

LOCAL FIRM GOVERNANCE

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Since the turn of the millennium, diverse cities—large and small, red and blue—have undertaken initiatives aimed at the governance of firms. These novel initiatives aim to constrain executive compensation, require board diversity, promote stakeholder governance, support the establishment of worker cooperatives, and beyond. These developments mean we must add localities to the conventional framework of firm governance. As that framework has been traditionally conceived, entities and their governance are based primarily in state law, which is supplemented by federal law, the law of foreign jurisdictions, and the rules of self-regulatory bodies and professional organizations. Within this complex and multidimensional tapestry, there has been little meaningful role for local government—until now. Localities have seized their formal and informal power to push through the margins of how firms are formed and governed.

This Article constitutes the only substantial treatment of firm governance by localities. This is despite localities' vast number, financial influence, and increasing political power. It surfaces and explores local initiatives and laws that directly affect relationships among firm insiders and other constituents. Because these issues concern classic issues of firm governance, I call these local initiatives "local firm governance." This paper also highlights theoretical implications for questions of organizational law, local government law, and economic geography. In what ways has one creature of the state attempted to influence another, despite the existing system of firm governance and inherent limitations upon localities' authority? What new issues and possibilities emerge in organizational law and local government law as a result?

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INTRODUCTION

The governance of firms in the United States has historically been shaped by state and more recently federal law. Yet in recent years, a growing number of ambitious municipalities have begun to test the limits of conventional firm governance. Through these new initiatives and laws, local governments have used their legal authority to promote: (1) board diversity mandates for organizations receiving funding from cities;¹ (2) businesses organized as worker cooperatives (which are businesses owned and controlled by their workers) or forms of stakeholder governance;² (3) the formation of private entities to manage community facilities, open spaces, and infrastructure;³ (4) limitations on executive compensation;⁴ (5) stakeholder engagement;⁵ and (6) exceptions to firms' limited liability.⁶ This Article is the first to surface and explore the emergence of these local initiatives that seek to directly affect relationships among firm insiders and stakeholders. These issues are well within the sphere of "firm governance," which traditionally encompasses the core issues of organizational law—(1) the formation and structure of legal entities and (2) the relationships among the constituents involved in the entity (particularly, in the corporation, investors, managers, and creditors), as well as the economic and institutional forces that shape these relationships (as forces like hedge funds, proxy advisors, or gadflies affect the governance of public companies).⁷ Because these local initiatives involve classic issues of firm governance, I argue that they constitute a form of "local firm governance" that merits close examination.⁸ I use this definition of firm governance—and do not limit my concern to only corporate governance, and traditional corporate governance instruments and institutions—in this Article for several reasons. Among other reasons, novel patterns about firm governance emerge when entities other than corporations are included in analysis of firm governance. In addition, governance instruments and institutions, beyond those used exclusively within corporate governance, lend credibility to the concept of firm governance.

This Article fills a gap in the scholarly literature by documenting and analyzing this emerging body of local initiatives, which I call local firm governance. Most scholarship that has examined jurisdictional competition in corporate law—which is driven at least in part by varying firm governance in

¹ See *infra* Part II.A.

² See *infra* Part II.B.

³ See *infra* Part II.C.1.

⁴ See *infra* Part II.C.2.

⁵ See *infra* Part II.C.3.

⁶ See *infra* Part II.C.4.

⁷ See *infra* Part I.B.

⁸ In some cases, local firm governance may also arguably comprise "local corporate law"—as in, law from state acting qua state (not only from or with unconnected organizations or private individuals), in the form of duly passed ordinances, regulations issued by authorized agencies, and so on that are functional equivalents to corporate law.

different jurisdictions—has focused primarily on state-federal and state-state jurisdictional competition.⁹ Limited discourse about jurisdictional competition in corporate law has recently extended beyond state and federal government to include stock exchanges¹⁰ and other sovereign nations.¹¹ But scholars have generally neglected to account for the influence of localities upon firm governance.¹² Similarly, few scholars specializing in local government law or economic geography have investigated firm governance and its interaction with local legal frameworks.¹³ This is despite cities' increasing power in our federalist system,¹⁴ their well-demonstrated, increased interest in regulating at the local level in many other areas of law,¹⁵ and the historical role of cities in

⁹ See generally Mark J. Roe, *Delaware's Competition*, 177 HARV. L. REV. 588 (2003); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987).

¹⁰ See Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation*, 38 WAKE FOREST L. REV. 961 (2003).

¹¹ See William Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403 (2020); Chris Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067 (2008).

¹² Limited research has tangentially examined the role of stakeholder communities in corporate law, though not cities specifically. See, e.g., Symposium, *Corporations and Their Communities*, 58 CASE W. RES. L. REV. 1017 (2008); *21st Annual Business Law Fall Forum, Innovating Corporate Social Responsibility: From the Local to the Global*, 21 LEWIS & CLARK L. REV. 277 (2017) (illustrating symposia considering the relationship between corporations and local communities). Some tangentially related research at the intersection of local government law and corporate law takes as its subject the local government as an entity. See e.g., Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565 (2018); Conor Clarke & Henry Hansmann, *Special Purpose Governments*, 92 U. CHI. L. REV. (forthcoming 2025).

¹³ Priya S. Gupta, *Entwined Futures of Financialisation and Cities*, 43 CAMBRIDGE J. ECON. 1123, 1123 (2019) (“While the efforts of national and transnational law to regulate the financial sector have been studied, there has been far less focus on local governments. Local governments, however, play a crucial role in how financial capitalism takes hold through their regulation of real estate and urban space . . .”). Professor Richard C. Schragger has explored how local governments attempt to regulate capitalism in *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 483 (2009). Professor Felipe Ford Cole has illuminated the way in which Dillon’s Rule designed private capital, rather than states, to fiscally discipline cities in *Unshackling Cities*, 90 U. CHI. L. REV. 1365 (2023). Professors Max Schanzenbach and Nadav Shoked have compared the disparate fiduciary obligations of municipal corporations under “public” local government law and private business entities under organizational law. *Supra* note 12. Relatedly, some scholars have analyzed the similarities and differences between homeowners’ associations, a common player in local legal frameworks, and business corporations. See, e.g., Nadav Shoked, *Forget the Pink Flamingos: The Mishandling of Common-Interest-Community Conflicts*, 74 ALA. L. REV. 821 (2023); Saige Culbertson, *Your HOA Does Not Work for You: Why HOAs Are Not Agents and Do Not Owe Fiduciary Duties*, 47 OKLA. CITY U. L. REV. 113 (2022); and Wayne S. Hyatt and Jo Ann P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROPERTY, PROBATE AND TRUST JOURNAL 589, 627 (1993).

¹⁴ Books and numerous articles authored by Professor Richard C. Schragger address this issue. CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE (2016); *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91 (2017); *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537 (2019); *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 WIS. L. REV. 1283.

¹⁵ See, e.g., Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 212–19 (2012) (discussing local “innovative and progressive policies” in areas including immigration, international, human rights, employment, and environmental law); Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for*

providing a home to the regional exchanges that list and trade the securities of local and national firms.¹⁶

Surprisingly, this gap in scholarship exists despite the relative prevalence of local firm governance. Varied cities across the United States have undertaken these local firm governance initiatives—from large cities (like New York City and San Francisco), to tiny towns (like Grant Township in Pennsylvania); from cities in red and blue states (like Dallas, Texas and Seattle, Washington, respectively), to cities in swing states, the Rustbelt, and the Sunbelt (like Minneapolis, Minnesota, Pittsburgh, Pennsylvania and Surprise, Arizona, respectively).¹⁷ Especially because politically liberal cities have generally been the most aggressive policy entrepreneurs,¹⁸ it is notable that local firm governance has not been confined to cities of one political stripe. Localities like Grant Township and others—which voted Republican in the 2016 and 2020 presidential elections¹⁹—pioneered local initiatives aimed at organizational law.²⁰ The diversity and total number of localities in the United States generally²¹—together with their fiscal,

Low-Wage Workers, 2009 U. CHI. LEGAL F. 187 (2009) (outlining local governments' actions in labor and employment law); Sheila R. Foster, *Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare*, 75 OHIO ST. L.J. 57 (2014) (exploring local expansion into consumer law); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1409 (2001) (exploring the ways local governments have acted in criminal law); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 573, 576 (2008) (discussing local government involvement in federal immigration law); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. & POL. 147 (2005) (considering local government involvement in family law as it relates to same-sex marriage); Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537 (2005) (criticizing the increasing expansion of local governments into international law); Rick Su, *A Localist Reading of Local Immigration Regulations*, 29 IMMIGR. & NAT'L REV. 741, 744 n.7 (2008) (questioning the nature of local governments' expansion into federal immigration law); Sean Hannon Williams, *Sex in the City*, 43 FORDHAM URB. L.J. 1107 (2016) (advocating for local government expansion into family law).

¹⁶ AMY CORTESE, *LOCAVESTING: THE REVOLUTION IN LOCAL INVESTING AND HOW TO PROFIT FROM IT* 199–220 (2011).

¹⁷ See *infra* Part II and accompanying notes; see also Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 676 (2015) (“From small New England hamlets to major mid-Atlantic cities to sea-side California counties—in largely unnoticed fashion—at least 150 local governments across the country have adopted ordinances proclaiming ‘community rights’ . . .”).

¹⁸ See Richard Briffault, *The Challenge of the New Preemption*, 70 STANFORD L. REV. 1995 (2018) (“[T]he emergence and rapid spread of a new and aggressive form of state preemption of local government action . . . is closely linked to the partisan and ideological polarization between red states and their blue cities.”).

¹⁹ *Joe Biden won in Pennsylvania, flipping a state Donald Trump won in 2016*, POLITICO (Jan. 6, 2021, 4:41 PM), <https://www.politico.com/2020-election/results/pennsylvania/> [<https://perma.cc/A6A6-GUH7>] (illustrating that Clarion, Schuylkill, and Indiana Counties in Pennsylvania all voted for the Republican presidential candidate in both 2016 and 2020).

²⁰ *Infra* Part II.C.

²¹ *Types of U.S. Local Government by State: 2022: Count of all local government units*, U.S. CENSUS BUREAU (Aug. 24, 2023), <https://www.census.gov/library/visualizations/interactive/types-local-governments-by-state-2022.html> [<https://perma.cc/5AED-KEVW>] (estimating the number of local governments in the United States to be approximately 90,000).

political, and other powers²²—are (or should be) reasons for city officials and firm lawmakers, managers, investors, and other stakeholders to consider local firm governance seriously.

In addition, examples of local initiatives impacting firm governance have made the news in leading financial publications and had real impact.²³ For example, after some foreign jurisdictions mandated quotas for women on boards as early as 2008,²⁴ the first jurisdiction in the United States to pioneer a board diversity initiative was not a state, as it is widely perceived,²⁵ but a city.²⁶ One such city-level initiative is the Office of the New York City Comptroller’s “Board Accountability Project,” which advanced board diversity and other proposals in select S&P 500 companies that lacked diversity.²⁷ Specifically, New York City requested such companies “adopt a policy requiring the consideration of both women and people of color for every open board seat and for [chief executive officer (CEO)] appointments.”²⁸ The *Financial Times*

²² While localities’ formal lawmaking power is contingent upon delegation from their enabling state governments, the power of the purse is a well-recognized power that localities have at their disposal. Localities have greater direct expenditures than state governments (\$1.8 trillion in fiscal year 2020). *State and Local Backgrounders: State and Local Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> [https://perma.cc/PV6H-3EV2] (last visited Feb. 6, 2024). Through the contractual terms and the volume of these direct expenditures, local governments can leverage their weight as market participants to influence firms’ internal decision-making. Additionally, they can use their traditional role as lawmakers to regulate the external impacts of firm activities.

²³ Lakshmi Naaraayanan, *Activist shareholders must push for environmental change*, FIN. TIMES (June 20, 2021), <https://www.ft.com/content/54972330-62b5-4026-9ae9-f2d95058df45> [https://perma.cc/42N4-YC2P] (reporting on the outcome of the New York City Comptroller’s Board Accountability Project).

²⁴ See, e.g., Norwegian Public Limited Liability Companies Act, § 6-11a (Act No. 45/June 13, 1997) (Nor.); see also Sunitha Malepati, *The Future (Public Company Boardroom) is Female: From California SB 826 to Gender Diversity Listing Standard*, 28 AM. U. J. GENDER, SOC. POL’Y & L. 493, 526–27 (2020).

²⁵ Malepati *supra* note 24, at 494; Andrea Vittorio, *California First State to Mandate Women on Corporate Boards*, BLOOMBERG L. (Oct. 1, 2018, 7:14 AM), https://news.bloomberglaw.com/employee-benefits/california-first-state-to-mandate-women-on-corporate-boards-1?utm_source=rss&utm_medium=EBNW&utm_campaign=00000165-f33a-ddfb-a37f-ff3e8c550002 [https://perma.cc/9TUF-XW27]; Michael Lev-Ram, *Exclusive: California’s board diversity law led to 670 board seats filled by women, report finds*, FORTUNE (Oct. 13, 2020, 8:11 AM), <https://fortune.com/2020/10/13/california-boards-diversity-jennifer-siebel-newsom/> [https://perma.cc/9T66-AV9K].

²⁶ D. K. Row, *Portland introduces new diversity goals for local arts and culture groups seeking public funds*, THE OREGONIAN (Feb. 25, 2012, 7:00 PM), https://www.oregonlive.com/art/2012/02/portland_introduces_new_divers.html [https://perma.cc/GW8Q-JJV4] (“Portland nonprofits seeking a chunk of the millions of dollars’ worth of annual public arts funding soon will have one more hurdle when they apply for grants . . . Specifically, arts groups will be asked to increase the ethnic makeup of their staff, boards and contractors.”).

²⁷ See Naaraayanan, *supra* note 23 (describing how the Board Accountability Project “identified companies that contributed significantly to climate change and those that lacked diversity, as well as other factors such as transparency in political contributions and excessive chief executive pay”).

²⁸ *Board Accountability Project*, N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/> [https://perma.cc/SPG6-Y986] (last visited July 13, 2023).

reported that researchers assessing the Board Accountability Project's impacts found improved outcomes, and attributed them "to the specific demands of the campaign, rather than to broader societal pressures."²⁹ Meanwhile, another New York City government agency, the Department of Cultural Affairs (DCLA), also began "review[ing] the diversity of the boards . . . of New York City cultural organizations"³⁰ (which depend upon the DCLA for funding) and soon after required them to adopt plans for diversifying their boards. Both initiatives deployed the city's power as a market participant—similar to the way that government-affiliated funds such as the California Public Employees' Retirement System (often referred to by its acronym, CalPERS) and sovereign wealth funds are well-recognized as powerful investors in the firm governance ecosystem domestically and internationally.³¹

So far, local initiatives crafted to shape firm governance raise greater questions of principle than practice. Also, local firm governance is an emerging trend, and the legality of some of its maneuvers has been challenged successfully.³² But regardless of the existing or potential challenges raised about its legal validity,³³ local firm governance has the potential to transform how organizational law and local government law are understood and practiced. In the rest of this section, I highlight several implications of local firm

²⁹ See Naaraayanan, *supra* note 23 (assessing environmental initiatives of Board Accountability Project).

³⁰ Robin Pogrebin, *New York City Plans to Study the Diversity of Its Cultural Groups*, N.Y. TIMES (Mar. 3, 2015), <https://www.nytimes.com/2015/03/04/arts/new-york-city-plans-to-study-the-diversity-of-its-cultural-groups.html> [<https://perma.cc/4V7G-XTF8>]. The 2016 study found that 67% of city residents identify as minorities, yet only 38% of employees at cultural organizations are minorities. Robin Pogrebin, *De Blasio, With 'Cultural Plan,' Proposes Linking Money to Diversity*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/arts/design/new-york-cultural-plan-museums.html> [<https://perma.cc/BBU4-QQ2S>].

³¹ James M. Nelson, *The "CalPERS effect" revisited again*, 12 J. CORP. FIN. 187 (2006) ("CalPERS is a recognized leader and major proponent of institutional shareholder activism"); Paul Rose, *Sovereign Shareholder Activism: How SWFs Can Engage in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 7, 2014), <https://corpgov.law.harvard.edu/2014/08/07/sovereign-shareholder-activism-how-swfs-can-engage-in-corporate-governance/> [<https://perma.cc/QN67-33ZX>] ("Because SWFs are often large but passive blockholders, they can exert significant influence simply through the exercise of their voting rights.").

³² Some local firm governance initiatives have failed federal constitutional challenges. The legal reasoning at the foundation of such decisions is not, however, universally accepted. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 419–25 (2010) (Stevens, J., dissenting) (arguing that "identity restrictions" on corporations may survive equal protection when considering that corporations are not similarly situated to individuals). At least some of the local laws that I discuss in this Article also may raise state constitutional law challenges. See *infra* Part II.A. Other local firm governance initiatives remain unchallenged on the merits or at all.

³³ Threats to the legitimacy of firm governance include federal and state constitutional challenges. For discussion of the legal challenges facing one kind of local firm governance, see Miller, *supra* note 17. For discussion of the legal challenges facing state laws that raise similar concerns to local firm governance, see, e.g., Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 48–49 (1992) (describing the main challenges to constituency statutes, such as the Dormant Commerce Clause and the Contracts Clause of the United States Constitution). See also Gary von Stange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie*, 11 HOFSTRA LAB. L.J. 461, 482 (1994). Further detailing the legal framework for local firm governance's legitimacy generally exceeds this Article's scope.

governance for both local government law and organizational law. I develop my analysis of these implications in greater detail later in this Article, where I also explore the mutually influential relationship between local government law and organizational law and the implications of local firm governance that they share.

From the perspective of organizational law, local firm governance matters because of the level at which it is made, the perspectives it brings to the table, and the issues it confronts. Local firm governance highlights localities as an underappreciated source of firm governance that complicates debates in organizational law about jurisdictional competition—when states (and sometimes the federal government) compete to supply organizational law to firms—whether or not the pressures upon localities differ from the influences upon these other sources of firm governance, and whether or not the focus of localities’ initiatives is constrained to their city limits. Local firm governance also offers a substantive vision for organizational law that differs from conventional firm governance. Currently, local firm governance initiatives and laws challenge the prioritization by conventional firm governance of a firm’s owners above other constituents. These well-intentioned objectives could, however, have indirect impacts that are counterproductive to their goals—by increasing managerial power and discretion without accountability,³⁴ or laying the groundwork for opponents from the other end of the political spectrum. Finally, local firm governance also confronts and clarifies questions about contemporary issues in organizational law, such as board diversity and the boundary between firm governance and firm regulation.

From the perspective of local government law, the local governance of firms raises important questions about the scope and exercise of the power of local governments. This is because local governments, as creatures of state government, possess only the authority that they are delegated through the state,³⁵ such as delegations of the state police power. Local firm governance may provide a novel opportunity to exercise such local police power. Some states also narrowly interpret grants of authority to local governments under the local government doctrine of “Dillon’s Rule” (rather than “home rule,” which broadly enables local government authority),³⁶ and further constrain the authority they grant local governments through recognition of a controversial “private law exception” to local lawmaking authority under home rule.³⁷ Localities are

³⁴ See, e.g., Anne Choike, *A New Urban Front for Shareholder Primacy*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 124–28 (2019).

³⁵ MCQUILLIN MUN. CORP. § 9:1 (3d ed.). Interestingly, some scholarship demonstrates that municipal corporations were created to diminish the power of private corporations. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

³⁶ MCQUILLIN MUN. CORP., *supra* note 35 at § 4:11.

³⁷ RICHARD BRIFFAULT ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW (West Academic Publishing, 9th ed. 2021) 433–36; see also Paul Diller, *The City and the Private Right of Action*, 64 STANFORD L. REV. 1109 (2012).

especially vulnerable to preemption in localities without home rule, and some local firm governance approaches may offer an innovative response that permits localities to exert influence on firms without exposing their initiatives to the threat of preemption or invalidity as attempts at private law.

In the rest of this Article, I seek to “widen the lens”³⁸ of both firm governance and local government law to illuminate the influence that cities have on the governance, ownership, and relationships of organizations. In Part I, I first describe the evolving landscape of firm governance to provide context for this Article’s analysis and argument. In Part II, I describe examples of local firm governance initiatives and laws. In Part III, I conduct a preliminary analysis of some of local firm governance’s implications for organizational law and local government law. In Part IV, I conclude with a brief assessment of local firm governance.

