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Is Corporate Law Nonpartisan?

Law Working Paper N° 692/2023
March 2023

Ofer Eldar
Duke University and ECGI
Gabriel V. Rauterberg
University of Michigan

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Abstract

Only rarely does the United States Supreme Court hear a case with fundamental implications for corporate law. In Carney v. Adams, however, the Supreme Court had the opportunity to address whether the State of Delaware's requirement of partisan balance for its judiciary violates the First Amendment. Although the Court disposed of the case on other grounds, Justice Sotomayor acknowledged that the issue "will likely be raised again." The stakes are high because most large businesses are incorporated in Delaware and thus are governed by its corporate law. Former Governors and Chief Justices of Delaware lined up to defend the state's "nonpartisan" approach to its judiciary. The case raises the question of why nonpartisanship is taken to be an advantage for Delaware and whether the processes by which corporate law is made are generally politically partisan or not. Despite these developments, however, the place of political partisanship in corporate law has been largely overlooked. This Article offers a framework for analyzing the role of political partisanship in corporate law. It begins by showing that there is suggestive evidence of a relationship between political partisanship and the substance of corporate law at the state level. When corporate law materially differs across states, those differences are often predicted by which party controls the state's government. Political party entrepreneurs also agitate for corporate law reforms at the state level. Yet, Delaware adopts a conspicuously nonpartisan approach to corporate law. As is widely observed, how Delaware makes corporate law, from its constitution, to its legislature, to its judiciary, is unusual. It is designed to insulate that law from political partisanship. More surprisingly, this began when Delaware first became a leading home to incorporations a century ago. In fact, the same thing was true of New Jersey during its brief period of prominence before Delaware. Why? We suggest that the answer relates to corporate law's central debate regarding the "market for corporate law." In the United States, the internal affairs doctrine allows corporations to choose the state whose corporate law governs them by incorporating in the jurisdiction of their choice. This doctrine produces a form of regulatory competition that is structurally biased to produce a winner that favors "demand-side" interests, i.e., the interests of corporate decision-makers themselves. Understanding this dynamic has been one of corporate law's foundational concerns. We complement that literature by arguing that nonpartisanship provides a competitive advantage in Delaware's quest to appeal to these interests. Delaware's approach enables it to afford great weight to the interests of nationally diverse and heterogeneous shareholders and makes it less likely that the state will sacrifice shareholders' interests to please local constituents. The internal affairs doctrine thus indirectly works to favor incorporations to a state with a nonpartisan approach. Our framework also offers new insights into the debate on the federalization of corporate law and the Supreme Court litigation. Specifically, we argue that within First Amendment jurisprudence, the Supreme Court can and should carefully consider its ruling's effects on Delaware nonpartisanship.

Keywords: Delaware, Corporate Law, First Amendment, Regulatory Competition, Supreme Court

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Ofer Eldar

Duke University and ECGI

Gabriel V. Rauterberg

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This Article offers a framework for analyzing the role of political partisanship in corporate law. It begins by showing that there is suggestive evidence of a relationship between political partisanship and the substance of corporate law at the state level. When corporate law materially differs across states, those differences are often predicted by which party controls the state's government. Political party entrepreneurs also agitate for corporate law reforms at the state level. Yet, Delaware adopts a conspicuously nonpartisan approach to corporate law. As is widely observed, how Delaware makes corporate law, from its constitution, to its legislature, to its judiciary, is unusual. It is designed to insulate that law from political partisanship. More surprisingly, this began when Delaware first became a leading home to incorporations a century ago. In fact, the same thing was true of New Jersey during its brief period of prominence before Delaware. Why?

We suggest that the answer relates to corporate law's central debate regarding the "market for corporate law." In the United States, the internal affairs doctrine allows corporations to choose the state whose corporate law governs them by incorporating in the jurisdiction of their choice. This doctrine produces a form of regulatory competition that is structurally biased to produce a winner that favors "demand-side" interests, i.e., the interests of corporate decision-makers themselves. Understanding this dynamic has been one of corporate law's foundational concerns. We complement that literature by arguing that nonpartisanship provides a competitive advantage in Delaware's quest to appeal to these interests. Delaware's approach enables it to afford great weight to the interests of nationally diverse and heterogeneous shareholders and makes it less likely that the state will sacrifice shareholders' interests to please local constituents. The internal affairs doctrine thus indirectly works to favor incorporations to a state with a nonpartisan approach.

Our framework also offers new insights into the debate on the federalization of corporate law and the Supreme Court litigation. Specifically, we argue that within First Amendment jurisprudence, the Supreme Court can and should carefully consider its ruling's effects on Delaware nonpartisanship.

* Duke Law School and University of Michigan Law School, respectively. For helpful comments and suggestions, we are grateful to Stephen Bainbridge, Christopher Bruner, Anne Choike, Brian Feinstein, Jill Fisch, Stavros Gadinis, Lawrence Hamermesh, James Nelson, Elizabeth Pollman, Jeff Powell, Bob Rasmussen, Michael Simkovic, Nick Stephanopoulos, Emily Strauss, Andrew Verstein, Ernie Young, and participants in the annual meeting of the National Business Scholars Conference and the annual meeting of the American Law & Economics Association.

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INTRODUCTION

Partisan politics now seems to be everywhere in corporate law.[1] Reforming corporate governance is increasingly a theme in political debates and legislative proposals,[2] and the view that corporations should aim to directly maximize social interests is gaining momentum.[3] A striking feature of the corporate law governing most large firms, however, is that its enactment and adjudication are conspicuously shielded from partisan politics.[4] The reason for this is that most large corporations incorporate in Delaware and thus are governed by its corporate law. As has been widely noted, how Delaware makes corporate law – at both the legislative and judicial levels – is deeply unusual.[5] In particular, Delaware's Constitution requires that the Delaware judiciary be balanced between Democratic and Republican judges and that changes to its corporate code receive supermajority support.[6] Although no system of laws is apolitical, it seems that Delaware's efforts to immunize its corporate law from political partisanship may have been a significant contributor to its success in attracting incorporations.

In 2019, however, one of the pillars of Delaware's nonpartisan approach was declared unlawful. In *Adams v. Carney*, the Third Circuit held that Delaware's bipartisan judicial balance requirement violated the First Amendment.[7] When certiorari was granted by the Supreme Court, former Governors and Chief Justices of Delaware as well as a host of influential scholars submitted amicus briefs to the Court supporting Delaware's constitutional provisions, arguing for nonpartisanship's role in the reputation of Delaware's courts as expert arbiters of corporate law.[8] Although the Court ultimately avoided the merits by finding that the challenger lacked standing,[9] Justice Sotomayor noted that the constitutional issues raised by Delaware's approach "will likely be raised again."[10]

Corporate law is not apolitical—as one scholar famously noted, "much of the firm's structure is affected, sometimes determined, by its political environment."[11] Corporations'

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[1] See, *e.g.*, Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 542 (2020) (discussing the implications of rising populism across the political spectrum on corporate purpose).

[2] *See, e.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018) (proposing reforms to corporate law designed to empower workers).

[3] *See, e.g.*, David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659 (2019) ("In the 1980s, a single ideology transformed American business: stockholder primacy."); "Statement on the Purpose of a Corporation," *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019).

[4] *See, e.g.*, *infra* notes 18-19 and accompanying text.

[5] *See infra* notes 36-40 and accompanying text.

[6] *See infra* section III.

[7] Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019).

[8] Governor of Delaware v Adams, Brief of Amici Curiae Professors in Support of Petitioner.

[9] Carney v. Adams, 141 S. Ct. 493, 500 (2020).

[10] *Id.* at 503.

[11] MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 1 (2003) ("Politics can affect a firm in many ways: it can determine who owns it, how big it can grow, what it can produce profitably, how it raises capital, who has the capital to invest, how managers and employees see themselves and one another, and how authority is distributed inside the firm . . . . [A]nd if we fail to scrutinize the political impact on a firm, we are unlikely to get the full story.").

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freedom to incorporate and the competition among states to attract incorporations are core themes of scholarship in corporate law.[12] We complement these important scholarly literatures on the "market for corporate law" by exploring the role of political partisanship across states and in Delaware's success, and in particular the consequences of which political party controls a state's government, formulates its laws, and appoints its judiciary.[13] It is worth emphasizing that by "political partisanship" we refer only to the effects of *party control* on legislative enactments and the nomination of party-affiliated judges. There are many other meanings of the term "partisanship" and its cousin "ideology," but our focus is specifically on the effects of political party control of government offices.[14]

This article offers a framework for exploring the role of political partisanship in corporate law. It begins by showing that there is suggestive empirical evidence for a relationship between political partisanship and the substance of corporate law at the state level.[15] Although much of corporate law is the same in every state, there remain some important differences. We explore the predictors of those differences, but make no conclusive claims of causation.

Among the most politically explosive of all corporate statutes have been the anti-takeover statutes passed in waves since the 1980s. These statutes, in various forms, aim to deter investors from seizing control of a corporation from its incumbent managers. We find that anti-takeover laws are more likely in states under Democratic control than under Republican control. We also find that states under Democratic control are significantly more likely to adopt statutes authorizing hybrid legal forms – legal forms that require companies formed under them to pursue a public purpose enshrined in their charter, alongside making

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[12] For a few of many important examples, *see, e.g.*, Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) (arguing that competition among states improves the quality of corporate law); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003) (arguing that the threat of federalization checks Delaware and shapes the content of its law); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1599-1600 (2005) (arguing that Delaware law and federal regulation have a mutually supportive relationship in which federal law supplements Delaware's common law process in complementary ways); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995) (arguing for the importance of network effects in the market for corporate law). More recently, Christopher Bruner's work has highlighted the extent to which only certain kinds of jurisdictions—which he characterizes as "market dominant small jurisdictions"—can make the kind of credible commitment that Delaware does. CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016); *see also* Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What Is the "Progressive" Agenda?*, 2 BYU L. REV. (2018). Bruner's work illuminates a number of other necessary preconditions for a jurisdiction to function as a locus of incorporations.

[13] *See* Roberta Romano, *Market for Corporate Law Redux*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS VOL. 2: PRIVATE AND COMMERCIAL LAW (2017) (describing the dynamics of the market for corporate law). Scholars of corporate law have developed many insights into the "politics" of corporate law in other senses of that term. *See, e.g.*, Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 969-71 (1984).

[14] *See* Edward G. Carmines & Nicholas D'Amico, *The New Look in Political Ideology Research*, 18 AM. REV. POL. SCI. 205, 205 (2015).

[15] *See infra* Section II.A.

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profits. We assemble a range of qualitative evidence suggesting that the adoption of these laws was motivated by politically partisan actors.[16]

Yet, the state in which most large businesses are incorporated—Delaware—takes a *distinctively nonpartisan* approach to corporate law. The process by which Delaware makes corporate law is explicitly designed to be insulated from political partisanship, and it has been since Delaware became the principal home to incorporations a century ago. Delaware's Constitution requires that the Delaware judiciary be balanced between Democratic and Republican judges and that changes to its corporate law receive supermajority support.[17] The main source of legislative drafting for any changes to Delaware's corporate law is not a political branch, but the Council of the Delaware State Bar Association's Corporation Law Section.[18] The major arms of Delaware corporate lawmaking—the legislative process and the courts—have both been carefully immunized from the normal political fray.[19]

In fact, this nonpartisanship was arguably part of Delaware's "product pitch" when it first entered the market for attracting incorporations by out-of-state companies in the late Nineteenth Century. We return to the debates around Delaware's Constitution of 1897 to show that even then, the framers of Delaware's Constitution were keenly aware of the dynamics of state competition for corporate charters. During the constitutional debate, statesman and later Delaware Attorney General and United States Senator William Saulsbury declared:

> I believe, under our general law, in encouraging corporations to take out charters under the laws of our State . . . . [I]f corporations can be induced to come to our State to take out their charters and pay their money into our State Treasury and relieve our people from taxation, instead of going to New Jersey to get their charters,—I would like to have them come here, and have some of this million dollars a year flowing into our State Treasury.

[16] *See infra* Section II.B. To be sure, political affiliation does not determine any individual's views regarding corporate law (or anything else for that matter). The Republican and Democratic parties encompass coalitions with distinct and often conflicting viewpoints, and their legislative proposals reflect complex negotiations among those coalitions and elected leaders. *See, e.g.*, Carmines & D'Amico, *supra* note 14. Needless to say, there are many Democrats (Republicans) who would oppose (support) anti-takeover statutes and support (oppose) anti-litigation laws. We only provide evidence addressing how party control of government is associated with certain statutes.

[17] *See infra* Section III.

[18] *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 (2006); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 900-01 (1990).

[19] *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 and the legislature as the "major player[s] in the Delaware corporate lawmaking system"). For broader analyses of how Delaware works, there is a vast literature. For some important examples, *see, e.g.*, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law. Work?*, 44 UCLA L. REV. 1009, 1017 (1997); Edward B. Rock, *Corporate Law and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019 (2015).

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Out of these debates came Delaware's 1897 Constitution, which called for a general incorporation law and adopted Delaware's super-majority requirement for amending its corporate law.

New Jersey was Delaware's predecessor in "chartermongering," and the first state to make a business of attracting out-of-state corporations.[20] At that time, it too was nonpartisan in its approach to corporate law. In fact, Delaware simply copied most of the features of its corporate law system from New Jersey. Yet, while trust-busting politics led New Jersey to dramatically restrict its previously liberal corporate laws (such as those enabling mergers)—and the subsequent the loss of its popularity for incorporations—Delaware has hewed the course ever since, maintaining the nonpartisanship of its corporate law from its constitution, to its legislature, to its judiciary.[21] Delaware's peculiarities and its success raise two questions: Why might those peculiarities lead to success in attracting incorporations, and is this system as a whole desirable?

First, why might nonpartisanship be a competitive advantage in the market for incorporations? We suggest that the answer lies in the distinctive character of U.S. corporate law. In the United States, corporate law is governed by the internal affairs doctrine, a choice of law rule under which corporations can freely choose the corporate law governing them by incorporating in the relevant state.[22] This doctrine produces a form of regulatory competition that has been at the heart of scholarship on corporate law for almost half a century.[23] This literature highlights that this competition is structurally biased to produce a winner that favors "demand-side" interests, i.e., the interests of corporate decision-makers themselves.[24] We argue that these demand-side interests favor a system for making and adjudicating corporate law that mutes political partisanship.[25]

It is important to understand why the interests of corporate decision-makers 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

[20] *See* Christopher Grandy, *New Jersey Corporate Chartermongering*, 1875-1929, 49 J. ECON. HIS. 677, 677 (1989); *see also* Charles M. Yablon, *The Historical Race, Competition for Corporate Charters, and the Rise and Fall of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 326-27, 349-50 (2007).

[21] *See infra* Section III.

[22] Historically, a defining feature of U.S. corporate law has been the fact that those creating a corporation can choose the state in which it is legally formed (i.e., "incorporated"). Under a choice-of-law rule known as the "internal affairs doctrine," the law of the state of incorporation governs legal disputes involving the corporation's "internal affairs," regardless of where the corporation is headquartered or does most of its business. In effect, the internal affairs doctrine lets a corporation choose its corporate law. *See* VantagePoint v. Examen, Inc., 871 A. 2d 1108, 1112 (Del. 2005) ("The internal affairs doctrine is a longstanding choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs — the state of incorporation.").

[23] See *infra* note 12.

[24] *See, e.g.*, 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, 683 (2005) ("[C]orporation law in Delaware is influenced by only the two constituencies whose views are most important in determining where entities incorporate: managers and stockholders.").

[25] By contrast, the area of financial regulation, which is dominated by the federal government rather than the states, is arguably more subject to partisan pressures. See Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 335 (2013).

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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.[26] In contrast, state partisan politics will typically be responsive to the state's concentrated stakeholders, such as local management or employees.[27] Thus, partisanship presents a risk that shareholders' interests will be compromised in favor of another constituency. To the extent that corporate decision-makers are motivated to protect the interests of shareholders, albeit imperfectly, they must be wary of such risk. Accordingly, to win the competition for corporate charters, committing to a politically nonpartisan approach to corporate law is advantageous in attracting a large number of out-of-state corporations, especially among firms that aim to raise capital from a broad set of investors.[28]

Scholars have noted that shareholders lack strong local political connections in comparison to employees or management, but the implications of this fact for states' relationship with partisan politics are both interesting and complex.[29] Because Delaware's corporate law is relatively immune to partisan politics, it can afford greater weight to the interests of diverse shareholders and is less likely to sacrifice their interests to please local constituents with strong state party affiliations. In this way, the internal affairs doctrine mitigates the effects of political partisanship on most large corporations.

This does not mean that the effects of the internal affairs doctrine are politically neutral or lack an ideological valence.[30] Political nonpartisanship, in the sense we use it, refers to institutions designed to reduce or preclude direct influence by party office-holders. Such nonpartisanship is not "neutral" in any sense of the term, and it may favor actors with specific ideologies or the interests of coalitions associated with a specific party. We aim to open a conversation as to whether Delaware's siloing of corporate law from politics is desirable or not.

