

WHAT WOULD MADISON THINK? THE IRONY OF THE TWISTS AND TURNS OF FEDERALISM

BY E. NORMAN VEASEY*

ABSTRACT

As one of the "Founding Brothers," James Madison promoted a vision of American federalism based on a national government with strong powers. But in order to navigate the competing views represented in the Constitutional Convention and to marshal the nascent Constitution through the ratification process, Madison became nimble in his view of the federal structure. The Constitution he drafted ultimately left blurred the line delineating federal and state powers, allowing Madison and his colleagues to win the support of both those who favored and those who feared a strong national government.

That blurry line, and the two centuries of judicial gloss on the contours of that line, have created a "Fog of Federalism" in which Congress and federal agencies frequently grope around hastily and randomly in response to any perceived crisis of the day. In recent years, the federalism tensions in the corporate governance arena have been particularly acute, as federal legislators and regulators have made incursions into the internal corporate affairs traditionally governed by state corporate law.

After a glimpse of the historical context that gave rise to American federalism, this article surveys recent ad hoc federalization of internal corporate affairs. It then suggests that it might be time for a respected institution such as the American Law Institute or others to undertake a comprehensive analysis of federal/state authority, both generally and in the corporate governance arena in particular.

I. INTRODUCTION

I would like to begin with a retrospective—looking far back into the rearview mirror to the eighteenth-century thinking of the "Founding

*Former Chief Justice of the Delaware Supreme Court, now a Senior Partner of the firm of Weil, Gotshal & Manges LLP, in Wilmington, Delaware, and New York, New York. This article is taken from an address at the American Law Institute Luncheon Honoring New Life Members and New 50-Year Members, Washington, DC, May 20, 2008. I would like to thank Christine Di Guglielmo, my colleague at Weil, Gotshal, for her superb and invaluable assistance. The views expressed here are my own and do not necessarily represent the views of my firm, any of its partners, or its clients.

Brothers"¹ and their debates about the respective powers of the national and state governments. Then I hope you will indulge me in a brief glimpse into how those respective powers have played out in Congress and in the courts over the past 220 years. Next, I will try to do what no lawyer in his right mind should do—speculate a bit about the future of federalism and how increasing federalization may affect corporations and investors.

Finally, I would like to ask whether the time may be nigh to consider encouraging a distinguished institution like the American Law Institute to undertake a law and policy analysis of the twenty-first-century direction of federalism. And I would further inquire whether the focus—at least initially—should be on the optimum respective roles of the states and the federal government in administering corporate law and corporate governance.

II. MADISON, THE "FATHER OF THE CONSTITUTION"

James Madison was principled, but he was nimble, about how the developing United States Constitution should articulate the balance of power between the nascent national government and the states. He was principled in his writings and debates at the 1787 Constitutional Convention. He asserted from the outset the view of the "Federalists" of that day that the new national government needed strong powers.²

His prime examples of that need were in specific areas, such as tax, war, defense, and treaties.³ Beyond that, however, he and others wanted to grant to the new federal government a strong constitutional veto power that could trump almost all state powers.⁴

There was, of course, a strong sentiment for state sovereignty in the land. The American Revolutionary War had been fought and won with the blood and zeal of patriots (and a bit of luck). The Americans prevailed over the far-away and far-reaching despotism of the British Crown. They needed

¹See generally JOSEPH J. ELLIS, *THE FOUNDING BROTHERS* (2000) (chronicling the debates of our founding fathers leading up to and during the constitutional convention). The "founding brothers" featured in this book by Ellis were James Madison, John Adams, Aaron Burr, Benjamin Franklin, Alexander Hamilton, Thomas Jefferson, and George Washington. They all had some role in shaping the republic, but none has been more closely identified with the United States Constitution than Madison, who is frequently called the "Father of the Constitution."

²JOSEPH J. ELLIS, *AMERICAN CREATION* 102 (2007).

³See *id.* at 104.

⁴*Id.* at 100-07.

a structure for the new government, but they needed the right balance between the national and state governments.⁵

The "Anti-Federalists" opposed a national government with strong powers.⁶ Of course, as the historian James Ellis has noted, these "Federalist" and "Anti-Federalist" labels "defied logic, for both sides were federalists, meaning that they advocated a confederated republic, but disagreed over the relative power of the states and the central government in the confederation."⁷ Today, we think of "federalism" and "federalists" as respecting states' rights and the proper, limited role of the federal government.

On the one hand, the Anti-Federalists of the eighteenth century viewed a far-away and far-reaching national government as creating the potential for regression into a form of despotism. It might not be the far-away despotism of the British Crown. But it ought not, they would say, be far reaching. Those espousing the eighteenth-century version of "State Rights" liked power closer to home—it was easier to control.

On the other hand, the war itself and its aftermath (in terms of revenue, national defense, and foreign affairs) had shown the shortcomings of the Articles of Confederation. The Articles represented loose and amorphous concepts of government authority, and thus were clearly flawed. Was radical surgery or mere tweaking the answer? As the one who would become known as the "Father of the Constitution," Madison and his colleagues were bent on a Constitution that would be a vastly remodeled document.⁸ Once Madison persuaded George Washington to that point of view, the Constitutional Convention, with Washington as presiding officer, sailed on in spite of opposition from those who preferred some modest tinkering with the Articles.⁹

The first irony in this story is that Madison and his colleagues got away with the remodeling. But they lost the battle in the Constitutional Convention for their vision of a dominant national government when the Convention decided against the concept of a national government with the power to veto the authority of the states.¹⁰ In fact, the Convention eschewed even a sharp line delineating federal and state powers. It left that line blurred, as we know. As historian James Ellis put it:

⁵GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 13-14 (Aspen Publishers 5th ed. 2005).

⁶ELLIS, *supra* note 2, at 115-16.

⁷*Id.* at 114.

⁸*Id.* at 107.

⁹*Id.* at 107-09.

