

# From Incongruity to Cooperative Federalism

By REZA DIBADJ\*

THE CONVENTIONAL wisdom has been that state law governs the internal affairs of corporations and federal law governs disclosure. Distinguished commentators lament Sarbanes-Oxley's ("SOX")<sup>1</sup> "unprecedented intrusions into corporate governance"<sup>2</sup> and claim that the "federal regime had until then consisted primarily of disclosure requirements rather than substantive corporate governance mandates, which were traditionally left to state corporate law."<sup>3</sup> These assertions, however, have little basis in today's reality.

Contrary to the usual exhortations, SOX is not a watershed: significant federal layering has been going on for decades.<sup>4</sup> As Mark Roe has shown in a series of articles, SOX is just the latest in an array of federal incursions, which include the Securities Act of 1933,<sup>5</sup> the Se-

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1. For a description of Sarbanes-Oxley, see, e.g., Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915 (2003); Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1154 (2004).

2. Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POL'Y 39, 42 (2004) [hereinafter Fisch, *New Federal Regulation*].

3. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005) [hereinafter Romano, *Quack Governance*].

4. As Robert Clark notes, "[t]he SOX-related reforms were not based on a policy decision to effect a major 'paradigm shift' in the allocation of law making authority between the federal government and the states." Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers* 30 (Harvard John M. Olin Center for Law, Economics, and Business, Harvard Law and Economics Discussion Paper No. 525, Dec. 5, 2005), <http://ssrn.com/abstract=808244>.

5. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77aa (2000)).

curities Exchange Act of 1934,<sup>6</sup> the Williams Act,<sup>7</sup> and the Foreign Corrupt Practices Act.<sup>8,9</sup> Roe concludes that

in nearly every decade of the twentieth century, the decade's major corporate law issue either went federal or federal authorities threatened to take it over—from early twentieth-century merger policy, to the 1930s securities laws, to the 1950s proxy fights, to the 1960s Williams Act, to the 1970s going-private transactions.<sup>10</sup>

John Coates sums up the current confusing state of affairs:

Commentators have often noted the odd division of labor between federal securities law and state corporate law. Federal regulation of proxies, tender offers, and insider trading are all arguably much more integral to the substantive relationships among investors, firms, directors, and managers that are at the heart of corporate law, than they are to the disclosure-oriented emphasis of the existing federal securities statutes. On the other hand, cash tender offers, mergers and recapitalizations involve investment decisions as important as an initial decision to invest and present similar opportunities for fraud and deception.<sup>11</sup>

Indeed, as I have argued elsewhere, a series of layers or “bandages” has developed to recover from recurring scandals—much like an antiquated computer operating system requires downloading patches to hobble along.<sup>12</sup>

Why the layers? Commentators such as Roe suggest that the mere threat of federal intervention serves as a check on states' powers.<sup>13</sup> A more Machiavellian reasoning, however, suggests that the federal gov-

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6. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78mm (2000)).

7. Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2000)).

8. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1978) (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78dd-3, 78ff (2000)).

9. See Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 611–16 (2003) [hereinafter Roe, *Delaware's Competition*]; Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2498, 2520–23 (2005) [hereinafter Roe, *Delaware's Politics*].

10. Roe, *Delaware's Politics*, *supra* note 9, at 2498.

11. John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT'L L. 531, 577 (2001).

12. See Reza Dibadj, *Delaying Corporate Law*, 34 HOFSTRA L. REV. 469 (2005) [hereinafter Dibadj, *Delaying Corporate Law*].

13. See Roe, *Delaware's Politics*, *supra* note 9, at 2499 (“Delaware's freedom to act and its limits are not determined solely, and perhaps not even primarily, by its strength vis-à-vis other states, but by the line demarcating where the federal authorities leave it alone and where they do not.”). See also Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 558 (2002) (“Our weak-competition account suggest that the greatest threat confronting Delaware is not competition from other states but the possibility that the federal government will intervene in a way that would undermine Delaware's position.”). Delaware is, of course, the leading jurisdiction for incorporations. See *infra* notes 20–24 and accompanying text.

ernment helps maintain the status quo by serving as a buffer that deflects attention from what state courts, most prominently in Delaware, are not doing.<sup>14</sup> Regardless of which account one believes, the status quo provides insufficient protections to shareholders. On the one hand, layers of regulation exist everywhere; on the other, problems fester and scandals routinely erupt.

This Article is a first step toward a new approach. Part I argues that existing proposals—framed around the polarities of dual federalism and preemptive federalism—leave much to be desired. Dual federalism suffers from a host of implausible assumptions and ignores the weaknesses of existing state corporate law. For its part, preemptive federalism assumes that the federal government can do much more to protect shareholders than is realistic given the institutional constraints Congress, the SEC, and the federal courts must face.

Part II frames the beginning of a fresh approach drawn from new research in economic regulation. It proposes that the relationship between corporations and their shareholders operate within the framework of cooperative federalism using a reverse-*Erie* framework. It suggests that the intersection of federalism and securities regulation may be analyzed along several dimensions, including type of regulatory intervention, whether private rights of action should be allowed, and what the jurisdictional nexus for state intervention might be. It then makes specific proposals along each dimension. The Article concludes by addressing a number of constitutional issues cooperative federalism might raise, including the creation of federal common law by state instrumentalities, as well as possible non-delegation and anti-commandeering concerns.

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14. See, e.g., William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism* 2 (European Corporate Governance Institute Law Working Paper Series, Working Paper No. 23/2004 & Georgetown University Law Center, Business, Economics & Regulatory Policy Research Paper No. 606481, 2004), <http://ssrn.com/abstract=606481> [hereinafter, Bratton & McCahery, *Equilibrium*]; Marcel Kahan & Edward Rock, *Our Corporate Federalism and the Shape of Corporate Law* 12 (University of Pennsylvania Law School Institute for Law and Economics Research Paper No. 04-12 & New York University Law School Law and Economics Research Paper Series Working Paper No. 04-020, 2004), <http://ssrn.com/abstract=564685> (forthcoming VAND. L. REV.) (“Delaware may favor federal intervention to the extent that it makes the corporate law system as a whole less scandal prone and reduces the chances of populist backlash against Delaware as principal regulator. Thus, the relationship between federal and state regulation in corporate law is, in our view, more symbiotic and less antagonistic than generally presumed.”).

## I. Incongruity

Conventional solutions to overcome the ineffectual confusion revolve around two polarities: dual federalism and preemptive federalism. Unfortunately, neither provides a workable framework.

### A. Dual Federalism

#### 1. Races and Deregulation

One proposal is to devolve securities regulation to the states, where corporate law ostensibly resides. The most eloquent proponent of this approach is Roberta Romano, who argues that firms should be allowed to “select their securities regulator from among the fifty states and the District of Columbia, the SEC, or other nations.”<sup>15</sup> She would thus prefer “a market-oriented approach of competitive federalism that would expand, not reduce, the role of the states in securities regulation.”<sup>16</sup>

On one level, the argument is quite seductive. After all, [c]ompetitive federalism harnesses the high-powered incentives of markets to the regulatory state in order to produce regulatory arrangements compatible with investors’ preferences. This is because firms will locate in the domicile whose regime investors prefer in order to reduce their cost of capital, and states have financial incentives (such as incorporation and registration fees) to adapt their securities regimes to firms’ locational decisions.<sup>17</sup>

Consistent with her work in corporate law, Romano assumes that such an approach would lead to a “race to the top.”<sup>18</sup> The thesis, however, relies on a host of implausible assumptions, notably that investors have perfect information and that the corporate form does not present externalities. Charles Tiebout’s hypothetical and perfectly informed citizen-voter is magically assumed to be a real-world investor.<sup>19</sup>

A little bit of history should drive the point home. Over the past century, states competed for charters by offering reduced public regu-

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15. Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2427 (1998) [hereinafter Romano, *Market Approach*]. See also *id.* at 2389.

16. *Id.* at 2361.

17. *Id.* at 2427.

18. See, e.g., Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, OXFORD REV. ECON. POL’Y (forthcoming), available at <http://ssrn.com/abstract=693484> [hereinafter Romano, *Regulatory Competition*].

19. See *id.* at 14 (“States compete for citizens, following Tiebout’s celebrated insight.”). Charles Tiebout’s famous article argues that this hypothetical “consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.” Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

latory oversight of the corporation.<sup>20</sup> Delaware, of course, has taken the lead in the quest to attract incorporations. To do so, it has created a legal regime protective of insiders, leading some critics to label it “the brothel of corporate law.”<sup>21</sup> It is unfair, however, to single out Delaware. As Jill Fisch has pointed out, “state corporation statutes contain relatively little substantive variation. Careful empirical research reveals that corporate codes tend toward uniformity.”<sup>22</sup> The reason for this consistency is intimately related to the competition for incorporations: state corporate codes must be attractive enough both for new local companies to incorporate at home rather than bear the additional costs of going to Delaware,<sup>23</sup> as well as for existing local corporations to remain in-state rather than reincorporate in Delaware.<sup>24</sup>

Lured by contractarianism, corporate law statutes are “enabling.”<sup>25</sup> Through clever tools such as the business judgment rule, fiduciary rules set “standards of review” well below “standards of conduct.”<sup>26</sup> They focus on directors, not officers who actually run a corporation.<sup>27</sup> And the list goes on.<sup>28</sup> The bottom line is simple: impressive-sounding obligations can be carefully skirted through clever process.<sup>29</sup> As Edward Rock suggests in his study of how Delaware cor-

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20. See, e.g., Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 Nw. U. L. REV. 542, 549 (1990) (referring to the process as “chartermongering”).

21. Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1189 (2003).

22. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1066 (2000).

23. See, e.g., Bebchuk & Hamdani, *supra* note 13, at 575 (“[T]he vast majority of firms that opt for out-of-state incorporation go to Delaware, and firms in each local market are currently making a choice that is effectively between incorporating in their home state or in Delaware.”).

24. See, e.g., Romano, *Regulatory Competition*, *supra* note 18, at 16 (explaining that charter competition is not only about “state officials’ actions to induce foreign corporations to reincorporate from another state” but should also consider “actions to maintain local firms’ domicile in-state”).

25. See *id.* at 11 (“State corporate law is in essence enabling, following a menu approach that permits firms to alter statutory defaults to fit their needs.”).

26. See Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 438 (1993).

27. See Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 781 (2004).

28. For a detailed discussion of the weak shareholder protections that state corporate law provides, see Dibadj, *Delaying Corporate Law*, *supra* note 12.

