Circumventing Lax Fiduciary Standards: The Possibility of Shareholder Multistate Class Actions for Directors' Breach of the Duty of Due Care

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This article questions whether decreasing accountability by directors for their negligence, either by limiting liability or relaxing standards of due care, necessarily promotes states’ interests. Specifically, the article proposes that states enact legislation holding directors, for actions pertaining to major transactions, to a standard of liability more stringent than that imposed by statutes modeled after the Delaware example. The proposed statute would hold directors liable for the damages caused by their negligence to shareholders residing in the enacting states. Because such a statute would aim to protect all resident shareholders victimized by directors’ negligence, an effective statute would need to reach directors of companies not incorporated in

1. The nature of the transactions to which the proposed statute would apply is discussed at Part I-B.
SHAREHOLDER CLASS ACTIONS

the enacting state. The state of incorporation, however, can lay a powerful claim to the prerogative of passing on derivative actions; hence, the statute would have to be confined to direct actions alleging a breach of duties owed to shareholders rather than to the corporate entity itself. Suits brought under the statute would therefore assume the form of shareholder class actions. Moreover, efficiency dictates that courts entertain the class of all of the corporation's shareholders, applying each shareholder's state's law governing due care and assigning damages accordingly.

The article principally identifies and responds to an array of potential objections against such application of local standards of care to directors of foreign corporations. In particular, the article focuses on challenges that the statute exceeds the bounds of the enacting state's authority under settled principles of federalism. In this view, constitutional doctrines and choice-of-law consensus bar a state from extending its conception of fiduciary duties beyond its boundaries in the manner proposed here. Each of these purported barriers, however, reflects an exaggerated notion of the exclusive prerogatives of states in which a corporation is domiciled or does substantial business. Conversely, putative limitations on the authority of the enacting state underestimate the extent to which modern doctrine accommodates state solicitude for the economic well-being of its citizens. Although corporate tradition and culture have shied away from holding directors to standards of care imposed by states other than the state of incorporation, the weight of these conventions does not translate into legal impediments to the proposed outreach statute.

I. A FIDUCIARY OUTREACH STATUTE: FIGHTING THE TIDE OF DIRECTORS' FREEDOM FROM THE CONSTRAINTS OF DUE CARE

A. Background: The Ascendancy of Permissive Legislation and Contractarian Thought

Seven years ago the Delaware Supreme Court in Smith v. Van

2. Unlike the derivative suit, the shareholder multistate class action does not ineluctably displace the lex incorporationis. A class action would apply the fiducial standard of each enacting state to the extent of its interest, as measured by the shares held in that state. By contrast, the derivative suit seeks to vindicate the unified interest of a single entity: viz., the corporation itself. See Note, Distinguishing Between Direct and Derivative Shareholder Suits, 110 U. PA. L. REV. 1147, 1148 (1962). For that reason, the variation in claims and apportionment of damages found in class actions are not available in a derivative suit. Thus, application of a law other than the lex incorporationis necessarily entails rejection of the law of the state of incorporation.

3. The term is Professor DeMott’s. See Deborah A. DeMott, Perspectives on Choice of Law for Corporate Internal Affairs, 48 LAW & CONTEMP. PROBS. 161, 162 (1985).
Gorkom4 startled many observers5 and dismayed the business community6 by holding the directors of Trans Union Corporation liable for their “grossly negligent”7 approval of a cash-out merger of Trans Union into another company. In the face of widespread fear that excessive exposure to liability would send capable persons fleeing from boardrooms and liability insurance spiraling to prohibitive levels,8 the Delaware General Assembly played a legislative trump card by enacting section 102(b)(7) of the Delaware Corporation Code.9 This statute empowers shareholders to insert in the certificate of incorporation provisions that eliminate or limit directors’ personal liability for breach of the duty of care. Van Gorkom inspired apprehension beyond Delaware; most other states also passed legislation designed in various ways to reduce the scope of potential director liability.10 Thus, paradoxically, directorial decisionmaking enjoys considerably more statutory protection than it did prior to Van Gorkom.

The rush to insulate directors from liability for negligence adds a new chapter to the longstanding debate over whether competition for corporate charters has created a “race for the bottom” destructive of shareholders' welfare.11 As an empirical matter, both those who con-

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4. 488 A.2d 858 (Del. 1985).
demn the pressure for more lax corporate codes as a "sort of Gresham's law" and those who sympathize with Delaware's philosophy of corporate governance agree that corporations can readily elude stricter duties for directors by selecting a congenial state of incorporation. Section 102(b)(7) and its counterparts typify both the permissive nature of Delaware corporate law and the tendency of other states to emulate Delaware's model. This article, then, seeks to construct a legal framework for the "de-Delawarization" of at least one aspect of corporate law by giving states the power to protect their own resident shareholders from directors' negligence despite incorporation elsewhere.

The proposed statute also runs directly counter to the dominant school of thought in contemporary scholarly discourse on corporations: the contractual model of the corporation. Contractarians view the corporation as essentially a nexus of contracts. Therefore, under the contractarian view shareholders should be left free in most matters to determine by agreement the rules under which corporate relationships shall be conducted. Under prevailing contractarian theory, then, the proposed statute's enforcement of the enacting


4. For an overview of the contractual model and significant criticisms, see Lucian A. Bebchuk, Foreword: The Debate on Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395 (1989); see generally, Symposium: Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395 (1989).


state's standard of care rather than the standard of the incorporating state would violate a fundamental tenet of corporate governance.\textsuperscript{17}

The contractarian trend in legislation and legal thought recently found further expression in the Corporate Governance Project of the American Law Institute. The Institute endorsed the principle that in derivative actions for breach of the duty of care, the recommendation of a directors’ special litigation committee to terminate the suit is not reviewable, provided that the prerequisites of the business judgment rule have been met.\textsuperscript{18} This provision essentially eliminates judicial review in duty of care cases brought on behalf of the corporation.

Given the pervasive sympathy for contractarian ideology in modern corporate law, the proposed outreach statute might seem unfeasible or even preposterous. Adoption of the statute would plainly challenge the prevailing legislative wisdom of minimal oversight. On reflection, however, the statute can be seen as a plausible reaction to an excessive erosion of director accountability. The widespread adoption of limited liability statutes might not even reflect a reasoned choice of minimal oversight, but instead might amount to an inordinately sweeping response to specific (and temporary) problems arising from the insurance crisis\textsuperscript{19} and the excesses of the takeover boom.\textsuperscript{20} In the absence of federal minimum requirements,\textsuperscript{21} outreach legislation may represent the most effective device for restoring some measure of fiduciary standards.\textsuperscript{22} Indeed, the contract model itself has

\begin{itemize}
\item Even contractarians who might concede the validity of some mandatory fiduciary rules, see Frank Easterbrook & Daniel R. Fischel, \textit{The Corporate Contract}, 89 Colum. L. Rev. 1416, 1437-39 (1989), would undoubtedly object to interference with the shareholders' presumed tacit agreement to be bound by the legal regime of the state of incorporation. Cf. DeMott, \textit{supra} note 3, at 162 (describing implications of contract model for constitutional choice of law).
\item Richard B. Smith, \textit{Motion to Amend § 7.04(a) of the Proposed Final Draft, ALI Corporate Governance Project Part VII (Remedies)}(May 10, 1992).
\item See Roberta Romano, \textit{Corporate Governance in the Aftermath of the Insurance Crisis}, 39 Emory L.J. 1155, 1158-59 (1990)(general increase in insurance rates during 1980's); but see id. at 1188 (concluding that limited liability statutes probably benefit shareholders).
\item See Dale A. Oesterle, \textit{The Effect of Statutes Limiting Directors' Due Care Liability on Hostile Takeover Defenses}, 24 Wake Forest L. Rev. 31 (1989).
\item See Cary, \textit{supra} note 11, at 700-02 (finding prospect of federal incorporation "politically unrealistic," but recommending federal fiduciary standards); see generally Lucian A. Bebchuk, \textit{Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law}, 105 Harv. L. Rev. 1435 (1992)(likelihood that state competition for charters produces undesirable results for some issues makes federal law rules appropriate).
\item A number of decisions holding directors liable for negligence indicate that an outreach statute would provide an opportunity to apply a meaningful standard of due care. \textit{See, e.g.}, Hoye v. Meek, 795 F.2d 893 (10th Cir. 1986); Fitzpatrick v. FDIC, 765 F.2d 569 (6th Cir. 1985); Robinson v. Watt's Detective Agency, Inc., 685 F.2d
been the subject of scholarly critique, and it should not be inevitably advanced as a rule of nature.

This article leaves the ultimate debate over the contract model and the desirability of state competition for charters to other forums. This proposal for the statute assumes that mandatory rules in general and a meaningful duty of due care in particular are useful ways for states to protect resident shareholders in discrete situations. Thus, rather than rehash the broader debate over such rules, the article addresses the concerns of a legislature which is already convinced of the value of applying that state's duty of care to directors of foreign corporations, but which is also doubtful that this can be done within the prevailing framework of law. The article seeks to demonstrate that such a legislature need not be deterred by illusory restraints stemming from a skewed vision of federalism.

B. Defining the Scope of the Statute

In proposing this statute, the realm of behavior that would subject directors to liability must first be defined. A narrow compass would help answer criticism that this type of statute would excessively distract directors by demanding that they keep a constant vigilance to a variety of state standards. Accordingly, the statute should first set

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24. The two issues are intertwined. See Bebchuk, supra note 21, at 1496-99.
forth with particularity both the occasions that will trigger its scrutiny for due care and then state the kinds of measures that will satisfy that standard.

The statute should focus principally on transactions intended to effect a fundamental change in the control or character of the corporation. This would include mergers, tender offers, and sales or purchases of a substantial amount of assets as well as adoption of defensive measures thereto, including lock-up agreements, crown jewel options, poison pills, shareholder rights plans, dual class capitalizations, and the like. It is in the course of these transactions that shareholders typically have the largest stake in the conscientious exercise of judgment by their directors. At the same time, it is during decisionmaking on these matters that directors are most likely to commit blunders that will prove costly to shareholders. Moreover, because these transactions are infrequent, a heightened requirement of due care would not disrupt or inhibit the ordinary course of decisionmaking.

The statute also should indicate procedures whose undertaking creates a strong presumption of sufficient care, thereby providing a safe harbor for apprehensive directors. By the same token, a description of the principal lapses that may expose directors to liability would alleviate the threat of unfair surprise. For example, the statute might warn against a decision made without adequate consideration, as evidenced by the deliberation or haste with which it was made.

In concluding that the directors of Trans Union were grossly negligent in approving a cash-out merger of the company, the Van Gorkom court emphasized that the board had acted "upon two hours' consideration, without prior notice, and without the exigency of a crisis or emer-

25. The application of the statute would not hinge on the success of the attempt.
26. The statute would reach directors of the successor as well as the merged corporation where absorption of the latter has a significant effect on the former.
27. Whether a sale of assets brings the statute into play would depend on the functional question of the sale's impact on the corporation rather than on a formal change in the corporation's structure. Compare Farris v. Glen Alden Corp., 143 A.2d 25, 31 (Pa. 1958)(reorganization agreement entailing sale of assets amounts to de facto merger activating dissenters' appraisal rights under Pennsylvania law) with Orzeck v. Englehart, 195 A.2d 375, 378 (Del. 1963)(purchase of all the stock of seven corporations not treated as merger for purpose of determining dissenters' rights under Delaware law).
29. See Stephen A. Radin, The Director's Duty of Care Three Years After Smith v. Van Gorkom, 39 HASTINGS L.J. 707, 709 (1988). This article contains an analysis of decisions in the years immediately following Van Gorkom that addressed whether board action demonstrated a lack of due care.
Similarly, subsequent judicial assessments of a lack of due care have almost invariably involved meetings whose brevity rendered the quality of decisionmaking suspect. Conversely, when courts have rejected allegations of directors’ negligence, a longer meeting has apparently been viewed as reflecting more thoughtful consideration.

It is doubtful whether a fiduciary outreach statute should apply to conduct other than decisions on fundamental changes. In principle, a state should not have to accede to other states’ lax attitudes toward the general directorial duty to monitor managers. The basic obligation of attentiveness to the operations of the corporation is well-understood and not controversial:

A director should become familiar with the fundamentals of the business in which the corporation is engaged. . . . Directors are under a continuing obligation to keep informed about the activities of the corporation. . . . Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look.\(^3\)

Nonetheless, courts, particularly those of Delaware, have exhibited a pronounced reluctance to enforce this duty rigorously, even in the face of evidence that directors have ignored or even condoned serious misconduct by employees.\(^3\)\(^4\) Accordingly, an outreach statute might stipulate that failure to undertake specific types of investigatory steps after suspect conduct has occurred, or even the absence of a mechanism for ferreting out predictable types of injurious behavior, raises a permissible inference of negligence that a director must rebut.

As a practical matter, however, extending the statute’s scope to include ongoing managerial tasks would likely prove ill-advised. The day-to-day occasions on which directors could be subject to charges of

\(^{33}\) Francis v. United Jersey Bank, 432 A.2d 814, 821-22 (N.J. 1981)(holding director liable for negligence in failing to detect and to try preventing other directors’ misappropriation of funds); see Meyers v. Moody, 693 F.2d 1196, 1209 (5th Cir. 1982) cert. denied, 464 U.S. 920 (1983)(personal liability based in part on Moody’s negligent management of corporation’s business affairs); Barnes v. Andrews, 298 F. Supp. 614, 616 (S.D.N.Y. 1924)(violation of director’s duty to inform himself found where severe losses resulting from delays in production might have been averted or reduced by director’s reviewing progress of production, investigating reasons for delay, and considering possible means of redressing underlying problems); see also Bates v. Dresser, 251 U.S. 524, 529-31 (1920)(president but not directors of national bank liable for negligence where apparent shrinkage in deposits and other indications should have alerted president to possibility of thefts by employees and necessity of taking steps to prevent future fraud); CORPORATE DIRECTOR’S GUIDEBOOK (1978), reprinted in 33 BUS. LAW. 1591, 1602-03 (1978).

\(^{34}\) See, e.g., Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. Ch. 1963)(defendant directors and officers held not to violate duty to supervise though not detecting and attempting to prevent participation by corporation’s employees in pervasive scheme to violate antitrust laws); JOHN BROOKS, BUSINESS ADVENTURES 199-223 (1969)(describing scale of antitrust conspiracy in which Allis-Chalmers employees were involved); Richard J. Spelts, Note, Corporations—Directors—Extent of Duty to Install Internal Control Systems to Prevent Antitrust Violations by Subordinates, 35 U. COLO. L. REV. 619 (1963); see also P.T. Cheff v. Mathes, 199 A.2d 548 (Del. 1964); Kelly v. Bell, 254 A.2d 62 (Del. Ch. 1969).
negligence for inadequately monitoring the company's operations are not clearly defined. Thus, an outreach statute's imposition of liability on these grounds might give directors insufficient notice of those instances in which states other than the state of incorporation may expect heightened diligence. In addition, the resulting preoccupation with the application of a multiplicity of standards could inhibit directors' decisionmaking. On balance, the prospect of frequent and protracted litigation, especially when factual issues concerning directors' awareness may prove exceptionally difficult, probably outweighs any incremental gain in accountability.

II. THE PROBLEM OF JURISDICTION

The threshold, and in many instances the most formidable, obstacle to shareholder class actions brought outside the state of incorporation is the necessity of asserting jurisdiction over defendant directors. Ever since the Supreme Court's decision in *International Shoe v. Washington*, the touchstone for the exercise of jurisdiction has been the existence of "minimum contacts" between the parties—especially the defendant—and the forum state. The plausibility of a forum state's claim of jurisdiction over a nonresident director varies with the weight and character of such contacts. Jurisdiction thus poses a very context-specific hurdle. For that reason, after a brief review of the constitutional principles governing jurisdiction, the next three subsections describe three basic possible levels of contact between a director and a forum state; these are presented in order of their increasingly problematic jurisdictional grasp. A separate section specifically focuses on the implications of the Supreme Court's decision in *Phillips Petroleum Company v. Shutts*, addressing jurisdiction in shareholder multistate class actions. The discussion contends that while jurisdiction over nonresident directors may entail an extension of settled principles, that extension involves no greater leap than the Court has already made in abandoning rigid territorial rules for more realistic and flexible analyses.

A. Due Process and Minimum Contacts

The Supreme Court has never reduced the concept of minimum contacts to a mechanical formula. Rather, the Court has tended to weigh the particular facts in each of its many rulings on jurisdiction, rendering individualized decisions in pointillist fashion. Nevertheless,

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35. In some cases even the state of incorporation may lack sufficient contacts with the director to assert jurisdiction.
37. Id. at 316.
a number of distinct concerns have crystallized from which one can venture an informed prediction of the Court's attitude toward a given attempt to assert jurisdiction.39

These concerns flow from the two functions the Court has identified as served by the minimum contacts test: to safeguard defendants against "the burdens of litigating in a distant or inconvenient forum" and to "ensure that the states, through their courts, do not reach out beyond the limits imposed by their status as coequal sovereigns in a federal system."40 While the latter concern with interstate federalism is still occasionally suggested by rules defined by territorial boundaries,41 that concern has been submerged in recent years beneath the Court's primary emphasis of protecting the defendant's liberty.42 Thus, International Shoe's requirement that in personam jurisdiction not offend "'traditional notions of fair play and substantial justice,'"43 and its proscription of jurisdiction by a state with which the defendant has no significant "contacts, ties, or relations,"44 must be viewed principally through the prism of the defendant's right not to be onerously subjected to the judgment of an objectionable forum.

The Court's replacement of strict territorial tenets, exemplified by Pennoyer v. Neff,45 with a more practical approach is illustrated by


41. See, e.g., Burnham v. Superior Court, 495 U.S. 604 (1990)(defendant's voluntary physical presence in state sufficient to establish jurisdiction); see also Hanson v. Denckla, 357 U.S. 235, 251 (1958)(restrictions on personal jurisdiction not only "a guarantee of immunity from inconvenient or distant litigation," but also "consequence of territorial limitations on the power of the respective States").

42. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985)(requirement of personal jurisdiction "comes from the Due Process Clause's protection the defendant's of personal liberty interest, and . . . 'represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.' ")(quoting Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03, n.10)(1982)).


