The State of State Competition for Incorporations Revisited

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Abstract: This chapter focuses on the competition by states for incorporations. More specifically, it examines three scholarly debates over state competition for incorporations: the "directional" debate, centered around the question of whether firms, if given a choice, will opt for corporate law rules that maximize shareholder value, corporate law rules that maximize managerial benefits, something in between, or something else entirely; the "competition" debate, which is concerned with whether, how, and which states compete for incorporations; and the "federalism" debate, which deals with the desirability of federal corporate law as an alternative to the present regime, where many corporate law rules are determined by the law of the firm's state of incorporation. The chapter also analyzes the empirical evidence in relation to all three debates.

1. Introduction

The competition by states for incorporations has long been the subject of extensive scholarship.[2] Views of this competition differ radically. While some commentators regard it as "the genius of American corporate law,"[3] others believe it leads to a "race to the bottom,"[4] or merely "to the middle"[5] and still others have taken the position that it barely exists.[6] Despite this lack of consensus among corporate law scholars, scholars in other fields have treated state competition for incorporations as a paradigm case of regulatory competition.[7]

In this chapter, I will try to deconstruct the state competition debates by showing that, in fact, scholars are engaged in three separate debates that are only loosely connected to each other. The first, "directional" debate concerns whether firms, if given a choice, will choose corporate law rules that maximize shareholder value, maximize managerial benefits, something in between,[8] or something else entirely.[9] Resolution of this question is relevant regardless of whether states "compete." All it takes to make this question important is for firms to have a meaningful choice among legal rules.

In the US, a firm can incorporate in any state (or, for that matter, in a foreign country) regardless of where it is headquartered and have its "internal affairs"[10] governed by the laws of its state of incorporation. An existing firm can also change its state of incorporation with the approval of the board and its shareholders without triggering major consequences other than the change in governing law.

As a result, even in the absence of state competition, firms have a choice among legal regimes as long as states offer different legal rules. For that matter, firms can have meaningful choices even if they have no choice of where to incorporate as long as the state's legal regime offers firms flexibility in devising their governance rules.

The second "competition" debate concerns whether, how, and which states compete for incorporations. Depending on what is meant by "competition," competition can exist even in a regime where firms have no choice over where to incorporate[11] and may not exist in a regime where firms have free choice. The third "federalism" debate concerns the desirability of federal corporate law as an alternative to the present regime, where many corporate law rules are determined by the law of the firm's state of incorporation. How such a law would stack up in absolute terms along various dimensions—pro-shareholder versus pro-manager, concern for other constituents such as creditors and employees, speed of adopting innovations, and so on—is a question that is entirely separate from the earlier two debates. The focus of each of these debates is on publicly-traded corporations.

2. The Directional Debate: To the Bottom or to the Top?

The issue in the state competition debate that has been the subject of the fiercest controversy is whether the "race" that state competition supposedly engenders leads to the "bottom"—to laws favoring managers at the expense of shareholders[12]—or to the "top"—to laws that maximize firm value.[13] That this issue is the one most analyzed by commentators is, on the one hand, not surprising: the direction of the "race" is clearly very important from a policy perspective.[14] On the other hand, however, the factors that determine whether the "race" is to the top or to the bottom have virtually nothing to do with state competition. Rather, these factors are internal to the firm. The underlying premise of both camps in the directional debate is that firms make incorporation decisions based on the quality of the "incorporation product" offered. The quality of this product differs between states on various dimensions. In addition to differences in the substantive legal rules, states may differ in terms of the quality of the courts and the administrative services they provide and in the commitment they have to maintain the quality of their product.[15] I will refer to these elements as the inherent quality of the incorporation product.

As Michael Klausner, on his own and with me, has argued, the quality of the incorporation product offered by different states also differs along a second dimension. Legal rules in general (and Delaware corporate law in particular) generate "network benefits" and related learning benefits.[16] Specifically, Delaware law may be more valuable since the financial market is more familiar, and is expected to stay more familiar, with Delaware law (making the law easier to price); since lawyers are more familiar, and are expected to stay more familiar, with Delaware law (and it is therefore easier to obtain legal advice); and since there are more judicial precedents interpreting the law and more such precedents are expected to be generated (clarifying Delaware law). Importantly, because Delaware is expected to continue to have a large market share, network benefits derive from the expectation that market familiarity and lawyer familiarity will continue in the future and that additional judicial precedents will be generated.[17] Commentators have since attributed Delaware's dominance as incorporation state, or race dynamics more generally, to these network benefits rather than the inherent quality of the law.[18]

"Race to the bottom" theorists, in effect, posit that, when given a choice between an incorporation product that favors managers but reduces overall value and one that disfavors managers but increases overall value, firms will choose the former. "Race to the top" theorists posit that firms will choose the latter. Viewed from this perspective, the theoretical debate about direction is more closely connected to the debate about the need for mandatory rules than it is to state competition more generally.[19]

As I will discuss here, the positions taken by the partisans, properly understood, are much closer to each other than the literature lets on. At the same time, the theoretical underpinnings make the question of firm choice significantly more complex than the "to the top" and "to the bottom" monikers suggest.

2.1 Extreme versus Nuanced Versions in the Directional Debate

The extreme claim that state competition has resulted in a race to the bottom is clearly false and was probably never seriously asserted. At the very bottom, managers have appropriated all shareholder wealth. The combined market capitalization of stock in publicly traded companies in the US is (and the returns that investors have earned from stock ownership are) sufficiently high that it is safe to conclude that we have not arrived at the very bottom. Indeed, Lucian Bebchuk, the contemporary scholar most identified with the "race to the bottom" view, argues that firms will choose a law favoring managers which reduces firm value over a law favoring shareholders which increases firm value only if the reduction in firm value, relative to the benefit to the managers, is not excessive.[20]

The extreme "race to the top" claim is also difficult to maintain. If firms, when given a choice, always choose the law that maximizes value, it must be either that managers have no power over that decision or that the interests of managers and shareholders regarding the choice coincide perfectly.

A more nuanced version of the "race to the top" claim would admit that firms may sometimes choose a law that reduces firm value and benefits managers. This more nuanced "race to the top" claim differs from Bebchuk's more nuanced version of the "race to the bottom" claim only in degree (and perhaps not at all). For example, Frank Easterbrook and Daniel Fischel, among the most prominent early "to the top" scholars, share Bebchuk's view[21] that managers regularly choose rules that entrench them against hostile bids even though such rules lower firm value.[22] So, possibly, the main difference between the two camps has less to do with their views on the directional debate and more to do with their (less well argued and articulated) views on the federalism debate: how good (or bad) a federal corporate law would be.

2.2 The Multiplicity of Settings for Choice

Firms choose their domicile, and thereby the legal rules that govern them, in a multiplicity of settings. Specifically, firms can make this choice prior to an IPO or mid-stream; they can make it explicitly (by reincorporating) or implicitly (by failing to reincorporate); and managers, at the time of the choice, can hold a small fraction ("outside managers") or a significant fraction ("large shareholder managers") of the firm's voting power. But the direction of firm choice depends on the power and incentives of managers and of shareholders. Because these factors will vary systematically among the settings for choice, there is no a priori reason why the directions of firm choices in different settings should be identical.

2.2.1 The Power to Effect Mid-Stream Incorporation Decisions

To change its state of incorporation, a firm typically merges with a wholly-owned subsidiary incorporated in a different state, with the subsidiary surviving the merger. Mergers generally require a recommendation by the board of directors and the approval of shareolders with at least a majority of the shares entitled to vote.[23] According to Guhan Subramanian, 373 publicly-traded firms effected mid-stream reincorporations over the 1991 to 2001 period.[24] Eldar and Magnolfi find 607 reincorporations between 1995 and 2013.[25]

To effect a mid-stream reincorporation that benefits themselves at the expense of shareholder value, managers thus need to both dominate the board of directors sufficiently to get the board to recommend a merger and either own sufficient shares to approve the merger or induce sufficient other shareholders to vote for the merger. To block a reincorporation that benefits shareholders at the expense of managers, managers merely need to either dominate the board of director sufficiently to get the board not to recommend a reincorporation merger or have sufficient shares to block the merger. Large shareholder managers will tend to have greater power than outside managers to effect or block a reincorporation as they own a greater fraction of shares and are more likely to dominate the board.

2.2.1.1 Board Domination

"Race to the bottom" scholars have generally assumed that even outside managers have sufficient influence over board decisions to block a reincorporation that runs counter to their interests and "race to the top" scholars have not directly challenged this assumption.[26] While this assumption may be justified for many companies, the degree to which managers control boards is not uniform and has declined over the years.[27] As Ed Rock and I have shown elsewhere, the percentage and the relative power of outside directors on corporate boards have increased substantially over the last 40 years.[28] Thus, at least in some companies, managers may not have the power to block a reincorporation on the board level.

Whether outside managers in many companies have sufficient sway over their boards to get them to recommend a reincorporation that favors managerial interest at the expense of shareholder interest is questionable. The fact that there is no widespread shareholder opposition to reincorporation recommendations (unlike, say, to board decisions to adopt a poison pill, or to retain a staggered board) suggests that managerial power in this regard is limited.