29. As Delaware Vice Chancellor Leo Strine candidly admits, “Delaware corporate law generally permits corporate managers wide flexibility and errs on the side of managerial freedom.” 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, 1279 (2001).

porate law is actually made, “we come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen.”<sup>30</sup>

Predictably, as a fresh batch of scandals began rocking the corporate world in 2001, state law was conspicuously absent:

But where has Delaware been through all this? No bills have been introduced in Delaware’s legislature; no hearings held by its committees; its law enforcement agents have taken no action; and its executives have staid mum. How is it that Delaware—the home of what has long been viewed as the *de facto* national corporate law—has sat on the sidelines?<sup>31</sup>

The problem, of course, is not confined to Delaware.<sup>32</sup> As Robert Thompson notes, “the response in state corporate law has been largely one of silence that has left any modifications in corporate governance to . . . other actors”<sup>33</sup>; in the end, “no one thought that state law was the place to address these problems.”<sup>34</sup>

In the wake of corporate scandals, Romano has written a strong rebuke of SOX,<sup>35</sup> instead suggesting an enabling statute akin to those in corporate law.<sup>36</sup> Tellingly though, she does not discuss the possibility that contractarian state corporate statutes and anemic fiduciary duties might have allowed scandals to develop. After all, it would be difficult to argue that the perpetrators in the recent corporate scan-

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30. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997). See also *id.* at 1067–68 (“As one experienced Wall Street transactional lawyer put it in private conversation, ‘We’re not afraid of what the Delaware courts say. We’re afraid of what the press says.’”).

31. Kahan & Rock, *supra* note 14, at 1. See also Hillary A. Sale, *Delaware’s Good Faith*, 89 CORNELL L. REV. 456, 456–57 (2004).

32. As Stephen Bainbridge reminds us, “the two main poster-children for reform, Enron and WorldCom, were not Delaware corporations; they were incorporated in Oregon and Georgia, respectively.” Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REC., Spring 2003, at 26, 30.

33. Robert B. Thompson, *Corporate Governance After Enron*, 40 HOUS. L. REV. 99, 102 (2003).

34. *Id.* at 107.

35. See Romano, *Quack Governance*, *supra* note 3, at 1585 (“The SOX corporate governance mandates were not carefully considered by Congress; in particular, they were not evaluated in light of the empirical literature questioning their efficacy.”). Cf. Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 130 (2005) [hereinafter Karmel, *Douglas*].

36. See Romano, *Quack Governance*, *supra* note 3, at 1529 (“The central policy recommendation of this Article is that the corporate governance provisions of SOX should be stripped of their mandatory force and rendered optional for registrants.”).

dals were either careful or loyal.<sup>37</sup> Perhaps “the SOX initiatives are not to be found in any state corporation codes”<sup>38</sup> precisely because state corporation codes have not protected shareholders.<sup>39</sup>

Indeed, devolving to simple dual regulation will likely make things worse, not better, by making Delaware’s position even more prominent than it is today.<sup>40</sup> This will exacerbate the existing “democratic deficit”<sup>41</sup> in corporate law, where a small state with approximately 800,000 citizens enjoys making de facto national law.<sup>42</sup> A cynic might be forgiven for wondering whether dual federalism could serve as an apologia for naïve deregulation of securities regulation.<sup>43</sup>

## 2. Internal Affairs and Blue Skies

The “internal affairs” doctrine undergirds dual federalist conceptions and has fueled the race to deregulate state corporate law. It is first important to understand what the doctrine is and what it is not. As the United States Supreme Court describes it,

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37. As Robert Thompson and Hillary Sale summarize, “[t]oday’s federal securities fraud claims are largely efforts to recover from what could be care claims at state law.” Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 904 (2003). See also Kahan & Rock, *supra* note 14, at 25 (as just one example, noting how looting at Tyco represents a “classic self-dealing transaction by a corporate fiduciary”).

38. Romano, *Quack Governance*, *supra* note 3, at 1528.

39. See Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 806 (2006) (“Federal securities law, not state corporate law, plays the most important role in corporate governance in America today . . .”). Perhaps surprisingly, a case might be made that securities law violations may constitute such transgressions of corporate law that they are even beyond the broad protections of the business judgment rule. As former SEC Commissioner Harvey Goldschmid observes, “[n]o case, to my knowledge (and I think I know of each and every one), has been brought [by the SEC] that second-guesses honest business decisions of directors or officers.” Harvey J. Goldschmid, *The SEC at 70: Let’s Celebrate Its Reinvigorated Golden Years*, 80 NOTRE DAME L. REV. 825, 830 (2005).

40. See Romano, *Market Approach*, *supra* note 15, at 2391 (“It is, however, probable that opening securities regulation up to state competition would enhance Delaware’s dominant position as an incorporation state.”).

41. Kahan & Rock, *supra* note 14, at 29.

42. Cf. Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL’Y REV. 297, 311 (1996) (“Our point thus is only that states in the American union now have complicated and ambiguous relationships to representative democracy and to ideas of citizen efficacy. One cannot draw the general conclusion that devolution of all sorts of programs and functions—where that devolution is of power to state government—promotes representative democracy in a federal polity like ours.”).

43. Cf. Roberta S. Karmel, *Reconciling Federal and State Interests in Securities Regulation in the United States and Europe*, 28 BROOK. J. INT’L L. 495, 496 (2003) [hereinafter Karmel, *Federal and State*] (“Some scholars believe that competition among financial regulators is beneficial and results in an optimum level of regulatory intrusion upon private business interests. Proponents of this theory frequently are apologists for deregulation.”).

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—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.<sup>44</sup>

As one commentator notes, “[w]ithout the internal affairs doctrine, a state will be severely restricted in its ability to apply its law to shareholders, managers, and assets outside of the state of incorporation.”<sup>45</sup> The race to attract corporate charters would cease.<sup>46</sup>

Theoretically, states would be free to ignore the internal affairs doctrine and rely on basic conflicts principles. As numerous commentators have pointed out, the doctrine is not constitutionally mandated.<sup>47</sup> Moreover, the guidance provided by the Restatement of Conflict of Laws provides space to regulate:

The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.<sup>48</sup>

Comment g seems to allow even more leeway, observing that “[s]tatutes in a number of states forbid regulation of the internal af-

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44. *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982). For discussions of the internal affairs doctrine, see Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29 (1987); Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161 (1985).

45. Arthur R. Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 494 (1987) [hereinafter Pinto, *Takeover Statutes*].

46. See, e.g., Kahan & Rock, *supra* note 14, at 33 (“The continued applicability of the internal affairs rule is, of course, the life-blood of Delaware.”); David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 521 (1994) (“If choice of law were based not on the state of incorporation, but on some other factor such as the firm’s principal place of business, corporate managers would lose much of their incentive to shop for the optimal corporation law regime, and the competition for charters would break down.”).

47. See, e.g., Arthur R. Pinto, *The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699, 764–65 (1988) [hereinafter Pinto, *Corporate Control*] (“Although the [United States Supreme] Court historically has deferred to the law of the state of incorporation on issues involving internal affairs, that does not mean that the Court has established a constitutional requirement under the commerce clause mandating that the law of the state of incorporation be applied on all corporate governance issues.”); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480 (2002) [hereinafter Note, *Internal Affairs*] (arguing that neither Due Process, Full Faith and Credit, nor Dormant Commerce Clause analysis compels the internal affairs doctrine).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971).

fairs of foreign corporations . . . . *On the other hand, statutes in other states specifically provide for such regulation.*"<sup>49</sup>

In fact, one might argue that the internal affairs doctrine makes for questionable policy. The doctrine is formalistic, especially as applied to states that host significant portions of a corporation's operations.<sup>50</sup> The internal affairs doctrine might ensure a uniform law for the business entity, but the other side of the equation—investor protection—is ignored.<sup>51</sup> In other words, states might also want to protect their resident shareholders. As Bernard Black notes, "[a]t the state level, the best prospect for manager constraining rules is laws whose force depends on contacts with the state other than incorporation."<sup>52</sup>

At the margins, some states have recognized that the internal affairs doctrine might elevate form over function. Large states, notably New York and California, reserve the right to regulate some aspects of corporations formed out of state as "pseudo-foreign" corporations.<sup>53</sup> Yet these statutes are both rare and rarely enforced. Maybe states would like to emphasize continuity and consistency. Or perhaps they cater to business interests and the powerful local bar committees who draft state corporate laws.<sup>54</sup>

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49. *Id.* (Reporter's Note, Comment g) (emphasis added).

50. See, e.g., Pinto, *Corporate Control*, *supra* note 47, at 769 ("If anything, a rule automatically applying the law of incorporation to situations in which substantially all the assets and shareholders and the principal place of business are in one state that is not the state of incorporation, without any other nexus, would promote form over substance and abandon any real balancing of interests."); Note, *Internal Affairs*, *supra* note 47, at 1488 ("Choosing the law of the state of incorporation over that of another state with which the corporation has contacts sufficient to satisfy due process is ultimately arbitrary.").

51. *Cf.* Note, *Internal Affairs*, *supra* note 47, at 1487 ("There is a dearth of empirical data specifically addressing the efficiency implications of the internal affairs doctrine; nevertheless, courts have continued to apply the doctrine, often citing consistency as their rationale. The persistence of the doctrine suggests that courts typically presume that the gains corporations accrue exceed any losses individual stockholders may suffer.").

52. Black, *supra* note 20, at 580. See also Note, *Internal Affairs*, *supra* note 47, at 1481 ("Forum states have at least two incentives to apply their law to the internal disputes of foreign corporations: to provide greater protection to resident shareholders and to undermine the primacy of Delaware as a state of incorporation.").

53. For negative views of these attempts, see, e.g., William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 759 (1998) [hereinafter Carney, *Corporate Law*] ("Statutes that preclude vigorous competition, such as those of New York and California that reduce the benefits of migration by regulating pseudo-foreign corporations, are the real problem."); P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers—Controlling Choice of Law Through the Commerce Clause*, 14 DEL. J. CORP. L. 499, 519 (1989) ("Cutting through the façade of the foreign incorporation and asserting global authority to regulate the internal affairs of this entity may constitute a frontal assault on the *lex incorporationis*.").

54. See, e.g., Carney, *Corporate Law*, *supra* note 53, at 716; Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 384–85 (2004).

