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Strengthening the Internal Affairs Doctrine Juul Labs, Inc. v. Grove, 238 A.3d 904 (Del. Ch. 2020).

Andrew J. Meyer

NOTE

Strengthening the Internal Affairs Doctrine

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Andrew J. Meyer[*]

I. INTRODUCTION

The state of Delaware plays a significant role in shaping corporate law around the country. Delaware is home to a substantial number of corporations – more than half of publicly held corporations and over sixty percent of Fortune 500 companies are incorporated in the state.[1] Furthermore, it contains the most out-of-state incorporations – a situation where a business incorporates in Delaware but has a principal place of business in another state.[2] For instance, the State of Missouri has ten Fortune 500 corporations with their principal place of business in the state, two of which are incorporated in Delaware.[3] Delaware maintains that the large number of incorporations is due to the predictability and stability provided by the Delaware General Corporation Law ("DGCL"), the corporate law-focused Delaware Court of Chancery ("Chancery Court"), and the prompt and efficient service provided to corporations through the

[*]B.S. Computer Engineering, B.S. Electrical Engineering, Missouri University of Science & Technology, 2011; J.D. Candidate, University of Missouri School of Law, 2022; Associate Member, *Missouri Law Review*, 2020-2021. I would like to thank Professor Thom Lambert for his insight, guidance, and support during the writing of this Note, as well as the *Missouri Law Review* for its help in the editing process.

[1] *Facts and Myths*, DELAWARE.GOV, https://corplaw.delaware.gov/facts-and-myths/ [https://perma.cc/94VP-4EFS] (last visited Feb. 15, 2021).

[2] *Id.*

[3] *Fortune 500*, FORTUNE, https://fortune.com/fortune500/2021/search?hqstate=MO [https://perma.cc/5BSM-AXS2] (last visited Aug. 10, 2021); *Cerner Corp*, SEC, https://www.sec.gov/edgar/browse/?CIK=804753&owner=exclude [https://perma.cc/UT9C-9VMG] (last visited Aug. 10, 2021) (located in North Kansas City, MO and incorporated in Delaware); *Centene Corp*, SEC, https://www.sec.gov/edgar/browse/?CIK=1071739&owner=exclude [https://perma.cc/3YME-F22B] (last visited Aug. 10, 2021) (located in St. Louis, MO and incorporated in Delaware).

state's tailored legal system.[4] Regardless of the accuracy of these claims, commentators and experts generally agree on Delaware's importance in corporate law.[5]

Because of this, a recent case decided in the Chancery Court could have an impact on corporate law throughout the country. In *Juul Labs, Inc. v Grove*, the Chancery Court considered whether a shareholder could invoke a California shareholder inspection law to demand inspection of the books and records of a Delaware corporation incorporated in Delaware that had its principal place of business in California.[6] The court held that the Internal Affairs Doctrine dictated that only Delaware law governs a shareholder's inspection rights of a Delaware corporation and the doctrine precluded the shareholder from demanding inspection under California law.[7] The Internal Affairs Doctrine is a court-made principle that states that disputes among the corporation, its directors, officers, and shareholders over the internal affairs of a corporation are governed by the laws of the state of incorporation.[8]

This Note examines the history of the Internal Affairs Doctrine and analyzes the reasoning of the Chancery Court. Part II outlines the facts and holding of *Grove*, Part III details the background of the Internal Affairs Doctrine, Part IV describes the Chancery Court's decision in *Grove*. Finally, Part V critiques the court's decision and discusses its implications. It does so by discussing the various interests of the states and questioning whether Delaware's interests in regulating its corporations overrides the compelling interests of other states in regulating foreign corporations which principally reside within their borders. It concludes by discussing possible future disputes over laws regulating diversity on boards of directors and if the Internal Affairs Doctrine will apply.

II. FACTS AND HOLDING

The plaintiff in *Juul Labs, Inc v. Grove*, Juul Labs, is a Delaware corporation whose principal place of business is in San Francisco, California.[9] Juul Labs is the result of a 2017 spin-off from Pax Labs, Inc.,

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[4] *Why Businesses Choose Delaware*, DELAWARE.GOV, https://corplaw.delaware.gov/why-businesses-choose-delaware/ [https://perma.cc/U4M5-ZXYR] (last visited Feb. 15, 2021).

[5] Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 59–60 (2009).

[6] 238 A.3d 904, 907 (Del. Ch. 2020).

[7] *Id.*

[8] *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480 (2002) [hereinafter *The Internal Affairs Doctrine*].

[9] 238 A.3d at 907.

a company that creates vaporizer products using cannabis and a variety of other plant-based materials.[10] In 2015, Pax Labs released the e-cigarette known as JUUL, which serves as an alternative to traditional cigarettes and delivers nicotine to users through a vapor.[11] Pax Labs spun off Juul Labs, Inc. and the JUUL products to allow Juul to focus on cigarette alternatives while Pax Labs could focus on other plant-based materials.[12]

The defendant, Daniel Grove, is a former employee of Juul Labs.[13] While employed at the company, Grove obtained options to acquire 20,000 shares of common stock in the company as part of his compensation.[14] To accept the options, Grove electronically signed a standard-form acceptance agreement on August 4, 2017.[15] On February 1, 2018, Grove exercised his options to purchase 5,000 shares of common stock by electronically signing a standard-form exercise agreement.[16] Both standard-form agreements contained similar provisions that stipulated Grove waived his inspection rights as a shareholder under Section 220 of the DGCL.[17] Furthermore, the company's certificate of incorporation contained a forum-selection provision designating Delaware courts as the exclusive forum for disputes governed by the Internal Affairs Doctrine.[18] Through the purchase of this stock, Grove became a minority shareholder in Juul Labs.[19]

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[10] Ari Levy, *E-cigarette maker Juul is raising $150 million after spinning out of vaping company*, CNBC (Dec. 19, 2017, 6:30 PM EST), https://www.cnbc.com/2017/12/19/juul-labs-raising-150-million-in-debt-after-spinning-out-of-pax.html [https://perma.cc/GE7Z-EWE9]; *About*, PAX LABS, INC., https://www.pax.com/pages/about [https://perma.cc/MT3V-DBK9] (last visited Feb. 13, 2021).

[11] *PAX Labs, Inc. Introduces Revolutionary Technologies with Powerful E-Cigarette JUUL*, BUSINESS WIRE (April 21, 2015 8:00 AM EDT), https://www.businesswire.com/news/home/20150421005219/en/PAX-Labs-Inc.-Introduces-Revolutionary-Technologies-with-Powerful-E-Cigarette-JUUL [https://perma.cc/RZV3-4R2G]; *What is a JUUL?*, JUUL (July 2, 2019), https://www.juul.com/about-juul [https://perma.cc/WNL6-S22F].

[12] Levy, *supra* note 10.