2.2.1.2 Shareholder Approval

That shareholders must vote in favor of a reincorporation would seem to indicate that reincorporations ought to benefit shareholders as long as managers do not control the shareholder vote. "To the bottom" theorists have countered that shareholders have imperfect information about the effect of a reincorporation on the value of the firm and may vote in favor of reincorporations that run counter to their interest.[29]

Whatever the merits of this argument may have been[30] in the past, it has lost much of its currency in light of the increased power of institutional investors. Institutional investors (such as mutual funds and pension funds) hold much larger stakes in specific firms than the individual investors of lore.[31] They also hold shares in many more different companies. This generates economies of scope to the extent that they vote on recurring issues that have similar effects on companies (such as decisions to reincorporate). While the incentives of most institutional investors to acquire information about upcoming votes are substantially lower than those of individual shareholders holding the same stake,[32] they still greatly exceed those of highly dispersed shareholders.[33] Moreover, institutional investors can pool their resources by hiring proxy advisory firms to give them voting advice.[34] It is thus highly doubtful that institutional investors regularly approve of reincorporations that reduce company value.

A second argument put forth by "to the bottom" scholars is that firms will propose reincorporations that maximize managerial benefits, but subject to the constraint that they do not reduce shareholder value.[35] The result of such a process could be characterized as a "crawl upwards," as firm value increases whenever a firm reincorporates (even if only by a little). As discussed in greater detail below, the "crawl upwards" model has significant implications for the optimal competitive strategy of states trying to attract reincorporations.

2.2.2 Conflicts of Interest in Mid-Stream Decisions

Mid-stream, various forces outside of legal rules (incentive compensation, the managerial labor market, the product market, etc.) align the interests of managers with those of shareholders.[36] Some "race to the top" scholars have suggested that these forces are sufficient to induce managers to prefer rules than maximize firm value.[37] But since these market forces do not work perfectly, residual conflicts of interest are likely to persist. Indeed, if outside market forces worked to align shareholder and managerial interests perfectly, there would not be much need for corporate law.

Individual managers, however, will have incentives to seek pro-manager rules only to the extent that they themselves profit from these rules. The ability of outside managers to profit from pro-manager rules is a function of their expected tenure. The longer their expected tenure, the larger the benefits they derive, for example, from rules insulating managers from hostile takeovers.[38]

This has significant implications. First, since managerial tenure is limited,[39] incumbent managers will obtain only a fraction of the aggregate managerial benefits of a pro-management rule. Second, because managers differ in their expected remaining tenure, they will differ in their incentives to favor a pro-management rule. Indeed, the incentives of a CEO close to retirement to seek rules that maximize share value (and thereby the value of her shares and her stock options) through reincorporations are likely to exceed the incentives to seek pro-management rules.

Large shareholder managers, however, may reasonably expect to sell their shares as a block. If such blocks sell for a higher price as a result of pro-manager legal rules, large shareholder managers can appropriate to themselves the benefits generated by such rules beyond the duration of their managerial tenure. Since large shareholder managers also tend to have greater influence over board actions, board reincorporation decisions at companies with large shareholder managers are likely to reflect the interest of such large shareholder managers. While large equity holdings by large shareholder managers reduce conflicts of interests, to the extent that conflicts remain, there are reasons to doubt whether reincorporation decisions in companies with large shareholder managers will maximize firm value.

2.2.3 The Power over Pre-IPO Incorporation Decisions

Pre-IPO firms generally have few shareholders. It is thus likely that pre-IPO boards will reflect the wishes of the pre-IPO shareholders. Pre-IPO, the power to change (and not to change) the state of incorporation therefore effectively rests with the pre-IPO owners of the firm.

The extent to which the pre-IPO owners are identical to the post-IPO managers of the firm varies from firm to firm. At one extreme, there may be a firm where the founding entrepreneur owns or controls most of the stock and plans to continue managing the firm post-IPO. At the other extreme, the pre-IPO owners may plan not to be involved in the management at all. In between are firms where both the managers and other pre-IPO investors (such as venture capitalists) own substantial shares and jointly exercise the power to make the pre-IPO incorporation decision.

2.2.4 Conflicts of Interest in Pre-IPO Incorporation Decision

In the IPO, the pre-IPO owners will sell a significant fraction of the equity in the firm. The pre-IPO owners—including pre-IPO managers to the extent they are owners—will thus have an incentive to make an incorporation decision that increases the price at which the firm shares can be sold at the IPO. To the extent that the market accurately values the incorporation product, this gives pre-IPO owners strong incentives to choose a domicile that maximizes firm value.

“Race to the bottom” theorists have made two retorts to this argument. First, they suggest that the market may not value the effect of the incorporation product correctly.[40] Second, they argue that, whatever the incentives for pre-IPO incorporation decisions, it will be post-IPO decisions that will drive the direction of state competition.[41] The second retort relates to the competition debate, rather than the directional debate, and will be taken up in the next section.

Whether theincorporation product is accurately priced in the IPO is essentially a debate about stock market efficiency. Since the firm’s state of incorporation and its laws are public information, believers in market efficiency would argue that their import is reflected in the stock price. “To the bottom” theorists, by contrast, would have to argue that the market systematically undervalues features of the incorporation law that protect shareholders against various forms of entrenchment and overreaching by managers.[42]

"To the bottom" theorists, however, have failed to present a cogent argument as to why the market would systematically misvalue companies in that fashion.[43] Indeed, theoretically, the market should be likely to price standard terms like the incorporation regime reasonably well. While small pricing inaccuracies may persist, it is unlikely that prices would fail to reflect legal rules that had a significant effect on company value.

2.2.5 Summary

Because of the systematic differences related to the multiplicity of settings, and because firms and managers will differ in less systematic ways (e.g., with respect to the degree of influence managers have over the board), it is unlikely that all firm choices follow the same paradigm. Rather, both across settings and, to a lesser extent, within settings, firms may choose different sets of rules.

2.3 Empirical Evidence on the Directional Debate

I now turn to some of the empirical evidence relevant to the directional debate. At the outset, it is important to note that this evidence is almost necessarily inconclusive. It is virtually impossible to distinguish the nuanced versions of the "to the top" and "to the bottom" positions empirically. Heterogeneity among settings and firms further complicates the empirical analysis. Moreover, the variety of factors that contribute to the quality of the incorporation product—and, in particular, that both inherent product quality and network and learning benefits may affect the incorporation choice—exacerbate the difficulty of assessing the empirical evidence.

The earliest empirical studies related to the directional debate are event

studies that examine the effect of mid-stream decisions to reincorporate on firm value. There have been several such event studies and they generally find a slight (in the range of 1%) statistically significant positive effect on the stock price upon the announcement of a reincorporation.[44] "To the top" scholars point to these reincorporation studies as evidence for their hypothesis.[45] Alas, these event studies at most show that mid-stream reincorporations tend to benefit shareholders. This result would be consistent with the view by "race to the bottom" scholars that the requirement for shareholder approval constrains managers in this setting and would have no direct implications for pre-IPO incorporation decisions or mid-stream failures to reincorporate. Moreover, the event studies do not distinguish between companies with outside and large shareholder managers.
A more recent study by Robert Anderson and Jeffrey Manns uses the fact that a merger of two companies incorporated in different states amounts to a move of assets from the state of incorporation of the company not surviving the merger to the state of incorporation of the surviving company. Anderson and Manns find that returns (at the acquirer, target, and portfolio levels) in acquisition of non-Delaware by Delaware firms are statistically indistinguishable from returns in acquisition of Delaware firms by non-Delaware firms.[46] Anderson and Manns interpret their findings as that the decision of where to incorporate resembles neither a "race to the top" nor a "race to the bottom" as Delaware adds no value compared to other states.
Another set of studies looks directly at the factors influencing incorporation decisions of firms. In separate studies, Guhan Subramanian[47] and Lucian Bebchuk and Alma Cohen[48] present evidence that firms are more likely to be incorporated in their home state than in Delaware if their home state has adopted anti-takeover statutes. If these statutes reduce firm value, this

result would be consistent with the “to the bottom” view in the directional debate. In contrast, a study by Ofer Eldar and Lorenzo Magnolfi of incorporations by existing public firms found that firms are less likely to be incorporated in states with strong anti-takeover provisions.[49]

Most anti-takeover statutes, however, are rendered redundant by poison pills. It is therefore unclear why these statutes should matter at all.[50] Indeed, in a different study, I have found that judicial quality and state law flexibility significantly affect IPO decisions and that, if one controls for these variables, anti-takeover provisions are insignificant.[51]

A third set of studies looks at anti-takeover charter provisions (ATPs) of IPO firms. The selection of charter provisions and the selection of domicile represent similar decisions of firms choosing among legal rules (or sets of legal rules). The first of these studies, by Robert Daines and Michael Klausner,[52] compares IPOs by firms that went public with venture capital backing, firms controlled by LBO specialists, and other firms. Daines and Klausner found that many IPO charters contained ATPs, with about 43% of the firm charters providing for staggered boards and 6% opting for dual-class voting stock. Dual-class stock was less common in firms with VC or LBO fund backing, but the incidence of staggered boards did not vary significantly among the three groups of companies.

