THE CONTESTED EDGES OF INTERNAL AFFAIRS

MOHSEN MANESH[*]

Because of the internal affairs doctrine, the tiny state of Delaware plays a unique and outsized role as the nation's preeminent regulator of corporate governance. But two recent developments have raised new questions about the precise scope of the doctrine and, consequently, Delaware's lucrative regulatory domain. Specifically, in a four-month span in late 2018, (i) California enacted the nation's first law

---

* Associate Professor, University of Oregon School of Law. The author wishes to express his gratitude to Ann Lipton, J. Travis Laster, Joseph Grundfest, Lynn LoPucki, Vince Buccola, Keith Bishop, and the participants at the 2019 Corporate and Securities Litigation Workshop at Boston University School of Law for their useful insights and comments on an earlier draft of this Article.

mandating board gender diversity for all public corporations headquartered in California, and (ii) the Delaware Court of Chancery in Sciabacucchi v. Salzberg *invalidated a corporate charter provision purporting to regulate shareholder rights arising under federal securities law.*

These two high-profile corporate law developments highlight the inescapable indeterminacy at the edges of the internal affairs doctrine. This indeterminacy puts Delaware—and the many corporations that rely on Delaware law—in a precarious position because other states may contest the boundaries of the doctrine. Challenges at the edges of internal corporate affairs may both erode Delaware's corporate law hegemony and reshape the regulatory landscape for corporations.

Author's Note: After this Article was already in the final editorial stages, but before its publication, the Delaware Supreme Court, in an opinion citing and quoting the pre-publication version of this Article, reversed the Court of Chancery's decision in *Sciabacucchi v. Salzberg*. Readers should be aware that all references in this Article to *Sciabacucchi v. Salzberg* refer to the Delaware Court of Chancery's decision and do not account for the Delaware Supreme Court's reversal.

In reversing the chancery court, the Delaware Supreme Court conceded that shareholder rights arising under federal securities law are outside of the internal affairs doctrine, but nonetheless ruled that such rights are within the "outer bands" of what may be regulated by Delaware corporate law. In doing so, the Delaware Supreme Court embraced an expansive view of Delaware law's regulatory reach, consistent with the analysis of Sections I.C and III.B.2 of this Article. But by eschewing the restrained approach of the chancery court, the high court has opened the door to corporate charter provisions mandating arbitration of federal securities law claims as well as, perhaps, state corporate law claims. The latter, as described in Section II.B.3 of this Article, could have disastrous consequences for Delaware corporate law. Needless to say, this Article will not be the last word on these topics.

INTRODUCTION

During a four-month span in late 2018, two events occurred at opposite ends of the country that may dramatically reshape the regulation of corporations in America. First, in September 2018, California enacted the nation's first law mandating board gender diversity for all public corporations that are physically headquartered in California.[1] Second, in December 2018, the Delaware Court of Chancery in *Sciabacucchi v. Salzberg* ruled that a corporation may not regulate the rights of its shareholders arising under federal securities law in its governing documents.[2] Although seemingly unrelated, both events share at their core a challenge to the internal affairs doctrine—a doctrine that is at the foundation of the state-based system of corporate law in the United States.[3]

The internal affairs doctrine is a widely accepted choice-of-law principle.[4] The doctrine provides that the internal affairs of a corporation—that is, "matters peculiar to the relationships among or

---

1. *See* 2018 Cal. Legis. Serv. Ch. 954 (S.B. 826) (West); Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (Sept. 30, 2018), https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html.

2. *See* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *2–3 (Del. Ch. Dec. 19, 2018), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020).

3. *See, e.g.*, Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 340 (2018) ("The internal affairs doctrine is the foundation on which modern corporate law is built."); Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 140 (2004) ("The internal affairs doctrine is . . . one of the foundational principles of corporate law.").

4. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90–91 (1987) (describing the internal affairs doctrine as "an accepted part of the business landscape in this country"); Resolution Tr. Corp. v. Chapman, 29 F.3d 1120, 1122 (7th Cir. 1994) (citations omitted) (noting that the internal affairs doctrine is "recognized throughout the states"); Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1081 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle." (citing McDermott Inc. v. Lewis, 531 A.2d 206, 216–17 (Del. 1987))); VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("[T]he conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation to 'the entire gamut of internal corporate affairs.'" (quoting *McDermott Inc.*, 531 A.2d at 216)); *McDermott*, 531 A.2d at 216 ("A review of cases over the last twenty-six years, however, finds that in all but a few, the law of the state of incorporation was applied without any discussion."); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 39 (2006) ("In its modern form, the internal affairs doctrine is a choice of law rule, widely accepted among states, that selects the law of the incorporating state to govern disputes over the corporation's internal affairs." (citations omitted)).

between the corporation and its current officers, directors, and shareholders"[5]—are governed by the laws of the state in which the corporation is incorporated.[6] The internal affairs doctrine is what has enabled one small and economically insignificant state, Delaware, to play a unique and outsized role in regulating corporate America.[7] Although Delaware represents less than one-third of one percent of the U.S. population,[8] more than half of all publicly traded companies,[9]

---

5. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); *accord McDermott*, 531 A.2d at 214 (citing *Edgar*, 457 U.S. at 645).

6. *See, e.g.*, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation."); *Edgar*, 457 U.S. at 645 ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs . . . ."); *VantagePoint*, 871 A.2d at 1112 ("The internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation." (citations omitted)); *McDermott*, 531 A.2d at 215 ("The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs." (citing *First Nat'l City Bank*, 462 U.S. at 621).

7. *See, e.g.,* Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 115 (2008) ("The internal affairs norm plays a critical role in Delaware's domination . . . of American corporate law."); Greenfield, *supra* note 3, at 135 ("Delaware's ability to define the rules of corporate governance depends on the so-called 'internal affairs' doctrine . . . ."); Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom / Top*, 23 YALE L. & POL'Y REV. 381, 382 (2005) (describing the doctrine as "the essential doctrinal underpinnings of Delaware's success"); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1616 (2005) ("The continued applicability of the internal affairs rule is, of course, the life-blood of Delaware."); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 60 (2009) ("Delaware's preeminence in corporate law is vitally connected to the internal affairs doctrine . . . .").

8. *See QuickFacts Delaware; United States*, U.S. CENSUS BUREAU (2018), https://www.census.gov/quickfacts/fact/table/DE,US/.

9. *See, e.g.*, Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1054–55 (2015) ("Delaware charters a clear majority of publicly traded companies in the United States, even though almost all publicly traded companies are headquartered in other states."); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 567 (2002) (finding that Delaware represents more than half of the incorporations of public companies as of 1999); Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2113 (2018) (citing data showing that 3964 of 7061 public companies are incorporated in Delaware); Steven Davidoff Solomon, *Why the Surge in Merger Litigation Fizzled*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/business/dealbook/why-the-surge-in-

including two-thirds of the Fortune 500,[10] are incorporated under Delaware law. Thus, because of the internal affairs doctrine, Delaware sets the rules of corporate governance for most of the nation's largest businesses.[11]

Among academics and business lawyers, the internal affairs doctrine is unremarkable.[12] Given its "irresistible intuitive appeal,"[13] the doctrine is typically "taken for granted."[14] And so is Delaware's improbably influential role as the nation's *de facto* arbiter of corporate governance,[15] a role that has substantially benefitted the state's finances.[16] But California's new statute together with *Sciabacucchi* raises new questions about the internal affairs doctrine—and, consequently, the scope of Delaware's lucrative regulatory domain.

---

merger-litigation-fizzled.html ("More than half of the public companies in the United States are incorporated in Delaware but have headquarters elsewhere.").

10. *See* DEL. DIV. OF CORPS., ANNUAL REPORT STATISTICS (2018), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2018-Annual-Report.pdf.

11. *See* sources cited *supra* note 7.

12. *See* Greenfield, *supra* note 3, at 137 ("Despite its foundational status, or perhaps because of it, the doctrine attracts scholarly attention only sporadically. Fierce defenses are infrequent, but forceful attacks rarer still."); Tung, *supra* note 4, at 39 ("To corporate lawyers and corporate law scholars, the internal affairs doctrine seems unremarkable. It seems always to have been a part of the corporate law landscape."); *see also* Glynn, *supra* note 7, at 115 (observing that in the scholarly corporate law literature the "continuing application of th[e] doctrine by states . . . is largely assumed, and, hence, its implications left unconsidered").

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

14. Tung, *supra* note 4, at 37, 39–40 ("Corporate lawyers and corporate scholars take the doctrine for granted."). Further, "modern justifications for the doctrine seem rational, and so it must ever have been thus." *Id.* at 39.

15. *See, e.g.*, Anderson & Manns, *supra* note 9, at 1104 ("It is indisputable that Delaware has won the race for corporate charters and enjoys a virtual monopoly on the out-of-state incorporation business." (citations omitted)); Bebchuk & Hamdani, *supra* note 9, at 554 ("[T]he dominant view in corporate law scholarship is that allowing Delaware to dominate national corporate law is not a problematic feature, but rather an important virtue . . . ."); Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 75 (2015) ("[Delaware] can be thought of as the home of corporate America, with two-thirds of U.S. public companies being incorporated under Delaware corporate law, with Delaware courts deciding a large proportion of major corporate law cases, and with courts in other states often applying Delaware case law."); Stevelman, *supra* note 7, at 59 ("In matters of state corporate law, Delaware has won—that is the consensus among scholars, commentators, and practicing corporate lawyers.").

16. *See infra* notes 76–79 and accompanying text.

In the past, Delaware courts have invoked the internal affairs doctrine to jealously protect the state's corporate law from encroachment by other states.[17] And the judicial response in Delaware to California's new gender diversity statute is likely to be no different. But the Delaware Court of Chancery's *Sciabacucchi* opinion represents a departure from Delaware precedents. Rather than invoking the doctrine to fend off incursions into Delaware's regulatory domain, the chancery court in *Sciabacucchi* invoked the doctrine *to limit* the regulatory reach of Delaware.[18] Although *Sciabacucchi* is novel in that sense, viewed more broadly, it is consistent with the Delaware courts' past use of the doctrine. The difference is that in invoking the internal affairs doctrine, *Sciabacucchi* sought to protect Delaware's regulatory domain not from encroachment by other states, but from the threat of federal intervention.[19]

But to the extent Delaware relies on the internal affairs doctrine to preserve its role as the nation's preeminent regulator of corporate governance, California's new statute together with *Sciabacucchi* highlight a vulnerability in Delaware's position: the boundaries of "internal affairs" are inescapably indeterminate and may be contested by other states.[20] Delaware courts may surely attempt to define those boundaries. But for Delaware courts to assert something is an "internal" corporate affair—for example, the gender diversity of a corporation's board of directors—is to say it is excluded from regulation by other states. And for Delaware courts to assert something is an "external" matter—for example, shareholder rights arising under federal securities law—is to say that no state's corporate law can address the matter either. Naturally, other states may have a different perspective. Thus, even if other states profess adherence to the internal affairs doctrine, other states may not sheepishly acquiesce to the doctrinal boundaries drawn unilaterally by Delaware.

The ability of other states to contest the scope of the internal affairs doctrine puts Delaware—and, therefore, the many

17. *See infra* Section I.C.

18. *Compare* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *2–3 (Del. Ch. Dec. 19, 2018) (invoking the internal affairs doctrine to limit the regulatory reach of the state's corporate law), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020), *with* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) (invoking the internal affairs doctrine to halt an incursion on Delaware's regulatory domain), *and* McDermott Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987) (same).

19. *Sciabacucchi*, 2018 WL 6719718, at *3.

20. *See infra* Part III.

corporations that rely on Delaware law—in a precarious position. Some states may take a more cramped view of the doctrine, enacting laws like California's gender diversity statute that encroach on matters otherwise governed exclusively by Delaware.[21] And other states may take a more expansive view of the doctrine, authorizing their domestic corporations to adopt governance provisions of the type that *Sciabacucchi* invalidated and thus attracting corporate charters away from Delaware. In either scenario, the scope of Delaware's lucrative regulatory domain shrinks.

Challenges at the edges of the internal affairs doctrine, like those that emerged in late 2018, are a problem unlikely to go away for Delaware. Since California enacted its first-in-the-nation board diversity statute, several other state legislatures, ranging from Massachusetts to Illinois to Washington, have considered similar bills.[22] And in early 2019, a shareholder-activist initiated litigation against the New Jersey-chartered healthcare conglomerate Johnson & Johnson pressing it to adopt a bylaw provision mandating arbitration for all shareholders claims brought under federal securities law.[23] These developments suggest that skirmishes at the frontiers of the internal affairs doctrine are likely to persist.[24] And these skirmishes could over time both erode Delaware's hegemony and fundamentally reshape the regulation of corporate America.[25]

The remainder of this Article proceeds in three parts. Part I describes the internal affairs doctrine, the essential role the doctrine has played in enabling Delaware's unique position among states, and

---

21. *See* CAL. CORP. CODE § 301.3 (West 2019).

22. *See infra* notes 299–300 and accompanying text.

23. *See* Cydney Posner, *Mandatory Arbitration Shareholder Proposal Goes to Court*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 1, 2019), https://corpgov.law.harvard.edu/2019/04/01/mandatory-arbitration-shareholder-proposal-goes-to-court/.

24. *See, e.g.*, Jill E. Fisch & Steven Davidoff Solomon, Centros*, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 520 (2019) (concluding that California's new statute "point[s] to a US future in which legislatures increasingly impose social-type legislation on US companies regardless of their state of incorporation").

25. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90 (1987) ("Th[e] . . . free market system depends at its core upon the fact that a corporation . . . is . . . governed by[] the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation."); Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism*, 84 N.Y.U. L. REV. 1149, 1150 (2009) ("[H]ow the corporate law and governance rules of our states interact with each other in a federal system . . . bears importantly on the efficient operation of the American economy.").

how Delaware courts have assertively applied the doctrine to preserve that position from incursions by other states. Next, Part II explores the recent challenges to the boundaries of the internal affairs doctrine represented by California's new board gender diversity statute and the corporate governance provisions at issue in *Sciabacucchi*. In particular, Part II demonstrates that although the Delaware Court of Chancery in *Sciabacucchi* employed the doctrine differently than Delaware courts have done before—employing it to limit the regulatory reach of Delaware—it did so with the same aims as Delaware's past precedents, namely to preserve the state's regulatory province from incursions, not by other states, but by the federal government.

Part III then explains the vulnerability in Delaware's position revealed by California's new board gender diversity statute and the corporate governance provisions at issue in *Sciabacucchi*. Each underscores the inexorable indeterminacy at the edges of the internal affairs doctrine. This indeterminacy, between internal corporate affairs and external matters, means that other states may contest Delaware's lucrative regulatory province, either by interpreting the doctrine more narrowly or broadly than Delaware. In either scenario, Delaware's regulatory power shrinks, and the resulting regulatory landscape for corporations is reshaped.

I. THE INTERNAL AFFAIRS DOCTRINE

In the United States, corporate law is a matter of state law.[26] Although federal law extensively regulates securities markets, the internal governance of corporations is largely left to the states to regulate.[27] Each state has its own general corporation statute,

---

26. *See, e.g.*, *CTS Corp*., 481 U.S. at 89 ("Every State in this country has enacted laws regulating corporate governance."); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." (quoting Cort v. Ash, 422 U.S. 66, 84 (1975))).

27. *See, e.g.*, William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 620 (2006) ("[U]nder the prevailing norm, national regulation covers the securities markets and mandates transparency respecting firms with publicly traded securities, while internal corporate affairs are left to the states."); James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 118 (2017) (articulating "the conventional account" in which "[federal] securities law requires public companies to

enabling any individual to incorporate and conduct business within the state as a domestic corporation.[28] Each state's statutes also recognize that corporations formed elsewhere may, subject to minimal qualification requirements, conduct business within the state as a foreign corporation.[29] Under this state-based system of law, a business may be incorporated under the laws of one state—say Delaware—even if it has offices, employees, shareholders, or assets or otherwise conducts business predominately or even entirely elsewhere.[30]

When a corporation is formed in one state but conducts its business in another—a scenario that is quite common for even modest enterprises—one question that naturally arises is which state's law will govern any disputes involving the corporation and the parties it interacts with. This common scenario presents a choice-of-law question.[31]

Typical choice-of-law analysis weighs various factors to determine which state has the most significant relationship to, therefore greatest interest in regulating, the parties and matters at issue.[32] This is the analysis most courts would apply to determine the law governing the corporation's external business activities, such as the corporation's

---

make disclosures to investors while [state] corporate law sets forth substantive norms regulating the internal affairs of the corporation").

28. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(a) (2018); OR. REV. STAT. §§ 60.044, 60.051 (2017).

29. *See, e.g.*, DEL. CODE ANN. tit. 8, § 371(a), (b) (2018); OR. REV. STAT. § 60.701 (2017).

30. *See, e.g.*, Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1802 (2002) ("Corporations are not constrained by their headquarters, location of manufacturing facilities, place of business, or other operational factors in deciding where to incorporate." (citations omitted)).

31. *See, e.g.*, Matt Stevens, Note, *Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047, 1048 (2007).

32. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. c (AM. LAW INST. 1971) (instructing courts to consider various factors, including "the relative interests of . . . states in the determination of the particular issue," and commenting further that "[i]n general, it is fitting that the state whose interests are most deeply affected should have its local law applied"); Greenfield, *supra* note 3, at 137–38 ("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 the governing law for the behavior." (citations omitted)).

relationships with its employees, contractors, suppliers, customers, and more broadly the general public.[33]

But with respect to internal corporate matters—matters involving the relationship between the corporation, its officers, directors, and shareholders—the internal affairs doctrine provides a different rule.[34] Rather than trying to determine which state has the most significant relationship and interest in regulating these parties, the doctrine focuses instead on a single, decisive factor: the corporation's state of incorporation.[35]

Section A below describes the basic outlines of the internal affairs doctrine and the rationale for its existence. Section B then explains a key consequence of the doctrine, namely a regulatory competition among states in which Delaware has emerged the undisputed leader. Finally, Section C describes how Delaware courts have historically applied the doctrine to protect Delaware's lucrative regulatory domain from interference by other states.

