Should Corporate Law Go Private?

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We are grateful to Andrew Baker, Elizabeth Cooper, Benjamin Edwards, Joel Fleming, Jeff Gordon, Zohar Goshen, Assaf Hamdani, Andrew Jennings, Igor Kirman, Aneil Kovvali, Mark Lebovitch, Lev Menand, Gabriel Rauterberg, Ed Rock, Roberta Romano, Reilly Steel, Greg Varallo, J.W. Verret, and participants at the 2025 Law and Entrepreneurship Annual Retreat, Case Western Reserve Law School, the George Mason Law and Economics Workshop, and SMU Law School for helpful comments and discussions. Thanks as well to Hazel Martello, Sean Deresh Larin, and Daniel Rogov for excellent research assistance. We are also grateful for support from the Grace P. Tomei Endowment Fund. All errors are ours.

Abstract

Delaware's dominance in corporate law is traditionally attributed to its expert judiciary, extensive case law, specialized bar, responsive legislature, and insulation from interest-group lobbying—factors thought to produce a desirable product for firms. This Article challenges the continued viability of that formula, arguing that Delaware faces daunting challenges in maintaining an optimal corporate law regime. We nevertheless show that the state retains an underappreciated secret weapon—the ability of Delaware corporations to opt out of courts and adopt fully privatized law—that can bolster and even strengthen its competitiveness. We make three contributions in this Article: conceptual, practical, and prescriptive. Conceptually, we show that prevailing jurisdictional competition debates are unhelpfully simplistic as to both demand and supply side features in the market for corporate law. On the demand side, the highly heterogeneous economic, strategic, and financial challenges facing corporate entities make a one-size-fits-all governance model highly improbable. On the supply side, law-producing states must be mindful of this heterogeneity while balancing their own goals and constraints—revenue needs, political capture, interest group pressure, and other frictions. In place of a simplistic account of regulatory competition, we develop and refine a "differentiated product" framework that reflects these demand- and supply-side heterogeneities and delivers concrete insights about the nature of regulatory competition in corporate law. Our second contribution is a practical application of our conceptual framework: using Delaware's 2025 legislative amendments as a case study, we demonstrate how interest-group politics shaped the process and outcome in ways that appear inconsistent with the state's espoused goal of defending its incorporation franchise. Our conceptual analysis corroborates empirical evidence indicating that Delaware did not improve its competitive position through the reforms. More importantly, it suggests that in Delaware (as well as other jurisdictions), the veneer insulating corporate law production from broader interest group pressures has worn thin, a state of play that appears unlikely to abate for the foreseeable future. Nevertheless, our prescriptive contribution offers an escape hatch from this perilous political predicament: private ordering. Other recent Delaware reforms have explicitly empowered shareholders to design governance terms through contract, and even to outsource the adjudication function. We propose a transactional template for leveraging private ordering to deliver stable governance arrangements better insulated from interest group politics, enabling Delaware corporations to remain in state while revitalizing the broader competitive landscape of corporate law.

Keywords: Corporate Governance, Corporate Law, Regulatory Competition, Delaware, Contractarianism

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Abstract

Delaware's dominance in corporate law is traditionally attributed to its expert judiciary, extensive case law, specialized bar, responsive legislature, and insulation from interest-group lobbying—factors thought to produce a desirable product for firms. This Article challenges the continued viability of that formula, arguing that Delaware faces daunting challenges in maintaining an optimal corporate law regime. We nevertheless show that the state retains an underappreciated secret weapon—the ability of Delaware corporations to opt out of courts and adopt fully privatized law—that can bolster and even strengthen its competitiveness.

We make three contributions in this Article: conceptual, practical, and prescriptive. Conceptually, we show that prevailing jurisdictional competition debates are unhelpfully simplistic as to both demand and supply side features in the market for corporate law. On the demand side, the highly heterogeneous economic, strategic, and financial challenges facing corporate entities make a one-size-fits-all governance model highly improbable. On the supply side, law-producing states must be mindful of this heterogeneity while balancing their own goals and constraints—revenue needs, political capture, interest group pressure, and other frictions. In place of a simplistic account of regulatory competition, we develop and refine a "differentiated product" framework that reflects these demand- and supply-side heterogeneities and delivers concrete insights about the nature of regulatory competition in corporate law.

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Introduction

Over Valentine's Day weekend of 2025, a fierce Nor'easter buffeted the Mid-Atlantic coast, exiling all but the hardiest weekend warriors indoors. Within the Delaware offices of Richards, Layton & Finger LLC, however, the swollen clouds were all silver lining to a cadre of attorneys and scriveners furiously at work. Their objective? To craft an unprecedented realignment of Delaware's General Corporate Law ("DGCL"). Richards Layton—which was contemporaneously representing Elon Musk and Mark Zuckerberg in high-stakes fiduciary litigation just blocks away[1]—had corralled the team to produce what would later be declared "the most significant single-year revision of Delaware's corporate code since at least 1967."[2] And they aimed to finish the job over the weekend.[3]

They succeeded. By Monday, the group had extruded a working draft of Senate Bill 21 ("SB 21"), which state Senator Bryan Townsend unveiled to the General Assembly and the public later that day. By all accounts, the draft legislation proposed a major overhaul of fundamental precepts of both fiduciary duties of loyalty and longstanding investor rights to inspect corporate books and records.[4] Those two domains alone had featured heavily in recent shareholder litigation, becoming a weapon of choice in investors' arsenal for challenging management conduct—and a major headache for corporate managers and controllers. SB 21 pared back both tools by prescribing controller-friendly protocols that the state's courts had rejected repeatedly in common law adjudication.[5] Shortly after the bill's introduction, another potent provision joined the mix, specifying that the new statutory proposal would apply retroactively to all cases and controversies where litigation had not yet commenced, even for actions complaining of conduct that predated the amendment's introduction.[6]

While SB 21 was substantively significant, the process generating it raised additional eyebrows: The scriveners bypassed traditional vetting protocols with the Delaware State Bar Association's Council of the Corporation Law Section (the "Council"), which historically delivers proposed legislation by late summer. Instead, SB 21's proponents aimed to fast-track legislative enactment to respond to the threat of "DExit"— a moniker for the purported trend of Delaware corporations

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1 *See* Richard J. Tornetta Plaintiff v. Elon Musk, Defendant, Docket No. 2018-0408 (Del. Ch. Jun 05, 2018); In Re Facebook Inc Derivative Litigation, Docket No. 2018-0307 (Del. Ch. Apr 25, 2018).

2 Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/.

3 See *Senate Bill 21*, DEL. GEN. ASSEMBLY, https://legis.delaware.gov/BillDetail/141857 (last visited Aug. 31, 2025).

4 Talley et al., *supra* note 2.

5 In fact, Delaware Supreme Court had rejected the kernel of the fiduciary proposals less than a year earlier. *See In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024); *see also* NVIDIA v. City of Westmoreland Police & Fire Ret. Sys., 282 A.3d 1 (Del. 2022) (broadening stockholders' ability to use 220 requests by allowing hearsay evidence to establish a proper purpose for the request). Note, however, that Delaware's fiduciary standards for assessing controller contracts had been criticized by some commentators as being too broad. See, e.g., Lawrence Hammermesh, Jack Jacobs, & Leo Strine, Jr., *Optimizing Corporate Law, A 20 Year Retrospective and a Look Ahead*, 72 Bus. L. 321 (2022).

6 *See* Karl Baker, *Delaware Lawmakers to Consider Legislation Derided as a 'Billionaires' Bill'*, SPOTLIGHT DEL. (Mar. 11, 2025), https://spotlightdelaware.org/2025/03/11/senate-bill-21-preview/?utm_source=chatgpt.com.

weighing reincorporation elsewhere. Although the specter of DExit had sketchy empirical support,[7] political and legal atmospherics amplified the emergency vibe, most notably a 2024 Chancery Court decision nullifying Musk's $56 billion pay package at Tesla.[8] Mr. Musk's ensuing social-media shibboleth—"never incorporate your company in the state of Delaware"[9]—drew widespread attention in media and tech circles,[10] and a handful of Musk-controlled companies (including Tesla) soon made moves to decamp. By February 2025, he occupied an even larger political stage, designing aggressive cuts to federal funding that any targeted state would find difficult to dodge. Delaware's heavy dependence on corporate franchise fees raised the stakes further, and nervous state officials soon began calling for a broad re-examination of the state's competitive position.[11]

Unlike the technocratic discourse that typically accompanies Delaware corporate legislation, debate over SB 21 was unmistakably perfervid. Proponents cast Delaware as being in crisis,[12] insisting that only immediate and dramatic action could restore predictability, reduce transaction costs, and salvage franchise tax revenues by pushing Delaware to emulate more management-friendly (and less judge-centric) states like Nevada and Texas.[13] Critics characterized SB 21 as rushed, constitutionally suspect, poorly drafted, and unduly solicitous of corporate controllers, dismissing it as political fearmongering rather than measured policymaking.[14]

Above all else, however, the debate surrounding SB 21 rekindled a longstanding quandary concerning how states compete with one another to provide corporate law and what such competition looks like. Participants in this debate typically invoke one of two binary accounts of jurisdictional competition. One camp posits that states compete by crafting laws that cater to managerial interests, often at shareholder and stakeholder expense (a "race to the bottom").[15] The opposing narrative argues

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[7] Stephen Bainbridge, *DExit Civil War? The Governor and Legislative Leaders Fire Shots Across Chancery's Bow*, PROFESSORBAINBRIDGE.COM (Feb. 5, 2025), https://www.professorbainbridge.com/professorbainbridgecom/2025/02/dexit-civil-war-the-governor-and-legislative-leaders-fire-shots-across-chancerys-bow.html; Stephen Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?* (UCLA Sch. L., Law & Economics Research Paper No. 24-04, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4909689 [hereinafter, Bainbridge, *DExit Drivers*].

[8] *See, e.g.*, Lora Kolodny, *After Elon Musk's Delaware Exit, State Lawmakers Weigh Bill to Overhaul Corporate Law*, CNBC (Mar. 15, 2025, at 08:00 ET), https://www.cnbc.com/2025/03/15/after-elon-musk-delaware-exit-state-weighs-overhaul-of-corporate-law.html.

[9] Elon Musk (@elonmusk), X (Jan. 30, 2024, at 17:14 ET), https://x.com/elonmusk/status/1752455348106166598?lang=en&utm_source=chatgpt.com.

[10] Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025, at 18:29 ET), https://www.reuters.com/business/autos-transportation/teslas-wake-more-big-companies-propose-voting-dexit-to-depart-delaware-2025-05-14/?utm_source=chatgpt.com.

[11] *See, e.g.*, Katie Balevic, *Delaware Governor Tells BI Things May 'Need to Change' as Companies Threaten to Leave the State*, BUS. INSIDER (Feb. 2, 2025, at 17:32 ET), https://www.businessinsider.com/delaware-governor-matt-meyer-corporate-law-elon-musk-bill-ackman-2025-2.

[12] *See generally* Daniel Taylor, Delaware's Manufactured Crisis (Columbia Blue Sky Blog March 6, 2025) (summarizing sources); *see also* Roberta Romano, The Crisis-Driven Politics of the Iron Law of Financial Regulation (working paper 2025) (detailing empirically how "crisis-driven" legislation commonly restricts / arrests legislative deliberation).

[13] Matthew A. Schwartz, William S.L. Weinberg & Brian T. Frawley, *Delaware Enacts Important Corporate Law Reforms*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 1, 2025), https://corpgov.law.harvard.edu/2025/04/01/delaware-enacts-important-corporate-law-reforms/; *see also* Hammermesh et al., *Optimizing*, supra note 5.

[14] Wendy Grasso, *Delaware Supreme Court to Consider Constitutionality of SB 21*, FENWICK & WEST LLP, https://whatstrending.fenwick.com/post/delaware-supreme-court-to-consider-constitutionality-of-sb-21.

[15] *See, e.g.*, William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663 (1974).

that states attempt to gain market share by generating laws that maximize company value for investors, lenders, and other contractual stakeholders (a "race to the top").[16]

The pyrotechnics surrounding SB 21 reveal that neither conventional account captures the myriad forces driving the modern incorporation market. In particular, both the race-to-the-top and the race-to-the-bottom narratives presume that state competition will ultimately converge on a homogenous "one size fits all" structure for corporate law.[17] But the odd procedures and divergent voices imbuing the SB 21 debate suggests that things are not so simple, at least not any more. Indeed, the realities of corporate law production in 2025 suggest a far more complicated space involving firms, managers, and investors with highly heterogenous objectives. Moreover, the political process has begun to introduce its own complexities, amplifying pressures that complicate and distort the impact of statutory reform.

This Article proposes a fresh accounting of regulatory competition in corporate law—one that captures the modern realities of the intertwined dance between business and politics. In so doing, we make contributions along conceptual, pragmatic, and prescriptive dimensions. Conceptually, we develop and refine a "differentiated products" framework for regulatory competition that accounts for both the heterogeneity of firm-level governance needs as well as jurisdictional goals and constraints.[18] Not only is our framework more descriptively faithful to the new corporate law reality, but it also offers multiple insights and predictions about how states can be expected to behave in competitive environments. Specifically, our framework gives us traction on a key diagnostic question that permeates the regulatory competition literature: What attributes of corporate law should we expect to observe in equilibrium if revenue-maximizing states truly competed for incorporations?[19]

Taking the revenue maximization goal at face value (at least provisionally[20]), we demonstrate that modern regulatory competition is highly unlikely to result in a homogenous set of offerings—in stark contrast to the presumptions advanced by the classic accounts. Instead, we argue that a far more successful way for a state to generate revenue is to offer a specialized legal product that caters to distinct segments within the corporate governance universe. Our framework also delivers predictions about what types of states should be more or less radical in tinkering with statutory reform. Delaware, as a moderate first mover jurisdiction with significant market power, should be relatively reluctant to

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[16] *See, e.g.*, Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1977).

[17] *See* Cary, *supra* note 15, at 663 ("This unhappy state of affairs, stemming in great part from the movement toward the least common denominator, Delaware, seems to be developing on both the legislative and judicial fronts."); Winter, *supra* note 16, at 255 ("The history of state corporation law is thus largely a history of drastic reduction of legal restrictions on management and of the legal rights of shareholders. . . . [A]s corporations have sought charters in states with less restrictive codes[,] [o]ther states have then adopted similar codes in response.").

[18] We join others who have advanced a market segmentation narrative of corporate law production, although take some effort to unpack its dynamics. See, e.g., Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990); Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012).

[19] Revenue maximization is not the only conceivable objective behind corporate legislation, and it need not motivate all state providers equally; but it looms unmistakably large for Delaware, which depends on corporate franchise taxes for budget balancing. *See Fiscal Year 2022: Governor's Recommended Budget 2022 Operating Book*, BUDGET.DELAWARE.GOV, https://budget.delaware.gov/budget/fy2022/documents/operating/introduction.pdf?utm_source=chatgpt.com (last visited Aug. 31, 2025) (showing that 30% of the budget comes from these fees).

[20] Although revenue maximization is typically asserted to be a first-order concern in the regulatory competition literature, our framework provisionally adopts this assumption because our analysis suggests that the adoption of SB 21 defied predictions that a revenue maximization hypothesis would suggest.

alter its law dramatically to meet the demands of the few. Rival jurisdictions, who stake out the relative "fringe" of the market, should be more willing to reform law in response to factional demands, since doing so can be a lower-cost way to experiment with expanding modest market shares.

Our framework also offers predictions about how competing revenue-maximizing jurisdictions will position themselves along other dimensions. For instance, we demonstrate that states will rationally favor predictability of their legal framework, and will seek to reduce the costs required to tailor it (such as by eschewing inflexible mandates in favor of default rules). Enhancing predictability and adaptability allows a jurisdiction to compete more effectively even as other aspects of its law remain unchanged. By the same token, reforms that reduce predictability and contractability tend to cannibalize a jurisdiction's competitive position.

Our second contribution is pragmatic, deploying our framework to reassess the passage of SB 21. In so doing, we argue that Delaware almost certainly departed from our core predictions about strategic revenue maximization. In particular, we show that SB 21 throttled contractarianism, demoted judicial expertise, ironically reduced predictability, and pushed Delaware law away from its historically moderate position in an attempt to copy aspiring competitors. Each of these moves contravenes how a dominant revenue-seeking jurisdiction would rationally behave. We therefore deduce that Delaware wandered from its historic formula in unexpected and risky ways, potentially jeopardizing its dominant market position. Although it is too early to assess the long-term implications of Delaware's departure,[21] early evidence suggests that the reform did not immediately deliver the results that proponents advertised:[22] The bill's progress through the General Assembly appears correlated with negative abnormal returns of Delaware-incorporated firms (especially in controlled companies[23]). Moreover, since passage, the overall pace of Delaware exits among high-profile companies has remained largely unchanged (and if anything has moderately increased[24]); similarly, states like Nevada and Texas have not been discernibly deterred from pitching themselves as alternative incorporation havens.[25]

Our third contribution is prescriptive, and it flows naturally from our pragmatic diagnosis. Mirroring the fractious politics that have come to pervade both state and federal lawmaking, the forces that ushered in SB 21 have pried open a Pandora's Box of interest group politics that seems unlikely to close anytime soon.[26] Such forces, moreover, are easily as muscular (if not more so) in Delaware's

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[21] As of this writing, in fact, a variety of challenges to the bill's very constitutionality are winding their way through the Delaware courts. *See, e.g.*, Rutledge v. Clearway Energy Group, C.A. No. 2025-0499-LWW (2025).

[22] *See* Kenneth Khoo & Roberto Tallarita, The Price of Delaware Corporate Law Reform (June 25, 2025) (unpublished manuscript), https://ssrn.com/abstract=5318203.

[23] Benjamin P. Edwards, *Pending Nevada Commission on Nevada Business Court*, BUS. L. PROF BLOG (July 1, 2025), https://www.businesslawprofessors.com/2025/07/pending-nevada-commission-on-nevada-business-court/; Greg Abbott, *Forget Delaware — 'Y'all Street' Is Open for Business*, WALL ST. J. (Mar. 5, 2025, at 16:59 ET), https://www.wsj.com/opinion/forget-delaware-yall-street-is-open-for-business-texas-corporate-law-cb9088d1?gaa_at=eafs&gaa_n=ASWzDAjQkNGiK4XLb4QOES6mQblzqlS9E4DZENwef31pFmn8Ii0KPClb3-4vyWqTDxI%3D&gaa_ts=68a84698&gaa_sig=eDXeS_Pu7s2SHIqLn8Jo4rPf2UD0ldjFmo0dyt-suv9jXs9nV2xv8QmjVnokRK-ebKcv74lTGVwYEeg7umHETQ%3D%3D.

[24] Benjamin P. Edwards, *Nevada & Texas Reincorporation Update*, BUS. L. PROF BLOG (AUG. 15, 2025), https://www.businesslawprofessors.com/2025/08/nevada-texas-reincorporation-update/; Gaurav Jetley and Nick Mulford, *DExit: Reincorporation Data Seem to Support the Hype*, Harvard Law School Forum on Corporate Governance (Sept. 2025) (https://corpgov.law.harvard.edu/2025/09/23/dexit-reincorporation-data-seem-to-support-the-hype/).

[25] *See* Khoo & Tallarita, *supra* note 22; Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 Ariz. L. Rev. 696 (2025).

[26] Indeed, just the year before, Delaware faced controversy over legislation offering broad authority for firms to enter into stockholder agreements, which we discuss in detail in Part IV.

chief jurisdictional rivals, such as Texas, Nevada, and California. We thus conclude that the near-term prospects for competition among state actors to deliver value-enhancing improvements to corporate law appear dim.

Nevertheless, we propose a promising pathway out: taking corporate law "private." Mere months before SB 21's introduction, Delaware unwittingly saved itself with another unprecedented (and contentious) statutory change that allowed firms to displace nearly all of state-provided corporate law with private ordering via stockholder agreement.[27] This newly unleashed power (buttressed by a receptive federal law environment) emancipates Delaware corporations to develop or otherwise acquire their own privately crafted law, largely excluding state courts from the dispute resolution process.[28]

Taking corporate law private through stockholder agreements would catalyze better calibrated firm-specific legal tailoring while also mitigating the influence of political partisanship in corporate lawmaking, all while reaffirming Delaware's central role in attracting and retaining incorporations. Although unbridled private ordering carries some limitations (which we discuss below), it offers a flexible path for Delaware-incorporated entities to adapt to evolving competitive dynamics at a far lower cost than reincorporating. And we offer a concrete plan for firms to get there. Specifically, we propose the formation of a Delaware Arbitration Board (or "DAB")—a subscription-based private tribunal composed of expert arbitrators incentivized to provide a less politicized set of default rules, a coherent and stable common law, and a responsive forum for dispute resolution. Over time, other private providers could enter the market, competing with the DAB (and legacy governmental regimes) for business—an ever-present threat that disciplines existing providers.

One caveat deserves explicit mention before proceeding. The analysis offered below—including our constructive proposal—does not take a position on whether and when controller conflicts should be singled out for heightened scrutiny under corporate law. This solitary issue has become something of a Rorschach test for assessing both recent jurisprudential trends and legislative amendments. Although we each have individual views on the substantive issue, we need not confront them here, since our proposal is designed to appeal to both sides of the debate. In other words, for those who disliked the evolution of controlling shareholder jurisprudence in Delaware prior to SB21, our proposal provides an option to sidestep it by embracing an adjudicator they have greater confidence in; similarly, critics of the SB21 can deploy our proposal to negate its objectionable attributes. Either way, the option to take governance private gives corporate actors the ability both to shape governance to their needs and to sidestep distracting political melodramas in the process.

Our Article proceeds as follows. Part I lays out our differentiated products account of jurisdictional competition in corporate law. It first describes the classic jurisdictional competition debate and its deficiencies. To animate the dynamics that undergird state production of corporate law,

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27 *Senate Bill 313*, DEL. GEN. ASSEMBLY, https://legis.delaware.gov/BillDetail/141480 (last visited Aug. 31, 2025); Cydney Posner, *Delaware SB 313, Controversial Proposed Corporate Law Amendments, Heads to Governor for Signature*, COOLEY PUBCO (June 25, 2024), https://cooleypubco.com/2024/06/25/delaware-sb-313-to-governor/. Note that the idea of contracting around state-provided corporate law is not entirely new (and was proposed by one of us in prior work). *See* Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, 22 J.L. ECON. & ORG. 414 (2006). But it was not until the passage of SB 313 in Mach 2024 that the statutory environment permitted full-fledged private ordering solutions.

