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The New Federal Corporation Law?

Lawrence A. Cunningham*

Professor Robert Ahdieh offers to reinterpret the debate over whether state competition for corporate charters leads to more or less optimal results—a race to the top or bottom.1 He presents the more modest stances taken by the debate’s titans, William Cary and Ralph Winter, and suggests narrower differences between them than appeared in later literature.2 Referring to this “race debate” as “the starting point for the study of corporate law,”3 Professor Ahdieh opines that the literature overvalues state charter competition for corporate governance and underappreciates advancing corporation law’s normative end to address the costs of separation of ownership from control in the modern public corporation.4

The original race debate highlighted two competitive patterns: one among states to attract charters and another among managers to attract capital.5 In the literature, a tendency to conflate arose, Professor Ahdieh says, in a logical misfire of the following form: states compete to promote managerial interests and managers compete to promote shareholder interests, ergo states compete to promote shareholder interests.6 Professor Ahdieh reverses the misfire to look separately at the two competitive patterns and gets a different picture.7 State competition may have something to do with resulting corporate laws, he says, but managerial competition for capital determines corporate governance, and that is driven by markets, not states.8 State competition’s main role, Professor Ahdieh concurs with Professor Jonathan Macey and others, is to control regulatory excesses that states may otherwise impose on corporations.9

This reversal carries implications for several discussions, including federal preemption of state corporation law. In Professor Ahdieh’s retelling, proponents of federal preemption, concerned about a state race to the bottom, may miss the mark; opponents of federal preemption, believing

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2 Id. at 256–57.

3 Id. at 257.

4 Id. at 257–58, 265, 292.

5 Id. at 257.

6 See id. at 257–58.

7 See id.

8 Id. at 258.

states race to the top, may understate preemption’s potential value. The reversal certainly means that one cannot simply say that federal regulation of corporations is inefficient because it is federal. The current set of institutional design choices, giving roles to both state and federal regulation for public corporations, may be optimal, but cannot be presumed, Professor Ahdieh concludes. The prescriptive upshot is to replace talk of racing to the top or bottom with a framework that links institutional design choices to stated objectives.

In this Comment on Professor Ahdieh’s article, several threshold quarrels concern what may be perceived as some overstatement in the piece. First, it is not obvious that the question of state charter competition is the starting point for the study of corporation law. Second, the article may overstate how often or seriously scholars make or take assertions about federal corporation law being presumptively inefficient or that the Sarbanes-Oxley Act is automatically suboptimal because it is a federal rather than a state statute. Third, although the article suggests that it is inaugurating a conversation, discourse transcending the race debate has been ongoing for some time. Fourth, one may question assertions that there is a lack of topics for discussion in corporation law or a lack of scholarship addressing the mechanisms and roles of markets in corporate practice and governance.

These objections aside, what is new in the article is a crystallization of the importance of institutional design. Professor Ahdieh may be right about the need for greater attention to questions of institutional design in corporate law scholarship. In particular, an interesting argument holds that there is nothing inevitable about the characteristics of federal corporation law that should be feared by devotees of state corporation law

10 See id. at 259–60, 281, 290–91.
11 See id. at 260.
12 Id. at 260–61, 297.
13 Id. at 260–61, 304–05.
14 Rivals include the nature of the firm, private contract versus social control, agency theory, shareholder-manager relations, limited liability, and the internal affairs doctrine. See infra text accompanying notes 92–94.
16 See Ahdieh, supra note 1, at 260, 296–97; infra text accompanying notes 80–84.
18 See Ahdieh, supra note 1, at 290, 296–97, 305; infra text accompanying notes 95–96.
19 See Ahdieh, supra note 1, at 260, 267–68, 273, 304; infra text accompanying notes 86–90.
20 See Ahdieh, supra note 1, at 306.
First, Professor Ahdieh argues, federal corporation law may assume a
form that is just as enabling as state corporation law—a characteristic of
state corporation law that many devotees prize as a singular virtue.
Second, despite concern about the costs of regulatory monopoly that could
result from federal corporation law, Professor Ahdieh argues that state
regulatory competition is primarily about regulating regulators, something
federal preemption would also require. The issue is the comparative costs
of regulatory excess in the two design choices.

The following analysis first reviews Professor Ahdieh’s corrective
account of the state competition debate and its identification of what is
significant about that competition (regulating the regulators). It critiques
discussion of implications for federal corporation law that Professor
Ahdieh highlights as among the most significant subjects to which his
article contributes, challenging some grounds for supposing that federal
corporation law would be enabling and detailing the larger quarrels referred
to above.

Nevertheless, this analysis then takes up Professor Ahdieh’s implicit
invitation to meditate on the possible form that federal corporation law may
plausibly assume. This discussion suggests that, despite longstanding
evidence, beliefs, and prescriptions to the contrary, it is possible to imagine
federal corporation law that is enabling. Recent deregulatory proposals by
the U.S. Department of the Treasury (“Treasury Department”) in cognate
fields suggest examples of how this could work, involving consolidation of
regulatory power in the federal government and substantial delegation of
that power to self-regulatory organizations, especially stock exchanges.
In turn, this deregulatory stance may be sustained when one considers that
Washington’s regulatory monopoly in securities regulation may be ending
amid globalization because numerous other national regulators and
exchanges now compete with the United States.