A. Doctrine

The internal affairs doctrine provides that a corporation's internal affairs are governed by the laws of only one state, the state in which the corporation is chartered.[36] The doctrine applies the laws of the chartering state even when a corporation has few or no other ties to

---

33. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301 (AM. LAW INST. 1971) ("The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties."); *see also* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) ("[T]he law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. . . . Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue." (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301)).

34. *See, e.g.*, Greenfield, *supra* note 3, at 136 (contrasting the internal affairs doctrine "with conflict-of-laws principles that apply in all other areas of law"); Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 62 (2005) ("The Internal Affairs Doctrine . . . eliminates the usual choice of law rule that a state applies its own law to its citizens and to economic activity within its boundaries." (citations omitted)).

35. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (AM. LAW INST. 1971) (instructing courts to apply "local law of the state of incorporation" to internal affairs), *with id.* § 6 (instructing courts to weigh various factors to ascertain which state has the most significant relationship to the parties and transaction at issue).

36. *See* cases cited *supra* note 6.

that state and conducts its business entirely elsewhere.[37] Although originally judge-made,[38] today the doctrine is codified in the corporate law statutes of many,[39] but not all,[40] states.

The scope of the doctrine, however, has never been precisely defined by statutes or caselaw.[41] For example, the Model Business Corporation Act uses the term "internal affairs" to codify the doctrine, but does not further define what the term means.[42] The U.S. Supreme Court has described a corporation's internal affairs in general terms to encompass "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[43] The Restatement (Second) of Conflicts of Laws likewise defines corporate internal affairs as "the relations *inter se* of the corporation,

---

37. *See, e.g.*, Greenfield, *supra* note 3, at 136 ("[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."); Stevens, *supra* note 31, at 1049 ("No matter how attenuated a corporation's contacts with the incorporating state, nor how significant its contacts with non-incorporating states, the incorporating state will have the exclusive authority to regulate the corporation's internal affairs." (citations omitted)).

38. *See* McDermott Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987) (observing that the doctrine was "developed by courts"); Jacobs, *supra* note 25, at 1157 ("The internal affairs doctrine is a judge-made choice-of-law rule . . . ."); *see also* Tung, *supra* note 4, at 65–68 (providing a historical account of the doctrine's judicial evolution).

39. *See, e.g.*, MODEL BUS. CORP. ACT § 15.01(a) (AM. BAR ASS'N 2016) ("The law of the jurisdiction of formation of a foreign corporation governs . . . the internal affairs of the foreign corporation . . . ."); *see also* DeMott, *supra* note 13, at 163 (stating that about half of the states have adopted provisions derived from the Model Business Corporation Act).

40. *See* DeMott, *supra* note 13, at 163–65 (observing that some states have not adopted the relevant language from the Model Business Corporation Act and that California and New York, in particular, have enacted statutes purporting to regulate the internal affairs of foreign corporations within their respective jurisdictions).

41. *See, e.g.*, Fisch & Solomon, *supra* note 24, at 500, 503 (noting that "the scope of the internal affairs doctrine . . . remain[s] somewhat unclear" and that "neither courts nor commentators have developed a satisfactory definition of the internal affairs doctrine"). Professors Fisch and Solomon further argue that "the internal affairs doctrine is critically intertwined with the norm of shareholder primacy." *See id.* at 503. Specifically, "the internal affairs doctrine applies to rules governing the *economic* relationships among shareholders, officers and directors. . . . [Consequently,] rules addressed to issues of general social welfare and the rights of third-party stakeholders fall outside the parameters of the internal affairs doctrine." *Id.*

42. *See supra* note 39 and accompanying text.

43. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).

its shareholders, directors, officers or agents."[44] And the Delaware Supreme Court, for its part, has embraced in its precedents definitions of internal corporate affairs that closely echo both the U.S. Supreme Court[45] and the Restatement.[46]

Whatever the precise scope of "internal affairs" may be, the doctrine clearly provides that if a dispute involves an internal corporate affair, the laws of the chartering state govern the dispute.[47] And that is true regardless of the forum adjudicating the dispute. By focusing solely on the state of incorporation, the doctrine represents a significant exception to typical choice-of-law principles,[48] which provide that the laws of the state with the greatest interest in regulating the relevant parties or transactions govern.[49]

The standard rationale given for this exception to typical choice-of-law principles is the critical need for certainty and uniformity for corporations and their managers and shareholders.[50] Without the

---

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 cmt. a (AM. LAW INST. 1971). As examples, the Restatement lists the following: (i) the requirements for incorporation; (ii) the election or appointment of corporate directors and officers; (iii) the adoption of bylaws; (iv) the amendment of a charter or bylaws; (v) the issuance of corporate shares; (vi) shareholders' rights to vote shares; (vii) shareholders' right to inspect corporate records; and (viii) mergers, consolidations, or reorganizations, including the reclassification of corporate shares. *Id.* § 313 cmt. c.

45. *See* McDermott Inc. v. Lewis, 531 A.2d 206, 214 (Del. 1987) ("Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." (citing *Edgar*, 457 U.S. at 645)). Elaborating on the distinction between internal versus external affairs, the *McDermott* court observed: "It is essential to distinguish between acts which can be performed by both corporations and individuals, and those that activities which are peculiar to the corporate entity." *Id.*

46. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders." (citing *McDermott*, 531 A.2d at 214)). The court also discusses the definition provided in the Restatement. *See id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301 (AM. LAW INST. 1971)).

47. *See* cases cited *supra* note 6.

48. *See* Greenfield, *supra* note 3, at 137 (describing the internal affairs doctrine as a "special case" in the broader conflict-of-laws context); Greenwood, *supra* note 7, at 382 (describing the doctrine as an "anomaly" and "quite contrary to ordinary choice of law rules.").

49. *See* sources cited *supra* notes 32–33.

50. *See, e.g.*, First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) ("Application of [the chartering state's] law[s] achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation." (citations omitted)); Shaffer

internal affairs doctrine, there would be uncertainty for any corporation that has offices, operations, or shareholders in multiple states.[51] Because states have conflicting corporate laws,[52] shareholders in one state may claim different rights than shareholders in another.[53] And corporate managers may find themselves in the untenable position of being subject to conflicting obligations under different states' laws.[54] The internal affairs doctrine avoids the potential for conflict and uncertainty by providing a clear and easily administrable rule.[55] Only one state's laws govern the

---

v. Heitner, 433 U.S. 186, 215 n.44 (1977) ("The rationale for the [doctrine] . . . appears to be based . . . on the need for a uniform and certain standard to govern the internal affairs of a corporation . . . ."); *VantagePoint*, 871 A.2d at 1113 ("By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation." (citation omitted)); *McDermott*, 531 A.2d at 216 (observing that the doctrine "facilitates planning and enhances predictability" (quoting P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 98)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. e (AM. LAW INST. 1971) (citing the need for "certainty, predictability and uniformity of result" and the "protection of the justified expectations of the parties" as rationales); Tung, *supra* note 4, at 40 ("The standard rationales for the doctrine . . . seem simple and straightforward: the doctrine offers predictability for firms and their investors; it offers uniform treatment of all shareholders; it vindicates the parties' choice of law."). *But see* Buccola, *supra* note 3, at 349–55, 360 (arguing that the standard rationales fail to justify the doctrine's existence and positing an alternative justification based on capital lock-in).

51. *See, e.g.*, *VantagePoint*, 871 A.2d at 1114 ("[A]pplication of local internal affairs law . . . to a foreign corporation . . . is 'apt to produce inequalities, intolerable confusion, and uncertainty . . . .'" (quoting *McDermott*, 531 A.2d at 216)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. e ("[I]t would be impractical to have matters . . . involv[ing] a corporation's organic structure or internal administration[] governed by different laws. It would be impractical, for example, if an election of directors, an issuance of shares, a payment of dividends, a charter amendment, or a consolidation or reorganization were to be held valid in one state and invalid in another."); Park, *supra* note 27, at 131 ("Corporate law would be unworkable if the law of each of the fifty states defined a corporation's governance rules.").

52. *See, e.g.*, DeMott, *supra* note 13, at 172–79 (highlighting variation in corporate law between states).

53. *See, e.g.*, Tung, *supra* note 4, at 40 ("[S]hares of stock within the same class are meant to enjoy identical rights. Disputes among corporate managers and shareholders would therefore seem to be an area where the same substantive rules must apply across the board.").

54. *See, e.g.*, *id.* ("Different laws to govern identical disputes could place the parties in untenable positions.").

55. *See, e.g.*, Atherton v. F.D.I.C., 519 U.S. 213, 224 (1997) ("The internal affairs doctrine . . . seeks only to avoid conflict by requiring that there be a single point of legal reference."); Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) ("The internal affairs

internal affairs of a corporation: the chartering state. Wherever located, shareholders have the same legal rights associated with their shares, and corporate managers are subject to a single set of legal duties.[56]

Naturally, one consequence of this clear and easily administrable rule is that it gives the chartering state's corporate law the potential for extraterritorial reach.[57] The chartering state's law governs the relationships among and between the corporation, its managers, and

---

doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands." (citation omitted)); Nagy v. Riblet Prods. Corp., 79 F.3d 572, 576 (7th Cir. 1996) ("A single rule for each corporation's internal affairs reduces uncertainty and the prospect of inconsistent obligations; it also enables the corporate venturers to adjust the many variables of corporate life . . . confident that they can predict the legal effect of these choices."); *VantagePoint*, 871 A.2d at 1112–13 ("The internal affairs doctrine developed on the premise that, in order to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions." (citing *Edgar*, 457 U.S. at 645)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. e (citing the "ease in the application" of the internal affairs doctrine as a justification for the rule); DeMott, *supra* note 13, at 161 (articulating as a justification for the doctrine the fact that "[t]he identity of [the chartering] . . . state is . . . more readily ascertainable and more constant than other states with which the corporation and its constituents may have entanglements"); Park, *supra* note 27, at 132 ("Designating the state of incorporation as providing the governing rule provides a clear answer to the choice-of-law issue." (footnote omitted)).

56. *See, e.g.*, Resolution Tr. Corp. v. Chapman, 29 F.3d 1120, 1122 (7th Cir. 1994) ("The internal affairs doctrine recognizes the benefits of using one rule of law to determine the duties and liability of directors and officers whose firm may do business in many states."); *McDermott*, 531 A.2d at 216 (observing that the doctrine "serves the vital need for a single, constant and equal law to avoid the fragmentation of continuing, interdependent internal relationships" within a corporation (quoting P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 98)); Newell Co. v. Petersen, 758 N.E.2d 903, 923 (Ill. App. Ct. 2001) ("The need for the inner workings of a corporation to be governed by a single body of laws has been frequently emphasized by state and federal courts alike."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. e ("Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law.").

57. *See* Greenfield, *supra* note 3, at 137 (observing that "[t]he key problem [created by the doctrine] 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"); Jacobs, *supra* note 25, at 1159 ("Extraterritoriality is an unavoidable consequence of the internal affairs doctrine."); LoPucki, *supra* note 9, at 2112 ("The effect of the internal affairs doctrine is that each state can regulate extraterritorially with regard to its own corporations but must yield to other states' extraterritorial regulation of their corporations.").

shareholders, even if some or all of those parties reside outside of the chartering state's boundaries.[58]

Extraterritorial reach, however, was not a particularly salient concern when courts first articulated the internal affairs doctrine in the middle of the nineteenth century.[59] At that time, a corporate charter required a special act of a state legislature and, consequently, corporations were in many respects a mere instrumentality of the chartering state.[60] Even when states later adopted general incorporation statutes, enabling any private individual to obtain a corporate charter without special legislative action, restrictive statutory provisions ensured that corporations chartered by a state were largely confined within the boundaries of that state.[61] By the late nineteenth century, however, states following New Jersey's lead liberalized their general incorporation statutes to enable a business without any meaningful ties to the state to incorporate under the state's statute.[62] Despite this dramatically altered legal landscape, judicial adherence and legislative acquiescence to the internal affairs doctrine has largely continued.[63]

B. Delaware's Dominance in Corporate Law

Because a corporation can be incorporated in any state, regardless of whether the corporation has a physical presence in that state, the internal affairs doctrine means that business planners can effectively choose which state's corporate law will govern the relationship

---

58. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. g (commenting that although "[t]he reasons for applying the local law of the state of incorporation carry less weight when the corporation has little or no contact with this state other than the fact that it was incorporated there," courts in such cases still "almost invariably" apply the internal affairs doctrine); Greenfield, *supra* note 3, at 138 ("[T]he 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.").

59. *See* Tung, *supra* note 4, at 37 ("[H]istorical analysis reveals that the doctrine's origin had nothing to do with regulatory competition. The doctrine emerged before state charter competition did, at a time when firms had little choice about where to incorporate. Firms ordinarily incorporated in their home states—where their operations were located and where their organizers lived.").

60. *See id.* at 46–56.

61. *See id.* at 56–65.

62. *See id.* at 74–84.

63. *See id.* at 84–96 (providing a historical explanation for continued adherence to the internal affairs doctrine).

between the corporation, its shareholders, officers, and directors.[64] This ability to choose the law that will govern a corporation's internal affairs has given rise to what scholars describe as a regulatory competition among states.[65] States compete to provide the best corporate law and judicial system to attract businesses to incorporate in-state.[66] By attracting incorporations, states reap the chartering fees and annual franchise taxes that are charged to their domestic corporations and generate business for local attorneys.[67]

Academics have long debated whether the regulatory competition among states has resulted in a race to the top, in which states compete to provide corporate laws that most efficiently and equitably balance shareholder rights with managerial prerogatives,[68] or a race to the bottom, in which states compete to provide corporate laws that favor managers at the expense of shareholders and all other corporate

64. *See, e.g.*, Greenfield, *supra* note 3, at 136 ("[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."); Greenwood, *supra* note 34, at 60–62 (noting that "[t]he Internal Affairs Doctrine gives corporations, unlike human citizens, the right to choose their own law" because "corporations may incorporate anywhere they choose, with no requirement of any other relationship with the incorporating state"); Park, *supra* note 27, at 131 ("This doctrine allows a corporation to choose one set of corporate law rules rather than being subject to the law of any state or country where it may operate." (footnote omitted)).

65. *See, e.g.*, Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 681 (2002) ("State competition for incorporations is . . . viewed as a textbook example of regulatory competition."); Tung, *supra* note 4, at 44 ("Courts' deference to the law of the incorporating state has enabled regulatory competition only because a firm may incorporate under the law of any state to do business in every state.").

66. *See* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1206–07, 1210 (2001) ("According to conventional wisdom, states compete in the market for incorporations by tailoring their laws to the taste of corporate decision makers.").

67. *See, e.g.*, Kahan & Kamar, *supra* note 65, at 687 ("According to conventional wisdom, the[] benefits [from charter competition] emanate primarily from franchise taxes assessed on incorporated firms, and secondarily from legal business generated by incorporations."); Subramanian, *supra* note 30, at 1803 ("States compete to have companies incorporated within their boundaries in order to maximize their corporate charter revenues." (footnote omitted)).

68. *See, e.g.*, Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 533, 555 (2001) (providing empirical support for the "race to the top" thesis); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 251–52 (1977) (articulating the original "race to the top" thesis).

constituencies.[69] More recently, many scholars have questioned whether the notion of a jurisdictional "race" is altogether misconceived.[70]

What is uncontroversial, however, is that in the competition for corporate charters, Delaware has been the preferred legal domicile for American businesses since the beginning of the twentieth century.[71] As noted at the outset, the preference for Delaware is pronounced among publicly traded corporations, a majority of which are chartered in Delaware.[72] This preference seems to be even more intense for new public companies: 93% of corporations engaged in an initial public stock offering between 2013 and 2017 were incorporated in Delaware.[73] And evidence suggests that even private companies flock to Delaware.[74]

---

69. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (articulating the original "race to the bottom" thesis); Subramanian, *supra* note 30, at 1798–1800 (providing empirical support for the "race to the bottom" thesis).

70. *See, e.g.*, Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 257–79 (2009) (arguing that the prevailing state competition debate conflates state competition for corporate charters and managerial competition for scarce capital); Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 662 (2018) (arguing that the sophistication of the law firm counseling a company or a company's demographics, rather than other factors like quality of a state's corporate law, drives incorporation decisions); Anderson IV & Manns, *supra* note 9, at 1105 (arguing that Delaware's dominance in corporate law is a consequence of "lawyer herding and path dependency" rather than the quality or value of the state's corporate law); Bebchuk & Hamdani, *supra* note 9, at 556 (arguing that no state other than Delaware actively competes for corporate charters); Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 SAN DIEGO L. REV. 273, 276–77 (2015) (arguing that the popularity of Delaware law stems from its familiarity, rather than the quality of the state's law); Kahan & Kamar, *supra* note 65, at 684 (arguing that no state other than Delaware actively competes for corporate charters); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 598 (2003) (arguing that the state competition debate is misconceived because it neglects the pervasive role of the federal government).

71. *See, e.g.*, William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 2–4 (recounting the history of Delaware corporate law's rise to dominance).

72. *See supra* notes 9–10 and accompanying text.

73. *See* WILMER CUTLER PICKERING HALE & DORR LLP, 2018 IPO REPORT 8 (2018), https://www.wilmerhale.com/en/insights/publications/2018-ipo-report.