44. Id. at 319.

45. 95 U.S. 714 (1877). Pennoyer held that "every State possesses exclusive jurisdiction over persons and property within its territory" and that "no State can exercise." Arguably, Pennoyer did not demand constitutionalization of the territorial principles of jurisdiction, but instead simply allowed the defendant
International Shoe itself. There, the Court upheld the Washington court's assertion of in personam jurisdiction over International Shoe, notwithstanding the absence of the literal physical presence required under Pennoyer.\textsuperscript{46} Similarly, Shaffer v. Heitner\textsuperscript{47} later reversed Pennoyer's plenary grant of in rem and quasi in rem jurisdiction based on the simple presence of the defendant's property within the forum state; Shaffer subjected those assertions of jurisdiction as well to the criterion of minimum contacts.\textsuperscript{48} More recent cases have tacitly affirmed the subordinate significance of physical ties—or more precisely, a paucity of such ties—between the defendant and a forum state in which the defendant has otherwise elected meaningful involvement.\textsuperscript{49}

The Court has set forth with notable candor the anti-formalist reasoning behind its abandonment of rigid jurisdictional standards. For example, to justify in part the broadened scope of in personam jurisdiction, the Court has pointed to the "increasing nationalization of commerce . . . [accompanied by] modern transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."\textsuperscript{50} Such considerations enter into the Court's larger equitable inquiry of "whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State."\textsuperscript{51} This inquiry is guided by the functionalist philosophy that "[m]echanical or quantitative evaluation of the defendant's activities [can] not resolve the question of reasonableness."\textsuperscript{52}

These general precepts of fairness and reasonableness subsume three distinct requirements. First, voicing a traditional due process concern with adequate notice, the Court has repeatedly insisted that the exercise of jurisdiction be the foreseeable result of voluntary con-
duct which the defendant could have foregone to avoid the forum.53 Only when the defendant “purposefully avails itself of the privilege of conducting activities within the forum State”54 or has intentionally directed its activities at residents of the forum55 may the defendant properly be deemed to have, in a sense, assumed the risk of subjection to the jurisdiction of that state. Due process thus assures the predictability that inheres in individuals’ ability to “structure their primary conduct” to choose where they may be exposed to liability.56

Second, the Court has manifested a concern that the basis for jurisdiction must have some congruence with the claim stated. The repugnance of forcing a defendant to appear before a court based merely on “random,”57 “fortuitous,”58 or “attenuated”59 contacts with the forum requires that these contacts bear some relationship to the subject matter of the litigation in which the defendant has been summoned to court. This concept of congruence is captured by the Court’s focus on “the relationship among the defendant, the forum, and the litigation,”60 as well as by its mandate that the litigation “arise out of or relate to” the defendant’s involvement with the forum state.61 For example, where the claim against the nonresident was not related to the property in the forum state upon which in rem jurisdiction was based,62 the lack of “substantial connection”63 between the contact with the state and the subject matter of litigation was fatal to the assertion of jurisdiction.64

53. E.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)(“[T]he foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)(jurisdiction valid where the contacts between defendant and forum state “proximately result from actions by the defendant himself that create a substantial connection with the forum state”)(citation omitted).
58. Id.
64. The modern ascendancy of so called specific jurisdiction evidences the centrality of the nexus requirement. See Stanley E. Cox, Comment, Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the “Minimum Contacts” Test, 75 KY. L.J. 885, 897 (1987). However, the persistence of general jurisdiction under special circumstances does not refute the notion of congruence. The division of jurisdiction into the categories of general and specific, with a preference for the latter, can be traced to Professors von Mehren and Trautman. See Arthur von Mehren & Donald T. Trautman, Multistate Problems 654
Third, although a forum state can demonstrate minimum contacts by showing foreseeability and congruence, the presence of such contacts does not always suffice to establish jurisdiction. In addition, the Supreme Court has enumerated a set of essentially equitable considerations that, if compelling, may defeat otherwise valid jurisdiction. These include "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." Conversely, when such considerations militate strongly in the plaintiff's favor, they may bolster an otherwise shaky conclusion that minimum contacts exist.

B. Asserting Jurisdiction Over Directors: Varying Scales Of Difficulty

The disparate strength of various state claims of jurisdiction over directors of foreign corporations precludes a single analysis of the validity of those claims. Nevertheless, the range of possible contacts between a director and a forum state can be usefully understood as

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(1965); Arthur von Mehran & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136 (1966). The Supreme Court has embraced this distinction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8-9 (1984); Calder v. Jones, 465 U.S. 783, 788 (1984). In cases in which specific jurisdiction exists, the dispute stems directly from the links between the defendant and the forum state. See von Mehran & Trautman, supra note 64, at 1136. General jurisdiction is based more broadly on the defendant's contacts with the state, regardless of the nature of the litigation, see Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610, 611 (1988), and is typically invoked to reach corporations regularly doing a substantial amount of business in the forum. See Peter Hay, Judicial Jurisdiction and Choice of Law: Constitutional Limitations, 59 U. COLO. L. REV. 9, 14 (1988). Rather than discarding the entire concept of nexus, general jurisdiction in effect presumes that where a corporation's involvement with the forum state is sufficiently "continuous and systematic," Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952), that state has a significant interest in any dispute between the corporation and one of the state's residents. A similar kind of sliding scale exists in the constitutional doctrine of defamation applied to public officials. While the stringent "actual malice" standard protects only those alleged defamations of public officials that relate to the plaintiff's official conduct, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)(requiring the plaintiff to demonstrate that the defendant either knew that the statement was false or had acted with reckless disregard of whether it was false), the more prominent the plaintiff's position in the government hierarchy, the more every aspect of her conduct and character is regarded as relevant to her fitness for office. See Clawson v. Longview Publishing Co., 589 P.2d 1223, 1228 (Wash. 1979).

falling into three principal groupings. A pervasive concern coloring all discussion of jurisdiction over directors, however, is apprehension that an overly expansive theory of jurisdiction will subject directors to lawsuits with intolerable frequency.  

1. Substantial Corporate and Director Involvement in the Forum State

The least troubling case for jurisdiction over directors occurs where the foreign corporation is doing regular and substantial business in the forum state and one or more of its directors have engaged in significant activities on behalf of the corporation in that state. Under this set of facts, the defendant presumptively cannot invoke the absence or paucity of contacts with the state as grounds for resisting jurisdiction. Unless the defendant director is domiciled in the forum state, however, or has otherwise maintained an ongoing physical presence there, jurisdiction will be based on acts associated with the director's assumption of tasks on behalf of the corporation. Basing a claim of jurisdiction on those contacts alone, however, entails a number of possible objections.

a. The Fiduciary Shield Doctrine

One ground upon which many directors can be expected to challenge jurisdiction by a distant forum is the "fiduciary shield doctrine." This doctrine provides that acts taken by a defendant in his or her capacity as a corporate employee do not amount to sufficient contacts to satisfy the requirements for personal jurisdiction. The doctrine

68. See Thomas H. Sponsler, Jurisdiction Over the Corporate Agent: The Fiduciary Shield, 35 WASH. & LEE L. REV. 349, 362 (1978). In some cases the enforceability of the forum's judgment might also present practical problems. However, given the mandated enforcement of judgments under the full faith and credit clause, see Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); Roche v. McDonald, 275 U.S. 449, 451-52 (1928), and the powerful means available to courts to force compliance with their order, see Note, Forum Nonconveniens as a Substitute for the Internal Affairs Rule, 58 COLUM. L. REV. 234, 248-50 (1958), the discussion here will assume effective means of enforcement.

69. Most states provide for joint and several liability for collaborative tortfeasors acting negligently in concert. See, e.g., Donnelly v. Larkin, 98 N.E.2d 280, 286-87 (Mass. 1951); Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984). Many modern statutes also permit contribution among all tortfeasors whom the injured person could hold jointly and severally liable. E.g., FLA. STAT. § 768.31 (West 1986); MASS. GEN. LAWS ANN. ch. 231B, § 1-4 (West 1986).


rests upon the belief in the intrinsic unfairness of subjecting a corporate employee to a suit for personal liability when her only involvement with the forum state was triggered by service performed for the benefit of the corporation.\footnote{3}{Marine Midland Bank v. Miller, 664 F.2d 899, 902 (2d Cir. 1981).} Two variations in the way that the doctrine is formulated affects its scope from jurisdiction to jurisdiction. One version of the doctrine provides that contacts which would support jurisdiction over a corporation cannot alone supply jurisdiction over a corporate employee who lacks independent contacts with the forum state.\footnote{4}{Lehigh Valley Indus., Inc. v. Birenbaum, 389 F. Supp. 798, 803-04 (S.D.N.Y.). aff'd, 527 F.2d 87 (2d Cir. 1975).} In contrast to this modest proposition, the more expansive version of the doctrine completely insulates an otherwise reachable defendant from jurisdiction because her contacts were activated by responsibilities as a corporate employee.\footnote{5}{Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1349 (E.D.N.Y. 1981).} While some decisions have inferred a fiduciary shield rule from state long-arm statutes,\footnote{6}{United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir.), cert. denied, 384 U.S. 919 (1966); Zemen v. Lotus Heart, Inc., 717 F. Supp. 733, 736 (D. Md. 1989); Rollins v. Ellwood, 565 N.E.2d 1302 (Ill. 1990). In addition, other courts have described the fiduciary shield rule as an equitable doctrine, e.g., Saktides v. Cooper, 742 F. Supp. 382, 385 (W.D. Tex. 1990); Schieffelin & Co. v. Jack Co. of Boca, Inc., 725 F. Supp. 1314, 1318 (S.D.N.Y. 1989), or as a common law doctrine. \textit{E.g.}, In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig., 750 F. Supp. 330, 335 (N.D. Ill. 1990).} others have elevated the doctrine to a constitutional principle mandated by due process.\footnote{7}{Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 92-93 (2d Cir.), aff'd, 527 F.2d 87 (2d Cir. 1975); Weller v. Cromwell Oil Co., 504 F.2d 927, 931 (6th Cir. 1974).} For purposes of assessing jurisdiction over allegedly negligent directors, only the latter contention—that due process bars jurisdiction over individuals whose corporate activities have brought them into contact with the forum state—must be addressed. Commentators have properly criticized the notion that constitutional principles compel the fiduciary shield doctrine.\footnote{8}{Sponsler, supra note 68, at 353-56; \textit{Note}, The Fiduciary Shield Doctrine: A Tool for Statutory Construction or a Constitutional Principle?, J. CORP. L. 901 (1985); Koenig, supra note 57, at 829-33.} Although the Supreme Court has recognized that the differences between individuals and corporations may under some circumstances permit state jurisdiction over the one but not the other,\footnote{9}{Shaffer v. Heitner, 433 U.S. 186, 204 n.19 (1977).} that recognition hardly leads to the wholesale exclusion of corporate employees qua employees from foreign states' jur
risdictional grasp. On the contrary, there is nothing inherent in "the relationship among the defendant, the forum, and the litigation," that places nonresident corporate managers and agents categorically beyond the pale of state jurisdiction. Indeed, given the Court's refusal to permit so weighty a value as first amendment concerns even to enter into jurisdictional analysis, it follows that the fiduciary shield doctrine cannot entirely short-circuit jurisdictional analysis.

In essence, the fiduciary shield doctrine's effort to preempt the minimum contacts standard's individualized inquiry with a wooden rule belies the doctrine's pretensions to constitutional stature. The inflexibility of the doctrine guarantees that its impact will often undermine rather than advance the due process concerns that support the minimal contacts inquiry. Moreover, the creation of a privileged class of individuals flies in the face of the trend, already evident over thirty years ago, of enlarging rather than contracting the scope of state jurisdiction. In a sense, the several exceptions permitted even by courts that embrace the fiduciary shield doctrine represent tacit acknowledgement that the rule's sweeping nature is incompatible with the nuanced philosophy of due process. In fact, recognition that relevant considerations of fairness are better accommodated by International Shoe's requirement of "fair play and substantial justice" has led the New York Court of Appeals to reject not only the constitutional underpinnings of the fiduciary shield doctrine, but also the rule itself.

A pair of companion defamation decisions by the Supreme Court confirm that the fiduciary shield doctrine is at most a creature of statutory construction. Calder v. Jones directly confronted the issue of jurisdiction over individual employees of a corporation, sustaining California's exercise of jurisdiction over a reporter and editor living in Florida and working for a newspaper headquartered in Florida. While conceding that the newspaper's contacts with California did not automatically confer jurisdiction over the paper's employees, the Court flatly stated that the defendants' "status as employees does not somehow insulate them from jurisdiction." If there was anything equivo-

80. Id. at 204.
82. But see Marine Midland Bank v. Miller, 664 F.2d 899, 903 (2d Cir. 1981)(as "equitable principle," doctrine not to be "applied mechanically").
84. See Koenig, supra note 72, at 823-28.
88. Id. at 790.
89. Id.
cal about Calder's demolition of any constitutional footing for the fiduciary shield rule, the Court's opinion in Keeton v. Hustler Magazine Inc. removed that doubt.\textsuperscript{90} Keeton specifically characterized Calder as "reject[ing] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity."\textsuperscript{91} Although attempts have been made to rationalize Calder's and Keeton's pronouncements as compatible with the theory that the fiduciary shield rule has a due process dimension,\textsuperscript{92} recognition appears to be gaining that Calder and Keeton have devastating implications for the rule.\textsuperscript{93}

\begin{itemize}
  \item[b.] \textbf{The Relationship Between the Director's Contacts and Her Negligence}

A second objection that a defendant director may raise rests upon an assertedly tenuous link between the source of the defendant's contacts with the forum state and the negligent conduct with which she is charged. That is, even if the director's business and other activities have brought her into frequent contact with the state, these contacts may arguably have no direct bearing on the injury resulting from her negligence. Although dismissal of jurisdiction under these circumstances can be framed as a corollary of the fiduciary duty rule,\textsuperscript{94} reservations about such jurisdiction are more usefully understood as flowing from the due process requirement of congruence.\textsuperscript{95} Of course, if the state may exercise general jurisdiction—which some authority indicates may be based solely on an individual's business contacts with a state—then the burden of demonstrating a more tailored fit among the defendant, the forum, and the litigation is removed. Otherwise, under the more stringent\textsuperscript{97} test for specific jurisdiction, the plaintiff

\textsuperscript{91} Id. at 781 n.13.
\textsuperscript{92} See Babbin, supra note 72, at 978-81.
\textsuperscript{95} See supra notes 57-64 and accompanying text.
\textsuperscript{97} Precisely how much more stringent may be unclear. See Lea Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 SUP. CT. REV. 77, 82 (lack of clear analysis of concept that forum is "related to" controversy or that cause of action "arose out of defendant's activities in forum"); see also Twitchell, supra note 64, at 610 (confusion by courts over distinction between general and specific jurisdiction).
must show that the dispute has arisen out of the defendant’s contacts with the state.98

As suggested by earlier criticism of the fiduciary shield doctrine's rigidity,99 the variety of possible director’s contacts with a forum state and their connection with a suit for breach of the duty of due care cannot be disposed of by a single rule. At one extreme, the mere presence of a director's personal property in the forum state clearly could not form the basis for jurisdiction.100 Still insufficient, absent more,101 would be scattered financial transactions by the director within the forum.102 Conversely, if a corporation’s officer enters a state to conduct negotiations for the corporation’s sale to a resident of property located within the state, courts would find no difficulty in sustaining the state’s jurisdiction over that officer in a suit alleging fraudulent misrepresentation in the course of the negotiations.103

Jurisdiction over a director whose alleged negligence is not an immediate outgrowth of her substantial activities in the forum state occupies an uncertain place on this spectrum of relationships. For example, suppose that a director in her dual capacity as an officer conducted a long series of major negotiations for the corporation in the forum state, while her purported misconduct consists of carelessly endorsing an unrelated improvident merger. On the one hand, the director's contacts with the forum arguably are too removed from the cause of action to support jurisdiction.104 On the other hand, a strict requirement that a director's negligent vote spring directly from her activities in the forum would result in almost wholesale nullification of

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99. See supra notes 72-93 and accompanying text.


101. See infra notes 131-141 and accompanying text (discussing significance of jurisdictional statute).


specific jurisdiction over directors, achieving by "fact specific" indirection what the fiduciary shield rule does by fiat. Accordingly, if actions for lack of due care of the type proposed here are to be preserved outside those instances where general jurisdiction exists, something short of an overwhelming causal connection must suffice.\textsuperscript{105}

The steady extension of jurisdictional reach in the modern era,\textsuperscript{106} as well as the Court's reasoning in \textit{Calder}, provide considerable latitude to states seeking to assert jurisdiction over directors who have had meaningful contacts with those states. In \textit{Calder}, the individual defendants' contacts with California bore scant relationship to their alleged defamation of Jones.\textsuperscript{107} Indeed, the editor of the offending article had traveled to California to take a pleasure trip and to testify at a trial unrelated to the libel action.\textsuperscript{108} Nevertheless, the Court, in sustaining California's jurisdiction, relied heavily on the fact that the "effects" of the defendants' actions were felt chiefly in that state.\textsuperscript{109} Similarly, the effect of directors' negligence—economic loss in the form of diminished value of shares—is typically suffered predominantly, if not exclusively, in the stockholder's domicile.\textsuperscript{110}

c. \textit{Burden on the Director}

One respect in which fairness concerns\textsuperscript{111} legitimately enter into

\textsuperscript{105} Again, this assumption does not take into account the impact of an explicit jurisdictional statute.

\textsuperscript{106} The notable increase in the number and scope of state long-arm statutes reflects the Supreme Court's expanding license to exercises of personal jurisdiction. See 2 Robert C. Casad, Jurisdiction in Civil Actions § 4.01 (2d ed. 1991).

\textsuperscript{107} The contacts by Defendant South, a reporter, were confined to "frequent trips and phone calls" to the state. Calder v. Jones, 465 U.S. 783, 786 (1984).

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 787, 789.

\textsuperscript{110} It may be granted that a director's knowledge that her negligence may produce harm to stockholders in a given state is less "targeted" to that state than libel against an entertainer whose career and professional reputation are centered in the state of her residence. See id. at 788-90. However, if a large number of shareholders are concentrated in a particular state, the argument that the directors should have been conscious of the impact of their actions in that state becomes more powerful. Furthermore, in the scenario assumed in this discussion, the defendant director has had substantially more contact with the forum state than defendant Calder had had with California. Thus, the cumulative quality of contacts with and foreseeable impact in the forum state produces, on balance, comparably compelling bases for personal jurisdiction in the two cases.

\textsuperscript{111} At bottom, most arguments asserting the unfairness of subjecting a director to a forum state's standard for negligence seem directed more toward the issue of choice of law than that of jurisdiction. The Supreme Court, however, has drawn a sharp distinction between the two concepts and the tests that govern them. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984); Hanson v. Denckla, 357 U.S. 235, 253-54 (1958); see also Terry S. Kogan, Toward a Jurisprudence of Choice of Law: the Priority of Fairness over Comity, 62 N.Y.U. L. Rev. 651, 712 (1987). But see Alfred Hill, Choice of Law Jurisdiction in the Supreme Court, 81
jurisdictional analysis is in the assessment of the defendant’s “burdens of litigating in a distant or inconvenient forum.” Not only does the requirement of minimum contacts incorporate protection against such burdens, but due process also invalidates exercises of jurisdiction that make litigation “so gravely difficult and inconvenient” that a defendant is placed at a harsh disadvantage relative to the plaintiff. On occasion the Court has cited such burdens as leading grounds for striking down an exercise of jurisdiction. In the case of corporate directors, this concern is compounded by the specter of wide-open jurisdiction subjecting directors to the demands of an unlimited number of states and stockholders.

Nonetheless, the Supreme Court has made clear that solicitude for the defendant’s convenience, however important a consideration, does not automatically raise an insurmountable obstacle to jurisdiction by remote forums. The salient forces reducing constitutional barriers to jurisdiction—the “fundamental transformation in the American economy” that has broadened the reverberations of commercial conduct, and technological advances that have eased the burden of defending suits in foreign tribunals—would seem to have special aptness for directors of large corporations. Even where the Court has not expressly taken into account the resources available to the defendant (and where free speech concerns might have given pause to a forum’s extended reach), the Court has upheld cross-country jurisdiction.

COLUM. L. REV. 960, 993 (1981). Accordingly, much of the consideration of charges of unfairness is deferred to the discussion of the full faith and credit clause. See infra Part III.

113. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972). In addition to constitutional safeguards, 28 U.S.C. § 1404(a) codifies the common-law doctrine of forum non conveniens: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a)(1988). See Note, supra note 68.
118. Without being bound by precise figures, one can fairly assume that an action of the kind proposed here would not be brought unless the stakes—for the attorney as well as for the name-plaintiff—were substantial. Certainly, except in the case of a director with unusually deep pockets, the action would not be worthwhile unless the corporation was willing and able to commit ample resources to indemnification or insurance.
119. See Calder v. Jones, 465 U.S. 783 (1984)(jurisdiction in libel suit by California court over editor and reporter who were Florida residents); see also Keeton v.
Moreover, the burden imposed upon a director is not the only part of the due process equation. The defendant's establishment of minimum contacts remains the fundamental criterion, and where the defendant has deliberately "directed his activities at forum residents," he must make out a "compelling case" to show that countervailing considerations override the presumption of jurisdiction. In determining whether jurisdiction would be unreasonable despite the presence of minimum contacts, a court must weigh other factors that may well tilt toward the exercise of jurisdiction. In the case of a shareholder suit for directors' negligence, the shareholders' "interest in obtaining convenient and effective relief" and the "fundamental social policies" underlying the forum's standard of due care should normally defeat a director's plea of inconvenience.

Ironically, arguments that jurisdiction in states other than that of incorporation might be barred because of inconvenience to the defendant directors—arguments typically invoked to support deference to Delaware courts—are further eroded by Delaware's own insistence on serving as a forum in all suits against directors of domestic corporations. The Delaware Supreme Court has rejected "mere convenience of the parties" as grounds for relinquishing jurisdiction in such suits where jurisdiction may be constitutionally asserted by the state. The court reasoned that Delaware has a strong interest in ensuring that its law is applied by an authoritative arbiter. This precise reasoning, however, can also be invoked by states seeking to enforce their own notions of due care.

2. Prior Contacts by Corporation, but Not by Director

In some instances a state might seek to hold accountable directors of a corporation doing substantial business in the state who themselves have not forged conventional contacts with that forum. An assertion of jurisdiction under such circumstances would represent an ambitious but not implausible extension of established principles of due process. Admittedly, this attempt seems to clash directly with both Shaffer's specific holding and its more general command that all jurisdiction be grounded in minimum contacts between the defendant

121. See supra notes 66-67 and accompanying text.
123. See 10 DEL. CODE § 3114 (acceptance of directorship of Delaware corporation entails consent to Delaware jurisdiction in suits involving defendant's conduct as director).
125. Id. at 177-78.
and the forum. However, a close reading of *Shaffer*, combined with subsequent developments, suggests that the Court would sympathetically entertain an appropriately framed theory to uphold the forum's claim in at least some situations.

a. The Relevance of Legislation

The *Shaffer* Court struck down Delaware's attempt to exercise jurisdiction over nonresident corporate officers named as defendants in a stockholder derivative suit. Neither the statutory presence of the defendants' stock in Delaware\(^\text{126}\) nor the defendants' status as officers of a Delaware corporation\(^\text{127}\) comprised the necessary level of minimum contacts required for "all assertions of state-court jurisdiction."\(^\text{128}\) Later Court decisions reinforced *Shaffer*'s message that some contacts were too insubstantial reasonably to provide an adequate foundation for jurisdiction.

For example, in *World-Wide Volkswagen Corporation v. Woodson*,\(^\text{129}\) the plaintiffs had purchased an automobile from a New York dealer and then driven it to Oklahoma, where it was struck in the rear by another car. Alleging that the fire produced by the collision was caused by defects in their car's design, the plaintiffs brought suit in Oklahoma against, among others, the car's regional distributor (headquartered in New York) and the New York dealer. The Court was unimpressed by the plaintiffs' argument that the financial benefit that these two defendants derived from the sale of cars destined to travel to Oklahoma had created a significant connection with that state. Rather, the "marginal revenues" derived by these New York businesses from the capacity of their products to be used in Oklahoma was considered "far too attenuated a contact" to sustain Oklahoma's exercise of in personam jurisdiction.\(^\text{130}\)

Against this precedential background, the notion that a director accused of negligence could be summoned to defend her conduct in a state where she had not previously chosen to involve herself might seem untenable. Nevertheless, the principle of *Shaffer* does not foreclose the possibility of jurisdiction in such a case, for the Court refrained from pronouncing minimum contacts a universal sine qua non of jurisdiction. Rather, the Court was careful to note the absence of statutes explicitly asserting Delaware's interest in having jurisdiction.

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127. *Id.* at 215-16.
128. *Id.* at 212.
over fiduciaries of its corporations\textsuperscript{131} and deeming acceptance of a directorship as consent to jurisdiction in the state.\textsuperscript{132} Had the legislature formally declared a significant interest in holding certain corporate personnel accountable, and promulgated as well a jurisdictional statute implementing that interest, \textit{Shaffer} suggests that the Court might have suspended the ordinary requirement of a prior independent connection between the defendant and forum. By making certain acts tantamount to explicit consent, such statutes may place the jurisdictional standard outside the regime of \textit{Shaffer} and \textit{International Shoe}, for those two cases analyzed state attempts to reach defendants through implied consent. Since \textit{Shaffer} the Court has again called attention to the absence of a special jurisdictional statute in striking down an attempted exercise of jurisdiction,\textsuperscript{133} and has acknowledged that a right to resist personal jurisdiction may be waived by express consent.\textsuperscript{134}

By legislatively announcing its intention to assert jurisdiction over directors whose negligence harms its residents, a state can supply the "foreseeability that is critical to due process analysis."\textsuperscript{135} Like the nationally distributed magazine that can be "charged with knowledge of the 'single publication rule'" subjecting it to a suit for nationwide damages,\textsuperscript{136} and unlike the \textit{Shaffer} directors who had "no reason to expect to be haled" before a Delaware court,\textsuperscript{137} directors whose corporation does business and sells shares in a state with an explicit jurisdictional statute have "fair warning" that their negligence "may subject [them] to the jurisdiction of a foreign sovereign."\textsuperscript{138} While it may be objected that this statute would permit jurisdiction through the "unilateral activity"\textsuperscript{139} of shareholders who choose to reside in the adopting state, a corporation wishing to insulate its directors from liability may simply bar the sale of its shares in any such state.\textsuperscript{140}

\textsuperscript{132.} Id. at 216.
\textsuperscript{133.} Kulko v. California Superior Court, 436 U.S. 84, 98 (1978).
\textsuperscript{135.} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
\textsuperscript{138.} Id. at 218 (Stevens, J., concurring in the judgment).
\textsuperscript{139.} Hanson v. Denckla, 357 U.S. 235, 253 (1958).
\textsuperscript{140.} Where a state's adoption of a jurisdictional statute prompts a corporation to discontinue the sale of shares there, the fair warning mandated by due process may require prospective application only. At a minimum, of course, directors placed on notice that their future negligence may subject them to the jurisdiction of that
Though perhaps a drastic recourse in some instances, this solution has precedent in the practice of corporations seeking to avoid the stringent substantive requirements or burdensome registration procedures of certain states' blue sky laws.\textsuperscript{141}

\textbf{b. The Significance of Effects}

Even if a statute's jurisdictional authority must rest in part on some material connection between the director and the forum,\textsuperscript{142} the impact of the director's negligence on shareholders in the forum may well qualify as that link. As noted earlier, the Court in \textit{Calder v. Jones} expressly embraced the theory that a state may base jurisdiction over a corporate employee on the effects that that employee's conduct has upon residents within that state.\textsuperscript{143} Insofar as \textit{Calder} points to an em-
phasis on causal connection between the corporate employee's actions and the injury felt by the plaintiff in the forum, the link between a director's negligence and shareholder's economic loss can be said to meet that standard. The concept of causation may provide a sufficient basis for jurisdiction, at least when it is infused with the notice and authority that attach to an explicit jurisdictional statute.

An arguable flaw of such a raw causation theory is its failure to require that the defendant's culpable acts took place inside the forum state. Several lower court cases have indicated that a corporate fiduciary's susceptibility to jurisdiction depends on whether she has committed the tort within the forum state. This conclusion is bolstered by the Supreme Court's mention, in rejecting Delaware's assertion of jurisdiction in *Hanson v. Denckla*, that the cause of action did not "arise out of an act done or transaction consummated in the forum state." However, these lower court decisions have generally been premised on the validity of the fiduciary shield rule. Furthermore, *Calder's* acceptance of an "effects" test signals that since *Hanson* the Court has shifted away from any fixation on the actual site of the tort's occurrence.

*Burger King Corp. v. Rudzewicz* underscores the Court's rejection of a per se rule that the liability-creating event must literally take place "within" the forum state. There, the Court upheld Florida's jurisdiction in a breach of contract action by Burger King, a Florida corporation, against one of its Michigan franchisees. Rudzewicz's business activities were more centered in Michigan than the activities of a typical director of a Delaware corporation are centered in Delaware, and his principal contacts were with Burger King's Michigan office. *Burger King*, in its broad understanding of how modern business practices allow a corporate actor to touch another state, dem-

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144. See Koenig, *supra* note 72, at 834-37; see also Zimmerman v. First Fed. Sav. and Loan Ass'n, 845 F.2d 1047, 1052 (10th Cir. 1988); Alvarado-Morales v. Digital Equip. Corp., 843 F.2d 613, 617 (1st Cir. 1988)("independent, personal involvement" by corporate offices in tortious act required to obtain jurisdiction); L.B. Indus., Inc. v. Smith, 817 F.2d 69, 71 (9th Cir. 1987); Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174 (5th Cir. 1985).


147. Id. at 251.

148. See *supra* notes 72-93 and accompanying text.


150. See id. at 487 (Stevens, J., dissenting).
onstrates the Court's unwillingness to make jurisdiction hinge on the adventitious circumstance that the defendant was physically in the forum state while committing her tortious act.\footnote{151}

Removal of the requirement of a director's earlier involvement with the forum state could subject directors to liability in numerous states; thus, the objection that such statutes could excessively burden directors\footnote{152} would apply with renewed force. However, insofar as Calder has placed the Court's imprimatur on the "effects" test, the Court has already tacitly rejected that objection as grounds for an automatic barrier to jurisdiction. In principle nothing in Calder would preclude a reporter's or editor's amenability to suit in every state at which she had "expressly aimed"\footnote{153} her allegedly libelous statement. Moreover, it is by no means clear that even the widespread adoption of statutes providing for express consent to jurisdiction would inevitably mean that directors would have to defend at multiple trials. A nationwide class action might well be brought in a single consolidated proceeding, or at least principles res judicata and collateral estoppel might operate to avoid retrial of matters already litigated. In any event, to the extent that direct actions against directors are typically joined with derivative suits in which the corporation is a nominal defendant, any practical unfairness to the defendant director is substantially reduced; the director's presence may be necessary anyway to testify on behalf

\footnote{151} Moreover, the state's interest in seeing resident shareholders compensated for wrongful economic injury, while not dispositive, see supra note 142 and accompanying text, is certainly relevant to the issue of jurisdiction. In an early instance of the modern expansion of jurisdiction, the Court cited California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)(upholding California court's jurisdiction over Texas life insurance company in suit by California beneficiary to recover benefits on company's policy with California resident). Even where the plaintiff was a nonresident, see Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984)(New York resident bringing suit in New Hampshire, in which fraction of copies of defendant's magazine were circulated), and where consideration of another state's sovereignty might have been implicated, see Nevada v. Hall, 44 U.S. 410, 424 (1979)(suit arising out of automobile collision in California brought in California court against, \textit{inter alia}, the state of Nevada), the Court has sustained jurisdiction, in part by taking cognizance of the forum's interest in redressing injuries experienced within the state. Assignment of significant weight to this type of interest is buttressed by the Court's suggestions of an increasing role for the plaintiff's interests in determining jurisdiction. See Pamela J. Stephens, \textit{The Single Contract as Minimum Contacts: Justice Brennan "Has it His Way,"} 28 WM. & MARY L. REV. 89 (1986); see also Louise Weinberg, \textit{The Place of Trial and the Law Applied: Overhauling Constitutional Theory,} 59 U. COLO. L. REV. 67, 102 (1988)(need for constitutional protections from plaintiff's choice of forum diminished by availability of \textit{forum nonconveniens} and constitutional review of choice of law).

\footnote{152} This objection was considered earlier. See supra notes 115-125 and accompanying text.

of the corporation, over which the state has undisputed jurisdiction.\textsuperscript{154}

Nor are all the equities piled on the director's side of the scale. Major transactions such as a merger or tender offer often personally enrich the transgressing directors, either through "golden parachutes"\textsuperscript{155} or by directors' membership in the class of shareholders for whose alleged benefit the transaction took place. They thus "purposefully derive benefit"\textsuperscript{156} from their conduct that impacts residents of the forum state; they have "reach[ed] out beyond"\textsuperscript{157} the state where the corporation is chartered or where its directors meet to take personal advantage of the interstate market for the corporation's shares. In the forum's eyes, at least, it would be inaccurate to assert that such directors have had "nothing to do with"\textsuperscript{158} the state or its residents.

c. Theories of Attribution

To some extent, perhaps, the ability of a forum to exert jurisdiction over a director when it is the corporation that has had visible prior involvement with the state may rest upon notions of derivative jurisdiction. Rather than isolating a director's relationship with the forum state, a more realistic perspective might examine the director's and corporation's joint impact on the state. The device of obtaining jurisdiction over corporations and corporate personnel through agency\textsuperscript{159} or other theories of attribution\textsuperscript{160} is hardly a radical innovation; even conspiracy theory has been invoked to assert jurisdiction over an absent defendant in corporate litigation.\textsuperscript{161} While the Supreme Court has stated that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him."\textsuperscript{162}

\textsuperscript{156} Kulko v. California Superior Ct., 436 U.S. 84, 96 (1978); see Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 903 (2d Cir. 1981)[(fiduciary shield doctrine inapplicable where corporate employee acts "in his own personal interest").
\textsuperscript{157} Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950).
that observation does not preclude narrowly tailored statutory invocation of derivative jurisdiction. Although doctrines of principal-agent are ordinarily used to hold the principal responsible for the agent’s misconduct, the agent herself is generally not relieved of liability.163

In the context of board approval of major transactions, the practical identity between the decision of the directors and the act of the corporation should permit a state to assert jurisdiction over directors partly on the basis of their relationship with the corporation. Whatever purposes are served by ordinary respect for the independent corporate personality, that rule has never been elevated to an absolute principle. Just as the common law has allowed plaintiffs to pierce the corporate veil when demanded by fairness and realism,164 so should a state be entitled to act on the reality that it is identifiable individuals, and not simply an abstraction, whose negligence has harmed the state’s residents. The Court in Calder, by allowing a California court to try the individual perpetrators of the magazine’s alleged libel, in effect recognized that some corporate actions are peculiarly intertwined with the conduct of particular agents. Moreover, given the prominent power and responsibilities of the board, and the narrow scope of the proposed statute, permitting state courts to try nonresident directors for alleged negligence in major transactions will not open the door to unlimited jurisdiction over a vast range of corporate employees.

Finally, it should be noted that in the larger perspective of modern jurisdiction doctrine, the proposal here does not represent a theoretical quantum leap. Jurisdiction over a director in these special circumstances would be as logical and no more unprecedented than was International Shoe’s abandonment of Pennoyer’s strict territorialism or McGee’s basing jurisdiction on a single insurance contract.165 The Court’s refusal to be shackled by “[m]echanical or quantitative evaluations”166 in determining jurisdiction, its intention to weigh a broad range of factors,167 and an emerging sentiment that the validity of changes in jurisdictional rules depends on whether they are “adopted as progressive by the American people” rather than “decreed as progressive by the Justices of this Court”168 all point to a willingness to tolerate forms of jurisdiction that can be sensibly justified rather than a rejection of them simply because they are innovative.

167. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985); see supra notes 51-52 and accompanying text.
3. No Prior Independent Contacts by Either Corporation or Director

Jurisdiction over directors grounded starkly in the simple presence of shareholders in the forum state may seem a far-fetched idea, and it must be conceded that few courts or legislatures would venture at present to consider such jurisdiction. Nevertheless, the principal rationales just recited for upholding jurisdiction over directors where the forum already has general jurisdiction over the corporation—the sufficiency of statutory notice and the “effects” test—also support reaching a director regardless of her corporation's prior presence in the state. On the one hand, there is a major difference between the two cases: the inability to bootstrap jurisdiction over the director onto any shareholder grievance against the corporation itself. On the other hand, there is something intuitively jarring about hinging the availability of suit against an allegedly negligent director on the fortuity that her corporation does business in the forum state. However, the debate on jurisdiction in this context is truly academic, because the multistate character of the class action proposed here may make it unnecessary, as a practical matter, to resort to suit in a state where neither the corporation nor its directors have had prior involvement. The authority for and mechanics of such multistate actions are discussed in the following section.

C. Shutts and Jurisdiction in Class Actions

Any discussion of the feasibility of multistate class actions warrants an examination of the Supreme Court's decision in Phillips Petroleum Company v. Shutts.\textsuperscript{169} Shutts demonstrates that bringing a claim against directors through this type of suit raises special jurisdictional questions, especially with regard to the plaintiff's latitude in choosing a forum. For example, it may seem incongruous to bring suit in a state in which relatively few shareholders live if many more shareholders are concentrated in another state. If the plaintiff selects a forum based on the stringency of the state's negligence standard, that choice will undoubtedly incur the familiar and opprobrious charge of forum shopping. Prior to Shutts, these concerns might have posed difficult problems for jurisdiction outside the state where the corporation is chartered, where its principal place of business is located, or where the largest number of its shareholders reside. The Court's reasoning in Shutts, however, substantially diminishes the likelihood that class action plaintiffs who otherwise establish a substantial connection between a defendant director and the forum will encounter serious constitutional obstacles to jurisdiction.

\textit{Shutts} upheld Kansas jurisdiction in a class action brought by own-

ers of royalty rights to leases of land from which Phillips, a Delaware corporation with its principal place of business in Oklahoma, produced natural gas.\textsuperscript{170} Most notably, the Court rejected Phillips's contention that valid jurisdiction required that nonresident royalty owners possess minimum contacts with Kansas.\textsuperscript{171} Rather, the Court held that due process is satisfied when absent class members are notified of the action, given a chance to be heard and to participate, and granted an opportunity to exclude themselves from the class by returning a completed "opt out" form to the court.\textsuperscript{172} The Court specifically refused to place on plaintiffs the burden of "opting in" to the class.\textsuperscript{173}

\textit{Shutts} appears to foreclose most colorable constitutional claims that an otherwise sufficient forum is not suited to host a class action. Only a small portion of the royalty owners\textsuperscript{174} in \textit{Shutts} (as well as a concededly "miniscule" number of gas leases)\textsuperscript{175} had any significant connection with the forum state. As long as Phillips had substantial contacts with Kansas, however—a matter not in serious dispute\textsuperscript{176}—the greater magnitude of contacts elsewhere did not defeat jurisdiction. \textit{Shutts} thus suggests that due process does not bar shareholders from maintaining a class action in a state where only a small proportion of the plaintiff class resides.