One practical result of global regulatory competition is that market-
driven regulation of the regulators becomes stronger. A contending

21 See id. at 297.
22 Id. at 270–71, 293–96.
23 See id. at 293 & n.151.
24 Id. at 293–96.
25 Id. at 294–95.
26 Id. at 260.
27 DEP’T OF THE TREASURY, THE DEPARTMENT OF THE TREASURY BLUEPRINT FOR A
MODERNIZED FINANCIAL REGULATORY STRUCTURE 5–22 (2008) [hereinafter TREASURY
academic result is that opponents of regulatory competition, concerned that it ratchets quality regulation down, may not embrace that competition either. For them, amid capital market globalization, search for a form of transnational consolidated supervisor may be necessary—precisely to provide mandatory, rather than enabling, regulations. The state corporation law race debate that Professor Ahdieh opposes may simply be replayed as an international securities regulation race debate. Ultimately, however, political realities accompanying the 2008–09 global economic crisis, revealing both market failure and regulatory weakness, do not create an auspicious time for such deregulatory reform. Proposals presented as alternatives to the Treasury Department’s suggest just such a search for international regulatory consolidation. Yet, just as Professor Adhieh emphasizes, reform discussions—whatever shape they take—should engage with questions of institutional design.

I. Account and Critique

Professor Ahdieh reviews the prevailing model that links the institutional design of state competition to concern about the separation of ownership and control. Some declare that state competition puts limits on managers that result in protecting shareholder interests. This stance has its origins in responses to William Cary’s claim that states, coveting franchise fees, cater to managers, not shareholders, and offer greater managerial discretion at shareholder expense. Ralph Winter’s response to Cary acknowledged this risk but explained that market forces constrain managers to promote shareholder interests.

The implication was that the agency cost problem of separation of ownership from control is addressed by markets, not state competition. Yet Winter’s scholarly successors took him to say that state competition negates Cary’s claim because it addresses agency costs and promotes a race to the top, not to the bottom, Professor Ahdieh says. Scholars thus “transmuted” a negative point into an affirmative one: Winter said Cary was wrong to predict a race to the bottom, because of market forces; Winter did not say the result would be a race to the top.

Professor Ahdieh accordingly recasts the Cary-Winter debate in this

29 Ahdieh, supra note 1, at 256–58.
32 See id. at 256.
33 See Ahdieh, supra note 1, at 262–63, 266–67.
34 Id. at 266–67.
bifurcated competition model to reveal that state competition offers limited implications for corporate governance, despite how the received story makes state competition its engine.  

Even if the race talk is just convenient shorthand, Professor Ahdieh notes, it has had profound effects. Significant counter-implications come from amplifying the distinct competitive patterns, especially concerning exactly what contribution state competition makes. Once managerial market forces are highlighted, they appear as the main devices to pursue corporation law’s normative ends addressing separation of ownership from control.

Professor Ahdieh explains that the actual role of state charter competition is to regulate the regulators—to address the relationship between the corporation (shareholders and managers included) and the state. Managerial competition’s goal is to promote corporation law’s normative ends, orbiting around agency cost control within the corporation between managers and shareholders. The two competitions are related, so that state competition that constrains regulators can indirectly lower costs to managers of promoting shareholder interests. But the ends remain distinct.

State competition aligns state regulatory interests with managerial demand as a response to that demand. It cannot supply good governance. If managers demand weak rules, states will efficiently produce them. Emphasizing managerial competition as the driver of governance quality implies that one could reach identical substantive results in a regime of multiple-state corporation laws or exclusive federal corporation law. So defining the different objectives requires recognizing that there are alternative ways to design institutions to advance them, which may mean that the optimal corporation law choice is multiple-state, exclusive federal, or a combination.

Federal corporation law is thus among the subjects that Professor

35 See id. at 267.
36 Id. at 268.
37 See id. at 268–69.
38 See id. at 269, 273, 281–82.
39 Id. at 281.
40 Id. at 258, 273, 281–82.
41 See id. at 268, 273.
42 See id.
43 See id. at 281–82.
44 Id. at 273.
45 See id.
46 Id. at 285–86.
47 Id. at 296–98.
Ahdieh highlights as implicated by his analysis. The standard account that state competition drives optimal law and governance hides how efficient regulation can result without it. Federalism is an institutional design choice, not the inexorable result of a drive to efficient regulation. That means that federal corporation law could be efficient too. If managerial competition drives state regulation to optimality, then it could equally drive federal law to optimality.

