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## The New Federal Corporation Law?

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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.<sup>1</sup> 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.<sup>2</sup> Referring to this “race debate” as “the starting point for the study of corporate law,”<sup>3</sup> 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.<sup>4</sup>

The original race debate highlighted two competitive patterns: one among *states* to attract *charters* and another among *managers* to attract *capital*.<sup>5</sup> 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.<sup>6</sup> Professor Ahdieh reverses the misfire to look separately at the two competitive patterns and gets a different picture.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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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<sup>1</sup> Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 255 (2009).

<sup>2</sup> *Id.* at 256–57.

<sup>3</sup> *Id.* at 257.

<sup>4</sup> *Id.* at 257–58, 265, 292.

<sup>5</sup> *Id.* at 257.

<sup>6</sup> *See id.* at 257–58.

<sup>7</sup> *See id.*

<sup>8</sup> *Id.* at 258.

<sup>9</sup> *See id.* at 258, 283 (noting scholarship produced by Henry Manne, William Carney, Jonathan Macey and David Haddock, and Susan Phillips and Richard Zecher).

102 *The George Washington Law Review* [Vol. 77:XXX  
states race to the top, may understate preemption's potential value.<sup>10</sup> The reversal certainly means that one cannot simply say that federal regulation of corporations is inefficient because it is federal.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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<sup>15</sup> is automatically suboptimal because it is a federal rather than a state statute.<sup>16</sup> Third, although the article suggests that it is inaugurating a conversation, discourse transcending the race debate has been ongoing for some time.<sup>17</sup> Fourth, one may question assertions that there is a lack of topics for discussion in corporation law<sup>18</sup> or a lack of scholarship addressing the mechanisms and roles of markets in corporate practice and governance.<sup>19</sup>

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.<sup>20</sup> 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

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<sup>10</sup> See *id.* at 259–60, 281, 290–91.

<sup>11</sup> See *id.* at 260.

<sup>12</sup> *Id.* at 260–61, 297.

<sup>13</sup> *Id.* at 260–61, 304–05.

<sup>14</sup> 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.

<sup>15</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

<sup>16</sup> See Ahdieh, *supra* note 1, at 260, 296–97; *infra* text accompanying notes 80–84.

<sup>17</sup> See, e.g., William W. Bratton, *Corporate Law's Race to Nowhere in Particular*, 44 U. TORONTO L.J. 401, 401 (1994); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 627–28 (2004).

<sup>18</sup> See Ahdieh, *supra* note 1, at 290, 296–97, 305; *infra* text accompanying notes 95–96.

<sup>19</sup> See Ahdieh, *supra* note 1, at 260, 267–68, 273, 304; *infra* text accompanying notes 86–90.

<sup>20</sup> See Ahdieh, *supra* note 1, at 306.

production.<sup>21</sup>

First, Professor Ahdieh argues, federal corporation law may assume a form that is just as enabling as state corporation law<sup>22</sup>—a characteristic of state corporation law that many devotees prize as a singular virtue.<sup>23</sup> Second, despite concern about the costs of regulatory monopoly that could result from federal corporation law,<sup>24</sup> Professor Ahdieh argues that state regulatory competition is primarily about regulating regulators, something federal preemption would also require.<sup>25</sup> The issue is the comparative costs of regulatory excess in the two design choices.<sup>26</sup>

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.<sup>27</sup> 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

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<sup>21</sup> *See id.* at 297.

<sup>22</sup> *Id.* at 270–71, 293–96.

<sup>23</sup> *See id.* at 293 & n.151.

<sup>24</sup> *Id.* at 293–96.

<sup>25</sup> *Id.* at 294–95.

<sup>26</sup> *Id.* at 260.

<sup>27</sup> DEP'T OF THE TREASURY, THE DEPARTMENT OF THE TREASURY BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 5–22 (2008) [hereinafter TREASURY BLUEPRINT], available at <http://www.treas.gov/press/releases/reports/Blueprint.pdf>.