¹⁰ELLIS, *supra* note 2, at 110.

[T]he political architecture of the new government defied the old orthodoxy of singular sovereignty by creating a unique diffusion of power . . . Madison had discovered the beauty of ambiguity, or perhaps shifting sovereignties. Though driven to this novel argument by necessity rather than choice, Madison had, willy-nilly, come upon an agreement just as original as his counterintuitive case for an extended republic.¹¹

Thus, the principled Madison became the nimble Madison. He was undaunted by losing that battle, and he set about to win the war.

He knew that the goal was not in the Constitutional Convention itself or the words of the document. Instead, the goal was ratification of the Constitution by nine of the thirteen original states. Without that, it would be just a piece of paper, and the Founders would have to go back to "square one." Ratification loomed as an uphill battle in some of the states (not in Delaware, however, which became "the First State" by promptly ratifying the document). The road to ratification in the other states was more than bumpy. It was perilous.

The Federalist Papers, written by Madison, Alexander Hamilton, and John Jay under the pseudonym "Publius," were used to lobby for ratification.¹² The Anti-Federalists published their rebuttals in *The Anti-Federalist Papers*.¹³ Some of Madison's rhetoric ultimately was persuasive. He wrote in *Federalist No. 45*, for example: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."¹⁴

When Madison went to the state ratifying conventions, like those in his home state of Virginia, he trumpeted, in essentially this manner, the blurred line between federal and state powers.¹⁵ He needed to downplay national power because he was up against formidable foes, such as Patrick Henry in Virginia. Because of these obstacles, Madison set about to use as an asset the limited national power and blurred line of relative powers.¹⁶ In short, he made lemonade out of the lemon of his defeat on the strong federal-power trump card.

¹¹*Id.* at 118-19.

¹²THE FEDERALIST NOS. 2-5, 64 (John Jay), NOS. 1, 6-9, 11-13, 15-36, 52-57, 59-63, 63-85 (Alexander Hamilton), NOS. 10, 14, 18-20, 37-58, 62, 63 (James Madison).

¹³See THE ANTIFEDERALIST PAPERS (Morton Borden ed., 1965).

¹⁴THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁵ELLIS, *supra* note 2, at 123.

¹⁶*Id.* at 116-20.

We all know that Madison and his allies ultimately prevailed as the ratification process played out. In 1791, they crafted the Bill of Rights and succeeded in getting it ratified. Slavery, of course, was the toughest problem. The founders did not want to address slavery, either in the Constitution itself or in the Bill of Rights. We also know that more amendments had to come and did come later.

It would take decades, a bloody civil war, and the Thirteenth Amendment to address slavery. Moreover, racial and gender discrimination endured for many decades after that, even with the Fourteenth Amendment on the books. Women did not receive the right to vote until 1920,¹⁷ and black children did not receive the right to attend integrated public schools until 1954.¹⁸

So, I conclude this section with the observation that there was, indeed, an irony at the outset. Madison led the charge for federalization at the Convention and led the charge in the ratification process for what we now call "federalism." Moreover, the Tenth Amendment appeared in the Bill of Rights, providing: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁹ What does that mean?²⁰ Stay tuned.

III. THE IRONIC EVOLUTION OF FEDERALISM

After the ink was dry on the new Constitution and the Bill of Rights, it became important for there to be a final arbiter of congressional authority. The defining moment came in 1803, of course, when Chief Justice John Marshall authored the Supreme Court's seminal opinion on judicial review of the constitutionality of government power in *Marbury v. Madison*.²¹ That

¹⁷U.S. CONST. amend. XIX; see also STEPHEN BREYER, ACTIVE LIBERTY 32-33 (Alfred A. Knopf 2005) (discussing the Thirteenth and Fourteenth Amendments, Breyer states that "[t]he 'people' had to amend the Constitution, not only to extend its democratic base but also to expand and more fully to secure basic individual . . . liberty").

¹⁸See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); see also *Gebhart v. Belton*, 91 A.2d 137, 149, 152 (Del. 1952) (upholding Delaware Court of Chancery decision that prohibited Delaware schools from segregating based on race).

¹⁹U.S. CONST. amend. X.

²⁰*Gonzales v. Raich*, 545 U.S. 1, 52 (2005) (O'Connor, J., dissenting)

Congress cannot use its authority under the [Commerce] Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers—a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command.

Id.

²¹5 U.S. (1 Cranch) 137, 180 (1803).

case was not about the proper constitutional division of federal power as compared to that of the states. But it, and its progeny, established who would ultimately decide and define that dividing line. That, of course, would be the courts.

Indeed, Chief Justice Marshall soon had the chance to put some gloss on the federalism issue and, in fact, to discuss the Tenth Amendment. In *McCulloch v. Maryland*²² he wrote for the Court that Congress had the "necessary and proper" power to establish a national bank, which the state could not tax.²³ He said that the Tenth Amendment was merely "framed for the purpose of quieting the excessive jealousies which had been excited,"²⁴ and that it was significant that the framers omitted the word "expressly" as the original modifier of the phrase "delegated to the United States."²⁵ This omission, he said, was important, "thus leaving the question, whether a particular power . . . has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument."²⁶

Lest I get bogged down and drone on about the progression of federalism cases of the past 220 years, many of which are well known to us, I would like to hopscotch a bit. Throughout the decades, from *McCulloch v. Maryland* to today, Congress, federal regulators, and state legislatures have tested the limits of their respective powers. Over time, many of those testing exercises wound up in the courts—some in the Supreme Court.

The bottom line, as I see it, is that the blurred median strip dividing national and state lanes of authority is being continually tested by Congress and sometimes federal agencies in an ad hoc, hasty, and random manner. It is driven by legislative perceptions of problems, crises, vacuums, scandals, or other spasms in need of federal resolution. Is that good or bad? Rather than randomness, should there be a comprehensive, general analysis of federalism versus federalization under the aegis of a respected institution such as a "think tank"? Or should the study be narrower and more focused, concentrating, for example, on corporate law?