Our framework offers new insights into a number of normative and empirical issues in corporate law, including the aftermath of the Supreme Court case that ultimately declined to rule on Delaware's requirement of partisan balance in its judiciary. In late 2019, the United States Supreme Court granted certiorari in *Carney v. Adams*.[31] In that case, the Third Circuit affirmed the invalidation of Delaware statutory provisions that prohibit individuals who are

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[26] *Cf.*, Da Lin, *Corporate Law Can No Longer Ignore Shareholder Heterogeneity*, Jotwell (May 6, 2020) (reviewing Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297 (2019)).

[27] *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 60 (1993) (suggesting why the large number of firms incorporated (but not located) in Delaware reduces any specific firm's managerial influence and makes for broader interests than most states where "the local corporate bar tends to be more aligned with incumbent management").

[28] Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism As A Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 512 (2011).

[29] See *infra* Section IV.

[30] Indeed, all of these terms are multifaceted and ambiguous. We focus on the consequences of party control over statutory and judicial outcomes, but emphasize that reasonable judgments as to what partisanship, nonpartisanship, and ideology mean will routinely disagree. *See, e.g.*, Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" is not "Partisanship"*, 61 EMORY L.J. 758 (2012).

[31] Carney v. Adams, 140 S. Ct. 602 (2019).

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not members of the Democratic or Republican party from serving on the Delaware Supreme Court, the Court of Chancery, or the Delaware Superior Court and require that no more than a "bare majority" of judges on those courts belong to one party. The case, inspired by a law review article,[32] was ultimately disposed of on other grounds, but the constitutionality of Delaware's bipartisan judiciary requirement is likely to be raised in the future. We argue that given First Amendment jurisprudence, it is appropriate for any court considering this issue to give considerable weight to Delaware's interest in a maintaining the nonpartisanship of its judiciary.[33]

This article makes several contributions. It provides new quantitative and qualitative evidence of the links between political party control and the substance of corporate law; it shows how Delaware's century-old constitutional provisions laid the foundation for nonpartisan corporate law; and it links the literature around the "market for corporate control" with the themes of political partisanship and nonpartisanship.

It proceeds as follows. Section I lays out a simple framework for examining political partisanship in corporate law. Section II develops empirical findings that suggest that partisan politics affects the substance of corporate law at the state level. Section III describes role of nonpartisanship in Delaware's dominance in the market for firm incorporations. Section IV explains the advantages of nonpartisanship in attracting firms' incorporations by providing a commitment to corporate interests, and the conditions necessary for nonpartisanship to serve this commitment credibly. Section V briefly discusses the political legitimacy of nonpartisanship. Section VI addresses the policy implications of our analysis in the aftermath of the Supreme Court's decision.

I. A FRAMEWORK FOR EXAMINING POLITICAL PARTISANSHIP IN CORPORATE LAW

What is the role of political partisanship in corporate law? This Section provides a brief framework for conceptualizing this question. Our framework is developed around three analytical building blocks: (1) the impact of partisan politics on the substance of corporate law at the state level, (2) the system of *federalism* that allows firms to choose their state of incorporation, and (3) the extent to which commitment to nonpartisanship in the making and adjudication of corporate law attracts incorporations.

First, we explore the state-level politics of corporate law. We offer qualitative and quantitative evidence that suggests a partisan character to several consequential state corporate law developments. Much of corporate law is uniform across all the states and much of corporate law may be inconsequential. We focus on some of the most important corporate law statutes that actually differ across jurisdictions, specifically anti-takeover statutes and laws that allow firms to exempt mangers from liability for violating their fiduciary duties. We find suggestive evidence of differences between the statutes adopted by governments

[32] Joel Edan Friedlander, *Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary?*, 58 ARIZ. L. REV. 1139 (2016).

[33] While judges of both political stripes would likely retain an interest in preserving Delaware's status as the leading state for incorporations, and thus the character of its corporate law, it is possible that removing this requirement in the state constitution would allow for the eventual deterioration of its nonpartisanship over time.

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controlled by each of the major parties. Loosely speaking, Democrats favor anti-takeover and pro-stakeholder statutes, while Republicans favor statutes that restrict the liability of corporate managers for violating fiduciary duties.

Second, we step back to address how the system of corporate law shapes the way that politics affects corporations themselves. In the United States, a choice of law rule known as the "internal affairs doctrine" empowers corporations to choose the state in which they incorporate.[34] Because the law of the state of incorporation governs a corporation's internal affairs—including the allocation of powers among its shareholders, directors, and officers—corporations can choose their corporate law regardless of where they are headquartered by incorporating in that jurisdiction. Incorporation is a "paper choice" that requires no operations in that state and which can be done at relatively low cost and friction on the basis of a jurisdiction's attractiveness. The result is that a corporation's choice of corporate law can be analogized to purchasing a product that states offer in return for incorporation fees, and the system as a whole can be characterized as a "market for corporate law."[35] The debate as to whether this market produces a "race to the top" in which states compete to provide optimal corporate governance and firms incorporate *en masse* in that state, or a "race to the bottom" in which states compete to attract self-interested management at shareholders' (and/or society's) expense has proved one of the most fundamental and enduring questions of corporate scholarship.[36] For our purposes, what is important is to understand how *partisanship* may affect firms' incorporation decisions within a system that permits such choices.

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[34] *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987) (addressing the internal affairs doctrine and noting "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.").

[35] *See* Romano, *supra* note 13. In particular, because the frictions to out-of-state incorporation or reincorporation are quite low—certainly in comparison to the relocation of a firm's actual headquarters—both of the dynamics noted above will occur. As Romano puts it: "(1) firms will seek out the jurisdiction with their preferred corporate law . . . and (2) states will compete to offer laws that attract or retain domestic corporations to increase state coffers." Romano, *id*., at 360. A sub-theme in this literature addresses how much of a race among states there actually is, as most states do not actively seek to attract incorporations. Marcel Kahan & Ehud Kamar, *The Myth of State Competition In Corporate Law*, 55 STAN L. REV. 679 (2002). For our purposes, however, whether the race is sluggish or vigorous, the key is that many corporations eventually move.

[36] William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (arguing that Delaware occupies an outsized role in corporate lawmaking to the detriment of national corporate policy); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEG. STUD. 251 (1977); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 561-63 (2002); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987); Roe, *supra* note 12, at 590. More recently, scholars have noted the interaction of the federal government with state-level competition in the provision of corporate law. While the welfare effects of recent federal interventions are fiercely contested, it seems undeniable that the specter of federal intervention affects how states compete. *See, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1524 (2005); John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, CORNELL L. REV. (2012). The result is what Marcel Kahan and Edward Rock have memorably called a "symbiotic" relationship between Delaware and federal corporate law. Kahan & Rock, *supra* note 12, at 1599-1600.

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Third, we develop the interaction of the first and second building blocks by arguing that corporate law's jurisdictional competition promotes the emergence of a state that offers a nonpartisan approach to corporate law as part of its "product." There are several important reasons for this feature. Shareholders, the providers of risk capital to corporations, are a diffuse national group.[37] An approach to corporate law that is porous to a state's partisan politics is likely to be inconsistent with promoting the interests of nationally diffuse shareholders over the long-term. Relatedly, because corporate law is a deeply technical body of law, its quality is highly dependent on expertise, which may be inconsistent with a partisan bias towards specific outcomes. Even the more generic attributes of Delaware's corporate law approach, such as its legislature's lauded responsiveness to corporations[38] and doctrinal flexibility,[39] may be more difficult to sustain in the face of political partisanship.

As a result, nonpartisanship in the creation and adjudication of corporate law provides a competitive advantage for a state interested in winning the jurisdictional race. This provides an account of why Delaware emerged as the winner that is complementary to the existing literature.[40] It also explains the loss of New Jersey's lead as the turn of the century approached.

To recap, understanding how partisan politics and corporate law interact requires exploring three distinct sets of questions. First, it requires setting the baseline by addressing the state-of-play in the states: Does partisan politics generally affect how corporate law is made? Second, it requires understanding the place of partisan politics in how corporate law is made *in Delaware*. Lastly, if Delaware's approach to partisan politics and corporate law is different from other states, it requires an account of why. Roberta Romano insightfully described Delaware as a credible "hostage" to corporate interests.[41] Here, we delve into the "black box" of what is necessary to be a credible hostage in terms of how partisan politics affects a jurisdiction's law. While nonpartisanship has a causally thorny relationship with whether a jurisdiction can be credibly "hostage" to corporate interests, we suggest that a nonpartisan corporate lawmaking process seems akin to a *necessary* but not sufficient

[37] *See infra* Section IV.

[38] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L., ECON. & ORG. 225 (1985).

[39] As is well-known, Delaware corporate law emphasizes the fiduciary duties of corporate managers, and the law of those duties depends largely on standards rather than bright line rules. Administering such rules requires business acumen and adaptability to changing economic conditions. Jill Fisch, *The Peculiar Role of Delaware Courts in the Competition for Corporate Charters*, 68 U. CINN. L. REV. 1061 (2000). For example, Delaware law has arguably changed to become more deferential to managers due to the increase in sophistication and size of institutional shareholders. See Steven Davidoff Solomon and Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards, in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (Steven Davidoff Solomon ed. 2019).

[40] While, to our knowledge, no article has systematically focused on the role of political partisanship, other scholars have observed the importance of closely related features of Delaware, such as its lack of a strong in-state corporate constituency. *See, e.g.*, Adam C. Pritchard, *London as Delaware?*, 78 U. CINN. L. REV. 473, 475 (2009) ("Delaware has prevailed in that competition by being highly attuned to demands by directors . . . . That responsiveness is driven, in part, by its small population and relatively insignificant share of the U.S. economy. Delaware has very few public companies, which limits the number of managers and shareholders who might seek to influence the direction of its corporate law.").

[41] See Romano, *supra* note 38, at 240, 278.

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condition for dominating the market for incorporations. Conversely, the demographic characteristics that have enabled Delaware's "hostage" status have also made durable nonpartisanship a feasible strategy.

The product of this analysis explains the structure of our paper. We explore partisanship in the states (Section II), partisanship in Delaware (Section III), and then seek to explain why Delaware is so conspicuously nonpartisan (Section IV).

II. AN EMPIRICAL ANALYSIS OF PARTISANSHIP IN STATES' CORPORATE LAW-MAKING

In this Part, we examine whether political partisanship may have an impact on the substance of corporate law. To evaluate whether party affiliation can predict corporate law legislation, we examine whether certain types of corporate laws are more likely to be adopted when the state is controlled by Democrats or by Republicans. We discuss three types of corporate laws: anti-takeover statutes, anti-litigation laws and hybrid legal forms that have a blended profit-social mission.[42]

A. Data

We create a panel dataset that tracks whether each state legislature and governor are Democratic or Republican, and the adoption of different types of corporate laws over time.[43] We omit from the analysis the District of Columbia because it is a federal state, and Nebraska because its state representatives do not formally affiliate with political parties.

The data contains variables that specify whether the state governor is a Democrat or a Republican, and the fraction of members in both the House of Representatives and Senate that are Democrats or Republicans. We code a state as Democratic if in a given year the governor is a Democrat and the majorities in both the Senate and the House are Democrat. Likewise, we code a state as Republican if the governor is a Republican and both the Senate and the House are controlled by Republicans. Note that this means that each state may be and often is neither Democrat nor Republican. This approach focuses on when both the legislature and the executive share the same political vision. While some studies, such as those relating to the effect of party affiliation on taxes, focus mainly on the legislature,[44] the

[42] See, e.g., John T. Jost, Christopher M. Federico, Jaime L. Napier, *Political Ideology: Its Structure, Functions, and Elective Affinities*, 60 ANNUAL REV. PSYCH. 307 (2009).

[43] The data on the legislatures and governors of each state across time is sourced from the University of Kentucky Center for Poverty Research, which collects panel data on states' politics and various economic measures since 1980. See *National Welfare Data,* U. KY. CTR. FOR POVERTY RES., http://ukcpr.org/resources/national-welfare-data (last visited February 14, 2020).

[44] Robert W. Reed, *Democrats, Republicans, and Taxes: Evidence that Political Parties Matter*, J. OF PUB. ECON., May 2006, at 725-750.

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involvement of state governors in the process of advocating and adopting state corporate laws[45] suggests that coordinated executive and legislative action may be necessary.[46]

The data on state corporate law is based mainly on data collected for several recent studies of state corporate law across time,[47] and data collected specifically for this project. We focus on three main areas of laws that are consequential and differ among states. The first two relate to what are generally considered key areas of corporate law: anti-takeover statutes and laws that protect firms and managers from litigation. These statutes have been subject to numerous studies that debate and test their impact on firm value and performance, as well as other outcomes, such as takeovers and litigation, and they appear to affect firm incorporation decisions.[48] We emphasize that we do not take a view on these issues in this article. The key point is that they were plausibly important when adopted and that party politics may be associated with their adoption. The third group of statutes relate to the recent adoption of legal forms that subject corporate managers to duties to pursue broader social objectives, primarily the Benefit Corporation.[49] These laws provide a good setting for testing whether corporate law may be subject to party politics because they implicate broader "stakeholder" issues, such as unemployment, inequality, diversity, and the environment.

***Antitakeover statutes*:** There are seven main forms of anti-takeover statutes.[50] (a) Business Combination Statutes: These statutes bar a bidder that obtains control from merging the target with an entity of its own for a defined period, unless stringent conditions are satisfied. (b) Constituency Statutes: These statutes explicitly empower management to consider the interests of corporate constituencies other than shareholders in defending against a takeover. (c) Control Share Acquisition Statutes: These statutes require a shareholder vote to permit a hostile bidder to proceed with its offer, and preclude the bidder from voting shares it acquires if it does not do so. (d) Fair-price Statutes: These statutes require a bidder who obtains control and undertakes a second-step freeze-out transaction to

[45] *See* e.g., Robert Daines, Shelley Xin Li & Charles C.Y. Wang, *Can Staggered Boards Improve Value? Evidence from the Massachusetts Natural Experiment* 4 (Stanford Law Sch. John M. Olin Program in Law & Econ., Paper No. 498, 2016), http://ssrn.com/abstract=2836463 (describing Michael Dukakis's involvement in pushing forward a law that would require Massachusetts firms to adopt staggered boards).

[46] In addition, Reed, *supra* note 44, uses the average Democratic and Republican control in a five year period prior to the relevant policy. All our results are robust to this specification.

[47] Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973 (2009); Cain, Matthew D., Stephen B. McKeon, and Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from Five Decades of Hostile Takeovers*, 124(3) J. FIN. ECON. 464 (2017); Ofer Eldar and Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12(2) AM. ECON. J.: MICROECONOMICS 60 (2020).

[48] *See* e.g., Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada* 61 J.L. & ECON. 555, 556 (2018) (noting that several proxy statements from firms reincorporating to Nevada list as a motivating factor Nevada's law insulating managers from lawsuits, and commenting that incorporating in states allowing greater freedom to defend against takeovers may help managers focus on long-term growth).

[49] *See e.g.*, Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937 (2020); J. Haskell Murray, Corporate Forms of Social Enterprise: Comparing the State Statutes, (January 15, 2015) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556).

[50] See Eldar & Magnolfi, *supra* note 47; Lucian Arye Bebchuck, and Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383 (2003); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PENN. L. REV. 1795-1873 (2002).

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remove remaining shareholders to pay the same price at the second step that it paid for shares in the initial bid. (e) Poison Pill Statutes: These statutes protect poison pills, arguably the most effective form of anti-takeover protection, from judicial review.[51] (f) Extreme: anti-takeover protections that make it extremely difficult to acquire firms without the acquiescence of the target board. These include laws that require firms to adopt staggered boards,[52] disgorgement statutes[53] and laws that validate dead-hand poison pills.[54]

Anti-Litigation Laws: Since 1986, virtually all states have adopted laws that permit firms to waive managers' duty of care. However, some states have gone further and adopted laws empowering firms to exempt managers from some elements of the duty of loyalty. There are broadly three types of such laws. (a) Loyalty Waiver: a broad waiver that essentially exempts directors and/or officers from most, if not all, aspects of the duty of loyalty and renders them liable when they engage in fraud or a knowing violation of the law. The liability exemptions under Nevada law have been well documented and discussed,[55] but as many as twenty-three states have adopted similar laws, such as Virginia and Maryland.[56] (b) Business Judgment Rule ("BJR") Protection: some states have adopted specific statutory provisions that accord managers' decisions business judgment protection, even in the context of takeovers.[57] These laws essentially curb substantive judicial review of managerial decisions in defending against takeovers, and protect their validity from being challenged in court for possible unfairness.[58] (c) Universal Demand: laws that mandate that shareholders make a demand on the board to initiate derivative lawsuits, typically against managers for breach of fiduciary duties against the corporation.[59] In contrast, in states that do not have universal demand laws, shareholders are not required to make such a demand if the demand

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[51] A poison pill consists of the issuance of warrants or rights to shareholders that allow the holders to purchase corporate stock at a materially lower price than a party who has triggered the pill's rights by purchasing a block of stock without board waiver of the pill.

[52] These laws typically allow firms to opt out of the staggered board by an amendment to the company's charter (*see* e.g., Mass. Ann. Laws ch. 156D, § 8.06), but this means that the board has to initiate this action before shareholders get to approve this decision. See Daines et. al, *supra* note 45. Steven J. Cleveland, *A Failure of Substance and a Failure of Process: The Circular Odyssey of Oklahoma's Corporate Law Amendments in 2010, 2012, and 2013*, 67 OKLA. L. REV. 221 (2014).

