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DO WE NEED A RESTATEMENT OF THE LAW OF CORPORATE GOVERNANCE?

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Abstract: The American Law Institute (ALI) has embarked on a Restatement of the Law of Corporate Governance. As with all Restatements, the purpose of the Restatement of corporate law is to clarify "the underlying principles of the common law" that have "become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States." Corporate law, however, does not suffer from such problems. In a majority of states, the Model Business Corporation Act provides detailed statutory guidance as to which common law functions, at most, interstitially. In addition, corporate law is virtually unique in being dominated by the law of a single jurisdiction; namely, Delaware. Given the prominence of Delaware law in this field, a Restatement of corporate law is unlikely to be influential.

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DO WE NEED A RESTATEMENT OF THE LAW OF CORPORATE GOVERNANCE?

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INTRODUCTION

In 1978, the American Law Institute (ALI) authorized a project originally intended to result in a Restatement of corporate law.[1] The new project was explicitly responsive to the ferment in corporate governance of the period.[2] In the period leading up to the project, both establishment figures such as former Securities and Exchange Commission (SEC) Chairman William Cary and liberal activists such as Ralph Nader vigorously criticized state corporate law and advocated a federal law of corporations.[3] At least in part, the project was intended to fend off federal incorporation.[4]

Not surprisingly, given that background, the drafters intended their project to be a departure from traditional Restatements.[5] As they visualized it, the project was to offer "a combination of classic Restatement, forward looking guidelines, and perhaps also model provisions."[6] Their efforts,

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[1] *See* PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS viii (AM. L. INST., Tent. Draft No. 1 1982) [hereinafter Draft No. 1].

[2] *See* Melvin Aron Eisenberg, *An Introduction to the American Law Institute's Corporate Governance Project*, 52 GEO. WASH. L. REV. 495, 496 (1984) (explaining that the project's rationale was, in part, a response to "an extraordinary ferment of activity in the field of corporate governance"). Professor Eisenberg served as Chief Reporter for the project from 1984 through its completion. Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 988 (1993).)

[3] *See* Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project,* 61 GEO. WASH. L. REV. 1034, 1044-46 (1993) (discussing the Cary and Nader critiques).

[4] *See* Victor Brudney, *The Role of the Board of Directors: The ALI and Its Critics*, 37 U. MIAMI L. REV. 223, 228 (1983) (quoting the Business Roundtable's chairman as stating that the "project had its roots in the '70s as part of the effort to meet federal incorporation and similar proposals").

[5] *See* Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582, 608 (1984) (stating that the project explicitly did "not take 'traditional Restatement form'").

[6] Draft No. 1, *supra* note 1, at ix.

however, met with immediate resistance. When Tentative Draft Number 1 was published in 1982, it was widely criticized for failing to restate the law but rather proposing major and dramatic changes in the law.[7]

As the decade long process of reaching consensus on the corporate governance project dragged on, it became what is still one of the most controversial projects the ALI ever attempted.[8] Indeed, one highly respected commentator went so far as to describe the project as "the most controversial event in the history of American corporate law."[9]

Despite this dubious precedent the ALI has returned to the corporate governance field with a proposed Restatement of the Law of Corporate Governance (Restatement).[10] At the ALI's 2022 annual meeting, the membership considered Tentative Draft No. 1, which contained provisions defining various terms, discussing the duties of care and loyalty, and the social purpose of the corporation.[11] Except for one of the provisions on the duty of loyalty, the membership approved the draft.[12]

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[7] *See* Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285, 314 (2021) ("While the project began as a Restatement initiative, it soon attracted criticism for being overtly reformative, a premise that it did not hide."); Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 351 (1987) ("The Business Roundtable virulently objected . . . to calling the Corporate Governance project a Restatement . . .."); Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 L. & CONTEMP. PROBS. 215, 223 (Summer 1999) (noting that the project was "vigorously criticized as making overregulatory suggestions for state corporate law").

[8] *See* Balganesh & Menell, *supra* note 7, at 314 ("The Principles project was an innovation that the ALI introduced in 1984 when one of its very controversial efforts, the Corporate Governance Project, was met with significant resistance during its early days."); Douglas M. Branson, *Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-Worldcom Era,* 58 S.C. L. REV. 65, 113 (2006) (noting that the project "proved very controversial").

[9] William J. Carney, *The ALI's Corporate Governance Project: The Death of Property Rights?,* 61 GEO. WASH. L. REV. 898, 898 (1993).