The \textit{Shutts} Court also appeared untroubled by the plaintiffs' selection of a Kansas court in the obvious hope that it would provide an exceptionally hospitable forum for their claims. Indeed, it would have been incongruous for the Court to have condemned the plaintiffs' strategy after it had so recently placed its imprimatur on a far more blatant form of forum shopping in \textit{Keeton v. Hustler Magazine, Inc.}\textsuperscript{177} \textit{Keeton} upheld New Hampshire's jurisdiction in a libel suit by a New York resident against an Ohio corporation which had its principal place of business in California.\textsuperscript{178} The Court openly acknowledged and condoned the plaintiff's strategy of exploiting New Hampshire's favorable statute of limitations.\textsuperscript{179} In addition, the New Hampshire courts were permitted to apply the "single publication rule," using New Hampshire law to award the plaintiff damages resulting from the national dissemination of the allegedly libelous material even though

\textsuperscript{170.} Id. at 799. \\
\textsuperscript{171.} Id. at 811. \\
\textsuperscript{172.} Id. at 812. \\
\textsuperscript{173.} Id. \\
\textsuperscript{174.} See id. at 814-16. \\
\textsuperscript{175.} Id. at 801; see id. at 814-16. Nor was ownership of the leases evenly distributed in small amounts among a large number of states; over half of the leases and royalty owners were in Texas. Id. at 816. \\
\textsuperscript{178.} Id. at 772. \\
\textsuperscript{179.} Id. at 778-79.
only a fraction of the copies of the defendant’s magazine were sold in New Hampshire. In Shutts, by contrast, the impact of Kansas law was far more limited; Kansas was forbidden to apply its law to determine the rights of royalty owners whose leases did not have a significant connection with the state.

Certainly shareholder direct actions differ from the royalty owners' claims in Shutts, but these differences do not appear to justify depriving shareholders of the expansive jurisdiction in class actions that Shutts recognized. For example, legitimate concerns may exist over a forum's ability to accurately apply other states' corporate rules, but these concerns raise issues of choice of law rather than constitutional barriers to personal jurisdiction. Likewise, although the nature of some shareholder class actions may support a more limited opt out right than was granted in Shutts, this consideration does not interfere with the exercise of jurisdiction. It is possible, too, that the traditional opprobrium attached to forum shopping may apply with heightened severity to shareholder attempts to bring their suit in an optimal forum; however, Shutts's tacit dismissal of this motive as a disqualifying factor is sweeping enough to encompass class actions by shareholders as well as by royalty owners. Indeed, shareholder forum shopping to maximize directors' accountability for negligent behavior may well be viewed as the flip-side to director shopping for permissive states of incorporation to minimize that accountability. The accepted legitimacy of such director behavior seems to require a recognition of the legitimacy of shareholder forum shopping. Finally, though it may be overstatement to say that Shutts "eliminated all constitutional barriers to personal jurisdiction" in small claim, multistate class actions, the sympathy signaled by the Court for the practicability of class actions does not seem likely to stop at royalty owners' suits.

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180. Id. at 773-74.
182. Id. at 821.
184. But see Note, Forum Shopping Reconsidered, 103 HARV. L. REV. 1677 (1990)(many activities characterized as "forum shopping" are not necessarily blameworthy).
III. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW IN A SUIT FOR BREACH OF FIDUCIARY DUTIES: THE LENIENT PARAMETERS OF THE FULL FAITH AND CREDIT CLAUSE

Once jurisdiction is established, the constitutional entitlement of a state to apply its law to breaches of fiduciary duties against its residents appears to fall within the generous boundaries of the full faith and credit clause. A series of older Supreme Court cases did cast doubt on the ability of a forum state to refuse to follow any aspect of the corporate regime created by the state in which a foreign corporation was chartered (lex incorporationis). However, even as the Court let those earlier pronouncements stand, it diluted the rigidity of lex incorporationis in other holdings under the full faith and credit and due process clauses. Finally, the Court’s 1981 decision in Allstate Insurance Company v. Hague, although not directly addressing the issue of lex incorporationis, made clear that the full faith and credit clause provided meager restraint on the forum state’s application of its law. Four years later, Shutts indicated that a forum state could also apply other states’ laws in the type of multistate class action proposed here.

A. The Constitutional Philosophy of Choice of Law

The determination of whether a forum may apply fiduciary standards other than those of the state of incorporation must be guided by full faith and credit’s basic requirement that the choice of law be neither “arbitrary nor fundamentally unfair.” A court must weigh the state’s interest in applying its own fiduciary rules against any need for national uniformity in the resolution of disputes over directors’ duties of due care. This calculus reflects full faith and credit’s attempt to balance the prerogatives of state sovereignty with the necessity that states “coexist in relative harmony.” By vindicating legitimate reliance on a state’s statutes and case law, the full faith and credit clause supplies a substantial measure of the predictability necessary to rational planning in a nation of multiple legal regimes. At the same


189. Id. at 313 (plurality opinion of Brennan, J.).


time, the command of the clause is far from absolute; "[n]othing in the Constitution insures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances." Where enforcement of another state's law would interfere with an important policy of the forum state, it need not defer to the offensive statute.

Many of the Court's rulings on the scope of the full faith and credit clause have also considered the limitations on choice of law imposed by due process. These two constitutional limitations ostensibly address different theoretical concerns. While full faith and credit is designed to restrain the centrifugal forces of federalism, due process aims to prevent unfair surprise to parties who have no reasonable expectation that they would be subjected to the forum state's law. In practice, however, the Court has tended to meld these two distinct purposes into a single overarching inquiry into the reasonableness of the forum's application of its own law. Even if a material distinction between the two protections were to be preserved, full faith and credit has traditionally been viewed as imposing a more stringent restriction than due process on a forum's choice of law. Accordingly, if application of the forum state's fiduciary standard comports with the requirements of full faith and credit, it satisfies due process as well.

B. The Decline of the Internal Affairs Rule Prior to Allstate

Allstate purported to draw from, rather than supplant, the full faith and credit jurisprudence that had earlier evolved. A number of prior decisions appeared to endorse a presumption that any deviation from lex incorporationis, such as this article's application of the

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Broderick v. Rosner, 294 U.S. 629, 643 (1935)(full faith and credit clause largely abolishing general principle in international law by which "local policy is permitted to dominate rules of comity").

196. See id. at 327; Russell J. Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449, 457-60 (1959); see also Kirgis, supra note 197, at 99-107.
197. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (plurality opinion of Brennan, J); id. at 332 (Powell, J. dissenting); id. at 321 nn. 5-6 (Stevens, J., concurring in the judgment); Olmstead v. Anderson, 400 N.W.2d 292, 305 n.13 (Mich. 1987).
198. See Reese & Kaufman, supra note 12, at 1139; Weintraub, supra note 196, at 468; see also Weinberg, supra note 151, at 76 ("[m]inimal scrutiny" given to choice of law under due process clause).
forum's fiduciary rule, presumptively exceeds the constitutional limitations on a state's ability to apply its own law. In light of other decisions handed down before Allstate, however, this tacit "internal affairs doctrine" can be understood as having already been largely confined to the specific type of setting in which it was most frequently promulgated.

The principal authority for an unyielding constitutional insistence on the primacy of lex incorporationis is a series of cases involving fraternal benefit societies. The Court has consistently held that the terms of membership in such a society were to be governed by the laws of the state in which the society was domiciled. These decisions elevated to constitutional doctrine the philosophy that "predictability, practicality, and equality call for both corporate governance and the common rights and obligations of the [members] to be subject to a single law." The series culminated in Order of United Commercial Travelers of America v. Wolfe, in which the Court barred a forum state's award of benefits in violation of a fraternal benefit society's constitution. Holding that the forum state must defer to the state laws under which the society was created, the Court summarized prior decisions as "unwaveringly safeguard[ing], in each state, the effectiveness of the public acts of every other state."

Well before Allstate the fraternal society cases were recognized as aberrant in their categorical sanction of the law of the corporate domicile. Currie criticized the reasoning of the cases, and other commentators grew skeptical of their precedential value. Seventeen years after Wolfe the Supreme Court characterized its holding as "a highly specialized decision dealing with unique facts." This statement, along with other developments, signaled that the fraternal society cases would not block the application of the lex fori to corporations.

Cases outside the area of fraternal benefit societies suggested a presumption of allowing the forum state to pursue its legitimate interests

200. See supra Part V-B.
202. P. John Kozyris, Corporate Wars and Choice of Law, 1985 DUKE L.J. 1, 34; see Modern Woodmen of America v. Mixer, 267 U.S. 544, 551 (1925)(referring to "indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that rights must be determined by a single law").
204. Id. at 609; see Kirgis, supra note 191, at 120, 126-27.
206. See, e.g., Reese & Kaufman, supra note 12, at 1131 n. 53.
by applying its laws, even if the litigants had entered into their contractual relationship in another state. Supreme Court decisions addressing choice of law in workers' compensation provide a conspicuous example of this approach. As early as 1939, the Court held that the full faith and credit clause did not prevent a state in which an accident had occurred from applying its own workers' compensation law rather than that of the state in which the employment relationship was formed.209 The significance of contacts with the forum state came210 to play a similar role in the applicability of the forum's law to private insurance policies,211 as the Court embraced the principle that full faith and credit "does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been executed."212

Even relying only on pre-Allstate jurisprudence, then, a proponent of legislation subjecting directors of foreign corporations to the fiduciary standards of the forum could cogently argue the Court's rejection of the central feature of Wolfe: an undifferentiated view of the forum's obligation to abide by every aspect of the lex incorporationis.213 Beyond the particular results in the workers' compensation and insurance cases, a larger strain of full faith and credit doctrine had author-

209. Pacific Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939). Pacific Employers began the gradual abandonment of Bradford Elec. Light Co. v. Clapper, 285 U.S. 145 (1932), which had apparently construed the full faith and credit clause as presumptively demanding the application of the worker's compensation statute of the state in which the employment relation was rooted. Later cases permitted the forum to "supplement" or "displace," Carroll v. Lanza, 349 U.S. 408, 414 (1955), the remedy provided by the workers' compensation act of another state as long as the forum state could claim a "substantial connection," Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 476 (1947), with the relationship between the employer and the employee. Even if a state makes its benefits scheme exclusive, the full faith and credit clause confers on neither the state where the employment relationship originated, Carroll v. Lanza, 349 U.S. 408, 412, nor the state where the injury occurred, Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), an absolute power to dictate the compensation policy of a forum with the requisite "connection."

210. An older case, Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924), had flatly prohibited the forum from applying its own law to a life insurance policy issued in another state.


It is of the essence of the full faith and credit clause that, if a state gives some faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from fraternal benefit societies organized by such other state, then it must give full faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships.

Id. at 625.
ized departures from *lex loci contractus* if its enforcement would infringe upon the public policy of the forum state. More broadly, commentators discerned in the Court's rulings the principle that "[w]hen a state has a policy of its own, and when the state's connection with a case is such as to constitute a reasonable and substantial basis for the state's assertion of an interest in applying its policy, neither the Full Faith and Credit Clause nor the Due Process Clause requires it to apply the law of another state in preference to its own."2

Although special considerations of corporate governance may counsel stricter adherence to the *lex incorporationis* than in the ordinary contractual relationship, developments in the corporate field conversely have militated against imposing strict full faith and credit constraints on the prerogatives of the forum state. Prior to *Allstate* the most direct affront to the primacy of the state of incorporation was the 1977 passage of section 2115 of the California Corporation Code. That legislation applies much of California law to foreign corporations whose contacts, as gauged by stockholding and business, are predominantly with California. The legislation represented the culmination of efforts to subject "pseudo-foreign" corporations to the laws of the state with which they are principally involved. A number of cases had already applied the forum state's law to such corporations. Section 2115 codified an emerging sense that there is nothing intrinsically sacrosanct or supreme about the *lex incorporationis* if the forum state can cite substantial interests in applying its law. Whatever colorable objections might be raised under conflicts principles or the commerce clause, the Court's holding a few years later in *Allstate* confirmed that the full faith and credit clause reins are loose indeed.

C. *Allstate* and the Permissive Test of "Minimum Contacts"

*Allstate* dispelled any doubts about the latitude afforded by the older full faith and credit cases. Although the decision did not directly involve corporate choice of law, its logic extends to that area. A state's interest in protecting its resident investors through the application of

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215. *B. CURRIE*, supra note 205, at 162; id. at 271 (choice of law violative of full faith and credit or due process "only when the state whose law is applied has no legitimate interest in its application").
216. *See supra* notes 14-17 and accompanying text.
218. *See Elvin R. Latty, Pseudo-Foreign Corporations, 65 YALE L.J. 137 (1955).*
220. *See infra* part V.
221. *See infra* part IV.
its fiduciary standards fits comfortably within the type of interest to which the Court gave deference in Allstate.

The Allstate plaintiff was the widow of a Wisconsin resident who had commuted to work in Minnesota. The husband had died after an automobile struck the motorcycle on which he was a passenger; the accident took place in Wisconsin. After the accident, the plaintiff became a resident of Minnesota. Since the driver of neither the car nor the motorcycle carried valid insurance, the plaintiff, as representative of her deceased husband's estate, sought to recover on an uninsured motorist clause in his insurance policy. The policy covered three automobiles and was limited to $15,000 for each one. Wisconsin law would have authorized the plaintiff to recover only the amount provided for one of the automobiles, whereas Minnesota permitted "stacking" of the three coverages to produce a $45,000 recovery. The plaintiff brought suit in Minnesota, and the Minnesota Supreme Court upheld the trial court's application of Minnesota law to allow the larger recovery.222 The Supreme Court affirmed.

Canvassing the Court's earlier decisions under the full faith and credit and due process clauses, Justice Brennan's plurality opinion extracted the principle that a state's valid selection of its own law requires that the state have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor unfair."223 Here, Minnesota could subject Allstate to its stacking law on the basis of an "aggregate" of three contacts: the decedent's fifteen years of employment in Minnesota, Allstate's presence and conduct of business in the state, and the plaintiff's status as a Minnesota resident and representative of her late husband's estate.224 Each contact in turn generated an interest that supported Minnesota's application of its own law: for example, fulfilling the state's "police power responsibilities" to members of its workforce.225

Both the immediate result and the general tenor of Allstate gave considerable momentum to attempts by forum states to apply their law to activities having a discernible impact within the state. Allstate signaled minimal constitutional restraint on choice of law.226 Refus-

223. Id. at 312-13.
224. Id. at 313-19.
225. Id. at 314.
226. In addition to the permissive reasoning of Justice Brennan's plurality opinion, Justice Stevens provided the fifth vote in the 5-3 decision. His concurrence in the judgment took a similarly lenient view of the restraints imposed by the full faith and credit and due process clauses. See id. at 320-332; see generally, e.g., Symposium: Conflict-of-Laws Theory After Allstate Insurance v. Hague, 10 Hofstra L. Rev. 1 (1981).
ing "blindly" to follow "wooden" choice-of-law rules, the plurality indulged the broad meaning that Minnesota gave to its connection with the parties and their dispute. Older decisions forbidding states to apply their law to insurance policies were dismissed as "extreme" instances of a forum's choosing its law and hence were deemed irrelevant to Minnesota's more extensive contact with the parties and controversy in Allstate. Critics of the decision quickly recognized its effective announcement of the Court's deep reluctance to intrude on states' choice of law. Agreeing at least on this interpretation of Allstate's thrust, approving observers welcomed the Court's apparent renunciation of close choice-of-law supervision as a "supremely sensible" step.

Allstate's overall laissez-faire approach to choice of law lends support to a state's application of its fiduciary standards to protect its resident investors. The plurality assumed that a state's interest in members of its workforce is less than its interest in its residents, yet still deemed the decedent's employment by a Minnesota company a "very important" contact. Therefore, a fiduciary statute aimed directly at protecting residents would also implicate a sufficiently weighty interest. Moreover, the plurality took an expansive view of the state's interest in compensation of its residents. For example, the Court acknowledged Minnesota's interest in keeping "'resident accident victims'... 'off welfare rolls' and able to meet 'financial obligations.'" These same types of economic concerns extend to shareholders who have suffered financial loss from the misconduct of directors. The plurality was similarly willing to entertain a liberal, if somewhat vague, theory of the broader impact of Allstate's compensation policies within Minnesota, stating that a state's workforce is

228. See id. at 314.
229. Id. at 311. The plurality's two examples were John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936) and Home Ins. Co. v. Dick, 281 U.S. 397 (1930).
233. Id. at 319 (quoting Allstate Ins. Co. v. Hague, 289 N.W.2d 43, 49 (Minn. 1978)).
“surely affected by the level of protection the State extends to it, either directly or indirectly.” Likewise, a state's investors are "surely affected" by the level of protection that they receive from the state through its regulation of fiduciary obligations.

One of the toughest criticisms of Allstate challenges the outcome because none of Allstate's prior involvement with Minnesota related to the claim brought by the plaintiff; by merely doing business in Minnesota, Allstate exposed itself to the imposition of unrelated Minnesota law. Under this approach, if a director's contacts with a forum state are sufficient to support jurisdiction, they could be comfortably aggregated with the state's interest in protecting resident shareholders in order to sustain the application of forum law. Moreover, the explicit fiduciary regulation proposed here would avoid the only real evil allegedly inflicted by the Allstate outcome: unfair surprise. By expressly announcing an intention to apply forum law to directors of foreign corporations, a state would provide a degree of notice lacking, and yet not fatal, in Allstate.

The imposition of forum fiduciary law on directors of foreign corporations does involve a countervailing factor not present in Allstate: the assertion by another state of a putatively superior interest in the exclusive application of its law. Again, though, however powerful the presumption in favor of lex incorporationis may be as a principle of conflicts law, there is nothing in Allstate to suggest that it rises to the level of constitutional doctrine. On the contrary, the plurality's rejection of "wooden" rules, its recognition that full faith and credit often permits the application of more than a single state's law, and its disavowal of a weighing-of-interests approach all point toward acceptance of the forum state's application of its fiduciary standard where that application is "neither arbitrary nor fundamentally unfair."

The resistance of California's section 2115 to full faith and credit challenges in the wake of Allstate supports this conclusion. In an important sense the proposed fiduciary rule is much more limited

234. Id. at 315.
235. See Kozyris, supra note 230, at 902.
236. See supra part II.
237. See Hill, supra note 230, at 968; Kozyris, supra note 230, at 900; von Mehran & Trautman, supra note 192, at 52-53.
238. But see Brilmayer, supra note 230, at 1317, 1324 (state policy preferring application of forum law in multistate setting not constitutionally entitled to deference).
240. Id. at 308 n.10.
241. Id. at 313.
than the scope of section 2115. Unlike the far-reaching provisions of section 2115, this article’s proposal touches on only one facet of a corporation’s governance. Moreover, the proposed treatment of that facet does not inherently override a divergent law of the state of domicile, and it is therefore consistent with *Allstate’s* tolerant philosophy of permitting some issues to be subject to resolution by the laws of more than one state. While an overarching need for uniformity arguably may dictate that a single law apply to matters such as shareholders’ voting rights and the formation of corporations, no such necessity extends to fiduciary obligations. The viability of having different fiduciary obligations to shareholders in various states leads this article in a later section to conclude that the proposal here is valid even under principles of conflicts law; if that is true, then it follows that the proposal falls well within the more capacious boundaries that *Allstate* established for the full faith and credit clause.