74. *See* Anderson, *supra* note 70, at 674–76 (finding, based on a dataset of Form D filings, that 64% of private companies are incorporated in Delaware versus 30% incorporated in their home state); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 81–82,

Businesses are so attracted to Delaware that they are willing to pay a significant premium above what other states charge for a corporate charter.[75] Indeed, today the largest companies pay Delaware up to $250,000 in franchise taxes annually for the simple privilege of being a Delaware corporation.[76] These franchise taxes, in turn, have been a significant financial boon to the state. In 2018, Delaware's franchise taxes from domestic corporations exceeded $856 million,[77] a figure that equals almost a fifth of the state's entire revenue[78] or approximately $2400 for each Delaware household.[79]

Of course, very few of the corporations chartered in Delaware conduct significant business activities in or have other ties to the state.[80] Delaware is a tiny state, the second smallest in the nation, with approximately 0.3% of the U.S. population[81] and contributing 0.3% to the nation's overall economy.[82] Although two-thirds of the companies in the Fortune 500 are incorporated in Delaware, only three of those companies are actually headquartered in the state.[83] Instead, practically all Delaware corporations conduct business almost entirely outside of the state's borders.[84]

---

106 (2011) (finding, based on a different dataset, a similar preference among larger private companies).

75. *See* Bebchuk & Hamdani, *supra* note 9, at 582–83; Kahan & Kamar, *supra* note 66, at 1219–21 (explaining the "[u]niqueness" of Delaware's franchise tax).

76. *See* DEL. CODE ANN. tit. 8, § 503(c)(4) (2018) (reflecting an increase in Delaware's maximum annual franchise tax from $180,000 to $250,000 in 2017); *see also* H.B. 175, 149th Gen. Assemb., Reg. Sess. (Del. 2017) (same).

77. *See* DEL. OFFICE OF MGMT. & BUDGET, GOVERNOR'S BUDGET FINANCIAL SUMMARY AND CHARTS: FISCAL YEAR 2020, at 7 (2020), https://budget.delaware.gov/budget/fy2020/documents/operating/financial-summary.pdf.

78. *See id.* (stating net revenues of $4.393 million for 2018).

79. *See QuickFacts Delaware; United States*, *supra* note 8 (estimating 357,765 households in Delaware as of 2018).

80. *See, e.g.*, Greenfield, *supra* note 3, at 136 ("Of the thousands of corporations incorporated . . . [in Delaware], only a few have significant numbers of employees or shareholders in the state. . . . The three hundred largest companies incorporated in Delaware employ over 15 million people, only an infinitesimal fraction of whom actually reside there.").

81. *See QuickFacts Delaware; United States*, *supra* note 8 (estimating a population of 973,764 as of 2019).

82. *See* U.S. DEP'T OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, NEWS RELEASE 2 (2019), https://www.bea.gov/system/files/2019-04/qgdpstate0519_4.pdf.

83. *See Search Fortune 500*, FORTUNE, https://fortune.com/fortune500/2019/search/?hqstate=DE&rank=asc (last visited May 10, 2020) (providing the three companies headquartered in Delaware as of May 2020).

84. *See* sources cited *supra* note 9.

Yet, despite Delaware's small size and economy, the internal affairs doctrine has enabled the state to play a uniquely consequential role in corporate America.[85] Because of the doctrine, the rules of corporate governance for most of the nation's largest businesses are defined by Delaware, specifically by the Delaware General Corporation Law (DGCL) and the sprawling and nuanced common law developed by the state's highly respected judges.[86]

C. Delaware's Assertive Application of the Doctrine

Because the internal affairs doctrine is integral to Delaware's entire corporate law enterprise, it is unsurprising that Delaware courts have embraced a particularly unbending and assertive interpretation of doctrine.[87] The two leading Delaware precedents are *McDermott Inc. v. Lewis*[88] and *VantagePoint Venture Partners 1996 v. Examen, Inc.*[89] Each decision demonstrates, in its own way, how the Delaware courts have invoked the internal affairs doctrine to jealously protect Delaware's lucrative regulatory domain from interference by other states.[90]

---

85. *See* sources cited *supra* note 7.

86. *See, e.g.*, John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1381 (2012) ("Delaware's . . . judges are often characterized as an elite judicial corps that engages in principled lawmaking, thus enhancing Delaware's legitimacy as a standard-setter for corporate law." (citation omitted)); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064, 1072–96 (2000) (describing the unusual characteristics of the Delaware courts and the unique role the courts play in Delaware's success for corporate charters); William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 586–97 (describing, from a practitioner perspective, the "genius" of the Delaware judiciary in using "traditional common law methods to recreate and improve the policymaking toolbox of a regulatory agency").

87. *See* Stevens, *supra* note 31, at 1066 (observing that Delaware courts apply the doctrine as a "categorical rule" and that "[a] Delaware court has never permitted a foreign state to regulate . . . the internal affairs of a corporation not chartered within that state" (citations omitted)).

88. McDermott Inc. v. Lewis, 531 A.2d 206, 217 (Del. 1987).

89. VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1117 (Del. 2005).

90. *See* Glynn, *supra* note 7, at 104–15 (arguing that that the Delaware courts' use of the internal affairs doctrine is motivated by a desire to protect the state's lucrative corporate chartering business); Stevens, *supra* note 31, at 1084–86 (same). In other contexts, scholars have frequently observed that the Delaware judiciary is motivated to protect the state's corporate law dominance. *See, e.g.*, Armour et al., *supra* note 86, at 1381–83; LoPucki, *supra* note 9, at 2142. Scholars have also recognized that Delaware judges have an even more self-interested reason to maintain Delaware's

1. *McDermott Inc.*

In *McDermott*, the court confronted a relatively obscure question: whether a Delaware-chartered subsidiary of a parent corporation chartered in Panama could vote the shares that the subsidiary held in its parent.[91] Although the corporate law of no U.S. jurisdiction (including Delaware) permits this kind of circular voting arrangement, it was permitted under the corporate law of Panama.[92]

McDermott is peculiar because it is essentially an advisory opinion.[93] As the court recognized, the parties' dispute had become moot by the time the court had rendered its decision.[94] Nevertheless, the case presented the court with a rare opportunity to squarely address the internal affairs doctrine, which the court described as a "question . . . of public importance" and a "major tenet of Delaware corporation law."[95] Moreover, the court was faced with a chancery court opinion that had declined to apply Panamanian law,[96] relying in part on a federal court precedent that under similar facts raised doubts about the internal affairs doctrine more broadly.[97] In light of these circumstances, the Delaware Supreme Court concluded that it could not pass on the opportunity.[98] "Given the importance of this

---

corporate law dominance, namely the "power and prestige [that] might wane if . . . Delaware state courts [c]ould not exercise jurisdiction over as many high-profile disputes." Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 643 (2004).

91. *McDermott*, 531 A.2d at 208.

92. *Id.* at 208, 212.

93. Although the court in *McDermott* asserted that "[n]ormally, we decline to decide moot issues," *id.* at 211, in fact Delaware courts—including the Delaware Supreme Court—routinely indulge in dicta to address matters unnecessary to the resolution of disputes. *See* Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 53–62 (2013) [hereinafter *Damning Dictum*]; Mohsen Manesh, *Defined by Dictum: The Geography of Revlon-Land in Cash and Mixed Consideration Transactions*, 59 VILL. L. REV. 1, 16–19, 28–33 (2014).

94. *McDermott*, 531 A.2d at 211.

95. *Id.* at 209, 211.

96. *See* Lewis v. McDermott Inc., Nos. 7034 & 7044, 1986 WL 7863, at *4 (Del. Ch. July 17, 1986) (citing Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir. 1984)), *rev'd*, 531 A.2d 206 (Del. 1987).

97. *See id.*; *see also Norlin Corp.*, 744 F.2d at 263 ("We are not so certain, however, that a New York court would apply the internal affairs rule and decide this case by reference to Panama law.").

98. *McDermott*, 531 A.2d at 211 ("[W]here the question is of public importance, and its impact on the law is real, this Court has recognized an exception to" the practice of declining to decide moot issues. (citing Darby v. New Castle Gunning Bedford Educ. Ass'n, 336 A.2d 209, 209 n.1 (Del. 1975))).

matter to Delaware corporation law, . . . we are compelled to decide this case based on the facts presented to the trial court."[99]

Then in unequivocal terms, the court stated: "Delaware's well established conflict of laws principles require that the laws of the jurisdiction of incorporation—here the Republic of Panama—govern this dispute."[100] In adhering to the internal affairs doctrine, the court articulated the standard rationale given for its existence.[101] The doctrine "serves the vital need for a single, constant[,] and equal law" to govern the corporation.[102] Thus, the court continued, the doctrine "facilitates planning and enhances predictability."[103] Any failure to strictly adhere to the doctrine "is apt to produce inequalities, intolerable confusion, and uncertainty" for the corporation and its managers and shareholders.[104] Based on these policy considerations, the court criticized, at length, decisions in other jurisdictions that failed to obey the doctrine.[105]

Beyond justifying the doctrine on policy grounds, however, the *McDermott* court also held that the doctrine is mandated by the U.S. Constitution.[106] Citing the Commerce Clause and the Fourteenth Amendment's Due Process Clause, the court asserted that all courts, in every U.S. jurisdiction, are constitutionally required to apply the laws of the state in which a corporation is chartered to resolve any disputes involving the corporation's internal affairs.[107] Under the

---

99. *Id*. at 212.

100. *Id*. at 215 (citations omitted).

101. *See supra* notes 50–56 and accompanying text.

102. *McDermott*, 531 A.2d at 216 (quoting P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 98)).

103. *Id*.

104. *Id*.

105. *See id.* at 214–17 (criticizing Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984); W. Air Lines, Inc. v. Sobieski, 12 Cal. Rptr. 719 (Cal. Dist. Ct. App. 1961)).

106. *See id.* at 217 ("[W]e conclude that application of the internal affairs doctrine is mandated by constitutional principles, except in 'the rarest situations.'" (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90 (1987))). *But see* Jed Rubenfeld, *State Takeover Legislation and the Commerce Clause: The Foreign Corporations Problem*, 36 CLEV. ST. L. REV. 355, 357 (1988) (refuting *McDermott*'s conclusion that the internal affairs doctrine is constitutionally mandated).

107. *See McDermott*, 531 A.2d at 216. In addition to the Constitution's Commerce Clause and the Due Process Clause, the *McDermott* court also cited the Full Faith and Credit Clause as a constitutional basis for the internal affairs doctrine. *See id*. at 216, 218. But as the *McDermott* court conceded, noting its own "lingering uncertainties" on the issue, there is serious reason to doubt the Full Faith and Credit Clause requires adherence to the internal affairs doctrine. *See id.* at 218; Rubenfeld, *supra* note 106,

Commerce Clause, the court explained, any state's failure to strictly adhere to the internal affairs doctrine would place an excessive and, therefore, impermissible burden on interstate commerce because it would subject a corporation's internal governance to the potentially inconsistent corporate laws of multiple states.[108] Regarding the Due Process Clause of the Fourteenth Amendment, the court continued, "[w]ith the existence of multistate and multinational organizations, directors and officers have a [constitutionally protected due process] right . . . to know what law will be applied to their actions."[109]

Although *McDermott* did not address the internal affairs of a Delaware corporation, the supreme court's message was clear: Delaware staunchly adheres to the internal affairs doctrine and so too should other states. Indeed, it is constitutionally mandated. As a result, no state may interfere with internal affairs of a Delaware corporation—something that is Delaware's exclusive domain.

2. *VantagePoint Venture Partners*

Unlike *McDermott*, *VantagePoint* did involve the internal affairs of a Delaware corporation.[110] Thus, *VantagePoint* more transparently illustrates how Delaware courts employ the internal affairs doctrine to protect state's regulatory domain from incursions by other states.[111] And it does so in a context that bears striking similarity to the recent controversy created by California's new gender diversity statute.

VantagePoint involved section 2115 of California's Corporations Code.[112] First adopted in 1977, section 2115 applies to any foreign

---

at 358–59. Reflecting this reality, the Delaware Supreme Court seems to have retreated from the assertion, omitting any reference to the Full Faith and Credit Clause in its subsequent *Vantagepoint* decision. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005).

108. *See McDermott*, 531 A.2d at 217. *But see* Rubenfeld, *supra* note 106, at 355–74 (explaining that the internal affairs doctrine is not required by the Commerce Clause).

109. *See McDermott*, 531 A.2d at 216.

110. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1110–11 (Del. 2005).

111. *See* Glynn, *supra* note 7, at 108 (arguing that *VantagePoint* represents Delaware's response to the threat of "regulatory 'intrusions' by other states into the internal affairs of Delaware firms"); Stevelman, *supra* note 7, at 84–88 (arguing that "*VantagePoint* . . . speaks volumes . . . about Delaware's concern for protecting its stature in corporate law" from incursions by other states).

112. *VantagePoint*, 871 A.2d at 1109–10; *see* CAL. CORP. CODE § 2115 (West 2020).

corporation that (i) is not publicly traded,[113] (ii) conducts more than half its business within California,[114] and (iii) has more than half of its outstanding voting shares held by residents of the state.[115] Under section 2115, a foreign corporation that meets these criteria is subject to "a fairly broad range" of governance provisions found elsewhere in California's Corporations Code,[116] including various provisions relating to shareholder rights, that normally apply to only California domestic corporations.[117] These various governance provisions apply "to the exclusion of the law of the jurisdiction in which [the foreign corporation] is incorporated."[118] Thus, section 2115 purports to override the internal affairs doctrine with respect to a narrowly tailored class of foreign corporations that have significant ties to California.[119]

The specific issue in *VantagePoint* concerned whether the rights of shareholders in a Delaware corporation to vote on a particular transaction was governed by Delaware law, as the internal affairs doctrine would dictate, or by California law pursuant to section 2115.[120] Surprising no one, the Delaware Supreme Court sided with Delaware law.[121]

In justifying its application of Delaware law, the Delaware Supreme Court described the internal affairs doctrine in maximalist terms, asserting that "both state and federal courts ha[ve] consistently . . . appl[ied] the law of the state of incorporation to the

---

113. *See* CAL. CORP. CODE § 2115(c) (exempting any corporation with publicly listed shares).

114. *See id*. § 2115(a)(1) (using property, payroll, and sales factors to measure a corporation's in-state business).

115. *See id*. § 2115(a)(2).

116. *See* Demott, *supra* note 13, at 165 ("Nonexempt foreign corporations falling within the outreach effect of the California statute are subject to a fairly broad range of internal affairs provisions.").

117. *See* CAL. CORP. CODE § 2115(b).

118. *Id*.; *see also* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1114 (Del. 2005) ("If the factual conditions precedent for triggering section 2115 are established, many aspects of a corporation's internal affairs are purportedly governed by California corporate law to the exclusion of the law of the state of incorporation.").

119. *See* Jacobs, *supra* note 25, at 1161 (observing that statutes like California's section 2115 "legislatively overrule the internal affairs doctrine and impose their own, often different, internal governance requirements upon foreign corporations").

120. *VantagePoint*, 871 A.2d at 1111–12.

121. *See id*. at 1116.

'*entire gamut* of internal corporate affairs.'"[122] With respect to shareholder voting rights specifically, the court continued, "disputes concerning a shareholder's right to vote fall squarely within the purview of the internal affairs doctrine."[123] The court then, echoing *McDermott*, recited the doctrine's standard policy rationale and "constitutional underpinnings."[124] Given these considerations, the court held, "well-established choice of law rules and the federal constitution mandate[] that [a corporation's] internal affairs, and in particular, [shareholders'] voting rights, be adjudicated exclusively in accordance with the law of its state of incorporation, in this case, the law of Delaware."[125] Left unsaid, but clearly inferred from this holding, was that California's attempt through section 2115 to regulate the internal affairs of corporations chartered in Delaware or elsewhere is unconstitutional and, therefore, invalid.[126]

Notably, both scholars and practitioners have questioned the court's repeated assertions that the internal affairs doctrine is constitutionally mandated.[127] And in any case, the Delaware Supreme Court's "parochially motivated"[128] interpretation of the federal

---

122. *Id*. at 1113 (emphasis added) (quoting McDermott Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987)).

123. *Id*. at 1115 (citing Rosenmiller v. Bordes, 607 A.2d 465, 468–69 (Del. Ch. 1991)).

124. *See id*. at 1113–15 (quoting *McDermott*, 531 A.2d at 209).

125. *See id*. at 1116 (citations omitted).

126. Interestingly, although the plaintiffs argued that "Delaware either must apply the [California] statute if California can validly enact it, or hold the statute unconstitutional if California cannot," the Delaware Supreme Court refused to expressly hold the statute unconstitutional. *Id.* at 1112.

127. *See, e.g.*, Norwood P. Beveridge, Jr., *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW. 693, 709 (1988) ("If the best case for the constitutional underpinning of the internal affairs doctrine . . . was made in *McDermott Inc. v. Lewis* . . . , that case is not very compelling."); Glynn, *supra* note 7, at 117–123 (arguing that the constitutional assertions made in *VantagePoint* are "transparently self-interested . . . [,] cursory and dubious"); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 716–18 (arguing that the internal affairs doctrine "never has been entitled to constitutional protection, including during the period when the [doctrine] was developed" and "[i]t is even clearer that no such protection exists today to account for the continued viability of the [doctrine]"); Rubenfeld, *supra* note 106, at 355–74 (providing a comprehensive constitutional analysis); Tung, *supra* note 4, at 69–74 (concluding that no historical evidence suggests that when states first articulated the internal affairs doctrine they viewed the doctrine as constitutionally mandated).

