DEMOCRACY AND THE DOMINANCE OF DELAWARE IN CORPORATE LAW

KENT GREENFIELD*

I

INTRODUCTION

Delaware has a population less than one-third of one percent of the nation, but it is the state of incorporation for more than fifty percent of U.S. public companies and more than sixty percent of the Fortune 500.[1] Delaware's resulting dominance over the terms of corporate governance in the United States has been the subject of one of the grandest and most persistent debates within corporate law scholarship. Still the question remains whether Delaware's dominance has been the result of, in William Cary's famous phraseology, a "race to the bottom"—toward a legal regime that benefits managers at the expense of the shareholders[2]—or a "race to the top"—toward an efficient, shareholder-centric governance framework.[3] The conventional wisdom is that if the result is a race to the bottom, then Delaware's dominance is illegitimate and a federal chartering statute is appropriate. If the result is instead a race to the top, its dominance simply flows from its success in providing the best, most efficient set of governance laws available. Delaware's dominance is, in other words, a laudable result of the "genius of American corporate law."[4]

This essay will argue that this debate, as popular and notable as it is, is largely beside the point. Even if Delaware's dominance is a race to the top resulting in a corporate law framework that efficiently serves the interests of shareholders, it is still illegitimate. This is because Delaware's ability to define the rules of corporate governance depends on the so-called "internal affairs" doctrine, which provides that

---

This Article is also available at http://law.duke.edu/journals/lcp.

* Professor of Law, Boston College Law School.

The author thanks the participants in the Fourth Annual Public Law Conference at Duke University School of Law, December 2002, for their helpful comments. The author also received very helpful suggestions from participants in faculty colloquia at Boston College Law School and UCLA Law School. Particular thanks to Adam Winkler, Lynn Stout, Jim Cox, Stephen Bainbridge, David Rothman, and Scott FitzGibbon. The author also thanks Brendan Murphy and Scott LaFranchi for excellent research assistance.

1. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering Competition Over Corporate Charters*, 112 YALE L.J. 553, 553-54 (2002).

2. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974) (using phrase "race for the bottom").

3. *See, e.g.*, Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919-20 (1982) (using phrase "climb to the top"). For another possibility, namely that state competition produces a race to the top in some issues and a race to the bottom in others, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1440 (1992).

4. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1 (1993).

the rules governing the internal affairs of a corporation (that is, the rules of corporate governance) originate from the state in which the corporation is chartered. This is in contrast with conflict-of-laws principles that apply in all other areas of law. Typically, the state with the greatest interest in regulating the behavior in question provides the governing law. But under modern incorporation statutes, a corporate charter is extremely easy to obtain, and there is no requirement of any meaningful contact whatsoever with the chartering state. Thus, corporations can, in effect, choose which corporate governance laws will apply to them, regardless of whether they have any other contact with the state whose laws they choose. This ability of corporations to elect their governance law is illegitimate as a democratic matter and inefficient as an economic matter.

A. Delaware's Dominance

Delaware's dominance is staggering. Over 300,000 companies are incorporated there, including nearly three hundred of the Fortune 500. In contrast, the state incorporating the second largest number of Fortune 500 companies (New York) has only twenty-five. In fact, so many companies incorporate in Delaware that incorporation and franchise fees provide one-quarter of total state revenues.[5]

But Delaware has little contact with these corporations besides being the jurisdiction that provides the corporate charter. Of the thousands of corporations incorporated there, only a few have significant numbers of employees or shareholders in the state. Only two Fortune 500 companies, DuPont and MBNA, are headquartered in Delaware.[6] More importantly, even though Delaware has less than 820,000 citizens,[7] its corporate governance rules govern companies with millions of employees. The three hundred largest companies incorporated in Delaware employ over 15 million people, only an infinitesimal fraction of whom actually reside there. The number of employees at Wal-Mart, the largest company incorporated in Delaware, is fifty percent larger than the population of the entire state.[8] Furthermore, Wal-Mart's total net sales in their last fiscal year, $244.5 billion,[9] were more than *six times* the entire Gross State Product of Delaware.[10]

B. The Internal Affairs Doctrine

Perhaps this would not be so striking if "internal affairs" meant only the narrow relationship between managers and the company. But because companies affect so many stakeholders, and because even the most "internal" rule has implications for

---

5. Jonathan Chait, *Rogue State*, THE NEW REPUBLIC, August 19, 2002, at 20.

6. *Largest U.S. Corporatations*, 147 FORTUNE, April 14, 2003, at F1.

