



# The New Political Economy of Delaware Corporate Lawmaking

Law Working Paper N° 879/2025

October 2025

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Corporate Lawmaking

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## Abstract

2024 and 2025 marked a breakdown in Delaware's traditional approach to corporate lawmaking, a breakdown that resurrects the longstanding debate over whether Delaware should function as the de facto promulgator of national corporate law. In this Article, we argue that the breakdown in the Delaware process is a result of changes in the capital and legal markets. The key capital market change is the rise of dual-class controlled companies that can credibly threaten to reincorporate from Delaware and have governance demands that traditional corporate law doctrine cannot easily accommodate. The key legal market change is increased competition among Delaware lawyers resulting from an increase in the size of Delaware firms, from an increase in the number of Delaware firms, and from more out of state firms opening Delaware offices. Together, these changes make it more difficult for Delaware lawyers to resist the pressure to accommodate demands from controllers, controlled companies and their out-of-state law firms even if accommodating these demands is adverse to the long-term interests of Delaware and of Delaware lawyers as a group. To address these changes, we propose replacing the current "Corporation Law Council" with a legislatively created "Corporation Law Commission" that prioritizes the creation of a balanced and technically excellent corporate law over making changes that serve immediate client interests. The Commission's membership incorporates greater representation from other stakeholders and has fewer Delaware lawyers engaged in active practice. Its procedures would establish mechanisms to enhance transparency and encourage input. By increasing the legitimacy of Delaware's statutory lawmaking process, these changes will help Delaware address the challenges from other jurisdictions and the ever-present threat of federal intervention. A robust process such as the one we propose will help Delaware withstand national scrutiny, external competition, and the prospect of federal intervention.

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# **The New Political Economy of Delaware Corporate Lawmaking**

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September 15, 2025

## **Abstract**

*2024 and 2025 marked a breakdown in Delaware's traditional approach to corporate lawmaking, a breakdown that resurrects the longstanding debate over whether Delaware should function as the de facto promulgator of national corporate law. In this Article, we argue that the breakdown in the Delaware process is a result of changes in the capital and legal markets.*

*The key capital market change is the rise of dual-class controlled companies that can credibly threaten to reincorporate from Delaware and have governance demands that traditional corporate law doctrine cannot easily accommodate. The key legal market change is increased competition among Delaware lawyers resulting from an increase in the size of Delaware firms, from an increase in the number of Delaware firms, and from more out of state firms opening Delaware offices. Together, these changes make it more difficult for Delaware lawyers to resist the pressure to accommodate demands from controllers, controlled companies and their out-of-state law firms even if accommodating these demands is adverse to the long-term interests of Delaware and of Delaware lawyers as a group.*

*To address these changes, we propose replacing the current "Corporation Law Council" with a legislatively created "Corporation Law Commission" that prioritizes the creation of a balanced and technically excellent corporate law over making changes that serve immediate client interests. The Commission's membership incorporates greater representation from other stakeholders and has fewer Delaware lawyers engaged in active practice. Its procedures would establish mechanisms to enhance transparency and encourage input. By increasing the legitimacy of Delaware's statutory lawmaking process, these changes will help Delaware address the challenges from other jurisdictions and the ever-present threat of federal intervention. A robust process such as the one we propose will help Delaware withstand national scrutiny, external competition, and the prospect of federal intervention.*

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We would like to thank Emiliano Catan for helpful comments and Juliette Paymayesh for helpful research assistance.

## INTRODUCTION

The last two years have seen unprecedented legislative changes to the Delaware General Corporation Law. In 2024, the legislature amended the DGCL<sup>1</sup> to reverse three Court of Chancery decisions issued during the preceding months: *Moelis*,<sup>2</sup> *Activision*<sup>3</sup> and *Crispo*.<sup>4</sup> Then, in 2025, the legislature made further amendments<sup>5</sup> to overhaul the treatment of controlling shareholders, including reversing the Delaware Supreme Court’s 2024 decision in *Match Group*,<sup>6</sup> providing a safe harbor for certain controller transactions and restricting access to books and records.

These amendments were far from technical. According to both their sponsors<sup>7</sup> and unaffiliated commentators,<sup>8</sup> they significantly changed the

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<sup>1</sup> Del. Code Ann. tit. 8, §§ 122, 261, 268 (2024); <https://legis.delaware.gov/BillDetail/141480>.

<sup>2</sup> *W. Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 311 A.3d 809 (Del. Ch. 2024).

<sup>3</sup> *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024) (corrected March 19, 2024).

<sup>4</sup> *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023).

<sup>5</sup> Del. Code Ann. tit. 8, §§ 144, 220 (2025); <https://legis.delaware.gov/BillDetail/141857>.

<sup>6</sup> *In re Match Grp, Inc. Derivative Litig.*, 315 A.3d 446 (Del. 2024).

<sup>7</sup> Katie Tabeling, *Corporate Law Amendments Proposed*, Del. Bus. Times (Feb. 18, 2025), <https://delawarebusinesstimes.com/news/corporate-law-amendments-proposed/> (reporting Gov. Meyer’s statement that Delaware would protect its corporate law “relentlessly” and that the Legislature acted “swiftly to respond to the evolving needs of the global market”); Jeff Montgomery, *Sponsor of Del.’s Corporate Law Rework Defends Bill*, LAW360 (Feb. 25, 2025), <https://www.law360.com/articles/2302716> (interviewing Sen. Bryan Townsend, the bill’s primary sponsor, who cited the “urgency of the moment” and “critical mass of developments” that prompted S.B. 21 and linked the legislation to concerns over Delaware’s reputation and corporate flight; added that “[t]his is not the first, and it won’t be the last time sensitive issues unfold with regard to Delaware corporation laws.”); Sarah Petrowich, *Del. Lawmakers Propose Corporate Law Changes and Ongoing Departure Threats and Musk Litigation*, Del. Pub. Media (Feb. 18, 2025), <https://www.delawarepublic.org/politics-government/2025-02-18/del-lawmakers-propose-corporate-law-changes-amid-ongoing-departure-threats-and-musk-litigation>

(noting Rep. Griffith warning that proxy votes on whether to leave Delaware were already arising, creating “an urgency to protect the state of Delaware;” and law firm Richards, Layton & Finger, involved in the drafting of the legislation, arguing that “changes are necessary to...ensure that Delaware remains the preeminent jurisdiction for incorporation.”)

<sup>8</sup> See, e.g., <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/>; [https://www.sullcrom.com/SullivanCromwell/\\_Assets/PDFs/Memos/Delaware-Enacts-Important-Corporate-Law-Reforms.pdf](https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Delaware-Enacts-Important-Corporate-Law-Reforms.pdf); House Committee Minutes, at 27-29, 22, 50 (Prof. Brian JM Quinn called the amendments “radical changes” and “not mere technical changes to corporate law”; Prof. Andrew Verstein warned they “chang[e] the rules so thoroughly that Delaware law may become unteachable”; Prof. Anne M. Tucker described them as “consequential”; and Prof. Ann Lipton asserted they would “authorize a shift in corporate governance” that could cause Delaware to “lose control over its law”); Gabriel Rauterberg

substance of Delaware corporate law. They were also, to varying degrees, controversial. Finally, both sets of amendments departed from Delaware's traditional process for amending the DGCL, with the 2024 amendments accelerating it and the 2025 process bypassing it.

The legislative interventions of 2024 and 2025 raise important questions. How should our national corporate law be produced in an era of political polarization? What are the root causes for the recent legislative interventions? Do the changes in Delaware's approach threaten the state's unique position as the de facto promulgator of national corporate law?

In assessing these questions, it is worth recalling the classic critique of Delaware's position. William Cary offered the most famous frontal attack. From his position as a corporate and securities law scholar, Dwight Professor of Law at Columbia, and chair of the S.E.C. from 1961-64, Cary bemoaned the state of the nation's corporate law and suggested that "[t]he first step is to escape from the present predicament in which a pygmy among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders thereby increasing its revenue."<sup>9</sup> Every corporate scandal revives the "pygmy"

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& Sarath Sanga, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, Harv. L. Sch. On Corp. Governance (Apr. 5, 2024) <https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve/> (arguing the amendments would "replace a century of nuanced if imperfect Delaware jurisprudence with an open-ended statement that enables too much to be taken at face value" and raise statutory conflicts that suggest "far more is at stake than the agreement rejected in *Moelis*"); Lucian A. Bebchuk, *The Perils of Governance by Stockholder Agreements*, Harv. L. Sch. On Corp. Governance (May 21, 2024) <https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements/> (raising "serious concerns" that the amendment would have "a broad effect on how governance arrangements can be made and changed," that "would operate very differently from what we have today" with "detrimental consequences for institutional investors"); Amy Simmerman & Jason Schoenberg, *Significant Amendments to the DGCL Are Set to Become Effective*, Harv. L. Sch. On Corp. Governance (Aug. 10, 2024) <https://corpgov.law.harvard.edu/2024/08/10/significant-amendments-to-the-dgcl-are-set-to-become-effective/> (describing the 2024 amendments as "significant" and predicting they will have "significant impacts for both private and public companies"); Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Private Equity and Stockholder Agreements: Empirical Insights for the Moelis Debate*, Harv. L. Sch. On Corp. Governance (Apr. 14, 2025) <https://corpgov.law.harvard.edu/2025/04/14/private-equity-and-stockholder-agreements-empirical-insights-for-the-moelis-debate/> (finding that S.B. 313 "fundamentally alter[ed] Delaware's traditional board-centric governance model" and "goes far beyond merely validating existing market practice" by allowing corporations to allocate virtually any board-level power to insiders; indicating S.B. 313 was likely influenced by private equity lobbying).

<sup>9</sup> William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 701 (1974).

trope.<sup>10</sup> With it, Delaware’s vulnerability waxes and wanes but never disappears.<sup>11</sup>

In this Article, we seek to answer these questions and suggest steps that Delaware could take to enhance its legitimacy as de facto promulgator of national corporate law.<sup>12</sup> In Part I, we review the traditional process through which Delaware has produced statutory corporate law, explain how this process has addressed Delaware’s inherent legitimacy deficit, and show how the recent legislative interventions represent a fundamental departure from the traditional process. In Part II, we argue that Delaware faces increased threats to its status, both due to renewed competition from other states and due to an increased risk of federal intervention. The 2024 and 2025 amendments have aggravated the threat of intervention. In Part III, we analyze the root causes for the breakdown in the traditional process, one traceable to changes in the capital markets and the other traceable to changes in the Delaware legal market. Together, these changes have increased the gap between the interests of Delaware lawyers, who have traditionally led the lawmaking process, and the state’s long-term interests. In Part IV, we explain how Delaware must “up its game” if it wants to preserve its role. To that end, we propose the creation of a “Corporation Law Commission” with features designed to enhance Delaware’s legitimacy over the long term and reduce the influence of out-of-state companies and law firms that seek provisions that, naturally, serve their clients’ interests but pay little regard to Delaware’s interests.<sup>13</sup> We close with a brief conclusion.