Abiding by the internal affairs doctrine may also be more palatable politically. Here, an analogy might be drawn to recent scholarship in criminal law. In his study of the different ways in which criminal “recidivist [sentence] enhancement and [sex offender] registration laws take account of out-of-state prior convictions,”<sup>55</sup> Wayne Logan has found two approaches among states:

The internal approach requires that out-of-state convictions, and any punishment resulting from those convictions, satisfy the eligibility requirements of the forum state’s registration or recidivist enhancement law. The external approach, on the other hand, allows such decisions to be based on the legal determinations of the forum state’s fellow sovereigns.<sup>56</sup>

While the analogy is far from perfect, the “external approach” is akin to abiding by the internal affairs doctrine; the “internal approach” is not. Interestingly, Logan finds that

the external approach also functions to undermine governmental transparency and political accountability. By deferring to the laws of other sovereigns, forum state officials become free riders: they avoid any possible negative political consequences that might attend enforcement of such laws in the first instance in the forum . . . . The external approach thus permits jurisdictions to indulge in a kind of stealth legislation: laws are applied by the forum without having been subject to the debate and compromise common to the legislative process.<sup>57</sup>

By contrast, “internal approach states can be considered stalwarts of ‘fifty-labs’ federalism. By insisting that foreign convictions warrant recidivist or registration treatment under their own laws, and not deferring to the judgments of the states where the convictions occurred, the states reify federalist values of self-governance and autonomy.”<sup>58</sup> State corporate law authorities by and large embrace the “external approach”—perhaps largely because it is more politically expedient.

In a fascinating irony, however, state attorneys general have become the heroes of the “internal approach” by using state blue sky laws. Interestingly, this new twist is a historical anomaly. After all, even the strongest of these statutes,<sup>59</sup> designed to protect investors from

55. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 261 (2005).

56. *Id.*

57. *Id.* at 322–23.

58. *Id.* at 318.

59. Many blue sky statutes, of course, were far from rigorous. See, e.g., Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1290 (2004) (“[M]any of the blue-sky laws were fraught with so many exemptions that they were essentially an illusory protection.”).

unscrupulous securities promoters and traders,<sup>60</sup> have a history of underenforcement and evasion.<sup>61</sup> In the wake of the most recent spate of corporate scandals, however, several states have dusted off these laws and begun enforcing them.

There are two major reasons why blue sky laws have become such a potent weapon. First, they rest on a different jurisdictional basis, effectively circumventing the internal affairs doctrine by focusing on the locus of the securities transaction. As one commentator summarizes:

Another enclave somewhat insulated from the *lex incorporationis* derives from the authority of a state to regulate local transactions involving the securities of foreign corporations wherever they are incorporated. Traditional wisdom holds that a state should be able to control the public distribution of all securities within its borders regardless of the affiliations of the issuing corporations.<sup>62</sup>

Second and relatedly, blue sky laws have teeth because they are mandatory: clever insiders cannot contract out of the law like they can with ineffectual state corporate codes. Moreover, states in whose jurisdiction significant securities transactions take place—notably New York, where Wall Street resides—can apply their blue sky laws to a broader array of corporations. This is precisely why New York's blue sky law, the Martin Act,<sup>63</sup> has been such a powerful weapon in Eliot Spitzer's hands.<sup>64</sup> Jonathan Macey even suggests that the Martin Act has allowed Spitzer to engineer a coup of sorts:

Mr. Spitzer has not been content to share power with the SEC. He certainly has not been content to follow the SEC's lead, or to let the SEC set the regulatory agenda. While Eliot Spitzer is driven by the spirit of political entrepreneurship, the SEC is driven by a sense

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60. For a succinct history of blue sky laws, see Christopher R. Lane, *Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 *NEW ENG. L. REV.* 317, 321–23 (2005).

61. See, e.g., Di Trollo, *supra* note 59, at 1289–90 (“[B]lue-sky laws could easily be evaded by disposing of securities out of state.”); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 *CORNELL L. REV.* 1, 23 (1998) (“[B]ecause state securities commissioners could not extend their authority across state lines, state securities laws could not control two major waves of securities frauds, which took place from 1917 to 1920 and in the late 1920s.”).

62. Kozyris, *supra* note 53, at 520. Cf. Painter, *supra* note 61, at 72 (“Securities fraud law, by contrast, is determined by the geographic location of the transaction in question, not by the incorporators’ voluntary forum selection.”).

63. See N.Y. Gen. Bus. Law § 352-c (McKinney 2006). For a recent application, see *State v. Clark McLeod*, 2006 WL 1374014 (N.Y. Sup. Ct. Feb. 9, 2006).

64. See, e.g., Karmel, *Federal and State*, *supra* note 43, at 520 (“The case against Merrill Lynch brought by the New York Attorney General was based on broad and general antifraud provisions of the Martin Act . . . .”); John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, *NEW YORKER*, Apr. 7, 2003, at 54 (“Spitzer’s assault on Merrill Lynch shocked the industry’s official regulators almost as much as it shocked Wall Street.”).

of rivalry. Clearly, the SEC has been far more influenced by Eliot Spitzer than Eliot Spitzer has by the SEC. In a real sense, Mr. Spitzer has engineered a successful “hostile takeover” of the SEC, hijacking its agenda and forcing the Commission to pursue his preferred approaches to capital market regulation, or else risk appearing slow and indifferent and suffering a major public relations defeat. Mr. Spitzer has replaced the SEC as “policy czar.”<sup>65</sup>

To what extent Spitzer is motivated by “political entrepreneurship” could be debated endlessly.<sup>66</sup> The more important point to remember is that he is not alone—attorneys general in other states have gotten into the act as well.<sup>67</sup> Whether this trend will last is questionable, although the issues it has raised cannot be conveniently ducked in the hope that they will go away.

In sum, the incongruity in what states are doing is jarring. On the one hand, the state corporate codes—mesmerized by contractarianism, anemic fiduciary duties, and the internal affairs doctrine—provide too little investor protection. In marked contrast, attorneys general have begun vigorously enforcing blue sky laws in a manner that critics find too protective.<sup>68</sup> To boot, the lack of coordination

65. Jonathan R. Macey, *Wall Street in Turmoil: State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 133 (2004) [hereinafter Macey, *State-Federal Relations*].

66. One journalist even observes that “analysts routinely refer to the nationwide attorneys general group as the National Association of Aspiring Governors.” Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST, Jan. 12, 2005, at A1.

67. See, e.g., Marilyn Geewax, *WorldCom Case Follows Trend of State Action*, AUSTIN AM-STATESMAN, Aug. 29, 2003, at C1 (Oklahoma Attorney General); Masters, *supra* note 66 (Connecticut Attorney General). Interestingly, other state instrumentalities have tried to get involved as well. See, e.g., Gretchen Morgenson, *Call In The Feds. Uh, Maybe Not*, N.Y. TIMES, Feb. 29, 2004, at § 3 p. 1 (“To critics, the failure to protect investors in Washington State is Exhibit A for why state regulators should stay in the oversight mix. Indeed, the debacle goes to the heart of the escalating battle between local and national officials over who should police financial institutions.”); Jeffrey Krasner & Andrew Caffrey, *SEC Missed a Chance at Its Probe of Putnam*, BOSTON GLOBE, Nov. 16, 2003, at A1 (“The investigations into Putnam and other fund companies were led largely by state regulators, with the SEC weighing in afterward. Congress and state regulators have blasted the agency as an ineffectual cop on the financial beat, and the new Putnam revelation is drawing more fire.”).

68. David Ratner thus argues for the need to

clearly distinguish between state *corporation* laws, through which states compete for the revenue of large national corporations by offering corporate managers the highest level of protection against claims by shareholders (and which contain almost no provisions requiring disclosure to shareholders), and state *securities* laws, which have been widely condemned by economists because they go far beyond the disclosure requirements found in federal law and often give a state official the authority to decide *on the merits* whether a particular security should be allowed to be offered in the state.

David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey*, 16 CARDOZO L. REV. 1765, 1769 (1995).

among state and federal regulators has occasionally led to chaos.<sup>69</sup> Dual federalism, at least so far, has proven itself to be an ambivalent mess.

## B. Preemptive Federalism

Annoyed with the shortcomings of dual federalism, some commentators have called for preempting state blue sky laws entirely.<sup>70</sup> There is virtually no question, given the Commerce and Supremacy Clauses, that Congress has the constitutional authority to do so.<sup>71</sup> I argue, however, that preemptive federalism makes for bad policy for two principal reasons. First, as federal regulation has grown and become increasingly preemptive over the past decade, it has often decreased shareholder protections. Second, and more generally, federal institutions simply lack the capacity to be the sole arbiters of securities regulation.

### 1. Political Vagaries

While preemptive federalism might help shareholders, it also runs the risk of further entrenching managers, depending on the political vagaries of the day. To begin with, federal oversight of corporate accounting—the root of many of the recent corporate scandals—has been lax.<sup>72</sup> More starkly, the recent triad of securities reform statutes enacted from 1995 to 1998—the Private Securities Reform Litiga-

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69. A notable example relates to the recent WorldCom debacle where Oklahoma state authorities charged “the four leading witnesses in the federal criminal case . . . . Those four witnesses whom pleaded guilty as part of cooperation deals with the government and have admitted in court that they acted legally . . . . [sic] Now, those admissions will be Exhibit A in the state criminal case against them.” Barnaby J. Feder & Kurt Eichenwald, *A State Pursues WorldCom, Effects Seen on U.S. Case*, N.Y. TIMES, Aug. 28, 2003, at C1. Cf. Fisch, *New Federal Regulation*, *supra* note 2, at 47 (“To the extent that federal standards intrude into traditional areas of state regulation, they may create confusion.”).

70. See, e.g., Rutheford B. Campbell, Jr., *An Open Attack on the Nonsense of Blue Sky Regulation*, 10 J. CORP. L. 553, 553 (1985) (“Today, blue sky laws are ineffective, philosophically unsound, and unnecessarily expensive, and they should be substantially eliminated.”).

71. Indeed, it would very likely be constitutional for the federal government to preempt all of corporate law. See, e.g., Bainbridge, *supra* note 32, at 26 (“No one seriously doubts that Congress has the power under the Commerce Clause, especially as it is interpreted these days, to create a federal law of corporations if it chooses.”).

72. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 744 (2002) (“[M]embers of Congress opposed by an overwhelming margin a proposal by the Financial Accounting Standards Board to require companies to account for stock options as an expense—until, that is, a series of major financial scandals changed the political calculus somewhat.”).

tion Act ("PSLRA"),<sup>73</sup> National Securities Market Improvements Act ("NSMIA"),<sup>74</sup> and Securities Litigation Uniform Standards Act ("SLUSA")<sup>75</sup>—all represent federal laws effectively meant to protect managers from shareholder suits.<sup>76</sup> Shareholder protection has not been high on the recent congressional agenda,<sup>77</sup> leading some scholars to wonder whether blue sky laws such as the Martin Act might be preempted next.<sup>78</sup>

Perhaps most amusingly, it is important to remember that while corporate interest groups do clamor for "states' rights" when federal laws do not suit them, they are also not ashamed to turn around and argue for federal preemption in the face of inconvenient state laws.<sup>79</sup>

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73. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. PSLRA introduced, "inter alia, heightened pleading requirements for class actions alleging fraud in the sale of national securities." *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001). See also Painter, *supra* note 61, at 32–34; A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 481–83 (2000) [hereinafter Pritchard, *Constitutional Federalism*].

74. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416. "The primary purpose of NSMIA was to preempt state 'Blue Sky' laws which required issuers to register many securities with state authorities prior to marketing in the state." *Lander*, 251 F.3d at 108. The securities exempted, called "covered securities," are those nationally listed on the New York or American Stock Exchanges, or on NASDAQ. See 15 U.S.C. § 77r(b) (2000). Note, however, that the "NSMIA expressly preserved state authority to bring enforcement actions with respect to securities transactions." Di Trolio, *supra* note 59, at 1295. See also Karmel, *Douglas*, *supra* note 35, at 91; Manning Gilbert Warren III, *Reflections on Dual Regulation of Securities: A Case for Reallocation of Regulatory Responsibilities*, 78 WASH. U. L.Q. 497 (2000).

75. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227. SLUSA makes "federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and . . . [mandates] that such class actions be governed exclusively by federal law." *Lander*, 251 F.3d at 108. See also Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks like a Securities Fraud Claim and Acts like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 ALA. L. REV. 325 (2004); Pritchard, *Constitutional Federalism*, *supra* note 73, at 483–91. For a critique of SLUSA, see Painter, *supra* note 61, at 9 ("To date, state law has not demonstrated significantly more bias in favor of plaintiffs than has federal law. The statistical evidence that plaintiffs fled to state courts following the 1995 Reform Act is at best ambiguous.").

76. See, e.g., Bratton & McCahery, *Equilibrium*, *supra* note 14, at 51. Cf. Marc I. Steinberg, *The Emergence of State Securities Laws: Partly Sunny Skies for Investors*, 62 U. CIN. L. REV. 395 (1993).

77. Cf. Painter, *supra* note 61, at 17 ("[P]assage of the 1995 Reform Act and the Uniform Standards Act suggests that shareholders might fare better if Congress continues to stay away from corporate law.").

78. For instance, Jonathan Macey even predicts that Eliot Spitzer's activities "are likely to lead to a congressional counterattack in the form of preemption of New York's Martin Act" and concludes that the "capital markets will be weaker if this occurs." Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 973 (2005).

79. As one newspaper article summarizes:

The pattern is not limited to securities regulation: tort reform,<sup>80</sup> drug labeling,<sup>81</sup> consumer lending,<sup>82</sup> and the deregulation of financial institutions<sup>83</sup> and household movers<sup>84</sup> provide just a few examples where commercial interests have sought the federal government to preempt state laws more favorable to consumers. Put simply, preemptive federalism can too readily morph into “Deregulation through Statutory Preemption.”<sup>85</sup>

## 2. Institutional Constraints

Even if we assume political vagaries away,<sup>86</sup> preemptive federalism suffers from serious institutional roadblocks: neither Congress, nor the federal courts, nor even the SEC has the institutional capacity to manage all securities regulation.

Securities are only one of a plethora of issues for Congress.<sup>87</sup> From the Securities and Exchange Acts in 1933<sup>88</sup> and 1934<sup>89</sup> to SOX

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Not surprisingly, as Mr. Spitzer and other state officials have grabbed headlines, financial firms have protested their involvement. Sometimes quietly, sometimes overtly, powerful financial institutions have lobbied hard in recent years to reduce the purview and power of state regulators. They typically argue that the patchwork of state and federal laws is inefficient and costly and that federal oversight should take precedence.

Morgenson, *supra* note 67.

80. See, e.g., Robert M. Ackerman, *Tort Law and Federalism: Whatever Happened to Devolution?*, 14 YALE L. & POL'Y REV. 429, 447 (1996).

81. See, e.g., FDA, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products 38, Jan. 24, 2006, <http://www.fda.gov/OHRMS/DOCKETS/98fr/00n-1269-nfr0001-01.pdf> (“FDA believes that under existing preemption principles, FDA approval of labeling under the act, whether it be in the old or new format, preempts conflicting or contrary State law.”).

82. See, e.g., Jonathan Peterson, *Lenders Target State Laws: An Industry that Makes Home Loans to People with Poor Credit Wants Uniform Federal Rules that Could Undo Tougher Consumer Protections*, L.A. TIMES, Dec. 28, 2005, at A1.

83. See, e.g., Helen A. Garten, *Devolution and Deregulation: The Paradox of Financial Reform*, 14 YALE L. & POL'Y REV. 65, 96 (1996) (“When states act to impose tighter restrictions on their banks than those favored by the national sovereign, their choices may be more responsive to public preferences than the deregulatory policies recently endorsed by the Comptroller of the Currency. Financial deregulation may reflect elitist rather than majoritarian values.”).

84. See, e.g., David Rogers, *Missouri Lawmaker Lends Movers a Hand*, WALL ST. J., Nov. 30, 2005, at A4.

85. Karmel, *Federal and State*, *supra* note 43, at 507.

86. For a strong defense of preemption, see generally Prentice, *supra* note 39.

87. Cf. Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99, 124 (2004).

88. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2000)).

89. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (2000)).

in 2002, federal securities laws have consistently been reactive. Put simply, Congress acts “on a fire patrol basis”<sup>90</sup> where “the fire alarm is a scandal or bad economic performance.”<sup>91</sup> Assuming, arguendo, that Congress would be able to act on an ongoing basis and with the best of intentions to protect shareholders, it is unclear whether its drafting of statutes would necessarily be to shareholders’ benefit. Any federal statute that seeks to be comprehensive will likely descend into complexity in order to satisfy various interest groups.<sup>92</sup>

What about the federal courts? After all, led by the United States Supreme Court, they have played an important historical role in fashioning common law remedies, most famously through the federal common law<sup>93</sup> remedy of implied private rights of action for plaintiffs alleging fraud or misrepresentation. These rights developed through the early 1970s,<sup>94</sup> but more recent developments suggest that the federal courts are unlikely to be able to serve as the frontline in protecting shareholder interests. Above and beyond heavy caseloads, there has been a general movement, at least since the landmark United States Supreme Court cases *Blue Chip Stamps v. Manor Drug Stores*<sup>95</sup> and *Cort v. Ash*,<sup>96</sup> to cabin the federal common law of securities regulation.<sup>97</sup>

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90. Bratton & McCahery, *Equilibrium*, *supra* note 14, at 44.

91. Roe, *Delaware’s Politics*, *supra* note 9, at 2530.

92. See, e.g., Kahan & Kamar, *supra* note 72, at 743–44 (“Like noncompeting states, Congress would likely be amenable to lobbying by campaign contributors. As a result, it would likely play to corporate managers, subject to occasional corrective legislation following financial debacles.”). As just one example, SLUSA has a careful carve-out for derivative actions based on state fiduciary duty claims. See, e.g., Kahan & Rock, *supra* note 14, at 10. This has no doubt made the Delaware bar happy. Whether it protects shareholders, however, is an entirely different matter. See *supra* Part I.A.1.

93. The term “federal common law” is used “to refer to any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.*” Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (footnote omitted).

94. In the landmark case *J.I. Case Co. v. Borak*, the Court implied a private right of action under SEC Rule 14a-9 for false or misleading proxies. 377 U.S. 426, 432 (1964).

95. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (limiting standing to sue in private rights of action under 10b-5 to actual purchasers or sellers of securities).

96. *Cort v. Ash*, 422 U.S. 66 (1975) (creating a more restrictive test to determine whether private rights of action may be implied under federal statutes).

97. As the Supreme Court cautioned in *Santa Fe Industries v. Green*, “[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.” 430 U.S. 462, 479 (1977). The retrenchment of federal common law has continued and is not limited to the securities arena. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); Kamen

Given the limitations on Congress as a decision-making body and on the federal courts as enforcers of securities law, perhaps the most workable approach under a preemptive federalist model would be for Congress to draft some broad mandates, then delegate expanded responsibilities to the SEC as its expert agency. This is possible and certainly more feasible than Congress trying to do things directly, but it would vastly expand the Commission's duties and require a rethinking of how the agency operates.<sup>98</sup> After all, at least during the most recent spate of corporate scandals, the SEC was often not a paragon of performance.<sup>99</sup> As one article in the *Wall Street Journal* rightly asks, "[h]ow did the SEC's staff of more than 3,000 allow Mr. Spitzer's investor-protection staff of 84 to grab the enforcement torch?"<sup>100</sup>

To boot, given the ambiguities inherent in its enabling statutes, the SEC has often found itself at the limits of the powers delegated to it.<sup>101</sup> Controversies related to Rule 14a-8<sup>102</sup> "precatory" shareholder townhall meeting proposals,<sup>103</sup> and Rule 19c-4<sup>104</sup> "one share, one vote" rights<sup>105</sup> reflect the precariousness of its mandate in the realm of

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v. Kemper Fin. Servs., 500 U.S. 90 (1991); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). As one commentator has observed, the Supreme Court "altered dramatically the balance between state and federal power during the 1990s: by restricting the federal common law making powers of the federal courts." Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 899 (1996). For a different perspective based on recent Supreme Court opinions in the securities arena, see Mark J. Loewenstein, *The Supreme Court, Rule 10b-5 and the Federalization of Corporate Law*, 39 IND. L. REV. 17, 20 (2005) [hereinafter Loewenstein, *Federalization*] ("[A] cynic might consider the new federalism cases to be an anomaly, with the reality being that the Court is still as nationalistic in its approach as it traditionally has been.").

98. An important component might be refashioning the SEC's power in criminal cases. See *infra* note 138 and accompanying text.

99. See, e.g., Kahan & Rock, *supra* note 14, at 35 (noting how Eliot Spitzer was "visibly on the ball while the Securities and Exchange Commission was asleep"); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 883 (1994) (lamenting "the SEC's erratic and desultory performance" in the context of Rule 14a-8).

100. Mark Maremont & Deborah Solomon, *Behind SEC's Failings: Caution, Tight Budget, '90s Exuberance*, WALL ST. J., Dec. 24, 2003, at A1. See also Jesse Eisinger, *SEC Screwdriver Joins Spitzer Hammer as Hedge-Trimmer*, WALL ST. J., Oct. 27, 2004, at C1.