[10] *Restatement of the Law, Corporate Governance*, AM. L. INSTIT., https://www.ali.org/projects/show/corporate-governance/ (last visited June 7, 2022).

[11] RESTATEMENT OF THE LAW OF CORPORATE GOVERNANCE (AM. L. INST., Tent. Draft No. 1) [hereinafter cited as RESTATEMENT].

[12] *Id.*

This article argues that the new Restatement is likely to prove a non-starter. Part I explores the purpose of a Restatement of the law, which is to clarify the common law. In most states, however, corporate law is largely statutory. The Model Business Corporation Act (MBCA), which is an ongoing projects of the American Bar Association's the American Bar Association's Corporate Laws Committee, is in force in 32 states and the District of Columbia.[13] Many other states have adopted the MBCA in parts.[14] Unlike a Restatement, which is a one-time static document that will go decades without being updated, the MBCA's drafters produce a near constant stream of updates and innovations. Because the MBCA provides detailed up-to-date guidance, the role of the common law in MBCA states is principally interstitial gap gilling. To the extent MBCA states need common law guidance, moreover, they are likely to look to corporate law's Leviathan rather than to a Restatement.

Part II argues that corporate law is unique in having a single dominant jurisdiction; namely, Delaware. In light of Delaware's dominance, Part II makes three distinct but related arguments. First, Delaware law provides a well-developed body of high-quality law. Delaware courts thus are unlikely to look to the Restatement rather than their own precedents. Second, because Delaware law provides such a large body of highly respected case law, non-Delaware jurisdictions looking for guidance will look to Delaware instead of a Restatement. Finally, perhaps even more so than the MBCA, Delaware law evolves rapidly in response to changing conditions.

Part III therefore concludes that a Restatement of the Law of Corporate Governance is unlikely to prove influential. Courts and commentators in Delaware and elsewhere will continue to focus on Delaware law, not a Restatement.

I. CORPORATE LAW AND THE PURPOSES OF A RESTATEMENT DO NOT MESH

The basic problem with the proposed Restatement of the Law of Corporate Governance is that corporate law is not a suitable subject for being restated. Courts are the main audience for Restatements and, as such, a Restatement's content is "generally common law."[15] The purpose of a Restatement is to clarify "the underlying principles of the common law" that have "become obscured by the ever-growing mass of decisions in the many

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[13] CORP. L. COMM., MODEL BUSINESS CORPORATION ACT v (rev. ed. 2016).

[14] *Id.*

[15] RESTATEMENT at x.

different jurisdictions, state and federal, within the United States."[16] Historically, the ALI thus avoided statutory subject areas.[17]

The law of corporate governance has multiple sources, most of which are statutory in nature. A growing body of corporate governance law—as applicable to public corporations—comes from federal statutes and regulations.[18] Important governance requirements also are imposed on public corporations by stock exchange listing standards.[19] A common law-focused Restatement will be of little utility with respect to those sources. Lastly, every state has adopted a business corporation statute,[20] with over three-fifths of the states having adopted the MBCA as their general corporation law.[21]

Common law adjudication is relatively unimportant in MBCA jurisdictions. First, the MBCA eliminated or derogated from many old common law rules, replacing them with new statutory approaches, which means corporate law in MBCA states is not reliant on the evolutionary processes of the common law but rather on the text of the statute.[22] Second,

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[16] *Id.*

[17] Balganesh & Menell, *supra* note 7, at 301 (noting the "mismatch between the Restatements and statutes").

[18] *See generally* MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE (2018) (reviewing the gradual federalization of corporate law).

[19] *See* Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law and Federal Regulations*, 38 WAKE FOREST L. REV. 961, 968-72 (2003) (discussing the role of listing standards in regulating corporate governance).

[20] *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) ("Every State in this country has enacted laws regulating corporate governance.").

[21] *See supra* text accompanying notes 13-14 (discussing extent of the MBCA's adoption).