7. U.S. Census Bureau statistics, *available at* http://www.census.gov/popest/states/tables/NST-EST2003-01.pdf.

8. *See id.*; *Largest U.S. Corporations*, *supra* note 6, at F1.

9. 2003 Wal-Mart Stores, Inc. Annual Report, *available at* http://www.walmartstores.com/wmstore/wmstores/Mainnews.jsp?pagetype=news&categoryOID=8775&catID=-8248&template=DisplayAllContents.jsp#.

10. U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, REGIONAL ECONOMIC ACCOUNTS, *available at* http://www.bea.doc.gov/bea/regional/gsp/; *see also supra* note 6, at F1.

these stakeholders, it is impossible to claim that internal affairs are immaterial to anyone other than shareholders and managers. Examples abound. Other stakeholders undoubtedly are affected by a rule that directors should maximize profit to shareholders, or a rule that directors should not disclose information to communities about their business practices absent a legal or financial imperative, or a rule that shareholders need not pay the debts of the corporation.

Indeed, the state law of fiduciary obligation itself—arguably the most "internal" of all rules—provides that directors owe duties of care and loyalty to shareholders. In so doing, obligations toward other stakeholders are excluded.[11] Thus, that workers are not represented on the boards of directors for the vast majority of companies incorporated in the United States is not the result of some element of labor law or federal securities law. Rather, this is a consequence of the state law of corporations. Clearly, one cannot avoid the difficulties of the internal affairs doctrine by claiming that only shareholders and managers are affected by it.

The key problem is that Delaware law, in the process of establishing the rules that govern the internal workings of corporations chartered in the state, reaches beyond its borders to affect all stakeholders in a corporation. This includes those who have no political influence over the status, terms, or requirements of the law. Delaware law can therefore be crafted without attention to the political influence of many important stakeholders; unless, of course, that influence can be transformed into market terms. The internal affairs doctrine thus allows Delaware to externalize the costs of its rules on other stakeholders and indeed other states.

This practice of deferring to Delaware law to govern most of the nation's largest and most powerful corporations is undemocratic. Indeed, if areas of the law can be evaluated on their susceptibility to democratic or political pressures, then corporate law must be among the least open to political influence. In a democracy, this should be seen as a serious flaw in the framework of corporate law.

The internal affairs doctrine, which dictates this awkward result, is a foundational principle "wholeheartedly embraced" by the corporate law academy and bar because of its seeming "irresistible intuitive appeal."[12] Despite its foundational status, or perhaps because of it, the doctrine attracts scholarly attention only sporadically.[13] Fierce defenses are infrequent, but forceful attacks rarer still.[14] Nevertheless, the doctrine deserves more attention, especially in a time of growing public distrust in the methods of corporate governance and increasing attention on the issue of corporate accountability.

The internal affairs doctrine is a special case in the doctrine of conflicts of laws. Typical conflicts of laws principles are complex, but they generally suggest that the state with the greatest interest in regulating the behavior in question should provide

11. For a further discussion, see Daniel J.H. Greenwood, *Democracy and Delaware: The Puzzle of Corporate Law* 25-27 (draft of June 14, 2002).

12. Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS., 161-62 (Summer 1985).

13. *See, e.g.*, P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1; Jack L. Goldsmith III, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597, 599 (1988).

14. For an excellent, current example, see Greenwood, *supra* note 11.

the governing law for the behavior.[15] Yet the internal affairs doctrine allows a state that is hardly affected by the corporate behavior at issue to dictate the rules governing that behavior.[16] Of all the areas of law that control and limit corporations, including contract law, tort law, environmental law, and labor law, it is only corporate law that is left to the corporation itself to choose. And like those other areas of law, the rules of corporate governance affect more than the parties embodied in the corporate charter. From the standpoint of democratic legitimacy, it is no more justifiable to allow corporations to choose which state provides their corporate governance laws than it is to allow such corporations to choose which state ought to provide the tort law or environmental law that governs them.

Consider the supreme oddity of the internal affairs rule: A corporation headquartered in New York, with all of its facilities, employees, and shareholders in New York, and with all or most of its business in New York, will have its rules of corporate governance provided not by the state of New York, but rather by the state where its incorporators secured a charter, usually Delaware. The internal affairs doctrine then says that Delaware law will govern such a corporation even if New York *wants* to exert its authority over the internal affairs of the corporation, and even if a claim arises in a New York court. While this example might appear extreme, it is a common application of the doctrine. In essence, the internal affairs doctrine allows Delaware to reach into the courts of other states and apply its own law to disputes between residents of other states regarding corporations that have little or no contact with Delaware.