[13] *Grove*, 238 A.3d at 907.

[14] *Id.*

[15] *Id.* The acceptance stipulated that (1) the company's 2007 Stock Plan would govern the options, (2) the options were granted under the terms of a standard-form stock option agreement, and (3) the options could only be exercised under a standard-form stock option exercise agreement. *Id.* at 907–08.

[16] *Id.* at 908.

[17] *Id.*

[18] *Id*. at 918.

[19] *See* Shareholder Class Action and Derivative Complaint at 19, Grove v. Bowen, No. CGC-20-582059 (Super. Ct. of Cal. County of S.F. filed Jan. 7, 2020).

In recent years, Juul Labs has come under scrutiny from the public and the United States Government over[20] a large increase in use of e-cigarettes by children and the emergence of lung injuries attributable them.[21] In 2017 and 2018, the United States Food and Drug Administration reported a seventy-eight percent increase in students vaping, with approximately 3.6 million children using e-cigarettes.[22] According to the United States Centers for Disease Control and Prevention, there have been 2,807 reported hospitalizations or deaths linked to lung injuries caused by e-cigarettes and vaping products, with sixty-eight confirmed deaths.[23]

In response to these and other issues, Grove demanded to inspect the records and books of Juul Labs under the authority of Section 1601 of the California Corporate Code.[24] Section 1601 allows shareholders residing in California to demand inspection of the accounting books, records, and meeting minutes of any domestic corporation of California or any foreign corporation that maintains records or a principal executive office in California.[25] Grove indicated that if Juul Labs refused or failed to respond to his demand, he might seek a court order to compel production.[26]

Instead of complying with Grove's inspection demand, Juul Labs filed an action in the Chancery Court on January 6, 2020, for declaratory and injunctive relief against Grove.[27] Juul sought a declaration from the

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[20] *JUUL suspends flavoured e-cigarette sales to curb teen use*, BBC NEWS (Nov. 18, 2018), https://www.bbc.com/news/world-us-canada-46201263 [https://perma.cc/KPU2-DHCR].

[21] *Michigan becomes first state to ban flavoured e-cigarettes*, BBC NEWS (Sept. 4, 2019), https://www.bbc.com/news/world-us-canada-49585672 [https://perma.cc/YM7T-9526]; *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, CDC (Feb. 25, 2020 1:00 PM EST), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html [https://perma.cc/TU4S-5Z2Y].

[22] *Michigan becomes first state to ban flavoured e-cigarettes*, *supra* note 21.

[23] *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, *supra* note 21.

[24] Juul Labs, Inc. v. Grove, 238 A.3d 904, 908 (Del. Ch. 2020).

[25] CAL. CORP. CODE § 1601(a)(1) (West) ("The accounting books, records, and minutes of proceedings of the shareholders and the board and committees of the board of any domestic corporation, and of any foreign corporation keeping any records in this state or having its principal executive office in this state, or a true and accurate copy thereof if the original has been lost, destroyed, or is not normally physically located within this state shall be open to inspection at the corporation's principal office in this state, or if none, at the physical location for the corporation's registered agent for service of process in this state, upon the written demand on the corporation of any shareholder or holder of a voting trust certificate at any reasonable time during usual business hours, for a purpose reasonably related to the holder's interests as a shareholder or as the holder of a voting trust certificate.").

[26] *Grove*, 238 A.3d at 908.

[27] *Id.*

court that the corporation was not obligated to make its books and records available to Grove.[28] It also moved to enjoin Grove from using California law to circumvent the waiver included in his stock-purchase agreements.[29]

On February 10, 2020, Juul Labs and Grove each moved for a judgment on the pleadings in the Chancery Court.[30] On August 13, 2020, the court granted Juul Labs' motion for judgment on the pleadings, holding that, under the Internal Affairs Doctrine, the right of a shareholder to seek inspection of the books and records of a Delaware corporation exists only under Delaware law.[31] It further held that, in Grove's case, any action to enforce that right must be brought in a Delaware court because the forum-selection clause in the company's charter stipulated that Delaware courts had jurisdiction over any action governed by the Internal Affairs Doctrine.[32]

III. LEGAL BACKGROUND

In the United States, corporate law is primarily the province of the states.[33] Provisions of state corporation laws range from "trivial housekeeping to the fundamental fashioning of shareholder-manager relations."[34] They can specify something as small as requiring that a corporation's name be placed in its charter to something as significant as specifying the fiduciary duties of directors and the voting rights of shareholders.[35] Corporate laws can vary considerably from one state to another.[36] To account for these variations among corporate laws, states

[28] *Id.*

[29] *Id.*

[30] *See generally* Opening Brief in Support of Plaintiff's Motion for Judgment on the Pleadings, Juul Labs, Inc. v. Grove, 238 A.3d 904 (Del. Ch. 2020) (No. 2020-0005-JTL), 2020 WL 758687; *see also* Defendant's Memorandum of Law in Support of His Motion for Judgment on the Pleadings, Juul Labs, Inc. v. Grove, 238 A.3d 904 (Del. Ch. 2020) (No. 2020-0005-JTL), 2020 WL 758640.

[31] *Grove*, 238 A.3d at 920.

[32] *Id*. at 918–19. The Chancery Court explained in a footnote that, but for the forum-selection provision in the company's charter, "nothing would prevent a California court from hearing Grove's claim to inspect books and records under Delaware law." *Id.* at 919, n.13. Another issue addressed by the Chancery Court was whether the standard-form agreements signed by Grove waived his inspection rights under California law, i.e., Section 1601. *Id*. at 907. The court answered in the negative because either (1) the agreements only contemplated waiver of his rights under Delaware law, i.e., Section 220 or (2) the agreements were exclusive for a defined set of stockholders of which Grove was not a member of. *Id.* The court did not decide whether a stockholder can waive his inspection rights under Delaware law. *Id.* at 919.

[33] ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1 (1993).

[34] *Id.*

[35] *Id.*

[36] *The Internal Affairs Doctrine*, *supra* note 8.

largely apply the Internal Affairs Doctrine to ensure consistency and predictability in governing corporations that operate in multiple states.[37]

The Internal Affairs Doctrine is a court-made conflict-of-law policy which requires that disputes among the corporation, its directors, officers, and shareholders over the internal affairs of a corporation be governed by the laws of the state of incorporation.[38] While the policy is easy to recite, interpreting and applying it can be more difficult. Specifically, whether an affair should be categorized as internal or external may be open to debate.[39]

Subpart A presents the historical context under which the Internal Affairs Doctrine emerged. Subpart B then outlines the doctrine's modern justifications and rationales. Finally, Subparts C and D briefly discuss the application of the doctrine in the state of Missouri and the emergence of state outreach statutes that challenge the doctrine.