Professor Ahdieh acknowledges that vital to these assertions is that resulting federal law be characterized by the same enabling element typical of state corporation law. He observes that the standard account is that state competition led to enabling corporation law. But he notes that he is “unsure this is correct” and provides reasons for this uncertainty. He then suggests, however, that even if it is correct, it remains possible that federal law could be enabling even without any analogue to state competition. Predicting the probable form (and content) of federal corporation law is facilitated by taking a rational-choice approach to federal regulation. That approach does not necessarily mean that federal law must be mandatory—it could be enabling so that corporations continue to have flexibility in tailoring general law to particular needs.

The issue becomes one of the prospects of regulatory capture of federal authorities, Professor Ahdieh says. Managers, amid competition driving them to demand laws favoring shareholder interests, would demand a federal corporation law that does so too, which should as likely be enabling as mandatory. Managerial interests, aligned with shareholder interests, would not be offset by any contending interest group, Professor Ahdieh supposes.

Professor Ahdieh recognizes that the political economy in Washington may be more complex than that prevailing in the states. Congress may face more competing demands than Delaware, for example, to give

48 See id. at 260–61, 296–98.
49 Id. at 272–73.
50 Id. at 260–61.
51 See id.
52 See id. at 260–61, 296–98.
53 Id. at 293–96.
54 Id. at 292–94; see also infra text accompanying notes 113–114.
55 Ahdieh, supra note 1, at 294.
56 See id. at 295–96.
57 See id. at 296–98.
58 Id.
59 Id. at 294.
60 Id. at 294–95.
61 Id.
62 See id. at 295–96.
corporation law requisite attention. Yet not much time is required, Professor Ahdieh observes, especially if manager-shareholder interests really are substantially aligned, as the conventional model assumes.

These assertions trigger two substantive criticisms. First, Professor Ahdieh challenges much of, but not all, the conventional model. He challenges conventional state competition stories by explaining that state competition does not really address agency costs, but he accepts conventional stories that managerial market competition is about agency costs and works, at least in the sense that managerial and shareholder interests are substantially aligned. But why should that assumption from convention be accepted? It seems as much susceptible to challenge as the state competition claim, and Professor Ahdieh’s discussion of state antitakeover statutes suggests reasons to doubt its plausibility.

Second, Professor Ahdieh rightly takes a cautious approach to this discussion, only challenging any assumption that federal corporation law would necessarily be more mandatory than enabling or questioning why it would never be flexible, given managerial competition and managerial promotion of shareholder interests. This is a shrewd allocation of the burden of proof. After all, it is not possible to prove what character any federal corporation law would have. If all that is required to ease its opponents’ fears is that federal corporation law could be enabling, the article proves a good case. But if one requires firmer evidence of likely form, skeptics may be unmoved.

Professor Ahdieh does implicitly acknowledge that the Washington environment is more complex than state environments, but this discussion also warrants a critical read. That environment would include interest groups lobbying on behalf of such constituencies as consumers, lenders, employees, and even the environment. Professor Ahdieh suggests that similar complexities may exist at the state level and suggests corporation law’s occasional indeterminacy as evidence.

But this discussion may insufficiently appreciate how state corporation law is primarily about manager-shareholder relations. Aside from the extraordinary case of the small subgroup of antitakeover statutes reflecting the interests of other constituencies, those other constituencies do their

63 Id. at 296
64 Id.
65 See supra text accompanying notes 39–46.
66 Ahdieh, supra note 1, at 299–302.
67 See supra text accompanying notes 43–47.
68 See Ahdieh, supra note 1, at 295–96.
69 Id. at 296.
bidding in Washington. “They lobby for laws imposed on corporations
through other fields of law, such as antitrust, bankruptcy, labor, tax, and
environmental law.

If the portion of corporation law addressing primarily managers and
shareholders were produced in Washington, those other interests would
come into direct play and into more direct political conflict. Professor
Ahdieh works through this interest group complexity analysis solely to
address and to dismiss as trivial any concern over whether Washington will
pay sufficient attention to corporation law.70 Washington would find the
time, no doubt. But he leaves it for later to explore how the laws likely
could look in the resulting hurly-burly.

Certainly, federal corporation laws could look more mandatory than
enabling given the more complete and complex interest-group picture.
Supporting that prediction are the mandatory character of many historical
proposals for a federal corporation law,71 much of traditional federal
securities regulation, and most of the provisions of the Sarbanes-Oxley
Act.72 Reinforcing that prediction are express preferences that advocates of
federal corporation law have shown for precisely a mandatory body of rules
to overcome perceived weaknesses in the enabling character of most state
corporation law.73

A potentially larger objection to a federal corporation law, Professor
Ahdieh notes, is that such a regulatory monopolist in corporation law could
increase rent extraction.74 But he says it is not obvious that Congress or the
Securities and Exchange Commission (“SEC”) would operate that way,
given limited evidence of having done so in the past in areas of corporate
affairs that they have regulated.75 Again, however, that occurred in an
environment where prevailing and historical political realities held that
states have power to compete.