[53] A disgorgement statute requires a bidder to disgorge profits from a failed bid. As a result, it bars a bidder from generating revenue by selling target shares back at a higher price. *See* Subramanian, *supra* note 50, at 1857-1859.

[54] See Md. Code Ann., Corps. & Ass'ns § 2-405.1(d); Va. Code Ann. § 13.1-727.1. Dead-hand poison pills are pills that cannot be redeemed even by a new board of directors; see Eldar & Magnolfi, *supra* note 47.

[55] See Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012); Bruce H. Kobayashi and Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165 (2011); Michal Barzuza and David C. Smith, *What happens in Nevada? Self-selecting into Lax Law*, 27 REV. FIN. STUD. 3593 (2014); Dain C. Donelson and Christopher G. Yust. *Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law*. 57(3) J.L. & ECON., 747 (2014); Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada* 61 J.L. & ECON. 555 (2018).

[56] *See* Md. Corp. & Assns. § 2-405.2 and Va. Code Ann. § 13.1-692.1. *See also* Eldar & Magnolfi, *supra* note 47.

[57] E.g., Nev. Rev. Stat. Ann. § 78.139.

[58] *See* Barzuza, *supra* note 55, at 955-957.

[59] Ian Appel, *Governance by Litigation*, (July 1, 2019) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532278).

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would be futile, mainly because the board or some members thereof are also the defendants in such lawsuits.[60] (d) Corporate Opportunity Waiver ("COW"): waivers that enable directors and/or controlling shareholders to appropriate business opportunities that would otherwise belong to the corporation, even if they do not disclose these opportunities to the corporation nor receive permission to pursue them. Nine states starting with Delaware in 2000 adopted these waivers.[61]

***Hybrid Legal Forms*:** The hybrid legal forms that have proliferated across states in recent years come in several varieties. We divide them into Benefit Corporation statutes and all other statutes. (a) Benefit Corporations: Legal corporate forms that requires a firm formed under the statute to adopt at least one public purpose in its charter, and require or in some cases permit the directors to pursue these public purposes.[62] (b) Other Hybrid Forms: the most common is the Low-Income Limited Liability Company ("L3C"), which is essentially an LLC that is formed for a charitable purpose.[63] Other legal forms include some idiosyncratic forms, such as the social purpose corporation, the public benefit corporation, and the public benefit LLC.[64] These forms differ from one another with respect to several legal characteristics, including the underlying form (corporation or LLC), whether the managers are required or permitted to pursue social purposes, and the level of disclosure required with respect to the performance of the social purpose. We lump these entity forms together, because it is unlikely that these differences are driven by the states' party affiliation, and because the variations among states is relatively small.

In Table 1, we provide descriptive statistics on our sample. It consists of 1,862 state-year observations covering the period from 1980 to 2017. Twenty-six percent of the observations are states that are subject to Democratic control and twenty-two percent are states under Republican control. Note that many states became Republican over time, such that before 2008 only 16% of state-year observations were Republican, and from 2008 about 39% are Republican. In 100 state-year observations, a state passes at least one antitakeover statute. Thirty-nine percent of these are Democratic and only eleven percent are Republican. This suggests that anti-takeover statutes are more likely under Democratic governments, although note that most of these statutes were passed before 2007 when the percentage of Republican states was much lower. The picture is somewhat more balanced and eclectic when examining the 52 instances where states pass anti-litigation statutes: 19% and 23% percent of state-year observations are Democratic and Republican, respectively. It is noteworthy that duty of loyalty waivers and universal demand laws were passed by more Republican states, mainly before 2008, when the percentage of Republican states was relatively low. Finally, Democratic and Republican states are relatively balanced when considering hybrid legal forms (39% and 36%, respectively). Note, however, that the first

[60] *Id*.
[61] *See* Gabriel Rauterberg and Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017).
[62] *See* Eldar, *supra* note 49, at 20.
[63] *Id*., at n. 75.
[64] *See* Murray, *supra* note 49, at 4.

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hybrid legal form was passed in 2008, when the percentage of Democratic states was substantially lower than Republican states.

B. Empirical Strategy

For the empirical analysis, we use a standard regression analysis that takes the following four forms:[65]

$$(1) \qquad Law_{st} = \beta_{Dem} Dem_{st} + \beta_{Rep} Rep_{st} + \eta_s + \varepsilon_{st},$$

$$(2) \qquad Law_{st} = \beta_{Dem} Dem_{st} + \beta_{Rep} Rep_{st} + \mu_t + \mathrm{d_r} + \eta_s + \varepsilon_{st},$$

$$(3) \qquad Law_{st} = \beta_{Dem} Dem_{st} + \beta_{Rep} Rep_{st} + \gamma X_{st} + \mu_t + d_r + \eta_s + \varepsilon_{st}, \text{ and}$$

$$(4) \qquad Law_{st} = \beta_{Dem} Dem_{st} + \beta_{Rep} Rep_{st} + \gamma X_{st} + \lambda_{rt} + \eta_s + \varepsilon_{st}.$$

where the dependent variable, Law_{st}, is an indicator variable that equals one if state s passes the relevant law in year t. The main variables of interests are Democrat (Dem_{st}) and Republican (Rep_{st}). Each equals one when the party of the governor and the majority of each house is Democrat or Republican, as applicable. The regression model accounts for unobserved characteristics of states by including random state fixed effects (η_s).[66] For example, a state may be reluctant to adopt any laws that relate to corporate law because it has other priorities. We do not include any observable controls in the first specification in equation (1).

In equation (2), we include a range of indicator variables (also known as fixed effects). These include year indicators (μ_t) that account for unobserved trends across states that may cause states to adopt certain laws. For example, a merger wave may lead many states to adopt anti-takeover statutes in a given year, irrespective of the political affiliation of the state. We further control for regional indicators ($\mathrm{d_r}$).[67] This addresses the concern that the passage of the relevant law may be driven by unobserved regional characteristics rather than party affiliation. For example, a particular region may have a political leaning towards laws that deter market-oriented transactions, such as takeovers and external investments in local assets.

In equation (3), we include a variety of state-year controls (X_{st}). First, the main control we include is *Largest Local Firm*. This variable is the log of the number of employees of the firm with the largest number of employees which is headquartered in the state. Legislators of either political stripe might be more amenable to adopting statutes, primarily anti-takeover statutes, when convinced that they are necessary to save a large local employer, and where the management of the lobbying firm aligns with other local constituencies, such

[65] The results are robust to using other models, such as the probit and logit models.

[66] It is not possible to include state fixed effects in the regression because of the limited number of instances in which the dependent variable can equal one, and the limited time-variation in the data.

[67] We divide the U.S. into nine regions based on the Census region classification: New England, the Middle Atlantic, the South Atlantic, East South Central, West South Central, East North Central, West North Central, the Mountain region, and West Pacific.

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as unions and community groups.[68] Second, we control for *Lawyers* defined as the log of the number of lawyers in the state in a given year.[69] The rationale is that lawyers may constitute an interest group that lobbies for a particular set of laws on behalf of itself or its clients. They might want laws that encourage litigation, or alternatively, they could lobby for laws that protect the managers that retain these lawyers. There is evidence that the corporate bar is highly influential in lobbying states to adopt different corporate laws.[70]

In addition, we control for other state characteristics that could possibly affect the probability of adopting corporate laws: *Unions* defined as the percentage of (non-farmer) employees in the state that are members of a union; *Population*, defined the log of the number of people that reside in the state; *Unemployment Rate* and *Poverty Rate*, which are simply the unemployment and poverty rates in each state in a given year; and *Avg. Income*, which is the total personal income of people residing in the state in a given year divided by the state population in that year. Finally, in equation (4), we add on further controls for region-year fixed effects to control for various unobserved temporary shocks that may have affected specific regions, and could potentially affect the probability of adopting corporate laws.[71]

We emphasize that in running the regressions we only include in each sample state-year observations when there is a realistic likelihood that the relevant corporate law statute will be passed. A well-known aspect of state corporate law is that state corporate laws are virtually never repealed.[72] For example, when, say, a Poison Pill statute is passed, as a matter of fact, it is never repealed. Accordingly, we do not include observations of states that have already passed the relevant statutes. For example, if a state already adopted all the relevant anti-takeover statutes by 2000, we do not include the observations for that state after 2000. In addition, we only include state-year observations from the first year in which the relevant law was passed. For example, the regressions for hybrid legal forms include only observations from 2008 because the first statute was passed in 2008.

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[68] *See* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 121-122 (1987) (postulating that managers of large companies may create coalitions with organized labor and community groups in lobbying for antitakeover statutes, and that these coalitions are particularly effective in areas where the relocation of a single firm is likely to affect the local economy). As discussed *infra* Section II.D, there is plenty of anecdotal evidence that suggests that a key motivation for enacting an anti-takeover statute is to protect a large firm that employs many state residents.

[69] We use the number of lawyers rather than the percentage of lawyers in the state because the relevant variable is the size of the legal market. For example, even if the percentage of lawyers in the population is relatively high, lawyers would likely not have much of an impact on legislation if their number is small. In any case, in unreported regressions, we use the percentage of lawyers in each state as a control variable, and the results are qualitatively the same.

[70] See Jonathan R. Macey and Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y no. 2, 2005, at 212-231.

[71] Note that in this specification, there is no need to control for year and region fixed effects because they are all absorbed by the year-region fixed effects.

[72] One rare exception is the repeal of the Oklahoma law that required Oklahoma to adopt a staggered board. See Cleveland, *supra* note 52.

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C. Results

We first examine anti-takeover statutes. Table 2 shows the results for a specification where Law_{st} equals one if a state passed one of the antitakeover statutes described above in a given year.[73] The results show that when a state is subject to a Democratic government, it is 3.3%-4.7% more likely to pass an anti-takeover statute. The coefficient on Republican is not statistically significant in most specifications except in the first column, in which it is negative and statistically significant. Interestingly, the coefficient on Largest Local Firm is positive and in column 3, statistically significant. Based on column 3, one standard deviation in Largest Local Firm is associated with 1.1% higher probability of adopting one anti-takeover statute in a given year. Our main interest is to compare the coefficients on Democrat and Republican. We use the Wald statistic to do so. If the Wald statistic is large, then we can reject the null hypothesis that the coefficients are equal. The table also reports the p-values for the one-sided tests for the null hypothesis that the coefficient on Democrat is larger than Republican (and vice se versa). As shown in Table 2, it is not possible to reject the hypothesis that Democrat is larger than Republican at a statistically significant level. That is, there is less than a 5 percent probability that the coefficient on Republican is higher than Democrat. This suggests that anti-takeover laws are more likely under democratic control than under republican control.

In Table 3, we show the results for anti-litigation laws. In contrast to anti-takeover statutes, we do not find good predictors of these laws. Importantly, neither the coefficients on Democrat or Republican are statistically significant, nor are they statistically different from one another. In Table 4, we show the result for hybrid legal forms. Here we observe a positive and statistically significant coefficient on Democrat in column 1, and a statistically significant difference from the coefficient on Republican at the 1% level. The coefficient on Democrat however is not statistically significant in the specifications in other columns. Nonetheless, in columns 2 through 5, the difference between the coefficients on Democrat and Republican is statistically significant, and it is not possible to reject the null hypothesis that Democrat is larger than Republican at the 5 or 10 percent level (depending on the specification). These regressions suggest that the likelihood of adopting a hybrid legal form is about 6% higher under a democratic regime.

Finally, in Table 5, we look at individual statutes.[74] Interestingly, the association between Democrat and anti-takeover statutes is primarily derived from Constituency Statutes, and to some extent the Extreme statutes (presumably, the statutes that require firms to adopt staggered boards). Not surprisingly, the association between Hybrid Forms and Democrat is mainly driven by the adoption of benefit corporations as shown in column 11.

[73] Column 1 corresponds to the regression model in equation (1). Column 2 corresponds to the model in equation (2). Columns 3 and 4 correspond to equation (4), and column 5 corresponds to equation (4). The same applies to Tables 3 and 4.

[74] In this table, we show the specifications with year and region fixed effects and Largest Local Firm as control variables. The rationale is that when evaluating individual statutes, the variation in the data is very limited, so we only include the fixed effects and the only variable that appears to have an association with some statutes (i.e., Largest Local Firm). Moreover, it is questionable whether controls, such as population and union membership, should be included in the first place because they may affect the likelihood of Democratic or Republican control.

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Interestingly, although the results in Table 3 did not suggest any relationship between party control and anti-litigation laws, we observe that loyalty waivers and universal demand are 2.88 percent and 1.91 respectively more likely in Republican states than in Democrat states.

Overall, the results suggest that party-affiliation is associated with corporate law making. In particular, we observe that Democratic control is associated with anti-takeover legislation, particularly constituency statutes that permit managers to consider the interests of a broader set of stakeholders. This is also consistent with the finding that Democrats tend to pass laws that facilitate the adoption of hybrid forms. These forms are essentially firms with strong constituency statutes that require managers to pursue social goals.[75] Although we do not find that anti-litigation statutes are associated with Republican control, there is some evidence that a subset of them, specifically loyalty waivers and universal demand laws are more likely under Republican rather than Democratic control.

It is important to emphasize that the empirical analysis does not lend itself to strong claims about causal inference. The evidence is strictly correlational. However, the findings are consistent with anecdotal evidence that Democrats tend to oppose hostile takeovers and favor an idealistic notion of corporations that maximize social goals. Likewise, the idea that Republicans are less likely to trust judicial second-guessing of managerial discretion seems plausible. Moreover, no other variable, including unemployment rates or even union membership, seems to explain the passage of corporate laws. Thus, taken together, the results suggest that party affiliation does play a role in the corporate law-making of most states.

D. Qualitative Evidence

Because the results are largely suggestive, we also search for qualitative evidence from the passage of specific statutes. We look into corporate law statutes that attracted substantial attention in the media and legal scholarship, and we examine their legislative history. To the extent that the evidence from legislative debates and voting records is consistent with the empirical findings, it supports a claim that our results are not merely correlational, but may in fact suggest a causal relationship between political partisanship and certain types of corporate laws.[76] As we show below, the anecdotal evidence indeed supports the empirical findings, showing that Democrats tend to be more supportive of anti-takeover statutes and hybrid legal forms, and Republicans more open to anti-litigation laws.

Perhaps the most heavily debated statute that generated intense controversy and national interest was Delaware's business combination statute, which is Delaware's only anti-takeover statute to date.[77] The bill was designed to deter certain hostile takeovers, and was proposed in the late 1980s, when anxiety over the effects of corporate raiders like Ivan

[75] Note that our findings are consistent with Mark Roe's account of comparative corporate structure. He finds that left-leaning social democracies "induce managers to stray further than otherwise from their shareholders' profit-maximizing goals," and that "the modern means that align managers with diffuse stockholders in the United States [which include] hostile takeovers and strong shareholder-wealth maximization norms – have been weaker and sometimes denigrated" by those left-leaning social democracies. *See* Roe, *supra* note 11 at 2.
[76] To be sure, this evidence itself is imperfect; in many instances, legislative history of specific statutes is not available, or the relevant laws passed with minimal debate. Further, most legislators tend not to be experts in corporate law, and may not understand the nuances of the legislation they are asked to pass.
[77] Del. Code Ann. tit. 8, § 203.

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Boesky and T. Boone Pickens loomed large in public debate. The bill was authored by the Corporate Law Section of the Delaware Bar Association,[78] and was the subject of many hours of testimony from various stakeholders across the political spectrum. Many proponents of the bill maintained that it was a thoroughly bipartisan effort,[79] and the bill passed the Republican-controlled House and Democrat-controlled Senate with only a single opposing vote.[80] Nonetheless, partisan sentiment spilled over in the hearings, with more Republican voices opposing the bill, and more Democrat ones supporting it.[81] To take one example, a Senator questioning Joseph Grundfest, then a commissioner of the Securities and Exchange Commission and now a Stanford law professor, stated: "The Reagan years have been characterized by deregulation. We had the Ivan Boesky scandal where the problem was greed and greed being the American way. We have had the takeovers by 51% of well-run companies with money in the bank. Employees can be sacrificed, meaning salaries, benefits, protections for families. What's your reaction to that point of view?"[82] In response, Grundfest said: "Well as far as the Reagan administration is concerned, I'm commissioner at an independent agency, and I'm a democrat, but we operate in a competitive marketplace and unless we operate lean and mean, there aren't going to be jobs to save in this country. . . "[83] Thus, while support for the legislation was ultimately bipartisan, the discussion in the legislative hearings suggests that it was vigorously supported by democrats opposing the wave of hostile takeovers.

Another highly publicized piece of legislation was the 1990 Massachusetts law that mandated staggered boards for all firms incorporated in Massachusetts.[84] The law was the result of intense lobbying by Norton Company, which was defending against a hostile takeover by British company BTR.[85] Norton lobbied its mayor and all its legislative

[78] Joint Hearing Before the Judiciary Committee, HB 396 (Jan. 21, 1988) [Joint Hearing Judiciary Committee 1988_0121 – 4.mp3].