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<sup>10</sup> See, e.g., Jonathan Chait, *Rogue State: The Case Against Delaware*, NEW REPUBLIC, Aug. 19-26, 2002, at 20, 22-23 (crediting Delaware with “the national emasculation of corporate governance”); Triumph of the Pygmy State, ECONOMIST, Oct. 23, 2003, at 55, 55-56 (questioning why the laws of a state with approximately 0.3 percent of population governs more than half of public corporations).

<sup>11</sup> Cary’s critique was generally accepted. A few data points help recall just how widespread the federalization/“race to the bottom” consensus was during the 1970s. In 1976, Harvey Goldschmid (then a faculty member at Columbia, later an SEC commissioner) authored a public letter endorsed by 75 academics calling for the federalization of corporate law. CITE. In 1978, when the American Law Institute’s Principles of Corporate Governance project was launched, only one Delaware lawyer was appointed as a “consultant” (Irving Shapiro, then chairman and CEO of DuPont) and only one as an “adviser” (William Quillen).

<sup>12</sup> In our 2005 article, Marcel Kahan and Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573 (2005), we analyzed the various ways in which the distinctive features of Delaware’s *traditional* approach to corporate lawmaking are an effective adaptation to the threat of federal intervention.

<sup>13</sup> We are not the only commentators addressing these issues. See Greg Varallo, Andrew Blumberg and Ben Potts, *Optimizing Delaware’s Corporate Law Amendment Process: Ideas for the Next 20 Years* (working paper 2025); Charles Whitehead, *Delaware’s Agency Problem* (working paper 2025).

This is an article about Delaware's role in creating national corporate law and Delaware's interest in maintaining that role. From within that perspective, we seek to understand the complex and contingent preconditions of the enterprise and how changing market conditions affect them. The article is only incidentally about whether the law Delaware creates is good corporate law.

There have always been challenges to Delaware's implicit claim that what is good for Delaware is good corporate law. As long-standing teachers and partisans of Delaware corporate law, we believe that Delaware's traditional process has resulted in a corporate law that, while far from perfect, has served both Delaware and the country well. Others are less sanguine. Some have argued that Delaware law tilts excessively towards managerial interests. Others believe that it generates an excessively high volume of litigation that benefits Delaware's long-term interests but is bad corporate law policy.<sup>14</sup> Yet others argue that Delaware's traditional suspicion of controlling shareholders is bad for the development of great public companies, bad for shareholders, and bad for shareholder value, especially in an era of institutional investor ownership and hedge fund activism.

These are important policy positions on which reasonable people can differ. But the question of what is the best corporate law for the nation is a separate question from the justification for Delaware's distinctive role in making corporate law. After all, we have national lawmaking institutions that have national democratic legitimacy. As a result, one's views of the substantive merits of the 2024 and 2025 amendments are separate from the arguments we make in this article. It is thus possible to agree with our analysis—that the 2024 and 2025 amendments constituted departures from the traditional process and over the long term endanger Delaware status as de facto promulgator of national corporate law—but nevertheless favor them, for example because one supports the substance of the amendment (even if they might jeopardize Delaware's role), or because one believes that the amendments were necessary to avert a unique short-term risk of a mass exodus of companies from Delaware, or because one favors a national corporate law and believes that the amendments will bring that closer.

## I: THE MAKING OF DELAWARE CORPORATE LAW

The modern story of Delaware's corporate law begins with the comprehensive update of the DGCL in 1967. In 1963, the legislature appropriated funds for a Delaware Corporation Law Revision Committee.

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<sup>14</sup> See, e.g., William Carney and George Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. Ill. L. Rev. 1.

A former chief justice of the Delaware Supreme Court chaired the committee which included leading Delaware attorneys in private practice,<sup>15</sup> representatives of the two leading corporate services companies, the Delaware Secretary of State, and the director of the Corporation Department within the Secretary of State's office.<sup>16</sup>

The committee retained Professor Ernest Folk of the University of Virginia Law School, a prominent corporate law academic, to write a report. Professor Folk examined every section of the DGCL, described how other states handled the issue, and made suggestions for how Delaware's statute should be amended. The Revision Committee accepted some of Folk's proposals, rejected others, and in many instances adopted its own approach.<sup>17</sup> The General Assembly unanimously adopted the committee's work without question or further changes or amendment.

Since that effort, the Corporation Law Council (the "Council") of the Delaware State Bar Association's Section on Corporate Law has initiated most amendments to the DGCL.<sup>18</sup> While the Council has no formal role—it is simply the governing body of one section of the Delaware State Bar Association (DSBA), the Section on Corporation Law<sup>19</sup>—it has proposed amendments on a yearly basis to keep the DGCL current and to make technical corrections.<sup>20</sup> The General Assembly has typically passed the Council's bill as a matter of course, without inquiring into the substance of the Council's work.<sup>21</sup> The large, commercial Wilmington firms dominate the Council membership, currently with three seats each.<sup>22</sup> The other members practice in smaller firms and a minority of members represent shareholder plaintiffs. Notably absent from the Council are non-Delaware

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<sup>15</sup> Samuel Arsht of Morris Nichols Arsht & Tunnell; Henry Canby of Richards Layton & Finger, Richard Corroon of Potter Anderson and Corroon, and Irving Morris of the plaintiffs' bar.

<sup>16</sup> S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976).

<sup>17</sup> Id; also Dogsbodies of the DGCL, 10 DELAWARE LAWYER SPRING 2008.

<sup>18</sup> Arsht, *supra* note \_\_, at 17, Hamermesh at 21 (“[F]or decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed by the Corporation Law Section of the Delaware State Bar Association. In particular, it is the governing body of the Corporation Law Section-its Council-that develops such initiatives.”)

<sup>19</sup> Bylaws §6.2 of the Section of Corporation Law of the DSBA:

<https://s3.amazonaws.com/media.dsba.org/public/Sections/CorpLaw/Corp%20Law%20Bylaws.pdf?AWSAccessKeyId=AKIAV5UXVRYA4QZVW36X&Expires=1755824076&Signature=jaru1Po3dXOgF6FC5Cyc5YotjEc%3D&response-content-disposition=inline&response-content-type=application%2Fpdf>

<sup>20</sup> Id.

<sup>21</sup> Assaf Hamdani & Kobi Kastiel, Courts, Legislation and Delaware Corporate Law, working paper available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5391963](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5391963).

<sup>22</sup> For a description of the current process, see Varallo et al at pp. X-y.

lawyers and, with one exception, any lawyers from firms not principally based in Delaware.<sup>23</sup>

Consider, for a moment, just how extraordinary it is that the Council, an unofficial body dominated by private lawyers who represent corporations, is entrusted with drafting amendments to the statute that regulates those very same corporations and their relationship with their shareholders. How, one might wonder, could this system possibly produce a de facto national corporate law statute that is in the public interest? How is it even permitted to exist? How, with a straight face, can anyone argue for giving lawyers with clients free rein to write the laws regulating those very clients? This has only been possible because of institutional structures supported by market conditions have limited the role of statutory amendments and encouraged the lawyers drafting those amendments to separate their clients' interests from their work on the Council. The traditional Delaware process did that remarkably well.

In the first subsection, we summarize the standard account of how amendments to the DGCL are drafted. In the next subsection, we provide five examples of legislative changes over the last 40 years.

#### *A. The Traditional Process*

To the extent that Delaware law is judge made common law, the courts play the dominant role in its development..<sup>24</sup> This includes nearly all of law of director, officer and controller fiduciary duties. Lewis Black, Jr., one of the leading corporate lawyers of his generation and a long-time Council member from Morris Nichols, explained that “The Delaware General Corporation Law is, in a sense, the least unique thing in the mix of things that recommends Delaware incorporation. That is because it is the most

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<sup>23</sup> Id. at 25. Historically, the General Assembly's calendar drove the Council's schedule. Delaware's legislators only meet from January through June. Over the preceding summer, Council members would circulate potential amendments among themselves, often arising from issues that the Council members or their colleagues had encountered in practice. The Council met monthly starting in August with the goal of submitting a bill for legislators to sponsor when the General Assembly reconvened in January. Shortly before sending the bill to the legislative sponsors, the Council would submit its proposal to the members of the Corporation Law Section as a whole for their approval. Almost invariably, approval was routine. The proposal then went to the Executive Committee of the DSBA, where approval was likewise routine. Once the legislative sponsors introduced the proposal as a bill, the Council might continue to meet monthly through March or April, but its work for that year was largely done.

<sup>24</sup> Kahan & Rock, Symbiotic, supra note \_\_; Edward Rock, The ALI's Restatement of the Law of Corporate Governance: A Reply to Professor Bainbridge, 78 Bus. Lawyer 451, 452-55 (2023)(fiduciary duty law in all jurisdictions is common law).

easily duplicated.”<sup>25</sup> Rather, “[m]any experienced lawyers believe that the principal reason to recommend to their clients that they incorporate in Delaware is the Delaware courts and the body of case law those courts have developed. They point, in particular, to the national reputation and importance of the Court of Chancery.”<sup>26</sup> Black concluded, “The Court of Chancery is an institution unique to Delaware. Its very existence offers a further reason for corporations to choose to incorporate in Delaware.”<sup>27</sup>

Legislative amendments to the DGCL are largely technical and interstitial.<sup>28</sup> From the beginning, the process for deciding what amendments to propose was informal.<sup>29</sup> When amendments were necessary, members of the Council insisted that they “put on their Delaware hat” and leave behind parochial client interests when engaging in Council business. Thus, Black explained:

The Delaware General Corporation Law is the great beneficiary of an unwritten compact between the bar and the state legislature. In broad outline, its terms recognize that the legislature will call upon the expertise of the Corporation Law Section of the Delaware Bar Association to recommend, review and draft almost all amendments to the statute. It is understood that the bar is obligated to leave parochial client interests behind when proposing corporate legislation, to present issues fairly and in an even-handed fashion, and always to deal candidly with the legislature on matters involving the corporation law. ... Wisely, the legislature has understood that, in the long run, the best

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<sup>25</sup> Lewis Black at 2.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 7; see also Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 (2006) (making similar observations).