128. Tung, *supra* note 4, at 42 n.29 (describing the *McDermott* court's constitutional assertions as "a bit of perhaps parochially motivated piling on"); *see also*

Constitution is not binding on state courts elsewhere or any federal court.[129] Nevertheless, the internal affairs doctrine is widely accepted among states.[130] And it is because of the doctrine that Delaware is even relevant to most American businesses.[131]

II. NEW FRONTIERS IN INTERNAL AFFAIRS

As *McDermott* and *VantagePoint* show, Delaware courts have relied on the internal affairs doctrine to protect Delaware's lucrative regulatory province from encroachment by other states. Based on these precedents, Delaware's response to California's new gender diversity statute is entirely predictable. As explained in Section A below, the inevitable response of the Delaware courts will be that board composition is an internal corporate affair and, therefore, California's statute is invalid as applied to Delaware corporations. Such an application of the internal affairs doctrine will be consistent with *McDermott* and, especially, *VantagePoint* and in that sense unremarkable.

But as detailed in Section B, the Delaware Court of Chancery in *Sciabacucchi* applies the internal affairs doctrine differently. In ruling that shareholder rights under federal securities law may not be regulated by a corporation's charter or bylaws, *Sciabacucchi* uses the internal affairs doctrine to impose limits on Delaware's regulatory province. Still, when viewed more broadly, even this novel use of the doctrine is consistent with *McDermott* and *VantagePoint*. Like those earlier precedents, *Sciabacucchi* applies the internal affairs doctrine to protect Delaware's regulatory domain from encroachment—not by another state, but by federal law.

A. Gender Diversity on Boards

Laws mandating some form of gender diversity in corporate boardrooms are common in Europe.[132] But before 2018, such laws

---

Glynn, *supra* note 7, at 118 (describing the *VantagePoint* court's constitutional assertions as "transparently self-interested").

129. *See* Glynn, *supra* note 7, at 117 ("Delaware's view of the U.S. Constitution binds no one but Delaware."); Stevelman, *supra* note 7, at 88 ("Delaware's views about the U.S. Constitution cannot bind any state other than Delaware.").

130. *See* cases cited *supra* note 4.

131. *See* sources cited *supra* note 7.

132. *See, e.g.*, Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES (Mar. 6, 2015), https://www.nytimes.com/2015/03/07/world/

were unknown in the United States. Instead, notwithstanding a seemingly widespread consensus that more women should serve of corporate boards,[133] the goal of achieving gender diversity in boardrooms has been left to the private sector to sort out.[134] Yet, despite increasing activism on the issue by institutional shareholders[135] and the proxy advisors,[136] in the absence of a legal mandate, corporations have been shamefully slow to increase the number of women represented on their boards.[137] In 2018, women

---

europe/german-law-requires-more-women-on-corporate-boards.html (describing quotas in Germany and other European nations).

133. *See, e.g.*, Institutional S'holder Servs., Inc., *Gender Parity on Boards Around the World*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 5, 2017), https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/ ("Perhaps no major issue in governance has risen up as ubiquitously across the globe as that of gender diversity in the boardroom. Board diversification has been embraced in principle by members of the issuer and investor communities alike . . . .").

134. *See, e.g.*, Mikayla Kuhns et al., *California Dreamin': The Impact of the New Board Gender Diversity Law*, CLS BLUE SKY BLOG (Jan. 4, 2019), http://clsbluesky.law.columbia.edu/2019/01/04/california-dreamin-the-impact-of-the-new-board-gender-diversity-law/ (observing that in the absence of any legal mandates in the United States, the increase representation of female directors has been "primarily driven by private ordering through company-shareholder engagement, shareholder proposals, and an increasing number of large asset managers adopting voting policies emphasizing board gender diversity").

135. *See, e.g.,* BLACKROCK INV. STEWARDSHIP, CORPORATE GOVERNANCE AND PROXY VOTING GUIDELINES FOR U.S. SECURITIES 5 (2020), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf ("In addition to other elements of diversity, we encourage companies to have at least two women directors on their board."); Justin Baer, *State Street Votes Against 400 Companies Citing Gender Diversity*, WALL ST. J. (July 25, 2017, 8:38 PM), https://www.wsj.com/articles/state-street-votes-against-400-companies-citing-gender-diversity-1501029490.

136. *See, e.g.*, GLASS LEWIS, 2020 PROXY PAPER GUIDELINES, UNITED STATES 15–16 (2020), https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf ("Regarding the nominating committee, we will consider recommending that shareholders vote against the following: . . . the nominating committee chair when the board has no female directors and has not provided sufficient rationale or disclosed a plan to address the lack of diversity on the board."); ISS, UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 11 (2019), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf ("For companies in the Russell 3000 or S&P 1500 indices, generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies when there are no women on the company's board.").

137. In 2016, based on the then-current rate of growth in female board representation, Equilar predicted it would take until 2055 for women to achieve gender parity on the boards of the Russell 3000 (composed of the 3000 largest U.S. publicly held companies). Amit Batish, *Russell 3000 Boards on Pace to Achieve Gender Parity*

held less than one in five boards seats in the United States.[138] Among corporations in the Russell 3000, 99% boards are majority male, and 394 boards had no female directors at all.[139] It is in this context that, on September 30, 2018, California became the first state in the nation to enact a law requiring gender diversity on corporate boards.[140]

1. Background

The California legislation mandates a minimum number of female directors on the boards of all publicly held corporations headquartered in the state.[141] All such corporations must have at least one female director by the end of 2019.[142] By the end 2021, and presumably each year thereafter,[143] the minimum number of female directors required by the new statute varies based upon a corporation's total number of board seats.[144] The statute's quotas are summarized in the table below.

---

by 2034, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2019), https://corpgov.law.harvard.edu/2019/04/05/russell-3000-boards-on-pace-to-achieve-gender-parity-by-2034/. In 2018, due to acceleration in the rate of appointment of female directors, Equilar moved up its prediction of board gender parity to 2034. *Id*.

138. *See* 2020 WOMEN ON BDS., GENDER DIVERSITY INDEX 2 (2018), https://2020wob.com/wp-content/uploads/2019/09/2020WOB_GDI_Report_2018_FINAL.pdf (noting that among the Russell 3000 companies, women held 17.7% board seats as of 2018).

139. *See* Jeff Green et al., *Wanted: 3,732 Women to Govern Corporate America*, BLOOMBERG BUSINESSWEEK (Mar. 21, 2019), https://www.bloomberg.com/graphics/2019-women-on-boards/?srnd=premium.

140. *See, e.g.*, Matt Stevens, *California's Publicly Held Corporations Will Have to Include Women on Their Boards*, N.Y. TIMES (Sept. 30, 2018), https://www.nytimes.com/2018/09/30/business/women-corporate-boards-california.html.

141. *See* CAL. CORP. CODE § 301.3(a)–(b) (West 2019) (regulating any "publicly held domestic or foreign corporation whose principal executive offices . . . are located in California").

142. *See id*. § 301.3(a).

143. The statute is not explicit about any mandatory gender quotas after 2021, but the legislative intent is presumably for gender quotas to apply to corporate boards indefinitely.

144. *See id*. § 301.3(b).

By End of Year	*Total Number of Directors*	*Required Minimum Number of Female Directors*
2019	*n/a*	1
2021	4 or less	1
	5	2
	6 or more	3

Importantly, the California statute purports to apply to all corporations headquartered in the state, regardless of where the corporation is chartered.[145] Specifically, the statute applies to every "publicly held domestic or foreign corporation whose principal executive offices . . . are located in California."[146] A corporation's "principal executive offices" is defined under the statue to be the place identified on a corporation's form 10-K filed annually with the U.S. Securities and Exchange Commission (SEC).[147] Failure to comply with the statute results in a fine, to be paid by the corporation, in the amount of $100,000 for the first violation and $300,000 for each subsequent violation,[148] the latter of which roughly equals the median pay for a director in larger corporations.[149]

By any measure, the new California statute is not a model of good drafting. It is rife with ambiguities.[150] And these ambiguities—along

145. *See id.* § 301.3(a)–(b).

146. *Id.*

147. *Id.*

148. *See id.* § 301.3(e).

149. Kosmas Papadopoulos, *Update on U.S. Director Pay*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 6, 2019), https://corpgov.law.harvard.edu/2019/05/06/update-on-u-s-director-pay/ (showing the median total compensation for a director among S&P 500, composed of the 500 largest corporations listed on U.S. stock exchanges, companies to be $285,000).

150. *See, e.g.*, Keith Paul Bishop, *Departing Is Such Sweet Sorrow: Some Things to Consider When You Leave California*, CAL. CORP. & SEC. L. (Oct. 5, 2018), https://www.calcorporatelaw.com/leaving-california-some-things-to-consider; Keith Paul Bishop, *Does California's Gender Quota Law Apply to All Foreign Corporations?*, CAL. CORP. & SEC. L. (Jan. 3, 2019), https://www.calcorporatelaw.com/does-californias-gender-quota-apply-to-all-foreign-corporations; Keith Paul Bishop, *Key Unanswered Questions About California's Gender Quota Law*, CAL. CORP. & SEC. L. (July 18, 2019), https://www.calcorporatelaw.com/key-unanswered-questions-about-californias-gender-quota-law.

with the constitutional questions that any gender-based quota raises[151]—have made the statute easy sport for its critics.[152]

But one facet of the statue is unambiguous: the intent to regulate both "domestic *and foreign* corporations" headquartered in California.[153] That fact is critical because the vast majority of the public corporations headquartered in California are foreign corporations, incorporated elsewhere, specifically Delaware.[154] If the statute was limited to only California-headquartered corporations that are also chartered in California, then its impact would be trivial.[155]

But if all California-headquartered corporations were to comply with the new statute, then it would amount to a "sea change" in corporate governance.[156] According to one analysis, of the approximately 4500 public companies in the United States, 689 have their executive offices in California.[157] As of the new law's passage, nearly one-third of those corporations lack any female directors.[158] By the end of 2021, 199 corporations would need to add at least one female director, 276 would have to appoint at least 2, and 136 would need to appoint at least 3 female directors to be in compliance with the new law.[159] Full compliance with the statute would mean that by the end of 2021, women would hold more than double the board seats

---

151. Although beyond the scope of this Article, it merits noting that the primary arguments made against California's new statute have been that a gender-based quota violates the Constitution's Equal Protection Clause. *See, e.g.*, Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, at 6–8 (Rock Ctr. for Corp. Governance, Stanford Law Sch., Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791; McGreevy, *supra* note 1 (reporting that California's "legislation is opposed by more than 30 business groups, including the California Chamber of Commerce, which said it appears to violate existing law and the state and U.S. constitutions").

152. *See* sources cited *supra* note 150.

153. *See* CAL. CORP. CODE § 301.3(a)–(b) (West 2019) (emphasis added).

154. *See* LoPucki, *supra* note 9, at 2112 (citing data showing that 1210 public companies are headquartered in California, but only 112 are incorporated in the state); Green et al., *supra* note 139 ("Most Russell 3000 companies are incorporated in Delaware, including 83 percent of those headquartered in California.").

155. *See* Grundfest, *supra* note 151, at 4–6.

156. *See* Green et al., *supra* note 139.

157. *See* Kuhns et al., *supra* note 134.

158. *See id.* The figure is even more dismal for smaller companies: among California-headquartered public corporations with a market capitalization of less than $1 billion, nearly half have no female directors of their board. *See id.*

159. *See id.*

they currently do in California-headquartered companies.[160] And because California is the headquarters of so many publicly held corporations, the law's mandate would be felt nationally, increasing the number of women on corporate boards in the United States by 22%.[161] Since enactment of California's gender diversity statute, state legislators elsewhere have signaled interest in passing similar legislation,[162] which would only amplify the effect in corporate America.[163]

2. Delaware's Response

No Delaware court has yet addressed the validity of California's gender diversity statute as applied to a Delaware corporation headquartered in California. But given the precedents in *McDermott* and *VantagePoint* it is entirely predictable how the Delaware courts will rule when presented with the issue: invoking the internal affairs doctrine, the Delaware courts will refuse to enforce California's statute.

VantagePoint, in particular, seems to be directly on-point.[164] Recall that *VantagePoint* also involved a California statute, section 2115, seeking to regulate aspects of internal governance for foreign corporations operating within California.[165] Given the holding of *VantagePoint*, it is hard to imagine that a Delaware court will not similarly refuse to enforce California's new gender diversity statute based upon the internal affairs doctrine. Like the shareholder voting rights at issue in *VantagePoint*, the Delaware courts will assert that the composition of a corporation's board "fall[s] squarely within the purview of the internal affairs doctrine."[166] Accordingly, the Delaware courts will rule that California's new gender diversity statute, like

---

160. *Id.*

161. *Id.*

162. *See infra* notes 299–300 and accompanying text.

163. *See* Green et al., *supra* note 139 ("If every state were to adopt California's lead, U.S. companies in the Russell 3000 would need to open up 3,732 board seats for women within a few years. The number of women on these boards nationally would increase by almost 75 percent.").

164. *See, e.g.*, Grundfest, *supra* note 151, at 4 (citing *VantagePoint* to conclude that California's new statute is subject to the internal affairs doctrine and therefore unenforceable against foreign corporations).

165. *See supra* Section I.C.2.

166. *Cf.* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1115 (Del. 2005) (citation omitted) (making the same assertion with respect to shareholder voting rights).

section 2115 of California's Corporations Code, is unenforceable against Delaware corporations because it infringes on a matter that, pursuant to "well-established choice of law rules and the federal constitution," is governed exclusively by Delaware law.[167]

To be sure, there are differences between California's new gender diversity statute and section 2115, although none of these differences suggest a Delaware court would rule differently. First, the jurisdictional hook for the two statutes is different. Unlike section 2115, which applies only to certain privately held foreign corporations that have a substantial presence in California,[168] the new gender diversity statute applies to all publicly held corporations with headquarters in the state.[169] Second, the new statute is narrower in its regulatory breadth. While section 2115 imposes a broad range of governance provisions on the foreign corporations within its purview,[170] the new statute regulates only the gender composition of boards and does purport to alter any other aspects of corporate governance.[171] Finally, unlike section 2115, the new gender diversity statute expressly contemplates a fine for noncompliance.[172] It is not clear, however, how any of these differences would have altered the reasoning or holding of *VantagePoint*. So, it is hard to imagine that California's new board gender diversity statute will yield a different result in Delaware courts.

3. Analysis

By striking down California's new statute, Delaware courts will be putting the internal affairs doctrine to a familiar use. The Delaware courts will be invoking the doctrine to prevent another state from regulating in an area that Delaware asserts is within Delaware's exclusive domain to regulate. Preventing such incursions is critical for Delaware's entire corporate law enterprise. After all, if other states are permitted to regulate aspects of internal governance for Delaware

---

167. *Cf. id.* at 1116 (citations omitted) (making the same assertion with respect to shareholder voting rights).

168. *See* CAL. CORP. CODE § 2115(a)(1)–(2) (West 2019).

169. *See id.* § 301.3(a)–(b).

170. *See id.* § 2115(b).

171. *See id.* § 301.3(a)–(b).

172. *See id.* § 301.3(e). As noted below, because California's statute expressly contemplates fixed fines for corporations that fail to comply with the prescribed quotas, the statute can be conceived of as a mere tax on the corporations that are subject to the statute, rather than a direct regulation of internal corporate affairs. *See infra* notes 303–05 and accompanying text.

corporations, then the very reason to be incorporated in Delaware is undermined.[173] The value of a Delaware corporate charter would be diminished, and businesses would be unwilling to pay a premium for it.

With respect to a corporation's board of directors in particular, Delaware law grants shareholders the right to elect whomever they like.[174] Delaware law certainly does not mandate gender diversity among directors; indeed, it is entirely silent on the issue. Instead, as is characteristic of Delaware law, it provides corporations with the broad freedom to individually adopt board gender diversity requirements by private ordering through the terms of a corporation's charter or bylaws.[175] If California were allowed to mandate gender diversity, abrogating the freedom that Delaware law provides, then it diminishes the value of being incorporated in Delaware for those businesses headquartered in California.

By invoking the internal affairs doctrine to fend off California's incursion, Delaware courts will thus protect Delaware's regulatory domain and the lucrative chartering business that it provides. This has been the traditional role of the doctrine for Delaware. And in this regard at least, *Sciabacucchi*'s application of the internal affairs doctrine is novel.

B. Shareholder Rights Under Federal Securities Law

Like the lack of gender diversity, frivolous shareholder litigation has been a longstanding problem for corporate America.[176] Such

---

173. *See, e.g.*, Demott, *supra* note 13, at 180 (observing that state statutes regulating the internal affairs of the foreign corporations within their jurisdiction would "reduce the appeal of Delaware incorporation"); Glynn, *supra* note 7, at 116–17 (arguing that other states' "refusal to apply [Delaware] law to disputes within Delaware firms" would make "incorporation in Delaware . . . less valuable to incorporators"); Tung, *supra* note 4, at 43 (observing that if a state legislature chose to regulate the internal affairs of "all corporations doing some quantum of business in-state" it "would have discouraged at least the local firms from incorporating in Delaware . . . since firms' chosen corporate law would not have been honored locally").

174. *See* DEL. CODE ANN. tit. 8, § 216(3) (2018) ("Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors[.]").

175. *See* DEL. CODE ANN. tit. 8, § 141(b) (2018) ("The certificate of incorporation or bylaws may prescribe . . . qualifications for directors.").