The results found by Daines and Klausner pose questions for both camps. If staggered boards reduce firm value, as believed by several (though not all) “to the top” commentators, IPO charters should not provide for them and should instead (but do not) contain provisions limiting the board’s authority to adopt takeover defenses. But if ATPs reflect managerial self-interest, as “to the bottom” scholars tend to believe, why are they not more universal? In particular, the small percentage of firms with a dual-class share structure is consistent with strong entrenchment provisions being priced at the IPO and being avoided by most firms for that reason. However, the fact that VC and LBO fund backed IPOs are as likely to adopt staggered boards as other firms (even though managers in these firms wield less power),[53] as well as anecdotal evidence, suggest that these weaker provisions may not affect the IPO price, arguably because their effect on firm value is not clear cut.[54]

A notable contribution to quantifying the relative importance of inherent product quality and network effects was made by Sarath Sanga. Sanga argues that Delaware's corporate law experienced several legal shocks in the years 1985 and 1986. Examining the evolution of Delaware incorporations in the post-shock period, Sanga attributes the instantaneous increase in Delaware's market share to the change in the quality of Delaware law resulting from the shock and the subsequent increase to increased network benefits. On that basis, Sanga estimates that most of the increase in Delaware's market share is attributable to network benefits.[55] The importance of network benefits for incorporation choices would be more consistent with the "race to the top" than the "race to the bottom" view since network benefits generally relate to the value of a firm for shareholders rather than to managerial benefits.

There are, however, several limitations to Sanga's analysis. For one, to the extent that market participants expected that Delaware's market share would increase as a result of the legal shocks, even the instantaneous increase in Delaware's market share may reflect network benefits. On the other hand, there are several factors besides network effects related to the 1985-1986 shocks that could have accounted for the increase in Delaware's market share in the late 1980s and early 1990s, including additional legal shocks (such as the Delaware Supreme Court's 1989 decision in Paramount Communications v. Time Inc. which validated the "just say no" defense)[56] or a change in the

composition in the headquarter states of newly incorporating firms (different states have different retention rates of firms headquartered in the state).[57]
Several recent empirical studies have examined the factors that influence incorporation choices by non-public firms. Drawing on data from Regulation D filings, Robert Anderson has found that "one of the most important factors in the incorporation decision is the company's choice of law firm near the time of its founding. … Sophisticated law firms, which often have fifty-state practices, tend to recommend Delaware incorporation, while less sophisticated firms, which often have single-state practices, recommend local incorporation."[58] Both sides of the directional debate, he concludes, thus focus on the wrong issue.[59]

Examining the incorporation choices of startup firms financed by venture capitalists, Brian Broughman, Jesse Fried, and Darian Ibrahim found no evidence that judicial quality and flexibility of the law affect incorporation decisions.[60] Rather, they found evidence that startup firms with more out-of-state investors are more likely to incorporate in Delaware and that startup firms with investors that had previously invested in a firm incorporated in the startup's home state are less likely to incorporate in Delaware. Broughman et al. attribute these results to investors' familiarity with different corporate laws. This would suggest that, at least for venture-backed startups, a specific type of learning benefits—investor familiarity with the law—dominates over judicial quality and flexibility.

Peter Molk examined the incorporation choices of LLCs after a Delaware Supreme Court decision which cast doubt on whether default fiduciary duties applied to LLCs. Even though the Delaware legislature quickly imposed such default duties by statute, Molk found a decline in the formation of new Delaware LLC relative to regular Delaware corporations that was not reversed by the legislative amendments.[61] Molk interprets his results as supporting the "credible commitment" theory, which posits that Delaware's commitment to produce responsive business law is a valuable product quality[62] and which has been undermined by the Delaware's Supreme Court decision.[63]

It is unclear to what extent the conclusions of these three studies apply to public companies. At the IPO (or subsequently), a company may re-evaluate its choice of law firm and also get input from underwriters and underwriters' counsel about where to incorporate or give greater weight to different elements of the incorporation product. Even at the IPO stage, Robert Daines has found that the issuer's law firm affects whether a company incorporates in Delaware and suggests the possibility that the legal advice provided by the law firm could be affected by agency costs.[64] But, as Daines notes, it is unclear whether this reflects agency costs on the part of law firms or a joint decision at the time of the IPO as to what type of law firm to retain and where to incorporate.

3. The Competition Debate: Who Competes and How?

The second debate concerns the actions of states: do they in fact compete for incorporations and, if they do, what is their competitive strategy? I refer to this prong as the competition debate.

Initially, most state competition scholars have regarded the notion that many states compete for incorporations as a premise for their other arguments, without bothering to inquire much into whether this premise is correct.[65] Starting with Bill Cary, state competition scholars have asserted that states stand to earn substantial franchise taxes by firms incorporated in them, which provides an incentive for many states (especially the smaller ones) to actively seek incorporations.[66] Other scholars have noted that incorporations generate business for local lawyers, which enhances the incentives provided by the franchise tax.[67]

The academic debate has since started to focus on whether states compete at all and, if so, which ones and how. In two articles from 2001 and 2002, Ehud Kamar and I have argued that only Delaware actively competes for incorporations.[68] Since our articles, three different positions on whether states compete have emerged. Kamar and I attribute the failure of states other than Delaware to compete to political as well as economic factors. Lucian Bebchuk and Assaf Hamdani basically agree that only Delaware competes for incorporations, but they attribute the failure of other states to do so to other states having realized that competition with Delaware would be futile.[69] Roberta Romano maintains that several states are trying to attract incorporations. Notably, all camps in this debate agree that Delaware competes;[70] the debate only concerns states other than Delaware.

3.1 Do States Compete?

The claim by Kamar and me that states other than Delaware do not actively compete for incorporations rests on two grounds: their lack of meaningful incentives to compete and their failure to take meaningful measures to compete. At the time our articles were written, most states either charged a low, flat franchise tax on in-state firms or a tax based on the amount of business conducted in the state that was also imposed on firms incorporated in other states. Other than Delaware, no state stood to derive substantial revenues even if it attracted a large portion of all public companies. Therefore, contrary to the claims in the earlier state competition literature, franchise tax revenues do not drive competition by other states.[71] Kamar and I further show that the benefits states stand to gain from attracting (or retaining) legal business through incorporations are modest.[72] These modest benefits may account for the fact that states periodically revise their corporation law or take other low-cost measures.[73] States, however, have not taken any more substantial—and possibly more effective—measures to compete, such as replicating Delaware's highly regarded Chancery Court which specializes in resolving corporate disputes.[74] Given the at best modest economic incentives to compete and the at best half-hearted measures to compete, Kamar and I conclude that only Delaware makes significant efforts to attract incorporations.

Consistent with our argument, Robert Daines has shown that most firms incorporate either in Delaware or in their headquarter state.[75] If states competed, Daines's findings would imply that states other than Delaware either do not try, or do not succeed, in attracting firms headquartered elsewhere.

More recently, Michal Barzuza has presented evidence that Nevada competes for, and attracts, some firms which seek extremely lax laws.[76] Nevada, which had raised its maximum franchise tax from $85 to $11,100 in 2003, accounts for about 6–7% of incorporations by firms not incorporated in their home state and could be seen as a niche competitor.[77] Similarly, Pierluigi Matera has argued that Wyoming is trying to attract blockchain, cryptocurrency, and token-based businesses.[78] Such niche competition strategies are consistent with our notion, discussed in the next section, that competition (and the lack thereof) is politically contingent, rather than futile, and hence may emerge.

3.2 Why Don't States Compete?

The prevailing franchise tax structure, which accounts for the fact that only

Delaware (and perhaps Nevada) stand to gain substantial revenues from attracting incorporations, is endogenous. States can revise their franchise tax structure, as Nevada did, to give them greater incentives to compete. Why have states not done so?

Bebchuk and Hamdani argue that unerodable economic entry barriers account for the lack of competition. Drawing on Michael Klausner's work,[79] they argue that Delaware's competitive advantages over any other state are attributable principally to network benefits derived from the fact that a large percentage of public companies are incorporated and are expected to remain incorporated in the state. No competing states could compensate for these advantages because Delaware would quickly copy any "improvement" in the inherent quality of the incorporation product offered by that state. Other states, understanding this dynamic, have realized that competition would be futile.[80] Delaware earns profit margins from the incorporation business that are, in economic terms, of a stupendous magnitude.[81] For Bebchuk and Hamdani's argument to work, therefore, the entry barriers generated by network benefits would have to be steep. Otherwise, other states could profitably offer an incorporation product with similar inherent quality but at a lower price. Moreover, even if network benefits are sizeable, it is unclear that they can would make competition futile. To maximize its profits, Delaware should set its franchise taxes at a level where demand for Delaware incorporations is elastic, i.e., where a change in price will induce a change in the number of firms that decide to incorporate in Delaware. That about half of all public corporations incorporate outside Delaware, and that franchise tax savings are a frequently stated reason for why they do so, is consistent with such a pricing regime. So is the fact that Delaware charges higher franchise taxes to large public firms (which are likely to attribute a greater dollar value to a Delaware incorporation) than to small public firms, but still has a larger market share among large corporations. But if demand for Delaware incorporations is elastic, it follows that a state could attract incorporations by improving its incorporation product.

