

January 2011

Law, Politics, and the Erosion of Legitimacy in the Delaware Courts

Kent Greenfield
Boston College Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Courts Commons](#), [Judges Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Legal Remedies Commons](#)

Recommended Citation

Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481 (2010-2011).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

KENT GREENFIELD

Law, Politics, and the Erosion of Legitimacy in the Delaware Courts

ABOUT THE AUTHOR: Kent Greenfield is a Professor of Law and Law Fund Research Scholar, Boston College Law School. The author thanks Jason Burke, Betsy Kaloyanides, and Meredith Regan for excellent research support and Peter Kostant for the invitation to such an interesting conference.

LAW, POLITICS, AND THE EROSION OF LEGITIMACY IN THE DELAWARE COURTS

One of the putative benefits of incorporation in Delaware is the expertise and knowledge of the Delaware courts. Professor Jonathan Macey says that Delaware “offers current and prospective charterers . . . a judiciary with particularized experience and expertise in corporate law.”¹ Professor Faith Stevelman cites the “expertise” of Delaware’s judges as “fostering the state’s leading reputation in corporate law,” which “safeguard[s] the financial returns which flow to Delaware from its chartering business.”² Professor Michael Klausner argues that Delaware’s dominance will likely be permanent in part because of the corporate expertise of Delaware’s judiciary.³ In fact, “[s]ome see the quality of the Delaware judiciary as the prime reason why corporations incorporate in Delaware.”⁴ The assertion of Delaware judicial superiority is so much a majority view that it in effect constitutes conventional wisdom within the corporate law academy.⁵

Commentators have lauded not only the expertise of the Delaware judiciary but also its insulation from politics. Professors Marcel Kahan and Edward Rock have

1. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 278 (1990).
2. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 130–31 (2009).
3. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 845–47 (1995).
4. Kresimir Pirsil, *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s)*, 14 COLUM. J. EUR. L. 277, 305 (2008) (“Delaware owes its corporate-law-environment superiority primarily to its specialized judiciary.”).
5. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 213 (1991) (listing Delaware’s “large body of precedents” as one of the three main reasons for that state’s success in the market for corporate charters); Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 589–90 (1990) (emphasizing judicial expertise as a major factor for Delaware’s dominance in the state competition for corporate charters); Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT’L L. 477, 526 n.245 (2004) (“A number of scholars have noted that Delaware’s rich body of precedents is an important factor in attracting foreign corporations.”); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1512 (1989) (“As the market has developed, Delaware has come to enjoy both a huge share of the market and a great amount of market power, because it offers attractions (some of which are beneficial to both shareholders and managers) that few other states can now match. Among these are a rich body of case-law that facilitates planning and dispute-settlement”); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) (demonstrating that Delaware’s dominance in the corporate charter market is a result of the judiciary’s legislation-like law-making ability); Timothy P. Glynn, *Delaware’s Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 97–101 (2008) (“Hence, the Delaware courts are the primary source of both the substance and enforcement of Delaware corporate law. By developing standards through a careful, contextual approach, rather than via broad pronouncements of unbending general rules, the courts assure further litigation over corporate legal norms and their application. The combination of upstream chartering activity and significant downstream corporate and business litigation supports a large incorporation and corporate law industry (composed of lawyers, registered agents, and others) in this otherwise tiny state . . . Delaware benefits from various ‘network advantages’—its widely known legal norms and practices provide familiarity and clarity which may add value and impose barriers to competition.”); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 638–39 (2004) (arguing that a factor for Delaware’s dominant position is Delaware’s extensive body of corporate law decisions).

compared Delaware courts favorably to federal courts: “Indeed, since Delaware’s judiciary is less politicized and has greater claims to expertise in corporate law than the federal judiciary, its rulings may enjoy greater legitimacy than would corporate rulings of federal judges.”⁶

This essay offers a contrary perspective on this assertion of Delaware courts’ expertise. While they may or may not be experts, I believe that their corporate law jurisprudence, especially over the last decade, has drifted toward incoherence. This might be for any of several reasons. But whatever the cause, the Delaware courts are putting themselves at risk of descending into legal and political illegitimacy. This essay will seek to explain why.

Part I of this essay will explain the importance of explanation in building and maintaining judicial legitimacy in the face of the so-called “counter-majoritarian difficulty” inherent in judicial decision-making.⁷ Part II offers examples of courts that sacrificed their own legitimacy because of incoherent, poorly reasoned judgments that strike readers as being based more on politics than law. Part III explains the implications of these insights for Delaware courts, namely that the Delaware judiciary needs to do a better job of justifying its decisions in traditional legal terms. Otherwise, the Delaware judiciary will increasingly be seen as merely instituting its political views by way of judicial rulings.

I. THE PROBLEM OF COURTS AND THE REQUIREMENT OF EXPLANATION

Ever since John Marshall penned *Marbury v. Madison* for the U.S. Supreme Court in 1803, a central problem of courts has been legitimacy. It was easy for Marshall to assert that: “It is emphatically the province and duty of the judicial department to say what the law is.”⁸ The more difficult task was to figure out a way to get the other branches of government and the general public to listen and obey.