104 *The George Washington Law Review* [Vol. 77:XXX  
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.<sup>28</sup> Yet, just as Professor Ahdieh 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.<sup>29</sup> 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.<sup>30</sup> Ralph Winter’s response to Cary acknowledged this risk but explained that market forces constrain managers to promote shareholder interests.<sup>31</sup>

The implication was that the agency cost problem of separation of ownership from control is addressed by markets, not state competition.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

Professor Ahdieh accordingly recasts the Cary-Winter debate in this

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<sup>28</sup> See, e.g., GROUP OF THIRTY, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY 17–18, 21 (2009) [hereinafter GROUP OF THIRTY REPORT], available at <http://www.group30.org/pubs/reformreport.pdf>.

<sup>29</sup> Ahdieh, *supra* note 1, at 256–58.

<sup>30</sup> See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663–70 (1974).

<sup>31</sup> See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–62 (1977).

<sup>32</sup> See *id.* at 256.

<sup>33</sup> See Ahdieh, *supra* note 1, at 262–63, 266–67.

<sup>34</sup> *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.<sup>35</sup> Even if the race talk is just convenient shorthand, Professor Ahdieh notes, it has had profound effects.<sup>36</sup> Significant counter-implications come from amplifying the distinct competitive patterns, especially concerning exactly what contribution state competition makes.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> Managerial competition's goal is to promote corporation law's normative ends, orbiting around agency cost control within the corporation between managers and shareholders.<sup>40</sup> The two competitions are related, so that state competition that constrains regulators can indirectly lower costs to managers of promoting shareholder interests.<sup>41</sup> But the ends remain distinct.<sup>42</sup>

State competition aligns state regulatory interests with managerial demand as a response to that demand.<sup>43</sup> It cannot supply good governance.<sup>44</sup> If managers demand weak rules, states will efficiently produce them.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

Federal corporation law is thus among the subjects that Professor

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<sup>35</sup> *See id.* at 267

<sup>36</sup> *Id.* at 268.

<sup>37</sup> *See id.* at 268–69.

<sup>38</sup> *See id.* at 269, 273, 281–82.

<sup>39</sup> *Id.* at 281.

<sup>40</sup> *Id.* at 258, 273, 281–82.

<sup>41</sup> *See id.* at 268, 273.

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* at 281–82.

<sup>44</sup> *Id.* at 273.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 285–86.

<sup>47</sup> *Id.* at 296–98.

106 *The George Washington Law Review* [Vol. 77:XXX  
Ahdieh highlights as implicated by his analysis.<sup>48</sup> The standard account that state competition drives optimal law and governance hides how efficient regulation can result without it.<sup>49</sup> Federalism is an institutional design choice, not the inexorable result of a drive to efficient regulation.<sup>50</sup> That means that federal corporation law could be efficient too.<sup>51</sup> If managerial competition drives state regulation to optimality, then it could equally drive federal law to optimality.<sup>52</sup>

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.<sup>53</sup> He observes that the standard account is that state competition led to enabling corporation law.<sup>54</sup> But he notes that he is “unsure this is correct” and provides reasons for this uncertainty.<sup>55</sup> 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.<sup>56</sup> Predicting the probable form (and content) of federal corporation law is facilitated by taking a rational-choice approach to federal regulation.<sup>57</sup> 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.<sup>58</sup>

The issue becomes one of the prospects of regulatory capture of federal authorities, Professor Ahdieh says.<sup>59</sup> 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.<sup>60</sup> Managerial interests, aligned with shareholder interests, would not be offset by any contending interest group, Professor Ahdieh supposes.<sup>61</sup>

Professor Ahdieh recognizes that the political economy in Washington may be more complex than that prevailing in the states.<sup>62</sup> Congress may face more competing demands than Delaware, for example, to give

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<sup>48</sup> *See id.* at 260–61, 296–98.

<sup>49</sup> *Id.* at 272–73.