176. *See, e.g.*, Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *8 (Del. Ch. Dec. 19, 2018) (noting the "epidemic of stockholder litigation" in which "frequently meritless" lawsuits "impose[] costs on corporations and society without concomitant benefit"), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020); Ann

lawsuits, brought nominally by shareholders against the corporation and its managers, are in reality a result of enterprising plaintiff's attorneys seeking not to root out actual misconduct but to secure lucrative fees through a nuisance value settlement.[177]

One particular form of shareholder litigation, so-called "deal litigation" alleging managerial misconduct in connection with a significant merger or acquisition,[178] spiked during the early 2010s.[179] By 2013, nearly every merger and acquisition (M&A) involving a publicly traded target corporation—an astonishing 96%—faced a shareholder lawsuit.[180] Making matters worse, most transactions faced multiple lawsuits in multiple jurisdictions by competing plaintiff's lawyers shopping for a favorable forum and seeking to wrest control of the litigation.[181]

In response to this metastasizing problem, many corporations adopted charter and bylaw provisions attempting to regulate

---

M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, *in* RESEARCH HANDBOOK REPRESENTATIVE SHAREHOLDER LITIGATION 176 (Sean Griffith et al. eds., 2018) ("For almost as long as it has existed, shareholder litigation . . . has been viewed as vexatious and potentially frivolous, to a degree that surpasses the annoyances posed by other kinds of lawsuits."); Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 860–67 (2016) (noting "[t]he problems associated with shareholder litigation are well known" and citing evidence of its impact on corporations, investors, and the broader economy).

177. *See, e.g.*, *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891–92 (Del. Ch. 2016) (observing that "far too often [attorney-driven] litigation serves no useful purpose for stockholders" but instead "serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints . . . and settling quickly on terms that yield no monetary compensation to the stockholders").

178. *See In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 721 (7th Cir. 2016) ("In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel.").

179. *See Trulia*, 129 A.3d at 895–96 (explaining the reasons for the "rapid proliferation and current ubiquity of deal litigation" in the 2010s); Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558–62 (2015) (same).

180. *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 620 (2018).

181. *See id.* at 620–21 (reporting frequency of multijurisdictional deal litigation); Fisch et al., *supra* note 179, at 558 (observing that "[d]eal litigation is pervasive" and that "[m]ultiple teams of plaintiffs file lawsuits challenging virtually every public company merger, often in multiple jurisdictions" (citations omitted)).

shareholder litigation rights.[182] Bolstered by developments in caselaw, these provisions proved initially successful at curbing the frequency of deal litigation.[183] But this success only caused plaintiff's attorneys to adapt their tactics—migrating their lawsuits from state to federal courts and trading in their state law fiduciary duty claims for federal securities law disclosure claims.[184] It is in this context that *Sciabacucchi* was decided.

1. Background

The first attempts made to address the spike in multi-jurisdictional deal litigation were through the adoption of corporate charter and bylaw provisions stipulating the exclusive forum in which shareholder claims must be brought.[185] Forum selection provisions eliminate the expense and complications presented by multi-jurisdictional litigation by channeling all lawsuits to a stipulated forum,[186] typically the courts of Delaware.[187]

---

182. *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1665–69 (2016).

183. *See* Cain et al., *supra* note 180, at 623.

184. *See id.* at 607, 621, 631–32 (explaining that forum selection clauses "do not prevent plaintiffs from bringing federal suits alleging disclosure violations under Rule 14a-9, the federal prohibition against proxy fraud" and providing empirical evidence of a shift in shareholder lawsuits to federal courts); *see also* Matthew D. Cain et al., *Mootness Fees*, 72 VAND. L. REV. 1777, 1780 (2019) (noting that forum selection clauses along with other developments in Delaware corporate law "resulted in the flight of merger litigation filings from Delaware to the federal courts" where "suits repackaged state-law fiduciary duty-based claims into antifraud actions under Section 14A and Rule 14a-9 thereunder" (citations omitted)).

185. *See* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *5 (Del. Ch. Dec. 19, 2018) ("The impetus for corporate forum-selection provisions came from an epidemic of stockholder litigation, in which competing plaintiffs filed a bevy of lawsuits, often in different multiple jurisdictions, before settling for non-monetary relief and an award of attorneys' fees."), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020); *see also* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 373–78 (2012) (providing a scholarly explanation for adoption of forum selection bylaws).

186. *See* Cain et al., *supra* note 184, at 1 ("Issuers adopted forum selection bylaws to prevent plaintiffs from filing litigation challenges in multiple states . . . .").

187. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942 (Del. Ch. 2013) (quoting the forum selection provisions of two defendant corporations); *see also* Grundfest, *supra* note 185, at 367–68 (providing data showing that almost all corporate forum selection provisions select the courts of Delaware).

The adoption of forum selection provisions among Delaware corporations was unsubtly encouraged by Vice Chancellor Laster in the dictum of a 2010 Delaware Chancery Court decision, *In re Revlon*.[188] And in 2013, the chancery court confirmed the validity on forum selection provisions in an influential decision by then-Chancellor Strine, *Boilermakers*.[189] Characterizing a corporation's governing documents as "a flexible contract between corporations and stockholders," the chancellor in *Boilermakers* ruled that a "forum selection clause . . . is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses."[190]

Two years later, in 2015, the Delaware legislature essentially codified the ruling in *Boilermakers* by enacting a set of consequential amendments to the DGCL.[191] The 2015 DGCL amendments explicitly authorized forum selection provisions by confirming that a corporate charter or bylaws may stipulate that "any or all *internal corporate claims* shall be brought solely and exclusively" in the state courts of Delaware.[192]

At the same time, however, the 2015 DGCL amendments prohibited another type of litigation-related term from corporate charters and bylaws: fee-shifting.[193] Fee-shifting provisions deter against frivolous shareholder lawsuits by requiring any plaintiff-shareholder to pay for the corporation's attorneys' fees if the plaintiff-shareholder does not substantially prevail on the merits of his or hers suit.[194] A year earlier, the Delaware Supreme Court had endorsed a fee-shifting bylaw in *ATP*,[195] a decision embracing the contractual conception of corporations that then-Chancellor Strine previously

---

188. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010) ("[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.").

189. *Boilermakers*, 73 A.3d at 940, 963.

190. *Id.* at 940.

191. *See* Solak v. Sarowitz, 153 A.3d 729, 732 (Del. Ch. 2016) ("In 2015, Section 115 was added to the Delaware General Corporation Law ('DGCL') codifying this Court's decision in *Boilermakers* . . . .").

192. *See* Act of June 24, 2015, 2015 Del. Laws 40 § 5 (codified at DEL. CODE ANN. tit. 8, § 115 (2018)) (emphasis added).

193. *See* Act of June 24, 2015, 2015 Del. Laws 40 §§ 2, 3 (codified at DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2018)).

194. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 (Del. 2014) (quoting an example corporate fee-shifting provision and noting that "fee-shifting provisions, by their nature, deter litigation").

195. *See id.* at 558.

articulated in *Boilermakers*.[196] But concern that fee-shifting provisions might prove to be too potent of a deterrent—quashing meritorious shareholder lawsuits alongside frivolous lawsuits—moved Delaware lawmakers to legislatively overrule *ATP*.[197] Specifically, the 2015 DGCL amendments banned "any [charter or bylaw] provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an *internal corporate claim*."[198]

With the imprimatur of the Delaware courts and legislature, forum selection provisions proliferated among Delaware corporations.[199] And this proliferation succeeded in reversing the frequency of deal litigation in 2016 and 2017.[200] This success was short-lived, however. Responding to the changed legal landscape, plaintiff's attorneys adapted their litigation tactics, shifting their lawsuits from state courts to federal courts and redressing their state law fiduciary duty claims in the guise of disclosure-based claims under federal securities law.[201] By 2017, the frequency of public M&A transactions subject to litigation was back up to 83% of all deals.[202] But only 5% of such deals were challenged in Delaware courts in 2018, plunging from 60% only three years earlier.[203] Meanwhile, the percentage of deals challenged in federal courts spiked from 32% in 2013 to 92% in 2018.[204]

---

196. *See id*. ("Because corporate bylaws are 'contracts among a corporation's shareholders,' a fee-shifting provision contained in a nonstock corporation's . . . bylaw[s] would fall within the contractual exception to the American Rule." (quoting Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010))).

197. *See* DEL. STATE BAR ASSOC. CORP. L. COUNCIL, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL 3–4 (2015), https://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf (expressing concern that "[f]ee-shifting provisions will make stockholder litigation, even if meritorious, untenable").

198. *See* Act of June 24, 2015, 2015 Del. Laws 40 §§ 2, 3 (codified at DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2018)) (emphasis added).

199. *See* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *9 (Del. Ch. Dec. 19, 2018) (describing the proliferation of corporate forum selection provisions), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020); Grundfest, *supra* note 185, at 358–62 (providing an empirical account of the spread of corporate forum selection provisions).

200. *See* Cain et al., *supra* note 180, at 621.

201. *See id*. at 631–32.

202. *See* Cain et al., *supra* note 184, at 1780–81.

203. *See id*. at 1779–81.

204. *See id*. at 1787.

The rise of deal litigation, and its migration to the federal level, has sparked a renewed interest in using corporate charters and bylaws to regulate federal securities law claims.[205] Limiting shareholder rights to bring federal securities law claims—for example, by imposing fee-shifting or mandating arbitration of such claims—would be enormously consequential not only to the current iteration of deal litigation, but also to the much broader realm of attorney-driven Rule 10b-5 class actions.[206]

Notably, the 2015 DGCL amendments were silent as to shareholder claims brought under of federal securities law.[207] Instead, the 2015 DGCL amendments authorizing forum selection, but banning fee-shifting, were limited to "internal corporate claims" only.[208] "Internal corporate claims" was, in turn, defined to mean

---

205. *See, e.g.*, Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 753–54 (2015) (noting the "the explosion in class action and derivative lawsuits that settle primarily for attorneys' fees" and asserting that "if mandatory arbitration bylaws barring class actions were enforceable, the logical outcome would be a marked decline in class actions, since the alleged existence of a class is a principal driver of attorneys' fees"); Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1189 (2013) ("Allowing stockholders to vote to adopt mandatory individual arbitration gives them a choice whether to accept the uncertain benefits and high costs of securities class actions.").

206. *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 181 (2015) ("[S]ecurities-fraud claims brought by shareholders comprise the largest share of class action suits against businesses today. This is true not only in terms of the number of suits, but, perhaps more importantly, in terms of the amount of money at stake . . . ." (citations omitted)). U.S. Securities and Exchange Commission Rule 10b-5 prohibits securities fraud. 17 C.F.R. § 240.10b-5 (2020).

207. *See*, *e.g.*, Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L.J. F. 169, 176 (2018) ("[T]he Delaware legislation reaches only . . . state law corporate governance claims. . . . [T]he state legislation was silent as to . . . non-state-law disputes, triggering debate over what that silence means for the arbitration of shareholders' federal claims."); John C. Coffee, Jr., *"Loser Pays": The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action*, 68 S.M.U. L. REV. 689, 693–95 (2015) (noting that the 2015 DGCL amendments do not cover federal securities class actions and, when read literally, would not preclude charter or bylaw provisions relating to federal securities lawsuits); William K. Sjostrom, Jr., *The Intersection of Fee-Shifting Bylaws and Securities Fraud Litigation*, 93 WASH. U.L. REV. 379, 387 (2015) (noting that 2015 DGCL amendments "do not expressly prohibit fee-shifting bylaws to extra-corporate claims, which, presumably, include those under the federal securities laws"). *But see* J. Robert Brown, Jr., *Staying in the Delaware Corporate Governance Lane: Fee Shifting Bylaws and a Legislative Reaffirmation of the Rules of the Road*, 54 BANK & CORP. GOVERNANCE L. REP. 4, 12–13, 15 (2015) (arguing that the 2015 DGCL amendments do not authorize charter or bylaw provisions relating to federal securities law).

208. *See* DEL. CODE ANN. tit. 8, §§ 102(f), 109(b), 115 (2018).

"claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery."[209] This definition is generally interpreted to limit the scope of the 2015 DGCL amendments to shareholder claims brought under Delaware state corporate law.[210] However, nothing in the 2015 amendments or elsewhere in the DGCL addresses whether the provisions of a corporation's governing documents may regulate other types of shareholder claims, such as claims arising under federal securities law.[211]

Pressing the boundaries of the "flexible contract" described by *Boilermakers*, and reaffirmed by *ATP*,[212] three Delaware corporations, each in advance of an initial public stock offering during the second half of 2017, included in its corporate charter a forum selection provision covering federal securities law claims.[213] In December 2018, the Delaware Court of Chancery confronted the validity of these provisions in *Sciabacucchi v. Salzberg*.[214]

2. Delaware's Response (*Sciabacucchi*)

In *Sciabacucchi*, the Delaware Court of Chancery ruled that a forum selection provision contained in a corporation's governing

---

209. *Id*. § 115.

210. *See* Clopton & Winship, *supra* note 207, at 176; Coffee, *supra* note 207, at 693–95; *see also* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *9 (Del. Ch. Dec. 19, 2018) (endorsing this interpretation and stating that "internal corporate claims" is "defined to encompass claims covered by the internal-affairs doctrine" (citations omitted)), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020). *But see* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi* 70–75 (Stanford Law Sch. & The Rock Ctr. for Corp. Governance, Working Paper No. 241, 2019), https://ssrn.com/abstract=3448651 (arguing that the statutory reference to "internal corporate claims" in DGCL includes claims brought under federal securities law).

211. *See Sciabacucchi*, 2018 WL 6719718, at *14 (recognizing that DGCL 115, as modified by the 2015 DGCL amendments, "does not say explicitly that the charter or bylaws cannot include forum-selection provisions addressing other types of claims"); Sjostrom, Jr., *supra* note 207, at 387.

212. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 559–60 (Del. 2014); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del Ch. 2013).

213. More precisely, the forum selection provisions at issue purported to stipulate the forum for any claims made under the 1933 Securities Act. *Sciabacucchi*, 2018 WL 6719718, at *6.

214. *Id.* at *3.

documents is "ineffective and invalid" as applied to the rights of shareholders to bring claims arising under federal securities law.[215] To reach this conclusion, Vice Chancellor Laster invoked the internal affairs doctrine, reasoning that the rights arising under federal securities law are not an internal corporate affair.[216] And in doing, he applied the doctrine in a novel way, using it to impose limits on Delaware's regulatory province.

"[R]easoning from 'first principles,'" the Vice Chancellor observed that the internal affairs doctrine is grounded in the fact that a corporation is an artificial entity created by a sovereign act of the state that has chartered it.[217] And because each corporation owes its existence to its chartering state, the chartering state has the exclusive power to regulate the corporation's internal affairs through the state's corporate law.[218] But a state's power to regulate the internal affairs of its domestic corporations cannot extend to external matters, like the rights arising from federal securities law, that lie beyond the chartering state's regulatory power.[219] Because external matters lie beyond the chartering state's regulatory power, the Vice Chancellor continued, the corporations that a state has chartered cannot use the contractual relationship created by the state's corporate law to regulate such matters either.[220] "Put self-referentially," the Vice Chancellor quipped, "the corporate contract can only regulate claims

---

215. *Id*.

216. *See id.* at *18–21.

217. *See id.* at *18 ("[A] corporation is a legal entity . . . created through the sovereign power of the state. Although the promulgation of general incorporation statutes . . . has reduced the visibility of the state's role . . . , the issuance of a corporate charter remains a sovereign act." (citations omitted)).

218. *See id.* at *20 ("Because the state of incorporation creates the corporation, the state has the power through its corporation law to regulate the corporation's internal affairs. . . . The power of the state of incorporation to address these matters manifests itself through the internal-affairs doctrine." (citations omitted)).

219. *See id.* at *2, *13–14 ("But Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships. . . . [T]he state of incorporation cannot use corporate law to regulate the corporation's external relationships. . . . The state cannot assert authority over other types of claims based on the corporate contract, because the claims do not arise out of internal corporate relationships.").

220. *Id*. at *21 ("In light of these principles, 'there is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale." (quoting Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 598 (2016))).

involving the corporate contract. It cannot regulate external activities, nor the behavior of parties in other capacities."[221]

Applying these principles to the forum selection provisions at issue, Vice Chancellor Laster concluded that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."[222] Although *Sciabacucchi* was decided in the context of a forum selection provision purporting to cover claims made under federal securities law, the reasoning and broad language of the decision are widely understood to implicate the validity of other types of litigation-related provisions covering federal securities law claims—provisions like fee-shifting and, most significantly, mandatory arbitration.[223] Because federal securities law claims do not arise under Delaware corporate law, a corporate charter or bylaw provision purporting to regulate any aspect of such claims would be, according to *Sciabacucchi*, invalid under Delaware corporate law.[224]

3. Analysis

By some standards, *Sciabacucchi* is an unusual Delaware corporate law decision. Delaware corporate law is routinely touted as being broadly enabling, containing few mandatory rules, and permitting an expansive freedom for the private ordering of internal corporate governance through the provisions of a corporation's governing documents.[225] Yet, in *Sciabacucchi*, the Delaware Court of

---

221. *Id*.

222. *Id*. at *3.

223. *See, e.g.*, James Hallowell & Mark H. Mixon, Jr., *Will 'Salzberg' Curtail Arbitration Provisions in Corporate Charters and Bylaws?*, LAW.COM (Feb. 13, 2019, 10:50 AM), https://www.law.com/delbizcourt/2019/02/13/will-salzberg-curtail-arbitration-provisions-in-corporate-charters-and-bylaws/; Kevin LaCroix, *Delaware Court Holds Charter Provision Designating a Federal Forum for Section 11 Claims Is Invalid*, D&O DIARY (Dec. 19, 2018), https://www.dandodiary.com/2018/12/articles/securities-litigation/delaware-court-holds-charter-provision-designating-federal-forum-section-11-claims-invalid/.

224. *See Sciabacucchi*, 2018 WL 6719718, at *3 ("The constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law.").

