

5-1968

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Recommended Citation

Stanley A. Kaplan, Foreign Corporations and Local Corporate Policy, 21 *Vanderbilt Law Review* 433 (1968)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol21/iss4/2>

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Foreign Corporations and Local Corporate Policy

Stanley A. Kaplan*

Due to competitive pressures from states with comparatively unrestrictive corporation statutes, the corporation acts of most states have become enabling rather than regulatory statutes, designed for greater freedom of incorporation rather than greater investor protection. Professor Kaplan examines the state corporation acts from the point of view of statutory directives and common law conflict of laws doctrine and seeks to answer two main questions: (1) whether the courts of the host state legally and constitutionally may impose its laws upon the internal affairs of foreign corporations; and (2) whether the states have sufficient public policy doctrines underlying their corporation statutes to impose their requirements upon the internal affairs of foreign corporations. The author suggests that it is now appropriate to reconsider the question of federal incorporation.

I. INTRODUCTION: THE PROBLEM

During the past half century, the state corporation statute has in large measure been transformed from a device to control, restrict, and govern the corporations chartered under it into an enabling act granting to enterprisers the relatively unrestricted opportunity to devise the type of entity which they desire. The growing reduction of statutory controls over possible impropriety and financial manipulation under the various state corporation statutes has occurred simultaneously with a markedly inconsistent countermovement. In the 1930's, it was fashionable to blame a large proportion of the nation's economic ills upon the financial improprieties of wicked promoters, speculators, and financiers who were asserted to have engaged in "predatory" trading and to have created securities markets that were largely false and deceptive.¹ Part of these activities were outside the

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1. See generally *Hearings on S. Bes. 97 Before the Comm. on Banking and Currency*, 73d Cong., 1st & 2d Sess. (1934); *Hearings on S. Res. 8456 Before the Comm. on Banking and Currency*, 72d Cong., 2d Sess. (1932); SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES pt. II, at 315-51 (1937); Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities and Exchange Act*, 38 MICH. L. REV. 133 (1939); Note, *Denial of Reorganization Profits On Bonds Purchased By Insiders During Insolvency*, 59 YALE L.J. 151 (1947).

sphere of the normal state corporation statute and were dealt with in state or federal securities acts; however, others were within the area normally handled by state corporation acts. Because of public, political, and academic outcries over the alleged financial chicanery, increasingly stringent controls were placed upon security sales and dealings. Such controls were achieved to some extent through stiffening state securities regulation but primarily pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the administration of these acts by the Securities and Exchange Commission (SEC).

Thus legislative controls over financial misdeeds were imposed largely by measures extrinsic to the state corporation statutes and in a manner parallel to and competitive with them. Concurrently, state corporation statutes, in general, have tended to play a diminishing role in the control of financial impropriety. The regulation of securities matters has expanded through securities legislation and administrative action; corporation acts have simultaneously and antithetically moved toward the enabling act² type, and investor protection thereunder has tended to contract.

This article will not attempt to document the thesis that there are corporate abuses or that an enabling act is less desirable than a regulatory type of statute.³ It is sufficient to assert or presume that there may be internal corporate abuses and that it may be desirable for some states, if they so choose, to have corporation statutes which are more than enabling acts and which limit or regulate specified aspects of corporate conduct. The question of whether it is feasible

2. The following quotation describes the different types of theories underlying corporation statutes, each reflecting ". . . a different conception of the appropriate role the government should play in this area. . . . At one extreme, under the so-called 'enabling act' theory, the privilege of incorporation would be made freely available, with a minimum of special conditions and limitations. Somewhat more restrictive is another theory whose adherents, although essentially persuaded of the social efficacy of enlightened self-interest, favor the interposition of legislative safeguards at critical junctures where experience has indicated that difficulties may arise. Another theory would, by legislative prescription, even more systematically impinge on freedom to contract, not only to protect investors and creditors, but to create and preserve the atmosphere of public confidence so necessary for business prosperity. And, finally, at the other extreme, the proponents of the so-called 'social responsibility' theory urge that corporate power be exercised not primarily for the benefit of investors and creditors, or even customers and employees, but rather for the benefit of the general public." Shimm, *Foreword* to 23 *LAW & CONTEMP. PROB.* at 175 (1958).

3. See, e.g., H. REUSCHLEIN, *THE SCHOOLS OF CORPORATE REFORM* (1950); Emerson, *Vital Weaknesses in the New Virginia Stock Corporation Law and the Model Act*, 42 *VA. L. REV.* 489 (1956); Hartis, *The Model Business Corporation Act—Invitation to Irresponsibility?* 50 *Nw. U.L. REV.* 1 (1955); Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 *LAW & CONTEMP. PROB.* 193 (1958); Latty, *Some General Observations on the New Business Corporation Law of New York*, 11 *BUFFALO L. REV.* 591 (1962); Wright, *Current Developments in Statutory Corporation Law*, 7 *MIAMI L.Q.* 1 (1952).

for a state to maintain a corporation statute which attempts closely to regulate the internal affairs of the corporation is then posed. The answer to such an inquiry is necessarily intertwined with the practices by which corporate charters are issued by the various states and with the federal character of our governmental structure. It is probable that the present characteristic leniency of corporation laws throughout the United States is in significant measure traceable to the ready availability of charters under the permissive statutes of such states as Delaware.⁴ The organizers of a corporation may obtain their charter in any state, without regard to the place where the corporation will conduct its activities or to the residence of the interested parties. Several states have succumbed to the revenue temptations inherent in the process of incorporating and offer charters to all comers on cheap terms with minimal internal restrictions. A race in the competitive laxity of corporation laws has succeeded in attracting to states such as Nevada or Delaware an inordinate proportion of the major corporations in the United States.⁵ Such competition from small states with little business or financial activity of their own has had the effect of inducing states, where commercial activity is heavier, to adopt comparably flexible corporation requirements in order to retain some

4. "A great barrier to the inclusion of strong protective features in any state corporation law long has been the utter futility of such features in face of the ease of evasion by simply incorporating in a state free from controls and then bringing the resulting 'foreign' corporation into the state to do business as a foreign corporation that is regulated, particularly in its internal affairs, by the law of the state of incorporation." Latty, *Some General Observations on the New Business Corporation Law of New York*, 11 BUFFALO L. REV. 591, 609-10 (1962). See also the dissent of Mr. Justice Brandeis in *Liggett Co. v. Lee*, 288 U.S. 517, 557 (1933). See "More Firms Adopt Delaware as Legal Home to Benefit from Liberal Corporation Law," *The Wall Street Journal*, April 16, 1968, at 4.

5. "The logical place to incorporate a corporation is the state within whose borders it will carry on its business. Relatively few small corporations are incorporated outside the state. It is the occasional larger than average business which seeks the most advantageous laws and becomes a foreign corporation. While Delaware ranks only twelfth on the foregoing list of number of incorporations, its significance is much greater because a high percentage of important corporations are formed in Delaware and many businesses which originally were formed elsewhere are subsequently transferred to Delaware when they become successful. Of the approximately 1250 corporations listed on the New York Stock Exchange on January 4, 1965, 433 or 35% were Delaware corporations. The next most popular state was New York with 164 or 13%. New Jersey, which years ago was the most favored state, is now third on the list with 84 or less than 7%. The only other states contributing as much as 5% were Ohio with 72 and Pennsylvania with 66." G. SEWARD, *BASIC CORPORATE PRACTICE* 5 (1966).

According to a letter dated October 3, 1967, from the Secretary of State of Delaware, that state has approximately 50,000 domestic and 1350 foreign corporations registered. This compares with approximately 428,496 domestic stock corporations and 34,320 foreign corporations in the State of New York, 78,909 domestic corporations and 14,543 foreign corporations in Illinois, approximately 200,000 domestic corporations and 50,000 foreign corporations in Pennsylvania and approximately 55,369 domestic and 4,878 foreign corporations in California.

measure of control over the corporate activities of their own citizens. The general corporation laws of many states have been watered down in order to deter local enterprises from the temptation of Delaware incorporation. For example, the Governor of Michigan, in his 1921 message to the Michigan Legislature, stated that it was useless to pass a stringent corporation act because "all of our corporations will come back to us as foreign corporations."⁶ Despite such competition as Michigan's, the ingenuity of the Delaware legislature has out-paced the efforts of other states to provide equal attractions to the organizers of corporations.⁷ Corporations still stream out of states such as Illinois to avoid the requirement of cumulative voting.⁸ Despite the opinion of the Secretary of State of Michigan, expressed in 1934, that "Michigan's new Corporation Code, Act 327, Public Acts of 1931 has given to Michigan corporations practically all the advantages which might be received under incorporation in any outside state," Michigan corporations still move to Delaware. In addition to lower capital stock or franchise taxes in Delaware, other advantages which induce corporate managements to seek incorporation in Delaware include: greater freedom to pay dividends and make distributions; greater ease of charter amendment and less restrictions upon selling assets, mortgaging, leasing, and merging, due to the lower percentage of shareholder approval required and also by virtue of lesser rights of appraisal for dissenting minority shareholders; freedom from mandatory cumulative voting; permission to have staggered boards of directors; lesser pre-emptive rights for shareholders; clearer rights of indemnification for directors and officers; greater freedom of action in many crucial respects for management; and a climate of opinion, thought to be prevalent in the

6. MICHIGAN H.R. JOUR. 37 (1921). See also note 126 *infra*.

7. The attraction of Delaware has usually been attributed to that state's non-restrictive laws, but is perhaps equally explainable by the 'crudeness and backwardness' of the corporation laws of many other states. H. BALLANTINE, CORPORATIONS § 11 (rev. ed. 1946). This statement may have had some validity as of thirty or forty years ago but is without validity today in most states and certainly with respect to the larger financial states.

8. In response to an inquiry, the Corp. Div. of the Office of the Sec. of State of Ill. replied in 1967 that:

A greater portion of large Illinois business corporations have migrated to Delaware many years ago, not only for the reason of cumulative voting, but also for the purpose of issuing non-voting stock.

In a subsequent letter, it was also stated:

It is estimated that approximately 350 Illinois domestic corporations have reincorporated in other states and returned to Illinois as foreign corporations within the past two years. The primary reasons for these moves are the Illinois capital stock tax, provisions of the Illinois statute which require that all shareholders be granted voting rights, and the decisions of the Illinois Supreme Court outlawing staggered boards of directors.

legislature and courts, generally favorable to management and generally unreceptive to the dissident minority shareholder.

In the 1920's and 1930's the growing corporate prominence of states which were granting relatively unrestricted charters was widely denounced. The methods used to attract incorporators by the states which exported charters as business commodities were described as beneath the dignity of the sovereign state and spoken of in terms of "peddling" and the issuing of "robber's licenses."⁹ Gresham's Law was cited, in sad recognition of the fact that the cheap drives out the good. The terms "charter-mongering," "tramp corporation," "pseudo-foreign corporation" and other epithets, which have been used in connection with the foreign incorporation process, are all disapproving. This kind of pejorative rhetoric assumes the existence of a higher degree of public virtue in the larger commercial states of the country. On the other hand, so long as a state has the undoubted right to issue a corporate charter upon such terms as it sees fit and the right to permit an entity so chartered to do business in another state but be governed by the corporation law of the place of incorporation,¹⁰ the legitimacy of such an attitude of moral superiority may be questioned. If the state which does not issue the charter does not have a public policy of sufficient importance or firmness to safeguard and protect its interests in such a situation, then there may be no justification for criticizing chartering activity of the incorporating state, in the face of the other state's disinterest or apathy.

It is the purpose of this article to investigate two areas of inquiry growing out of the problem briefly sketched above: first, whether the non-incorporating state in such a situation can legally and constitutionally take action to govern the internal affairs of a foreign corporation; and second, whether there is a sufficient public policy underlying the corporation statutes to impel a state to enforce its public policy for the purpose of governing the internal affairs of a foreign corporation.

9. For denunciations of the ability to obtain corporate charters where the connection is only nominal, see W. RIPLEY, *MAIN STREET AND WALL STREET* (1927); WORNOWER, *FRANKENSTEIN, INC.* (1930); Address by Charles Terry, President of the Commission on Uniform State Laws, 37 *ABA ANN. REP.* 1044 (1914); 20 *C.J.S. Corporations*, §§ 1793-94 (1940); Church, *The Tramp Corporation*, 64 *ALBANY L.J.* 275 (1902); Foley, *Foreign Corporations*, 6 *ENCYC. OF SOC. SCI.* 354-58 (1931); Jackson, *Unsound Corporation Laws*, *POLITY*, at 9, May 20, 1933.

10. "It is no fraud or evasion of the laws of a State for its citizens, intending to act only in their own State, to form themselves into a corporation under the laws of another State." 2 J. BEALE, *CONFLICT OF LAWS* 775 (1935). For early discussions of a "fraud upon the law" concept in connection with foreign incorporation which is not adopted by the courts, see *State ex rel. Brown Contracting & Building Co. v. Cook*, 181 Mo. 596, 80 S.W. 929 (1904); and *Demarest v. Flack*, 128 N.Y. 205, 28 N.E. 645 (1891).

For the purpose of simplifying references, the state of incorporation will be referred to as the "chartering state" and the state to which the corporation migrates for the purpose of doing business as a foreign corporation will be called the "host state." Unless the context otherwise indicates, all foreign corporations whose activities will be discussed will be assumed to be engaged in intrastate commerce within the host state; the right to engage in interstate commerce within the host state is protected by the commerce clause of the Constitution of the United States and involves different considerations than those which will be dealt with here.¹¹

There are several different types of entities which are included within the broad term "foreign corporation." A host state may have the power to apply its local law to the internal affairs¹² of a corporation which is incorporated in another state by citizens of the host state but which does all its business and has its head office in the host state where all its business life is lived; this type of entity has been termed a "pseudo-foreign corporation."¹³ The host state's powers may be quite different and less extensive if the foreign corporation has its main office and does substantially all of its business in the state where it was incorporated and has no contact with the host state other than conducting a small portion of its business there. Such an entity will, for convenience, be called a "genuine foreign corporation." Another type of entity is a corporation which is incorporated in one state, has its main office in another state and has its business activities scattered widely throughout the country. Its business relationship to the particular host state consists of a branch office from which a small percentage of its total business is done. Its stockholders are widely scattered, and its main office and corporate meetings are outside the host state. A corporation such as this—which shall be termed a "national corporation"—does not have an overriding identification or connection with any particular host state, except possibly the state where its head office is located. The last

11. See generally G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* ch. VII (1918).

12. Although there has been much dispute over the definition of "internal affairs," a widely accepted definition was given by the Maryland Supreme Court: "[w]here the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors . . . then such action is the management of the internal affairs of the corporation. . . ." *North State Copper & Gold Mining Co. v. Field*, 64 Md. 151, 154, 20 A. 1039, 1040 (1885). As used in *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 192, Comment *a* at 126 (Tent. Draft No. 7, as revised 1963): ". . . a corporation's internal affairs are involved whenever the issue concerns the relations *inter se* of the corporation, its stockholders, directors, officers or agents."

13. Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. Rev. 26, 52-53 (1954).

type of corporation is the one which is organized by citizens of two or more states who effect incorporation in one state and then do business in two or three other states. Its ties to the state of incorporation will be limited to the single fact of the issuance of the charter. Its ties to each of the other two or three states will be substantially equivalent, so that the corporation cannot easily be identified with one host state to the exclusion of others. Since this type of corporation cannot readily be said to be seeking its out-of-state charter in order to avoid the laws of a single particular host state, and since it is connected with several host states to a significant extent, it differs factually—and possibly legally—from the “pseudo-foreign corporation” described above. For ease of reference such corporations will be referred to as “quasi-foreign corporations.”¹⁴

The appropriate law to govern the internal affairs of a corporation—what might be called “proper law” of the corporation—has been discussed, with varying degrees of concern and attention, since the corporation became a significant form of business entity. Most of the theoretical discussion has been conducted in the writings of continental theorists. In earlier times, when the word “corporation” primarily denoted a legal entity created by direct and specific royal grant, there was not much question but that the governance of its internal affairs would be determined either by the charter itself or by the sovereign who granted it. The liability of such an entity to third persons, in such a matter as a contract, would be decided by private conflict of laws rules, in the same manner as a contract question where both contracting parties were individuals. But disputes between various participants in the corporate enterprise or between management and the corporation or between management and shareholders would be referred back to the law of the creating state. Comity and respect for sovereignty could dictate no less.

In the 18th and 19th centuries, continental theorists discussed at great length and with much spun-out erudition the question of which law should govern the internal affairs of a corporation.¹⁵ There was also a considerable amount of academic and theoretical American discussion of these questions at an earlier stage in American commercial development, when the nation was in the process of becoming fa-

14. One might question the utility or desirability of adding additional cumbersome terms and spinning new but minor distinctions. This process is believed justified and useful if it lends emphasis to the need for breaking down discussions of foreign corporation matters from the monolithic question of “the” foreign corporation into its different components, so that each type of foreign corporation can be considered upon the basis of its own set of facts and its own constellation of state and private interests.

15. See generally, BADR, *ALIEN CORPORATIONS IN CONFLICTS OF LAWS* (1953); E. RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY*, chs. 18-19 (2d ed 1958); Latty, *Pseudo-Foreign Corporations*, 65 *YALE L.J.* 137, 166 *et seq* (1955).

miliarized with its current pattern of extensive commerce among the states conducted in corporate form.¹⁶ The question of choosing the appropriate law was generally framed in substantially the following fashion: should the controlling law be that of (1) the place of incorporation (even though the entity was merely incorporated there and it did business and was located elsewhere); or (2) the place where it located its "administrative headquarters" (its central executive offices); or (3) the place where it carried on most of its business activities? Suppose a corporation chartered in country A locates its head offices in country B and conducts its business almost entirely in country C. In general, and without recapitulating the refined and elaborate learning on this subject, Britain and the United States would look to country A, the place of incorporation, as the source of the law in governing the internal affairs of a corporation. In the same situation, France and Germany would give consideration to the location of the corporation's head office and the primary place of doing business in order to decide where the administrative center is located and would probably decide upon country B. Much of the discussion in deciding which laws would be controlling with respect to the corporation's internal affairs would be expressed in the rhetoric of determining where the corporation had its domicile. The various legal theories of the different countries involved would each locate the domicile of the corporation at a different situs and would then derive, from the laws of the place in which the domicile was "discovered," the applicable rules.

In general, a simplistic approach to the problem of determining the law applicable to the internal affairs of foreign corporations has characterized American commentary and decisions. The doctrine which selects administrative seat or the primary place of doing business as the commercial domicile (the domiciliary alternative to the state of incorporation) has not made headway in American law. The American approach has almost uniformly equated domicile with the place of incorporation and then derived the governing law from the chartering state. This rationale has eschewed the possibility of a domicile in any state other than the place of incorporation. Though this method had the disadvantage of artificiality, it had the presumably greater merit of simplicity and unity. The earlier American theorists (as typified by Beale) treated the domicile-equals-place-of-incorporation theorem as axiomatic.

Most American courts follow the same approach. In the *Restate-*

16. Henderson, *supra* note 11, at chs. I-II; Rabel, *supra* note 15, at ch. 19. For discussions of the beginnings of the law of foreign corporations see 1 J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF FOREIGN CORPORATIONS*, (1905); Baldwin, *American Business Corporations Before 1786*, 8 AM. HIST. REV. 449 (1903).

ment (Second) of Conflict of Laws, which re-examined and rejected many of the earlier doctrines of Beale and the first *Restatement*, the proper law of a corporation remains substantially the same. Although the present draftsmen are thoroughly aware of the erosion of rigid conflict of laws axioms in contract, torts, divorce and other conflict of law matters, they have concluded that uniformity and certainty dictate that the internal affairs of a corporation should still be governed by the law of the state of incorporation. This concept of a unifying law is somewhat gingerly treated in the *Restatement (Second)*; after defining domicile, the comment states that:

when a domicil is assigned to a corporation, it is always in the state of incorporation. No useful purpose, however, is served by assigning a domicil to a corporation. Most of the uses which the concept of domicil serves for individuals . . . are inapplicable to corporations. . . . But unlike an individual, a corporation has a state of incorporation. This state may tax the corporation, exercise judicial jurisdiction over it and regulate its corporate activities. It is both inaccurate and unnecessary to explain the existence of these powers on the ground that the corporation has its domicil in the state of its incorporation.¹⁷

After disavowing the concept and language of domicile the *Restatement (Second)* enunciates the following rationale with respect to organic structure and internal administration:

The efficient operation of a corporation as an entity, as well as the obvious desirability of affording uniform treatment to directors, officers and stockholders, require that such acts be governed by a single law. It would be impracticable, for example, if the law governing the declaration of a dividend or the funds out of which the dividend can be paid varied according to where the directors happened to meet when they declared it. Acts of this sort are governed by the local law of the state of incorporation.¹⁸

Such matters of internal affairs are, of course, distinguished from the rights and liabilities of a corporation with respect to third persons, which are to be governed by the same law which would have controlled if the particular transaction had involved an individual and not a corporation.¹⁹ The *Restatement (Second)* does, however, note that there is a possibility of a different rule in the case of the pseudo-foreign corporation, with respect to which opinion is withheld; however, the phrasing of the comment suggests disapproval of such a variant.²⁰

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 11, comment *l* at 59 (Proposed Official Draft 1967. See Francis, *The Domicile of a Corporation*, 38 YALE L.J. 335, 357. Compare 3 ALI PROCEEDINGS 226-31 (1925) (comments of W. Cook).

18. RESTATEMENT SECOND OF CONFLICT OF LAWS, § 166a, comment *a* (65 Tent. Draft No. 7, 1962).

19. *Id.* § 166.

20. *Id.* § 166, caveat 1 at 67, reading as follows: "The Institute expresses no opinion whether questions involving the organic structure or internal administration

II. CAN THE HOST STATE IMPOSE DOMESTIC LAW ON FOREIGN CORPORATIONS?

The first conceptual hurdle which had to be overcome with respect to foreign corporations was the metaphysical difficulty of recognizing that a legal entity—an artificial and fictitious being—created by one sovereign state could exist in the territory of another sovereign.²¹ By virtue of various degrees of philosophical esotericism, it soon became established doctrine throughout the United States that corporations chartered by one state could be recognized for purposes of doing business in other states.²²

of a corporation will always be determined in accordance with the local law of the state of incorporation in situations where the corporation is incorporated in one state, but does all, or nearly all, of its business in a second state, and where all, or nearly all, of the corporation's shareholders reside in the second state. In such a situation, the second state is the state of greatest interest. On the other hand, predictability and uniformity of result can best be attained by application of the local law of the state of incorporation in all cases involving the organic structure or internal administration of a corporation. Existing authority does not permit the making of any definite statement as to whether application of the local law of the state where a corporation does all, or nearly all, of its business and where all, or nearly all, of its shareholders reside, is ever justified and, if so, in what circumstances and with respect to what issues."

21. W. MURFREE, *LAW OF FOREIGN CORPORATIONS* 2 (1893): "It was said by Chief Justice Marshall, in a much-quoted opinion, that 'a corporation is an artificial being, invisible, intangible and existing only in contemplation of law.' *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 250, 303 (1819). It follows that, strictly speaking, a corporation can have no legal existence beyond the boundaries of the State from which it receives its charter; for laws, *ex proprio vigore*, have no extra-territorial force."

"It is, however, a principle of the law of nations that, in the absence of any positive rule affirming, denying, or restraining the operation of foreign laws, courts will, through comity, presume the tacit adoption of them by their own government, unless repugnant to its policy and interests. By an application of this rule, the legal existence and corporate capacity of foreign companies are now universally recognized."

See also *Bank of Augusta v. Earle*, 38 U.S. (19 Pet.) 443 (1839); YOUNG, *FOREIGN COMPANIES AND OTHER CORPORATIONS* (1912).

22. On early corporate theory, see generally *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 443 (1839); *cf.*, *Troy & N. C. Mining Co. v. Snow Lumber Co.*, 173 N.C. 593 (1917).

Four cardinal principles "which have had a profound effect upon American legal theory on the subject of foreign corporations" are set forth, with the clarity and succinctness characteristic of this casebook, in E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 1007 (5th ed. 1964). They are:

"(1) A corporation, being a creature of law, cannot exist outside the boundaries of the state of incorporation. (2) Being a creature of law, a corporation can nowhere exercise powers not granted it either by its charter or by the general laws of the state of incorporation. (3) A state is under no obligation to adhere to the doctrine of comity and hence has the power not only to refuse recognition to the foreign corporation but also to prevent the corporation from acting within its territory. . . . (4) The fourth principle, largely complementary to the third, is that a state is under no obligation to accord a foreign corporation the privileges which are enjoyed by its individual citizens."

The magnetism of the state of incorporation and the automatic reference to the sovereignty of the chartering state was, however, so strong that until a few decades ago many courts took the position that a dispute with respect to the internal affairs of a foreign corporation was outside the jurisdiction of any state other than the state of incorporation. Comparatively recently this rigid position of lack of jurisdiction was replaced by the slightly more flexible doctrine that a court should, in its discretion, and as a matter of comity and deference, refuse to entertain such a suit.²³ This refusal to accept jurisdiction over such litigation has now in turn largely given way to acceptance or rejection of jurisdiction over such suits based upon the doctrine of *forum non conveniens*. Most modern courts will probably accept jurisdiction over such a dispute if the balance of convenience indicates that it can conveniently be tried by the forum where the suit is brought.²⁴

Concomitant to the doctrine of recognition by comity of a corporation chartered by another state was the doctrine that a state need not allow foreign corporations to do intrastate business within its borders at all; if a state wants to exclude foreign corporations from its borders entirely, it still may theoretically do so.²⁵ Since a state is considered to have an almost unlimited right to exclude foreign corporations, it is thought to have the corollary right to admit foreign corporations to do business only on such terms as the state might choose; this doctrine, that the greater includes the lesser, has been explored in many decisions and many commentaries.²⁶ This power to impose conditions upon entering foreign corporations was said to be limited only to the extent that the conditions sought to be imposed by the

23. *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933). See generally Note, *Forum Non Conveniens as a Substitute for the Internal Affairs Rule*, 58 COLUM. L. REV. 234 (1958); Note, *Forum Non Conveniens and the Internal Affairs of a Foreign Corporation*, 33 COLUM. L. REV. 492 (1933); Comment, *Internal Affairs Rule in the Federal Courts—The Erie Problem*, 115 U. PA. L. REV. 973 (1967); Comment, *The Internal Affairs Doctrine in State Courts*, 97 U. PA. L. REV. 666 (1949).

24. *Koster v. Lumbermans Mut. Cas. Co.*, 330 U.S. 518 (1947). See *Lonergan v. Crucible Steel Co. of America*, 37 Ill.2d 599, 229 N.E.2d 536 (1967). Comment, *Internal Affairs Rule in the Federal Courts—The Erie Problem*, 115 U. PA. L. REV. 973, 975 (1967).

25. *Railway Express Co. v. Virginia*, 282 U.S. 440 (1931).

26. See Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Henderson, *supra* note 11, ch. VIII; Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929). See also Comment, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1605-09 (1960).

Hale, particularly, points out, with cogent logic, that the ability to exclude a foreign corporation should carry with it the ability to exact a waiver of rights, otherwise granted under the constitution, as a price of admission. He therefore contends that the state's power to exclude a foreign corporation is not absolute, as it is often asserted to be, but, in actuality, the power does not exist in the particular circumstances in which the Supreme Court has held it may not be exerted. Hale, *supra* at 322.

state could not be unconstitutional. The primary example of the unconstitutionality of such a condition would be the attempt to exact, as a condition of entry, a commitment to abandon recourse to the federal courts.²⁷ Sometimes it is said that a state cannot impose the condition that it be allowed to regulate the affairs which the applicant corporation seeks to conduct outside the territory of the state imposing the condition;²⁸ but it may have the ability to do even this if such external control is reasonably calculated to protect a legitimate interest of the state imposing the condition.²⁹ The courts have been concerned, in discussing such conditions, lest the state imposing the condition shall exert its jurisdiction and impose its laws in an extraterritorial manner. This implies that the laws of the state should deal only with transactions within its own territorial borders or a legally permissible juridical extension thereof. "Extraterritoriality" apparently means the application, improperly, of the laws of a state to acts or transactions outside of its borders. The application of a state's laws to an act or a transaction occurring outside the borders of the state but having significant repercussions and reactions within the state and involving interests of an important character within the state are apparently justifiable and consequently, therefore, may not be "extraterritorial." The extent to which the doctrine of unconstitutional conditions currently protects rights of applicant foreign corporations, and the extent to which the host state has a legitimate interest which it may safeguard by appropriate condition have been little explored during the past twenty-five or thirty years. Occasional references, mostly dicta, have suggested that the ability of a state to exclude foreign corporations is virtually unlimited. Moreover, current developments in the general field of conflict of laws, which recognize that a state with significant interest in a matter with multistate associations can constitutionally apply its own law to ensure proper protection of its interests, will probably have the effect of extending the ability of a state to impose conditions upon entering foreign corporations.

