluesky.law.columbia.edu/2020/04/14/large-corporations-did-not-need-a-bailout/ [https://perma.cc/9YAG-Q27T].

249. Levitin, *supra* note 247, at 447 ("Political legitimacy is critical for ensuring that government responses to financial crisis are effective. Serious crises often require repeated government actions, and the perceived legitimacy of one governmental action affects the government's range of actions in the future."); *see also* Wake Forest Law Events, *Sager Speaker Series with Kenneth Feinberg 9/28/2017*, YOUTUBE (Jan. 3, 2018), https://www.youtube.com/watch?v=1pnZ8OlMx9Y [https://perma.cc/AXC4-DUTZ] (discussing the Troubled Asset Relief Program and the controversy surrounding bailing out banking institutions).

250. Levitin, *supra* note 247, at 491.

251. Casey, *supra* note 248.

252. *See* Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L.J. 951, 959 (1992) ("A thoughtful bailout policy must take this moral hazard problem into account."); Levitin, *supra* note 247, at 440 ("[H]aircuts on creditors are essential for limiting government losses, reducing moral hazard. . . ."); Jeffrey Manns, *Building Better Bailouts: The Case for a Long-Term Investment Approach*, 63 FLA. L. REV. 1349, 1366 (2011) ("Bailouts must be linked with investment returns and conditions, both to cover the government's assumption of risk and to mitigate moral hazard."). *But see* Casey & Posner, *supra* note 245, at 526 ("[T]he moral hazard problem is partly self-correcting and largely exaggerated."); Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. 761, 774 (2017) ("[M]oral hazard does not cause systemically important firms to engage in excessively risky behavior.").

253. Levitin, *supra* note 247, at 481–82.

254. Casey, *supra* note 251.

255. Casey & Posner, *supra* note 245, at 532.

Recession.[256] Under TARP, bailout relief came with executive compensation and corporate governance restrictions.[257] Taxpayers ultimately received a return on their investment, yet the program was criticized because "while achieving a measure of short-term stability," it "failed to address certain underlying issues that may wreak havoc on the financial sector and the broader economy in the not-too-distant future," such as moral hazard and the perception of unfairness.[258] Scholars have argued for placing corporate governance-related restrictions on companies receiving bailouts up front.[259] A potential condition for a large corporation to receive bailout assistance could include federal chartering among other structural reforms.

A hypothetical candidate for federal chartering might be an airline or other large transportation companies that provide a public service and receive a major government bailout, subsidy, or contract. In exchange for government support, the company would have to secure a federal charter for a particular period of time or until certain conditions attached to

---

256. *See* CONG. OVERSIGHT PANEL, 111ST CONG., DECEMBER OVERSIGHT REPORT: TAKING STOCK: WHAT HAS THE TROUBLED ASSET RELIEF PROGRAM ACHIEVED? 81 (2009); Pepper Culpepper, *America's Bank Bailouts Worked*, WASH. POST (Nov. 17, 2014, 11:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/17/americas-bank-bailouts-worked/ [https://perma.cc/J5NV-TGLE] ("The United States actually got the big details of the bailout right – and for this reason, American taxpayers made money on the deal: about $8-10 billion, excluding the non-bank parts of the bailout.").

257. 12 U.S.C. § 5221(b)(2) ("The Secretary shall require each TARP recipient to meet appropriate standards for executive compensation and corporate governance."); Kenneth R. Davis, *Taking Stock–Salary and Options Too: The Looting of Corporate America*, 69 MD. L. REV. 419, 484–85 (2010) (describing how the Department of Treasury utilized a Special Master, Kenneth Feinberg, to oversee all TARP participants executive compensation).

258. CONG. OVERSIGHT PANEL, *supra* note 256, at 82. The COP report explains that, although TARP boosted the economy, it produced negative consequences: "[a]nother [negative] consequence, however, was to signal to the market that, going forward, the government may step in to provide bailouts to certain systemically significant institutions—such as financial institutions and auto manufacturers—should they face the risk of failure. As a result, the market has been distorted in a way that could, absent responses outside of the TARP, plague the financial sector and the broader economy for the foreseeable future." *Id.* at 85; *see also* Wake Forest Law Events, *supra* note 249.