28 *See* 9 U.S.C. §§ 1–16 (2018); *see also* DEL. CODE ANN. tit. 8, § 122(18) (2025) (authorizing private arbitration in certain corporate matters). For more details on federal law's receptivity to arbitration provisions in corporate contracts, see notes 206-210 *infra* and accompanying text.

we graft heterogeneous corporate and jurisdictional goals onto a regulatory competition setting. We show that corporations will tend to self-sort across the menu of distinct jurisdictional specialties, which revenue-oriented jurisdictions will readily offer. The end result tends to be neither a race to the top, bottom, nor the ill-defined middle, but rather a landscape of differentiated jurisdictional offerings. After laying out this framework, we next show how it offers numerous insights and predictions compared to more simplistic accounts of regulatory competition.

Part II then applies our framework to the modern corporate law landscape. It describes the aspects of Delaware's dominance that make it difficult to emulate and reveals how smaller rivals have instead differentiated themselves to make a play for market share. It concludes by using our framework to evaluate the passage of SB 21, showing how Delaware departed from its historic formula in ways that appear inconsistent with revenue-maximization. Part III turns to our prescriptive proposal for corporate law: private ordering. It describes how recent statutory innovations have unleashed a new—and potentially far more disruptive—competitor, not in the form of state or federal jurisdictions, but rather private ordering. Specifically, we argue that corporations can now depart from Delaware courts via stockholder agreements providing for arbitration, describing in detail what these contracts and enforcement mechanics might look like as well as the legal authority supporting them. We then reflect on the benefits for corporations—and for the overall system of jurisdictional competition—that would stem from privatized corporate governance, before considering some of the concomitant pitfalls.

I. A Differentiated Product Framework for the Production of Corporate Law

This Part sets forth our conceptual framework for the production of corporate law across multiple strategic jurisdictions. We begin by summarizing the classic regulatory competition debate and its deficiencies, and particularly its prediction that state competition will produce homogenous law (racing either to the "top" or the "bottom"). To better understand the dynamics that undergird the production of corporate law, we next introduce the existence of heterogeneous corporate and jurisdictional goals onto the state competition dynamic.[29] These dynamics predict that firms will tend to self-sort across the menu of available jurisdictional options, and that jurisdictions will tend to specialize rather than copy each other. The end result tends to be neither a race to the top, bottom, nor the ill-defined middle, but rather a differentiated landscape of jurisdictional offerings. We conclude by highlighting the many insights and predictions that our framework offers about regulatory competition in equilibrium, including that all states should seek to increase the predictability of their law and decrease the costs of adapting to it.

A. Jurisdictional Competition Debate

What factors shape American corporate law? Legal scholars have focused on jurisdictional competition as the defining determinant.[30] It is an approach with considerable appeal: U.S. corporations can choose to incorporate in any state, which will cause the firm's internal affairs to be

[29] Our discussion in this section is kept at an intuitive and conceptual level. For readers wanting more technically precise and mathematical treatment, see Hadfield & Talley, *supra* note 27; *see also* Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015) (extending the framework to explore a combined regulatory competition setting where tax and corporate law are simultaneously determined).

[30] Mark J. Roe, *Regulatory Competition in Making Corporate Law in the United States—And Its Limits*, 21 OXFORD REV. ECON. POL'Y 232 (2005); Hadfield & Talley, *supra* note 27.

governed by the set of rules offered by that state (at least as a default).[31] And because incorporation offers benefits for the home state—and most notably, revenue in the form of corporate franchise taxes—states compete with each other to attract corporations.

There is a longstanding debate about whether such competition produces efficient corporate laws that maximize firm value, or allows rent extraction to the detriment of investors. The origins of the modern debate go back to 1974, when Columbia Law professor and former SEC chairman William Cary published an article that sought to explain Delaware's longstanding leadership.[32] Cary pointed out that Delaware sought to attract corporate charters to pad its coffers; moreover, because management dictated the incorporation choice, Delaware would sensibly structure its law to cater to firm management.[33] Accordingly, this "race to the bottom" would result in an inefficient legal regime that systematically favored management at the expense of shareholders.[34]

A few years later, Cary's conclusion was challenged by Second Circuit Judge Ralph Winter, who argued that regulatory competition would produce a "race to the top."[35] His logic was as follows: Because investor expropriation would raise the cost of capital for firms, managers would be less likely to choose a jurisdiction that coddled management but harmed shareholders.[36] Instead, entrepreneurs who wanted to raise the most money would choose the jurisdiction that offered the "best" law.[37] In this way, jurisdictional competition would protect investors and cause the state with the most efficient legal framework to dominate.[38]

Since that time, a rich literature on the effects of jurisdictional competition has developed, with scholars mostly aligning themselves with one side or the other.[39] And in spite of the enduring nature of this "race" metaphor in American corporate law scholarship, the Cary/Winter account seems obviously simplistic. As others have observed, it ignores many essential features of the demand

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31 Note that these accounts depend on the internal affairs doctrine, which posits that the law of the firm's state of incorporation will govern its internal affairs. Recent cases have called into question whether the internal affairs doctrine will hold strong. For example, in 2019, a California District Court held that forum selection clauses deeming Delaware the exclusive forum for the resolution of corporate disputes was unenforceable, given California's constitutional right to a jury trial. Handoush v. Lease Fin. Grp., LLC, 254 Cal. Rptr. 3d 461 (Cal. Ct. App. 2019). This decision was overruled, but it remains possible that other states will rely on their long-arm statutes or constitutional rights to a jury trial to modify the bounds of the internal affairs doctrine. EpicentRx, Inc. v. Superior Ct. of San Diego Cnty., 572 P.3d 1 (Cal. 2025). Such an outcome would substantially alter the jurisdictional competition framework.

32 Cary, *supra* note 15.

33 *Id.* at 668-70.

34 *Id.* at 698-99.

35 Winter, *supra* note 16.

36 *Id.* at 275.

37 *Id.*

38 *Id.* at 290.

39 On Cary's side see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619 (2006); Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593 (2014); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001). On Winter's side see ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993) [hereinafter ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW]; Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1996); *see also* Michael Klausner, *Corporations, Corporate Law, and Network of Contracts*, 81 VA. L. REV. 757 (1995); William J. Carney, George B. Shephard, and Joanna Shepherd Bailey, *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123 (2012); *Mark J. Roe, Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (arguing that Delaware's primary competitor is the federal government).

side, including heterogeneous corporate needs and the lawyer-driven nature of incorporation decisions.[40] On the supply side, the received account of regulatory competition tends to presume a clear shared objective across jurisdictions, with rivals attempting to copy the market leader and chase the same rainbow.[41] All told, both theories predict states will converge in offering a homogenous set of rules that caters to one of these two (mutually exclusive) goals.[42] It ignores the nuanced motivations of firms and lawmakers, which the next Section describes in detail.

B. Differentiated Product Framework for Corporate Law

This Section develops our conceptual framework for regulatory competition in corporate law that takes both supply and demand-side nuance into account. Layering firms' goals (the demand side) over lawmakers' incentives (the supply side) onto the forces of jurisdictional competition predicts market segmentation rather than uniform corporate law. Even though the process may be susceptible to some political capture, such forces need not be dysfunctional (or even suboptimal). Instead, our framework predicts a modified version of the "regulatory race" narrative—one where contestants pursue heterogeneous policies—resulting in jurisdictional differentiation and specialization that can benefit firms, their shareholders, and state budgets.[43]

We begin with a detailed depiction of the nuanced factors that shape both firm demand for corporate law and a states' motives in supplying it. With that background in mind, we develop our conceptual framework that interlaces these complex motivations into the forces of jurisdictional competition using a series of stylized examples. We then describe the insights as well as predictions that our framework reveals about the market for corporate law.

i. Demand Side

Consider first the forces that shape demand for corporate law, and more specifically the goals (and constraints) of corporate actors in a regulatory competition setting. Recall that the traditional debate raised opposing, binary assertions about what motivates firms when they incorporate. Such an accounting is unduly rigid and simplistic. Most immediately, it does not permit firm goals to be hybridized in ways that are both obvious and well-documented in the literature. Consider, for example, a company attempting to maximize stockholder value (per Winter), but doing so requires retaining competent management by offering attractive management cash flow and control rights to attract talent (per Cary).[44] Alternatively, consider a management-controlled firm (per Cary) that must periodically raise outside capital, where prospective investors require credible market commitments to

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[40] *See, e.g.*, Carney et al., *supra* note 39; Klausner, *supra* note 39.

[41] *But see* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990) (arguing that we should expect specialization but that it doesn't occur); Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012) (describing Nevada's law as an example of market segmentation).

[42] ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW, *supra* note 39, at 47 ("Both the classic positions in the debate over state competition for corporate charters are consistent with the extant uniformity of codes: a race for the top or for the bottom results in copycat statutes . . . .").

[43] The observation that specialization should be expected is not a novel one. *See, e.g.,* Hadfield & Talley, *supra* note 27; Black, *supra* note 41; Barzuza, *supra* note 41; Richard Posner and Kenneth Scott, Economics of corporation law and securities regulation; Romano, *Law as Product*; See Ofer Eldar & Lorenzo Magnolfi, Explaining Delaware's Dominance: Firm Heterogeneity and Demand for Legal Flexibility, working paper (2025); *But see* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987) (criticizing product specialization as an explanatory force). Although others have highlighted the prospect of specialization, we are the first to unpack the dynamics that lead to it.

[44] Xavier Gabaix & Augustin Landier, *Why Has CEO Pay Increased So Much?*, 123 Q.J. ECON. 49 (2008).

safeguard their investments from managerial excess (per Winter). In either case, the objective of the firm must accommodate each of these external market constraints,[45] leading to governance choices that lie somewhere between unalloyed managerialism and pure value maximization. Accounting for these varying goals transforms the binary jurisdictional competition framework into something of a spectrum with pure investor protection on one end and pure managerial autonomy on the other, with most firms' favored governance falling somewhere in between.

To further illustrate this point, we offer a few concrete hypotheticals where the dual needs for investor protection and managerial autonomy can result in very different governance needs. Consider a hypothetical early-stage technology company that has few concerns about agency costs given its confidence in management and a highly competitive product market that keeps management laser focused on profitability. Instead, the firm is worried about the prospect of costly shareholder litigation, which it fears will unduly tax the firm and lead to management risk aversion that could undermine the company's strategy. Delaware, which is committed to the principle of deterring managerial self-dealing via fiduciary litigation,[46] might not be the best fit for this firm. Moreover, although Delaware law can be customized, it does not allow exculpation of certain fiduciary duty breaches.[47] Such a rule may be advantageous for a majority of corporations; this particular firm, however, might be better off (and secure the highest valuation) by moving to a jurisdiction like Nevada which eliminates the prospect of litigation except in the most extreme circumstances.[48]

A high degree of management autonomy may be desirable for another reason—to ensure stability while the firm transitions into new markets or makes significant investment outlays. Consider, as an example, an early-stage pharmaceutical company with several drugs in development. Ushering the drugs through the approval process will take years of investment; if successful, the company will be extremely profitable and impactful. For this firm (at least in its initial years), a legal regime that provides for a high degree of management autonomy and minimizes shareholder litigation is likely to provide the greatest returns for shareholders by ensuring the stability that is needed to realize the profit-maximizing goal.[49] The same reasoning could also apply to an early-stage technology company with a "moonshot" product—providing insulation from shareholder second-guessing could help management realize the company's full potential.[50]

For a different species of company, however, investor protection may be more critical. For firms with high information and monitoring costs, agency costs loom large. At such firms, directors and officers with little "skin in the game" may attempt to exploit their differential advantages, shirking their duties and sacrificing value for private benefits. Moreover, sometimes managers take the form of controlling shareholders, which may be in a unique position to divert value away from minority

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[45] The theory of incentive design in economics posits that core objectives when constrained by such external forces, essentially become hybridized maximization problems, where the constraint imposes an additional weighted factor to the core objective. *See* DREW FUDENBERG & JEAN TIROLE, GAME THEORY (1991).

[46] Zohar Goshen, Assaf Hamdani & Dorothy S. Lund, *Fixing MFW: Fairness and Vision in Controller Self-Dealing* 4 (Eur. Corp. Governance Inst., Law Working Paper No. 818/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5061341.

[47] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2025) (allowing exculpation for breaches of the duty of care but not loyalty or bad faith); see also Gad Weiss, *The Venture Corporation*, 62 AM. BUS. L.J. 45 (2025).

[48] NEV. REV. STAT. § 78.240 (2025).

[49] *Cf.* Cathy Hwang & Dorothy S. Lund, *Purpose and Nonprofit Enterprise* (Eur. Corp. Governance Inst., Law Working Paper No. 819/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5061739.

[50] Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2016).

shareholders and into their own pockets, accentuating the dangers of conflicts of interest.[51] Depending on the extent of their ownership stake[52] and their wealth, controllers may or may not be sensitive to external effects of these decisions.

In addition, agency costs may grow and ebb over time, a factor that itself affects the optimal corporate law regime. For an early-stage company that is subject to discipline from capital and product markets, for example, managerial agency costs may not be a paramount concern. More mature firms with robust retained earnings, by contrast, may be more susceptible to managerial self-interest. For those firms, providing flexible and context-specific investor protections may be more important than providing predictability and insulation for management.

These examples reveal the known fact that demand for corporate law will vary depending on foundational firm-level attributes, vintage, outside market conditions, and ownership structure. This rationale underpins a state's decision to allow legal customization, but only to a degree. For some alterations, the company may need to move to a different jurisdiction. And we expect that a firm will choose a governance structure somewhere across a spectrum ranging from extreme managerial autonomy to extreme investor protection. Firms are also likely to be heterogeneous as to other dimensions, including needs for coordination, stakeholder empowerment, regulatory oversight, and so forth.[53] Such multi-dimensional heterogeneity seems highly unlikely to invite a one-size-fits-all, cookie-cutter governance system so long as the providers of corporate law are even minimally responsive to these needs. In our view, then, the battle to uncover a single corporate law regime that applies uniformly and homogenously to highly heterogeneous firms is unwinnable: Optimal corporate law arrangements can, do, and *should* vary considerably across firms, depending on their specific characteristics.

FIGURE 1: STYLIZED DISTRIBUTION OF GOVERNANCE REGIMES ACROSS POPULATION OF FIRMS

To illustrate this point, Figure 1 depicts a stylized rendering of demand-side heterogeneity, simplified (for illustrative purposes) along a single dimension—investor protection versus management deference. The Figure depicts a hypothetical firm "Z Corp.", whose optimal governance structure leans somewhat toward the management autonomy end, but also provides for some instances where deference is sacrificed for investor protection.

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[51] *See, e.g.*, Lucian Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Creation and Agency Costs of Separating Control from Cash Flow Rights* (Nat'l Bureau of Econ. Rsch., Working Paper No. 6951, 1999), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=226401.

[52] *Id.*

[53] See Zohar Goshen and Richard Squire, Principal Costs, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571739.

In contrast to the conventional debate, however, other firms are not organizational clones of Z Corp. Rather, as discussed above, firms differentially trade off investor protection against management autonomy. The shaded region above the axis in Figure 1 captures this heterogeneity, depicting the population distribution of firms in terms of their ideal tradeoff. The height of the curve above each point on the continuum represents the "population density" (or generalized histogram) of companies whose optimal governance package corresponds to that particular gradation between investor protection and management autonomy. While this distribution of firms might take on any shape, we have represented it in Figure 1 to be bi-modal, meaning that there are two more heavily populated "humps" in the overall population, represented by a hump of somewhat investor protective and a second hump of somewhat more management-deferential firms. By construction, the area under the curve represents the whole population of incorporating firms.[54]

ii. Supply Side

We now consider how the differential demand for corporate law affects jurisdictional incentives to supply law. Thus far, we have said nothing about whether firms like Z Corp. have the option to achieve their ideal governance structure. That determination will tend to turn on the other side of the market—the supply side—where states determine their respective corporate law packages.

What motivates lawmakers when supplying law? The jurisdictional competition literature overwhelmingly posits that the key motivation for states is the desire to generate revenue by securing both a large number of incorporations and a high per-firm franchise tax fee. This narrative has kernels of truth, and it will help motivate a benchmark thought experiment developed below. At the same time, it is likely too reductive. Although legislative actions are the product of myriad factors, we preview three additional considerations that both encompass and complicate the revenue generation goal: electoral pressure, influence from political elites and interest groups, and varying degrees of risk- and uncertainty-aversion.

The first complication concerns the election cycle. It is well known that "[t]he desire to win reelection—the electoral connection—is perhaps the single most powerful animator of legislator behavior."[55] As such, political scientists have established that legislators become more productive as elections approach,[56] and may also begin to advance more moderate positions in anticipation of a general election.[57] Those incentives can fade quickly when the election cycle begins anew.

How does a state's production of corporate law fit this picture? In some ways, election concerns may help bolster the goal of revenue generation. Indeed, electoral pressures may substantially

[54] To preview the considerations on the supply side, it is this heterogeneous market for incorporations that different providers of corporate law are interested in capturing.

[55] Michael J. Barber & Soren J. Schmidt, *Do Competitive Elections Influence Legislators' Productivity?*, LEGBRANCH.ORG (Apr. 10, 2018), https://www.legbranch.org/2018-4-3-do-competitive-elections-influence-legislators-productivity/.

[56] Michael Barber & Soren Schmidt, *Electoral Competition and Legislator Effectiveness*, 47 AM. POL. RSCH. 683 (2018); David Mayhew, *Congress: The Electoral Connection* (1974).

[57] Stephen Ansolabehere, James M. Snyder, Jr. & Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 AM. J.POL. SCI. 136 (2001); Morris P. Fiorina, *Electoral Margins, Constituency Influence, and Policy Moderation: A Critical Assessment*, 1 AM. POL. Q. 479 (1973); John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911 (2006). *But see* Alexander Fouirnaies & Andrew B. Hall, *How Do Electoral Incentives Affect Legislator Behavior? Evidence from U.S. State Legislatures*, 116 AM. POL. SCI. REV. 662 (2022).

interact with the desire to increase revenue base, particularly for states like Delaware that rely on corporate franchise taxes.[58] But this factor, standing alone, does not predict a strong inclination towards unmitigated revenue generation. Close elections may turn on other (non-fiscal) considerations, including interest groups that seek to benefit themselves at the expense of revenue generation. At best, then, electoral concerns provide sporadic support to the goal of revenue generation, as well as sporadic tension.

Second and relatedly, legislators can frequently succumb to pressures from political elites and interest groups when producing law (both inside and outside the election cycle). As to the former, political elites generally differ from their constituents and may govern pursuant to their own in-group preferences, values, and partisan priorities.[59] Consider, as an example, how the Texas legislature has focused particular attention on anti-ESG lawmaking, including a proposed bill that would have changed the burden of proof for derivative plaintiffs alleging improper consideration of environmental, social, and governance criteria.[60] As to interest groups, vocal and coordinated pockets of special interests can pressure lawmakers and "capture" the lawmaking process via several avenues, most notably lobbying, campaign contributions, and judicial and regulatory advocacy.[61] In the context of corporate law production, the key interest groups are corporate managers, controlling shareholders, and both defense- and plaintiff-side lawyers, all of whom play a role in lobbying, as the next Part will describe in detail. Typically, the plaintiff-side lawyers tend to push for legal changes that empower shareholders, whereas the defense-side lawyers tend to seek laws that benefit controlling shareholders and managers. Neither side is likely to be a consistently reliable lodestar for optimal policies.

In short, jurisdictional preferences are plausibly every bit as heterogeneous as firms'. With this brief overview in mind, we now turn to showing how this nuanced picture of supply and demand for corporate law predicts a landscape that differs appreciably from that envisioned by the classic Cary/Winter debate.

iii. Differentiated Product Framework

Having established the range of motivations for jurisdictions supplying and corporations selecting corporate law, we turn to our differentiated product framework that shows how such heterogeneity combined with the forces of competition ought to shape the corporate law landscape. We illustrate our framework and the series of predictions that it generates with a series of stylized examples.

We begin with a simple world featuring a single provider of corporate law (which we label Delaware), offering a regulatory package that is approximately in the middle of the protective/deferential continuum. Such a package is not an ideal fit for our hypothetical Z Corp's needs, and thus incorporating there will require some adaptation, which imposes a cost. Figure 2 depicts this adaptation cost with a dashed cost curve that increases as the firm's ideal governance grows further away from Delaware's regulatory package in either direction.

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58 *See supra* note 19.

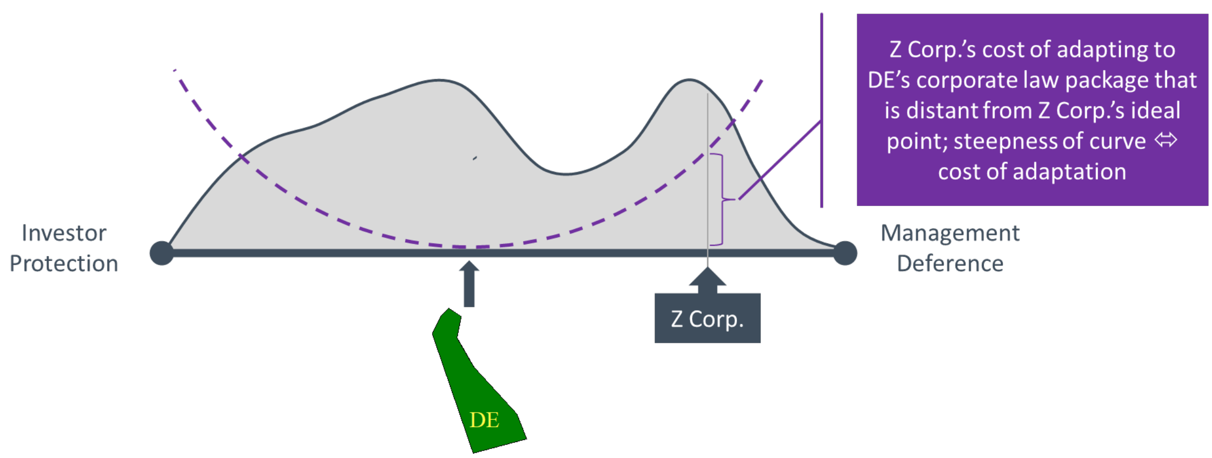
59 *See, e.g.*, Joshua D. Kertzer, *Re-Assessing Elite-Public Gaps in Political Behavior*, 66 AM. J. POL. SCI. 539 (2022); Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data, and the Representation of (Mis)Perceived Electorates*, 52 U.C. DAVIS L. REV. 571 (2018).

60 *See, e.g.*, H.B. 872, 89th Leg. (Tex. 2025).

61 *See, e.g.*, JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE (1996).

