

DORMANCY AND DELAWARE: AN EMERGING THREAT TO THE INTERNAL AFFAIRS DOCTRINE

INTRODUCTION

A longstanding choice-of-law rule known as the internal affairs doctrine has predominated over corporate law matters in the United States since at least the 1860s.¹ Acknowledged by the Supreme Court² and generally followed by the states,³ the doctrine holds that the internal affairs of a corporation are governed by the law of the state where it is incorporated,⁴ notwithstanding where it may be headquartered. This state-by-state approach to corporate regulation, many have argued, has prompted a race to the bottom in the market for corporate law whereby states compete for corporate chartering.⁵ In reality, this has meant that the winner of the race — Delaware — has crafted most of the corporate law in effect within the United States.⁶

Today, despite vocal dissidents,⁷ Delaware remains the premier state for incorporation. Sixty-seven percent of Fortune 500 companies and two million entities in total are incorporated in the state.⁸ A few noteworthy reincorporations out of Delaware as of late have sparked conversation on the potential for Delaware to be dethroned by states like

¹ See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 44 (2006).

² See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

³ See Tung, *supra* note 1, at 39–40; see also MODEL BUS. CORP. ACT § 15.01(a)(1) (A.B.A. 2025) (propounding the rule in the model act for states).

⁴ See RESTATEMENT (SECOND) OF CONFLICT OF L. §§ 301–02, 302 cmt. a (A.L.I. 1971). This includes matters arising among or between “shareholders, directors, [and] officers.” *Id.* § 302 cmt. a.

⁵ See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974); Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, 1166, 1180 (2012). *But see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256–58 (1977). See generally Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 225, 228 (1985) (describing the range of scholarship on the desirability of interstate competition in chartering).

⁶ See Cary, *supra* note 5, at 665 (“[T]he Model Act has been watered down to compete with the Delaware statute . . . rather than offering alternative approaches.”).

⁷ See, e.g., Jai Ramaswamy, Andy Hill & Kevin McKinley, *We’re Leaving Delaware, And We Think You Should Consider Leaving Too*, ANDREESSEN HOROWITZ (July 9, 2025), <https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too> [<https://perma.cc/FKV9-RG8Y>].

⁸ DEL. DIV. OF CORPS., 2024 ANNUAL REPORT, at 1. But most of these corporations are headquartered elsewhere. Armando A. Argueta, *Delaware Incorporation: Benefits, Drawbacks and How-To Steps*, SILICON VALLEY BANK, <https://www.svb.com/startup-insights/vc-relations/why-incorporate-in-delaware> [<https://perma.cc/AEB5-MB33>] (most Delaware corporations headquartered in other states); see Marcus Lu, *Map: The Number of Fortune 500 Companies in Each U.S. State*, VISUAL CAPITALIST (July 30, 2024), <https://www.visualcapitalist.com/map-the-number-of-fortune-500-companies-in-each-u-s-state> [<https://perma.cc/4VG9-K8E8>] (only one Fortune 500 company headquartered in Delaware).

Nevada or Texas.⁹ Yet there is no substantial empirical evidence that “DExit” is really happening.¹⁰ The vast majority of companies incorporated in Delaware are sticking with the state,¹¹ as are most large companies choosing destinations for initial public offerings (for now).¹²

Still, Delaware’s supremacy is on shaky ground. A recent Supreme Court development could shift power from Delaware even if the state does manage to remain in first place for corporate chartering. Looming over the internal affairs doctrine and Delaware’s superiority is the dormant commerce clause, which has traditionally prevented states from unduly obstructing commerce beyond their borders.¹³ While the Supreme Court used to regularly overturn state statutes with extraterritorial effect on commerce under the dormant commerce clause,¹⁴ more recently the Court has upheld statutes with significant extraterritorial effects in other states.¹⁵ In light of other weaknesses with the internal affairs doctrine,¹⁶ scaling back the dormant commerce clause threatens to dilute Delaware’s supremacy by enabling other states — through muscular outreach statutes — to regulate the corporate governance matters of Delaware-incorporated companies. This strikes at the very heart of what makes it the de facto regime for American corporate law.

To date, scholars have analyzed the relationship between the dormant commerce clause and the internal affairs doctrine.¹⁷ Moreover, scholars and courts have encountered the doctrine’s “indeterminacy” when states debate what exactly falls within the boundaries of internal affairs (and conversely, what does not).¹⁸ To address these phenomena and others, some have called for a constitutional mandate of the internal

⁹ Alexis Keenan, *More Musk-Like “Dexits” Pose Fresh Threat to Delaware’s Corporation Crown*, YAHOO! FIN. (Feb. 18, 2025), <https://finance.yahoo.com/news/more-musk-like-dexits-pose-fresh-threat-to-delawares-corporation-crown-153056633.html> [<https://perma.cc/T2DC-B6GQ>].

¹⁰ See Stephen M. Bainbridge, *DExit Drivers: Is Delaware’s Dominance Threatened?*, 50 J. CORP. L. 823, 827–28 (2025) (also noting that the reincorporation alarms are cyclical, *id.* at 891).

¹¹ See *id.* at 828 & n.23.

¹² John Coates, LINKEDIN (Sep. 8, 2025 at 12:37 ET), https://www.linkedin.com/posts/john-coates-505990b_dexit-ipos-delaware-activity-7370857935046094848-tEd-4 [<https://perma.cc/KU86-E96R>].

¹³ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141–42 (1970).

¹⁴ Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 272, 292–95, 299 (2017).

¹⁵ See *id.* at 301.

¹⁶ See *infra* section II.B, pp. 808–11.

¹⁷ See, e.g., Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 329–30 (2023).

¹⁸ E.g., Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 272–74, 297–98 (2020).

affairs doctrine;¹⁹ some have proposed a federal incorporation system;²⁰ and others have advocated for a new interest-balancing conflicts rule.²¹

This Note offers a new contribution to this body of scholarship by arguing that a weaker dormant commerce clause is an emerging threat to Delaware because it is conceivably less protective of the internal affairs doctrine. Fully appreciating the impact of the dormant commerce clause on the internal affairs doctrine results in a more nuanced account of the evolving status of Delaware, incorporation, and corporate governance.

The Note proceeds as follows. Part I discusses the development of the internal affairs doctrine, including both its staying power and its frailty. Part II then reviews the two seminal internal affairs doctrine Supreme Court cases, along with *Eccles v. Shamrock Capital Advisors, LLC*²² from New York, to show that the internal affairs doctrine as a conflict-of-laws solution entails unsettled questions along two different dimensions of horizontal federalism.²³ Next, Part III explains the connection between the dormant commerce clause and the internal affairs doctrine. With that established, it analyzes *National Pork Producers Council v. Ross*²⁴ and extracts themes to explain how the condonement of extraterritorial regulation could have import for the internal affairs doctrine. Finally, Part IV highlights the nascent threat that Delaware faces as a result of these effects, presenting yet another challenge in its battle to remain the leader for corporate law.

¹⁹ See, e.g., Jack B. Jacobs, Brennan Lecture, *The Reach of State Corporate Law Beyond State Borders: Reflections upon Federalism*, 84 N.Y.U. L. REV. 1149, 1167–68 (2009); Timothy P. Glynn, *Delaware's VantagePoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 117 (2008).

²⁰ See, e.g., George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499, 507–08 (2010).

²¹ See Lipton, *supra* note 17, at 382–85; Norwood P. Beveridge, Jr., *The Internal Affairs Doctrine: The Proper Law of a Corporation*, 44 BUS. LAW. 693, 713–18 (1989).

²² 245 N.E.3d 1110 (N.Y. 2024).

²³ This Note adopts definitions of federalism from Professor Allan Erbsen. The most common conception of federalism is vertical federalism, that is, “how power is or should be allocated between the federal and state tiers of government.” Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502 (2008). Preemption doctrine would be a clear example of vertical federalism. See *id.* at 552. Mechanisms like the internal affairs doctrine and other conflict-of-laws principles exist on the plane of horizontal federalism: “encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.” *Id.* at 503. This Note uses “horizontal federalism” to describe the conflictual relationship between states. While the dormant commerce clause, as a constitutional principle, functions vertically on the states, it is also a tool to manage horizontal conflict. See *infra* notes 126–29 and accompanying text; cf. Erbsen, *supra*, at 504–05, 552 (generally describing overlap between horizontal and vertical federalism).