[22] *See, e.g.,* Addington v. Raleigh Mine and Indus. Supply, Inc., CIV.A. 2:12-06404, 2014 WL 3548934, at *8 (S.D.W.Va. July 17, 2014) (holding that "the MBCA eliminates the right to cumulative voting unless the articles of incorporation provide for it"); Warren v. Campbell Farming Corp., 271 P.3d 36, 41–42 (Mont. 2011) ("With its enactment of the MBCA, the Legislature employed only the broader concept of transaction and generally eliminated the former designation of contract as a subspecies of transaction . . .."); McMinn v. MBF Operating Acq. Corp., 164 P.3d 41, 50 (N.M. 2007) (noting that "more recent amendments to the MBCA have expressly eliminated exclusivity of appraisal rights in conflict of interest transactions where the merging corporations are under common control"); Murphy v. Crosland, 886 P.2d 74, 77 (Utah App. 1994), aff'd, 915 P.2d 491 (Utah 1996) (stating that "the MBCA eliminated the common law concepts of de facto corporations, de jure corporations, and corporations by estoppel"); *see also* D. Gordon Smith, *A Proposal to Eliminate Director Standards from the Model Business Corporation Act*, 67 U. CIN. L. REV. 1201, 1209-27 (1999)

courts in MBCA states generally "do not treat a continual flow of corporate-law disputes,"[23] which further pushes them towards relying on the statute rather than case law. Third, unlike the piecemeal statutory authorities that are grist for the typical Restatement,[24] the MBCA provides a detailed and comprehensive statute.[25] As a result, much—if not most—common law adjudication in MBCA states serves mainly to fill statutory interstices.[26] Courts in MBCA states are thus less likely to look to a Restatement than to their state's statute.[27]

This is particularly true because the legal and business environments in which corporations operate are highly dynamic, which necessitates frequent updates to corporate law.[28] The Corporate Laws Committee consists of 25 judges, practitioners, and academics.[29] The committee meets four times per

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(criticizing the MBCA's statutory statement of the duty of care for altering the common law standards).

[23] Bryn R. Vaaler, 2*.02(b)(4) or Not 2.02(b)(4): That Is the Question*, 74 L. & CONTEMP. PROBS. 79, 93 (Winter 2011).)

[24] *See* Richard Stanley, *The Restatement of the Law Governing Lawyers: Lawyer Regulation Coming of Age*, 48 LA. B.J. 22 (2000) ("The Restatements are intended to be collecting works that gather the corpus of piecemeal jurisprudential and statutory authority in a particular subject area and organize that law into a coherent and more readily digestible treatise.").

[25] *See* James D. Cox & Herbert S. Wander, *The Model Business Corporation Act Financial Provisions: A Historical Snapshot*, 74 L. & CONTEMP. PROBS. 121 (Winter 2011) (noting that "the MBCA's statutory provisions" have evolved to become "more detailed and lengthy"); Rafael A. Porrata-Doria, Jr., *The Proposed Pennsylvania Business Corporation Law: A Horse Designed by Committee,* 59 TEMP. L.Q. 437, 443–44 (1986) ("The MBCA is a much more detailed . . . statute than the DGCL.").

[26] E. Norman Veasey, *On Corporate Codification: A Historical Peek at the Model Business Corporation Act and the American Law Institute Principles Through the Delaware Lens,* 74 L. & CONTEMP. PROBS. 95 (Winter 2011) (stating that the MBCA "leaves room for the judiciary to fill in some interstices").

[27] *Cf*. Marco Ventoruzzo, *The Role of Comparative Law in Shaping Corporate Statutory Reforms*, 52 DUQ. L. REV. 151, 162 (2014) (noting that "the MBCA offers a more detailed and comprehensive set of statutory provisions . . ., which gives guidance to businesspeople, practitioners and judges").

[28] *See* Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1836 (2006) (noting the need for frequent updates to corporate law to account for the "dynamic and ever-changing world" in which public corporations operate).

[29] CORP. L. COMM., *supra* note 21, at vi.

year and frequently promulgates amendments to address new conditions.[30] The process by which the MBCA is maintained thus serves to provide "greater statutory clarity and more bright lines aimed at anticipating future problems and providing greater guidance."[31]

In contrast, if the Restatement goes forward, it will be a static document.[32] When the project is completed, the drafters will disband and thus will be unable to "exercise oversight over" the Restatement's continuing fitness for purpose.[33] As for the larger ALI, "it is ill-equipped to evaluate the possible consequences of law reform proposals and not equipped at all to evaluate the actual consequences of those proposals once adopted."[34] The single moment of a Restatement, even if done beautifully, thus cannot keep up with the constantly evolving business and legal environment. Accordingly, many of the Restatement's provisions inevitably will become obsolescent, which will enhance the incentives for courts and lawyers to look elsewhere for guidance.