A. The History of the Internal Affairs Doctrine

The history of the Internal Affairs Doctrine and how it came to be is unclear.[40] This is partly due to the fact that adherence to the doctrine requires states to voluntarily give up their power to regulate foreign corporations using their own laws and instead apply the laws of the incorporating state.[41] If Missouri, or any other state, wishes to regulate a particular business activity or market, it is generally within its power to do so as a sovereign jurisdiction within the United States.[42] However, most states adhere willingly to the doctrine, and some have chosen to codify it.[43]

Prior to industrialization, choosing to incorporate in one state while operating in others was typically not an option.[44] Businesses generally operated locally at low volumes of production and exchange due to the technological limitations of the time and were primarily partnerships consisting of family members.[45] States granted charters to businesses through special acts of the legislature rather than through the simple

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[37] Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 36 (2006).

[38] *The Internal Affairs Doctrine*, *supra* note 8.

[39] Deborah A. DeMott, *Shareholder Deriv. Actions L. & Prac*. § 2:13 (2020–2021).

[40] Tung, *supra* note 37, at 35.

[41] *Id.* at 36–37.

[42] Alden v. Maine, 527 U.S. 706, 714 (1999) (recognizing that the Constitution preserves the sovereign status of the States).

[43] *The Internal Affairs Doctrine*, *supra* note 8, at 1480–81.

[44] Tung, *supra* note 37, at 44.

[45] *Id.* at 55. In 1830, the United States only had twenty-three miles of railroad track, and sources of energy were limited to humans, animals, wind, and water. *Id.*

modern day administrative process.[46] Businesses that operated in multiple states obtained a charter from each state.[47] States held a territorial monopoly over regulating businesses within their borders due to the localized nature of commerce in the pre-industrial era, and an exertion of power over foreign corporations would likely have been seen as an intrusion upon the other state's sovereignty.[48]

Spurred in part by improvements to transportation, communication, and energy production, industrialization brought both business growth and an increase in interstate commerce.[49] As interstate commerce and industrialization increased, states began to move away from special charters and adopt general corporate laws.[50]

In the late 1800s, New Jersey emerged as a pioneer in corporate law by breaking with the traditional territorial approach.[51] It sought to entice businesses to incorporate within it by helping out-of-state businesses file certificates of incorporation, provide an address for their principal offices, and provide an employee to serve as the business's local agent for service of process.[52] Corporations flocked to New Jersey and, rather than resist, most states modified their corporate laws to match New Jersey's.[53] Although it was within their power, states did not attempt to exclude or regulate New Jersey corporations, nor did the states prevent domestic corporations from being acquired.[54] Instead, states copied New Jersey corporate laws to "defend against the tide of their domestic corporations seeking new charters from New Jersey."[55] While New Jersey may have been first, Delaware ultimately won the battle for the most out-of-state incorporations.[56]

As interstate commerce increased, disputes over the internal affairs of corporations arose in courts outside the states of incorporation, and the Internal Affairs Doctrine emerged.[57] Typically, these disputes involved

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[46] *Id.* at 52, 55–56.

[47] *Id.*at 55–56. Early corporations were not exclusively profit-seeking, but were quasi-public agencies with a mixture of public and private funding. David McBride, *General Corporation Laws: History and Economics*, LAW & CONTEMP. PROBS. 3 (Winter 2011).

[48] Tung, *supra* note 37, at 56.

[49] *Id.* at 56–58.

[50] *Id.* at 60, 63.

[51] *Id.* at 74.

[52] *Id.* at 78–79. Early on, large trusts were the primary entities to reincorporate in New Jersey to avoid being attacked by attorneys general in their home states. *Id.* at 80.

[53] *Id.* at 80, 83.

[54] *Id.* at 82–83.

[55] *Id.*

[56] *Id.* at 37, 42.

[57] *Id.* at 57.

resident shareholders exerting their rights against foreign corporations in which they had invested.[58] The early decisions involving the internal affairs of corporations "echoed pre-industrial notions of states' sovereignty over their domestic corporations."[59] Courts generally found their jurisdictional limitations over foreign corporations to be self-evident and gave deference to the laws of the incorporating state.[60] They consistently noted that corporations owed their existence to their state of incorporation and, as such, only incorporating states possessed the power to regulate their corporations' internal affairs.[61] The New York legislature rejected the doctrine for a time.[62] Most states, however, did not, and the courts continued to think of corporations in territorial terms and as creations of their state of incorporation.[63] This deference and lack of resistance gave rise to an understanding among the states not to interfere with the internal affairs of one another's domestic corporations.[64]

B. The Justifications and Rationales for the Doctrine in its Modern Form

Over the years, scholars and courts have offered several rationales for the doctrine's existence and persistence.[65] Asserted rationales have rested on both non-constitutional and constitutional grounds.[66]

There are three main non-constitutional rationales put forth for the Internal Affairs Doctrine – the contractual justification, the consistency justification, and the state-interest justification.[67] The contractual justification views the Internal Affairs Doctrine as a choice of law principle that respects a corporation's decision to incorporate in a particular state by applying the laws of that state.[68] It posits that persons that were parties to the agreement to incorporate contractually chose the laws of the incorporating state by electing to form there, and the doctrine therefore dictates that the laws of the incorporating state govern for internal affairs.[69]

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[58] *Id.* at 65–66.

[59] *Id.* at 66.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 92–93.

[63] *Id.* at 92, 96.

[64] *Id.* at 68.

[65] *The Internal Affairs Doctrine*, *supra* note 8, at 1482.

[66] *Id.*

[67] *Id.* at 1483.

[68] *Id.*

[69] *Id.* at 1483–84. Under this theory, future shareholders are deemed to be parties to the original incorporation agreement constructively. *Id.* at 1483 n.27. Additionally, other persons, such as third parties suing in tort, are deemed to not be

The consistency justification holds that it is efficient to apply the laws of the incorporating state because it reduces uncertainty over which laws apply to disputes regarding the corporation's internal affairs.[70] Reducing uncertainty can theoretically reduce costs because the corporation will only have to comply with the corporate laws of its incorporating state and not the laws of each state it operates in.[71] Furthermore, proper compliance can reduce the costs associated with litigation.[72]

Finally, the state-interest justification holds that the incorporating state has a greater interest than other states in regulating the internal affairs of the corporation.[73] This rationale rests significantly upon the history of corporations and where their power is derived from.[74] Specifically, the law formerly considered the corporation to be a creature of the state and only recognized it in the incorporating state.[75] As a result, only the laws of the incorporating state could govern the corporation.[76]

In addition, courts and scholars have put forth constitutional explanations for the Internal Affairs Doctrine. The Delaware courts are the most ardent proponents of these explanations, one of which is the Commerce Clause.[77]

The Commerce Clause is a power enumerated to the United States Congress to regulate interstate commerce; however, the United States Supreme Court has interpreted it to also bar states from passing laws that discriminate against interstate commerce – the Dormant Commerce Clause.[78] On its face, eliminating the Internal Affairs Doctrine within a state would not be discriminatory because it would treat all corporations within a state uniformly regardless of whether they are domestic or foreign.[79] However, by subjecting corporations to inconsistent obligations from state to state, it could still discourage interstate commerce and thereby violate the Commerce Clause.[80] The United States Supreme Court

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parties to the original agreement and the law of the forum state governs because it is an external affair. *Id.*

[70] *Id.* at 1485–86.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 1488.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Vincent S.J. Buccola, *States' Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595, 639 (2016). The Due Process and Full Faith and Credit Causes are two other theories that will not be discussed in this Note.