I. THE EVOLVING LANDSCAPE OF FIRM GOVERNANCE

A. *The Foundation of Firm Governance: The Substance of Corporate Law, Now and Then*

The general concept of firm governance includes, but is not limited to, corporate law, and the substance of much firm governance is therefore founded upon, and drawn from, corporate law. This section therefore provides a brief description of the substance of corporate law, and how it has evolved.

Today, the enabling nature of corporate law, which provides for the establishment of an organization as an entity with a legal personality separate from its owners and representatives, is the field’s essential feature.³⁹ In addition, the principal-agent relationship between an entity (and its owners, if any) and managers is a direct consequence of recognizing the entity’s legal personality as separate.⁴⁰ Indeed, agency conflicts among an entity’s owners (if any), managers, and third parties “occupy most of corporate law.”⁴¹

Corporate law’s substance has evolved from a historically broader scope beyond an entity’s enablement and its principal-agent relations. Even after the introduction of general incorporation statutes democratized access to the

³⁸ Linda L. Berger, Kathryn M. Stanchi, and Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Cambridge University Press 2016) at 17 (describing the feminist method of “widening the lens” as “staying within the boundaries of existing legal doctrine and using recognizably paradigmatic modes of legal reasoning [while relying] on alternative legal rules, [framing] issues more narrowly or more broadly; and [presenting] different rationales.”).

³⁹ See generally Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387 (2000).

⁴⁰ See generally ADOLF A. BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

⁴¹ John Armour et al., *What is Corporate Law?* in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 2* (Reinier Kraakman et al. eds., 1st ed. 2004).

corporate form,⁴² many states continued to maintain restrictions on corporations' purposes, size, and activities,⁴³ as American society struggled to accept corporations' existence.⁴⁴ Today, the principle of "corporate federalism" provides that states regulate the inner workings of corporations (their "internal affairs"), while the federal government concerns itself with the external trading of corporate securities⁴⁵ and other externalities of entities' conduct such as their environmental and social impacts.

Widespread commitment to corporate law federalism in the United States is less than a century old,⁴⁶ and most developed countries in fact form and govern enterprises under centralized national legislation.⁴⁷ Indeed, corporate federalism is contested domestically even today, as calls for federal chartering of corporations resurface,⁴⁸ and the pendulum seems to swing back toward an expansive interpretation of corporate law's internal affairs doctrine, determining its substantive scope.⁴⁹ Placed in such historical context, the entry of local firm governance comes into focus as part of the continual legal innovation in the governance of corporate entities.

B. Sources and Methods of Firm Governance: State and Federal Government, Self-Regulatory Organizations, and Market Participants

States are the primary sources of laws that enable entities, address the agency conflicts within firms, and generally provide firm governance. Delaware is the leading state jurisdiction for firm governance,⁵⁰ though other states are also important players. California is an important source of firm governance due to its economic power,⁵¹ while Nevada, Wyoming, and, most recently, Texas, are prominent among other states who are shaping their organizational laws in attempt to compete directly with Delaware.⁵² Colorado

⁴² Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 278-279 (2008).

⁴³ Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of Federal Chartermongering*, 3 COLUM. BUS. L. REV. 1017, 1028 (2017).

⁴⁴ See generally *id.*

⁴⁵ Roe, *supra* note 9, at 596.

⁴⁶ *Id.*

⁴⁷ See generally Hutchison, *supra* note 43.

⁴⁸ Accountable Capitalism Act, S.3348, 115th Cong. (2018) (unsuccessfully proposing federally chartering legal entities for conducting for-profit business in the United States).

⁴⁹ See generally Ann M. Lipton, *Inside Out (Or, One State to Rule them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321 (2023).

⁵⁰ See, e.g., CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW (Stephen Bainbridge et al. eds., Cambridge University Press 2018).

⁵¹ Matthew A. Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG (Oct. 22, 2022, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy> [https://perma.cc/DE65-AF4S].

⁵² See, e.g., Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73 (2022); see, e.g., Matt Levine, "Texas

seeks to become the “Delaware” of worker cooperatives.⁵³ Other states that may not enjoy such prominence nonetheless remain key players in the firm governance framework, simply because their state laws govern organizations that form in their jurisdiction.⁵⁴

Federal law also provides for the governance of firms’ principal-agent relationships. Contracts between market participants have also recently gained importance as a source of firm governance.⁵⁵ A variety of rules promulgated at the federal level encroach upon states’ authority to govern the firms they charter. Among rules promulgated at the federal level, the Public Company Accounting Reform and Corporate Responsibility Act (the “Sarbanes-Oxley Act” or “SOX”) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) are perhaps best known for the firm governance requirements they impose on public companies.⁵⁶ For example, SOX requires that a public company have a majority of independent directors on the audit committees of their boards, and Dodd-Frank requires independent committee members on compensation committees. Some other examples of federal laws that impact firm governance can be seen in corporate tax policy,⁵⁷ labor law,⁵⁸ environmental law,⁵⁹ and bankruptcy.⁶⁰

Principles of legal pluralism recognize the “coexistence of several systems and authoritative foundations . . . for regulating private interactions,”

Tempts Tesla,” Bloomberg Opinion Money Stuff (February 1, 2024) <https://www.bloomberg.com/opinion/articles/2024-02-01/texas-tempts-tesla> [<https://perma.cc/M98V-6CCB>] .

⁵³ Steve Dubb, *Colorado Says It Wants to Be the “Delaware” of Employee Ownership*, NONPROFIT Q. (Mar. 26, 2019), <https://nonprofitquarterly.org/colorado-says-it-wants-to-be-the-delaware-of-employee-ownership/> [<https://perma.cc/TT2U-C8YT>].

⁵⁴ See Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2115 (2018) (quantifying the number of public companies that incorporate in the state in which they are headquartered).

⁵⁵ Lipton, *supra* note 49, at 330–31; see also Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2021).

⁵⁶ See, e.g., Public Company Accounting Reform and Corporate Responsibility Act, 15 U.S.C. §§ 7201–7266 (2002) (Sarbanes-Oxley Act); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 25 GA. ST. U. L. REV. 251 (2005) (discussing the requirement that a public company have a majority of independent directors on the audit committees of their boards); Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–641 (2010) (requiring public companies to include stockholder-nominated candidates in proxy statements, disclosure of proxy materials, and independent committee members on compensation committees).

⁵⁷ See, e.g., James J. Fishman, *Commentary: The Federalization of Nonprofit Regulation and its Discontents*, 99 KY. L.J. 799 (2011).

⁵⁸ See, e.g., Lenore Palladino, *Worker Representation on U.S. Corporate Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 30, 2019), <https://corpgov.law.harvard.edu/2019/12/30/worker-representation-on-u-s-corporate-boards/> [<https://perma.cc/QH96-3XJW>] (discussing the intersection of federal labor laws and corporate governance).

⁵⁹ See, e.g., ALAN R. PALMITER & FRANK PARTNOY, *CORPORATIONS: A CONTEMPORARY APPROACH* 349–60 (2d ed. 2014) (discussing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)).

⁶⁰ John Armour et al., *Transactions with Creditors in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 109–43 (Reinier Kraakman et al. eds., 3d ed. 2017).

some of which may not be the “product of the national state’s law-making.”⁶¹ To that end, firm governance draws upon many sources not limited to state or federal organizational law, and may also include: the rules of self-regulatory organizations (“SROs”); governance by non-charter, non-bylaw documents that speak to issues of corporate governance; contractual agreements; and the influence of a vast number of institutional actors with some economic role relevant to firms. Like some forms of local firm governance, these sources may be elective (for example, choosing to list on an exchange and being subject to its listing rules) or privately negotiated (such as shareholders’ agreements)—but they are no less sources of firm governance.

SROs—such as the many exchanges that existed in the United States, only a few of which remain today⁶²—play a critical role in firm governance. In addition to state and federal laws addressing firm governance, SROs such as the New York Stock Exchange (NYSE) and National Association of Securities Dealers Automated Quotations Stock Market (NASDAQ) also subject publicly traded firms to listing rules that affect corporate governance.⁶³ For example, NASDAQ recently adopted a rule requiring that firms listed on its exchange disclose board-level diversity statistics and have (or explain why they do not have) diverse directors.⁶⁴ SROs’ influence on firm governance could also increase further if those who argue for a “rebirth of the local stock exchange” succeed in making a “cautious comeback.”⁶⁵ In addition to SROs, other private entities that are sources of firm governance include professional organizations and investor activists who promulgate best practices for firm governance.

Contracts between market participants increasingly play a key role as a source of firm governance addressing agency conflicts within entities.⁶⁶ Several kinds of contracts have generated ambiguity regarding the extent to which their content includes firm governance within the realm of organizational

⁶¹ Leon Anidjar, *Corporate Law and Governance Pluralism*, 35 CAN. J. L. & JURIS. 283, 285 (2022).

⁶² CORTESE, *supra* note 16, at 199–200 (describing how less than a century ago, “the United States was teeming with stock exchanges” established by cities all over the United States).

⁶³ Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2597–99 (“Stock exchanges represent another source of corporate governance.”); *see also* Thompson, *supra* note 10.

⁶⁴ *Corporate Governance Requirements*, NASDAQ, Rules 5605(f)(2)(A), 5606 (Mar. 12, 2009), <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq-5600-Series> [<https://perma.cc/TR8V-SBKG>]. The 5th Circuit recently struck down this rule. *All. for Fair Bd. Recruitment v. Sec. & Exch. Comm’n*, 2024 WL 5078034 (5th Cir. Dec. 11, 2024). As of the time of this article’s publication, it remains unknown whether the United States Securities and Exchange Commission will appeal such ruling. Andrew Ramonas, *Nasdaq Board Diversity Rules Struck Down by Fifth Circuit*, *Bloomberg Law* (Dec. 11, 2024), <https://news.bloomberglaw.com/esg/nasdaq-board-diversity-regulations-struck-down-by-fifth-circuit> [<https://perma.cc/D3V9-2R54>].

⁶⁵ CORTESE, *supra* note 16, at 199, 220.

⁶⁶ *See generally* Lipton, *supra* note 49, and Fisch, *supra* note 55.

law. These contracts include limited liability company agreements, shareholder agreements, investment agreements, and employment agreements⁶⁷—sometimes to the dismay of Delaware judges.⁶⁸ Indeed, the limited liability company certificate of formation itself is considered by some to be a contract: to wit, “LLCs, with their lack of mandatory structure, make it even more difficult to distinguish the entity elements of a contract from other elements.”⁶⁹ The contractual nature of an agreement is even fluid sometimes: in one case, a memorandum of understanding governing an internal joint venture between two business units of the same firm “went on a remarkable journey” to become an enforceable contract when one of the units was sold to a different entity.⁷⁰ Beyond contract, “shadow governance” in the form of non-charter, non-bylaw documents that speak to issues of corporate governance (such as codes of conduct) has also grown as a nontraditional source of firm governance.⁷¹

In addition to these shifts in firm governance, methods of governance more generally—beyond the boundaries of the firm governance ecosystem—have also expanded and have become both more nuanced and multidimensional. For example, governance can take the form of “nudges” that shape the choices of firms and their decision-makers,⁷² as theorized by Professors Richard Thaler and Cass Sunstein in their book *Nudge: Improving Decisions About Health, Wealth, and Happiness*.⁷³ Professors Thaler and Sunstein define “choice architects” as those who have “the responsibility for organizing the context in which people make decisions,”⁷⁴ and describe how incentives—including default rules that let people “opt in” and “opt out” of certain behaviors—can change those behaviors over time.⁷⁵ In addition to nudging, the power to allocate and spend funds has also been recognized as a form of

⁶⁷ Lipton, *supra* note 49, at 359–64 (discussing shareholder agreements, limited liability company agreements, employment agreements, and investment agreements as sources of corporate governance).

⁶⁸ See, e.g., *West Palm Beach Firefighters’ Pension Fund v. Moelis*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024); see also *id.* at 376 (stating that the “trend of employment disputes being shoehorned into entity law via partnership and LLC agreements” has alarmed Delaware judges who state that “Delaware should not be determining employment law for the country and for the world”). Employment agreements contain many provisions that alter default Delaware law governing LLCs. See e.g., Alexandra Andhov, *Commentary on Agreement between Harvey Weinstein and The Weinstein Company Holdings LLC, as of October 20, 2015*, in *FEMINIST JUDGMENTS: CORPORATE LAW REWRITTEN* 161 (Anne M. Choike et al. eds., 2023).

⁶⁹ Lipton, *supra* note 49, at 379–80.

⁷⁰ DANIEL MARKOVITS & GABRIEL RAUTERBERG, *CONTRACTS: LAW, THEORY, AND PRACTICE* 895–96 (2018).

⁷¹ See generally Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CAL. L. REV. 1097 (2020).

⁷² See Lee Tien, *Architectural Regulation and the Evolution of Social Norms*, 7 YALE J. L. & TECH. 1, 22 (2003) (“Government action that architects social settings and equipment can regulate our behavior as effectively as can sanction-backed rules.”).

⁷³ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 83–87.

governance—one that is especially meaningful in stymied political and law-making processes.⁷⁶ Governance approaches have also become multidimensional, involving “a wide range of governmental and nongovernmental actors in substantively crosscutting issues at local, state, national, and international levels.”⁷⁷ Such interdependence within a regulatory system—like firms and the framework governing them⁷⁸—makes multidimensional governance problems “complex” (not just “complicated”),⁷⁹ necessitating the development of specialized governance approaches to deal with them.

C. Firm Governance Defined

In this Article, I broadly refer to “firm governance” to encompass the rules governing the core issues of organizational law—(1) the formation and structure of legal entities with legal personality separate from their owners and representatives, and (2) the relationships among the constituents involved in the entity, as well as the economic and institutional forces that shape these relationships—whether originating from governmental laws, SROs, or contracts among market participants.

I use this definition of firm governance—and do not limit my concern to only corporate governance, and traditional corporate governance instruments and institutions—in this Article for several reasons. First, research on firm governance recognizes the significance of entities other than corporations.⁸⁰ A second benefit of this definition is identification of the patterns that emerge across entities that have been otherwise overlooked in exclusively focusing only on corporations or particular entities within the field of firm governance.

Finally, and of most relevance to this Article, a definition of firm governance that highlights the role of nontraditional corporate governance instruments and institutions lends credibility to the concept of local firm governance. The prior existence of regional exchanges, which locally regulated companies

⁷⁶ Jonathan S. Gould, *Republic of Spending*, 123 MICH. L. REV. 209 (2024).

⁷⁷ Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1079 (2011).

⁷⁸ Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 583 (stating that “companies in particular can be viewed as complex systems in which multiple elements (e.g., financial capital, physical capital, and human capital) interact with each other to perform a variety of useful and desirable functions (e.g., providing goods and services, employment opportunities, investor returns, and tax revenues)”); see also Lund & Pollman, *supra* note 63, at 2565 (describing a “complex governance system in the United States composed of law, institutions, and culture”).

⁷⁹ See Osofsky, *supra* note 77, at 1100 (“The interdependence within the regulatory system . . . is what makes the governance problem here ‘complex’ rather than merely ‘complicated.’”).

⁸⁰ Armour, *supra* note 41, at 6 (stating that an “anatomy of corporate law” also “applies to firms that are governed by special statutes—such as those for limited liability companies or business trusts—that omit one or more of the core characteristics [of corporations] from their default regime”) (internal citations omitted).

through their listing requirements, renders local firm governance a less radical suggestion than it might otherwise seem without such historical context. In addition, if contracts between private investors and entities can be considered a source of firm governance, it seems a logical extension that contracts between local governments that provide public investment in entities can also be considered a source of firm governance. This is especially relevant to local firm governance arising from contracts between a local government entity and a corporation (for example, a grant agreement, a development agreement, or an investment or share purchase agreement permitting a local government to become one of an entity's investor members). In such cases, the local government entity uses its power as a market participant to create firm governance.

II. EXAMPLES OF LOCAL FIRM GOVERNANCE

In this Part, I detail examples of local firm governance initiatives that influence diverse board and management composition or encourage the adoption of specific entity types or governance structures. I analyze each selected type of local initiative in the context of issues addressed by corresponding conventional firm governance, to illuminate the similarity of the issues they present, and demonstrate how local initiatives contribute to conventional firm governance. In the interest of facilitating robust discussion, I conduct an in-depth analysis of only these two types of local firm governance initiatives.

Local firm governance initiatives that influence diverse board and management composition or encourage the adoption of specific entity types or governance structures do not comprise the full range of local firm governance, however. Other kinds of local firm governance include new local laws that encompass a variety of initiatives in which local governments have used their legal authority to encourage or even demand: (1) the formation of private entities to manage community open spaces, facilities, and infrastructure;⁸¹ (2) limitations on excessive C-suite compensation in an attempt to address income inequality between firms' executives and workers;⁸² (3) stakeholder engagement;⁸³ and (4) constraints upon corporate privileges (for example, limited liability) under certain circumstances.⁸⁴ In the interest of comprehensiveness, I also briefly summarize these local firm governance laws in Parts II.C.1, II.C.2, II.C.3, and II.C.4, respectively.

To be sure, the examples in this Part disproportionately discuss the initiatives and laws of large cities.⁸⁵ Ease of information gathering about large

⁸¹ See *infra* Part II.C.1.

⁸² See *infra* Part II.C.2.

⁸³ See *infra* Part II.C.3.

⁸⁴ See *infra* Part II.C.4.

⁸⁵ See generally Amel Toukabri & Lauren Medina, *America: A Nation of Small Towns*, U.S. CENSUS BUREAU (May 21, 2020), <https://www.census.gov/library/stories/2020/05/>

cities' initiatives and laws is a significant reason for this emphasis. This emphasis is not meant to suggest that small cities' initiatives and laws regarding firm governance are less important, worthy of analysis, or prevalent. Excluding entity formation mandates (due to the lack of available data about them),⁸⁶ at least thirty local firm governance initiatives and laws exist in cities or counties with a population of 50,000 or more.⁸⁷ Meanwhile, one estimate counts approximately 200 local laws which purport to disable core privileges of the corporation (laws that I call "disabling laws" and describe in more detail in Part II.C.4 of this Article),⁸⁸ most of which seem to have been enacted in cities, towns, counties and other local governments with a population under 50,000.⁸⁹ Importantly, this data is not the product of a survey, and therefore it is not possible to provide any definite conclusions regarding the absolute number of local firm governance laws and initiatives. Nonetheless, this rough estimate of local firm governance initiatives and laws, and their distribution across cities of different sizes, is a starting point for understanding local firm governance.

A. *Local Firm Governance Board and Management Diversity Initiatives*

Board composition is conventionally the concern of corporate law: one of the "matters that are peculiar to corporations and other associations" includes "the election or appointment of directors and officers."⁹⁰ Recently, diversity in board composition has received renewed interest, with some states and regulatory bodies seeking to encourage or mandate change in corporate board rooms by enacting rules requiring certain diversity initiatives and punishing those who fail to comply.⁹¹

america-a-nation-of-small-towns.html [https://perma.cc/UX49-KF57] (referring to large cities as cities with a population of 50,000 or more).

⁸⁶ See generally Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 895 (2006) (emphasizing the lack of generalizable data available with respect to the prevalence of municipal policies requiring the formation of entities).

⁸⁷ Telephone Interview with Ben Price, Education Director, Community Environmental Legal Defense Fund (Sep. 2024).

⁸⁸ CMTY. ENV'T LEGAL DEF. FUND, COMMUNITY RIGHTS DO-IT-YOURSELF GUIDE TO LAW-MAKING 8 ("Since 1999, 200+ communities in twelve states have passed Community Rights Laws.").

⁸⁹ Price, *supra* note 87.

⁹⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. L. INST. 1971).

⁹¹ California is currently the leading example of state corporate law addressing board diversity, even as the future of its pioneering legislation remains in question after recently being overruled in federal court. See, e.g., Sarah Jarvis, *Calif. Appeals Ruling on Board Diversity Laws To 9th Circ.*, LAW360 (June 16, 2023), <https://www.law360.com/articles/1690065> [https://perma.cc/FR8Z-W2KT]. In California, the legislature passed a pair of bills promoting diversity on corporate boards of directors. See CAL. CORP. CODE § 301.3–1.4. The laws require that, by certain dates, all publicly held corporations headquartered in California must have a specified number

A few cities across the United States are using their power to contract as a market participant to influence the board composition of the for-profit and nonprofit corporations with whom they do business.⁹² These local firm governance initiatives seek to change board composition requirements deriving from conventional firm governance which would otherwise apply. In this Part, I discuss some such firm governance initiatives.⁹³ New York City's pioneering

of women or other underrepresented individuals on their board of directors. The bill states that it applies both to publicly held general domestic corporations and foreign corporations that have their principal executive offices located in California (as indicated on their SEC 10-K). For purposes of the statute, "Publicly held corporation" means "a corporation with outstanding shares listed on a major United States stock exchange. *See* CAL. CORP. CODE § 301.3.