Corporate law should not promote this odd result. Rather, the conflict rules for corporate governance should be consistent with the conflict rules in other areas of law: The state that has the greatest interest in regulating the internal affairs of a corporation should provide the rules for corporate governance. The application of such a simple, straightforward, and consistent rule would bring about fundamental changes in the way corporate law is provided in the United States. Instead of being an area of law uniquely insulated from democratic pressures, corporate law would become subject to the same political pressures as other areas of the law.

15. *See* Goldsmith, *supra* note 13, at 599 (noting choice of law rules "generally provide[] that a court faced with a choice of law problem should initially look to the policies expressed in the purportedly conflicting state laws in order to assess the extent of each state's interest in having its law apply to the particular case"); *see also* Kozyris, *supra* note 13, at 16-17 ("In the new conflicts calculus, the interests and policies of the forum state, especially the protection of forum domiciliaries, weigh heavily in favor of applying its law. . . . Fixed, single-factor, content-blind, forum-neutral rules are supposed to be particularly obnoxious because they defer automatically and totally to one legal system in disregard of the interests and policies of the other states of contact. The [internal affairs rule] is precisely such a rule.").

16. One might say that Delaware cares a great deal about regulating the behavior at issue, but a state's desire to regulate, without more, does not constitute a genuine interest. Delaware's desire to regulate springs from the fact that without such power, it cannot dominate the market for corporate charters. Such a desire should not be material in the conflicts-interest analysis, since it is a desire that many, if not all, other states share. Rather, the analysis should ask whether the act of gaining a corporate charter from Delaware's Secretary of State gives Delaware a greater state interest in regulating the internal affairs of a corporation than a state where, for example, the corporation is headquartered, or where most of the corporation's employees or shareholders are located.

II

A HYPOTHETICAL STATUTE

Let us imagine that a particular state legislature, in Massachusetts for example, believes that corporations consistently undervalue the interests of their employees, especially when corporations consider fundamental decisions such as a merger, acquisition, or major sale of assets. In such a context, Massachusetts might consider the following statute:

> Regardless of where such a corporation is chartered, the directors of:
>
> a. a corporation that employs 51% or more of its employees within Massachusetts; or
>
> b. a corporation that employs more employees within Massachusetts than in any other state or political subdivision of the United States or other nation;
>
> shall consider the interests of the corporation's employees in making decisions that have a material effect on the level of the corporation's present or future employment. Such a duty shall be deemed satisfied if the board of directors includes at least one member who is elected by hourly-wage employees rather than shareholders.

Undoubtedly, this statute purports to regulate the internal affairs of certain corporations. Furthermore, this statute almost certainly conflicts with Delaware law—Delaware law requires corporate directors to owe an "unyielding" duty to the corporation and its shareholders.[17] This legal duty is interpreted to bar the consideration of employee interests except when necessary to further shareholder interests.[18] Additionally, this hypothetical Massachusetts statute conflicts with the Delaware requirement that directors be elected by shareholders.[19]

Let us now imagine a case arising under this statute. A Massachusetts employee of a corporation sues in Massachusetts court to enjoin a planned merger of that corporation with another. The employee shows that the majority of the corporation's employees reside in Massachusetts and that the corporation's directors have refused to consider the interests of the employees in the merger negotiations.

The corporation will file a motion to dismiss, saying that it is chartered in Delaware and that Delaware law governs its internal affairs. But should the suit be dismissed? At first glance, the answer seems to be an easy "yes." The statute purports to regulate the internal affairs of corporations incorporated in Delaware; if the internal

17. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); *see also* Katz v. Oak Indus. Inc., 508 A.2d 873, 879 (Del. Ch. 1986) (holding that the obligation of directors is to "maximize" interests of shareholders).

18. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that the "board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders"). Note that Delaware law had feinted toward the allowance of such consideration, *cf.* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (implying that directors could take into account interests of constituencies other than stockholders in defending against hostile takeovers), before retreating in *Revlon*. Some scholars believe that Delaware law does not require shareholder interests to be maximized. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 305 (1999) (lending support to the argument that "treating directors as trustees charged with serving interests above and beyond those of shareholders in fact can be in shareholders' 'long-run interests'"). But even if not, there is little doubt that the above statute would be deemed to be in conflict with Delaware law.