<sup>50</sup> *Id.* at 260–61,

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 260–61, 296–98.

<sup>53</sup> *Id.* at 293–96.

<sup>54</sup> *Id.* at 292–94; *see also infra* text accompanying notes 113–114.

<sup>55</sup> Ahdieh, *supra* note 1, at 294.

<sup>56</sup> *See id.* at 295–96.

<sup>57</sup> *See id.* at 296–98.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 294.

<sup>60</sup> *Id.* at 294–95.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 295–96.

corporation law requisite attention.<sup>63</sup> Yet not much time is required, Professor Ahdieh observes, especially if manager-shareholder interests really are substantially aligned, as the conventional model assumes.<sup>64</sup>

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.<sup>65</sup> 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<sup>66</sup> 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.<sup>67</sup> 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,<sup>68</sup> 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.<sup>69</sup>

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

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<sup>63</sup> *Id.* at 296

<sup>64</sup> *Id.*

<sup>65</sup> *See supra* text accompanying notes 39–46.

<sup>66</sup> Ahdieh, *supra* note 1, at 299–302.

<sup>67</sup> *See supra* text accompanying notes 43–47.

<sup>68</sup> *See* Ahdieh, *supra* note 1, at 295–96.

<sup>69</sup> *Id.* at 296.

108 *The George Washington Law Review* [Vol. 77:XXX  
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.<sup>70</sup> 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,<sup>71</sup> much of traditional federal securities regulation, and most of the provisions of the Sarbanes-Oxley Act.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

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<sup>70</sup> *See id.*

<sup>71</sup> *See* E. Merrick Dodd, *Federal Corporation Act*, 53 *YALE L.J.* 812, 813 (1944) (noting that early proposals for federal corporation law were “compulsory”).

<sup>72</sup> *See infra* text accompanying notes 106–135.

<sup>73</sup> *See* Joel Seligman, *The Case for Federal Minimum Corporate Law Standards*, 49 *MD. L. REV.* 947, 947–49, 971–74 (1990); *see infra* text accompanying notes 106–108.

<sup>74</sup> Ahdieh, *supra* note 1, at 296.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 297.

<sup>77</sup> *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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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,<sup>81</sup> others highlighting particular provisions.<sup>82</sup> Even scholars known to oppose federal corporation law analyzed the substance and character of particular provisions.<sup>83</sup> Such engagement with the appropriate content balance between state and federal regulation seems quite common.<sup>84</sup> Accordingly,

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<sup>78</sup> *Id.* at 260, 297.

<sup>79</sup> *See id.* at 297.

<sup>80</sup> *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).

<sup>81</sup> *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).

<sup>82</sup> *See, e.g.,* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 977-78, 980 (2005); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672, 674 (2002).

<sup>83</sup> *See, e.g.,* Jonathan R. Macey, *A Pox on Both Your Houses: Enron, Sarbanes-Oxley and the Debate Concerning the Relative Efficacy of Mandatory Versus Enabling Rules*, 81 WASH. U. L.Q. 329, 349-55 (2003); Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 86-90 (2003).

<sup>84</sup> *See* Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 233 (1999). Similar confrontations occur in related fields, such as insurance and banking. *See, e.g.,* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 20 (1993); Geoffrey P. Miller, *Legal Restrictions on Bank Consolidation: An Economic Analysis*, 77 IOWA L. REV. 1083, 1105-08 (1992); Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 994-97 (1992).

110 *The George Washington Law Review* [Vol. 77:XXX]  
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,<sup>85</sup> 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.<sup>86</sup> The issue is relative capital market efficiency and strength.<sup>87</sup> Professor Ahdieh's prescription for scholars to study mechanisms and limits of informational efficiency in capital markets thus likewise seems sound.<sup>88</sup> Again, however, this work has been undertaken extensively in the scholarly literature<sup>89</sup> and enjoys a visible place in resulting teaching materials.<sup>90</sup>

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.<sup>91</sup> 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"<sup>92</sup> or certainly that the literature is "single-minded" about these.<sup>93</sup>

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.<sup>94</sup> This also makes one

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<sup>85</sup> See *supra* text accompanying notes 77–79.