Following California's S.B. 826, states including Colorado, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Washington, as well as NASDAQ, have all enacted or proposed similar rules. *See, e.g.*, H.R. 3394, 101th Gen. Assemb., Reg. Sess. (Ill. 2019) (outlining Illinois's reporting requirements noting hiring practices and self-identified gender and race of directors on and considered for board); S.B. 115, 100th Leg., Reg. Sess. (Mich. 2019) (mandating that boards have one female on their board of directors by the start of 2021, and one, two, or three females for boards of four or less, five, or six-plus directors, respectively, by 2023); S.B. 911, 439th Gen. Assemb., Reg. Sess. (Md. 2019) (requiring corporations to include the number of female directors and total directors in their annual reports); S. 1879, 191th Gen. Ct., Reg. Sess. (Mass. 2019) (mandating that one female on corporate boards by the close of 2021, and two or three for boards of five or six-plus, respectively, by the close of 2023); S. 3469 218th Leg., Reg. Sess. (N.J. 2019) (mandating that boards have one female on their board of directors by the end of 2019, and one, two, or three females for boards of four or less, five, or six-plus directors, respectively, by end of 2021); S. 4278, 2019-2020 Gen. Assemb. (N.Y. 2019) (enacting a "Women on Corporate Boards Study" to determine how to increase the number of females on boards of directors); H.Res. 0114, 2019-2020 Gen. Assemb., Reg. Sess. (Pa. 2019) (encouraging that by 2021, boards of five or fewer have at least one female, boards of five to eight directors have at least two females, and boards of nine or more directors have at least three females); State S.B. 6037, 66th Leg., Reg. Sess. (Wa. 2020) (mandating corporations to have "gender-diverse boards" by the start of 2022, defined as "individuals who self-identify as women" making up at least 25% of the board); NASDAQ Listing Rules, R. 5605(f).

⁹² I do not discuss local initiatives that subject the governing bodies of public entities, such as city commissions, to rules regarding the diversity of their composition. *See, e.g.*, Ann Arbor, MI Code § 1-214(3) (2018) (requiring diversity on a local police oversight commission). I also do not discuss local rules that mandate disclosure of the diversity of city contractors and grant recipients. *See, e.g.*, Phila., PA Code § 17-104(3) (2023), (requiring contractors who want to do business with the city to: disclose the current percentage of female executives in the company and the percentage of females on the company's boards; disclose the company's goals for including females in executive positions and on boards; and disclose the efforts the contractor is making to achieve the aspirational goals); N.Y.C., NY., Local Law No. 44 of 2016 (2023) (requiring the Department of Small Business Services to distribute a voluntary survey to all prospective city contractors to collect racial, ethnic, and gender information regarding those companies' executive boards, and to solicit information regarding selection and employment practices, policies, and procedures pertaining to the racial, ethnic, and gender composition of the entity's directors, officers, and other executives). I exclude these local initiatives from discussion even though some corporate law scholars have recently begun to study government entities. *See, e.g.*, Clarke & Hansmann, *supra* note 12. This is because the legal framework governing the ability of government and private entities to mandate diversity differs. *See generally, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (setting forth that studies establishing racial disparities must be conducted to establish the need for quotas, set asides, or other affirmative action in procurement in order to pass strict scrutiny under the Fourteenth Amendment's equal protection clause).

⁹³ In addition to New York City and Minneapolis, Portland, Oregon also has initiatives to address board composition. In 2016, the City of Portland, Oregon implemented board composition

efforts to do so, beginning in 2014, appear to be unique in terms of the large size of the for-profit organizations to which they apply. In contrast, Minneapolis, Minnesota adopted local initiatives that influence nonprofit board composition only. The Minneapolis nonprofit board composition initiative for the city's neighborhood organizations is also consequential: it requires not only a diversity plan but also affirmative term limits, and noncompliance results in loss of funding.

1. New York City Board Composition Initiatives for Public Companies

New York City has used its contracting power as a market participant in attempt to influence the board composition of for-profit public companies.⁹⁴

requirements as a condition for arts organizations to be eligible for certain arts opportunities. Portland, acting through a contract with its Regional Arts & Culture Council (RACC) nonprofit organization, changed its funding model to distribute more money to small organizations and marginalized artists by conditioning the availability of arts funding on board diversity, among other conditions. RACC Contract 30001790 - Agreement for Services 1-3 (2010), https://racc.org/wp-content/uploads/2016/02/2010CITYCONTRACT_30001790.pdf [<https://perma.cc/LFF8-PZ6F>]. RACC created the Capacity Building Program in 2016, which, in acknowledgment that not everyone in the region has equal access to arts and funding, provides “operating and professional development support to arts organizations serving under-represented populations and whose leadership reflects those population’s communities.” REGIONAL ARTS & CULTURE COUNCIL, REQUESTS FOR PROPOSALS - CAPACITY BUILDING PROGRAM 2 (2019), <https://racc.org/wp-content/uploads/2019/03/FINAL-Capacity-Building-RFP.pdf> [<https://perma.cc/4MB2-RJ38>]; *see also* Caleb Diehl, *A new funding model improves equity in the arts*, OR. BUS. (Feb. 12, 2019), <https://www.oregonbusiness.com/article/arts-entertainment/item/18670-a-new-funding-model-improves-equity-in-the-arts> [<https://perma.cc/GKP4-328R>]. RACC officials planned to increase the ethnic makeup of arts groups’ staff, boards, and contractors by tying funding to these improvements, among other conditions. Row, *supra* note 26. Among other diversity requirements for various opportunities, a recipient organization must (1) have 60% or more of the organization’s leadership (staff and board) self-identifying as part of the underrepresented community that the organization serves, REGIONAL ARTS & CULTURE COUNCIL 2019 REQUESTS FOR PROPOSALS - CAPACITY BUILDING PROGRAM 2 (2019), or (2) evidence of equity, diversity, inclusion, and access in board diversity and leadership generally. REGIONAL ARTS & CULTURE COUNCIL, GENERAL OPERATING SUPPORT FY 20-21 APPLICATION GUIDELINES FOR NEW PARTNER ORGANIZATIONS 3, 4 (2020), <https://racc.org/wp-content/uploads/2021/02/FY21-GOS-New-Applicant-Guidelines-and-Questions-final-1.pdf> [<https://perma.cc/7GJV-9BA8>]; *see also* REGIONAL ARTS & CULTURE COUNCIL, RACC GOS INVESTMENT AWARD FRAMEWORK FY2019-20 (Dec. 20, 2018), <https://racc.org/wp-content/uploads/2018/12/Investment-Award-Framework-WEB.pdf> [<https://perma.cc/TZD9-PCWG>]. RACC created its own performance measures and “[m]aintains composition of Board of Directors, grants review panels, and selection committees that reflects the diversity of the City and region’s population.” Regional Arts & Culture Council, Exhibit A – Regional Arts & Culture Council Performance Measures 2 (2010), <https://www.portlandoregon.gov/shared/cfm/image.cfm?id=327839> [<https://perma.cc/XKS7-CMKZ>]. It also “educates board members, panels, and committees about equity issues” and “provides grants and services that will proportionately reflect the . . . diversity of cultures in the City of Portland.” *Id.* at 2–3.

⁹⁴ New York City also has initiatives to influence the diversity of boards and leadership in nonprofit organizations, in addition to for-profit organizations. In 2015, New York City began “review[ing] the diversity of the boards, staffs and audiences of New York City cultural organizations, such as museums, orchestras and dance troupes.” Pogrebin, *supra* note 30. In 2017 New York City announced that its first “cultural plan”—CreateNYC, spearheaded by the largest

New York City, acting through the Office of the New York City Comptroller (“NYC Comptroller”), has done so since 2014 with the NYC Comptroller’s Board Accountability Project.⁹⁵ The NYC Comptroller is New York City’s Chief Financial Officer, and in this role, manages the sizable pension fund assets of all New York City employees—approximately \$249.8 billion as of April 2023.⁹⁶

The Board Accountability Project has unfolded in three phases. First, the NYC Comptroller, together with New York City’s pension funds, submitted shareholder proposals to seventy-five companies to obtain the right to nominate directors, known as “proxy access.”⁹⁷ The number of companies

cultural funding organization in the United States, the New York City Department of Cultural Affairs (DCLA) – would link future funding for museums and arts groups to increased diversity of their boards and staff. NEW YORK CITY OFFICE OF THE MAYOR, CREATE NYC 2019 ACTION PLAN 2 (2019), https://createnyc.cityofnewyork.us/wp-content/uploads/2019/08/CreateNYC_ActionPlan_FIN_20190801.pdf [<https://perma.cc/5GDF-S2ZW>] [hereinafter CREATE NYC 2019]. One of CreateNYC’s expressed goals included promoting “[g]reater representation of underrepresented groups in arts and cultural leadership and staff positions.” NEW YORK CITY OFFICE OF THE MAYOR, CREATE NYC: A CULTURAL PLAN FOR ALL NEW YORKERS 163 (2017), https://createnyc.cityofnewyork.us/wp-content/uploads/2019/08/CreateNYC_Cultural_Plan.pdf [<https://perma.cc/M66U-PR2T>]; see also Pogrebin, *supra* note 30. In 2019, DCLA introduced the CreateNYC Action Plan, which streamlined CreateNYC into specific objectives, strategies for achieving such objectives, and “actions” for implementing the strategies. CREATE NYC 2019. To encourage “inclusive practices in the cultural sector,” among other CreateNYC Action Plan objectives, one “action” required all Boards of Directors of a group of thirty-three prominent museums and arts groups in New York City (the “cultural institutions group” or “CIG,” such as the Metropolitan Museum of Art, Carnegie Hall, and the American Museum of Natural History) to “adopt and implement diversity, equity, and inclusion plans with measurable goals” by April 2019. CREATE NYC 2019 at 10. Citing an alleged inability to legally set quotas, the former DCLA commissioner argued that it was intentional not to set specific goals; rather, the city encouraged organizations to review their procedures and “do what made the most sense for them and to do it in the way they thought they were most likely to make progress.” Sarah Bahr, *Is New York’s Arts Diversity Plan Working? It’s Hard to Tell*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/arts/design/diversity-new-york-culture-plans.html> [<https://perma.cc/F3F6-RB8W>]. CIG members are required to report on progress annually to DCLA, and as of March 2021, the plan states that this action is “ongoing.” Press Release, NYC Department of Cultural Affairs Releases New Report on Demographics of City’s Cultural Workforce (July 29, 2019), <https://www1.nyc.gov/site/dcla/about/pressrelease/PR-2019-07-29-DCLA-Releases-DataArts-Report-Cultural-Workforce-Demographics-Diversity.page> [<https://perma.cc/KTZ3-LU33>]. In Fall 2020, members of the CIG submitted their first full-year progress reports to DCLA. Besides mentioning the requirements of CIG’s diversity, equity, and inclusion plans, the reports did not include any quantitative information about the impact of the efforts on diversity for these institutions. CITY OF NEW YORK, MAYOR’S MANAGEMENT REPORT 129–33 (Sept. 2020), https://www1.nyc.gov/assets/operations/downloads/pdf/mmr2020/2020_mmr.pdf [<https://perma.cc/RWQ4-7VB7>]. As of December 2024, DCLA has not produced any other reports. *Cultural and Workforce Demographics*, NYC CULTURAL AFFAIRS, <https://www.nyc.gov/site/dcla/programs/diversity.page> [<https://perma.cc/QPA7-YN5U>] (last visited December 18, 2024).

⁹⁵ Jena McGregor, *New York City comptroller pushes 56 companies to commit to diversity and adopt the NFL’s Rooney Rule*, WASH. POST (Oct. 11, 2019, 8:30 AM), <https://www.washingtonpost.com/business/2019/10/11/new-york-city-comptroller-pushes-companies-improve-diversity-adopt-nfls-rooney-rule/> [<https://perma.cc/58HB-XKQD>].

⁹⁶ *Assets Under Management*, N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/services/financial-matters/pension/asset-under-management/> [<https://perma.cc/LK7P-NRV3>] (last visited July 5, 2023).

⁹⁷ *Board Accountability Project Overview*, *supra* note 28.

with proxy access has increased since then from six to over 600.⁹⁸ The NYC Comptroller's proxy access initiative is notable especially because the United States Securities and Exchange Commission unsuccessfully attempted to pass proxy access rules on more than one occasion.⁹⁹ Following the successful proxy access initiative, the NYC Comptroller escalated efforts to influence board composition. In September 2017, the second phase of the Boardroom Accountability Project launched, calling on companies to disclose the "skills, gender, and race/ethnicity of individual directors on the board; and engagement with independent directors regarding 'refreshment' opportunities to bring new voices and viewpoints into the boardroom."¹⁰⁰ According to the NYC Comptroller's website, the number of companies disclosing such information has doubled as of October 2019.¹⁰¹ In October 2019, the third phase of the Boardroom Accountability Project began when the NYC Comptroller sent letters to fifty-six S&P 500 companies requesting that they "adopt a policy requiring the consideration of both women and people of color for every open board seat and for CEO appointments."¹⁰²

The New York City Comptroller's request is in addition to requirements with which public companies comply: state corporate law setting forth any board composition requirements (such as minimum age), federal laws regarding board composition,¹⁰³ and any requirements promulgated by exchanges on which such companies were listed.¹⁰⁴

2. Minneapolis's Board Composition Initiative for Neighborhood Organizations

In January 2019, Minneapolis, Minnesota's city department of Neighborhood and Community Relations ("NCR") released a draft plan called "Neighborhoods 2020." This plan proposed changes to the funding of non-profit corporations in the city operating as neighborhood organizations.¹⁰⁵ The

⁹⁸ *NYC Comptroller Stringer and Retirement Systems Announce Precedent-Setting Board/CEO Diversity Search Policies as part of Boardroom 3.0 Initiative*, N.Y.C. COMPTROLLER, <https://comptroller.nyc.gov/newsroom/nyc-comptroller-stringer-and-retirement-systems-announce-precedent-setting-board-ceo-diversity-search-policies-as-part-of-boardroom-3-0-initiative/> [https://perma.cc/3BYC-ZQY7] (last visited July 5, 2023).

⁹⁹ Holly J. Gregory et al., *The Latest on Proxy Access*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 1, 2019), <https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/> [https://perma.cc/Z3DW-A7Y6].

¹⁰⁰ *Board Accountability Project*, *supra* note 28.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Clark, *supra* note 56.

¹⁰⁴ See, e.g., NASDAQ STOCK MARKET, Rulebook, Rule 5605; NYSE Listed Company Manual §§ 303A.01–.02.

¹⁰⁵ Chelsea Dennis & Steve Dubb, *Minneapolis Aims to Diversify Its 70 Neighborhood Associations*, NONPROFIT Q. (Feb. 7, 2019), <https://nonprofitquarterly.org/minneapolis-aims-to-diversify-its-70-neighborhood-associations/> [https://perma.cc/HUX3-TZB9].

January 2019 Neighborhoods 2020 draft plan recommended tying municipal funding to the diversity of the neighborhood organizations' leadership boards and asking associations to set bylaw requirements and term limits for board members, among other requirements.¹⁰⁶

In May 2019, the Minneapolis City Council approved a new framework for Neighborhoods 2020 that called for neighborhood organizations to develop "Diversity Action Plans."¹⁰⁷ These plans describe "how each organization's leadership reflects the demographics of their neighborhoods based on gender, race, age, income and homeowner or renter status, and specifies the process each organization will undertake to match their respective areas."¹⁰⁸ In terms of board membership and leadership, the May 2019 framework used both an incentive-based and regulatory-based approach.¹⁰⁹ It required that Board membership requirements follow Minneapolis's principles of equity and diversity, including:

- (1) Ensuring that no more than 25% of the board membership serve more than 6 years;
- (2) Requiring board officer term limits;
- (3) Allowing ex-officio non-voting board members as an option;
- (4) Supported and assisted by NCR, requiring a "Diversity Action Plan" that will outline procedures, meetings and events that will reach out to a wider demographic base, in order to actively encourage new membership that reflects the diversity within the neighborhood including race, gender, age, income, and homeowner and renter status; and
- (5) Supported and assisted by NCR, requiring an outreach plan to be submitted in conjunction with the Diversity Action Plan.¹¹⁰

Absent the foregoing funding conditions, recipients of grants from Minneapolis's Neighborhoods 2020 would not be required under state law to consider the diversity or term length in determining their board compositions because the state corporate law under which the grantee nonprofit organizations were

¹⁰⁶ Miguel Otárola, *Minneapolis neighborhood leaders raise questions about changes in 2020 plan*, STAR TRIBUNE (Feb. 3, 2019, 9:45 PM), <https://www.startribune.com/minneapolis-neighborhood-leaders-raise-questions-about-changes-in-2020-plan/505283932/> [<https://perma.cc/C756-ZR62>].

¹⁰⁷ Minneapolis, Minn., Res. 2019R-153 (May 22, 2019).

¹⁰⁸ Andrew Hazzard, *New Guidelines Issued for Neighborhoods 2020*, Sw. J. (May 30–June 12, 2019) https://issuu.com/southwestjournal/docs/swj_053019_issuu [<https://perma.cc/GP6K-X7YF>].

¹⁰⁹ Jenkins & Gordon, *Neighborhoods 2020 Framework Resolution*, THE CITY COUNCIL OF THE CITY OF MINNEAPOLIS, https://lms.minneapolismn.gov/Download/File/2327/Jenkins-Gordon%20Substitute%20Neighborhood%202020%20Resolution_final.pdf [<https://perma.cc/P5YY-52UP>].

¹¹⁰ *Id.*

formed do not require them to do so.¹¹¹ In addition, beyond state law, consideration of diversity is also not required by other conventional firm governance potentially applicable to the organizations subject to the funding conditions of Minneapolis's Neighborhoods 2020. For example, federal tax law applying to exempt organizations, such as tax-exempt cultural and community institutions, requires that their corporate governance avoid conflicts of interest among, and private inurement to, organizational leadership, among other potential beneficiaries.¹¹² This mandate only requires consideration of directors' identities and relationships, however—not their diversity.

In late 2020, the city council unanimously approved the final Neighborhoods 2020 plan, which went into effect in July 2021.¹¹³ NCR is collecting data by conducting in-person neighborhood organization board diversity surveys¹¹⁴ and following up on the board diversity surveys that it has been conducting since 2014.¹¹⁵

B. *Local Firm Governance Initiatives to Encourage Adoption of Specific Entity Types or Governance Structures*

Only states—with some exceptions¹¹⁶—have enacted entity enabling legislation that sets forth such default structures.¹¹⁷ Domestically, states generally advocate for and pass legislation enabling the formation of an overwhelming variety of entity types.¹¹⁸ These include New York's first general incorporation statute in 1811,¹¹⁹ the Delaware statutory business trust first adopted in 1988, which “offers virtually complete contractual freedom with respect to

¹¹¹ See MINN. STAT. §§ 317A.181–.257; N.Y. NOT-FOR-PROFIT CORP. LAW §§ 401–06, 701–26; OR. REVISED STAT. §§ 65.044–.067, 65.301–.335.

¹¹² See 26 U.S.C. § 501(c)(3) (prohibiting inurement “to the benefit of any private shareholder or individual”); 26 C.F.R. § 1.501(a)–1(c) (2022) (explaining that “the words private shareholder or individual in section 501 refer to persons having a personal and private interest in the activities of the organization”).

¹¹³ City of Minneapolis, Council Action No. 2020A-0848, File No. 2020-01060 (Nov. 21, 2020), https://lims.minneapolismn.gov/Download/MetaData/19331/2020A-0848_Id_19331.pdf [<https://perma.cc/9XSL-SKS8>].

¹¹⁴ See Racial Equity Impact Analysis (REIA) Standard (Nov. 5, 2020), <https://lims.minneapolismn.gov/File/RacialEquity/6940> [<https://perma.cc/N4XE-JMPS>].

¹¹⁵ See 2022 Neighborhood Organization Board Representation Survey Report, MINNEAPOLIS (Oct. 5, 2023), <https://www.minneapolismn.gov/media/-www-content-assets/documents/2022-Neighborhood-Organization-Board-Representation-Survey-Report.pdf> [<https://perma.cc/9N8U-NGXE>].

¹¹⁶ See generally Lev Menand and Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361 (2021).

¹¹⁷ But see *infra* Part II.C.4 (describing city attempts at passing disabling legislation).

¹¹⁸ See Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 575 (2016); cf., e.g., Accountable Capitalism Act, *supra* note 48 (unsuccessfully proposing federally chartering legal entities for conducting for-profit business in the United States).