On this contestable terrain, Professor Ahdieh cautiously emphasizes
that one need not take a firm stance on the question of whether federal
corporation law would more likely reflect a mandatory versus enabling
character.76 Again shrewdly allocating the burden of proof, Professor
Ahdieh says it is enough to observe that this line of analysis leads to a
different and potentially more productive discourse than the line of analysis
that sees state competition as the driver of corporate governance.77

70 See id.
71 See E. Merrick Dodd, Federal Corporation Act, 53 YALE L.J. 812, 813 (1944)
(noting that early proposals for federal corporation law were “compulsory”).
72 See infra text accompanying notes 106–135.
73 See Joel Seligman, The Case for Federal Minimum Corporate Law Standards, 49
74 Ahdieh, supra note 1, at 296.
75 Id.
76 See id. at 297.
77 See id.
Professor Ahdieh instances how some say any federal corporation laws, such as the Sarbanes-Oxley Act, are bad precisely because they are federal.\textsuperscript{78} He argues that once the distinct functions of the two competitions are clarified, analysis must examine content on the merits, whether coming from Washington or Delaware.\textsuperscript{79}

These assertions prompt interpretive criticisms concerning Professor Ahdieh’s characterizations of the literature and prescriptions for its direction. The advice to put merits first seems self-evidently wise. It leads one to wonder whether scholars have ignored the substantive content of state versus federal law in favor of simple declarations like state corporation law must be better than federal corporation law (or vice versa). This does not seem obvious. True, Professor Ahdieh is in good company in lamenting a tendency, at least among a group of scholars, to “fulminate[]” over federal incursions into corporation law shown in the Sarbanes-Oxley Act.\textsuperscript{80} But it may be overstated to say that scholars generally, or the literature taken as a whole, do that.

Many analyses of the Sarbanes-Oxley Act engage directly with its substantive merits, some evaluating the provisions sequentially,\textsuperscript{81} others highlighting particular provisions.\textsuperscript{82} Even scholars known to oppose federal corporation law analyzed the substance and character of particular provisions.\textsuperscript{83} Such engagement with the appropriate content balance between state and federal regulation seems quite common.\textsuperscript{84} Accordingly,

\begin{itemize}
  \item \textsuperscript{78} Id. at 260, 297.
  \item \textsuperscript{79} See id. at 297.
  \item \textsuperscript{80} See, e.g., John C. Coffee, Jr. & Hillary A. Sale, Redesigning the SEC: Does the Treasury Have a Better Idea?, 95 VA. L. REV. (forthcoming Dec. 2009).
  \item \textsuperscript{81} See, e.g., Lawrence A. Cunningham, The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work), 35 CONN. L. REV. 915, 974–77 (2003).
\end{itemize}
Professor Ahdieh’s prescription for scholars to engage in specific debates over what is optimal to reduce agency costs, rather than general debates of state versus federal law,85 seems both sound and already taken.

Similarly, it seems self-evident that participants cannot assume or deduce from capital market efficiency any particular institutional design choice, since managerial capital market competition and state charter competition do different things. Professor Ahdieh observes that one can believe in efficient capital markets and still support federal corporation law; one can be skeptical of efficient capital markets and still prefer state corporation law.86 The issue is relative capital market efficiency and strength.87 Professor Ahdieh’s prescription for scholars to study mechanisms and limits of informational efficiency in capital markets thus likewise seems sound.88 Again, however, this work has been undertaken extensively in the scholarly literature89 and enjoys a visible place in resulting teaching materials.90

Nor is it obvious that the question of state charter competition is the “starting point” for the study of corporation law that Professor Ahdieh says it is.91 Rivals include the nature of the firm, private contract versus social control, agency theory, shareholder-manager relations, limited liability, and the internal affairs doctrine. Similarly, it may not be fair to say, as Professor Ahdieh does, that federalism and state competition are corporation law’s “central questions”92 or certainly that the literature is “single-minded” about these.93

Scores of issues in corporation law discourse have little or nothing to do with federalism or state competition, revealed in many syllabi for the corporations course and casebook tables of contents.94 This also makes one

85 See supra text accompanying notes 77–79.
86 See Ahdieh, supra note 1, at 305.
87 See id. at 303–04
88 See id.
91 See Ahdieh, supra note 1, at 257.
92 Id. at 261.
93 Id. at 297 n.164, 305.
94 See, e.g., Larry D. Soderquist et al., Corporations and Other Business
question the article’s assertions that there is a lack of topics for discussion in corporation law and possibly to bristle at some of the article’s ungenerous characterizations of corporate law scholarship.

Still, it does seem desirable to dislodge any absolutist or binary top-bottom framing in favor of attention to institutional complexity, as Professor Ahdieh recommends. It seems particularly desirable to consider Professor Ahdieh’s ultimate point that the importance of institutional design in corporation law may receive too little attention. More granular studies of federalism’s effects might be useful, as Professor Ahdieh concludes, to decide which institutions are better at what. The following discussion accepts a modified form of Professor Ahdieh’s invitation.