19. DEL. CODE ANN. Tit. 8, § 211 (2001).

affairs doctrine controls, then the statute would not be valid and the case should be dismissed.

Few corporate lawyers or corporate law scholars would contest the suit's dismissal. The internal affairs doctrine is, as noted above, one of the foundational principles of corporate law. It has been remarkably immune from attack. It is even the subject of a special section of the *Restatement (Second) of Conflict-of-Laws*, which is often quoted as saying that "Issues involving the rights and liabilities of a corporation . . . are determined by the . . . local law of the state of incorporation."[20]

In fact, the internal affairs doctrine is so embedded that this statute would likely not be passed by a state legislature in the first place. Few would think of such regulation as feasible. Nevertheless, there is an economic argument for this kind of statute and a democratic argument for this kind of statute, and these arguments are remarkably similar.[21]

III

THE ECONOMIC ARGUMENT FOR THE HYPOTHETICAL STATUTE

The economic argument is straightforward. It focuses on externalities, which are routinely cited as a cause of inefficient decisions and thus a rationale for government regulation. Indeed, the internal affairs doctrine is easily characterized as an "externality machine."[22] Under the internal affairs doctrine, states compete for corporate charters on the basis of which state can provide a set of laws most beneficial to the decision makers—that is, directors and shareholders. Even if this competition is viewed as a "race to the top" that maximizes the interests of shareholders, the economic interests of other stakeholders are not taken into account by the jurisdiction providing the rules. This is a consequence of the fact that these other stakeholders have no say in the decision as to where to incorporate. In other words, the jurisdictions competing for corporate charters have no incentive to take into account the economic interests of other corporate stakeholders, even though those other stakeholders undoubtedly are affected by the terms of the corporate charter.[23]

When certain stakeholders (for example, employees and communities) lack political clout in the jurisdiction making the rules, that jurisdiction can construct laws that benefit the corporate decisionmakers at the expense of those other stakeholders. And the jurisdiction in question can do so at no cost to itself. This is a classic example of externalities: the state can internalize the benefits of its manager- and shareholder-

---

20. RESTATEMENT (SECOND) OF CONFLICT-OF-LAWS § 302 (1971). But this quote is misleading. The full text of the section includes an important caveat: The law of the state of incorporation will be applied "except in the unusual case, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied." *Id.*

21. For the purposes of this essay I am making the reasonable assumption that there is no constitutional underpinning of the internal affairs doctrine. The best examination of this point is Jed Rubenfeld, *State Takeover Legislation and the Commerce Clause: The "Foreign" Corporations Problem*, 36 CLEV. ST. L. REV. 355, 357 (1988).

22. To paraphrase LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY (2001).

23. *See* Bebchuck, *supra* note 3, at 1485 ("[I]f the rule is designed by the states, then the competition among them will lead state officials to exclude consideration of [third party] interests.").

centric corporate governance rules while externalizing most of the costs onto powerless stakeholders. Consequently, these externalities lead to state laws that fail to maximize social welfare.[24]

Law and economics scholars would suggest that states can maximize social welfare by imagining what various parties would agree to, absent transaction costs. If that is the model, then the internal affairs doctrine almost certainly results in a less socially optimal legal framework since the jurisdiction need not consider any parties other than those who have a hand in choosing where to incorporate. The hypothetical, socially optimal negotiation has all stakeholders at the table. The real negotiation has only a few.

Indeed, it is difficult to imagine how, given the internal affairs doctrine, a state could craft a socially optimal corporate governance framework. Suppose, for example, a state sought to create a corporate governance rule (such as the hypothetical statute above) that would take into account the interests of nonshareholder stakeholders. In response, shareholders and managers would likely move their corporations to other states with more shareholder-centric governance regimes. This is possible under the internal affairs doctrine because shareholders face no serious consequences for moving to another jurisdiction to choose a different set of corporate laws. Consequently, because of the internal affairs doctrine, "the state [trying to protect non-shareholder constituencies] may both lose its incorporations and fail to achieve any protection of third parties' interests."[25]