What comprises this adaptation cost for Z Corp. (or any other hypothetical firm on the spectrum)? Our framework conceives of the lesser of two measures: On the one hand, the firm can simply live with an imperfect match to Delaware's corporate law regime; on the other, the firm may be able to re-shape Delaware's baseline rules through express provisions in its governance documents that displace Delaware's rules in favor of a more bespoke alternative. The first option will tend to turn on firm-specific attributes and may also be a source of heterogeneity among firms. The second option depends on jurisdictional traits concerning whether corporate laws are relatively flexible and enabling (with default rules that permit easy alteration) or inflexible (such as with an immutable set of rules or "sticky" defaults that require effort to contract around).[62] In this sense, competing states may not only be heterogeneous regarding their locations on the policy spectrum (i.e., the horizontal axis), but also on the difficulty of contracting around such rules. The stickier the rule, the steeper the cost curve for adaptation. The cost structure we assume posits that firms have chosen to take the cheapest route to adaptation.[63]

FIGURE 2: Z CORP.'S COST OF ADAPTATION TO A DIFFERENT STATE LAW PACKAGE



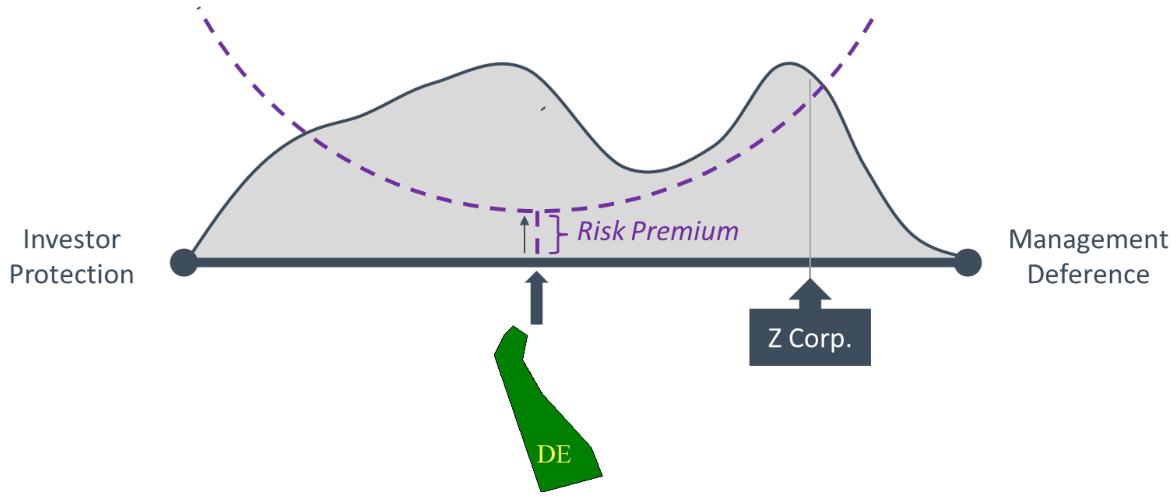
Another important attribute of adaptation to state law turns on predictability. States will almost certainly differ in the predictability of their corporate law when called upon to settle disputes, and less predictable jurisdictions will impose greater risk and uncertainty *ex ante* on entities incorporating there. For states with considerable precedent and judicial expertise, the underlying risk premium will be relatively low. But for states with untested laws or less credentialed judges, parties rationally anticipate inconsistent adjudication of their claims. The incremental addition of unpredictability in law is incorporated in Figure 3, in the form of an additive "risk premium" that firms must effectively pay to roll the dice in that state, which increases the costs of adaptation for firms incorporating there. As can be seen in the Figure, this risk premium is represented by a uniform vertical shift in the adaptation

[62] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Brett McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007); Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

[63] The adaptation cost schedule pictured in Figure 2 (and succeeding figures) is represented as a parabolic (quadratic) curve. The spatial competition literature has studied a wide variety of parametric shapes (including quadratic, linear, and others). *See, e.g.,* Hadfield & Talley, *supra* note 27. Although we believe that the quadratic rendering is the most instructive (particularly when we include jurisdictional risk premia below), our arguments are robust to alternative formulations.

cost curve (even for firms whose ideal point coincides precisely with the state's substantive package of corporate laws). States with more novel and untested legal regimes will impose relatively higher variability and thus larger risk premiums on firms incorporating there.[64]

FIGURE 3: Z CORP.'S ADAPTATION COST WITH UNPREDICTABILITY RISK PREMIUM



We now enrich the analysis further by introducing rival jurisdictions into our framework. Figure 4 depicts three hypothetical corporate law jurisdictions offering differentiated regulatory products along a spectrum, with California imposing the most investor protective law, Nevada offering the most managerial autonomy; Delaware remains where it was in Figure 3, in the moderate center. Note that the rival states' offerings are also differentiated along other dimensions: Each features a different intensity of adaptation cost, as well as a state-specific risk premium, representing the fact that states can and will differ in the development of their jurisprudence and the flexibility of their rules. Figure 4 also introduces the presence of a state-specific franchise tax, paid by all incorporating entities, which increases the costs of selecting a particular jurisdiction. The franchise fee is an important source of revenue for states—as noted above, over a third of Delaware's state budget is financed by corporate franchise taxes.[65]

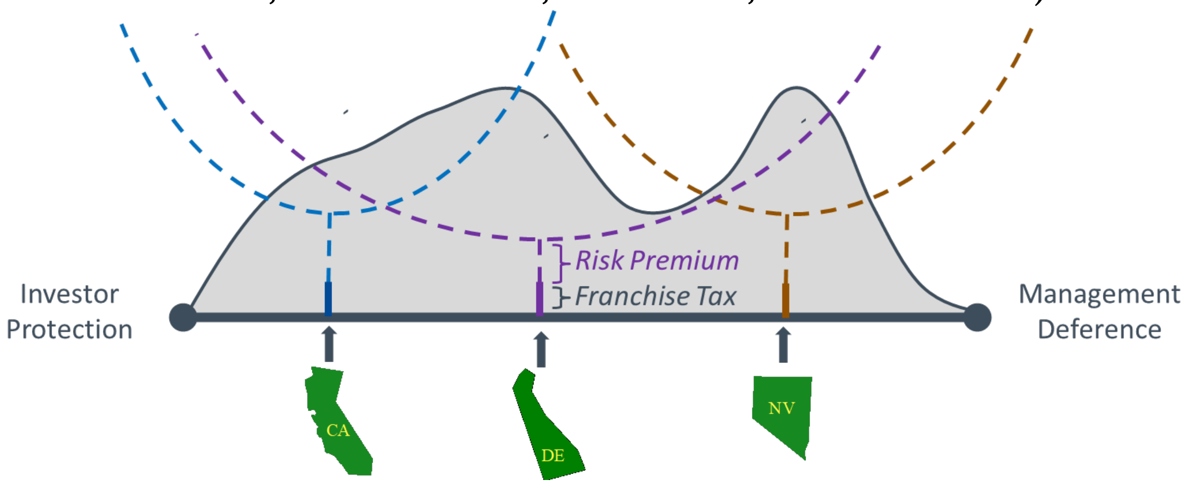
The depiction in Figure 4 provides that both the risk premia and the adaptation cost structure are favorable for Delaware. But nothing is sacrosanct about these initially posited positions. The three jurisdictions can strategically choose to locate wherever they want on the continuum. They can also flatten the costs of adaptation by expanding the role of contractarianism and default rules. In theory, they can even alter their risk premia over time, with flexible statutes, expert judges, and a large body of case law providing guidance for seasoned corporate practitioners to predict outcomes. Finally, each

[64] The quadratic configuration of the adaptation cost curves in Figure 2 facilitates a natural way to account for enforcement risk, since quadratic payoff functions induce an additive risk premium that scales linearly in outcome variance. *See* Kenneth Arrow, *Aspects of the Theory of Risk Bearing*, in ESSAYS IN THE THEORY OF RISK BEARING, MARKHAM PUBL. CO., CHICAGO 90–109 (1971); John Pratt, *Risk Aversion in the Small and in the Large*, 32 ECONOMETRICA 122–136 (1964).

[65] Jeffrey A. Friedman & Jeremy P. Gove, *Alternative Entities, Professional Perspective — The "Secret" Delaware Tax*, BLOOMBERG L. (Mar. 2024), https://www.bloomberglaw.com/external/document/XDJOK4EC000000/alternative-entities-professional-perspective-the-secret-delawar; Jacob Owens, *Delaware Explained: State Revenue*, SPOTLIGHT DEL. (May 28, 2025), https://spotlightdelaware.org/2025/05/28/delaware-explained-state-revenue/.

jurisdiction can increase its franchise tax and hope that the resulting combined product is attractive enough to maintain a critical mass of incorporations.

FIGURE 4: THREE JURISDICTIONS' CORPORATE LAW OFFERINGS (DIFFERENTIATED BY LOCATION, ADAPTATION COSTS, RISK PREMIUM, AND FRANCHISE TAX)



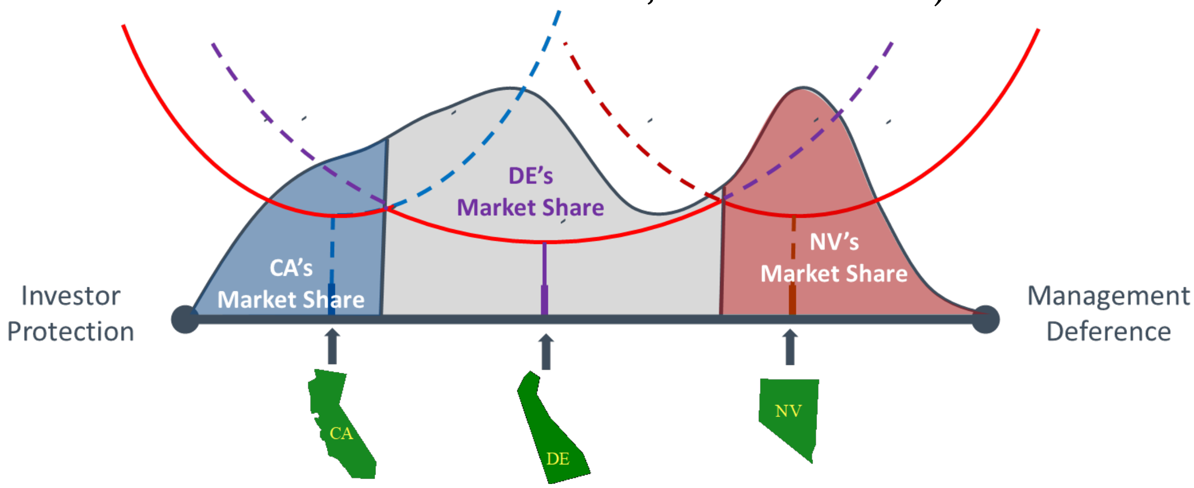
iv. Benchmark Thought Experiment with Predictions

We are now in a position to combine our demand- and supply-side observations into predictions about how the market for incorporations will sort itself out in equilibrium. We begin with a benchmark thought experiment that assumes that state legislators are principally interested in maximizing expected revenues from incorporation fees when they make corporate law. Although this supposition is no doubt a simplifying one, we show that it generates predictions that can be compared to real-world outcomes, allowing us to assess whether (and to what extent) legal changes are consistent with revenue maximization.

Figure 5 holds constant the state choices depicted in the previous figure and considers how incorporating firms will sort themselves across jurisdictions. As discussed, firms are presumed to be profit motivated and so will attempt to minimize the combined costs of pursuing their ideal governance regime, adapting as necessary so long as those costs are less than moving to a different jurisdiction. Ultimately, firms will choose the jurisdiction that is closest to their ideal point, facilitates easy adaptation, promises high predictability (i.e., low risk premia), and charges low incorporation fees.

As such, revenue-maximizing competing jurisdictions will tend to divide the market into segments whose boundaries correspond to the point where the respective cost curves form the minimum scalloped union of the states' individual curves (represented by the solid red line). Figure 5 shows how our conceptual framework fits this picture: California will tend to attract firms on the extreme investor protective end of the spectrum (shaded blue), Nevada will attract states on the extreme management autonomy end (shaded red), and Delaware will stake out the ground in between (shaded gray). The total revenue generated by each state is simply the portion of the firms incorporating there multiplied by the per-firm franchise fee. As pictured here, Delaware will tend to attract most corporate entities in the moderate regions of the continuum, but both California and Nevada also capture market share. Unsurprisingly, heterogeneous firms and heterogeneous offerings give rise to heterogeneous market shares for differentiated providers of corporate law.

FIGURE 5: MARKET SHARE OF EACH JURISDICTION (FIXING LOCATION, ADAPTATION COSTS, UNPREDICTABILITY PREMIUMS, AND FRANCHISE TAX)



Although we have thus far fixed each jurisdiction's package of corporate law, rational revenue-maximizing states will understand how the population of corporations will sort and will accordingly adjust their legal product to maximize revenue given what other states are offering. When this adjustment process reaches the point where no state has an incentive to change further, it is what game theorists refer to as the "Nash equilibrium" of the regulatory competition game.[66] Our framework also tracks a class of similar analyses in the industrial organization literature which specify that an equilibrium must exist (and that it is typically unique).[67] And, because it is an equilibrium, there is no reason to expect further change, at least so long as the foundational environment of the incorporation market does not experience a shock.

What attributes can one expect in an equilibrium of the differentiated product market for corporate law? Our benchmark case yields several predictions. Perhaps the most immediate is *that all states will value offering high predictability to incorporating firms*. For states and firms, predictability is a "win-win" proposition, reducing the risk premium of incorporating in the state and thereby increasing the state's market share even if the state does not change any other part of its substantive law. Within Figure 5, a hypothetical decrease in uncertainty for Delaware would cause its adaptation cost curve to shift downwards, allowing it to increase its fees and/or draw in new incorporations from the edges of both California's and Nevada's markets.[68] Therefore, we should not expect revenue-maximizing jurisdictions to embrace corporate law reforms that unnecessarily reduce predictability for incorporating firms. Doing so would cannibalize the franchise fee revenues and incorporations the state can expect to enjoy.

[66] *Game Theory*, STANFORD ENCYCLOPEDIA OF PHIL. (Sep. 3, 2023), https://plato.stanford.edu/entries/game-theory/.
[67] Fudenberg & Tirole, *supra* note 45.
[68] Having reduced the risk premium, of course, a state might be able to make additional profitable choices, such as increasing its franchise tax fees.

The second equilibrium implication for revenue-maximizing jurisdictions is *that states will soften adaptation costs as much as is practically possible.*[69] Although some determinants of adaptation costs are at the firm level and beyond states' control (as discussed above), others are much more centrally affected by the state's regulatory policy, and chief among them is the cost the state imposes to contract around its baseline offerings. A state that offers a highly enabling corporate law consisting mainly of default rules that can be freely tailored will be relatively more attractive to any firm whose ideal governance system is an imperfect fit with the state's offerings. In the framework from Figure 5, were Delaware to transform more of its mandates into default rules, it would cause the slope of its cost curve to flatten, once again attracting new incorporations from the boundaries of competitor states. Thus, all else constant, a rational revenue-maximizing state would not deliberately inject unnecessary stickiness to its baseline rules.

Our framework generates additional equilibrium predictions about regulatory competition, though these predictions are slightly more nuanced than the two above. Consider first how rational jurisdictions would individually set franchise tax fees, an important component of revenue maximization. Determining the optimal fee to charge in equilibrium is a delicate balance, however: setting it too low might attract corporations but raise little revenue, whereas a high fee might scare all but a few of them off. In equilibrium, then, the optimal revenue-maximizing fee navigates a "Goldiloxian" middle ground. Specifically, we predict *that competing jurisdictions will increase the fee up to the point where marginal revenue gain from firms that enter or remain in the state equals the marginal revenue lost for firms who go elsewhere because of the price increase.*[70] Although achieving this balance is tricky, it is made easier for a jurisdiction offering high predictability and low adaptation costs, both of which reduce the marginal costs associated with a fee increase.

Although the logic above is intuitive, things become more interesting when we interact these predictions with the most important legal choice that jurisdictions make: Locating the state's substantive corporate law offerings along a continuum of governance structures. On this point, our framework offers several additional predictions. First, *we predict that the forces of competition will push revenue-maximizing states to differentiate their legal product, rather than copy their rivals, because product differentiation gives them pricing power.* Consider, for example, two states whose corporate law imposes exactly the same degree of predictability and identical costs of adaptation. If both states decide to craft their corporate law package to be in the same location on the continuum from Figure 5, the only differentiator is the franchise fee. Rational firms would simply choose to incorporate in the state offering the lowest fee, leaving its higher-charging doppelganger with zero market share. That latter state would respond by cutting its fee to be slightly south of the current leader's. And this process would continue apace until the otherwise-identical states converged on a $0 franchise fee.[71] While businesses would love this ruinous competition, it would wholly undermine both states' revenue goals. Indeed, by copying one another in all other respects, these two states would ensure that they minimize revenue generation at $0. At a high level, therefore, we predict that copying will rarely be an optimal revenue generation strategy. Instead, by differentiating themselves, states can soften the competition they feel, maintain a positive franchise tax and make more revenue.

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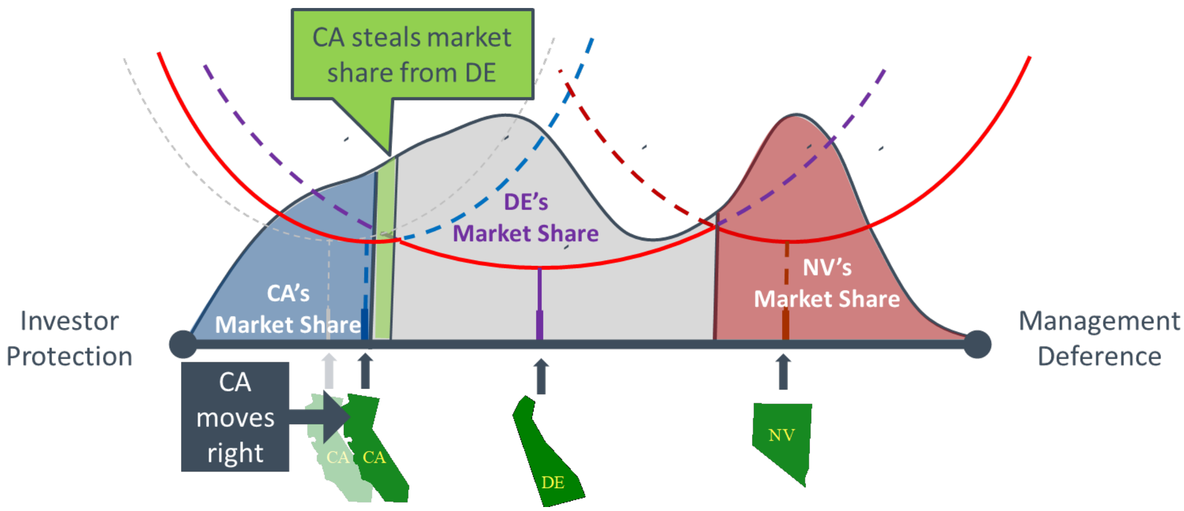
[69] A recent paper argues that Delaware's adaptability explains its historic dominance. See Ofer Eldar & Lorenzo Magnolfi, Explaining Delaware's Dominance: Firm Heterogeneity and Demand for Legal Flexibility, working paper (2025).

[70] This is roughly the same logic that any business with price setting discretion uses to maximize profits.

[71] This is type of ruinous price competition amongst otherwise identical firms is sometimes known as "Bertrand" competition. *See* Fudenberg & Tirole, *supra* note 45.

Another prediction concerns how aggressively states will differentiate their product. Specifically, *while all states prefer differentiation, states offering moderate corporate governance provisions should be more reluctant to experiment with their packages than extreme states.* To see why, consider Figures 6A and 6B below. Figure 6A examines a possible move by California (which dominates the investor protective flank of the policy continuum) in the direction of Delaware's more moderate position. Such a move may or may not be revenue enhancing for California: Moving in the direction of Delaware will allow it to steal some of Delaware's market (pictured by the green shaded region), therefore increasing revenue. But at the same time, California's closer proximity to Delaware would cause both states to compete more vigorously on franchise fees, therefore reducing revenues. Thus, California will find it advantageous to make this move only if its unambiguous market share gains compensate for per-firm competitive reductions in franchise fees.

FIGURE 6A: MARKET SHARE IMPLICATIONS OF A HYPOTHETICAL RIGHTWARD MOVE BY CALIFORNIA



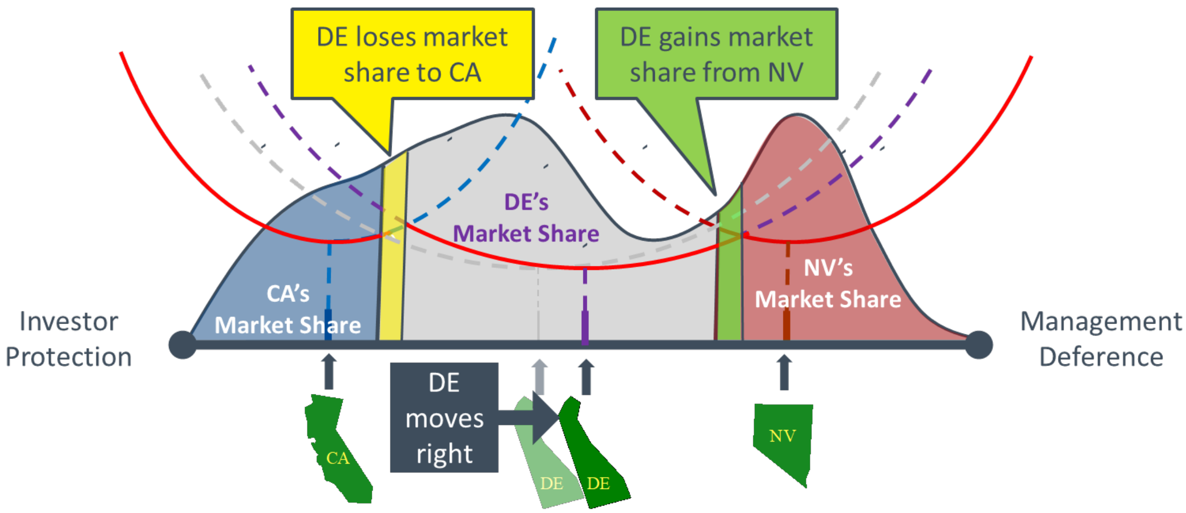
Now consider Figure 6B, which supposes that Delaware is contemplating moving right towards Nevada's management-protective law. The tradeoff for Delaware is somewhat more complex than that of California. To be sure, Delaware will garner market share even if it has to lower franchise fees as it emulates Nevada. Delaware faces another cost, however, which California did not face in the previous example: Its move towards Nevada simultaneously cedes territory to California and leaves its "rear flank" exposed. As such, California can attract reincorporations without even trying, from close-to-indifferent firms who disfavor Delaware's rightward move. This loss in market share to California is an additional downside that Delaware would have to consider in reforming itself to look more like Nevada.[72] This logic leads to yet another prediction: *jurisdictions face lower costs in moving towards a near competitor when the regulatory package they offer is situated at the extreme end of legal policy space rather than somewhere in the middle.*

There is an additional reason why states (and especially moderate ones like Delaware) should be reluctant to make significant changes to their corporate law structure. Figures 6A and 6B presume that jurisdictions face few additional costs when moving to emulate each other. But the reality of

[72] Cf. Eldar and Magnolfi (developing a model that allows them to predict that Delaware would lose revenue by emulating Nevada).

jurisdictional competition is more complex. As we discuss in detail in the next Part, Delaware's formula—and in particular, its expert equity court and robust body of precedent—is highly desirable, but it is not easy to replicate. For these reasons, Delaware's rivals will find it difficult and time consuming to match the state's modest risk premium. Likewise, because certain substantive features of Delaware law cannot be easily copied, competing jurisdictions will be hamstrung in how far they can move toward Delaware's moderate middle.