¹¹⁹ An act relative to incorporations for manufacturing purposes, 1811 N.Y. Laws 151 (Mar. 22, 1811), available at <https://archive.org/details/newyorkannualreg1836newy/page/350/mode/2up?view=theater> [<https://perma.cc/592G-CZY7>].

assignment of earnings, control, and even fiduciary duties”;¹²⁰ and the limited liability company (LLC) first introduced in 1997 in Wyoming, now the most commonly formed legal entity in all fifty states. More recently, states have introduced social enterprise oriented legislation, including the low-profit limited liability company first introduced in Vermont in 2013;¹²¹ the benefit corporation first enabled by Maryland in 2010;¹²² and new cooperative-friendly legislation in Colorado.¹²³ All of these entity types and many others supplement the partnership, which was the dominant legal entity in Western civilization for conducting jointly owned business until the end of the nineteenth century.¹²⁴

Cities do not similarly possess the power to enable entities, but this has not stopped them from attempting to influence the adoption of specific entity types or governance structures. Numerous initiatives in cities across the United States support worker cooperatives, a form of organization in which the providers of human, rather than financial, capital own and control the entity.¹²⁵ In addition, a few cities also experimented with incentivizing entrepreneurs to adopt novel entity forms such as benefit corporations.¹²⁶ In Parts II.B.1 and II.B.2, I briefly describe both kinds of local initiatives to encourage adoption of specific entity types or governance structures. In both cases, cities directly impact the firm governance because an entity’s organizational framework fundamentally establishes a default structure for the relationship among entity constituents.

1. Local Ordinances or Proposed Ordinances to Support Worker Cooperatives

In this Part, I present local ordinances or proposed ordinances to support Worker Cooperatives in New York City and Berkeley, California, respectively. New York City and Berkeley are two of several cities that have both directed city assistance, programming, and discretionary funding to worker cooperatives,

¹²⁰ Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 3 (2006) [hereinafter Hansmann, *Corporation and Contract*].

¹²¹ See, e.g., Robert Esposito & Shawn Pelsinger, *Social Enterprise Law Tracker*, SOC ENT LAW TRACKER, available at <https://socentlawtracker.org/#/map> [<https://perma.cc/N8BU-MNCC>] (stating that Vermont was the first state to authorize the L3C form with “Vt. Stat. Ann. tit. 11, §§ 3001(27), 3005(a), 3023(a) (2013)”) (last visited Sept. 29, 2024).

¹²² MD. CODE ANN., CORPS. & ASS’NS §§ 5-6C-01–08.

¹²³ See Courtney Berner, *Where Are New Co-ops Emerging? The Changing Map of Co-op Development*, NONPROFIT Q., (Jan. 19, 2022), <https://nonprofitquarterly.org/where-are-new-co-ops-emerging-the-changing-map-of-co-op-development/> [<https://perma.cc/6V5U-LSXU>].

¹²⁴ It is outside the scope of this article to comprehensively acknowledge all forms for conducting business worldwide throughout history. See generally, e.g., Vikramaditya Khanna, *The Economic History of the Corporate Form in Ancient India* (2005) (Working Paper), available at https://pcg.law.harvard.edu/wp-content/uploads/papers/2006sp-Speakers_Paper03_02-21_Khanna.pdf [<https://perma.cc/UHU4-3LC6>] (describing the *sreni*, a form for conducting business in ancient India).

¹²⁵ *Infra* Part II.B.1.

¹²⁶ *Infra* Part II.B.2.

rather than entities with other firm governance.¹²⁷ Both of these cities' initiatives also precede the 2018 Main Street Employee Ownership Act, which was the first federal legislation to explicitly name worker cooperatives. New York City has the highest absolute number of worker cooperatives in any city in the United States,¹²⁸ while Berkeley has among the highest per capita number of worker cooperatives in any state.¹²⁹ In addition to both cities' concentration of cooperatives, I discuss New York City and Berkeley because they are cities with the most robust programs, among other cities with cooperative initiatives.¹³⁰ Both cities' programs are led bottom-up, by grassroots and advocacy organizations, as well as top-down, by civic and municipal institutions.¹³¹ New York City and Berkeley also stand out because their programs are the newest among other cities considered to be leaders in supporting worker cooperatives.¹³² Finally, New York City is the only city in this group that has codified any part of its initiatives as a local ordinance; Berkeley has nearly done the same, after a proposed ordinance was sponsored by the current mayor when he was a city council member.¹³³

a. New York Worker Co-Op Framework

New York City's support for worker cooperatives takes the form of institutional programs administered by the city and through partner organizations; discretionary funding; and a local ordinance. In 2014, New York City launched its Worker Cooperative Business Development Initiative ("WCBDI"), and seeded it with funds from the city budget.¹³⁴ Such financial support marked

¹²⁷ Stacey A. Sutton, *Cooperative Cities: Municipal Support for Worker Cooperatives in the United States*, 41 J. URB. AFFS. 1081, 1095–96 (2019) (analyzing twelve cities' municipal programs supporting worker cooperatives).

¹²⁸ Karen Kahn, *Latest Worker Co-op Survey Shows More Co-ops but Fewer Workers*, FIFTY BY FIFTY (Feb. 11, 2022), <https://www.fiftybyfifty.org/2022/02/latest-worker-co-op-survey-shows-more-co-ops-but-fewer-workers/#:~:text=New%20York%20City's%20investment%20in,60%20of%20California's%2099%20cooperatives> [<https://perma.cc/QTR6-RKNW>]; NYC SMALL BUSINESS SERVICES, FY22 WORKING TOGETHER: A REPORT OF THE EIGHTH YEAR OF THE WORKER COOPERATIVE BUSINESS DEVELOPMENT INITIATIVE (WCBDI), https://www.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy22.pdf [<https://perma.cc/KJG3-VCFP>].

¹²⁹ Joanne Furio, *What Makes Berkeley a Hotbed of Worker Co-ops?*, BERKELEYSIDE (OCT. 9, 2022, 6:44 AM), <https://www.berkeleyside.org/2022/10/09/berkeley-worker-co-ops> [<https://perma.cc/76JF-78BW>].

¹³⁰ See generally Sutton, *supra* note 127. Some other cities with worker cooperative support initiatives include: Austin, Texas; Minneapolis, Minnesota; Madison, Wisconsin; Boston, Massachusetts; Cleveland, Ohio; Richmond, California; Richmond, Virginia; Rochester, New York; Philadelphia, Pennsylvania; and Oakland, California. *Id.*

¹³¹ *Id.*

¹³² Other cities' cooperative initiatives began as early as 2009. *Id.* at 1089–90.

¹³³ See *infra* Parts II.B.1.a–b. Other cities that support worker coops only have resolutions, studies on best practices, cooperative business associations, budget directives and allocations for technical assistance, grants, loan funds, etc. See Sutton, *supra* note 127.

¹³⁴ Jake Blumgart, *NYC Takes a \$1.2 Million Step Toward Fighting Corporate Greed*, NEXT CITY (July 17, 2014), <https://nextcity.org/daily/entry/nyc-coop-new-york-worker-cooperative-funding>

New York City as the first city with discretionary funding specifically for the development and cultivation of worker cooperatives.¹³⁵ In 2015 New York City also passed an ordinance requiring the city to report on the status of worker cooperative businesses.¹³⁶ In 2020, New York City also announced the creation of Employee Ownership NYC,¹³⁷ including a program called Owner2Owner specifically concerning sales of and conversions to worker co-ops.¹³⁸ With these actions, as well as WCBDI's steadily growing budget allocation,¹³⁹ New York City became a leader among municipalities supporting worker cooperatives and has inspired other cities to develop similar programs.¹⁴⁰

The city allocates its budgetary funding through WCBDI partner organizations.¹⁴¹ With funding through the WCBDI, organizations have developed trainings, workshops, and one-on-one opportunities to help with various aspects of running a business such as business planning development, marketing and market research, strategic planning, bookkeeping, and financial planning.¹⁴² With

[<https://perma.cc/N7ZQ-3B8U>] (citing Liz Pleasant, *Worker-Owned Co-ops Get \$1 Million in NYC Spending*, YES! MAG. (June 28, 2014), <https://www.yesmagazine.org/economy/2014/06/28/worker-owned-co-ops-get-one-million-dollars-in-new-york-budget/> [<https://perma.cc/2VYJ-6ZG6>]). This amount is undoubtedly “a small fraction of the \$75 billion budget, which the city approved that year.” *Id.*

¹³⁵ *Id.*

¹³⁶ N.Y.C. ADMIN. CODE § 6-139.

¹³⁷ Press Release, Office of the Mayor of NYC, *Mayor de Blasio Launches Employee Ownership NYC, Nations Largest Municipal Initiative to Support Employee Ownership Conversion*, CITY OF NEW YORK (Dec. 2, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/826-20/mayor-de-blasio-launches-employee-ownership-nyc-nation-s-largest-municipal-initiative-support> [<https://perma.cc/MP3M-BGFX>].

¹³⁸ *About – Owner to Owner*, OWNER TO OWNER, <https://www.owner2owners.nyc/about> [<https://perma.cc/UH5S-378C>] (last visited July 5, 2023); see also Karen Kahn, *Employee Ownership Key to NYC Recovery Strategy*, FIFTY BY FIFTY (Jan. 25, 2021), <https://www.fiftybyfifty.org/2021/01/employee-ownership-key-to-nyc-recovery-strategy/> [<https://perma.cc/Y7QN-EY8X>]; *New York City Requests Information on Shared Equity*, FIFTY BY FIFTY (May 6, 2021), <https://www.fiftybyfifty.org/2021/05/new-york-city-requests-information-on-shared-equity/> [<https://perma.cc/8XLL-DD4U>].

¹³⁹ See, e.g., NYC SMALL BUSINESS SERVICES, *FY 19 WORKING TOGETHER: A REPORT ON THE FIFTH YEAR OF THE WORKER COOPERATIVE BUSINESS DEVELOPMENT INITIATIVE 30* https://www.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy19.pdf [<https://perma.cc/T7FP-A7NN>] (last visited July 5, 2023).

¹⁴⁰ See, e.g., *New York City Continues to Pioneer Innovative Economic Development Strategies, Committing Another \$2.1 Million to Worker Cooperative Development*, DEMOCRACY AT WORK INST. (June 26, 2015), <https://institute.coop/news/new-york-city-continues-pioneer-innovative-economic-development-strategies-committing-another> [<https://perma.cc/T2YA-GT4J>] (noting that cities such as Madison, Wisconsin were inspired by and have modeled their initiatives after the worker cooperative initiative in New York).

¹⁴¹ See Darren Sharp, *A look at New York City's Worker Cooperative Business Development Initiative*, SHAREABLE (Sept. 6, 2018), <https://www.shareable.net/a-look-at-new-york-citys-worker-cooperative-business-development-initiative/> [<https://perma.cc/B9JK-SBQZ>].

¹⁴² NYC SMALL BUSINESS SERVICES, *WORKING TOGETHER ADDENDUM: A REPORT ON FISCAL YEARS 2017–19 OF THE WORKER COOPERATIVE BUSINESS DEVELOPMENT INITIATIVE 6*, , https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy17-19.pdf [<https://perma.cc/H56D-RLM7>] (last visited July 5, 2023); see also *NYC Business: Worker Cooperative Business Development Initiative*, CITY OF NEW YORK <https://www1.nyc.gov/nyc-business/article/worker-cooperatives> [<https://perma.cc/9E9B-CAKS>] (last visited July 5, 2023).

the availability of these services, WCBDI has leveled the playing field between worker cooperatives and entities with conventional governance and ownership who generally have wide access to similar services through the New York City Department of Small Business Services and other agencies.

Building upon the 2015 budget allocation to WCBDI, New York City passed Local Law 22 of 2015, which requires the city to monitor the participation of worker cooperatives in businesses that receive city contracts, with an eye for expanding the number of worker cooperatives that do business with the city.¹⁴³ This legislation tasks the city's chief procurement officer with preparing and submitting annual reports to the NYC Council that detail the impact of services provided by WCBDI, city contract statistics on worker cooperatives, city assistance to worker cooperatives (as well as the industries in which they operate), difficulties that co-ops face in competing for city contracts, and specific information about each worker cooperative that received assistance.¹⁴⁴ In compliance with Local Law 22, publicly available annual reports describe the accomplishments of WCBDI and its partner organizations in strengthening worker cooperatives across the city.¹⁴⁵

Based on the data gathered (summarized in Table 1), the number of worker cooperatives in New York City has grown in the absolute,¹⁴⁶ and also as a percentage of the total number of businesses registered to do business in New York City.¹⁴⁷ In addition, worker cooperatives created with the assistance of WCBDI partner organizations exceeded the five-year survival rate for small businesses by 17%.¹⁴⁸ Perhaps the most surprising data is that, prior

¹⁴³ Press Release, Office of Helen Rosenthal, Council Member Helen Rosenthal and Carlos Menchaca, Worker Co-operative Advocates, and Worker-Owners Rally in Advance of Council Vote on Intro. 423 (Feb. 25, 2015), <http://helenrosenthal.com/wp-content/uploads/2015/08/257037597-Council-Members-Helen-Rosenthal-and-Carlos-Menchaca-advocates-and-worker-owners-rally-in-advance-of-Thursday-vote-on-Worker-Co-operative-Bill-Febru.pdf> [https://perma.cc/SAP8-YA5G].

¹⁴⁴ N.Y.C. ADMIN. CODE § 6-139, *supra* note 136.

¹⁴⁵ *NYC Business: Worker Cooperative Business Development Initiative*, *supra* note 142 (“Working Together” report series that detail worker cooperative achievements for Fiscal Years 2015–2022).

¹⁴⁶ *Why has New York seen a boom in new worker cooperatives?*, MUTUAL INTEREST MEDIA, <https://www.mutualinterest.coop/2021/09/why-has-new-york-seen-a-boom-in-new-worker-co-operatives> [https://perma.cc/3Q3M-RBGV] (noting that the number of worker cooperatives in New York City grew from 23 in 2014 to 91 in 2022); Kahn, *supra* note 128.

¹⁴⁷ The number of business establishments in New York City (excluding Staten Island) grew from 225,697 in 2014, *see* UNITED STATES CENSUS BUREAU, CBP TABLES 2014 (Apr. 24, 2016), <https://www.census.gov/programs-surveys/cbp/data/tables.html>, to 274,180 at the end of 2022. *See* U.S. BUREAU OF LABOR STATISTICS, QCEW STATE AND COUNTY MAP, <https://data.bls.gov/maps/cew/us>. These statistics, taken together with the number of worker cooperatives in New York City, described in note 146, show that the number of worker cooperatives in New York City nearly quadrupled between 2014 and 2022; in contrast, the total number of business establishments grew by only about 20% during the same period.

¹⁴⁸ *See* Steve Dubb, *Building a Worker Co-op Ecosystem: Lessons from the Big Apple*, NON-PROFIT Q. (Feb. 5, 2022), <https://nonprofitquarterly.org/building-a-worker-co-op-ecosystem-lessons-from-the-big-apple/> [https://perma.cc/N92V-9UD6] (“Fourteen (67 percent) of those

to the pandemic, worker cooperatives punched above their weight in terms of the city contracts they were awarded, relative to their incidence among other types of business entities registered in New York City (Table 1).

TABLE 1: WORKER COOPERATIVE CITY PROCUREMENT,
NEW YORK CITY (2017-2021)

	FY17	FY18	FY19	FY20	FY21
Total City Contracts Awarded to Worker Coops in Fiscal Year	96	96	96	51	26
Total New City Contracts	39,469	39,295	35,571	32,082	30,238
Value of Contracts Awarded to Worker Cooperatives (in \$)	1,427,400	1,633,275	2,645,552	2,812,946	966,338
Value of All New City Contracts (in \$)	20,977,722,533	19,264,571,468	17,423,404,174	18,189,744,570	17,486,123,653
Percent of Total Contract Value Awarded to Worker Cooperatives	0.0068%	0.0085%	0.0152%	0.0155%	0.0055%
Percent of All New City Contracts in Fiscal Year	0.24%	0.24%	0.27%	0.03%	0.01%

The data in Table 1 above, compiled from available city reports,¹⁴⁹ demonstrate the efficacy of WCBDI's attempts to support worker cooperatives in New York City. Although worker cooperatives comprised between just 0.01% and 0.03% of all business entities registered to do business in New York City between 2014 through 2022,¹⁵⁰ in the aggregate they were awarded approximately 0.2% of city contracts between 2017 and 2019. The percentage of total city contract value awarded to worker cooperatives also more than doubled following WCBDI's inception. Unfortunately, the COVID-19 pandemic reversed worker cooperatives' gains in city procurement. One possible explanation for this decline is that the workforce of worker cooperatives is predominantly female¹⁵¹—and women suffered exponentially during the pandemic, with their labor force participation rate only returning to pre-pandemic levels in 2023.¹⁵² Therefore, the declines reported with respect to city

businesses are still in operation — surpassing the national five-year survival rate for small businesses (about 50 percent).”)

¹⁴⁹ *Worker Cooperative Report*, N.Y.C. MAYOR'S OFF. OF CONT. SERVS., <https://www.nyc.gov/site/mocs/resources/worker-cooperative-report.page> [<https://perma.cc/J6WL-7MAY>].

¹⁵⁰ See *supra* notes 146–47.

¹⁵¹ Kahn, *supra* note 128.

¹⁵² See Lauren Bauer et al., *Who's Missing from the Post-Pandemic Labor Force*, BROOKINGS (Apr. 4, 2023), <https://www.brookings.edu/articles/whos-missing-from-the-post-pandemic-labor-force/> [<https://perma.cc/T3AA-PTJ2>] (discussing the post-pandemic labor force); Richard Fry, *Some gender disparities widened in the U.S. workforce during the pandemic*, PEW RSCH.

contracts awarded to worker cooperatives do not repudiate the efficacy of New York City's programming to support worker cooperatives through WCBDI.¹⁵³

b. Berkeley, California Worker Co-Op Framework

The City of Berkeley actively works with community advocates and businesses to increase social and financial support of worker cooperatives.¹⁵⁴ Berkeley has undertaken several initiatives, some of which include developing and promulgating educational materials on the worker cooperative model.¹⁵⁵ Berkeley has also changed its licensing paperwork to suit worker cooperatives and incentivized existing businesses to convert to cooperatives with a competitive revolving loan fund.¹⁵⁶

In 2016, Berkeley unanimously passed a resolution calling for greater support to worker cooperatives, and proposed an ordinance that would do so.¹⁵⁷ In 2019, Berkeley launched a pilot program that provided business succession planning and worker cooperative conversion services.¹⁵⁸ Later that year, Berkeley extended the pilot program's services through 2021 and expanded the scope of services to assist worker cooperative startups.¹⁵⁹ Berkeley also revised the city's revolving loan fund to include funds for closing or retiring businesses to convert to worker cooperatives.¹⁶⁰ Most recently, in 2022,

CTR. (Jan. 14, 2022), <https://pewrsr.ch/322kiTI> [<https://perma.cc/85T4-FFKH>] (discussing the workforce during the pandemic).

¹⁵³ Of course, more can be done to support worker cooperatives, as WCBDI acknowledges. See REPORT ON FISCAL YEARS 2017–19, *supra* note 142; NYC SMALL BUSINESS SERVICES, FY 2020–2022 WORKING TOGETHER ADDENDUM, https://www.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy20-22.pdf [<https://perma.cc/F9UV-RDL4>] (last visited January 31, 2025).

¹⁵⁴ Press Release, City of Berkeley Commits \$100,000 to Worker Cooperative Development, SUSTAINABLE ECON. L. CTR. (June 26, 2019), https://www.theselc.org/berkeley_commits_two_years_of_funds_to_worker_coops [<https://perma.cc/2BSG-KL6T>].

¹⁵⁵ See Dee Williams-Ridley, *Memorandum on Referral Response: Further Supporting Worker Cooperatives*, 4 (May 31, 2022), <https://berkeleyca.gov/sites/default/files/documents/2022-05-31%20Item%2040%20Referral%20Response%20Further%20Supporting.pdf> [<https://perma.cc/HFS8-DH39>].

¹⁵⁶ *See id.*

¹⁵⁷ See Yassi Eskandari, *Berkeley Worker Cooperative Resolution Passes!*, SUSTAINABLE ECON. L. CTR. (Feb. 12, 2016), https://www.theselc.org/berkeley_worker_cooperative_resolution_passes [<https://perma.cc/7BCX-KYT2>]; Furio, *supra* note 129.