[79] *See, e.g., id.,* Statement of Bruce Stargate, past president of Delaware State Bar Association who assisted in drafting the bill [at 38:56] ("[This] is a bill that deserves bipartisan support from both sides of the aisle.")

[80] *See* Senate Roll Call for HB 396 (1988) [HS1 for HB 396_134th_Senate debate.mp3] (recording a voice vote of 19-1); House Roll Call for HB 396 [HS1 for HB 396_134th_House debate 2.mp3] (recording a voice vote of 39-0).

[81] *See, e.g.*, Statement of Nell Minnow, Director of Center for Corporate Governance at Cordozo Law School, Joint Hearing Before the Judiciary Committee, HB 396 (Jan. 20, 1988) [Joint Hearing Judiciary Committee 1988_0120 – 5 at 2:06] ("The circulation of this draft was enough to cause that bastion of free market conservatism, the Wall Street Journal, to call for federal preemption."); Statement of John Robins, Delaware State Capital Council, Joint Hearing Before the Judiciary Committee, HB 396 (Jan. 21, 1988) [Joint Hearing Judiciary Committee 1988_0121 – 2.mp3 at 35:45] ("There are not many times when management and unions agree, but this is one of those rare and important occasions. . . . I can tell you that the little guy, the average worker, supports this legislation.")

[82] Statement of unidentified Senator questioning Joseph Grundfest, Securities and Exchange Commission, Joint Hearing Before the Judiciary Committee, HB 396 (Jan. 20, 1988) [Joint Hearing Judiciary Committee 1988_0120 – 2 at 55:10].

[83] Id.

[84] MASS. GEN. LAWS ANN. ch. 156B, § 50A, ch. 156D, § 8.06(b)–(g) (2005 & Supp. 2011).

[85] Joan Vennochi and Elsa C. Arnett, *Antitakeover bill on Dukakis' desk; BTR undaunted by Legislature's speedy OK*, BOSTON GLOBE, Apr. 19, 1990.

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representatives to create House Bill 5666.[86] The bill was pushed forward by Worcester Democratic Representative Kevin O'Sullivan and the Democratic Governor Michael Dukakis. Although the bill allowed companies to opt out of the staggered board requirement, doing so required a vote of the board, or a vote of two thirds of the shareholders which could not take place until 1992.[87] BTR's offer forced a tight deadline,[88] and within hours of committee approval, the bill had passed both Democratically-controlled (though minimally staffed)[89] houses and was signed by the Democrat governor, Michael Dukakis.[90] Thus, while the BTR's offer no doubt was the initial inspiration for the law, decisive action by Democrats facilitated its passing.

Similar evidence comes from the passage of corporate legislation in Oklahoma and Iowa. In Oklahoma, the board of Chesapeake, one of Oklahoma's largest companies, was facing pressure to de-stagger and a potential hostile takeover from Carl Icahn.[91] In order to pass the bill quickly, the brief language mandating staggered boards was written by Chesapeake itself and added to an already in-progress, 115-page bill reforming partnership law.[92] The staggered board requirement passed both houses of the legislature with virtually no discussion by legislators, and only three votes against,[93] all by Republicans.[94] A similar bill in Iowa was passed to protect a local company, Casey's, that spent six months and vast resources fighting off what its management thought was an "inadequate and opportunistic" takeover offer.[95] The bill swiftly passed the Democrat-controlled Senate and the Republican-controlled House;[96] all votes in opposition were Republican.[97] Although these statutes passed without full Democratic legislative control, the fact that only Republicans opposed them suggests again that partisan stances could affect the probability of passing these anti-takeover statutes.

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[86] Elsa C. Arnett, *Hearing set for today on Norton issue; Ownership of Worcester firm subject of antitakeover bill*, BOSTON GLOBE, Apr. 9, 1990.
[87] *Norton Bill*, STATE HOUSE NEWS SERVICE, Apr. 17, 1990.
[88] Joan Vennochi, *Antitakeover bill faces tight deadline*, BOSTON GLOBE, Apr. 13, 1990.
[89] *Id.* (noting that there were only 10 members present in the House when bill passed, and no more than 12 in the Senate).
[90] *Id.*
[91] Cleveland, *supra* note 52.
[92] *Id.* at 233-34
[93] Oklahoma House Journal, 2010 Reg. Sess. No. 69 (voting on Senate Bill 1132); Oklahoma Senate Journal, 2010 Reg. Sess. No. 66 (voting on Senate Bill 1132)
[94] http://www.oksenate.gov/Senators/Default.aspx?selectedtab=0. Interestingly, the Oklahoma law was repealed a few years later in what seems to be the only instance where a state repealed an anti-takeover statute. This repeal passed both Republican-controlled houses in the legislature, but this time, every opposing vote was a Democrat. Oklahoma State Senate Vote on House bill 1646 (Feb. 26, 2013) (passing the Senate unanimously); Oklahoma House of Representatives Vote on Bill 1646 House (Feb. 12, 2013) (passing the House 70-24).
[95] Matthew G. Dore, *The Iowa Business Corporation Act's Staggered Board Requirement for Public Corporations: A Hostile Takeover of Iowa Corporate Law?*, 60 DRAKE LAW REVIEW DISCOURSE 1, 4-8 (2012).
[96] Senate Journal, Mar. 7, 2011, https://www.legis.iowa.gov/docs/publications/SJNL/20110307_SJNL.pdf#page=7 (passing Senate 40-10); House Journal, Mar. 21, 2011, https://www.legis.iowa.gov/docs/publications/HJNL/20110321_HJNL.pdf#page=9 (passing House 96-2).
[97] https://www.legis.iowa.gov/legislators/informationOnLegislators/allLegislators.

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There are fewer accounts discussing anti-litigation laws. But one that stands out concerns Nevada's policy decision, in 2001, to protect officers and directors from personal liability for breaches of the duty of loyalty by default.[98] Although the bill, Senate Bill 577, ultimately passed both legislative houses with strong bipartisan support, it appears to have been the result of a series of political compromises. The bill was introduced by Republican Senator Mark James and backed by Republican governor, Kenny Guinn,[99] and was intended to entice companies to Nevada in exchange for higher franchise fees.[100] Proponents claimed that the liability protections would effectively lure corporations to Nevada because "[d]irectors are the ones who decide where to incorporate."[101] The higher fees, in turn, were committed to educational spending to help remedy the deplorable condition of Nevada's public schools.[102] The bill passed the Republican-controlled Senate[103] with only one (Democratic) vote in opposition,[104] but several Democratic senators expressed serious reservations about the liability protections, and stated that they were only voting for the bill in order to procure the educational funding, which they were assured would not otherwise materialize.[105] In the Democrat-controlled Assembly,[106] several representatives queried whether the liability protections were actually necessary to increase revenue,[107] and ultimately revised the bill to strike the liability protections.[108] The Senate refused to concur with the revisions.[109] The bill was ultimately referred to a conference committee, from which it emerged with the liability protections intact.[110]

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[98] Nev. Rev. Stat. Ann. § 78.138(7). Note that Nevada allowed firms to exempt directors and officers from the duty of loyalty as early as 1987, but the law required a provision in the articles of incorporations to give effect to such an exemption. See Barzuza, *supra* note 55; Eldar, *supra* note 55.

[99] *See* Minutes for Hearings before S. Jud. Comm. On SB 577, May 22 and 24, 2001, https://www.leg.state.nv.us/Session/71st2001/Minutes/Senate/JUD/Final/1464.html, https://www.leg.state.nv.us/Session/71st2001/Minutes/Senate/JUD/Final/1498.html.

[100] Minutes for Hearings before S. Jud. Comm. On SB 577, May 22, https://www.leg.state.nv.us/Session/71st2001/Minutes/Senate/JUD/Final/1464.html.

[101] *Id.*

[102] Minutes for Hearings before S. Jud. Comm. On SB 577, May 24, 2001, https://www.leg.state.nv.us/Session/71st2001/Minutes/Senate/JUD/Final/1498.html.

[103] https://ballotpedia.org/Nevada_State_Legislature.

[104] Hearing before Senate, May 26, 2001, https://www.leg.state.nv.us/Session/71st2001/Journal/Senate/Final/sj111.html.

[105] *See id.*, Statement of Senator Terry Care ("It is unfortunate [that these provisions] will protect our children, their welfare, their future, but at the same time, protect some corporate crooks."); Statement of Senator Dina Titus ("I have been threatened, and I do not use that term lightly, that if Senate Bill No. 577 does not pass in this exact form, the so-called education funding package deal falls apart, and there will be no money to pay for the critical needs of our schools and no money for teacher raises. I cannot let that happen.").

[106] https://ballotpedia.org/Nevada_State_Legislature.

[107] *See* Statement of Chairman Bernie Anderson, *id.*, ("[T]he question was . . . whether public policy should be put at risk to fund education.").

[108] *See* Hearing before General Assembly, SB 577, June 3, 2001, https://www.leg.state.nv.us/Session/71st2001/Journal/Assembly/Final/aj119.html.

[109] Hearing before Senate, SB 577, June 3, 2001, https://www.leg.state.nv.us/Session/71st2001/Journal/Senate/Final/sj119.html.

[110] SB 577 Bill History, https://www.leg.state.nv.us/Session/71st2001/Journal/Senate/Final/sj119.html. The final Assembly vote was unanimous. *Id.*

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Again, this account is broadly consistent with the finding that Republicans are more amenable to exempting managers from liability. While there was bipartisan support for the final outcome, presumably in an effort to find funding for Nevada's schools, the main proponents of the law were Republicans, and it is clear from the legislative records that many Democrats were not enthusiastic about the law.

Finally, it appears that the recent trend of states adopting hybrid legal forms, such as the benefit corporation, appears in many instances, to have been generated by Democrats. For instance, California attempted to create such a form in 2008, and though it passed both Democrat-controlled legislative houses,[111] it was vetoed by Republican Governor Schwarzenegger. [112] Three years later, under Democratic Governor Jerry Brown, California created both the benefit corporation and the flexible purpose corporation.[113] Virtually all opposing votes were Republican.[114] Other states significant for their share of out-of-state incorporations – Delaware and Nevada – also have benefit corporation statutes that were sponsored almost entirely by Democrats,[115] and passed with little opposition in Democrat-controlled legislatures.[116] Even among less prominent states for corporate law, the great

[111] Assembly Floor Unofficial ballot, AB 2944 (Aug. 31, 2008), http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vote_20080831_0431PM_asm_floor.html; Senate Floor Unofficial Ballot, AB 2944 (Aug. 29, 2008), http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vote_20080829_0441PM_sen_floor.html; https://ballotpedia.org/Party_control_of_California_state_government.

[112] Veto Message, AB 2944 (Sept. 30, 2008), http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vt_20080930.html.

[113] Assembly Bill 361 (2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_bill_20111009_history.html; Senate Bill 201 (2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_bill_20111009_history.html.

[114] See Assembly Floor Vote, AB 361 http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_vote_20110829_0236PM_asm_floor.html; Assembly Judiciary and Appropriations Committee Votes, AB 361, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_cfa_20110525_163718_asm_floor.html; Senate Floor Vote, AB 361, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_vote_20110822_0134PM_sen_floor.html (showing a single democratic vote against); Senate Banking and Judiciary Committees, AB 361, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_vote_20110822_0134PM_sen_floor.html; Assembly Floor Vote, SB 201, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_vote_20110830_1003AM_asm_floor.html; Assembly Appropriations and Judicial Committees, SB 201, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_vote_20110713_000001_asm_comm.html; Senate Floor Vote, SB 201, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_vote_20110901_1146AM_sen_floor.html; Senate Appropriations, Judiciary and Banking Committees, SB 201, http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_vote_20110526_000002_sen_comm.html.

[115] *See* Delaware SB 47 (2013), http://legis.delaware.gov/BillDetail?legislationId=22350 (primary sponsors are Senator David Sokola (D) and Rep. Byron Short (D)); Nevada AB 89 (2013), https://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=259 (sponsored by a group of legislators consisting of 21 Democrats and four Republicans).

[116] *See* Senate Journal (May 20, 2013), Nevada AB 89, https://www.leg.state.nv.us/Session/77th2013/Journal/Senate/Final/SJ106.pdf (passed Nevada Senate unanimously); Assembly Journal (March 13, 2013), Nevada AB 89,

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majority of benefit corporation statutes in the 36 states that have passed them have been sponsored by Democrats, or groups of legislators dominated by Democrats.[117]

In sum, the circumstances giving rise to changes in corporate law are widely varied and difficult to predict, and different measures may pass regardless of whether legislators are Democrats or Republicans. Nonetheless, both the regression analysis and the qualitative evidence from voting records and legislative debates suggest that that legislators' political affiliations do inform the adoption of specific laws.

III. NONPARTISANSHIP AND THE RISE OF DELAWARE

Our evidence suggests that state corporate law can be fraught with partisan politics, and that partisanship can affect the substance of states' corporate statutes. But strikingly, the leader in the market for incorporations takes a nonpartisan approach to corporate law. This is important because Delaware essentially produces the corporate law and adjudication governing the substantial majority of large U.S. firms. In this section, we document the rise of Delaware as the most popular state for incorporations in the late nineteenth century, and explain the role nonpartisanship played in its ascent. Although our focus is on Delaware, it is useful to start the discussion by examining the rise and decline of Delaware's predecessor, New Jersey. Specifically, we argue that New Jersey lost its leadership in the market for corporate law because it could no longer credibly commit to insulate corporate law-making from partisan politics. In capitalizing on the opportunity to commit to nonpartisanship, Delaware was able to exploit an opportunity to increase its market share for incorporations, and ultimately overtake New Jersey.

A. New Jersey's Rise and Fall

New Jersey inaugurated the market for corporate control, or "chartermongering" as it is sometimes called, in the late decades of the Nineteenth Century.[118] Facing significant state budgetary issues, political and legal entrepreneurs struck upon a novel plan to generate revenue: attract corporations to domicile in the state by routinizing the incorporation process and liberalizing the law with the aim of increasing franchise fees and incorporation taxes.[119] The plan, whose details we discuss below, was a major success. By the 1900s, franchise

https://www.leg.state.nv.us/Session/77th2013/Journal/Senate/Final/SJ106.pdf (passed Nevada Assembly unanimously); Delaware General Assembly, Senate Bill 47 Bill Detail, http://legis.delaware.gov/BillDetail?legislationId=22350 (SB 47 passed the Delaware Senate and House with a single opposing vote).

[117] Information on sponsors was taken from the Benefit Corporation website, Benefit Corporation, State-by-State Status of Legislation, https://benefitcorp.net/policymakers/state-by-state-status?state=0, and sponsors' party affiliation identified using manual searches. States where benefit corporation legislation has been sponsored by Republicans are Arizona, Idaho, Indiana, Kansas, Kentucky, Pennsylvania, Texas, Utah and Wisconsin.

[118] Chartermongering, as the historian Christopher Grandy put it, is the "active solicitation of corporation charters for the purpose of bolstering state revenues," and it was invented by New Jersey near the end of the nineteenth century. Grandy, *supra* note 20, at 677.

[119] *Id*. at 681.

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taxes and charter fees had gone from a trivial part of state revenue to 60% of state fund receipts, and New Jersey's state budget was flush with wealth.[120]

The success of New Jersey's plan and its dominance in attracting incorporations appears to date from several developments. First, in the late 1880s, amid growing antitrust sentiment across the country, New Jersey amended its corporate code to allow corporations to own stock in other corporations, allowing large trusts to incorporate and operate as holding companies.[121] Second, beyond the (in)famous trust provisions, New Jersey adopted an enabling corporation law in 1896 that granted businesses wide freedom of design, including allowing corporations to be formed for any purpose and providing managers and shareholders great freedom in structuring their own transactions.[122] Third, New Jersey took a deliberate and aggressive approach to marketing itself as a desirable state of incorporation.[123] Finally, New Jersey judges were appointed by the Governor and ratified by the legislature, rather than popularly elected or appointed solely by the executive.[124] Moreover, since the 1850s, judges were appointed, by custom, on a bipartisan basis, a policy which was designed to achieve nonpartisanship in adjudication.[125]

Better known than its rise as a locus of incorporations, however, is New Jersey's fall through the early twentieth century.[126] It is not entirely clear when New Jersey's demise began,[127] though it is clear that after the passage the Seven Sister laws in 1913, it largely lost its appeal as a destination for incorporating.[128] These laws essentially repealed New Jersey's liberal corporate laws by prohibiting features that made merger waves feasible, including

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[120] *Id*. at 683.

[121] Yablon, *supra* note 20, at 326-27.

[122] *Id.* at 349-350. Note though that New Jersey did retain some mandatory provisions protective of creditors and shareholders in order not to "scare off potential investors." *Id.* at 352.

[123] For instance, in 1892, the Corporation Trust Company of New Jersey ("Trust Company") was formed to advertise the state's laws to businesses both in and out-of-state. *Id*. at 347. The Trust Company had the support of a network of powerful players in New Jersey politics and included the Governor, Secretary of State, the Clerk of the Chancery Court, and the State Attorney General as directors. The Trust Company thus underlined the reliability of New Jersey law, and the responsiveness of New Jersey politicians to the needs of businesses. Substantively, the Trust Company provided low cost incorporation services to out-of-state businesses. New Jersey also published a very clear and comprehensive treatise, complete with forms, on its corporate law to help entice businesses. *Id*. at 347-353.