<sup>28</sup> Hamdani and Kastiel.

<sup>29</sup> Samuel Arshnt provided the following account of the early modern period:

Within the Committee, suggested changes in the law are, in most cases, first raised by a letter from a Committee member to the Chairman. The Chairman then places the suggested change on the agenda for a forthcoming meeting. If the change is one of substance rather than a minor change in language and if the Committee does not disapprove the suggested change on initial consideration, the Chairman usually names a subcommittee to draft a suggested revision to the statute. On a major substantive change, the subcommittee will meet separately from the full Committee and work through numerous drafts before presenting its proposal to the full Committee. The full Committee may accept the work of the subcommittee for submission to the Bar Association and the legislature, retain the work of the subcommittee for revision by the full Committee or return the proposal to the subcommittee for further drafting. Minor changes in the law, on the other hand, are usually assigned to the member who suggested the change for drafting and presentation to the full Committee.

*Id.* at 19.

corporation law is the one that has the respect of all the constituencies which corporations serve, and that short-term appeals to one group or another inevitably lead to disrespect for the law and undermine its long-term viability.<sup>30</sup>

Larry Hamermesh, another long-time Council member and former Morris Nichols partner, highlighted two additional features of the traditional process: its secrecy; and the limited degree of the Council's interactions with the judiciary. Council members did not discuss proposals with persons outside the firms represented on the Council, and, in particular, not with firm clients or out-of-state referring lawyers;<sup>31</sup> the Council tried to avoid proposing legislation that would affect the outcome of litigation pending in the Delaware courts;<sup>32</sup> and, in turn, the Delaware judges played a relatively peripheral role in the Council process, influencing the Council's work, if at all, through private conversations with members about potential amendments.<sup>33</sup>

In sum, the traditional process had five key attributes. First, most lawmaking in Delaware has been non-statutory and the product of adjudication by the Delaware Court of Chancery and Supreme Court. Legislation has been largely interstitial and technical. Second, when the statute has been amended, Delaware lawyers act as the principal decisionmakers through the Corporation Law Council, an informal body with no official role to which the General Assembly has chosen to defer. Third, the Council members have tried to balance the interests of all the constituencies that Delaware corporate law served and to insulate themselves from parochial client interests. In doing so, as will be clear below, the Council has moved cautiously and followed a highly deliberative and consensus-driven process. Fourth, the Council and the judiciary maintained a degree of separation. The Council kept the judiciary at arms-length, but also did not interfere with pending litigation. Fifth, the Council kept its deliberations highly confidential.

### *B. Some Historical Examples*

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<sup>30</sup> Lewis Black at 4; Accord Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 (November 2006) at 21 (“The members of the Delaware General Assembly, however, have not taken on any significant role in initiating or drafting changes to the DGCL. Nor are those amendments the product of any legislative staff, or of any lobbyists engaged by individual businesses. Likewise, and in light of the large number of Delaware public corporations, the drafting of the DGCL is not dominated by any one Delaware corporation”).

<sup>31</sup> Id. at 1756-57.

<sup>32</sup> Id. at 32.

<sup>33</sup> Id. at 1757.

The standard accounts of the traditional approach are largely (but not entirely) supported by the historical record. In this subsection, we briefly review the process followed for five of the most important post-1967 amendments: the adoption of §102(b)(7) in 1986; the adoption of a new anti-takeover statute in 1988; the 2003 Amendment of §220 and §3114 in response to Sarbanes-Oxley; the fee-shifting and exclusive forum bylaw amendments in 2015; and, the exception that proves the rule, the deemed consent to jurisdiction amendment in 1977. These five amendments are, in a sense, atypical. Unlike most other amendments, they depart from the traditional process in that they are not interstitial technical changes but are fairly major changes driven by events. They illustrate, therefore, how the traditional process has operated even with respect to such significant changes.

### 1. The 1986 Enactment of Section 102(b)(7)

In January 1985, the Delaware Supreme Court's opinion in *Smith v. Van Gorkom*<sup>34</sup> imposed personal liability on a public company's directors for breaching their duty of care when agreeing to sell the company. Corporate lawyers, academics, and the financial press sharply criticized the decision.<sup>35</sup> The D & O insurance market, which had begun tightening in 1984, tightened further.<sup>36</sup> By the summer of 1985, insurers began

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<sup>34</sup> 488 A.2d 858 (Del. 1985).

<sup>35</sup> See, e.g., Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Lawyer 1437 (1985); Leo Herzel, Scott J. Davis & Dale Colling, "Smith" Brings Whip Down on Directors' Backs, Legal Times (May 13, 1985) at 14 (practitioner noting that the court's decision "seems to reflect nothing but the court's need to force haphazardly chosen defendants to repent for the State of Delaware's pro-business ways"); Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom after Van Gorkom*, 41 Bus. Law. 1 (1985) (reporting that "the corporate bar generally views the decisions as atrocious," and he concluded that the court "had exploded a bomb"); Richard Koenig, *Court Rules Trans Union's Directors Used Poor Judgment in Sale of Firm*, Wall St. J. (Feb. 1, 1985) at 7 (noting that the decision "shocked the corporate world" and was "a landmark ruling that puts board members in peril"); Richard M. Leisner, *Boardroom Jitters: A Landmark Court Decision Upsets Corporate Directors*, Barron's Nat'l Bus. & Fin. Wkly. (Apr. 22, 1985) at 34; see also Robert T. Miller, *Smith v. Van Gorkom and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 Wm. & Mary Bus. L. Rev. 65, 121–22 (2017) (summarizing contemporaneous criticism)..

<sup>36</sup> The 1985 Wyatt Directors and Officers Liability Insurance Survey, available at <https://www.law.upenn.edu/live/files/6692-85-the-1985-wyatt-directors-and-officers-liability> (detailing the increasing tightening between 1984 through the second quarter of 1985, finding that by early 1985, premiums rose 189.5%, deductibles nearly 296%, excess coverage trebled, and 17% of renewals had reduced limits) (hereinafter Wyatt Survey); Roberta Romano, *What Went Wrong with Directors' and Officers' Liability Insurance?*, 14 Del. J. Corp. L. 1 (noting that beginning in late 1984 the D&O market "changed dramatically: premiums skyrocketed, deductibles increased, and coverage was reduced,"

withdrawing from the market.<sup>37</sup> During this period, directors began to resign from boards citing increased liability risks.<sup>38</sup>

Despite all this commotion, it was not until October 1985—nine months later—that the Council first appointed a subcommittee to study what could be done to address the liability crisis. The subcommittee met weekly to discuss possible solutions, including amending the indemnification provisions or imposing a liability cap.<sup>39</sup> In February 1986, it began meeting regularly with the Council.<sup>40</sup> The eventual solution—exculpation—was first raised at a March 10, 1986 meeting. The ultimate version of § 102(b)(7) was drafted, discussed, debated and revised during April and May 1986.<sup>41</sup> In these debates, prominent members of the Council such as Bruce Stargatt, strongly opposed exculpation, in part because it directly attacked a court decision.<sup>42</sup> Stargatt withdrew his objections only at the end of the process in deference to the Council’s tradition of consensus.<sup>43</sup> The General

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reporting that in the first quarter of 1985, 93% of renewals experienced average premium hikes of 190%, deductibles rose nearly 300%, and coverage limits declined).

<sup>37</sup> Wyatt Survey

<sup>38</sup> See Stacy D. Blank, *Delaware Amendment Relaxes Directors’ Liability*, 44 WASH. & LEE L. REV. 111 at 120 (1987) (discussing before the enactment of §102(b)(7), “the insurance crisis forced the resignations of many directors.”); Baum, *The Job Nobody Wants*, BUS. WK. at 56 (Sept. 8, 1986) (discussing the shortage of D&O insurance prompting director resignations, noting directors are unwilling to continue serving for fear of personal liability); Darlin, *Most of Armada’s Directors Resign Over Insurance*, WALL ST. J. at 40, col. 3 (Feb. 5, 1986); Roberta Romano, *What Went Wrong with Directors’ and Officers’ Liability Insurance?*, 14 Del. J. Corp. L. 1, 1-2 (citing reports of directors resigning when firms lost coverage and others declining invitations to serve on boards in increasing numbers); Stephen P. Lamb, *Transcript of Interview on the Evolution and Adoption of Section 102(b)(7)* at 3 (Univ. of Pa. L. Sch. 2020) (hereinafter Lamb Interview), <https://www.law.upenn.edu/live/files/6872-transcript-of-lamb-102b7-interview> (recalling how liability exposure during the 1985 D&O crisis led directors to question whether board service was worth the personal financial risk given mainly the “spectrum of potential liability”).

<sup>39</sup> Subcommittee on Director Liability memo to members of the Corporation Law Section, re: Proposed Amendments to DGCL§102 and 145: A Response to Bruce M. Stargatt, Esquire May 9, 1986, at 3, available at <https://www.law.upenn.edu/live/files/6688-860509-director-liability-subcommittee-response-to>.

<sup>40</sup> Id.

<sup>41</sup> Lamb Interview, supra note \_\_\_, at 2.

<sup>42</sup> May 7, 1986 memo from Bruce Stargatt to the Corporation Law Council available at <https://www.law.upenn.edu/live/files/6686-860507-stargatt-memo-to-sectionpdf> (“Delaware has reserved to the courts the function of developing a body of law defining directors’ duties. Some of those decisions have pleased the corporate community. Some have not. Our courts have taken no popularity polls. Nor should they.”).

<sup>43</sup> Stargatt Withdrawal Letter, June 2, 1986, available at <https://www.law.upenn.edu/live/files/6691-860602-stargatt-letter-withdrawing-oppositionpdf>.

Assembly enacted the amendment, adding § 102(b)(7) to the DGCL, on June 18, 1986.

## 2. The 1988 amendment of § 203

In 1988, Delaware adopted its “anti-takeover” statute, §203. From their beginnings in the 1970s, hostile takeovers were controversial. During the 1970s, several states adopted statutes requiring pre-offer notice for tender offers.<sup>44</sup> When the U.S. Supreme Court in 1982 held that these first-generation statutes were preempted by the Williams Act,<sup>45</sup> some states adopted second-generation “business combination” and “control share acquisition” statutes.<sup>46</sup> In April 1987, the U.S. Supreme Court upheld a second generation statute against challenges in in April 1987 in *CTS Corp. v. Dynamics Corp. of America*.<sup>47</sup> Following *CTS*, multiple additional states adopted second-generation statutes.