II. Federal Corporation Law’s Potential Character

Professor Ahdieh suggests there is nothing inevitable about a federal corporation law’s character along the spectrum from mandatory to enabling. It is worth noting that the mandatory-enabling distinction, although often critical to the state-federal debate, is not the only one relevant to opponents of federal corporation law. Others, in addition to concerns about regulatory monopoly, include fears that it would be heavy with rules, not principles-oriented, and too regulatory rather than deferential. To imagine the form of federal corporation law in those terms, first consider traditional suppositions and inferential evidence tending to support conventional suspicion, which Professor Ahdieh implicitly critiques, and then more contemporary proposals and implications that support the contrary possibility, which Professor Ahdieh says we should consider.

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95 See Ahdieh, supra note 1, at 290, 297, 305.
96 See, e.g., id. at 270–72, 302–03.
97 See id. at 281, 302–03, 306–07.
98 See id. at 260–61, 297–98, 305–06.
100 See supra text accompanying notes 22, 53–64.
101 See infra text accompanying notes 109–110.
There may be only limited historical grounds to accept the possibility that a federal corporation law could be enabling. Since the 1940s, proposals for and drafts of a federal corporation act have existed.\textsuperscript{102} One of the first, drawn directly from the Illinois state corporation statute, was explicitly enabling.\textsuperscript{103} Today’s Model Business Corporation Act (“Model Act”) traces its lineage to early proposals for a federal corporation act.\textsuperscript{104} Most, though not all, of the content of the original versions, and of today’s Model Act, epitomize the enabling character of state corporation law.\textsuperscript{105}

On the other hand, some versions of proposals for the Model Act were rejected as too restrictive—too mandatory, i.e., not enabling—and these were often prepared with a view toward fighting off federal preemption efforts.\textsuperscript{106} In addition, federalism issues were implicated in debate leading to promulgation of the American Law Institute’s Corporate Governance Code, in which many detect a more mandatory than enabling character.\textsuperscript{107} It also is true that many advocates of federal corporation law exhibit commitment to a more stringent, mandatory system of regulation.\textsuperscript{108}

Furthermore, many scholars and judges promote Delaware corporation law as “principles-based,” especially when contrasting it with federal securities regulation, which they allege to be “rules-based.”\textsuperscript{109} Others believe that the purpose of the asserted rules-density of federal securities regulation is precisely to overcome deficiencies of state corporation law’s perceived penchant for principles.\textsuperscript{110} Although there is reason to question the clarity of these classifications,\textsuperscript{111} discussions suggest an appetite among devotees of federal corporation law for rules whereas proponents of state corporation law tend to prefer principles.\textsuperscript{112}

\textsuperscript{102} See Thompson, supra note 84, at 223.
\textsuperscript{103} See Dodd, supra note 71, at 812, 818.
\textsuperscript{104} See Richard A. Booth, A Chronology of the Evolution of the MBCA, 56 BUS. LAW. 63, 63 (2000).
\textsuperscript{106} See Thompson, supra note 84, at 223.
\textsuperscript{107} See Larry E. Ribstein, The Mandatory Nature of the ALI Code, 61 GEO. WASH. L. REV. 984, 985, 999–1000 (1993); see also Thompson, supra note 84, at 223 & n.52.
\textsuperscript{108} See Seligman, supra note 73, at 949, 971–74.
\textsuperscript{109} Lawrence A. Cunningham, A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting, 60 VAND. L. REV. 1411, 1446 (2007) (citing Sean J. Griffith & Myron T. Steele, On Corporate Law Federalism: Threatening the Thaumatrope, 61 BUS. LAW. 1, 20–23 (2005)).
\textsuperscript{111} See id. at 1420–23, 1446–52.
\textsuperscript{112} See id. at 1446–52.
Accordingly, there is at least some inferential, experience-based reason for opponents of federal corporation law to assume that it would adopt a more mandatory and rule-like character than laws that states have produced. In addition, the evidence is reasonably strong that the enabling quality of state corporation law is traceable to competition among the states, and that the use of principles promoted a state’s position in the competition. By contrast, the absence of competitors to a federalized business regulation system may impair the federal institutional capacity to generate laws bearing such qualities. Regulatory monopoly can lead more nearly to mandatory than enabling laws, especially when regulators extract rents by imposing excessive regulation on corporations.

It may also be difficult to identify much in existing federal securities regulation that is more enabling than mandatory. Certainly this is so of its most important element, the mandatory disclosure system. Critics complain that this mandatory system is unnecessary and costly, and contend that, absent regulation, a voluntary disclosure system would exist and serve better.

True, some provisions of federal securities regulation are optional and many exhibit principle-like qualities rather than rule-like qualities. But by and large the laws tend to be mandatory and many bear characteristics of rules. These features may be particularly evident in subjects, including, as examples, the regulation of broker-dealers and much of federal law addressing insider trading, that traditionally had been classified as within state corporation law rather than federal securities regulation. Accordingly, historical and prevailing securities regulation may tend to support the suspicion that a federal corporation law would bear characteristics more nearly regulatory than deferential, at least when compared to existing state corporation law.