[124] John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583, 595-96 (2010) (noting that although local New Jersey judges were briefly elected, state and county judges have always been appointed subject to ratification).

[125] ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 32-33 (1955) ("Paradoxical as it may sound, a bipartisan judiciary is the only way in this country to achieve a nonpartisan judiciary, and who would deny that all justice should be nonpartisan?").

[126] See Harold W. Stoke, *Economic Influences Upon the Corporation Laws of New Jersey*, 38 J. POL. ECON. 551, 575-76 (1930); Grandy, *supra* note 20, at 687; Sarath Sanga, *On the Origins of the Market for Corporate Law* (December 13, 2019).

[127] Sanga, *id*., claims that New Jersey's share of incorporations started declining as early as 1903. However, Sanga's account does not provide details on firms' market capitalizations, and some accounts suggest that the largest firms continued to be incorporated in New Jersey after 1903. As of 1904, half of Moody's 318 "industrial trusts," including the seven largest ones were incorporated in New Jersey. John Moody, The Truth About Trusts (New York, 1904), pp. 453-69.

[128] Stoke, *supra* note 126; Grandy, *supra* note 20.

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limiting the extent to which corporations could hold stocks in other firms, placing restrictions on the issuances of stocks, and imposing liability on directors and officers for violations of these laws.[129]

The Seven Sister laws emerged from state and national political shifts, particularly the rise of an aggressive antitrust movement in New Jersey. Antitrust was a key component of the New Jersey Democrats' political platform as early as 1901.[130] This form of partisan opposition to New Jersey policy continued to mount through the first decade of the twentieth century, with leading commentators calling New Jersey the "Traitor State,"[131] and local politicians increasingly espousing reform proposals to tax and regulate corporations.[132] This sentiment was so strong that by 1907, candidates of both parties pledged to impose restrictions on corporations.[133] Thus, when the Democrat elected governor, Woodrow Wilson, was elected in 1910, some reversal of New Jersey policy may have been a foregone conclusion. This political sentiment likely triggered New Jersey's demise even before it was enshrined in actual legislation.

Relatedly, various demographic changes made New Jersey less dependent on its ability to attract incorporations. New Jersey's population grew rapidly from 1.4 to nearly 1.9 million in the 1890s (this is 27 times the growth of Delaware's population in the same period, which increased from roughly 168,000 to 185,000).[134] New Jersey was also the only state to more than double its population between 1890 and 1920 that lay east of the Mississippi.[135] The growing population coincided with greater industrial development, and engagement in massive infrastructure construction projects that ultimately could not be provided for by franchise taxes.[136] This expansion likely loosened the corporate hold on New Jersey's political system because (1) the state had to account for the interests of its expanding and increasingly diverse population, and (2) was no longer solely dependent on incorporation fees and franchise taxes. In fact, multiple authors have pointed to this expansion[137] in support of Roberta Romano's thesis that smaller states can more credibly commit to responsiveness to corporate interests.[138]

That New Jersey had lost its dominance in attracting incorporations at least in part because of these political energies would have been clear at the time. It thus appears to be no accident that Delaware took deliberate steps to restrict the influence of political partisanship on the creation of its corporate law. But before discussing Delaware, it is worth asking why other states that seemingly competed for incorporations were less successful

[129] Grandy, *id.*, at 689; Stoke, *id*., at 578.
[130] Grandy, *id.*, at 688; Stoke, *id.*, at 577.
[131] Lincoln Steffens, *New Jersey: A Traitor State*, McClure's Magazine, 25 (May 1905)
[132] Grandy, *supra* note 20, at 686-687.
[133] Stoke, *supra* note 126, at 577.
[134] Census, Historical Populations, Table 45. New Jersey - Race and Hispanic Origin: 1790 to 1990, http://www.census.gov/population/www/documentation/twps0056/tabs15-65.pdf.
[135] Grandy, *supra* note 20, at 689.
[136] Yablon, *supra* note 20, at 375-76, Grandy, *supra* note 20, at 689-90.
[137] *Id.*
[138] Roberta Romano, *supra* note 38, at 231.

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than Delaware. Several states, including Maine, Maryland, and New York apparently competed with New Jersey for incorporations by copying its corporate laws.[139]

So why didn't one of these states become an important player in the market for corporate law? At least in part, the answer seems to be that such states fell short of making a strict commitment to nonpartisanship and responsiveness to corporate interests. In the 1880s, Maine's volume of incorporations was similar to New Jersey's,[140] but an 1890 decision by Maine's Supreme Court holding that shareholders could be personally liable for certain corporate infractions caused investors to balk, on the basis that incorporation in Maine was too "dangerous."[141] Maine changed its statute to mimic New Jersey's and overruled the decision in 1901, but it remained a "second-rank" chartering state.[142] New York, though a hub for big businesses, was viewed as "mercurial" and less politically reliable than New Jersey.[143] It changed its corporate code in 1901 to better retain in-state businesses, and appears to have been quite successful in this arena, becoming third in attracting incorporations that year behind New Jersey and Delaware.[144] West Virginia amended its corporate code in 1901 to offer the "loosest, most liberal law of any state in the union," hoping to attract incorporations. This strategy failed, exacerbating an already-existing reputation for "attracting fakers and swindlers" which scared off legitimate businesses.[145] South Dakota also competed for incorporations by offering extremely low franchise fees and no annual franchise tax,[146] but the state quickly developed a reputation for businesses involved in "shady schemes."[147] Washington D.C. employed a similar strategy with similar results.[148]

Notably, none of these jurisdictions mimicked the desirable features of New Jersey's courts as thoroughly as Delaware did. The judges in New York, South Dakota, and West Virginia were popularly elected, likely making them more politically malleable to different constituencies and more susceptible to the vote-buying and gerrymandering practices that were rampant throughout the country in the 1890s.[149] Maine's judges were appointed by the governor and confirmed by a council of legislators, similar to New Jersey's.[150] However, the

[139] Grandy, *supra* note 20, at 685; Stoke, *supra* note 126, at 575-576. It is not clear however, the extent to which this strategy was successful in attracting firm incorporations. Although based on Sanga, *supra* note 126, New York's share of incorporations increased around that time, copying New Jersey's laws does not appear to have been a successful strategy for other states, such as West Virginia.
[140] *Id.* at 361, n. 226.
[141] *Id.* at 361-62.
[142] *Id.*
[143] *Id.* at 363-364.
[144] *Id.* at 364, n. 250.
[145] *Id.* at 365.
[146] *Id.* at 366. All of the jurisdictions setting out to compete with New Jersey deliberately competed with New Jersey on price, but South Dakota appears to be the most extreme example.
[147] *Id.*
[148] *Id.* at n. 266.
[149] *See, e.g.*, Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age*, 100 POL. SCI. QUARTERLY 669 (1985-86).
[150] THOMAS NELSON, NELSON'S ENCYCLOPAEDIA: EVERYBODY'S BOOK OF REFERENCE, 537 (1907).

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1890 decision on personal liability appeared to create a lasting impression that the judiciary was not reliable, and Maine did not require a bipartisan judiciary.

B. Delaware's Rise

As noted, in the late 1890s, Delaware copied every one of the features of New Jersey's original approach to corporate law. In 1897, it adopted a new constitution that removed the historical requirement that corporations obtain a charter from the legislature, and directed the legislature to pass a new, liberalized corporate code.[151] The resulting code, passed in 1899, was virtually identical to New Jersey's.[152] Corporation trust companies, similar to New Jersey's, worked closely with state government officials to market the new code to businesses, and a treatise, modeled on the New Jersey treatise, was written in the same year that the new code was passed.[153] Moreover, in 1900, the Delaware Court of Chancery issued a decision committing to interpret issues under its new code in line with New Jersey precedent in order to assure new corporations that the law would be reliable, and not subject to any dramatic changes.[154]

In 1897, even as New Jersey began its decline as the leading site of incorporations, Delaware went through a major process of constitutional revision.[155] This revision, only the third in its history, had as a centerpiece certain provisions regarding corporate law.[156] The power of the legislature to create individual corporations was removed, and a general corporation law adopted.[157] Article IX requires that any corporate law enjoy support of at least two-thirds of the legislators elected to each house before it can be enacted.[158]

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[151] *The Delaware Constitution of 1897: The First 100 Years*, ed. Harvey Bernard Rubenstein, 157 (1997).

[152] Yablon, *supra* note 20, at 359-360. The Delaware code was more promoter-friendly than New Jersey's in that it did not require shareholder meetings or original books to be held in Delaware, and incorporation fees and franchise taxes were 75% and 50% respectively of those in New Jersey. *Id.* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 J. CORP. L. 249 (1976).

[153] *Id.*

[154] *Id.* at 361. Wilmington City Railway v. People's Railway, 38 Del. Ch. 1, 21 (1900) (articulating "the presumption that the legislature, in adopting this language of the New Jersey act, had in mind the construction given to the adopted language by the New Jersey courts, and intended to incorporate it into the statute"). The motivation of Delaware was noted by the press at the time. "It is not surprising that Delaware should become envious of the increasing stream of gold that is pouring into New Jersey's treasury and take over bodily the latter's corporation act-except that where New Jersey's tax is one-tenth of one percent of all stock outstanding up to three million, Delaware's tax is one-twentieth of one per cent up to five million." McReynolds, WORLD'S WORK, September, 1904, p. 2528, quoted in Stoke, *supra* note 126, at 576. See also RUSSELL CARPENTER LARCOM, THE DELAWARE CORPORATION 14-15 (1937).

[155] Delaware's original constitution was adopted in 1776. Its first major revision was in 1792, its second in 1831, and its third in 1897. PAUL DOLAN, THE CONSTITUTION OF DELAWARE 75 (1954).

[156] Dolan, *id*., at 75.

[157] Dolan, *id*., at 79-80.

[158] Delaware Constitution Article IX Corporations, Section 1 ("No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly."). Dolan, *id*., at 81. Delaware Constitution Article IX Corporations, Section 1 ("No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law").

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Perhaps even more importantly, Article IV, Section 3 of the Constitution created a partisan balance requirement for the Delaware judiciary. Previously, Delaware judges had been appointed by the governor without ratification by the legislature, with the result that the judiciary had been captured by the dominant political party – the Democrats – for the 20 years prior to the 1897 constitution.[159] The new constitution added a requirement that the Superior and Supreme Courts be bipartisan, with no more than a bare majority of judges (where panels were composed of odd numbers) of either main political party.[160]

The Framers of the Delaware Constitution were keenly aware of the dynamics of chartermongering during the debates leading up to the adoption of the Constitution of 1897. In one of the most interesting exchanges, William Saulsbury declared, "I think we cannot be too careful in inserting in this Constitution any provision which might tend to restrict or embarrass the corporations acting under the laws of this State," and that "I believe, under our general law, in encouraging corporations to take out charters under the laws of our State, rather than to make that difficult or impossible."[161]

Saulsbury specifically praised New Jersey:

> The wisdom of this liberality of the laws toward corporations is shown most strongly in this New Jersey case. I imagine there is no state in the Union that has laws more favorable to corporations than the State of New Jersey—not only corporations which do business in the State of New Jersey go to Trenton for charters, but corporations all over the country are operating under New Jersey charters . . . and they do this simply because they can get more favorable terms there than elsewhere. The direct result of this liberal policy of that State has been an increase in the revenues of the State derived from corporations taxes and franchise fees from $75,000 in 1875, to $957,000 in 1896.[162]

Saulsbury was then challenged as to "what good an outside corporation does New Jersey"?[163] Saulsbury replied, "[T]he money it puts into the Treasury. That amount would be enough to run our State Government, schools and everything else. . . . It simply shows the result of a liberal policy in one state, as against a narrow, restrictive and hampering policy in some other state."[164] He then summed up his enthusiasm for Delaware's entrance into the chartermongering business:

> [I]f corporations can be induced to come to our State to take out their charters and pay their money into our State Treasury and relieve our people from taxation, instead of going to New Jersey to get their charters,—I would like to have them come here,

[159] *See* debates and the *The Constitution of 1897*, *supra* note 9.
[160] *The Constitution of 1897*, *supra* note 151. Note that the Court of Chancery was initially exempt from the bipartisanship requirement because only a single Chancellor presided. However, appeals of chancery court decisions went to the Supreme Court, which was subject to the requirement. Moreover, in the 1940s when the law was modified to allow for the appointment of vice-chancellors, they too were subject to the bipartisanship requirement. Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 133 (2002).
[161] Constitutional Proceedings at 2135.
[162] *Id*. at 2136.
[163] *Id*.
[164] *Id*.

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> and have some of this million dollars a year flowing into our State Treasury to run our schools and State Government, thus relieving our people from excessive taxation.[165]

Similar concerns were echoed. One Framer objected to a proposed amendment noting, "I believe that provision would prevent the organization of corporations under the laws of our State, and if they wanted to do business here they would go to New Jersey or somewhere else where they could get charters without these restrictions."[166]

It is also clear that many of the Framers wished to adopt a general corporation statute precisely in order to eliminate the partisan lobbying routinely attendant to the special incorporation process, which had begun to occupy a major part of the Delaware legislature's attention.[167] As a member of the Committee on Corporations noted, the "main object" of the Committee was establishing "in this Constitution provisions which should enable us to obtain charters without the necessity of going before the Legislature, and, perhaps, in some cases, securing the assistance and entering upon all those questionable methods of obtaining legislation."[168] Or as one member of the Committee sharply put it, "It was our intention to make it so that bodies could not be incorporated, except under a general corporation law. . . . It will certainly prevent one very great abuse and a very great evil; and that is the lobbying of wild-cat schemes and corporations through the Legislature."[169] Many of the advocates of the Committee's proposed amendments echoed concerns of the Committee about the demands on the legislature as well,[170] including one Framer who noted that "more time of

[165] *Id*. at 2139. ("If we undertake to go too far, there is danger of driving capital out. Capital goes where it can invest under the most advantageous terms. Capitalists are not so philanthropic as to invest for the benefit of communities, unless they can realize some benefit therefrom. *If we can be liberal and protect our citizens to the same extent as they do in New Jersey and make it so that people can come here and get acts of incorporation and pay for the privilege, through and by which we can replenish our treasury, I do not know but it is a very good thing to take some little risk*; for I think we are going to need some source to draw from.") (emphasis added).

[166] *Id*. at 2141.

[167] *See, e.g.*, Constitutional Proceedings at 2033 ("People come here with corporation bills, there are large lobbies employed on both sides of the question, and any amount of time is consumed."); *id*. at 2101 ("[W]e can rely upon the Legislature to frame a proper and wise general corporation law that will protect the interests of the people of this State and at the same time protect corporate interests; . . . [along with preventing] the corrupting influences brought to bear upon our Legislature and all that sort of thing, and the great expenditure of the public money, for no good purpose, consuming the time of the General Assembly.").

[168] *Id*. at 843.

[169] *Id*. at 2100.

[170] *Id*. at 856 ("You cannot get a charter . . . under the present Constitution, from anybody or from any place except from the Legislature . . . . It has, therefore, cost an immense increase in the time of this Legislature in the granting of these charters which ought to have been issued by some properly authorized body . . . . It has cost months of time and thousands and thousands of dollars under the present method, and it has wasted the time of the Legislative body to a very great extent in performing this duty. . . . You want a corporate act; you want a charter; you have got to wait two years for that charter.").

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the Legislature probably is taken with" the process of granting special incorporations "that than any other subject that is presented to it."[171]

Corporate law, strangely enough, was close to the constitutional designer's hearts. Indeed, one Framer reflected on the constitutional proceedings, "there has been quite an express determination here, as regards corporations, to protect them."[172] One newspaper of the time similarly reflected an awareness of this. It discussed the fact that special incorporation would be replaced with a general corporate law that would require "much time and study on the part of the [legislators] . . . , but if modelled after the laws of some of the other states it will be a great source of revenue to the state."[173]

In the century since, Delaware has added other bipartisan features to its approach to corporate law. Any amendment to the Delaware's corporate statute is formulated and proposed by the governing body of the Corporation Law Section of the Delaware State Bar Association (the "Council"), a long-standing custom in the Delaware General Assembly.[174] The council is comprised of practitioners and expert corporate lawyers from renowned law firms, with a focus ranging from litigation to transactional counseling to shareholder plaintiffs.[175] Currently, there are 26 members in the Council.[176] Corporate law professor and long-time member of the Council Larry Hamermesh notes that "[a] number of informal traditions guide the selection of nominees to the Council.[177] This process "insulates the Delaware corporate law from the vagaries of the routine political process and ensures its continuing vitality and consistency."[178] The State of Delaware's website goes so far as to state: "Partisan divides are unheard of, because both political parties understand that trillions of dollars are invested in these corporations and respect the importance of ensuring that managers and investors can rely on a statute with real integrity, efficiency, and reliability."[179]

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[171] *Id*. at 2033. *Id*. at 2034 ("[If] the Legislature is also relieved of all that work, it seems to me that it would be almost impossible for the Legislature to string out its sessions over very many days. EDWARD G. BRADFORD: It takes away two-thirds of the business.").