D. *Shutts* and Choice of Law in Class Actions

While full faith and credit thus appears to permit a forum state’s application of its fiduciary laws, questions remain about the particular restraints that might be imposed on the specific vehicle of shareholders’ multistate class action. The Supreme Court’s decision in *Shutts* placed restrictions on the ability to apply forum law to transactions with which the forum state has a relatively slight connection. Nevertheless, the Court also upheld the basic mechanism of the multistate class action, as long as the forum state recognizes those instances in which the law of another state should prevail.

While *Shutts* struck down Kansas courts’ selection of law in a mult-

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244. See Reese & Kaufman, supra note 212, at 1133.

245. See infra part V.

246. *Shutts* invalidated the Kansas courts’ resolution of most of the substantive claims involved not simply because the class action reached beyond Kansas’s border, but rather because the courts overreached in their choice of law. Only about three percent of the plaintiffs and fewer than one percent of the leases could be fairly characterized as having a substantial connection with Kansas. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-15 (1985). Under these circumstances, it was improper for Kansas to apply its own law across-the-board in ruling on the disputed royalty payments. However “modest,” id. at 818, the restrictions placed by *Allstate* on choice of law, the plurality opinion there did not leave defendants helpless in the face of forum aggrandizement. Thus, Kansas’s lack of “‘interest’” in the out-of-state transactions made the application of its law to those transactions impermissibly “arbitrary and unfair.” Id. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Although the Court declined to state precisely which law must be applied to each of the transactions involved in *Shutts*, id. at 823, the Kansas Supreme Court on remand apparently proceeded on the premise that the law of the state in which the lease was held would govern. See
tistate class action, the Court made clear that it was not rejecting the procedural device itself. On the contrary, the Court simply acknowledged that compliance with full faith and credit requirements may entail special difficulties and burdens when managing a class action involving many transactions and the laws of several states. Thus, any reservations about the practical obstacles to implementation of a multistate class action lie in the realm of policy debate; they do not detract from the Court's approval of a properly administered action.

States can tailor their shareholder actions to avoid the defects on which the suit in Shutts foundered. Kansas not only lacked a significant connection with most of the leases at issue in Shutts, but its law directly conflicted with the laws of states possessing such a connection. By contrast, the statute proposed here would pointedly limit the reach of forum law to directors' liability toward shareholders who are residents of the forum state; liability to out-of-state shareholders would be governed by the laws of their respective states. Where the law of another state would relieve the defendant directors of liability—either because of more relaxed fiduciary standards or deference to the state of incorporation—the class members residing in that state would not recover. This compartmentalization by plaintiffs' state of residence appears to be what the Shutts Court had in mind when it differentiated between Phillips Petroleum's ostensible liability to Kansas shareholders and the possibility of the company's being excused from payment to leaseholders in Texas and Oklahoma.

Admittedly, the application of forum law to the internal relations of a foreign corporation may bring the forum state into conflict with the state of domicile. A clash becomes almost inevitable if the state of incorporation wishes to have its law govern all of the directors' fiduciary obligations, and such a clash would undoubtedly threaten application of forum law under orthodox conflicts theory. As a constitutional matter, however, the problem is the extreme deference given to the lex incorporationis, which assumes a supremacy by the state of domicile that the modern thrust of full faith and credit doctrine has relinquished. It is one thing to say that Kansas may not impose its law on transactions that are rooted in another state and devoid of links to Kansas. It would be erroneous, though, to read Shutts and

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249. See id.

250. See infra notes 332-94 and accompanying text.
Allstate as denying to a state the power to protect its own residents from economic harm originating elsewhere. Nor is a state deprived of that power simply because the harm has been inflicted through the apparatus of a corporation.

Finally, the role that unfair surprise played in the decision to overturn Kansas's choice of law indicates that the proposed fiduciary statute would be viewed in a different light from the claim in Shutts. The Shutts Court noted that the parties to leases involving land and royalty owners outside of Kansas would not have expected that their obligations would be governed by Kansas law. As in the case of jurisdiction, however, an explicit outreach statute grounded in a legitimate state interest would give clear notice of the state's intention to hold directors accountable to the forum state's heightened duty of care.

IV. COMMERCE CLAUSE PROHIBITIONS: BURDENS, DISCRIMINATION, AND EXTRATERRITORIALITY

The commerce clause provides a more powerful constraint than full faith and credit on a state's ability to regulate the behavior of directors of foreign corporations. The fundamental objection to the proposed fiduciary statute lies in its potential to disrupt orderly corporate planning. The internal affairs of corporations, it is said, should be "subjected to a unitary, cohesive, consistent, predictable, equal, and continuous regime of regulation." Accordingly, the imposition of disparate state regulations could interfere to an unreasonable degree

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252. See supra notes 131-41 and accompanying text.
253. Perhaps the most difficult and complex questions that Shutts raises for the proposed statute pertain to the res judicata effect of a judgment in a shareholder class action. One of the principal underpinnings of the rule of res judicata—shielding the defendant from vexatious lawsuits, see, e.g., Jack H. Friedenthal et al., Civil Procedure 615 (1985) (most important purpose of res judicata is to "provide repose for both the party litigants and the public"), takes on a special focus in the corporate setting. Subjecting directors to several suits for the same conduct, perhaps with officers summoned as witnesses, threatens serious disruption of corporate operations. See Note, Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff, 71 Mich. L. Rev. 1042, 1058 (1973). In the case of adoption by numerous states of the statute proposed here, such disruption might result from competing or successive shareholder class actions. Shutts does not altogether preclude the possibility of such actions; while the Court endorsed the defendant's interest in having the entire plaintiff class bound by res judicata, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985), the opinion did not promulgate a firm rule for claim preclusion. See Miller & Crump, supra note 247, at 36. Ultimately, however, the special danger of multiple suits posed by shareholder multistate class actions is probably more theoretical than real. For an excellent analysis of concerns about multistate class actions left in the aftermath of Shutts, see Miller & Crump, supra note 247.
254. P. John Kozyris, Some Observations on State Regulation of Multistate Take-
with the free flow of commerce protected by the commerce clause. In this view, diverse fiduciary duties would impede the commerce clause goal of facilitating multistate commercial transactions. However plausible concerns over expediting economic activity may be, they are more significant to economic than constitutional theory. In finding that Congress's power to regulate interstate commerce implies limitations on states' ability to affect that commerce, the Supreme Court's overriding purpose has been to counter state protectionism. If state legislation expressly discriminates against out-of-state commerce, the Court inspects the statute skeptically and almost invariably strikes down this manifestation of protectionism. A similar level of scrutiny invalidates state statutes that seek to control commerce that takes place entirely outside the boundaries of the state. On the other hand, if the impact on interstate commerce results from the nondiscriminatory pursuit of a valid state interest, a more tolerant approach applies. In those instances, the Court balances the burden placed on interstate commerce against the weight and character of the state interest involved. It is by this standard, rather than by the stringent scrutiny of a favored economic doctrine, that efforts to hold directors of foreign corporations accountable for their negligence must be judged.

The fiduciary statute proposed here is not tainted by the favoritism toward in-state interests that triggers the more stringent commerce clause test. On the contrary, the statute would simply apply to directors of a foreign corporation that has shareholders in the enacting states—Controlling Choice of Law Through the Commerce Clause, 14 DEL. J. CORP. L. 499, 525 (1989).

255. See Harold W. Horowitz, The Commerce Clause as a Limitation on State Choice-of-Law Doctrine, 84 HARV. L. REV. 506, 514 (1971); see also Kozyris, supra note 254, at 516-17 (finding in Supreme Court decisions invalidating state restrictions on instruments of transportation support for commerce clause challenges to differing state regulations in the corporate area).

256. See Horowitz, supra note 255, at 514.

257. Cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (2d ed. 1988) (function of commerce clause is to "ensure solidarity, not economic efficiency").


state the same requirement of due care demanded of directors of domestic corporations. Nor does closer inspection betray a practical discrimination lurking beneath a superficially benign regulation; the evenhanded application of a high standard of due care does not cloak an invidious attempt to put out-of-state competitors at an unfair disadvantage. Indeed, it is states’ adoption of more permissive fiduciary standards that has been disparaged as an unsavory attempt to lure corporations by offering an improper inducement to management.

It might still be argued that the proposed statute imposes an excessive burden on interstate commerce, or that its extraterritorial reach extends beyond the limits placed on state sovereignty by the commerce clause. In particular, three distinct lines of commerce clause decisions, discussed below, could be invoked to challenge the validity of such legislation. Although each admittedly has some surface applicability to a fiduciary outreach statute, the proposed statute has crucial differences from the laws that the Court has found unacceptable. At most, the proposed statute would have to be carefully tailored to avoid the objections that proved fatal in these earlier cases.

A. MITE and CTS: Deference to the Lex Incorporationis in Anti-takeover Legislation Cases

The most conspicuous authority upon which to mount a commerce clause challenge to the proposed statute is a pair of Supreme Court decisions on the validity of state takeover acts: Edgar v. MITE Corp. and its sequel, CTS Corporation v. Dynamics Corporation. This was the ground on which the Court in Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977), struck down a North Carolina statute requiring that closed apple containers sold in the state either be marked with a United States Department of Agriculture grade or marked “unclassified,” “not graded,” or “grade not determined.” Id. at 339. The Court found that the prohibition on marking containers with state grades amounted to impermissible discrimination against Washington apple growers, who incurred increased costs by having to prepare special crates for shipment into North Carolina, and who were barred from capitalizing on the superior reputation of the Washington apple industry. Id. at 350-53. By contrast, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), sustained a Maryland law forbidding producers or refiners of petroleum products from owning or operating retail gasoline service stations in the state. Even though almost all of the excluded producers and refiners were out-of-state businesses, and almost all of the nonintegrated dealers who benefitted from the elimination of powerful competition were Maryland businesses, id. at 137-38, the Court refused to characterize the restriction as discriminatory. Instead, the Court emphasized that the statute did not favor in-state businesses as such over out-of-state businesses; in particular, the Court noted that a number of interstate companies that did not refine or produce gasoline already operated gas stations in Maryland. Id. at 125-26.

263. This was the ground on which the Court in Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977), struck down a North Carolina statute requiring that closed apple containers sold in the state either be marked with a United States Department of Agriculture grade or marked “unclassified,” “not graded,” or “grade not determined.” Id. at 339. The Court found that the prohibition on marking containers with state grades amounted to impermissible discrimination against Washington apple growers, who incurred increased costs by having to prepare special crates for shipment into North Carolina, and who were barred from capitalizing on the superior reputation of the Washington apple industry. Id. at 350-53. By contrast, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), sustained a Maryland law forbidding producers or refiners of petroleum products from owning or operating retail gasoline service stations in the state. Even though almost all of the excluded producers and refiners were out-of-state businesses, and almost all of the nonintegrated dealers who benefitted from the elimination of powerful competition were Maryland businesses, id. at 137-38, the Court refused to characterize the restriction as discriminatory. Instead, the Court emphasized that the statute did not favor in-state businesses as such over out-of-state businesses; in particular, the Court noted that a number of interstate companies that did not refine or produce gasoline already operated gas stations in Maryland. Id. at 125-26.

264. See supra note 12.


and CTS set limits on states' ability to place conditions on tender offers that could inhibit their consummation. The proposed statute threatens the same type of inhibition. In some instances a heightened standard of care might inflict liability on directors of a target corporation who acquiesced in a tender offer or other change of control that ultimately proved unprofitable to the corporation's shareholders. Arguably, the spectre of personal damages might so discourage board cooperation in even potentially beneficial changes of control that it would impose an impermissible burden under MITE and CTS.

Both decisions refer to the broad power that a state enjoys in regulating corporations created under the laws of that state. An extreme reading might construe these references as engraving the "internal affairs" doctrine into constitutional law, thus categorically barring legislation such as that advanced by this article as intrusive. Even if the two opinions do not create an absolute bar to foreign regulation of domestic corporations, they might be read as sufficiently wary of such regulation to presumptively prohibit a fiduciary outreach statute. Although these concerns have some foundation, a closer inspection of the opinions in MITE, and more recently in CTS, discloses that they do not provide grounds for finding the proposed statute violative of the commerce clause.

MITE was decided against the background of a rising tide of state anti-takeover legislation that placed formidable obstacles in the way of tender offers. The Illinois act at issue imposed delay, cost, and uncertainty typical of the antitakeover statutes of that vintage. That act required any takeover offer for the shares of a target company to be registered with the Illinois secretary of state. An offer could not become effective until twenty days after the bidder had filed a registration statement. Meanwhile, the Illinois secretary of state could suspend the offer indefinitely by commencing a hearing to review the offer for substantive unfairness. Even if the secretary declined to initiate a hearing on his own, he was required to hold one if requested by either a majority of the target company's outside directors or by Illinois stockholders owning ten percent of the target shares. The act stated the grounds upon which the secretary could deny registration in

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267. See infra part V-B.


269. Target companies were defined expansively to include companies in which Illinois residents owned at least ten percent of the company's shares. In the alternative, a corporation could qualify as a target company by meeting two of the three following conditions: location of its principal office in Illinois, incorporation in Illinois, or the presence of at least ten percent of its stated capital and paid-in surplus within the state. Edgar v. MITE Corp., 457 U.S. 624, 627 (1982).
sweeping terms. The grounds included not only failure to provide full and fair disclosure, but also a "tend[ency]" to defraud or deceive offerees or a determination that the offer was simply "inequitable." 270

Only the conclusion that the act imposed an excessive burden on interstate commerce commanded a majority of the Court. 271 The Court's opinion noted the interference with the free and efficient operation of the marketplace that would result from a veto of a nationwide tender offer by the Illinois secretary of state. 272 On the other side of the equation, the state's asserted interest in protecting Illinois investors could not justify the burdens placed on out-of-state transactions. 273 The Court expressly rejected Illinois's assertion that the act conferred substantial benefits on shareholders. 274 In addition, a plurality supported Justice White's reasoning that the commerce clause condemned the extraterritorial scope of Illinois regulation. The act purposed to reach securities transactions that took place entirely outside of the state. This ambitious projection of Illinois authority, the plurality concluded, violated the limitations placed on state sovereignty by the commerce clause. 275

CTS sustained the validity of a post-MITE Indiana anti-takeover statute that differed in significant detail from the earlier Illinois act. Most notably, 276 Indiana's regulatory scheme applied only to corporations chartered in the state. When a certain number or proportion of a domestic corporation's shares or shareholders were located in Indiana, the act's restrictive provisions came into play if the corporation chose to adopt them. 277 Under these provisions, the acquiror of a substantial portion of the shares of an Indiana corporation covered by the act would not automatically be entitled to vote its "control shares." Rather, voting rights—and hence acquisition of control—hinged on approval by a majority of those shareholders who were not affiliated with the acquiror or with any officer or director of the corporation. 278

The ability of a state to offer redress to resident shareholders who have been injured by directors' negligence is consistent with the rea-

270. Id. at 626-27.
271. A plurality endorsed Justice White's contention that the Illinois Act was preempted by the Williams Act. Id. at 630-40 (White, J., plurality).
272. Id. at 643-44.
273. Id. at 644.
274. Id. at 644-45.
275. Id. at 641-43.
276. The discussion here addresses only the constitutional analysis in MITE. The Court also held that Indiana's statute was consistent with the Williams Act; unlike the Illinois act, the Indiana statute did not tilt toward management and did not authorize indefinite delays in the consummation of tender offers. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 78-88 (1987).
277. Id. at 72-73.
278. Id. at 73-74.
soning of CTS\textsuperscript{279} in at least two key respects. First, the proposed statute draws no distinction between the directors of domestic and foreign corporations; hence, the statute is nondiscriminatory. The Court in CTS did not read the limitation of Indiana's takeover act as discriminatory, and the absence of formal discrimination was crucial to the CTS decision. The Court noted at the outset of its commerce clause analysis that "[t]he principal objects of dormant commerce clause scrutiny are statutes that discriminate against interstate commerce."\textsuperscript{280} Reflecting at least partial endorsement of a position that has drawn increasing support,\textsuperscript{281} the Court suggested that state regulation that does not reflect overt favoritism is entitled to a powerful presumption of validity. Even if a state's restriction in practice falls principally upon out-of-state actors—as the Indiana statute did—the Court declared that a disparate impact alone does not trigger the skeptical scrutiny provoked by outright discrimination.\textsuperscript{282}

The proposed statute and the Indiana act share a second similarity: neither authorizes the state to erect an insuperable obstacle to shifts in corporate control. As the Court emphasized, Indiana had not forbidden anyone from attempting to gain control of Indiana corporations through the purchase of shares; rather, the state had merely "provide[ed] regulatory procedures designed for the better protection of the corporations' shareholders."\textsuperscript{283} This feature presented an obvious contrast to the Illinois statute struck down in MITE, whose empowerment of the Illinois secretary of state to "block a nationwide

\textsuperscript{279} As the more recent of the Court's two decisions concerning state takeover legislation, as well as one whose entire commerce clause analysis commanded a majority of the Court, CTS must be regarded as the Court's authoritative pronouncement on this topic. CTS did not purport to overrule or even to qualify the commerce clause analysis found in either the majority or the plurality opinion in MITE. Nevertheless, CTS appears to signal a more tolerant, less hostile attitude toward takeover legislation than that found in Justice White's opinion in MITE. See C. William Baxley, The Constitutionality of the Delaware Anti-Takeover Statute, 13 HARY. J.L. & PUB. POL'Y 319, 325-26 (1990); Alan E. Garfield, State Competence to Regulate Corporate Takeovers: Lessons from State Takeover Statutes, 17 HOFSTRA L. REV. 535, 536-37 (1989); William C. Tyson, The Proper Relationship between Federal and State Law in the Regulation of Tender Offers, 66 NOTRE DAME L. REV. 241, 337-38 (1990). That Justice White dissented in CTS, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 97-101 (1987), may have reflected a shift in sentiment on the Court.

\textsuperscript{280} Id. at 87.

\textsuperscript{281} See id. at 95-96 (Scalia, J., concurring in judgment); Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 495, 505 (7th Cir.), cert. denied, 493 U.S. 955 (1989); Ford Motor Co. v. Insurance Comm'r, 874 F.2d 926, 941-45 (3d Cir.), cert. denied, 493 U.S. 969 (1989); Regan, supra note 259, at 1091; Robert A. Sedler, The Negative Commerce Clause As a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885 (1985).

\textsuperscript{282} CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88 (1987).

\textsuperscript{283} Id. at 93.
tender offer" was found objectionable. Likewise, the ability of shareholders in a given state to hold directors accountable for the injuries produced by their negligence in connection with a takeover bid would not pose an absolute bar to shifts in control. On the contrary, directors' liability could be assessed only after the shift in control had been accomplished.

Insofar as the proposed statute would provide management of target companies with an incentive to accept rather than resist attractive tender offers, the statute would actually promote the flow of interstate commerce. Conversely, where tender offers did not materialize, the absence of raiders could be attributed to the satisfactory record of management rather than to the type of artificial roadblocks struck down in MITE. Thus, the tender offer—or at least the credible possibility of one—would serve its function of spurring management "to perform well so that stock prices remain high."285

On the other hand, liability in some instances might be predicated on management's acceptance of a tender offer or other overture whose terms are deemed inadequate. The spectre of damages could cast a chilling effect on the willingness of directors to approve a takeover that they genuinely believed to be beneficial to the company and its shareholders. Such an inhibition would arguably violate the Court's proscription of a single state's control of a nationwide tender offer. The limited reach of the proposed statute, however, should shield it from this objection. The statute only allows damages strictly commensurate with the harm inflicted on residents of the forum state. A conscientious effort to tailor damages to a state's interest in protecting its residents should not be regarded as tantamount to interference with a multistate transaction.