[78] *Id.* at 641. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power…[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes….").

[79] Buccola, *supra* note 77, at 641–42.

[80] *Id.*

has never directly addressed the constitutional implications of the doctrine, but it indirectly addressed them in two 1980s cases involving the Dormant Commerce Clause.[81]

In *Edgar v. MITE Corp*., decided in 1982, the Court struck down an Illinois statute that required a tender offer to be registered with the Illinois Secretary of State if the target corporation maintained a certain level of contact with the State.[82] Illinois argued that the statute served a local interest by protecting resident shareholders and that the statute also regulated the internal affairs of companies incorporated in Illinois.[83] The Court recognized the Internal Affairs Doctrine as a conflict of law principle.[84] It then dismissed Illinois's internal affairs argument by stating that tender offers contemplate a transfer of shares to a third party, which does not implicate the internal affairs of the target company.[85] Furthermore, the Court noted that the statute also applied to foreign corporations whose principal place of business is outside of Illinois and that Illinois had no interest in regulating foreign corporations.[86] Ultimately, the Court decided the case on other grounds and held that the statute violated the Commerce Clause in that the statute imposed a substantial burden on interstate commerce that outweighed the local benefits.[87]

In *CTS Corp. v. Dynamics Corp. of America*, decided in 1987, the United States Supreme Court considered another tender offer statute in Indiana, which regulated the allocation of voting rights in Indiana corporations.[88] This time, the Court upheld the statute, finding that the effect it had on interstate commerce was justified by Indiana's interest in regulating shares in its domestic corporations and protecting shareholders.[89] The Court acknowledged the Internal Affairs Doctrine and stated that "[n]o principle of corporation law and practice is more firmly

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[81] *The Internal Affairs Doctrine: supra* note 8, at 1490; *see also* Edgar v. MITE Corp., 457 U.S. 624 (1982); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

[82] 457 U.S. at 626–27, 630.

[83] *Id.* at 644.

[84] *Id.* at 645 ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").

[85] *Id.*

[86] *Id.* at 645–46 ("The [Illinois statute] applies to corporations that are not incorporated in Illinois and have their principal place of business in other States. Illinois has no interest in regulating the internal affairs of foreign corporations.").

[87] *Id.* at 643.

[88] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 73–74 (1987).

[89] *Id.* at 94.

established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."[90] It continued, stating that "[a] State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs."[91] Furthermore, the Court cited cases in which it invalidated statutes that "may adversely affect interstate commerce by subjecting activities to inconsistent regulation."[92] The Court stated that the existence of the current market system, which facilitates ownership of corporations by shareholders in multiple states, depends upon the fact that a corporation is organized under and governed by the law of a single jurisdiction. [93] It noted that this jurisdiction is traditionally the state of incorporation except in the rarest of situations.[94]

While these two cases do not directly confront whether there are constitutional underpinnings of the Internal Affairs Doctrine, commentators have suggested that they hint at such a possibility.[95] *Edgar* came close in that the Court stated in dicta that Illinois had no interest in regulating a foreign corporation.[96] *CTS Corp.* articulated that the current state of affairs in interstate commerce depends upon corporations being governed by a single jurisdiction; however, it did not decide whether regulation of interstate commerce mandated it.[97]

Although the United States Supreme Court has not directly addressed the constitutional implications of the Internal Affairs Doctrine, the Supreme Court of Delaware did in 1987, shortly after the decision in *CTS Corp*.[98] In *McDermott Inc. v. Lewis*, the Supreme Court of Delaware decided that the corporate law of the country of Panama would govern the internal affairs of a Panamanian corporation that owned a Delaware

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[90] *Id.* at 89.

[91] *Id.* at 91.

[92] *Id.* at 88–89.

[93] *Id.* at 90 ("Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.").

[94] *Id.*

[95] *The Internal Affairs Doctrine*, *supra* note 8, at 1494; Buccola, *supra* note 77, at 642.

[96] Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982).

[97] *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90 (1987).

[98] *See* McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987).

subsidiary.[99] In making this decision, the court held that the Internal Affairs Doctrine is not only a conflict of law principle, but it is "also one of serious constitutional proportions—under due process, the commerce clause and the full faith and credit clause…."[100] The Delaware Supreme Court quoted *Edgar*, specifically the United States Supreme Court's statement that Illinois had no interest in regulating a foreign corporation.[101] It also quoted *CTS Corp.*, where the United States Supreme Court spoke of corporations traditionally being governed by the laws of the incorporating state except in the rarest of situations.[102] Although the Delaware Supreme Court implicitly acknowledged that the United States Supreme Court had not yet made an official decision on whether the doctrine is grounded in the Constitution, it nevertheless held that the doctrine is mandated by constitutional principles.[103] The Delaware Supreme Court reaffirmed this holding in subsequent cases.[104] Regardless of the arguable constitutional underpinnings, most states, including Missouri, choose to adhere to the Internal Affairs Doctrine.[105]

C. The Internal Affairs Doctrine in the State of Missouri

The Internal Affairs Doctrine is codified in Missouri law, which states that its corporate code "does not authorize [Missouri] to regulate the organization or internal affairs of a foreign corporation authorized to transact business in [Missouri]."[106] Missouri courts have interpreted this provision only once in the past thirty years.[107]

In *Yates v. Bridge Trading Co.*, the Missouri Court of Appeals for the Eastern District considered whether the Internal Affairs Doctrine precluded the choice of Missouri law by parties to a stock purchase agreement in a pseudo-foreign corporation.[108] The corporation at issue was incorporated in Delaware, but maintained its principal place of business in Missouri, and had most of its shareholders in Missouri.[109] The

[99] *Id.* at 209.

[100] *Id.* at 216.

[101] *Id.* at 217.

[102] *Id.*

[103] *Id.* at 217–18.

[104] *See* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1115 (Del. 2005); *see also* Salzberg v. Sciabacucchi, 227 A.3d 102, 135–36 (Del. 2020).

[105] 1 James D. Cox & Thomas L. Hazen, *Treatise on the Law of Corporations* § 2:13 (3d ed. 2020); 26 Philip G. Louis, Jr., *Mo. Prac. Business Organizations* § 29.14 (2d ed. 2021).