In *Marbury* itself, President Thomas Jefferson had made it known that he was not prepared to abide by any decision holding against him, and every law student in America has been taught the reason. After the bitter 1800 presidential election lost by incumbent John Adams, Adams tried to cement the power of his Federalists by appointing a number of his sympathizers to government positions before Jefferson’s inauguration. *Marbury* was one of these—Adams tried to appoint *Marbury* as Justice of the Peace (a fairly important position at the time) in the last days of the Adams administration.⁹ *Marbury*’s commission was never delivered, and once Jefferson came into office he instructed his Secretary of State, James Madison, to let it lie. *Marbury*

6. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1612 (2005).

7. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

9. For a short summary of the lead-up to the case, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1–2 (3d ed. 2009). For a detailed account of the election of 1800, see JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004).

then filed suit in the Supreme Court, asking for a writ of mandamus requiring Madison to deliver the commission. Marshall had himself been appointed Chief Justice in the last weeks of Adams's term in office, and Marbury knew that the Supreme Court was the last remaining bastion of power for Adams's Federalists.

But Marshall was in a bind. He knew the Court had no army or police force to enforce its decision, and the influence of the Court was completely dependent on the legitimacy it could command from the other branches. On that score, Marshall had reason to worry. The Court's influence was so weak that Congress, controlled by Jefferson's party, passed a law abolishing the Court's sittings until 1803 in order to delay the Court hearing the case.¹⁰ When the *Marbury* case finally made it to oral argument, President Jefferson refused to send a lawyer to argue his side.¹¹

Marshall's response in the opinion for the Court was brilliant. The Court held that the Constitution did not allow the Court to have original jurisdiction over mandamus petitions, and the federal act that purported to give it such jurisdiction was therefore unconstitutional.¹² In giving up its power to hear the case, the Court seized the power of judicial review, striking down a law passed by Congress and signed by the President. More importantly, Marshall crafted a way to consolidate the Court's power that did not require either of the other branches to do anything. Only the Court itself was required to do something—decline to hear a case that could only make political difficulties for itself.

When I teach *Marbury* to first-year law students, I ask them to focus on two insights from the case. First, the Court's opinions and decisions come within a context in which the views of the other branches and of the general public matter a good deal. It has to be mindful of the political context in which it operates, because it cannot force other branches or the American public to do its will. If a court gets out of sync with the legal and political culture, its pronouncements risk being ignored or evaded. This awareness of the political context is an important component of a court's legitimacy.

Second, the Court's legitimacy also depends on its distinctiveness from the political branches. This is perhaps in tension with the fact that courts need to be aware of the political context in which they operate, but a court's power to "say what the law is" cannot be seen as a political act. Because of its insulation from political accountability and direct political check, the judiciary must be seen as doing *law* rather than politics. Politics is the realm of sheer power, of will. If political actors, courts are unconstrained. Unconstrained, they will lose their claim to distinctiveness, weakening their assertion that "it is emphatically the province and duty of the *judicial* department" to have the last say on law.¹³

10. CHEMERINSKY, *supra* note 9, at 2.

11. See Louis H. Pollak, *Marbury v. Madison: What Did John Marshall Decide and Why?*, 148 PROC. OF AM. PHIL. SOC'Y 1, 6–8 (2004).

12. *Marbury*, 5 U.S. at 174–76.

13. *Id.* at 177; see THE FEDERALIST NO. 78 (Alexander Hamilton), available at <http://www.constitution.org/fed/federa78.htm>.

This is why scholars of judicial power have long fixated on the question of how to constrain courts in their exercise of power. Some scholars and judges argue that the best constraint is for courts to operate under a presumption of deference to the political branches.¹⁴ Others argue that judicial restraint should come by way of strict interpretive methodologies, either originalism (for constitutional questions) or strict textualism (for both statutory and constitutional issues).¹⁵

There is merit in both suggestions, but in my view the most important judicial constraint is the requirement of explanation—the practice of courts to write out reasons for their judgments.¹⁶ Written opinions matter; explanations matter.¹⁷ The

-
14. The leading statement of this proposition is Justice Oliver Wendell Holmes's famous dissent in *Lochner v. New York*: "[M]y agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
 15. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971) ("[T]here is no way of deciding [constitutional questions] other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ [T]he judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute."); DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 174 (2005) (quoting Robert Bork as saying, "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else"); Clarence Thomas, Justice, Sup. Ct., Wriston Lecture to the Manhattan Institute (Oct. 16, 2008), reprinted in Op-Ed, *How to Read the Constitution*, WALL ST. J., Oct. 20, 2008, at A19, available at <http://online.wsj.com/article/SB122445985683948619.html> ("Let me put it this way; there are really only two ways to interpret the Constitution—try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are, but at least originalism has the advantage of being legitimate and, I might add, impartial."); see also Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 602 (2004) ("By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them."). See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed. 2007); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).
 16. Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 156 (2005) ("[T]he judiciary's legitimacy and authority depend largely on its ability to persuasively explain and justify its decisions."); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990–91 (2008) ("[J]udicial decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept. To determine whether a given justification satisfies this requirement, judges must make public the legal grounds for their decisions."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–37 (1987) ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) ("One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do.").
 17. See Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 248 (1998) ("Written opinions encourage judges to produce well-reasoned, well-written decisions because they subject judges' conclusions to public scrutiny. This leads to better, more consistent opinions because it holds judges

LAW, POLITICS, AND THE EROSION OF LEGITIMACY IN THE DELAWARE COURTS

purpose of written opinions is “[a]bove all else to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent.”¹⁸ If the reasons given by courts are not logical, clear, or persuasive, there will be push back from the bar, from democratic bodies, and from scholars.