Now, let us focus upon the assumed situation of a host state with a public policy concerning the proper fashion of conducting the in-

27. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

28. *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926). *But see Osborn v. Ozlin*, 310 U.S. 53 (1940), which in effect overruled the decision in *Fidelity* without altering the expressed concern over the extraterritorial reach of conditions.

29. *Holmes v. Springfield Fire & Marine Ins. Co.*, 311 U.S. 606 (1940); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, § 172 (1963). *See also* the advocacy of the doctrine of reasonableness as a basis for the sustaining of conditions in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *State v. State Mut. Life Assurance Co.*, 163 Tex. 240, 353 S.W.2d 412 (1962).

ternal administration of a corporation, which it wishes to enforce upon foreign corporations. Suppose the legislature of the state has determined that all foreign corporations seeking to do business within the state must comply with local rules for conducting corporate affairs, in the same manner as required of a domestic corporation. Does the present state of the law permit a state to do so, and if it does, by what means? This could probably be achieved by denying qualification to all foreign corporations seeking to do intrastate business and requiring them to re-incorporate as domestic corporations under the local corporation law. This kind of requirement has been sustained in *Railway Express Agency, Inc. v. Virginia*,³⁰ but there the corporation had a type of public utility responsibility which presumably gave the state a particular justification for exerting unusual levels of control. Whether, in the light of modern commercial affairs and the present free migration of business, such a rule would be broadly sustained as to all foreign corporations has not been tested. It is possible that different results would follow depending upon the nature and character of the corporation, though there is no suggestion in the cases that the principle of the *Railway Express* case is not a broad and general one.

Another device for control over foreign corporations is to demand as a condition of entry that the applicant corporation agree to be bound by specified provisions (with respect to which there is presumably a strong public policy) of the state's domestic corporation act. Although such an imposition of conditions is less pervasive and drastic than the requirement of domestic re-incorporation, it is similarly premised on the assumption that the state has power to exclude a foreign corporation entirely. The prime example of this kind of statutory requirement is set forth in the New York Business Corporation Act,³¹ which requires all foreign corporations of a certain character to be subject to certain specific domestic provisions.

There has been much academic discussion concerning the possibility that the full faith and credit clause of the United States Constitution may require a state to give full faith and credit to the corporation statute of the incorporating state and refrain from applying the law of the host state to matters provided for in the statute pursuant to which the entity was chartered.³² For a time in the 1930's, it appeared that the Supreme Court of the United States might well

30. 282 U.S. 440 (1931).

31. N.Y. BUS. CORP. LAW (McKinney 1963).

32. Latty, *supra* note 15, at 164-66; Baraf, *The Foreign Corporation—A Problem in Choice-of-Law Doctrine*, 33 BROOKLYN L. REV. 219, 240 *et seq* (1967); Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958).

interpret the United States Constitution to be a compulsory unifier of the law of multistate transactions and that the due process and the full faith and credit clauses would be utilized to effect such unification.³³ The passage by Congress in 1948 of the Act, which defined statutes as public records, gave further impetus to the expanding recognition of the full faith and credit clause as a broad mandate. The possibility that the full faith and credit clause might require all states to observe the requirements of the corporation statutes of the chartering state is raised by the decision of the United States Supreme Court in *Order of United Commercial Travelers of America v. Wolfe*.³⁴ In that case an insurance contract, entered into in North Dakota by an insured who was a member of a fraternal organization chartered in Ohio, sought to apply the law of the State of North Dakota to nullify a short contractual period of limitations for asserting claims; this period, invalid under North Dakota law, was permitted under the law of Ohio. The Supreme Court upheld the shorter period contained in the insurance policy, on the ground that the full faith and credit clause required that recognition be given to the law of Ohio (the state of incorporation) on such matters. The Court felt that it was necessary that one central law be uniformly applied in connection with such intimate relationships as were involved in a fraternal benefit society. The notion that there is in reality a close relationship between individuals who join and become insured in any of the large fraternal benefit societies and that such relationship is any more intimate or less commercial than the relationship of policy holders in any other major mutual life insurance society is probably specious. The precedent set by the *Wolfe* case could be made applicable, upon similar reasoning concerning the necessity of unity, to ordinary commercial stock corporations as well as incorporated fraternal benefit societies.³⁵

Recent developments in the field of conflict of laws have rendered the precedent value of the *Wolfe* case highly dubious, even with respect to fraternal benefit societies. Even if *Wolfe* is still good law in the narrow situation in which it was promulgated, it is highly unlikely that it will be extended to general business corporations.³⁶ Moreover,

33. See Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953).

34. 331 U.S. 586 (1947). See also *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915).

35. See dissent of Mr. Justice Black in *Order of United Commercial Travellers of America v. Wolfe*, 331 U.S. 586, 641 (1947). But see remarks of Baraf, *supra* note 32, at 244, asserting that distinction between the corporation and the fraternal benefit society is an easy one.

36. In *Clay v. Sun Ins. Office*, 377 U.S. 179 (1964), the Court rejected the *Wolfe* case doctrine in a commercial stock company insurance case. It should also be noted

even if it were held that the full faith and credit clause is applicable to the corporation statute of the state of incorporation, it is doubtful whether such a holding in itself would have the effect of inhibiting another state, which has a valid and substantial interest to safeguard, from applying its own rule of law, even if contrary to that of the incorporating state. The long line of Supreme Court cases in the field of workmen's compensation³⁷ has made it clear that, even in a situation where an employment relationship would customarily be governed by the workmen's compensation act of the state where the employment contract was entered into, the full faith and credit clause does not require that statute to be followed by a state which has a substantial interest in the transaction and seeks to apply its own law. Similarly, it seems reasonably clear that the full faith and credit clause does not bar a state, which has a substantial connection with a foreign corporation, from applying its law to the internal affairs of a foreign corporation in the manner, for example, set forth in Chapter 13 of the New York Business Corporation Act of 1961.

Supreme Court doctrine, with respect to the necessity of a substantial interest in the transaction, raises the question of whether the full faith and credit clause might allow a state to apply its law to the internal affairs of some foreign corporations but not to certain other corporations. If the rationale circumscribing the impact of the full faith and credit clause is predicated upon the nature of the state's connection with the transaction, then the significance and weight of the interest of the host state would have to be demonstrated in order to justify the application of its law to the internal affairs of a foreign corporation. If that were the case, the host state might be able to apply its local law, notwithstanding the full faith and credit clause, to the pseudo-foreign corporation or the quasi-foreign corporation, but probably not in the case of the genuine foreign corporation or the national corporation. If, however, the full faith and credit clause is not applicable to enforce observance of a foreign corporation statute or the charter of a foreign corporation—as would appear to be the situation in the light of the inapplicability of the *Wolfe* doctrine—then the host state can apply its domestic law to foreign cor-

that the *Wolfe* case, like all five-to-four decisions, rests on a somewhat precarious foundation. See *Order of Commercial Travellers of America v. Duncan*, 221 F.2d 703 (6th Cir. 1955); *Cheatham*, *supra* note 33, at 601. Compare *Broderick v. Rosner*, 294 U.S. 629 (1935), with *Converse v. Hamilton*, 224 U.S. 243 (1912) which require a state to give full faith and credit to administrative or judicial determinations by the state of incorporation of assessments of liability of shareholders.

37. *Carroll v. Lanza*, 349 U.S. 408 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm. of Calif.*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

porations as a condition to entry, in such manner and to such extent as it chooses. It should be noted that the New York Corporation Act in effect prior to 1963 (when the present statute became effective) made certain specified provisions of the corporation act applicable to all foreign corporations, without exception and without regard to the nature of the corporation's New York activities.³⁸

The present New York statute avoids any uncertainty concerning its application by virtue of its built-in definition of a sufficient New York interest. The statute is applicable by its terms only to corporations which do fifty per cent or more of their business within the State of New York, and then only if the corporation's securities are not listed on a national securities exchange. These specifications for the applicability of New York rules to a foreign corporation discriminate between different kinds of foreign corporations in a manner somewhat similar to the differentiation inherent in the four categories of foreign corporations heretofore described. The requirement of a percentage of business in the State of New York makes it clear that local law will not be applied to a corporation unless it has significant operations within the state, thus eliminating from local control the genuine foreign corporation. The provision that the New York law will not apply if the corporation's stock is listed on a national securities exchange withholds local control from corporations which, by that criterion, are deemed national in character (apparently on the theory that corporations whose securities are so listed have a wide dispersion of shareholders and a meaningful multistate character). Theoretically, it would be possible to have a pseudo-foreign corporation, incorporated outside of New York, doing all of its business in New York, with all of its stockholders resident there, but listed on a national securities exchange, which is free from the requirement of observing the New York Corporation Act.³⁹ The significance of the New York Act is that it prescribes specific criteria to measure

38. For comparable statutes imposing upon directors of foreign corporations the same duties as are required of directors of domestic corporations, see ARIZ. REV. STAT. §§ 10-196, 10-197 (1956); MASS. ANN. LAWS, ch. 181, § 14 (1955); MICH. STAT. ANN. § 21.95 (1963).

For a discussion of the abortive concept of the "domiciled foreign corporation" which was included in the New York Business Corporation Act of 1961 and then removed by amendment before it became effective, see Comment, *Domestic Regulation of Foreign Corporations*, 47 CORNELL L.Q. 273 (1962).

39. Even those provisions of the New York Act relating to foreign corporations can be avoided by organizing the main corporation as a Delaware entity and having the New York enterprise carried on by a New York subsidiary of the Delaware corporation holding company. The proposed but abortive North Carolina provision relating to pseudo-foreign corporations sought to close this loophole. See N.C. Sess. Laws 1955, ch 55, §§ 135-36; Latty, *Some General Observations on the New Business Corporation Law of New York*, 11 BUFFALO L.J. 591, 610 (1962).

the interest of the state, as a condition to applying local law to the internal affairs or a foreign corporation. Whether the criteria selected by New York are as broad or as comprehensive as they might constitutionally be is unlikely. Another state, following the same theory of defining the area in which it desires to have its local policy applied, might select other criteria, thereby embracing different categories of foreign corporations. Interestingly enough, the New York statute imposing its domestic law upon foreign corporations never seems to have been challenged upon constitutional grounds.

Another difficult question remains. In the absence of express statutory directive, can the host state apply its own domestic law to govern the internal affairs of a foreign corporation as a matter of conflict of laws doctrine?⁴⁰ Seldom will the legislature of the forum specify whether, for example, the tort law of the forum should be applicable to a tort taking place in another state; the question of whether the local law should be so applied is determined by a court in accordance with the forum's conflict of laws doctrine. The court will determine the "proper law of the tort." If the court followed the first *Restatement*, the applicable rule would be derived from the tort law of the place of the accident. If it followed more modern doctrine, it would analyze the factual situation before deciding whether the law of the place of the accident or the law of the forum or the law of some other state should apply. The ultimate decision will depend upon the "preponderance of contacts" in the transaction or its "center of gravity" or the character, distribution and relative importance of the connections with and the interests of the various states involved in the multistate situation. For some particular purposes and with respect to certain parties involved in such an accident, the law of the state of the accident might apply; for other purposes and other parties the law of the state of the forum might apply. All decisions in such an action would be made on the basis of varying and diverse criteria, depending upon the particular judge and the school of thought which he might follow. A common factor present in all such instances would be the flexibility available to the judge in selecting the proper law for the particular transaction; if the modern judge does not select the law of a state which has no substantial contact whatsoever with the transaction, beyond being the forum state (as in *Home Insurance Company v. Dick*⁴¹), he is probably not consti-

40. For an interesting study of time conflicts, and some analogies to territorial conflicts, in the law of corporations, see McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 16, 20 (1967).

41. 281 U.S. 397 (1930). See also *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914).

tutionally inhibited from selecting any law that he chooses. And it is not even certain that the limiting doctrine of *Home Insurance Company v. Dick* has not itself been eroded.⁴²

If this flexibility exists in the selection of the proper law of a tort (and also of the proper law of contract, workmen's compensation, etc.), then one might question whether a similar flexibility should not also be possible, as a matter of choice of law doctrine, in a dispute involving the internal affairs of a foreign corporation. The usual holding in cases involving the internal affairs of a foreign corporation applies the law of the state of incorporation, without even questioning its necessity or desirability. It should not be inappropriate to inquire whether the law governing corporate conduct should be determined by the same processes of judgment and selection used in other questions of conflict of laws and to examine the possibility that the law of the forum might be applied to internal corporate disputes under certain circumstances. It may well be that the practical considerations pressing toward unity of rule are so essential in the corporate situation that the court of a host state should be unwilling to impose its own law and should instead select the law of the state of incorporation. Whether such a determination is mandatory is a separate question. However, practicability and unity of rule are usually merely factors which should bear upon the appropriateness of the selection of law; the fact that they may turn out to be decisive should not preclude a court from considering the subject. It would be logically compelling, for example, to have the measure of damages for all persons killed in the same airplane crash to be the same; however, under the doctrine of the *Kilberg*,⁴³ *Pearson*,⁴⁴ and *Van Dusen*⁴⁵ cases, it has been determined to be permissible, as a matter of conflict of laws doctrine to have such a damage rule vary with different factors of forum, residence, place of purchase of ticket, and the like. If the proper law of a tort, a contract, marriage, support, custody, and divorce can in many respects be fractionalized and diverse, must the law governing the internal affairs of a corporation be inexorably the same, regardless of where the corporation is acting, what the particular dispute entails, and what the respective interests of the states involved may be?

Probably the leading decision on the question of applying the law of the host state to the internal affairs of a foreign corporation is

42. See *Clay v. Sun Ins. Office*, 377 U.S. 179 (1964).

43. *Kilberg v. Northeast Airlines Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

44. *Pearson v. Northeast Airlines Inc.*, 309 F.2d 553 (2d cir. (1962), *cert. denied*, 372 U.S. 912 (1963).

45. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

German-American Coffee Company v. Diehl,⁴⁶ in which the court held that the New York statutory provision forbidding payment of dividends out of capital could be enforced against directors of a solvent New Jersey corporation at the instance of a stockholder in a derivative suit. The New Jersey statute also forbade payment of dividends under these circumstances but it vested the remedy in the company's stockholders and not in the corporation itself. Judge Cardozo, speaking for the court of appeals, took the position that the offense involved was in violation of the provisions of the New York statute, which created new duties and new rights. He stated:

A foreign corporation not engaged in interstate commerce may be excluded altogether. [*Phoenix Mutual Life Ins. Co. v. McMaster*, 237 U.S. 63]; if admitted, it may be subjected to conditions. . . . In these days, when countless corporations, organized on paper in neighboring states, live and move and have their being in New York, a sound public policy demands that our legislature be invested with this measure of control.⁴⁷

Although the dividend under attack in the case was improper under the laws of both New York and New Jersey, the New Jersey law would not have permitted a derivative action in connection with this dividend; this fact gives additional force to Judge Cardozo's statement that the right sued upon was founded upon New York law, rather than the law of the state of incorporation.

This case does not involve a common law choice of conflicts rules; furthermore, the result can be, in part, justified on the ground that New York creditors were supposedly protected by this statutory provision which required corporations to maintain their capital unimpaired for the protection of creditors. It could thus be contended that this intervention really involved the protection of outside third parties. The rationale of the decision would therefore not necessarily extend to justify application of New York law to a foreign corporation either in the absence of express statutory provision or to an internal dispute in which the rights of creditors were not involved. It is interesting, in this latter context, to note that the draftsmen of the current New York Business Corporation Act did not feel inhibited in their application of New York law to foreign corporations by any assumed need to protect an outside third party's interest. The New York statute applies explicitly to matters involving only shareholders and not creditors or other third parties as, for example, in connection with (a) the right of stockholders to inspect corporate records, (b) the obligation to disclose information to shareholders, (c) the procedure to enforce a shareholder's right to receive payment for shares, or (d)

46. 216 N.Y. 57, 109 N.E. 875 (1915).

47. 216 N.Y. 57, 64, 109 N.E. 875, 877 (1915).

the provision for indemnification of officers and directors. It should also be noted that the German-American Coffee Company was not so entirely connected with New York and so minimally connected with New Jersey that it would fall in the pseudo-foreign corporation category.

A situation involving the application of the New York prohibition against the payment of dividends out of capital came up for consideration in *International Ticket Scale Corp. v. United States*,⁴⁸ where, unlike the *German-American Coffee Company* case, such a payment was permitted by the state of incorporation. The court, in passing upon the availability of a credit for the purposes of the tax on undistributed profits, held that the New York statute prohibited such a dividend because the statute applied "to foreign corporations the same prohibitions against unauthorized dividends that were imposed upon domestic corporations."⁴⁹ The Court of Appeals therefore reversed the district court which had "rested its decision merely on a reference to 'the reasoning' of *Borg v. International Silver Co.* . . . where the court thought the Diehl principle applicable only when the dividends were also unlawful under the laws of the state of incorporation."⁵⁰

A later case which grapples with the choice of law problems more directly is *Mansfield Hardwood Lumber Company v. Johnson*,⁵¹ in which a shareholder in a Delaware corporation brought a derivative action for rescission of the sale of stock to his corporation. He alleged a fraudulent conspiracy to acquire the stock and to liquidate the corporate assets at an inordinate profit to the remaining stockholders, following the purchase of the minority shares. The court stated that Delaware, the state of incorporation, imposed no fiduciary duty on the part of officers and directors or majority shareholders in buying stock from other shareholders. Despite the general rule which looks to the law of the state of incorporation to determine obligations between officers, directors, and shareholders, the court applied Louisiana law, stating that:

When, however, the situation is such as here, where neither the charter nor the statutory laws of the incorporating state are applicable, and *all* contact points are in the forum, we believe that the laws of the forum should govern.⁵²

The only direct precedent cited by the *Mansfield* court was *Blazer*

48. 165 F.2d 358 (2d Cir., 1948).

49. *Id.* at 359.

50. *Id.*

51. 268 F.2d 317 (5th Cir. 1959).

52. *Id.* at 321.

v. Black,⁵³ in which a former stockholder of a dissolved corporation sued its former president for damages, charging fraudulent conversion of the plaintiff's stock prior to dissolution. The corporation was chartered in Illinois but all other contacts were in Kansas. The court held that the Kansas law governed and imposed a fiduciary duty upon the director, without even discussing the law of Illinois. Both the *Mansfield* and the *Blazer* cases involved pseudo-foreign corporations and the imposition of liability in situations where liability under the law of the host state would not result in any serious conflict with procedure prescribed by the statute of the incorporating state and where there was no problem of double liability.⁵⁴

An especially significant recent decision on this subject is *Western Airlines, Inc. v. Sobieski*.⁵⁵ Western Airlines originally had been a California corporation; in 1929, by exchanging shares with a Delaware corporation created for that purpose, it re-incorporated in Delaware. In 1956, the Delaware corporation sought to amend its charter to eliminate cumulative voting. The California Corporations Commissioner took the position that this alteration of the rights of the common stockholders constituted a sale of new stock in exchange for the old stock under the Corporate Securities Law (even though no exchange of certificates was contemplated) and that such a sale necessitated the issuance of a permit under the Corporations Code. Western then applied for a permit, which the Commissioner denied on the ground that the proposed change was inequitable and unfair. The findings made in the hearings included the fact that Western's business in California was of a substantial nature and that California residents were the holders of about fifty per cent⁵⁶ of Western's outstanding shares. Western argued that:

53. 196 F.2d 139 (10th Cir. 1952).

54. The court in the *Mansfield* case stated: "[W]hat has been said concerning the choice of laws to determine the duty owed by officers, directors, or majority stockholders to the minority stockholders may not be necessary for the disposition of this case. That is true because, as will be seen, the broad scope of fraud in Louisiana covers situations where the law imposes an obligation on the party with superior knowledge to disclose facts within his knowledge to the other and to deal in an atmosphere of trust and confidence." 268 F.2d 317, 322 (5th Cir. 1959).

Consequently, it might be argued that the statement in the *Mansfield* case concerning choice of law is dictum and that the case involves what Professor Currie calls "a false conflict."

55. 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961). For later decisions in the same chain of litigation, see *Western Airlines, Inc. v. Schutzbank*, 258 Cal. App. 2d 291, 66 Cal. Rptr. 293 (1968), and *People v. Western Airlines, Inc.*, 258 Cal. App. 2d 286, 66 Cal. Rptr. 316 (1968).

56. The precise percentage of California shareholders is not shown. Approximately fifty per cent of the shares were held in brokers' names. Of the fifty per cent held in individual names, about half were owned by Californians. The Commissioner therefore assumed that a like percentage applied to the ownership of the securities held in

(1) the filing of the charter amendment in Delaware was the last act to effect the change in voting rights contemplated by the charter amendment and that any issuance of shares affected thereby took place outside California; and (2) the action of the Commissioner was extraterritorial and beyond the jurisdiction of the Commissioner and of the State of California. The court upheld the Commissioner's action, stating, in part:

It would appear that the provisions of the Corporate Securities Act here before us are a proper exercise of legislative discretion in requiring that corporate dealings with residents of this state be authorized by the Commissioner of Corporations, particularly where such corporation does a substantial amount of business within the state, and the act is not violative of the constitutional clauses of equal protection, contract, due process and full faith and credit if such legislative enactments operate equally upon such foreign corporations and domestic corporations in this state.⁵⁷

Western's additional contention of unfair classification was rejected by the court:

Western complains that the commissioner, since the institution of this action, has created a new class of foreign corporation called a pseudo-foreign corporation, and urges that such definition of such corporation is mere fiat; that the commissioner has usurped the function of Legislature which has seen fit to divide corporations into only two classes—domestic and foreign; and that the commissioner has seen fit by his arbitrary definitions to create a third. Western's position in this respect is not well taken. The commissioner did not create any new class of corporation. He merely named a class of corporations which has, in effect, existed for many years, one with its technical domicile outside of this state but one which exercises most of its corporate vitality within this state. Unless it can be said that the Corporation Commissioner's characterization of such corporation as 'pseudo-foreign' is arbitrary, it would appear to be a matter well within his administrative discretion. The concept of a pseudo-foreign corporation as defined by the commissioner and the well established concept of 'commercial domicile' of a corporation appear to us to be founded upon reality.⁵⁸

The court did not even cite the earlier cases of *Pinney v. Nelson*⁵⁹ and *Thomas v. Mathiessen*,⁶⁰ sustaining the imposition of personal liability upon shareholders of foreign corporations pursuant to California statute, despite the fact that the shareholders were protected against such liability by the law of the state of incorporation. These cases, unlike the *Western Airlines* case but somewhat like the *German-American Coffee Company* case involved relationships between the

brokers' names. On that assumption, approximately fifty per cent of all shares would be beneficially owned by California residents.

57. 191 Cal. App. 2d 399, 411, 12 Cal. Rptr. 719, 727 (1961).

58. *Id.* at 412, 12 Cal. Rptr. at 727.

59. 183 U.S. 144 (1901).

60. 232 U.S. 221 (1914).

corporation and creditors, rather than internal relationships of participants in the corporate enterprise.

The only case relied upon by the court in the *Western Airlines* case was *State ex rel. Weede v. Iowa Southern Utilities Company*.⁶¹ There an Iowa shareholder in a Delaware corporation claimed that a proposed recapitalization of the corporation was unfair and inequitable. The enterprise was initially incorporated in Maine, where it did business for seven years, after which it reincorporated in Delaware; thereupon it qualified as a foreign corporation in Iowa, where all of its property and business was located at the time of litigation. The Iowa Supreme Court proceeded to judge the matter in accordance with Iowa doctrine, citing only *German-American Coffee Company v. Diehl*⁶² and stating:

Neither justice nor the practical necessities of the modern business world can lend a sympathetic ear to the claim of a foreign corporation, with all its business in Iowa—plants, records, officers, etc.—that under its articles issued to it by the authority of the foreign state, it can come into our state and violate its statutory requirements.⁶³

The *Weede* case is not a holding on strict common law choice of law but may, like *German-American Coffee Company*, be an application of choice of law required by the Iowa statute, which expressly applied to foreign corporations engaged in utility activities. Similarly, *Western Airlines* may not be a common law choice of law case of any significant precedential value because of the unique character of California law. "Sale" is so broadly defined in the California Corporate Securities Law that it can include almost any modification of the rights of California shareholders, at least by charter amendment. Other state securities laws do not have so broad a reach. It is interesting to note that in California the Corporations Code and the Corporate Securities Law are both administered by the Corporations Commissioner. In most states the corporation statute and the securities or blue-sky laws are separate, and separately administered. Theoretically, California's broad definition of sale may also extend to other kinds of actions altering the rights of shareholders by means other than charter amendments. Rights of shareholders could, for example, be affected substantially by a provision in a contract or indenture restricting payment of dividends. Caution and administrative practice have led many attorneys to seek permits from the

61. 231 Iowa 784, 2 N.W.2d 372 (1942), *affd. sub. nom.* *State ex rel Weede v. Bechtel*, 239 Iowa 1298, 31 N.W.2d 853 (1948), *cert. denied, sub. nom.* *Bechtel v. Thatcher*, 337 U.S. 918 (1949).

62. 216 N.Y. 57, 109 N.E. 875 (1915).

63. *State ex rel. Weede v. Bechtel*, 239 Iowa 1298, 1320-21, 31 N.W.2d 853, 865 (1948), *cert. denied, sub. nom.* *Bechtel v. Thatcher*, 337 U.S. 918 (1949).

California Commissioner even in such situations.⁶⁴ The rationale of the Corporation Commissioner in the *Western Airlines* case could even be extended to control charter amendments of a large corporation with only a few shareholders in California; any charter amendment constitutes a sale, and there is no exemption in California for sales to a small number of persons.

The Corporation Commissioner in *Western Airlines* regarded Western as a pseudo-foreign corporation. By the definitions hereinabove used, Western would be a quasi-foreign corporation, not a pseudo-foreign corporation. It was incorporated in Delaware, had about fifty per cent of its shares in the hands of non-California owners, and did a substantial portion of its business outside the State of California; it was not—like the corporations involved in the *Mansfield* and the *Blazer* cases—totally connected with the host state, except for the formality of incorporation. It may also be noted in passing that were Western to be measured by the criteria of the New York Business Corporation Act, it would have been exempted from the application of that Act because Western's securities are listed on a national securities exchange. The *Western Airlines* case enunciates its doctrine in terms of pseudo-foreign corporations only, but then applies it to a quasi-foreign corporation. Literally, the Corporate Securities Law would bring charter amendments by all corporations within the jurisdiction of the California Corporations Commissioner. Whether California courts would hold that the Corporations Commissioner had the same jurisdiction under the terms of California statutes if a national corporation or a genuine foreign corporation were involved is uncertain. Whether they would hold that an exercise of such jurisdiction, even if specifically conferred upon the California Corporations Commissioner, is appropriate as a matter of conflict of laws or is

64. Small, *Changes in Rights, Preferences, Privileges and Restrictions on Outstanding Securities Under the California Corporate Securities Law*, 14 *HASTINGS L.J.* 94, 104 *et. seq.* (1962). See also Dahlquist, *Regulation and Civil Liability Under the California Corporate Securities Act: II*, 34 *CALIF. L. REV.* 344, 350 (1946). The proposed California Corporate Securities Law of 1968, now under consideration, contemplates rather sweeping revision of the California statute. In connection with the problem of pseudo-foreign corporations, the proposed law provides an exemption from the need for an issuer incorporated outside of California to obtain a California permit in connection with recapitalization or reorganization "unless a certain percentage of California shareholders have California addresses of record. In the case of a recapitalization, 25 per cent of the outstanding shares 'directly or indirectly affected substantially and adversely by such' recapitalization must have record addresses in California [§ 25103(b)]. As to a reorganization, exemption is provided unless at least 25 per cent of the investors who will receive shares have California residence addresses [§ 25103(c)]. Excluded from the calculation of the total class to which the 25 per cent is to be applied are securities held of record by brokers-dealers and securities controlled by one person who controls 50 per cent or more of the applicable class." Sterling, *California Corporate Securities Law of 1968*, 23 *BUS. LAW.* 645, 651 (1968).

permissible as a matter of constitutional law remains undecided.⁶⁵

The courts in a number of jurisdictions, even without clear statutory mandate, have held that domestic corporation law should be applied to require a foreign corporation doing business within the state to make the corporate books and records available to a stockholder for inspection, even though such a right would not have been granted under the law of the state of incorporation.⁶⁶ To say, however, that a suit by a stockholder against the corporation or against its officers and directors to make available corporate records does not involve the internal affairs of a foreign corporation is plainly not true. By any reasonable definition of internal affairs, a dispute between the shareholders and the entity or its management, in the vital preliminary skirmish before the battle for eventual control, is not only central to the affairs of the corporation but can in no way be said to be a non-internal matter; it is between persons entirely within the corporate structure, and does not involve the rights of third parties against the corporation. It can, of course, be argued that this type of dispute, though involving the internal affairs of the corporation, is of the sort in which the corporate operation will not be upset or obstructed even if the host state requires exhibiting records to shareholders. This analysis of these cases would admit that the internal affairs of a foreign corporation are involved but would deny that this type of dispute would cause difficulty if local law of the host state were applied. Whatever the rationale, the result is that in such suits the courts have not been reluctant to apply domestic law, even though it may involve the internal affairs of a foreign corporation.