²⁴ 143 S. Ct. 1142 (2023).

I. ORIGINS AND DEVELOPMENTS

Delaware's status as the preeminent incorporation hub is rooted in the history and mechanics of the internal affairs doctrine. This position is naturally unsteady, in part because the internal affairs doctrine is fallible. Its acceptance came to fruition as a result of its simplicity and corresponding practical incentives for states — reasons that are historically contingent and potentially outdated. With a drastically different economic landscape for corporations today than when the doctrine was first adopted, it might be considered less necessary than it once was. Understanding the historical developments that led to the acceptance of the doctrine sheds new light on how today's changing landscape jeopardizes the universality of Delaware's corporate law regime.

A. *An Opportunistic Delaware*

Courts first articulated the internal affairs doctrine in the 1860s,²⁵ and the idea that corporations were governed by their chartering state's law soon became a seemingly obvious proposition.²⁶ During this pre-industrial era, corporations operated almost exclusively within a single resident state.²⁷ On top of that, a corporation had inextricable ties to its chartering state's legislature and was therefore considered an “arm[] of the state” in which it was created;²⁸ it only made practical sense to abide by the rules of the chartering state.²⁹ Little interstate conflict over corporate regulation could arise in this context. But by the latter part of the nineteenth century, things were changing. The development of major railroads provided a boon to the economy that proliferated a network of corporate operations across several states.³⁰ And as interstate commerce grew, so did interstate litigation over state jurisdiction to hear certain matters.³¹ This development presented a host of new challenges for state and federal courts.³²

As businesses began operating across state lines, state legislatures were liberalizing their chartering requirements.³³ Recognizing the incorporation market that this created, New Jersey began offering charters

²⁵ Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 371 (2018).

²⁶ See *id.* (quoting *Gregory v. N.Y., Lake Erie & W.R.R. Co.*, 40 N.J. Eq. 38, 44 (Ch. 1885)).

²⁷ Tung, *supra* note 1, at 44–46.

²⁸ Buccola, *supra* note 25, at 371–72.

²⁹ See Tung, *supra* note 1, at 47–48. See generally 2 JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1917) (discussing early corporations and their relations with state legislatures).

³⁰ See Tung, *supra* note 1, at 58.

³¹ See Buccola, *supra* note 25, at 374–75.

³² See, e.g., *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1856) (resolving a dispute where Ohio residents brought a fire insurance case against Lafayette Insurance, a corporation chartered in Indiana and operating in Ohio).

³³ See Eric Hilt, *Early American Corporations and the State*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 37, 59 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

to any corporation that was willing to pay for one.³⁴ This drew in foreign corporations and prompted what is known today as the “race for the bottom” in corporate law.³⁵ New Jersey would maintain its position until 1913, when it passed restrictive amendments to its incorporation law and presumably turned off many companies.³⁶ It stepped Delaware to take the reins.³⁷

Suffice it to say, Delaware has not looked back since, going all in on its state chartering enterprise. Through legislation and court decisions, it has promulgated a corporate law regime that largely satisfies corporate executives;³⁸ it has beefed up its Chancery Court, a court of equity that specializes in corporate matters and decides cases expeditiously;³⁹ it has given significant power to a council of corporate practitioners that essentially decides all amendments to the Delaware General Corporation Law (DGCL);⁴⁰ and over time, it has enshrined a robust industry of local registration services.⁴¹ There are two primary consequences from this history: First, Delaware has become highly dependent on its chartering revenues. By 2022, over twenty-eight percent of its net revenue derived from this business.⁴² Second, Delaware corporate law has amassed considerable staying power. It enjoys incumbent advantages given its familiarity, quality, and scale.⁴³ At least for now, these factors have insulated Delaware from its challengers.

³⁴ Lipton, *supra* note 17, at 326; *see* Tung, *supra* note 1, at 78.

³⁵ Cary, *supra* note 5, at 665; *see id.* at 664–66. *But cf.* Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 786–89 (2006) (providing contrary theories for Delaware’s supremacy).

³⁶ Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443 (1992).

³⁷ *See id.*

³⁸ *See* Cary, *supra* note 5, at 669–70 (noting that “features of Delaware law demonstrat[e] liberality” for management and that even “the courts have undertaken to carry out the ‘public policy’ of the state and create a ‘favorable climate’ for management”).

³⁹ William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS. (1993), <https://courts.delaware.gov/chancery/history.aspx> [<https://perma.cc/C5Z3-Y3ET>] (acknowledging the Chancery Court’s reputation for “deciding quickly and coherently whatever corporate America and its advisors [can] concoct”).

⁴⁰ Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 312 n.225 (2019). For example, look no further than recent S.B. 21, enacting a number of sweeping changes to the DGCL in an effort “to ensure that Delaware remains the preeminent home of choice for many corporations.” Nicholas O’Keefe et al., *Delaware Enacts Significant Changes to Delaware General Corporation Law*, NAT’L L. REV. (Apr. 4, 2025), <https://natlawreview.com/article/delaware-enacts-significant-changes-delaware-general-corporation-law> [<https://perma.cc/GSW5-VZU3>].

⁴¹ *See List of Delaware Registered Agents*, DEL. DIV. OF CORPS., <https://corp.delaware.gov/agents> [<https://perma.cc/3ZQ8-AB4H>].

⁴² DEL. OFF. OF MGMT. & BUDGET, FISCAL YEAR 2022: GOVERNOR’S RECOMMENDED BUDGET 6.

⁴³ Lucian Arye Bebchuk & Assaf Hamdani, Essay, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 588 (2002).

B. A Delicate Doctrine

The foundation for Delaware's control over corporate law today is still the internal affairs doctrine, which allows Delaware to govern "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."⁴⁴ To date, the doctrine's main appeal — its simplicity — has been sufficient for most to accept it as a resolution of horizontal federalism disputes in corporate law. But this justification is contestable and lacks modern import. Further, history shows that challenges to the doctrine have limited its scope and demonstrated that it is not firmly affixed.

As previously mentioned, the internal affairs doctrine initially came about before the Industrial Revolution, when corporations were tethered to the states in which they were created.⁴⁵ A new approach to corporate regulation might have been warranted once the economy changed in the late nineteenth century, but state incentives ran counter to adopting a new regime.⁴⁶ Once power shifted from states to corporations during the chartering frenzy,⁴⁷ any action by a state to revisit its corporate law regime or prevent out-of-state businesses from chartering would have put that state at an economic disadvantage.⁴⁸ Thus, the collective action problem ran amok, and a classic race to the bottom ensued.⁴⁹ This inertia behind the internal affairs doctrine was then dignified by courts as the proper conflict-of-laws solution to horizontal disputes in corporate law.⁵⁰ After quite some time, the rule is still with us today.

The doctrine's simplicity undergirds its staying power. It is true that governing all of a corporation's internal affairs under a single jurisdictional umbrella makes for a streamlined regulatory landscape.⁵¹ To otherwise subject corporate governance to different regulations from different states — potentially conflicting with one another — could be imprudent and cause confusion.⁵² For many, this justifies applying the doctrine with full force: If the case involves an internal affair, the rule requires application of the chartering state's law.⁵³ Former Delaware Supreme Court Justice Jacobs takes this argument further, suggesting that "the stability and certainty afforded by the internal affairs doctrine

⁴⁴ See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

⁴⁵ See *supra* notes 27–29 and accompanying text.

⁴⁶ See *Tung*, *supra* note 1, at 45–46.

⁴⁷ See *id.* at 45–46, 60.

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See *id.* at 46.

⁵¹ See Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1485–87 (2002).

⁵² See *Jacobs*, *supra* note 19, at 1162.