<sup>86</sup> See Ahdieh, *supra* note 1, at 305.

<sup>87</sup> See *id.* at 303–04.

<sup>88</sup> See *id.*

<sup>89</sup> See, e.g., Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546, 547–48 (1994); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 553 (1984); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1541 (2007); Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 765 (1985).

<sup>90</sup> See, e.g., WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 6–38 (6th ed. 2008); JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 195–203 (6th ed. 2004); LAWRENCE E. MITCHELL ET AL., CORPORATE FINANCE AND GOVERNANCE: CASES, MATERIALS, AND PROBLEMS FOR AN ADVANCED COURSE IN CORPORATIONS 221–275 (3d ed. 2006); LAWRENCE E. MITCHELL & DALIA TSUK MITCHELL, CORPORATIONS: CASES AND MATERIALS 204–206 (2006).

<sup>91</sup> See Ahdieh, *supra* note 1, at 257.

<sup>92</sup> *Id.* at 261.

<sup>93</sup> *Id.* at 297 n.164, 305.

<sup>94</sup> 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<sup>95</sup> and possibly to bristle at some of the article's ungenerous characterizations of corporate law scholarship.<sup>96</sup>

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.<sup>97</sup> 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.<sup>98</sup> More granular studies of federalism's effects might be useful, as Professor Ahdieh concludes, to decide which institutions are better at what.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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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ORGANIZATIONS: CASES, MATERIALS, PROBLEMS xvi–xxvi (6th ed. 2005) (listing the following topics in the table of contents that have little or nothing to do with federalism or state competition: limited liability and veil piercing, capitalization and dividends, oppression, cumulative voting, fiduciary duties of directors and controlling shareholders, changes in control, and derivative litigation and indemnification). By comparison, the foregoing casebook devotes a total of six pages to the “race” issue, emphasizing the substantial congruence of corporation law across states. *See id.* at 19–20, 227–30.

<sup>95</sup> *See* Ahdieh, *supra* note 1, at 290, 297, 305.

<sup>96</sup> *See, e.g., id.* at 270–72, 302–03.

<sup>97</sup> *See id.* at 281, 302–03, 306–07.

<sup>98</sup> *See id.* at 260–61, 297–98, 305–06.

<sup>99</sup> *See id.* at 297–98, 306–07.

<sup>100</sup> *See supra* text accompanying notes 22, 53–64.

<sup>101</sup> *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.<sup>102</sup> One of the first, drawn directly from the Illinois state corporation statute, was explicitly enabling.<sup>103</sup> Today's Model Business Corporation Act ("Model Act") traces its lineage to early proposals for a federal corporation act.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> 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.<sup>107</sup> It also is true that many advocates of federal corporation law exhibit commitment to a more stringent, mandatory system of regulation.<sup>108</sup>

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."<sup>109</sup> 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.<sup>110</sup> Although there is reason to question the clarity of these classifications,<sup>111</sup> discussions suggest an appetite among devotees of federal corporation law for rules whereas proponents of state corporation law tend to prefer principles.<sup>112</sup>

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<sup>102</sup> See Thompson, *supra* note 84, at 223.

<sup>103</sup> See Dodd, *supra* note 71, at 812, 818.

<sup>104</sup> See Richard A. Booth, *A Chronology of the Evolution of the MBCA*, 56 BUS. LAW. 63, 63 (2000).

<sup>105</sup> See Mark J. Loewenstein, *A New Direction for State Corporate Codes*, 68 U. COLO. L. REV. 453, 453–54 (1997) (noting that although the Model Act includes some mandatory provisions, their continued existence "is in doubt," and overall the Model Act "reflects th[e] trend toward enabling acts").