[106] MO. REV. STAT. § 351.582(3) (2016).

[107] Yates v. Bridge Trading Co., 844 S.W.2d 56, 61 (Mo. Ct. App. 1992).

[108] *Id.* at 62.

[109] *Id.*

court determined that the Internal Affairs Doctrine did not apply because the corporation was a pseudo-foreign corporation where the only contact it had with Delaware was the fact that it was incorporated there.[110] The court reached this conclusion for two reasons. First, as an issue of first impression in Missouri, it relied upon other jurisdictions that already addressed the question.[111] Specifically, the court cited precedent from California, New York, and Ohio that reached the same conclusion regarding pseudo-foreign corporations.[112] It noted that this precedent demonstrated an increasing willingness by courts and legislatures to deviate from the traditional rigidity of the doctrine and regulate foreign corporations that maintain certain levels of contacts with a forum state.[113] Secondly, the court determined that the risk of inconsistent obligations to the shareholders was low in this case.[114] *Yates* demonstrates that Missouri is willing to depart from a strict interpretation of the Internal Affairs Doctrine in particular situations. Other states, however, take a more active approach in challenging the doctrine.

D. State Outreach Statutes and Challenges to the Internal Affairs Doctrine

Though most states adhere to the Internal Affairs Doctrine, some choose to challenge it. New York and California enacted corporate outreach statutes that "impose their own…internal governance requirements upon foreign corporations having a specified level of contact with [them]."[115] California's outreach statute, Section 2115, provides that California's corporate code will apply to certain foreign corporations for specified internal governance matters.[116] The statute incorporates, by reference, other laws that cover issues such as election and removal of directors, a director's duty of care, voting requirements, and shareholder

[110] *Id.* at 62, 61 n.2 ("Psuedo-foreign corporations are organized under the laws of a state other than the forum state, but have essentially all of their contacts with the forum state.").

[111] *Id.* at 61.

[112] *Id.* at 61–62.

[113] *Id.* at 62.

[114] *Id.*

[115] Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism*, 84 N.Y.U. L. REV. 1149, 1161 (2009).

[116] *See* CAL. CORP. CODE § 2115(a) (West 2021) ("A foreign corporation…is subject to the [governance] requirements [referenced in this section] if: (1) The average of the property factor, the payroll factor, and the sales factor (as defined in Sections 25129, 25132, and 25134 of the Revenue and Taxation Code) with respect to it is more than 50 percent during its latest full income year and (2) more than one-half of its outstanding voting securities are held of record by persons having addresses in this state….").

inspection rights.[117] Other states, such as Louisiana and New Jersey, purposely refused to codify the doctrine into law even though their corporate law is shaped by the Model Business Corporation Act, which includes the doctrine.[118] This leaves the door open for the courts in those states to disregard the doctrine.[119] Also, states sometimes challenge the doctrine in the case of shareholder inspection rights.[120]

Inspection rights allow a shareholder to access the records of a corporation upon request.[121] This right originally developed at English common law in the 1700s to serve as a mechanism for shareholders to protect their economic interest in corporations.[122] Inspection rights were not absolute, and for the request to be proper, the shareholder needed to prove that the request was reasonable as to the time, place, and purpose.[123] Today, all states have some form of inspection rights codified into statute; however, a majority of jurisdictions hold that these statutes co-exist with the common law and do not abrogate it.[124] Some states, such as Missouri, only grant inspection rights to resident shareholders of domestic corporations.[125] Others, such as California, grant inspection rights to resident shareholders of either domestic or certain foreign corporations

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[117] Jacobs, *supra* note 115.

[118] *The Internal Affairs Doctrine*, *supra* note 8, at 1480–81.

[119] *Id.*

[120] DeMott, *supra* note 39.

[121] Robin Hui Huang & Randall S. Thomas, *The Law and Practice of Shareholder Inspection Rights: A Comparative Analysis of China and the United States*, 53 VAND. J. TRANSNAT'L L. 907, 909 (2020).

[122] Browning Jeffries, *Shareholder Access to Corporate Books and Records: The Abrogation Debate*, 59 DRAKE L. REV. 1087, 1100 (2011).

[123] *Id.*

[124] *Id.* at 1113–14 (2011); *see, e.g.*, State ex rel. Brown v. III Invs., Inc., 80 S.W.3d 855, 860 (Mo. Ct. App. 2002) (holding that Missouri's statutory right of inspection law did not abrogate the common law right of inspection because the statute lacked a clear intent to do so).

[125] *See* MO. REV. STAT. § 351.215(1) (2016) ("Each corporation shall keep correct and complete books and records of accounts…. Each shareholder may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the bylaws."); *see also* MO. REV. STAT. § 351.215(6) (2016) (defining corporation as any organization created under Missouri law and excluding foreign corporations).

under Section 1601.[126] Delaware codified its inspection law under Section 220 of the DGCL.[127]

Courts use several justifications for rejecting the Internal Affairs Doctrine in the case of shareholder inspection rights.[128] Some courts simply regard a shareholder's right to inspection as guaranteed by common law and allow for the inspection of a foreign corporation's books.[129] Other courts claim that a corporation impliedly accepts the conditions of local law by doing business in the state or argue that a foreign corporation does not have rights or privileges that are superior to domestic corporations.[130] Even the Chancery Court in *Grove* acknowledged that there is substantial case law that holds that the Internal Affairs Doctrine does not apply in cases of shareholder inspection rights.[131] The Restatement (Second) of Conflict of Laws notes in its comments that "[t]he right of a shareholder to inspect the books of a corporation poses special problems" and that the shareholder-inspection-rights law of a state can be applied to a foreign corporation conducting substantial business in the state.[132] The Restatement reasons that determining inspection rights differently in each state can be done practicably and "will not seriously undermine the policy favoring uniform treatment for all shareholders of a corporation."[133] The determination of whether shareholder inspection rights are an internal affair and whether the Internal Affairs Doctrine should be applied was a contested issue in *Grove*.[134]

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[126] *See* CAL. CORP. CODE § 1601(a)(1) (West 2021) ("The accounting books, records, and minutes of proceedings of the shareholders and the board and committees of the board of any domestic corporation, and of any foreign corporation keeping any records in this state or having its principal executive office in this state…physically located within this state shall be open to inspection at the corporation's principal office in this state, or if none, at the physical location for the corporation's registered agent for service of process in this state, upon the written demand on the corporation of any shareholder or holder of a voting trust certificate at any reasonable time during usual business hours, for a purpose reasonably related to the holder's interests as a shareholder or as the holder of a voting trust certificate").

[127] *See* DEL. CODE ANN. tit. 8, § 220(b) (West 2021) ("Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from: (1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and (2) A subsidiary's books and records….").