II. THE DELAWARE ISSUE

As important as the MBCA is as a source of corporate law, it pales in comparison to the Leviathan of the field. It is difficult to think of a body of law as thoroughly dominated by a single state as Delaware dominates corporate law, especially the law governing public corporations. Indeed, Delaware law is so dominant that, in many respects, it functions as a de facto national corporate law.[35]

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[30] *Id.*

[31] Vaaler, *supra* note 23, at 93.

[32] As Allan Vestal observed, Restatements offer "static statements," Allan D. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent,* 66 CORNELL L. REV. 464, 465 (1981), but "the law is a growing, dynamic force." *Id.* at 508.

[33] Alan Schwartz & Robert E. Scott, *Obsolescence: The Intractable Production Problem in Contract Law*, 121 COLUM. L. REV. 1659, 1663 (2021).

[34] *Id.* at 1708.

[35] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 Am. J. Compar. L. 329, 331 (2001). Mike Dooley thus observed that, in the corporate law field, "the terms 'prevailing,' 'weight' and 'majority' are all understood to mean 'Delaware.'" Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 463 (1992). Arguably, Congress is the only real competition to Delaware's status as regulator-in-chief of corporate governance. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (discussing competition between Wilmington and Washington).

Delaware is home to more than half of the public corporations listed for trading on U.S. stock exchanges, a point that is especially significant for assessing the merits of a Restatement of corporate law.[36] Delaware's share of large public corporations is even higher, with almost two-thirds of Fortune 500 corporations.[37] Most business entities form under the laws of their home state, of course, but Delaware is the leading choice of businesses that opt to incorporate outside their home state.[38] Because of the generally accepted choice of law principle known as the internal affair doctrine, Delaware law will govern the corporate governance disputes of those companies regardless of which U.S. jurisdiction in which the dispute is litigated.[39]

It is true that Delaware corporate law is also unique in being more a product of common law adjudication rather of legislation.[40] This is not to say

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[36] *Delaware Corporate Law: Facts and Myths*, DELAWARE.GOV, https://corplaw.delaware.gov/facts-and-myths/ (last visited June 8, 2022). The relevance of Delaware's dominance in the public corporation space is demonstrated by an observation made by Principles Chief Reporter Melvin Eisenberg. In defending the ALI's decision to go forward with the Principles, Eisenberg posed the rhetorical question: "how could the ALI fail to undertake a project in the area of law governing those institutions on which our entire system of production of goods and services depends?" Eisenberg, *supra* note 2, at 495. The answer, of course, is that most of those institutions are public corporations and most public corporations are incorporated in Delaware. With respect to those key institutions, there thus is little risk that the common law will be obscured by conflicting rules coming from many competing jurisdictions.

[37] *Delaware Corporate Law*, *supra* note 36. As far as the larger universe of business entities is concerned, Delaware is home to over 1 million, which consistently places it in the top 5 states of organization. *Id.*

[38] *Id.*

[39] *See, e.g.*, Askanase v. Fatjo, 130 F.3d 657, 674–75 (5th Cir. 1997) ("Because LivingWell is a Delaware corporation, Delaware law controls."); *see generally* Kimberly-Clark Corp. v. Factory Mut. Ins. Co., 566 F.3d 541, 546 (5th Cir. 2009) (holding that "corporate governance issues must be adjudicated using the law of the state of incorporation"); Kikis v. McRoberts Corp., 639 N.Y.S.2d 346, 346 (N.Y. App. Div. 1st Dept. 1996) (holding that "issues of corporate governance are determined by the State in which the corporation is chartered"); *see generally* Vaaler, *supra* note 23, at 93 ("Delaware has provided the flesh and bone of corporate law by acting as the forum for resolving the ongoing issues great and small involving corporations and their constituencies.").

[40] *See* Valian A. Afshar, Note, *A Blended Approach to Reducing the Costs of Shareholder Litigation*, 113 Mich. L. Rev. 315, 339 (2014) ("Delaware's 'highly developed body of case law,' rather than the DGCL, comprises the bulk of Delaware corporate law."); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1577 (2005) ("Delaware's corporate law may be the last vestige of the classical 19th century common law model

that the Delaware General Corporation Law is unimportant; it is simply to say that it is a relatively bare-bones statute compared to the much more detailed MBCA and thus leaves a great deal more room for courts to make law.[41] Accordingly, if the purpose of a Restatement is to address the potential for confusion that arises when many competing jurisdictions are all contributing to the development of the law, corporate law is not in need of such assistance.