*CTS* also led the Council to begin to study the desirability of a second-generation statute for Delaware.<sup>48</sup> By May 1987, Council members had circulated initial drafts of a statute but the Council did not propose legislation for the current legislative session. Over the summer and fall of 1987, the Council received over 100 comments from across the U.S.<sup>49</sup> Contributors ran the gamut from S.E.C. Commissioner Joseph Grundfest, who suggested specific thresholds for stockholder approval to address coercive tactics,<sup>50</sup> to Martin Lipton, who proposed that Delaware adopt a statute modeled on New York’s.<sup>51</sup> In September, the Council formed a “Takeover Legislation Subcommittee,” that included leading members of the corporate bar including Gil Sparks of Morris Nichols, who had represented the target corporations in many of the great takeover decision,

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<sup>44</sup> See, e.g., Del. Code Ann. tit. 8, § 203(c)(2) (1977) (enacted May 1, 1976) .

<sup>45</sup> *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

<sup>46</sup> See, e.g. Ohio Rev. Code Ann. § 1701.831 (West 1984) (Control Share Acquisition Act); Ohio Rev. Code Ann. §§ 1704.01–.06 (West 1984) (business combination statute). N.Y. Bus. Corp. Law § 912 (McKinney 1985). N.J. Stat. Ann. §§ 14A:10A-1 to -9 (West 1986). N.C. Gen. Stat. §§ 55-75 to -75E (1987) (Control Share Acquisition Act); N.C. Gen Stat. §§ 55-9A-01 to -09 (1987) (Business Combination Act)..

<sup>47</sup> *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

<sup>48</sup> Edward McNally & Stephen E. Jenkins, Memorandum to the Members of the Corporation Law Section re: The Proposed Delaware Business Combination Statute at 3 (Dec. 30, 1987). .

<sup>49</sup> *Id.* at 1, 3-4.

<sup>50</sup> *Id.* art 11.

<sup>51</sup> Lipton archives.

Charles Richards of Richard Layton, who had represented raiders, and future Chief Justice Norman Veasey.<sup>52</sup>

The subcommittee faced pressure from both sides. On one hand, the October 19, 1987 Black Monday market crash increased concern that corporations (including Delaware-based companies like DuPont, whose stock had fallen by 30%) would become attractive takeover targets.<sup>53</sup> On the other hand, there were calls for restraint from the S.E.C.<sup>54</sup> and threats of federal preemption “if Delaware goes too far.”<sup>55</sup>

On December 22, 1987, the Council approved a draft of what became Section 203 of the DGCL. There were significant criticisms: Veasey raised concerns about a lack of essential data and limited time for deliberation;<sup>56</sup> Richards advocated for a more moderate statute; representatives from the United Shareholders Association and major pension funds claimed the bill would harm shareholder interests and adversely affect pension benefits; an amendment to weaken the statute by making it an opt-in statute was

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<sup>52</sup> See A. Gilchrist Sparks, III., Memorandum to M. Goldman, D. Wolfe, Jr., B. Stargatt, H. Herndon, Jr., M. Hanrahan, C. Crompton, Jr., L. Black, Jr. re: Takeover Legislation Subcommittee (Sept. 14 1987), <https://www.law.upenn.edu/live/files/8187-10-mem1pdf>; David B. Brown, Memorandum to L. Ashby, et al. re: Corporation Law Section Council Meeting Tuesday, October 20, 1987 (Oct. 13, 1987), <https://www.law.upenn.edu/live/files/8188-11-mem1pdf> (noting the purpose was to consider legislation “proposed by the Takeover Committee chaired by Mike Goldman” with A. Gilchrist Sparks, III, and Charles F. Richards, Jr., on the distribution list). See also Transcript of Charlie Richards, Jr. Interview, Univ. of Pa. L. Sch. (Jan. 9, 2019) 3-7 <https://www.law.upenn.edu/live/files/9508-section-203-richards> (discussing the Council’s fall 1987 takeover-legislation deliberations).

<sup>53</sup> Transcript of Gilchrist Sparks Interview, Univ. of Pa. L. Sch. (Oct. 18, 2018) at 7-10 <https://www.law.upenn.edu/live/files/8952-section-203-sparks-transcript-finaldocx>, at 33.

<sup>54</sup> In a December 1987 letter, SEC Commissioner Grundfest criticized the subcommittee’s intention to move quickly, suggested that more time was needed to assess the practical effects of the proposed legislation and expressed concern that a Delaware takeover statute could lend credence to calls for federal chartering of corporations, which he described as a potential “disaster for the economy as well as for Delaware.” E. Norman Veasey, Memorandum to the Executive Committee of the Delaware State Bar Association re: Proposed Section 203 at 4 (Jan. 5, 1988) (hereinafter Veasey Memorandum) <https://www.law.upenn.edu/live/files/8182-5-memo1pdf>. Later that month, SEC Commissioner Cox expressed serious reservations about the proposed legislation. Charles F. Richards, Jr., Memorandum to the Members of the Corporation Law Section re: Proposed Delaware Business Combination Statute at 43-46 (Dec. 31, 1987), <https://www.law.upenn.edu/live/files/8186-9-memo1pdf>.

<sup>55</sup> Veasey Memorandum, *supra* note \_\_, at 2 (quoting Consuela Washington and Al Sommer, who said “if Delaware goes too far, such action would ‘fuel the fires’ of preemption”).

<sup>56</sup> *Id.* at 11 (“Since the consideration and resubmission of the November 19th Council draft at the December 11th Section meeting there has been an inexplicable haste which has not permitted adequate development of vital data or a reasonable exposure draft process.”).

introduced.<sup>57</sup> Despite these criticisms, the Corporation Law Section and the DSBA Executive Committee approved the draft legislation on January 4 and 5, 1988, and the proposed bill was adopted on February 2, 1988.<sup>58</sup>

Today, Section 203 stands out as the weakest business combination statute adopted by any state. It restricts business combinations for only three years after a person becomes an “interested stockholder,” a period on the low end for such statutes. It also contains exceptions, not found in most other statutes, for business combinations approved by 66-2/3% of non-interested shareholders and for interested shareholders who succeed in acquiring 85% of the company’s shares. As a practical matter, Section 203 was largely superfluous because Delaware’s 1985 judicial validation of poison pills already gave boards a more powerful tool to resist takeovers.<sup>59</sup>

### 3. The 2003 Amendment of §220 and §3114 in response to Sarbanes-Oxley, Enron, Tyco and Worldcom

The 2001 collapse of the dot-com bubble and the accompanying corporate scandals at Enron, Worldcom, Tyco and other issuers created significant pressure for a response.<sup>60</sup> Congress reacted quickly and enacted the Sarbanes-Oxley Act (SOX) on July 30, 2002.<sup>61</sup> SOX included a variety of corporate governance provisions that displaced traditional state corporate law.<sup>62</sup> The statute also represented a frontal challenge to Delaware’s

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<sup>57</sup> Floor Debate on H. Sub. to 1 to H.B. 396, 134th Gen. Assemb. at 15-17, 25 (Del. Jan. 26, 1988) (statement of Gil Sparks, Chair, Del. State Bar Ass’n Corp. Law Sec.) (arguing that an opt-in statute “would not be competitive, since all the other 27 states which have acted in this area have opt-out statutes,” warning that requiring a vote could prompt “a reincorporation vote to one of the 27 other states that have acted in this area,” and cautioning that if Delaware’s law were “viewed either in the short run or the long run as unbalanced and unreasonable, we all know that ultimately somewhere down the road we might have to pay the price for that in the context of the federal government coming in and taking some portion of that privilege from us”).

<sup>58</sup> <https://legis.delaware.gov/SessionLaws/Chapter?id=22443>

<sup>59</sup> Emiliano M Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 *Stan. L. Rev.* 629 (2016). . Ironically, the only notable transactions where §203 matters involve controlling shareholders who want to sell their control blocks. *In re Digex, Inc. Shareholders Litig.*, 789 A.2d 1176 (Del. Ch. 2000)

<sup>61</sup> Sarbanes-Oxley Act of 2002 §§ 101-109, 15 U.S.C.A. §§ 7211-7219 (West, WESTLAW through Pub. L. No. 107-377) [hereinafter Sarbanes-Oxley Act].

<sup>62</sup> For a highly critical overview, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *Yale L. J.* 1521 (2005); Cite to some other SOX articles.

primacy in corporate governance.<sup>63</sup> How did Delaware respond to the underlying scandals and the challenge to its primacy?

The Council did not initially react. Rather, atypically, two of Delaware's most prominent judges, then Chancellor William Chandler and then-Vice Chancellor Leo Strine, took the lead.<sup>64</sup> In a comprehensive article that critically evaluated Sarbanes-Oxley's intrusion into corporate governance, they argued that Delaware needed to expand its focus from directors to officers. Specifically, they proposed amending §3114 to assert personal jurisdiction over officers of Delaware corporations.<sup>65</sup>

It was only after Chandler and Strine's article that the Council took up similar proposals and proposed legislation. In June 2003, eleven months after Sarbanes-Oxley was enacted, the Delaware General Assembly enacted a bill that expanded its personal jurisdiction in corporate suits to officers<sup>66</sup> and amended §220 to make it easier for shareholders to access corporate books and records. Notably, the legislation that Delaware did adopt even after delay was very limited—much more so than SOX.<sup>67</sup>

#### 4. The 2015 Amendment to §102, §109 and §115 to permit forum selection but bar fee-shifting bylaws

The 2000s saw a wave of merger litigation. Unlike in the 1980s, suits were brought by lawyers representing shareholders rather than frustrated acquirers and often multiple suits related to the same transaction were filed (by different lawyers) nearly simultaneously in the several different courts. The *forum non conveniens* doctrine was only partly successful in centralizing litigation, as were ad hoc workarounds.<sup>68</sup>

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<sup>63</sup> Robert B. Thompson, Hillary A. Sale, Securities Fraud as Corporate Governance: Reflections Upon Federalism, 56 Vand. L. Rev. 859, 909-10 (2003) (“Corporate governance, once almost the exclusive domain of state law, is now very much a function shared by the federal and state governments.”).

<sup>64</sup> William B. Chandler III, Leo E. Strine, Jr., The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State, 152 U. Pa. L. Rev. 953 (2003).

<sup>65</sup> *Id.* at 1004 and n. 125. Chandler and Strine's analysis largely followed the work of Thompson and Sale, who identified weaknesses in Delaware's corporate law regime. Those included an anachronistic focus on directors given the concentration of power in public corporations in the hands of officers. They specifically called out the limitations on personal jurisdiction in §3114 that Chandler and Strine proposed to address.