[128] DeMott, *supra* note 39.

[129] *Id.*

[130] *Id.*

[131] Juul Labs, Inc. v. Grove, 238 A.3d 904, 913 n.7 (Del. Ch. 2020).

[132] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 cmt. d (1971).

[133] *Id.*

[134] 238 A.3d at 913.

IV. INSTANT DECISION

In *Juul Labs, Inc. v. Grove*, the Chancery Court of Delaware held that, under the Internal Affairs Doctrine, the right of a shareholder to seek inspection of the books and records of a Delaware corporation exists only under Delaware law.[135] The court reached its decision by discussing the rationales for the doctrine, the constitutional concerns, the history of the doctrine with respect to shareholder inspection rights, and by comparing the relevant corporate law of Delaware and California.[136]

A. Constitutional Concerns and The Rationales for the Doctrine

The Chancery Court began its analysis by stating the basic premise of the Internal Affairs Doctrine and the rationale for it.[137] The court quoted *Edgar* and *CTS Corp.*, concluding that a state's authority to regulate a corporation is well established.[138] It continued, stating that the doctrine holds that only one state should have the authority to govern a corporation's internal affairs to avoid conflicting demands on it.[139] Citing other precedent by the United States Supreme Court, the Chancery Court stated that corporations are creatures of state law, and investors commit their funds to corporate directors with the understanding that state law will generally govern internal affairs.[140]

The court stated that an important policy served by the doctrine "is to ensure the uniform treatment of directors, officers, and stockholders across jurisdictions."[141] The court declared that a state has an interest in promoting stable relationships among those involved in the corporation in addition to ensuring that shareholders have an effective voice in the affairs of the corporation.[142] Citing a comment in the Restatement (Second) of Conflict of Laws, the court articulated that this policy is achieved only when a corporation is governed by a single state's law.[143] The court

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[135] *Id.* at 920. The Chancery Court also decided two other main issues: (1) whether the plaintiff waived his inspection rights under California law by signing several standard form agreements that included waiver language for inspection rights under Delaware law and (2) whether the plaintiff could bring an action in a court outside of Delaware when the certificate of incorporation included a forum selection clause mandating a Delaware jurisdiction over internal affairs disputes. *Id.* at 907. The court answered in the negative for both issues. *Id.*

[136] *Id.* at 913–18.

[137] *Id.* at 913–14.

[138] *Id.* at 914.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 915.

[142] *Id.* at 915–16.

[143] *Id.* at 915.

concluded that the Internal Affairs Doctrine prevents application of inconsistent legal standards to corporations and provides certainty and predictability–all of which protect the expectations of parties involved with the corporation.[144]

The Chancery Court also briefly discussed the constitutional concerns related to the Internal Affairs Doctrine.[145] Specifically, it stated that, among other constitutional underpinnings, the Commerce Clause holds that a state has no interest in regulating the internal affairs of a foreign corporation.[146]

B. The Doctrine and Shareholder Inspection Rights

The Chancery Court then turned to the issue of what matters are covered by the doctrine.[147] The court broadly stated that the doctrine applies to matters pertaining to the relationship between the corporation and its officers, directors, and shareholders and does not pertain to matters where the rights of third parties outside the corporation are at issue.[148] The court specifically discussed the issue of shareholder inspection rights and stated that they are "a core matter of internal corporate affairs."[149] The court cited precedent of the Supreme Court of Delaware stating that a shareholder's ability to inspect books and records is an important piece of the corporate governance landscape.[150] It noted that the Supreme Court of Delaware has, in interpreting Delaware's shareholder inspection law, struck a balance between the interests of shareholders in obtaining information and the right of corporations to be free of unwarranted and burdensome requests.[151]

C. Comparison of Delaware and California Corporate Law

Although the Chancery Court already concluded that inspection rights are an internal affair, it continued its discussion by comparing the inspection laws of Delaware and California.[152] First, the court compared Section 1601 of the California Corporations Code to Section 220 of the DGCL.[153] The court noted that, although the laws generally resemble each

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[144] *Id.*

[145] *Id.* at 914.

[146] *Id.* Other constitutional concerns raised by the Chancery Court included the Due Process Clause and the Full Faith and Credit Clause. *Id.*

[147] *Id.* at 914–15.

[148] *Id.* at 914.

[149] *Id.* at 915.

[150] *Id.*

[151] *Id.*

[152] *Id.* at 916.

[153] *Id.*

other, California grants shareholders broader rights to inspect a corporation's subsidiaries.[154] Furthermore, the court declared, without explanation, that the judicial interpretation of each statute could be different.[155]

Then the court compared the other inspection-related laws of California to those of Delaware.[156] The court noted that California law generally differs from Delaware law in that shareholders and directors have certain absolute inspection rights under California law whereas those rights are rebuttable by the corporation under Delaware law.[157] Specifically, under California law, a shareholder has an absolute right to obtain a shareholder list regardless of purpose, whereas under Delaware law, there is only a rebuttable presumption that the shareholder has a proper purpose.[158] Similarly, under California law, directors have an absolute right to request an inspection of the corporation's books, records, and documents of every kind whereas, under Delaware law, there is a rebuttable presumption that the director has a proper purpose.[159] Under Delaware law, the corporation can make a showing of an improper purpose to defeat the shareholder's or the director's inspection request.[160]

The court concluded that, while the California inspection laws are not radically different from Delaware's, they are also not identical.[161] It stated that California's balancing of interests between the corporation and its shareholders differs from that of Delaware and that the inspection rights granted under California law are applicable to both domestic and foreign corporations.[162] Furthermore, the court acknowledged that California is not alone in granting inspection rights to shareholders for foreign corporations.[163] The court expressed concern for this fact in that, if other states can define shareholder inspection rights, "then a Delaware corporation could be subjected to different provisions and standards in jurisdictions around the country."[164]

Ultimately, the Chancery Court concluded that the United States Supreme Court and Supreme Court of Delaware precedent dictated that inspection rights are an internal affair.[165] As a result, the Internal Affairs

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[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 916–17.
[158] *Id.*
[159] *Id.* at 917.
[160] *Id.* at 916–17.
[161] *Id.* at 917.
[162] *Id.* at 917–18.
[163] *Id.*
[164] *Id.* at 918.
[165] *Id.*

Doctrine prevented Grove from demanding inspection using the California inspection laws.[166]

V. COMMENT

The impact of the decision in *Grove* is significant considering Delaware's prominence in the field of corporate law. More than half of all publicly held corporations are incorporated there, as are over sixty percent of Fortune 500 companies.[167] Of all fifty states, Delaware has the greatest number of incorporated companies whose principal place of business is located in in another state.[168] The decision exemplifies Delaware's continued strong support of the Internal Affairs Doctrine and the competing interests of the states in regulating corporations. Nevertheless, the strong stance taken by the Chancery Court could have implications beyond the issue of shareholder inspection rights. Specifically, disputes could arise among states seeking to enforce their own corporate laws because it is unclear whether a state is required by the Constitution to apply the doctrine or if a state can disregard it. In addition, newer state laws mandating diversity on boards of directors could run afoul of the doctrine.