259. Manns, *supra* note 252, at 1391; *see also* Levitin, *supra* note 247, at 512 (asserting government bailouts should come with "control over corporate governance" which "could guarantee better governance without actual government involvement"); Saule T. Omarova, *Why We Need a National Investment Authority* 3–4 (Cornell Legal Stud., Research Paper No. 20-34, 2020), https://ssrn.com/abstract=3566462 [https://perma.cc/9LDS-TDR4] (asserting the need for a National Investment Authority which would condition emergency relief, such as a bailout, on specific changes to the internal operations of a company and have the ability to enforce such conditions with a "golden share"); Scott W. Singer, *Asserting Government Control over Subcontractors*, 1994 ARMY L. 11, 12 (1994) (explaining that the Federal Acquisition Regulations contain mandatory flow-down provisions for all government contracts that allow the government to assert some degree of control over both the party they directly contract with, the prime contractor, and the subcontractors the prime contractor chooses to subcontract with.); *id.* at 12–14 (explaining flow down provisions address a range of issues from security to socio-economic issues).

government support were met.

3. *Amnesty for Corporate Entities*

Another instance when a company might be required to reincorporate under a federal charter would be as a condition pursuant to a government settlement agreement to prevent the imposition of stiffer civil and criminal penalties. By analogy, companies and other entities enter into prosecutorial agreements, consent decrees, and other settlement agreements with government authorities where they agree to undertake certain measures.[260] Federal chartering could be such a measure. Additionally, companies might sua sponte, in the absence of an active investigation or settlement, secure a federal corporate charter to prevent, ex ante, more severe penalties in the event of a violation. For example, a company's compliance program can serve as a mitigating factor under the U.S. Sentencing Guidelines for Corporations.[261] Here, amnesty might provide a potential incentive to secure a federal charter.

V. ALTERNATIVES TO FEDERAL CHARTERING

As mentioned, federal chartering stands at one end of a continuum of methods to regulate corporations. It requires more than simply tampering with the regulatory process, and the case for it is weakened by the availability of less radical measures, including: (A) a federal licensing regime; (B) a federal corporate code that almost completely displaces state corporate law; (C) incremental corporate legislation, such as Sarbanes-Oxley (SOX) and Dodd-Frank; (D) direct stakeholder regulation of business enterprises; (E) state benefit-corporation statutes; (F) market forces (e.g., labor, capital, investor activism, and reputational shaming); and (G) self-regulation.

A. *Federal Licensing*

Historically, there was a more robust debate pitting federal chartering against federal licensing approaches to regulating large corporations.[262] A licensing regime retains state corporation law, but corporations must seek

---

260. *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.*, 112th Cong. 8 (2012) (statement of Robert Khuzami, Director, Division of Enforcement U.S. Securities and Exchange Commission).

261. Paula Desio, An Overview of the Organizational Guidelines, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf [https://perma.cc/F73M-QU7Z].

262. Schwartz, *supra* note 6, at 84–85; Horace LaFayette Wilgus, *Federal License or National Incorporation*, 3 MICH. L. REV. 264, 265–67 (1905).

a federal license, ostensibly fulfilling established criteria, to engage in interstate commerce.[263] Federal chartering preempts state corporate law and perhaps the need for state incorporation with federal incorporation.[264] The scope of both licensing and chartering regimes could turn on the size of the corporation, as reflected by a range of indicators, such as revenues or number of employees. Licensing, like chartering, can be voluntary or mandatory, but to achieve far-reaching impact, either would have to be mandatory.

B. Federal Corporate Code

A comprehensive federal code for corporate law would displace state law that has traditionally addressed the internal affairs of corporations. In theory, it could operate in the absence of, or in conjunction with, a federal chartering regime. For example, vocal Delaware critic William Cary recommended a federal corporate code but not federal chartering.[265] Presently, we have no federal corporate code, but we do have "important federal statutes (that is, the Securities Act of 1933 and the Securities Exchange Act of 1934) addressing disclosure, insider trading, and periodic reporting" without generally emphasizing internal affairs.[266] A federal code would ostensibly reflect a broader stakeholder view of corporate governance because "[c]ompared to Delaware, federal government lawmaking is more pluralistic and involves more interest groups reflecting populist concerns."[267]

---

263. Schwartz, *supra* note 6, at 84–85.

264. It is conceivable for a company under a federal corporate chartering regime to simultaneously hold a state and federal charter.