<sup>66</sup> 10 Del. C. § 3114(b) (added by 2003 Del. Laws ch. 83, § 1, effective Jan. 1, 2004).

<sup>67</sup> Lewis S. Black, Jr. and Frederick H. Alexander, Analysis of the 2003 Amendments to the Delaware General Corporation Law (2003) available at:

<https://www.law.upenn.edu/live/files/6782-analysis-2003-amend-del-gen-corp-lawpdf>

<sup>68</sup> Strine Hamermesh and Jennejohn, Putting Stockholders First, Not the First Filed Complaint, 69 Bus. Lawyer 1 (2013).

Firms sought to control this onslaught of suits by adopting bylaws (or charter amendments) designating the Delaware courts as the exclusive forum for litigation.<sup>69</sup> Other firms adopted bylaw provisions requiring unsuccessful shareholder plaintiffs to pay the company's legal fees. Though less common than forum selection bylaws, fee shifting bylaws got a major boost when the Delaware Supreme Court, on May 8, 2014, upheld a fee-shifting bylaw in a non-stock corporation in *ATP Tour, Inc., et al. v. Deutscher Tennis Bund* ("ATP").<sup>70</sup>

*ATP* was immediately interpreted as opening the door to fee-shifting bylaws in stock corporations. Such provisions were seen as much more significant (and much more helpful to defendants) than exclusive forum provisions. As a New York M & A lawyer stated, there is a "possibility that these fee-shifting provisions will be more effective in deterring frivolous shareholder litigation altogether with the forum selection bylaws only effective in eliminating duplicative litigation outside Delaware."<sup>71</sup> Steve Bainbridge, a prominent corporate law academic and a leading corporate law blogger, hailed the decision as a means for addressing "runaway frivolous litigation [which] is having a major deleterious effect on U.S. capital markets."<sup>72</sup> In a memorandum to clients, Wilson Sonsini said that boards of Delaware companies should "seriously consider" adopting such bylaws.<sup>73</sup> The best time to do so would be "on a 'clear day,' when a board is not facing threatened or pending derivative litigation."<sup>74</sup>

Fee-shifting bylaws created a tension between the interest of the Delaware bar—the flow of corporate litigation is the life blood of the Delaware corporate law and the Delaware bar—and the interests of at least some out-of-state companies and law firms that were eager to adopt fee-shifting provisions. But at least the expressed concerns by Delaware lawyers about fee shifting provisions went beyond their narrow interest in legal fees. The Council circulated a twelve page memo advocating for a prohibition of fee-shifting provisions on principled, Delaware focused

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<sup>69</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (holding a forum-selection bylaw facially valid).

<sup>70</sup> *ATP Tour, Inc., et al. v. Deutscher Tennis Bund* (German Tennis Federation), et al., 91 A.3d 554 (Del. 2014) (upholding the facial validity of a fee-shifting bylaw in a non-stock corporation).

<sup>71</sup> David Marcus, Fee shifting bylaws not ready for prime time, *The Deal Pipeline*, May 19, 2014 Monday available on Lexis.

<sup>72</sup> Bainbridge, The case for allowing fee shifting bylaws as a privately ordered solution to the shareholder litigation epidemic, <https://perma.cc/P957-D8SD>. See, also, Stephen Bainbridge, Fee Shifting: Delaware's Self-Inflicted Wound, 40 *Delaware Journal of Corporate Law* 851 (2016).

<sup>73</sup> Wilson Sonsini, Delaware Court Endorses "Fee-Shifting" Bylaw, <https://corp.gov.law.harvard.edu/2014/05/14/delaware-court-endorses-fee-shifting-bylaw/>

<sup>74</sup> *Id.*

grounds.<sup>75</sup> First, fee-shifting provisions would make even meritorious stockholder litigation untenable. Second, fee-shifting provisions would “curtail the development of the common law of corporations.” Third, stockholder litigation is the only “extant regulation of substantive corporate law.” Fee-shifting, the Council argued, would eventually lead to federal incursion: “Eventually, other regulators would likely feel compelled to step in. The federal government might perceive a need to occupy the field of corporate law in order to maintain this critical aspect of the national and world economy.”

Whatever the motivations, the Delaware bar reacted quickly. Within two weeks, the Council recommended amending the DGCL to bar fee-shifting bylaws. A bill to do so was soon thereafter introduced in the General Assembly.<sup>76</sup> But the business community pushed back.<sup>77</sup> The U.S. Chamber of Commerce, joined by public companies, mounted a rearguard action and sent letters to the legislature opposing the bill.<sup>78</sup> In response, on June 18, the Delaware legislature tabled the legislation and instructed the Council to study the issue further and report back.<sup>79</sup>

Over the next year, new legislation was developed that represented a compromise. Sections 102 and 109 were amended to prohibit fee-shifting bylaws relating to “internal corporate claims.” And Section 115 was added to legislatively validate forum selection bylaws (which had previously only been upheld by a Chancery Court opinion).<sup>80</sup>

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<sup>75</sup> EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL, available as a word document online.

<sup>76</sup> Francis Pileggi, Proposed Addition to Delaware Corporate Statute Regarding Fee Provisions in Bylaws (May 26, 2014), available at <https://www.delawarelitigation.com/2014/05/articles/commentary/proposed-addition-to-delaware-corporate-statute-regarding-fee-provisions-in-bylaws/>

<sup>77</sup> <https://www.delawarelitigation.com/2014/05/articles/commentary/proposed-addition-to-delaware-corporate-statute-regarding-fee-provisions-in-bylaws/>

<sup>78</sup> Liz Hoffman, Delaware Fight over Corporate Legal Bills on Hold, June 18, 2014 <https://www.wsj.com/articles/BL-LB-48387>

<sup>79</sup> Liz Hoffman, Delaware Fight over Corporate Legal Bills on Hold, June 18, 2014 <https://www.wsj.com/articles/BL-LB-48387> ; Delaware Delays Consideration of Proposed Prohibition on Fee-Shifting Bylaws for Delaware Stock Corporations, Legal Monitor Worldwide, June 25, 2014 Wednesday

<sup>80</sup> 80 Del. Laws ch. 275, § 12 (2015) (amending 8 Del. C. § 109(b) to prohibit fee-shifting provisions in charters and bylaws of stock corporations); Claudia Allen, Delaware Proposal Banning Fee-Shifting and Permitting Exclusive Forum Provisions, <https://www.corporatefinancialweeklydigest.com/2015/03/articles/seccorporate-1/delaware-proposal-banning-fee-shifting-and-permitting-exclusive-forum-provisions/>  
The proposed legislation also included an additional proposal: restrictions on appraisal that would discourage “appraisal arbitration”.

The amendments discussed so far largely support the traditional account. Most of these amendments were atypical in that they departed from the standard, incremental and interstitial amendment process. Invariably, when that occurred, the final proposal was the product of a prolonged, cautious, highly deliberative, consultative and consensus-driven process. The Council, moreover, did not propose a client-driven solution but strove to propose a balanced bill. In response to *Van Gorkom*, it authorized corporations to adopt a charter provision, which would have to obtain shareholder approval, exculpating directors from monetary liability for breaches of the duty of care. Section 203 is one of the mildest, and least protective, anti-takeover statutes. The amendments following SOX were relatively minor and technical. The proposal banning fee-shifting merely preserved the status quo prior to ATP when very few companies had adopted a fee-shifting provision and was ultimately coupled with a pro-defendant validation of exclusive forum bylaws.

There were some additional deviations from the traditional account but they were relatively minor. Two judges took the lead in proposing the expansion of personal jurisdiction to officers in response to the collapse of the dot come bubble and Sarbanes-Oxley. The initial proposal to ban fee shifting after ATP was hasty and made with little consultation. After opposition emerged and generated some overt lobbying, the proposal was tabled. At that point, the process returned to the traditional approach. . Throughout this extended period, the Delaware lawmaking process retained its apolitical, bipartisan, technocratic character even in the rare occasions where proposed changes were more significant and controversial.

5. The 1977 Enactment of 10 Del. C. §3114 in response to *Shaffer v. Heitner*

An exception proves the rule. In *Shaffer v. Heitner*, the U.S. Supreme Court held that *quasi in rem* jurisdiction, Delaware's basis for asserting

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<https://clsbluesky.law.columbia.edu/2015/03/18/wilson-sonsini-discusses-proposed-2015-amendments-to-the-delaware-general-corporation-law/> However, that provision was dropped from the final bill.

jurisdiction over directors,<sup>81</sup> violated principles of due process.<sup>82</sup> Handed down on June 24, 1977, *Shaffer v. Heitner* posed an immediate threat to Delaware's ability to adjudicate cases involving non-resident directors of Delaware corporations. In marketing its corporate law, Delaware had always stressed the high-quality of its state court system.<sup>83</sup> But that system could not fulfill its function if Delaware did not have jurisdiction over key defendants. Delaware litigation also provided revenue for local lawyers<sup>84</sup> and enabled Delaware judges to further develop doctrine.<sup>85</sup> A solution had to be found.

On July 7, 1977, a mere 13 days after *Shaffer*, Delaware adopted 10 Del. C. §3114.<sup>86</sup> Building on the U.S. Supreme Court's reference to "consent" statutes, Delaware declared that acceptance of an appointment as a director would signify consent to jurisdiction in corporate lawsuits.<sup>87</sup>

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<sup>81</sup> Del Code. Ann. tit. 10, § 366 (2012)) and DEL. CODE ANN. tit. 8, § 169 (2012). The sequestration process relied on the legal fiction that Delaware was the "situs" of the stock of a Delaware corporation. A court-appointed sequestrator could seize the shares and hold them to compel the appearance of a nonresident defendant, such as a director of a Delaware corporation. At that point, the non-resident would have appeared in Delaware and become subject to its jurisdiction, and the shares would be released. The sequestration process was originally developed to support in rem jurisdiction over real property located within the jurisdiction. Anyone who claimed an interest in the property had to appear to assert it. The sequestration process supported quasi-in-rem jurisdiction, in which the seizure caused the individual defendant to appear and then become subject to personal jurisdiction. For a more detailed summary of Delaware's approach, see Eric Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicaastro*, 37 Del. J. Corp. L. 783, 794-95 (2013).

<sup>82</sup> *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

<sup>83</sup> See, e.g., Lewis Black pamphlet, *supra*; U.S. CHAMBER OF COMMERCE, STATE LIABILITY SYSTEMS RANKING STUDY: FINAL REPORT, STUDY NO. 14966 (Jan. 11, 2002) (reporting national survey results that rank the Delaware court system first in each of ten categories), available at [http://www.litigationfairness.org/pdf/liabilities\\_survey.pdf](http://www.litigationfairness.org/pdf/liabilities_survey.pdf); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5-8 (1995) (praising the chancery court); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, Speech at the Bicentennial of the Delaware Court of Chancery, 48 Bus. Law. 351, 354-55 (1992) (same).