Explanation is a constraint for courts because it requires coherence, which usually means an explanation of why the result reached in a specific case flows from neutral principles that the court will apply in other like cases.¹⁹ Not only does each explanation need to make sense, but a string of cases must fit together in a story. Advances and adjustments can be made over time, of course—that is the brilliance of the common law method.²⁰ But one should be able to read a line of cases and construct a coherent narrative that holds together based on the court’s stated reasons and rationales, not just its results.²¹ In other words, explanation is a constraint because it means that the court has to remain linked to its decisions in past cases. Past cases need not be a straightjacket, but they should be anchors and baselines. If courts diverge from existing narratives, they need to explain why, and they need to do so in a way that is persuasive. Without such requirement of fealty to past decisions and rationales, courts erode into political institutions, because—as argued above—law requires constraint. If a court can reach whatever decision it wants, it is performing not as a legal actor but a political one.

accountable to the public which they serve. This accountability, in turn, dispels the perception of the judiciary as a self-regulating, secret society, and it legitimizes the judicial branch of the government in the eyes of its citizens.”).

18. Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS, 237, 244 (2008) (quoting George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 200–01 (1967)).
19. Gerard N. Magliocca, *The Philosopher’s Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 189 (1998) (“Courts are generally thought to derive legitimacy from acting according to what Herbert Wechsler called ‘neutral principles,’ by which he meant that rules of decision had to be applied with consistency to fact-patterns similar to the one that spawned the original rule.”); see also Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 511–12 (1997); Kent R. Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 985 (1978); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).
20. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960) (“[T]he opinion has as one[,] if not its major[,] office to show how like cases are properly to be decided in the future . . . (If I cannot give a reason why I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.”).
21. See *Washington v. Glucksberg*, 521 U.S. 702, 770 (1997) (Souter, J., concurring) (“Common law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The ‘tradition is a living thing,’ albeit one that moves by moderate steps carefully taken. ‘The decision of an apparently novel claim must depend on grounds which follow closely on well accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come.’ (internal quotation marks omitted)”) (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

II. BAD EXPLANATIONS AND LEGITIMACY

When courts' explanations are poor, when honest readers find genuine reasons submerged, and when doctrine becomes so malleable that a court can reach whatever result it desires, then judicial will has replaced law. In that situation, courts suffer blows to their legitimacy.²² History provides numerous examples of this very phenomenon.

The so-called *Lochner* era is one example.²³ In the four decades before 1937, the Supreme Court was so committed to a jurisprudence of laissez-faire that it used virtually every tool at its disposal to fight the ability of state and federal governments to regulate the economy.²⁴ If the regulation came from the federal government, the Court cited a narrow interpretation of the Commerce Clause power or a broad interpretation of the non-delegation doctrine to strike down regulatory efforts.²⁵ If efforts to regulate the economy came from states, the Court's language switched to a focus on "freedom" and economic "liberty" that was protected by substantive due process protections of the Fourteenth Amendment.²⁶ The reasoning of the Court became increasingly incoherent, unworkable, and transparently political. For instance, after insisting in numerous cases that the Commerce Clause gave Congress the power (only) to regulate the passage of goods across borders (including in *Champion v. Ames*, where the Court upheld federal power to prohibit interstate shipments of lottery tickets),²⁷ the Court ruled in *Hammer v. Dagenhart* that Congress could not prohibit the passage of goods *manufactured by child labor* across borders.²⁸ The best explanation for the difference was that the Court did not want the regulation of commerce to be a mechanism through which the federal government could implement progressive visions of workers' rights.

The Court's anti-regulatory bias became a significant obstacle to effective legislative and regulatory responses to the Great Depression, and the Court was

22. See Patrick Emery Longan, *Professionalism on the Appellate Bench: The Life and Example of Justice George Rose Smith of the Arkansas Supreme Court*, 54 ARK. L. REV. 523, 550 (2001) ("Another purpose of the appellate opinion is institutional legitimacy The court and the author expose themselves to scrutiny and the possibility of criticism, or even condemnation, if the opinion is not well written or reasoned. Legitimacy follows from publication if the author of the opinion can demonstrate competence and diligence in resolving the case."); George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 200–01 (1968) (explaining that the purpose of an appellate opinion is "above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see"). See generally DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* (1994).

23. See *Lochner v. New York*, 198 U.S. 45 (1905); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (stating that *Lochner* represents the "nadir" of judicial competence).

24. See CHEMERINSKY, *supra* note 9, at 145.

25. See *id.*

26. See *id.*

27. 188 U.S. 321 (1903).