One of the most recent cases involving such a problem is *McCormick v. Statler Hotels Delaware Corp.*,⁶⁷ in which an Illinois stockholder

65. A very interesting recent case impinging upon the problem of the role of the full faith and credit clause with respect to the application of the forum's law to a dispute involving the internal affairs of a foreign corporation and with respect to the choice of law problems is *O'Brien v. Virginia-Carolina Chem. Corp.*, 44 N.J. 25, 206 A.2d 878 (1965) and its counterpart case under the name of *O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 152 S.E.2d 278 (1967). The two cases are commented upon at length in Gibson & Freeman, *A Decade of the Model Business Corporation Act in Virginia*, 53 VA. L. REV. 1396, 1405 *et seq* (1967).

66. These cases often state that this type of dispute is either not a matter of the internal affairs of a foreign corporation or the type of internal affairs matter which can properly be handled in the courts of a state which did not issue the charter. FLETCHER, 17 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed. 1967) § 2229. See *Loveman v. Tutwiler Inv. Co.*, 240 Ala. 424, 199 So. 854 (1941); *McCormick v. Statler Hotel Delaware Corp.*, 30 Ill. 2d 86, 195 N.E.2d 172 (1963); *State v. Sterns Tire & Tube Co.*, 202 S.W. 459 (Mo. App. 1918); *Donna v. Abbotts Dairies, Inc.*, 399 Pa. 497, 161 A.2d 13 (1960); *cf. Toklan Royalty Corp. v. Tiffany*, 93 Okla. 120, 122, 141 P.2d 571, 573 (1943), in which the Oklahoma court said that the foreign corporation "is not, strictly speaking, a foreign corporation with respect to the question of examination and inspection of its books and records by its stockholders."

67. 30 Ill. 2d 86, 195 N.E.2d 172 (1963), and 55 Ill. App. 2d 21 (1963).

of a Delaware corporation brought action in Illinois against the corporation and its secretary to compel them to permit examination of the stockholders list and to recover the Illinois statutory penalty of ten per cent of the value of his stock for unjustified refusal to permit him to inspect corporate records. The court mentioned, but did not emphasize, that the secretary was a resident of Illinois.⁶⁸ The court did not refer to the percentage of the defendant's business done within Illinois, or to the number of hotels which it owned in the state, or to the relative weight of the connections between the corporation and any of the various states in which it did business. The case was appealed from the trial court directly to the Illinois Supreme Court on constitutional grounds; that court transferred the case back to the appellate court upon finding that no substantial constitutional issue was presented. The appellate court held for the plaintiff on the ground that the Illinois Business Corporation Act applied and stated that this type of dispute did not involve the internal affairs of the corporation. The court brushed aside the contention that such a holding would constitute interference in the internal affairs of a foreign corporation contrary to section 102 of the Illinois Business Corporation Act which states *inter alia*: "Nothing in this Act contained shall be construed to authorize this state to regulate the organization or the internal affairs of such [foreign] corporation." Upon the initial appeal to the Illinois Supreme Court, that court had stated:

It is uncontrovertible that the legislature may prescribe reasonable conditions on which foreign corporations, other than those engaged in interstate commerce or constituting instrumentalities of the Federal government, may do business in the State . . . and it has been repeatedly held that the qualification of a foreign corporation in accordance with the statutes permitting its entry into a State constitutes an assent on its part to all reasonable conditions imposed.⁶⁹

A subsequent decision by the Supreme Court of Illinois, *Loneragan v. Crucible Steel Co. of America*,⁷⁰ deals with a series of related matters in a more sophisticated fashion than the *McCormick* case. A derivative action had been brought in Illinois by four shareholders of the corporation, two of whom were Illinois residents, alleging that the president had entered into a conspiracy with a California financier to arrange for the merger of Crucible into another corporation in return for an agreement whereby the president would be retained in office at an increased salary. The complaint also sought to restrain the use of allegedly deficient proxy material, and to prevent

68. Statler Hotels Delaware Corporation was a national corporation chartered in Delaware, and not a pseudo-foreign corporation or a quasi-foreign corporation.

69. 30 Ill. 2d 86, 88, 195 N.E.2d 172, 173 (1963).

70. 37 Ill. 2d 599, 229 N.E.2d 536 (1967).

some forty-six individual defendants from acquiring additional shares of stock of Crucible and from voting the shares they had already acquired. The Illinois Supreme Court, in a four to three decision, stated that the question was one not of jurisdiction but of *forum non conveniens* and that there was no other forum which was more convenient to all concerned than Illinois. Jurisdiction was therefore retained. The court stated:

In early cases the acceptance or denial of jurisdiction of derivative actions against foreign corporations turned on what the courts determined was or was not interference with the internal affairs of the corporation. . . . We feel that the acceptance or denial of jurisdiction of such actions should be decided under the doctrine of *forum non conveniens* and that interference with the internal affairs of a foreign corporation is only one factor in determining whether an Illinois court would serve the convenience of the parties and the ends of justice.⁷¹

There was a strong dissent, written by Justice Schaefer, contending that the balance of convenience indicated that Illinois should refrain from entertaining jurisdiction of such a case. The dissent stated that, with the exception of the fact that two Illinois plaintiffs had recently bought stock in Crucible, Illinois had:

no connection with this case. Crucible is a New Jersey corporation. Its principal offices and manufacturing facilities are in Pennsylvania, and its stockholders meetings are required to be held either in New Jersey or in Pennsylvania. Its connections with Illinois, measured in terms of percentage of total sales, total assets and total employees located there, are minimal. None of the conduct of which the plaintiffs complained took place in Illinois.⁷²

He goes on to say that "Illinois law will govern the rights of the parties only to the extent that its doctrines of conflicts of laws may be involved."⁷³

The majority did not discuss the question of which law should apply and concerned itself merely with the question of jurisdiction. Justice Schaefer's comment concerning application of Illinois law may mean merely that its conflict of laws doctrines will point to Delaware for the governing law; it may also indicate that there is some flexibility as to whether Illinois law may apply in such a dispute, as distinguished from the mechanical application of the law of the state of incorporation.⁷⁴

71. *Id.* at 605, 229 N.E.2d at 539.

72. *Id.* at 613, 229 N.E.2d at 543.

73. *Id.*

74. Another exercise of power over foreign corporations by host states occurs in connection with extension of the corporate life of the entity after its dissolution by the chartering state. Some states, by statute, subject dissolved foreign corporations to

In summary, it appears that an interested host state is not bound by the full faith and credit clause to apply the corporation statute of a chartering state and that the due process clause would not prevent the application of the local law. There is apparently no constitutional barrier presently raised against such action by the host state; it also appears within the power of the host state to impose conditions of entry which require that the foreign corporation be bound by specified statutory requirements concerning the internal affairs of the corporation. It also appears that the host state has the power—if it wishes to employ it—to apply its local law to the internal affairs of a foreign corporation with substantial activities within the state through application of choice-of-law principles. There is a paucity of cases which support this choice-of-law power, and these cases usually do so only with respect to pseudo-foreign corporations. However, these appear to be no jurisdictional or constitutional obstacles to such a non-statutory choice of law determination. A host state could probably also adopt the broad doctrine of commercial domicile, analogous to that of the European legal systems, if it chose to do so, so far as constitutional power is concerned.

III. PUBLIC POLICY OF THE HOST STATE

The question of the desirability and propriety of application of the law of the host state to a dispute involving a foreign corporation's internal affairs is a quite different question from that of its ability to do so. The decision concerning propriety and desirability rests fundamentally upon considerations of expediency and public policy; the latter is based upon the host state's conception of public order, its evaluation of the importance of its own solution of the problem under consideration, and the nature of state interests involved.

The concept of public policy in American conflict of laws—as between the various states of the union—has been minimized as an “affectation of superior virtue,” between jurisdictions with fundamentally homogeneous standards of conduct. The usefulness of the public policy concept has been frequently doubted and often condemned as the product of slovenly thinking and as an unacceptable

suit pursuant to the rules of the host state; such requirements are usually imposed as a condition to entering and doing business within the host state. Thus, says EHRENZWEIG, *CONFLICT OF LAWS* 68-69 (1959): “The breakdown of the original, allegedly analytical, rule of ‘nonexistence’ in conflicts cases is moreover shown by the fact that a ‘public policy’ of the forum may be held sufficient to revive the ‘dead’ corporation.” Moreover, some states are also willing to tamper with the foreign creature to the extent of conferring upon it the right to exercise a power in the host state which it did not have in the state of its origin. See Hawkland, *Control of Foreign Corporate Activity by the State of Incorporation*, 6 *MIAMI L.Q.* 41 (1951).

substitute for careful reasoning and the precise delineation of rules.⁷⁵ Such criticism is usually directed against decisions which merely rely upon a broad policy as the basis for refusal to enforce a foreign cause of action. However, it may be that a careful delineation of the role of public policy will serve to make it a helpful tool for initiating consideration of the development of a set of relatively narrow rules which will provide reasonable certainty for utilization of local law of the host state in the field of foreign corporations. Perhaps a useful entry into this area of public policy may be found in a consideration of *Hausman v. Buckley*,⁷⁶ which is one of the few cases that has made a search for the public policy of the host state and discussed whether such public policy, if ascertained, should be applied to a foreign corporation. This stockholder's derivative action based on diversity of citizenship was brought in the District Court of New York on behalf of a Venezuelan corporation. The threshold issue was whether a minority stockholder of a Venezuelan corporation could "participate in its management" by bringing a law suit in the corporation's behalf. The trial court had stated that a stockholder's ability to bring a derivative suit was a substantive matter rather than a procedural one and that the New York conflict of laws rules would therefore apply; such rules the trial court found, referred to the place of incorporation, under whose laws the individual shareholder could not bring a derivative suit. In a sophisticated and searching opinion by Judge Kaufman, the court of appeals considered the impact of a number of conflict of laws rules upon this set of facts and finally rejected the minority shareholder's derivative action. The court agreed that the ability to bring a derivative suit was sufficiently important to the rights of the shareholders to be a substantive matter, even though the issue seemed to be expressed in procedural terms. The court recognized that "the 'internal affairs' choice-of-law rule, as applied to issues peculiar to disputes involving corporations, is well established and generally followed throughout this country."⁷⁷ "Moreover," the court said, "the 'internal affairs' rule has been applied repeatedly in order to determine the fiduciary duty of a foreign corporation's di-

75. See generally EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 78 (1967); GOODRICH, CONFLICT OF LAWS, §§ 11 & 106 (4th ed. E. Scoles 1964); 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY ch. 33 (2nd ed. 1960); STROMBERG, CONFLICT OF LAWS 166 & 276 (3rd ed. 1963); Hoff, *The Intensity Principle in the Conflict of Laws*, 39 VA. L. REV. 437 (1953); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940); Paulsen & Sovern, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

76. 299 F.2d 696 (2d Cir. 1962).

77. *Id.* at 702.

rectors.”⁷⁸ The court pointed out that there was no showing in the New York decisions that New York would not follow the “internal affairs” rule, as broadly stated above; the court made no reference in this connection to the *German-American Coffee Company* case nor to the provisions of Chapter 13 of the New York Business Corporation Act imposing observance of New York law in certain respects upon foreign corporations.

The appellants argued that New York conflict of laws doctrine is currently in a state of flux and that rigid rules such as the “internal affairs” rule are being undermined by New York decisions which are replacing the older rules in other fields of conflict of laws by a more flexible mode of choice of law, citing *Auten v. Auten*⁷⁹ and *Kilberg v. Northeast Airlines*.⁸⁰ The court rejected these contentions, noting that all the cited cases involved contract or tort questions and that none of them suggested that the *Auten* approach has been introduced by New York tribunals into corporate stockholder litigation. It stated, however, that:

We do not wish to be understood as intimating in any way that the *Auten* rule could or could not be applied profitably to some corporate questions. Nor do we pass judgment upon the relative merits of the ‘internal affairs’ doctrine, vis-a-vis the *Auten* rule except to note our disagreement with appellants’ suggestion that the ‘internal affairs’ doctrine has no application to the branch of the law with which we are dealing, or that it clearly serves no useful purpose at all. We think it is generally agreed that, in fact, ‘the values of predictability and ease of application are best served by this rule.’⁸¹

The appellants then proceeded to their ultimate argument that even if the New York courts do adhere to the general internal affairs doctrine which refers such matters to the law of the state of incorporation, that the public policy of New York is such that it should not tolerate the application of Venezuelan law in this instance. “The crux of this argument is that New York courts, which allow minority stockholder actions, would not defer to the policy of Venezuela (the corporation’s domicile), which, in effect, allows only majority stockholder actions.”⁸² The court rejected this contention, after a short wallow in the uncertainty concerning what New York public policy actually is. The court apparently was not persuaded that the allowance of minority stockholder actions is an important and basic matter of New York policy, and nothing appeared to have been cited

78. *Id.* at 703.

79. 308 N.Y. 155, 124 N.E.2d 99 (1954).