265. Cary, *supra* note 7, at 701–03.

266. Simmons, *supra* note 22, at 328; *see also* Roe, *supra* note 24, at 2498; Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020) (upholding federal forum selection clauses in several Delaware companies' charters regarding claims under the Securities Act of 1933 even after acknowledging these claims are not matters of "internal affairs" but still are "internal" to the corporation).

267. Simmons, *supra* note 22, at 327; *see also* Roe, *supra* note 24, at 2518–19. Mark Roe describes the broader interests implicated at the federal level:

> More goes on in Washington than wider coalition possibilities. Public-regarding policymakers in Washington see themselves as custodians for the overall health of the American economy; accordingly, they could conclude that tight managerial accountability—beyond that which even interests institutional investors—would be best for the economy. The Council of Economic Advisors influences the President, the GAO writes reports, and the SEC often proposes rules that managers and institutional investors dislike. Of course, we shouldn't naïvely think that interests don't influence these players too, but the interests differ from Delaware's, and sometimes the public-policy players have enough slack to be able to act on their ideological preferences.

Id. at 2503.

C. Incremental Corporate Legislation

Over the past two decades, Congress and the SEC have demonstrated a willingness to influence the internal affairs of corporations more directly but not by developing a comprehensive federal corporate code that would completely displace Delaware law. In recent history, partial or incremental reforms have been used to displace or to fill gaps in Delaware law rather than more intrusive measures like federal corporate chartering or implementing a comprehensive federal corporate code. For example, SOX federalizes rules for the composition of a corporation's audit committee, the separation of accounting and auditing services, forfeiture of executive pay, and prohibitions on loans to corporate executives.[268] These rules impact corporate internal affairs. Although the possibility of mandatory federal chartering or a comprehensive federal corporate code remains slim, incremental federal encroachment is a real threat to Delaware's influence.[269]

D. External Federal Stakeholder Regulation

External stakeholder regulation is a common method of regulating corporate enterprises. The federal government is reluctant to directly regulate the internal affairs of the corporation; that is, to alter existing power relationships among managers and shareholders. Instead, it prefers to use more external and less internally intrusive forms of regulation, such as disclosure, to prevent political backlash from powerful corporate constituencies.[270] Beyond traditional corporate law, a panoply of other regulations affect corporations (e.g., OSHA,[271] ERISA,[272] the Clean Air Act,[273] antitrust laws).[274] This broader set of external regulations may

---

268. Simmons, *supra* note 22, at 328. *See generally* 15 U.S.C. §§ 7261–66 (2006).

269. Examples of incremental encroachment include the Sarbanes-Oxley Act and the Dodd Frank Act. *See* Jonathan R. Macey, *The Politicization of American Corporate Governance*, 1 VA. L. & BUS. REV. 10, 44–48 (2006); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1527 (2005); *see also* Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817, 1821 (2007); Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 733 (2013).

270. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 284–85, 290 (1990).

271. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78.

272. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000).

273. 42 U.S.C. §§ 7401–7671q.

274. *See* CLARK, *supra* note 26, at § 1.4 (distinguishing between traditional corporate law and other laws affecting corporations).

address stakeholder concerns to a greater degree than state corporate law and even federal securities statutes. The staunchest shareholder-primacy proponents acknowledge stakeholder concerns, yet they prefer redress through external regulations, not core corporate law.[275] For example, federal chartering proponents have historically targeted corporate concentrations.[276] They might wish to consider whether addressing corporate concentrations is better served within the context of specific regulatory laws; antitrust laws could directly address the anti-concentration efforts. Decoupling or severing antitrust considerations from federal chartering proposals might also increase the likelihood of federal chartering's adoption.