28. 247 U.S. 251, 273 (1918).

increasingly the target of harsh political criticism.²⁹ Eventually, in early 1937 President Franklin Roosevelt proposed his controversial “court packing” plan that would have given him the opportunity to appoint several new Justices to the Court.³⁰ That plan was seen as too political, but it was not long until the Court changed its tune. Within a few weeks, the Court held in *West Coast Hotel v. Parrish*³¹ that economic “liberty” would no longer serve as the basis for limiting state regulatory efforts, upholding a minimum wage law that was “almost identical to the one [that had been] struck down the previous year.”³² Soon afterward, the Court also ruled that the Commerce Clause allowed the federal government broader Commerce Clause power than it had previously recognized.³³ This was the famous “switch in time that saved nine.”³⁴ The Court’s doctrinal distinctions were becoming increasingly incoherent, which meant it was increasingly seen as a political institution. This opened the door to allowing it to be changed by way of political pressure.

In the *Lochner* era, incoherence meant a fixation on result and an inability to articulate a neutral principle that the Court respected consistently. Incoherence can also spring from vagueness, since a vague rule contains a less genuine constraint on judicial will. One of the more modern examples of Supreme Court incoherence comes from the so-called liberal side of the modern Court in the privacy cases. Ever since Justice William O. Douglas in *Griswold v. Connecticut* articulated a right to contraceptive services that sprang from “penumbras, formed by emanations” from explicitly articulated constitutional rights,³⁵ the important rights based on such reasoning—the right to medical care,³⁶ the right to terminate unwanted pregnancy,³⁷ the right to engage in consensual sexual relations with someone of the same sex³⁸—have been on tenuous political and legal ground. These holdings have been based on “substantive due process,” an awkward linguistic phrasing that hints at a broader doctrinal difficulty (e.g., how is process substantive?).³⁹

29. See DREW PEARSON & ROBERT ALLEN, *THE NINE OLD MEN* (1936).

30. *Franklin Delano Roosevelt’s Court Packing Plan*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/about/history/CourtPacking.cfm> (last visited Nov. 10, 2010).

31. 300 U.S. 379 (1937).

32. *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 204 (Kermit L. Hall et al. eds., 1992) [hereinafter *THE OXFORD COMPANION*].

33. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–32, 37–38 (1937).

34. See *THE OXFORD COMPANION*, *supra* note 32, at 204.

35. 381 U.S. 479, 484–85 (1965).

36. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (right to refuse treatment); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (physician-assisted suicide).

37. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

38. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

39. See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 969 (2002) (“In light of the oxymoronic character of the doctrine of substantive due process, the Fourteenth Amendment’s Due Process Clause is a very awkward vehicle for incorporating substantive rights like freedom of speech or religion.”); Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28

The phraseology used by the Court in explaining its decisions often exacerbates the incoherence. In *Lawrence v. Texas*, for example, the Court struck down Texas's sodomy statute saying that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”⁴⁰ This kind of language is not easily constrained. As Justice Scalia said in dissent in *Lawrence*, such reasoning does not easily distinguish anti-sodomy statutes from laws prohibiting “bigamy, . . . adult incest, prostitution,”⁴¹ or “recreational use of heroin.”⁴²

It is possible to construct a coherent theory of substantive due process (or, for that matter, equal protection or privileges and immunities) that protects the right to terminate a pregnancy, have access to contraceptives and medical care, or have intercourse with someone of the same sex, and which distinguishes those rights from, for example, the “right” to use heroin. (I would point to the concurrence of Justice David Souter in *Washington v. Glucksberg*⁴³ or Justice John Harlan’s dissent in *Poe v. Ullman*⁴⁴ as examples of how good judges go about the task with integrity. Here’s a

CARDOZO L. REV. 623, 692 (2006) (“To begin, the Privileges or Immunities Clause does not suffer any of the textual awkwardness of substantive due process.”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 894, 982 (2000) (“As a constitutional doctrine, substantive due process is a mile wide and an inch deep By far the most difficult definitional issue is presented by substantive due process.”); Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 991, 1004 (2002) (“It also makes sense to say that substantive due process should be used sparingly, because of its uncertain textual basis and because of the unreliability of judicial judgments about which rights should qualify as fundamental The argument for a cautious approach to the due process clause depends in part on a belief that the idea of ‘substantive due process’ is awkward as a matter of text and history.”). Some scholars believe that the Privileges or Immunities Clause of the Fourteenth Amendment is a better basis for substantive, fundamental rights. See Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 694 (2006) (“Stripped of error, however, Justice Miller’s discussion [in the *Slaughter-House Cases* opinion] of the words privileges and immunities offers the beginning of meaningful content for them as words which can now be used in a Fourteenth Amendment Meta Principle.”); see also Scott Dodson, *Vectorial Federalism*, 20 GA. ST. U. L. REV. 393, 457 (2003) (“[T]he Privileges or Immunities Clause is experiencing academic revival”); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 927–28 (2007) (proposing a “unitary reading of Section 1” of the Fourteenth Amendment that would “reinvigorate the Privileges or Immunities Clause” and make it the “basis” for the protection of fundamental rights); Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1477 (2008) (“[T]he right to court access for civil litigants, particularly the right to access the federal courts, is a privilege or immunity of national citizenship protected by the Fourteenth Amendment.”); Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15 (2009) (arguing for the reinvigoration of the Privileges or Immunities Clause).