A. Delaware Does Not Need a Restatement of its Law

The Principles proved irrelevant to the evolution of Delaware law. Delaware courts cited the Principles only 19 times in the 26 year period 1996 to 2022.[42] So where do Delaware courts and lawyers look for guidance? Not surprisingly, they look internally. Delaware case law provides an enormous body of precedents, which makes its law more predictable than that of other states, and from which counsel thus may draw guidance with confidence.[43]

Delaware's corporate law is unique not only in its exceptional quantity but also in its high quality.[44] To be sure, Delaware law has its critics.[45] But

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in America: most important legal rules are promulgated by a nonpartisan, expert judiciary . . .").

[41] Philip S. Garon, Michael A. Stanchfield, & John H. Matheson, *Challenging Delaware's Desirability As A Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 806 (2006) ("The MBCA and similar statutes are much more detailed and extensive in scope than the Delaware statute and include more precise definitions of terms used in the statutes."); Ventoruzzo, *supra* note 27, at 162 ("Delaware statutory provisions leave a lot of room to case law").

[42] Those numbers were derived by searching Westlaw's Delaware State Cases database on June 20, 2022, for citations to "Principles #of Corporate Governance: Analysis #and Recommendations."

[43] *See* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1235 (2001).

[44] *See, e.g.*, Steven M. Davidoff, *Fairness Opinions*, 55 AM. U.L. REV. 1557, 1625 (2006) (positing that Delaware is "generally regarded to have the most trenchant case law"); David B. Feirstein, *Parents and Subsidiaries in Delaware: A Dysfunctional Standard*, 2 N.Y.U.J.L. & BUS. 479 (2006) ("The state of Delaware arguably has the most developed body of corporate common law jurisprudence . . ."); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 842–43 (1995) ("Delaware's current body of high-quality case law . . .").

[45] *See* Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?,* 27 FORDHAM J. CORP. & FIN. L. 73, 107 (2022) (noting that "critics of Delaware's dominance argue that federal legislation should regulate large areas of corporate law").

even one of Delaware's foremost critics, Lucian Bebchuk, concedes that Delaware possesses an "experienced and respected judiciary working with a well-developed jurisprudence" and that the "Chancery Court . . . is renowned for its expertise in corporate law matters."[46]

As Bebchuk acknowledges, the Delaware judiciary is critical to Delaware's success in attracting corporations. The Delaware judiciary takes care to ensure that its law provides certainty and predictability, which relieves transaction planners of much regulatory uncertainty.[47] The Delaware judiciary also provides the bar with guidance "outside the four corners of legal holdings, especially in the form of speeches and articles."[48] Members of the Chancery Court are particularly noted for using "speeches and articles to signal the evolutionary direction of [their] . . . jurisprudence" to promote to predictability as to how the law will evolve.[49] Delaware judges further provide guidance by being active in law reform organizations, including the Corporate Laws Committee, which provides useful exchanges of ideas between Delaware and the drafters of the MBCA.[50]

Because of Delaware's small size, the Delaware bench and bar form a unique community that not only facilitates communication about the content and future direction of the law, but also provides strong incentives to get the law right.[51] Former Delaware Chancellor William Allen, himself a nationally

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[46] Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 145 (2001). Bebchuk has been called Delaware corporate law's "principal critic." Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 468 (2006).

[47] *See, e.g.,* Harff v. Kerkorian, 324 A.2d 215, 220 (Del. Ch. 1974) ("It is obviously important that the Delaware corporate law have stability and predictability.").

[48] Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 214 (2007).

[49] *Id.* at 196.

[50] *See id.* at 214 (discussing law reform efforts of Delaware jurists).

[51] *See generally* Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study, in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 120, 134-43 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim, & James Park eds. 2018) (discussing the incentives of the Delaware legal system's actors to make quality corporate law).

respected leader in corporate law,[52] explained that Delaware provides "a smaller community in which deep knowledge about character and about talent is easily available and in which prestige or honor can be more easily constructed and used as a reward system."[53] In turn, "pride in the tradition of excellence and the importance that Delaware law has played nationally act as an important non-economic incentive for judges who serve under the light of national publicity to work hard and do their best. Part of the secret of Delaware law [thus] is you have judges who are very, very diligent."[54] Those judges, moreover, are situated in and benefit from constant interaction with a professional legal culture comprised of "expert lawyers who are continuously exposed to . . . a steady flow of corporate problems."[55]