Similar inferences may be drawn from the Sarbanes-Oxley Act and receptions to it. The Act preempted several areas of corporation law

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117 See id. at 1446–47.
118 See id. at 1431, 1447–48.
119 See infra text accompanying notes 148–158.
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traditionally handled by states. Most of its provisions are mandatory, including rules addressing board audit committees and corporate internal controls and rules prescribing specific required or prohibited activities of corporate officers, directors, and board committee members, as well as securities lawyers and securities analysts. They even create specific federal derivative lawsuits. They also dictate what auditors must do and how both auditing standard setters and accounting standard setters are to be organized.

Only a few of the Sarbanes-Oxley Act’s hundreds of provisions may be classified as enabling. One is the provision concerning financial expertise on audit committees. It assumes the have-or-disclose approach: either a company has a financial expert on the committee or, if not, must explain why not. A second is the similar approach taken to whether a company adopts a code of business ethics. The Act required the SEC to promulgate regulations requiring public disclosure of whether a company has a code of ethics for senior officers and, if not, the reason why not.

In addition to the Sarbanes-Oxley Act’s largely mandatory content supporting suspicion that federal corporation law would assume a similar form, one may infer from scholarly receptivity to the Act additional grounds for that suspicion. For example, many scholars who are antagonistic to the Act also tend to oppose federal corporation law generally and vice versa. Critics complained about not only the mandatory nature of the Act, but about its “suffocating” regulatory characteristics. Others complained of its rules-density. Accordingly,

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120 See Cunningham, supra note 109, at 1482–83.
123 See id. § 7245.
124 See id. § 78o-6.
125 See id. § 7244.
126 See id. § 78j-1.
127 See id.
128 See id. §§ 7128–7219.
129 Id. § 7265.
130 See id. § 7265(a).
131 Id. § 7264.
it does not seem irresponsible to conclude that there is a good basis for predicting, contrary to Professor Adhieh’s hypothesis, that federal corporation law would more likely exhibit a mandatory, rules-heavy orientation rather than the enabling, principles orientation of traditional state corporation law.

B. New Federal Corporate Regulation

All that may change amid capital market globalization and in light of some recent proposals to reform the U.S. financial regulation system. In contrast to older conceptions of federal corporation law or securities regulation, readily imaginable proposals envision an enabling, and generally deregulatory, federal corporation law—and indeed such a federal securities regulation.

Consider the *Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure* ("Treasury Blueprint"). Inspired initially by concern about declining U.S. capital market competitiveness, it was revised and presented as a response to the global financial crisis that manifested in March 2008. The *Treasury Blueprint* proposes a radical reorganization and consolidation of regulatory power in the U.S. federal government, but then imagines adopting provisions that may best be characterized as more enabling than mandatory, more principles-rich than rules-heavy, and more supervisory than regulatory. It also imagines delegating this power to self-regulatory organizations, especially stock exchanges.

Particularly illuminating is the *Treasury Blueprint*’s proposal to merge securities and futures regulation, which includes combining the SEC and the Commodity Futures Trading Commission ("CFTC"). The *Treasury Blueprint* describes the agencies as using differing regulatory philosophies, making clear that it prefers the CFTC’s to the SEC’s and that a uniting of the agencies should result in a surviving entity and output more like the what can be a suffocatingly complex regulatory environment.

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135 See Katherine Schipper, *Principles-Based Accounting Standards*, 17 *ACCT. HORIZONS* 61, 61 (2003) (noting discussions suggesting, either implicitly or explicitly, that the “U.S. abandon the current allegedly ‘rules-based’ system”).

136 TREASURY BLUEPRINT, supra note 27.

137 See id. at 1.

138 See id. at 1–3, 21–22.

139 See id. at 5–22.

140 See id. at 12–13.

141 See id. at 11–12.

former than the latter. All cut in favor of looser rather than stricter imposition, as three philosophical examples suggest.

First, the Treasury Blueprint says that the CFTC uses a “principles-based regulatory philosophy” and announces that it has characteristic “market benefits” worth preserving in the futures area and expanding into the securities area. It refers to this migration as a method to “modernize the SEC’s regulatory approach.” Second, the Treasury Blueprint recommends that the SEC mimic the CFTC’s core principles applicable to contract markets and clearing agencies to apply to securities exchanges and clearing agencies. Third, the Treasury Blueprint encourages greater delegation of regulation to self-regulatory organizations. It applauds current rulemaking by those organizations in the futures context and urges that the same be intensified for the securities context, especially by SEC delegation to stock exchanges along with swift and deferential approval of stock-exchange proposals.

The Treasury Blueprint identifies multiple substantive topics on which current federal securities and futures regulation differ and suggests that these be harmonized, mainly by shifting from the SEC’s mandatory, rule orientation and toward the CFTC’s enabling, principles orientation. Doing so, the Treasury Blueprint says, will “enhance investor protection, market integrity, market and product innovation, industry competitiveness, and international regulatory dialogue.” A brief review of some of these topics supports the inference that the proposed federal consolidated and delegated structure would be vastly more enabling, principles-like, supervisory, and deferential than the existing system of securities regulation—and potentially even more relaxed than prevailing substantive corporation law produced by states.