40. 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851 (plurality opinion)).

41. *Id.* at 599 (Scalia, J., dissenting).

42. *Id.* at 592 (Scalia, J., dissenting).

43. See 521 U.S. 702, 767–69 (1997) (Souter, J., concurring in the judgment).

44. See 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

hint: neither has anything to say about the “meaning of the universe.”) But the Court has not done such a good job of it.

The problem of legitimacy is not just an issue for federal courts, of course. One example of incoherence from state courts comes from the 1980s and 1990s, when many state courts struggled with the definition of rape. Many courts still imposed the requirement that, to prove rape, the prosecution had to show the use of force to overcome the victim’s will. Lack of consent, in itself, was not enough.⁴⁵ The tension between the two conceptions of rape—forced intercourse as opposed to intercourse without consent—came to the fore in one particular case in Pennsylvania. In *Commonwealth v. Berkowitz*,⁴⁶ the defendant was a male college student who had intercourse with a female student who vocally protested throughout the encounter but who did not physically fight back. A jury convicted the man of rape, but the Pennsylvania Supreme Court overturned the conviction. The key passage was: “As to the complainant’s testimony that she stated ‘no’ throughout the encounter with [Berkowitz], we point out that, while an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force.”⁴⁷

The Pennsylvania Supreme Court’s result was the source of wide controversy.⁴⁸ Women’s groups protested; court watchers issued scathing critiques, saying the opinion was “one of the worst setbacks for the sexual assault movement in the last several years.”⁴⁹ One newspaper halfway across the country asked in an editorial, “What is it about the word ‘no’ they”—the “seven men sitting on the Pennsylvania Supreme Court”—“don’t understand?”⁵⁰ “Obviously the court has a difficult time comprehending the most unambiguous word in the English language.”⁵¹

The court’s holding was seen as incoherent, but not in the same way that the *Lochner* era cases or the substantive due process cases reveal incoherence. In the

45. See, e.g., *State v. Alston*, 312 S.E.2d 470 (N.C. 1984) (overturning a lower court decision finding second-degree rape when a woman was forced to have sex out of fear on the grounds that there was no force); *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (holding that no rape occurred because the statute required there to be force when a high school principal threatened student that he would withhold her diploma if she did not have sex with him); *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (overturning a guardian’s conviction for rape because of lack of showing of force when an adult guardian of a teenage girl threatened to have her recommitted to a juvenile detention facility if she did not submit to his sexual advances).

46. 609 A.2d 1338 (Pa. Super. Ct. 1992), *aff’d in part and vacated in part*, 641 A.2d 1161 (Pa. 1994).

47. *Berkowitz*, 641 A.2d at 1164.

48. For a fascinating use of the *Berkowitz* case to show the effect of cultural bias on the fact-finding of juries, see Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in “*Acquaintance Rape*” Cases (Cultural Cognition Project at Yale Law Sch., U. Penn. Law Sch. Working Paper No. 29, 2009), available at <http://ssrn.com/abstract=1437742>.

49. Dale Russakoff, *Where Women Can’t Just Say “No”; Pennsylvania Supreme Court Rules Force is Needed to Prove Rape*, WASH. POST, June 3, 1994, at A1 (quoting Cassandra Thomas, president of the National Coalition Against Sexual Assault).

50. Editorial, *When “No” Means Nothing*, ST. LOUIS POST-DISPATCH, June 6, 1994, at 6B (quoting Deborah Zubow of the Women’s International League for Peace and Freedom).

51. *Id.*

Lochner era cases, courts fixated on result at the expense of consistency; in the substantive due process privacy cases, courts are guilty of articulating vague standards that do not provide guidance or limits.

In contrast, the incoherence in *Berkowitz* is a problem of obtuseness. What I mean by this is that the opinion seems disconnected to the experiences of many people (especially women) who read it. An opinion setting aside a jury conviction for rape in a case in which the victim verbally protested throughout the encounter, on the ground that no force was involved, could reasonably strike a reader as a victory of form over substance. Such an opinion also ignores the genuine experience of many women who are so fearful in such assaults that they believe any resistance would be met by even worse consequences. Such an opinion ignores the fact that the most powerful force is one that need not be exercised. It also fails to come to terms with the fact that the harm that comes from rape arises not just because of force involved, but because of the lack of consent on the part of the victim.

Obtuseness—when courts “just don’t get it”—is a kind of incoherence because it means that the court’s explanation is not ultimately persuasive to the readers of the opinion. And when readers of a judicial explanation believe the court is missing an insight that is fundamental to understanding the case, the court risks losing its place as a respected arbiter of disputes.

These various kinds of incoherence—result orientation, vagueness, and obtuseness—are, of course, related. If a court is fixated on result, it is likely to articulate vague rules. If it is missing key insights, it is free to reach results that fit with its pre-existing assumptions. If a court articulates its holding in vague ways that do not constrain its judgment in future cases, it is more able to reach pre-determined results and more likely to elide key aspects of a persuasive judgment. In any event, the key point is that a court’s failure, over time, to articulate persuasive and consistent rationales for its judgments will result in harm to the court’s reputation. This reputational harm will result in a loss of legitimacy and respect for the court’s judgments.