E. State Social Enterprise Statutes

In essence, recent proposals for federal chartering impose a mandatory benefit-corporation structure on large corporations that require directors to balance stakeholder interests.[277] More than thirty-two states have already implemented benefit-corporation statutes.[278] Recent research suggests that private investment in nascent Delaware public benefit corporations is significant.[279] More experience and time is needed to discern whether these entities will attract enough capital to affect the governance practices of major corporations.[280] Adopting a de facto federal benefit-corporation statute seems premature in the absence of more robust empirical data concerning litigation, investment, and incorporation.[281]

F. Market Constraints

In theory, market constraints could make corporate managers accountable to shareholder and stakeholder constituencies in the absence of federal chartering. Elite labor markets play a role.[282] Executives worried about their reputation and prospects with present or future

275. Bebchuk & Tallarita, *supra* note 134, at 94–96.

276. *See supra* sections II.A–.C.

277. *See* Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Smith, *supra* note 173; Nader & Green, *supra* note 173; Sanders, *supra* note 5.

278. *Why Pass Benefit Corporation Legislation*, BENEFIT CORP., https://benefitcorp.net/ policymakers/why-pass-benefit-corporation-legislation [https://perma.cc/HS4K-5HRQ]; *see also* Dana Brakman Reiser, *Benefit Corporations—a Sustainable Form of Organization?*, 46 WAKE FOREST L. REV 591, 592 (2011) (describing growth in benefit corporation statutes).

279. J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 581 (2016).

280. *Id.* at 586.

281. *Id.*

282. Omari Scott Simmons, *Forgotten Gatekeepers: Executive Search Firms and Corporate Governance*, 54 WAKE FOREST L. REV. 807, 821–22 (2019).

employers will tailor their conduct accordingly. Research shows that discharged executives have a difficult time securing comparable positions.[283] Executive service contracts could serve as an additional restraint on managerial shirking and incentivize desirable conduct.[284] The market for corporate control also affects managerial behavior.[285] Here, the acquisition and disposal of controlling interests can serve as a check. Poorly run companies become subject to takeover, and incumbent management may be replaced.[286] Capital markets influence managerial behavior and decision making. Access to financial capital is essential to achieving corporate goals and sustainability. Companies that need to raise funds via issuing shares or borrowing money will face scrutiny from investors if the company is poorly run.[287] Product and service markets also constrain management. A company that is poorly run will not satisfy supply and demand or stimulate demand for its products and services. This could negatively impact perceptions of management.[288] Reputational

283. Rachel Feintzeig, *When Chief Executives Become Job Seekers*, WALL ST. J. (Mar. 5, 2014, 12:08 PM), https://www.wsj.com/articles/ceos-scramble-to-sell-themselves-when-looking-for-a-new-job-1393979853 [https://perma.cc/6GT4-HRUW]; *see also* C. Edward Fee, Charles J. Hadlock & Joshua R. Pierce, *New Evidence on Managerial Labor Markets: An Analysis of CEO Retreads*, 48 J. CORP. FIN. 428, 428–29 (2018) (finding the loss of a CEO position typically results in a "substantially inferior" subsequent CEO position).

284. Hannah Levitt, *Wells Fargo Ties Senior Executive Pay to Improving Diversity*, BLOOMBERG L. (June 16, 2020, 6:18 PM), https://www.bloomberg.com/news/articles/2020-06-16/wells-fargo-ties-senior-executives-pay-to-improving-diversity [https://perma.cc/HT24-XFLX]; *see also* Seymour Burchman, *A New Framework for Executive Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 13, 2020), https://corpgov.law.harvard.edu/2020/03/13/a-new-framework-for-executive-compensation/ [https://perma.cc/7EJH-MBAY] (discussing realignment of executive pay with a company's mission and purpose as a means to encourage more long-term and stakeholder focused decisions).

285. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–13 (1965).

286. *See id.* at 113 ("The lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently.").

287. *See, e.g.*, Zohar Goshen, *Shareholder Dividend Options*, 104 YALE L.J. 881, 889 (1995) ("This need for financing will expose the firm to the scrutiny of investors in the capital markets and of investment bankers and underwriters who serve as intermediaries between the firm and the capital markets.").