¹⁵⁸ See Press Release, City of Berkeley Commits \$100,000 to Worker Cooperative Development, *supra* note 154. See also Jean Tepperman, *Berkeley Pledges Support and Funding for Worker Co-ops*, EAST BAY EXPRESS (Mar. 6, 2019), <https://www.eastbayexpress.com/oakland/berkeley-pledges-support-and-funding-for-worker-co-ops/Content?oid=25301247> [<https://perma.cc/8PGW-WQNR>].

¹⁵⁹ See Press Release, City of Berkeley Commits \$100,000 to Worker Cooperative Development, *supra* note 154.

¹⁶⁰ See Press Release, Jesse Arreguín, Berkeley Approves New Financial Opportunities to Promote Worker Cooperatives (Sept. 25, 2019), <https://www.jessearreguin.com/press-releases/2019/9/25/berkeley-approves-new-financial-opportunities-to-promote-worker-cooperatives> [<https://perma.cc/RN7Z-9Y6G>].

Berkeley revised its New Business License Application to include cooperative corporations.¹⁶¹

Berkeley's proposed ordinance appears to remain unenacted as of May 2022,¹⁶² but some of its substance has already been undertaken through the foregoing programs.¹⁶³ For example, the proposed ordinance would create a worker cooperative program to provide individualized support for existing businesses converting to worker cooperatives and expand the city's loan fund.¹⁶⁴ Still, significant elements of the proposed ordinance remain unenacted, particularly a bidding preference in city procurement and contracting to worker cooperatives.¹⁶⁵ To date, Berkeley provides only a general "Buy Local" bidding preference recently made available to all businesses "based in the City of Berkeley" whether or not they are a worker cooperative.¹⁶⁶ Other unenacted elements of the proposed ordinance include a development fund for cooperatives and for businesses seeking to convert to worker cooperatives,¹⁶⁷ and business tax and land use incentives.¹⁶⁸

Berkeley's programs supporting worker cooperatives are forward-thinking,¹⁶⁹ but ultimately have only temporary status until codified as an ordinance. Nonetheless, Berkeley's successful pilot program and fund allocation may signal a shift toward municipal adoption of concrete policies to support worker cooperatives,¹⁷⁰ at least until broader state support is achieved. Indeed,

¹⁶¹ *New Business License Application*, CITY OF BERKELEY, CAL., <https://berkeleyca.gov/sites/default/files/documents/business-license-new-with-calcs.pdf> [<https://perma.cc/USE8-VAWM>].

¹⁶² See Williams-Ridley, *supra* note 155, at 4; *but see* Furio, *supra* note 129 (referring to the ordinance as if it has been enacted).

¹⁶³ *DRAFT Berkeley Worker Cooperative Ordinance*, SUSTAINABLE ECON. L. CTR., 2, 7, https://docs.google.com/document/d/1v1jp6xISbb6Lb2ecLem3IZZz_hocKnBNcLSrr5Esg8k/edit# [<https://perma.cc/G9K9-W52J>] (stating that with the 2017 draft ordinance, Berkeley's mission is to encourage the growth of worker cooperatives in the city, primarily by establishing worker cooperative bid preferences and incentivizing the creation of and conversion to worker ownership).

¹⁶⁴ *Id.* at 8–10 (detailing the Worker Cooperative Development and Conversion Support Policy, "Worker Cooperative Support Program," and expansion of access to Berkeley's Revolving Loan Fund).

¹⁶⁵ *Id.* at 2–5 (proposing to provide contracting opportunities to local businesses and cooperatives that support workers' rights, worker-owner control, and cooperative distribution). The City of Berkeley has not foreclosed the possibility of a worker cooperative specific preference. See Williams-Ridley, *supra* note 155, at 5 ("Possible additional future actions may also include developing a more tailored local worker cooperative preference in the City's standard procurement and contracting practices.")

¹⁶⁶ *Information for Vendors*, CITY OF BERKELEY, CAL. <https://berkeleyca.gov/doing-business/working-city/information-vendors> [<https://perma.cc/2SNJ-BXWR>].

¹⁶⁷ *DRAFT Berkeley Worker Cooperative Ordinance*, *supra* note 163 at 12–14 (detailing the worker cooperative development fund and loan guarantees for worker cooperative startup, expansion, and conversion financing).

¹⁶⁸ *Id.* at 14–16 (detailing worker cooperative certification, maintenance of certification, and enforcement).

¹⁶⁹ See Steve Dubb, *In California, Berkeley City Council Votes Unanimously to Support Worker Co-ops*, NONPROFIT Q. (Mar. 8, 2019), <https://nonprofitquarterly.org/in-california-berkeley-city-council-votes-unanimously-to-support-worker-co-ops/> [<https://perma.cc/LP7F-B3JP>].

¹⁷⁰ See *id.*

declining momentum for Berkeley's local initiatives supporting worker cooperatives coincides with an uptick in state-level support for cooperatives in California.¹⁷¹ Even if only anecdotally, the experiences of Berkeley and California may suggest a relationship between local and state law, respectively, pertaining to entities and corporate law more generally.

2. Local Initiatives Encouraging Stakeholder-Governed Social Enterprise Entities in Philadelphia, Los Angeles, and San Francisco

In addition to cities that have supported creation of worker cooperatives, several localities in the United States, including Philadelphia, Pennsylvania, and Los Angeles County and the City of San Francisco, California, have established local initiatives to encourage organizations to adopt stakeholder-governed entity forms, or otherwise implement stakeholder governance within their organization ("Social Enterprise Entity Incentives"). My prior legal scholarship provides examples and analysis of these Social Enterprise Entity Incentives.¹⁷²

There are numerous similarities between Social Enterprise Entity Incentives and initiatives that encourage formation of worker cooperatives. Similar to cities that have taken an interest in incentivizing the establishment of worker cooperatives, and as noted in my prior research on Social Enterprise Entity Incentives, it is novel for cities to express "interest in influencing firms to choose stakeholder-governed organizational forms It is also new for public incentives to express a preference for a particular approach to governance."¹⁷³ Also, as with city initiatives that support the establishment of worker cooperatives, state legislatures still fully control the types of entities available in their respective states. Nonetheless, Social Enterprise Entity Incentives encourage firms to choose a particular stakeholder-governed entity, through either tax credits to entities that have adopted stakeholder governance or preferential bidding in city procurement processes.¹⁷⁴

While worker cooperatives are also often considered to be a kind of social enterprise, Social Enterprise Entity Incentives differ from city initiatives to support worker cooperatives because worker cooperatives and social enterprises are ultimately different kinds of entities. In particular, workers are also owners in worker cooperatives, but this may not be true of all the social enterprise organizations targeted by Social Enterprise Entity Incentives. As a result, Social Enterprise Entity Incentives may have different impacts than

¹⁷¹ California Employee Ownership Act, CAL. GOV. CODE § 12100.31 (West 2022) (providing California's small business owners options for succession and employee engagement, and workers opportunities to become co-owners of the companies where they work).

¹⁷² Choike, *supra* note 34, at 91, 104–09 (2019).

¹⁷³ *See id.* at 104–05.

¹⁷⁴ *See id.* at 104–09.

city initiatives to support worker cooperatives. For example, Social Enterprise Entity Incentives may contribute to the weakening of shareholder primacy norms within conventional firm governance.¹⁷⁵

C. Local Firm Governance Laws

1. Local Entity Formation Mandates

Among the most aggressive local firm governance measures, some local laws mandate the formation of private entities to manage community open spaces, facilities, and infrastructure in order to secure development approval (“Local Entity Formation Mandates”).¹⁷⁶ While no known survey has ever documented how many Local Entity Formation Mandates exist,¹⁷⁷ some research asserts that Local Entity Formation Mandates exist “on a broad scale and independent of market forces.”¹⁷⁸ A City of Dallas, Texas ordinance exempts a typical Local Entity Formation Mandate:

Prior to final plat approval, the owner(s) of the Property must execute an instrument creating a homeowners (*sic*) association for the maintenance of common areas, screening walls, landscape areas (including perimeter landscape areas), private streets and for other functions. This instrument must be approved as to form by the city attorney, approved by the city planning commission and filed in the Dallas County Deed Records.¹⁷⁹

As illustrated in the above example, Local Entity Formation Mandates commonly require the creation of a homeowners’ association to manage common assets “under unified control.”¹⁸⁰

Homeowners’ associations are often recognized as nonprofit corporations under state law.¹⁸¹ Nonetheless, many Local Entity Formation Mandates such as the one in the City of Dallas do not mandate the specific form of entity that parties must choose, but other laws may. For example, homeowners’ associa-

¹⁷⁵ See *id.* at 127–28.

¹⁷⁶ See generally Siegel, *supra* note 86.

¹⁷⁷ *Id.* at 898 (“It remains for others to conduct surveys of homebuilders and local government officials in order to gain a more complete understanding of the nature and extent of municipal requirements to establish a community association.”). The utility of such a survey, if it existed, may be limited. *Id.* at 894 (explaining that “comprehensive survey of codified municipal policy pertinent to the establishment of community associations necessarily would underreport the existence of actual municipal policy—including de facto policy.”).

¹⁷⁸ *Id.* at 860.

¹⁷⁹ *Id.* at 891–92.

¹⁸⁰ See Clark Cty. Unified Dev. Code § 30.24.020, available at https://library.municode.com/nv/clark_county/codes/code_of_ordinances?nodeId=TIT30UNDECO_30.24PLUNDEPU [<https://perma.cc/W57X-MMCJ>].

¹⁸¹ *Id.* at 2.

tions exempt under 501(c)(4) of the Internal Revenue Code must be formed as a corporation, limited liability company, unincorporated association, or trust.¹⁸² Despite their community-oriented role, homeowners' associations (like the nonprofit organizations described earlier in this Article) are treated as privately operated "business ventures" by law.¹⁸³ In many cases, the legal framework that governs homeowners' associations also borrows from corporate law.¹⁸⁴ Thus, firm governance must include the legal framework governing homeowners' associations.

Local Entity Formation Mandates contrast with state-level approaches permitting organizations to operate with or without entities.¹⁸⁵ In doing so, Local Entity Formation Mandates strip private parties of the option to organize private activity contractually. Thus, Local Entity Formation Mandates take up an issue that conventional firm governance addresses: what conditions require or prohibit a particular form of firm governance. For example, state uniform partnership acts set forth the conditions under which the enterprise form of a general partnership will be imposed upon transacting parties.¹⁸⁶ Federal tax and banking laws, which are a source of firm governance for tax-exempt and bank organizations, respectively, are additional illustrations in that they require adoption of certain firm governance measures.¹⁸⁷ For example, exempt organizations may not adopt certain entity forms; meanwhile, banking firms must conduct their activities as federally chartered bank entities.

2. Local Executive Pay Laws

Local firm governance initiatives include those that discourage excessive C-suite compensation ("Local Executive Pay Laws").¹⁸⁸ Between 2017 and

¹⁸² *Form 1024-A*, INTERNAL REVENUE SERV. (Jan. 2022), <https://www.pay.gov/public/form/start/964636103> [<https://perma.cc/FHS8-FM75>] (select "Preview Form" at the bottom of the page).

¹⁸³ See Madeline F. Carr & Daniel Boyd Kramer, *Homeowners' associations: Barriers or bridges to more sustainable residential development?*, 224 LANDSCAPE AND URB. PLAN. 1, 2 (2022).

¹⁸⁴ See, e.g., Shoked, *supra* note 13, at 822 ("[C]ourts' review of common-interest-community regulations . . . imported the business judgment rule from corporate law.").

¹⁸⁵ Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 247 (2017) ("[V]ast enterprises—with millions of customers paying trillions of dollars—often operate without any meaningful use of entities.").

¹⁸⁶ See, e.g., MICH. COMP. LAWS § 449.6(1) (2024), <https://www.legislature.mi.gov/Laws/MCL?objectName=MCL-449-6> [<https://perma.cc/TMK6-XJJL>] ("A partnership is an association of 2 or more persons . . . to carry on as co-owners [of] a business for profit.").

¹⁸⁷ See generally Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497 (2021); Menand & Ricks, *supra* note 116.

¹⁸⁸ Between 2017 and 2020, the cities of Portland, Oregon; San Francisco, California; and Seattle, Washington all implemented similar measures to rein in—or at least generate extra revenue from—executive compensation at firms within their local jurisdictions. Portland's "Pay Ratio Surtax" ("Portland Pay Ratio Surtax") was the first such initiative. PORTLAND, OR., LIC-5.02 – PAY RATIO SURTAX (2017), <https://www.portland.gov/policies/licensing-and-income-taxes/>

2020, the populous cities of Portland, Oregon; San Francisco, California; and Seattle, Washington enacted Local Executive Pay Laws. Some commentators expect that “most of the urban areas would have [measures limiting CEO pay ratios] in five to 10 years.”¹⁸⁹ Local Executive Pay Laws regulate executive pay using mechanisms similar to some of the approaches employed or proposed by conventional corporate law: tax incentives and disclosure.¹⁹⁰

The failure of corporate law to rein in executive compensation has made headlines lately.¹⁹¹ Corporate law jurisprudence has sought to address excessive executive compensation,¹⁹² and within conventional corporate law scholarship, it is a well-cited proposition that executive compensation is an agency problem.¹⁹³ Numerous corporate law scholars have addressed how

fees/lic-502-pay-ratio-surtax [https://perma.cc/J5RN-E3YK]. The Portland Pay Ratio Surtax assesses a surtax on the business license tax paid by publicly traded companies with a CEO-to-median worker compensation ratio equal to or above 100:1, based on the publicly available pay disclosures mandated by Dodd-Frank. *Id.* The Portland Pay Ratio Surtax was first gathered in 2017 and remains in effect. *Id.* San Francisco and Seattle each followed with their own version of Portland’s law, called the “Overpaid Executive Tax” (“San Francisco Overpaid Executive Tax”) and the Payroll Expense Tax (“Seattle Payroll Expense Tax,” and together with the San Francisco Overpaid Executive Tax and the Portland Pay Ratio Surtax, the “Local Executive Pay Laws”). S.F., CAL., BUS. AND TAX REGULS. CODE, art. 33, § 3303 (2020), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_business/0-0-0-50212 [https://perma.cc/KH36-3E45]; *see also* SEATTLE, WASH., ORDINANCE 126108 (July 6, 2020), https://library.municode.com/wa/seattle/ordinances/municipal_code?nodeId=1030819 [https://perma.cc/TU8N-4YSH]. Each of the Local Executive Pay Laws differs slightly in its formulation and effective date.

¹⁸⁹ Cyrus Farivar, *Can a CEO tax strike a blow to inequality? In Portland, the answer is elusive*, NBC NEWS (Nov. 27, 2020, 6:00 AM), <https://www.nbcnews.com/business/business-news/can-ceo-tax-strike-blow-inequality-portland-answer-elusive-n1248484> [https://perma.cc/Z72D-K6BT].

¹⁹⁰ With respect to disclosure, see Press Release, U.S. SEC. AND EXCH. COMM’N, SEC Votes to Adopt Changes to Disclosure Requirements Concerning Executive Compensation and Related Matters (July 26, 2006), <https://www.sec.gov/news/press/2006/2006-123.htm> [https://perma.cc/KPS5-SG67]; *see also Corporate Governance Issues, Including Executive Compensation Disclosure and Related SRO Rules*, U.S. SEC. AND EXCH. COMM’N (July 1, 2015), <https://www.sec.gov/spotlight/dodd-frank/corporategovernance.shtml> [https://perma.cc/34L9-A3BB]. With respect to tax, I.R.C. § 162(m) (West, current through P.L.118-7) (limiting any deduction for compensation paid to certain executives to only \$1 million, unless that compensation is “performance based”); I.R.C. § 83(b) (West, current through P.L.118-7) (accelerating taxation and deduction on restricted stock); I.R.C. § 409A (West.) (setting forth requirements for deferral of compensation); and I.R.C. § 280G (West, current through P.L.118-7) (establishing an excise tax and limiting the deductibility of “golden parachute” payments).

¹⁹¹ Jack Ewing & Peter Eavis, *Tesla Shareholders Approve Big Stock Package for Musk*, N.Y. TIMES (June 13, 2024), <https://www.nytimes.com/2024/06/13/business/tesla-shareholder-vote-elon-musk.html> [https://perma.cc/2VZF-HSRZ].

¹⁹² *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024); *see also In re The Walt Disney Co.*, 906 A.2d 27 (Del. 2006). *Disney* is the leading case within corporate law that deals with executive compensation. *See also* Lawrence Lederman, *Disney Examined: A Case Study in Corporate Governance and CEO Succession*, 52 N.Y.L. SCH. L. REV. 557, 558 (2007). Beyond case law, executive compensation is governed by the Securities and Exchange Acts of 1933 and 1934, the Internal Revenue Code, the Employee Retirement Income Security Act of 1974, the Dodd-Frank Act, and some state laws. *What is Executive Compensation?*, WINSTON & STRAWN LLP, <https://www.winston.com/en/legal-glossary/executive-compensation.html> [https://perma.cc/DB2S-NHW].

¹⁹³ Lucian A. Bebchuk & Jesse Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSPS. 71 (2003) (cited over 3,000 times according to Google Scholar).

corporate law governs and should govern executive compensation.¹⁹⁴ Proposals at the federal level,¹⁹⁵ and in nine states,¹⁹⁶ have attempted to further address excessive compensation in the C-suite—but each has faced challenges.¹⁹⁷

In contrast, Local Executive Pay Laws have succeeded in becoming effective—as in legally valid,¹⁹⁸ without regard for their efficacy—in carrying out stated policy goals of curbing excessive C-suite compensation.¹⁹⁹ This difference between local corporate law and conventional corporate law in the area of executive pay is especially notable because it may provide a basis for challenging well-cited corporate law scholarship that argues states are laboratories for corporate law experimentation.²⁰⁰ Cities are providing “blueprints” of novel approaches for other jurisdictions at local, state, and federal levels.²⁰¹

3. Local Stakeholder Consideration Laws

Another type of local firm governance are laws, such as community benefit ordinances,²⁰² encouraging or requiring the consideration of stakeholder interests (“Local Stakeholder Consideration Laws”). New Local Stakeholder

¹⁹⁴ See, e.g., Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers’ Pay*, 98 GEO. L.J. 247 (2010).

¹⁹⁵ Tax Excessive CEO Pay Act, S.794 / H.R.1979, 117th Cong. (2021) and Equity in Compensation Act, S.2312, 116th Cong. (2019).

¹⁹⁶ S. 747, 31st Leg. (Haw. 2021); H.B. 3083, 192nd Gen. Ct., Reg. Sess. (Mass. 2021) / S. 1907, 192nd Gen. Ct., Reg. Sess. (Mass. 2021); H.B. 06373, Gen. Assemb., Jan. Sess. (Conn. 2017); H.B. 3335, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); S.B.37 2019–20 Sess. (Cal. 2019); H.F.65, 90th Legis., 1st Reg. Sess. (Minn. 2017); S.1659, 2019–20 Gen. Assemb. (N.Y. 2019); A.07454, 2019–2020 Gen. Assemb. (N.Y. 2019); H.5141, Gen. Assemb., Jan. Sess. (R.I. 2017); and H.B.1681, 66th Legis., Reg. Sess. 2019–20 (Wash. 2019).

¹⁹⁷ Memorandum from Drexel Univ. Ctr. for Hunger-Free Communities on *Legislation To Address Extreme Pay Disparity* (Feb. 2022), <https://drexel.edu/~media/Files/hunger-free-center/research-briefs/PolicyMemoPayDisparity-Feb2022.ashx> [<https://perma.cc/3K4T-RRZ8>].

¹⁹⁸ *Id.*

¹⁹⁹ Local Executive Pay Laws, like conventional corporate laws directed at curtailing excessive executive compensation, have been criticized for their inefficacy. See, e.g., Farivar, *supra* note 189 (describing academic criticism of the Portland Pay Ratio Surtax’s significance); Brian J. Hall & Jeffery B. Liebman, *The Taxation of Executive Compensation*, 14 TAX POL’Y & ECON. 1, 2 (2000) (finding no evidence that tax regulation decreased total compensation, among other conclusions).

²⁰⁰ See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993) (cited by almost 1,400 according to Google Scholar).

²⁰¹ Farivar, *CEO Tax*, *supra* note 189.