⁵³ *E.g.*, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (“[O]nly the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.”).

justifies according that doctrine *constitutional status*⁵⁴ under the Commerce Clause, Due Process Clause, or Full Faith and Credit Clause.⁵⁵ Even short of constitutional status, which the U.S. Supreme Court has refrained from recognizing,⁵⁶ the internal affairs doctrine's functionality gives it teeth. Every state in the country (to varying degrees) abides by some version of the rule.⁵⁷

So does that settle it? Well, not exactly. In reality, corporate regulation has evolved to enable actions that the internal affairs doctrine would purportedly prevent. Two trends have contributed to this development. First, the rule's *boundaries* have tightened from covering a broad notion of the "internal affairs" of a corporation to only corporate governance, narrowly defined.⁵⁸ As corporate stakeholders such as employees and creditors demanded legal protections that a shareholder-centric corporate law regime would not accommodate, other bodies of law subsumed aspects of corporate regulation thought not to concern core corporate governance issues.⁵⁹ Second, because of regulatory ambition from nonchartering states and a broader trend toward interest-balancing approaches to conflict-of-laws issues,⁶⁰ the internal affairs doctrine's *weight* has been reduced from a blanket "jurisdictional bar" to a mere "choice of law" presumption.⁶¹ As a result, the version of the rule today is fainter than what it once was.⁶² Hence, we have a triumvirate regime for corporate regulation: The federal government, individual states where companies operate, and chartering states now all get different pieces of the regulatory puzzle.⁶³ Ironically, then, we arguably live in a version of the "economically disruptive" reality that some have

⁵⁴ Jacobs, *supra* note 19, at 1165 (emphasis added).

⁵⁵ See *id.* at 1165 & n.53 (citing Note, *supra* note 51, at 1490–96). The Delaware Supreme Court has (unsurprisingly) taken this position too. See *VantagePoint*, 871 A.2d at 1113; *McDermott Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987).

⁵⁶ See Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 716–21. Moreover, "scholars and practitioners have questioned . . . repeated assertions that the internal affairs doctrine is constitutionally mandated." Manesh, *supra* note 18, at 274 & n.127 (recounting analyses that debunk the constitutional bases).

⁵⁷ Cf. Tung, *supra* note 1, at 39–40 (noting that acceptance of the internal affairs doctrine among states is "widespread," *id.* at 40). But cf. *id.* at 39 n.17, 40 n.20 (describing variation in scope of internal affairs doctrine's coverage in a few states).

⁵⁸ See Ribstein & O'Hara, *supra* note 56, at 694–95.

⁵⁹ See *id.* For example, employee protections have developed outside the realm of the internal affairs doctrine, see *id.* at 694, whereas matters like fiduciary duties have developed within it, see *id.* at 726.

⁶⁰ For a summary of the historical evolution of conflict-of-laws doctrine, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 360–62 (1992).

⁶¹ See Tung, *supra* note 1, at 39, 47. Contrast *Rogers v. Guar. Tr. Co.*, 288 U.S. 123, 130 (1933) ("[A] court . . . sitting in one State will [generally] . . . decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State . . ."), with *Salzberg v. Sciabacucchi*, 227 A.3d 102, 128 (Del. 2020) ("[T]he law of the state of incorporation should determine issues relating to internal corporate affairs." (quoting *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987))).

⁶² See Ribstein & O'Hara, *supra* note 56, at 694–97.

⁶³ See *id.*

argued would result without the internal affairs doctrine.⁶⁴ This historical evidence of the doctrine's constriction is a convincing indication that new pressures on the doctrine could portend even further winnowing.

II. CONTESTS OF INTERNAL AFFAIRS

Changes to the boundaries and the weight of the internal affairs doctrine show that it is malleable. Delaware's rise as the leader in U.S. corporate law has come with myriad challenges from other states over the contours of the internal affairs doctrine and just how expansively it applies. A pair of U.S. Supreme Court cases in the 1980s and one recent New York Court of Appeals case illustrate these different dimensions of internal affairs challenges. Above all, what these cases show are the different contests of horizontal federalism extant in internal affairs doctrine cases. Spotting them unveils a distinct frontier in Delaware's fight to maintain its grasp on corporate law.

A. *The Supreme Court's Light Tread*

The leading Supreme Court cases on the internal affairs doctrine came out of the mergers and acquisitions craze of the 1980s. Hostile takeovers and leveraged buyouts were relatively novel corporate governance tools, posing new interjurisdictional legal issues when applied to large, publicly held companies.⁶⁵ The Court took up these issues in *Edgar v. MITE Corp.*⁶⁶ and *CTS Corp. v. Dynamics Corp. of America*,⁶⁷ both of which examined whether the disputes were properly internal affairs matters.⁶⁸

MITE, the first case, specifically involved Delaware. *MITE Corp.*, the respondent, was a Delaware-incorporated and Connecticut-domiciled firm that made a tender offer for Chicago Rivet, incorporated in Illinois.⁶⁹ Illinois had a state securities statute that imposed certain tender offer requirements on both Illinois corporations and certain other corporations in which Illinois shareholders owned at least ten percent of the stock.⁷⁰ Illinois Secretary of State James Edgar argued that Illinois had a predominant interest in the matter because of the internal affairs

⁶⁴ Cf., e.g., Jacobs, *supra* note 19, at 1166 (arguing that lack of internal affairs doctrine would prove "economically disruptive").

⁶⁵ See Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 SCIENCE 745, 745 (1990); Lipton, *supra* note 17, at 336.

⁶⁶ 457 U.S. 624 (1982).

⁶⁷ 481 U.S. 69 (1987).

⁶⁸ It should be noted that both *MITE* and *CTS* also involved federal preemption related to the Williams Act. See *MITE*, 457 U.S. at 635 (opinion of White, J.); *CTS*, 481 U.S. at 78. For purposes here, this Note puts the preemption issues aside. These two cases are also the only substantive discussion of the internal affairs doctrine from the Supreme Court.

⁶⁹ *MITE*, 457 U.S. at 626–27.

⁷⁰ *Id.*

doctrine.⁷¹ The Court was unconvinced. For one, it said that the Illinois statute went beyond the doctrine because it purported to cover any “tender offers . . . for which 10% of the outstanding shares are held by Illinois residents.”⁷² Under this interpretation, Illinois corporate law would impermissibly extend to many non-Illinois-incorporated businesses.⁷³ Additionally, the Court held that tender offers were not matters of “internal affairs” because they are transactions where stock is transferred to a third party — defeating any claim that the dispute was purely between directors, officers, and shareholders.⁷⁴

Just five years later in *CTS*, the Supreme Court mentioned the internal affairs doctrine in a similar hostile takeover dispute.⁷⁵ But the Court distinguished the Indiana Act in *CTS* from the Illinois statute in *MITE*.⁷⁶ Unlike the Illinois statute, the Indiana Act applied only to “corporations incorporated in Indiana” and “corporations that have a substantial number of shareholders in Indiana.”⁷⁷ Accordingly, the Court concluded that Indiana had discretion to regulate the tender offer requirements for Indiana-incorporated businesses because “promoting stable relationships among parties involved in the corporations [that the state] charters” falls within the internal affairs gamut.⁷⁸ Thus, in *CTS*, the Court was sympathetic to the states’ abilities to impose regulations on businesses that they had chartered, giving the internal affairs doctrine its most significant recognition ever.⁷⁹

The two opinions, taken together, say little on how the internal affairs doctrine actually works. Notably, the Court made no constitutional commitment to the internal affairs doctrine. At most, the *CTS* Court embraced the idea that a chartering state is “traditionally” the state that regulates corporate governance, but it stopped short of solidifying a robust version of the internal affairs doctrine.⁸⁰ Another observation is that its internal affairs discussions pertained to the *boundaries* of the internal affairs doctrine. The Court asked whether the cases concerned matters that were internal (giving the chartering state the governing right) or external (likely denying the chartering state the governing

⁷¹ *Id.* at 645.