[172] Constitutional Proceedings, *Vol. 5*, at 3328.

[173] *Changes in the Laws*, THE MORNING NEWS (WILMINGTON DELAWARE), July 20, 1897.

[174] Hamermesh, *supra* note 18, at, 1755; Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not*, UNIV. DELAWARE – JOHN L. WEINBERG CTR. CORP. GOVERNANCE 15 (Mar. 15, 2017).

[175] Hamermesh, *id*., at 1755–56.

[176] DELAWARE STATE BAR ASSOCIATION, About the Section of Corporation Law, https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/ (last visited Nov. 1, 2019).

[177] Hamermesh, *id.*, at 1756. For the complete and up-to-date by-laws of the Corporate Law Section, follow http://media.dsba.org/sections/Corporation/CorpLawSectionByLaws2017.pdf.

[178] Elson, *supra* note 174.

[179] Delaware.gov, *About Delaware's General Corporation La*w, https://corplaw.delaware.gov/delawares-general-corporation-law/. *See also* Stephen Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 138 (2018) (arguing that Delaware judges also act to preserve Delaware's dominance).

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IV. WHY DOES A NONPARTISAN JURISDICTION WIN?

The historical evidence from early days of the market for corporate law demonstrates the chilling effect that partisan politics has on the interests of investors. Clearly, the antitrust movement was detrimental to the interests of business owners, because it constrained their ability to enter into privately value-maximizing transactions. But even in modern times, our empirical analysis shows that partisan politics is rarely driven by investors' interests. As we show in Section II, party control of the legislature is related to outcomes in corporate law-making that generally widen managerial discretion. Although the form of such managerialist laws appears to differ based on whether the control is in the hands of Democrats or Republicans,[180] both forms of partisan influence lead to a similar outcome in terms of the allocation of corporate authority between shareholders and management – to greater managerial discretion and a lower likelihood of questioning corporate decision-making through shareholder lawsuits.[181]

Why would partisanship work to potentially curtail shareholders' rights and increase managers' powers? We suggest that the reason for this is that the "shareholder franchise" is not likely to be vigorously represented by any specific political party. There are several reasons for this. First, shareholders as a class are a highly diverse group. They range from unsophisticated retail investors, who still directly hold a nontrivial percentage of equity in corporations,[182] to various diversified index funds that hold a substantial and increasing share of ownership in a vast cross-section of public companies,[183] to a variety of other intermediaries, including hedge fund activists,[184] actively managed mutual funds, and more. Shareholders thus encompass a vast heterogeneity of styles, holding horizons, and portfolios. Thus, their interests and corporate governance philosophies can differ substantially, with some favoring companies pursuing short-term interests, and others preferring long-term corporate value propositions and sustainability objectives.[185] These shareholders do not and

[180] As shown in Section II, Democratic control is associated with anti-takeover and pro-stakeholder statutes, while Republican controlled legislatures seem to favor certain statutes that restrict the litigation liability of corporate managers.

[181] Of course, it may be the case that that laws that increase managerial discretion indirectly benefit shareholder value. We do not address this issue in this paper.

[182] Jonathan B. Berk & Jules H. van Binsbergen, *The Economics of Intermediaries, in* SECURITIES MARKET ISSUES FOR THE 21ST CENTURY (Merritt B. Fox, Lawrence R. Glosten, Edward F. Greene & Manesh S. Patel eds.) (2018).

[183] Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018).

[184] Alon Brav, Wei Jiang & Hyunseob Kim, *Recent Advances in Research on Hedge Fund Activism: Value Creation and Identification*, 7 ANNUAL REV. FIN. ECON. 579 (2015).

[185] Zohar Goshen & Richard Squire, 117 COLUM. L. REV. 767, 771 (2017). It may be the case that many shareholders come from the wealthier echelons of society. *See* Scott Hirst, *Social Responsibility Resolutions*, No. 2016-06 The Harvard Law School Program on Corporate Governance Discussion Paper (2016) (noting in particular that investors in mutual funds, which comprise the majority of stock ownership, tend to be wealthier). Nonetheless, these investors increasingly hold socially progressive views. *See id.* at 16 (noting that the majority of mutual fund investors favor resolutions requiring disclosure of campaign contributions); Michal Barzuza, Quinn Curtis, and David H.Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance* (August 19, 2019). 93 Southern California Law Review (Forthcoming 2020), Available at SSRN: https://ssrn.com/abstract=3439516 (arguing that index funds increasingly vote aggressively on social issues to win business from socially conscious millennial investors).

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cannot have a clear party affiliation, nationally, let alone at the state level, and they will rarely interact as a unified constituency with state politicians. In contrast, other corporate constituencies will often have a very strong state-level presence. Thus, partisanship presents a risk that shareholders' interests will be compromised in favor of another constituency

Second, shareholders, tend to be located in different geographic jurisdictions. They are unlikely to be a locally powerful constituency. Increasingly, most public equity is owned by large institutional fund families. BlackRock alone has more than $6 trillion in assets under management and is the largest shareholder in a significant percentage of U.S. corporations.[186] Vanguard, too, has $5 trillion in assets and holds a diversified portfolio of public equity. The ultimate investors in these funds are located throughout the U.S. (and even globally). Thus, in any given state, at any given point, they are likely to be politically weak in comparison to geographically concentrated local actors. Finally, investors tend to be diversified and invest in firms located in multiple jurisdictions. Their stake in lobbying for legislation in each state, particularly states where few firms are incorporated, is likely to be low.

A recent example that illustrates the weakness of shareholders in partisan politics involves the infamous activist investor, Carl Icahn, lobbying for the overhaul of North Dakota corporate law code in 2008. The law, which was intended to brand North Dakota firms as "shareholder-friendly," was passed by a Republican-controlled legislature and approved by a Republican Governor.[187] The resulting law includes a prohibition on staggered boards, mandatory majority voting in the election of directors, and limitations on the adoption of poison pills and shareholder access to the proxy.[188] The intent behind this measure was to establish a "brand" by which North Dakota companies would be immediately recognized as shareholder-friendly.[189] Despite the legislative efforts, as of 2013 only two public companies incorporated in North Dakota (one owned by Carl Icahn), and twelve shareholder proposals sponsored by activist investors to reincorporate firms in North Dakota have failed to gain shareholder support.[190]

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[186] Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANNUAL REV. FIN. ECON. 413, 417 (2018).

[187] Although there was a ragbag of votes for and against, the majority of votes against the measure were democrat. https://www.legis.nd.gov/assembly/60-2007/journals/sr63.pdf#Page1265 (passing Senate 42-5, with two democrats and three Republicans voting against, and 19 Democrats and 23 Republicans in favor); https://www.legis.nd.gov/assembly/60-2007/journals/hr30.pdf#Page594 (passing House 63-31, with 22 democrats and nine Republicans against, and 12 Democrats and 51 Republicans in favor).

[188] William H. Clark, Jr. and Amber A. Hough, *A New Paradigm for State Corporation Laws*, 84 N.D. L. REV. 1059 (2008).

[189] *Id.*; *see also* Statement of Bill Clark, Hearing on HB 1340 Before the H. Comm. on the Judiciary, 60th N.D. Legis. Sess. (Jan. 24, 2007) at 2, https://www.legis.nd.gov/files/resource/60-2007/library/hb1340.pdf. Proponents of the bill promoted it as a measure with no downside (since companies would opt in) that would "tell the rest of the country and beyond the country that North Dakota believes in a business model that encourages shareholder involvement and support." Statement of Rick Berg (Republican), House Majority Leader *Id.*, at 1.

[190] Liz Hoffman, *Icahn Likes North Dakota for Shareholders, but State Fails to Draw Public Companies*, WALL ST. J. (Oct. 28, 2013). *See also* Stephen Bainbridge, *Why the North Dakota Publicly Traded Corporations Act*

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There may be many salient reasons why North Dakota failed to compete with Delaware, such as its lack of corporate law expertise, geographic distance from major business and legal hubs, or the objections of corporate managers to the reincorporations. But the widespread failure of shareholder proposals to reincorporate in North Dakota also suggests that not all shareholders want laws that promote maximum shareholder activism, and some may prefer managers to have some latitude in decision-making. At least in part, the role of managers is to resolve conflicts of interest among diverse types of shareholders, whose interests may not be aligned with those of activists.[191] A partisan commitment to promote the interests of hedge funds might not appeal to all classes of shareholders (as well as managers), and thereby may fail to attract firms with diverse public shareholdings.[192] Accordingly, the general failure of investors to jump on Icahn's bandwagon with respect to North Dakota reinforces our argument that shareholders are heterogenous in their governance preferences.[193] A nonpartisan jurisdiction, such as Delaware, can make a stronger commitment to adopt laws that balance the interests of different types of shareholders (as well as managers) and to attempt, albeit imperfectly, to maximize value for all shareholders.

But if managers are often the main decision-makers in corporations, why would they seek to escape the impact of political partisanship by incorporating in Delaware? After all, if political partisanship works to benefit managers, managers might view it as advantageous. The extent to which managerial incentives shape incorporation decisions is the subject of a long-standing and much re-hashed debate regarding the desirability of regulatory competition. Critiques of the internal affairs doctrine have argued that incorporations are to a large extent driven by managerial interests,[194] and thus, firms prefer to incorporate in states that have laws that are more favorable to managers. Conversely, others have argued that in competitive capital markets, firms must choose to incorporate in jurisdictions that provide optimal protection for shareholders, or they will be able to raise less capital.[195] For our purposes, we do not need to decide between these competing viewpoints or to quantify the extent to which agency costs affect incorporation decisions (if at all).

What matters for our purposes is that shareholders' interests have at least some meaningful influence on firms' incorporation choices. Even if agency costs exist in many corporations, it seems unlikely that managers, who mostly get equity compensation, would have incentives to incorporate in a state that systematically neglects shareholders' interests. In fact, empirical evidence shows that states that adopted anti-takeover statutes have lost

Will Fail, 84 N.D. L. REV. 1043 (predicting that North Dakota's shareholder-friendly corporate law would not attract incorporations away from Delaware).

[191] Goshen & Squire, *supra* note 185 (discussing costs arising from disagreements among shareholders).

[192] Critics of the North Dakota bill worried that it would put "another tool in the belt of activist shareholders, or greenmailers." Statement of Stacey Dahl (Republican) at 19, Hearing on HB 1340 Before the H. Comm. on the Appropriations, 60th N.D. Legis. Sess. (Feb. 9, 2007), https://www.legis.nd.gov/files/resource/60-2007/library/hb1340.pdf.

[193] Had enough large investors shared Icahn's vision, it seems plausible that they could have devoted sufficient resources, acting together, to bolster North Dakota's corporate judiciary sufficiently to make it competitive with Delaware's.

[194] Cary, *supra* note 36; Bebchuk & Cohen, *supra* note 50.

[195] Winter, *supra* note 36; ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

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rather than gained market share of firm incorporations.[196] Moreover, the composition of the shareholder franchise has changed in the last century from dispersed shareholders who hold shares in individual accounts to savvy institutions who hold more than seventy percent of public corporations.[197] These institutions have shown substantial influence in tilting the balance of power against managers in several contexts, including poison pills,[198] staggered boards[199] and majority voting,[200] and there is evidence that they have a material impact on incorporation decisions.[201] While managers, if left to their own devices, might prefer to incorporate in jurisdictions with highly pro-managerial laws, pressure from powerful institutional investors and organized proxy advisory firms makes this strategy difficult to implement.[202]

Accordingly, we claim that market-oriented firms are likely to resist incorporating in states where corporate law-making and adjudication are highly partisan. The reason is that these states may be more likely to adopt laws that compromise shareholder rights to benefit other stakeholders. Such laws may result in greater uncertainty for investors, and higher risk that managers will have excessive discretion in running corporations. Of course, even a nonpartisan state would likely address the interests of managers and local stakeholders because they influence local interests and politics.[203] The key point is that a nonpartisan process in corporate law makes that law less likely to be biased against shareholders' rights.[204]

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[196] Eldar & Magnolfi, *supra* note 47.

[197] Matthew Backus, Christopher Conlon, & Michael Sinkinson, *Common Ownership in America: 1980-2017* (Nat'l Bureau Econ. Res., Working Paper No. w25454, 2019).

[198] Emiliano M. Catan, *The Insignificance of Clear-Day Poison Pills*, 48 J. LEGAL STUD. 1 (2019).

[199] Martijn Cremers & Simone Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67 (2016).

[200] Stephen J. Choi, Jill E. Fisch, Marcel Kahan, & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016).

[201] Eldar & Magnolfi, *supra* note 47.

[202] For a telling example, see Steven Davidoff Solomon, Abercombie's Ohio Express, N.Y. TIMES., Dec. 23 2010 (describing Abercombie & Fitch's failed attempt to reincorporate from Delaware to Ohio in order to benefit from Ohio's anti-takeover statutes).

[203] The example of Delaware's business combination statute is complex, but the recollections of attorneys present in the 1980s suggest its principal motivation was to provide a balanced statute that nonetheless addressed takeovers in the wake of other states' action on the subject. Gil Sparks, then Chairman of the Delaware Corporation Law Section, recalled that "with 27 other states . . . having passed some form of antitakeover legislation, that . . . competitively, it was appropriate for Delaware to do something. And I think the sense of the bar was . . . we ought to try to be a leader here and come up with something that is acceptable to all constituencies. That we . . . had enough of a – sort of an economic lead in this area that we could afford to be trendsetters and try to come up with something that . . . was as balanced as it could possibly be." Transcript of Interview with Gil Sparks at 9-10, https://www.law.upenn.edu/live/news/7006-section-203-of-the-delaware-general-corporation. See also Section II.D.

[204] There may also be an argument that nonpartisanship promotes stability, which makes it easier to do business. *See* Feinstein, Brian D. and Meng, Chen and Padi, Manisha, *Polarized State Politics, Stable Mortgage Markets* (2019). U.Chi. Research Paper No. 882, available at SSRN: https://ssrn.com/abstract=3385963 (noting that political uncertainty may decrease economic activity);

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But why would any state commit to a nonpartisan process? The reason is to attract incorporations. As described above, Delaware commits to create a legal system that is attentive to corporate interests.[205] That is, Delaware commits to be responsive to demand-side interests in order to maintain its leadership in the market for incorporations. Delaware's commitment is particularly credible due to the state's fiscal dependence on revenue from franchise taxes.[206] We believe that within this framework, nonpartisanship is another important, albeit overlooked, element in Delaware's strategy to commit to corporate interests. Nonpartisanship signals to investors that their interests will not be unpredictably harmed to benefit a local constituency.[207] Thus, corporations' ability to raise capital and run their business efficiently will remain intact.[208]

Moreover, nonpartisanship is tightly linked to the notion of fostering technical expertise. As every scholar of corporate law knows, corporate law is a technically demanding body of law that requires expertise to understand the potential effects of an intervention on the functioning and success of corporations. One of the main rationales for nonpartisanship is the promotion of expertise over interest-group politics. Partisanship could mean that a state may make a decision that promotes the interest of one isolated group without regard to the broader impact on the functioning of capital markets and the economy at large. To create an effective corporate law system, law makers and judges must carefully balance the interests of managers, different types of investors, and possibly other stakeholders. They also

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Candace Jens, *Political Uncertainty and Investment: Causal Evidence from U.S. Gubernatorial Elections* (January 20, 2016), available at SSRN: https://ssrn.com/abstract=2176855 (political uncertainty can lower investment); Gönül Çolak, Art Durnev & Yiming Qian, *Political Uncertainty and IPO Activity: Evidence from U.S. Gubernatorial Elections*, 52 J. OF FIN. & QUANTITATIVE ANALYSIS 2523–2564 (2017) (political uncertainty may diminish IPO activity). While it is possible that this may contribute to Delaware's popularity, we note that Delaware's corporate law is largely judge-made, and therefore potentially subject to frequent or unexpected changes.

[205] See Romano, *supra* note 38.

[206] *Id*.

[207] Note that we do not claim here that Delaware is committed to maximum investor protection, but only that nonpartisanship is part of a strategy to that commits to creating corporate laws consistent with corporations' ability to raise capital. Thus, this claim is consistent with (a) views that most states have limited incentives to vigorously compete with Delaware for incorporations, *see, e.g.*, Bebchuk & Hamdani, *supra* note 36, at 561-63; Kahan & Kamar, *supra* note 35; (b) views that Delaware is too deferential to managers and should give greater protections to shareholders, *see, e.g.*, Lucian A. Bebchuk, & Robert J. Jackson Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549 (2014); and (c) the view that greater investor protection is not actually conducive to shareholder value, *see, e.g.*, Cain et al., *supra* note 47; K.J. Martijn Cremers, Scott B. Guernsey, Lubomir P. Litov, & Simone M. Sepe, Shadow Pills and Long-Term Firm Value (European Corporate Governance Institute, Working Paper, 2018).