First, consider broker-dealer regulation. Although federal securities regulation has substantially, yet selectively, preempted many state laws in this field, most of these laws derive from principles that predate federal securities acts. These range from licensing to recordkeeping and capital

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142 See id. at 11–12, 115–18.
143 Id. at 11–12.
144 Id. at 11.
145 See id. at 110–11.
146 See id. at 12–13.
147 See id. at 111–13.
148 See id. at 11–12, 109–11. The Treasury Blueprint lists the following additional topics in securities and futures regulation that it envisions requiring melding as the SEC and CFTC merge: margin accounts and trading; customer funds; customer suitability; short selling; insurance for institutional insolvency; SRO mergers; and agency funding. Id. at 116–18.
149 Id. at 115.
adequacy, to basic common-law principles of fair dealing. As adapted into federal law, most of these regulations tend to be mandatory and rule-like. Examples include the extensively delineated duty of fair dealing with customers and duties on firms to supervise employees. Federal law imposes no such explicit requirements on futures intermediaries, although the industry’s self-regulatory organization, the National Futures Association, sets kindred principles for members. The Treasury Department recommends moving securities law from its mandatory, rule-orientation towards the futures law approach, a recommendation embracing an enabling, principles-oriented character.

Second, consider insider trading laws, which prohibit trading while in possession of material, nonpublic information when occupying some capacity of trust or other special relationship. As applied to corporate officers and directors, these laws derive from state corporate fiduciary duty principles and become a federal violation when coupled with the antifraud provisions of federal securities statutes. The SEC accelerated federalization of these laws in the mid-1980s in an enforcement campaign that some opponents of federal business regulation considered too vigorous or ad hoc.

In contrast, the scope and level of legal prohibitions and risks of insider trading in futures are narrower. A wide swath of futures markets involves contracts that are not susceptible to insider trading. The Treasury Blueprint notes that insider trading “prohibitions under the securities laws, and the penalties applied, are generally considered to be much more stringent and extensive.”

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152 See id. at 1273, 1295–96.
159 Treasury Blueprint, *supra* note 27, at 117.
This likewise provides a basis for imagining a federal corporation and securities law more akin to traditional state corporation law.

Finally, consider private litigation. Investors in securities who have been defrauded are generally entitled to sue primary culpable actors. These rights of action have developed principally by decisional law of judges, implying such private rights of action from the broad antifraud principles of federal securities statutes. The Treasury Blueprint notes that such investor rights to sue “may generally be more available under the securities laws than under [futures laws].” The Treasury Blueprint favors harmonizing the two bodies of law along lines of the looser approach of futures law rather than securities law. Again, this furnishes a basis to envision a deregulatory federal corporation law.

The foregoing examples—plus the Treasury Blueprint’s listing of a dozen such subjects—illustrate a deregulatory approach, more enabling than mandatory, and more principles-oriented than rules-oriented, along with considerable delegation of regulatory authority from federal agencies to self-regulatory organizations. Although the Treasury Blueprint does not directly discuss state corporation law or corporate governance aspects of federal securities regulation, its philosophy and logic easily extend to those fields.

Extending the Treasury Department’s approach yields an interesting conception of federalized corporation law. It offers a novel hybrid recasting the competing stances in the decades-long debate, between devotees of federal corporation law, who say it is necessary because state law is too lax, and supporters of state power, who counter that state law production creates competition that promotes superior laws. Under the Treasury Blueprint, federalizing corporation law could occur but would be lax and deregulatory. That is not what many champions of federal corporation law traditionally sought, and something more akin to the possibilities that Professor Ahdieh suggests are feasible.

Furthermore, much of federal corporation law production would be

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160 See id. at 117–18.
162 TREASURY BLUEPRINT, supra note 27, at 118.
163 Although the Treasury Blueprint is not explicit on this point, the result could include having the Securities and Exchange Commission effectively dis-imply such private rights of action. See Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority, 107 HARV. L. REV. 961, 964–68 (1994).
164 See TREASURY BLUEPRINT, supra note 27, at 117–18.
165 Notably, a competing proposal by the Group of Thirty explicitly and directly references reform proposals concerning corporation law. See GROUP OF THIRTY REPORT, supra note 28, at 19, 39–46.
delegated to self-regulatory organizations in the private sector, especially to stock exchanges. Stock exchanges would expand the scope of their existing listing manuals, which already overlap with many state corporation law provisions, to round out the entire subject. Similarly, self-regulatory organizations could expand their existing mechanisms of dispute resolution, including arbitration of broker-investor disputes, to encompass disagreements between shareholders and managers traditionally litigated in state courts. Stock exchanges and other self-regulatory organizations would effectively replace states, and competition among them would produce alternative approaches to subjects traditionally contained in state corporation law.