III. DELAWARE COURTS AND INCOHERENCE

For many years, one of the putative bases for Delaware’s dominance in the competition among states to provide corporate charters is the expertise of the Delaware judiciary in deciding corporate law cases.⁵² The notion of Delaware judicial expertise has become conventional wisdom in the academy as well as in corporate practice. But it is becoming increasingly difficult to make that claim if one wants to base it on the actual performance of Delaware courts in producing coherent legal doctrine.

My perspective on this question is informed (or skewed, perhaps) by the fact that I teach the basic corporate law course to one hundred or more law students each year. They are eager to discuss and explore the underlying themes and narratives of this fascinating area of law, but they are also eager to learn the black-letter doctrine. In the latter pursuit, I am increasingly unable to make sense of existing Delaware

52. See *supra* notes 2–7 and accompanying text.

corporate law. I must admit to my students that I do not know how best to characterize much of the corporate law doctrine of the jurisdiction.

Allow me to take an example that occurs early in the course: the duty of care. The key modern case, *In re Caremark International Inc. Derivative Litigation*,⁵³ articulates a fundamental duty on the part of corporate fiduciaries to stay informed and to obey the law. But the actual results of the case—in which the directors escaped liability even though unlawful activity had cost the firm \$250 million in fines—strikes students as inconsistent with the rhetoric of the case.⁵⁴ When I point the students to the language in the opinion where the court establishes that the board can avoid liability merely by establishing an information system that will give them fair warning of financial or legal improprieties, and that the extent of such a monitoring system is subject to the deferential business judgment rule,⁵⁵ students rightly question the integrity of the court's insistence on the underlying duty at all. So I am left opining that the court continues to assert the existence of a duty of care but does not seek to have it enforced in a meaningful way.⁵⁶ The students are left wondering if there is a genuine duty of care anymore.

It does not get much better when we turn to the duty of loyalty. For example, what is the effect of ratification of a self-interested transaction—is it dispositive, as the statute seems to imply? If not, what is the standard the plaintiff has to meet? Is it lack of fairness, as some cases imply?⁵⁷ Or is it the more managerially protective business judgment rule, as other cases seem to hold?⁵⁸ This strikes me as a fairly important doctrinal point, but the Delaware judiciary has done worse than leave it undecided. It has decided it in contradictory ways.

When we study the duties of directors in takeover situations, the law—again—seems to lack a certain clarity. Do *Revlon* duties require directors to fixate on shareholder gain, as *Revlon v. MacAndrews & Forbes Holdings, Inc.* and its progeny seemed to say?⁵⁹ Or do fiduciary duties in such a situation give directors more

53. 698 A.2d 959 (Del. Ch. 1996).

54. *See id.* at 971–72.

55. *Id.* at 968–70.

56. *See* Edward R. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (discussing the difference between the rhetoric of corporate law cases and their actual holdings).

57. *Cf.* Kahn v. Tremont Corp., 694 A.2d 422, 428–29 (Del. 1997) (stating that the standard of review for an independent committee of the board negotiating a transaction in which there is an interested controlling shareholder is “entire fairness”).

58. *See* Cooke v. Oolie, No. 11134, 2000 Del. Ch. LEXIS 89, at *44 (Del. Ch. May 24, 2000) (fairness); Marciano v. Nakash, 535 A.2d 400, 405 (Del. 1987) (“[A]pproval by fully-informed disinterested directors under section 144(a)(1), or disinterested stockholders under section 144(b)(2) permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof on the party attacking the transaction.”).

59. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 51 (Del. 1994).

discretion, as *Paramount Communications, Inc. v. Time Inc.*, seemed to say?⁶⁰ And the 2009 case, *Lyondell Chemical Company v. Ryan*, confused my students even more. Whatever the *Revlon* test was, did the Delaware court change it in *Lyondell*, essentially adding an intent test for director liability?⁶¹

Admittedly, our confusion about *Lyondell* is really a confusion over the doctrine of good faith, which has been fodder for law school classroom (and law professors' conference) discussions for a decade or more. For all of that discussion in classrooms, conferences, and Delaware opinions, one still labors to understand the test for good faith. Is it an "utter failure" to meet one's duties (as the Delaware court endorsed in *Lyondell*)⁶² or the analytically distinct "reckless disregard" of one's duties (that the Delaware court articulated in, ahem, *Lyondell*).⁶³ The distinction is not lost even on beginning legal scholars: one test asks about behavior, the other about mental state. Or, does a plaintiff have to prove *both* a knowing failure and a complete failure? This, too, was asserted in *Lyondell*.⁶⁴ Finally, now that after almost a decade of indecision⁶⁵ the Delaware courts have decided that the duty of good faith is a component of the duty of loyalty rather than a stand-alone duty,⁶⁶ does it make any sense for the doctrine to depend on a test ("utter failure") derived from *Caremark*, a duty of *care* case?⁶⁷

I have ceased being embarrassed by my inability to articulate a coherent set of tests for corporate law duties under Delaware law, as it has become clear that I am hardly alone in my inability. Indeed, "[c]ommentators are in wide agreement that

60. See *Paramount Commc'ns*, 571 A.2d at 1153.

61. See *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243–44 (Del. 2009).

62. The "utter failure" language, originated in *Caremark*, was followed in *Stone v. Ritter*, and endorsed in *Lyondell*. See *Stone v. Ritter*, 911 A.2d 362, 364 (Del. 2006) ("[O]nly a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.") (quoting *In re Caremark Int'l. Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)); *Lyondell*, 970 A.2d at 240, 244. ("The trial court approached the record from the wrong perspective. Instead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors *utterly failed* to attempt to obtain the best sale price.") (citing *Stone* and *In re Caremark*) (emphasis added).