A. Delaware's Strong Stance on the Internal Affairs Doctrine

In *Grove*, the Chancery Court took a strong stance in support of the Internal Affairs Doctrine when it disregarded substantial contrary authority in reaching its decision.[169] In a footnote in the *Grove* opinion, the Chancery Court engaged in a healthy discussion of existing authority concerning inspection rights and application of the doctrine.[170] It acknowledged that a "substantial volume of authority" from numerous jurisdictions holds that the Internal Affairs Doctrine does not preclude enforcement of the inspection laws of a forum state upon a foreign corporation.[171] The court recognized conflicting precedent and cited several secondary sources that summarized how the doctrine applies to inspection rights.[172] The court conceded that its decision does not parse through the competing authorities. Rather, the court argued that a larger

[166] *Id.*

[167] *Facts and Myths*, DELAWARE.GOV, https://corplaw.delaware.gov/facts-and-myths/ [https://perma.cc/AM6X-RZEQ] (last visited Feb. 15, 2021).

[168] *Id.*

[169] 238 A.3d at 913 n.7, 918.

[170] *Id.* at 913 n.7.

[171] *Id.*

[172] *Id.*

inquiry is needed.[173] This inquiry would "require tracing the development of the internal affairs doctrine from its origins as a limitation on the authority of a non-chartering jurisdiction, to a discretionary abstention doctrine, to its contemporary manifestation as a choice-of-law principle."[174] Despite the lack of consistency among authorities and the need for a larger inquiry, the court held that shareholder inspection rights are a core matter of internal corporate affairs and that the doctrine dictates that only the laws of the state of incorporation apply.[175]

The reason for Delaware's strong stance in support of the Internal Affairs Doctrine becomes clearer when two significant benefits it receives are considered. First, Delaware assesses franchise taxes and filing fees from companies incorporated within it.[176] Due to the state's relatively small size, these taxes and fees can make up a large percentage of its annual tax revenue – anywhere from sixteen to twenty-five percent.[177] Second, Delaware, and the legal system it has crafted, maintains a certain level of prestige and power by having a large number of corporations registered there.[178] Specifically, Delaware-based corporate attorneys and the Delaware courts are influential in shaping the state's corporate law.[179] Delaware corporate attorneys are engaged as co-counsel by out-of-state attorneys litigating in Delaware courts and the Supreme Court of Delaware is sometimes regarded as the unofficial "highest court" of corporate law.[180] Challenges to the Internal Affairs Doctrine and the imposition of state specific corporate laws upon Delaware corporations reduce the need for corporations to be incorporated in Delaware, potentially reducing both the state's tax base and prestige.[181]

Delaware's strong stance is arguably understandable; however, it may be slightly alarmist in reality. Allowing an exception to the doctrine for inspection rights is not a new idea, as evidenced by the substantial

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[173] *Id.*

[174] *Id.*

[175] *Id.* at 913, 915.

[176] Stevelman, *supra* note 5, at 67.

[177] *Id.*

[178] *See generally id.* (discussing Delaware's monetary and nonmonetary stakes in preserving its position in the corporate law realm).

[179] *Id.* at 69, 71.

[180] *Id.* at 69–71.

[181] *See id.* at 60 ("Delaware's preeminence in corporate law is vitally connected to the internal affairs doctrine (IAD). Under the IAD, incorporation effectuates a choice of corporate law that is binding on the corporation and its directors, officers, and controlling shareholders. Even if a Delaware-incorporated company, its managers, or controlling shareholders become defendants in out-of-state corporate lawsuits, Delaware's corporate statutes and fiduciary tenets will still govern. The IAD makes choice of corporate law durable, which is relevant to decision making about chartering, of course").

authority that runs contrary to the *Grove* opinion.[182] The Chancery Court noted that California is not alone in granting its residents the right to inspect the books of foreign corporations, and it conceded that the inspection laws of California and Delaware are not radically different.[183] The court acknowledged that the main difference between California's Section 1601 and Delaware's Section 220 was that California provided broader rights to shareholders for inspection of subsidiaries.[184] However, the court expressed concern about these differences and in subjecting Delaware corporations to different inspection standards around the country.[185] Is Delaware's interest in regulating internal affairs so great that it overrides the competing interests of California in regulating a corporation with its principal headquarters in California? Delaware's interest should not outweigh the considerable contrary authority or California's substantial interest in regulating corporations which, for all intents and purposes, principally reside within its borders. Such a corporation should be aware of and be able to adhere to the inspection laws of the state in which it resides. Conveniently, Delaware's interest in protecting its corporations also happens to protect the revenues and prestige it receives by being the top forum choice for incorporating companies.

B. Competing Interests of the States

The Chancery Court mentioned an incorporating state's interest in regulating a corporation.[186] However, that is not the only interest at play. The court quoted comment e of Section 302 of the Restatement (Second) of Conflict of Laws to support its argument, which states that the "[u]niform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law.".[187] In a footnote, the court also mentioned Section 304 of the Restatement which states that the law of the incorporating state should generally "determine the right of a shareholder to participate in the administration of the affairs of the corporation."[188] Unmentioned by the court is comment d of Section 304 which cuts against the court's holding.[189] It states that "[t]he right of a shareholder to inspect the books of a corporation poses

[182] Juul Labs, Inc. v. Grove, 238 A.3d 904, 913 n.7 (Del. Ch. 2020).
[183] *Id.* at 917–18.
[184] *Id.* at 916.
[185] *Id.* at 918.
[186] *Id.* at 915.
[187] *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971)).
[188] *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971)).
[189] *Id.* at 915–16.

special problems," and inspection rights laws of the forum state can be applied to foreign corporations conducting substantial business in the state.[190] The Restatement recognizes what the Chancery Court tries to downplay, the existence of substantial contrary authority and the interest California has in regulating its markets and protecting resident shareholders.[191]

As the largest state in both population and economy, California has a significant interest in regulating the internal affairs of "foreign" corporations.[192] The size of California's economy rivals that of independent nations.[193] As a separate country, it would be the fifth largest in the world, with a gross domestic product ("GDP") of $3.1 trillion dollars – fifteen percent of the economy of the United States.[194] There are 1,210 publicly held companies principally based in California, but only 112 of them are incorporated there.[195] In 2020, fifty-three companies on the Fortune 500 were principally based in California.[196] Many of these corporations, such as Google, Intel, and Walt Disney Co., are Delaware corporations headquartered in California.[197] California has a significant interest in regulating these corporations that reside primarily in California but are incorporated in Delaware – a state that by comparison has a GDP of seventy-six billion dollars.[198] In addition to California's interest as a state, a California resident shareholder probably expects to be able to invoke California law in a California court against a corporation with California headquarters. In his filing in opposition to Juul's motion for judgment on the pleadings, Grove stated that he, as a California resident,

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[190] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 cmt. d (1971).