225. *See, e.g.*, Shintom Co. v. Audiovox Corp., 888 A.2d 225, 227 (Del. 2005) (describing Delaware's corporation statute as "an enabling statute that provides great flexibility"); Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004) (Strine, V.C.) (noting that Delaware corporate law "is widely regarded

Chancery imposes a limit on private ordering—a mandatory rule prohibiting provisions regulating federal securities law claims.[226] Nothing in the DGCL compelled this result. Indeed, as noted above, the DGCL is completely silent on corporate governance provisions regulating federal securities law claims.[227] And, as Chancellor Strine affirmed in *Boilermakers*, "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs. Merely because the [DGCL] is silent as to a specific matter does not mean that it is prohibited."[228] Nonetheless, the chancery court in *Sciabacucchi* prohibited corporate governance provisions regulating federal securities law claims, relying on the internal affairs doctrine as its justification.[229]

In this respect, *Sciabacucchi* is also an unusual Delaware corporate law decision because it uses the internal affairs doctrine differently than *VantagePoint* and *McDermott*.[230] Rather than invoke the doctrine to prevent the incursion of another state's law into

---

as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints"); *In re* Ford Holdings, Inc. Preferred Stock, 698 A.2d 973, 976 (Del. Ch. 1997) (Allen, C.) (explaining that "unlike the corporation law of the nineteenth century, modern corporation law contains few mandatory terms; it is largely enabling in character"); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 379 (2018) ("By virtue of its largely enabling structure, Delaware corporate law is consistent with the private ordering approach." (citation omitted)); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1783 (2006) ("There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering."); Leo E. Strine, Jr., *Delaware's Corporate–Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1260 (2001) (describing Delaware's approach to corporate law as one that is "largely enabling and provides a wide realm for private ordering").

226. *See* DEL. STATE BAR ASSOC. CORP. L. COUNCIL, *supra* note 197, at 10 ("[Delaware] courts must . . . respect the broadly enabling nature of the DGCL. Where. . . the market begins to use the DGCL's breadth in new ways, it is the General Assembly, *not the courts*, that should evaluate whether, on public policy grounds, the statute's authorizing breadth should be narrowed." (emphasis added)).

227. *See supra* notes 207–11 and accompanying text.

228. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 953 (Del Ch. 2013) (quoting Moran v. Household Int'l, Inc., 500 A.2d 1346, 1351 (Del. 1985)).

229. *Sciabacucchi*, 2018 WL 6719718, at *18–21.

230. *See* Hallowell & Mixon, Jr., *supra* note 223. *Compare* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005), *and* McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987), *with Sciabacucchi*, 2018 WL 6719718.

Delaware's regulatory domain, *Sciabacucchi* uses the doctrine to impose a limit on what Delaware law can regulate.[231]

Viewed more broadly, however, the Delaware Court of Chancery's holding in *Sciabacucchi* can be harmonized with *McDermott* and *VantagePoint*. Like those earlier precedents, *Sciabacucchi* applied the doctrine to protect Delaware's lucrative regulatory domain. But unlike *McDermott* and, in particular, *VantagePoint*, in which the threat to Delaware came from incursions by another state,[232] the threat animating *Sciabacucchi* is instead the risk of a damaging collision with federal law.[233]

Scholars have long recognized that the most pressing threat to Delaware's regulatory power, and the lucrative chartering business that it provides, comes not from other states, but from the risk of federal preemption.[234] Congress and the SEC have before exercised their lawmaking authority to preempt various aspects of corporate governance that were once the subject of state corporate law.[235] Mindful of this reality, Delaware's legislature and judiciary have in the past moved proactively to forestall further federal incursions.[236] The Delaware Court of Chancery's novel use of the internal affairs

---

231. *See Sciabacucchi*, 2018 WL 6719718, at *2; Hallowell & Mixon, Jr., *supra* note 223 (observing that the "holding in [*Sciabacucchi*] offers what might seem to be a cautious interpretation of the reach of Delaware corporate law").

232. *See VantagePoint*, 871 A.2d at 1112; *McDermott*, 531 A.2d at 209.

233. *See Sciabacucchi*, 2018 WL 6719718, at *1; Hallowell & Mixon, Jr., *supra* note 223 ("Defining Delaware's reach narrowly, the [*Sciabacucchi*] court avoids a potential collision with federal securities law."). *But see* Grundfest, *supra* note 210, at 80 ("*Sciabacucchi* creates unprecedented and unnecessary tension with the federal regime.").

234. *See, e.g.*, Jones, *supra* note 90, at 627–29, 633–38; Kahan & Rock, *supra* note 7, at 1609–10; Roe, *supra* note 70, at 591–93, 596–634.

235. *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1780–83 (2011); Jones, *supra* note 90, at 639–45; Park, *supra* note 27, at 125–31, 155–69; Roe, *supra* note 70, at 604–34.

236. *See* Jones, *supra* note 90, at 643–63; *see also* Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 840 (2013) ("Delaware is sensitive to its position vis-a-vis the federal government and is highly responsive to moves that might impinge on its position."). Indeed, Delaware's recent statutory ban on fee-shifting, enacted as part of the 2015 DGCL amendments, *see supra* Section II.B.1, was itself rationalized by a concern on the part of the state's lawmaking organs that without such a ban, shareholder lawsuits challenging corporate mismanagement would no longer be viable and, therefore, "other regulators"—namely the federal government—"would likely feel compelled to step in . . . [and] occupy the field of corporate law." *See* DEL. STATE BAR ASSOC. CORP. L. COUNCIL, *supra* note 197, at 6.

doctrine in *Sciabacucchi* can be understood as only the latest example of this.[237]

Consider what would have happened if the chancery court in *Sciabacucchi* had ruled differently—had ruled instead that corporations *are permitted* under Delaware law to adopt provisions regulating shareholder rights arising under federal securities law. Inevitably, one or more Delaware corporations would then adopt a provision compelling private arbitration of any shareholder claims made under federal securities law.[238] But the enforceability of that provision is ultimately a question of federal law—one that must be answered by the federal courts.[239] Although it is not clear how the federal courts would resolve that question,[240] one can easily imagine scenarios that would turn out poorly for Delaware.

For one, a federal court could decide that mandatory arbitration provisions are unenforceable and invalid under the anti-waiver provisions of federal securities laws.[241] After all, this has been the long-held position of the SEC.[242] Such a result would place Delaware in the awkward position of having permitted under its state corporate law something that both the nation's chief investor protection agency and a federal court have concluded unlawfully violates shareholders' rights under federal law. The federal court ruling would be seen as a rebuke to Delaware's cavalier attitude toward protecting shareholders. Beyond the mere political damage, the episode may stoke a populist backlash in Washington, D.C.[243] Advocates across

---

237. *Cf.* Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. REV. 913, 920 (2015) ("Limiting the reach of litigation provisions . . . [to state corporate law claims] is also prudent for . . . Delaware courts. . . . [T]o do otherwise may invite action by the SEC." (citations omitted)).

238. *Cf.* Sjostrom, Jr., *supra* note 207, at 387 (noting that after *ATP* upheld fee-shifting provisions but before the 2015 DGCL amendments banned fee-shifting, fifty-one corporations, including forty Delaware corporations, adopted such provisions in their charter or bylaws).

239. *See, e.g.*, Clopton & Winship, *supra* note 207, at 176–78 (discussing the involvement of federal law).

240. *See, e.g.*, *id.* at 175–78 (explaining that "federal law is not entirely clear on the validity of arbitration provisions in corporate organizational documents").

241. *See* 15 U.S.C. § 77n (2018); *id.* § 78cc.

242. *See* Allen, *supra* note 205, at 775–79 (describing the SEC's policy on mandatory arbitration in corporate governance documents); Clopton & Winship, *supra* note 207, at 178 (same).

243. *See* Kahan & Rock, *supra* note 7, at 1609–10, 1621 ("[T]he possibility of federal preemption of state corporate law due to populist pressure probably constitutes the single most important threat to Delaware's profits from the franchising business."

political lines may push Congress or the SEC to clampdown on Delaware's regulatory power in the name of protecting investors and the capital markets.

Alternatively, a federal court could uphold the validity of a mandatory arbitration provision set forth in a corporation's governing documents. Relying on the language of recent U.S. Supreme Court decisions applying the Federal Arbitration Act (FAA),[244] a federal court could reason that compelled arbitration of federal securities law claims does not amount to a waiver of rights and that arbitration provisions in a corporate charter or bylaws should be treated no differently than in other contractual contexts.[245] For the latter conclusion, the federal court could readily point to any number of Delaware court precedents characterizing a corporation's charter and bylaws as a "contract" between the corporation and its shareholders.[246]

(citing Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Debate on State Competition over Corporate Charters*, 112 YALE L.J. 553, 558 (2002); Roe, *supra* note 70, at 600)).

244. *See* 9 U.S.C. §§ 1–16 (2018).

245. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–39 (2013) ("[T]he fact that it is not worth the expense involved in proving a statutory remedy [through compelled arbitration] does not constitute the elimination of the right to pursue that remedy."); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (rejecting the argument that "class [action] proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system" because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485–86 (1989) (enforcing a contract clause mandating arbitration of Securities Act claims); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 227–28 (1987) (enforcing a contract clause mandating arbitration of Securities Exchange Act claims); *see also* Allen, *supra* note 205, at 754–57 (analyzing the implications of the relevant Supreme Court precedent to corporate charters and bylaws). *But see* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 601–39 (2016) (arguing that corporate charters and bylaws are fundamentally unlike traditional contracts and therefore should not be subject to the FAA).

246. *See, e.g.*, Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders." (citing Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990))); *accord Centaur Partners*, 582 A.2d at 928 ("Corporate charters and bylaws are contracts among the shareholders of a corporation . . . ."); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013) ("As our Supreme Court has made clear, the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL."); *see also* LoPucki, *supra* note 9, at 2157 ("The Delaware courts are irretrievably committed to the view that charters and bylaws are contracts between the corporation and its shareholders, leaving Delaware little room to insist that arbitration bylaws are not arbitration contracts protected by [the FAA]."

Although such a ruling would avoid an embarrassing reversal for Delaware, it could ultimately prove much more damaging for the state. Because in upholding an arbitration provision set forth in a corporate charter or bylaws under the FAA, the federal court ruling would cast serious doubt on Delaware's statutory ban against such provisions covering state corporate law claims.[247] That ban[248]—quietly enacted as part of the 2015 DGCL amendments[249]—is essential to Delaware's corporate law enterprise. By prohibiting arbitration of state corporate law claims, Delaware law ensures that its state courts—the crown jewel of the state's corporate law[250]—remain the central regulatory authority for the nation's corporations, and that those courts continue to produce new precedents to address emergent and novel issues relevant to corporations.[251] The widespread use of arbitration to resolve state corporate law disputes would strip Delaware courts of their regulatory authority and, thus, retard the development of the state's corporate law.[252] For this reason,

---

(citing *Boilermakers*, 73 A.3d at 939)).

247. *See* Lipton, *supra* note 245, at 591–93 ("Advocates of [arbitration] provisions defend their enforceability by relying on the Supreme Court's FAA jurisprudence, suggesting that corporate constitutive documents are indistinguishable from ordinary contracts for FAA purposes. If that interpretation is correct, an arbitration provision contained within such documents is beyond the power of states to regulate." (citation omitted)). Aside from potentially invalidating Delaware's statutory ban against arbitration provisions covering state corporate law claims, Professor Lipton also notes that a federal determination that corporate charters are contracts subject to the FAA would prohibit Delaware courts from scrutinizing a corporate board's decision to invoke an arbitration provision, thus displacing a significant facet of fiduciary law in Delaware. *Id.* at 626–30.

248. *See* DEL. CODE ANN. tit. 8, § 115 (2019) ("[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.").

249. The statutory text of DGCL section 115 omits any express reference to arbitration, but instead precludes arbitration by banning any corporate governance provision that would "prohibit bringing . . . claims in the courts of [Delaware]." *See id*. Interestingly, the Delaware Corporate Law Council's explanatory memorandum accompanying the 2015 DGCL amendments also makes no reference to the fact that the amendments ban arbitration. *See* DEL. STATE BAR ASSOC. CORP. L. COUNCIL, *supra* note 197.

250. *See supra* note 87.

251. *See, e.g.*, Armour et al., *supra* note 86, at 1349 (describing the centrality of the Delaware courts to the state's corporate law and its success over other states); Fisch, *supra* note 86, at 1072–96 (same); LoPucki, *supra* note 9, at 2141–42 (same).

252. *See* Lipton, *supra* note 245, at 637–38; LoPucki, *supra* note 9, at 2156–58; Quinn, *supra* note 236, at 868–69; *cf.* Armour et al., *supra* note 86, at 1380–84 (predicting the same consequences if corporate cases are diverted away from Delaware

arbitration has been described as an "existential threat" to Delaware corporate law.[253]

For now, Delaware's statutory ban against arbitration provisions covering state corporate law claims has forestalled this existential threat. Under the U.S. Supreme Court precedent, however, "[w]hen state law prohibits outright the arbitration of a particular type of claim, . . . [t]he conflicting rule is displaced by the FAA."[254] A federal court ruling under the FAA that enforces an arbitration provision covering federal securities law claims would mean a similar provision covering state corporate law claims must be likewise enforceable under the FAA.[255] Delaware's statutory ban would be preempted, and Delaware corporations would be free to adopt such provisions.

The Delaware Court of Chancery in *Sciabacucchi* artfully avoided this unwanted outcome by embracing a narrow view of the internal affairs doctrine and thus invalidating under state corporate law mandatory arbitration provisions covering federal securities law claims. In doing so, the chancery court effectively prevented Delaware corporations from testing the enforceability of such provisions under the FAA and thereby provoking an uncertain and potentially disastrous collision between Delaware corporate law and federal law.

III. DELAWARE'S PRECARIOUS POSITION

Sciabacucchi shows that the internal affairs doctrine is more versatile than previously understood. Not only does the doctrine

---

courts to other states' courts); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 471–74 (2015) (highlighting the importance of Delaware courts retaining corporate cases).

253. *See* Lipton, *supra* note 245, at 588 ("[I]f corporate governance arrangements are deemed 'contractual' for FAA purposes . . . it could represent an existential threat to an entire substantive field of law, and states—particularly Delaware . . . —would be powerless to do anything about it." (citations omitted)); LoPucki, *supra* note 9, at 2157 ("Arbitration bylaws present an existential threat to Delaware.").

254. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (citation omitted); *see also* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." (citations omitted)).

255. *See* Lipton, *supra* note 245, at 588 ("Delaware recently amended [the DGCL] to ban the use of exclusive arbitration provisions in corporate charters and bylaws—but if the FAA applies, that legislation is likely preempted." (citations omitted)); LoPucki, *supra* note 9, at 2160–61 ("[DGCL] section 115 is in apparent conflict with section 2 of the Federal Arbitration Act (FAA), [which] provides that written agreements to arbitrate are 'valid, irrevocable and enforceable.'" (quoting 9 U.S.C. § 2 (2012))).

protect Delaware corporate law from interference by other states, the doctrine can also be used to prevent Delaware corporations from pressing too far and thereby provoking incursions at the federal level. But to the extent Delaware relies on the internal affairs doctrine to preserve its lucrative regulatory domain from incursions at the state or federal level, California's new gender diversity statute together with *Sciabacucchi* highlight a vulnerability in Delaware's position: the boundaries of "internal affairs" are incapable of crisp delineation and, therefore, will always be subject to challenge.

As explained in Section A below, the scope of the doctrine—what constitutes an internal corporate affair, rather than an external matter—is inescapably indeterminate. The questions of board gender diversity and shareholder rights arising under federal securities law highlight this indeterminacy. This indeterminacy leaves Delaware—and the countless corporations that rely on Delaware law—in a precarious position. As discussed in Section B, although Delaware courts may, through cases like *Sciabacucchi*, attempt to firmly establish the boundaries of the internal affairs doctrine, nothing compels other states to accede to those boundaries. Indeed, other states have their own self-interested reasons to draw the doctrinal boundaries differently than Delaware. Capitalizing on the indeterminacy of the doctrine, some states may define internal corporate affairs more strictly and others more broadly. Either scenario presents challenges to the continued hegemony of Delaware. Finally, Section C concludes by explaining that Delaware's vulnerability is one that cannot be resolved by appealing to the supposed constitutional underpinnings of the internal affair doctrine. Because even if other states are constitutionally compelled to adhere to the internal affairs doctrine, other states may still define the doctrinal boundaries differently than Delaware.

A. Indeterminacy at the Doctrinal Edges

Because the internal affairs doctrine is the cornerstone of Delaware's corporate law enterprise,[256] Delaware has much staked on the basic distinction that the doctrine makes—the distinction between internal corporate affairs versus external matters. Internal affairs, so the doctrine provides, are to be governed exclusively by the laws of

256. *See supra* note 7 and accompanying text.

Delaware.[257] External matters, in contrast, are subject to traditional choice-of-law principles.[258]

The problem is that the distinction between internal corporate affairs and external matters is ultimately indeterminate.[259] One cannot draw a neat line separating internal corporate affairs from external matters because the two inevitably bleed into one another.[260] Internal corporate affairs can readily have external consequences, and external matters can readily implicate internal corporate

---

257. *See supra* note 6 and accompanying text.

258. *See supra* notes 32–33 and accompanying text.