²⁰² A community benefit ordinance (“CBO”) is one type of local initiative that encourages entities’ consideration of stakeholder interests. Regardless of their precise formulation, all CBOs have in common that they directly affect the principal-agent relationship in corporations because they empower, indeed, require, agents to consider interests beyond those of their principals. The City of Detroit, Michigan adopted the nation’s first CBO in 2016. CITY OF DET., *COMMUNITY BENEFITS ORDINANCE*, <https://detroitmi.gov/departments/planning-and-development-department/community-benefits-ordinance> [<https://perma.cc/AQY7-QTTR>]. A handful of other cities have adopted their own CBOs. See, e.g., Choike, *supra* note 34, at 91, 111–17 (describing and analyzing various permutations of CBOs). All CBOs mandate that companies at least dialogue with their local stakeholders, and in some cases even require companies to provide the benefits they request. *Id.* In so doing, CBOs require entities to consider the interests of stakeholders other

Consideration Laws empower—and in some cases, mandate—that agents consider interests beyond those of their principals. As with Social Enterprise Entity Incentives, my prior legal scholarship provides examples and analysis of these Local Stakeholder Consideration Laws.²⁰³

Whether firms can and should prioritize owners equally to or more than stakeholders is a central and persistent issue in conventional firm governance domestically.²⁰⁴ Local Stakeholder Consideration Laws are similar in ways to the state constituency statutes that emerged in the 1980s and also directly addressed stakeholder interests.²⁰⁵ Recently, there has been a resurgence of interest in permitting or even requiring firm managers to consider stakeholder interests, with the introduction of benefit corporations and similar entities.²⁰⁶ While constituency statutes are a mere expansion of the business judgment

than their shareholders, even though such entities would have no legal obligation otherwise to do so by virtue of their legal form alone. *Id.*

²⁰³ Choike, *supra* note 34, at 79, 91, 110–17 (2019).

²⁰⁴ The case of *Dodge v. Ford* is most famous for taking up this issue. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (stating that “[a] business corporation is organized and carried on primarily for the profit of the stockholders”). Yet, it was neither the first case to consider this issue, *see, e.g.*, Jena Martin, *Commentary on Dodge v. Ford Motor Company in FEMINIST JUDGMENTS: CORPORATE LAW REWRITTEN* 91, 105–06 (Anne M. Choike et. al. eds., 2023) (citing decisions preceding *Dodge v. Ford*), nor did it settle the issue definitively. *See, e.g.*, Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008). A variety of corporate law scholars thereafter analyzed constituency statutes and case law interpreting them in the aftermath of their passage. *See, e.g.*, Orts, *supra* note 33; von Stange, *supra* note 33; Lawrence E. Mitchell, *Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992); Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971 (1992).

²⁰⁵ The Illinois constituency statute exemplifies how conventional corporate law has typically taken up the issue of consideration of stakeholder interests:

In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best interests of the corporation, consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors. § 2.01 PRINCIPLES OF CORPORATE GOVERNANCE (AM. L. INST. 2005) (citing 32 ILL. COMP. STAT. ANN. STAT. § 8.85 (West Supp. 1989)).

Some state constituency statutes mandated consideration of stakeholder interests until recently. *See* von Stange, *supra* note 33 at 480 (“Three states, Arizona, Connecticut and Idaho . . . enacted mandatory constituency statutes. The Connecticut statute, for example, require[d] directors of a public corporation registered under the Securities Exchange Act of 1934, in control-shifting circumstances, to take into account other constituencies and matters. These mandatory statutes provide[d] or, in the very least, strongly suggest[ed], that directors’ action favoring nonshareholders over shareholders [was] protected. Idaho and Arizona require[d] directors to consider the long term as well as the short-term interests of the corporation and its shareholders, including the possibility that these interests [might have been] best served by the continued independence of the corporation. The Idaho statutes, however, [were] most likely limited to a change of control or merger because they [were] included within the control share acquisition statute and a business combination statute. The Arizona statute expressly limit[ed] a board’s consideration for nonshareholder constituencies to takeovers.”).

²⁰⁶ H.B. 726, 2012 Gen. Assemb., Reg. Sess. (Md. 2012); S.B. 114, 151st Gen. Assemb., Reg. Sess. (Del. 2021).

rule applicable to corporations,²⁰⁷ state statutes enabling stakeholder-governed entities (like benefit corporations) and local firm governance encourage or compel consideration of stakeholder interests by an organization.

Local Stakeholder Interest Laws and some conventional firm governance—constituency statutes—share a related impetus. Constituency statutes were some states’ response to the corporate takeover boom by “corporate raiders” of the 1980s.²⁰⁸ Larger, heavily resourced corporations sought to acquire other businesses, creating a shakeup of the smaller entities.²⁰⁹ These takeovers resulted in a profit for shareholders but were often seen as a disadvantage to the other stakeholders of the smaller corporation.²¹⁰ Constituency statutes responded to these takeovers by granting directors leeway to make decisions considering all of the players in the game. Local Stakeholder Consideration Laws originated similarly, as community members and organizations who support local community benefit initiatives believe that corporations who utilize tax incentives are “raiding” public resources for private benefit.²¹¹

Local Stakeholder Consideration Laws operate differently from conventional firm governance laws like constituency statutes, despite their shared motivations. Local Stakeholder Consideration Laws neither alter the entity’s fundamental fiduciary duties (as in constituency statutes and statutes enabling stakeholder governed entities like benefit corporations)²¹² nor install stakeholder representatives among an entity’s governance structure. Rather, Local Stakeholder Consideration Laws require accounting for stakeholder interests through an incentive structure, requiring consideration (and even sometimes

²⁰⁷ See Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 95 (2015).

²⁰⁸ Caroline Flammer & Aleksandra Kacperczyk, *The Impact of Stakeholder Orientation on Innovation: Evidence from a Natural Experiment*, 62 MGMT. SCI. 1982, 1987 (2016).

²⁰⁹ See von Stange, *supra* note 33 at 467.

²¹⁰ See *id.*

²¹¹ *Detroit’s Deeply Flawed Development*, DETROIT PEOPLES PLATFORM (Nov. 22, 2019), www.detroitpeoplesplatform.org/economic-justice/detroits-deeply-flawed-development/ [<https://perma.cc/E4H3-ZPT5>] (quoting one community organization in Detroit that decries the city’s economic development programs for diverting “hundreds of millions of public dollars . . . into the construction of luxury high rise apartment buildings, the ‘Downtown Entertainment Complex’ i.e. sports arenas, bars, and restaurants, and more private than public transportation alternatives”).

²¹² Neil Whoriskey, *Outlaws of the Roundtable? Adopting a Long-term Value Bylaw*, CLEARY M&A AND CORPORATE GOVERNANCE WATCH (Oct. 11, 2019), <https://www.clearymawatch.com/2019/10/outlaws-of-the-roundtable-adopting-a-long-term-value-bylaw/> [<https://perma.cc/Y54X-5BYE>] (“The objections . . . to constituency statutes are . . . namely, that . . . attempting to balance the priorities of the various stakeholders would result in . . . creating un-prioritized duties owed to undefined constituencies.”). See also Gargi Bohra, *Benefit Corporations: Doing Well and Doing Good*, N.Y.U. J.L. & BUS. ONLINE (Feb. 28, 2022), <https://www.nyu.jlb.org/single-post/benefit-corporations-doing-well-and-doing-good> [<https://perma.cc/ETZ4-J3M6>] (“[D]irectors and officers are required to balance the shareholder pecuniary interests, interests of those affected by the corporation’s conduct and the identified specific public benefit. . . . Unless otherwise provided in the certificate of incorporation, the breach of the balancing requirement does not also constitute a breach of duty of loyalty or good faith.”).

delivery) of stakeholder benefits, unless firms choose to forgo public benefits such as tax incentives which they would otherwise receive.

4. Local Disabling Corporate Laws

Some enacted local laws and proposed local laws called “community rights ordinances” purport to disable core privileges of the corporation.²¹³ Therefore, I refer to them as “Local Disabling Corporate Laws.” Local Disabling Corporate Laws are the product of a national movement supported by the work of the Community Environmental Legal Defense Fund (CELDF), an advocacy group founded in 1995 by law students to promote environmental protection and local self-determination.²¹⁴ Despite their likely legal untenability,²¹⁵ Local Disabling Corporate Laws have proliferated across the nation with real practical impact, warranting their inclusion as a form of local firm governance.

CELDL organizers do not publicly publish the number or names of localities that have adopted Local Disabling Corporate Laws to protect municipalities from too easily and collectively coming under attack by organizations like the American Legislative Exchange Council.²¹⁶ However, CELDF estimates that, since northwestern Pennsylvania’s Porter Township adopted the nation’s first ordinance denying corporations their rights as “persons” under the law in 2002,²¹⁷ more than 200 Local Disabling Corporate Laws have been enacted.²¹⁸ More than half of these are in the six states that make up the National Community Rights Network (Colorado, Ohio, Oregon, New Hampshire, Pennsylvania, and Virginia).²¹⁹ With the exception of states in the southern United States, communities in other states (including Alaska, California, Michigan, North Carolina, Oregon, Vermont, and Washington) have also adopted Local Disabling Corporate Laws. According to CELDF, the vast majority of Local Disabling Corporate Laws have been adopted in nonmetropolitan localities with populations under 50,000.²²⁰

The most extreme of these Local Disabling Corporate Laws have attempted to fundamentally challenge an entity’s basic legal personhood,

²¹³ See generally Miller, *supra* note 17.

²¹⁴ *Id.*

²¹⁵ See *id.* at 726 (determining that community rights ordinances “rest on largely untenable positions relative to supremacy and preemption, state law constructions of local government power, and corporate personhood doctrines all several centuries in the making”).

²¹⁶ Price, *supra* note 87.

²¹⁷ KEVIN DANAHER, ET AL., BUILDING THE GREEN ECONOMY: SUCCESS STORIES FROM THE GRASSROOTS 43 (2017).

²¹⁸ CMTY. ENV’T LEGAL DEF. FUND, *supra* note 85 (“Since 1999, 200+ communities in twelve states have passed Community Rights Laws.”).

²¹⁹ Price, *supra* note 87.

²²⁰ Price, *supra* note 87.

qualifying and subordinating it to the rights of the human and ecological communities within which the entity operates.²²¹ Some Local Disabling Corporate Laws have failed to survive legal challenges,²²² but many others—like one in Pittsburgh, Pennsylvania—remain on the books.²²³ The newest proposed variations, such as Cincinnati, Ohio’s proposed Ohio River Bill of Rights, have evolved to preserve their targets’ legal personhood but nonetheless restrict the corollary privilege of corporate limited liability.²²⁴ Specifically, in recognizing the rights of the local ecosystem and requiring corporate polluters to pay any amount necessary for its restoration, Cincinnati’s proposed Ohio River Bill of Rights seeks to establish unlimited liability.²²⁵

Local Disabling Corporate Laws’ continual evolution and power in practice—as demonstrated by their efficacy in driving out corporations interested in pursuing fracking in Pittsburgh,²²⁶ and other communities²²⁷—may render them a force with which both organizational and local government law must contend, regardless of challenges to their legal validity. In addition, as

²²¹ See, e.g., Kenneth Kilbert, *Lake Erie Bill of Rights: Legally Flawed But Nonetheless Important*, JURIST (Mar. 14, 2019, 2:57 PM), <https://www.utoledo.edu/law/academics/ligl/pdf/2019/Lake-Erie-Bill-of-Rights-GLWC-2019.pdf> [<https://perma.cc/3AN2-TKKU>].

²²² See, e.g., Joint Stipulation and Order, Pa. Gen. Energy Co. v. Grant Twp., 1:14-cv-00209 (W.D. Pa. Apr. 9, 2019). See also Jon Hurdle, *Judge Says Grant Township Must Pay \$100,000 in Legal Bills After Injection Well Dispute*, STATE IMPACT PA. (Apr. 3, 2019, 5:28 PM), <https://stateimpact.npr.org/pennsylvania/2019/04/03/judge-says-grant-township-must-pay-100000-in-legal-bills-after-injection-well-dispute/> [<https://perma.cc/5VUE-RD6B>] (describing sanctioning and fining of CELDF’s co-founder Thomas Linzey for using a “frivolous” legal argument to defend the ordinance). For further information about the dispute, see Patrick Varine, *Injection rejection: Indiana County community pushes back against fracking residue well*, TRIB LIVE (June 22, 2023, 5:01 AM), <https://triblive.com/local/regional/injection-rejection-indiana-county-community-appeals-presence-of-fracking-residue-well/> [<https://perma.cc/3WHJ-QUCP>].

²²³ See, e.g., PITTSBURGH, PA., MUN. CODE § 618.01 (2010).

²²⁴ Citizens for Rights of the Ohio River Watershed, *Ohio River Watershed Ecosystem Bill of Rights*, CROW OHIO, <https://crowohio.org/bill-of-rights/> [<https://perma.cc/7JHW-ZTK7>] (last visited July 19, 2023). See also Bill Rinehart, *Toledo voters approved a bill of rights for Lake Erie. A group wants the same for the Ohio River*, 91.7 WVXU NEWS (Apr. 18, 2023, 3:59 PM), <https://www.wvxu.org/environment/2023-04-18/crow-group-petitions-bill-of-rights-lake-erie-ohio-river> [<https://perma.cc/8QJK-E86F>].

²²⁵ Citizens for Rights of the Ohio River Watershed, *supra* note 224 (“Any person or any government found to have violated [the Ohio River’s] rights is liable to the [Ohio River ecosystem] in the amount necessary to restore the ecosystem, plus attorney fees and costs.”) (emphasis added). Violators of the proposed Ohio River Bill of Rights would also be liable for punitive damages for repeat offenses. *Id.*

²²⁶ Matt Stroud, *Five years later, what Pittsburgh gained, lost with fracking ban*, PITT. BUS. TIMES (Nov. 16, 2015), <https://www.bizjournals.com/pittsburgh/news/2015/11/16/five-years-later-pittsburgh-fracking-ban.html> [<https://perma.cc/2SZX-LQSW>].

²²⁷ See, e.g., Justin Nobel, *Nature Scores a Big Win Against Fracking in a Small Pennsylvania Town*, ROLLING STONE (Apr. 1, 2020), <https://www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159/> [<https://perma.cc/ZMS6-X4RM>]; Peggy Kirk Hall, Ellen Essman & Evin Bachelor, *In the Weeds: The Lake Erie Bill of Rights Ballot Initiative*, OHIO ST. U. EXTENSION (Feb. 8, 2019), <https://src.bna.com/Fzz> [<https://perma.cc/9THN-9HF6>] (describing how courts in Ohio, Pennsylvania, New Mexico, and Washington have rejected local community amendments to charters and ordinances that include community rights).

with city-level worker cooperative initiatives, laws similar to Local Disabling Corporate Laws have been introduced at the state level.²²⁸ For example, the proposed New York State Assembly Bill introduced as the Great Lakes Bill of Rights would recognize the Great Lakes’ “unalienable and fundamental rights to exist, persist, flourish, naturally evolve, regenerate and be restored by culpable parties, free from human violations of these rights and unencumbered by legal privileges vested in property, including corporate property.”²²⁹ Like Local Disabling Corporate Laws, the proposed Great Lakes Bill of Rights would also suspend the validity of charters and privileges for the entities in violation of these rights.²³⁰

III. PRELIMINARY ANALYSIS OF THE IMPLICATIONS OF LOCAL FIRM GOVERNANCE

The emergence of local firm governance raises a number of issues meriting close examination.²³¹ From an organizational law perspective, these issues include the impact of local firm governance upon: (1) the market for firm governance, (2) organizational purpose, and (3) the clarity and scope of organizational law as a source of firm governance. I analyze these implications in Part III.A below. From a local government law perspective, these issues include, among others,²³² the impact of local firm governance upon: (1) local police powers; (2) the private law exception to home rule authority, and (3) preemption of local government action. I analyze these implications in Part III.B below. In Part III.C, I also demonstrate the shared influences upon,

²²⁸ Assemb. B. A3604B, 2021–22 Leg. Sess. (N.Y. 2021) [hereinafter, “Proposed Great Lakes Bill of Rights”]; see also Gary Wilson, *Buffalo legislator calls for bill of rights protection for the Great Lakes*, GREAT LAKES NOW (Dec. 12, 2022), <https://www.greatlakesnow.org/2022/12/buffalo-legislator-calls-for-protection-for-great-lakes/> [<https://perma.cc/4WFW-2H2J>] (describing a recently introduced initiative at the state level similar to the proposed Ohio River Bill of Rights).

²²⁹ Proposed Great Lakes Bill of Rights, *supra* note 228, § 17-2301(1).

²³⁰ See *id.* § 17-2303(2).

²³¹ The considerations in this section apply to all local firm governance initiatives generally. In addition to these considerations, the local firm governance laws discussed in Part II.C may raise a more complicated set of issues than just local firm governance initiatives in Parts II.A and II.B. Such issues may include federal constitutional challenges, such as the Dormant Commerce Clause challenges. Other issues are specific to corporate law and local government law. From a corporate law perspective, these issues may include the internal affairs doctrine and the nature of corporate law as a framework of mandatory rather than default rules. From a local government law perspective, these issues may include state constitutional issues arising from home rule and police power (which do not apply to the board diversity and social enterprise entity incentive initiatives analyzed in Parts II.A and II.B because they are not “law”).

²³² Other potential implications from a local government law perspective remain unexplored in this Article, including, but not limited to, that local firm governance may also contribute to and exacerbate a trend of local governments utilizing lawmaking approaches drawn from corporate and contract law. See, e.g., Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011) and GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981).

and mutually influential relationship between, local government law and organizational law.

A. Analysis under Organizational Law

1. The Implications of Local Firm Governance for the Market for Firm Governance

The principal sources of conventional firm governance are made at the state and sometimes federal level.²³³ Because almost all business entities are formed under state law, states govern organizations' establishment and internal affairs, and the federal and state governments jointly regulate their external affairs. This division, called corporate federalism,²³⁴ assumes no meaningful role for local jurisdictions, such as cities, in the market for firm governance (also called "jurisdictional charter competition"). As a result of the emerging role of cities in firm governance that I describe in Part II of this Article, local firm governance has several implications for jurisdictional charter competition.

One contribution that local firm governance might make to the efficiency of the market for firm governance is to account for the overlooked dynamics of local jurisdictions, their constituents, and historical, political, economic, and other considerations. Firms are not situated across uniform local jurisdictions—in fact, sub-state level jurisdictions may have very different concerns from one another for a variety of historical, socioeconomic, and geopolitical reasons. These divergent concerns may not be reflected in firm governance made at state or federal levels. For example, firm governance at these levels is or may be dominated by bar associations representing the interests of large corporate

²³³ State laws enabling the formation of and regulating the governance of corporations are increasingly complemented by corporate law at the federal level. *See, e.g.*, Roe, *supra* note 9; Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGULATION 26 (2003-2004); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Verity Winship, *Teaching Federal Corporate Law*, 8 J. BUS. & TECH. L. 217 (2013); James J. Park, *The Limits of the Right to Sell and the Rise of Federal Corporate Law*, 70 OKLA. L. REV. 159 (2017); MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* (2018).

²³⁴ James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 578 (2010) ("The American political system's major twentieth century development was the growth of federal power Federal regulators moved into areas once traditionally considered matters of state law, such as corporate governance of business corporations registered with the [SEC], tort liability for defective products, and environmental protection."). *See also, e.g.*, Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 26 (2011) ("A typical public company in the United States will find itself regulated by corporate law made in Delaware and securities regulation made by Congress and the SEC."); E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 43 (2009) ("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.").

clients.²³⁵ In addition, local constituencies may have difficulty forming political coalitions to influence firm establishment, governance structure, and rights at state and federal levels because localities compete with one another in a hierarchical system.²³⁶ The local lawmaking process, on the other hand, may manifest a different political economy than the production of firm governance at state and federal levels and result in firm stakeholders' concerns reflected in local laws and ordinances regulating firms, in ways such local concerns are not reflected at state and federal levels. The resulting local firm governance may thus be more responsive to local constituencies than state-level firm governance—and thus more efficient than otherwise might be expected, even if only in terms of the legitimacy conferred by virtue of their subsidiarity.

In addition, states are increasingly disempowered relative to one another (on account of competing with one another) and to cities (on account of cities' growing population and economic size, among other factors).²³⁷ As a result, from a political economy perspective, cities, not states, may be best positioned to enable firm governance to innovate and more flexibly pursue social ends—also potentially promoting efficiency. As evidence of this, local firm governance initiatives to support worker cooperatives and community rights appear to have initiated or at least coincided with momentum for state-level legislation in some places like California and New York. In addition, local firm governance has emerged in numerous cities addressing executive compensation, while state and federal proposals on the subject have failed. City-level board diversity initiatives also surface interesting differences to reforms undertaken at the state level. For example, board diversity reforms at the state level have not targeted culturally significant nonprofits despite their outsized influence on mediating powerful, nonfinancial forms of capital. These trends may suggest that—at least in the area of corporate social responsibility—states are less effective or efficient than cities as laboratories of legal innovation in corporate law.²³⁸

In principle, innovative, responsive local firm governance could either complement or subvert conventional firm governance depending on the substance of local initiatives. Cities have a distinctive political economy relative to states, however, and therefore cities are likely to offer a different kind of “product” than the product offered by states, to use Professor Roberta Romano's terminology.²³⁹ In that sense, localities may well enrich the market for firm governance, without displacing it. This is because the reasons that firms choose to organize

²³⁵ Jonathan Macey and Geoffrey Miller, *Towards an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

²³⁶ See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309 (1976); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991).