[208] Ron Gilson, Henry Hansmann, and Mariana Pargendler make a related observation that the U.S. system of corporate law—in which half of public corporations charter in their headquarters state, half incorporate in Delaware, and few other states attract out-of-state incorporations—can be understood as a system of "regulatory dualism." In this system, companies with managers or controlling shareholders who want to protect their interests using local political influence interests incorporate in their headquarters state, while companies controlled by parties interested in maximizing market value incorporate in Delaware, "whose law offers (at least modestly) greater shareholder protection and overall efficiency than do the laws of other states." *See* Gilson, Hansmann & Mariana Pargendler, *supra* note 28, at 512-13.

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need to continuously adapt the law to the ever-changing landscape of business transactions and corporate enterprise.

For many years, the Delaware Chancery Court has been viewed as the epitome of corporate law expertise.[209] Delaware judges are known for their business savvy and ability to engage with empirical studies that evaluate the consequences of different types of legal regimes. Many Delaware judges engage in scholarly writing and teach corporate law in leading law schools in the United States. Although some states have tried to emulate Delaware by creating specialized business courts,[210] no state has been able to come close to Delaware's reputation. When Delaware made a firm commitment in 1897 to a bipartisan judiciary, and thus nonpartisan adjudication, other states that competed for incorporations failed to do so. This enduring commitment likely facilitated the evolution of judicial expertise in corporate law that forms part of the Delaware product to date.

Finally, we note that there is no guarantee that any state with a commitment to nonpartisan corporate law will emerge. As noted, New Jersey, Delaware's predecessor in the 19th century, lost its status as the leader for firm incorporations largely due to political intervention in its corporate law-making that culminated in the revision of its corporate code to the detriment of corporate interests.[211] Unlike New Jersey, which experienced major population growth in the late 19th century, Delaware is uniquely suited to adopt a nonpartisan process for corporate law-making. It is one of the least populous states in the U.S. with no major local manufacturing or agricultural industry that generates substantial revenues. In fact, its main source of revenue is franchise fees from firm incorporations. Thus, if Delaware's demographics changed, there is no guarantee that another state would take its place.

V. A NOTE ON THE POLITICAL LEGITIMACY OF NONPARTISAN CORPORATE LAW

Delaware's nonpartisan corporate law raises concerns about legitimacy. Should one state define the law governing large corporations that affect individuals in all states, when that state answers only to itself? And this problem is only sharpened if we appreciate (1) that a measure of Delaware's success lies in insulating its corporate law even from *its own ordinary politics*, and (2) that this success is due to a regulatory system in which the provision of insulated corporate law will be favored by out-of-state corporations. Should we worry all the more if the state that provides corporate law to national companies will be a state that tries to cordon that law off from ordinary politics?

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[209] See, e.g., Hamermesh, *supra* note 18; Fisch, *supra* note 39; Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111, 146 (2001); Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99, 106 (2004); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008).

[210] Jens Dammann, *Business Courts and Firm Performance*. U of Texas Law, Law and Econ Research Paper 564 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2889898.

[211] As discussed above, Delaware then seized the opportunity to enshrine the partisan balance in its judiciary in its state constitution.

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A literature of its own explores the political legitimacy of Delaware, and we cannot hope to do it justice or decisively answer this question.[212] Instead, we draw on that literature's insights to show that the problem, while real, has a broader political and institutional context that must be appreciated before reasonable judgments about Delaware's legitimacy can be made. First, as Mark Roe has famously observed, corporate law is made in Delaware, but also in Washington, D.C.[213] The federal government can and does adopt laws altering the governance of public corporations, particularly during times of crisis. The fact that the federal government intervenes, and could federalize corporate governance entirely, arguably means that it "permits" Delaware's outsized success.[214] In principle, the federal government could eliminate it. Nonetheless, Roe and others have made two additional points about federal involvement in corporate governance. One is to catalog the many limitations on federal lawmaking, which prevent the federal government from acting as an optimal overseer of state competition.[215] Because of all the frictions associated with federal statutory law, the fact that federal corporate law could displace Delaware simply does not assure the merits of the Delaware experiment or signal that the federal government "approves" of it or any specific law. The other point is that there is no guarantee that the federal government would produce corporate law more reflective of popular sentiment (or more effective at governing companies) than Delaware law. In fact, the federal government could be more prone to capture by lobbyists and interest groups than Delaware.[216]

Another key institutional feature is that Delaware's legislators and judges appreciate its legitimacy problem, and seek to secure the state's legitimacy through decisions of broad appeal and by avoiding intervention on issues of truly national import. As Marcel Kahan and Edward Rock note, while Congress, federal agencies, and even other states reacted aggressively to the frauds at Enron or WorldCom, Delaware's legislators and agencies did nothing, recognizing the state's "lack of political legitimacy" on national issues.[217] Delaware's judges are similarly attuned to broader social currents, and Delaware's law is sufficiently flexible to allow its judges to mold it for changing times.[218] The most recent example might be their effort to nod toward corporate social responsibility in a series of

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[212] *See, e.g.*, Renee M. Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, 86 WASH. U. L. REV. 1272 (2009) (arguing that while state corporate law suffers from a legitimacy deficit, federal involvement mitigates it and should be granted greater judicial deference); Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y. L. SCHOOL L. REV. 481 (2011) (arguing that the Delaware judiciary's departures from traditional legal analysis undermine its legitimacy); CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 276-78 (2013) (discussing the debate as to Delaware's political legitimacy).

[213] Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1 (2009).

[214] *See, e.g.*, Roe, *supra* note 12, at 588 ("[T]hat which persists in Delaware is that which the federal authorities tolerate"); Jones, *supra* note 212.

[215] In particular, Roberta Romano has been a vigorous and insightful critic of the federal government's forays into crisis-inspired corporate governance mandates. *See* Romano, *Quack Corporate Governance*, *supra* note 36; *see also* STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 270 (2012).

[216] *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Kahan & Rock, *supra* note 12; Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2493 (2005).

[217] *See* Kahan & Rock, *supra* note 12.

[218] Fisch, *supra* note 39.

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recent *Caremark* opinions refusing to dismiss suits against directors based on their failure to prevent corporate wrongdoing.[219] Claims based on *Caremark* oversight duties have been summarily dismissed for two decades, but the Delaware Chancery Court now seems willing to entertain claims to enforce compliance obligations that go to broader concerns of sustainability and governance.[220]

In this paper, we can only gesture at the issue of Delaware's broader political legitimacy. We note that Delaware makes law in a complex institutional context including not only the other states but the federal government and global actors. Appreciating this by no means settles the score, however. We hope our project clarifies the stakes.

VI. THE THREAT TO DELAWARE'S NONPARTISANSHIP IN THE U.S. SUPREME COURT

Our analysis of the partisanship of many states and the nonpartisanship of Delaware opens up a broader discussion about the relationship between partisan politics and corporate law. While we find partisanship to be linked to differences in the laws of many states, and nonpartisanship to be part of Delaware's attraction, this feature was recently under threat in litigation in the Supreme Court. In this section, we discuss the litigation, the implications of its outcome, and how our analysis may inform future decisions.

The recent litigation in *Carney v. Adams*,[221] threatened a prominent piece of Delaware's nonpartisan approach, namely the bipartisanship of its judiciary. As discussed above, Delaware's expert judiciary is an important competitive advantage. The provisions creating partisan balance are widely viewed as a key element in ensuring that adjudication of corporate disputes is guided by judges' expertise, rather than political ideology. The Delaware judiciary's bipartisan balance consists of two parts. The first is the requirement that no more than a bare majority of the judges in Delaware's Supreme Court, Court of Chancery, and Superior Court belong to any political party (the "bare majority" requirement).[222] The 1897 Constitutional Convention that adopted this requirement was acutely aware that ". . . there was already at that time 'too much politics' in the courts and that the election of judges would merely contribute to that unsatisfactory situation."[223] In 1951, Delaware finalized the character of its partisan balance requirement by adopting the second component, which mandates that the minority of judges on Delaware's Supreme

[219] *See, e.g.*, In re Clovis Oncology, Inc. Derivative Litigation, C.A. No. 2017-0222-JRS (consol.), memo. op. (Del. Ch. Oct. 1, 2019) (addressing alleged failure to monitor for FDA violations).; Jack L. Marchand, II v. John W. Barnhill, Jr., et al. and Blue Bell Creameries USA, Inc., No. 533, 2018, opinion (Del. June 18, 2019; rev. June 19, 2019) (addressing allegations of failure to monitor for health and safety compliance).

[220] Martin Lipton, Daniel A. Neff, and Andrew R. Brownstein, Risk Management and the Board of Directors, Wachtell, Lipton, Rosen & Katz, November 20, 2019, at https://corpgov.law.harvard.edu/2019/11/20/risk-management-and-the-board-of-directors-7/ .

[221] Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019).

[222] *The Constitution of 1897*, *supra* note 151. Note that the Court of Chancery was initially exempt from the bipartisanship requirement; see *supra* note 160.

[223] *No Elective Judges*, MORNING NEWS, Feb. 10, 1897, at 1, 3, *quoted by* Friedlander, *supra* note 32, at 1148-49.

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Court, Court of Chancery, and Superior Court all belong to the "other major party" and only to that party (the "two-party" requirement).[224]

The State of Delaware was sued on the ground that disqualifying individuals who are not Democrats or Republicans from serving on any of these three Delaware high courts violates the First Amendment of the federal constitution. In *Carney v. Adams*,[225] the Third Circuit affirmed the lower court ruling that the partisan balance provisions of Delaware's Constitution were invalid because the two-party majority requirement conditions appointment on a judicial candidate's political affiliation.[226] The case was appealed to the Supreme Court. In its December 2020 opinion, the Court avoided entirely any substantive analysis of the provisions, holding instead that the challenger lacked standing.[227] In a brief concurrence, however, Justice Sotomayor cautioned that while she agreed with the Court's standing analysis, "the constitutional issues in this case will likely be raised again."[228]

Our analysis can inform future consideration of the constitutionality of Delaware's bipartisan balance requirement. We focus here on the two-party provision, which "arguably impose[s] a greater burden on First Amendment associational rights,"[229] and is therefore likely to be more problematic from a constitutional perspective. Subject to constitutional constraints, each state has the power to determine qualifications for its judges.[230] Delaware's requirement that its judges belong to one of the two main political parties arguably impinges on the First Amendment because it "limits a judicial candidate's freedom to associate (or not to associate) with the political party of his or her choice."[231] If the two-party requirement does indeed restrict First Amendment rights, it must satisfy the strict scrutiny standard. To meet that standard, the two-party requirement must "further some vital governmental end by a means that is the least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[232] We make three points. First, strict scrutiny may not be the correct standard under which to examine the two-party requirement. Second, even if strict scrutiny applies, the provision may plausibly further a "vital government end" by the "least restrictive means" available. Third, because the bipartisanship requirements reflect a deliberate choice by Delaware as to its constitutional structure and the qualifications of its judges, restraint should be exercised in interpreting the First Amendment in a way that disrupts them.

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[224] Henry R. Horsey & William Duffy, *The Supreme Court After 1951: The Separate Supreme Court*, DEL. COURTS, http://courts.delaware.gov/supreme/history/history3.aspx (last visited Nov. 15, 2016).
[225] *See supra* note 209.
[226] The Third Circuit held that the bare majority provision is not severable from the two-party provision, Adams, *supra* note 221, at 183.
[227] Carney v. Adams, 141 S. Ct. 493 (2020).
[228] *Id.* at 503 (Sotomayor, J., concurring).
[229] *Id.* (noting that the bare majority and the two-party requirements are materially different, and "may require distinct constitutional analysis.").
[230] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (holding that there is no violation of the equal protection clause for not extending mandatory retirement age in the public sector to state judges).
[231] Adams, *supra* note 221, at 169.
[232] Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), at 363, 96 S.Ct. 2673.

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First, a provision restricting the political affiliation of a government office-holder may avoid strict scrutiny if the position is that of a "policymaker."[233] Whether an employee is a policymaker turns on "whether the employee acts as an adviser or formulates plans for the implementation of broad goals."[234] The Third Circuit held that "the policymaking exception does not apply to members of the judicial branch because judicial decisions do not reflect the political will and partisan goals of the party in power.[235] Other circuits, however, have found that judges occupy policymaking positions for which disqualification on the basis of political party is appropriate,[236] on the ground that "[a] judge both makes and implements governmental policy."[237] Delaware's bipartisanship requirement reflects the realistic role that Delaware's Framers expected judges to play in promulgating policy. Those expectations were born out – the Chancery Court's decisions affect corporate policy across the country. Studies routinely show that Delaware judicial decisions affect how major business transactions are conducted,[238] and it is widely appreciated that Delaware corporate law is mostly judge-made.[239] The idea that Delaware chancellors do not "make and implement government policy" would seem unrealistic to most students of corporate law. Accordingly, there is at the very least a colorable argument that Delaware's judges qualify as "policymakers," obviating the need for strict scrutiny of the provision.

Second, even if the two-party requirement does not satisfy the policymaking exception, there are reasons to argue that it is necessary to achieve Delaware's interests under the strict scrutiny standard. To survive strict scrutiny, the government interest in the provision must be "paramount, one of vital importance."[240] The professionalism of Delaware's judiciary and its commitment to protecting investors is crucial to Delaware's ability to remain the leading jurisdiction for corporate law. As we argue in this article, nonpartisanship is a critical element of the Delaware "product." Empirical studies suggest

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[233] Elrod, *id*. Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). A less demanding view of this exception to the strict scrutiny standard requires only that political affiliation may be an appropriate qualification (Branti, *id.* at 518). Given that most judges are appointed based on political affiliation, this requirement seems to be easily satisfied.

[234] Elrod, *id.* at 368.

[235] Adams, *supra* note 221, at 179-181,

[236] *See* Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993) (holding that the governor is "free to make judicial appointments based on political considerations."); Kurowski v. Krajewski, 848 F.2d 767, 770 (7th Cir. 1988) ("A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions."). *But see* Adams v. Carney, at 179-181 (holding that that judges cannot be viewed as policymakers because their decisions relate to cases under review and not to partisan political interests).

[237] Kurowski, *supra* note 236 at 770.

[238] *See e.g.*, Cain, Matthew D. and Griffith, Sean J. and Jackson, Jr., Robert J. and Davidoff Solomon, Steven, *Does Revlon Matter? An Empirical and Theoretical Study* (February 1, 2020). European Corporate Governance Institute - Law Working Paper No. 466/2019, available at SSRN: https://ssrn.com/abstract=3418499 (finding that deals governed by Delaware's Revlon doctrine are more intensely negotiated, involve more bidders and result in higher transactions than other deals not governed by Delaware law).

[239] Fisch, *supra* note 39; Hamermesh, *supra* note 18.

[240] Elrod, *supra* note 232 at 362.

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that political diversity on judicial panels produces less polarized decisions,[241] and polarized decisions could hamper the predictability and expertise characteristic of the Delaware judiciary. Accordingly, it is plausible that a bipartisan judiciary is a vital interest of Delaware.[242]

Relatedly, although the Third Circuit held that the two-party provision could not survive strict scrutiny because it was not sufficiently "narrowly tailored," it is possible that the provision might be the least restrictive means available to preserve Delaware's interest in judicial balance. Delaware currently requires appointees to belong to one of the two major parties, and the Third Circuit found that the bare majority requirement was not severable from the two-party requirement.[243] But if it were decided that the two requirements are severable, Delaware could retain the bare majority requirement, but allow appointees from outside the two main parties. However, it would be possible to manipulate such a system by appointing nominal independents who are committed to particular political causes.[244] The petitioner in *Adams v. Carney* identifies as a "Bernie Sanders supporter."[245] Similarly, right-leaning "independents" might also be used to stack the courts, even if the bare majority provision survives. While there may be other means that Delaware could explore to maintain the nonpartisanship of the law its judiciary produces, these are unproven, and the stakes are high. Bipartisanship has played a central role in enhancing the expertise and reputation of Delaware's judiciary, and the economic stakes involved in its decisions.[246] Accordingly, the preservation of that bipartisanship might outweigh the First Amendment restrictions of the two-party provision.

Even if the bare majority provision is, on its own, susceptible to manipulation, it is nonetheless better than nothing at all, and the Court should find that it is severable from the two-party provision. A provision is severable if (1) it is capable of standing alone, and (2) it

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[241] Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000); Brian Feinstein and Daniel Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 75-78 (2018); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 852 (2006).

[242] Brief for the Delaware State Bar Association as Amicus Curiae, Jan. 28 2020, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/130178/20200128140258521_19-309tsacTheDelawareStateBarAssociation.PDF (last visited July 12, 2020) (citing *Elrod* and *Branti*, *supra* note 233).

[243] Adams, *supra* note 221, at 183.

[244] Brief of Amicus Curiae Professors Brian D. Fenstein and Daniel J. Hemel in Support of Petitioner at 6, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/130152/20200128124557751_19-309%20tsac%20Profs.%20Feinstein%20and%20Hemel.pdf (last visited July 12, 2020).

[245] Third Circuit at 172. In oral argument, the lawyer representing Delaware observed that the respondent "made the point [that Delaware courts could be stacked with nominal independents without the two-party provision]. 'If there were already a Democratic majority on the court and the governor were able to name [the petitioner], it would just fly in the face and frustrate the purpose of the political balance provision.'" Jess Bravin, *Supreme Court Opens Term with Case on Partisanship of Judges in Delaware*, WALL ST. J. (Oct. 5, 2020).