259. *See, e.g.*, Glynn, *supra* note 7, at 115, 134 (arguing that "the [internal affairs] doctrine's scope . . . remains contested." (citations omitted)); Greenwood, *supra* note 7, at 421 ("The [internal/external] . . . distinction [made by the internal affairs doctrine] is no different than the other famous distinctions around which legal debate centers: It is . . . debatable, contestable, and ultimately quite fragile."); Park, *supra* note 27, at 131 ("While [the internal affairs doctrine] is well established, the line distinguishing internal and external affairs is difficult to precisely define . . . ."); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2538 (2005) ("The line dividing internal and external is surely not bright . . . ." (citations omitted)); Rubenfeld, *supra* note 106, at 379 ("There can be no bright line—indeed no line at all—drawn to separate internal and external affairs; a corporation's internal affairs are external affairs when they implicate third-party rights."). The dividing line between internal corporate affairs and external matters is not only indeterminate, but it may also shift from time to time. *See* Roe, *supra* note 70, at 611 (citing examples, such as insider trading and shareholder voting, in which the dividing line was redrawn).

260. *See, e.g.*, Greenfield, *supra* note 3, at 136–37 ("[B]ecause companies affect so many stakeholders [beyond the shareholders and managers], and because even the most 'internal' rule has implications for these stakeholders, it is impossible to claim that internal affairs are immaterial to anyone other than shareholders and managers."); Greenwood, *supra* note 7, at 430 ("[A]lmost any issue involving corporate law impacts large and diverse groups of individuals beyond the ones empowered by corporate law or impacts public policy beyond corporate law itself."); LoPucki, *supra* note 9, at 2111 ("The internal affairs doctrine's impact is broader than its scope. . . . Because rules that apply only internally have direct effects on third parties . . . ."); Rubenfeld, *supra* note 106, at 376–77 ("No corporate affairs are ever exclusively 'internal'; they will always have consequences of greater or lesser magnitude on the 'outside' world.").

affairs.[261] In either case, the question is the degree of the spillover.[262] California's gender diversity statute and shareholder rights arising under federal securities law each underscores this reality.

1. Gender Diversity on Boards

Consider first gender diversity on boards of directors. On one hand, it is easy to assert, as some commentators have, that the composition of a corporation's board of directors is an internal corporate affair.[263] After all, the institution of a board of directors and the rights of shareholders to elect the directors are both matters "peculiar" to the corporate entity.[264] And mandating gender diversity on boards infringes on the rights of shareholders to elect whomever they wish to serve as the corporation's directors.

But on the other hand, to the extent the rationale of the internal affairs doctrine is to ensure uniformity by protecting corporations from inconsistent legal obligations,[265] that rationale is not implicated by California's gender diversity statute.[266] As previously noted,

---

261. The incoherent distinction between internal and external affairs is manifest in veil-piercing cases, where some courts, focused on the relationship between the corporation and its shareholders, apply the internal affairs doctrine, while other courts, focused on the relationship between the corporation and its creditor, apply traditional choice-of-law analysis. *See generally* Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 93–95 (2008).

262. As Professor Rubenfeld has observed, the degree to which internal corporate affairs spill over into the external world will dictate the degree to which a forum state will seek to regulate the governance of the foreign corporations within its jurisdiction. *See* Rubenfeld, *supra* note 106, at 377. Others have noted that the same is true when it comes to federal intervention into corporate governance. *See, e.g.*, Bainbridge, *supra* note 235, at 1784–86; Bratton & McCahery, *supra* note 27, at 660–77; Kahan & Rock, *supra* note 7, at 1588–90.

263. *See, e.g.*, Grundfest, *supra* note 151, at 1–3 (asserting that board composition is a "prototypical example" of an internal corporate affair subject to the internal affairs doctrine); Stephen Bainbridge, *Can California Require Delaware Corporations to Comply with California's New Board of Director Gender Diversity Mandate? No*, PROFESSORBAINBRIDGE.COM (Sept. 1, 2018), https://www.professorbainbridge.com/professorbainbridgecom/2018/09/can-california-require-delaware-corporations-to-comply-with-californias-new-board-of-director-gender.html (assuming the same).

264. *See supra* note 5 and accompanying text (quoting the U.S. Supreme Court's definition of "internal affairs").

265. *See supra* notes 50–56 and accompanying text.

266. *See* Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1486

Delaware corporate law is silent regarding a board's gender composition.[267] And although shareholders enjoy under Delaware law the right to elect to the board whomever they like, nothing in Delaware law requires a board be comprised of all or practically all male directors. The fact that Delaware corporate law neglects to address the gender of directors may itself be construed as a recognition that board gender composition is not a sufficiently internal affair to be regulated exclusively by Delaware. But Delaware's silence on the topic also means that California's new statute is unlike its older section 2115, which as Delaware Supreme Court noted in *VantagePoint* creates direct and irreconcilable conflicts with explicit provisions of Delaware law.[268] Instead, California's new statute creates no such conflict.[269]

Moreover, the new California legislation makes clear that the state's intent is not to regulate the relationship between the shareholders, directors, and the corporation. Instead, the intent is to regulate the relationship between the corporation and the broader public.[270] The first section of the legislation states that its objective is to "boost the California economy [and] improve opportunities for women in the workplace."[271] As Professors Fisch and Solomon note in a contemporaneous work, studies show that female representation on a corporation's board of directors is associated with greater gender diversity throughout the corporation, improved professional employment opportunities for women, and better gender equality practices within the workplace.[272] Likewise, in the wake of the #MeToo movement, inclusion of women on boards of directors may also have a positive influence on corporate culture and promote values

---

(2002) (arguing that deference to the internal affairs doctrine is warranted "[o]nly in the class of disputes in which two or more statess' [sic] laws truly conflict"); *cf*. Park, *supra* note 27, at 133 (observing in a different context that "[o]ther than the need for clarity when equal sovereigns attempt to regulate the same corporation, the internal affairs doctrine does not provide a principle that would justify its application.").

267. *See supra* notes 174–75 and accompanying text.

268. *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1111–12 (Del. 2005) (noting that the plaintiff would have voting rights under California law but not under Delaware law and because of this conflict the court "could not enforce both Delaware and California law").

269. *See* Fisch & Solomon, *supra* note 24, at 14 n.90.

270. *See id*. at 15–16 ("[T]he text of SB 826 demonstrates that a substantial motivation of the legislation was to address social welfare considerations. One of these considerations is increasing the representation of women in positions of leadership.").

271. *See* 2018 Cal. Legis. Serv. Ch. 954 (S.B. 826), § 1(a) (West).

272. *See* Fisch & Solomon, *supra* note 24, at 15–17.

of diversity and inclusion.[273] In light of these considerations, the two professors conclude that California's statute is directed at the promotion of social welfare rather than internal corporate governance.[274]

So, which is it? Does California's new board gender diversity statute infringe on an internal corporate affair or does it regulate an external matter? The reality is that there is truth to both perspectives. Who sits on a board of directors surely implicates internal corporate affairs. But, as Fisch and Solomon have argued, whether women are represented at the highest levels of business is a matter that has consequences for all women and the broader public.[275] And in that sense, it is an external matter.[276] Putting aside whether legislatively mandated gender quotas are good policy or can withstand constitutional muster,[277] the point is that Delaware and California may reasonably hold different perspectives on whether a gender quota for corporate boards is subject to the internal affairs doctrine.

2. Shareholder Rights Under Federal Securities Law

Consider next shareholder rights arising under federal securities law. On one hand, one could argue, as Vice Chancellor Laster did in *Sciabacucchi*, such rights are an external matter that fall beyond the internal affairs of a corporation.[278] As the Vice Chancellor observed in *Sciabacucchi*, such rights arise under federal, not state, law.[279] Moreover, a shareholder's right to bring claims under federal securities law is not predicated upon a shareholder's status *as a shareholder* but instead upon his or her status as a *purchaser* or *seller*

---

273. *See id*. at 16.

274. *See id*. at 16–17 ("[W]e argue that SB 826 is better understood as promoting the interests of women executives, employees, and members of society and, as such, is directed to the promotion of societal value rather than shareholder wealth.").

275. *See id*. at 15–17.

276. *See id*. at 3 ("[P]ure matters of corporate governance are subject to the internal affairs doctrine while laws governing external interests are not. We argue that SB 826 falls within the latter category." (citation omitted)).

277. *See* sources cited *supra* note 151.

278. *See* Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *2 (Del. Ch. Dec. 19, 2018) (ruling that shareholder rights arising under federal securities law are "external" matters that "[do] not implicate the internal affairs of the corporation"), *rev'd*, No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020); Lipton, *supra* note 245, at 597–601 (making the same argument).

279. *See Sciabacucchi*, 2018 WL 6719718, at *1, *5, *15–16.

of a security.[280] A "security," in turn, is defined under federal securities law more broadly than just the shares of a corporation;[281] it covers all types of financial instruments including bonds and other kinds of investments.[282] Consequently, the right to bring a federal securities law claim is not "peculiar" to the relationship between the corporation and its shareholders;[283] rather it is external to the narrow legal relationship created and governed by state corporate law.[284]

On the other hand, however, while it is true that federal securities law sweeps more broadly than state corporate law, the relevant question presented in *Sciabacucchi* concerned the *rights of shareholders only*, and specifically, whether the *rights of shareholders* to bring federal securities law claims is an internal affair that may be regulated by a corporation's governing documents.[285] In that specific context, the very act that creates a shareholder's rights under federal securities law—the purchase or sale of corporate stock—is inseparable from the legal relationship created and governed by state corporate law.[286] It is through the purchase of corporate stock that one becomes a shareholder with the concomitant rights of a shareholder under state corporate law, and it is through the sale of corporate stock

---

280. *See id*. at *17.

281. *See id*.

282. *See* 15 U.S.C. § 77b(a)(1) (2018); 15 U.S.C. § 78c(a)(10) (2018).

283. *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).

284. *See Sciabacucchi*, 2018 WL 6719718, at *21; Lipton, *supra* note 245, at 598 ("[T]here is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale." (citation omitted)).

285. In a contemporaneous work, Dhruv Aggarwal, Albert H. Choi, and Ofer Eldar make a similar argument. *See* Dhruv Aggarwal et al., *Federal Forum Provisions and the Internal Affairs Doctrine*, HARV. BUS. L. REV. (forthcoming 2020), https://ssrn.com/abstract=3439078 (arguing that "while it is true that the 33 Act applies to any security . . . there is no compelling reason to invalidate [federal forum provisions] so far as they apply to shareholders [only]").

286. *See* Letter from Hal Scott, Tr., The Doris Behr 2012 Irrevocable Tr., to U.S. Sec. & Exch. Comm'n Div. of Corp. Fin. 6 (Jan. 23, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf (arguing that "a federal securities law claim by a shareholder against the corporation either for fraudulently inducing the shareholder to sell stock, thus terminating the corporation-shareholder relationship, or for fraudulently . . . inducing the investor to purchase stock and thereby *become* a shareholder. Unquestionably . . . has a sufficient nexus to the corporation-shareholder relationship to qualify as an intra-corporate claim.").

that one's status as a shareholder may cease.[287] Indeed, several provisions of DGCL expressly regulate the rights of purchasers and sellers of a corporation's stock, reflecting the reality that such rights are inexorably an internal corporate affair.[288]

The fact that the relevant rights arise under federal securities law—and not state corporate law—should not make a difference.[289] After all, forum selection provisions covering state corporate law claims regulate a shareholder's rights arising not just under state corporate law, but also under generally applicable rules of civil procedure.[290] Such rules, like federal securities law, are external to

---

287. *See id*. (arguing that "it would be hard to conceive of a claim more central to the relationship between a corporation and its shareholders qua shareholders than a challenge to the very circumstances that either terminate or create that relationship").

288. *See* Grundfest, *supra* note 210, at 44–45, 65–70 (citing DGCL §§ 152, 157, 166, and 202 as examples). Delaware's common law likewise recognizes that the purchase and sale of corporate stock is an internal corporate affair, even when its regulation by Delaware law creates overlap with federal securities law. For example, in the context of a hostile tender offer, a context that the U.S. Supreme Court has recognized "do[es] not . . . implicate the internal affairs of the target company," *Edgar*, 457 U.S. at 645, Delaware law empowers the target corporation's board to intervene on the theory that a hostile tender offer can represent a "threat" to internal corporate affairs and "a danger to corporate policy and effectiveness." *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–56 (Del. 1985). Consequently, Delaware law enables the target corporation's board to prevent its shareholders from selling their shares (and, consequently, a hostile bidder from purchasing those shares) by adopting of a poison pill. Poison pills directly impair the rights of shareholders as potential sellers of securities, even though hostile tender offers are extensively regulated under federal securities law. *See* Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at §§ 78m(d)–(e), 78n(d)–(f) (2018)); 17 C.F.R. §§ 240.14d–1; 17 C.F.R. § 240.14e-1.

289. In contemporaneous works, others make similar arguments. *See* Grundfest, *supra* note 210, at 56–63 (arguing that claims brought under the 1933 Securities Act implicate internal corporate affairs); Aggarwal et al., *supra* note 285, at 24–25 (arguing that the internal affairs doctrine could be interpreted to cover claims brought under the 1933 Securities Act); *cf.* Renee Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879, 882–89 (2006) (arguing that the line between federal law securities and "internal" corporate affairs is an "artificial boundary" because the former regulates many topics within the domain of the latter); Park, *supra* note 27, at 132–33 (arguing that "the internal affairs doctrine is too vaguely defined to separate corporate and securities law" and that the doctrine "could conceivably encompass securities law issues such as the sale of securities and the regulation of periodic disclosure" (citations omitted)).

290. *See* Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 274–75 (2015) ("*Boilermakers* empowers corporate boards to take action with direct legal consequences for shareholders—actions bearing

the narrow relationship that state corporate law creates and governs. Nonetheless, both the Delaware judiciary and legislature have authorized forum selection provisions covering state corporate law claims. [291]

So again, which is it? Are the rights of shareholders arising under federal securities law—rights that arise upon the purchase or sale of a corporation's shares—an internal corporate affair or an external matter? The reality is that one can make reasonable arguments in either direction.

B. Challenges at the Doctrinal Edges

From Delaware's perspective at least, the gender makeup of a board of directors is an internal corporate affair governed exclusively by Delaware law; in contrast, the right of shareholders to bring claims under federal securities law is an external matter beyond Delaware law's reach. But for the internal affairs doctrine to preserve Delaware's hegemony, other states must not only accede to the doctrine as a choice-of-law principle, but also accede to the doctrinal boundaries drawn by Delaware courts. Nothing, however, compels states to do so.[292] Instead, as explained above, other states may reasonably disagree with the doctrinal boundaries set by Delaware. And other states have both political and economic motives to do so.

Some states, like California, seeking to regulate the many foreign corporations within their jurisdiction, may take a more cramped view of the internal affairs doctrine, enacting laws that encroach upon matters formerly governed by Delaware law exclusively. Conversely, other states, seeking to attract businesses to incorporate in their state, may embrace a more expansive view of the internal affair doctrine, permitting their domestic corporations to adopt governance provisions of the type that the Delaware Chancery Court under *Sciabacucchi* prohibited. Either scenario would diminish the scope of Delaware corporate law's lucrative regulatory province, although in different ways.

---

on rights not entirely originating with the corporation itself, including the applicability of general rules of civil procedure which specify permissible venues.").

291. *See supra* notes 188–92 and accompanying text.

292. *See, e.g.*, Greenwood, *supra* note 7, at 412 (observing that a state's adherence to the internal affairs doctrine is ultimately a political choice); LoPucki, *supra* note 9, at 2113 ("[S]tates could end the charter competition simply by rejecting the internal affairs doctrine."); Tung, *supra* note 4, at 43 ("[S]tate legislatures control state choice of law rules just as they control substantive corporate law.").

1. States Taking a More Restrictive View

It is not a coincidence that California enacted the nation's first board diversity statute *and* sought to make that statute applicable to both domestic and foreign corporations. California has been long known for its tradition of progressivism. And given its enormous size and dynamic economy, California is naturally host to countless successful corporations.

Under traditional choice-of-law principles, California would be free to enact progressive laws regulating various aspects of the corporations that are otherwise within the state's regulatory jurisdiction. But because many of these corporations—including virtually all of those that are publicly held—are chartered elsewhere (namely Delaware),[293] the internal affairs doctrine means that in one critical area—a corporation's internal affairs—California's regulatory powers are hamstrung.[294] Instead, the power to regulate the internal affairs of these foreign corporations rests with the far-flung jurisdiction in which the corporations are chartered—a jurisdiction that otherwise has little relationship with the corporations that make their home in California.

As early as 1915, then-Judge Cardozo, writing for the New York Court of Appeals, inveighed against this constraint—although for New York at that time the relevant jurisdiction was not far-flung Delaware, but instead next-door New Jersey[295]:

> As long as a foreign corporation keeps away from this state it is not for us to say what it may do or not do. But when it comes into this state and transacts its business here, it must yield obedience to our laws. . . . In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with [a]

---

293. *See supra* note 154 and accompanying text.

294. *See* Greenfield, *supra* note 3, at 142 ("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.").

295. *See* Tung, *supra* note 4, at 92–96.

> measure of control. If the control is irksome, it may be avoided by leaving us.[296]

Because the internal affairs doctrine hampers the regulatory power of states like California and New York—states that host significant commercial activity within their borders—these states are the most likely to adopt a narrow view of the doctrine.[297] Doing so gives these states wider latitude, with respect to the foreign corporations within their jurisdiction, to regulate matters that would be otherwise off-limits if the internal affairs doctrine was accorded a more expansive interpretation.[298]

Diversity among directors is one such matter. California's statute is the first in the nation to regulate gender diversity of corporate boards. But other states, including New Jersey, Massachusetts, and Washington, are now considering similar legislation.[299] And in Illinois, the state legislature advanced a bill that would take matters a step further, mandating both gender *and* racial diversity on corporate boards.[300] Emboldened by these states, others are likely to

---

296. German-Am. Coffee Co. v. Diehl, 109 N.E. 875, 876–77 (N.Y. 1915) (citations omitted).

297. Thus, it is not a coincidence that New York, like California, has a long history of attempting to regulate the internal affairs of the foreign corporations within its jurisdiction. *See* Demott, *supra* note 13, at 164–65 (describing current New York and California law regulating foreign corporations); Tung, *supra* note 4, at 92–96 (recounting the history of New York law regulating foreign corporations).