<sup>84</sup> Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679, 694-699 (2002).

<sup>85</sup> Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1208 (1998).

<sup>86</sup> Jack B. Jacobs, *Personal Jurisdiction over Corporate Officers and Directors: Recent Developments*, 4 DEL. J. CORP. L. 690, 694 (Summer 1979).

<sup>87</sup> <https://legis.delaware.gov/SessionLaws/Chapter?id=24805> "Every non-resident of this State who after September 1, 1977 accepts election or appointment as a director . . . of a corporation organized under the laws of this State or who after June 30, 1978 serves in such capacity . . . shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in

Alone among the pre-2024 amendments, §3114 does not exhibit the major hallmarks of the traditional process. First, it did not go through the Council. Second, the resulting statute took an aggressive approach. While eleven states had statutes or court rules making corporate fiduciaries amenable to suit, only Connecticut had a statute specifically asserting “that election or service as a director acts as consent to the jurisdiction of the Connecticut courts.”<sup>88</sup> Moreover, it was not even clear that the new approach would be constitutional.<sup>89</sup> Finally, the process moved with lightning speed.

Section 3114, of course, differed, in important ways from the other amendments. It addressed an issue outside the standard menu of Council amendments. It did not relate to corporate governance or shareholder rights, but to the jurisdiction of the Delaware courts. And at least within Delaware, the need to find an alternate basis for jurisdiction, and to do so quickly, was paramount and non-controversial. In other words, Section 3114 did not require Delaware to find, as Black said, “the best corporation law . . . that has the respect of all the constituencies which corporations serve,” but directly supplied an essential basis for Delaware’s comparative advantage as incorporation haven.<sup>90</sup>

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all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director . . . is a necessary or proper party, or in any action or proceeding against such director . . . for violation of his duty in such capacity, whether or not he continues to serve as such director . . . at the time suit is commenced. Such acceptance or service as such director . . . *shall be a signification of the consent of such director . . . that any process when so served shall be of the same legal force and validity as if served upon such director . . . and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.*” (Emphasis added). For further background, see Jack B. Jacobs & Bruce M. Stargatt, The New Delaware Director-Consent-to-Service Statute, 33 BUS. LAW. 701 (January 1978).

<sup>88</sup> Rodman Ward Jr., A Delaware Phoenix: The Fall of Sequestration and the Enactment of a Director Service Statute, 3 DEL. J. CORP. L. 1, 13 (Fall 1977).

<sup>89</sup> The *Shaeffer* decision specifically rejected the plaintiff’s claim that the defendants’ positions as directors of a Delaware corporation provided sufficient contacts with the state of Delaware to support jurisdiction over non-resident defendants. And the U.S. Supreme Court observed that Delaware had not articulated any vital state interest in being the forum to adjudicate claims under its corporate law. For important discussions of the dubious constitutionality of §3114, see Eric Chiappinelli, The Myth of Director Consent, 37 Del. J. Corp. L. 783 (2013); and Verity Winship, Jurisdiction Over Corporate Officers and the Incoherence of Implied Consent, U. ILL. L. REV. 1171 (2013). According to Winship, no other state’s implied consent statute survives. Winship at 1183. For a defense, see William B. Chandler III & Leo E. Strine, Jr., The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State, 152 U. PA. L. REV. 953, 1002-03 (2003).

<sup>90</sup> Lewis Black *supra*.

*C. Delaware's Traditional Approach  
as a Response to the Legitimacy Deficit*

There is something strikingly old-fashioned about the traditional Delaware approach. It is reminiscent of a (perhaps fictional) time when much lawmaking was conducted in a similar way, when people trusted those in key positions to act disinterestedly and in the public interest.

But there is also a different way to understand Delaware's traditional approach, namely, as a response to threats to its distinctive role as the de facto promulgator of national corporate law.<sup>91</sup> Delaware derives enormous economic benefits from being the prime domicile for publicly traded corporations in the United States. Corporate franchise taxes account for nearly 30% of the state's annual revenues.<sup>92</sup> Approximately 90% of these fees are paid by publicly traded corporations.<sup>93</sup>

Being an incorporation haven also generates revenues for private business. The most significant business benefits are for local lawyers. Delaware law firms provide advice on Delaware corporate law and represent companies in corporate law disputes filed in Delaware courts. In addition, because companies are subject to general personal jurisdiction in their state of incorporation, Delaware companies are also more likely to be sued in Delaware state and federal courts in non-corporate legal disputes. Delaware incorporation also provides the jurisdictional hook for the United States District of Delaware to operate the busiest patent docket in the country, and for the United States Bankruptcy Court in Delaware to be a perennial venue for the largest bankruptcies.

These practices generate high-end legal work that command high fees. As a result, even before adjusting for the cost of living, the per capita income of Delaware lawyers exceeds the income of lawyers in other states or cities in the U.S.<sup>94</sup> Other business benefits run to service providers like

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<sup>91</sup> For a fuller discussion of these issues, see Kahan and Rock, *Symbiotic Federalism*, supra note \_\_.

<sup>92</sup> Del. Econ. & Fin. Advisory Council, Revenue Summary (June 2025), [https://financefiles.delaware.gov/DEFAC/06-25/Revenue\\_Summary\\_2025\\_06.pdf](https://financefiles.delaware.gov/DEFAC/06-25/Revenue_Summary_2025_06.pdf) (reporting that corporate franchise taxes themselves account for approximately 20% of Delaware's General Fund revenue in the 2025 fiscal year, that net franchise taxes with limited partnership and LLCs account for over 27%, and that related business entity fees and Uniform Commercial Code filings brought the total to approximately 30%). See also Press Release, Office of the Governor, Governor Meyer Calls for Swift Passage of Senate Bill 21 (Mar. 12, 2025), <https://news.delaware.gov/2025/03/12/governor-meyer-calls-for-swift-passage-of-senate-bill-21/> (stating that the corporate franchise represents more than one-third of the Delaware state budget at roughly \$2.2 billion)..

<sup>93</sup> Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 *Corn. L. Rev.* 1205 (2001)..

<sup>94</sup> Kahan & Kamar, supra note \_\_, at 695.

registered agents, restaurants, hotels, coffee shops, and copy shops. Unsurprisingly, maintaining its position as the prime domicile for public corporations is of paramount importance for the state.

Delaware's role as incorporation haven is thus undeniably good for Delaware. But this role is also historically and constitutionally contingent. New Jersey was the center of corporate chartering until Governor Woodrow Wilson forfeited the role.<sup>95</sup> The U.S. Congress has the power under the Commerce Clause to nationalize corporate law and regularly flirted with the idea during the twentieth century, although federal preemption never came to pass.<sup>96</sup> Delaware thus faces two potential threats to its role that we will examine in more detail below: one economic and one political. The economic threat is that some other state may get into the incorporation business and reduce Delaware's market share.<sup>97</sup> Blissfully, for Delaware, no state had made serious efforts to compete with Delaware—until recently.<sup>98</sup> Without any serious competition, Delaware could adopt a minimalist strategy of enacting technical amendments to keep its statutes up to date, maintaining a high-quality judiciary that would benefit corporations generally, and adopting a middle course when the interests of various corporate constituencies diverge or conflict.

The political threat is that the federal government of other states may act in ways that undermine Delaware's position. Congress or the SEC might federalize all or portions of corporate law. Other states might change the conflict of law rules that apply to the internal affairs of a corporation.<sup>99</sup> Finally, as *Shaffer* illustrates, federal law might interfere with the practical ability of the Delaware courts to oversee litigation, such as by undermining Delaware's ability to assert personal jurisdiction over directors and officers.

The political threat to Delaware's role is aggravated by the fact that Delaware, as one of the smallest states in the nation, suffers from a severe legitimacy deficit.<sup>100</sup> Why should Delaware lawmakers, elected by its less than 800,000 registered voters,<sup>101</sup> set national policy in a key area? From the standpoint of national democratic legitimacy, Delaware has a weak claim.

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<sup>95</sup> William E. Kirk, III, A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence, 10 J. Corp. L. 233 (1984).

<sup>96</sup> Mark Roe, Delaware's Competition, 117 Harv. L. Rev. 588 (2003); Kahan and Rock, Symbiotic Federalism.

<sup>97</sup> Kahan & Kahar, supra note \_\_

<sup>98</sup> Kahan & Kamar, supra note \_\_, at 724 – 735.

<sup>99</sup> Kahan & Rock, supra note \_\_, Roe, Delaware's Competition

<sup>100</sup> Cary, supra note \_\_.

<sup>101</sup> [https://elections.delaware.gov/voter/registrationtotals/pdfs/vrt\\_PP20250101.pdf](https://elections.delaware.gov/voter/registrationtotals/pdfs/vrt_PP20250101.pdf)

Delaware needs a persuasive answer to the legitimacy question. The stronger Delaware's legitimacy argument, the stronger the argument against intrusion by Congress, regulatory agencies like the SEC, and federal courts. It also provides a reason why other states should continue to apply Delaware law to internal affairs disputes involving Delaware corporations.

Delaware can plausibly lay claim to two other sources of legitimacy. First, it can claim legitimacy based on consent. At least as a first approximation, incorporators voluntarily choose to incorporate in Delaware, directors voluntarily agree to serve on the board of a Delaware corporation, and shareholders voluntarily buy shares of a Delaware corporation. These actions could be construed as consenting to have their rights and duties governed by Delaware law and adjudicated in Delaware courts.