[246] Brief For Amici Curiae Professors In Support Of Petitioner, *Carney v. Adams*, Jan. 27 2020, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/130034/20200127153858238_19-309%20Carney%20v%20Adams%20Amici%20Curiae%20Professors%20in%20Support%20of%20Petitioner.pdf (last visited February 15, 2020).

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is not clear that the legislature "would have preferred no statute at all."[247] The Third Circuit itself acknowledged that the bare majority requirement is perfectly capable of standing alone, and actually does in the sections of the Delaware constitution involving Family Court and the Court of Common Pleas.[248] Yet, the court invalidated the provision on the ground that it was toothless without the two-party requirement.[249] There is no evidence that the Framers would have preferred both provisions to be invalidated. In fact, the bare majority requirement was the only bulwark against partisanship in the Delaware courts from 1897 until 1951, when the two-party requirement was adopted.[250] These facts suggest, as Justice Sotomayor implied in her concurrence, that the Third Circuit may not have been the correct court to decide such a "sensitive issue of state constitutional law," which should instead be certified to the Delaware Supreme Court.[251]

Finally, because the bipartisan requirements reflect a deliberate decision by Delaware about its constitutional structure and the qualifications of its judges, courts should be hesitant to interpret the First Amendment in a way that invalidates them.[252] Judicial "scrutiny will not be so demanding [when dealing] with matters resting firmly within a State's constitutional prerogatives."[253] Accordingly, a court's First Amendment review of Delaware's bipartisan requirements should be "less exacting."[254] The right to establish qualifications for its judges is "fundamental" to Delaware's sovereignty,[255] and Delaware has made use of this right to create an exceptional judiciary.[256] Future courts should think twice before undoing the provisions that contributed to that achievement.

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[247] Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 37 (2014). The burden is on the party arguing that the provisions are not severable. Reese v. Hartnett, 73 A.2d 782, 784 (Del. Super. Ct.).
[248] Adams, *supra* note 221, at 183-184.
[249] *Id.*
[250] Brief for the Petitioner at 52, *Carney v. Adams*, Jan. 2020, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/132933/20200213123011467_19-309%20ts%20reprint.pdf.
[251] See *Carney v. Adams*, *supra* note 227 at 504 (Sotomayor, J., concurring).
[252] See *id.* (noting that certification to the state's highest court "may be especially warranted in a case such as this, where invalidating a state constitutional provision would affect the structure of one of the State's three major branches of government.").
[253] Gregory, *supra* note 230, at 463.
[254] *Id.*
[255] *Id.* at 460 ("The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity.")
[256] *See* Brief For Amici Curiae Professors In Support Of Petitioner, *Carney v. Adams*, Jan. 27 2020, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/130034/20200127153858238_19-309%20Carney%20v%20Adams%20Amici%20Curiae%20Professors%20in%20Support%20of%20Petitioner.pdf (last visited February 15, 2020) ("The Delaware experiment has been a triumphant success"); Brief For Amici Curiae Former Chief Justices In Support Of Petitioner, *Carney v. Adams*, Oct. 7, 2019, *available at* https://www.supremecourt.gov/DocketPDF/19/19-309/130034/20200127153858238_19-309%20Carney%20v%20Adams%20Amici%20Curiae%20Professors%20in%20Support%20of%20Petitioner.pdf (last visited July 12, 2020) ("Delaware's political balance requirement has produced an excellent judiciary.").

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CONCLUSION

The relationship between corporate law and partisan politics has been largely overlooked in the corporate law literature. Recent developments, such as new movements to make corporate law more responsive to stakeholders and the recent Supreme Court case of *Carney v. Adams*, are giving rise to fundamental questions about this relationship. They call for a broader framework for understanding the underlying politics of corporate law.

Our article seeks to start the task of filling in this void by offering an original theoretical and empirical framework for understanding the role of partisan politics in corporate law. Our empirical analysis suggests that partisan politics could explain differences among states' corporate laws, and that partisanship works primarily to benefit the interests of corporate managers.[257] Yet, strikingly, the state in which most large businesses choose to incorporate—Delaware—adopts a conspicuously nonpartisan approach to corporate law that insulates it from political partisans. We offer a revised history of Delaware's rise by emphasizing that its commitment to nonpartisanship played an early role in its quest to displace New Jersey as the most popular venue for incorporations.

We claim that Delaware's nonpartisanship flows from the system of regulatory competition that gives firms the freedom to choose the corporate law that governs them through their incorporation decisions. Delaware's incentives are to attract firm incorporations to increase its revenue from franchise fees. Nonpartisanship provides a unique competitive advantage to Delaware in its quest for incorporations. Nonpartisanship allows Delaware to afford great weight to the interests of nationally diverse and heterogeneous, but locally weak shareholders, rather than catering to constituents with strong state political power.

Our analysis has timely policy implications. It suggests that in the aftermath of the Supreme Court in *Carney v. Adams*, courts considering the constitutionality of Delaware's courts should carefully consider Delaware's interest in maintaining the bipartisanship of its judiciary. Although the politics of contemporary lawmaking – whether through legislation

[257] We note that further work is necessary to evaluate the implications of our analysis for partisanship at the federal level, where politically charged debates on corporate law have increasingly played out in recent years. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 969-71 (1984) (describing Ralph Nader's proposal to federalize corporate law following 1980s takeover wave by reforming "corporate boards, such that each board member would represent a special interest, including consumer protection, employee welfare, environmental protection, and community relations."); *see* Accountable Capitalism Act, S. 3348, 115th Cong. (2018) (Elizabeth Warren's recent proposal to federalize corporate law, which would require firms with over $1 billion in revenue to obtain a federal charter, create a "general public benefit," and have two fifths of directors elected by employees); Lucian Bebchuk & Assaf Hamdani, Federal Corporate Law: Lessons from History 106 COLUM. L. REV. 1793 (2006) (recommending the implementation of a federal public companies code in order to adequately police insiders and protect investors). It is not clear whether partisan debates on corporate law would reflect the same issues on a federal level as on a state level. *See* Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What Is the "Progressive" Agenda?*, 2 BYU L. REV. (2018) (exploring the diverging approaches of the ideological left at the state and federal levels on corporate governance issues); *but see* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that ideologically coherent national party partisanship animates political activity at the state level).

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or judicial decision-making – is highly complex,[258] the bipartisan balance requirement which Delaware adopted as early in 1897 appears to be one of the foundational pillars of the current system and its reputation for expertise and responsiveness. While we cannot predict with certainty the effect of invalidating the bipartisan balance requirement, we caution that removing it from the Delaware's constitution could allow for the slow deterioration of its nonpartisanship, and might ultimately result in broader changes to the substance of corporate law-making and adjudication.

[258] *See* e.g., Macey, *supra* note 70; Roe, *supra* note 11; Romano, *supra* note 13;

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Table 1: Summary Statistics

Variable	Democrat % (1)	Republican % (2)	All Observations (3)
All Observations	25.99%	22.29%	1,862
1980-2007	26.68%	16.40%	1,372
2008-2017	24.08%	38.78%	490
Anti-takeover Statutes	39.00%	11.00%	100
Business Combination	36.36%	15.15%	33
Pill Statute	27.78%	16.67%	36
Constituency	43.75%	9.38%	32
Control Acquisition	38.46%	15.38%	26
Fair Price	40.74%	11.11%	27
Extreme	37.50%	0%	8
Anti-Litigation Statutes	19.23%	23.08%	52
Loyalty Waiver	26.09%	34.78%	23
Business Judgment	37.50%	12.50%	8
Universal Demand	18.18 %	27.27%	22
Corporate Opportunity Waiver	11.11%	11.11%	9
Hybrid Legal Form	38.64%	36.36%	44
Benefit Corporation	34.38%	37.50%	32
Other Hybrid	42.86%	35.71%	14

This table provides summary statistics showing the percentage of state-year observations that are under Democratic and Republican control out of the total state-year observations when a given corporate law statute was passed. The sample-period is 1980-2017. All variables are described in the Sections II.A and II.B.

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Table 2: The Probability of Anti-Takeover Statutes

	(1)	(2)	(3)	(4)	(5)
Democrat	0.0333**	0.0400***	0.0399***	0.0381***	0.0473***
	(2.11)	(3.38)	(3.38)	(3.22)	(3.32)
Republican	-0.0267**	0.00397	0.00806	0.00947	0.0167
	(-2.45)	(0.34)	(0.69)	(0.82)	(1.25)
Largest Local Firm			0.00679**	0.00285	0.00465
			(2.34)	(0.68)	(0.95)
Lawyers				-0.0135	-0.0110
				(-0.61)	(-0.45)
Unions				0.00247	0.00211
				(1.40)	(1.12)
Population				0.0231	0.0182
				(0.96)	(0.69)
Unemployment Rate				-0.00284	-0.00665
				(-0.45)	(-1.05)
Poverty Rate				-0.00154	-0.000583
				(-0.75)	(-0.25)
Avg. Income				-0.000543	-0.000168
				(-0.57)	(-0.13)
Year Indicators	No	Yes	Yes	Yes	No
Region Indicators	No	Yes	Yes	Yes	No
Year×Region Indicators	No	No	No	No	Yes
R^2	0.00829	0.154	0.156	0.157	0.283
$Wald_{Dem=Rep}$	13.98	6.364	4.992	4.456	4.113
p-value$_{Dem>Rep}$	0.0000924***	0.00582***	0.0127**	0.0174**	0.0213**
p-value$_{Rep>Dem}$	1.000	0.994	0.987	0.983	0.979
N	1,760	1,760	1,760	1,760	1,760

This table shows the results of a random effects model where the dependent variable is equal to 1 if a state passed an anti-takeover statute in a given year. All variables are described in the Sections II.A and II.B. $Wald_{Dem=Rep}$ is the Wald Statistic that tests the null hypothesis that the coefficient on Democrat is equal to the coefficient on Republican. p-value$_{Dem>Rep}$ (p-value$_{Rep>Dem}$) is the p-value of the Wald statistic that tests the null hypothesis that the coefficient on Democrat (Republican) is larger than the coefficient on Democrat (Republican). Standard errors are robust and clustered at the state level. t statistics are in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

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Table 3: The Probability of Anti-Litigation Statutes

	(1)	(2)	(3)	(4)	(5)
Democrat	-0.00956	-0.00393	-0.00399	-0.00557	-0.00150
	(-1.05)	(-0.39)	(-0.40)	(-0.58)	(-0.12)
Republican	-0.0103	0.0118	0.0123	0.0101	0.0159
	(-0.77)	(0.85)	(0.88)	(0.66)	(0.99)
Largest Local Firm			0.00102	0.00226	0.00127
			(0.31)	(0.46)	(0.30)
Lawyers				-0.0451*	-0.0352
				(-1.79)	(-1.22)
Unions				0.000682	0.000722
				(0.38)	(0.38)
Population				0.0479*	0.0395
				(1.78)	(1.30)
Unemployment Rate				-0.00162	-0.00430
				(-0.39)	(-0.82)
Poverty Rate				-0.000619	-0.000482
				(-0.26)	(-0.19)
Avg. Income				0.000583	-0.0000987
				(0.59)	(-0.11)
Year Indicators	No	Yes	Yes	Yes	No
Region Indicators	No	Yes	Yes	Yes	No
Year×Region Indicators	No	No	No	No	Yes
R^2	0.000470	0.0401	0.0402	0.0426	0.216
$Wald_{Dem=Rep}$	0.00305	1.281	1.403	1.067	1.247
p-value$_{Dem>Rep}$	0.478	0.871	0.882	0.849	0.868
p-value$_{Rep>Dem}$	0.522	0.129	0.118	0.151	0.132
N	1,470	1,470	1,470	1,470	1,470

This table shows the results of a random effects model where the dependent variable is equal to 1 if a state passed an anti-litigation statute in a given year. All variables are described in the Sections II.A and II.B. $Wald_{Dem=Rep}$ is the Wald Statistic that tests the null hypothesis that coefficient on Democrat is equal to the coefficient on Republican. p-value$_{Dem>Rep}$ (p- value$_{Rep>Dem}$) is the p-value of the Wald statistic that tests the null hypothesis that the coefficient on Democrat (Republican) is larger than the coefficient on Democrat (Republican). Standard errors are robust and clustered at the state level. t statistics in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

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Table 4: The Probability of Hybrid Legal Form Statutes

	(1)	(2)	(3)	(4)	(5)
Democrat	0.0836**	0.0561	0.0551	0.0575	0.0586
	(2.25)	(1.40)	(1.39)	(1.43)	(1.43)
Republican	0.0238	-0.00802	-0.00580	-0.00531	-0.0151
	(0.94)	(-0.40)	(-0.29)	(-0.22)	(-0.54)
Largest Local Firm			0.00503	-0.00752	-0.00691
			(0.96)	(-0.86)	(-0.76)
Lawyers				0.0990**	0.0725
				(2.13)	(1.58)
Unions				-0.00408	-0.00367
				(-1.40)	(-1.13)
Population				-0.0839*	-0.0563
				(-1.66)	(-1.12)
Unemployment Rate				0.00723	0.00397
				(0.83)	(0.46)
Poverty Rate				-0.00637	-0.00408
				(-1.09)	(-0.68)
Avg. Income				-0.00265	-0.00109
				(-1.40)	(-0.56)
Year Indicators	No	Yes	Yes	Yes	No
Region Indicators	No	Yes	Yes	Yes	No
Year×Region Indicators	No	No	No	No	Yes
R^2	0.0127	0.108	0.109	0.116	0.276
$Wald_{Dem=Rep}$	3.952	2.640	2.412	2.495	3.164
p-value$_{Dem>Rep}$	0.0234***	0.0521*	0.0602*	0.0571*	0.0376**
p-value$_{Rep>Dem}$	0.977	0.948	0.940	0.943	0.962
N	490	490	490	490	490

This table shows the results of a random effects model where the dependent variable is equal to 1 if a state passed a hybrid legal form statute in a given year. All variables are described in the Sections II.A and II.B. $Wald_{Dem=Rep}$ is the Wald Statistic that tests the null hypothesis that the coefficient on Democrat is equal to the coefficient on Republican. p- value$_{Dem>Rep}$ (p-value$_{Rep>Dem}$) is the p-value of the Wald statistic that tests the null hypothesis that the coefficient on Democrat (Republican) is larger than the coefficient on Democrat (Republican). Standard errors are robust and clustered at the state level. t statistics are in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

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Table 5: The Probability of Individual Corporate Law Statutes

	Anti-takeover Statutes						Anti-Litigation Statutes				Hybrid Legal Forms	
	Pill Statute	Business Combination	Fair Price	Control Acquisition	Constituency	Extreme	Loyalty	Business Judgement	Universal Demand	COW	Benefit Corporation	Other Hybrids
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(10)	(9)	(11)	(12)
Democrat	0.0104	0.0296	0.0222	0.0177	0.0472***	0.00137	0.0147	0.00399	0.000513	-0.0140	0.0748*	0.00892
	(0.65)	(1.59)	(1.45)	(1.39)	(2.66)	(0.31)	(1.36)	(1.00)	(0.06)	(-1.56)	(1.71)	(0.41)
Republican	0.0239	0.00887	0.0124	0.0177	-0.0126	-0.00431	0.0435***	0.000434	0.0196	-0.0159	-0.0498	-0.00124
	(1.12)	(0.45)	(1.05)	(1.31)	(-0.75)	(-1.21)	(2.73)	(0.10)	(1.43)	(-1.48)	(-1.46)	(-0.10)
Largest Local Firm	0.0122***	0.0174***	0.00755*	0.00336	0.00641*	0.00175	-0.000182	0.00109	-0.000820	0.00390	0.00898	0.00121
	(2.68)	(2.67)	(1.68)	(0.76)	(1.75)	(1.15)	(-0.05)	(0.80)	(-0.27)	(1.31)	(0.94)	(0.29)
Year Indicators	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Region Indicators	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
R^2	0.142	0.147	0.117	0.117	0.127	0.0538	0.0586	0.0456	0.0539	0.0304	0.139	0.109
$Wald_{Dem=Rep}$	0.303	0.990	0.409	0.00000918	7.513	2.400	3.564	0.538	1.860	0.0422	8.556	0.177
p-value$_{Dem>Rep}$	0.709	0.160	0.261	0.499	0.00306***	0.0607*	0.970	0.232	0.914	0.419	0.00172***	0.337
p-value$_{Rep>Dem}$	0.291	0.840	0.739	0.501	0.997	0.939	0.0295**	0.768	0.0863*	0.581	0.998	0.663
N	900	818	951	998	885	1,620	1,003	1,564	1,107	788	367	490

This table shows the results of a random effects model where the dependent variable is equal to 1 if a state passed the relevant corporate law statute in a given year. All variables are described in the Sections II.A and II.B. $Wald_{Dem=Rep}$ is the Wald Statistic that tests the null hypothesis that the coefficient on Democrat is equal to the coefficient on Republican. p-value$_{Dem>Rep}$ (p-value$_{Rep>Dem}$) is the p-value of the Wald statistic that tests the null hypothesis that the coefficient on Democrat (Republican) is larger than the coefficient on Democrat (Republican). Standard errors are robust and clustered at the state level. t statistics are in parentheses. * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

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