This argument against the internal affairs doctrine assumes that the socially optimal level of public regulation is not zero. States, localities, and the federal government are charged with regulating the public and private spheres in order to maximize social welfare. Governments care, as they should, about crafting the proper mix of regulation to reach certain social goals in the most efficient way. Even if one cares only about economic well-being, governments must routinely step into the market to adjust for market defects such as monopolies, insufficient information, obstacles to negotiation, and (yes) externalities. Over time, governments learn which policy tools are more efficient than others in reaching public policy objectives. One way that governments learn is feedback from the citizenry. To quote Justice Louis Brandeis, states are the "laboratories of novel social and economic experiments."[26] When a state tries a new regulatory initiative and is successful in maximizing social welfare, the state and its officials receive certain benefits as a consequence of the policy (for example, an influx of people into the state or reelection of officials). When a state makes a mistake, the feedback is negative (a decrease in population or failure to be reelected).

Now note that the unique trait of the internal affairs doctrine is that this opportunity to provide feedback on corporate law is available only to the corporation itself. If the corporation benefits from a state's regulation of corporate governance, then the corporation reacts positively by incorporating in that state. If the corporation does not

24. *See id*. ("When externalities are present . . . rules that maximize shareholder value may well diverge from the socially desirable ones.").

25. *Id.* at 1486.

26. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

benefit, then the corporation reacts negatively and incorporates elsewhere. Because the corporation alone is free to incorporate in another state, no other stakeholder affected by the rules of corporate governance has the opportunity to influence the state's policy through feedback.

This result diverges from that which is socially optimal. By any reasonable assumption, a socially optimal law of corporate governance would take into account the interests of parties other than shareholders and managers. The internal affairs doctrine all but makes that impossible and thus guarantees that corporate law will fall short of optimal.

Nor is the optimal result reached even if one assumes, as do many corporate scholars, that the concerns of nonshareholder constituencies should be left to bodies of law other than corporate law (such as labor and employment law, environmental law, or consumer protection law). A state seeking to create a socially optimal system of regulation for corporations doing business within its jurisdiction but not chartered there will have fewer regulatory options at its disposal. As long as the internal affairs doctrine applies, changes in corporate governance will be unavailable. Fewer regulatory options usually result in less efficient and more costly regulation, resulting in a move away from social optimality.

This argument is further illustrated if we analogize the "internal affairs" doctrine to another area of law—for example, environmental law. Imagine that Delaware allowed companies to come to it and, for a fee, receive permits to increase sulfur dioxide emissions, or to log in old growth forests, or to construct shopping malls in open spaces. Furthermore, these permits would have legal force *regardless* of where these activities would occur. Such a regime would be disastrous. No one would suggest that Delaware was engaging in a "race to the top" in environmental protection. Nor would anyone suggest that the end result was the most efficient because states could compete on the basis of what permits to offer.

Indeed, if Delaware attempted to adopt such a doctrine, other states would object strenuously. For the same reasons, states should object to Delaware's dominance in corporate law.

IV

THE DEMOCRATIC ARGUMENT FOR THE HYPOTHETICAL STATUTE

The democratic argument is strikingly similar. The difference is that in addition to being inconsistent with social welfare, the internal affairs doctrine is inconsistent with democratic legitimacy. The internal affairs doctrine allows Delaware to insulate its laws from democratic pressures by allowing corporations to take advantage of Delaware's laws of corporate governance without subjecting themselves to the other laws of the state. Corporations located outside of Delaware can adopt Delaware's laws for their internal affairs, leaving non-shareholder stakeholders affected by those laws but with no democratic mechanism to influence those laws.

This is not true with regard to any other area of law. It is possible, of course, for two or more states to have conflicting laws on a specific subject, or to have the laws of one state affect the citizens of another. For example, the tort law of a given state will affect the citizens of other states whenever they travel within the given state. But typical conflict-of-laws notions exist to resolve such disputes, and these notions, which balance the interests of states in regulating behavior, embody important democratic principles.

When state laws are in conflict, one reason why the governing law comes from the state with the greatest interest in regulating the behavior is that such law typically has a better democratic pedigree. A state may have an interest in regulation because it is the site of the behavior at issue, or because most of the people regulated are residents there. Regardless, the state that has the greatest interest in a specific dispute will, almost by definition, be subject to democratic pressures with regard to the law at issue.