63. *Lyondell*, 970 A.2d at 243 ("[B]ad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'").

64. *Id.* at 243–44 ("Only if they knowingly *and* completely failed to undertake their responsibilities would they breach their duty of loyalty.") (emphasis added).

65. See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, n.112 (Del. 2006) ("For the same reason, we do not reach or otherwise address the issue of whether the fiduciary duty to act in good faith is a duty that, like the duties of care and loyalty, can serve as an independent basis for imposing liability upon corporate officers and directors. That issue is not before us on this appeal.")

66. *Stone*, 911 A.2d at 369–70 ("The failure to act in good faith may result in liability because the requirement to act in good faith is a subsidiary element, i.e., a condition, of the fundamental duty of loyalty.") (internal quotation marks omitted).

67. *In re Caremark*, 698 A.2d at 971.

LAW, POLITICS, AND THE EROSION OF LEGITIMACY IN THE DELAWARE COURTS

Delaware corporate law lacks clarity.”⁶⁸ During the conference for which this essay was written, some of the leading corporate law scholars in the country expressed similar frustration.⁶⁹ James Cox, in describing the “entire fairness” standard, admitted that he was “not sure what that means.”⁷⁰ He described the Delaware court’s causation standard in *Cede & Co. v. Technicolor, Inc.*⁷¹ as “non-sensical” and called Delaware jurisprudence “screwy.”⁷² Alan Palmiter said that, in the context of the various cases on the duty of good faith, Delaware was either saying “everything” or “nothing” and, in the context of the duties of care and loyalty, had “screwed it up.”⁷³ Mae Kuykendall admitted that she was “uncertain” whether good faith had any real substance.⁷⁴ Kristin Johnson offered a hypothesis of Delaware law based on “an absence of a functional framework.”⁷⁵

Other scholars see similar difficulties. Stephen M. Bainbridge, Star Lopez, and Benjamin Oklan recently opined that “new and unnecessary doctrinal uncertainties have been created” by Delaware’s good faith jurisprudence.⁷⁶ Clark W. Furlow said that “Delaware’s inability to offer a clear, consistent conception of good faith is significant.”⁷⁷ Robert B. Ahdieh asserted that Delaware maintains “a certain lack of clarity in its legal rules.”⁷⁸

-
68. Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1233 n.120 (2001).
 69. Symposium, *The Delaware Fiduciary Duty of Good Faith after Disney: Meaningful or Mickey Mouse?*, (Nov. 13, 2009) [hereinafter Good Faith after *Disney* Symposium]. An archive of the symposium is available at <http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=98c600182aeb4f098abd525b2c5b5c89>.
 70. James D. Cox, Brainerd Currie Professor of Law, Duke Univ. Sch. of Law, Good Faith after *Disney* Symposium, *supra* note 69.
 71. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del 1993).
 72. Cox, *supra* note 70.
 73. Alan R. Palmiter, Professor of Law at Wake Forest Univ. Sch. of Law, Good Faith after *Disney* Symposium, *supra* note 69.
 74. Mae Kuykendall, Professor of Law at Mich. State Univ. Coll. of Law, Good Faith after *Disney* Symposium, *supra* note 69.
 75. Kristin N. Johnson, Professor of Law at Seton Hall Univ. Sch. of Law, Good Faith after *Disney* Symposium, *supra* note 69.
 76. Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 (2008).
 77. Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061, 1062 (2009).
 78. Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255 n.131 (2009); see, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (adopting a non-literal interpretation of DEL. CODE ANN. tit. 8, § 262(h) (2001)); see also *Speiser v. Baker*, 525 A.2d 1001 (Del. Ch. 1987) (adopting a non-literal interpretation of DEL. CODE ANN. tit. 8, § 160(c) (2001)); *Jewel Recovery, L.P. v. Gordon*, 196 B.R. 348, 355 (N.D. Tex. 1996) (“In Delaware [the leading jurisdiction], ‘the extent to which directors of putatively insolvent corporations [can] continue to advance the interests of stockholders without violating their fiduciary duty to the corporate entity or to creditors remain[s] hazy.’”) (quoting *Matthew Bender & Co., Delaware Corporation Law &*

These are not casual observers. These scholars are experts in the field who study Delaware jurisprudence deeply and consistently. But they do not see coherence. Even the Delaware Chancery Court has admitted that corporate law doctrine in Delaware is “shrouded in a fog of hazy jurisprudence.”⁷⁹

The kind of incoherence at center stage in Delaware is of the vagueness stripe, but the problems of result orientation and obtuseness are inherent as well. The Delaware courts are widely seen as fiercely protective of management,⁸⁰ a result orientation that is easy to satisfy given their vague rules. The Delaware courts also often seem obtuse and out of touch. For example in *Disney*, the result protecting managerial prerogative even when it resulted in a severance payment of \$130 million for a failed executive could reasonably strike an observer as a victory of form over substance.⁸¹ The court’s inability to see the squandering of such wealth as a violation of the obligation of care, loyalty, or good faith, seemed out of touch with what most people would think those words mean, with what most people would think the obligations of executives should be, and with what most people would think of the value of that amount of money.