298. *Cf.* Greenwood, *supra* note 7, at 410–11 (observing that "large commercial states would have great ability to impose law were they to reject the internal affairs doctrine").

299. *See* Jeff Green & Andrea Vittorio, *New Jersey Follows California in Measure to Add Women to Boards*, BLOOMBERG (Dec. 21, 2018, 8:00 AM), https://www.bloomberg.com/news/articles/2018-12-21/new-jersey-follows-california-in-measure-to-add-women-to-boards (reporting that the New Jersey bill "mimic[s]" the California legislation); Lily Jamali, *A Push to Get More Women on Corporate Boards Gains Momentum*, NPR (Mar. 5, 2020), https://www.npr.org/2020/03/05/811192459/a-push-to-get-more-women-on-corporate-boards-gains-momentum ("The idea is gaining traction elsewhere, where similar legislation being introduced in Massachusetts, New Jersey and Washington."); Cydney Posner, *New Report on California Board Gender Diversity Mandate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 8, 2020), https://corpgov.law.harvard.edu/2020/03/18/new-report-on-california-board-gender-diversity-mandate/ (noting that Hawaii, Massachusetts, Michigan, New Jersey, and Washington have similar legislation in the works).

300. The Illinois bill, which passed the state's House of Representatives in March 2019, "would [have required] any publicly traded company with an Illinois headquarters to have at least one woman and one African-American on its board of directors by the end of 2020." Corilyn Shropshire, *A New Bill Aims to Force Illinois'*

follow with their own proposals.[301] One could imagine states enacting statutes requiring board representation across a range of socio-economic categories.

But diversity on corporate boards is only one matter that straddles both internal corporate affairs and the interests of the general public. Income inequality is another. Indeed, since the disclosure of CEO pay ratios was mandated by the SEC,[302] the progressive city of Portland, Oregon, has imposed a tax surcharge on the revenues of publicly traded corporations that pay their CEOs more than 100 times their median employee.[303] While not a direct regulation of CEO compensation, Portland's surcharge imposes an economic cost on corporations with compensation practices that the city finds inequitable. Interestingly, to the extent California's new statute expressly contemplates a fixed fine for noncompliance with its prescribed quotas,[304] it can be similarly conceived of as a mere tax—and not a direct regulation—of internal corporate affairs, thus sidestepping any tension with the internal affairs doctrine. Beyond gender equity and income inequality, other politically salient issues like corporate political spending, gun violence, and climate change seem likewise ripe for regulation in progressive jurisdictions, either through a tax, fine, or otherwise.[305]

Largely White, Male Corporate Boards to Diversify. Some Say It's Unconstitutional., CHI. TRIB. (May 9, 2019, 6:00 AM), https://www.chicagotribune.com/business/ct-biz-illinois-bill-public-company-board-diversity-20190430-story.html. Ultimately, an amended bill was passed, rejecting mandated quotas and instead requiring the publication of an annual report by the University of Illinois rating Illinois companies on diversity. *See* Corilyn Shropshire, *Illinois Bill Requiring Minorities on Corporate Boards 'Gutted'; Lawmakers Pass Version Calling for Disclosure, Report Card*, CHI. TRIB. (June 4, 2019, 1:55 PM), https://www.chicagotribune.com/business/ct-biz-corporate-diversity-bill-passed-gutted-20190603-story.html; *see also* Posner, *supra* note 299 (noting that New York has also taken this approach).

301. *See* Fisch & Solomon, *supra* note 24, at 17–18 ("California has frequently led the way in adopting progressive legislation, and other states often follow its initiatives. . . . Other states may follow California's example and adopt board diversity requirements." (citations omitted)).

302. *See generally* Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123 (2019).

303. *See* Gretchen Morgenson, *Portland Adopts Surcharge on C.E.O. Pay in Move vs. Income Inequality*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/business/economy/portland-oregon-tax-executive-pay.html.

304. *See* sources cited *supra* note 172 and accompanying text.

305. *See* Fisch & Solomon, *supra* note 24, at 18 ("SB 826 may reflect a state trend not merely to regulate board diversity but to extend state corporate law to address a broader range of [environmental, social, and governance] issues.").

If such statutes proliferate in number and regulatory reach, they will chip away at the hegemony of Delaware. Aspects of corporate governance, once the exclusive province of Delaware corporate law, will become subject to regulation by other states. And each such regulation will incrementally diminish the value of being chartered in Delaware.[306] In the worst case, the proliferation of state regulations affecting corporate governance may prove so burdensome or disruptive to multistate businesses that Congress may feel compelled to intervene by preempting state corporate law with a federal statute, eliminating Delaware's regulatory province altogether.[307]

Naturally, Delaware may attempt to resist these results. As described in Section II.A above, the Delaware courts may invoke the internal affairs doctrine to hold that other states' regulatory incursions are unenforceable against corporations chartered in Delaware. But there are obvious limits of this form of resistance. First, judicial lawmaking is by its nature reactive and slow.[308] Courts cannot speak unless and until presented with an actual controversy.[309] Consider for example *VantagePoint*, Delaware's judicial response to California's section 2115.[310] Although Delaware courts are frequently praised for their responsiveness to new and emerging issues in the corporate world,[311] *VantagePoint* was not

---

306. *See supra* note 173 and accompanying text.

307. *See, e.g.*, Jacobs, *supra* note 25, at 1166 (observing that if many states began regulating the internal affairs of the foreign corporations within their jurisdiction, the situation could "become sufficiently disruptive [that] it could create pressure for Congress to eliminate the conflict by enacting some kind of preemptive uniform legislation"); LoPucki, *supra* note 9, at 2114 (noting the possibility that "if the internal affairs doctrine becomes unsettled, the federal government might issue charters, taking both the power to regulate corporations and the resulting filing-fee and franchise-tax revenues for itself" (citation omitted)); Ribstein & O'Hara, *supra* note 127, at 727 ("If several states regulating Delaware corporate insiders impose undue burdens on multistate firms, Congress may have to step in . . . ."). Alternatively, instead of preempting state corporate law with a federal corporate statute, Congress could codify the internal affairs doctrine as a choice-of-law rule binding on all states. *See* Glynn, *supra* note 7, at 141; Jacobs, *supra* note 25, at 1166. Such a result would certainly benefit Delaware, but would present its own challenges, because any such legislation would still need to demarcate the boundaries of the doctrine.

308. *See* Fisch, *supra* note 86, at 1072.

309. *See id*.

310. *See supra* Section I.C.2.

311. *See* Fisch, *supra* note 86, at 1074–89; *Damning Dictum*, *supra* note 93, at 59.

decided until nearly thirty years after California's section 2115 was first enacted.[312]

Aside from the glacial pace of judicial lawmaking, there is another, more consequential, constraint to Delaware's ability to resist such challenges to the boundaries of the internal affairs doctrine. Delaware judicial rulings will do little for Delaware corporations when subjected to litigation in another state's courts.[313] Consider, for example, if California sought to enforce its board gender diversity statute against a Delaware-chartered corporation headquartered in California. The enforcement action would likely arise in the state courts of California, not Delaware.[314] And in that proceeding, the defendant Delaware corporation cannot simply invoke the internal affairs doctrine. After all, the relevant question is not whether the internal affairs doctrine applies but whether board gender diversity falls within the boundaries of the doctrine. In relying on a Delaware court ruling on the issue, the defendant corporation would still have to contend with the legislative determination of California that board gender diversity is not an internal corporate affair beyond California's regulatory reach. Thus, the defendant corporation would need to convince the California court to disregard the doctrinal boundaries statutorily drawn by the state of California in favor of a Delaware court ruling. Needless to say, this would be a difficult defense for any defendant corporation to mount.[315]

Given this reality, Delaware corporations headquartered in California may reasonably determine that the cost of resisting California's board gender diversity mandate exceeds the cost of complying and, therefore, simply choose to comply. From a pragmatic

---

312. *See* Glynn, *supra* note 7, at 135 (explaining that Delaware courts are typically unable to participate in situations where a foreign state applies its own law to a Delaware corporation). *VantagePoint* was not decided until 2005 and section 2115 was enacted in 1977. *See* CAL. CORP. CODE § 2115 (West 2020); VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005).

313. *Cf.* Stevens, *supra* note 31, at 1073 (observing, in the context of section 2115 of the California Corporations Code, that "the outcome of any internal affairs litigation involving a Delaware corporation" will "be completely dependent on" whether the litigation is adjudicated in California or Delaware).

314. Fisch & Solomon, *supra* note 24, at 14 n.87 ("We note that such a challenge to the statute would likely occur in a California court as a defense to California's effort to enforce the fines applicable under the statute to firms that fail to comply.").

315. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 302 cmt. a (AM. LAW INST. 1971) (instructing courts to not defer to the internal affairs doctrine where there is "a local statute that is explicitly applicable to the situation at hand" and recognizing that "[a]ll States . . . have statutes which regulate in various ways the affairs of foreign corporations within their territory").

perspective then, Delaware's say over the governance of these Delaware corporations is dwindled by California's statute, even if Delaware courts continue to insist that board gender diversity is governed exclusively by Delaware law.

2. States Taking a More Expansive View

While states like California embrace a restrictive view of the internal affairs doctrine, other states may see opportunity in challenging Delaware by construing the doctrine more broadly. In particular, smaller states—those with relatively small populations and economies—have little to gain in terms of regulatory power by seeking to regulate the activity of the foreign corporations within their jurisdiction.

Instead, such states may have more to gain by construing the internal affairs doctrine more expansively than Delaware, authorizing the types of corporate governance provisions that Delaware Court of Chancery under *Sciabacucchi* prohibited. Consider for example Nevada, Delaware's most active competitor in the market for corporate charters.[316] Hoping to attract corporate charters away from Delaware, Nevada could change its corporate law to specifically authorize charter and bylaw provisions regulating shareholder rights arising under federal securities law.[317] Such a change would enable Nevada corporations to include not just forum selection provisions of the type *Sciabacucchi* invalidated, but also fee-shifting and mandatory arbitration provisions covering federal securities law claims.

If such provisions are prohibited under Delaware law, there will be some number of Delaware corporations tempted to reincorporate in Nevada.[318] To be sure, the number will depend on the willingness of investors to accede to any such provisions regulating their rights

---

316. *See, e.g.*, Anderson, *supra* note 70, at 674–76 (providing evidence of Nevada's success in attracting corporate charters). *See generally* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012); Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165 (2012).

317. Such a move would not be far-fetched for Nevada, which already seeks to distinguish itself from Delaware by providing corporate directors and officers greater protection from liability. *See* Barzuza, *supra* note 316, at 947–55.

318. *Cf.* Bainbridge, *supra* note 176, 869–72 (arguing that Delaware's statutory ban on fee-shifting for state law claims will tempt corporations to migrate to states where fee-shifting is not banned).

arising under federal securities law.[319] But with respect to at least forum selection provisions governing federal securities law claims—the very type of provision barred by the Delaware Chancery Court in *Sciabacucchi*—there are reasons to believe shareholders will not oppose, and may actually favor, such provisions. Empirical evidence shows that immediately following the Delaware Chancery Court's *Sciabacucchi* decision, the stock price of corporations with forum selection provisions governing federal securities law claims suffered significant declines.[320] This evidence "generally lend[s] some support to the view that [such provisions] are desirable and do not undermine shareholders' rights."[321]

To the extent Nevada, or any other state, is successful in attracting corporations away from Delaware, Delaware's regulatory domain will be diminished by the simple fact that fewer corporations will be incorporated under Delaware law. There is nothing Delaware can do to stop another state from this form of regulatory competition. Although *Sciabacucchi* speaks in broad terms, grounding its conclusion in "first principles,"[322] Delaware courts cannot prevent another state from coming to a different conclusion regarding the scope of internal affairs covered by that state's corporate law.

The problems for Delaware do not end there, however. As corporations formed elsewhere adopt charter and bylaw provisions regulating federal securities law claims, the validity of those provisions under federal law will be ultimately tested. The federal courts will eventually resolve the very issue that Delaware Chancery Court in *Sciabacucchi* averted—the applicability of the FAA to a corporation's governing documents. Although *Sciabacucchi* would prevent Delaware corporations from raising this question before federal courts, Delaware cannot stop another state's corporations from raising it.

If the federal courts rule that under the U.S. Supreme Court's FAA jurisprudence an arbitration provision set forth in a Nevada corporation's charter or bylaws is enforceable against its shareholders, then the consequences for Delaware are the same as

---

319. *See, e.g.*, Allen, *supra* note 205, at 789–94 (discussing the potential for shareholder opposition to mandatory arbitration in corporate governance documents); David H. Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201, 211 (2015) (same).

320. *See* Aggarwal et al., *supra* note 285, at 22–23.

321. *Id*. at 23.

322. *See supra* notes 217–21 and accompanying text.

previously described.[323] Delaware's statutory ban on arbitration provisions covering state law claims will be preempted; Delaware corporations will be free to adopt such provisions; and Delaware's regulatory domain will face an existential crisis.

C. The Irrelevance of the Doctrine's Constitutional Underpinnings

Critically, the challenges facing Delaware are not ones that Delaware can fend off by relying on the internal affairs doctrine's purportedly constitutional underpinnings. As noted before, the Delaware Supreme Court's repeated assertion in *McDermott* and *VantagePoint* that the doctrine is a constitutionally mandated rule is the subject of serious skepticism.[324] What is not in doubt is that the U.S. Supreme Court has never explicitly held that the federal Constitution requires all states to rigidly adhere to the internal affairs doctrine.[325]

But even if the doctrine were a constitutionally mandated rule, that would not resolve Delaware's vulnerability. Because even if other states are constitutionally compelled to adhere to the internal affairs doctrine as a choice-of-law principle, as practically all states already do anyway,[326] that still leaves open the question of the doctrine's precise boundaries.[327] The indeterminacy at the edges of the doctrine, and the ability of other states to exploit that indeterminacy, is what makes Delaware's regulatory domain susceptible to challenges.

For Delaware to be protected from such challenges, the U.S. Supreme Court would need to not only constitutionalize the internal affairs doctrine, but also provide firmer definition to the boundaries of the doctrine. Given the inherent indeterminacy of the internal/external distinction, however, constitutionalizing the

---

323. *See supra* notes 244–53 and accompanying text.

324. *See supra* note 127 and accompanying text.

325. *See* Jacobs, *supra* note 25, at 1164–66 (conceding, as a then sitting member of the Delaware Supreme Court, that whether the internal affairs doctrine is a constitutionally mandated rule is a question the U.S. Supreme Court has yet to decide and that "any prediction about how the nation's highest court might rule would be hazardous"); Rubenfeld, *supra* note 106, at 357 ("The holding in . . . *McDermott* [that the internal affairs doctrine is a constitutionally mandated rule] is not logically required by anything the Court said in *CTS*.").

326. *See supra* note 4 and accompanying text.

327. *See* Rubenfeld, *supra* note 106, at 381 ("Constitutionalizing the internal affairs doctrine would not produce the absolute choice-of-law certainty and predictability that is generally supposed. Difficult choice-of-law problems would still arise; the only difference is that they would take the form of attempts to distinguish 'internal' from 'external' affairs.").

internal affairs doctrine would only ensnare the U.S. Supreme Court in haphazard, case-by-case line drawing.[328] That reality alone may be enough to dissuade the Court from constitutionalizing the choice-of-law principle.[329] But in any case, relying on the U.S. Supreme Court to define the edges of the internal affairs doctrine will not fully resolve Delaware's vulnerability. The vulnerability merely shifts from the self-interested challenges of other states to the whims of a distant federal court unconcerned with Delaware's parochial interests.

CONCLUSION

For over a century now, Delaware has enjoyed an unrivaled role among states as the *de facto* regulator of American corporations.[330] But recent events suggest that this unrivaled power may be unraveling at the edges. The boundaries of the internal affairs doctrine are now the subject of dispute, and additional challenges are likely to surface. As other states seek to contest the scope of the internal affairs doctrine, restricting and expanding its reach, Delaware confronts a new threat to its lucrative regulatory domain, and corporate America faces a fundamentally altered regulatory landscape.

Of course, Delaware has weathered previous challenges. And with the help of the powerful corporations that rely on Delaware law, the state may well survive this one.[331] But in this contest, there is little Delaware can do to defend itself because the boundaries of the internal affairs doctrine are not something Delaware may unilaterally dictate for other states.

---

328. *See id*. ("Constitutionalizing the internal affairs doctrine . . . . will devolve into a case-by-case analysis measuring the 'external' effects of putative 'internal' conduct and then, inevitably, balancing those effects against the need for choice-of-law certainty.").

329. Conversely, the precise boundaries of the internal affairs doctrine may be more amenable to codification by federal legislation. *Cf.* Glynn, *supra* note 7, at 140–41 (considering the possibility of codifying the internal affairs doctrine through federal legislation); Jacobs, *supra* note 25, at 1157, 1166–67 (same).

330. *See* Carney & Shepherd, *supra* note 71, at 23–24.

331. *See* Glynn, *supra* note 7, at 140–42 (explaining that the U.S. Chamber of Commerce and other "powerful interest groups" may push for federal legislation codifying the internal affairs doctrine nationally and, thus, preserving Delaware's hegemony); Greenwood, *supra* note 7, at 431 (noting "that powerful and wealthy corporations and their lobbyists have every reason to defend the internal affairs doctrine, which places corporate governance beyond the law, while no comparably wealthy and organized group presses the issue on the other side").