⁷² *See id.*

⁷³ *Id.*

⁷⁴ *Id.* A transaction of stock to third parties concerns the relationship between the corporation and external actors, as opposed to an internal transaction among or between “shareholders, directors, [and] officers.” *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 302 cmt. a (A.L.I. 1971).

⁷⁵ *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 75, 78 (1987).

⁷⁶ *Id.* at 80.

⁷⁷ *Id.* at 93.

⁷⁸ *Id.* at 91.

⁷⁹ *See id.*

⁸⁰ *See id.* at 90. The *CTS* Court’s primary concern seemed to be “that a corporation — except in the rarest situations — is organized under, and governed by, the law of a single jurisdiction” to effectuate a “beneficial free market system.” *Id.* It could have mandated that single jurisdiction as the chartering state, but it did not do so.

right). In *MITE*, the Court answered that tender offers from foreign third parties were beyond the internal affairs doctrine and therefore outside of a chartering state's power.⁸¹ In *CTS*, the Court framed the locus of the case as being shareholder rights, which it considered an internal affairs subject.⁸² In both instances, the Court resolved horizontal federalism disputes — inquiries of the scope of state police power over corporate activity.

B. State Tinkering

Battles in state courts have a more voluminous history and present their own challenges to the internal affairs doctrine.⁸³ Much of that history is of the same ilk as *MITE* and *CTS* at the federal level: cases ascertaining the boundaries between internal and external for the purpose of determining which state's law should govern the dispute.⁸⁴ Powerful economic states like California and New York often try their hands at governing companies headquartered in their states (but incorporated elsewhere, often in Delaware) with aggressive “outreach statutes.”⁸⁵ Such statutes, which are extraterritorial regulations from nonchartering states, can tee up litigation over the boundaries of the internal affairs doctrine when these laws differ from a chartering state's law.⁸⁶

The cases that less frequently surface in state courts are those that balance competing state interests instead of just determining internal versus external affairs boundaries like *MITE* and *CTS*. That is, notwithstanding where a corporation is chartered, a state where the corporation is domiciled (but not chartered) may have a predominating interest in an internal affairs matter such that its law overrides the chartering state's law. This presents a fundamentally different inquiry about the *weight* of the internal affairs doctrine. To be sure, this is part of what made the 2024 New York case *Eccles v. Shamrock Capital Advisors* draw the attention of corporate scholars and practitioners.⁸⁷ In this

⁸¹ *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982).

⁸² *See CTS*, 481 U.S. at 89.

⁸³ For an illustrative list, see Beveridge, *supra* note 21, at 703–07 (canvassing nine state statutes and corresponding cases in California, Delaware, Iowa, New York, Oklahoma, and Wisconsin).

⁸⁴ *See, e.g., Lidow v. Superior Ct.*, 141 Cal. Rptr. 3d 729, 737 (Ct. App. 2012) (stating that a wrongful termination claim “goes beyond internal governance”); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1082 (Del. 2011) (stating that “[t]he presuit demand requirement” for stockholder suits “is quintessentially an ‘internal affair’ that falls within the scope of the internal affairs doctrine”).

⁸⁵ *See Beveridge, supra* note 21, at 703–07; Manesh, *supra* note 18, at 306.

⁸⁶ *See Beveridge, supra* note 21, at 703–07.

⁸⁷ *See, e.g., Peter Sluka & Farrell Fritz, Court of Appeals Bolsters the Internal Affairs Doctrine, Takes a Stroll Through Scottish Fiduciary Law*, JD SUPRA (June 17, 2024), <https://www.jdsupra.com/legalnews/court-of-appeals-bolsters-the-internal-7632258> [<https://perma.cc/SZP9-5KR9>] (“[I]t’s . . . rare to see the Court of Appeals, in a case of first impression, fashion a new framework for addressing a complex question.”). The question was of such intrigue that corporate law professors wrote

case, the Court of Appeals adopted a balancing analysis, resisting the foregone conclusion that the law of the chartering state (here, Scotland) automatically governs a corporation's internal affairs.⁸⁸ While the impact of the case remains to be seen, a state high court lending credence to the idea that a nonchartering state's law might govern an internal affair is a significant development.

The dispute in *Eccles* involved FanDuel, incorporated in Scotland with its headquarters in New York.⁸⁹ The plaintiffs (common shareholders including the company's founders) alleged that the defendants (directors and preferred shareholders) breached their fiduciary duties by deliberately undervaluing the consideration in a merger deal.⁹⁰ Central to this dispute was whether Scots or New York law applied as to the scope of fiduciary duties. The plaintiffs pleaded several causes of action under New York law and argued that under a balancing test, the court should apply New York law to the case.⁹¹ The defendants instead asserted that because the case concerned a dispute between directors and shareholders — a traditional matter of internal affairs — Scots law must govern.⁹² And for its part, Scots law prescribed director fiduciary duties to corporations themselves, but *not* to shareholders.⁹³

The court sided with the defendants' conclusion that Scots law should apply but adopted the plaintiffs' balancing approach. First, it stated that the matter was one of internal affairs and that under New York precedent, "the 'general[]' approach is to apply the law of the state of incorporation."⁹⁴ While holding that the law of a chartering state "presumptively applies" to internal affairs issues, the court also clarified that this presumption could be overcome by showing that (1) "the interest of the place of incorporation is minimal," and (2) "New York has a

as amici for the defendants-respondents. See Brief for Amici Curiae Corporate Law Professors in Support of Defendants-Respondents at 1, *Eccles v. Shamrock Cap. Advisors, LLC*, 245 N.E.3d 1110 (N.Y. 2024) (No. APL-2023-00087). On the other hand, conflicts professors wrote for the plaintiffs-appellants. See Brief for Amici Curiae Conflict of Laws Professors Patrick J. Borchers et al. in Support of Reversal of the Decision Below at 2, *Eccles*, 245 N.E.3d 1110 (No. APL-2023-00087).

⁸⁸ See *Eccles*, 245 N.E.3d at 1121–24.

⁸⁹ *Id.* at 1115.

⁹⁰ *Id.* at 1118. FanDuel was likely undervalued because merger negotiations were happening in anticipation of the Supreme Court's ruling in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), which opened the door for states to legalize sports betting. *Id.* at 1484–85. Failing to account for this factor, FanDuel's valuation was plausibly lower than it should have been, undercutting common shareholders due to a specific "waterfall provision" in the contract. *Eccles*, 245 N.E.3d at 1115–17.

⁹¹ *Eccles*, 245 N.E.3d at 1118–19.

⁹² *Id.* at 1118.

⁹³ *Id.* at 1118–19.

⁹⁴ *Id.* at 1121 (alteration in original) (quoting *Zion v. Kurtz*, 405 N.E.2d 681, 684 (N.Y. 1980)). But the court read New York precedent as leaving open the question of whose law might apply where "significant contacts with New York" were present. *Id.* at 1121–22 (quoting *Greenspun v. Lindley*, 330 N.E.2d 79, 81 (N.Y. 1975)).

dominant interest in applying its own substantive law.”⁹⁵ Applying this balancing test to the facts, the court concluded that because FanDuel’s offices and shareholder base sufficed as significant contacts with Scotland, and because “only 10–15% of FanDuel’s total revenue was derived from New York customers,” Scots law applied.⁹⁶

Eccles crossed somewhat of a hallowed barrier; the court adopted a less deferential version of the internal affairs doctrine than has been traditionally explicated.⁹⁷ Formulations of the rule often plainly declare that the law of the state of incorporation determines issues relating to a corporation’s internal affairs.⁹⁸ However, the Restatement (Second) of Conflicts articulates a looser choice-of-law inquiry for what law should govern an internal affairs question.⁹⁹ It explains that the “law of the state of incorporation will be applied” *unless* “some other state has a more significant relationship to the occurrence and the parties.”¹⁰⁰ In *Eccles*, New York essentially retreated to the Restatement test — a more open-ended inquiry than the historical, binary “general approach” favored by Delaware.¹⁰¹ Despite concluding that *Eccles* concerned an open-and-shut internal affairs matter,¹⁰² the court acknowledged a possibility that a nonchartering state’s law could overcome the presumption of adhering to the chartering state’s law.¹⁰³ This development may significantly alter how state courts treat horizontal federalism conflicts in corporate law cases.