Moreover, any overreaching can be addressed by fine-tuning director liability rather than categorically invalidating it. For example, a state might go so far as to make any rejection of a plausible tender offer per se grounds for liability. In that case, the statute would violate the commerce clause unless the state amended it to conform to traditional concepts of negligence: i.e., an actual showing that the directors had failed to exercise due care in deciding to refuse the tender offer. In addition, the commerce clause might prohibit a state from lightly presuming the existence of damages; a substantial prima facie showing of the inadequacy of the takeover's terms might be required in order to go forward. Such a requirement would help deflect assertions that the mere threat of protracted litigation would deter directors from fairly considering changes in corporate control. For similar

285. Id.
286. The holding in Van Gorkom illustrates this category. See supra notes 4-7 and accompanying text.
reasons, commerce clause values may require sufficiently streamlined procedures for resolving negligence claims, thereby avoiding any undue burden that might deter directors from pursuing attractive deals.\textsuperscript{287}

The congruence between the limited reach of the proposed statute and the state interest which it serves also helps to explain how the proposed statute can be reconciled with CTS's treatment of the internal affairs of a corporation. The proposed statute, although having a potential to impact an out-of-state corporation's internal affairs, is not primarily designed with that end in mind. The CTS approach to the internal affairs doctrine has its roots in MITE. The MITE Court rejected Illinois's contention that its interest in regulating the internal affairs of domestic corporations justified its takeover statute. That rationale failed because the statute's restrictions applied to tender offers for foreign as well as domestic corporations. As the Court stated, Illinois had "no interest in regulating the internal affairs of foreign corporations."\textsuperscript{288} By contrast, the Indiana statute upheld in CTS confined its reach to domestic corporations. Thus, the act served Indiana's "substantial interest in preventing the corporate form from becoming a shield for unfair corporate dealing."\textsuperscript{289} That interest in turn derived from the manner in which business has traditionally been structured: states have assumed the responsibility to "create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."\textsuperscript{290} The Court observed that the free market system prevailing in the American economy "depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed . . . by . . . the corporate law of the State of its incorporation."\textsuperscript{291}

Considered in isolation, these statements lend support to the proposition that an ambitious outreach statute would presumptively violate the commerce clause. In the context of the Court's broader discussion of Indiana's legitimate interests, however, these comments do not reflect an intent to confer constitutional status on a strict internal affairs doctrine.\textsuperscript{292} Rather, they demonstrate that all the com-

\textsuperscript{287.} The mere possibility that a statute may limit the number of successful offers does not itself violate the commerce clause where the statute does not bar efforts to gain control. \textit{See} CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 93-94 (1987).


\textsuperscript{289.} \textit{CTS Corp. v. Dynamics Corp. of America}, 481 U.S. 69, 93 (1987).

\textsuperscript{290.} \textit{Id.} at 91.

\textsuperscript{291.} \textit{Id.} at 90.

\textsuperscript{292.} \textit{See} Richard M. Buxbaum, \textit{The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law}, 75 CAL. L. REV. 29 (1987), for discussion of the view that \textit{CTS} "comes dangerously close to," \textit{id.} at 34, but ultimately avoids, constitutionalizing the internal affairs doctrine; \textit{accord} Norwood P. Beveridge, Jr., \textit{The Internal Affairs Doctrine: The Proper Law of a Corporation}, 44 BUS.
The commerce clause requires is a sufficient degree of interest in the transactions which the state seeks to regulate. Because of the historic primacy that states have assumed in regulating corporations created under their laws, Indiana's "purpose . . . to protect the shareholders of Indiana corporations" outweighed any encroachment on interstate commerce. This objective drew particular strength from the fact that the act's provisions applied only to corporations having a substantial number of shareholders in Indiana; therefore, the statute's operation would always "affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting." Thus, it is the protection of individuals and entities in whom the state has a direct

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293. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 91 (1987).

294. Id. at 93. The weightiness of the state's interest in the welfare of its residents is underscored by its approval of statutory preferences in favor of residents. Such preferences have been upheld against challenges under the commerce clause, see White v. Mass. Council of Const. Employers, Inc., 460 U.S. 204 (1983)(upholding city's requirement that city residents comprise at least 50% of work force of all construction projects funded by city); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982)(state's ownership of ground water "may support a limited preference for its own citizens in the utilization" of water); Reeves, Inc. v. Stake, 447 U.S. 429 (1980)(sustaining state policy of confining sale of cement by state-owned plant to state residents); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976)("[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others"); but see Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980)(invalidating statute prohibiting out-of-state banks from owning Florida investment advisory businesses); the equal protection clause, see Martinez v. Bynum, 461 U.S. 321 (1983)(upholding state residency requirement for admission to tuition-free public schools); and the privileges and immunities clause of article IV, see Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978)(upholding large discrepancy between license fees charged to residents and nonresidents for recreational hunting); but see Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)(striking down rule limiting bar admissions to state residents); Hicklin v. Orbeck, 437 U.S. 518 (1978)(invalidating hiring preference for state's residents in all employment related to the development of state's oil and gas resources, where state could not demonstrate that influx of nonresidents seeking employment was principal source of state's unemployment problem or that blanket preference was necessary to effectuate state's interest); see generally Mark P. Gergen, The Selfish State and the Market, 66 TEX. L. REV. 1097 (1988).
interest, not an abstract apotheosis of the *lex incorporationis*, that lies at the heart of *CTS's* approval of the Indiana statute.

Viewed in the light of this emphasis on the state's ultimate interest, the proposed fiduciary statute fits within the latitude allowed by *CTS* and in *MITE*. *MITE* acknowledged that "protecting local investors is plainly a legitimate state objective;" the Illinois statute, to the extent that it interfered with out-of-state transactions by nonresident shareholders, simply failed to advance that objective. By contrast, the statute proposed here is tailored to promote only the state's interest in protecting resident shareholders. The scope of the statute differs from those involved in both *MITE* and *CTS*. While Illinois improperly attempted to protect nonresident shareholders of nonresident corporations, the Court permitted Indiana to protect nonresident shareholders of resident corporations. By providing redress for resident shareholders of nonresident corporations, the proposed statute rests on the same fundamental foundation as *CTS*: broad state power to protect those who are governed by that state's regime of rights and responsibilities. That one type of protection arises out of incorporation and the other out of residency should not create a constitutional distinction. Indeed, it would be ironic if technical incorporation in a state—often little more than a formality—were to carry more weight than residency.

**B. Brown-Forman and the Limits of Extraterritorial Impact**

Another possible line of attack on the proposed fiduciary statute is suggested by *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, which struck down a New York liquor statute because of its excessive extraterritorial impact. *Brown-Forman*, along with antecedent holdings, suggest commerce clause limitations on the extent to which a state statute may influence decisionmaking by directors of foreign corporations. The out-of-state reverberations of the statute proposed here, however, differ in crucial respects from the features that proved fatal in *Brown-Forman*.

*Brown-Forman* struck down New York's liquor law because of its relatively direct control over liquor prices in other states. The law mandated that the wholesale price of liquor sold in New York must

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not exceed the lowest price that the distiller was simultaneously charging elsewhere in the country. By preventing distillers from lowering their prices in other states,\(^299\) the statute violated the proscription laid down in *Baldwin v. G.A.F. Seelig, Inc.*\(^300\) that a state may not "project its legislation into [another state] by regulating the price to be paid in that state for [goods] acquired there."\(^301\)

Later, in *Healy v. Beer Institute, Inc.*,\(^302\) the Court relied largely on *Brown-Forman* to strike down a Connecticut statute compelling out-of-state shippers of beer to affirm that the prices charged Connecticut wholesalers were no higher than the prices at which the same products were then being sold in certain neighboring states. The Court focused on the variety of restraints that the dormant commerce clause imposes on the permissible extraterritorial effects of state economic regulations.\(^303\) Like New York's liquor law, the Connecticut statute improperly interfered with brewers' pricing decisions in other states.\(^304\)

In most instances in which the projection of commercial regulation has transgressed the limits of state power, indications of economic protectionism have tainted the defective statute. The presence of state protectionism, the principal evil at which the commerce clause was directed,\(^305\) heightens the Court's scrutiny of regulatory effects beyond a state's boundary. For example, *Baldwin* rejected New York's rationale that the state's farmers must be shielded from lower prices

\(^299\) For the month during which a distiller's posted price was in effect in New York, it could not lower its price for the same item in other states without the approval of the New York State Liquor Authority. *Id*.

\(^300\) *294* U.S. 511 (1935).

\(^301\) *Id.* at 521, quoted in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.* *476* U.S. 573, 583 (1986). In *Baldwin*, the Court struck down a New York statute barring the retail sale in New York of milk purchased outside the state at a lower wholesale price than the minimum price that New York then imposed for wholesale transactions within the state. The Court in *Brown-Forman* also referred to its decision in *Southern Pacific Co. v. Arizona*, *325* U.S. 761 (1945), which struck down an Arizona statute limiting trains to seventy freight cars. Because other states did not impose this restriction on train lengths, carriers whose trains passed through Arizona were confronted with a choice between two alternatives: to uncouple longer trains to conform to Arizona's restriction while in the state, or simply to place on such routes only trains of seventy or fewer cars. Since it was frequently not feasible to reconstitute trains near the Arizona border, carriers were forced to comply with Arizona's deviant limitation while traveling in other states as well. *Id.* at 774-75. In light of the negligible contribution that the Arizona law made to enhancing safety, *id.* at 775-78, the Court held invalid Arizona's effective "control" of rail traffic outside the state. *Id.* at 774-75.

\(^302\) *491* U.S. 324 (1989).

\(^303\) See *id.* at 336-37.

\(^304\) See *id.* at 338-39.

in other states in order to ensure an adequate supply of milk to New York residents. Instead, the Court recast New York's defense as a pretext for the kind of barrier against economic competition that the commerce clause was intended to forbid.306 Similarly, Brown-Forman noted that the prohibition on protectionism encompasses efforts to secure for in-state consumers an advantage over consumers elsewhere,307 as New York's liquor law did by depriving liquor customers in other states of the lower prices that they would have otherwise enjoyed. In Healy the aura of protectionism was even more pronounced.308

Unlike the regulatory schemes struck down in Baldwin, Brown-Forman, and Healy, the fiduciary statute proposed here would not further protectionist ends. A state's attempt to hold directors liable for the harm that they have inflicted on resident shareholders is qualitatively different from an effort to benefit local consumers at the expense of consumers in other states. Nor should a program designed to ensure accountability for negligent conduct be equated with state regulation that coerces companies to divert business from other states, as the discriminatory statute in Healy (by its assault on the advantage of selling beer in neighboring states) had the capacity to do.

The only respect in which the proposed statute might prod a shift in business operations lies in its possible influence on a company's choice of state of incorporation. By rendering states with lenient fiduciary standards less effective havens for careless conduct, the statute might reduce the attraction of incorporation in states such as Delaware. However, even if the potential for such an impact were significant,309 this effect on business decisionmaking does not resemble the interference with economic activity found illegitimate in Baldwin, Brown-Forman, and Healy. Those statutes altered or superseded the

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308. The Connecticut statute exempted from its affirmation requirement brewers or shippers who sold beer only within the state. By freeing from price regulations brewers and shippers who confined their sales to Connecticut, the statute enacted a "patent discrimination" which discouraged those seeking to profit from the Connecticut market from pursuing opportunities in neighboring states. Healy v. Beer Inst., Inc., 491 U.S. 324, 341 (1989).
309. Reasons in addition to the broad discretion afforded management are often offered for the appeal of Delaware as a state in which to incorporate. These include comprehensive corporate statutes, see Curtis Alva, Delaware and the Market for Corporate Charters: History and Agency, 15 DEL. J. CORP. L. 885, 918 (1990), a judiciary well-versed in matters of corporate law, see Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 TEX. L. REV. 469, 522 (1987), and a substantial and stable body of case law, see Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U. L. REV. 913, 942 (1982).
ordinary operation of economic competition in other states, involving such decisions as what price to charge for milk or whether to sell beer in a given market. Distorting out-of-state market forces to deprive consumers or businesses of advantages strikes at the heart of the commerce clause’s prohibition of state interference with interstate commerce. By contrast, the commerce clause does not value the artificial advantage that a state creates for itself by erecting a permissive regulatory regime. Delaware’s eagerness to entice companies to incorporate in that state does not deserve the same constitutional solicitude as the ability of Vermont farmers to produce milk more cheaply than their New York counterparts.310

The statute does not exercise the type of “control” over out-of-state events found impermissible in the cases described above. As already noted, the statute would neither compel nor forbid directors to act in a certain way with respect to major decisions. In this sense the statute differs substantially from state regulation that explicitly or effectively dictates the price which must be charged for goods in other states.

Admittedly, the prospect of liability to even a fraction of a corporation’s shareholders might dissuade directors from pursuing a course that they might otherwise take. However, the potential deterrent effect of post hoc liability does not inevitably invalidate extraterritorial regulation. Under products liability principles, for example, a decision made and carried out in one state furnishes grounds for liability in

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310. A challenge to a fiduciary outreach statute might still invoke Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), to argue that the same level of scrutiny of extraterritorial effects exists even in the absence of protectionist elements. There, Arizona evenhandedly banned long trains from both intrastate and interstate routes. However, heightened scrutiny was not required to reach the Court’s result in Southern Pacific. The undoubted burden on the flow of interstate rail traffic clearly outweighed the “at most slight and dubious advantage,” id. at 779, created by Arizona’s restriction. By contrast, a statute that appears to represent a plausible effort to promote a legitimate state interest—such as standards of care to protect resident investors—would receive more sympathetic judicial examination. See e.g., Northwest Central Pipeline Corp. v. State Corp. Comm’n, 489 U.S. 493, 525-26 (1989); Maine v. Taylor, 477 U.S. 131 (1986); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Service Comm’n, 461 U.S. 375, 394 (1983); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471-72 (1981). Even in the specific area of safety regulations imposed on channels of transportation, the Court since Southern Pacific has expressed a more tolerant attitude toward regulation that fails to harmonize with those of most other states. The Court has indicated that unusual requirements will fall only when they manifestly place an excessive burden on interstate commerce. See Bibb v. Navajo Freight Lines, 359 U.S. 520, 530 (1959)(“state legislatures plainly have great leeway in providing safety regulations for all vehicles”); see also Kassel v. Consolidated Freightways, 450 U.S. 622, 670 (1981)(Powell, J., plurality)(“If safety justifications are not illusory, the court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.”)(quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978)(Blackmun, J., concurring)).
another. In both instances harm felt in the state imposing liability can be attributed to delinquent conduct outside of that state. Likewise, the links to commerce within the state in both cases—the subsequent purchase of the defective product and the earlier purchase of shares respectively—arise from transactions removed in time from the original out-of-state conduct. Both forms of liability seek to provide incentive for the exercise of due care by those whose actions directly affect residents of the state. While the proposed fiduciary statute would impose personal rather than corporate liability, this difference has no constitutional significance.

Nor does the proposed fiduciary statute present the same danger of "inconsistent obligations" that the Court found ominous in Brown-Forman and Healy. If numerous states were to adopt affirmation laws, their conflicting requirements would produce "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." By contrast, susceptibility to a variety of negligence standards ranging from lax to responsible would not create this type of economic gridlock. Rather, the proposed statute would simply enable a state to exact proportionate redress for failure to observe due care toward its resident shareholders.

Given this element of proportionality, the statute would comport with the commerce clause philosophy reflected in the "internal consistency" criterion for state taxation of multistate businesses. Under this principle, any formula of taxation "must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary


312. Nor should it matter that directors' liability would flow from the earlier sale of shares by a third party, either the corporation or a private seller. In products liability as well, a manufacturer can be held liable notwithstanding the existence of one or more intermediaries who are more directly responsible for the sale of the defective product to the injured plaintiff. See Hutson v. Fehr Bros., Inc., 584 F.2d 833, 835 (8th Cir.), cert. denied, 439 U.S. 983 (1978); Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129, 1135 (9th Cir. 1977); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); RESTATEMENT (SECOND) OF TORTS § 402A (1977).


316. Id. at 337.
business's income being taxed." Similarly, the proliferation of fiduciary outreach statutes, each compensating only injury to resident shareholders, would not produce total liability above the damages that could be ascribed to directors' negligence.

Aside from specific requirements of proportionality, the existence of varying obligations in different jurisdictions does not necessarily offend constitutional principles. Indeed, the Court tolerates disparate standards among the states even in the regulation of so fundamental a right as free speech. For example, a state may make it easy, difficult, or impossible for private plaintiffs in defamation suits to recover damages, as long as minimal constitutional requirements are met. Likewise, a state may elect whether to designate sexually oriented material as punishable obscenity, subject to the broad criteria laid down by the Court. In neither case does the prospect that a lawsuit in the most stringent jurisdiction might dampen or disrupt nationwide circulation constitute a sufficient objection. The latitude granted to states in these areas suggests considerable latitude as well in applying their own fiduciary standards to compensate resident shareholders for injuries caused by directors' negligence. It would be incongruous for the Constitution to allow the most prudish jurisdiction to determine the contents or dissemination of a national periodical, while forbidding a state with high fiduciary standards from making directors take into account the importance that jurisdiction attaches to due care.

C. Bendix and the Convergence of the Commerce Clause and Due Process

A final commerce clause challenge to the proposed fiduciary statute might be mounted under the Court's decision in *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.* Bendix struck down an

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318. In addition to requiring internal consistency, *Container* also referred to "external consistency": "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). In other words, the state may not tax income derived from business transacted beyond its border. Again, by confining liability to injury suffered by residents of the enacting state, the proposed fiduciary statute meets the spirit of this requirement.


Ohio statute tolling the statute of limitations for foreign corporations that did not consent to the jurisdiction of Ohio courts. On its face, the holding suggests the Court's wariness of laws that demand accountability by corporations lacking ongoing involvement with the enacting state. Closer review, however, reveals significant distinctions between the excessive scope of Ohio's law and the fiduciary statute proposed here.

The lawsuit that had been authorized in *Bendix* by Ohio's suspension of its statute of limitations clearly fell beyond the ambit of state power. *Bendix*, a Delaware corporation, brought a breach of contract action in Ohio against Midwesco, an Illinois corporation. The claim arose out of Midwesco's installation of a boiler system at a Bendix facility in Ohio six years prior to the suit. When Midwesco sought to invoke Ohio's four-year statute of limitations, Bendix cited Ohio's suspension of the statute for any period that someone is not "present" in the state. Midwesco was not present because it was not domiciled in Ohio and had not appointed an agent for service of process; Ohio deems designation of an agent to effect consent to the general jurisdiction of the Ohio courts.322

The Court shielded Midwesco from liability because of the inordinate burden that Ohio's law imposed on interstate commerce.323 Specifically, the Court objected to the disproportionate price that Ohio extracted from foreign corporations for the privilege of doing business in the state: indefinite exposure to suit in Ohio unless a corporation submitted to the general jurisdiction of Ohio courts.324 Overtones of due process entered into the Court's analysis; the Court noted that Ohio's law compelled foreign corporations to defend themselves "with reference to all transactions," even those in which the corporation lacked minimum contacts sufficient to establish personal jurisdiction.325

In drawing on both commerce clause and due process concerns, *Bendix* presumptively disapproved of state efforts to assess liability against foreign corporations that have not established a significant presence in the state. However, Ohio's basis for subjecting Midwesco to liability was unusually tenuous, and the holding in *Bendix* does not preclude the operation of outreach statutes like that proposed here. The defective Ohio statute pressed too far by bringing within its compass corporations that otherwise lay beyond the jurisdictional reach of the state. By contrast, the proposed fiduciary statute would apply only in those circumstances where conditions sufficed to establish personal jurisdiction.