Let us consider a few present-day examples of the attempts by the courts and Congress, on an ad hoc basis, to navigate through what I would call the "Founders' Fog of Federalism" to discern a median line in the road. There seems to be a never-ending quest to define in discrete contexts the

²²17 U.S. (4 Wheat.) 316 (1819).

²³*Id.* at 422-24.

²⁴*Id.* at 406.

²⁵*Id.*

²⁶*McCulloch*, 17 U.S. (4 Wheat.) at 406.

lanes separating what Congress and the states are constitutionally empowered to do and what they should do—as a matter of federalism policy.

The breadth of the Commerce Clause has been found by the courts to grant Congress extensive authority. But there are cases limiting that authority at the margins. And even where Congress has authority to legislate under the Commerce Clause, it might not choose to exercise it.

Let us consider a few relatively modern cases. The last three decades of the twentieth century and the first decade—so far—of the twenty-first century have proven to be fertile ground for federalism cases—some in the corporate area, some in other areas.

The Supreme Court has held:

- In the Securities Exchange Act of 1934, Congress did not create a federal common law of corporations regulating internal corporate affairs. At least three cases make that clear: *Blue Chip Stamps v. Manor Drug Stores*;²⁷ *Santa Fe Industries, Inc. v. Green*;²⁸ and *Kamen v. Kemper Financial Services, Inc.*²⁹
- Congress may not reach completely into the authority of the states and use the Commerce Clause to regulate guns in school zones (*United States v. Lopez*),³⁰ or violence against women (*United States v. Morrison*),³¹ where the regulated activities do not constitute economic activity.
- Congress may preempt, and has preempted, state laws regarding arbitration (*Preston v. Ferrer*),³² regulation of medical devices

²⁷421 U.S. 723, 754-55 (1975) (holding that no private right of action exists under Rule 10b-5 where plaintiff is not a purchaser or seller of securities).

²⁸430 U.S. 462, 479 (1977) (holding that absent clear congressional intent, federal courts should be reluctant to federalize and override state corporate laws).

²⁹500 U.S. 90, 107-09 (1991) (holding that a federal court entertaining a derivative action of a company registered under the federal Investment Company Act of 1940, 15 U.S.C. § 80a-20(a), must apply demand futility exception defined by the state of incorporation).

³⁰514 U.S. 549, 602 (1995) (holding that in the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), Congress exceeded its authority to regulate interstate commerce).

³¹529 U.S. 598, 627 (2000) (holding that neither the Commerce Clause nor the Fourteenth Amendment gives Congress authority to provide a federal remedy for victims of gender-motivated violence).

³²128 S. Ct. 978, 989 (2008) (regarding federal preemption of state law concerning arbitration).

(*Riegel v. Medtronic, Inc.*),³³ and delivery of tobacco products within a state (*Rowe v. New Hampshire Motor Transport Ass'n*).³⁴

The United States Courts of Appeals have also handed down some important decisions:

- The United States Court of Appeals for the District of Columbia Circuit has held that Congress did not authorize the Securities and Exchange Commission (SEC) to regulate what a state of incorporation may do in permitting dual classes of stock (*Business Roundtable v. SEC*).³⁵
- United States Courts of Appeals have also held that Congress may—and has—preempted state laws by authorizing the Federal Aviation Administration to regulate airports and air travel (*Air Transport Association of America v. Cuomo*),³⁶ and permitting the SEC to occupy the field of regulating the federal Investment Company Act of 1940 (*Chamber of Commerce v. SEC*).³⁷

IV. CURRENT FEDERALISM TENSIONS IN CORPORATE GOVERNANCE

Thus, the courts have made it quite clear that Congress did not legislate a federal corporate law, and that federal courts and agencies, as well as the SEC, are not at liberty to fashion a kind of federal common law of corporations, or otherwise to trump state law, unless Congress expressly so

³³128 S. Ct. 999, 1011 (2008) (stating that federal law preempts state law and common law claims challenging the safety of a medical device).

³⁴128 S. Ct. 989, 998 (2008) (holding that federal law preempts state law regulating the delivery of tobacco to customers within Maine).

³⁵905 F.2d 406, 407 (D.C. Cir. 1990) (vacating SEC Rule 19c-4, which barred self-regulatory organizations from listing stock of companies with certain types of disparate voting rights plans because Congress had not authorized interference with valid state corporate law).

³⁶520 F.3d 218, 219-20 (2d Cir. 2008) (invalidating New York statute granting airline "Passenger Bill of Rights" as expressly preempted by the federal Airline Deregulation Act of 1978). For the statutory provision that preempts state regulation in air transportation, see 49 U.S.C. § 41,713(1)(b) (2005).

³⁷412 F.3d 133, 136 (D.C. Cir. 2005) (upholding SEC rule requiring that an investment company have a board with at least seventy-five percent independent directors and an independent chair in order to engage in certain transactions because Congress had selected regulation of the governance structure of investment companies as a means to achieve the purposes of the Investment Company Act of 1940 (ICA)). For a description of the policy goals of the ICA, see 15 U.S.C. § 80a-1 (2005).

provides. So, given the broad congressional power under the Commerce Clause, the question is this: when and how, if at all, *should* Congress provide for federal law that trumps state corporate law?

Federal and state laws have coexisted reasonably well in managing the division of authority between federal disclosure regulation and state primacy over internal corporate affairs. Delaware courts have exemplified the evolution of specialized institutions to govern different facets of business. The federal government, through the SEC, has developed an elaborate regulatory apparatus properly devoted to monitoring and controlling the disclosure of information to the financial markets. With its focus on disclosure, the SEC largely has refrained from regulating the aspects of corporate governance that have traditionally been the province of state law—that is, the internal affairs that work to balance power among stockholders, directors, officers, and other corporate constituents.