Finally, at least insofar as fiduciary duties are concerned, the Restatement's own Chief Reporter has persuasively argued that Delaware corporate law consists of standards rather than rules.[56] Professor Rock further argued "that standards work very differently than rules, that standards are typically generated and articulated through a distinctively narrative process, leading to a set of stories that is typically not reducible to a rule."[57] At the same time, however, Professor Rock argued that reliance on standards does not lead to indeterminacy.[58] To the contrary, he posited that Delaware's process of common law adjudication leads to "reasonably determinate guidelines" and "reasonably precise standards proceeds through the elaboration of the concepts of independence, good faith, and due care through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms."[59]

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[52] *See Mark J. Loewenstein, Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 513 (2000) (describing Chancellor Allen as "a highly respected jurist").

[53] William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 73 (2000).

[54] *Id.*

[55] *Id.*

[56] *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?,* 44 UCLA L. REV. 1009, 1014-15 (1997) (describing content of Delaware law).

[57] *Id.* at 1016.

[58] *See id*. at 1017 ("My claim is not that Delaware law is unpredictable and indefinite.").

[59] *Id.*

It would be unusual for a Restatement to try to incorporate such standards rather than writing rules.[60] After all, the process of drafting a Restatement "has been described by the ALI as 'the quest to determine the best rule.'"[61] As such, it seems clear that Delaware law is poorly suited to being captured by a Restatement.

B. Other States Will Look to Delaware Rather than a Restatement.

As a de facto national corporate law, Delaware law will be the primary source of guidance in cases involving companies incorporated in other states and even other countries. Many state courts follow Delaware law when their own state law does not provide an answer to the question at bar.[62] Federal courts have looked to Delaware law for assistance in interpreting federal law, as the Third Circuit observed in a case interpreting Bankruptcy Code § 328's requirement that indemnification provisions in employment agreements be reasonable:

> We look to Delaware corporate law as a guide primarily because it offers time-tested insights on how courts should best evaluate an issue similar to the one before us. Additionally, Delaware's law often cues the market.[63]

Even foreign countries look to Delaware corporate law for guidance.[64]

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[60] Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J. Forum 293, 297 (2018) (explaining that "preference for standards over rules is unusual for a restatement").

[61] *Id.*

[62] *See, e.g.,* Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 253 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987) ("Indiana takes its cues in matters of corporation law from the Delaware courts, which are more experienced in such matters . . .."); Weinberger v. Am. Composting, Inc., 4:11CV00848 JLH, 2012 WL 1190970, at *5 (E.D. Ark. Apr. 9, 2012) (observing that "state courts often rely heavily upon Delaware law" when interpreting derivative suit statutes); Casey v. Brennan, 780 A.2d 553, 567 (N.J. Super. App. Div. 2001), *aff'd*, 801 A.2d 245 (N.J. 2002) ("When considering issues of first impression in New Jersey regarding corporate law, we frequently look to Delaware for guidance or assistance.").

[63] United Artists Theatre Co. v. Walton, 315 F.3d 217, 230 (3d Cir. 2003).

[64] *See* Omari Scott Simmons, *Delaware's Global Threat,* 41 J. CORP. L. 217, 246 (2015) ("Delaware, in the merger and acquisitions context, has influenced developments in Japanese takeover law, as well as statutory and other legal innovations in the United Kingdom, Canada, Australia, China, and India.").

> The Republic of the Marshall Islands, for instance, has literally copied and pasted Delaware's corporate code wholesale into its domestic law, statutorily pegging its corporate law to be updated in accordance with Delaware's judicial precedents, as well. Other nations, including Panama, Israel, Malaysia, and Nevis have enacted corporate law statutes modeled after Delaware. Still other nations, including the Netherlands, Canada, and Japan have relied on Delaware's judicial precedents to varying degrees.[65]

There is no reason to think they would cease doing so even if a Restatement were available.

C. Delaware Law is Constantly Evolving

Concerns about obsolescence are even less pronounced with respect to Delaware law than is the case with the MBCA. As we have seen, Delaware's judiciary—especially the all-important Court of Chancery—is highly respected.[66] For some " eighty-five to ninety years, there has been a constant stream of corporate litigation, mostly in the Court of Chancery . . .."[67] The steady flow of new cases posing novel questions gives Delaware courts more than ample opportunity to keep the law up to date in response to changing conditions.