Cases like *MITE* and *CTS* at the federal level and *Eccles* at the state level show two dimensions of the internal affairs doctrine that can be challenged when determining how to apply the rule: *boundaries* and *weight*. Along the former axis, cases like *MITE* and *CTS* indicate that the lines can be blurred between “internal affairs” and everything else.¹⁰⁴ As to the latter, state courts can accord the internal affairs doctrine less

⁹⁵ *Id.* at 1123 (citing RESTATEMENT (SECOND) OF CONFLICT OF L. § 302(2)).

⁹⁶ *Id.* at 1123–24.

⁹⁷ *Id.* at 1123 (“Scores of other state and federal cases have applied the internal affairs doctrine to require the application of the law of the place of incorporation . . .”).

⁹⁸ *See, e.g.*, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005).

⁹⁹ *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 302 (A.L.I. 1971).

¹⁰⁰ *Id.* § 302(2).

¹⁰¹ *Eccles*, 245 N.E.3d at 1121–24. Though, to be sure, the court “decline[d] to create any broad exceptions” to the internal affairs rule due to its benefits. *Id.* at 1123.

¹⁰² *See id.* at 1123–24. The central issue was “the valuation of merger consideration by the director defendants.” *Id.* at 1123.

¹⁰³ *See id.*

¹⁰⁴ *Contrast* *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982) (arguing that tender offers do not implicate the internal affairs of the target company), *with* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–91 (1987) (determining that statutory protections relating to hostile takeover practices do fit within the ambit of the internal affairs doctrine). And if history is any indication, the scope of internal affairs has shrunk over time. *See supra* notes 58–59 and accompanying text.

weight, applying it as a mere presumption rather than a per se rule.¹⁰⁵ Both of these threats emanate from battles of horizontal federalism, mainly implicating the governing power of a chartering state versus that of a forum state. These interstate fights raise major questions in horizontal federalism jurisprudence.

C. *Shifting Landscape*

Despite horizontal federalism conflicts being central to what the internal affairs doctrine seeks to manage, those studying the doctrine have not fully appreciated the implications of the latest jurisprudential shifts for horizontal federalism. Recent scholarship loosely acknowledges horizontal federalism but is less concerned with contemporary changes in horizontal federalism jurisprudence.¹⁰⁶ Perhaps most on point, Professor Mohsen Manesh discusses regulations that test the “edges” of the internal affairs doctrine, acknowledging that these statutes pose threats to Delaware.¹⁰⁷ But this scholarship does not squarely confront how the Supreme Court’s doctrinal treatment of horizontal federalism questions may significantly alter the landscape for the internal affairs doctrine.¹⁰⁸ Nor have commentators on federalism and corporate governance linked the concepts directly.¹⁰⁹

It is intuitive that states formulating open-ended or narrow internal affairs rules could eat at Delaware’s “absolute” domain over corporate disputes.¹¹⁰ This is precisely the upshot that some fear cases like *Ecclēs* will facilitate.¹¹¹ The threat coming from the Supreme Court’s changing view of horizontal federalism is less obvious but equally troubling. As the Supreme Court expands the extraterritorial effect of state power,¹¹² there are consequences in areas of the law where states’ rights are already in tension with one another. The internal affairs doctrine is one

¹⁰⁵ See *supra* notes 60–61 and accompanying text. History suggests that this treatment is not only plausible but that it comports with broader conflict-of-laws trends over time. See Borchers, *supra* note 60, at 359–62 (describing the “conflicts revolution,” *id.* at 361, whereby categorical rules were replaced with interest-balancing tests).

¹⁰⁶ For example, Professor Ann Lipton notes that allowing chartering states to impose extraterritorial regulation is seemingly “an exception” to the principle against regulating beyond borders, which she takes to justify a revised approach to the internal affairs choice-of-law analysis. See Lipton, *supra* note 17, at 330.

¹⁰⁷ Manesh, *supra* note 18, at 257, 308.

¹⁰⁸ Notably, neither Lipton’s nor Manesh’s piece directly uses the word “federalism.” See generally Lipton, *supra* note 17; Manesh, *supra* note 18.

¹⁰⁹ For a comprehensive discussion of horizontal federalism, extraterritoriality, and the dormant commerce clause, see generally Ruth Mason & Michael S. Knoll, *Bounded Extraterritoriality*, 122 MICH. L. REV. 1623 (2024).

¹¹⁰ See Ribstein & O’Hara, *supra* note 56, at 694.

¹¹¹ See Brief for Amici Curiae Corporate Law Professors in Support of Defendants-Respondents, *supra* note 87, at 21–22.

¹¹² Note, *Federalism Rebalancing and the Roberts Court: A Departure from Historical Patterns*, 138 HARV. L. REV. 1385, 1393–95 (2025).

of those areas,¹¹³ and Delaware, as its largest beneficiary, stands to lose ground as the Court lays these changes without bolstering the internal affairs doctrine.

Weaker internal affairs rules¹¹⁴ and more aggressive extraterritorial regulation from nonchartering states could pose the ultimate threat to Delaware. But even alone, allowing states to sometimes regulate the corporate governance of companies incorporated elsewhere would be a devastating blow. Of course, whether a state narrowly or generally applies the internal affairs doctrine matters only to the extent that its own state law differs from (or conflicts with) that of the chartering state.¹¹⁵ Thus, it would behoove scholars to place more focus on jurisprudential developments involving horizontal federalism to effectively portray the outlook for the internal affairs doctrine and Delaware. One recent development has been the reorientation of the dormant commerce clause, which could have major consequences for the internal affairs doctrine.

III. FEDERALISM'S SLEEPING GIANT

The dormant commerce clause and the internal affairs doctrine are often implicated together given the natural overlap in their operations.¹¹⁶ However, recent internal affairs doctrine scholarship has not kept up with the changing landscape of the dormant commerce clause at the Supreme Court. In particular, the recent 2023 case *National Pork Producers Council v. Ross* authorizes extensive forms of extraterritorial regulation that may extend to corporate law.¹¹⁷ Because protection against extraterritorial corporate regulation serves as the basis for the internal affairs doctrine, the Court's decreased interest in striking down extraterritorial state laws creates the potential for states to erode Delaware's power. Hence, even if Delaware maintains its status as the premier corporate-charter destination, that alone will not save it from extraterritorial aggrandizement.

A. *Dormant Commerce Clause and Internal Affairs*

The dormant commerce clause principle derives from a combination of Congress's Article I power to regulate interstate commerce¹¹⁸ and federal law's supreme status vis-à-vis state law under Article VI.¹¹⁹ Its thrust is that Congress's power to regulate interstate commerce implies a negative power that — to some extent — prevents states from erecting

¹¹³ See Manesh, *supra* note 18, at 297–99, 304.

¹¹⁴ See *supra* notes 97–100 and accompanying text.

¹¹⁵ See, e.g., Huber v. Taylor, 469 F.3d 67, 74 (3d Cir. 2006) (“Before a choice of law question arises, there must first be a true conflict between the potentially applicable bodies of law.”).

¹¹⁶ See Lipton, *supra* note 17, at 329–30.

¹¹⁷ See 143 S. Ct. 1142, 1155 (2023) (denying a per se rule against extraterritoriality).

¹¹⁸ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁹ *Id.* art. VI, cl. 2; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 13 (1824); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 421 (1827).

barriers to interstate commerce or discriminating against out-of-state commercial actors.¹²⁰ Over time, this principle has shaped limits on the ability of states to regulate outside of their borders.