<sup>106</sup> See Thompson, *supra* note 84, at 223.

<sup>107</sup> 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.

<sup>108</sup> See Seligman, *supra* note 73, at 949, 971–74.

<sup>109</sup> 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)).

<sup>110</sup> *Id.* (citing Mark J. Roe, Institutional Foundations for Securities Markets in the West 1, 5–7 (Dec. 17, 2002) (unpublished manuscript, on file with author), available at <http://www.wzb.eu/alt/ism/conf/conf03/papers/roe.pdf> (Sept. 19, 2003 version)).

<sup>111</sup> See *id.* at 1420–23, 1446–52.

<sup>112</sup> 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,<sup>113</sup> and that the use of principles promoted a state's position in the competition.<sup>114</sup> 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.<sup>115</sup>

True, some provisions of federal securities regulation are optional and many exhibit principle-like qualities rather than rule-like qualities.<sup>116</sup> But by and large the laws tend to be mandatory and many bear characteristics of rules.<sup>117</sup> These features may be particularly evident in subjects, including, as examples, the regulation of broker-dealers and much of federal law addressing insider trading,<sup>118</sup> that traditionally had been classified as within state corporation law rather than federal securities regulation.<sup>119</sup> 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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<sup>113</sup> See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 333 (2007).

<sup>114</sup> See, e.g., Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1927 (1998) (suggesting that “the indeterminacy of Delaware [corporation] law . . . enhances [its] competitive advantages”).

<sup>115</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 680–85 (1984).

<sup>116</sup> See Cunningham, *supra* note 109, at 1447–48.

<sup>117</sup> See *id.* at 1446–47.

<sup>118</sup> See *id.* at 1431, 1447–48.

<sup>119</sup> See *infra* text accompanying notes 148–158.

114 *The George Washington Law Review*. [Vol. 77:XXX  
traditionally handled by states.<sup>120</sup> Most of its provisions are mandatory,<sup>121</sup>  
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,<sup>122</sup> as well as  
securities lawyers<sup>123</sup> and securities analysts.<sup>124</sup> They even create specific  
federal derivative lawsuits.<sup>125</sup> They also dictate what auditors must do<sup>126</sup>  
and how both auditing standard setters<sup>127</sup> and accounting standard setters<sup>128</sup>  
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.<sup>129</sup> It assumes the have-or-disclose  
approach: either a company has a financial expert on the committee or, if  
not, must explain why not.<sup>130</sup> 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.<sup>131</sup>

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<sup>132</sup> and vice versa.<sup>133</sup> Critics complained about not only the  
mandatory nature of the Act, but about its "suffocating" regulatory  
characteristics.<sup>134</sup> Others complained of its rules-density.<sup>135</sup> Accordingly,

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<sup>120</sup> See Cunningham, *supra* note 109, at 1482–83.

<sup>121</sup> See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745  
(codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). See also Cunningham,  
*supra* note 81, at 941–75.

<sup>122</sup> See 15 U.S.C. §§ 78j-1, 7241–7244, 77t, 78u, 78m, 7262.

<sup>123</sup> See *id.* § 7245.

<sup>124</sup> See *id.* § 78o-6.

<sup>125</sup> See *id.* § 7244.

<sup>126</sup> See *id.* § 78j-1.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* §§ 7128–7219.

<sup>129</sup> *Id.* § 7265.

<sup>130</sup> See *id.* § 7265(a).

<sup>131</sup> *Id.* § 7264.

<sup>132</sup> See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack  
Corporate Governance*, 114 YALE L.J. 1521, 1602–03 (2005).

<sup>133</sup> See, e.g., Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and  
Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1195 (2004).