101. See, e.g., Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1131 (1993) ("The statutory language and legislative history are ambiguous as to whether the SEC is authorized to enact rules with a substantive effect on corporate governance or simply to implement disclosure requirements.").

102. 17 C.F.R. § 240.14a-8 (2005).

103. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 846 (2005).

104. 17 C.F.R. § 240.19c-4 (2005).

105. The landmark case is *Business Roundtable v. SEC*, where the District of Columbia Circuit Court of Appeals held that "[b]ecause the rule directly controls the substantive

corporate governance. The regulatory tap-dance is perhaps most contorted when the SEC is relegated to exerting its influence indirectly by having the stock exchanges implement what the Commission would be precluded from doing directly.<sup>106</sup> As a former chairman of the Agency somberly warns, "the SEC tiptoes in the corporate governance area, with an omnipresent shadow of doubt surrounding the question of breadth of the SEC's own mandate."<sup>107</sup> With broader direction from Congress, this problem might ameliorate, but it is unlikely to disappear.

### C. Stalemate

The responsibility for regulating the relationship between corporations and their shareholders has thus descended into a welter of confusion. Neither dual federalism nor preemptive federalism has proved satisfactory.<sup>108</sup> Little dialogue exists—even article titles have become polarized. One commentator writes, "An Open Attack on the Nonsense of Blue Sky Regulation";<sup>109</sup> another, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance."<sup>110</sup> Even before reading further, one could be forgiven for being skeptical about existing paradigms for understanding the intersection of federalism and securities regulation.

Interestingly, there has been no shortage of creative suggestions to work around the problem. One commentator suggests that federalism might be a red herring: "[C]ourts would be better off if instead of invoking traditional notions of federalism in this area, they directly confronted the substantive policy choices, such as that between managerial autonomy and investor protection, which are often disguised as choices between federal and state law."<sup>111</sup> Other scholars try to shift

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allocation of powers among classes of shareholders, we find it in excess of the Commission's authority under § 19 of the Securities Exchange Act of 1934." 905 F.2d 406, 407 (D.C. Cir. 1990).

106. See, e.g., Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325, 338–39 (2001) ("[S]tock exchange listing standards operate as a bridge between state and federal law with respect to corporate governance, but their legal status is uncertain.").

107. Richard C. Breeden, *Giving It Away: Observations on the Role of the SEC in Corporate Governance and Corporate Charity*, 41 N.Y.L. SCH. L. REV. 1179, 1182 (1997).

108. Cf. Mashaw & Calsyn, *supra* note 42, at 316 ("But there seems no convincing way to measure the comparative capacities of states and the federal government to pursue the public interest.").

109. Campbell, *supra* note 70.

110. Romano, *Quack Governance*, *supra* note 3.

111. Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 VA. L. REV. 813, 819–20 (1984). At the time Anderson was writing, the

the analysis to new analytical categories: for example, between “specific” protections such as rules governing proxy solicitations, and “catch-all” protections such as Rule 10b-5;<sup>112</sup> or between mandatory versus enabling rules.<sup>113</sup> Some observers—grasping to justify preemptive federalism as a deregulatory tool amid all the earlier talk among laissez-faire’s acolytes of devolving power to states—now couch their deregulatory arguments in the rhetoric of “liberty” from government intrusion.<sup>114</sup> Regardless of how one might view the merits of these proposals, they sidestep the central issue of how to assess and prescribe the relative roles of federal and state governments.

Rather than duck the federalism question, perhaps it can be reframed as a response to a second-best world with imperfect institutions.<sup>115</sup> As Jill Fisch observes:

[T]he very dispersion of regulatory responses to the corporate governance scandals offers a powerful reason to reject the search for the ideal institution to anoint as the dominant regulator . . . . The resulting regulatory competition offers valuable experimentation and innovation with respect to potential regulatory solutions and, ultimately, a powerful defense to the broad allocation of regulatory authority among competing institutions such as Congress, the SEC, the NYSE, and the states.<sup>116</sup>

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tension was between federal regulation and state deregulation. *See id.* at 814. Today, of course, the situation might be reversed, with state attorneys general frequently being more protective of investors than the SEC. *See supra* Part I.A.2.

112. *See* Dennis S. Karjala, *Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law*, 80 NW. U. L. REV. 1473, 1476 (1986) (“[A]ppeals to the general principles of federalism usually will not be helpful in interpreting the specific regulatory provisions of federal securities law, but that the federal interest in maintaining free and honest national markets can and probably should play an important role in interpreting and applying the catchall provisions.”).

113. *See* Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721, 737 (2005) (“What allows competition in corporate law to be conceived as a ‘federal’ question, thus, is not the adoption of relevant rules by national versus local authorities. Rather, it is the traditionally mandatory nature of rules adopted under federal law, and the enabling nature of state corporate law.”).

114. *See, e.g.*, Pritchard, *Constitutional Federalism*, *supra* note 73, at 439–40 (“I conclude that the Uniform Act [SLUSA] is consistent with principles of constitutional federalism because its preemption results in less, rather than more, government interference with private conduct . . . . [T]he Uniform Act enhances individual liberty because eliminating state regulation enhances individuals’ choices.”).

115. On the importance of institutional analysis in welfare economics generally, *see* Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325 (2006).

116. Jill E. Fisch, *Institutional Competition to Regulate Corporations: A Comment on Macey*, 55 CASE W. RES. L. REV. 617, 625 (2005). *See also* Fisch, *New Federal Regulation*, *supra* note 2, at 47 (“Federalization may also reduce the responsiveness of state lawmakers in favor of leaving the field to the federal government.”); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 122 (2004); Macey, *State-Federal Relations*, *supra* note 65, at 139 (“To the extent that corporate and special interests have

Notwithstanding this important point, current paradigms to get beyond preemptive federalism either bring with them the laxity of dual federalism, a lack of coordination, or both. Part II begins to sketch out an alternative vision to foster the benefits of regulatory competition while at the same time minimizing its downsides.

## II. Cooperative Federalism

### A. Overview

Ideally, we would like the best of both worlds: some kind of federal intervention to force states to address their inconsistencies, without deploying the homogenizing tendencies of the vast federal apparatus. The goal will be to find a middle ground between “‘preemptive federalism’ that relies primarily or exclusively on federal courts or administrative agencies to develop unitary and pinpointed federal policies . . . [and] ‘dual federalism’ that leaves the states as autonomous actors separated from the federal government.”<sup>117</sup>

The notion of cooperative federalism, drawn from new research in the theory of economic regulation, provides at least a promising beginning to addressing the conundrum.<sup>118</sup> The federal government could create a framework and objective that states would implement and possibly supplement. Philip Weiser, a leading commentator on cooperative federalism in the regulatory arena, provides a compelling description of the idea:

In contrast to dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law . . . . Significantly, these programs neither leave state authority unconstrained within its domain, as would a dual federalism program, nor displace such authority entirely with a unitary federal program, as would a preemptive federalism . . . . By crafting a middle ground solution between the extremes of dual federalism and preemptive federalism, Congress continues to out-

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captured the SEC, these groups will similarly favor preemption, since they have more control over the SEC than they do over a world in which the SEC and the states are locked in competition for headlines, political support, and relevant targets to prosecute.”).

117. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1693 (2001) [hereinafter Weiser, *Telecom Act*].

118. New variations on cooperative federalism are emerging as well. See, e.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) (“[A] polyphonic conception recognizes an important role for competition among states and between states and the federal government. The relationship of the states and the federal government may indeed be confrontational rather than cooperative. Polyphony accepts a substantial role for dissonance as well as harmony.”).

strip existing constitutional rhetoric, which envisions a separation that does not exist in practice.<sup>119</sup>

While discussions of cooperative federalism have yet to occur in securities regulation, the reasons behind its emergence in economic regulation offer a striking parallel to the current problems in corporate and securities law:

Under the cooperative federalism model, certain choices are removed from the state level to ensure that the state does not compromise—for whatever reason—on issues of national importance. Thus cooperative federalism schemes define the terms of competition between the states so that they do not deviate from basic federal policy goals, underinvest in goods and services that would benefit neighboring states, or engage in a “race to the bottom.”<sup>120</sup>

Cooperative federalism has been used in a variety of regulatory contexts: environmental law, telecommunications, and social services, to name a few.<sup>121</sup> In their usual incarnation, cooperative federalism programs “set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements.”<sup>122</sup> The bottom line is simple if one re-

119. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001) [hereinafter Weiser, *Constitutional Architecture*]. Cf. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 852 (1998) (“[I]t had never been the case that the federal and state governments operated in ‘separate and distinct spheres’ pursuing independent and distinct objects with distinct resources.”).

120. Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 32–33 (1999) (emphasis added) [hereinafter Weiser, *Chevron*]. As Weiser elaborates:

[T]here are at least three related reasons why the federal government has decided to promote diversity in federal regulatory regimes: (1) to allow states to tailor federal regulatory programs to local conditions; (2) to promote competition within a federal regulatory framework; and (3) to permit experimentation with different approaches that may assist in determining an optimal regulatory strategy.

Weiser, *Telecom Act*, *supra* note 117, at 1698. All of these reasons are eminently applicable to securities regulation.

121. See, e.g., Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999); Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002); Weiser, *Chevron*, *supra* note 120.

122. Weiser, *Telecom Act*, *supra* note 117, at 1696. Cf. Mashaw & Calsyn, *supra* note 42, at 312–13 (“First there is the centralizing move of creating a requirement at the federal level. That condition or entitlement then empowers individuals within the state political process either to participate more effectively in the processes of state collective decisionmaking or

turns to first principles: set a minimum floor, and allow regulatory competition above it.

## B. Some Dimensions

At a broad level, then, the federal government would set minimal shareholder protections, but leave implementation and the creation of enhanced standards to the states. While the details of such a proposal should be debated, the following thoughts serve as a starting point for further discussion.

### 1. Fighting Fraud

The new securities regime should eschew merit regulation and set disclosure and baseline antifraud standards at the federal level. At the same time, however, it should leave implementation of these antifraud standards—as well as the possibility of establishing higher antifraud standards—largely to the states.

To begin with, merit review smacks of “command and control” regulation that is long past its heyday in the world of economic regulation.<sup>123</sup> It is unlikely that government officials will be able to pass judgment accurately on the relative value of investments.<sup>124</sup> For their part, disclosure parameters should be set once at the federal level, rather than subjecting corporations to multiple state-by-state requirements.<sup>125</sup> There is likely enough disclosure qua disclosure<sup>126</sup>—the more important point is to ensure its accuracy. Moreover, having uni-

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to avoid them entirely. Government moves away from and then back toward ‘the people.’”).