State lawmakers and courts have defined the rights and obligations of a corporation's owners and managers, as well as governing state disclosure issues. Delaware has embraced the federalism model and adopted a wide range of corporate innovations—most notably the establishment of a neutral body of experts to review and recommend changes to its corporation law and the cultivation of a cadre of judges and lawyers with special expertise in business law.

This phenomenon has led to more than sixty percent of the Fortune 500 being incorporated in Delaware.³⁸ As Justice Brandeis noted in a famous dissent more than seventy-five years ago: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."³⁹

Another historic note of particular interest in the context of corporate law relates to the debate about federal chartering or federal "minimum standards" that was very intense in the 1970s.⁴⁰ This debate was sparked by

³⁸HARRIET SMITH WINDSOR, DEL. DEP'T. OF STATE: DIV OF CORPS. 1 (2007), available at <http://corp.delaware.gov/2007DivCorpAR.pdf>.

³⁹New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 5 (Christopher C. DeMuth ed., The American Enterprise Institute Press 1993) ("[F]ederalism spurs innovation in public policy because of the incremental experimentation afforded by fifty laboratories of states competing for citizens and firms."); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 211-12 (2006) (describing the trend toward statutory uniformity once a state—typically Delaware—establishes a successful remedy for a corporate law issue).

⁴⁰See William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101, 1101 (1974) [hereinafter Cary, *Corporate Minimum Standards Act*]; William L. Cary,

the late William L. Cary, who was a former SEC Commissioner and a professor at Columbia Law School. Professor Cary deplored the dominant corporate role of Delaware—which he called that "pygmy" state—and contended in several writings⁴¹ in the mid-1970s:

[I]n my opinion the time has come for us to consider a Federal Minimum Standards Act. There has been a deterioration of corporate standards, and I think it is safe to say that Delaware has been the sponsor and the victim of this unhappy denouement [sic] [in] . . . a race for the bottom.⁴²

There was some academic agreement with Cary's thesis at the time. In fact, some academics would have gone further than Cary and urged that there be a complete federal incorporation statute. But there was, to be sure, strong disagreement with either notion of federalization. These issues of federalism versus federalization were fully aired by many distinguished scholars at the ABA-sponsored "Airlie House Symposium" in Warrenton, Virginia, in June 1975.⁴³

Ralph Winter, a distinguished Yale Law School professor and now a senior federal circuit judge of the United States Court of Appeals for the Second Circuit, wrote a book in 1977 engaging this debate and basing his thesis against federalization on a persuasive economic analysis.⁴⁴ He concluded "that state corporate legal systems are protective of shareholders and that state regulation is generally preferable to federal" regulation.⁴⁵ Judge Winter's analysis added:

Summary of Article on Federalism and Corporate Law, 31 BUS. LAW. 1105, 1105 (1976) [hereinafter Cary, *Federalism and Corporate Law*].

⁴¹William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 701, 705 (1974); Cary, *Corporate Minimum Standards Act*, *supra* note 40, at 1116.

⁴²Cary, *Federalism and Corporate Law*, *supra* note 40, at 1105; *see also* Ralph Nader, *Introduction to JAMES PHELAN & ROBERT POZEN, THE COMPANY STATE: RALPH NADER'S STUDY GROUP REPORT ON DUPONT IN DELAWARE*, at xi-xii (1973) (lamenting the effects of corporations on working-class Delawareans).

⁴³A comprehensive resource for this debate can be found in the proceedings of "The Airlie House Symposium," which took place on June 13-14, 1975. This symposium was so named because it was held at the Airlie House in Warrenton, Virginia. It was sponsored by the Federal Regulation of Securities Committee of the Section of Corporation, Banking and Business Law of the American Bar Association. These proceedings are published in full in a special issue of *The Business Lawyer*, entitled *Symposium on Federal and State Roles in Establishing Standards of Conduct for Corporate Management*, 31 BUS. LAW. 859, 859-1213 (1976).

⁴⁴RALPH K. WINTER, *GOVERNMENT AND THE CORPORATION* 5 (The American Enterprise Institute 1978).

⁴⁵*Id.*; *see also* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 252 (1977) (similarly concluding "that state regulation is generally preferable to federal").

An expanded federal role in corporate governance would almost surely be counterproductive. At the federal level, there is no mechanism by which optimal legal rules governing the shareholder-corporation relation can be determined

. . . .

Once federal legislation is enacted, it will be very difficult to correct, no matter how wrong it may be . . . [and] even the most demonstrably foolish rule will lead to calls for more rather than less regulation.⁴⁶

Although some question its validity, Judge Winter's economic analysis demonstrating the value to investors of Delaware corporations has been validated in recent years by Professor Roberta Romano and others.⁴⁷

I think it is fair to say that this intense debate at the Airlie House, in part, led to the creation in 1977 by the American Law Institute (ALI) of its own fifteen-year-long work on the *Principles of Corporate Governance*.⁴⁸ This monumental ALI study may have been seen by some as a way to address or defuse the federalization debate. It ultimately devolved into a number of well-considered ideas for the modification or improvement of

⁴⁶WINTER, *supra* note 44, at 44-46; *see also* Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1529 (1989) (concluding that, among other benefits, competition over franchise tax revenues prompts state governments to enact increasingly "efficient" corporate codes); Ralph K. Winter, *On "Protecting the Ordinary Investor,"* 63 WASH. L. REV. 881, 902 (1988) (distinguishing between various classes of investors, and concluding that additional regulation of investment markets would assist speculators, who assume risk voluntarily, and would saddle other investors with additional costs).