Amid globalization, U.S. exchanges would compete not only with each other but with all other stock exchanges in the world. The result would be a broader competitive market, extending beyond U.S. states to the world’s capital markets. Federal corporation law would become a product in competitive global regulatory markets. If such regulatory competition is an important contributor to laws bearing enabling characteristics, then one may expect that resulting federal corporation law would have those features. Certainly, market forces would be a driving engine toward the production and characteristics of those laws.

Another question is whether any initial enabling character of federal corporation law, promulgated substantially by stock exchanges and other self-regulatory organizations, would be sustainable. Probing that question can be done by putting this hypothesis in the context of the debate addressing costs of federal securities-regulation monopoly. A group of scholars, championing state competition in corporation law, object to the functional federal monopoly over securities law production, arguing that the result can be inefficient laws.

Curative prescriptions include giving securities issuers the choice of applicable laws, letting stock exchanges where issuers list make the choice, or mutual recognition (allowing foreign entities regulated

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167 Existing dispute resolution mechanisms used by the Financial Industry Regulatory Authority (“FINRA”), the self-regulatory organization for the securities industry, may be adapted for this purpose. See FINRA, About FINRA, http://www.finra.org/AboutFINRA/index.htm (last visited Mar. 19, 2009).


The George Washington Law Review  [Vol. 77:XXX comparably elsewhere access to securities markets without local regulation].

Others observe that stock exchanges may already supply a measure of functional competition or question the efficacy of such choice-of-law models given national variation in other respects.

Issues surrounding the issuer choice debate may warrant revisiting amid globalization and technology changes that intensify stock-exchange competition and accompanying regulatory oversight. These forces have resulted in a large increase in the number of physical and jurisdictional locations to access capital under alternative securities regulation regimes. In the past, the United States, and especially New York, may have been the only (or one of very few) places where large enterprises could raise significant capital, so that U.S. federal regulation was such a monopoly.

Now, however, capital can be raised readily in numerous places in the world, creating much more regulatory competition than previously possible. Regulatory competition emerges in this world because stock exchanges not only facilitate capital formation, but also supply alternative legal regimes for issuers and other market participants. The Treasury Blueprint’s express or implied visions for U.S. corporate regulation would enable U.S. stock exchanges to engage more aggressively in this international regulatory competition.

Current developments, the Treasury Blueprint, and Professor Ahdieh’s article begin to coalesce. Exchanges are competing globally, manifested in how they have increasingly combined their operations in various ways, ranging from direct investment by one exchange in others, strategic alliances like joint ventures, and full mergers. The Treasury Blueprint imagines U.S. stock exchanges needing to compete in precisely these terms. It prescribes a relaxed regulatory environment to promote that result, identifying federal law as the source with a loose regulatory philosophy. And that is very much the kind of form that Professor


174 See id. at 1451–55.

175 See supra text accompanying notes 136–164.

176 See Brummer, supra note 173, at 1473–77.

177 See TREASURY BLUEPRINT, supra note 27, at 1–5, 21–22.

178 See id. at 5–22.
Ahdieh’s article says is feasible.179

The observation that regulatory monopoly in securities regulation, and maybe corporation law, in Washington is diminished amid globalization contributes potentially competing implications for Professor Ahdieh’s thesis. If Washington’s command of regulatory power has waned, fears of excesses that result from regulatory monopoly may be eased. Cutting the other way, the resulting competition is global, yielding a new form of regulatory competition that traditional proponents of federal corporation law may greet skeptically. For them, finding a single transnational regulator may be desirable, precisely to establish mandatory regulations.180 These two competing stances thus suggest renewal of the old race debate in a new form, moving from state charter competition to international stock exchange listing competition.

Finally, however, these speculations must confront political reality. The Treasury Blueprint is highly deregulatory, enabling, principles-oriented, and heavily reliant on delegation from federal authorities to self-regulatory organizations. When released in March 2008, these philosophical views may have enjoyed considerable appeal. As the entire global financial system sailed toward the brink of devastation from then into 2009, however, the political mood shifted radically along with it. Amid the brewing catastrophe, those seeking regulatory reform may now tend to favor tougher regulation, probably meaning mandatory, not enabling, provisions and tighter rules, not looser principles.

If federal corporation law proposals were seriously considered in that environment, along with broader proposals concerning financial regulation, it seems more likely that the results would bear characteristics akin to traditional securities regulation and the Sarbanes-Oxley Act rather than characteristics of the Model Business Corporation Act or the Delaware General Corporation Law. Even so, accompanying discourse should address matters of institutional design, incorporating a principal point crystallized by Professor Ahdieh’s Article.

179 See supra text accompanying notes 53–58.

180 Evidence of this interest appears in a proposal competing with the Treasury Blueprint, published by the Group of Thirty. See GROUP OF THIRTY REPORT, supra note 28, at 18, 33–37. This report prescribes international regulatory coordination to establish order in global capital markets rather than to promote U.S. capital market competitiveness, the aim of the Treasury Blueprint. See Lawrence A. Cunningham & David Zaring, The Three or Four Approaches to Financial Regulation, 78 GEORGETOWN L. REV. (forthcoming Nov. 2009).