Moreover, Bebchuk and Hamdani's argument that competition is futile because Delaware would copy any innovation is premised on the notion that all firms are attracted to the same legal regime. But as discussed before, due to the multiplicity of settings and the heterogeneity of firms, different firms may be attracted to differing regimes. Furthermore, outside managers and large shareholder managers will differ in the kind of legal rules that bestow benefits on them. Outside managers will be interested in rules that entrench them vis-à-vis shareholders (such a rules on takeover defenses), while large shareholder managers will be interested in rules that make it difficult to sue them for breaches of fiduciary duties (e.g., if they engage in self-dealing transactions). Even if Delaware enjoys substantial network benefits, it would thus seem feasible for states to offer a differentiated product attractive to a subset of public corporations, as Nevada does according to Barzuza, as Wyoming is trying to do according to Matera, and as Maryland does for regulated investment companies.[82]

Rather than purely economic factors, Kamar and I argue that political ones account for the lack of more significant competition. For one, states are not firms. Entry is limited (one cannot form a new state) and the notion that existing states will generally try to maximize their profits in designing their corporate law is unsupported. Indeed, Romano as well as Bebchuk and Hamdani acknowledge that economic benefits from attracting incorporations are unlikely to induce larger states to compete. But even most smaller states have probably never given serious thought to competing for incorporations or taken actions like hiring a consultant to explore whether competition would be profitable.

In addition, seriously competing for incorporations can entail substantial political costs. For example, in most states, establishing a court modeled after Delaware's Chancery Court would require a constitutional amendment and attract political opposition, e.g., from the plaintiffs' bar worried about undermining the right to a jury trial; if established, the most qualified potential judges would probably not be residents of the state; small-firm lawyers, who would stand to gain little from attracting public incorporations, may oppose a wholesale change in the state's corporate law; and so on.[83]

While more costly reform is difficult, states still revise their law. But as Bill Carney has argued, in some states these revisions are driven by the influence of political interest groups—lawyers and management—rather than by a desire to attract incorporations, while other states try to reduce the cost of lawmaking by adopting the Model Business Corporation Act.[84]

Whether it is just economic factors or whether it is also political factors that explain the present state of (non-)competition bears on the stability of that state. For Bebchuk and Hamdani, it would take a significant economic upheaval to permit states to compete effectively. For Kamar and me, competition may emerge spontaneously, more states may start pursuing niche strategies, and some niche players may start aiming at a greater market share, as the political dynamics in a state change.

3.3 Competitive Strategy

Though the directional debate and the competition debate are in many ways separate, they are linked with respect to one issue: what competitive strategy should Delaware (and other competing states) adopt?

The discussion of the competitive strategies for Delaware in this section will be somewhat stylized. In reality, it is of course difficult for anyone—and surely for amorphous political entities like states—to devise and implement a strategy. One important aspect of this difficulty is that a significant portion of Delaware corporate law is judge-made. And while the judiciary may not be oblivious to a state's goals in attracting incorporations, it is also not the stooge of the state budget and economic development office. Moreover, the interests of lawyers, an important interest group even in Delaware,[85] may lead to deviations from the profit-maximizing strategy. Thus, whatever a state's optimal strategy is in theory, in practice it will be implemented imperfectly.

A starting point to the analysis of Delaware's optimal strategy is to determine the forces that shape the law of other states. One possibility is that states will neglect their corporate laws. This is indeed what several very large and very small states seem to be doing. The laws of states like New York, California, Alaska, West Virginia, and the District of Columbia contain, or did until recently, antiquated provisions requiring, for example, a supermajority to approve a merger or cumulative voting for directors. One can speculate that, in these states, corporate laws are not regularly updated either because the corporate bar takes no interest (because it is small or because it is dominated by firms specializing in Delaware law) or because the state legislature has bigger fish to fry.

Another possibility is that managers of in-state public firms will lobby for pro-managerial laws. Bill Carney, among others, has argued that such lobbying accounts for the adoption of anti-takeover laws.[86] In addition, labor groups may sometimes affect corporate law provisions, as is the case with the notorious section in New York's law imposing personal liability on the ten largest shareholders for unpaid wages.

Third, the local corporate bar may induce states to adopt a relatively decent, relatively up-to-date, statutory law, either by adopting the Model Business Corporation Act (and updating it regularly) or by devising and updating their own code.[87] Members of the local bar may do so for a variety of reasons, such as benefitting closely-held companies incorporated in the state or enhancing their reputation. Such updating could also reflect a low-cost attempt to retain and attract incorporations by public firms.

Finally, some states may pursue a niche competition strategy. Such a strategy would not be designed to replicate Delaware's high-quality judiciary and would not significantly erode Delaware's network benefits, but might attract a significant share of firms in a certain market segment.[88]

The resulting laws of states other than Delaware can be mapped along two dimensions. The first dimension concerns the degree to which the law contains pro-management or pro-shareholder rules. The second dimension concerns the overall quality (including the content of rules where shareholder and manager interest do not conflict, judicial quality and network benefits). The laws of states other than Delaware will differ along both dimensions, because states will differ in their susceptibility to managerial lobbying, in the degree of attention the corporate bar devotes to updating the law, in the influence of the local bar on the political process, in the niche strategy they may pursue, etc.[89]

Delaware's problem then becomes one of positioning its product optimally relative to both the demand by firms and to the products offered by its competitors. If all firms preferred the same position on the pro-management/pro-shareholder dimension, as posited by the more extreme "race to the top" and "race to the bottom" positions, Delaware's strategy would be simple. But if, as argued above, firm choices are heterogeneous, Delaware's positioning choice becomes more complex. To position its law optimally, Delaware would have to take account of the effect on whether existing Delaware corporations migrate out of the state, whether non-Delaware corporations move to Delaware, where companies incorporate at the IPO stage, and how high a franchise tax it could charge.[90] Moreover, to the extent that it does not reduce network benefits, Delaware would want to provide firms with a choice of rules along the pro-management/pro-shareholder dimension. Return now to the argument that firms will try to maximize shareholder value at the IPO stage (to the extent that the rules of the state of incorporation are priced). "To the bottom" theorists have argued in response that, since the stock of already existing companies is larger than the flow of IPOs, a state trying to compete for incorporations will focus on the latter rather than the former segment of the market.[91] But if Delaware caters to existing companies (which prefer relatively pro-management rules), why does Delaware attract a high percentage of companies at the IPO stage (which prefer rules that maximize company value)?[92] The answer presumably is that Delaware is superior from the company value perspective, despite its hypothesized pro-management rules.

But such a conclusion raises questions for "race to the bottom" theorists. If states compete, at least some of them should have adopted a niche strategy of catering to IPO firm demand for pro-shareholder rules. And if states do not compete, it must be that, however distorted Delaware law allegedly is by the dynamics of state competition, the product of non-competing states is even worse for shareholders.

Rather, it is more plausible that Delaware positions its law to appeal to both IPO firms and existing companies by pursuing a middle ground on the pro-manager/pro-shareholder dimension and otherwise focusing on maximizing quality (by having an up-to-date law, a good court system, quickly correcting court decisions that reduce firm value, etc.). Since no other state offers a product that is superior for both shareholders and managers, few firms would migrate out of Delaware (and firms from some other states may migrate in). And because the combination of balanced rules and high general quality results in relatively high firm value (possibly higher, or at least not significantly lower, than the rules of any other state), many IPO firms will choose Delaware law.

3.4 Refinements

The preceding discussion of Delaware's competitive strategy can be refined in several ways. First, whether or not other states are actively competing with Delaware, Delaware has market power. The presence of such market power is suggested by Delaware's substantial market share and confirmed by the supra-competitive profits Delaware earns from its chartering business.[93]

Commentators have examined several ways in which market power may affect Delaware's strategy. Most notably, Ehud Kamar has suggested that Delaware's use of fact-intensive standards serves to protect its competitive advantages. A competing state can easily copy Delaware's statutory law and even instruct its judiciary to follow Delaware case law precedents. But without an expert judiciary to interpret and apply that law, a law based on fact-intensive standards is less valuable. By using standards, in conjunction with an expert court, it becomes harder for other states to replicate Delaware law.[94]

A relationship between federal lawmaking and Delaware corporate law has given rise to other refinements to the competition debate. Congress has the power, and to some extent has exercised the power, to adopt corporate law rules. Thus, federal law governs issues like insider trading, the right to have shareholder proposals included in the company's proxy statement, and whether a company can make loans to officers. In theory, federal law could completely supplant the present regime of state-based corporate law. Such a move would be harmful to Delaware, which derives substantial revenues from the franchising business.[95]

Commentators have taken different positions on how the threat of federal intervention affects Delaware law. On one extreme, Mark Roe has argued that Delaware either mimics the rules favored by federal lawmakers or gets preempted by federal law.[96] In Roe's world, Delaware is basically a federal implementation agent that enjoys little autonomy. Put in our earlier terms, the threat of federal intervention forces Delaware to place its law at a certain position along the pro-management/pro-shareholder dimension.