Because of its questionable constitutional roots, Justices' competing views on balancing federalism, and a variety of regulatory interests to accommodate, the principle is widely considered incoherent.¹²¹ Perhaps expectedly, this has resulted in a disjointed doctrinal framework. Applying the principle includes administering several fact-intensive tests like the interstate discrimination test¹²² and the *Pike* balancing test,¹²³ just as it requires considering a variety of exceptions.¹²⁴ The vitality of these inquiries, at this very moment, is in flux.¹²⁵

The relevant point of overlap between the dormant commerce clause and the internal affairs doctrine harkens back to the conception of vertical and horizontal federalism set forth earlier.¹²⁶ The dormant commerce clause as a matter of federal law can be generalized as a vertical restraint on state power to regulate interstate commerce; variably, the internal affairs doctrine is a horizontal restraint (between the states themselves) on state police power to regulate corporations. In reality, these planes of power certainly overlap.¹²⁷ As Professor Allan Erbsen points out, the dormant commerce clause also acts horizontally by “play[ing] a coordinating role in the exercise of concurrent state authority” that limits the “possibility of excessive friction” between states.¹²⁸ This helps to explain why the dormant commerce clause is often simultaneously implicated in internal affairs doctrine cases. The internal affairs doctrine operates as somewhat of an obscure carveout to the

¹²⁰ See *Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008).

¹²¹ See e.g., Michael S. Knoll & Ruth Mason, *Bibb Balancing: Regulatory Mismatches Under the Dormant Commerce Clause*, 91 GEO. WASH. L. REV. 1, 16 (2023); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 427, 460 (2008); Earl M. Maltz, *How Much Regulation Is Too Much — An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 59 (1981). Justice Thomas has even gestured that the dormant commerce clause principle should not exist. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (“[O]ur negative Commerce Clause jurisprudence . . . was already both overbroad and unnecessary.”).

¹²² See, e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201–07 (1994).

¹²³ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹²⁴ See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 808–10 (1976) (declining to apply *Pike* balancing test to state entry as potential purchaser into bidding market).

¹²⁵ See *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1164 (2023) (opinion of Gorsuch, J.).

¹²⁶ See *supra* note 23 and accompanying text.

¹²⁷ To confuse the matter, one might ask whether the internal affairs doctrine would be considered a vertical restraint if the Supreme Court did mandate it as a doctrine or if Congress passed a statute to the same effect.

¹²⁸ Erbsen, *supra* note 23, at 504. Vertical limits in some instances necessarily engender horizontal limits. For example, if the federal government prevents states from charging customs duties, in addition to vesting the federal government with exclusive power to do so, it also eliminates a state's ability to charge customs for products across state lines like they might in a but-for world without such a restraint.

dormant commerce clause, allowing chartering states to extraterritorially regulate the corporate governance affairs of businesses headquartered elsewhere.¹²⁹

Indeed, in both *MITE* and *CTS* — the hallmark Supreme Court cases on the internal affairs doctrine — the appellees offered theories that the respective state laws inflicted upon them (as businesses not actually located within those states) violated the dormant commerce clause.¹³⁰ In *MITE*, the Court invalidated the Illinois statute on dormant commerce clause grounds because it imposed an excessive burden on interstate tender offers that exceeded Illinois’s local interests.¹³¹ By contrast, the *CTS* Court upheld the Indiana Act.¹³² “Because nothing in the Indiana Act impose[d] a greater burden on out-of-state offerors than it d[id] on similarly situated Indiana offerors,” the Court reasoned, the Act did not violate the dormant commerce clause.¹³³

Similar cases would be analyzed differently by the Court today. Lately, the Court has narrowed the dormant commerce clause, condoning forms of extraterritorial regulation that the principle once barred.¹³⁴ Widening the sphere of state police power in this way will make it more difficult for the Court, going forward, to strike down extraterritorial state regulations that encroach on traditional internal affairs matters. This could be seriously unsettling for Delaware.

B. *Ross and Extraterritoriality*

National Pork Producers Council v. Ross is the latest in a line of decisions that has narrowed the dormant commerce clause to the benefit of states seeking to regulate extraterritorially.¹³⁵ To be clear, *Ross* (and other cases) did not involve internal affairs matters.¹³⁶ Perhaps this helps to explain why the potential implications for the internal affairs doctrine has eluded scholars thus far. But the sentiment from *Ross* — that extraterritoriality of economic regulation is a practical reality of a

¹²⁹ Lipton, *supra* note 17, at 329–30.

¹³⁰ *Edgar v. MITE Corp.*, 457 U.S. 624, 628 (1982); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 75 (1987).

¹³¹ *MITE*, 457 U.S. at 643.

¹³² *CTS*, 481 U.S. at 88.

¹³³ *Id.*

¹³⁴ Michael S. Knoll & Ruth Mason, *For Now, Court Is Cool with California in Charge*, REGUL. REV. (July 11, 2023), <https://www.theregreview.org/2023/07/11/knoll-mason-for-now-court-is-cool-with-california-in-charge> [https://perma.cc/EG9E-5URS].

¹³⁵ Professor Daniel Francis notes that since *CTS*, “the Court has not struck down a single statute [using] the dormant Commerce Clause” under the *Pike* test, also known as “burden review.” Francis, *supra* note 14, at 301.

¹³⁶ *Ross* was about an animal welfare law for pork products. *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1150–51 (2023).

modern economy — upsets the rationale that has long kept the internal affairs doctrine alive.¹³⁷

Ross considered a challenge to a California ballot measure that, in relevant part, prevented the in-state sale of pork that “is the product of a breeding pig” confined in such a way that does not “allow [it] to lie down, stand up, fully extend limbs, [or] turn around freely.”¹³⁸ National Pork’s linchpin argument against the measure was that it violated the dormant commerce clause because “the majority” of compliance costs would fall on out-of-state producers since California imported almost all of its pork.¹³⁹ The Court denied that claim in a fractured decision.¹⁴⁰ In piecing together the opinions and parsing the disagreements among the Justices, it seems the Court upheld the law for two reasons, both of which indicate a permissive view toward extraterritorial regulation.¹⁴¹

First, the Court denied National Pork’s claim that dormant commerce clause precedent can be read as standing for an “almost *per se*’ rule against” any “extraterritorial effects.”¹⁴² Justice Gorsuch stated that the “petitioners read too much into too little” from “discrete cases,” closing off any latent theories that extraterritorial regulations by states are unconstitutional as such.¹⁴³

Second, the Court disagreed over whether the ballot measure failed the *Pike* balancing test, which assesses whether the burden that a law places on interstate commerce is clearly outweighed by local benefits.¹⁴⁴ Whether and how to apply the *Pike* test was the real point of division between the Justices.¹⁴⁵ The majority made clear that *Pike* should no longer be viewed as a separate inquiry from the main dormant commerce clause test that assesses out-of-state discrimination.¹⁴⁶ That being

¹³⁷ See Knoll & Mason, *supra* note 134 (“The case . . . is about much more than pork chops. It involves weighty constitutional issues about the power of the states to regulate activity within their borders. The case also concerns the limits on those powers when a state’s laws interfere with the ability of other states to regulate within their borders . . .”).

¹³⁸ CAL. CODE REGS. tit. 3, § 1322.1(a) (West 2025).

¹³⁹ *Ross*, 143 S. Ct. at 1151–52.

¹⁴⁰ See *id.* at 1149–50; *id.* at 1165 (Sotomayor, J., concurring in part); *id.* at 1166 (Barrett, J., concurring in part); *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part).

¹⁴¹ See *id.* at 1165 (majority opinion).

¹⁴² *Id.* at 1155 (quoting Brief for Petitioners at 19, 23, *Ross*, 143 S. Ct. 1142 (No. 21-468)).

¹⁴³ *Id.* at 1155; *id.* at 1154 (“This argument falter[ed] out of the gate,” *id.* at 1154).

¹⁴⁴ See, e.g., *id.* at 1163–64 (opinion of Gorsuch, J.) (contrasting his approach to *Pike* balancing with the approach elucidated in Chief Justice Roberts’s concurrence in part and dissent in part). For a summary of the *Pike* balancing test, see *id.* at 1165–66 (Sotomayor, J., concurring in part).

