

The Brussels Effect and the Extraterritoriality of Delaware Corporate Law

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Existing Frameworks for Policing “Extraterritorial” Corporate Lawbreaking

- Existing frameworks:
 - Alien Tort Statute;
 - Soft law & CSR;
 - ESG



Extraterritorial Corporate Governance

- Violations of “positive law” can trigger viable fiduciary duty claims against directors and officers as a matter of Delaware corporate law.
- Oversight Failure: *Caremark*
- Disobedience: Bad Faith



Extraterritorial Corporate Governance

- Sustained violations of non-American law standing alone can trigger viable fiduciary duty claims against directors and officers as a matter of American corporate law.



Positive law = “enacted law—the codes, statutes, and regulations that are applied and enforced in the courts.”
Freedman v. Adams, No. CIV.A. 4199-VCN, 2012 WL 1345638, at *11 (Del. Ch. Mar. 30, 2012).

Extraterritorial Corporate Governance

Flores v. S. Peru Copper Corp., 253 F.
Supp. 2d 510, 512–13 (S.D.N.Y. 2002)



Extraterritorial Corporate Governance

Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).



The European Commission's Directive on Corporate Sustainability Due Diligence



Brussels x Delaware



European Subsidiaries of Starbucks

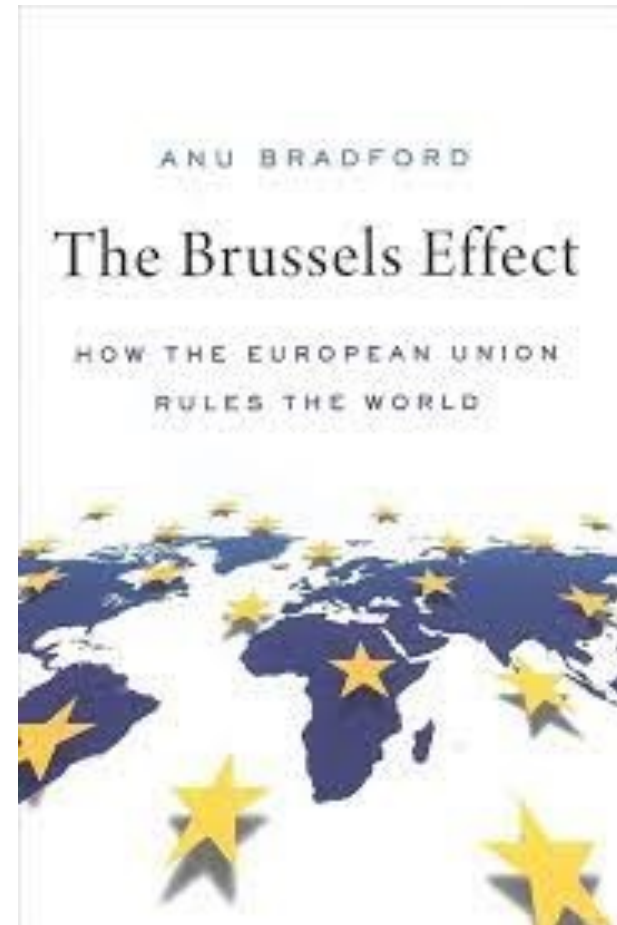
- Emerald City C.V. (Netherlands)
- Starbucks Coffee France S.A.S. (France)
- Starbucks Coffee Deutschland GmbH (Germany)

Brussels x Delaware

Over 66 percent of Fortune 500 companies are incorporated in Delaware.



The Brussels Effect



The Brussels Effect x International Law



Anu Bradford, *The Brussels Effect* 73 (OUP 2020)
("There are many examples of where the EU has successfully transmitted its rules to foreign jurisdictions via international organizations.")

The Brussels Effect x International Law



Convention on
Biological Diversity



Stockholm Convention
on persistent organic
pollutants (POPs)