⁴⁷*See, e.g.,* ROMANO, *supra* note 39, at 18 (observing that several reincorporation event studies "have found significant positive stock price effects on firms' reincorporation to Delaware," while none have "found a negative stock price effect"); Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 381-84 (2002) (reviewing reincorporation event studies and stating that "[a]ll [eight] of the studies find positive abnormal returns, with four finding a significant positive stock return at the time of the announcement of the domicile change"); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 532-33, 541 (2001) (finding that firms incorporated in Delaware were worth an average of up to two percent more than firms incorporated in other states, and that firms incorporated in Delaware were significantly more likely to receive takeover offers and were more likely to be sold than firms incorporated in other states). *But see* Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1785-86 (2002) (citing studies completed after 1999 finding no correlation between firm value and Delaware incorporation).

⁴⁸*See* Roswell B. Perkins, *President's Foreword* to AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* §§ 1.01-6.02, at xvi (1994) (describing the effort toward a comprehensive analysis of the federalization debate).

state corporate law. But the ALI project largely veered away from addressing federalization of internal corporate affairs. As a result, the federalization effort *temporarily* withered.

Despite occasional federal incursions into the states' traditional domain, this division of responsibilities survived as a fragile ecosystem⁴⁹ more or less intact for over seventy years. In 2001, however, a wave of highly publicized scandals broke at prominent public corporations such as Enron, WorldCom, and Tyco.⁵⁰ The scandals followed close on the heels of the now infamous bursting of the technology bubble, and the loss to the national economy of about \$7 trillion in market capitalization. This catastrophe led to the passage of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),⁵¹ a loose package of federal legislation, ostensibly intended to rein in corporate executives run amok and to restore investor confidence.

Unlike most of the federal initiatives that preceded it, Sarbanes-Oxley established some mandatory rules governing the internal affairs of publicly traded corporations. Not only were these rules arguably unrelated to the corporate scandals they were supposed to address, but they also represented a perceptible (albeit partial) shift in the established federal-state division of authority.

Placed in historical context, Sarbanes-Oxley represents a federal incursion into discrete areas of regulation of corporate governance that had been traditionally left to the states under the internal affairs doctrine. To determine the extent of this incursion, one needs to analyze each component of Sarbanes-Oxley and how that component fits within the traditional federal-state balance.⁵²

⁴⁹E. Norman Veasey, *The Stockholder Franchise is Not a Myth: A Response to Professor Bebchuk*, 93 VA. L. REV. 811, 817 (2007); see also E. Norman Veasey & Christine Di Guglielmo, *History Informs American Corporate Law: The Necessity of Maintaining a Delicate Balance in the Federal "Ecosystem"*, 1 VA. L. & BUS. REV. 201 (2006) (discussing the evolution of corporate law in the United States and the current balance of state and federal regulation).

⁵⁰Cathy Booth Thomas, *Called to Account*, TIME, June 18, 2002, <http://www.time.com/time/business/article/0,8599,263006,00.html> (examining the causes of the Enron collapse); Kyle Vasatka, *WorldCom Scandal: A Look Back at one of the Biggest Corporate Scandals in U.S. History*, ASSOCIATED CONTENT, Mar. 8, 2007, http://www.associatedcontent.com/article/162656/worldcom_scandal_a_look_back_at_one.html?cat=3 (highlighting the methods WorldCom used to defraud investors); *Timeline of the Tyco International Scandal*, USATODAY.COM, June 17, 2005, http://www.usatoday.com/money/industries/manufacturing/2005-06-17-tyco-timeline_x.htm (providing a chronology of the relevant dates).

⁵¹Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

⁵²See E. Norman Veasey et al., *Federalism vs. Federalization: Preserving the Division of Responsibility in Corporation Law*, in 2 THE PRACTITIONER'S GUIDE TO THE SARBANES-OXLEY ACT, at V-5-1 (John J. Huber et al. eds., 2005) (discussing the various components of the Sarbanes-

While Sarbanes-Oxley strays into the state preserve of internal affairs in some areas, many of its provisions stay within (or involve a minimal expansion of) the proper and preexisting role of the federal law. In my view, areas that are arguably in the federal sphere include:

- Audit regulation and oversight
- Executive certification of financial statements
- Prohibition on insider trades during pension fund blackout periods
- Enhanced criminal penalties
- Additional disclosure requirements⁵³

The more worrying aspects of Sarbanes-Oxley are those that represent an expansion of federal authority into areas of corporate governance traditionally regulated by the states. In my view, those include:

- Regulation of non-audit services
- Audit committee composition
- Executive bonuses
- Executive loans⁵⁴

Section 307 of Sarbanes-Oxley represents another federal incursion into the states' traditional authority.⁵⁵ The ethical rules governing lawyer conduct have traditionally been the province of state supreme courts. Earlier attempts to federalize those rules have been blocked. For example, in 1994 U.S. Attorney General Janet Reno attempted to circumvent states' venerable authority over the rules of lawyer conduct by promulgating a regulation

Oxley Act and the extent to which they altered the federal-state division of responsibility over corporate affairs).

⁵³*Id.* at V-5-17 to -25.

⁵⁴*Id.*

⁵⁵*See* Pub. L. No. 107-204, § 307, 15 U.S.C. § 7245 (2000) (directing the SEC to adopt rules of professional responsibility requiring any lawyer who practices before the SEC to report material violations of the securities laws "up the ladder" within the company).

concerning certain ethical standards for Department of Justice attorneys.⁵⁶ Among other things, the regulation permitted *ex parte* communications with employees of a corporation that was represented by counsel unless the employees were "controlling individuals,"⁵⁷ despite state rules of ethics prohibiting *ex parte* communication with parties represented by counsel.⁵⁸

The validity of the regulation was tested in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*⁵⁹ In that case, Department of Justice agents investigating False Claims Act charges against McDonnell Douglas Corporation had *ex parte* contacts with current and former employees of McDonnell Douglas without the consent of McDonnell Douglas's counsel.⁶⁰ The government asserted that such conduct was authorized by the regulation promulgated by Attorney General Reno, which, the government contended, superseded Missouri's ethical rules (which had been adopted by the federal district court in Missouri in which the litigation was pending).⁶¹ The Eighth Circuit confirmed that the Missouri Supreme Court's Rule 4-4.2 prohibited *ex parte* contact with lower-level employees of a corporation that was represented by counsel.⁶² The court held that no statute "expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States" and that the regulation was therefore invalid.⁶³ Later that year, Congress expressly stepped in on the side of the states and enacted the McDade Amendment, which confirms the primacy of state courts over lawyer ethics rules.⁶⁴

Section 307 of Sarbanes-Oxley intrudes on the states' traditional role as arbiters of the rules of lawyer conduct and alters the long-standing position of the federal courts and Congress that the regulation of lawyer ethics rests with the states.⁶⁵ Section 307 and the SEC rule implementing that section are broadly written and may apply to the legions of lawyers who

⁵⁶See 28 C.F.R. § 77.10(a) (1995).