¹⁴⁵ See *The Supreme Court, 2022 Term — Leading Case: National Pork Producers Council v. Ross*, 137 HARV. L. REV. 330, 333–36 (2023).

¹⁴⁶ *Ross*, 143 S. Ct. at 1157 (“[P]etitioners overstate the extent to which *Pike* and its progeny depart from the antidiscrimination rule that lies at the core of our dormant Commerce Clause jurisprudence. As this Court has previously explained, ‘no clear line’ separates the *Pike* line of cases from our core antidiscrimination precedents.” (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997))).

so, the petitioners' claim necessarily failed because they conceded that the law was not discriminatory.¹⁴⁷

Differences aside, the Court confirmed that the bellwether test for deciding when a state law has violated the dormant commerce clause is whether the law is "designed to benefit in-state economic interests by burdening out-of-state competitors."¹⁴⁸ As such, the only clearly cognizable claims left under the dormant commerce clause are those that can satisfy the high bar of this discrimination test, which is the "very core" of the constitutional principle.¹⁴⁹

These results from *Ross* indicate that the Court now takes a softer view on extraterritorial regulation under the dormant commerce clause,¹⁵⁰ but this was not so when the Court last decided its two big internal affairs doctrine cases that also raised dormant commerce clause questions: *MITE* and *CTS*.¹⁵¹ What has been lost since *MITE* and *CTS* were decided in the 1980s are two lines of cases that barred states from regulating beyond their borders even without discriminating against out-of-state entities.¹⁵² During the period when the Court last discussed the draw of the internal affairs doctrine, it was regularly striking down state laws under these lines of cases.¹⁵³ It has now been several decades since the Court has done so.¹⁵⁴ This federalism reorientation — exemplified by *Ross* — puts the internal affairs doctrine on shaky ground. Certainly, a bigger sphere of regulatory power for nonchartering states, combined with the unceasing infringement on the boundaries of the internal affairs doctrine,¹⁵⁵ does not bode well for Delaware.

IV. A RUDE AWAKENING

Some state efforts are already underway to test the boundaries of the Court's new acquiescence in extraterritorial state police power,¹⁵⁶ and Delaware's fate may rest on the weight that courts give the internal

¹⁴⁷ *Id.* at 1153.

¹⁴⁸ *Id.* (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008)).

¹⁴⁹ *Id.* (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

¹⁵⁰ *Leading Case*: *National Pork Producers Council v. Ross*, *supra* note 145, at 336 ("[T]he Court's discussion of the dormant commerce clause and examination of *Pike* suggest an attitude of permissiveness toward state laws despite their extraterritorial effects.").

¹⁵¹ See Francis, *supra* note 14, at 277. Only since the 1980s has "the zone of presumptive illegality . . . been narrowed to a rule against intentional protectionism." *Id.* Until then, state statutes were struck down under "burden review" even as the Court struggled to make the doctrine coherent. See *id.* at 266–67. Notably, the shift really took place from *MITE* (1982) to *CTS* (1987). See *id.* at 299–301.

¹⁵² *Id.* at 266–68.

¹⁵³ See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 280 (1988); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986).

¹⁵⁴ See Francis, *supra* note 14, at 301.

¹⁵⁵ See, e.g., *Lipton*, *supra* note 17, at 351–53 (discussing how California Corporations Code "Section 2115 . . . purports to override the internal affairs doctrine," *id.* at 351); *Tung*, *supra* note 1, at 92–96 (discussing New York statutes).

¹⁵⁶ E.g., *infra* notes 171–76.

affairs doctrine when evaluating these laws. Delaware can battle to maintain its chartering business by keeping controlling shareholders and other corporate actors satisfied.¹⁵⁷ It can also continue to defend a broad construction of the internal affairs doctrine.¹⁵⁸ Still, these efforts would do little to save it from the expansion of other states' police power over companies incorporated in Delaware but possessing more significant contacts in the other states. While Delaware's robust enterprise may be effective in the competitive market for chartering, outreach statutes circumvent this competition by their very nature.

Outreach statutes are not new.¹⁵⁹ What is new, however, is that the Court is more likely to uphold statutes that place incidental yet significant burdens on interstate commerce. Specifically, statutes that would fail the two dormant commerce clause theories that the petitioners advanced in *Ross* — but pass the antidiscrimination test that remains the core of dormant commerce clause jurisprudence — may now be upheld. With respect to corporate law, this means that state statutes that simply regulate the corporate governance of businesses that are headquartered in their states but are chartered elsewhere, without disfavoring those businesses, could plausibly be constitutional.

As an illustrative example, reconsider *MITE*. Disputing the Illinois statute's requirements, *MITE* asserted that the law violated the dormant commerce clause under the *Pike* balancing test.¹⁶⁰ Noticeably absent from the Court's decision was any suggestion that the statute discriminated against out-of-state businesses, because it did not.¹⁶¹ Yet, under only the *Pike* balancing test and an extraterritoriality analysis, the Court struck down the Illinois statute.¹⁶²

It follows that the Illinois statute in *MITE*, by the Court's own reasoning in *Ross*, would not be blocked by the dormant commerce clause today. The statute treated all businesses evenhandedly, and the "absence of discrimination . . . prove[s] decisive."¹⁶³ This tracks from the Court's analysis and was even hinted at just five years after *MITE* in *CTS*. Evaluating a statute similar to the one at issue in *MITE*, the *CTS* Court declared the act valid "[b]ecause nothing in the Indiana Act impose[d] a greater burden on out-of-state offerors than it d[id] on similarly situated

¹⁵⁷ See *supra* notes 38–41 and accompanying text.

¹⁵⁸ See, e.g., *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112–13 (Del. 2005); *McDermott Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987).

¹⁵⁹ Beveridge, *supra* note 21, at 702 (“[Outreach] statutes are common in all jurisdictions in the United States and have been for the last century.”).

¹⁶⁰ Brief for Appellees at 6, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (No. 80-1188).

¹⁶¹ See *MITE*, 457 U.S. at 640–46. In fact, the petitioners specifically argued that a statute that affects interstate commerce, but does not discriminate, is constitutional. Brief for Appellant at 23, *MITE*, 457 U.S. 624 (No. 80-1188). Of course, this is the position that the Court later adopted in *Ross*. But the “antidiscrimination” concept doesn’t substantively appear in *MITE*, suggesting that the Court has changed what the dormant commerce clause requires for a statute’s invalidation.

¹⁶² *MITE*, 457 U.S. at 643.

¹⁶³ *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1158 (2023).

Indiana offerors.”¹⁶⁴ This result, alongside the possibility of state courts reading the internal affairs doctrine narrowly, could largely authorize states to regulate aspects of the corporate governance of businesses that reside within their borders, even if they are incorporated elsewhere — butting heads with the internal affairs doctrine.

For years, states like California have tested the waters by exerting pressure on the boundaries of the internal affairs doctrine.¹⁶⁵ *Ross* could now permit states to invade those boundaries in the absence of the Court’s explicit commitment to the doctrine. For example, in 2018, California passed a law that created diversity requirements for the boards of directors of all public companies headquartered in the state.¹⁶⁶ Legal commentators both asserted and rejected that this legislation reached a company’s internal affairs.¹⁶⁷ But California courts invalidated the law on equal protection grounds, so the internal affairs doctrine issue was never resolved.¹⁶⁸

One could imagine a similar law that requires board directors of California-headquartered companies to meet certain job qualifications or education requirements. Here, there would be no equal protection problem. Yet such a law would have a vast impact on interstate commerce, as there are many Fortune 500 companies headquartered in California but incorporated in Delaware.¹⁶⁹ Critically, though, the law would not discriminate against out-of-state businesses and therefore would likely pass constitutional muster. Such a law would have the potential to meaningfully erode some of Delaware’s dominance in corporate regulation.