288. Munteanu Claudiu-Cătălin, Florea Dorian-Laurențiu & Pagalea Andreea, *The Effects of Faulty or Potentially Harmful Products on Brand Reputation and Social Responsibility of Business*, 16 AMFITEATRU ECON. 58, 60 (2014) (linking "the effects of faulty and potentially harmful products on brand reputation specific constructs and key outcomes"); *see also* CNN Business, *Volkswagen Emissions Scandal: A Timeline*, YOUTUBE (June 28, 2016), https://www.youtube.com/watch?v=Y5TvFY7xRDM [https://perma.cc/YLQ4-S8FR]; WXYZ-TV Detroit, *GM Expected to Report Quarterly Loss Over Ignition Switch Recall*, YOUTUBE (Apr. 23, 2014), https://www.youtube.com/watch?v=b64qr5oV-tc [https://perma.cc/R5DP-XDZT]; Doron Levin, *GM Posts Huge Profit Drop Driven by Ignition Switch Crisis*, FORTUNE (Apr. 24, 2014, 4:18 PM), https://fortune.com/2014/04/24/gm-posts-huge-profit-drop-driven-by-ignition-switch-crisis/ [https://perma.cc/V9CU-FN4Y].

concerns are especially acute for consumer-facing companies and brands.

For example, a company's response to social activism in the current business climate can threaten its reputation or provide an opportunity to enhance it. One observer describes this issue as follows:

> The broad reach and deep impact of social activism powered by new information technology means that businesses are frequently engaged in social issues whether they want to be or not. . . . [C]hanges in social expectations about corporate behavior have also altered corporate social activism. Many in society and within corporations now expect businesses and executives, particularly those at large public companies, to engage with the critical social issues of today.[289]

The failure to account for complex reputational risks may destroy the long-term value of a company.[290] A company under a cloud of litigation, investigations, and even social media outrage may suffer reputational damage with serious financial ramifications.

These market-based constraints on managerial conduct, however, have their limits. An overreliance on market mechanisms is unlikely to adequately prevent managerial entrenchment, shirking, self-dealing, and greenwashing.[291] A company's market power may insulate poor management. The market for executive talent is not that robust and executives may not face sufficient reputational damage and loss of job prospects to tailor their behavior. Similarly, the market of corporate control may not serve as an adequate check on managerial misconduct. Takeovers are often expensive, cyclical, more likely to happen in good financial times, and possibly impacted by a range of entrenchment mechanisms.

G. Self-Regulation

Some observers argue that adopting a self-regulatory paradigm focused on long-term value while embracing stakeholder concerns will obviate the need for more intrusive legislation.[292] The threat of a federal chartering

---

289. Lin, *supra* note 210, at 1546.

290. *Id.* at 1579–81.

291. Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863, 896–97 (2013); Reiser, *supra* note 278, at 611; Fairfax, *supra* note 238, at 1696–98.

292. Solomon, *supra* note 64, at 596–97 (describing the basic functions of a regulatory regime); *see also* Martin Lipton, *Wachtell Lipton Discusses Capitalism at an Inflection Point*, CLS BLUE SKY BLOG (Feb. 20, 2019), https://clsbluesky.law.columbia.edu/2019/02/20/wachtell-lipton-discusses-capitalism-at-an-inflection-point/ [https://perma.cc/YQB7-QK7T] ("*The New Paradigm* is structured

statute laden with stakeholder-related measures may strengthen the appeal of self-regulation; a self-initiated response can forestall more "blunt" regulatory reforms and, at the same time, contribute to long-term corporate value and stakeholder welfare.[293]

Like biological immune systems, the Corporate Immune System (CIS) includes a range of internal mechanisms to ward off threats. It reflects firms' efforts to adapt to growing corporate complexity, threats to corporate value, and the reality of political compromise.[294] Functionally, CIS performs an internal regulatory function that lowers monitoring costs for government regulators through such mechanisms as a monitoring board, compliance and risk management systems, compensation structures, an enhanced chief legal officer role, and ESG-sensitive governance.[295] These internal measures complement external corporate governance strategies: markets, litigation, gatekeepers, and top-down public regulation.[296] A well-established CIS, especially when complemented by engaged regulators and external gatekeepers, is an important feature of healthy corporate governance in large, publicly traded companies.[297] In today's socio-political context, companies are pragmatically adapting to investor and public demands to address stakeholders' concerns.