FIGURE 6B: MARKET SHARE EFFECTS OF A HYPOTHETICAL RIGHTWARD MOVE BY DELAWARE



These observations generate additional insights about state competition in equilibrium. The first is that *Delaware, as moderate market leader with established revenue expectations, should be risk averse when adjusting its law*. It should rightly perceive that its rivals are limited in how much market share they can capture; moreover, a mistaken move that reduces predictability or adaptability could inadvertently make it easier for competitors to take its place. By contrast, should the state proceed incrementally and carefully, and by not bending its law to serve interest groups or the needs of a small subset of the market with extreme needs, it can comfortably expect to remain the market leader.

The same is not true for Delaware's competitors. Once again, rival states who are seeking to increase their market share will not be able to emulate Delaware; instead, their dominant move is to compete by offering a specialized product that Delaware cannot or will not offer. Because they are more likely to be operating on a clean slate, with non-expert judges and thin precedents, experimentation with their statutory structure has lower costs. And we predict that rival jurisdictions will be far less risk averse when experimenting, and *that they may even be risk seeking when experimenting with their package of corporate law.*

Although our thought experiment has largely suppressed the presence of interest groups and elites in lawmaking, their inclusion need not reverse these predictions. For a market leader like Delaware, its dominance has long supported a cottage industry of interest groups—ranging from corporate lawyers to bell-hops at the Hotel Dupont—that depend on the continual maintenance of the state's leadership in the incorporation market. This insight leads us to predict that *market leaders in corporate law will face many interest group pressures that reinforce revenue generation.* States that are not established market leaders, by contrast, depend on revenue from other sources; moreover, with less to lose, such states are comparatively more amenable to entreaties from specific interest groups—lawyers, managers, founders—to make speculative wagers on legal changes that may result in additional incorporations. Accordingly, we predict that *fringe jurisdictions will be relatively more susceptible to interest group pressures than dominant ones when crafting their laws*.

Although the inclusion of interest groups implies that the corporate legislation process is "captured" to some degree, we are loathe to condemn it as an unadulterated race to the bottom or inefficient. As we have discussed, there are likely to be multiple optimizing law configurations such that no one jurisdiction can adopt them all.[73] Moreover, the prospect of securing incorporations should motivate fringe jurisdictions to experiment with legal changes that appeals to fringe firms. In this way, our account views specialization as a feature, rather than a bug.[74] In the next Part, however, we reveal how these predictions sometimes break down, leading to disruptions that have the potential to substantially alter the jurisdictional competition equilibrium.

II. Differentiated Competition and the Real-World Corporate Law Landscape

With a deeper conceptual understanding of the forces that shape the production of corporate law, we turn to the pragmatic application of these insights. This Part first describes the modern corporate law landscape in detail, beginning by describing the attributes that have traditionally been thought to be key to Delaware's dominance in corporate law—its expert judiciary, responsive legislature, enabling statute, well-developed law, practitioner networks, and insulation from partisan forces. The confluence of these factors fits comfortably within our framework's predictions, providing a deeper understanding of the value underlying the nuanced product Delaware has spent decades creating. We then highlight some of the leading jurisdictional rivals to Delaware and their differences. Once again, the picture reflects equilibrium behavior in our conceptual framework, where smaller rivals attempt to gain market share from a market leader via creative experimentation and differentiation at the fringes of the policy spectrum, and often in response to pressure from interest groups.

We then turn to the legal changes that occurred in in Delaware in March 2025, as well as the pressures that brought them about, and juxtapose those events against the predictions generated by our framework. In so doing, we offer a critical appraisal of both the DExit risk, as well as the state's response. Specially, we argue that SB 21 caused Delaware to depart from our framework's predictions about a market-leading, revenue-maximizing state's behavior in equilibrium. This divergence, we argue, plausibly increased the risk of flight of corporations to other jurisdictions. Moreover, we contend that the interest group pressures shaping this current chapter of corporate legislation are unlikely to abate anytime soon—in Delaware or anywhere else—representing a novel shock to the corporate law competitive landscape.

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[73] Although incorporators may be able to customize their charters to move across that spectrum to some degree, there are often limits, and at some point, the cost of tailoring will exceed the cost of choosing a jurisdiction that is a better fit.

[74] That is not to say that jurisdictional competition will always lead to efficient laws. It is possible that a jurisdiction could compete by offering suboptimal law that allowed for management or controller expropriation. But given that managers, who are often shareholders, would bear the wealth effects of this decision, not many would willingly make this choice. As such, a firm that competed on the basis of suboptimal law would be unlikely to gain very many incorporations, aside from the handful of firms that are controlled by individuals that are so wealthy that they do not bear the wealth effects of their poor decisions.

A. Delaware's Dominance: The Received Story

For over a century, Delaware has been the preferred jurisdiction for large U.S. corporations. As of this writing, over 60% of Fortune 500 companies choose Delaware as their legal home, and over 90% of recent IPOs are incorporated in Delaware.[75] (Even the recent high-profile exits from Delaware, such as Tesla, have yet to put a material dent in these aggregate figures.[76]) And the modest natural-person population of Delaware benefits significantly from this status—over a third of the state's budget comes from taxes and fees collected from these incorporated entities.[77] As such, this Section describes the received wisdom regarding Delaware's persistent dominance in the market for corporate law. The consensus recipe for Delaware's success is simple to articulate in broad strokes, but difficult for others to recreate overnight. It combines an expert judiciary, well-developed case law, a responsive legislature, a specialized legal community, and insulation from partisan politics. We discuss each of these interrelated factors in turn and highlight how they reflect our framework's predictions.

i. Expert Judiciary

Consider first what many view as the linchpin of the state's success: Its sophisticated and experienced judiciary.[78] Business disputes are typically heard in the Delaware Court of Chancery, with a right of appeal (and no certiorari impediments) to the Delaware Supreme Court.[79] The Court of Chancery is explicitly modeled (via the state's constitution) after the traditional equity court of England, which means there are no juries or punitive damages.[80] It currently consists of seven judges that are not elected, but chosen by the governor after a careful process that includes vetting from the Judicial Nominating Commission, which is populated by Delaware lawyers. Confirmed judges serve for twelve-year terms, a term calculated to provide insulation from political pressure.[81]

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[75] Amy Simmerman, William B. Chandler, III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/.

[76] *See* Daniel Taylor, *Delaware's Manufactured Corporate Crisis*, CLS BLUE SKY BLOG (Mar. 6, 2025), https://clsbluesky.law.columbia.edu/2025/03/06/delawares-manufactured-corporate-crisis/.

[77] Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111 (2021).

[78] *See* Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. BUS. & TECH. L. 409, 409–10 (2007) (describing the judiciary as one of the "major player[s] in the Delaware corporate lawmaking system").

[79] *See, e.g.*, Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002) [hereinafter, Kahan & Kamar, *The Myth of State Competition*] (explaining Delaware's chancery court system); Donald F. Parsons, Jr. & Joseph R. Slights, III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY, Mar./Apr. 2008, at 21, 22 (describing the Delaware Court of Chancery's "unique" features). The Superior Court hears cases that do not fall within the jurisdiction of the Court of Chancery, which can include complex contract disputes. The Superior Court allows parties to eschew jury trials and the complex commercial litigation division is also composed of expert judges. Simmerman et al., *supra* note 75.

[80] Indeed, the Delaware constitution specifically grants the Court of Chancery all the powers that were "vested" within the English Court of Chancery as of the state's initial constitution in 1792. DEL. CONST. art. IV, § 10; *DuPont v. DuPont*, 85 A.2d 724 (Del. 1951); *see also* Simmerman et al., *supra* note 75.

[81] William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS., https://courts.delaware.gov/chancery/history.aspx (last visited Sep. 1, 2025). There are also five magistrates that help preside over certain disputes. *Magistrates of the Court of Chancery*, DEL. CTS., https://courts.delaware.gov/chancery/magistrates.aspx (last visited Sep. 1, 2025).

At both the trial and appellate level, judicial officers are typically drawn from the corporate bar, meaning that they are already familiar with intricacies of complex business disputes.[82] They also move quickly, with a commitment to resolve disputes in a matter of months or even days when circumstances require. Consider, as just one example, how Chancellor Kathaleen McCormick presided over the complex *Twitter v. Musk* litigation via a motion to expedite, agreeing to begin the behemoth trial within sixty days given the significant risk that a busted deal posed to Twitter's business.[83] This speed is a significant benefit for firms that may be unable to continue normal business operations until the dispute is resolved. Within our framework, the expert judiciary provides a means by which transaction and governance designers can delegate certain details of dispute resolution to a later court, a luxury that reduces up-front transaction costs and enhances predictability.

ii. Responsive Legislature and Enabling Statute

The Delaware General Corporation Law ("DGCL") provides a detailed set of rules that govern Delaware corporations. Although the statute is comprehensive, it is (for the most part) not prescriptive. Instead, the statute has traditionally followed a broadly enabling approach that gives business planners ample flexibility in customizing their procedures and governance to meet their firm-specific needs.[84] For example, founders can customize their corporate charter to adopt a dual-class structure, can stagger their board or adopt majority voting provisions, and can even adopt a bespoke corporate purpose.[85] The state's general practice of treating its statutory structure as a default (and not immutable) rule translates into a readily adaptable contractarian landscape. When viewed through the lens of our framework, Delaware law facilitates low-cost adaptation and tailoring for firms wishing to alter the provisions of the DGCL.

Moreover, the statutory framework is itself subject to regular adaptation, too. Each year, the Corporation Law Council of the Delaware State Bar Association, a group composed of corporate lawyers, examines the code and suggests amendments, typically responding to notable practice or caselaw developments as they crop up.[86] Indeed, recent research reveals a historic pattern of legislative responses to judicial decisions, and argues that this interplay represents an important benefit that Delaware has historically supplied to incorporators.[87] To become binding law, the proposed amendments must be adopted by the legislature and signed into law by the Governor. But the fact that the amendments originate with the Corporation Law Council's annual review means that legal

[82] *See* Simmerman et al., *supra* note 75.
[83] Plaintiff's Reply in Further Support of Motion to Expedite Proceedings, Twitter, Inc. v. Musk, No. 2022-0613-KSJM (Del. Ch. July 18, 2022).
[84] *See* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (And Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005) (observing that "the Delaware approach to corporate law keeps statutory mandates to a minimum. And even some of the mandatory terms are subject to being overridden through charter and bylaw provisions. In particular, our law gives corporate planners tremendous power to use the charter—the equivalent of the corporate constitution—to vary otherwise mandatory terms"); Coffee, *supra* note 69; Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989).
[85] DEL. CODE ANN. tit. 8, § 214.
[86] Simmerman et al., *supra* note 75; *see also* Ofer Eldar & Gabriel Rauterberg, *Is Delaware Law Nonpartisan?*, 2023 WIS. L. REV. 177, 181 (noting that the Council acts as "[t]he main source of legislative drafting" and helps "insulate[] [Delaware corporate law] from political partisanship").
[87] Assaf Hamdani & Kobi Kastiel, *Courts, Legislation, and Delaware Corporate Law* (Eur. Corp. Governance Inst., Law Working Paper No. 869/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5391963.

change has tended to move in an orderly but expedited fashion,[88] relatively insulated from political contestation (at least until recently).[89]

iii. Well-Developed Case Law

Working hand in glove with its expert judiciary and enabling statutory framework, Delaware has produced an immense body of judicial opinions and rulings and continually adds to it in response to emergent inconsistencies and indeterminacies in its code and caselaw. The contributions of Delaware corporate caselaw are staggeringly disproportional relative to other states. For example, each year the Delaware Supreme Court takes upwards of 60 cases on appeal specifically from the Court of Chancery on corporate law topics, compared to low single digits for its principal jurisdictional rivals.[90] The Delaware Court of Chancery likewise produces many more written opinions, bench rulings, and orders that are never appealed and thus also act as precedents. Other states, such as Nevada, do not even issue written opinions at the trial court level.[91]

These lopsided figures should hardly be surprising: One benefit of being a market leader in incorporations for the past century is that Delaware sees a proportionally greater number of legal disputes, many of which culminate in additions to an already-well-developed caselaw.[92] As such, incorporators and litigators have the luxury of navigating their metaphorical boats by reckoning against a sky that is dense with the starlight of precedents, providing guidance and assurance to corporate actors in a wide array of situations. This predictability fits well within our framework, reducing the risk premium associated with incorporating in Delaware, as well as easing efforts to tailor governance based on firm-specific characteristics.

Beyond its detail and scope, Delaware caselaw is known for several other advantageous attributes. First, it typically relies on fact-specific standards instead of bright line one-size-fits-all rules. Consider, for example, the requirement that managers act subject to fiduciary duty when running the business.[93] There is no clear roadmap to follow in discharging one's fiduciary duties; instead, these

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[88] *Id.* (showing a slower pace of change in other jurisdictions)

[89] The relative insulation of Delaware corporate law is subject to periodic political maelstrom where the legislature will amend the DGCL to overturn controversial decisions by Delaware's courts. *See* Hamdani & Kastiel, *supra* note 87, at App. A (documenting instances of legislative interventions, including: the addition of § 102(b)(7) in 1986, 2024 amendments enacted through S.B. 313 and, most recently, amendments following S.B. 21).

[90] In fiscal years 2021 and 2022, for example, the Delaware Supreme Court granted 75 and 61 civil appeals from the Delaware Court of Chancery. Delaware Supreme Court, *Supreme Caseload Breakdown by Court of Origin, FY 2021*, at 1 (Del. Admin. Office of the Courts 2021); Delaware Supreme Court, *Supreme 2022 Statistics*, at 2 (Del. Admin. Office of the Courts 2022). In fiscal years 2023 and 2024, respectively, the Delaware Supreme Court granted 70 and 96 civil appeals from the Court of Chancery. Delaware Supreme Court, *Supreme 2023 Statistics*, at 3 (Del. Admin. Office of the Courts 2023); Delaware Supreme Court, *Supreme Caseload Breakdown by Court of Origin, FY 2024*, at 1 (Del. Admin. Office of the Courts 2024). By comparison, the number of appeals concerning corporate law disputes heard by the Supreme Court of Nevada in 2024 was two. *See Capital Advisors, LLC v. Cai*, 548 P.3d 1202 (2024); *In re Parametric Sound Corp.*, 549 P.3d 1189 (2024). The Supreme Court of Texas similarly heard only two such appeals in 2024. *See In re Ill. Nat'l Ins. Co.*, No. 22-0872 (Tex. 2024); *Keyes v. Weller*, 692 S.W. 3d 274 (Tex. 2024). The California Supreme Court appears not to have decided any appeals concerning corporate law claims that year.

[91] *See* Joshua Halen, *Transforming Nevada into the Judicial Delaware of the West: How to Fix Nevada's Business Courts*, 16 J. Bus. & Sec. L. 139 (2016).

[92] Simmerman et al., *supra* note 75.

[93] Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 678-79 (2009) (describing the origins of fiduciary duties in Delaware).

duties provide only a crude guide made concrete by ad hoc judicial interpretation.[94] On first gloss, such indeterminacy might pose the potential to undermine predictability.[95] But on deeper reflection, the ability to use equity to adjudicate formalistic rules allows expert judges to examine corporate conduct closely when facts indicate misconduct.[96] It also discourages opportunistic "gaming" of textualist, cookie-cutter rules.[97] Relatedly, Delaware judges routinely supplement seemingly indeterminate standards through creative use of dictum and in scholarly activities, which provide additional advisory guidance to business planners without undermining the court's ability to act flexibly as needed.[98] And, like the legislature, the judiciary has proven responsive when aspects of its law become unwieldy or suboptimal. For example, a wave of M&A litigation that deluged Delaware courts in the early 2010s was deftly dealt with by a series of careful decisions that cracked down on the more aggressive litigation tactics, obviating the need for any major legislative overhaul.[99]

iv. Practitioner Networks

As the previous paragraph indicated, the presence of well-developed case law further supports professional network effects among corporate lawyers and other practitioners. The corporate bar inside and outside of Delaware is intimately versed in Delaware legal doctrine,[100] and many rival state courts look to Delaware precedent as strong persuasive authority.[101] The network effect grows stronger each year, as professional networks meet regularly to discuss Delaware legal developments, and most law school courses in corporate law teach Delaware law exclusively.[102] Because lawyers influence incorporation choice, they habitually favor Delaware because of their training and continued familiarity with it.[103] These network effects further enhance the predictability of Delaware caselaw because it receives so much attention.[104]

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[94] Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1909 (1998)

[95] Ehud Kamar argues that corporate law is "inefficiently vague". *Id.* at 1912; *see also* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORN. L. REV. 1205, 1249-50 (2001) (concluding that "Delaware's [corporate-law] package seems to contain more litigation than is optimal"); William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1.

[96] Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000); Strine, *supra* note 84.

[97] In contrast, consider corporate debt doctrines, which adhere much more textually to code and bright-line rules, and has largely invited strategic gaming by activist hedge funds and corporate transactional attorneys. Eric L. Talley & Sneha Pandya, *Debt Textualism and Creditor-on-Creditor Violence: A Modest Plea to Keep the Faith*, 171 U. PA. L. REV. 1975 (2023).

[98] William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 590 ("Considered recourse to dictum allows Chancery to prospectively regulate fiduciary conduct, without requiring the litigants before it to bear the cost (through retrospective application) of prospective rulemaking. Equally importantly, Chancery utters its dictum with full appreciation of the broad range of cases that will be affected, largely sidestepping the pitfalls of dictum that have been identified by commentators."); *see also* Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 207 (2007) (observing that Delaware courts "frequently craft[] dicta to give valuable guidance to deal lawyers . . . on uncertain but vital areas of corporate law"); Ronald J. Gilson, *The Fine Art of Judging: William T. Allen*, 22 DEL. J. CORP. L. 914 (1997).

[99] *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016); *DFC Glob. Corp. v. Muirfield Value Partners*, 172 A.3d 346 (Del. 2017); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017).

[100] Simmerman et al., *supra* at 75.

[101] *Id.*

[102] Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1 (2020); Carney et al., *supra* note 39.

[103] *See* Carney, et al., *supra* note 39 (surveying lawyers and finding that the vast majority recommended Delaware law because they did not know the law of other states).

[104] *See, e.g.*, Klausner, *supra* note 39, at 845 ("So long as a large number of firms remain incorporated in Delaware, that state's courts will probably produce a steady stream of case law that addresses cutting-edge issues in a timely fashion. . . . [N]o other state can offer the prospect of such an extensive and timely body of case law.")

v. Nonpartisan Approach to Corporate Law

Finally, Delaware corporate lawmaking is structured in an attempt to minimize partisan leanings, likely as a means of protecting its corporate franchise tax revenues from disruption.[105] As discussed above, the Council is composed in a "bipartisan" fashion, with individuals from both the plaintiff and defense side of the bar.[106] Likewise, Delaware judges are not elected, but appointed after a lengthy vetting process. In addition, a constitutional provision requires a supermajority vote of two-thirds of both houses of the legislature to make any changes to the DGCL.[107] Finally, the Delaware Constitution requires that its judiciary maintain balance between Democratic and Republican judges.[108] Although the connection between politics and corporate law is complex, conservative political groups have tended to push for law that enhances management autonomy, while progressives favor shareholder and even stakeholder influence in corporate law. Nevertheless, the state's traditional ability to protect many of the components of the lawmaking machine from partisan agendas safeguards the state's ability to produce law that benefits firms and their investors.[109]

vi. Aspiring Contenders

As the discussion above reveals, Delaware's dominance fits comfortably within our framework's predictions that a market leading state will emphasize moderate policy commitments, high predictability, low tailoring costs, and significant tax revenue generation. And this recipe is not easy for rivals to emulate. Several of Delaware's most important features, and namely the commitment to a nonpartisan approach to lawmaking and the avoidance of jury trials, would take a constitutional amendment for competing states to establish.[110] And without an expert judiciary that is insulated from political winds, it is difficult to emulate Delaware's approach to corporate law, which favors judicial

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[105] *See* Roberta Romano, *Market for Corporate Law Redux* 52-55, (Eur. Corp. Governance Inst., Law Working Paper No. 270/2014, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514650 (explaining that Delaware's "hostage-like dependence on franchise tax revenues . . . serves as a credible commitment to firms").

[106] A roughly contemporaneous paper to ours argues that the Council should be disbanded in favor of "a legislatively created 'Corporation Law Commission' that prioritizes the creation of a balanced and technically excellent corporate law over making changes that serve immediate client interests." See Edward Rock and Marcel Kahan, The New Political Economy of Delaware Corporate Lawmaking (working paper 2025). Although we concur with Kahan & Rock's conclusion that the Delaware lawmaking process has eroded in recent years, we do not view the Council as the sole driver—indeed, the decision to rush the legislative process and *bypass* the Council was a critical development in SB 21, as the next Part describes in detail. Given the growing influence of interest group politics on broader governmental actors, we are skeptical that a legislative solution will be forthcoming absent competition from private providers (as we outline below).

[107] *Id.*

[108] Note that this partisan balance requirement narrowly avoided being struck down in 2019, in *Adams v. Governor of Delaware*, although future challenges are likely to occur again. *See* Eldar & Rauterberg, *supra* note 86.

[109] *Id.* ("It is important to understand why the interests of corporate decisionmakers might be inconsistent with partisanship. While the day-to-day decision-makers in most corporations are their managers, corporations ultimately depend on shareholders to raise equity. As we argue, shareholders, who range from retail investors to various sophisticated institutions, do not have a clear party affiliation, and they rarely interact as a unified constituency with local politicians. In contrast, state partisan politics will typically be responsive to the state's concentrated stakeholders, such as local management or employees. Thus, partisanship presents a risk that shareholders' interests will be compromised in favor of another constituency." (citations omitted)). Compare this regime to that of Texas, which has not been able to keep partisan politics out of its corporate law even during its overhaul of its framework, as we discuss in Section V.