123. See, e.g., REZA DIBADJ, *RESCUING REGULATION* (forthcoming 2006).

124. See, e.g., Campbell, *supra* note 70, at 563–67; William J. Carney, *Jurisdictional Choice in Securities Regulation*, 41 VA. J. INT’L. L. 717, 721 (2001) [hereinafter Carney, *Jurisdictional Choice*] (criticizing “the paternalism of ‘merit’ jurisdictions, which allow bureaucrats to determine the worthiness of an investment—an extreme form of over regulation.”). But see Steinberg, *supra* note 76, at 411–12 (“Although merit regulation has been attacked for being paternalistic and for increasing the costs of raising capital without generating countervailing benefits, its continued embracement by the states reflects their priority to foster investor protection.”).

125. Cf. Skeel, *supra* note 46, at 475–76 (“I argue that lawmaking authority over corporate bankruptcy should be shifted back to the states . . . Rather than relinquishing control altogether, Congress should continue to regulate limited aspects of corporate bankruptcy, such as the applicable disclosure requirements.”).

126. Some scholars are even quite cynical about the value of the existing disclosure regime. See, e.g., A. C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1097–98 (2005) [hereinafter Pritchard, *SEC at 70*] (“Congress and the SEC focus almost exclusively on disclosure because it reinforces the myths of investor autonomy and sovereignty, a very lucrative myth as far as the financial services sector is concerned.”).

form disclosure requirements takes much of the air out of arguments that a federalist system of securities regulation harms the international competitiveness of American capital markets.<sup>127</sup> Perhaps disclosure might even be simplified.<sup>128</sup>

The focus, rather, should be on preventing fraud.<sup>129</sup> This effort should coexist at two levels. First, a baseline level of protection articulated by the federal government, but implemented largely by the states. Second, an additional level of investor protection that states could adopt voluntarily. It is important to recognize as a threshold matter that some might argue the additional layer is unnecessary. After all, “conduct that constitutes fraud under federal law is likely to constitute fraud under state law, and vice versa.”<sup>130</sup> As one commentator observes, “[c]ontrary to the assertions of preemption advocates, similar standards for fraud *do* exist across all securities regimes, state and federal.”<sup>131</sup> The real problem, then, might really be anemic enforcement, not divergent legal standards.<sup>132</sup> There is validity to this point.

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127. As one commentator suggests, “[e]limination of state registration requirements would debase arguments that the states’ securities laws impose regulatory barriers to capital formation, internationalization, and the facilitation of internet securities markets.” Warren, *supra* note 74, at 508.

128. See, e.g., Carney, *Jurisdictional Choice*, *supra* note 124, at 723 (“The competitive problem now facing U.S. markets is the reluctance of foreign issuers to comply with U.S. GAAP as well as other burdens of our disclosure system, which has led to a relative dearth of foreign listings in U.S. markets, and a plethora of such listings on the London Exchange.”); Coates, *supra* note 11, at 533. It is important to remember, however, that disclosure should not be simplified in a way conducive to fraud. Cf. Painter, *supra* note 61, at 85–86 (“The 1933 Act registration and prospectus delivery requirements are riddled with new exceptions, some of which have increased the opportunity for fraud.”).

129. Interestingly, even scholars who suggest moving toward a voluntary disclosure regime for offerings nonetheless advocate maintaining mandatory antifraud liability. See, e.g., Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 130 (1999) (“A critical adjunct to my proposal of disclosure choice is that issuers in public offerings would be subject to a mandatory antifraud standard—namely, Rule 10b-5 liability. Disclosure choice would shift compliance from *ex ante* line-item disclosure to *ex post* liability standards.”).

130. Painter, *supra* note 61, at 60–61.

131. Jones, *supra* note 116, at 127. See also *id.* at 129 (“The fact that the SEC joined [New York Attorney General] Spitzer and [Massachusetts Secretary of State] Galvin in the analyst and mutual fund investigations supports the proposition that the conduct targeted by the states also breaches the federal securities laws.”).

132. See, e.g., Geewax, *supra* note 67 (“We need more police on the beat for corporate abuses and consumer rip-offs, not fewer investigations and actions.” (quoting the legislative counsel of a consumer advocacy group)); Masters, *supra* note 66 (“We are right on the facts. This isn’t new regulation. It’s enforcement of existing statutes.” (quoting Eliot Spitzer)); Pritchard, *SEC at 70*, *supra* note 126, at 1080–81 (“[S]ome of the abuses that

Nonetheless, some states might want to provide stronger investment protections. For example, antifraud claims are arguably easier to bring under New York's Martin Act than under the federal statutes.<sup>133</sup> And state blue sky laws can differ in how they treat private rights of action, aider and abettor liability, statutes of limitations, and the like.<sup>134</sup> Such differences allow for healthy experimentation and have, if nothing else, served as a vehicle to highlight gaps in the federal regime.<sup>135</sup> In fact, it is remarkable what state attorneys general have been able to accomplish, given that their only effective power has been ex post enforcement, not ex ante rulemaking.<sup>136</sup>

Thus, the central focus of the regulatory regime that I propose uses both levels of government to prevent fraud. Focusing on the antifraud aspects of the securities regime, rather than merit review or more disclosure, will go a long way to enhancing investor confidence in our capital markets.<sup>137</sup>

## 2. Public Enforcement and Private Rights of Action

There are of course two ways in which an antifraud mandate might be pursued: first, via public enforcement and second, through

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Congress has lately seen fit to regulate can be traced back not to a lack of regulation, but rather to laxity in enforcement.”).

133. See, e.g., Karmel, *Federal and State*, *supra* note 43, at 521 (“In the New York Attorney General’s view, in contrast to the requirements of the federal securities laws, no purchase or sale of stock is required, nor are intent, reliance or damages required elements of a violation [under the Martin Act].”).

134. See Steinberg, *supra* note 76, at 418–27. See also Painter, *supra* note 61, at 71 (“Some evidence suggests that state blue sky laws treat plaintiffs more favorably than does the federal civil liability regime. Some states have weaker scienter requirements, and most allow suits against aiders and abettors. A few states allow punitive damages for securities fraud, and others allow for recovery of attorneys’ fees.”). For criticism of these differences, see Campbell, *supra* note 70, at 575 (“[O]n balance, the state antifraud provisions should be preempted in favor of the federal antifraud provisions, since it would, at least to some degree, reduce the possibility of unnecessary regulation at the state level.”).

135. See, e.g., Karmel, *Federal and State*, *supra* note 43, at 546 (“Since the problems are national, and in some respects international in scope, an effective national regulator seems more appropriate than piecemeal state regulation. On the other hand, aggressive state action, such as the New York Attorney General’s against Merrill Lynch, can highlight gaps and problems with the federal regulatory scheme.”).

136. Cf. Macey, *State-Federal Relations*, *supra* note 65, at 129 (The New York Attorney General’s “only option, if it wants to engage in rulemaking or to otherwise affect basic conduct or structure within the securities industry, is to do so through an enforcement mechanism.”).

137. See also Painter, *supra* note 61, at 76 (“[A] legal framework that protects investors increases the size and breadth of a country’s capital markets. Assuming Congress understands this point, it is unlikely that it would risk diminishing the scope of the U.S. capital markets by repealing laws against fraud.”).

private rights of action. I propose both, albeit with different procedures.

To begin with, public enforcement by both federal and state officials is essential.<sup>138</sup> Not only would some regulatory competition be healthy, but states could play an especially important role in criminal prosecutions, which serve as arguably the most important deterrent to corporate miscreants.<sup>139</sup> Whether they be civil or criminal cases, federal officials could bring suits in federal courts and state officials in state courts.

Notwithstanding the advantages of engaging both federal and state enforcement, better coordination is essential—one might even argue that had state attorneys general simply informed federal officials of impending action, they would not have stirred nearly as much controversy.<sup>140</sup> Within a different model for federalism, John Coffee has even suggested giving the SEC the power to enjoin actions by states,<sup>141</sup> but this would risk squelching healthy competition among regulators. A better and less drastic approach would be to impose a notification requirement on the states.<sup>142</sup>

Private rights of action, though controversial,<sup>143</sup> should serve as a useful adjunct to public enforcement.<sup>144</sup> Here, though, I would propose a different institutional structure that is in many respects the mirror image of SLUSA: leaving the implementation of private rights of

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138. Indeed, the Martin Act does not even provide for private rights of action. See *CPC Int'l Inc. v. McKesson Corp.*, 514 N.E.2d 116, 119 (N.Y. 1987). See also Steinberg, *supra* note 76, at 419 (“New York declines to recognize a private right of action for violation of its securities laws.”).

139. See, e.g., Pritchard, *SEC at 70*, *supra* note 126, at 1098 (“The SEC’s civil enforcement powers look rather tame by comparison to hard time in a federal prison.”). Yet, as former SEC Commissioner Harvey Goldschmid explains “very few U.S. Attorneys were willing to bring criminal securities cases, even in the most willful, hard-core areas.” Goldschmid, *supra* note 39, at 830.

140. Cf. Cassidy, *supra* note 64 (“Eliot [Spitzer] didn’t tell any other agency what he was doing.” (quoting SEC official)).

141. See John C. Coffee, *Competitive Federalism: The Rise of the State Attorney General*, 230 N.Y. L.J. 5 (Sept. 18, 2003) (“[T]he better answer is not to preempt all new initiatives by the states, but to give the SEC authority to determine that a particular initiative or action went too far and unduly burdened a national market system that ideally should be uniform.”).

142. For a similar proposal, see Lane, *supra* note 60, at 347 (“[T]he best solution requires state authorities to notify and consult with federal regulators when there is any possibility that their enforcement activities will impact the national market system or interfere with ongoing federal investigations.”).