VI. IMPLICATIONS

A global pandemic, socio-economic inequality, and broad public calls to address racial injustices are revealing weaknesses in U.S. economic and social arrangements. Public sentiment has shifted to support "stakeholder capitalism."[298] The confluence of these developments is forcing policymakers to rethink the overlapping roles that businesses, citizens, and the state will play in the future. These events, although significant, will not displace Delaware as a de facto national regulator.

---

to obtain its benefits without the ill-fitting encumbrance of legislation and regulation. It is flexible and self-executing by corporations and investors adopting it and notifying each other that they have adopted it.").

293. *See* Lipton et al., *supra* note 140.

294. *See generally* Simmons, *supra* note 65.

295. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 110–16 (Donald R. Harris et al. eds., 1992) (discussing the benefits of internal firm regulation); Simmons, *supra* note 65, at 1133.

296. AYRES & BRAITHWAITE, *supra* note 295, at 128–29.

297. Simmons, *supra* note 65, at 1133.

298. Gavin Hinks, *US Public Backs Shift to Stakeholder Capitalism Amid Covid-19*, BD. AGENDA (June 9, 2020), https://boardagenda.com/2020/06/09/us-public-backs-shift-to-stakeholder-capitalism-amid-covid-19/ [https://perma.cc/C47P-CKSL].

A. The Shape of Future Corporate Governance Reform

Within this contemporary context, Delaware will remain the "federal option" for corporate chartering. No federal corporate chartering law has been adopted despite centuries of debate. And contemporary federal chartering proposals along with efforts to enact an expansive federal corporate code likely face a similar fate. Some of the conditions under which previous proposals for federal corporate chartering came about, such as significant shareholder support, no longer exist given the enhanced voice of institutional investors. The relative absence of support from one of the key historical groups advocating for federal corporate chartering makes it less tenable from a political standpoint. In the future, incremental federal encroachment on Delaware law and external federal stakeholder regulation are likely regulatory responses.[299] Self-regulation via accepted ESG frameworks will also play a prominent role in mollifying public fervor for more intrusive federal regulation.

B. The Value of Federal Corporate Chartering Proposals

Despite their lack of success, federal corporate chartering proposals provide value in important ways.

1. Looking Beyond the Status Quo Toward Greater Hybridization in Regulatory Design

Delaware's effectiveness as a de facto agency, coupled with other available forms of corporate regulation, renders contemporary proposals for mandatory or even voluntary federal chartering premature and superfluous. Notwithstanding, the federal chartering debate prompts a more robust discussion of alternatives and possibilities beyond the status quo. It encourages deeper exploration of existing and potential reforms as well as their interplay. Contemporary federal corporate chartering proposals reflect a longstanding tension between the exercise of corporate power and broader stakeholder concerns. This tension underlies the important trend of hybridization in regulatory design as well as corporate practice to accommodate the interests of multiple corporate constituencies with diverse motives.[300] Hybridization has been used in a variety of fields

299. For a discussion of incremental federal encroachments and external federal stakeholder regulation see *supra* sections V.C–.D. An example of state stakeholder regulation is a recent California law requiring women be on the board of all publicly held companies. CAL. CORP. CODE § 301.3 (Deering 2020).

300. ESG and public benefit corporations reflect this hybridization trend.

as a way to create proposals by blending competing theories.[301] As a theoretical and practical matter, meeting the demands of diverse stakeholders requires an adaptive hybridized approach to governance issues. This is a type of evolution; the regulatory architecture is improved by grafting on the best features from an array of approaches.