> Delaware has provided a stable and efficacious but responsive corporate law for decades. It reacts to business changes, it innovates when needed, and, if it errs, it corrects the errors quickly. Other states have fewer incentives and a lower capacity to be both stable and accommodating.[68]

The comparison to a static Restatement thus strongly favors Delaware.

D. We Already Have a Restatement of Delaware Law

Accordingly, a Restatement of the Law of Corporate Governance is unnecessary. Courts and lawyers not only in Delaware but across the country

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[65] William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1736–37 (2021).

[66] *See, e.g.*, Kahan & Rock, *supra* note 40, at 1613 ("Delaware's judiciary . . . is highly respected for its technocratic expertise . . ..").

[67] E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 167 (2004).

[68] Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?,* 74 BROOK. L. REV. 75, 79 (2008).

and around the globe will look to the Delaware law for guidance, even when Delaware law is not directly applicable. Hence, as I quipped on Twitter:

> We don't need a Restatement of Corporate Governance. We already have one. Folk on the Delaware General Corporation Law: Fundamentals, 2021 Edition . . ..[69]

III. LIKE THE PRINCIPLES BEFORE IT, THE RESTATEMENT WILL FADE INTO OBSCURITY

History gives me confidence in making the prediction that Delaware law will trump the Restatement. It was Delaware's dominance, after all, that ultimately doomed the Principles' drafters efforts to reform corporate law.[70] As the Principles evolved across multiple tentative drafts, many provisions tended to converge on Delaware law:

> The Principles' substantive provisions evolved according to a relatively consistent pattern. Early drafts focused on the need for management accountability and relied on judicial review as the primary mechanism for accomplishing that goal. The early drafts therefore increased the likelihood of a corporate decision undergoing judicial review and the concomitant risk of liability for directors and officers. Later drafts, in contrast, retreated towards a position more or less resembling existing law.[71]

The Principles' provision governing interested director transactions, for example, was "based largely on Delaware corporate law."[72] As a result of "much pushing and tugging and pulling," the Principles' provisions on

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[69] Stephen Bainbridge (@PrawfBainbridge), TWITTER (May 17, 2022, 4:58 PM), https://twitter.com/PrawfBainbridge/status/1526713894567149569.

[70] Admittedly, it might be more accurate to say that Delaware's dominance gave the Principles' critics a plausible alternative model to the reforms preferred by the Principles' drafters. *See, e.g.,* E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131 (2000) (offering Delaware law as an alternative to the Principles' derivative litigation provisions). CORPRO was an ad hoc group of corporate lawyers and academics who emerged as the Principles' main critics. *See* Bayless Manning, *Principles of Corporate Governance: One Viewer's Perspective on the ALI Project*, 48 BUS. LAW. 1319, 1329 (1993) (noting the prominent role of "the persistent ever-vocal CORPRO"). Much of CORPRO's efforts were aimed at tweaking the Principles to more closely resemble Delaware law and the MBCA. E. Norman Veasey, *The Emergence of Corporate Governance as A New Legal Discipline,* 48 BUS. LAW. 1267, 1268 (1993).

[71] Bainbridge, *supra* note 3, at 1041.

[72] Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc., 496 N.E.2d 959, 972 (Ohio 1986) (Brown, J., dissenting).

derivative litigation and transactions in control ended up embracing Delaware's view of the board of directors' authority, if not the entire letter of Delaware law on point.[73]

Not surprisingly, given the controversy surrounding the project, and the extent to which it ended up tracking Delaware, the Principles have had little influence on judicial development of corporate law.[74] To be sure, there are those who claim to the contrary,[75] but the reality is that the Principles have done little to change the law. As we saw, the Pirnciples had no discernible impact on the evolution of Delaware law. More generally, as of 2011, almost two decades after the Principles were finally promulgated, a nationwide study found only six cases that had adopted one of the Principles' provisions.[76] Only one of those cases involved one of the Principles' most controversial provisions.[77] In contrast, five cases had declined to follow a specific provision of the Principles.[78] Over half the cases citing to the Principles

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[73] Veasey & Dooley, *supra* note 70, at 147. *See* Bainbridge, *supra* note 3, at 1043 (noting that the Principles' "procedures governing derivative suits gradually moved toward the Delaware position, as did the substantive provisions governing interested-director transactions").