80. 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

81. 299 F.2d 696, 704 (2d Cir. 1962).

82. *Id.* at 705.

by plaintiffs to that effect. The court pointed out that there is logic behind the Venezuelan position that only a majority of the shareholders could bring such a suit—nuisance value suits and the cavalier institution of unfounded litigation are avoided. Judge Kaufman stated that there is nothing heinous or reprehensible in the Venezuelan position and that “we are not persuaded that the Venezuelan law under consideration is ‘immoral’ or ‘fundamentally unjust’ or that it contravenes any New York policy involving the right of stockholders to participate in the management of a corporation through the intervention of the courts.”⁸³ The opinion also noted that New York would probably enforce the so-called “Massachusetts rule” which effectively bars a derivative action unless it is approved by an independent majority of shareholders. The court pointed out that one should not argue “too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. . . .”⁸⁴

The court, in effect, said that it cannot discover any public policy of New York on these points. Even if it could have deduced a policy from the existence of highly important procedural devices granted to minority shareholders, Venezuela’s variation from the New York format is not so heinous that it violates fundamental principles of justice or “outrages the public policy of New York.” If, however, New York statutes—or possibly even the New York courts—had expressed themselves forcefully to the effect that there was a relevant New York public policy, then this type of opinion indicates that a different ultimate decision might result. It is also interesting to note that the opinion does not state the nature of the connection between New York and the business and affairs of the Venezuelan corporation, except to say that it was not a “paper” corporation. If the issue in the case were not the ability to bring a minority stockholder’s derivative action but rather the ability to declare a dividend or to take some other action which contravenes the provisions of Chapter 13 of the New York Business Corporation Law, the court of appeals would probably have enforced the New York statutory rule, even though this would have amounted to an intrusion into the internal affairs of the Venezuelan corporation. The expression of public policy by the New York Legislature concerning the matters enumerated in Chapter 13 would presumably result in the enforcement of these specific sections; the failure of the New York legislature to include any other specific actions of a foreign corporation to be governed by New York law could probably be taken as an expression of legis-

83. *Id.*

84. *Id.* at 706.

lative intention to exclude all matters not set forth therein from the operation of New York public policy. However, it is interesting to note that the case made no reference to Chapter 13 of the New York Business Corporation Act of 1961, or to any inferences that might be drawn from its provisions. The court treated the choice of law matter as a strict common law question, without statutory directions or pressures.

The *Hausman* case illustrates many aspects of conflict of laws theory which impinge upon foreign corporation problems and the special characteristics and difficulties which must be met in the solution of such problems. In general most courts approach cases involving the internal affairs of foreign corporations in the same terms and with the same rigidity which was found in Beale's closed universe of conflict of laws of fifty years ago. A very respectable proportion of modern courts, in most matters before them, would be receptive to the proposition of the local law theorists that their actions constituted enforcement of the local law of the forum, with due attention paid to the manner in which a related foreign state would decide the same question. However, most court decisions in foreign corporation matters are still expressed in terms resembling the vested rights concepts of enforcing foreign law.⁸⁵ Because the foreign corporation derives its existence from the act of another sovereign, American courts have generally regarded it as solely the creature of, and wholly dependent upon, the foreign state, which is not to be tampered with by the local law of the host state. With few exceptions, American courts tend to regard foreign corporation problems as generically different from ordinary conflict problems and largely immune from treatment by the approach of local law theorists. The umbilical tie of the foreign corporation to the state of its charter is usually still religiously regarded as conclusive in determining the law to be applied in intra-corporate disputes. The fundamental re-examination of the nature of conflict of laws over the past few years has virtually left foreign corporation matters remaining as a pocket of the past in a subject area which has otherwise been characterized by free inquiry, change and flux.

In the relatively few instances in which foreign corporation matters have been considered in recent writings, they are usually discussed either from the point of view of the genuine foreign corporation (with

85. Lorenzen points out cogently that the fixity of vested rights concepts has been responsible for creating rules "which govern 'on principle,' to be set aside under certain circumstances by the rules of 'public policy' or 'public order.' Anglo-American courts and writers . . . also use language implying that the ordinary rules, governing 'on principle,' are the expression of the territoriality of law . . ." Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736, 746 (1924).

respect to whose internal affairs local law should have little reason for application) or, at the other extreme, from the vantage point of the extreme pseudo-foreign corporation (with no connection to any state other than the host state, except for the issuance of the charter). The shading in the spectrum between these two extremes is seldom mentioned or analyzed. This polarizing generally proceeds either on the theory of applying the law of the state of incorporation as a mandatory matter because of the nature of things or, in the case of the pseudo-foreign corporation, on a theory analogous to the concept of fraud on the law, though that term is disavowed. The flexible and penetrating analysis of the local law theorists from Cook to Cavers to Currie,⁸⁶ with the breakdown of broad subjects into specific issues and narrow rules and with the subjects analyzed and vivisected on the basis of the interests of the parties and of the states involved, has no counterpart in the field of foreign corporations.

It may be that the first few wispy stirrings of this type of local law analysis are now becoming detectable. The primary commentaries upon foreign corporations in the past two or three decades have been the articles by Dean Latty of Duke University entitled *Pseudo-Foreign Corporations*,⁸⁷ and by Professors Reese and Kaufman entitled *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*.⁸⁸ The article by Professors Reese and Kaufman is a comprehensive discussion of a wide range of corporation problems in the conflict of laws growing out of a consideration of the lower court opinion in the *Western Airlines* case, which was subsequently reversed. The authors disapprove of the position which was finally taken by the upper court in the *Western Airlines* litigation. Its general thesis matches that of *Restatement (Second)*,⁸⁹ of which Professor Reese was reporter. *Restatement (Second)* retains the blanket rule on foreign corporations that the law of the state of incorporation shall govern but expresses it in terms which make it less of a commandment than a statement of expediency. This mode of presentation, at least, opens the matter to argument and discussion. Moreover, the statement of the broad rule is furnished with a caveat that no position is taken on the law applicable to a pseudo-foreign corporation, thus opening the question of possible deviation from the application of the law of the forum at least in this one situation—and also leaving open the definition of pseudo-foreign corporation.

86. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); COOK, *The Logical and Legal Bases of Conflicts of Laws*, 33 *YALE L.J.* 457 (1924).

87. 65 *YALE L.J.* 137 (1955).

88. 58 *COLUM. L. REV.* 1118 (1958).

89. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* ch. 6 (Tent. Draft No. 7, 1963).

In his article, Dean Latty argues strongly that pseudo-foreign corporations should be governed by the laws of the states in which they operate and realistically have their being, rather than by the laws of the states which merely granted them charters. His views to this end were embodied in the draft of the corporation act for the State of North Carolina, although the provisions were deleted from the statute as finally enacted.

An exceedingly able and searching consideration of the liability of shareholders in a foreign business trust, in the framework of a local law analysis against a background of comparison with foreign corporations, is contained in a long student note; in attempting to apply Professor Currie's governmental interest theory to the questions presented, the author states:

Where it is suggested that a foreign law be applied, a court should determine the nature of the policy underlying the forum law. If the relation of the forum to the case provides a legitimate basis for asserting an interest in applying its own policy, then the rule of decision under forum law should prevail, regardless of any interest of a foreign state.⁹⁰

Although there may appear to be greater freedom to apply the local law approach to a foreign business trust, as contrasted with a foreign corporation, because of the formal differences between the two entities, the note itself recognizes that the two types of entities perform very much the same function and have similar roles. The use of the local law approach and the examination of the interests and the public policy of the states involved inevitably suggest that a similar approach may not be inappropriate for foreign business trusts and foreign corporations.

The possibility of the application of the law of the forum is also hinted at in the *Hausman* case where Judge Kaufman weighed the contention that foreign corporation matters should be considered in the light of the local law analysis, which might conceivably call for the application of the local law of the host state. This approach was rejected with the disclaimer that a federal court should not attempt to make new law under circumstances where it is required to observe and follow the law of the state in which the federal court sits.

The possible application of modern conflict of law approaches to foreign corporations is also considered ably and at length in *The Foreign Corporation—A Problem in Choice-of-Law Doctrine* by Donald L. Block Baraf.⁹¹ This article is primarily directed at the status and development of New York statutory provisions concerning foreign

90. Note, *Limited Liability of Shareholders in Real Estate Investment Trusts and the Conflict of Laws*, 50 CALIF. L. REV. 696 (1962).

91. 33 BROOKLYN L. REV. 219 (1967).

corporations, against a background consideration of the constitutionality of the exercise of regulatory power over foreign corporations by a host state. After expressing admiration for the method of analysis proposed and exemplified by Professor Currie,⁹² Mr. Baraf states:

Consequently, the possibility of real conflict and uncertainty arising out of the absence of a constitutionally required uniformity is indeed a real problem. . . . The groping for a unifying principle thus must move beyond merely railing against the logical inconsistency of multi-state regulation of a unitary transaction or emphasizing the need for judicial subordination to the often irrelevant dictates of the domicile (because commentators throw up their hands and exclaim that some uniform rule is better than none and that the domicile is the most readily identifiable contact point).

Instead of emphasizing the virtue of certainty and thus promoting a rule of automatic reference, a rule which stresses the need for protection might be developed. Such a rule would provide that whenever the law of the domicile conflicts with the law of the state in which the corporation is doing business that law which best serves to protect the interest of creditors and/or shareholders would be applicable. This would be consistent with the modern view favoring protection and would impose upon corporations a more rigid adherence to evolving standards of increased fiduciary obligation.⁹³

Such scanty academic and judicial feelers toward the distant chance of turning away from the rigid rule of the law of the state of incorporation may indicate a possible route for governing foreign corporations by the law of the state where their activities are primarily conducted, rather than by the law arbitrarily chosen by the entrepreneurs who created the entity. Unless the host state, whose law is asserted, has a significant interest in the matter in litigation and a policy of protecting that interest, the law of the state of incorporation might as well govern, and the law of the host state should not properly apply. In a situation where both the chartering state and the host state have interests to protect, then, unless the host state has some strong corporation policy, the collision of interests between two states without an opposition of significant policy will not justify the application of the law of the host state. That would probably constitute a type of conflict which is both unimportant and "false," in the terminology of Professor Currie and Judge Traynor.⁹⁴ This suggests that it would be profitable to inquire into the existence of public policy—that region where Judge Kaufman searched in vain for

92. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie, *The Verdict of Quiescent Years, Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961). For a brief summary of Currie's methodology, see CHEATHAM, ET AL. *supra* note 22 at 477-78.

93. *Supra* note 91, at 252.

94. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

a New York policy on which to support the contention of the plaintiff in *Hausman v. Buckley*.

It must be admitted that the evoking of public policy as a basis for decision usually introduces uncertainty into the law and brings litigants into a difficult and amorphous area. Many American commentators have suggested that the employment of public policy, to be avoided wherever possible, is, in effect, abandoning logical analysis for parochial emotionalism.⁹⁵ Public policy is undoubtedly an "unruly horse," to be utilized only with care and a proper understanding of its role. However, the public policy concept can, as Elrenzweig has suggested,⁹⁶ furnish protection against a rigid and over-generalized rule of conflict of laws which needs to be made more flexible and trimmed to more appropriate size. It is a talismanic phrase which is palatable to many courts and may be helpful for a re-examination of a rigid rule, holding over from the days of vested rights and strict territoriality; without it, the court would have to reconsider the whole philosophic question of the way corporations should be governed and study in depth the decisions in the field of conflict of laws in other areas. Exceptions to a rigid rule, even in the name of public policy, might be useful in eventually leading to such a broader reconsideration. If properly and narrowly defined some public policy exceptions might provide a set of rules narrow and predictable enough to afford reasonable certainty with respect to the few situations in which the host state might properly safeguard its interests and apply local law to the internal affairs of a foreign corporation.

In an excellent article, *Suggested Limitations of Public Policy Doctrine*,⁹⁷ Charles Nutting considers the provision of the first *Restatement* (which has been continued in the same form in the *Restatement (Second)*) to the effect that "no action can be maintained upon a cause of action created in another state, the enforcement of which is contrary to the strong public policy of the forum." "Immediately," Professor Nutting says, "numerous questions come to mind. Is this actually a statement of existing law? What is public policy? How does a strong public policy differ from any other kind? Is it desirable that the application of the rule be strictly limited? If so, how is it to be done? And, perhaps the fundamental query, should we have a rule of this kind at all?"⁹⁸

Professor Nutting considers Professor Cavers' suggestion "that the invocation of public policy may constitute a device for the prevention

95. See note 75 *supra*.

96. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 154 (1967).

97. 19 MINN. L. REV. 196 (1935).

98. *Id.* at 197.

of a too rigid adherence to the law generally deemed applicable to a given case."⁹⁹ He concludes that public policy is necessarily too nebulous a concept to be employed without specific rules and asserts that "although there is a place for the public policy doctrine in safeguarding the domestic interests of the state from foreign encroachment, the declaration of policy is a matter which should be entrusted to the legislature rather than the courts."¹⁰⁰

This course of having the state's public policy with respect to foreign corporations declared by the legislature has been followed by New York, which has specified precisely which sections of the New York Business Corporation Act shall apply to foreign corporations. Presumably the specification of certain applicable provisions carries with it the corollary that other portions of the statute are not applicable to foreign corporations.

A different type of statutory determination of public policy is contained in the California statute involved in the *Western Airlines* case, where broad general language, referring to all sales within the state, is interpreted as applying to all sales of securities by any corporation, domestic and foreign.

The recent case of *Gaillard v. Field*,¹⁰¹ involving the question of whether investments in oil interests were securities, illustrates the uncertainties of ascertaining public policy in a subject area closely related to corporation matters. The plaintiffs were California residents, who sought to rescind the purchases on the ground of non-compliance with California securities laws; suit was brought in Oklahoma where the blue-sky law did not treat oil interests as securities. The place where the sale was made and the contract entered into is quite vague in the opinion. In rejecting the plaintiffs' claim the court, in a vague, unexplicit and unsatisfactory opinion, stated:

The policy of Oklahoma is not passive, neutral, or unarticulated. The contrary with California law is expressed in clear statutory language. Appellants argue that the difference between the California and the Oklahoma statutes is an unimportant detail because the basic policy of each state is the regulation of securities. Regulation of securities is undoubtedly the basic policy of the Oklahoma Securities Act, but oil and gas transactions are not securities in Oklahoma.¹⁰²

The court stated further, in commenting upon the application of the full faith and credit clause, that the cases cited "considered together establish that the legitimate interest of the forum state may out-

99. *Id.* at 198.