<sup>134</sup> See Simon Lorne, *Sarbanes-Oxley: The Pernicious Beginnings of Usurpation?*, 6  
SEC. IN ELEC. AGE, No. 4, at 1 (2002), reprinted in E. NORMAN VEASEY & R. FRANKLIN  
BALOTTI, WHAT ALL BUSINESS LAWYERS & LITIGATORS MUST KNOW ABOUT DELAWARE  
LAW DEVELOPMENTS 651, 660 (2005) (contending that the Sarbanes-Oxley Act "adds to

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*”).<sup>136</sup> Inspired initially by concern about declining U.S. capital market competitiveness,<sup>137</sup> it was revised and presented as a response to the global financial crisis that manifested in March 2008.<sup>138</sup> 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.<sup>139</sup> It also imagines delegating this power to self-regulatory organizations, especially stock exchanges.<sup>140</sup>

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”).<sup>141</sup> 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

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what can be a suffocatingly complex regulatory environment”).

<sup>135</sup> 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”).

<sup>136</sup> TREASURY BLUEPRINT, *supra* note 27.

<sup>137</sup> See *id.* at 1.

<sup>138</sup> See *id.* at 1–3, 21–22.

<sup>139</sup> See *id.* at 5–22.

<sup>140</sup> See *id.* at 12–13.

<sup>141</sup> See *id.* at 11–12.

116 *The George Washington Law Review* [Vol. 77:XXX  
former than the latter.<sup>142</sup> 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.<sup>143</sup> It refers to this migration as a method to “modernize the SEC’s regulatory approach.”<sup>144</sup> 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.<sup>145</sup> Third, the *Treasury Blueprint* encourages greater delegation of regulation to self-regulatory organizations.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> Doing so, the *Treasury Blueprint* says, will “enhance investor protection, market integrity, market and product innovation, industry competitiveness, and international regulatory dialogue.”<sup>149</sup> 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.<sup>150</sup> These range from licensing to recordkeeping and capital

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<sup>142</sup> See *id.* at 11–12, 115–18.

<sup>143</sup> *Id.* at 11–12.

<sup>144</sup> *Id.* at 11.

<sup>145</sup> See *id.* at 110–11.

<sup>146</sup> See *id.* at 12–13.

<sup>147</sup> See *id.* at 111–13.

<sup>148</sup> 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.

<sup>149</sup> *Id.* at 115.

<sup>150</sup> See Howard M. Friedman, *The Impact of NSMIA on State Regulation of Broker-Dealers and Investment Advisers*, 53 BUS. LAW. 511, 513–17, 561 (1998).

adequacy, to basic common-law principles of fair dealing.<sup>151</sup> 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<sup>152</sup> and duties on firms to supervise employees.<sup>153</sup> 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.<sup>154</sup> The Treasury Department recommends moving securities law from its mandatory, rules-orientation towards the futures law approach, a recommendation embracing an enabling, principles-oriented character.<sup>155</sup>

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.<sup>156</sup> 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.<sup>157</sup> 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.<sup>158</sup>

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."<sup>159</sup> It implicitly but clearly endorses relaxing those

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<sup>151</sup> See Roberta S. Karmel, *Is the Shingle Theory Dead?*, 52 WASH. & LEE L. REV. 1271, 1273 (1995).

<sup>152</sup> See *id.* at 1273, 1295–96.

<sup>153</sup> See John H. Walsh, *Right the First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry*, 1997 COLUM. BUS. L. REV. 165, 174 (1997). See generally Lewis D. Lowenfels & Alan R. Bromberg, *Broker-Dealer Supervision: A Troublesome Area*, 25 SETON HALL L. REV. 527 (1994).

<sup>154</sup> See NAT'L FUTURES ASS'N, NFA MANUAL/RULES (2008), available at <http://www.nfa.futures.org/nfamanual/manualFinancial.asp>.

<sup>155</sup> See TREASURY BLUEPRINT, *supra* note 27, at 115.

<sup>156</sup> See *United States v. O'Hagan*, 521 U.S. 642, 669 (1997); see also *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 112 (1961).