143. See, e.g., Di Trollo, *supra* note 59, at 1311.

144. Cf. Warren, *supra* note 74, at 499 (proposing “the adoption of corollary civil remedies to ensure supportive private enforcement”).

action exclusively to the state courts. Such a construct presents a number of advantages. First, it ensures a central role for state courts in a new application of cooperative federalism—in contrast to conventional conceptions of cooperative federalism that focus on the role of state agencies as implementers.<sup>145</sup>

Second, it would relieve the already overburdened federal courts from the frontlines of policing corporations via securities regulation.<sup>146</sup> Further, the boundary between state and federal antifraud regulation is already fuzzy.<sup>147</sup> Think, for example, of the saga in the federal courts about whether or not to imply federal rights of action.<sup>148</sup> Perhaps this debate could be sidestepped if private rights of action were litigated exclusively in state courts. Indeed, as one observer has suggested, maybe Congress did not include a private right of action in the securities laws precisely because the federal statutes were enacted against the backdrop of state securities laws that allowed such lawsuits.<sup>149</sup>

The confusion between the role of state and federal courts has been further muddied by SOX. As Delaware Chancellors William Chandler and Leo Strine point out,

Because the [SOX] Reforms address boardroom practices traditionally governed by state law but do not, in themselves, constitute

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145. *Supra* notes 121–122 and accompanying text. *Cf.* Schapiro, *supra* note 118, at 301 (“The interrelationship of state and federal legislative and administrative mechanisms has been noted in studies of ‘cooperative federalism.’ An important element of the polyphonic conception is a recognition of the significant role of courts in realizing the promise of federalism.”).

146. *But see* Judith S. Kaye, *Federalism Gone Wild*, N.Y. TIMES, Dec. 13, 1994, at A29 (noting the significant burdens already on state courts).

147. *See, e.g.*, Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1994) (developing a taxonomy of different ways in which the federal courts borrow from state law in securities cases); Karjala, *supra* note 112, at 1473 (“because the federal scheme was adopted as an overlay on, and without explicit preemption of, state securities and corporation law, problems concerning the location of the boundary between federal and state securities regulation have been unavoidable.”). *Cf.* Romano, *Market Approach*, *supra* note 15, at 2390 (“States can, however, compensate for the problem of meager judicial precedents by formally incorporating federal court decisions interpreting the national laws, through either legislation or judicial action, to the extent that the state’s statutory language tracks the national laws.”).

148. *See supra* notes 93–97 and accompanying text.

149. *See, e.g.*, Painter, *supra* note 61, at 79 (“Ironically, one reason the 1934 Congress did not think to include this private right of action in the 1934 Act may have been because Congress specifically preserved state causes of action in section 28 of the Act.”); *id.* at 84 (“By now preempting state causes of action, the Uniform Standards Act [SLUSA] leaves investors with substantially less protection than they might have had if the Congresses of 1933 and 1934, and the courts since then, had known that the federal law would become the sole remedy for securities fraud.”).

a comprehensive body of substantive corporation law, the Reforms will inevitably begin to influence state law adjudication. One of the important factors supporting this intuition is that Congress and the Exchanges did not supply forums for the resolution of implementation disputes at the instance of stockholders.<sup>150</sup>

Allowing state courts to hear securities cases would reduce ambiguity as to the role of the states in the implementation of SOX, not to mention the welter of confusion that SLUSA has already engendered.<sup>151</sup> In doing so, it would begin giving state courts a meaningful role as venues for the adjudication of securities disputes.<sup>152</sup>

Third, having state courts adjudicate private rights of action does not lock in the states to a national securities law regime, but only sets a minimum federal floor. As this upsets the existing equilibrium, those states that might be serious about offering greater investor protections would be free to do so, provided they do not contract out of the federal statute.<sup>153</sup> A related benefit is that allowing an interpretative role for state courts allows state doctrine to evolve, thereby avoiding the “vestigialization”<sup>154</sup> of state law that accompanies preemption. David

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150. William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 982 (2003). *See also* Karmel, *Douglas*, *supra* note 35, at 138 (“Since Sarbanes-Oxley does not create new civil liabilities, with a few exceptions, failure to comply with its provisions may result in state court actions.”).

151. Jennifer O’Hare summarizes some of the problems:

[C]ourts have struggled with SLUSA’s removal and preemption provisions. Some courts hold that SLUSA applies only to cases expressly bringing a “fraud” claim, and other courts find that SLUSA also applies to preempt claims grounded on non-fraud theories of liability. Some courts look to the allegations actually made in the complaint to determine whether SLUSA applies, while other courts look beyond the allegations made in the complaint. Some cases permit plaintiffs to plead around SLUSA, other cases do not. Moreover, most courts have had difficulty in interpreting SLUSA’s “in connection with” requirement.

O’Hare, *supra* note 75, at 368.

152. Currently, federal courts have exclusive jurisdiction under the 1934 Act. *See* 15 U.S.C. § 78aa (2000). There is concurrent jurisdiction under the 1933 Act, except for class actions covered under SLUSA. *See* 15 U.S.C. § 77v (2000). Some commentators have proposed expanding concurrent jurisdiction. *See, e.g.*, Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 433 (1991) (“The federal antitrust and securities laws are candidates for at least an experiment in concurrent jurisdiction.”).

153. *Cf.* McDonnell, *supra* note 87, at 139 (“Full-fledged nationalization [of corporate law] would lose the gains from diversity and experimentation. Full-fledged devolution to the states would eliminate the check on excessive managerialism that the various federal actors provide.”).

154. David Skeel uses the term in the bankruptcy context because it “refers to the fact that after the separation of state corporate law and federal corporate bankruptcy, the interaction between these two areas of law is based upon the remnants of what might otherwise have been a cohesive, integrated policy.” Skeel, *supra* note 46, at 474 n.7.

Skeel's critique of the existing bankruptcy regime applies well to securities law:

The artificial separation of state corporate law and federal corporate bankruptcy has undermined both areas of the law. In the state corporate law context, state lawmakers fail to consider fully insolvency-related issues because corporate bankruptcy is regulated by Congress rather than the states; yet federal bankruptcy courts frequently look to state law for guidance on precisely those corporate governance issues where state law is likely to be inefficient or inapplicable. I refer to these perverse effects of the federalization of corporate bankruptcy as a "vestigialization" problem.<sup>155</sup>

It goes without saying that a belief in devolving some power to the states does not necessarily equate to laissez-faire economics<sup>156</sup>—again, provided the federal government sets a mandatory minimum floor.

### 3. Transactions or Internal Affairs?

Despite a focus on fraud liability, a cooperative federalist model will nonetheless raise issues about jurisdiction if not managed carefully. In particular, should states be able to exercise jurisdiction based on the locus of the transaction as with existing blue sky laws, or should jurisdiction rest on internal affairs?

Provided a minimum federal floor is maintained, enforcing the antifraud laws in the state of incorporation would at first glance appear very attractive. It would simplify the administration of regulation<sup>157</sup> and treat shareholders from different states uniformly.<sup>158</sup>

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155. *Id.* at 474–75. *Cf.* Loewenstein, *Federalization*, *supra* note 97, at 49 (“[I]nterpreting federal laws so as to displace state law inevitably results in the arrested development of state law.”).

156. The mantra among traditional law and economics commentators is to argue for less government, not necessarily for states' rights if it does not suit their agenda. *See supra* note 114 and accompanying text.

157. *Cf.* Kozyris, *supra* note 53, at 510; Pinto, *Takeover Statutes*, *supra* note 45, at 490–91 (“The use of the internal affairs doctrine in corporate law, under which a single rule of law is selected, minimizes the problems of multiple state regulation.”).

158. As Roberta Romano argues:

Fraud claims against an issuer should be uniformly adjudicated across investors . . . . Yet choice-of-law rules establish the application of one state's (the incorporation state's) standard to fiduciary duties in corporate law but leave the latter decision on disclosure to vary with the investor's domicile, even though a duty of full and fair disclosure is at the heart of the fiduciary duties of state corporate law. Such intellectual incoherence concerning fiduciary conduct is the fallout of current choice-of-law doctrine.

Romano, *Market Approach*, *supra* note 15, at 2404. Romano advocates “changing the current choice-of-law rule for securities transactions from one that focuses on the site of the transaction to an issuer-based approach analogous to the internal affairs rule applied in corporate law.” *Id.* at 2364. Needless to say, her proposal fits squarely within the dual federalist

While elegant, such an approach does present a significant risk: given the inextricable links between corporate law and securities laws, states such as Delaware could potentially circumvent securities law claims by effectively recasting arguments as corporate law claims.<sup>159</sup>

Yet, if state corporate law could be reframed to give greater teeth to shareholder protection, resting jurisdiction on internal affairs would make more sense. Indeed, I have proposed elsewhere a delayering of corporate law and a return to first principles of fiduciary law as the foundation for a new minimalist architecture.<sup>160</sup> One striking advantage of such an approach would be the possibility of treating corporate and securities claims in a coordinated matter.<sup>161</sup> But until such corporate law reforms occur, basing jurisdiction for securities claims on the locus of the transaction would allow states—notably New York and California—to offer stronger protections. There will undoubtedly be resistance to this idea, especially as relates to class actions—but these protections are likely overblown for two reasons: first, state class actions tend to be concentrated in the state where the defendant is either headquartered or incorporated,<sup>162</sup> and second, small tweaks in the federal statute—far short of complete preemption—could readily address any residual concerns.<sup>163</sup>

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paradigm without a role for the federal government—except, somewhat ironically, to impose issuer domicile as the choice of law for securities claims. *See id.* at 2402.

159. *Cf. Skeel, supra* note 46, at 522 (“Because much of bankruptcy addresses third-party issues of this sort, the internal affairs doctrine would not ensure the application of the bankruptcy laws of the state of incorporation. Instead, a court would apply ordinary conflict-of-laws principles to determine which state’s law to apply.”).

160. Specifically, I argue corporate law must match “standards of review” to “standards of conduct,” focus on the behavior of corporate officers, and vest exclusive jurisdiction to litigate corporate claims in state courts. *See Dibadj, Delayering Corporate Law, supra* note 12, at 470.

161. *See, e.g., Marcel Kahan, Some Problems with Stock Exchange-Based Regulation*, 83 VA. L. REV. 1509, 1515 n.36 (1997) (“If regulatory power is devolved upon states, the system of securities regulation would have to be integrated with the system of corporation laws.”); *Painter, supra* note 61, at 65 (observing “the inherent connectedness of the law of corporate fiduciary duties and securities law, despite a longstanding effort by the federal courts to separate the two.”).

162. *See, e.g., Painter, supra* note 61, at 72–73.

163. *See id.* at 90 (“For example, Congress could have preempted class actions in states where *none* of the following three connections exist: (1) The issuer is incorporated in the state; (2) The issuer has its principal place of business or more than fifty percent of its operations in the state; and (3) Twenty percent or more of the securities purchased or sold by the issuer or other named defendants during the class period were purchased or sold within the state.”).

### C. Constitutional Dialogue

A cooperative federalist approach to securities regulation might raise constitutional questions, including the creation of federal common law by state instrumentalities as well as possible non-delegation and anti-commandeering concerns.<sup>164</sup> I argue, however, that such concerns are misplaced.