On the other extreme, Roberta Romano has argued that states compete largely unimpeded by the threat of federal intervention because states correlatively exercise power over Congress. As evidence, Romano points out that the key components of state corporate law—fiduciary duties and the allocation of authority between managers and shareholders—are largely governed by state law.[97] William Bratton and Joseph McCahery have similarly argued that federal and state regulation are largely in an equilibrium with federal regulation dealing with securities markets and disclosure but leaving internal corporate affairs to state laws.[98]

Ed Rock and I have taken an intermediate position.[99] We argue that the possibility of federal preemption constitutes a threat to Delaware, but that this threat is significant only in times when systemic change can generate a significant populist payoff. At other times, as long as the interest groups representing managers and investors are reasonably satisfied, the built-in inertia of federal legislation makes federal intervention unlikely.[100]

To minimize its exposure to a populist attack, Rock and I argue, Delaware has adopted a classical or nineteenth-century common law model of lawmaking that makes Delaware law less overtly political. Specifically, most important and controversial legal rules are the product of judge-made law. Delaware's judiciary has technocratic expertise on corporate law and is appointed on a non-partisan basis. Its opinions are filled with quasi-deterministic reasoning. Statutory amendments to the corporation law are initially drafted by a bar committee, are adopted without debate or change by the legislature, and address largely technical matters.[101]

3.5 Empirical Evidence

There is relatively little statistical evidence as to whether states compete. In an early seminal article on state competition, Roberta Romano has found that there is a statistically significant correlation between the percentage of a state's total tax collections derived from franchise taxes and the speed at which the state enacts corporate law innovations.[102] However, since most states do not stand to gain material franchise tax revenues from attracting incorporations, this correlation does not provide evidence that states adopt innovations to increase revenue.

Another empirical approach in the competition debate is to examine the law of Delaware, the state that is clearly most successful in attracting incorporations. Indeed, several commentators have also tried to resolve the directional debate based on Delaware's actions. For example, Bill Cary, who wrote the first significant modern article on state competition in corporate law, examined several then recent decisions by the Delaware Supreme Court, found that they were unduly pro-management, and concluded that the race must be heading “to the bottom.”[103] Cary’s conclusion, of course, depends on knowing how the optimal law compares to Delaware law.

A more systematic and elaborate study in a similar vein by Brian Cheffins, Steven Bank, and Harwell Wells (CBW) tracks the development of shareholder rights under Delaware law, Illinois law, and the Model Business Corporations Act (MBCA) from 1899 to the present era using three different rights indexes.[104] CBW reason that, if competition has resulted in an erosion of shareholder rights, the index scores they study should decline. They find a modest downward trend for two of the three indexes and a mixed trend for the third index for each of the three bodies of law.

There are some inherent limitations in the CBW approach: reasonable minds can differ as to what items to include in a rights index and how to score an item. In particular, one may question whether the shareholder rights score should be based on a state’s default rules, the approach taken by CBW, or only on mandatory rules.[105]

It is also unclear how CBW’s results should be interpreted. For much of the period of analysis, Illinois and the drafters of the MBCA did not compete intensely, if at all, for incorporations. The impact of competition would then be reflected in differential trends in the index for Delaware compared to Illinois and the MBCA. If the Delaware indices show a similar trend to the ones for Illinois and the MBCA, as found by CBW, this could indicate that competition did not drive the index changes.

The most significant empirical analysis of Delaware law is a study by Robert Daines. Daines has shown that firms incorporated in Delaware have a higher Tobin’s q than similar firms incorporated elsewhere, and argues that this Delaware premium is due to Delaware’s relatively takeover-friendly corporate law.[106] In a follow-up study employing a different methodology, Guhan Subramanian confirms the results reported by Daines, but finds no statistically significant Delaware premium after 1996.[107]

It is unclear to what extent the cross-sectional relationship between Tobin's q and state of incorporation found by Daines signifies that a Delaware incorporation enhances firm value. To the extent it does, Daines' findings suggest that Delaware is competing for incorporations by offering a superior incorporation product.

Daines's results have also become enmeshed in the directional debate. While "to the top" scholars have embraced Daines's findings as confirmation of their view,[108] "to the bottom" scholars have pointed to the disappearance of a significant Delaware premium after 1996.[109] This controversy illustrates once again the conceptual confusion engendered by the failure to separate the various strands within the state competition debate. About half of all firms are not incorporated in Delaware. Thus, it is hard to see how a Delaware premium can be proof that firms choose a legal regime that maximizes firm value. Rather, a Delaware premium would suggest that other states either do not try to compete (or do not compete effectively). In the presence of effective competition, neither the "to the top" nor the "to the bottom" theories would predict a sizeable Delaware premium. If states raced "to the top," it would be hard to see how Delaware could have earned such a significant lead. And if states raced "to the bottom," then Delaware would, at most, have to be as good as or slightly better on the shareholder value front than other states. But if other states do not compete and thus offer an inferior product, Delaware becomes able to design its law to appeal to both managers and shareholders.

4. The Federalism Debate: What Would Federal Law Look Like?

Although the arguments are least well worked out, the federalism debate lurks in the background of many disagreements among state competition scholars. If we had a mandatory federal corporate law that replaced the current regime that gives corporations a choice among different bodies of state law, what would it look like and how would it compare to state corporate law?

For adherents to the more extreme positions in the directional debate, it is not necessary to devote much energy to this issue. However, for proponents of the more nuanced versions, the quality they expect federal corporate law to take may be a key determinant of their normative views of the present regime. But even though one can make some sensible predictions on how federal law would differ from state law, it is hard to arrive at firm conclusions on whether a mandatory federal law, on the whole, would be better or worse than the current regime. This difficulty is compounded by the fact that, in the current regime, only about half of the public companies are incorporated in Delaware, and governed by Delaware law, while the other half are incorporated in other states with a hodge-podge of different laws.

4.1 The Pro-Management/Pro-Shareholder Dimension

As several commentators have noted, federal law would be influenced by political factors, rather than by the desire to attract incorporations.[110] "Race to the bottom" theorists have acknowledged that federal law may have a pro-management bias as a result of lobbying of managerial interest groups. But they argue that at least such lobbying would be made against a neutral baseline. By contrast, the argument goes, in a state competition regime, pro-management lobbying may also take place, but would occur against a baseline that is already excessively pro-management as a result of states' interests in attracting incorporations.[111] Therefore, they claim, federal law would be less pro-management than current state law.

This argument is problematic in two respects. First, unlike federal lawmakers, Delaware lawmakers would have strong incentives to resist lobbying for laws that would reduce Delaware's attractiveness as incorporation domicile. As a result, in Delaware (and any other state that is actively competing), lobbying would be less effective than it would be in a system where attracting incorporations would not be a countervailing objective for lawmakers. If both lobbying and competition introduce a pro-managerial bias, it is a priori unclear when the bias is stronger. At least under some versions of the nuanced "to the bottom" theory (that takes account of the fact that shareholders also have power over incorporation decisions), it is possible that the pro-management bias resulting from lobbying is the stronger one.

Second, not all states actively compete for incorporations. The law of non-competing states, like federal law, would be determined by political factors.[112] To be sure, the political dynamic on the federal level may work differently than on the state level. In particular, interest groups would have very different incentives to lobby at the federal level, where they would be dealing with a large, monopolistic rule-maker,[113] than they presently do at the state level, where they are dealing with a much smaller lawmaker and may be able to escape any laws by reincorporating.[114] But it is not evident whether federal law would therefore be more or less pro-management than the laws of non-competing states.

On the other side, commentators have suggested that federal law may impose excessive regulations that are purportedly in the interest of shareholders, but in fact reduce company value. In particular, such overregulation may be the political response to corporate scandals.[115] Thus, Roberta Romano has analyzed various corporate governance mandates in the Sarbanes-Oxley Act ("SOX") and concluded that the empirical literature does not support the view that they enhance corporate value.[116]

However, many of the studies cited by Romano also do not show that SOX mandates reduce company value. In any case, it would be possible that federal law overreacts to corporate scandals, but at other times provides reasonably efficient regulation. Thus, SOX may not be emblematic of a wholesale federal corporate law. In sum, neither "to the top" nor "to the bottom" scholars have succeeded in establishing that federal law would be, respectively, inferior or superior to state laws on the pro-management/pro-shareholder dimension.

4.2 Other Considerations

4.2.1 Other Interest Groups

Several commentators have argued that groups representing labor, creditor, and similar interests may be more influential on the federal level than they are in Delaware.[117] Illustrating the possibility that federal law may give substantially greater weight to other interest groups, the platforms of two leading candidates in the 2020 Democratic Party presidential primaries contained proposals for a federal corporate law with strong pro-labor elements.[118] To the extent that federal law will cater to such other interest groups, it may result in lower benefits to shareholders or managers (or both). This may, or may not, enhance overall welfare.[119]

One particular interest group—lawyers—requires differentiation. According to Bill Carney, lawyers have a significant effect on the corporate law of states other than Delaware,[120] and even Delaware law probably caters significantly to the interest of the bar.[121] Unlike other interest groups, lawyers may thus have less influence in a federal regime than they do presently.

4.2.2 Judicial Quality and Network Effects

Delaware has an expert corporate law judiciary and, according to many commentators, Delaware law generates network benefits. A federal corporate law would presumably be adjudicated to a large extent by federal courts. Although federal judges are generally highly regarded, they would lack the specialized expertise of Delaware's judiciary. However, companies incorporated in states other than Delaware may see a benefit in a greater opportunity to have corporate law disputes resolved by federal courts rather than state courts.

