

Because firms are diverse and subject to a variety of accountability mechanisms, including product markets, managerial labor markets, external audits, and the market for corporate control, firms ought to be allowed to adjust the board to fit their particular needs.<sup>80</sup>

Delaware Chancellors William Chandler and Leo Strine have also cautioned against boards where the CEO is the only inside director.<sup>81</sup> In addition to doubting the ability of the independent board to control managers, they noted that it might be difficult to hold non-director officers liable in a Delaware court for breaches of fiduciary duties.<sup>82</sup>

Supermajority independent boards have fared no better among scholars receptive to regulatory interventions in corporate governance. Professor Donald Langevoort has cautioned that outsiders on the board are likely to focus excessively on monitoring management.<sup>83</sup> Since management also sits on the board, the monitoring focus causes friction among board members.<sup>84</sup> This is problematic because boards are also tasked with setting strategy and advising management on acquisitions. Boards where insiders and outsiders can work cooperatively on those tasks add value to the company, while supermajority independent boards increase unproductive discord on the board.<sup>85</sup> Similarly, Professor Jill Fisch has argued that managing is an important board function and that too many outsiders on the board detract from that function.<sup>86</sup> Finally, Professor Hillary Sale has observed that independent boards of directors have failed to prevent corporate crises and scandals.<sup>87</sup> The failure of corporate self-regulation hurt shareholders and

80. See Bainbridge, *supra* note 79, at 1065–66; see also Adam J. Epstein, *The Broken Small-Cap Market Undermines the Recovery*, BLOOMBERG BUSINESSWEEK (Mar. 11, 2013), <http://www.businessweek.com/articles/2013-03-11/the-broken-small-cap-market-undermines-the-recovery> (“One-size-fits-all corporate governance doesn’t work because small public companies have a fraction of the resources of their larger counterparts.”).

81. See William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1002 & n.119 (2003).

82. See *id.* at 1003–04. The reason is that, absent some act in Delaware, its courts might not have personal jurisdiction over remote officers. The Chancellors propose an amendment to the Delaware Code presuming the consent of top officers to service of process in Delaware. See *id.*

83. See Langevoort, *supra* note 58, at 801.

84. See *id.* at 799–80.

85. See *id.* at 799; see also Faley et al., *supra* note 5, at 160–61 (suggesting that intense independent monitoring negatively affects corporate productivity).

86. See Fisch, *supra* note 58, at 267–68.

87. See Hillary A. Sale, *The New “Public” Corporation*, 74 LAW & CONTEMP. PROBS. 137, 147–48 (2011).