²³⁷ *Supra* note 14.

²³⁸ See *supra* Part II.B.1.b.

²³⁹ See Romano, *supra* note 9.

in jurisdictions like Delaware persist, regardless of the substance of any local firm governance initiatives that may apply. Firms choose to organize in Delaware not only for the substance of its state firm governance frameworks, but also for the greater certainty it offers. Organizing a firm in Delaware comes with a tested firm governance framework that jurists expert in business issues have developed more so than any other state. Consequently, unless localities imposed so many burdens that they overwhelmed the content of dominant state legal frameworks, local firm governance may complicate, but is unlikely to entirely dilute, the force of conventional firm governance frameworks like Delaware law. As such, local firm governance thus adds a layer of social regulation that is not inconsistent with jurisdictional competition.

Of course, there may be reasons to doubt the local governance offered by cities to be “efficient,” even if one views the current market for incorporation to promote the emergence of a jurisdiction offering efficient corporate law. For example, local firm governance introduces the possibility of inexperienced government officials unintentionally influencing firms and their constituents. This concern may be mitigated, however, in large cities with large populations of sophisticated professionals competing for prestigious positions in local government, such as New York City. The fact that corporations do not choose local governance also shapes cities’ choices as to which laws to adopt. This is because wherever a firm operates, it would be subject to local firm governance, in addition to the law of the jurisdiction in which the firm is organized (often Delaware, if not the state in which the firm’s headquarters are located). In light of states’ growing disempowerment, this state of affairs may represent a leveling of the playing field between lawmakers and corporations more than capture or abuse of power, however.

2. The Implications of Local Firm Governance for Firm Purpose

While federal law influences the governance and specific purposes pursued by organizations interested in tax-exempt status, modern state organizational law is widely viewed as agnostic to the purposes pursued by business firms. This seems less true of local firm governance, at least based on the initiatives that have been adopted so far. In fact, one might characterize them as a kind of “activist” firm governance, which encourages or even imposes a particular view regarding the appropriate organizational purpose of firms.

Most localities that have undertaken local firm initiatives have sought to enhance firms’ social responsibility,²⁴⁰ a topic that is the subject of much

²⁴⁰ Localities’ initiatives have focused on increasing firms’ representation or consideration of groups—such as workers, stakeholders, or demographics like women or people of color—who have historically been excluded from firm decision-making. *See supra* Parts II.A, II.B, II.C.3, II.C.4.

debate, not only within contemporary organizational law²⁴¹ but also in national politics.²⁴² Localities are already extending their reach further into other areas “ripe for regulation in progressive jurisdictions,” such as climate change.²⁴³ To date, few local jurisdictions at the other end of the political spectrum have taken a different tack but more could conceivably do so. For example, proponents of small government and fiscal conservatism increasingly seek private ownership and management of community assets and infrastructure,²⁴⁴ such as libraries,²⁴⁵ museums,²⁴⁶ and parking systems.²⁴⁷ Might the next step entail *requiring* that private entities own and manage these assets, just as some local laws require the formation of private entities for the ownership and management of community infrastructure like roads and parks?²⁴⁸ Also, just as actors at the state level are opposing environmental, social, and governance (ESG) initiatives,²⁴⁹ might localities similarly adopt anti-ESG policies restricting the investments of their city employees’ retirement funds or excluding stakeholder-governed entities from eligibility for business licenses – just as they are already limiting localities from using ESG factors in state and local government investment decisions and government contracting processes?²⁵⁰

²⁴¹ See, e.g., Belinfanti & Stout, *supra* note 78, at 579 (“Despite the dominant role corporations play in our economy, culture, and politics, the nature and purpose of corporations remain hotly contested.”).

²⁴² Daniel F. C. Crowley & Robert G. Eccles, *Rescuing ESG from the Culture Wars*, HARV. BUS. REV. (Feb. 9, 2023), <https://hbr.org/2023/02/rescuing-esg-from-the-culture-wars> [<https://perma.cc/9MHY-L2AF>] (“In the past year, ESG investing has become caught up in America’s culture wars . . .”).

²⁴³ Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 307 (2019) (“[O]ther politically salient issues like corporate political spending, gun violence, and climate change seem likewise ripe for regulation in progressive jurisdictions.”); see also Naaraayanan, *supra* note 23 (reporting on the outcome of the New York City Comptroller’s Board Accountability Project).

²⁴⁴ See generally Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118 (2014); MICHELLE WILDE ANDERSON, *THE FIGHT TO SAVE THE TOWN: REIMAGINING DISCARDED AMERICA* (2022).

²⁴⁵ See Kelly Jensen, *Huntsville Public Library (TX) Privatized After Pride Display*, BOOK RIOT (Dec. 21, 2022), <https://bookriot.com/huntsville-public-library-privatization/> [<https://perma.cc/KQK5-SVCL>].

²⁴⁶ See Martin Levine & Larry Kaplan, *Critics Tackle Proposal to Replicate Detroit’s “Grand Bargain” in Other Midwest Cities*, NONPROFIT Q. (May 11, 2016), <https://nonprofitquarterly.org/critics-tackle-proposal-to-replicate-detroits-grand-bargain-in-other-midwest-cities/> [<https://perma.cc/7P7G-9VAL>] (describing “privatization of the world-renowned Detroit Institute of Arts, which the city essentially sold to a private nonprofit established to run it”).

²⁴⁷ See Schanzenbach & Shoked, *supra* note 12, at 565–69 (describing the privatization of Chicago’s parking system).

²⁴⁸ See *supra* Part II.C.1.

²⁴⁹ See Witold Henisz, *How to Confront the Anti-ESG Campaign*, KNOWLEDGE AT WHARTON (Aug. 30, 2022), <https://knowledge.wharton.upenn.edu/article/how-to-confront-the-anti-esg-campaign/> [<https://perma.cc/DQK5-DRZE>].

²⁵⁰ See, e.g., Kimberly A. Case et al., *New Florida Law Prohibits the Use of ESG Factors in Government Investment and Procurement Decisions*, HOLLAND & KNIGHT (June 30, 2023) <https://www.hklaw.com/en/insights/publications/2023/06/new-florida-law-prohibits-use-of-esg-factors-in> [<https://perma.cc/WVE2-47UN>].

Regardless of where a locality may fall on the political spectrum, local support for certain firm purposes, or certain entity forms like benefit corporations, may reveal broader insights about state organizational law's goals as well. In addition to ease of formation and economic efficiency,²⁵¹ jurisdictions—whether state or local—may promote particular entity types because they are motivated by specific normative beliefs regarding the purpose and beneficiaries of business activities. Indeed, some scholars suggest that states' efforts in promulgating particular entity types as variations on the business trust might be most accurately framed as influencing and instigating dialogue about the kinds of entities and governance structures that businesses adopt.²⁵² Cities may similarly be undertaking a state-like role in their own attempts to wield their influence upon firms operating within their jurisdictions, with their local initiatives to influence firm governance through entity and governance structures.

Interestingly, like states,²⁵³ cities have been targeted by special interests advocating for specific entity types.²⁵⁴ Special interest groups promoting social

²⁵¹ See, e.g., Hansmann, *Corporation and Contract*, *supra* note 120 at 2–3, 17 (2006) (arguing that the evolution of legal forms for doing business “allow[s] for the constant readjustment of [a firm’s] relationship over the long period of time that it may last,” and that such evolution may manifest as intra-jurisdictional choices among systems of provisions for different legal entities, when “firms differ substantially in their ownership structure or their line of business”); see also Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV 5 (2005) (hypothesizing that entity proliferation may occur because new business forms “permit signaling and bonding that the business trust cannot provide” or offer “specialized sets of default rules that are suitable to different types of firm” that do not lend themselves to specification in a firm’s governing instrument); cf., Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 83 (2004) (“The current proliferation of the number of business forms has become a source of increasing confusion.”).

²⁵² See Elizabeth Schmidt, *New Legal Structures for Social Enterprises: Designed for One Role but Playing Another*, 43 VT. L. REV. 675, 724–25 (2019) (arguing that the intent of state legislatures in enacting laws that enable new social enterprise oriented legal entities is to promote dialogue about socially minded business practices).

²⁵³ See, e.g., Macey & Miller, *supra* note 235 (describing the role of the Delaware Bar in maintaining the primacy of Delaware as a jurisdiction favored for its corporate law); Susan Pace Hammill, *The Origins Behind the Limited Liability Company*, 59 OHIO STATE L. J. 1459 (1998) (describing the role of an oil company and its lawyer who pushed for the introduction of the LLC in Wyoming and its blessing by the federal Internal Revenue Service with favorable tax treatment); William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855 (1955) (discussing the concern by Georgia attorneys that Georgia businesses were turning to Florida LLCs, and the role of the local bar association in pressuring the Georgia state legislature to enable LLCs so that businesses and business formations remained in state rather than moving to states with LLC enabling statutes on their books).

²⁵⁴ See, e.g., *Contact Us: Get in Touch with B Lab all Around the World*, B LAB, <https://www.bcorporation.net/en-us/movement/contact-us> [<https://perma.cc/QJA2-BXA7>] (describing the Global Headquarters of B Lab—the group that drafted and lobbied for legislation enabling benefit corporations—as located in Philadelphia); *Payments, assistance & taxes: Business tax credits*, CITY OF PHILA., <https://www.phila.gov/services/payments-assistance-taxes/taxes/tax-credits/business-tax-credits/sustainable-business-tax-credit/> [<https://perma.cc/PY3G-NPDD>] (last visited Jan. 24, 2023) (describing a City of Philadelphia local tax credit available to certified B Corps and other sustainable businesses that expired in 2023); see generally Roberts

enterprise are not reticent in sharing their motivation to change dominant dialogues about the way business is done.²⁵⁵ Therefore, it is unlikely that easing entity formation²⁵⁶ or promoting economic efficiency²⁵⁷ (among other common explanations for entity proliferation) motivate these special interests to promote social enterprise entities in local firm governance initiatives. Rather, local jurisdictions who accept special interests' influence to promote entity or governance structures likely also support a specific worldview regarding the purpose and beneficiaries of business activities.²⁵⁸

3. The Implications of Local Firm Governance for the Clarity and Scope of Organizational Law

Local firm governance adds another layer—and many new players—to the legal framework governing firms. In addition, on first blush, local firm governance may also blur the boundaries of firm governance and firm regulation. The ambiguity produced by such blurred boundaries creates the potential for further complicating an already complex system of firm governance.²⁵⁹ The distinction between initiatives comprising firm governance, or “mere” regulation of corporate activities and impacts, is possible to delineate, however. What makes an initiative firm governance is not about the desired outcome of the initiative, but the means of achieving such outcome. Firm governance initiatives are those that seek to achieve their outcomes by influencing firm structure, or by altering the fundamental relationships of power in organizational law, as these are the principal concerns of firm governance. Meanwhile, initiatives that regulate what firms do—without regard to firm structure or relationships among constituents—are not firm governance.

To illustrate, firm governance or firm regulation both may seek as their outcomes safe and healthy places of employment for workers. A firm governance initiative may entrust workers with achieving such outcomes, by

Enterprise Development Fund (REDF), *About: History*, <https://redf.org/history/> [<https://perma.cc/U2W2-UY4V>] (last visited Jan. 24, 2023) (describes REDF as going from a “California-based funder to national leader” for social enterprise and identifying Los Angeles and San Francisco—cities with local initiatives incentivizing the formation of social enterprise entities—as the two principal offices of REDF). Special interests promoting cooperatively governed business entities, like the Sustainable Economies Law Center in Berkeley and the Federation of Protestant Welfare Agencies in New York City, similarly motivated local initiatives to form cooperatives.

²⁵⁵ *E.g.*, *Make Business a Force for Good*, B LAB, <https://www.bcorporation.net/en-us> [<https://perma.cc/YQ7D-EVMX>] (stating its mission to “[transform] the global economy to benefit all people, communities, and the planet” and that it “won’t stop until all business is a force for good”).

²⁵⁶ See Franklin, *supra* note 118, at 575.

²⁵⁷ See generally Hansmann, Kraakman & Squire, *supra* note 251.

²⁵⁸ See, e.g., Schmidt, *supra* note 252; Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767 (2015) (arguing that the development of legislation for social enterprise forms promotes and coordinates social enterprise as a distinct field).

²⁵⁹ *Supra* Parts I.A and I.B.

empowering them as firm owners in worker-owned entities, or with board representation as worker representatives. Meanwhile, a regulation entrusts agencies and regulators with achieving such outcomes, by empowering the agency or regulator to set forth safety and health standards and charging them to monitor and enforce such standards. The distinction between local firm governance from other forms of local firm regulation may be extrapolated to state and federal levels, contributing to efforts at delineating firm governance and firm regulation more broadly.²⁶⁰

Local firm governance may also enhance clarity within organizational law. Revealing a new, emergent layer of firm governance at the local level can help in analyzing broader corporate issues. For example, there has been uncertainty about whether the purpose of board diversity initiatives is profit or socially motivated.²⁶¹ Local firm governance may shed light on this question, when considering that at least some local board diversity initiatives have been undertaken by tax exempt organizations like nonprofits—which are prohibited from pursuing purely profit-motivated ends more than insubstantially. Assuming that a reason other than profit drives such tax-exempt organizations to implement board diversity initiatives, perhaps a similar reason also underlies such policies in for-profit organizations (alone or in addition to profit-maximization).

B. Analysis under Local Government Law

1. The Implications of Local Firm Governance for Local Police Powers

The local police power is one of the powers authorizing local governments to act to benefit the public health, safety, and general welfare of a community.²⁶² Some of the implications posed for the local police power by local firm governance have already been extensively analyzed elsewhere.²⁶³ For example, Local Disabling Corporate Laws “could well be the most substantive challenge to the established norms of the police powers limits in contemporary legal thought” and “might ultimately prove to be a more profound shift in local government law.”²⁶⁴ In addition, other local firm governance initiatives may also impact the local police power.

²⁶⁰ See, e.g., James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116 (2017).

²⁶¹ See, e.g., Jill E. Fisch & Steven Davidoff Solomon, Centros, *California’s ‘Women on Boards’ Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019).

²⁶² See generally MCQUILLIN, MUN. CORP., *supra* note 35, § 24:1.

²⁶³ See generally Miller, *supra* note 17.

²⁶⁴ *Id.* at 708. The survival of the Pittsburgh Home Rule Charter, discussed in Part III.A.2 may be one application of such an interpretation. One commentator has attributed the survival

In the interest of preventing and abating disturbances of the peace, order, morals, and decency,²⁶⁵ local ordinances that restrict or prohibit certain kinds of business activities have been upheld as valid exercises of the local police power.²⁶⁶ “Big box” retail business activities—massive chain stores often but not always located in suburban areas, and often resisted by local communities on account of their business practices, like loss-leader item pricing, poor employee wages and benefits—have also been restricted as valid exercises of localities’ police power.²⁶⁷ Along these lines, local firm governance—with its promotion of social responsibility and consideration of firm stakeholders—seems like another well-suited application for localities’ police power. For example, a locality using its police power could conceivably condition approval of a building permit in a particular area on that business operating as some sort of more socially oriented business form, like a benefit corporation. (Of course, whether or not any locality would do so in practice depends on a city’s bargaining power and political environment, among other considerations.) Using the local police power in this way could represent a novel, but natural, expansion of this form of local authority.

Another limitation on local firm governance might be that the “general welfare” that local police powers must advance includes not only the local community but also the state as a whole.²⁶⁸ This is because of the nature of the police

of the Pittsburgh Home Rule Charter to the very reasoning that Miller describes. See Joseph Schaeffer, *Municipal ‘Fracking’ Bans and Preemption in Appalachia*, JURIST (July 12, 2011, 11:00 AM), <https://www.jurist.org/commentary/2011/07/joseph-schaeffer-hydraulic-fracturing/> [<https://perma.cc/9ZSJ-TYCC>].

Specifically, if a corporation brings a preemption claim, the City of Pittsburgh can argue that corporations are not entitled to remedies because, per the ordinance, they are not “persons;” do not have standing, and cannot challenge the ordinance or enforce preemption law. *Id.*; PITTSBURGH, PA., CODE OF ORDINANCES § 618.04(a)–(d) (2024). Even if a court finds these arguments to be unconstitutional, as they have in other cases, the challenger must argue that the city lacks the power to enact the ordinance and that it is thus preempted. See *id.* In response, the city could argue that regulating health and safety, rather than the state-regulated oil and gas industry, is not inconsistent with state law and, therefore, not preempted. See *id.*

These obstacles in challenging the ordinance may explain why no corporations have done so, even though the ordinance arguably is preempted by state law, implicates issues of due process and equal protection through its removal of corporate personhood, and violates Pennsylvania’s Certain Remedy Clause. See Schaeffer, *supra* note 285 (citing Range Res. Appalachia, LLC v. Salem, 964 A.2d 869 (Pa. 2009), which held that ordinances regulating surface and land development related to oil and gas drilling were preempted by the Pennsylvania Oil and Gas Act).

²⁶⁵ See generally MCQUILLIN, *supra* note 35, § 24:93.

²⁶⁶ See, e.g., MCQUILLIN, *supra* note 35, § 24:129 (“Ordinances seeking to regulate or prohibit topless or nude entertainment have been upheld as valid exercises of the police power.”)

²⁶⁷ See Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 474 (2012); see also Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County’s Police Power and Its Comprehensive Plan: California’s Experience*, 6 VT. J. ENV’T L. 31 (2005).

²⁶⁸ See S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 725 (N.J. 1975).

power as delegated from the state.²⁶⁹ Therefore, local firm governance initiatives that derive their authority from the local police power must advance the general welfare of not only the local community but also the state community. Some local firm governance initiatives, like New York City's board and management diversity initiatives in public companies, seem to easily advance broader state, and even national or international, interests. In this way, the local police power may increase localities' power over firms that are not exclusively local.

2. The Implications of Local Firm Governance for the Private Law Exception to Home Rule Authority

Home rule describes the authorization of localities by states to decide which services they provide, the policies they implement, and the ways they solve problems locally.²⁷⁰ Home rule is defined by state law, due to the United States Constitution's silence with respect to local governments.²⁷¹ In this vacuum, states predominantly asserted control over local governments as legally subordinate (the strongest form of such view being known as "Dillon's Rule," which still exists today),²⁷² and home rule developed in response.

The local authority that home rule provides is far from absolute, and one controversial exception is known as "the private or civil law exception."²⁷³ This exception sets forth that home rule authority does not extend to the enactment of "private or civil law governing civil relationships" which are inherently reserved for the state, "except as incident to an exercise of an independent county or civil power."²⁷⁴ Among other reasons why this exception is controversial,²⁷⁵ it is neither easy to define private law, nor define when it is exercised "incident" to an independent local power. Theoretically, according to one definition, private law "consists of the substantive law which establishes legal rights and duties between and among private entities"—like contract law, property law, commercial law, and agency law.²⁷⁶ In practice, however, distinguishing between private law and "public" health and safety ordinances that affect these subjects is difficult.

²⁶⁹ See *id.*

²⁷⁰ See *New Principles of Home Rule*, NAT'L LEAGUE OF CITIES (Feb. 7, 2020), <https://www.nlc.org/resource/new-principles-of-home-rule/> [<https://perma.cc/95FD-3NMF>].

²⁷¹ See *Principles of Home Rule for the 21st Century*, NAT'L LEAGUE OF CITIES 9 (2020), available at <https://www.nlc.org/wp-content/uploads/2020/02/Home20Rule20Principles20ReportWEB-2-1.pdf> [<https://perma.cc/KP6Y-7LY4>].

²⁷² See *id.* at 9–10 (describing the development of "Dillon's Rule," which sets forth that local governments, "as administrative conveniences of the state, had no inherent lawmaking authority, possessing only those powers expressly delegated to them by the state or indispensable to the purposes of their incorporation").

²⁷³ BRIFFAULT ET AL., *supra* note 37, at 433.

²⁷⁴ *Id.*

²⁷⁵ See *id.* at 433–36.