There are current and pending laws that already fall within this new category of plausibly constitutional laws that chip away at the internal affairs doctrine. The California Climate Corporate Data Accountability Act¹⁷⁰ is on the books and requires large companies within the state to

¹⁶⁴ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

¹⁶⁵ See, e.g., Manesh, *supra* note 18, at 299–300 (describing California’s 2018 law implementing diversity quotas for boards of directors of public companies with principal executive offices located within the state, including companies incorporated elsewhere).

¹⁶⁶ CAL. CORP. CODE §§ 301.3–4 (West 2019); see Lipton, *supra* note 17, at 341.

¹⁶⁷ Compare, e.g., Jill Fisch & Steven Davidoff Solomon, Centros, *California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 509 (2019) (arguing the law concerned a company’s internal affairs), with, e.g., Manesh, *supra* note 18, at 299–301 (arguing the opposite).

¹⁶⁸ See *Crest v. Padilla*, No. 20 STCV 37513, 2022 WL 1073294, at *23 (Cal. Super. Ct. Apr. 1, 2022); *All. for Fair Bd. Recruitment v. Weber*, No. 21-cv-01951, 2023 WL 3481146, at *2 (E.D. Cal. May 15, 2023).

¹⁶⁹ See Lucas Combos & Beth Dalbey, *53 CA Companies Make Fortune 500 List for 2023*, PATCH (June 6, 2023, at 11:24 PT), <https://patch.com/california/across-ca/53-ca-companies-make-fortune-500-list-2023> [<https://perma.cc/9TW7-RKR5>]. A manual search of SEC filings suggests that at least forty such companies are incorporated in Delaware. See, e.g., Alphabet Inc., Annual Report (Form 10-K), at 1 (Feb. 5, 2025); Meta Platforms, Inc., Annual Report (Form 10-K), at 1 (Jan. 30, 2025).

¹⁷⁰ CAL. HEALTH & SAFETY CODE § 38532 (West 2024).

disclose certain environmental metrics and associated financial risks.¹⁷¹ New York's S3697A would similarly require climate-related financial risk reports,¹⁷² and Washington's S.B. 6092 would enact climate-related disclosure requirements.¹⁷³

Most of all, two bills from Texas make the point. The Texas Legislature proposed laws that would “legislate corporate governance changes *even for companies that are not incorporated in the state*, so long as they have headquarters in the state or trade on the Texas Stock Exchange.”¹⁷⁴ And both concern topics that are indubitably internal affairs matters: One pertains to a company's right to refuse shareholder proposals,¹⁷⁵ and the other involves the disclosure of proxy advice for shareholders.¹⁷⁶ This is no accident; it is a direct effort by the Texas Legislature to dethrone Delaware as the leader in American corporate law,¹⁷⁷ and it comes just as the Supreme Court has opened the door for states to make such challenges.

Ultimately, whether nonchartering states can chip away even further at the internal affairs doctrine will be up to the courts, and, in the last instance, the Supreme Court. Favoring Delaware in this feud is the tradition and convenience of the internal affairs doctrine. For the same reasons we still have the doctrine today, courts may be inclined not to disrupt this choice-of-law resolution. The *CTS* Court itself recognized the benefits of having “a single jurisdiction” govern matters of corporate governance for U.S. capital markets.¹⁷⁸ Understandably, the Supreme Court may be hesitant to uproot Delaware law as the foundation of the U.S. corporate law regime after two centuries of investment.

But not all signs for Delaware are positive. Insofar as internal affairs doctrine outcomes run with the results from dormant commerce clause analyses,¹⁷⁹ the weight of the internal affairs doctrine may now also be lighter. Thus far, the Supreme Court has shied away from constitution-izing the internal affairs doctrine despite its longstanding tradition — meaning Delaware should not be confident that it will do so now.¹⁸⁰ All the while, the Court has been busy empowering horizontal federalism.¹⁸¹

¹⁷¹ *Id.* § 38532(c).

¹⁷² S. 3697A, 2025–2026 Leg., Reg. Sess. (N.Y. 2025).

¹⁷³ S. 6092, 68th Leg., Reg. Sess. (Wash. 2024).

¹⁷⁴ Ann Lipton, *The Internal Affairs Doctrine Is Getting a Workout*, BUS. L. PROF BLOG (May 30, 2025), <https://www.businesslawprofessors.com/2025/05/the-internal-affairs-doctrine-is-getting-a-workout> [<https://perma.cc/2FH9-JKHK>]. The bills eventually got amended. *See id.*; Ann Lipton, *You're Gonna Have to Do Better Than That*, BUS. L. PROF BLOG (May 9, 2025), <https://www.businesslawprofessors.com/2025/05/youre-gonna-have-to-do-better-than-that> [<https://perma.cc/74KP-SYZ2>].

¹⁷⁵ H.R. 4115, 89th Leg., Reg. Sess. (Tex. 2025).

¹⁷⁶ S. 2337, 89th Leg., Reg. Sess. (Tex. 2025).

¹⁷⁷ *See* sources cited *supra* note 174.

¹⁷⁸ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987).

¹⁷⁹ *See supra* notes 160–64 and accompanying text.

¹⁸⁰ *See supra* pp. 807–08.

¹⁸¹ *See* Note, *supra* note 112, at 1393–95.

Once upon a time, the Court was wary of subjecting corporations to competing state regulations.¹⁸² However, it might now be less concerned given the complex network of corporate regulation necessitated by our modern economy.¹⁸³ That could entice the Court to adopt an *Eccles*-like version of the internal affairs doctrine in its dormant commerce clause analysis,¹⁸⁴ to the extent it does so at all.

The role of state courts also cannot be understated. Unless and until these battles make it to the Supreme Court, many of them will play out in state courts. Consider the following: What is the likelihood that in evaluating a Texas outreach statute, the Texas Supreme Court would be inclined to invalidate its legislature's statute to the benefit of Delaware? It is probably fair to conclude that the Texas statute will at least have a shot at surviving.¹⁸⁵

Finally, it cannot be ignored that external pressures have given the internal affairs doctrine a propensity to compress over time. Today's rule is a remnant of the version that initially covered more ground and operated as a jurisdictional requirement.¹⁸⁶ As much as Delaware maintains "absolute" power over a distinct slice of corporate regulation, the scope of that power has been continually diminished.¹⁸⁷ This diminution of the internal affairs doctrine, combined with emboldened extra-territorial regulation from competing states, represents a reckoning for Delaware.

CONCLUSION

Delaware could be in trouble, but for a reason absent from conversation until now. The recent discourse — on DExit, choice-of-law battles, and even outreach statutes — has not zeroed in on shifting Supreme Court jurisprudence with unsettling implications for Delaware's fate. Maybe this is because of loud voices drawing attention to recent Delaware legislation and court decisions. Or, perhaps, it is because recent dormant commerce clause jurisprudence does not squarely touch upon internal affairs matters. Either way, the Supreme Court has escorted us to a reality in which corporate outreach statutes wading into Delaware's internal affairs waters are constitutionally plausible thanks to the withdrawal of the dormant commerce clause principle. The opportunity for states to pick at Delaware's regime is only reinforced by

¹⁸² See *supra* notes 150–54 and accompanying text.

¹⁸³ See *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1156 (2023) ("In our interconnected national marketplace, many (maybe most) state laws have the 'practical effect of controlling' extra-territorial behavior.").

¹⁸⁴ See *Eccles v. Shamrock Cap. Advisors, LLC*, 245 N.E.3d 1110, 1121–24 (N.Y. 2024).

¹⁸⁵ See *Manesh*, *supra* note 18, at 304 & n.292.

¹⁸⁶ See *supra* notes 58–62 and accompanying text.

¹⁸⁷ Ribstein & O'Hara, *supra* note 56, at 694.

the doctrine's indeterminate boundaries and the possibilities that cases like *Eccles* create.

In the absence of a categorical mandate for the internal affairs doctrine, it is unclear how this phenomenon might resolve itself. The days of the dormant commerce clause acting as a threshold blocker to such outreach statutes may be over, and courts may welcome extraterritorial regulation of internal affairs at Delaware's expense. Both Delaware's proponents and adversaries should take notice. The future of corporate governance regulation will depend on it.