My point is that if legitimacy springs from persuasive explanation, the Delaware courts are putting themselves at risk. More problematically, if law is a constraint, Delaware courts are increasingly likely to be seen as political rather than legal actors since their reasoning does not constrain them from reaching the outcomes they prefer in any given case.⁸² After a while, what the Delaware courts are doing will cease to

Practice § 15.15, at 15-106 (1994)); Jon Dwain McLaughlin, *The Uncertain Timing of Directors’ Shifting Fiduciary Duties in the Zone of Insolvency: Using Altman’s Z-Score to Synchronize the Watches of Courts, Directors, Creditors, and Shareholders*, 31 *HAMLIN L. REV.* 145, 155 (2008) (“The case law is such that commentators and courts alike have not been able to pull from the opinions any generally applicable clear-cut principles or rules concerning the fiduciary duties of directors towards creditors.”); Philip S. Garon, et al., *Challenging Delaware’s Desirability as a Haven for Incorporation*, 32 *WM. MITCHELL L. REV.* 769, 773 (2006) (“Minnesota’s statutory codification creates more certainty than the Delaware case law because of (a) internal ambiguities in many of the Delaware judicial decisions; (b) apparent inconsistencies among certain contemporaneously decided Delaware cases; (c) divergence of certain decisions with the letter of, and apparent policy behind, the Delaware statute; and (d) tendency of the Delaware courts to reverse or ignore precedent and upset expectations.”); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 *CORNELL L. REV.* 1205 n.120 (“However, even where the code contains relatively precise language, Delaware courts do not necessarily follow the code when they find the results objectionable.”).

79. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 63 n.98 (Del. 2006); see *Solomon v. Armstrong*, 747 A.2d 1098, 1113–14 (Del. Ch. 1999) (“Delaware’s law concerning the effect of shareholder ratification in the face of an alleged breach is not a model of clarity.”).

80. See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 666 (1974) (Delaware law allows for “the race for the bottom” in favor of management at cost to shareholders).

81. *Disney*, 906 A.2d at 27.

82. In her comments at this conference, Justice Carolyn Berger, the author of *Lyondell*, admitted as much. In an answer to a question about the implications of the managerially protective language in *Lyondell* that managers would be held liable for a breach of the duty of good faith only if they “utterly” fail to meet their obligations, Justice Berger said that such language would not stop the Delaware courts from finding liability in a case in which they were convinced they needed to find liability. See Hon. Carolyn

be seen as law and will instead be seen as simply judicial will. This, too, will cost them legitimacy.

What will be the implications for Delaware, and the Delaware judiciary? We might see more federal intervention into the fabric of corporate governance, something we have already had a hint of in the Sarbanes-Oxley Act of 2002.⁸³ Other states could begin asserting their right to govern the internal affairs of corporations based outside of Delaware, notwithstanding the corporations' Delaware charters.⁸⁴ The persuasiveness of the notion that Delaware has won a "race to the top" in corporate law will wane, along with the notion that there is something special about the expertise of Delaware courts when it comes to matters of business and corporate governance. Scholars will increasingly chide the court for lack of clarity and coherence. Students of corporate law will finally realize that the emperor has no clothes.

Berger, *Good Faith after Disney: Justice Berger's Closing Discussion*, 55 N.Y.L. SCH. L. REV. 659, 661–62 (2010–11).

83. See J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 374–75 (2004) ("Sarbanes-Oxley represents another instance of federal intrusion seeking to compensate for lax standards at the state level. Sarbanes-Oxley forces the board to be more informed, largely supplanting Delaware law concerning the duty to monitor. Counsel must report to management suspected breaches of fiduciary duties. Companies are required to put in place information gathering systems—a requirement that has effectively overturned Delaware law. Sarbanes-Oxley increases both the standards for, and the duties of, directors on the audit committee.") (footnote omitted); Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 WAKE FOREST L. REV. 879 (2006); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004); Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 12–15 (2009) (discussing how aware the Delaware judiciary is of the potential power of the federal government in the area of corporate law); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2521–22 (2005) ("[Sarbanes-Oxley] illustrates a Congress swept by scandal and national opinion into regulating corporate organization in a way it usually leaves to state law. Delaware authorities did seek the chance to remedy the corporate governance debilities that the scandals highlighted, but the state didn't act dramatically, perhaps because the concerned officials were judges, who need a case before them to act, or because Delaware's primary interest groups wouldn't have been able to agree on what to do in the legislature.").
84. See Kent Greenfield, *Democracy and Dominance of Delaware in Corporate Law*, 67 J.L. & CONTEMP. PROBS. 135 (2004).