Consent-based legitimacy, however, is subject to criticisms and limitations. For one, in publicly traded corporations, it is unclear how much attention shareholders pay to the state of incorporation and its specific rules when they make investment decisions. Nor is it clear to what extent these rules are "priced," especially in the IPO market. Moreover, the state of incorporation and the other rules can change *after* a shareholder makes an investment decision and without that shareholder's consent. Of course, shareholders in principle know that the rules can change and that a company can reincorporate and, to that extent, can be viewed as having consented as well to these rule changes; but the degree of consent to contingencies of that nature is lower than the degree of consent to the rules in place when the investment decision was made. Finally, in other areas of law, consent is not always the governing principle. California, for example, applies its prohibition against non-compete agreements in contracts even if the contract contains a choice-of-law clause electing a different state's law.<sup>102</sup> A contract to wager on a life is universally banned, even if both parties consent. You cannot legally sell a kidney to the highest bidder. And the

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<sup>102</sup> Cal. Bus. & Prof. Code § 16600 (West 2024) (declaring void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind"); Cal. Bus. & Prof. Code § 16600.5 (West 2024) (declaring that a non-compete void under California law is "unenforceable regardless of where and when the contract was signed" and "regardless of whether the contract was signed and the employment was maintained outside of California"); Cal. Lab. Code § 925(a)(1)–(2) (West 2024) (prohibiting employers from requiring California-based employees to agree to choice-of-law or forum-selection clauses that deprive them of California substantive protections). *See also, Is My Out-of-State Noncompete Agreement Enforceable in California?*, Bona Law PC (Sep. 28, 2023), <https://www.bonalaw.com/insights/legal-resources/is-my-out-of-state-noncompete-agreement-enforceable-in-california> (explaining that California courts refuse to enforce choice-of-law provisions where doing so would contravene the state's fundamental public policy against non-compete agreements).

DGCL itself contains mandatory provisions, including the existence of a board of directors and the duty of loyalty.

There is also a second objection to the consent argument. As William Cary argued, the fact that *corporate managers and directors* consent to incorporating in Delaware does not mean that Delaware law is good or should be the de facto national standard. While in the classic literature, there are strong arguments, starting with Ralph Winter's classic response, for why it is a race to the top rather than the bottom, those are primarily market-based arguments that do not rely on consent.<sup>103</sup>

Consent is therefore not a magic bullet, leading to the second argument for legitimacy: technocratic expertise. As we argued twenty years ago, Delaware's traditional approach to lawmaking can be understood as designed to enhance its technocratic legitimacy.<sup>104</sup> As discussed above, the traditional account views legislative amendments to the DGCL as largely interstitial with judicial decision-making taking the leading role in the development of the law. Judicial adjudication has a greater claim to technocratic expertise and apolitical decisionmaking than legislative interventions. Indeed, judges, including Delaware judges, who apply the common law methodology traditionally claim never to make new law, just to discover law using neutral principles. Delaware's judiciary, in particular, is highly regarded for its expertise in corporate law and both the Delaware Supreme Court and the Court of Chancery have historically been subject to a partisan balance requirement.

Whatever the deficiencies in judicial lawmaking, and there are many, Delaware's judges are about as democratically legitimate as most other judges, and, as widely acknowledged, far more technically competent when it comes to corporate law.<sup>105</sup> In other words, by limiting the traditional scope of legislative lawmaking and according a greater role to judicial adjudication, Delaware has already significantly reduced the legitimacy deficit.<sup>106</sup>

Moreover, the traditional account describes legislative lawmaking as largely confined to technical issues that generate little controversy.<sup>107</sup> The resolution of these technical issues has been delegated to the Council,

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<sup>103</sup> Ralph K. Winter Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (June 1977).

<sup>104</sup> Kahan and Rock, *Symbiotic Federalism*.

<sup>105</sup> Federal judges have (more) national democratic legitimacy because they are nominated by the president and confirmed by the Senate. As to judges in other states, only elected judges can claim any direct democratic legitimacy and that brings with it a host of other problems.

<sup>106</sup> Kahan & Rock, *Symbiotic Federalism*

<sup>107</sup> For a comprehensive analysis, see Hamdani and Kastiel, *supra* note X.

another expert body with claim to technocratic legitimacy. The Council's deliberations have been confidential, which, some commentators claim, insulates its members from interest group pressure.<sup>108</sup> It certainly hides the potential presence and effects of interest group pressure and camouflages any political disagreements which promotes the appearance of legitimacy. Historically, the Council has acted annually, diminishing any charges of issue-specific legislating. And the General Assembly has generally adopted the amendments by a wide margin without any debate, further reinforcing the appearance on non-controversial, apolitical, technocratic updates. Finally, in the rare cases when proposed amendments have been more controversial, as in the examples discussed above, the Council has traditionally strived to achieve as wide a consensus as possible and proceeded deliberately even if doing so has delayed enactment.<sup>109</sup>

Through its consent-based and technocratic legitimacy, Delaware has historically been able to deflect most criticisms based on its lack of democratic legitimacy.<sup>110</sup> Delaware has also benefited from actual and long-tenured representatives in Congress who have been able to protect Delaware's interests.<sup>111</sup> Indeed, federal law has gone out of its way not to step into Delaware's territory. Thus, the federal Securities Litigation Uniform Standards Act contains a provision widely-known as the Delaware carve-out<sup>112</sup> that excludes certain state law claims from the coverage of the Act.<sup>113</sup> Similarly, the Class Action Fairness Act exempts from its coverage actions under the corporate law of a company's state of incorporation.<sup>114</sup>

#### *D. The Break Down of the Traditional Approach*

The 2024 and 2025 amendments marked a break-down of the traditional approach.<sup>115</sup> In 2024, the legislature adopted the "market practice

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<sup>108</sup> Varallo et al., *supra* note \_\_, at 18.

<sup>109</sup> See *supra* Sections I.A and I.B.

<sup>110</sup> Marcel Kahan, *Delaware's Peril*, 80 Md. L. Rev. 59 (2021).

<sup>111</sup> An article could and should be written about the successful efforts by Senator William Roth, then-Congressman Michael Castle and then-Congressman Thomas Carper to defend Delaware against several assaults on Bankruptcy jurisdiction.

<sup>112</sup> <https://www.gibsondunn.com/wp-content/uploads/documents/publications/DavisAtkinson-SlicingAndDicingTheDelawareCarve-Out.pdf>; [https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/General/Navigating the Securities Litigation Uniform Standards Act of 1998 \(SLUSA\) \(w-027-3670\).pdf](https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/General/Navigating%20the%20Securities%20Litigation%20Uniform%20Standards%20Act%20of%201998%20(SLUSA)%20(w-027-3670).pdf)

<sup>113</sup> 15 U.S.C. § 77p(d).

<sup>114</sup> Class Action Fairness Act, 28 U.S.C. § 1453(d)(2).

<sup>115</sup> One commentator has suggested that we may have entered a new "Legislative Era" in Delaware corporate law. On that account, that era may have begun even before the 2024 and 2025 amendments. In 2022, for example, the Council proposed legislation that expanded §102(b)(7) to allow the exculpation of officers overruling a series of recent

amendments” (SB313). Most controversially, these amendments added subsection §122(18) to provide broad validity for stockholder governance agreements (overruling the Court of Chancery’s *Moelis* opinion). In addition, the legislature enacted §147 to relax board approval requirements for merger agreements (overruling *Activision*) and changed §261 to validate contracted for liquidated damage provisions even if they are a penalty, including lost merger premium provisions (overruling *Crispo*). Then, in 2025, the legislature adopted the “DExit amendments” designed to stem an asserted potential outflow of Delaware corporations (SB21). An ad hoc group convened by the Governor produced a legislative proposal that went directly to the General Assembly, thereby circumventing the Council process. The resulting legislation transformed §144 to provide a safe harbor for certain transactions in which a controller, director or officer is interested and significantly cut back the types of books and records available under §220.

Both interventions were rushed. The 2024 Market Practice Amendments responded to complaints at the March 2024 Tulane Corporate Law Institute and were enacted by the General Assembly in June. The 2025 DExit amendments were drafted by the ad hoc committee over two weeks and subsequently received only limited review. The speed prevented the extensive deliberation that preceded prior controversial amendments.

The justification offered for the hasty 2024 process was that the decisions at issue were so incompatible with “market practice” that delay was impossible.<sup>116</sup> However, no actual evidence of the prevalence of market

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Chancery Court decisions. In 2023, the Council proposed legislation that reduced the required majority for certain technical charter amendments from “majority of outstanding shares” to “majority of votes cast” which also touched on issues then in litigation. Nevertheless, the 2022 and 2023 amendment were technical in nature, followed the traditional process, and did not differ qualitatively from prior legislative interventions. They were at best harbingers, only recognizable in hindsight as the potential seeds of a trend. See Laster, *supra* note \_\_.

<sup>116</sup> See House Committee Minutes at 5 (testimony of Council Chair Raju) (acknowledging the “compressed time frame due to the need for timely action”); Senate Judiciary Committee Hearing (testimony of Council Chair Raju) (emphasizing that *Moelis* had created significant uncertainty among corporations, stating that the Council “believe[s] there are thousands of contracts... whose validity may be called into question by *Moelis*... Investors have invested millions of dollars in corporations, and they don’t know if the rights they have are valid,” and urging the Senators to fulfill their “historic role” of amending the DGCL in accord with market needs, given the uncertainty); Del. Sen. Legis. Session (June 13, 2024) <https://sg001-harmony.sliq.net/00329/harmony/en/PowerBrowser/PowerBrowserV2/20250201/-/4296?startposition=20240613145050&mediaEndTime=20240613151245&viewMode=3&globalStreamId=3> (testimony of Council Chair Raju) (warning that it was “extremely important” for senators to approve the bill in the waning days of the annual legislative

practice was provided and, in stark contrast to the manner in which §203 was adopted, proponents rejected calls to obtain data on the prevalence and nature of stockholder governance agreements before providing a broad validation of these agreements.<sup>117</sup> Subsequent scholarship has questioned whether the provisions that the *Moelis* decision invalidated were commonly employed.<sup>118</sup> The justification for the accelerated 2025 DExit amendments was that, as a result of a series of recent decisions that manifested suspicion of controlling shareholders, there was a real threat of controlled public firms leaving Delaware for Nevada or Texas, a trickle that could easily turn into an irreversible flood.<sup>119</sup>

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session), *as cited in* Mohsen Manesh, A New Cardinal Precept in Delaware Corporate Law, 86 LA. L. REV. 45, 48.