A uniform federal corporate law is also likely to generate network benefits. However, to the extent that the network benefits generated by Delaware law are dependent on Delaware corporate law disputes being resolved by Delaware's small judiciary, they may exceed the network benefits arising under federal law.

4.2.3 Innovation

A federal lawmaker would lack incentives to update its law and adopt useful innovations in order to attract incorporations. As a result, the speed of innovation may be lower than it currently is for Delaware.[122] This is likely true regardless of whether Delaware's market power generates monopoly's slack, as argued by some commentators,[123] or increases its incentives to develop innovations, as argued by others.[124] Other states, of course, presently adopt innovations at a lesser pace than Delaware does, and federal law may compare favorably to at least some of such other states.

4.2.4 Rules versus Standards

To the extent that a regulatory agency would have authority to promulgate federal corporate law, federal law may be substantially rule-based. Some commentators have suggested that Delaware law relies on open-ended standards to a greater extent than is optimal.[125] If so, a more rule-based approach may be superior at the margin. There is, however, no particular reason to believe that federal law would be optimally rule-based or, for that matter, that it would be superior in this respect to the law of Delaware and other states.

4.3 Summary

While the specific parameters of federal law are unclear, there are some weak reasons to believe that federal law would be superior to the laws of non-competing states. Federal law would likely be superior in some respects—like the generation of network benefits and judicial quality—and there are no particular reasons to predict how it would differ in other respects. Whether federal law would be superior or inferior to Delaware law is not clear. Moreover, unlike in the present regime, firms would have no alternative to monopolistic federalist regulation if federal law turns out to be substantially suboptimal.[126]

5. A Note on Competition for Incorporations Elsewhere

The notion that jurisdictions may compete for incorporations is not confined to the United States. There is a significant literature and debate about jurisdictional competition in the European Union[127] and, to a lesser extent, in Canada.[128] If there is one take-away point from this chapter, it is that the dynamics of how firms choose rules, whether and how jurisdictions compete, and how the resulting product would compare with a mandatory regime can play out differently, depending not only on the formal requirements for choosing the corporate domicile, but also on the institutional and economic context. As to firm choice, the factors that will affect whether it will trend to the top or the bottom, and by how much, include the extent to which firms have controlling shareholders; whether shareholdings among non-controlling shareholders are highly dispersed or more concentrated; the presence of information intermediaries; the prevalence of non-law-based devices that align the interests of managers and shareholders; and the degree to which legal rules are reflected in the IPO price.

Predicting whether and how jurisdictions will compete is even harder. We do not have a good model that explains when jurisdictions will act as profit maximizers rather than as political actors. Perhaps the only factor one can identify with reasonable confidence is size: smaller jurisdictions are more likely to compete actively than larger ones. The extent to which jurisdictions will face political costs also cannot be generalized. Finally, geographic and language barriers may impede competition. Thus, for example, some of the smallest countries in the European Union, such as Cyprus and Estonia, may make unlikely competitors.

Finally, multi-jurisdictional bodies can differ in the power and the political economy of the central government. Even just considering the constitutional structure, there are major differences. Thus, for example, Canada, like the United States, is a federal state; but as a parliamentary democracy with a weak upper house, it is much easier to pass legislation in Canada than it is in the US. The European Union is a treaty-based union of sovereign member states, where the governments of member states have much more influence over EU-wide legislation than state or provincial governments have over federal legislation in the US or Canada.

Thus, the main lesson that other jurisdictions should draw from the US experience is that it is difficult to draw any lessons. It is not only that different scholars have come to widely different conclusions regarding the three debates that make up the larger state competition debate. More importantly, however one views the dynamics that have evolved in the United States, they may evolve differently elsewhere.

6. Conclusion

Absent clear evidence that federal law would be superior to the current system, one may be inclined not to advocate any major changes. For one, the devil we know may be better than the devil we don't know. Delaware law works at least tolerably well, so why take a chance and replace it with some unknown federal rules? Moreover, the current system at least offers alternatives: if the political process at the state level for some reason produces a deficient law, companies can opt into a different regime.

This suggests that commentators should focus on how to improve the present regime of state competition, rather than on how to replace it. To the extent that firm choice has features that cause firms to choose suboptimal law, can these features be changed? To the extent that states do not compete (and that more competition would be desirable), can more states be induced to compete? Perhaps the most interesting proposal in this vein has been advanced by Lucian Bebchuk, writing with various co-authors. They suggest that, as a matter of federal law, shareholders should be permitted to initiate and approve a reincorporation from one state to another without board approval.[129] Although their premise is that the current system trends to the bottom, their proposal should also appeal to commentators who take a nuanced "to the top" position.

There are various complications and details with Bebchuk et al.'s suggestion that would still need to be worked out. Should large shareholders have a fiduciary duty to minority shareholders in pushing for a reincorporation? Should there be a built-in delay between the time shareholders first vote for a reincorporation and the time the reincorporation becomes effective? What would be the status of charter provisions that are invalid in the state that a company migrates to? Should shareholder power to initiate reincorporations be mandatory or should companies have the ability to opt out?

On the other hand, the proposal has some intriguing elements. The present requirement that boards recommend a reincorporation, together with the possibility that managers at least sometimes use their position on and relationship with the board to advance their personal interest, will bias firm choice at the margin downwards. This, in turn, will induce Delaware to position its law to cater more to managerial interests than it would if managers had less power over incorporation decisions. A shake-up in the rules on reincorporation may also induce other states to enter the competitive fray. Finally, even for "to the top" scholars, it is easy to think of reasons why Delaware (or any other state) would not, on its own, change its law to permit this option.[130] Thus, even though at present it looks as if shareholders would not avail themselves of a power to initiate reincorporations on a regular basis,[131] giving shareholders this power could improve the competitive dynamic and make the present regime more attractive.

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[2] See, e.g., Lucian Arye Bebchuk & Allen Ferrell, Federalism and Takeover Law: The Race to Protect Managers from Takeovers, 99 Colum. L. Rev. 1168 (1999); Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 Va. L. Rev. 757 (1995); Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1461-1470 (1992); Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (Harvard, 1991); Melvin A. Eisenberg, The Structure of Corporation Law, 89 Colum. L. Rev. 1461, 1512-1513 (1989); Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. Econ. & Org. 225 (1989); Daniel R. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 Nw. U. L. Rev. 913 (1982); Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251, 256 (1977); William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L. J. 663, 666 (1974).

[3] Roberta Romano, The Genius of American Corporate Law (American Enterprise Institute, 1993).

[4] Cary, supra note 2, at 666.

[5] William Magnuson, The Race to the Middle, 95 Notre Dame L. Rev. 1183 (2020)(arguing that competition leads to harmonization of law irrespective of efficiency).

[6] Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679 (2002).

[7] See, e.g., Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210 (1992) (arguing that, unlike in corporate law, state regulation of environmental law will not result in a race to the bottom); Lynn M. LoPucki & Sara D. Kalin, The Failure of Public Companies in Delaware and New York: Empirical Evidence of a "Race to the Bottom", 54 Vand. L. Rev. 231, 232-237 (2001) (analogizing state competition for incorporations to bankruptcy venue choices); Robert K. Rasmussen & Randall S. Thomas, Timing Matters: Promoting Forum Shopping by Insolvent Corporations, 94 Nw. U. L. Rev. 1357, 1382-1406 (2000) (drawing on the competition-for-incorporations literature to propose reforms in bankruptcy venue rules); Edward J. Janger, Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom, 83 Iowa L. Rev. 569, 588-592 (1998) (drawing on state-competition-for-incorporations literature to argue that uniform law drafters may facilitate the adoption of inefficient rules); David Charny, Competition among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities, 32 Harv. Int'l L. J. 423 (1991) (using the state-competition paradigm to analyze whether corporate law in the European Union should be harmonized).

[8] Brett H. McDonnell, Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects, 31 Hofstra L. Rev. 681 (2003).

[9] William W. Bratton, Corporate Law's Race to Nowhere in Particular, 44 Univ. Tor. L. J. 401 (1994).

[10] Jens Dammann , State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis, 80 Md. L. Rev. 214 (2021) (discussing scope of internal affaris doctrine).

[11] Ehud Kamar, Beyond Competition for Incorporations, 94 Geo. L. J. 1725 (2006).

[12] See, e.g., Bebchuk, supra note 2 (arguing that state competition leads to rules biased toward managerial interests); Cary, supra note 2 (arguing that state competition results in a race to the bottom).

[13] See, e.g., Winter, supra note 2 (arguing that state competition results in a race to the top); Fischel, supra note 2 (challenging Cary's analysis); Romano, supra note 2 (adducing evidence that state competition results in a race to the top).

[14] Even if firms choose legal rules that maximize firm value, the result may not be optimal due to the presence of network and other types of externalities, see Klausner, supra note 2.

[15] See, e.g., Romano, supra note 3; Kahan & Kamar, supra note 6; Marcel Kahan, The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?, 22 J. L. Econ. & Org. 340 (2006); see also Ofer Eldar & Gabriel Rauterberg, Is Corporate Law Nonpartisan?, 2023 Wis. L. Rev. (forthcoming 2023) (arguing that nonpartisan nature of Delaware makes it attractive as incorporation choice for companies with heterogeneous shareholders).