<sup>157</sup> See *In re Cady, Roberts & Co.*, 40 S.E.C. at 112. For state law approaches, see *Diamond v. Oreamuno*, 248 N.E.2d 910, 912–15 (N.Y. 1969), and *Brophy v. Cities Service Co.*, 70 A.2d 5, 7–8 (Del. Ch. 1949).

<sup>158</sup> See Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 156–57, 199–202 (1990).

<sup>159</sup> TREASURY BLUEPRINT, *supra* note 27, at 117.

118 *The George Washington Law Review* [Vol. 77:XXX  
securities laws in favor of the approach taken in futures regulation.<sup>160</sup> 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.<sup>161</sup> The *Treasury Blueprint* notes that such investor rights to sue “may generally be more available under the securities laws than under [futures laws].”<sup>162</sup> The *Treasury Blueprint* favors harmonizing the two bodies of law along lines of the looser approach of futures law rather than securities law.<sup>163</sup> Again, this furnishes a basis to envision a deregulatory federal corporation law.<sup>164</sup>

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.<sup>165</sup>

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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<sup>160</sup> See *id.* at 117–18.

<sup>161</sup> See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196–97 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

<sup>162</sup> TREASURY BLUEPRINT, *supra* note 27, at 118.

<sup>163</sup> 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).

<sup>164</sup> See TREASURY BLUEPRINT, *supra* note 27, at 117–18.

<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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,<sup>168</sup> letting stock exchanges where issuers list make the choice,<sup>169</sup> or mutual recognition (allowing foreign entities regulated

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<sup>166</sup> See, e.g., N.Y. STOCK EXCH., LISTED COMPANY MANUAL § 312.00 (1999), available at <http://www.nyse.com/regulation/nyse/1182508124422.html> (dealing with Shareholder Approval Policy).

<sup>167</sup> 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).

<sup>168</sup> Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 907 (1998).

<sup>169</sup> Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2361–64, 2399–2401 (1998).

120 *The George Washington Law Review* [Vol. 77:XXX  
comparably elsewhere access to securities markets without local  
regulation).<sup>170</sup> Others observe that stock exchanges may already supply a  
measure of functional competition<sup>171</sup> or question the efficacy of such  
choice-of-law models given national variation in other respects.<sup>172</sup>

Issues surrounding the issuer choice debate may warrant revisiting  
amid globalization and technology changes that intensify stock-exchange  
competition and accompanying regulatory oversight.<sup>173</sup> 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.<sup>174</sup> The *Treasury  
Blueprint's* express or implied visions for U.S. corporate regulation<sup>175</sup>  
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.<sup>176</sup> The *Treasury Blueprint*  
imagines U.S. stock exchanges needing to compete in precisely these  
terms.<sup>177</sup> It prescribes a relaxed regulatory environment to promote that  
result, identifying federal law as the source with a loose regulatory  
philosophy.<sup>178</sup> And that is very much the kind of form that Professor

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<sup>170</sup> See Howell E. Jackson, *A System of Selective Substitute Compliance*, 48 HARV. INT'L L.J. 105, 105–07 (2007); see also Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 31–33 (2007).

<sup>171</sup> See, e.g., John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1770 (2002); Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 FORDHAM L. REV. 2541, 2543, 2549–50 (2006).

<sup>172</sup> See, e.g., James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200, 1229–33 (1999).

<sup>173</sup> See Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1435–39 (2008).

<sup>174</sup> See *id.* at 1451–55.

<sup>175</sup> See *supra* text accompanying notes 136–164.

<sup>176</sup> See Brummer, *supra* note 173, at 1473–77.

<sup>177</sup> See TREASURY BLUEPRINT, *supra* note 27, at 1–5, 21–22.

<sup>178</sup> See *id.* at 5–22.

Ahdieh's article says is feasible.<sup>179</sup>

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.<sup>180</sup> 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.

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<sup>179</sup> See *supra* text accompanying notes 53–58.

<sup>180</sup> 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 GEO. WASH. L. REV. (forthcoming Nov. 2009).