⁵⁷*Id.*

⁵⁸See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983) (adopted in a number of states).

⁵⁹132 F.3d 1252 (8th Cir. 1998).

⁶⁰*Id.* at 1253.

⁶¹*Id.* at 1254.

⁶²*Id.* at 1257.

⁶³*O'Keefe*, 132 F.3d at 1257.

⁶⁴See 28 U.S.C.A. § 530B(a) (West 2006) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.")

⁶⁵See Pub. L. No. 107-204, § 307, 15 U.S.C. § 7245 (2000).

participate in securities filings or investigations and not just to those who practice directly before the SEC.⁶⁶ And they are not justified by any failure of the states to appropriately regulate lawyers. Under these circumstances, the federalization of the rules of lawyer conduct is troublesome.

In addition to intruding into areas traditionally left to state regulation, it is important to note that Sarbanes-Oxley has yielded some adverse impacts. Certain provisions, such as section 404,⁶⁷ have a high cost of compliance, which has been particularly burdensome to smaller businesses. Moreover, Sarbanes-Oxley, along with the litigation climate in the United States, is driving some mergers and acquisitions transactions to London and other foreign markets. But many observers believe that Sarbanes-Oxley's intrusion into state corporate law might have been much more extensive. Any assessment of the negative impacts of Sarbanes-Oxley should be balanced by recognition of an arguably positive impact in elevating board awareness of the need to pursue best practices.

Many people think that this law, and the post-Enron environment more generally, have helped to improve board conduct. Although many governance improvements (some stimulated by Delaware judges) preceded Sarbanes-Oxley, I believe that this law (with all of its warts, unfortunate one-size-fits-all edicts, and unwarranted federal incursions) has not been, in itself, the disaster that some have contended. But my concern is that even the partial federalization embodied in this law may be seen as a justification for further intrusions into state law when political pressures on Congress stimulate it into ill-conceived action.

A number of post-Sarbanes-Oxley developments in the federal arena also raise significant federalism questions:

- The question of the extent to which the SEC may fashion a stockholder-access rule raises questions (similar to those involved in the *Business Roundtable*⁶⁸ case) concerning the SEC's doubtful authority to regulate corporate internal affairs as well as the wisdom of federalizing such regulation.
- A bill requiring a stockholder advisory vote on executive compensation (the "Say on Pay" bill) that recently passed the U.S.

⁶⁶See *id.*; see also 17 C.F.R. § 205.2 (2008) (promulgating standards of professional conduct for attorneys appearing and practicing before the SEC).

⁶⁷See Pub. L. No. 107-204, § 404, 15 U.S.C. § 7262 (2000) (requiring reporting regarding companies' internal controls).

⁶⁸905 F.2d 406 (D.C. Cir. 1990).

House of Representatives and is pending in the Senate raises the question of whether and to what extent regulation of executive compensation should be federalized, even if only at a so-called advisory level.⁶⁹

- A recent Second Circuit case has broadly construed the federal Class Action Fairness Act of 2005⁷⁰ to allow for removal from state court to federal court of class actions asserting misrepresentation brought under state laws.⁷¹ In a case of first impression, this case furthers the federalization of class action litigation, which until now could be adjudicated in state courts.
- On May 1, 2008, Senators Carl Levin of Michigan, Norm Coleman of Minnesota, and Barack Obama of Illinois introduced a bill that would require states of incorporation to obtain beneficial ownership information for the corporations formed under their laws and to provide access to this information upon receipt of a subpoena or summons.⁷² According to Senator Levin, this federal intrusion is justified by antiterrorism and other law enforcement concerns because the owners of such enterprises allegedly use the opaque state laws to hide their identity.⁷³
- The Emergency Economic Stabilization Act of 2008⁷⁴ and the regulations promulgated under that statute⁷⁵ mandate certain executive compensation standards for companies participating in the Troubled Asset Relief Program, including prohibitions and limitations on "golden parachutes,"⁷⁶ limitations on compensation

⁶⁹Shareholder Vote on Executive Compensation Act, H.R. 1257, 110th Cong. (2007).

⁷⁰Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

⁷¹Estate of Pew v. Cardarelli, 527 F.3d 25, 32 (2d Cir. 2008).

⁷²Incorporation Transparency and Law Enforcement Assistance Act, S. 2596, 110th Cong. (2008).

⁷³Press Release, Carl Levin, Levin-Coleman-Obama Bill Introduced to Stop Misuse of U.S. Companies (May 1, 2008), available at <http://levin.senate.gov/newsroom/release.cfm?id=297090>. The bill has been assigned to the Senate Homeland Security and Governmental Affairs Committee, which is chaired by Senator Levin.

⁷⁴Pub. L. 110-343, 122 Stat. 3765 (2008) (to be codified at 12 U.S.C. §§ 5201-5261; 26 U.S.C. §§ 162(m)(5), 280G(e); 31 U.S.C. § 1105(a)(36)).

⁷⁵See Tarp Capital Purchase Program, 73 Fed. Reg. 62,205 (Oct. 20, 2008); I.R.S. Notice 08-94, 2008-44 I.R.B. 1070; Treas. Notice 2008-TAAP, available at <http://www.ustreas.gov/initiatives/eesa/docs/Exec%20Comp%20TAAP%20Notice.pdf>.