[110] *See* Eldar& Rauterberg, *supra* note 86, at 179, 181 ("Delaware . . . takes a distinctively nonpartisan approach to corporate law."); Shane Goodwin, *The Lone Star Docket: How the Texas Business Court Will Shape the Corporate Landscape* 47-48 (SMU Sch. of Bus., Research Paper No. 24-14, 2024) (identifying the absence of jury trials in Delaware's Court of Chancery as a contributor to Delaware's corporate law dominance).

discretion in applying indeterminate standards.[111] Moreover, the orderly and swift nature of Delaware's lawmaking and judicial process is unparalleled in any legal jurisdiction in the country.[112] Delaware's substantial precedent is also difficult to recreate: it would take decades for a rival state to generate a similar body of guiding law. Moreover, certain states—most notably, Nevada—do not publish opinions at the trial court level, which further hampers their ability to offer incorporators predictability.[113]

Table 1: Comparison of Corporate Law Attributes in Nevada, California, New York & Texas

Attribute	Nevada	California	New York	Texas
Specialized business court	In progress. In 2025 the legislature approved a constitutional amendment to establish a dedicated business court with appointed judges (pending voter approval by 2027).[114]	No. California handles complex business cases in general civil courts.[115]	Yes. New York has the Commercial Division of the Supreme Court (its trial court) – a specialized business court established in 1995 that handles complex commercial disputes statewide.[116]	Yes. Texas created a new statewide Business Court in 2023 (operational as of Sept. 1, 2024) with appointed judges and exclusive jurisdiction over large commercial cases.[117]
Elected Judges	Yes. Nevada's state judges (including those hearing business cases) are elected. (The proposed business court would have gubernatorially appointed judges serving set terms.)[118]	Yes. California's trial court judges are elected by county voters to six-year terms. Appellate justices are appointed by the Governor and	Yes. New York's Supreme Court justices – including Commercial Division justices – are elected by voters to 14-year terms. (Higher courts use appointive selection.)[120]	Yes. Texas selects judges in partisan elections. However, new Business Court judges are to be appointed by the governor (with Senate confirmation).[121] May raise constitutional issues.

111 Kamar, *supra* note 94.
112 Simmerman et al., *supra* note 75.
113 *Nevada Case Law Research Guide*, SUP. CT. OF NEV. L. LIBR. (AUG. 8, 2025), ("There are no print sources for trial-level opinions or orders from Nevada's trial courts.").
114 *See Delaware, Nevada or Texas – Which State's Corporation Statute Will Reign Supreme?*, NOSSAMAN LLP (June 30, 2025), https://www.nossaman.com/newsroom-insights-delaware-nevada-or-texas-which-states-corporation-statute-will-reign-supreme#:~:text=,until%202027%20at%20the%20earliest.
115 *See* Lee Applebaum, *The Steady Growth of Business Courts*, *in* FUTURE TRENDS IN STATE COURTS 70, 70 (2011), https://ncsc.contentdm.oclc.org/digital/api/collection/ctadmin/id/1820/page/0/inline/ctadmin_1820_0.
116 *See* AMICI: *Demystifying the Courts: The Commercial Division*, at 01:03-3:30 (SoundCloud, May 13, 2024), https://soundcloud.com/user-716357085/demystifying-the-courts-the-commercial-division/s-cxYYhTqkcb6?si=fb43adeb225a499f98db575a1135698c&utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing (transcript available at https://ww2.nycourts.gov/sites/default/files/document/files/2024-05/commercial%20division.pdf).
117 *See* Adam J. Greenup & Conor G. Bateman, *An Introduction to the New Texas Business Courts* (Nov. 8, 2024), *on Under Construction – November 2024*, SNELL & WILMER (Nov. 8, 2024), https://www.swlaw.com/publication/under-construction-november-2024/#an-introduction-to-the-new-texas-business-courts.
118 *See* Benjamin P. Edwards, *Nevada Proposes Appointed Business Court*, BUS. L. PROF BLOG (Feb. 20, 2025), https://www.businesslawprofessors.com/2025/02/nevada-proposes-appointed-business-court/#:~:text=In%20my%20view%2C%20this%20is,at%20how%20cases%20are%20decided.
120 *See Judicial Selection in New York*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_New_York#:~:text=Method%3A%C2%A0%C2%A0%20Assisted%20appointment%20%20Term%3A%C2%A0%C2%A0,Term%3A%C2%A0%C2%A0%2014%20years%20%2012 (last visited Sep. 1, 2025).
121 *See* Greenup & Bateman, *supra* note 117.

		then face retention votes.[119]		
Jury trials in corporate cases	Yes, but can opt-out. The default rule is trial by jury in corporate and commercial cases. In 2025, Nevada amended its law to let corporations include a charter provision opting for bench trial without a jury in internal affairs cases.[122]	Yes. California's constitution strongly protects the right to a jury trial, and the state Supreme Court has held that pre-dispute contractual jury waivers are unenforceable.[123]	Yes, but can opt-out. New York provides a right to jury trial in civil actions, and the Commercial Division can conduct jury trials for legal claims. However, New York does not prohibit contractual jury-trial waivers by statute.[124]	Yes, but can opt-out. In 2024, Texas amended its corporate code to permit Texas corporations to include a jury trial waiver clause in their certificate of formation or bylaws for internal disputes (if made knowingly and voluntarily, and with the consent of all parties).[125]
Written opinions	Uncommon at the trial level. The planned dedicated business court is expected to publish its decisions to increase transparency. Nevada Supreme Court decisions are published, but there have been relatively few on corporate matters.	Uncommon at the trial level, but California courts issue written opinions in corporate cases at the appellate level.	Yes. New York's Commercial Division judges often write detailed opinions on important motions and trials, and many of those decisions are published.	Yes. Texas courts produce written opinions in corporate law cases.
Explicitly "contractarian" law	Yes. Nevada's statutes prioritize enabling freedom of contract in corporate governance – e.g. corporations can broadly eliminate directors' personal liability through charter provisions.[126]	No. California's corporate law is not overtly contractarian – it contains various mandatory provisions designed to protect shareholders and other stakeholders.[127]	New York's corporate law does not explicitly embrace contractarian principles, but its embrace of contractarianism resembles that of Delaware.[128]	Yes. Texas has embraced a more contractarian approach in its reforms from 2023-2025.[129]

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[119] *See Judicial Selection: How California Chooses Its Judges and Justices*, CAL. CTS. NEWSROOM, https://newsroom.courts.ca.gov/branch-facts/judicial-selection-how-california-chooses-its-judges-and-justices (last visited Sep. 1, 2025).

[122] *See Delaware, Nevada or Texas – Which State's Corporation Statute Will Reign Supreme?*, *supra* note 114.

[123] *See Wave Goodbye to Predispute Jury Waivers*, BURKHALTER KESSLER CLEMENT & GEORGE LLP, HTTPS://WWW.BKCGLAW.COM/FIRM-NEWS/WAVE-GOODBYE-TO-PRE-DISPUTE-JURY-WAIVERS/ (last visited Sep. 1, 2025).

[124] *See* Jacqueline Gottlieb Luther & Steven Cardoza, *Start Spreadin' the News: California Court Says No to New York, New York; Rejects Forum Selection Clause*, SHEPPARD MULLIN (Nov. 19, 2019), https://www.corporatesecuritieslawblog.com/2019/11/forum-selection-clause/.

[125] *See* Greenup & Bateman, *supra* note 117; *Delaware, Nevada or Texas – Which State's Corporation Statute Will Reign Supreme?*, *supra* note 114.

[126] *See* Benjamin P. Edwards, *Two More Announcements for Nevada*, BUS. L. PROF BLOG (Apr. 18, 2025), https://www.businesslawprofessors.com/2025/04/two-more-announcements-for-nevada/#:~:text=Nevada%20differs%20from%20Delaware%20in,and%20essentially%20everyone%20opts%20in.

[127] *See Did You Think the Majority Rules in California? Think Again – Cumulative Voting is the Law for All California Corporations*, MINUTES (Dec. 10, 2009), https://eminutes.com/did-you-think-the-majority-rules-in-california-think-again-cumulative-voting-is-the-law-for-all-california-corporations#:~:text=In%20California%2C%20cumulative%20voting%20is,5%28a.

[128] *See* Jens Dammann, Response, *How Lax Is Nevada Corporate Law?: A Response to Professor Barzuza*, 99 VA. L. REV. IN BRIEF 1, 7 n.23 (2013).

[129] *See Delaware, Nevada or Texas – Which State's Corporation Statute Will Reign Supreme?*, *supra* note 114.

Although Delaware's portfolio is not easy to copy, that has not stopped states from trying.[130] Indeed, some states copy Delaware law in its entirety, and several are attempting to create specialized business courts, as Table 1 reveals.[131] Even so, these states lack the decades of proven track record, body of case law, speed, and protection from interest group politics that Delaware offers incorporators (at least traditionally). In the language of our conceptual framework above, this means that many states are limited in their ability to move across the substantive legal product spectrum and lower their risk premium to match that of Delaware. Instead, they are largely compelled by market forces to differentiate their offerings to targeted strata of firms, effectuating competition at the edges.[132]

The non-Delaware jurisdiction garnering the most attention as a competitor is Nevada, which has seized a modest chunk of Delaware's market share, at least for certain types of firms. As Michal Barzuza has described, Nevada competes by "tailoring its product to a particular subset of the market," and specifically, firms interested in maximizing managerial autonomy.[133] Nevada, for example, insulates management from liability for all fiduciary duty breaches—even loyalty breaches—unless there is evidence of bad faith.[134] By contrast, California competes by offering a regulatory package that is relatively protective to investors and other non-managerial stakeholders. To take a few examples, California prohibits staggered boards unless the company is listed on a major stock exchange, and offers substantial protections for minority investors in controlled companies including by mandating cumulative voting for private companies.[135] California additionally foists dozens of mandates onto out-of-state corporations that have a material economic footprint in the state, via an infamous long-arm statute (with an exception for publicly traded companies).[136] New York, by contrast, falls closer to Delaware on the spectrum, with a selection of differentiated factors (including elected judges and a default rule calling for jury trials[137]).

Texas is a relative newcomer to the corporate law dance-off, and its profile is still taking shape—putting it at a significant disadvantage on predictability grounds, at least at present. But one aspect where Texas has attempted to distinguish itself from Delaware (but not states like Nevada) is in minimizing the role of expert judges in rendering opinions through a strongly statute-driven law shaped by powerful interest groups.[138] It also embraces open partisanship in ways Delaware has

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[130] Klausner, supra note 39; Kamar, *supra* note 95; Kahan & Kamar, *The Myth of State Competition*, *supra* note 79; Lucian Arye Bebchuk & Assaf Hamdani, *Vigorour Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002); Brian Broughman, Jesse M. Fried, Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865 (2014).

[131] Ryan Meltzer et al., *DExit Ramp: A Guide to Delaware's Corporate Law Overhaul*, NORTON ROSE FULBRIGHT (Apr. 2025), https://www.nortonrosefulbright.com/en-us/knowledge/publications/ac449116/dexit-ramp-a-guide-to-delawares-corporate-law-overhaul.

[132] Andrew Verstein, The Corporate Consensus (Apr. 30, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5154952.

[133] *Id.*

[134] *See* NEV. REV. STAT. § 78.138 (2025); *see also* Barzuza, *supra* note 41, at 950-951; Barzuza & Smith, *supra* note 39.

[135] CAL. CORP. CODE §§ 301, 301.5 (2024) (permitting staggered boards only for listed corporations); CAL. CORP. CODE § 708 (2024) (cumulative voting).

[136] Cal. Corporations Code § 2115 (2024).

[137] *See* AMICI: *Demystifying the Courts: The Commercial Division*, *supra* note 116 (explaining that Commercial Division judges are justices from the New York Supreme Courts who are assigned to the Commercial Division by the Chief Judge or Chief Administrative Judge); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70, Rule 9 (2025).

[138] Hurt, supra n. x at 734; Lauren McGaughy, *Inside Elon Musk's Stellar Year at the Texas Capitol,* Texas Tribune (July 2, 2025), https://www.texastribune.org/2025/07/02/elon-musk-texas-politics-legislature-laws-spacex-tesla/#:~:text=Become%20one.,administration%20to%20cut%20federal%20spending.

traditionally eschewed, for example, by limiting proxy advisors' ability to give investing advice on ESG issues.[139] Moreover, Texas appears to be directing its ship towards managerial deference, for instance, by putting substantial barriers in the way of shareholder suits, permitting corporate bylaws to require 3% ownership stake for filing a derivative action,[140] and imposing minimum share requirements (either six-month holding or 5% stake) to inspect books and records.[141] Thus far, beyond a spattering of companies, Texas has yet to make an appreciable dent in the incorporation market.[142]

Aside from these rivals, Delaware's greatest competitor is traditionally thought to be a corporation's home state.[143] Small companies often co-locate their incorporation and operations, either because the state's long-arm statute would apply to them anyway or because it is easier to understand (and find local counsel to advise on) a single body of law. Likewise, a large company headquartered in a state receptive to political influence may choose to incorporate there as well, seeking to exercise clout over the political process and the development of law to its own benefit. This strategy appears to have influenced Elon Musk's decision to choose Texas, where Tesla is headquartered, when in reincorporated out of Delaware in 2024.[144] All in all, despite Delaware's dominance, rival states continually try to chip away at Delaware's market footprint, and they therefore contribute on associated margins to the supply of law that binds U.S. corporations.[145] And the more successful contestants have typically done so—consistent with our model's predictions—by differentiating themselves from Delaware law rather than copying it wholesale.

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Overall, this picture suggests that our differentiated product framework is a parsimonious fit for the realities of regulatory competition in corporate law. As a result of its substantial head start, Delaware has historically had the luxury of acting deliberatively when changing its law, proceeding only after collaboration and consultation with a balanced group of stakeholders in order to safeguard its market-leading product. The same is not true of its rivals. Given the difficulty in replicating Delaware's formula, competing states must offer a more specialized and extreme product that Delaware cannot or will not offer.[146] Recall that our framework predicts exactly this type of specialization: On the demand side, firms will seek different corporate law arrangements due to their differing governance needs. They will vote with their feet by incorporating in the state that offers the best package of legal rules; they may also seek to influence the lawmaking process via lobbying, campaign contributions, elite networks, and judicial and regulatory advocacy.[147] On the supply side, fringe state politicians should be much less reluctant to experiment with law that caters to the edges of the market. Not only does their limited initial market penetration reduce the cost of a failed experiment, but it allows such states to swing for the fences to make a credible play for converts.

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139 *See* S.B. 2337, 89th Leg. (Tex. 2025). The law is being challenged. Jonathan Stempel, *Glass Lewis, ISS Sue Texas over Law Limiting DEI, ESG Proxy Advice*, REUTERS (July 25, 2025), https://www.reuters.com/legal/government/glass-lewis-iss-sue-texas-over-law-limiting-dei-esg-proxy-advice-2025-07-24/.

140 S.B. 29, 89th Legislature, (Tex. 2025).

141 TBOC § 21.218(b).

142 Bainbridge, *DExit Drivers*, *supra* note 7; Taylor, *supra* note 76; Hurt, supra n. X.

143 Verstein, *supra* note 132.

144 Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 37 (Eur. Corp. Governance Inst., Law Working Paper No. 677/2251, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878 [hereinafter Barzuza, *Nevada v. Delaware*).

145 Verstein, *supra* note 132.

146 *See* Barzuza, *supra* note 41, at 960-70.

147 Delaware legislators are also subject to these same pressures, of course, but they are mediated by the goal of being the home state for the prototypical corporation, which cautions against favoring any particular interest group.

Our framework also suggests that Delaware's conservatism about altering its law is helpful—not just for the market, but especially for the state. Given Delaware's proven formula that is difficult to replicate, and that competitors' experimentation is often targeted at a fringe subset of the incorporation market (e.g., controlled companies), the calculus of experimentation is different for Delaware, and it need not overreact to the threat of jurisdictional competition. With supply-side specialization, some incorporation "melt" is to be expected in equilibrium. But given all of the other advantages Delaware offers competitors, it is unlikely to lose many incorporations on the basis of directional change. Nevertheless, we next discuss how Delaware departed from this equilibrium behavior with major amendments to its corporate code in the spring of 2025.

B. The DExit Boogeyman, Protecting the Franchise, and SB 21: A Case Study

We now turn to SB 21, which visited significant reform on longstanding Delaware law, and discuss what our differentiated product framework reveals about this watershed event. We begin by describing the landmark legislation and the unconventional process that generated it. We next apply our differentiated product framework to the SB 21 episode, illustrating how Delaware seems to have departed from the revenue-maximizing behavior predicted by our model by reducing predictability, curtailing contractarianism, falling prey to interest group influence, emulating rivals, and failing to account for rear-flank risk. We conclude by offering some thoughts on why Delaware deviated in this manner, and whether such deviations can be expected going forward.

i. SB21: A Brief Overview

On February 17, 2025, the Delaware State Senate surprised the business and legal community with SB 21, a bill that represented the most sweeping set of changes to the Delaware General Corporation Law in a half century.[148] In particular, the bill proposed to amend Section 144 of the Delaware Corporation Code, transforming it from a sleepy statute dealing with the voidability of director and officer transactions into one that imposed mandatory protocols for judging a broad set of conflicted transactions.[149]

Amended Section 144 changed the legal regime in a number of ways, most notably by providing a redesigned (and more bright-line-rule-oriented) roadmap for cleansing controlling shareholder transactions.[150] In particular, the bill invalidated a series of Supreme Court precedents that determined that full cleansing of a controlling shareholder conflict transaction would require the application of the onerous test set forth in *Khan v M&F Worldwide* (or "*MFW*").[151] As a result, SB 21 substantially eased the burden on controlling shareholders seeking to transact with their companies in Delaware, and likewise increased the difficulty for lawyers who sought to challenge such transactions in court. Moreover, rather than make these changes optional for companies, the bill provided that

148 Talley et al., *supra* note 2.

149 *See id.*

150 *See id.* One purported rationale for these revisions is that a series of radical cases had caused Delaware corporate law to falter. We do not take a position on whether SB21 was a positive legal change but instead focus on the process that led to it. And as we discuss, our proposal offers benefits for individuals who viewed the evolution of Delaware law negatively, just as it does for those who preferred the pre SB-21 regime.

151 *See id.*; *see also In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024).

they would be mandatory for all Delaware corporations.[152] In addition, a retroactivity provision was eventually added to the mix, specifying that the new statutory landscape applied to all parties that had not already commenced litigation (even for actions and wrongs alleged to have occurred under the pre-reform regime).[153]

Beyond these major substantive changes, the bill was singular in the process that led to it. In the year before SB21's announcement, Delaware had come under fire from a handful of prominent executives and controlling shareholders who threatened to incorporate outside of Delaware and urged other companies to follow suit.[154] Only a handful actually followed through on such threats.[155] But Tesla did, a mere five months after the Chancery Court's invalidation of CEO Elon Musk's compensation package which led Musk to admonish his X followers to "never incorporate in Delaware."[156] Musk's rallying cry provoked widespread anxiety, especially for political actors worried about protecting Delaware's franchise tax revenues considered critical for the state.[157] Shortly after his election in January 2025, new Governor Matt Meyer echoed these sentiments, declaring a need for "changes" to the state's corporation law, thereby paving the way for an unconventional and accelerated process that brought about SB21.[158]

As discussed above, a hallmark of Delaware lawmaking is that it traditionally employs a careful deliberative process that is shaped by stakeholder input from the beginning. Typically, amendments to the state corporation code are considered annually, and are initially drafted by the Council, which is composed of prominent lawyers from both the defense and plaintiffs' bar.[159] The members of the Council then study, debate, cull, and revise proposed amendments, after which they might decide to recommend it to the General Assembly for committee consideration and eventual full-body passage. This process ensures that amendments are generated by a group with expertise in business practice and litigation; it also ensures stakeholder buy-in, given the diverse group involved in the drafting process.[160] From there, the amendments move through the Senate and the House, and they are typically passed unchanged from their original form, usually in late summer.[161]

The process leading to SB 21, by contrast, appeared heavily influenced by interest group pressures. Rather than emerging from the Corporation Law Council, the bill was drafted by a group of defense-side lawyers recruited by Richards Layton & Finger. That firm was not only representing Musk in his executive compensation appeal,[162] but also controlled-company Meta in its Delaware

[152] *See* William Mills & Erin Ward, *Delaware Governor Signs Senate Bill 21 into Law, Significantly Amending Delaware Corporate Law*, JD SUPRA (Mar. 31, 2025), https://www.jdsupra.com/legalnews/delaware-governor-signs-senate-bill-21-8995318/.
[153] *See id.*
[154] *See* Hals, *supra* note 10.
[155] *See* Taylor, *supra* note 76; *see also* Bainbridge, *DExit Drivers*, *supra* note 7.
[156] Alexis Keenan, *Elon Musk Wants to Take Away Delaware's Incorporation Crown. It Won't Be Easy.*, YAHOO! FINANCE (Feb. 17, 2024), https://finance.yahoo.com/news/elon-musk-wants-to-take-away-delawares-incorporation-crown-it-wont-be-easy-090033669.html.
[157] Nicole Poore & Melissa Minor-Brown, *Delaware's Corporate Laws Sustain the First State. We Have to Protect Them*, DEL. ONLINE (Feb. 6, 2025 04:23 ET), https://www.delawareonline.com/story/opinion/2025/02/06/delawares-corporate-franchise-is-under-attack-opinion/78210109007/.
[158] Jacob Owens, *Meyer Considers Corporate Court Reform, Drawing Concerns*, SPOTLIGHT DEL. (Feb. 11, 2025) https://spotlightdelaware.org/2025/02/11/meyer-chancery-court-reform/.
[159] Talley et al., *supra* note 2; Rock & Kahan, Political Economy, supra n. X.
[160] Hamdani & Kastiel, *supra* note 87.
[161] *Id.*
[162] *See supra* notes 1-2 and accompanying text.

litigation, and Meta employees appear to have been invited into the drafting process.[163] The bill was introduced to the Senate in February 2025, months before amendments are typically brought forward by the Council.[164] From there, the bill was sent to the Council for comment; accordingly, the Council suggested modest clarifications during a brief editing window but left the bill's major substantive changes intact.[165] The revised bill was then sent to the Delaware General Assembly, where it was the subject of heated debate and critical testimony (including from one of us).[166] In spite of the controversy surrounding the law that generated seven proposed amendments, debate and discussion were tightly controlled (and in some cases abruptly shouted down[167]). A mere month after the initial drafting session, the General Assembly enacted SB21 in its entirety.