Indeed, there is value in recognizing the interest of the state in which political accountability is maximized. If the legislature or courts "get it wrong" in making regulatory decisions, it is much easier to correct the mistake when the state has within its borders those whose behavior is regulated or those who bear the costs or gain the benefits of the regulation. More to the point, one would not expect a state whose interest in regulating the behavior at issue derives only from the desire to gain incorporation fees to have the appropriate democratic incentives to correct missteps within the regulatory framework.

There is an even more fundamental point. At some level, politics is about constructing a community. And according to democratic theory, the rules of the community should be enacted either by the community itself or by representatives who are subject to community oversight. Those who live in such a community are deemed to have voluntarily subjected themselves to that community's laws. One can have a say in the laws of the community as long as one consents to be governed by those laws. The laws of one community should not be thrust on another without the consent of the other.

Under this simple construct, the internal affairs doctrine is open to attack. Corporations are already insulated from the influence of the community because of the impersonal nature of the corporate form, which separates the firm's decisionmakers from the legal and cultural norms that influence behavior. The internal affairs doctrine makes this problem worse by allowing corporate elites to choose the law that governs not only their interactions among themselves, but also many of their interactions with others. If a community (read: state) were to attempt to regulate the affairs of a corporation within its borders, the corporation could simply reincorporate in another jurisdiction. In the usual situation, if someone wants to avoid the laws of a community, she has to leave the community, thereby giving up the benefits of living in that community. The internal affairs doctrine, however, allows a corporation to opt out without leaving, thus allowing it to have its cake and devour it as well.

One response to this argument is that the other stakeholders are not at all left without remedies. Just because workers, creditors, or consumers cannot affect the internal affairs of a company is not to say they have no recourse. Moreover, other stakeholders still have significant market power. For example, if employees desire to be treated better, they need not change existing internal affairs rules to have directors owe them a fiduciary duty. They need only exert their desires in the marketplace, either by going to other firms or by threatening to do so.

These responses leave the issue unresolved, however. One could imagine, for example, that the best way for workers to protect their interests is to require a representative on the board of directors. But the internal affairs doctrine once again serves as an obstacle: even if all of a company's workers lived in one state, that state could not impose such a requirement on a company that was incorporated elsewhere. Under the internal affairs doctrine, gaining a worker representative on the board would require a successful vote of the shareholders, which is highly doubtful. Of course, Delaware law could be changed to require a worker representative, but this seems even less likely.

Nor is it a response to the democratic legitimacy critique to say that other stakeholders retain market power. Democracy is not the market, nor vice versa. The market is available as a recourse whether the internal affairs doctrine is in place or not. Often, the best way to protect one's interests is not through the market but through the political process. Yet the internal affairs doctrine places the governance of corporations beyond the reaches of the political process, except, of course, to the political process of Delaware. And because few corporations are actually based in Delaware, no one—certainly not the Delaware citizenry who pay fewer taxes thanks to the many corporations enticed to incorporate there—has an interest in looking out for the interests of corporate stakeholders elsewhere in the nation.

V

CONCLUSION

Of course, much remains to be said. Certainly, arguments could be advanced in favor of Delaware's dominance. And perhaps it would be preferable—if democratization of corporate law is the goal—to look to federalization of corporate charters rather than to the end of the internal affairs doctrine. Regardless, the point here is that the power of the internal affairs doctrine is so ingrained in corporate law scholarship that it deserves far greater attention.

I believe the internal affairs doctrine is open to serious challenge. I believe it is best seen as simply an exception to conflict-of-laws rules; an exception that could be easily discarded by state courts while adjudicating cases under statutes such as the one proposed earlier in this essay.[27] In other words, a state that has significant interests in the internal affairs of corporations doing business in that state can pass corporate governance statutes such as that suggested above. When claims arise under these statutes, the state can assert its interest in court as it could in any other circumstance in which it had a significant interest in regulating the behavior at issue. A state may not always be able to convince a judge that its interests are the most significant and that its law

27. A possibility assumed in the *Restatement* as well. *See supra* note 20. I am also making the reasonable assumption here that the internal affairs doctrine is not required by the Constitution. *See* Jed Rubenfeld, *State Takeover Legislation and the Commerce Clause: The "Foreign" Corporations Problem*, 36 CLEV. ST. L. REV. 355 (1988).

should apply. But if typical conflict-of-laws rules were to apply, the state would sometimes win. That would, at least, be more often than the state wins now, which is never.

In relaxing the constraints of the internal affairs doctrine, corporate law would become more accountable to the states in which the corporations themselves enjoy the benefits of the social and legal fabric. That would be a good thing.