100. *Id.* at 209.

101. 381 F.2d 25 (10th Cir. 1967).

102. *Id.* at 27-28.

weigh the unifying principle embodied in the full faith and credit clause."¹⁰³ In reaching its conclusion that to apply California law "would violate a deep-rooted tradition of the common weal in Oklahoma,"¹⁰⁴ the court did not take judicial notice of the public policy and received no evidence on the point other than the testimony of a former chairman of the Oklahoma Securities Commission.¹⁰⁵ The testimony in the record showed only that the Oklahoma version of the Uniform Securities Act as originally adopted contained a provision which clearly included oil and gas interests as securities, and that, after several years, the Act was amended to exempt such interests. The testimony of the "expert" did not mention the phrase public policy or the tradition of the state, and the strong language used by the court seems to have been drawn from its own interpretation of the peculiar status and significance of the oil and gas industry in Oklahoma. Or perhaps the court interpreted the special attention paid by the legislature in exempting oil interests by later amendment as constituting an expression of strong policy.¹⁰⁶ Perhaps, even this court is following an atavistic remnant of the discarded position that a foreign mode of procedure is against public policy merely because it is different.

The provision for equal treatment of foreign corporations, and a limitation clause prohibiting intrusion into the internal affairs of a foreign corporation, generally found in corporation acts, could conceivably constitute a declaration of the state's public policy and be dispositive of the question of the law applicable to foreign corporations. Such provisions, though literally relevant, are probably only tangentially and unintentionally related to the problem of the law applicable to foreign corporations. These two types of clauses were considered in the *McCormick* case, which discussed sections 102 and 103 of the Illinois Business Corporation Act.¹⁰⁷ The equal treatment clause is found in the statutes of twenty-nine states and the no-intrusion clause in the statutes of nineteen of those twenty-nine states.

There have been relatively few attempts to explore the meaning of

103. *Id.* at 28.

104. *Id.* at 29.

105. The court refused to permit the introduction in evidence of a study by the "legislative counsel" of Oklahoma recommending the amendment of the securities law to exempt oil and gas interests. Record at 85.

106. The related question of whether the sale of securities issued by a corporation of one state can be held void under the securities law of another state raises an interesting question of extraterritoriality. The securities act of a state can undoubtedly determine the legality of the sale of securities of a foreign corporation made within the state. Whether the blue-sky law can invalidate a securities issue by a foreign corporation is dubious. See *Mau v. Montana, Pac. Oil Co.*, 16 Del. Ch. 114, 120-22, 141 A. 828, 831-32 (1928); L. Loss & E. M. Cowett, *BLUE-SKY LAWS* 192 (1958).

107. See *supra* note 67 and connected text.

either of these two sections. The inclusion of a clause, which grants equal treatment to a foreign corporation but requires it to bear the same burdens and responsibilities as a domestic corporation, could arguably be the basis for broad application of domestic rules of conduct to the internal affairs of a foreign corporation. It is highly doubtful that the inclusion of such a provision really means that the state is thereby announcing either a mandate or a permission to apply domestic law generally to foreign corporations. In a few instances such a clause has been so interpreted, particularly when the clause is contained in the state's constitution as well as its corporation act.¹⁰⁸ It is probable that such a clause was intended to mean that foreign corporations, in relationships with third persons, should be in the same situation as domestic corporations, rather than that the internal affairs of a foreign corporation are to be governed by domestic law. It would seem strained and unjustified to regard this provision as a pronouncement that domestic law should govern internal affairs of a foreign corporation.¹⁰⁹

A clause forbidding intrusion into the internal affairs of a foreign corporation could, however, easily be interpreted to be an expression of policy to the effect that the state should not apply its laws to govern a foreign corporation's internal affairs; the language of such a provision seems literally so to provide. Since automatic reference to the state of incorporation is so traditional a means of determining the appropriate law for governance of the internal affairs of a foreign corporation, it is possible that such a clause would be so interpreted. It is probable, however, that the clause was merely designed to have the state refrain from exercising jurisdiction over suits involving the internal affairs of a foreign corporation. It could be cogently argued that if the state's policy is against permitting such a dispute to be tried in its courts, then the legislative intention would, a fortiori, refer all matters relating to internal affairs to the law of the chartering state for determination. However, the history and intention of such a no-intrusion provision would suggest that it should be interpreted as a pronouncement that the state regarded itself as an improper forum for litigation, rather than being a statement of policy with re-

108. *Williams v. Gold Hill Mining Co.*, 96 F. 454 (N.D. Cal. 1899).

109. In his discussion of "equal treatment" statutes, Latty comments that: "Some of these provisions would, if taken literally, automatically subject all foreign-chartered corporations to local corporation law; others would similarly apply if liberally construed; nearly all would so apply if the court strained the interpretation a bit, as courts will from time to time. . . . Yct it is quite conceivable that under such statutes local corporation law would, on many occasions where the courts are faced with protection of local interests, be applied to pseudo-foreign corporations." Latty, *Pseudo-Foreign Corporations*, 65 *YALE L.J.* 137, 157 (1955). See also Coleman, *Corporate Dividends and the Conflict of Laws*, 63 *HARV. L. REV.* 433, 444 (1950).

spect to the appropriate law to be applied to the internal affairs of a foreign corporation.¹¹⁰ It should be noted, however, that, after the enactment of such provisions, the doctrine of forum non conveniens has, in most states, practically superseded the earlier doctrine that only the state of incorporation should try matters relating to the internal affairs of its corporations. At the present time, states which have enacted no-intrusion clauses exhibit little hesitancy in accepting a case for trial even though the internal affairs of a foreign corporation are involved.

The determination of what portions, if any, of such a long and complex statute as the corporation act shall be considered as expressing public policy is very difficult. The inferences which one must draw from scant and wispy evidences of public policy are generally tenuous and unsatisfactory. Legislative history in this field is generally sparse and inadequate and provides little enlightenment. If the particular provision of the corporation act is included mandatorily by direction of the state's constitution, it is probable that such a provision should be treated as enunciating a strong public policy. Similarly, if a statute is amended to include a provision granting a particular remedy which was not theretofore available, the fact that the matter was regarded as important enough for individual amendment might suggest that it involves public policy. On the other hand, it may very well be that such an amendment is merely another aspect of the rule of the road which was subsequently inserted, as a simple house-keeping measure, to clarify procedures and avoid disputes. Professor Rabel,¹¹¹ in his comparative study of the conflict of laws, de-

110. A portion of § 99, ¶ 1, of the Model Business Corporation Act contains a "no-intrusion" clause which corresponds to § 102 of the Illinois Act. The comment to § 99, ¶ 1, indicating that the purpose of such a clause is not to prescribe the answer to a choice of law question, reads in part as follows: "Section 99 of the Model Act does not confer any power on the officials, agencies or courts of a state to regulate the organization or the internal affairs of a foreign corporation. Conversely, this section does not attempt to preclude the exercise of any power the state may otherwise have to regulate by other statutes those activities of a foreign corporation which might ordinarily be construed as involving issues of organization or internal affairs nor does it deny the power to the courts of the state to apply common law principles affecting the organization or internal affairs of a foreign corporation. *This section of the Model Act neither grants nor limits any power of a state over the internal affairs of foreign corporations.*" [Emphasis added]. 2 ABA-ALI Model Bus. Corp. Act Ann. comment on § 99, ¶ 1 (1960). Such "hands-off" or no-intrusion statutes, says Latty, "by no means foreclose the question of applicability of local law to foreign-chartered corporations, for the courts can and often do say, when faced with a pseudo-foreign corporation: this is not *really* a foreign corporation at all; its foreignness is a fiction, not substance. . . . such provisions seemingly putting foreign corporations beyond local law should really be no more the determinative factor than those numerous statutes previously discussed purporting to put foreign corporations under the local corporation law." Latty, *supra* note 109, at 159.

111. See STROMBERG, *supra* note 75, at 209.

votes an interesting chapter to the subject of public policy. He notes the American repugnance to the use of the public policy concept and considers the desirability of restricting the use of public policy to situations where legislative pronouncements announce public policy, following Nutting's thesis.¹¹² Rabel, however, suggests that statutes contain two types of provisions, one designed for regulation of private affairs and the other designed to protect the public order. The public aspects of such a statute express public policy; the private aspects, Rabel suggests, are merely rule-of-the-road mechanical procedures, with respect to which public policy is neutral. However, Rabel suggests no workable touchstone for separating the private aspect from the public one and leaves unresolved the problem of how to determine which portion of the statute sets forth public policy and which is purely mechanical. Any attempt to determine which part of a corporation statute expresses a significant public policy and which part is merely mechanical and neutral would involve a difficult and wayward search.

If the corporation statute is of the enabling kind and generally grants the entrepreneurs a relatively free hand in working out such arrangements as they may specify in their organic documents, could it be argued that this implies a broad public policy, on issues not specifically covered, favoring management? If, on the other hand, the statute provides pervasive and stringent controls over corporate actions and contains a detailed, comprehensive and restrictive series of specifications for corporate conduct, could the reverse policy be inferred; could a court deduce a broad public policy restrictive with respect to management and in favor of protecting minority shareholders? Although there might be much cogency behind such inferences, the public policy so deduced is too amorphous, diffuse and uncertain, and should not be used as a basis for governing the internal procedures of a foreign corporation, without some specific statutory directive or some special indication of ethical compulsion behind a given section of the corporation statute of the forum.¹¹³ Variations and differences in formats, procedures, and specificity, in themselves, have no public policy content, but merely indicate differences in the statutory techniques of setting forth the rules of the road. If a corporation statute, such as that of Illinois, is generally of the enabling character but has a few

112. *Supra* note 97.

113. For an example of the problems of ascertaining the public policy underlying Ontario's host-guest liability statute and the difficulties of measuring its temperature, intensity, continued importance and the sources from which answers to these inquiries can be obtained, see Trautman, *A Comment on Kell v. Anderson*, 67 COLUM. L. REV. 465 (1967). For a contrary interpretation of the public policy indicators see the remarks of Professor Moffat Hancock as reported, and commented upon by Professor Keeffe in 54 A.B.A.J. 91 (1968).

regulatory provisions—such as mandatory cumulative voting and the prohibition of non-voting stock—can it be said that the public policy is genuinely expressed in, at least, these few dissimilar provisions? Could it be contended that public policy is expressed by provisions of a corporation act which (a) are included by constitutional requirement, or (b) are unusual or innovative (at least at their inception), or (c) impose sanctions by criminal or civil penalties (other than mere restitution), or (d) are couched in rhetoric of ethical imperatives, of a character usually associated with matters of public policy? Professor Latty suggests on this point:

One good touchstone of the strength of the legislative policy expressed in a particular protective feature is whether a domestic corporation could legally circumvent the feature—for instance, by an appropriate clause in its charter or by-laws. That is, if the same ends as this pseudo-foreign corporation is reaching could be attained by a domestic corporation with a properly drafted charter or by-laws, there is not much point in insisting on application of local law to the foreign enterprise. Similarly, if the local corporation statutes themselves offer ready methods for circumventing other protective features of local corporation law, there would seem to be little point in applying those protective features even to a pseudo-foreign corporation.¹¹⁴

Although this suggestion, that public policy be equated with the non-evasive character of a statutory provision, has great plausibility, it would, in practical effect, probably eliminate almost all public policy considerations. There are in fact few protective features of any corporation statutes which cannot be effectively circumvented. The Illinois statutory provisions for mandatory cumulative voting and prohibition of non-voting stock—buttressed by constitutional mandate and by documented constitutional history indicating a strong public policy—present probably as vigorous a pronouncement of state public policy behind corporate requirements as can be found anywhere in the United States. This policy has shown sufficient vigor to be protected against partial circumvention by denying board members the right to fill vacancies on the board of directors and by prohibiting staggered boards. However, the requirement is effectively undermined in daily practice by issuing several classes of stock at different prices each with one vote per share (*e.g.*, 1000 Class A common shares sold for \$100 each and 1500 Class B common shares sold for \$1 each). Does the ability effectively to shift control about freely and to circumvent the underlying purposes of these requirements of the Illinois statute mean that there is no public policy content behind them? Such a conclusion is, of course, untenable. Perhaps the better way

114. Latty, *supra* note 109, at 160.

of determining the existence of a public policy would be to follow Professor Latty's other suggestion that:

Perhaps a guide to the strength of the policy behind a particular protective feature would be the seriousness or prevalence of the actual evils, and to a lesser degree the potential evils, against which it is aimed. Testing it by this standard we should say, for example, that the Nebraska fair-and-just statute for recapitalizations represents a strong policy choice. So does the mandatory dividend provision of the new . . . North Carolina Business Corporation Act, which permits sizable shareholders under certain circumstances to force dividend payments of one-third of annual net profits. Even without a knowledge of the legislative history of such a provision we can see clearly that it purports to cope with a serious minority stockholder problem which arises frequently in close corporations—such corporations being the prevailing pattern in North Carolina.¹¹⁵

The task of ascertaining the existence of a public policy directive behind a particular provision of the corporation statute is tortuous, difficult and uncertain in the absence of an explicit statutory directive by the legislature. And even if a domestic public policy is discernible, there is usually only vague uncertainty as to the applicability of such policy to foreign entities. Where, however, such a statutory directive specifying applicable provisions of local statutes exists, as in New York, the course is clear. Where there is no statutory directive, the use of the public policy argument to justify the application of the law of the host state to a foreign corporation calls for great circumspection and restraint on the part of the courts. Its application may depend upon the clarity of the public policy doctrine in the state and its importance and intensity and also upon the character of the corporation. If the corporation is a pseudo-foreign corporation, then it would seem that the court of the host state might apply its local law fairly freely, as a common law choice-of-law matter, if it could be made to appear that local public policy was of significant force. Where the corporation involved is a quasi-foreign corporation, the courts' freedom to apply local law should be restrained and determined in direct relation to the extent to which the corporation has substantial contacts and affiliations with states other than the host state. In the case of the genuine foreign corporation and the national corporation, the host state should refrain from applying its local law to the internal affairs of such entities in the absence of an express statutory directive. These conclusions are not based upon lack of power in the host state or on any constitutional obstacle. Rather, they are based upon the desirability of avoiding the difficulty of ascertaining public policy where there is no clear and explicit legislative pronouncement.