322. *Id.* at 889-90.
323. *Id.* at 891.
324. *Id.* at 893.
325. *Id.* (emphasis added).
jurisdiction.\textsuperscript{326} In addition, while the \textit{Bendix} Court declined to determine whether Ohio's law amounted to discrimination against out-of-state entities,\textsuperscript{327} the opinion bears several earmarks of the Court's vigilance against disparate treatment of such entities. The Court left little doubt that Ohio had the burden of justifying its subjection of foreign corporations to "requirements more onerous than those imposed on domestic parties."\textsuperscript{328} Ultimately, the Court refused to tolerate Ohio's manner of imposing "a greater burden on out-of-state companies than it does on Ohio companies."\textsuperscript{329} Indeed, Justice Scalia, concurring in the judgment, asserted that Ohio's discriminatory treatment of interstate commerce constituted the sole defect of the statute.\textsuperscript{330} By contrast, the proposed fiduciary statute would avoid this defect by scrupulously extending to directors of domestic and foreign corporations alike the identical requirement of due care.\textsuperscript{331}

V. CHOICE OF LAW: THE SURMOUNTABLE BARRIER OF PREFERENCE FOR THE \textit{LEX INCORPORATIONIS}

The ability to meet constitutional concerns does not resolve reservations about the compatibility of the proposed fiduciary statute with

\textsuperscript{326} See supra part II. Even in those situations in which the theory of jurisdiction advanced by this article might appear doubtful, the foundation for liability under the proposed fiduciary statute falls outside of the Court's fundamental objection to the invalid law in \textit{Bendix}. Whereas foreign corporations in \textit{Bendix} were forced to concede to Ohio courts jurisdiction over transactions "in which Ohio had \textit{no} interest," \textit{Bendix Autolite Corp. v. Midwesco Enter., Inc.}, 486 U.S. 888, 895 (1988)\textsuperscript{(emph. added)}, jurisdiction under the statute proposed here is premised on the existence of an important state interest. Likewise, while any interests that prompted passage of the Ohio law were "not much advanced by the statute," \textit{id.} at 891, the proposed fiduciary statute would directly promote the state's interest in protecting resident shareholders from directors' negligence. Thus, the effort to tailor the scope of potential liability to the precise state interest at stake distinguishes the proposed fiduciary statute from the crude overbreadth of the statute in \textit{Bendix}.

\textsuperscript{327} The Court elected instead to consider only whether the law imposed an impermissible burden. \textit{id.}

\textsuperscript{328} \textit{id.} at 893.

\textsuperscript{329} \textit{id.} at 894.

\textsuperscript{330} \textit{id.} at 898.

\textsuperscript{331} The significance of this distinction from the statute in \textit{Bendix} is heightened by the unusual severity of Ohio's discrepancy in the status accorded domestic and foreign corporations. By making Ohio's statute of limitations available only on the state's own onerous terms, the statute effectively deprived foreign corporations alone of a defense that is an "integral part of the legal system...." \textit{Bendix Autolite Corp. v. Midwesco Enter., Inc.}, 486 U.S. 888, 893 (1988). The \textit{Bendix} Court displayed obvious skepticism toward denial of "ordinary legal defenses or like privileges" \textit{id.}, to out-of-state businesses. Such skepticism is not warranted toward statutes, like that proposed here, that do not skew the state's regime of liability by selectively magnifying the exposure of out-of-state entities.
established principles of choice of law. In a sense reconciliation is at once easy and impossible, for the area of conflicts of laws is conspicuous for its absence of universally recognized governing principles. To one not immersed in the area, the quarrels among choice-of-law theorists often resemble in intensity and obscurity the ancient disputes among competing schools of Greek philosophy. The result appears to be, if not entirely the "judicial nightmare" or "reign of chaos" condemned by courts, a field in which competing approaches have stymied the emergence of a coherent set of generally accepted tenets.

This is not to say that a choice-of-law assessment of the proposed fiduciary statute must take place against the backdrop of doctrinal anarchy. As discussed below, two principal camps may be discerned in the debate which has raged over organizing principles: a traditional school that favors fixed rules, and a fluid approach that relies on a multi-factored analysis. The latter, of course, could be expected to offer a more sympathetic framework for the departure from the proposed outreach statute. Even more traditional adherents to the firm rule of lex incorporationis, however, have conceded that the rule admits of some exceptions.

A. The Conflicts Revolution and Counterrevolution: A Brief Overview

To a striking degree, debate over the appropriate manner of selecting applicable law has centered in academe rather than in the courts. The voluminous commentary on choice of law defies facile summary. However, a brief review of the salient tension in conflicts analysis may provide a useful context for an examination of the proposed outreach statute.

The hallmark of choice-of-law doctrine before the upheaval in conflicts theory was the quest for comprehensive rules that would dictate the law to be applied irrespective of the interests and policies of the forum state. Thus, for example, tort liability was presumed to be determined by reference to lex loci delicti. Such rules assumed that in a given field, the law that must govern any dispute could be discerned by identifying the jurisdiction that had a certain designated connec-

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335. For an ambitious attempt at a comprehensive view of choice of law, see Joseph William Singer, Real Conflicts, 69 B.U. L. Rev. 1 (1989). Professor Singer enumerates factors that a "consensus" agrees are relevant to choice-of-law determinations. Id. at 33-34.

tion with that dispute. Ideologically, this approach sprang from theories of territoriality and vested rights. As a matter of policy, the traditional system rested on the promise of predictability and uniformity. For its authority and primer, traditional methodology looked to the First Restatement of Conflicts of Laws.

The assault on traditional conflicts theory criticized both its stated methodology and its assertedly false pretensions. The old order was condemned for inflexibly exalting certainty and simplicity over the advancement of state interests and substantive justice in the particular case. In addition, the traditional system in practice had failed even to achieve that vaunted predictability which was purportedly its overriding virtue. As long ago as 1933, Professor Cavers could report a "'confusion of authority'" in the area of conflicts. He observed that some courts were already deviating from the dictates of conventional doctrine when the equities of a particular case demanded, though still under the guise of simply choosing the appropriate jurisdiction whose law should apply. Cavers advocated a result-oriented resolution of conflicts cases, under which courts would take into account "justice between litigating individuals" and "broader considerations of social policy" to achieve a "just decision in the principal case."

The most notable standard-bearer in the conflicts revolution has been Brainerd Currie, who condemned the "inane automatism" of traditional jurisdiction-selecting rules. Currie championed an approach that focused on the respective interests of states having some connection to a case. If only one of those states has a "legitimate interest" in applying its law, Currie believed that no actual conflict exists at all; the court should simply apply the law of the state whose law and

340. RESTATEMENT, supra note 336. Another highly influential work was Story's treatise. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (Boston 1834).
341. Cavers, supra note 338, at 177.
342. Id. at 178, 181.
343. Id. at 192.
344. Id. at 193.
345. See generally CURRIE, supra note 205.
346. Id. at 161.
policy would be vindicated.\textsuperscript{347} Where a genuine collision of interests occurs, no mechanical, forum-neutral rule can yield a rational result. Instead, Currie argued that the "rational pursuit of self-interest"\textsuperscript{348} ordinarily demands that the forum state resolve these true conflicts in favor of its own law.\textsuperscript{349} Currie eventually modified his automatic presumption in favor of forum law by counseling courts to extend a second "more moderate and restrained review" to determine whether an apparent conflict in fact implicated valid interests by both states.\textsuperscript{350} However, he never retreated from his insistence that forum law must ultimately prevail where it inescapably clashes with foreign law, or from his rejection of "that mindless and ruthless machine"\textsuperscript{351} which would dispose of conflicts through forum-neutral rules that fail to account for the interests involved.

Currie's ideas have played a large role in the proliferation of proposed systems in the conflicts revolution. These theories have reduced somewhat the overriding status that Currie assigned to the law of the forum.\textsuperscript{352} In particular, courts have been encouraged to consider a broad range of factors to select the law that would produce the best result in the case at hand.\textsuperscript{353} Notwithstanding numerous variations,\textsuperscript{354} however, these commentators have retained the common core of Currie's philosophy that choice of law must rest on a foundation less rigid than a certain kind of contact pointing ineluctably to the law of a particular jurisdiction.

The impact of the newer approaches has been felt in the courts. The New York Court of Appeals led the way when, in a wrongful death action, the court refused to subordinate New York's public policy concerning damages to the contrary law of the state in which the accident causing death had occurred.\textsuperscript{355} Two years later, in Babcock v. Johnson,\textsuperscript{356} the court expressly embraced an approach toward choice of law that drew heavily on the methodology of the conflicts revolution.\textsuperscript{357} Since Babcock the strict rule of lex loci delicti has yielded in a

\textsuperscript{347} Id. at 189.
\textsuperscript{348} Id. at 190.
\textsuperscript{349} Id. at 169.
\textsuperscript{351} CURRIE, supra note 205, at 161.
\textsuperscript{353} See, e.g., ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 195 (3d ed. 1977).
\textsuperscript{356} 191 N.E.2d 279 (N.Y. 1963).
\textsuperscript{357} Babcock rejected the application of lex loci delicti to an automobile negligence
majority of states to a variety of other approaches which all reflect the triumph of the conflicts revolution over traditional methodology.358

Despite such success, recent years have witnessed a revived appeal of territorial rules.359 According to critics, interest analysis fosters discrimination against citizens of non-forum states360 and has introduced a degree of unpredictability incompatible with the ordering function of choice of law.361 Conversely, concrete rules that require only identification of the jurisdiction in which a specified triggering event took place are said to avoid the vagueness and discretion that produce the vices of interest analysis.362 Moreover, while Currie presented his method as simply seeking to implement the intent of the legislature,363 critics have contended that Currie and other interest analysts have in fact disingenuously sought to substitute their own substantive preferences for legislative will.364

B. The Internal Affairs Doctrine: A Persistent But Not Absolute Rule

Given the availability of competing schools of choice of law, justification of the proposed fiduciary statute would appear to be simply a matter of selecting the malleable and forum-oriented approach of interest analysis. Indeed, as a matter of positive law, nonconstitutional choice of law principles could not bar a state from enacting such action in which the accident had taken place in Ontario. Instead, the court applied the law of New York as the state with which the parties, their relationship, and the automobile trip that led to the accident were predominately connected. Employing the criteria of "[j]ustice, fairness, and the best practical result," the court found these interests best served by giving effect to the policy of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation." Id. at 283 (citations omitted).

358. See Korn, supra note 337, at 776.
361. See Brilmayer, supra note 360, at 402-07.
362. See Ely, supra note 359, at 402-07.
363. See CURRIE, supra note 205, at 82.
a statute. However, the continued sway of the internal affairs doctrine would undoubtedly give pause to a legislature contemplating such a step. Like doctrines in other fields that are strongly entrenched but not constitutionally compelled, the principle that issues arising out of internal corporate relationships are governed by the law of the state of incorporation is deeply rooted in corporate jurisprudence. Though far more congenial to traditional methodology than to modern approaches, the internal affairs doctrine has proved strongly resistant to the conflicts revolution. Nevertheless, the rule has not been so universally applied as to render unthinkable consideration of the proposed outreach statute. Though aligned as a matter of theory with the eroded “vested rights” approach to choice—of—law issues, the internal affairs doctrine has flourished because it is thought to serve practical ends as well. The qualities of predictability and uniformity cherished by traditional methodology are conditions deemed indispensable to the effective conduct of corporate business. Fixing the lex incorporationis as the exclusive regime by which a corporation’s internal affairs are governed serves the need of managers to refer to a single, identifiable body of law to determine their rights and obligations. Moreover, as a contractual matter, those who form or invest in a corporation are viewed as agreeing that internal disputes shall be submitted to the law of the state authorizing creation of the corporation.

Although the category of “internal affairs” comprehended by the rule remains indefinite, courts have rarely struggled to ascertain the


367. This doctrine was referred to earlier in this article in connection with a discussion of the commerce clause. See supra notes 288-96 and accompanying text.

368. See Kozyris, supra note 202, at 15. Professor Kozyris’s article contains the most extensive discussion of the ramifications of the internal affairs doctrine of which the author is aware.


appropriate occasions for its application.\textsuperscript{373} For example, it has been widely assumed that the adoption of by-laws,\textsuperscript{374} the issuance of corporate shares,\textsuperscript{375} and the holding of shareholders' meetings\textsuperscript{376} are all governed by the law of the state of incorporation. Both the procedural\textsuperscript{377} and substantive\textsuperscript{378} requisites of derivative suits have generally been resolved by the \textit{lex incorporationis}, as have questions of indemnifying directors for litigation expenses.\textsuperscript{379} Further, courts confronted with issues that relate purely to relationships among shareholders, such as the construction of stockholder agreements\textsuperscript{379} or notice requirements for shareholders' meetings,\textsuperscript{381} almost always defer to the state of incorporation. Thus, the assertion made thirty years ago that the internal affairs rule is "well established and generally

\textsuperscript{373} See Kozyris, supra note 202, at 15. Kozyris notes that the Restatement (Second) of the Conflict of Laws offers an exhaustive listing of matters that could be characterized as "internal affairs." \textit{Id.} at 15, n.46. These include "the original incorporation, the election or appointment of directors and officers . . . preemptive rights, the holding of directors' . . . meetings, methods of voting including any requirement for cumulative voting, shareholders' rights to examine corporate records, charter and by-law amendments, mergers, consolidations and reorganizations and the reclassification of shares," RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS \S 302 comment a (1971); "the declaration and payment of dividends and other distributions," \textit{id.}, at comment e; "who are shareholders," \textit{id.}, \S 303; "the existence and extent of a shareholder's liability . . . to [the corporation's] creditors for corporate debt," \textit{id.}, \S 307; and "the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders," \textit{id.}, \S 309.

\textsuperscript{374} See Reese & Kaufman, supra note 12, at 1124.


\textsuperscript{376} RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS at \S 302 comment a.

\textsuperscript{377} These would include requirements for making demand on both shareholders, see Allright Missouri, Inc. v. Billetter, 829 F.2d 631, 639 (8th Cir. 1987); Burt v. Danforth, 742 F. Supp. 1043, 1048-49 (E.D. Mo. 1990), and directors, see Starrels v. First Nat'l Bank of Chicago, 870 F.2d 1168, 1170-71 (7th Cir. 1989); Tabas v. Mullane, 608 F. Supp. 759, 764 (C.D.N.J. 1985), and for posting security for expenses, see First American Bank & Trust v. Frogel, 726 F. Supp. 1292, 1298-99 (S.D. Fla. 1989); Recchin v. Kirby, 637 F. Supp. 284, 290 (W.D. Pa. 1985).


followed throughout this country” remains a fair one.

Nevertheless, the internal affairs doctrine is not absolute; the Second Restatement of Conflicts itself concedes that the "overriding interest" of a state other than the state of incorporation may justify a deviation from the *lex incorporationis*. Perhaps the most prominent exception to the rule is the regulation of "pseudo-foreign" or "tramp" corporations. These terms describe a corporation whose nominal incorporation in one state is belied by the presence of most of its assets and economic activities in another. As long ago as the early 1940's, some courts treated as established doctrine the proposition that significant affairs of a pseudo-foreign corporation can be subjected to regulation by the state in which the corporation "in actually resides. The core principle represented by the pseudo-foreign corporation doctrine continues to receive support from courts and even from commentators who generally endorse the primacy of the *lex incorporationis*. Moreover, both California and New York have codified and expanded the doctrine by subjecting foreign corporations whose predominant contacts are with the state to substantial portions of the state's corporation code.

Courts have also applied forum law in other contexts. For exam-

383. RESTATEMENT (SECOND) OF THE CONFLICTS OF LAW, supra note 373, at § 302 comment g.
385. See id. at 385-86 (banning issuance of stock illegal under forum law); Toklan Royalty Corp. v. Tiffany, 141 P.2d 571, 573 (Okla. 1943)(compelling corporation to comply with forum law granting shareholder right to inspect corporation's books and records).
387. See, e.g., Kocheris, supra note 202, at 55, 57; Oldham, supra note 371, at 345-46, 366.
388. CAL. CORP. CODE § 2115 (West 1990).
390. While other states have also enacted outreach statutes, California's and New York's are considered the most ambitious. See DeMott, supra note 3, at 167. California's provisions cover all foreign corporations where a majority of its business is tied to California and a majority of its stock (not traded over a national securities exchange) is held in California. CAL. CORP. CODE § 2115(a). For corporations that fall into this category, California law supplants the law of the state of incorporations on a broad range of matters. Id. at § 2115(b). See generally, Michael J. Halloran & Douglas L. Hammer, Section 2115 of the New California General Corporation Law—The Application of California Corporation Law to Foreign Corporations, 23 U.C.L.A. L. REV. 1282 (1976). New York's provisions reach even further, in that they apply much of New York corporate law to foreign corporations that do no more than derive a majority of their income from New York. N.Y. BUS. CORP. LAW § 1320(a)(2)(McKinney 1986).
ple, while most courts apparently regard the question of whether to pierce the corporate veil as a matter of internal affairs to be decided by the *lex incorporationis*, some have dissented from such automatic deference. Courts have commonly invoked local law to compel foreign corporations to make their records available for inspection by resident shareholders. Similarly, issues concerning the manner in which the voting rights of certain shares may be exercised are often determined by local contract law.