[74] *See* Minor Myers, *Measuring the Influence of the Ali's Principles of Corporate Governance on Corporate Law* 1 (July 13, 2011) ("Courts cite only a few sections of the Principles, the controversial provisions do not appear to be cited more often or more favorably than more traditional Restatement-style provisions, and citations to the Principles have declined over time."), https://ssrn.com/abstract=1884701; *see generally* Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1232 (1993) (predicting that despite the drafters "fourteen years" of efforts "to transform American corporate law, American corporate law will hardly be affected by the modest reforms that finally were approved").

[75] *See, e.g.* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U.L. REV. 733, 738 (2005) (describing the Principles as "influential"); Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence,* 42 WASHBURN L.J. 31, 77 n.214 (2002) (describing the Principles as "very influential").

[76] Myers, *supra* note 74, at 5.

[77] *Id.* In Kamen v. Kemper Fin. Services, Inc., 908 F.2d 1338 (7th Cir. 1990), *rev'd*, 500 U.S. 90 (1991), the Seventh Circuit adopted the Principles' approach to the demand requirement as the federal common law governing derivative litigation under the Investment Company Act of 1940. *Kamen*, 908 F.2d at 1344. The Supreme Court reversed, holding that federal courts in these cases should look to the law of the state of incorporation. *Kamen*, 500 U.S. at 109.

[78] Myers, *supra* note 74, at 17 tbl. 1.

simply noted it in the discussion or the footnotes.[79] Principles § 2.01, on the objective of the corporation, which Chief Reporter Melvin Eisenberg characterized as one of "the central . . . rules of the Principles,"[80] has been cited in only five decisions: as a see also citation in Justice Stevens's partial dissent in *Citizens United*;[81] in a concurrence in the Tenth Circuit's *Hobby Lobby* decision;[82] in a federal district court opinion, which was reversed on other grounds;[83] and two intermediate Massachusetts appellate court decisions.[84] In sum, it seems fair to conclude that the Principles "failed to live up to the aspirations of the movement that gave it birth."[85]

I feel confident in predicting a similar fate for the Restatement, as I tweeted:

> Either the Restatement of Corporate Governance will restate Delaware law (in which case who needs it) or it will not restate the law but rather propose changes (in which case it will be ignored).[86]

The time and effort that will go into continuing the Restatement thus could be better spent elsewhere.

CONCLUSION

It doubtless would be difficult for the ALI to reverse course and stop the Restatement project from going forward. The ALI membership voted to approve the idea of a Restatement and subsequently voted to approve most of the first tentative draft. The project has three reporters, all well respected

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[79] *Id.*

[80] Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1275 (1993),

[81] Citizens United v. Fed. Election Commn., 558 U.S. 310, 470 (2010) (Stevens, J., dissenting in part).

[82] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1147 (10th Cir. 2013) (Hartz, J., dissenting), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[83] Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1111 (N.D. Ill. 2012), *rev'd*, 743 F.3d 509 (7th Cir. 2014).

[84] Crowley v. Commun. For Hosps., Inc., 573 N.E.2d 996, 1001 n.11 (Mass. App. 1991); Evans v. Multicon Const. Corp., 574 N.E.2d 395, 399 (Mass. App. 1991).

[85] Myers, *supra* note 74, at 5.

[86] Stephen Bainbridge (@PrawfBainbridge), TWITTER (May 17, 2022, 4:48 PM), https://twitter.com/PrawfBainbridge/status/1526713907032641536.

corporate law academics.[87] There are dozens of very prominent and very influential attorneys, judges, and academics acting as advisers to the project.[88] There are 170 ALI members serving as a consultative group.[89] So the project has a lot of inertia and a lot of powerful individuals with a stake in seeing the project come to fruition.

Having said that, however, the time and effort expended to date are sunk costs.[90] Granted, many people are not very good at ignoring sunk costs.[91] Ignoring sunk costs, however, is precisely what rational decision makers ought to do.[92] One way of inducing decision makers to ignore sunk costs is by encouraging them to obey the proverbial adage against throwing good money after bad,[93] which is exactly what the ALI ought to do.

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[87] RESTATEMENT at iv (listing the reporters).

[88] *See id.* at v-vi (listing advisers).

[89] *See id.* at vii-viii (listing members).

[90] "'Sunk costs' . . . are costs that have already been incurred and do not vary with one's subsequent actions." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1144 (2000).)

[91] *See* Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 128 (2007) (noting that "overcoming the sunk cost effect is likely to be an extremely challenging task").

[92] *See* REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGEMENT AND DECISION MAKING 37 (2001) (discussing sunk costs).

[93] *Id.* at 42.