There are two connected implications stemming from this accelerated and non-routine process. First, it is not hard to imagine that because the bill was initially crafted by defense attorneys actively representing controlled-company clients, the substance was skewed in their direction; had the bill originated in the Council, it likely would have taken a different (and more sangfroid) form. Second and relatedly, the process led to fierce opposition from plaintiffs' lawyers[168] and investor groups,[169] who felt the bill was being unfairly forced through without the customary deliberation. The contentious kerfuffle that ensued—which even featured "stop SB21" billboards going up all over Wilmington[170]—did little to augur Delaware's reputation as a balanced jurisdiction that impartially adopts nonpartisan, value-creating rules.[171]

ii. An Assessment of SB 21

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163 *See* Mike Leonard, *Delaware Corporate Overhaul Signed Into Law by Governor*, BLOOMBERG L. (Mar. 25, 2025), https://news.bloomberglaw.com/esg/delaware-corporate-overhaul-passes-legislature-goes-to-governor; *Seeking Balance, Delaware Law Making It Harder to Challenge Certain Corporate Deals Could Undermine Stability Instead*, COHEN MILSTEIN (Apr. 24, 2025), https://www.cohenmilstein.com/de-law-making-it-harder-to-challenge-certain-corporate-deals-could-undermine-stability/.

164 *See supra* notes 158-161 and accompanying text.

165 Ryan Philp & Andrew Sumner, *Delaware's Corporations Law Council Weighs In on Proposed DGCL Amendments*, JD SUPRA (Mar. 10, 2025), https://www.jdsupra.com/legalnews/delaware-s-corporations-law-council-7033097/.

166 Karl Baker, *Lobbying on Corporate Law Change SB21 Enters Final Stretch*, SPOTLIGHT DEL. (Mar. 21, 2025), https://spotlightdelaware.org/2025/03/21/sb21-final-stretch/.

167 Karl Baker & Jacob Owens, *Meyer Signs Controversial Senate Bill 21 into Law After Bitter House Debate*, SPOTLIGHT DEL. (Mar. 26, 2025), https://spotlightdelaware.org/2025/03/26/meyer-signs-senate-bill-21/.

168 *See, e.g.*, Letter from Gregory V. Varallo, Bernstein Litowitz Berger & Grossmann LLP, et al. to Delaware General Assembly (Mar. 4, 2025), https://filehandler.lbr.cloud/files/alm/1Rl0PI7ccz9wPj1-U9Hz5N_-Jt6vicYX5.pdf.

169 *See, e.g.*, Letter from Matthew G. Jacobs, CalPERS General Counsel, to Delaware Legislators (Mar. 14, 2025), https://spotlightdelaware.org/wp-content/uploads/2025/03/CalPERS-letter-on-SB21.pdf; Jeff Mahoney, Council of Institutional Investors, *Letter on Delaware Senate Bill 21*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 12, 2025), https://corpgov.law.harvard.edu/2025/03/12/letter-on-delaware-senate-bill-21/#1b.

170 Image posted by u/TheShittyBeatles, REDDIT (r/WilmingtonDE), *STOP SENATE BILL 21 mobile billboard is up on Rodney Square in Wilmington* (Mar. 14, 2025), https://www.reddit.com/r/WilmingtonDE/comments/1jb9o94/stop_senate_bill_21_mobile_billboard_is_up_on/

171 *See id.*; *Protect Delaware from Elon Musk*, STOP SB21, https://web.archive.org/web/20250319203909/https://www.stopsb21.com/ (last visited Sep. 10, 2025) (a capture of the "Stop SB 21" website describing SB 21 as, among other things, a "blatant power grab [which] would allow CEOs and controllers to transfer massive value from public investors and pension funds into their own pockets while overturning dozens of Delaware Supreme Court precedents"); Michael Watson, *Understanding Delaware's Senate Bill 21 and the Growing Opposition*, DEMINOR (Mar. 3, 2025), https://www.deminor.com/en/news-insights/understanding-delawares-senate-bill-21-and-the-growing-opposition/ (discussing the tactics and main contentions of the public campaign opposing SB 21).

We now turn to considering what our framework reveals about the passage of SB 21. At the onset, we recognize that robust debate exists about how much substantive deference controllers should be given under Delaware law,[172] and whether the state's courts had accorded too much or too little scrutiny over the last three decades in that regard.[173] Rather than dwelling on the substance of the bill, we instead consider whether Delaware's behavior fits our predictions about how a revenue-maximizing state should operate in equilibrium. Here, we argue that Delaware likely departed from revenue maximization by reducing predictability, curtailing contractarianism, emulating more extreme states, and departing from its historic deliberative approach to legal reform.[174]

We first consider whether SB 21 made Delaware's law more predictable. This was no doubt a significant contention of its proponents,[175] and it has some initial appeal. After all, the new Section 144 erects elaborate safe harbor structures and bright line rules that seek to protect transactions that meet pre-defined characteristics.[176] Nonetheless, there are many attributes of SB 21 that likely reduce predictability. First, the new section is verbose, increasing the length[177] and complexity of the preexisting statutory text.[178] Indeed, SB 21 introduced several new undefined terms and presumptions that courts will have to interpret in the future.[179] And those terms and presumptions may bleed beyond the intended context. For example, will SB21's new statutorily defined standard for independence become the new normal for demand futility and SLC inquiries? Second, the new statute not only takes equitable authority away from the state's expert judges, but it also overturned or departed from the logic of approximately three dozen well-established Delaware Supreme Court opinions, effectively removing those metaphorical stars from the doctrinal sky that legal professionals have used as guidance.[180] Third, the statute's specific exemption of "going private" transactions features a rigid yet highly manipulable definition of that term, opening the door to gaming through transactional structures that replicate the economics of a squeeze-out yet evade a textualist rendering of the

172 *Compare* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019), *with* Goshen & Hamdani, *supra* note 50.

173 *Compare* Stephen Bainbridge, *Courts Are not Omniscient and/or Sancrosanct. Not even Delaware Courts. The Law Governing Conflicted Controller Transactions Needs a Legislative Fix*, PROFESSORBAINBRDIGE.COM (Mar. 4, 2025), https://www.professorbainbridge.com/professorbainbridgecom/2025/03/courts-are-not-omniscient-andor-sacrosanct-not-even-delaware-courts-the-law-governing-condlicted-con.html, *with* Talley et al., *supra* note 2 *and* Jill Fisch & Steven Davidoff Solomon, Control and its Discontents, 173 U. Penn. L. Rev.

174 Our prediction about competitive fee setting did not make unambiguous predictions about directionality, other than to observe that an optimal fee trades off market share against fees per incorporating firm. To the best of our knowledge, Delaware has yet to change its fees at all after its reform took hold.

175 *See, e.g., AIC Statement in Support of Delaware Senate Bill 21*, AM. INV. COUNCIL (Mar. 7, 2025), https://www.investmentcouncil.org/311-aic-statement-in-support-of-delaware-senate-bill-21/; Lisa Schmidt, *A Message from RLF President Lisa Schmidt*, RICHARDS LAYTON & FINGER (Feb. 26, 2025), https://www.rlf.com/a-message-from-rlf-president-lisa-schmidt/.

176 In this way, Delaware may have also diminished the value of its product by reducing the discretion of its judges, which not only served as a clear rebuke, but reduced one of its key competitive advantages—allowing its expert judges to apply equitable principles and indeterminate standards to screen bad behavior. And by adopting a set of bright line rules, SB21 made it easier for competitors to emulate its law and move toward it on the spectrum.

177 Revised 144 went from 280 words and 5 sentences to 2200 words and 57 sentences. *Compare* DEL. CODE ANN. tit. 8, § 144 (2010) (amended 2025), *with* DEL. CODE ANN. tit. 8, § 144 (2025).

178 https://news.law.fordham.edu/blog/2025/04/16/delaware-court-of-chancery-vice-chancellor-j-travis-laster-delivers-22nd-annual-destefano-lecture/

179 Id. One open question whether parties can opt out of revised Section 144 via their charters. [Cite]

180 *See* Eric Talley, LINKEDIN (2025), https://www.linkedin.com/posts/eric-talley-808b52b_del-supreme-court-cases-overturned-by-sb21-activity-7299162202542886912-F71H.

determining criteria.[181] Finally, the addition of the retroactivity provision substantially lessened the predictability of Delaware's legal product. If retroactive amendments are the new normal, all corporate decisions could be subject to new and as-yet-unknown legal treatment from some future Delaware reform, an uncertainty that complicates transactional planning. Of course, retroactivity might also provide assurance that judicial mistakes will be swiftly undone, but such a benefit presumes a legislative body that is not responsive to interest group pressures—a presumption that we will question momentarily.

In our view, therefore, SB 21 did much to reduce the predictability of how and whether Delaware law will apply to transactions, at least pending the years of caselaw needed to clarify the contours of the law. Viewed in terms of the figures above, then, our assessment is that SB 21 increased the risk premium from incorporating in Delaware,[182] making it (all else constant) less attractive to risk-averse firms.

What about the ease of adaptation of Delaware law, which has notoriously touted itself as a champion of contractarianism?[183] Here too, the passage of SB 21 seems to have contravened our model's predictions of revenue-maximizing behavior. As noted during its passage, SB 21 did not include an explicit contractarian "opt out" or "opt in" provision that would have allowed companies to tailor their governance system in a way that preserved the status quo. Compare this result to the adoption of DGCL § 102(b)(7) in 1986—that statute provided exculpation for companies, but only those that opted in to the statutory regime.[184] And this omission was not because nobody thought of it—indeed, after one of us suggested including an opt-in provision, a member of the Delaware House introduced just such a friendly amendment.[185] It was roundly defeated with little discussion, and the House speaker even shouted down a law professor and former SEC commissioner who testified in support of an opt-in feature during chamber debate.[186] In terms of our framework above, the non-contractarian nature of SB 21 represents a steepening (and not a flattening) of the adaptation cost curve that incorporating firms face.

Delaware also appears to have departed from our framework's strong intuition that a rational revenue-maximizing state should avoid copying another state's law, especially when doing so would cause a moderate provider of corporate law to move towards one of the extreme ends of the spectrum (see Figures 6A and 6B above). Such a move is ill-advised for revenue maximization, because states offering near cloned versions of one another's substantive law will be drawn into ruinous price

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[181] One of us has tabulated several ways to engineer a transaction that replicates the economics of a squeeze out but appear to dodge new § 144's definition. ERIC TALLEY, THE RENEWED (AND WILD) RACE IN CORPORATE LAW (Feb. 25, 2025), https://drive.google.com/file/d/142JIWyJgCsJh2PUHcezMZxkvrEAStIbe/view. Whether later litigation will impose an equitable "de facto squeeze out" doctrine to apply to such cleverly designed structures is still up in the air, and thus contributes to the unpredictability of the text.

[182] Usha Rodrigues, *Delaware Puts Its Corporate Law Dominance at Risk*, DIRS. & BDS. (Aug. 26, 2024), https://www.directorsandboards.com/board-issues/delaware-puts-its-corporate-law-dominance-at-risk/; BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP, BALANCING OR BULLDOZING? at 9 (2025), https://www.directorsandboards.com/board-issues/delaware-puts-its-corporate-law-dominance-at-risk/.

[183] Eric Talley, *A Contractarian Path Forward for Delaware: A Modest Proposal for SB21*, CLS BLUE SKY BLOG (Mar. 7, 2025), https://clsbluesky.law.columbia.edu/2025/03/07/a-contractarian-path-forward-for-delaware-a-modest-proposal-for-sb21/

[184] *See* DEL. CODE ANN. tit. 8, § 102(b)(7).

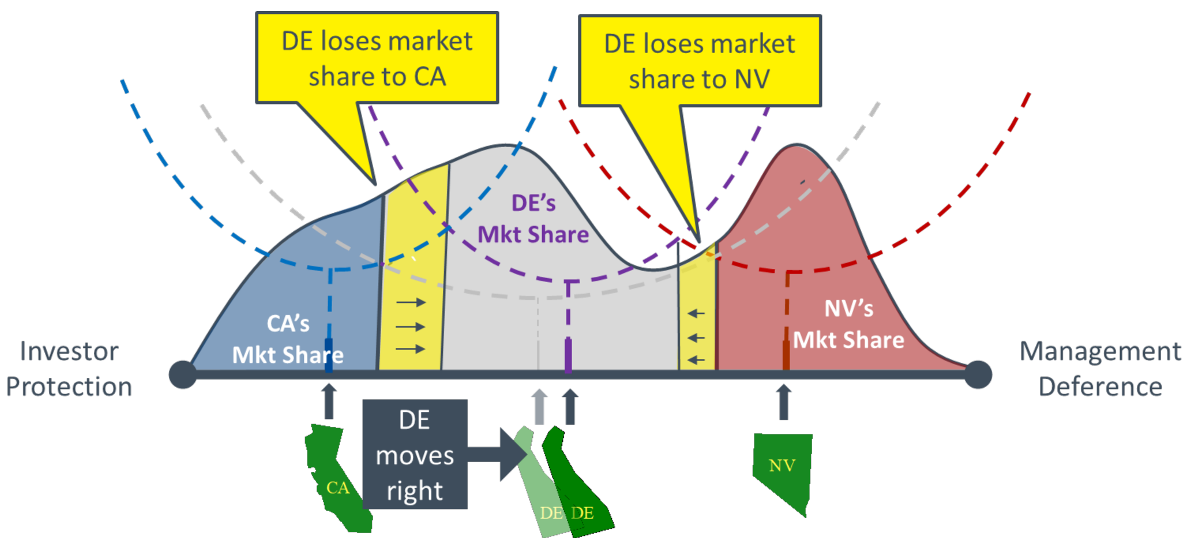
[185] *House Amendment 2 to Senate Substitute 1 for Senate Bill 21*, DEL. GEN. ASSEMBLY (Mar. 25, 2025), https://legis.delaware.gov/BillDetail?legislationId=141993.

[186] Baker & Owens, *supra* note 167.

competition on franchise tax fees. It is therefore surprising that the final product of SB 21 is a close copy of Subchapter F of the revised Model Corporation Business Act (MBCA), which offers insulation for management and controlling shareholders engaging in conflict transactions under specific circumstances.[187] Such copying is particularly puzzling for Delaware, which has traditionally eschewed bright line rules in favor of equitable doctrine that its expert judiciary applies with alacrity. Emulating rivals with a check-the-box approach to corporate law not only invites price competition but also diminishes Delaware's distinct advantages. Moreover, by coming closer to controller-friendly states like Nevada, Delaware neglected the danger of leaving its rear flank exposed to market share appropriation from the other side of the policy spectrum (such as by California in Figure 6B).

Ultimately, SB 21 represents a highly unlikely reform for a market-leading, revenue-maximizing state: It reduced predictability, throttled contractarianism, embraced copycatting objectives, and failed to account for rear-flank risk. Not only are such features inconsistent with revenue maximization, but they ironically can lead to market share and revenue reductions within our framework.

FIGURE 7: DELAWARE MOVES RIGHTWARD BUT LOSES MARKET SHARE ON BOTH FLANKS



To understand the confluence of such moves in our framework, consider Figure 7, which builds on Figure 6B by assuming that Delaware's rightward shift is further accompanied by a larger risk premium (due to SB 21's increase in unpredictability) and adaptation cost (due to SB 21's non-contractarian nature). As in Figure 6B, Delaware's move causes it to lose ground on its rear flank as California lures firms who become dissatisfied with the post-reform statutory package in Delaware. However, California now picks up even more market share in Figure 7 because of the more imposing cost curve firms face in Delaware. Perhaps more surprisingly, however, is what Figure 7 illustrates on the boundary between Delaware and Nevada. While the rightward shift of Delaware should (all else

[187] Stephen M. Bainbridge, *The Good, the Bad, and the Lost Opportunities of Delaware's Proposal on Deal Conflicts Involving Directors and Officers*, CLS BLUE SKY BLOG (Feb. 25, 2025), https://clsbluesky.law.columbia.edu/2025/02/25/the-good-the-bad-and-the-lost-opportunities-of-delawares-proposal-on-deal-conflicts-involving-directors-and-officers/. Typically, the MBCA emulates Delaware law, but Delaware has occasionally refined its law in response to the MBCA approach in the past. Jeffrey Gorris, Lawrence Hammermesh, Leo Strine, Jr., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 7 L. & Contemp. Problems 107 (2011).

constant) cause it to steal some of Nevada's competitive mojo, Figure 7 shows that when such a shift is accompanied by greater uncertainty and higher adaptation costs, Delaware's attempted reform can backfire. In Figure 7, Delaware actually loses ground to Nevada notwithstanding altering its underlying corporate law to better resemble Nevada's. In other words, a hasty reform proposal that reduces predictability and increases adaptation costs can cause a moderate state like Delaware to surrender both market share and revenues.

To be sure, Figure 7 merely lays out the theoretical possibility that Delaware could lose market share to Nevada by moving toward it. But this possibility has some support from empirical evidence. Indeed, in the days after SB 21 was signed into law, "DExit" continued to command headlines, as several Delaware public companies began to announce their reincorporation outside of Delaware (and predominantly to Nevada).[188] In a cruel ironic twist, several of these companies specifically singled out SB 21's reforms as a reason for decamping, citing the reduced predictability as to how the new laws would be interpreted and applied. Roblox's April 2025 proxy solicitation is one such example:

> On February 17, 2025, the Delaware governor and legislative leaders announced legislative initiatives that would amend the DGCL in order to address recent concerns with transactional certainty and the litigation atmosphere in Delaware, including as a result of some of the high-profile cases that are considered reasons for why companies may choose to move out of Delaware and reincorporate into another state. …[O]ur Board [] considered the DGCL Amendments in their deliberations regarding the Nevada Reincorporation and the course and process of debate over such provisions before the Delaware General Assembly. While Delaware law continues to evolve and address concerns including through the DGCL Amendments, *the DGCL Amendments are new, untested and subject to judicial interpretation and may not fully mitigate a variety of litigation and business planning concerns for the Company*.[189]

This evidence is not limited to specific anecdotes either: Early empirical work suggests that as SB 21 progressed to ultimate passage, Delaware-incorporated firms experienced unusually negative abnormal stock returns, particularly so for minority shares of controlled companies.[190] To the extent such negative returns signal reduced value of Delaware law, it suggests that Delaware's reform may have corroded its revenue generation power.

Viewing the passage of SB 21 through the lens of our differentiated product framework leads to a somewhat startling conclusion: that Delaware was somehow seduced to chase after a small subset of the market—controlled companies—forsaking its historic balanced and incremental lawmaking process that had long kept the state in the driver's seat of incorporations. Although we believe that many Delaware legislators were acting in good faith to preserve Delaware's corporate revenue franchise, they were nonetheless lured onto a course that—in our view—undermined that goal.

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188 *The U.S. Reincorporation Race: Who's in the Lead?*, ISS INSIGHTS (July 16, 2025), https://insights.issgovernance.com/posts/the-u-s-reincorporation-race-whos-in-the-lead/.

189 *See* Roblox Corp., Preliminary Proxy Statement (Schedule 14A) at 87 (Apr. 2, 2025)(emphasis added).

190 Khoo & Tallarita, *supra* note 22. A seeming limitation of the Khoo & Tallarita study is that abnormal returns may reflect either (a) value destruction in SB 21's substantive reforms, or (b) market uncertainty about how the new reforms will evolve over time. As our framework above shows, however, *either* factor can alter the attractiveness of Delaware law relative to other states, and in some sense greater uncertainty is actually worse, since it imposes a cost on *all* firms (while a substantive law change might produce both winners and losers on the margin, as in Figure 6B, *supra*).

What led to this deviation? While we are not in a position to observe these causal drivers directly, there are many reasons to believe that interest group politics played an appreciable role. To be sure, such pressures always play a role in legislation, and Delaware is no exception. But for much of the last century, interest group politics have been predominantly aligned with using the corporate law market to raise state revenues for general budgetary outlays. In other words, interest group politics have traditionally reinforced the objective of revenue maximization as paramount in Delaware's corporate law strategy, even as other partisan forces battled over how to allocate those revenues. With the advent of SB 21, however, that reinforcement cycle disintegrated, devolving into a process that appeared to be shaped by interest groups and elites with other fish to fry—and startup founders and their defense attorneys in particular. That process, in turn, culminated in a reform that diverged from our framework's revenue-maximization predictions in a corresponding way, by moving Delaware away from its moderate middle by emulating rival states that had gone further to protect management autonomy. In so doing, Delaware may well have undermined its core product and—ironically enough—made itself more vulnerable to poaching from states eager to take its place as the market leader.

This observation spawns a more foreboding question: Was SB 21 an episodic legislative spasm, unlikely to be repeated in the future? Or, did it reflect a sea change, presaging the future direction of interest group pressure in business regulation and statutory reform? In our view, there are good reasons to believe that the latter scenario best describes our current moment,[191] where politics have become infused more overtly into business regulation at all levels—local, state, and national.[192] The second Trump administration has no doubt contributed to politicizing the business regulation landscape, but the current climate is also symptomatic of a longer trend that have edged moderates out of the political and regulatory landscape, replacing them with more extreme voices.[193] During this time, we have not only become collectively desensitized to nakedly political governmental regulation, but also have come to expect it as the new normal. And there are few signs that this trend will abate any time soon. We hope this dreary prognostication proves inaccurate, but we are not betting our next Columbia paychecks on it (assuming we continue to receive them[194]).

If partisan business regulation has become the new normal, is there any way that politically nonpartisan business interests can break loose? We believe, somewhat improbably, that there is, and the answer may already be hiding in plain sight within the Delaware code itself. In the next Part, we demonstrate precisely how.

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191 Indeed, the year before SB21, Delaware experienced contentious debate over SB 313, that culminated in two sitting judges criticizing the bill, only to be later criticized by a former Chancellor for doing so. *See* Joel Edan Friedlander, *William Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?* (Inst. for L. & Econ., Research Paper No. 24-24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901375.

192 *See, e.g.*, Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530 (2011) (using roll-call data and survey responses to show polarization in state legislatures, with moderates disappearing over time); David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization in Congress*, 105 CORN. L. REV. 499 (2019) (using computational text analysis of congressional floor speeches to document growing polarization and the erosion of shared, cross-partisan rhetoric); Danielle M. Thomsen, *Ideological Moderates Won't Run: How Party Fit Matters for Partisan Polarization in Congress*, 76J. POL. 786 (2014) (demonstrating that ideological moderates are less likely to enter congressional races, leading to a hollowing of the center).

193 *See* Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571 (2012); Pozen et al., *supra* note 192; Roblox Corp., Preliminary Proxy Statement (Schedule 14A) (Apr. 2, 2025).

194 *See* Brandon Drenon, *Columbia University to Pay $200m in Settlement with Trump Administration*, BBC (July 23, 2025), https://www.bbc.com/news/articles/cq8zljpvyk0o.

III. Should Corporate Law Go Private?

As the preceding analysis demonstrates, the contours of regulatory competition in corporate law are far more complex than the conventional "race to the top" or "race to the bottom" narratives permit. On the demand side, heterogeneous firms face diverse governance needs that resist a one-size-fits-all statutory model. On the supply side, state responsiveness is often constrained by political capture and risk aversion among legislators and practitioner groups. The combination need not be suboptimal, and for many years, the equilibrium appeared not only stable, but also desirable. However, Delaware's recent legislative stumbles have ushered in a new reality where corporate lawmaking must navigate a newly-energized brand of interest group pressures that is unusually fractious, unpredictable, and uncompromising.