115. *Id.*

IV. CONCLUSION

The primary argument against the application of local law to a foreign corporation, even when constitutionality is admitted, is that a dual or variable set of rules would introduce unbearable chaos and uncertainty into the law. The precise details of such confusion are seldom stated, other than to assert that it would be impossible to comply with mutually exclusive requirements. Such a result would almost never occur under present corporation statutes and is unlikely to occur in the future. This argument of uncertainty and confusion is seldom challenged, though it is probably neither so cogent nor so compelling as it might at first seem.¹¹⁶

The comparable potentialities of double taxation, divisible divorce, and other variable rules of law throughout the realm of conflict of laws have not caused irremediable chaos, or intolerable disruption, nor have they forced inexorable unity of rule. The European concept of commercial domicile for corporations, which could theoretically lead to duality or conflict between the law of the country of incorporation and the country where the commercial seat is located, does not seem to have disrupted corporate operations or forced abandonment of the commercial domicile concept. Railroads which are incorporated or domesticated under the corporation acts of several states have managed to work out their problems, despite multiple applicable standards.¹¹⁷ The contention of the *Restatement* and of other commentators that avoidance of confusion and difficulty makes it imperative to look to the law of the state of incorporation seems belied by the experience of New York. For many decades New York has required all foreign corporations to conduct themselves in accord with domestic rules with respect to dividends, certain directors' duties, and certain other specified provisions of the domestic corporation statute. So far as any published difficulty is concerned, it seems to have been minimal. In any event, the catastrophic results of dual corporate regulation which might otherwise be predicted do not seem to have occurred. Such regulation appears to have been viable for foreign corporations. Furthermore, there are extensive and sometimes conflicting dual controls, state and federal, at the present time in many corporate matters—primarily in the area of corporate internal affairs. In the last few years there has been an extraordinarily rapid burgeoning of so-called "federal common law of corporations," based upon implied civil

116. *Wolfson v. Avery*, 6 Ill. 2d 78, 126 N.E.2d 701 (1955); *People ex rel Weber v. Cohn*, 339 Ill. 121, 171 N.E. 159 (1930).

117. For a discussion of a similar assertion about the possible conflict of antithetical commands under different blue-sky laws, see Sobieski, *State Blue Sky Jurisdiction over Foreign Corporations*, 14 HASTINGS L. REV. 75, 90 (1962).

liability under section 10(b) of the Securities Exchange Act of 1934; this law is pervading, and all but absorbing, a large portion of internal fiduciary obligations.¹¹⁸ There is a substantial and growing body of federal corporation law under Sections 14 and 16 of the Securities Exchange Act of 1934, governing insider trading and proxy regulations. The reorganization doctrines under Chapter XI of the National Bankruptcy Act follow a strict priority doctrine in sharp contrast with the increasingly lax standards applicable in recapitalizations, mergers and readjustments.¹¹⁹ Although the existence of these duplicating and complementary controls, state and federal, has created a situation of theoretical conflict, the practical results have been accepted and viable, and the duplication of controls has resulted not so much in conflict as in cumulative standards.¹²⁰ Consternation over the problems of dual standards has not deterred the development of a significant body of federal corporation law;¹²¹ likewise, such a possibility should not preclude a host state from the development of appropriate requirements to govern those foreign corporations with which it has significant and important contacts and an important public policy to assert and vindicate.¹²²

118. The decisions seem to order that such corporations shall not act in violation of the positive prohibitions of any state in which the entity is incorporated. See generally Foley, *Incorporation, Multiple Incorporation, and the Conflict of Laws*, 42 HARV. L. REV. 516 (1929).

119. Daum & Phillips, *The Implications of Cady, Roberts*, 17 BUS. LAW. 939 (1962); Fleischer, *Federal Corporation Law: An Assessment*, 78 HARV. L. REV. 1146 (1965); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 413 (1964); Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication through Rule 10b-5*, 59 NW. U.L. REV. 185 (1964).

120. Comment, *A Standard of Fairness for Compensating Preferred Shareholders in Corporate Reorganizations*, 33 U. CHI. L. REV. 97 (1965).

121. For representative cases in which the federal law superseded the state law in matters traditionally within the area of concern of state law, see, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (validity of proxy and invalidity of merger); *McClure v. Borne Chem. Co.*, 292 F.2d 824 (3d Cir. 1961) (security for costs); *Miller v. Steinbach*, 268 F. Supp. 255 (S.D.N.Y. 1967) (appraisal rights and effect of dissolution of corporation on surviving rights).

122. If conflicting regulation of the internal affairs of foreign corporations were ever to result in a non-viable situation of confusion, then it is not improbable that the Supreme Court might turn to the due process clause or to the full faith and credit clause to enforce uniformity. The doctrine of the *Wolfe* case might then be applied to the internal affairs of corporations. In this connection it is appropriate to note the second caveat to § 166a of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Tent. Draft No. 7, 1963). "The Institute likewise expresses no opinion whether there are situations where, as between States of the United States, the Constitution requires application of the local law of the State of incorporation to determine questions involving the organic structure or internal administration of a corporation. Otherwise, situations may arise where one State can prevent a corporation from taking action affecting its organic structure or internal administration which the corporation could lawfully take under the local law of its State of incorporation and also perhaps under the local law of the great majority of States in which the corporation does business."

Although states have the power to apply their domestic laws to foreign corporations, the fact is that they lack the inclination to do so. This reluctance is not due to a matter of jurisdiction but rather to a decline in interest in providing protection for investors through corporation statutes. The clamorous criticism of the 1920's and 1930's, directed against the competitive leniency of Delaware laws, is seldom heard today and has largely been replaced by acquiescence, indifference and resigned emulation. In an era of mergers and combinations, there is an increasing tendency to make the process of merger quicker and simpler, to broaden the types of securities which can be forced upon dissenters, and to diminish or abandon dissenters' rights. The notion that the real remedy of the dissenting stockholder is to sell his security in the open market for what he can get and move on to another investment seems to be gaining headway. It has eminent academic acceptance,¹²³ it has been the general policy of major institutional investors and has recently been embodied in the Delaware Corporation Act, by amendments effective July 1, 1968.¹²⁴ In general, it can be said that the position of management in corporate enterprise is largely becoming more secure, that the powers accorded to management are in practice becoming greater and that the status of individual shareholders is becoming less secure.¹²⁵ No new state legislative machinery is being provided to fill gaps in protection of the interests of the shareholders against managerial excess or to replace earlier mechanisms which have been rendered ineffective by the phenomenon of shareholder dispersion and the size of enterprise. It may be that these developments are necessary concomitants of the nature of the modern corporation and of the modern securities market. However, it seems that the effort to work out suitable protective and regulatory devices at the state level is being abandoned with undue haste. The trend makes one doubt whether there is much public policy force behind the provisions of state corporation laws and leads to the expectation that even the rare instances where strong public policy underlies state corporation acts will continue to decrease.

Possibly the complacency about corporation laws and the relative inactivity of the states, in matters of investor protection through corporation acts, may in some measure be attributable to the dramatic growth of federal intervention and inventiveness in this area. There is a great public interest in matters of investor protection. News-

123. Manning, *The Shareholders' Appraisal Remedy: An Essay for Frank Coker*, 72 *YALE L.J.* 223 (1962).

124. Arshat & Stapleton, *Delaware's New General Corporation Law: Substantial Changes*, 23 *BUS. LAW.* 75, 87 (1967).

125. See Gibson, *How Fixed are Class Shareholder Rights?* 23 *LAW & CONTEMP. PROB.* 282 (1958).

papers carry a great many articles about alleged corporate misdeeds, and federal court dockets contain many cases alleging corporate wrongs; however, the remedial action is largely sought by the SEC or in suits under statutes administered by the SEC. Here, as in many other areas of government, the states have drawn back and left a large part of the field to federal activity and control.

If the states wish to regain their prior position in the field of investor protection, it will necessitate a change in the legislative attitude and a reversal of the trend of corporation statutes, from the enabling to the regulatory type. The argument that the states cannot do this because of the competitive availability of Delaware's lenient laws could be met—if the will to do so existed—by statutory directives that foreign corporations doing business within the states must comply with specified domestic corporate requirements. The New York type of statutory device for specifying the provisions of the corporation act which are applicable to foreign corporations points out the most satisfactory way to carry out such a process of retaliatory legislation. However, New York itself, in its most recent statutory revision, retained its statutory directive but drained it of much of its force by reducing the portions of the domestic act applicable to foreign corporations and also by exempting a very large proportion of foreign corporations from the application of its statute.¹²⁶ If, however, several important commercial states chose to use this statutory directive device for protective purposes and asserted it with vigor, it might have some effect in reversing the accelerating tendency of all corporation statutes to become mere enabling acts. If substantial difficulty is encountered because of the adoption of strong retaliatory statutes applying domestic law to foreign corporations, then the pressure to avoid this difficulty could conceivably result either in appro-

126. According to Professor Henn, "One ever-present strand in the thinking of the Joint Legislative Committee was to 'foster New York incorporation of business and retention of existing business corporations. . .'" Henn, *The Philosophies of the New York Business Corporation Act of 1961*, 11 BUFFALO L. REV. 439, 453 (1962). This objective is "facilitated by a *laissez-faire* attitude toward corporations: the statute must be 'enabling' rather than 'regulatory' and should not interfere with their 'internal affairs.'" *Id.* Professor Henn then states that the device of express statutory exemption, which the New York law now contains, is used "to exempt foreign corporations doing business in New York from New York regulatory policies" in contradistinction to the rejected provisions of the proposed North Carolina Act, which would have increased domestic regulations over foreign corporations. *Id.* at 455 n.109. Similarly, Comment, *Particular Problems under the New York Business Corporation Law*, 11 BUFFALO L. REV. 615, 679-81 states: "While the scope of jurisdiction over foreign corporations has been significantly broadened, the outstanding change in the treatment of foreign corporations is the narrowing of the class of such corporations which are subject to extensive internal regulations. . . . It is hoped that the new act will thus secure the desired results of discouraging domestic investors in businesses from incorporating elsewhere merely to escape statutory regulation, while not discouraging other foreign corporations from qualifying and transacting business in New York."

priate widespread revision of the character of corporation statutes or in the Supreme Court's intervening and taking federal control, by application of full faith and credit or due process formulae. Such pressure might also possibly give impetus to the moribund movement toward federal incorporation. Political philosophy and individual predilection would make state action preferable to federal intervention in the area of corporation legislation. The states by clear legislative fiat could effectively assert a public policy in corporate affairs. However, they must first determine that it is critically important, for the advancement of the public order, to strengthen and safeguard the regulatory aspects of corporation statutes and to bolster confidence in managerial propriety. However, this is not likely to happen. The governance of corporations is not regarded as significant enough to cause the states to alter their corporation laws or aims. The will to take such steps has been found in only one or two states, and even there it is on the wane. Consequently, the existence of the power to act is academic. The power appears to exist; the wish to use it does not.

If it is true that state corporation laws are trending toward virtual uniformity, then it is probably desirable that such uniformity be prescribed by Congress rather than by emulation of Delaware's Corporation Act. There is no more reason for the corporation law in the United States to be set by the standards of Delaware than there is for the conflicts rules of the world to be promulgated by the Island of Tobago. The standards of the corporation statutes of the various states are alleged to have been eroded by the nature of our federal system. If such is the fact, then the centralizing force of the federal system should be utilized to provide standards of investor protection consonant with the needs of the economic system. The federal government is playing a very major role in investment protection at the present time: it prescribes the manner in which new issues of securities are sold; it regulates securities markets; it lays down proxy rules and insider trading limitations; it regulates investment advisors and investment companies; it prescribes the manner in which reorganizations of corporations in serious financial difficulties shall take place; it sets standards of disclosure in connection with the purchase or sales of securities; and it is developing and expanding an important federal common law of corporations. With such a major involvement in the sphere of investor protection, it would seem appropriate for the federal government to give consideration once more to the possibility of enacting a federal incorporation act or a federal licensing act for corporations.¹²⁷ When such measures were proposed forty

127. See LOSS, *SECURITIES REGULATION* 58-62 (1951); REUCHLEN, *THE SCHOOLS OF CORPORATE REFORM* (1950); Berlack, *Federal Incorporation and Securities Regula-*

years ago, the federal government had not been so deeply enmeshed in the field of investor protection and the political possibilities of the enactment of such legislation were hampered by the different political climate and the novelty of federal intervention in such a field.¹²⁸ All those factors have now been altered; the nation's commercial system has become more unified, and the need for national legislation has become more logical and more compelling. In the light of the caliber of federal legislation already in effect in the area of investor protection, it is likely that any federal corporation statute would be of a character commensurate with the existing federal legislation in the area; it seems unlikely that any federal statute concerning corporations which might be enacted would be less desirable than the present general level of state corporation statutes. In any event, that risk seems worth taking. Furthermore, it is probable that legislation could be drafted in such a fashion as to permit the states to superimpose higher or additional standards of conduct if they so chose. The federal government's role in the protection of investors is prominent and growing. It would be logical, efficacious, and desirable for the control over securities sales and markets to be combined with the regulation of corporate affairs in one unified and correlated program of investor protection. Although securities acts and corporation acts are designed to deal with somewhat different sets of problems, there is considerable overlapping and much similarity;¹²⁹ they could readily be designed to intermesh and complement each other, instead of going their separate ways with little or no reconciliation or correlation. The subject of federal incorporation ought to be reopened and considered again at this time as a complement to and an extension of the program for investor protection already undertaken and administered by the federal government.

tion, 49 HARV. L. REV. 396 (1936); Jennings, *Federal Incorporation or Licensing of Interstate Corporate Business*, 23 MINN. L. REV. 710 (1939); Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193, 194-96 (1958); Reuschlein, *Federalization—Design for Corporate Reform in a National Economy*, 91 U. PA. L. REV. 91 (1942).

128. The drive for federal incorporation legislation seems to have been blunted by federal securities legislation, according to Loss, *SECURITIES REGULATION* 61 (1951) & Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193, 196 (1958). Apparently, also federal securities legislation has similarly had a blunting effect upon the possibility of developing corporation statutes which are regulatory in character.

129. See Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193 (1958); Kaplan, *Corporation Law and Securities Regulation*, 18 BUS. LAW. 86 (1963).