⁷⁶12 U.S.C. § 5221(b)(2)(C) (2008); 26 U.S.C. § 280G(e)(2)(B)(i)-(ii) (2008).

structures that encourage executives to take excessive risks,⁷⁷ provisions for recovery of bonus or incentive compensation paid to executives based on inaccurate financial statements,⁷⁸ and others. These provisions are an acceptably limited intrusion into internal corporate affairs because they are structured as conditions on a financial institution's acceptance of taxpayer money. But they raise the specter of increasing federalization of internal corporate affairs and erosion of the federal/state balance in other contexts.

V. WHAT IS THE FUTURE OF FEDERALISM VERSUS FEDERALIZATION?

There are constitutional issues here, to be sure. But given Congress's plenary authority over interstate commerce, the game is being played out on the policy stage. Here is the irony, as I see it.

On the one hand, recent articles in *The New York Times* suggest that business loves the federal preemption implemented by some recent Supreme Court decisions.⁷⁹ A prime example is *Riegel v. Medtronic, Inc.*,⁸⁰ which held that Congress preempted the medical device area.⁸¹ Business applauds the "uniformity" of preemption in this area that prevents state legislatures, tort lawyers, and state courts from enforcing state laws providing stronger consumer protection than that provided by federal law.⁸² On the other hand, I think businesses and many investors are pleased with the management of internal corporate affairs by Delaware and other states.⁸³

There are other ironies in this federalism debate over corporate law. One of those ironies relates to what some activist investors euphemistically

⁷⁷12 U.S.C. § 5221(b)(2)(A) (2008).

⁷⁸*Id.* § 5221(b)(2)(B).

⁷⁹Linda Greenhouse, *Justices Will Hear Liability Cases with Federal-State Disparity at Issue*, N.Y. TIMES, Jan. 19, 2008, at C3; Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 41.

⁸⁰128 S. Ct. 999 (2008).

⁸¹*Id.* at 1007.

⁸²See *supra* note 79; see also *Devices for Lawyers*, WALL ST. J., Aug. 13, 2008, at A.16 (suggesting that businesses would prefer federal preemption as, otherwise, businesses would be subject to state product liability laws, in addition to harsh federal approval requirements).

⁸³See *supra* notes 45-47 and accompanying text.

call "corporate democracy."⁸⁴ Investors want directors to be "accountable" for the direction of their management of the corporation.⁸⁵

There is a salutary trend in that direction. Today, majority voting is becoming the norm in director elections as a result of state law.⁸⁶ That is, a director in many of the major U.S. public corporations now must receive a majority—rather than a mere plurality—of the votes cast in an uncontested election in order to be elected. So, efforts of disgruntled stockholders to conduct a campaign to withhold votes from a particular director or directors now have more meaning than in the past.

Also, stockholders have always had the right to propose mandatory amendments to bylaws and bring them to a vote, assuming the proposed bylaw is valid under state law.⁸⁷ This is a very effective corporate governance tool available to stockholders. And it is being used more and more by activist investors in today's world.

In fact, some investor-activists have sought access to the company's proxy in order to put to a stockholder vote a mandatory bylaw setting up election processes that would permit stockholders to propose nominees to the board under certain conditions.⁸⁸ But the SEC has not permitted the

⁸⁴Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 78-80 (1997).

⁸⁵*Id.* at 79.

⁸⁶See CLAUDIA H. ALLEN, NEAL, GERBER & EISENBERG LLP, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS, at ii (2007), http://www.ngelaw.com/files/upload/majority_study111207.pdf ("[Sixty-six percent] of the companies in the S&P 500 and over [fifty-seven percent] of the companies in the Fortune 500 have adopted a form of majority voting . . ."); see also Claudia H. Allen, Remarks at the Issues from the 2008 Proxy Season Panel at the 28th Annual Ray Garrett Jr. Corporate and Securities Law Institute, Northwestern University School of Law (May 1, 2008) (presentation available at http://www.law.northwestern.edu/professionaled/documents/Issues%20from%20the%202008%20Proxy%20Season_Claudia%20Allen.pdf) (reporting (1) that the author's interim data indicates that over seventy-two percent of the S&P 500 and over sixty-two percent of the Fortune 500 have adopted a form of majority voting and (2) that from the point of view of underlying election standards, within each of the S&P 500 and Fortune 500, companies with true majority vote bylaws (or charter provisions), outnumber those with a plurality election standard augmented by a majority vote policy (including bylaws which are functionally policies), by a ratio of over 2.5:1).

⁸⁷See, e.g., DEL. CODE ANN. tit. 8, § 109 (2001); cf. also *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (determining, with respect to question certified to the court by the SEC, that a shareholder-proposed bylaw providing for reimbursement of expenses in connection with nominating candidates for election as directors was invalid under Delaware law because it would impinge on the statutory province of the board to manage corporate affairs).

⁸⁸See *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group*, 462 F.3d 121, 123 (2d Cir. 2006) (reviewing the SEC's varying interpretations of Rule 14a-8(i)(8) and holding that "a shareholder proposal that seeks to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot does not relate to an

inclusion of mandatory bylaws governing election processes, even though they are valid under state law.⁸⁹ Nevertheless, for many years, the SEC has permitted stockholders to put purely precatory (or advisory) measures on the company's proxy. The irony is that the precatory proposals have no basis in state law, whereas many mandatory bylaws, including those setting up director-election procedures, are valid under state law.⁹⁰ The SEC permits the former, but not the latter. What is the basis for the SEC's claim to authority in perpetrating this irony?