C. The Fiduciary Exception

The liability of directors for breach of fiduciary duties to shareholders appears to be a strong candidate for the roster of exemptions from the rule of *lex incorporationis*. A state’s motivation in holding directors of foreign corporations accountable for their harm to shareholders represents the type of interest to which modern approaches give considerable weight. While courts generally assume that the *lex incorporationis* governs directors’ liability, significant authority now concedes the permissibility of applying forum law under some circumstances. Most notably, section 309 of the Second Restatement provides an exception for those instances where “with respect to the particular issue, some other state has a more significant relationship . . . to the parties and the transaction, in which event the local law of the other state will be applied.” Comment (c) distinguishes conduct

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396. RESTATEMENT (SECOND) OF THE CONFLICTS OF LAWS at § 309.
that "closely affect[s] the organic structure or internal administration of the corporation" (for example, the declaration of dividends) from acts such as seizing a corporate opportunity or causing the corporation to make a contract or commit a tort. 397 Issues of liability arising from the latter category can "practically" be resolved in different ways in different states. 398 While courts have traditionally applied the law of the state of incorporation even to acts that fall into this second category, another state's rule is "most likely to be applied where this rule embodies an important policy of the other state and where the corporation has little contact with the state of its incorporation." 399

Commentators on corporate choice of law have acknowledged that directors' fiduciary obligations may afford more scope for outreach provisions than "hard core areas" 400 that demand governance by a single regime. Professor Kozyris, for example, notes that the state of the residence of the shareholders has a "superior claim" to the state of incorporation because shareholders are the "ultimate beneficiaries" of directors' fiduciary duties. 401 Similarly, a commentator who has expressed concern over difficulties in applying some provisions of California's outreach statute 402 has endorsed the proposition that directors of corporations covered by section 2115 should "behave in a manner consonant with the highest standard of care prescribed in either the California code or the law of the state of incorporation." 403 Consistent with these views, some courts have looked outside the state of incorporation to determine management's fiduciary obligations where the corporation's predominant contacts have lain elsewhere. 404

397. Id. at § 309(c).
398. Id.
399. Id.
400. Kozyris, supra note 202, at 64.
401. Id.
403. Id. at 123.
404. See, e.g., In re ORFA Securities Litigation, 654 F. Supp. 1449, 1455 (D.N.J. 1987)(forum state cite of corporation's principal place of business and much of officers' conduct that formed alleged breach of fiduciary duty); Ficor, Inc. v. McHugh, 639 P.2d 385, 391 (Colo. 1982)(all of corporation's business and assets located in forum state); Francis v. United Jersey Bank, 392 A.2d 1233, 1240 (N.J. Super. 1978) aff'd, 407 A.2d 1253 (N.J. Super. 1978); aff'd, 432 A.2d 814 (N.J. 1981)(forum state was corporation's principal place of business, domicile of parties, and location of almost all payments at issue). In Meyers v. Moody, 693 F.2d 1196 (5th Cir. 1982) reh'g denied, 701 F.2d 173 (5th Cir. 1983), the court upheld the liability of Moody, president and board chairman of an Alabama corporation, imposed by a Texas jury. Moody was found to have breached his duty to exercise due care in the management of the corporation's affairs under Texas law. Id. at 1209. The court cited a provision of the Texas Business Corporation Act that subjects officers and directors of a foreign corporation doing business in the state to the same duties and liabilities as those imposed on officers and directors of Texas corporations. TEX. BUS. CORP. ACT. ANN. art. 8.01, 8.02 (West 1980), cited in Meyers v. Moody, 693 F.2d 1196, 1209.
These expressions of tolerance for plural fiduciary standards support the conclusion that fiduciary duties are not inherently either conceptually or practically indivisible. The presumption in favor of uniformity that undergirds the internal affairs rule is more appropriately applied to questions such as the validity of a stock issue\textsuperscript{405} and the validity of an election of directors.\textsuperscript{406} For states to tug corporations in different directions on such issues would undermine the stability of corporate governance. By contrast, differing state judgments about the existence of director's liability for breach of fiduciary duties do not fundamentally interfere with the ability of a corporation to do business. They simply amount to a workable system under which different states elect to extend different levels of protection to their residents. In this respect they resemble the permissible variety of state statutes governing the right to inspect shareholder lists\textsuperscript{407} or corporate books.\textsuperscript{408} In both cases the presence of a shareholder right in one state is compatible with the absence of that right in another. It is true that the type of outreach statute proposed here could prod directors to comply with the strictest fiduciary standard to which they might be subject. However, this result seems no more intrinsically objectionable than the opposite phenomenon under which the internal affairs rule induces gravitation by corporations to states with the most lax corporate laws and emulation of such laws by other states.\textsuperscript{409}

D. Weighing the Forum State's Interest

Even granting the legitimacy of fiduciary outreach statutes, criticism of the particular statute proposed here might contend that its sweep fails to meet even the liberal requirements of modern interest analysis. Because the presence of a small number of shareholders in the enacting state would suffice to trigger liability, the statute would extend the forum's grasp beyond that permitted by the pseudo-foreign corporation doctrine or even California's and New York's statutory schemes. However, the nature of a state's interest in protecting resident shareholders from directors' misconduct does not vary with the number of shareholders or the amount of corporate contacts with the state. In other exercises of state police power, such as blue sky laws or products liability, foreign companies' compliance with state law does not hinge on quantitative impact. The presence of only a handful of

\textsuperscript{405} See Reese & Kaufman, supra note 12, at 1137; see also William T. Coleman, Jr., Corporate Dividends and the Conflict of Laws, 63 Harv. L. Rev. 433, 465-66 (1950)(legality of a dividend).

\textsuperscript{406} See Reese & Kaufman, supra note 12, at 1141.

\textsuperscript{407} See Valtz v. Penta Investment Corp., 188 Cal. Rptr. 922, 924 (DCA 4 1983).

\textsuperscript{408} See Reese & Kaufman, supra note 12, at 1134-35.

\textsuperscript{409} See id. at 1127-28.
offerees or victims of a flawed product does not diminish a state's interest in providing its residents a shield or redress from dangerous behavior that originates elsewhere.

Of course, advocates of Delaware would still contend that Delaware's interest in governing the director-shareholder relationship overrides that of the state adopting the proposed statute. Under one view, the light fiduciary restraints placed by a state like Delaware reflect a coherent philosophy—embodied in other provisions of the state's corporate code as well—concerning the extent to which corporate management should be able to formulate decisions free of second-guessing by shareholders. Accordingly, fiduciary outreach statutes may frustrate that policy by injecting an unwelcome element of caution into management's deliberations. Such disrespect for the regulatory regime chosen by the corporation and its affiliates, it may be said, ignores a major value of choice-of-law analysis: "tolerance of the norm of another political community where the relationship be-


411. The refusal to adhere slavishly to the lex incorporationis when that law conflicts with the forum's principles governing fiduciary duties also has precedent in common judicial attitudes toward enforcement of restrictive covenants in employment contracts. Courts frequently refuse to enforce such restrictions, though valid where made, because they violate the public policy of the state in which enforcement is sought. E.g., Barnes Group, Inc. v. C & C Prods. Inc., 716 F.2d 1023, 1032 (4th Cir. 1983); Muma v. Financial Guardian, Inc., 551 F. Supp. 119, 121-23 (E.D. Mich. 1982); Auto Club Affiliates, Inc. v. Donahue, 281 So. 2d 239, 243 (Fla. 2d DCA 1973) cert. denied, 285 So. 2d 28 (Fla. 1973); but see Wilkinson v. Manpower, Inc., 531 F.2d 712, 715-16 (5th Cir. 1976)(restrictive covenant in licensing agreement entered into outside Florida enforceable in Florida courts as not contrary to Florida's public policy, although agreement would be unenforceable under Florida statute prohibiting this type of agreement). In both cases a powerful claim in favor of the lex loci contractus rests on a state's substantial interest in regulating the terms of a relationship (director-shareholder, employer-employee) entered into under its laws. However, even courts that are willing to accord substantial deference to the contractual regime under which an employment relationship was formed may decline to enforce that aspect of the employment agreement whose enforcement would undermine a fundamental policy of the forum. See e.g., Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 127 (S.D. Ala. 1978), aff'd, 559 F.2d 748 (5th Cir. 1978)(refusal to enforce covenant not to compete in hiring of independent contractor).

412. See e.g., DEL. CODE ANN. tit. 8, § 145 (liberal provision for indemnification).
tween the parties is centered." 413

The problem with the above assessment is not that it is incorrect but that it is incomplete. In the last thirty years, reflexive obeisance to the law of a state that can claim a particular connection to the parties in question has yielded to pluralistic approaches. Among the most important factors against such deference, of course, is promotion of the forum's public policy through application of what it adjudges the better law. 414 A preference for the forum's fiduciary standards may seem especially attractive where the interests perceived to be actually embodied by the lex incorporationis are less appealing than those asserted in formal justification of it. For example, while Delaware may clothe its permissive fiduciary rules in the theoretical accoutrements of efficiency, 415 other states are entitled to act on the premise that less highminded motives are at work. Delaware's suspected desire to attract and retain lucrative corporate business 416 does not weigh so heavily in the balance when pitted against the indisputable interest in protecting resident shareholders from improper management conduct.

Nor under the proposal advanced here would adherence to the forum's view of fiduciary requirements come at the expense of other values. The consistent imposition of reasonable fiduciary standards on directors of domestic and foreign corporations alike renders inapposite the criticism that interest analysis promotes discrimination against out-of-state parties. Evenhandedness underscores the authenticity of the state's interest in sheltering all of its resident shareholders from the consequences of directors' carelessness. 417 The growing acceptance by courts 418 and legislatures 419 of the principle that foreign corporations enjoy no greater rights than domestic corporations bolsters the legitimacy of subjecting all corporate conduct touching a state to a single standard of responsibility. 420

413. Singer, supra note 335, at 34.
414. See LEFLAR, supra note 353, at 195; Singer, supra note 335, at 6.
417. Cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981)(rejecting contention that actual purpose of Minnesota ban on plastic nonreturnable containers was to promote economic interests of local dairy and pulpwood industries, rather than state's professed environmental goals, where ban applied to containers regardless of source).
419. See e.g., ALA. CODE § 10-2A-227; COLO. REV. STAT. § 7-9-104 (1986).
420. Similarly, concerns about vagueness, either of the reach of a fiduciary rule or of the intensity of the state's interest in its application, see Kaplan, supra note 208, at 472, would be dispelled by the express legislative statement contained in the
E. A Limited Fiduciary Outreach Statute: the Appropriateness of Due Care

Although the considerations described above would support outreach statutes designed to enforce all ordinary fiduciary duties, the statute proposed here would penalize only violations of the duty of due care. Confining the statute's scope to the familiar concept of negligence facilitates the ease with which it can be applied. At the same time, the exclusion of breaches of the duty of loyalty reduces the potential for intrusion on the interests and prerogatives of the state of incorporation. The details of any such statute should be carefully tailored to advance both of these goals. Much of the argument for deference to the corporate code of the state of incorporation rests on a contractual conception of the relationship among incorporators and among shareholders. Under this theory, enforcement of the lex incorporationis merely implements the rules of the jurisdiction that the parties themselves have agreed shall govern their affairs. Hence, the more the breach of a fiduciary obligation is viewed as violating a contractual duty, the more compelling is the argument in favor of ac-

statute. See Kozyris, supra note 202, at 64 (“it is relatively easy for the fiduciaries to learn about applicable rules and to conform to them”). The state can provide adequate notice by announcing its intent to hold directors accountable for their negligent conduct and spelling out the standard to which they will be held. While legitimate concerns arise over the inherent imprecision of fiduciary obligations and of the due care requirement in particular, these can be met by clear and specific drafting. See supra Part I-B. Admittedly, compliance with numerous outreach statutes would present a more complicated task than does subjection to local law by a pseudo-foreign corporation, whose management must familiarize itself with one (or at most two) corporate codes. However, this task does not differ dramatically in nature or scope from other multiple regulatory regimes which corporations must navigate under the federal system: environmental restrictions, blue sky requirements, and taxation schemes. Even if difficulties in drafting can be surmounted and directors sufficiently alerted to their obligations, it might still be argued that the proposed statute ignores the original expectations of the parties. That is, shareholders who choose to invest in a company may be deemed to have submitted their relationship with its directors to governance by the laws of the state in which the company is incorporated. To the extent that this conclusion arises out of theories of contract, see DeMott, supra note 3, at 194, the argument is undercut by the proposed statute's limitation to violations of due care—a concept rooted in tort rather than contract. The significance of the tortious nature of negligence is developed at text accompanying infra notes 464-69. Beyond formal distinctions between tort and contract, modern society increasingly looks to the state to protect individuals from a variety of injuries. The availability of local law to provide resident shareholders redress for directors' carelessness no more defeats expectations than does the application of forum law to hold distant companies responsible for their manufacture of products that inflict injury.

421. See supra notes 14-17 and accompanying text; see also State v. Great Northern-Chan Restaurant, Inc., 445 N.E.2d 732, 733 (Ohio App. 1982)(comparison to “contracting parties who validly agree that their potential contract disputes must be heard and resolved in a particular state”).
cepting the *lex incorporationis* as the pertinent authority. On the other hand, to the extent that a breach of fiduciary duty assumes more of a tortious character, more latitude may be conceded to the law of the forum. The relaxing of the sway of the *lex loci delicti* rule in torts has left many courts willing to accord substantial weight to the interests and policies of the forum. Thus, even deeming the injury caused by a director's tortious conduct as having been in a sense (perhaps a metaphysical one) inflicted "in" the state of incorporation should not automatically defeat the application of forum law.

Negligence is a classic torts doctrine. In requiring a responsible level of care from directors of foreign corporations whose conduct affects resident shareholders, a state simply extends its general policy regarding negligence to a particular facet of the corporate setting. By contrast, imposition of local norms governing the duty of loyalty could more plausibly represent an unraveling of the contractual bonds to which shareholders and directors have committed. The organic relationship between directors and shareholders is formed partly in reliance on the degree of conflict-of-interest countenanced by the state of incorporation; outside demands of compliance with a more stringent standard of loyalty would arguably amount to revision of the terms upon which the corporate parties have agreed. The duty of due care, however, transcends the contractual arrangements among those associated with the corporation. Traditional doctrine rejects efforts to contract out of duties owed in tort, especially the duty of due care; one does not "agree" to be subjected to tortious conduct. And while the state of incorporation may define the contours of the director's duty of due care in the first instance, a lax standard should not bar other states from implementing their own conceptions of negligence when resident shareholders are affected.

Nor is the treatment of directors' negligence as an ordinary tort merely a matter of abstract doctrine or convenient labeling. If carefully limited to specifically defined circumstances as described earlier, the proposed statute would not constitute an ongoing intrusion into corporations' daily governance. The difficulty of continual compliance with a variety of regulatory demands is one of the chief argu-

422. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 691-93 (2d ed. 1992) (majority of states still adhering to rule of *lex loci contractus*).
423. See supra note 390.
427. See supra Part I-B.
ments in favor of the internal affairs rule.\textsuperscript{428} Under the statute, however, the need for heightened alertness to other states' requirements would be confined to a handful of discrete events. In invoking the law of the enacting state only occasionally rather than regularly, the statute would resemble the increasingly accepted application of forum policy to conflicts in torts rather than the constant interference with corporate operations that proponents of the internal affairs rule fear.\textsuperscript{429}

Moreover, while the discrepancy between lax notions of due care held by the state of incorporation and the greater responsibility required by the enacting state may amount to a genuine conflict, it generally does not represent an unusually severe one. Presumably even the more indulgent state does not affirmatively object to directors' displaying an abundance of diligence and care; it is simply more tolerant of the failure to do so. In that sense the difference between the two states' standards reflects differences in degree regarding the appropriate level of care rather than a wholesale contradiction in policies. Such a relatively modest departure from the policy of the state of incorporation supports application of the enacting state's statute to the extent that the presence of shareholders there creates a legitimate interest.\textsuperscript{430} Certainly enforcement of forum policy in this setting falls within the admittedly capacious boundaries of modern interest analysis.\textsuperscript{431}

Of course, the prospect of damages (or simply litigation) might in

\textsuperscript{428} See Kozyris, supra note 202, at 49.

\textsuperscript{429} See id. (contrasting isolated nature of typical tort dispute with corporation's "entire system of private governance on a continuing basis"); see also DeMott, supra note 3, at 193.

\textsuperscript{430} See Reese & Kaufman, supra note 12, at 1138 (distinguishing between differences in corporate statutes that represent variations in detail in pursuit of the "same basic policy" and other types of differences.).

\textsuperscript{431} See Brilmayer, supra note 359, at 459 (criticizing the "infinite elasticity" of policy analysis). Nevertheless, advocates of the primacy of the \textit{lex incorporationis} might argue for a state's prerogative to set an exceedingly low threshold of due care for directors of its corporations in order to encourage the greatest amount of entrepreneurial risk-taking. Viewed in this light, the gap between the policies of the enacting state and the state of incorporation could not be dismissed as only a nuance of difference in judgment about the appropriate level of care. Nevertheless, the proposed statute's application of its own more stringent standard can be justified by the asymmetry between the impact of that choice and the effect of a preference for the \textit{lex incorporationis}. As discussed earlier, the imposition of liability for damages for failure to observe a responsible level of care does not preclude a transaction that is permissible under the \textit{lex incorporationis}. See supra notes 258-87 and accompanying text. Thus, the proposed statute's extraction of costs for injurious negligence does not amount to wholesale nullification of the policies of the state of incorporation. Conversely, however, exculpation of directors under the lenient fiduciary principles of the state of incorporation would entirely defeat the enacting state's policy of providing redress to injured resident shareholders.
some circumstances deter the board from a course of action condoned by the *lex incorporationis*. Even here, however, the enacting state is justified in implementing its own view of the better law. In any calculus of interests, the aim of the state of incorporation—to liberate its directors to ignore precautions reasonably thought necessary by the enacting state—does not seem especially compelling.432

VI. CONCLUSION

The question of whether the proposed outreach statute would effectively promote state interests could provide new grist for the ongoing debate between contractarians and more traditional proponents of fiduciary duties. This article makes clear, however, that the debate is not preempted by fundamental principles of constitutional law; such principles do not stand in the way of a legislature wishing to protect resident shareholders from harm caused by the negligence of directors of foreign corporations. Jurisdictional requirements could in theory make some directors inaccessible, but programmatically should have little bearing in most instances. Similarly, the obligation of full faith and credit does not preclude a state's application of its own law as recommended here. Finally, while the extraterritorial reach of the proposed statute might superficially appear to run afoul of the dormant commerce clause, closer examination of decisions under that doctrine reveals that the statute does not share the flaws of legislation disapproved by the Supreme Court. Nor need a willing legislature fear stumbling on nonconstitutional roadblocks. The novelty of the proposed statute lies in its practical effect, not in any drastic departure from universally recognized principles of choice of law.

The larger question posed by these issues is whether, in the absence of a federal fiduciary law, the law of the state of incorporation must provide a substitute unity of regulation. Again, analyses rooted in a favored economic model can be invoked to support the primacy of

432. The principle can be illustrated by the hypothetical example of a state whose corporate code tolerates behavior by directors that would widely be regarded as reckless. In that instance blind adherence to the internal affairs rule would leave shareholders without relief from the consequences of even egregiously sloppy directors' conduct. It would not require an extreme bias in favor of forum law to accept other states' insistence on applying their more conventional standards of due care to assess liability in that situation. Those who endorse an expansive notion of contractual freedom in corporate law, however, might dispute the need to disregard the *lex incorporationis* even under these circumstances. Shareholders who suffered damages from highly negligent conduct would be deemed to have accepted the risk of such injury by having agreed to the terms on which the corporation was formed. Under this theory, market forces would deter corporations from tolerating directors' lapse from generally accepted norms; presumably shareholders would not invest in companies in which the opportunity for abuse was feared to be excessive. For discussion and critique of the contractual perspective on corporations, see *supra* notes 14-17, 23.
the incorporating state. As a matter of legal doctrine, however, legal thought has moved away from formulations that confer monopolistic authority on a state. The devolution of power and responsibility from the federal to state level does not mean that each state then becomes the sole arbiter of all intrastate conduct, regardless of its impact elsewhere. Neither Delaware nor any other state is entitled to co-opt the Supremacy Clause. Rather, as reflected by the doctrines examined in this article, states have considerable latitude to counteract the harmful effects of activity that originates beyond their borders. A legislature that enacted the statute proposed here would be acting in harmony with, not contrary to, evolving conceptions of federalism.