[16] There are subtle differences between network benefits and learning benefits. Learning benefits have accrued from past actions. The accumulated legal expertise on Delaware law would be a learning benefit. Network benefits derive from expectations about the future. The fact that lawyers continue to gain expertise in Delaware law because Delaware law is expected to remain dominant is a network benefit. Since the implications of network and learning effects are similar, this chapter will use the term network effects or network benefit also to encompass learning effects or benefits.

[17] Klausner, supra note 2; Marcel Kahan & Michael Klausner, Corporate Contracting: Standardization, Innovation and the Role of Contracting Agents (or "The Economics of Boilerplate"), 83 Va. L. Rev. 713 (1997).

[18] Robert Anderson & Jeffrey Manns, The Delaware Delusion, 93 N.C. L. Rev. 1049 (2015); Magnuson, supra note 5; Oren Bar-Gill, Michal Barzuza & Lucian A. Bebchuk, The Market for Corporate Law, 172 J. Inst. Theor. Econ. 134 (2006).

[19] See, e.g., Lucian A. Bebchuk, The Debate on Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395 (1989); Jeffrey N. Gordon, The Mandatory Structure of Corporate Law, 89 Colum. L. Rev. 1549 (1989).

[20] Bebchuk, supra note 2, at 1461.

[21] See Bebchuk & Ferrell, supra note 2.

[22] Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

[23] See, e.g. Delaware General Corporation Law, Section 251.

[24] See Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching, 150 U. Pa. L. Rev. 1795, 1820 (2002).

[25] Ofer Eldar & Lorenzo Magnolfi, Regulatory Competition and the Market for Corporate Law, 12 Am. Econ. J.: Microeconomics 60 (2020).

[26] See, e.g., Winter, supra note 2. An exception is Romano, who points out that, when Pennsylvania enacted a disgorgement anti-takeover statute in 1990, the boards of almost three-quarters of all exchange-traded Pennsylvania companies decided to opt out. Roberta Romano, Competition for Corporate Charters and the Lesson of Takeover Statutes, 61 Fordham L. Rev. 843, 859 (1993).

[27] Marcel Kahan & Edward Rock, Embattled CEOs, 88 Tex. L. Rev. 987 (2010).

28 Kahan & Rock, supra note 26; Marcel Kahan & Edward Rock, How I learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law, 69 U. Chi. L. Rev. 871, 881–884 (2002).

[29] Bebchuk, supra note 2, at 1470–1476.

[30] The argument that some shareholders are imperfectly informed is clearly valid. But it does not necessarily follow that they will tend to vote for value-reducing mergers. It may be more rational for rationally uninformed shareholders to abstain, split their votes, vote randomly, or even systematically vote against board proposals (if they believe that most proposals are adverse to shareholder interests). These strategies would be particularly effective if there are other, better informed shareholders whose votes would become more likely to carry the day. Whether uninformed shareholders ever follow these more sophisticated strategies, however, is unclear.

[31] See Kahan & Rock, supra note 26, at 996 (institutional shareholders have increased from 14% in 1965 to 50% in 2008).

[32] Lucian Bebchuk & Scott Hirst, Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy, 119 Colum. L. Rev. 2029, 2030 (2019).

[33] Marcel Kahan & Edward Rock, Index Funds and Corporate Governance: Let Shareholders Be Shareholders, 100 B.U. L. Rev. 1771 (2020); Jonathan Lewellen & Katharina Lewellen, Institutional Investors and Corporate Governance: The Incentives to Be Engaged, 77 J. Fin. 213 (2021).

[34] See Kahan & Rock, supra note 26, at 1005–1007.

[35] Bebchuk, supra note 2, at 1471–1472; a more elaborate version of the basic

argument is presented in Bar-Gill et al. supra note 17.

[36] The extent to which legal rules, e.g., rules on hostile takeover defenses, align interests is not relevant here since these rules can, in principle, be changed through reincorporation. See, e.g., Bebchuk, supra note 2, 1467–1470.

[37] See, e.g., Winter, supra note 2, at 256–266; Fischel, supra note 2, at 919.

[38] With respect to other types of rules, for example those permitting blatant forms of self-dealing, even a manager with short tenure may be able to extract the bulk of the value from the company. However, such rules are not really at issue in the state competition debate. See Bebchuk, supra note 2; Bebchuk & Ferrell, supra note 2.

[39] See, e.g., Steven N. Kaplan & Bernadette A. Minton, How Has CEO Turnover Changed?, 12 Int'l. Rev. Fin. 57 (2012) (estimating average CEO tenure of six years).

[40] Bebchuk, supra note 2, at 1479.

[41] Id. at 1481.

[42] Id. at 1478–1481.

[43] See, e.g., Bebchuk, supra note 1, at 1478–1481 (noting generic belief of some commentators that markets may not price corporate law rules efficiently). Later on, Bebchuk argues that pro-shareholder rules are likely to be innovative and that innovative rules may not be accurately priced. Id. at 1482. But innovative rules (like rules permitting poison pills, anti-takeover laws, or the set of legal decisions originally attacked by Cary) may also often be pro-management.

[44] The studies are summarized in Sanjai Bhagat and Roberta Romano, Event Studies and the Law: Part II: Empirical Studies of Corporate Law, 4 Am. L. Econ. Rev. 424 (2002). As the authors note, some of the studies find significant results only for certain subsamples.

[45] See Romano, supra note 2, at 16–22.

[46] Anderson & Manns, supra note 17.

[47] Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching, 150 U. Pa. L. Rev. 1795 (2002).

[48] Lucian A. Bebchuk & Alma Cohen, Firms' Decisions Where to Incorporate," 46 J. L. & Econ. 383–425 (2003).

[49] Eldar & Magnolfi, supra note 24.

[50] Emiliano M. Catan & Marcel Kahan, The Law and Finance of Antitakeover Statutes, 68 Stan. L. Rev. 629 (2016).

[51] Kahan, supra note 14; see also Robert Daines, The Incorporation Choices of

IPO Firms," 77 N.Y.U. L. Rev. 1559 (2002) (anti-takeover provisions are not significant if one controls for the law firm advising the firm at the IPO).

[52] Robert Daines & Michael Klausner, Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs, 17 J. L. Econ. & Org. 83 (2001). Other studies include John C. Coates IV, Explaining Variation in Takeover Defenses: Blame the Lawyers, 89 Cal. L. Rev. 1301 (2001) (arguing that variation in defenses can be explained by characteristics of law firms advising owner-managers) and Laura C. Field & Jonathan M. Karpoff, Takeover Defenses of IPO Firms, 57 J. Fin. (2002).

[53] Daines and Klausner report that pre-IPO CEOs own on average 34% of the stock of "other" firms, compared to 15% and 8%, respectively, of the stock of VC and LBO fund backed firms. The pre-IPO holdings of VCs and LBO funds are, on average, 54% and 75%, respectively.

[54] Marcel Kahan & Edward Rock, Corporate Constitutionalism: Anti-Takeover Provisions as Precommitment, 152 U. Pa. L. Rev. 473 (2003).

[55] Sarath Sanga, Network Effects in Corporate Governance, 63 J.L. & Econ. 1 (2020).

[56] 571 A.2d 1140 (Del. 1989).

[57] See Kahan, supra note 14; Eldar & Magnolfi, supra note 24.

[58] Robert Anderson IV, The Delaware Trap: An Empirical Analysis of Incorporation Decisions, 91 S. Cal. L. Rev. 657, 710 (2018).

[59] Id. at 703.

[60] See Brian Broughman, Jesse M. Fried & Darian Ibrahim, Delaware Law as Lingua Franca: Theory and Evidence, 57 J.L. & Econ. 865, 872 (2014).

[61] Peter Molk, Delaware's Dominance and the Future of Organizational Law, 55 Ga. L. Rev. 1111, 1156–68 (2021).

[62] Romano, supra note 2.

[63] Since Molk's measure of LLC formation is the ratio of Delaware LLC formation to the formation of regular Delaware corporations, the negative impact on Delaware's commitment must have affected only for former type of organizations.

[64] Daines, supra note 50, at 1584-86, 1594.

[65] The most notable exceptions are Romano, supra note 2, and William J. Carney, The Production of Corporate Law, 71 S. Cal. L. Rev. 715 (1998).

[66] See Kahan & Kamar, supra note 6, at 687, note 31 (citing literature).

[67] See Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469 (1987); Bebchuk supra note 2, at 1443; Romano, supra note 2, at 240–241.

[68] See Kahan & Kamar, supra note 6; see also Marcel Kahan & Ehud Kamar, Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1205 (2002).

[69] Lucian A. Bebchuk & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the Debate on State Competition over Corporate Charters, 112, Yale L. J. 553 (2002).

[70] For an historical account of how Delaware gained its position, see Sarath Sanga, The Origins of the Market for Corporate Law (Mar. 3, 2020). https://ssrn.com/abstract=3503628

[71] Kahan & Kamar, supra note 6, at 687-694.

[72] Id. at 694-699.

[73] See also Carney, supra note 64, at 722-728, 737-741 (discussing role of lawyers in corporate law production).

[74] Kahan & Kamar, supra note 6, at 708-715.