VI. WILL FEDERALIZATION OF CORPORATE LAW AND GOVERNANCE BE BETTER OR WORSE FOR INVESTORS?

In the corporate area, the central question is whether the federal government is better equipped than the states, particularly Delaware, with its decades of experience and its ongoing expertise, to oversee corporate law and governance. The nimble Madison was quite content with a limited federal government and a blurred line defining its powers.⁹¹ What would he think about how the ironic twists and turns have played out over these twenty-two decades? What would he prescribe for the future? Madison's *Federalist No. 46* was prescient:

[T]he federal and State governments are . . . constituted with different powers, and designed for different purposes [The] ultimate authority . . . will not depend merely on the comparative ambition . . . of the different governments . . . to enlarge its sphere of jurisdiction at the expense of the other [C]hange can only result from such manifest and irresistible proofs of a better administration⁹²

election within the meaning of the Rule and therefore cannot be excluded from corporate proxy materials under that regulation"); Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. 70,450 (Dec. 11, 2007) (to be codified at 17 C.F.R. § 240) (responding to the *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group*, 462 F.3d 121 (2d Cir. 2006), decision by "clarifying" that Rule 14a-8(i)(8) does not provide stockholders with a means of including stockholder nominees for director in the company's proxy materials).

⁸⁹See *supra* note 88.

⁹⁰See Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079 (2008).

⁹¹ELLIS, *supra* note 2, at 118-19.

⁹²THE FEDERALIST NO. 46, at 315-17 (James Madison) (Jacob E. Cooke ed., 1961); see also THE FEDERALIST NO. 45, *supra* note 14 and accompanying text.

It is worth repeating Madison's last sentence here: "[C]hange can only result from such manifest and irresistible proofs of a better administration."⁹³

Likewise, in the modern-day words of philosophy Professor Donald Regan of the University of Michigan:

[I]n thinking about whether the federal government has the power to do something or other, we should ask what special reason there is for the federal government to have that power. What reason is there to think the states are incapable or untrustworthy? . . . [Is there] any reason why the regulation under consideration should come from the federal government[?]⁹⁴

The area of federalism that is particularly fascinating to me is the area of internal corporate affairs. Personally, I have no doubt that Congress has the power to intrude into state internal corporate affairs as it did, partly, in Sarbanes-Oxley. But that does not mean that Congress should exercise that power. Will Congress continue to chip away, federalizing internal corporate affairs on an ad hoc basis?

My speculation on the future—at least in my lifetime—is that Congress may chip away, depending on the scandal or perceived need du jour. I think it is unlikely that Congress will totally preempt state corporation law—but it might. If so, what would be the consequences? For one, the Delaware courts would no longer have the responsibility for adjudicating the fact-intensive, highly-nuanced, judge-made law of fiduciary duties of directors. Rather, the federal statutory language would be new and untested. Significantly, the responsibility for interpreting and applying that new language would devolve largely to the 1,500 or so⁹⁵ already overburdened federal district court judges in the 94 federal districts and the 179 similarly-burdened federal circuit court judges in the 12 federal circuits around the nation.⁹⁶ In my opinion, that outcome would make little sense for

⁹³THE FEDERALIST NO. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961).

⁹⁴Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 557, 561-62 (1995).

⁹⁵There are 678 authorized federal district court, Article III judgeships, with approximately 647 active judges and 310 senior judges who have staff. The authorized district court magistrate judgeships include 505 full-time magistrates and 46 part-time magistrates. 2007 JUDICIAL FACTS AND FIGURES, tbl. 1.1, <http://www.uscourts.gov/judicialfactsfigures/2007/Table101.pdf> (last visited Oct. 28, 2008); see also JAMES C. DUFF, DIRECTOR, ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR 11 (2007), <http://www.uscourts.gov/library/annualreports/2007/2007%20FINAL%20REPORT.pdf> (noting that in order to address workload needs, 151 intercourt assignments were approved for 95 Article III judges).

⁹⁶In addition to the 179 authorized courts of appeals judgeships (of which 163 were filled by

businesses, directors, stockholders, or foreign investment. But that is just my opinion—it is no doubt shared by many, but not all.

VII. IS IT TIME FOR A FEDERALISM ROADMAP?

So, we return to the question of Madison's thinking. The federal/ state authority line is still blurred. Should we leave it that way 220 years later? Should Congress continue twitching, as every spasm develops—without any well thought-out plan?

Madison had a plan. It was called the Constitution. Should we ask an institution like the American Law Institute, the American Bar Association, or a distinguished university to convene a new "think tank" to help us navigate and define the federal/state lanes? Should it be a general federalism convocation, or should we start with corporation law?

As Madison and, more recently, Professor Regan have queried:⁹⁷ which sovereign is better equipped with experience, wisdom, or the promise of effective implementation and administration? Specifically, in the corporate arena, when internal affairs are implicated, is Delaware or the federal government better equipped? The question, it seems to me, is just what Madison and Professor Regan have raised: Is there a compelling reason to federalize corporate law?

Let us start by asking not where, precisely, the federal/state divide should be, but whether a study of the issues is needed and desirable, and which institution should conduct it. The Council of the American Law Institute (ALI) may or may not have any interest in having the ALI delve into this area. It was only sixteen or so years ago that it completed the fifteen-year debate that produced the *Principles of Corporate Governance*. Does this institution have an interest now in getting involved in a comprehensive analysis of federal/state authority?

Although I am mindful of the admonition to "be careful what you wish for," I think it might be good to have the best brains at work on this question and not wait for the next scandal to stimulate Congress into an unwise paroxysm of federalization. Who knows?—such a respected analysis just might be helpful to lawmakers.

You have done me the honor of inviting me here to speak at the ALI Annual Meeting. If there is to be a federalism convocation, it makes sense to me that the ALI should be the first to consider it. If this great institution declines to undertake the project, should we look to other institutions for

active judges in 2007), 107 senior circuit judges participated in appeals dispositions in 2007. 2007 JUDICIAL FACTS AND FIGURES, *supra* note 95.

⁹⁷Regan, *supra* note 94.

work on a plan and a roadmap? Or shall we let Congress continue to grope around randomly in the "Fog of Federalism"?