The institutional approach I have proposed is one where the federal government would set minimum standards, but adjudication would occur largely through state courts<sup>165</sup> via a reverse-*Erie* principle, as articulated by the United States Supreme Court in *Testa v. Katt*.<sup>166</sup> Simply put, state courts have an obligation to enforce federal law.<sup>167</sup> More specifically, United States Supreme Court precedent has repeatedly confirmed Congress' right to create a federal claim to be litigated exclusively in state courts.<sup>168</sup> Even Justice O'Connor's opinion in *New York v. United States*,<sup>169</sup> which held, under an anti-commandeering principle, that "the Constitution simply does not give Congress the authority to require the States to regulate,"<sup>170</sup> nonetheless was very careful to observe that: "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, *but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause*. No comparable constitutional provision authorizes Congress to command state legislatures to legislate."<sup>171</sup> One federal judge puts it succinctly:

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164. See generally Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463 (2000).

165. The exception being, of course, enforcement actions brought by federal officials. See *supra* Part II.B.2.

166. 330 U.S. 386 (1947).

167. See *id.* at 389 ("For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country."). See also Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964) ("Just as federal courts now conform to state decisions on issues properly for the states, state courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested, be it ever so slightly, an intention to that end.").

168. See *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996) ("[E]ven when exclusively federal claims are at stake, there is no 'universal right to litigate a federal claim in a federal district court.'" (quoting *Allen v. McCurry*, 449 U.S. 90, 105 (1980))); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 513 (1900) ("[T]he mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts.").

169. 505 U.S. 144 (1992).

170. *Id.* at 178.

171. *Id.* at 178–79 (emphasis added).

"No constitutional impediment prevents Congress from creating a federal right that can only be vindicated in state courts."<sup>172</sup>

Beyond its overarching constitutionality, specific precedent exists in another regulatory context for my approach. The Telephone Consumer Protection Act of 1991,<sup>173</sup> which authorizes a plaintiff to file suit "if otherwise permitted by the laws or rules of court of a State . . . in an appropriate court of that State,"<sup>174</sup> provides a useful analogy. As the United States Court of Appeals for the Fourth Circuit stated in upholding the statute, "We today reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by federal law."<sup>175</sup> The court remarked that "[b]ecause federal-question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on that congressional intent manifested in [sic] statute."<sup>176</sup> My approach should thus be plainly constitutional.<sup>177</sup>

What if one were to go beyond my proposal and have state agencies enforce federal securities laws? The question is a difficult one,<sup>178</sup>

172. William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources*, 48 RUTGERS L. REV. 1139, 1186 (1996). Of course, state courts routinely adjudicate federal rights. See, e.g., Solimine, *supra* note 152, at 413 ("Many theoretical or empirical discussions of parity focus on the adjudication of federal constitutional rights in state *criminal* cases.").

173. Pub. L. No. 102-243, 105 Stat. 2394 (1992).

174. 47 U.S.C. § 227(b)(3) (2000).

175. *Int'l Sci. & Tech. Inst. v. Inacom Commc'ns*, 106 F.3d 1146, 1150 (4th Cir. 1997). The Second, Third, Fifth, and Eleventh Circuits have agreed with the Fourth Circuit. See *Foxhall Realty Law Offices v. Telecomms Premium Servs.*, 156 F.3d 432 (2d Cir. 1998); *Erienet, Inc. v. Velocity Net*, 156 F.3d 513 (3d Cir. 1998); *Nicholson v. Hooters of Augusta*, 136 F.3d 1287 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997).

176. *Inacom*, 106 F.3d at 1153-54.

177. *Cf. Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) ("The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.").

178. After all, as the Supreme Court noted in *Printz v. United States*, the Madisonian Compromise of Article III § 1 and the Supremacy Clause apply only to courts. 521 U.S. 898, 907 (1997). It is thus "understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time." *Id.* One commentator suggests reducing the complexities to the canonical make/buy decision in transaction cost economics, essentially treating nonfederal governments as private contractors:

The essence of this functional theory is an analogy between nonfederal governments—state, municipalities, counties, school districts, and so on—and private organizations . . . . [T]he theory maintains that state and local governments should have "autonomy"—that is, immunity from federal demands for regulatory

and to be sure, there is tension in Supreme Court precedent on the issue.<sup>179</sup> Nonetheless, it is quite likely even here the federal government would have authority—provided the program is framed appropriately. There are several options that would likely pass constitutional muster. The first would be to argue that the agency acts in a quasi-judicial, rather than executive capacity.<sup>180</sup> Second, the program could be attached to federal funding, in the form of a “conditional grant.”<sup>181</sup> The third possibility is “conditional preemption” where “Congress enacts a general regulatory scheme, delegating implementation to the states on the condition that the states submit an acceptable implementation plan to the federal government.”<sup>182</sup> Even under this new hypothetical scenario, then, cooperative federalism is very likely constitutionally permissible.

Finally, and perhaps most excitingly, thinking about cooperative federalism as it relates to securities regulation can offer a fresh per-

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services . . . . Rather, the federal government should purchase such services through a voluntary intergovernmental agreement.

Hills, *supra* note 119, at 816–17.

179. Compare, for example, *FERC v. Mississippi*, 456 U.S. 742, 766 (1982) (“We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one.”), with *Printz*, 521 U.S. at 907 (“[W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service.”). Indeed, as the *Printz* Court itself continues, “[t]he Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes . . . . We of course do not address these or other currently operative enactments that are not before us.” *Id.* at 917–18.

180. See, e.g., *FERC*, 456 U.S. at 769 (“[T]he State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights”); *Printz*, 521 U.S. at 929. This raises the interesting question of whether state agencies should be permitted to create federal common law. For differing viewpoints, compare Weiser, *Constitutional Architecture*, *supra* note 119, at 719 (“[O]ur constitutional commitment to federalism and effective governance justifies state agency administration of federal law not subject to federal agency review.”), with Reza Dibadj, *Competitive Debauch in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L.Q. 1, 58–60 (2003). Cf. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385–86 n.10 (1999).

181. Where “Congress provides funds to the states on the condition that the state spend the funds in accordance with federal priorities.” Hills, *supra* note 119, at 859. See also *New York v. United States*, 505 U.S. 144, 166–67 (1992).

182. Hills, *supra* note 119, at 866. See also *Printz*, 521 U.S. at 929; *New York*, 505 U.S. at 167 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”); *FERC*, 456 U.S. at 771 (“If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress’ requiring certain procedural minima as that body goes about undertaking its tasks.”).

spective on federalism more broadly. The underlying, perhaps counterintuitive, premise that state courts would be articulating federal common law<sup>183</sup> can raise a number of exciting questions. One issue would be how the federal statute should manage appeals. Obviously the United States Supreme Court would have the final say, at least as to the first level of baseline federal protection,<sup>184</sup> but to what extent should a federal appellate court have authority to review a state court's decision? Will resistance develop to state court articulation of federal common law?<sup>185</sup> Might more complex forms of "multijurisdictional" adjudication emerge?<sup>186</sup> When state court procedures differ from federal court procedures,<sup>187</sup> which should take precedence?<sup>188</sup> To what extent might congressional delegations to state actors be in tension with Article II's mandate that the executive should "execute"

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183. See, e.g., Field, *supra* note 93, at 890 n.30 ("Because federal common law applies in state as well as federal court . . . , an argument that it should apply can be made in the first instance in state court, just as in federal district court. In theory a state judge would recognize federal common law if she believed the United States Supreme Court would recognize it. And the contention that it is applicable would be reviewable by the United States Supreme Court, whether it prevailed below or not.").

184. Interestingly, recent empirical research suggests the Supreme Court is showing declining interest in hearing business law cases. See E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004) (noting how the United States Supreme Court is showing a declining tendency to adjudicate private law disputes, notably in the securities regulation and antitrust arenas).

185. For example, at least one commentator has questioned the proper geographical boundaries pertaining to the creation of federal common law by state courts. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 869 (2005) ("The fact that a delegation of authority to make federal common law would be a *mandate* to a state court to make law purporting to impose obligations *throughout the jurisdiction of the United States* distinguishes such a delegation from the adoption by Congress of a state law that a state *voluntarily* has made and that purports to impose obligations only *within the jurisdiction of the state*").

186. Different portions of a case could be reviewed in different court systems. Some forms of multijurisdictional adjudication already exist; for example, federal certification of state law questions or federal collateral review of state decisions through habeas corpus petitions. Barry Friedman suggests greater cross-fertilization between state and federal courts. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004).

187. See, e.g., Solimine, *supra* note 152, at 424–27 (outlining a series of possible procedural differences).

188. Commentators diverge. For instance, compare Schapiro, *supra* note 118, at 303 ("The limitations of Article III of the United States Constitution do not apply to state courts. Accordingly, state courts can enforce the federal laws without the obstacle of federal standing requirements."), with Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1332 (2005) ("Federal standing limits should accompany federal causes of action because Congress relies on these judge-made doctrines to frame its policymaking endeavors.").

federal laws?<sup>189</sup> Dialogue on these and other issues could help provide a case study for constitutional controversies well beyond securities regulation.

## Conclusion

It is unlikely that Oscar Wilde was thinking about securities regulation when he reminded us that “[w]e are all in the gutter, but some of us are looking at the stars.”<sup>190</sup> But his words are nonetheless applicable. Neither defeatism nor effrontery is in order in the face of the shortcomings of either dual or preemptive federalism. Rather, as Judith Resnik notes, we should “aspire to a conversation within law that relies less on preexisting categories and that searches among evolving practices to learn something new about federalism in the United States.”<sup>191</sup>

This Article has been a first attempt to get beyond stale paradigms. The approach I propose is one of cooperative federalism: the federal government would impose minimum standards but allow individualized implementation at the state level. Trying to create a new architecture, rather than piecemeal reform, is challenging. Not to mention that federalism is inherently a difficult subject.<sup>192</sup> Much work lies ahead. My goal here has simply been a small step to a new conversation about rethinking the balance between federalism and securities regulation.

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189. See, e.g., *Printz v. United States*, 521 U.S. 898, 922 (1997); Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075 (1997); Weiser, *Constitutional Architecture*, *supra* note 119, at 707 (“Constructing a constitutional architecture for cooperative federalism requires a new vision not only of federal-state relations, but also of the nature of separation of powers law.”).

190. BARTLETT’S FAMILIAR QUOTATIONS 566 (Justin Kaplan ed., Little, Brown, and Co. 1922) (1855) (quoting Oscar Wilde).

191. Judith Resnik, *Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 473 (1996).

192. As the Supreme Court has observed, “the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.” *New York v. United States*, 505 U.S. 144, 155 (1992).