United Nations



Convention on the
Rights of the Child



The Brussels Effect x American Corporate Law



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Corporate
Governance Law

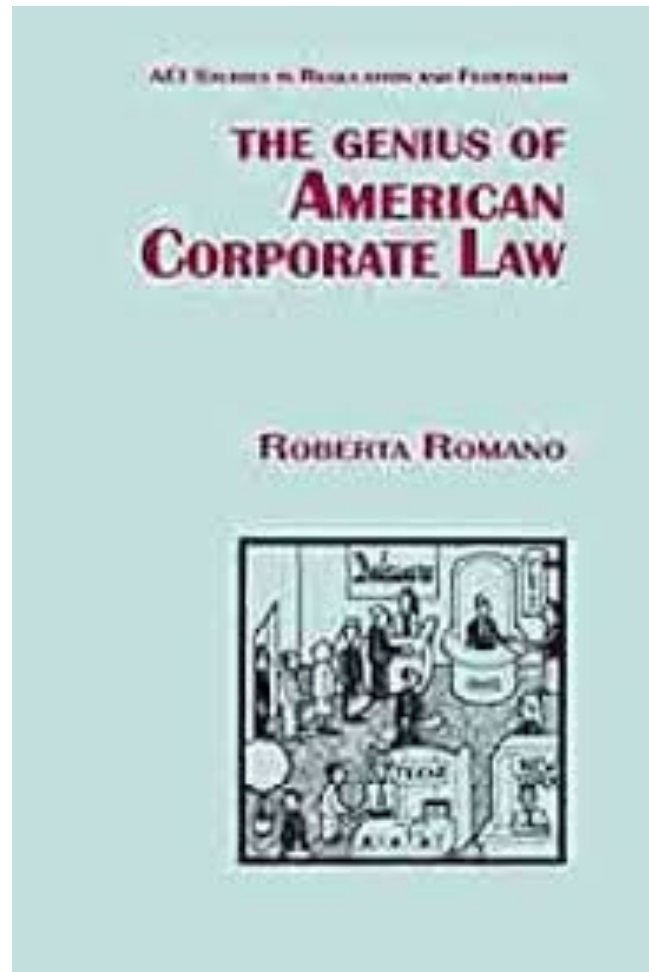
Washington-
made

Delaware-made

Federal

Delaware

The Dominant Academic Debate



The Yale Law Journal

Volume 83, Number 4, March 1974

Federalism and Corporate Law:
Reflections Upon Delaware

William L. Cary[†]

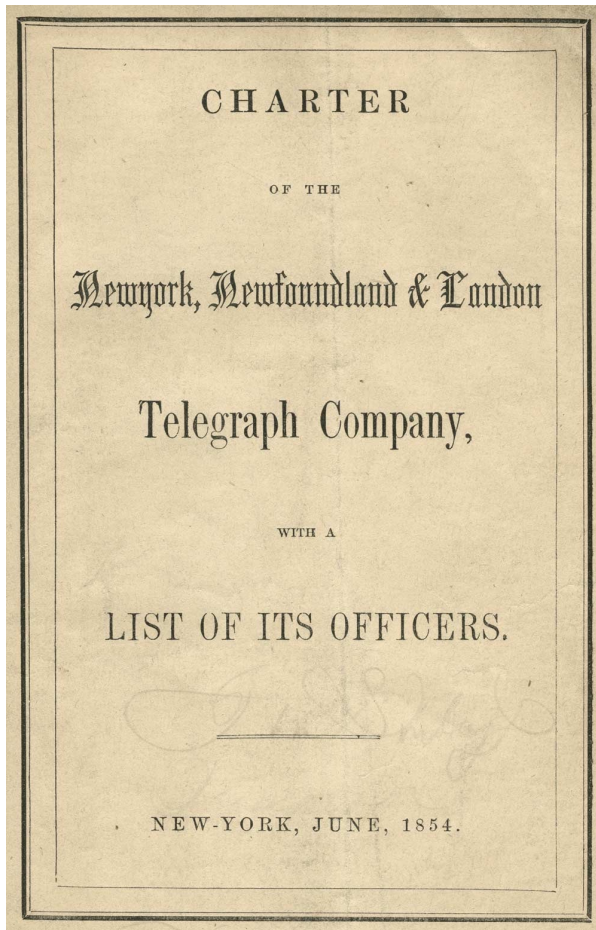
Should Corporate Law Even Police Corporate Lawbreaking?



Corporate “managers not only may but also should violate the rules when it is profitable to do so.”

Frank H. Easterbrook & Daniel R. Fischel, Antitrust Suits by Targets of Tender Offers, 80 Michigan Law Review 1155, 1177 n.57 (1980).

Should Corporate Law Even Police Corporate Lawbreaking?



The New Concession Theory: Large corporations are parasitic on the law and the administrative capacity of modern states for their very existence.

William J. Moon, *Beyond Profit Motives*, 122 Michigan Law Review (forthcoming 2024)

Future Research

- Corporate purpose
- Corporate groups/subsidiaries
- Conflicting legal obligations
- International law and corporations