²⁷⁶ *Id.* at 433–34.

Like local “living wage” ordinances that require employers to pay a minimum wage greater than federal or state minimum wages, many local firm governance initiatives may have been presented as a condition on doing business with or accepting a benefit from a city.²⁷⁷ These local firm governance initiatives may include, for example, local board and management diversity initiatives and local stakeholder consideration laws, described in Parts I.A and I.C.3 of this Article. This is presumably so that the cities with these local firm governance initiatives can protect themselves from the argument that the private law exception applies and thus that they lack legal authority to direct private firm governance structures. The private law exception to home rule authority could apply, however, to other local firm governance initiatives that are not conditioned upon doing business with or accepting a benefit from a city. For example, just as some localities have adopted ordinances applicable to all private employers (not only those contracting with or receiving benefits from a city) that mandate living wages, paid sick leave, and fair scheduling of employees—and such ordinances have been upheld²⁷⁸—they could also conceivably attempt to adopt mandates applicable to private firms to diversify boards and management, or to use stakeholder governance. Indeed, the City of San Francisco justifies its Local Executive Pay Law as a tax “for the privilege of engaging in business *in the City*”—not *with the City*.²⁷⁹

3. The Implications of Local Firm Governance for Local Preemption

A major implication of local firm governance from a local government law perspective pertains to how it—and any other related local initiatives—may diffuse and thus survive the increasing threat of state preemption. Preemption occurs when a local action is within the scope of power granted to the locality by the state but is in conflict with a state law.²⁸⁰ A local law may be expressly preempted (when a state law expressly prohibits the local law) or impliedly

²⁷⁷ See *id.* at 436 (“By presenting the living wage requirement as a condition on doing business with or accepting a benefit from the city, localities sought to protect themselves from the argument that they lacked legal authority to regulate private sector wages”); *id.* at 376–77 (describing examples local living wage ordinances and limits to the legal authority of localities in exercising authority over wages); *but see id.* at 436 (“... [N]ot all states or state courts are as reluctant to find preemption [of local living wage ordinances]. As of 2021, fifty-one counties and cities had adopted local minimum wage ordinances, although eleven of them were nullified by state law, and another six were superseded when their states raised the minimum wage above the level set by the local government.”).

²⁷⁸ See *id.* at 436–37.

²⁷⁹ S.F. BUS. AND TAX REGULS. CODE art. 33, § 3303(a) (2020) (emphasis added). Of course, the Local Executive Pay Laws also draw upon a locality’s power to tax—however, such powers are not inherent, and only exist to the extent that such power has been granted to them by the state, and to the extent that such laws are not preempted. See generally MCQUILLIN MUN. CORP., *supra* note 35, § 44:4; see also *supra* Part III.B.2.

²⁸⁰ See BRIFFAULT ET AL., *supra* note 37, at 554.

preempted because it is inconsistent with or frustrates the purpose of state law, or state law fully occupies the field in which the local law is enacted.²⁸¹ Generally, state law will preempt local law unless the state law is invalid or the state lacks the power to preempt local action. In certain states, however, if a matter is of exclusively local concern or of mixed state and local concern, the local law may prevail despite the conflict with state law.²⁸²

In general, state preemption of local authority is a significant obstacle to local policymakers.²⁸³ Local authority exercised in the form of local ordinances has encountered numerous forms of resistance at the state level.²⁸⁴ The range of such resistance includes tax and expenditure limitations, unfunded mandates, limitations on public health measures, and “new preemption” that is characterized by policy restrictiveness and punitiveness.²⁸⁵ Within this constrained preemption environment, some localities have responded by working with state legislators, passing local legislation before preemption takes effect, or engaging local constituents to pressure state lawmakers to repeal preemptive state laws.²⁸⁶

These avenues may not, however, be successful or available to all localities, and therefore localities are urged to “think about how to best create and implement local policies in an environment where the distribution of power between governments is competitive and changing.”²⁸⁷ One promising possibility that responds to this imperative may be to use local firm governance, as well as the tools of local firm governance that I describe in Parts II.A and II.B—nudges and expenditures, such as funding and other resource conditions, incentives, and proposals. This is because contracting for the allocation and expenditure of funds uses localities’ authority within their broader executive²⁸⁸ or market participant powers,²⁸⁹ rather than localities’ more limited

²⁸¹ See *id.*

²⁸² See *id.* at 554–55.

²⁸³ See Christopher B. Goodman, Megan E. Hatch, & Bruce D. McDonald, III, *How States Preempt Local Laws*, NAT’L LEAGUE OF CITIES (Jan. 14, 2021), <https://www.nlc.org/article/2021/01/14/how-states-preempt-local-laws/> [<https://perma.cc/4H4Q-8JTY>] (“One of the most visible challenges city policymakers are facing today are states that preempt their lawmaking abilities.”).

²⁸⁴ See Christopher B. Goodman, Megan E. Hatch, & Bruce D. McDonald, III, *State Preemption of Local Laws: Origins and Modern Trends*, 4 PERSP. ON PUB. MGMT. GOVERNANCE 146, 147–50 (2021).

²⁸⁵ See *id.* at 150–53.

²⁸⁶ See *id.* at 155.

²⁸⁷ *Id.*

²⁸⁸ See generally Bradley E. Morris, *Separation of Powers in Municipal Government: Division of Executive and Legislative Authority*, 1978 BYU L. REV. 961 (1978) (describing “judicial recognition of the separation of municipal executive and legislative powers” and the emergence of new forms of local government “that allow increased executive authority and autonomy”).

²⁸⁹ See MCQUILLIN MUN. CORP., *supra* note 35, at § 19:125 (“A state’s actions in regulating commercial activity are limited by the dormant Commerce Clause, but its actions as a participant in the marketplace are not. . . . If the state is buying or selling goods as any private economic actor might, then it is engaging in ‘market participation’ that by definition falls outside the scope of activity governed by the dormant Commerce Clause.”); *but see* State ex rel Brnovich v. Tucson,

legislative lawmaking authority used to enact local ordinances. Of course, local government actions taken using these powers can be legally preempted as well,²⁹⁰ but practically it may be more difficult to do so. As a result, local firm governance using such tools may encounter decreased susceptibility of local government action to state preemption.

C. The Shared Implications of Local Firm Governance Analyzed under both Local Government Law and Organizational Law

Beyond its separate implications for organizational law and local government law, local firm governance may impact the accountability and legitimacy of both areas of law. When local firm governance initiatives speak to issues of particular local concern (which some but not all local firm governance initiatives may do), taking into account considerations specific to localities can also be a socially desirable outcome of local firm governance. That the law of Delaware applies to multinational firms with worldwide operations²⁹¹—and worldwide stakeholders, many of whom lack any influence over Delaware law—results in a lack of democratic accountability.²⁹² At the same time, localities encounter constraints in serving their constituents due to limitations on their lawmaking authority as local governments.²⁹³ Local firm governance might enhance accountability of both firm governance and local governments because local firm governance may enable localities to respond to constituents’ interests through novel local initiatives and laws. In doing so, local firm governance may enhance the legitimacy of both firm governance frameworks, as well as local govern-

242 Ariz. 588, 603 (“[T]he City’s . . . proprietary capacity is not determinative . . . [and] the proprietary/governmental distinction is murky and unhelpful in resolving disputes of this kind, [so] we do not view it as an appropriate factor in determining whether a state law relates to a matter of ‘statewide or purely local interest.’”). It is important to note that a city’s power to act as a market participant is related to, and also sometimes referred to as, a “proprietary” power. *See, e.g.,* MCQUILLIN MUN. CORP., *supra* note 35, at § 10:27 (“The municipal power to engage in private or proprietary activities is to be distinguished from the power to regulate or control such activities”); *White v. Mass. Council of Constr. Empls*, 460 U.S. 204, 208 (1983) (summarizing a judicial determination that a “city . . . is not participating in the market . . . where the city is acting in a nonproprietary capacity”).

²⁹⁰ *See, e.g.,* Case et al. *supra* note 250.

²⁹¹ Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499, 506 (2015) (“U.S. state law, whether of Delaware or another state of incorporation, will only govern the internal affairs of the specific entity incorporated within the state. If this entity holds functional authority over the firm as a whole, serves as a regional or divisional headquarters, or otherwise oversees other subsidiaries, then state corporate law will directly or indirectly govern the affiliates under its control.”)

²⁹² *See, e.g.,* Macey & Miller, *supra* note 235, at 490 (“Because the physical assets of most large Delaware corporations are located in other states, Delaware lawmakers ordinarily are not subject to pressures from unions, environmental groups, local communities, or other special interests associated with the corporation’s physical plant or assets.”).

²⁹³ *See, e.g.,* Cole, *supra* note 13, at 1414 (“Dillon’s Rule still restrains cities from wielding full fiscal powers. . . . compels cities to subscribe to a market-defined version of local economic development, and . . . blocks efforts to address climate change in cities.”)

ment, by addressing the concerns of stakeholders who do not believe their interests have otherwise been adequately considered to date.

*D. Mutual Influence between Local Government Law and
Organizational Law*

In this Article, I have primarily focused upon the ways in which *localities* seek to influence firm governance. There are, however, ways in which *firms* have affected local governance, demonstrating that local government law and organizational law may be mutually influential.

One example of the ways in which firms affect local governance can be drawn from recently unearthed history of one of local government law's most foundational canons, Dillon's Rule. In his article *Unshackling Cities*, Professor Felipe Ford Cole describes the way that the originator of Dillon's Rule, John Forrest Dillon, intentionally constrained local power by private capital as a core design feature of Dillon's Rule.²⁹⁴ Specifically, Dillon did not task states with the responsibility of fiscally disciplining cities but rather "made cities fiscally powerless so that they could only borrow and spend in a narrow way that would convince municipal creditors that their debts would be repaid."²⁹⁵ Professor Ford Cole's observations show that "attracting and shielding capital against city power . . . shackles cities to a limited range of market-consented options with which to address shortages in local economic development, affordable housing, and climate change" that disproportionately burden people of color.²⁹⁶

Innovations at the forefront of organizational and securities law also show the way in which firm governance impacts local governance, further highlighting their mutually influential relationship. For example, the recently proposed adoption of New York Stock Exchange listing standards for natural asset companies ("NACs") illustrates how firm governance is also attempting to extend its reach into local governance, such as land use management. NACs are corporations "whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services . . . [and who] seek to conduct sustainable revenue-generating operations . . . [and] other activities that support community well-being, provided such activities are sustainable," where doing so is consistent with the aforementioned primary purpose.²⁹⁷ Some examples of "ecosystem services" include "clean air, water supply, flood protection, pro-

²⁹⁴ See Cole, *supra* note 13, at 1365.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1366.

²⁹⁷ Listing Standards for Natural Asset Companies, Exchange Act Release No. 34-98665, 2 (Sept. 29, 2023).

ductive soils for agriculture, climate stability, habitat for wildlife, among others” that NACs could provide.²⁹⁸

Many of the “ecosystem services” that NACs could provide are regulated at the local government level (among other levels of government) through localities’ traditional roles in addressing land use management, planning, and zoning.²⁹⁹ Indeed, some of the highest profile opponents of the NAC listing standards explicitly cited their impact upon local land uses (among others), and called the proposal “a subverted, back door approach to apply ESG principles to land use management.”³⁰⁰ Interestingly, some of the opposition to NACs seems similar to claims of intrusion by international law into local land use management.³⁰¹ In evaluating whether NACs indeed overreach into the scope of local land use, authorities would benefit from consideration of scholarship at the intersection of law and natural resource management and planning.³⁰² NACs thus demonstrate that it is important to examine the unexplored relationship between local government law and organizational law from both directions.

CONCLUSION

As demonstrated in this Article, local firm governance is a force with which firms must increasingly contend. It exemplifies and extends the growing lawmaking power flexed by local governments, contributing to the realignment of the relationship between cities and states.³⁰³ The reach of local firm governance is also potentially expansive and consequential.³⁰⁴ The addition of the local level to the firm governance framework has the potential to improve the efficiency, clarity, and objectives of firm governance. In addition,

²⁹⁸ *Id.* at 3.

²⁹⁹ See, e.g., Richard K. Norton, *Dynamic Coastal Shoreland Zoning: Adapting Fastland Zoning for Naturally Shifting Coastal Shores*, 3 ZONING PRACTICE 2 (2020) (“A variety of federal and state authorities and programs also address coastal shoreland resource conservation . . . Nonetheless, zoning is the primary legal mechanism used by states and localities to strike a balance between private property rights and public interests in land use. Moreover, the wide array of federal and state programs that exist today for coastal management ultimately rely on local governments to make most of the meaningful and enforceable public management decisions that shape shoreland use.”); see also generally Richard K. Norton, *Who Decides, How, and Why? Planning for the Judicial Review of Local Legislative Zoning Decisions*, 43 URB. LAW. 1085 (2011).

³⁰⁰ Letter from Brad Little, Joe Lombardo, Greg Gianforte & Mark Gordon, Governors, to Vanessa Countryman, Sec’y, U.S. Sec. and Exch. Comm’n, Re: SR-NYSE-2023-09 Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Adopt Listing Standards for Natural Asset Companies (Oct. 25, 2023), available at <https://www.sec.gov/comments/sr-nyse-2023-09/srnyse202309-281199-687142.pdf> [<https://perma.cc/5RP4-HMDW>].

³⁰¹ See Richard K. Norton, *Agenda 21 and Its Discontents: Is Sustainable Development a Global Imperative or a Globalizing Conspiracy?*, 46 URB. LAW. 325 (2014).

³⁰² See *id.*

³⁰³ See *supra* note 14.

³⁰⁴ See Manesh, *supra* note 243, at 307 (“[O]ther politically salient issues like corporate political spending, gun violence, and climate change seem likewise ripe for regulation in progressive jurisdictions.”).

local firm governance brings attention to issues in local government law that are relevant to firm governance, and vice versa. On the other hand, local firm governance may create challenges extending beyond organizational and local government law.³⁰⁵ As a result, local firm governance is both promising and concerning, and thus necessitates close examination—both on a case-by-case basis for each local initiative, and also conceptually by comprehensively considering all types of local firm governance in general.

More empirical research—like the assessment of New York City’s Board Accountability Project described in the Introduction to this Article—is necessary to individually assess local firm governance initiatives beyond preliminary observations. Any such evaluation will require the consideration of many factors. These include a locality’s size, politics, economy, and geography; a locality’s relationship with other related or nearby jurisdictions; and the subject of the local firm governance initiative. For example, localities without the broad power of home rule authority, or without political alignment at local and state levels, may benefit more greatly from local firm governance to innovate solutions free from constraint. Similarly, a locality may be more likely to benefit from local firm governance if its interests are not adequately represented in state and federal firm governance.

A subject may be more appropriate for local firm governance if other levels of government have failed to address it successfully, such as excessive executive compensation or limited innovation in socially oriented entity types. These benefits may exist regardless of the size of a jurisdiction. The size of a locality (whether in terms of its population or economy), however, may matter in other respects. Local firm governance may be more likely to represent sound policy if the jurisdiction’s size is large enough such that its local government is staffed by sophisticated professionals with appropriate expertise. On the other hand, a large jurisdiction may provide such a lucrative market to firms that such firms may be willing to tolerate even poorly conceived local firm governance, diminishing the incentive of local governments to devise efficient firm governance. Ultimately, the advisability of each local firm governance initiative will depend on a case-by-case, multi-factor analysis that exceeds the scope of this Article.

From a broader, more conceptual perspective, there are many tools and schools of thought that could be used to assess local firm governance in general.³⁰⁶ One multidimensional governance approach identifies criteria that suggest local firm governance is an effective regulatory solution to the

³⁰⁵ See generally *supra* note 183 (identifying that Local Entity Formation Mandates pose barriers to environmental sustainability due to the formal entity procedures they impose); see also Anne Choike, Asia Dowtin & Daniel B. Kramer, *The Influence of Homeowners’ Associations on the Environmental Sustainability of Residential Development* (working paper).

³⁰⁶ While these approaches are also necessary to consider, surveying all of them is beyond the scope of this Article’s focus on surfacing the phenomenon of local firm governance.

complexity posed by firms and the framework that governs them.³⁰⁷ Specifically, multidimensional governance research suggests three key principles for framing effective regulatory solutions in the face of complexity: (1) the need to craft hybrid legal structures after identifying the various overlapping formal and informal regulatory vehicles, (2) the importance of attending to the way geographical scale operates and developing strategies that allow key actors at each level to interact meaningfully and effectively, and (3) the need for these “hybrid multiscale structures . . . to be systemically aware of and responsive to change.”³⁰⁸ Local firm governance demonstrates all three principles. First, many of the forms of local firm governance described in Part II of this Article are hybrid legal structures, in the sense that they involve government using or encouraging private law mechanisms (like contractual agreements), rather than more traditional forms of lawmaking. Second, local firm governance allows the framework governing firms to be attentive to the local level, a geographical scale that conventional firm governance previously underappreciated at best—and, at worst, overlooked or intentionally excluded. Third and finally, with its primary focus on social responsibility and firm stakeholders, local firm governance demonstrates awareness and responsiveness to important contemporary social and environmental issues in ways that “‘the corporate governance machine’—a complex governance system in the United States composed of law, institutions, and culture that orients corporate decision-making toward shareholders”—has not.³⁰⁹

If local firm governance indeed offers one such solution, as the foregoing multidimensional governance research suggests, this factor should be emphasized heavily when stakeholders evaluate local firm governance—perhaps even more than any other advantages and disadvantages, whether individually or taken together. This is because there are scant solutions available when facing problems of such a complex nature³¹⁰—like the complex problem of structuring a technically competent, efficient, inclusive, and just system of firm governance. Other solutions currently under consideration, such as the creation of a Texas Stock Exchange (TXSE) to “take on” existing institutions that dominate firm governance, demonstrate that there is an appetite for disruption due to dissatisfaction with the status quo.³¹¹ Yet, the TXSE is subject

³⁰⁷ See Belinfanti & Stout, *supra* note 78, at 583 (“[C]ompanies in particular can be viewed as complex systems in which multiple elements (e.g., financial capital, physical capital, and human capital) interact with each other to perform a variety of useful and desirable functions (e.g., providing goods and services, employment opportunities, investor returns, and tax revenues.”); see also Lund & Pollman, *supra* note 78, at 2565 (describing a “complex governance system in the United States composed of law, institutions, and culture”).

³⁰⁸ Osofsky, *supra* note 77, at 1116–17.

³⁰⁹ Lund & Pollman, *supra* note 78, at 2565.

³¹⁰ Osofsky, *supra* note 77, at 1100 (“complexity is easier to identify than resolve”).

³¹¹ See S.E. Jenkins, *New Texas-based stock exchange looks to take on Nasdaq, NYSE*, CBS NEWS (June 6, 2024, 6:03 PM), <https://www.cbsnews.com/texas/news/new-texas-based-stock-exchange-looks-to-take-on-nasdaq-nyse/> [<https://perma.cc/MXR7-4MWE>]; Money Stuff: The

to similar limitations that hinder existing institutions, and commentators have expressed doubt that the TXSE will really offer meaningfully different governance options to firms.³¹²

Of course, this is not to suggest that local firm governance is *the only* or *the best* solution to the complex, multidimensional challenge of governing firms effectively. Local firm governance is, however, a partial solution. Thus, to the extent of the legal validity of local firm governance—and *together* with other reforms at different levels of lawmaking regarding the frameworks governing firms—city officials and firm lawmakers, managers, investors, and other stakeholders should seriously consider local firm governance because, and not in spite, of its radical nature.³¹³

Podcast, *Equities in Secaucus: TXSE, PSUS, GME*, at 2:38 (June 10, 2024) (“I think the people starting this exchange, or at least hinting that some of those rules are either too onerous and expensive or they’re too like woke and left wing, and so they will offer a different set of rules in Texas.”), available at <https://www.youtube.com/watch?v=OkQHWWOGLf8> [<https://perma.cc/U7NJ-EGEV>].

³¹² See, e.g., Money Stuff: The Podcast, *supra* note 311, at 2:51 (“The SEC still has to approve their listing rules, so they can’t be like too crazy and out there. . . . [T]here’s only so far that the Texas Stock Exchange can differ.”).

³¹³ *Radical* (adjective), OXFORD ENG. DICTIONARY (2008) (“Of, belonging to, or from a root or roots; fundamental to or inherent in the natural processes of life, vital”); *cf.*, *Radical* (noun), OXFORD ENG. DICTIONARY (2008) (“A person who advocates radical or far-reaching political or social reform; a member of a political party or part of a party pursuing such aims. . . . revolutionary”).