[75] Daines, supra note 50. The same pattern seems to hold for venture-capital backed firms (Broughman et al., supra note 59) and for larger private firms (Jens Dammann & Matthias Schündeln, The Incorporation Choices of Privately Held Corporations, 27 J.L. Econ. & Org. 79, 106 (2011)), but not for smaller private companies (id.) and nonprofits, with corporations in either category mostly incorporating in their home states (Peter Molk, Where Nonprofits Incorporate and Why It Matters, 108 Iowa L. Rev. 1781 (2023)).

[76] Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 99 Va. L. Rev. 935 (2012); see also Eldar & Magnolfi, supra note 24(providing empirical evidence that Nevada law attracts small corporations).

[77] Id. at 949.

[78] Pierluigi Matera, Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?, 27 Fordham J. Corp. & Fin. L. 73 (2022).

[79] See Klausner, supra note 2.

[80] Bebchuk & Hamdani, supra note 68, at 586.

[81] Kahan & Kamar, supra note 67, at 1211 (estimating that Delaware’s margin is several thousand percent).

[82] Kahan & Kamar, supra note 6, at 721-722.

[83] Kahan & Kamar, supra note 6.

[84] See Carney, supra note 64.

[85] See Cary, supra note 2; Macey & Miller, supra note 66.

[86] See Carney, supra note 64, at 750.

[87] Id.

[88] See Barzuza, supra note 75.

[89] See Bar-Gil et al., supra note 17, for a formal model making similar points.

[90] See also Michal Barzuza, Price Considerations in the market for Corporate Law, 26 Cardozo L. Rev. 127 (2004) (highlighting interaction of positioning and maximum franchise tax).

[91] Bebchuk, supra note 2, at 1459. In particular, Bebchuk argues, both states that already have a large stock of companies incorporated in them (like Delaware) and states with presently few domiciled corporations that become successful in attracting IPO firms (the latter ultimately) will focus on reincorporation decisions.

[92] See Daines, supra note 50.

[93] A high market share is not necessarily indicative of market power as the market may be "contestable." However, a contestable market does not offer more than a normal rate of profit. William J. Baumol, Contestable Markets: An Uprising in the Theory of Industry Structure, Am. Econ. Rev. 1 (1982).

[94] Ehud Kamar, A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98 Colum. L. Rev. 1908 (1998). Although Kamar, when writing the article, assumed that other states competed with Delaware, his argument requires only that Delaware is concerned about potential competition emerging in the future. In another article, Kamar and I have argued that Delaware engages in price discrimination. In particular, Delaware's franchise tax effectively discriminates between publicly traded firms (that attribute a greater value to a Delaware incorporation) and closely held firms (that attribute a lower value), as well as, among publicly traded firms, between larger and smaller firms. Kahan & Kamar, supra note 67.

[95] See Kahan & Kamar, supra note 67, at 1251 (revenues of $425 million in 1999).

[96] Mark J. Roe, Delaware's Competition, 117 Harv. L. Rev. 588, 591–592 (2003); see also Magnuson, supra note 5 (arguing that states adopt corporate law rules similar to those of other states to reduce risk of federal intervention).

[97] Roberta Romano, Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?, 21 Oxford Rev. Econ. Pol'y 212 (2005).

[98] William W. Bratton & Joseph A. McCahery, The Equilibrium Content of Corporate Federalism, 41 Wake Forest L. Rev. 619 (2006).

[99] Another intermediate position, taken by Cary, supra note 2, and Bratton, supra note 9, 418–425, is that Delaware, in some instances but not always,

adjusts its law to ward off federal intervention.

[100] Marcel Kahan & Edward Rock, Symbiotic Federalism and the Structure of Corporate Law, 58 Vand. L. Rev. 1573 (2005).

[101] Id. at 1590–1615; see also Eldar & Rauterberg, supra note 14 (stressing nonpartisan nature of Delaware law). In a subsequent 2005 article, Roe seems to depart from his earlier claim that the threat of federal intervention is highly constraining and adopts an intermediate position similar to the one taken by Rock and myself. Roe observes that the set of groups that are influential in Delaware (managers, shareholders, lawyers) is narrower than those that wield power in Washington. As a result, the major state-level players want to minimize federal intervention, at least as long as Delaware does not adopt a lopsided law. This creates space where Delaware has room to maneuver in fashioning its law. Mark J. Roe, Delaware's Politics, 118 Harv. L. Rev. 2493 (2005).

[102] Romano, supra note 2. Romano, supra note 96, at 218, argues that the S-shaped pattern of adoption of innovations and the movement of firms from non-responsive states to responsive states are additional evidence that states compete. An S-shaped adoption pattern, however, does not show that diffusion is due to competition (see Kahan & Kamar, supra note 6, at 715–716) and the action of firms relate to the directional debate, not to whether states compete.

[103] Cary, supra note 2.

[104] Brian R. Cheffins, Steven A. Bank & Harwell Wells, Shareholder Protection Across Time, 68 Fla. L. Rev. 691 (2016).

[105] The same arguments that "to the bottom" commentators have advanced to argue that firm choice will trend "to the bottom" also imply that default rules do not offer protection. This suggests that erosion of rights could take the form of a state adopting a default rule offering protection (instead of a mandatory rules) with firms opting out of the rule.

[106] See Robert Daines, Does Delaware Law Improve Firm Value?, 62 J. Fin. Econ. 525 (2001).

[107] Guhan Subramanian, The Disappearing Delaware Effect, 20 J. L. Econ. & Org. 32 (2004); see also Anne Anderson, Jill Brown & Parveen Gupta, Jurisdictional Competition for Corporate Charters and Firm Value: A Reexamination of the Delaware Effect, 14 Int'l J. of Disclosure & Governance 341 (2017) (finding that the Delaware premium disappears after 1997 and turns negative in some specifications); Robert J. Rhee, The Irrelevance of Delaware Corporate Law, 48 J. Corp. L. 101 (2022) (finding no difference in q and various other financial ratios between Delaware and non-Delaware Fortune 500 companies in the 2015 to 2019 period).

[108] See, e.g., Jonathan R. Macey, Displacing Delaware: Can the Feds Do a Better Job than the States in Regulating Takeovers?, 57 Bus. Law. 1025 (2002); Romano, Roberta, The Need for Competition in International Securities Regulation, 2 Theoretical Inquiries in Law 387 (2001).

[109] See, e.g., Lucian Bebchuk, Alma Cohen & Allen Ferrell, Does the Evidence Favor State Competition in Corporate Law?, 90 Cal. L. Rev. 1775, 1784-1790 (2002).

[110] See, e.g., Roe, supra note 95; Kahan & Rock, supra note 99; Kahan & Kamar, supra note 6; Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359 (1998) (arguing that the federal government would be subject to significant managerial lobbying); Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale L. J. 1521, 1568-1594 (2005).

[111] See, e.g., Bebchuk, supra note 2, at 1503-1504.

[112] Carney, supra note 64; Kahan & Rock, supra note __, at 736-738; Bebchuk & Hamdani, supra note 68, at V.B.2.

[113] Cf. Bratton, supra note 9, at 432 (noting presence of economies in federal lobbying).

[114] See also Kahan & Kamar, supra note 6, at 743.

[115] See Romano, supra note 109; see also Kahan & Rock, supra note 99.

[116] Romano, supra note 109, at 1529-1543.

[117] See, e.g., Roe, supra note 79; Kahan & Rock, supra note 99.

[118] Marcel Kahan, Delaware's Peril, 80 Md. L. Rev. 59 (2020).

[119] See, e.g., Bebchuk, supra note 2, at 1505. Even at present, other interest groups may have influence over the corporate law of non-competing states. See, e.g., Kahan & Kamar, supra note 6, at 732 (noting influence of labor groups on certain provisions of New York law).

[120] See Carney, supra note 64.

[121] See, e.g., Cary, supra note 2, Macey & Miller, supra note 66; Douglas M. Branson, Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law, 43 Vand. L. Rev. 85 (1990).

[122] See Romano, supra note 2.

[123] Bebchuk & Hamdani, supra note 68, at [V.A.3]

[124] Kahan & Kamar, supra note 6, at 742.

[125] See Kamar, supra note 93; Branson, supra note 120; see also Kahan & Rock, supra note 99.

[126] Romano, supra note 109, at 2387.

[127] See, e.g., David Charny, Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities, 32 Harv. Int'l L. J. 423 (1991); Karsten Engsig

Sorenson & Mette Neville, Corporate Migration in the European Union, 6 Colum. J. Eur. L. 181, 186–187 (2000).

[128] See, e.g., Douglas J. Cumming & Jeffrey G. MacIntosh, The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law," 20 Int'l Rev. L. & Econ. 141–186 (2000).

[129] See Lucian A. Bebchuk & Allen Ferrell, A New Approach to Takeover Law and Regulatory Competition, 87 Va. L. Rev. 111, 161–163 (2001); Bebchuk & Hamdani, supra note 68.

[130] For example, Delaware may not want to adopt a rule that makes it easier for domestic firms to move to a different state.

[131] At present, precatory shareholder resolutions requesting the board to propose a reincorporation are scarce and gain little shareholder support. For example, in 2013, there were two such proposals among S&P 1500 companies (each requesting a reincorporation from Oklahoma to Delaware) with neither gathering more than 5% shareholder support. See, Georgeson, Ann. Corp. Gov. Rev. (2013).

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