[191] *Id.*

[192] Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, UNITED STATES CENSUS BUREAU (April 26, 2021), https://www.census.gov/library/stories/2021/04/2020-census-data-release.html [https://perma.cc/G2NS-U8SH].

[193] *California*, FORBES, https://www.forbes.com/places/ca/?sh=34db69763fef [https://perma.cc/6VFM-7KMV] (last visited Apr. 5, 2021).

[194] *Id.*

[195] Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2112 (2018).

[196] *Fortune 500*, *supra* note 3.

[197] *Alphabet Inc.*, SEC, https://www.sec.gov/edgar/browse/?CIK=1652044&owner=exclude [https://perma.cc/A947-B9Z4] (last visited Apr. 5, 2021); *Intel Corp*, SEC, https://www.sec.gov/edgar/browse/?CIK=50863&owner=exclude [https://perma.cc/8HHR-FTT9] (last visited Apr. 5, 2021); *Walt Disney Co*, SEC, https://www.sec.gov/edgar/browse/?CIK=1744489&owner=exclude [https://perma.cc/9M8W-23PJ] (last visited Apr. 5, 2021).

[198] *Delaware*, FORBES, https://www.forbes.com/places/de/?sh=538f3d8a7599 [https://perma.cc/VB6L-EXF6] (last visited Apr. 5, 2021).

chose to "avail himself of his rights under California law" in a California court.[199]

C. Implications Beyond Shareholder Inspection Rights

The decision in *Grove* concerned shareholder inspection rights.[200] However, Delaware's strong support of the Internal Affairs Doctrine could have far-reaching implications. Delaware's stance could lead to more conflict among the states over corporate governance and bleed over into an emerging area of law mandating diversity on boards of directors.

Recently, California enacted new corporate governance laws mandating diversity on the boards of directors for certain corporations doing business in California.[201] In 2018, California mandated gender diversity.[202] Section 301.3 requires that any domestic or foreign publicly held corporation with a principal place of business in California needed to have a minimum number of female directors by the 2021 calendar year.[203] Then in 2020, California enacted section 301.4, requiring that any publicly held domestic or foreign corporation whose principal executive offices reside in California need to have a minimum number of directors from underrepresented communities by the end of 2022.[204] Commentators

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[199] *See* Defendant's Opposition to Plaintiff's Motion for Judgment On the Pleadings at 9–10, Juul Labs, Inc. v. Grove, 238 A.3d 904 (Del. Ch. 2020) (No. 2020-0005-JTL), 2020 WL 1076016, at 9–10.

[200] *See generally* 238 A.3d 904.

[201] David Bell et. al., *New Law Requires Diversity on Boards of California-Based Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 10, 2020), https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/ [https://perma.cc/H2RC-SLGE].

[202] *Id.*

[203] CAL. CORP. CODE § 301.3 (West 2021) ("(a) No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one female director on its board….(b) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices…are located in California shall comply with the following: (1) If its number of directors is six or more, the corporation shall have a minimum of three female directors. (2) If its number of directors is five, the corporation shall have a minimum of two female directors. (3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.").

[204] CAL. CORP. CODE § 301.4 (West 2021) ("(a) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one director from an underrepresented community on its board….(b) No later than the close of the 2022 calendar year, a publicly held domestic or foreign corporation whose principal executive offices…are located in California shall comply with the following: (1) If its number of directors is nine or

expect these statutes to be challenged on various constitutional and other grounds.[205] The Internal Affairs Doctrine is thought to be one of the grounds on which plaintiffs will challenge the diversity statutes.[206]

No Delaware courts have addressed the diversity statutes. However, it is likely that Delaware will invoke the Internal Affairs Doctrine and refuse to enforce them, as it has with other corporate governance laws of foreign states.[207] For example, the Supreme Court of Delaware in a prior case articulated that a shareholder's right to vote falls squarely within the doctrine when confronted with a California statute that attempted to regulate aspects of the internal governance of a Delaware corporation operating within California. [208] Delaware, in order to maintain its dominance, certainly has an interest in preventing California and other states from regulating board composition. Businesses based in California would have less incentive to incorporate in Delaware if California law still applied.[209] Furthermore, California is not alone in attempting to regulate board composition. New Jersey, Massachusetts, and Illinois are also considering similar diversity legislation which may motivate Delaware to assert the doctrine to counter this movement.[210] However, there is disagreement among scholars as to whether the diversity statutes are an internal affair between shareholders and the corporation or an external affair between the corporation and the public.[211] Only time will tell. Conflicts and disagreements over the Internal Affairs Doctrine are likely to continue until the United States Supreme Court finally addresses the bases for it.

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more, the corporation shall have a minimum of three directors from underrepresented communities. (2) If its number of directors is more than four but fewer than nine, the corporation shall have a minimum of two directors from underrepresented communities. (3) If its number of directors is four or fewer, the corporation shall have a minimum of one director from an underrepresented community.").

[205] Bell et. al., *supra* note 201.

[206] *Id.*; Mohsen Manesh, *The Contested Edges of Internal Affairs*, THE CLS BLUE SKY BLOG (Sept. 23, 2019), https://clsbluesky.law.columbia.edu/2019/09/23/the-contested-edges-of-internal-affairs/ [https://perma.cc/RZ4V-CRZY].

[207] Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 280 (2020).

[208] VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1115 (Del. 2005).

[209] Manesh, *supra* note 207.

[210] *Id.* at 306.

[211] *Id.* at 299–301.

VI. CONCLUSION

In *Grove* the Delaware Court of Chancery reaffirmed its adherence to the Internal Affairs Doctrine in holding that only Delaware law will govern shareholder inspection rights for a Delaware corporation.[212] In doing so it reaffirmed a broad interpretation of the Internal Affairs Doctrine that serves that state's own interests over the significant interests of other states. The Chancery Court expressed concern about subjecting its corporations to inconsistent obligations in other states and spoke of fairness, predictability, and promoting commerce. However, the court overlooked the significant monetary and personal stake Delaware has in preserving the doctrine. Specifically, Delaware receives substantial revenues from companies incorporating within the state and maintains a high level of prestige in the development of corporate law. The Chancery Court's interpretation is based upon questionable legal bases that could tee up further controversy in the future. Beyond shareholder inspection rights, these controversies could impact other important areas in which states seek to challenge the doctrine such as diversity statutes.

[212] Juul Labs, Inc. v. Grove, 238 A.3d 904, 913–18 (Del. Ch. 2020).