There is, however, a way to break the cycle. Recent statutory innovations in Delaware have unleashed a new and potentially far more potent competitor to state-provided corporate law—not from other states; nor from the federal government; nor from other nations. Rather, the competitive threat comes from corporations themselves, in the form of private ordering. Instead of relying substantially on the formal (and increasingly unstable) statutory regimes assembled by legislators, corporations can increasingly use stockholder agreements to supersede traditional corporate governance structures.[195] Although the concept of privately-provided corporate law is not a new one (and indeed one of us floated it nearly two decades ago[196]), only recently has it become a practically attainable reality—with Delaware providing the most potent weapon.

The discussion below details how privatized corporate governance could work in practice. We begin by describing our proposal for privatized corporate law, showing how Delaware's newly expanded statutory authority lays the foundation for corporate law to "go private" by eschewing even seemingly immutable rules and courts in favor of arbitration. After describing the specifics of our proposal and the legal authority that supports it, we turn to reflecting on the core benefits for corporations, as well as the overall ecosystem of jurisdictional competition, before concluding with some potential pitfalls.

A. Private Dispute Resolution via Shareholder Agreement

How would private ordering of corporate law work? It is first important to observe that the concept is hardly new to business law. Other organizational structures, such as LLCs, have long provided substantial contractual freedom for governance; but for a variety of reasons such forms have not caught on at public companies thus far.[197] Our proposal demonstrates how recent reforms have unleashed a similar potential for contractual ordering within corporate entities. While multiple private-ordering templates are possible (indeed that is kind of the point), we propose a benchmark prototype whereby Delaware corporations can utilize stockholder agreements to leverage an already-familiar landscape of governance structures, effectively creating a private dispute-resolution network that parallels—and effectively outmaneuvers—the offerings of Delaware, Nevada, Texas, and all other governmentally mediated system. Moreover, such agreements would not require corporations to reincorporate outside Delaware; rather, they would have strong reasons to stay within the state, which permits substantial freedom to engage in private ordering via shareholder agreement.

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[195] Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018).
[196] *See* Hadfield & Talley, *supra* note 27.
[197] Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections*, 42 J. CORP. L. 503 (2017); Robert B. Thompson, *Private Ordering and Contracting Out in Twenty-First-Century Corporate Law*, 74 CASE W. RSRV. L. REV. 13 (2023).

The key precondition for unlocking private ordering of corporate law is a statute enabling such displacement. While much of Delaware's code famously allows for tailoring, other parts are either immutable or difficult to displace. To take one significant example, beyond specific domain of corporate opportunities (where waivers have been allowed since 2000[198]), the duty of loyalty is generally an immutable doctrine in Delaware.[199] This remains true even after SB 21.

Nevertheless, Delaware greatly expanded contractual freedom for corporations via DGCL Section 122(18), which was enacted by a similarly contentious process a mere seven months before SB 21.[200] Section 122(18) authorizes corporations to enter into contracts relating to their business and affairs and states that such contracts will not be deemed invalid solely because they govern or restrict board action.[201] Indeed, Section 122(18) was adopted for the express purpose of reversing a Delaware Court of Chancery opinion that invalidated a shareholder agreement that altered rules that could only be changed via the corporate charter or bylaws (or not at all) under the clear language of the DGCL.[202] Notably, the statute does not require that such contracts receive unanimous or majority shareholder consent.[203] Therefore, Section 122(18) allows a stockholder agreement between the company and a shareholder group (or even a single shareholder or prospective shareholder) to rewrite the rules of the road, so long as that agreement does not directly contravene express provisions in the charter.

Our proposal marshals Section 122(18)'s provisions in an intriguing way—one that arguably eliminates the threat of DExit. Specifically, we propose that a Delaware corporation could privatize virtually all of its governance not through traditional governance documents (such as its charter and bylaws), but rather through a stockholder agreement. Because doing so would (technically) be executed pursuant to Delaware law, the corporation would remain incorporated in Delaware,[204] while credibly committing to have internal corporate claims adjudicated via protocols specified contractually. Section 122(18) specifically exempts internal affairs matters and intra-corporate disputes from a different

[198] See Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017).
[199] *Id.* at 1077; Thompson, *supra* note 197, at 41.
[200] DEL. CODE ANN. tit. 8, § 122(18) (2025) (effective Aug. 1, 2024). The Section 122(18), like SB 21, was adopted amid significant controversy and criticisms. *See* Mohsen Manesh, *A New Cardinal Precept in Delaware Corporate Law*, CLS BLUE SKY BLOG (June 2, 2025), https://clsbluesky.law.columbia.edu/2025/06/02/a-new-cardinal-precept-in-delaware-corporate-law/; Lucian A. Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements/; https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/.
[201] DEL. CODE ANN. tit. 8, § 122(18).
[202] *See* West Palm Beach Firefighters' Pension Fund v. Moelis, 311 A.3d 809 (Del. Ch. 2024); *see also* Manesh, *supra* note 200. Even before the adoption of Section 122(18), Delaware courts had previously held that shareholders and boards could limit the scope of the duty of loyalty and even allow parties to denude it altogether by committing not to enforce it through charter provisions. *See* New Enterprises v. Rich, C.A. No. 2022-0406-JTL (2023) (allowing such changes if contained within the charter of the corporation, notwithstanding the immutable nature of the duty of loyalty).
[203] 8 Del. C. § 122(18) (2024); S.B. 313, 152nd Gen. Assemb. (Del. 2024).
[204] Although we focus on stockholder agreements under Delaware law, other jurisdictional sources similarly permit stockholder agreements to displace governance and fiduciary duty precepts. These provisions are generally more limited, because they typically require either majority or unanimous stockholder approval before a stockholder agreement can displace governance and/or fiduciary duties. *See* MODEL BUS. CORP. ACT § 7.32; TEX. BUS. ORG. CODE ANN. §§ 21.101–21.111 (2025); NEV. REV. STAT. §§ 78.365, 78.378–78.3793 (2025); MINN. STAT. § 302A.457 (2025); N.D. CENT. CODE § 10-19.1-83; FLA. STAT. § 607.0732; N.C. GEN. STAT. § 55-7-31; GA. CODE ANN. § 14-2-732 (2025).

section of the DGCL that would otherwise require a Delaware court to be a jurisdictional forum.[205] In contrast, Delaware law all but invites stockholder agreements to mandate any adjudicatory body, even to the exclusion of Delaware courts.

That expanded contractual license under state law, moreover, is just the beginning. By specifically enabling governance by contract, Section 122(18) places a stockholder agreement firmly within the ambit of the Federal Arbitration Act,[206] which has been expansively interpreted to bind all validly formed contracts, with scantily-protected exceptions.[207] The most important exception invalidates arbitration clauses only to the extent that there are general grounds in law and equity to find an invalid contract. [208] That said, the Supreme Court has held that notwithstanding this seemingly inviting exception, the arbitration clause alone cannot be the driver of invalidity,[209] nor could an adjunct enforcement statute that does not explicitly require a judicial forum.[210] Moreover, both federal and state law place tight restrictions on vacatur of an arbitral award, requiring corruption, fraud, misconduct, or clear partiality in the arbitration process.[211] Delaware law reinforces this view, explicitly instructing courts to confirm an arbitral award regardless of whether the Court of Chancery would issue the same ruling.[212] In other words, by formally recognizing such contracts, the DGCL has unleashed an effective competitor to state corporate law—one that is strongly protected under state and federal law and that does *not* require Delaware corporations to leave the state. The sub-Sections that follow describe one potential model of what a private ordering competitor would look like.

i. The Contract

We begin by delineating the key components of a shareholder agreement pursuant to Section 122(18) that would privatize corporate law. Figure 8 lays out a conceptual framework that we propose, returning to our hypothetical Z Corp. The core unifying document is a stockholder agreement, as pictured in the center of the diagram. The corporation's board of directors (individually and collectively) would be parties to the agreement, and the board would execute it on behalf of the corporation. While Z Corp. is legally required to have a charter and bylaws, the emancipating power

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205 *See* DEL. CODE ANN. tit. 8, §§ 115, 122(18). In 2025, § 115 was amended to prohibit forum selection provisions in the *charter/bylaws* from exclusive non-Delaware-court forum selection not only internal affairs matters but also for "intra-corporate" claims. *Id.;* Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020). However, the amendment left untouched the text of DGCL § 122(18), and thus these restrictions would not constrain the stockholder agreement mechanism we envision here.

206 *See* Federal Arbitration Act, 9 U.S.C. §§ 1-402 (2018) (applying to any "transaction involving commerce").

207 *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) "[The FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contract . . . ."; Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024) (holding that exemptions under § 2 of the FAA must be construed narrowly).

208 *See* 9 U.S.C. § 2.

209 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

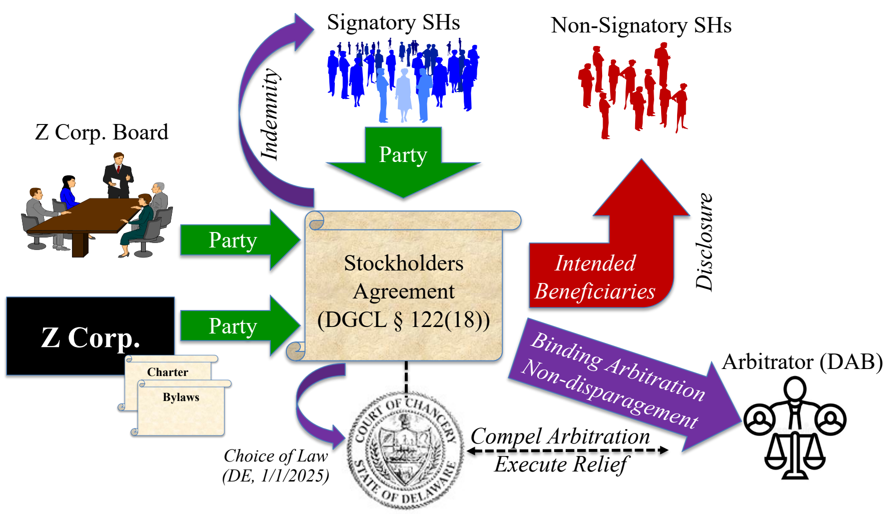
210 *See* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).

211 *See* 9 U.S.C. § 10 (setting forth an exclusive list of contingencies where vacatur would be allowed).

212 *See* Delaware Uniform Arbitration Act ("DRAA"), 10 Del. C. § 5714(a) ("the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award"). The DRAA further states that the Delaware Supreme Court may only vacate/modify/correct an arbitral award in a manner conforming to the Federal Arbitration Act (FAA). *Id.* § 5809(c). Accord SPX Corp. v. Garda USA, Inc., 94 A.3d 745, 750 (Del. 2014) ("review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence") (quotations omitted).

of Section 122(18) means that the contract may specifically take precedence over the bylaws. Moreover, while Section 122(18) does not permit a stockholder agreement to contravene *express* provisions of the charter, it is authorized to contract around *implied* terms, whether they are supplied by common law or existing Delaware statute. Critically, the agreement can bind signatories to forbear from asserting a variety of allegations, even those tethered to otherwise-unwaivable Delaware mandates. To take one example, the signatories could agree to forbear from pursuing duty of loyalty claims against corporate fiduciaries. While such a provision is not a formal "waiver" of such duties, the forbearance obligation substantially defangs them by committing the parties (including the corporation) to abstain from pursuing legal action alleging their breach.[213]

Figure 8: Contracting Out of Delaware via DGCL § 122(18) and Subscribing to the DAB



Another key party to the agreement is—as the contract's name makes clear—the stockholders themselves. The ideal agreement would bind *all* stockholders to its terms, and it thus is most cleanly promulgated at an early (e.g., pre-IPO) stage where the number of stockholders remains modest; however, a majority-vote mandate is hardly necessary under Delaware law for the contract to bind other signatories (including the corporation). As discussed, a stockholder agreement could be entered into between the company and as few as one stockholder—even one *prospective* stockholder.[214] Thus, it is possible to promulgate a stockholder agreement with less than full initial buy-in by stockholders. The agreement could (and should) further mandate that subsequent purchasers and transferees of signatories' shares must also agree be bound by the agreement.[215]

Because the provisions of the stockholder agreement are a matter of contract, the design options are virtually limitless. However, too much tailoring from a commonly shared set of default rules can be counterproductive because it contravenes established norms, practices and precedents that foster predictability. Consequently, we would encourage (and indeed predict) that such contracts will have several conventional parts, detailed as follows.

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213 Before § 122(18), such provisions were previously held to be both permissible and enforceable when included in a certificate of incorporation. *See* New Enterprises v. Rich, *supra* note 202.
214 DEL. CODE ANN. tit. 8, § 122(18).
215 See DGCL 202(b).

First, because all contracts are necessarily incomplete as a textual matter, the agreement should import a body of background rules that delineate the default rights and obligations of the corporation, fiduciaries, shareholders, and stakeholders. There is much freedom to proceed,[216] but we expect that the contract will—via an express term—import an existing "template" that supplies a bundle of default rules that apply when the contract is either silent or ambiguous. In this way, the corporation could undertake to reserve power to assert any of its rights against corporate fiduciaries (including rights typically enforced through derivative suits) that were provided under the template's prescriptions. At the same time, however, the corporation could agree (expressly or through the template) not to pursue certain claims it might otherwise have under state law—even those that are purportedly unwaivable—since an agreement to forbear is (formally) not the same as a waiver of the right.[217] Any other rights or defenses (including the safe harbors of Delaware's new reforms) could be disregarded unless the chosen default template contains them. Obviously, other rights and obligations might be added through express contract terms on a case-by-case basis. In this way, the shareholder agreement could either expand or narrow the types of action that could be pursued through a conventional derivative suit. Significantly, should the corporate entity commit to forbear form bringing claims that rightfully belong to it, that commitment would also constrains *any* later shareholder plaintiff wishing to assert similar claims derivatively (even non-signatories to the stockholder agreement), since a representative plaintiff cannot assert rights that the corporation has already relinquished.[218]

Second, in order to maximize uniformity among equity investors, we propose that non-signatories be explicitly designated as intended third-party beneficiaries, and that they be allowed to become signatories. Such measures would effectively give non-signatories virtually the same bundle of affirmative rights that signatories enjoy pursuant to the contract. This does not completely put non-signatories and signatories on level footing, of course: To the extent non-signatories can still assert *direct* claims that signatories had signed away, the stockholder contract may not be able to foreclose such claims entirely.[219] However, the contract can ensure parity (or better) there too, granting a "liability put" to signatories that would indemnify them for any valuation leakage visited on the firm from a non-signatory's recovery of on claims that signatories had contractually relinquished.[220] That

216 Certain immutable and/or sticky state law mandates would need to be handled carefully. For example, under Delaware law, there are certain rights and duties that cannot be waived (or can only be waived through the charter). *See, e.g.*, New Enters. Assocs. 14, LP v. Rich, 295 A.3d 520 (2023). To nonetheless alter these contractually, the stockholder agreement should focus on restricting the taking of legal actions, such as binding the relevant parties contractually not to assert a specified type of claim (or not to raise a defense).

217 *See Rich*, 295 A.3d at 535-36 (2023) (A covenant not to sue and a release are different things. 'A covenant not to sue or execute is distinguished from a release as a forbearance of a right rather than a discharge of liability.'" (quoting 76 C.J.S. *Release* § 51 (2023))).

218 *See* In re Riverstone Nat'l, Inc. S'holder Litig., 2016 WL 4045411 (Del. Ch. 2016) ("[w]here the board has caused the corporation to enter a release that extinguishes its claims, a derivative plaintiff cannot prosecute the released claim"). *Accord* In re Primedia, Inc. S'holders Litig., 67 A.3d 455 (Del. Ch. 2013); In Re Am Trust Fin. Svcs. SH Litigation (Del. Ch. 2020).

219 *Cf.* NAMA Holdings, LLC v. World Market Ctr. Venture, LLC, 948 A.2d 411 (Del. Ch. 2007) (explaining that intended third-party beneficiaries may invoke equitable enforcement of contractual rights, but only to the extent such rights are expressly conferred); Comrie v. Enterasys Networks, Inc., 2004 WL 293337, No. Civ.A. 19254 (Del. Ch. Feb. 17, 2004) (same).

220 Specifically, this proposal would allocate signatories with a synthetic claim permitting them to receive a payment (on a per share basis) equal to the gross recovery (also on a per-share basis) of the non-signatories who receive an award or settlement of a non-relinquished claim. *Cf.* In re Dell Techs. Inc. Class V Stockholders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748 (June 11, 2020). Vice Chancellor Laster recognized that structural coercion arises when shareholders face an impossible choice between an unappealing status quo and an alternative which, although unfair, is better than their existing situation, and he emphasized the importance of avoiding structures that induce votes for reasons other than the merits of a transaction. *See id.*; *see also* Tyler O'Connell, *Special Committee's Narrow Mandate, Company's Decision*

indemnity, in turn, would come solely from the contract's enforcement provisions and would not impound attorney fees (as would the non-signatory's net recovery). This makes it financially more attractive for non-signatories simply to sign on, since their indemnity right as signatories would more than offset the net private recovery they might glean from private litigation.

Third, both signatories to the stockholder agreement, as well as all non-signatory beneficiaries who prosecute rights pursuant to the contract,[221] must specifically agree to arbitrate any dispute before an arbitration body specified in the agreement. Although federal law ensures that such arbitration designation will have significant force, it does not constrain the arbitrators' identity. To this end, we propose the creation of the Delaware Arbitration Board (or "DAB"), with particulars detailed below. The contract parties and beneficiaries would further agree to follow arbitrators' decisions and judgments as reflected in the arbitration decision, including filing a joint motion before the relevant judicial officer (including any Delaware court) to confirm and execute its decisions and judgments. In addition, the signatories and intended beneficiaries would agree to adhere a broad anti-disparagement provision, preventing them from publicly criticizing or disparaging the arbitrator(s) who heard their case or appeal, with a significant sanction for violations, including injunctive relief backed by contempt orders.[222] We now turn to describing the DAB in detail.

ii. The DAB

Identifying an appropriate and sophisticated arbitration body to apply the agreement's chosen law is obviously an important task. To this end, we propose that all internal affairs disputes arising under the stockholder agreement would be resolved by the DAB, to the maximal exclusion of Delaware Courts. We assume that most shareholder agreements will select Delaware law, although the law of other states is also possible (and might even present a growth opportunity for the DAB or some other private provider). But for the most part, we envision that the DAB would be a standing body of arbitrators chosen from prominent former (or soon-to-be-former) Delaware judges and potentially others, such as business practitioners, corporate lawyers, and academics. If an agreement designates the DAB as the arbitrator, the signatories will pay a modest subscription fee (akin to a private franchise tax) to the DAB for the right to use its services.[223] In order to facilitate transparency and predictability,

to Bypass Committee and Impermissible "Coercion" Prevent Dismissal Under MFW, MORRIS JAMES LLP (July 17, 2020), https://www.morrisjames.com/p/102jgf1/special-committees-narrow-mandate-companys-decision-to-bypass-committee-and-im/. That said, indemnification arrangements are broadly permitted under Delaware law—so long as they do not cover bad faith or derivative settlements. *See* Paul J. Lockwood & Arthur Bookout, *Legal and Practical Limits on Indemnification and Advancement in Delaware Corporate Entities*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 2, 2018), https://corpgov.law.harvard.edu/2018/07/02/legal-and-practical-limits-on-indemnification-and-advancement-in-delaware-corporate-entities/. Moreover, the adoption of DGCL § 122(18) preemptively buttresses such contractual provisions, reducing the Chancery Court's ability to invalidate them based on structural coercion concerns. *See Delaware Court of Chancery Holds Charters Cannot Incorporate Private Agreements by Reference*, PAUL WEISS (Aug. 1, 2024), https://www.paulweiss.com/insights/client-memos/delaware-court-of-chancery-holds-charters-cannot-incorporate-private-agreements-by-reference?utm_source=chatgpt.com.

221 NAMA Holdings LLC v. World Market Ctr. Venture, LLC, 948 A.2d 411 (Del. Ch. 2007) (non-signatory intended beneficiary of LLC Agreement suing to enforce rights extended under the agreement bound by its terms).

222 We propose that the sanction be the surrender of the shares held by the disparaging party or group and an additional monetary sanction of up to 100 percent of the value of monetary damages claimed in the underlying dispute (regardless of side). Corporate bylaws may further prescribe that non-parties to the stockholder agreement must refrain from disparaging the arbitration panel or judgments, or individual arbitrators.

223 Failure to designate the DAB would not foreclose using it to arbitrate claims, but we envision the litigants to pay a substantially heftier fee without a prior subscription.

we recommend that the DAB should require the existence and content of a DAB-selecting stockholder agreement to be disclosed not only to the parties but also to the beneficiaries (i.e., non-signatory stockholders). [224]

The DAB itself will be a for-profit business entity (such as a duly organized Delaware LLC[225]), with a simple management structure and equity owners. DAB arbitrators will be compensated for their time on an hourly billables basis (funded in equal parts by the parties, subject to contrary provisions in the stockholder agreement). DAB members may additionally be compensated with equity membership units in the DAB. In this way, the more business the DAB generates, the better compensated its arbitrators will be. The DAB could also be subject to competitive pressure, as other private adjudicators (including private law firms) could enter the market. The threat of entry would further incentivize the DAB to create value across the companies that designate it as arbitrator.

At its inception, we propose that the DAB would adopt and follow Delaware law in all forms as it existed at a publicly disclosed measurement date.[226] We imagine that many firms would view January 1, 2025—i.e., just before SB 21's adoption—as a sensible starting date, although firms could certainly opt into an earlier or later vintage or even adopt parts of the SB 21 reforms by contract. The DAB would then follow its arbitral law consisting of the DGCL and extant Delaware precedent as of the measurement date (as modified by express contractual provisions), and it likewise could choose to endorse later Delaware (or other states') precedents as persuasive authority. The DAB would also be responsible for amending its arbitral statutory code on a yearly basis going forward, where it might choose to mimic changes made in Delaware's code as it sees fit. It could alternatively choose to adopt reforms made by other states as part of its ordinary-course amendment process.

Unless otherwise specified by express contract terms, the DAB's written opinions will be published and made public. As a default, published arbitration opinions become arbitral precedent that will contribute to its common law, applying to all future DAB proceedings (subject, of course, to bespoke carve-outs or tailoring provisions that are unique to particular stockholder agreements). Parties are permitted to stipulate confidentiality in any written opinion and require it to be sealed. Doing so, however, creates negative externalities by robbing the DAB (and other parties) from future precedents.[227] As such, we expect that the DAB would have demanding requirements (including charging material additional fees) for the sealing of records, particularly arbitral opinions. In addition, as a default matter (and unless the stockholder agreement prevents it), arbitration opinions will be appealable to a designated appellate body. The appellate body initially will be comprised of the entire DAB panel (including the original arbitrator), sitting *en banc*, and who will similarly issue published,

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224 Although there is no default requirement in contract law for an intended beneficiary to have disclosure rights about the contract so designating them, that right can be created by contract, and would likely serve as a significant bolstering factor for the DAB to be an attractive nominee. By the same token, this requirement could be further tailored over time by the DAB as well.