The contemporary ESG focus and proliferation of social enterprise statutes are an outgrowth of this trend toward hybridization. The emergence of impact investing and ESG frameworks, among the most significant developments in the past fifty years, requires a hybridized attention to both financial and social impacts. This landscape is pressuring federal, state, and firm self-regulatory regimes to accommodate broader stakeholder concerns.[302] A new generation of investors prioritizes stakeholder impact.[303] In response, companies are altering some of their internal governance practices. Recent events involving the COVID-19 pandemic along with broader calls to address racial and economic injustice have accelerated demands for regulatory reform and greater self-regulation. A broad, hybridized approach to corporate governance is demanded, one not limited to shareholder concerns but incorporating a range of stakeholder constituencies. As one observer acknowledges, "the current—and likely future—terrain of business and social activism suggests that a singular narrative centered exclusively on amoral profit-seeking would be unsatisfactory for many corporate stakeholders, social activists, and policymakers."[304] Businesses "should be able to articulate their profit-seeking purposes in a comprehensive manner that better accounts for the social interests and norms expected . . . which in turn may actually lead to superior financial performance" and enhance their value for employees, consumers, and society at large.[305]

301. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 349 (2004) (defining hybridization as "drawing together elements from rival schools of thought" in the context of creating new forms of governance); Lin, *supra* note 210, at 1579–80 ("By working on important issues that are at the forefront of society's concerns, instead of focusing solely on profit, corporations could enhance their value to consumers, employees, recruits, and shareholders. Being socially responsible does not mean being financially irresponsible.").

302. Similarly, social enterprise statutes require a balancing of stakeholder interests. *See* Eccles & Klimenko, *supra* note 226.

303. Dorff et al., *supra* note 243, at 27 ("In a recent international survey, some 87% of millennials said they thought that financial performance should not be the only measure of a company's success.").

304. Lin, *supra* note 210, at 1597–98.

305. *Id.* at 1598; *id.* at 1579–80 ("Being socially responsible does not mean being financially irresponsible.").

2. Discrete and Severed Elements from Corporate Chartering Proposals Are Sometimes Adopted

Elements of unsuccessful federal corporate chartering proposals have been proposed "à la carte" or recycled as part of more successful reform proposals (e.g., independent directors, enhanced disclosures, etc.). This phenomenon reveals the cyclical nature of corporate reform and that many contemporary reform proposals are not novel but often contain elements of previously unsuccessful reform efforts.[306] In this sense, corporate chartering proposals might signal or foreshadow future reforms.

3. Functioning as a Bargain Tool

Finally, federal chartering proposals provide value as a bargaining tool where the threat of more intrusive federal regulation makes other reform methods more palatable to diverse corporate constituencies. They prompt legislators and corporate managers to coalesce around less intrusive, stakeholder-focused reforms. The threat of top-down regulation and more punitive sanctions may sometimes be necessary to discipline corporate actors, to force recalcitrant firms to obey established rules intended to provide systemic benefits to a broader range of market participants, and to push firms to address problems through internal self-governance.[307]

CONCLUSION

The laws from which U.S. corporations are created and acquire their legal characteristics are largely local. Yet modern corporations have a global scope and far-reaching impacts on multiple constituencies. Concentrated corporate power has profound economic, democratic, and social consequences. From this tension emerges the desire to subject modern corporations to federal law. Despite the historical and recent waves of federal chartering proposals, Delaware's role as a de facto regulator will likely persist alongside incremental federal encroachment on the traditional scope of state corporate law. Sarbanes-Oxley and Dodd-Frank provide the incremental, less disruptive, and politically feasible template for greater federalization of corporate governance. Despite two centuries of reoccurring federal corporate chartering proposals, these proposals have not become law. Similarly, contemporary corporate

---

306. *See* Simmons, *supra* note 2, at 219. *See generally* Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1; Fairfax, *supra* note 238.

307. Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535, 553–55 (2010).

chartering proposals like the Warren and Sanders plans are likely to fail. They will, however, coincide with other successful types of corporate reform (e.g., antitrust, labor, climate, and tax reforms as well as political spending and climate disclosures). These recent chartering proposals and their context resurrect a seminal question: Can Delaware serve as an effective national regulator? Yes, with some caveats and qualifications, Delaware can continue to perform an important agency-like role in collaboration with federal regulators and regulated firms.