225 To prevent circularity issues, the DAB would not serve as its own dispute resolution mechanism. The contractualized LLC structure could, however, be organized under any state's law or alternatively name an arbitrator that is wholly independent of the DAB. We would not expect—at least initially—the DAB to be a publicly traded entity, though nothing necessarily prevents such a transition down the road.

226 The DAB will also specify its own streamlined procedural rules for adjudicating cases, but as a default will follow current Delaware procedural rules. Consequently, such procedures may also limit discovery until the case has proceeded past a preliminary "motion to dismiss" stage.

227 See, e.g., The Chancery Daily (August 19, 2025) (discussing the policy concerns around redactions in opinions).

written opinions.[228] Processes for appeals will otherwise be modeled after appeals to the Delaware Supreme Court.

Pursuant to this model, Delaware corporations subscribing to the DAB need only execute a stockholder agreement, and could thereby exit Delaware courts[229] without the burden of the costs of reincorporation. In this sense, Delaware would facilitate an internal form of competition with itself to absorb discontented corporations. While such structures were nearly impossible a generation ago, they have substantial legal authority to support them today, as the next Section describes in detail.

B. Legal Authority

The type of structure outlined above was not practically attainable before August 2024, when Section 122(18) became law. As discussed above, Section 122(18) provides specific authority for the board to enter into shareholder agreements that provide for arbitration of internal corporate claims, so long as the agreements are otherwise lawful and enforceable and do not contravene mandatory provisions of the DGCL or the corporation's charter.[230] Our proposal satisfies key pre-conditions of contract enforceability; moreover, it specifically invokes a provision of the DGCL, which itself prescribes the validity of stockholder agreements so long as not explicitly contravened by the certificate of incorporation.

Note further that several states other than Delaware have similarly promulgated statutes that permit shareholder agreements to alter or even displace traditional board authority and fiduciary norms. They have largely done so, however, in clunkier and less flexible ways, typically requiring more stringent approval thresholds. For example, MBCA § 7.32 and the states that adhere to it (including Florida, Georgia, North Carolina, Minnesota, and North Dakota) allow shareholders to enter into unanimous written agreements that may eliminate or restrict board discretion.[231] Likewise, the Texas Business Organizations Code §§ 21.101–21.111, and Nevada Revised Statutes §§ 78.365 and 78.378–78.3793, recognize binding, governance-altering shareholder agreements through a non-MBCA route, but they too require unanimous consent by stockholders to reallocate corporate governance powers.[232] Thus, while Delaware has opened the door the widest to permit privatized corporate governance, our proposal may have traction within at least a half-dozen additional states as well.

[228] This structure can be changed by the DAB panel as needed.

[229] The Court of Chancery's only duties would be to grant motions to compel arbitration for all corporations adopting our proposed stockholder agreement or to enter judgment entered by the DAB after an arbitration opinion issues.

[230] DEL. CODE ANN. tit. 8, § 122(18) (expressly authorizing boards to enter into stockholder agreements—even those that limit the corporation's future actions or require approvals from specified persons or bodies—so long as they are supported by board-approved consideration and do not contravene the DGCL or the company's charter); *see also Senate Bill 313*, DEL. GEN. ASSEMBLY, https://legis.delaware.gov/BillDetail/141480 (last visited Sept. 8, 2025). Moreover, the April 2025 amendments to Section 115 that prohibit mandatory arbitration of corporate claims left intact the carveout of stockholder agreements.

[231] MBCA § 7.32(a)(1)–(8) authorizes unanimous shareholder agreements—even if they conflict with other provisions of the statute—that may "eliminate the board of directors or restrict the discretion or powers of the board of directors," govern distributions, establish who serves as directors or officers, or otherwise supplant traditional board authority.

[232] *See* TEX. BUS. ORGS. CODE § 21.101(a)(1)–(3) (2025) (authorizing shareholder agreements—if unanimous and properly noticed—that may, inter alia, restrict board discretion, eliminate the board, or set director or officer selection, "even if the terms … are inconsistent with this code"); NEV. REV. STAT. §§ 78.378–.3793 (providing control-share acquisition regime and dissenting shareholder rights under Nevada law, but not authorizing comparable governance-altering shareholder agreements unless embedded in charter/bylaws).

Our proposal also gains reinforcing authority from federal law, and specifically, the Federal Arbitration Act (FAA), which broadly preempts state attempts to invalidate such provisions.[233] Although the so-called "savings clause" in the FAA exempts contracts that are themselves invalid under existing general principles of law and equity,[234] recent Supreme Court cases have significantly narrowed this exception, and in the process underscored a strong federal policy favoring arbitration.[235] In fact, enabling provisions like DGCL Section 122(18) recognize the validity of stockholder agreements as contracts under general principles of law and equity, and specifically reduce the Court of Chancery's equitable discretion. The inclusion of an arbitration provision in such a contract, moreover, has been consistently held to be insufficient grounds to challenge the validity of such an agreement based on "singling out" arbitration.[236] Even more recently, the Securities and Exchange Commission has strongly endorsed the use of binding arbitration provisions in contractual and governance instruments, expressing the view that the FAA is binding on them.[237] Consequently, not only does federal law permit proposals such as ours, but it provides a preemptive basis that lends additional credibility to contractual decisions to delegate internal corporate disputes the DAB (or an equivalent body).

A final consideration is federal securities regulations and stock exchange listing requirements. For the vast majority of Delaware corporations that are privately held (including Silicon Valley startups), federal securities regulations simply do not come into play. Even for publicly traded Delaware corporations, federal law does not appear to place large constraints on stockholder contracts with binding arbitration. In principle, stock exchange listing standards could require shareholder approval if the agreement effectively results in a material change of control or requires amendments to the charter or bylaws.[238] In our view, however, our proposal would likely not trigger such provisions when a stockholder agreement does not alter ownership structure. Moreover, given that the SEC recently endorsed the effectiveness of arbitration agreements even for securities law claims,[239] there appears to be little regulatory resistance to their general use. Moreover, even if a vote requirement were imposed, it would not be a show stopper as a stockholder vote would unlikely scuttle the selection of a value-enhancing arbitral panel. Through a stockholder vote occurring, the company could amend its charter to provide a "drag along" requirement compelling all stockholders to become signatories to the DAB agreement so long as a minimum amount (such as a majority) so chose.[240]

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233 9 U.S.C. §§ 1 *et seq.* (2018); Ann Lipton, *Manufactured Consent*, Georgetown L. J. (2016) ("The FAA, however, preempts any state law or policy that would interfere with the enforcement of contractual arbitration clauses."); Andrew Jennings, *Firm Value and Intercorporate Arbitration*, 38 Rev. Lit. 1, 16 ("The FAA applies equally to federal and state courts and preempts state law that prohibits or discriminates against arbitration.").

234 9 U.S.C. § 2.

235 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018).

236 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

237 *See* Securities and Exchange Commission, Policy Statement (September 17, 2025) (available at www.sec.gov). Interestingly, the SEC's endorsement of arbitration clauses extends even to corporate charters and bylaws, notwithstanding that DGCL § 115 currently prohibits the exclusion of courts in adjudication. Because our contractual mechanism is explicitly exempted from § 115, however, we need not grapple with this tension between state law and SEC policy.

238 *See, e.g.*, N.Y.S.E. Manual § 312.03; Nasdaq Rule 5635.

239 *See, e.g.,* Douglas Gillison, US SEC hands victory to IPO issuers who want to avoid class-action lawsuits (Reuters, Sept. 17, 2025).

240 *See, e.g.,* Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199 (2021) (where the Delaware Supreme Court expressly upheld an advance waiver of statutory appraisal rights embedded in a drag-along agreement between informed, sophisticated common stockholders represented by counsel, holding such waivers enforceable "in exchange for valuable consideration"); *see also* Matthew J. Gardella & Brendan J. Chaisson, *Delaware Supreme Court Upholds Advance Waiver of Statutory Appraisal Rights — Affirms Key Component of "Drag Along" Critical for M&A Exits for Venture-Backed Companies*,

In sum, our proposal appears supported by both state and federal law, and it therefore would represent a binding and credible displacement of Delaware courts and undesirable statutes without incurring the costs of a reincorporation. By shifting dispute resolution to a contract-based forum, Delaware corporations could preserve the doctrinal strengths of Delaware corporate law while insulating themselves from political uncertainty. In so doing, our proposal would introduce substantial potential benefits in the market for corporate control, as detailed below.

C. Potential Benefits

We now turn to considering what the presence of this novel private-ordering competitor means for corporations and states. Our differentiated product framework for jurisdictional competition took a nuanced view of the supply and demand sides of the equation, and in so doing it developed a series of predictions about the nature of lawmaking. Applying those same analytical insights to our proposal reveals that we can expect a privatized governance regime to be a worthy competitor.

On the supply side, recall the numerous interacting aspects of Delaware's dominance in the production of corporate law. Privatized governance envisioned by our proposal would emulate or even enhance each of these aspects. First, by harnessing the human capital of sophisticated judges, lawyers, business people, and even academics as arbitrators, the DAB would ensure the requisite subject matter expertise. In addition, the arbitral parties could choose their preferred arbitrator, bringing about a closer fit between the desirable law on the books and as it is applied. Indeed, for corporations that view recent judge-made controller law in Delaware as radical and that are concerned about the ongoing presence of certain judges even post-SB 21, our proposal would allow them to sidestep this issue by choosing their preferred decisionmaker. Second, the DAB could easily secure the benefits of a detailed and incrementally evolving body of case law via its background default rules and the requirement that any future arbitral precedent be subsequently published. And given the DAB's ability and commitment to consider amendments to its arbitral statutory code on a yearly basis, it could emulate the Delaware legislature's responsiveness as well.

But it could do more than that. A third benefit is that the DAB and its lawmaking function would be much better inoculated than state actors against the whipsaw forces of interest group politics that have seemingly become the norm in corporate lawmaking. Because none of the arbitrators would be elected officials, the DAB will not be subject to the same degree of political pressure as states. Instead, the arbitrators' incentives would be explicitly shaped by a pay-for-performance compensation system, competition for corporations, and reputation. Over time we expect that the DAB may well compete not just with states, but with rival private providers. And this competitive pressure is likely to lead to a much nimbler "race" for corporate charters. As we have described in Part I, corporate law has traditionally been intermediated by competing governmental bodies, which limited the effectiveness of competition. State law production typically proceeds slowly, and electoral cycles and interest group politics often commandeer the process. Private provision of corporate law, in contrast, can move quickly. Not only that, the possibility of privatized governance via shareholder agreement makes it easy for new entrants to fill market segments left neglected by a private provider who gets coopted by specialized interests in ways that erode value for firms in those segments.

MINTZ (Nov. 23, 2021), https://www.mintz.com/insights-center/viewpoints/2871/2021-11-23-delaware-supreme-court-upholds-advance-waiver-statutory.

Beyond these practical benefits, the private production of law can help take the temperature down via anti-disparagement provisions. As the events of the last few years have revealed, Delaware lawmaking (as is true of the broader legislative landscape) has been marred by hostility and contentious battles that increase the perception of legislative capture and skew the debate toward more partisan extremes. And unlike government actors who are not permitted to regulate public criticism of their laws, the DAB can include anti-disparagement provisions that prevent angry and well-heeled losing parties from spreading half-truths about the process and outcome in ways that undermine both the sanctity of the tribunal and also the public's perception of the sanctity of the dispute resolution process. Overall, therefore, we expect that privatized governance will lead to a less-politically compromised process, both in the generation of law and its eventual interpretation.

Fourth and finally, firms with privatized governance can benefit from practitioner networks to the extent that they select well-understood legal regimes. Because the most critical governance document is the contract, however, privatized governance allows maximal freedom for parties to tailor terms and/or contract out of DAB precedents that they dislike. Such tailoring could potentially reduce the size of practitioner networks and the predictability that follows, but these costs may be worth the benefits of customization. Moreover, over time, the DAB would evolve along with these norms, adopting new provisions and precedents most consistent with value enhancement of its constituency of subscribing corporations.

On the demand-side, note that under our proposal, corporations can freely tailor their law and even their choice of arbitrator based on their specific needs. As a result, adaptation costs should drop considerably, as firms can frictionlessly choose the governance structure that best fits their unique characteristics. In our figures, this would generate a flattening of the adaption cost curve because moves along the spectrum would be relatively inexpensive. Moreover, firms that adopt Delaware law as of January 1, 2025 would recapture the benefits of longstanding precedents and judicial expertise, free from the uncertainties surrounding interpretations of SB 21. Overall, our proposed system of privatized governance is likely to match or improve on the desirable aspects of Delaware's production of corporate law, while jettisoning many of its downsides.

What does the presence of this private-ordering competitor mean for state competition writ large? The presence of a vehicle for companies to easily customize and tailor their law in response to their needs will send a strong signal about the desirability of flexibility and contractarianism for different legal arrangements. States, in turn, could survey existing shareholder arrangements to get a better sense of what corporations are looking for, perhaps even adjusting their legal product accordingly against special interests or elites with other agendas. The rising tide could thus lift all boats; at the very least, it could allow for a more tailored form of market segmentation.

We conclude by addressing two subtler advantages of our proposal for state competition. First, it bypasses the leaky federalist boat that the internal affairs doctrine has long represented for state-court adjudication. In particular, there is a long-running and still-unresolved battle about whether states other than the state of incorporation state are permitted to take full control over internal affairs disputes. For example, California's long-arm statute wrests control over a bevy of substantive governance matters for private companies.[241] Although this statute was held unconstitutional by the

[241] CAL. CORP. CODE § 2115 (West 2025) (long arm statute).

Delaware Supreme Court twenty years ago,[242] no California court (or federal court) has similarly held the long arm statute to be unconstitutional. By relegating such governance matters to the province of contract law, bolstered by the preemption of the Federal Arbitration Act, our private ordering proposal would substantially render much of this debate moot.

Second and relatedly, several states, including California and Georgia, guarantee jury trials for state citizens, even those involved in corporate disputes.[243] Forum selection bylaws that require litigation to be brought in courts that do not permit juries (such as Delaware's Court of Chancery or potentially the DAB) facially violate those protections. And indeed, in a recent case, a California Court of Appeals upheld the invalidation of a Delaware forum selection bylaw on precisely these grounds.[244] Although this decision was reversed on appeal,[245] similar challenges in other states remain feasible, retaining an arc of unpredictability about state-enforced governance. At the same time, however, the California Court of Appeals opinion made clear that arbitration agreements were excluded from its analysis, holding that they did not direct disputes to a court and thus the jury requirement was not in play. Therefore, incorporators avoid the risk of state's overriding their governance choices when they select private ordering through the DAB via shareholder agreement.

D. Potential Downsides

Although we believe that a system of privatized governance would be a worthy addition to the status quo, that does not mean that it is free of downsides. Below, we address several of them, including the risk of externalities, interest group pressures, and enforcement limitations.

First, there is a risk that a world of privatized governance could lead to *too much* product differentiation. Within the class of conceptual models of product market competition that our framework resembles, it is well known that there can be an excessive number of differentiated providers compared to the social optimum, because each new provider analyzes only its upside to entering and not losses to other providers.[246] Although excessive differentiation is a potential problem for our framework, we conjecture the danger to be modest. Remember that one of the large benefits of Delaware law historically (and the DAB prospectively) is the large body of precedents that help reinforce predictability. If too many firms opt for bespoke governance (or providers differentiate too much), they are likely to see fewer comparable disputes and thus fewer comparable opinions, reducing the guidance provided by an extensive body of precedent. These network effects impose a natural outer bound on the dangers of excessive product differentiation.

A second risk is that our proposed DAB structure might attract a different type of capture—not by politicized special interests or elites, but idiosyncratic players who attempt to influence it in their favor. This is particularly the case given that shareholder agreements that bind the corporation can theoretically be entered into by a single shareholder. Suppose, for example, Elon Musk entered into a secret shareholder agreement with Tesla selecting Delaware law and designating his lawyers at Richards Layton to arbitrate all disputes. Suppose further that the contract stipulated that all arbitral

[242] Vantage Point v. Examen, 873 A.2d 318 (Del. 2005).
[243] CAL. CONST. art. I, § 16; GA. CONST. art. I, § 1, ¶ XI.
[244] EpicentRx, Inc. v. Superior Court, 313 Cal. Rep. 3d 782 (Cal. Ct. App. 2023), *rev'd*, 572 P.3d 1 (2025).
[245] *See* EpicentRx, Inc. v. Superior Court, 572 P.3d 1 (2025)
[246] Suzanne Scotchmer, *On price-taking equilibria in club economies with nonanonymous crowding*, 65 J. PUB. ECON. 75-88 (1997).

outcomes would be sealed. This arrangement would likely ensure that Musk would receive not only the most management deferential body of law, but also maximally Musk-friendly judicial decisions, without any sunlight on the resulting outcomes.

At the risk of sounding flippant, we would counsel the following in the face of such a threat: Let Musk try to do it, and let him live with the consequences. It is important to observe that notwithstanding the freedom that contractual provisions create, there are both structural and practical limits. First, as discussed above, we propose that one of the DAB's only mandatory requirements is the disclosure of the existence and contents of a stockholder agreement to non-signatory stockholders. But even if Musk utilized a different private arbitrator, Musk's arrangement would likely be disclosed and priced under federal securities law, and it would also be available under a stockholder books and records request under DGCL Section 220.[247] To the extent that such an arrangement destroys value for other stockholders, it should result in downward pricing pressure on the company's equity once disclosed, representing an anchor on Tesla's prospective cost of raising capital.[248] If, on the other hand, Musk's hypothetical reform creates value, he should be eager to disclose it and stock prices should reflect the value created; regardless, he need not forsake Wilmington for Austin or anywhere else. For other more conventional firms who embrace the DAB, the structure we propose will be attuned to disclosure issues and attempt to mitigate them, such as by making it very difficult to seal arbitral records.

Third and relatedly, although the DAB would sidestep election-cycle dynamics bigfooting the decision-making process, it is unlikely to be wholly free of interest group pressures. Indeed, to the extent that defense-side lawyers may influence the choice of arbitrator, arbitrators may bend their legal reasoning to cater to them. Such a result could not only result in a captured process, but it would also reduce the overall predictability of law via arbitration. Likewise, to the extent that plaintiffs' lawyers advise shareholders on the desirable legal arrangements, investor demand for law could be skewed in that direction. All in all, it is difficult to exclude these pressures entirely. Nevertheless, while some interest group capture risk may persist under our proposal, the "compared to what?" question looms large—vocal interest groups already shape and distort outcomes under the status quo, and the influence of other forms of political partisanship continues to grow alongside them. Our proposal, in contrast, not only removes election cycles and extraneous objectives from the mix, but it subjects such deviations to much more immediate market discipline from prospective private-market competitors.

Fourth, from a practical perspective, the DAB is a private arbitral body and accordingly lacks core powers to execute and enforce judgements relative to courts. For example, the DAB would not be able to seize corporate shares if the corporation refused to pay a judgment. In that scenario, however, the defendant would be in breach of its contractual obligation to support and not impede enforcement of the DAB's judgments. As such, the defendant could be subject to a breach of contract action with legal and equitable relief. State and federal law, moreover, give tremendous deference to arbitral judgements when executing and enforcing their decisions. Therefore, while not without risk, the DAB's arbitral decisions are likely to be followed by Delaware courts, per state and federal law.

247 Although there is no specific requirement that shareholder agreements be disclosed, they would likely qualify as material and therefore required to be disclosed in a public company's 8-K. Shareholders can also secure them pursuant to a books and records request, both before and after SB 21. Section 220.

248 *Cf.* Jennings, *supra* note 233 (arguing that intra-corporate arbitration provisions affect firm value).

Finally and most significantly, the entry of private actors like the DAB may—if successful—leave little for standard judicial actors to do once governance is privately provided by contract and adjudicated by arbitral bodies. Governmentally provided corporate law will still be necessary, of course, to safeguard the protections of limited liability, ensure corporate personhood, and enforce arbitral judgments; but not much else. Moreover, if Delaware's judiciary decides to decamp for private arbitration systems like the DAB, many Delaware corporations will plausibly follow, not by reincorporating but by contracting out of the courts (and into the DAB). In many respects, this would benefit Delaware, since the state can continue to charge its corporate franchise taxes without having to underwrite a large judicial system. Moreover, other states offer far less flexibility than Delaware in facilitating stockholder agreements that bypass the courts. Over time, of course, Delaware's core state-provided function would likely winnow, becoming more homogenous with other states—a development that may invite significant price competition for the modest remnants of publicly-prescribed corporate law. Nevertheless, given Delaware's current susceptibility to interest group politics, some revenue loss may be inevitable anyway. Accordingly, the DAB may be the best way to keep corporations in the state, while also offering empirical data to Delaware's lawmakers about how it can change its law to keep up.

Conclusion

A familiar (if oft-misused) adage from Greek philosophy is that the only thing constant is change.[249] For over a century, Delaware's dominance of the incorporation market has famously defied that folk wisdom, bolstered by its difficult-to-replicate expert courts, ample and predictable caselaw, contractarianism nature, and non-partisan legislative processes. But recent political forces have disrupted Delaware's longstanding perch as market leader, rekindling foundational questions about whether (and how) regulatory competition can dependably deliver high-quality corporate law and governance. Other would-be-competitor states are hardly immune from these newly energized political forces either.

This Article has presented and refined a novel differentiated products framework for understanding not only historical patterns in regulatory competition of corporate law, but also our current moment. It has shown that when corporate ordering is delegated predominantly to state actors, it can easily diverge from both firm value maximization and state revenue maximization, particularly in today's politically-freighted environment. But even as Delaware has wandered (alongside other states) into this larger swamp of interest group politics, it unwittingly ushered in a new species of competition: privatized corporate law. And by choosing governance by shareholder agreement, Delaware firms need not exit the state at all: They can stay put while harnessing maximal corporate customization and mitigating the risks of politicization. Our Article has provided an attainable roadmap for this transition, envisioning a landscape that invites multiple private-ordering competitors to the contractarian dance-off. And whichever entrant (or entrants) come to dominate the market for private provision, there will be plenty of design and drafting work to go around. So scriveners, keep those pencils out and sharpened: corporate law's private-ordering era is nigh upon us.

[249] *See* Teri Williams, *The Only Constant Is . . . Misunderstanding of Heraclitus*, EDINBURGH UNIV. PRESS (July 19, 2021), https://euppublishingblog.com/2021/07/19/misunderstanding-of-heraclitus/

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