<sup>117</sup> Jordan Howell, *Senate Judiciary Ignores Objections to Corporate Law Amendments*, Del. Call (June 12, 2024) <https://delawarecall.com/2024/06/12/senate-judiciary-ignores-objections-to-corporate-law-amendments/> (reporting testimony urging senators to consider “substantial empirical data” showing that, in public companies, such agreements are “overwhelmingly given to private equity”); Professors’ Letter in Opposition, *supra* note 8 (disputing “common practice” claims, stating that the *Moelis* contract was “far from typical, especially for public corporations,” and urging “careful judicial review, not hasty legislative action”); Jordan Howell, *Dissent in House Judiciary over Controversial Corporate Amendments*, Del. Call (June 19, 2024) <https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporate-amendments/> (reporting former Rep. John Kowalko’s request to “hit the pause button” until a fuller and more thorough public discussion could occur); Cydney Posner, *Delaware SB 313, Controversial Proposed Corporate Law Amendments, Heads to Governor for Signature*, Cooley PubCo (June 25, 2024), <https://cooleypubco.com/2024/06/25/delaware-sb-313-to-governor/> (quoting Vice Chancellor Laster that claims of “thousands” of agreements at risk “smacks of hyperbole”); Letter from Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Investors, to Kate Harmon, President, Del. State Bar Ass’n 2–3 (May 14, 2024), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2024/Moelis\\_CII%20letter.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2024/Moelis_CII%20letter.pdf) (requesting a pause to permit the “full analysis and debate” the proposals require); Tom Hals, *Delaware Law to Allow Big Investors Greater Sway over U.S. Boards*, Reuters (June 25, 2024), <https://www.reuters.com/markets/us/delaware-law-allow-big-investors-greater-sway-over-us-corporate-boards-2024-06-25/> (noting “warnings from state judges and academics” that legislators were “rushing ahead without understanding the potential impact”).

<sup>118</sup> See also Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Moelis and Private Equity in the Public Market* (Yale J. Reg., forthcoming; ECGI Law Working Paper No. 861/2025, Feb. 28, 2025), <https://ssrn.com/abstract=5160684>

<sup>119</sup> See Delaware Call Bryan Townsend Interview, *supra* note 7 (stating that in late January–early February there was an “unprecedented series of announcements” and “unprecedented amount of discontent” that “came to a head”; attributing the pressure to “the rise of [Texas and Nevada] as viable alternatives”; describing “building pressure in the system ... resulting in departures, or very seriously considered departures,” describing the departure of Elon Musk, Zuckerberg, and Dropbox as “a sudden flurry,” and likening the moment to “a run on the bank,” a “sudden flurry that led to a snowball... rolling downhill,” which legislators felt they “had to put a stop to... for the sake of the franchise, [the] economy, [and] community”).

The process was unusually (and highly) politicized. Wilson Sonsini, a Silicon Valley-based firm, advocated for the changes that resulted in the 2024 Market Practice Amendments in its April 2024 memo.<sup>120</sup> The threat of controlled company “emigration” was arguably decisive for the 2025 DExit Amendments.<sup>121</sup> After meeting with Silicon Valley firms and Meta, which had announced that it was considering leaving Delaware, the Governor asked representatives of Richards Layton and Morris Nichols to craft the first version of the 2025 amendments in secret. As the process unfolded, interest groups engaged in significant lobbying.

The result of this speedy and interest-group driven process was legislation that was neither well-drafted nor balanced. But, most critically, the changes represented a shift from the Delaware’s traditional judge-led common law development. Delaware traditionally has garbed itself in a nearly 19<sup>th</sup> century commitment to common-law judging, with legislation playing a secondary role—a crucial part of making Delaware law, and making it appear to be, more technocratic and less political.<sup>122</sup> Now, within the last two years, Delaware seems to have embraced the virtues of legislation.

#### *E. A Tale of Two Controversies: Interco and Moelis*

The difference between Delaware’s traditional approach and the last two years can be illustrated by the contrasting reactions to Chancellor Allen’s *Interco*<sup>123</sup> opinion and Vice Chancellor Laster’s *Moelis* opinion.<sup>124</sup>

*Interco* dealt with a classic 1980s takeover battle. The Rales Brothers had launched an all cash, all shares tender offer for Interco at \$74 per share. The board thought the price inadequate and adopted a poison pill to block the tender offer. At the same time, Interco pursued a leveraged restructuring that Wasserstein Perella, its investment banker, opined was worth “at least” \$76 per share. The Rales Brothers sought an injunction to force the redemption of the pill and to block the implementation of the restructuring until the shareholders had a chance to decide on its tender offer.<sup>125</sup>

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<sup>120</sup> <https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html> .

<sup>121</sup> Stephen Bainbridge, DExit Drivers: Is Delaware’s Dominance Threatened?, 50 J. Corp. L. 823 (2025).

<sup>122</sup> Kahan and Rock, Symbiotic.

<sup>123</sup> *City Capital Assocs. Ltd. P’ship v. Interco, Inc.*, 561 A.2d 787 (Del. Ch. 1988) (Allen, C).

<sup>124</sup> *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 310 A.3d 985 (Del. Ch. 2024) and 311 A.3d 809 (Del. Ch. 2024).

<sup>125</sup> *Interco*, 551 A.2d at 790, 793.

Chancellor Allen held that, faced with an “inadequate” but non-coercive tender offer, a pill could be used only to delay the offer in order to permit negotiations, give the target a chance to find a competing bidder, or propose an alternative. But, once that time had ended, or if the target did not plan to pursue any of these actions,

then, in most instances, the legitimate role of the poison pill in the context of a noncoercive offer will have been fully satisfied. The only function then left for the pill at this end-stage is to preclude the shareholders from exercising a judgment about their own interests that differs from the judgment of the directors, who will have some interest in the question. What then is the “threat” in this instance that might justify such a result? Stating that “threat” at this stage of the process most specifically, it is this: Wasserstein Perella may be correct in their respective valuations of the offer and the restructuring but a majority of the Interco shareholders may not accept that fact and may be injured as a consequence.<sup>126</sup>

Chancellor Allen ordered the redemption of the shareholder rights plan.

The reaction to Chancellor Allen’s opinion was swift and furious. His rejection of the use of the pill as part of a “just say no defense,” it was thought, greatly reduced the utility of the pill. Most notoriously, Martin Lipton (of Wachtell Lipton) circulated a memo suggesting to clients (and others) that “Perhaps it is time to migrate out of Delaware.”<sup>127</sup> After the *Pillsbury* decision followed Allen’s reasoning,<sup>128</sup> Lipton wrote an even stronger memo.<sup>129</sup>

Lipton carried the flag for “board centrality” and the ability of boards of corporations with dispersed ownership to block tender offers even when shareholders wanted to accept them. Investor forces opposed that point of view and, given investor opposition, reincorporating from Delaware may not have been straightforward. The few publicly listed controlled companies then in existence did not have a dog in this fight because their controllers already had the unfettered ability to “just say no” to an unwelcome bid without triggering any fiduciary review.<sup>130</sup>

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<sup>126</sup> Id. at 798 (footnotes omitted).

<sup>127</sup> Martin Lipton, *The Interco Case* at 1 (Nov. 3, 1988), <https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf>; <https://theliptonarchive.org/1980s/> at TAN and N 220..

<sup>128</sup> *Grand Metro, Pub. Ltd. v. Pillsbury Co.*, 558 A.2d 1049, 1060-62 (Del. Ch. 1988).

<sup>129</sup> Martin Lipton, *You Just Can’t Say No in Delaware No More* (Dec. 17, 1988), <https://theliptonarchive.org/wp-content/uploads/346-You-Cant-Just-Say-No-in-Delaware-No-More-dated-December-17-1988.pdf>.

<sup>130</sup> *Bershad v. Curtiss Wright*, 535 A.2d 840 (1987).

*Interco* and *Pillsbury* were decided in 1988. How did Delaware react to the threat by the most prominent takeover defense lawyer? Essentially by doing nothing, for the time being. The Rales Brothers dropped their bid, so *Interco* could not be appealed.<sup>131</sup> Despite the inability to obtain immediate clarification from an appeal to the Delaware Supreme Court, no legislation was adopted or even proposed. Rather, little of note happened until 1989/1990, when the Delaware Supreme Court was called on to decide *Paramount v. Time*, the next major takeover case.<sup>132</sup> In *Paramount v. Time*, the Supreme Court made it clear that the reasoning in *Interco* did not reflect the law and that a board could, in fact, “just say no” to a bid—that is, not redeem the pill and pursue its pre-existing business plan—so long as it reasonably believed that the offer was not in the best interests of the shareholders.<sup>133</sup>

Delaware’s response, in the face of attacks from leading lawyers like Martin Lipton, preserved its claim to technocratic decision-making and apolitical neutrality in resolving this contentious issue. The Delaware Supreme Court grounded the result in *Paramount v. Time* on the neutral and generally applicable principle that the board runs the corporation and, in exercising its fiduciary role, need not abandon its pre-existing business plan just because some raider made a hostile bid.<sup>134</sup> The response emerged from the regular judicial process in the form of an opinion by the Delaware Supreme Court issued after an appeal of a decision by the Chancery Court. There were no rushed or panicky calls for action by Delaware lawyers. And there was no overt lobbying by interest groups.

Finally, Delaware’s response was balanced. Potential bidders found that a “just say no” defense was not so different from the *Interco* approach because it turned out that a tender offer tied to a proxy contest could overcome a board refusal to redeem a poison pill.<sup>135</sup> In practical terms, *Interco* enabled a board to maintain a pill for a few months while (really or ostensibly) looking for alternatives. *Paramount* enabled companies, at least those without a staggered board, to maintain a pill for a few additional

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<sup>131</sup> *Appeal Moot in Interco Case*, N.Y. Times, 34 (Nov. 19, 1988), <https://www.nytimes.com/1988/11/19/business/appeal-moot-in-interco-case.html> (reporting that the Rales’ brothers withdrawal rendered the appeal of *Interco* moot).

<sup>132</sup> *Paramount Communication, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

<sup>133</sup> *Id.* at 1150, 1153-54 (holding there is no per se duty to maximize short-term value absent *Revlon* triggers, thereby permitting the board to pursue its pre-existing plan rather than accept a hostile bid). See also Steven Davidoff Solomon & Randall S. Thomas, *Chapter Two: The Rise and Fall of Delaware’s Takeover Standards* at 33 (ECGI Law Working Paper No. 358/2016) (noting that *Interco* and *Pillsbury* were “left for dead” by *Time*).

<sup>134</sup> *Id.* at 1150, 1153-1155 (affirming that *Time*’s response pursued a pre-existing transaction and was reasonably related and proportionate under *Unocal*).

<sup>135</sup> 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

months, until the next annual meeting. Importantly, while *Paramount* was understood as endorsing the “just say no” defense, it was also understood to limit a board’s ability to use the pill-created delay to “cram-down a management sponsored alternative”, as Interco had tried to do in its restructuring.<sup>136</sup> Later, when boards threatened that equilibrium by adopting poison pills with delayed redemption provisions that would prevent newly-elected directors from redeeming the pill (“dead hand” pills), the Delaware Supreme Court brought the effort to a halt by invalidating that approach in *Quickturn*.<sup>137</sup> Notably, *Quickturn* rested on the same general corporate governance principle as *Paramount*: the board runs the corporation.<sup>138</sup>

Fast forward to 2024. In *Moelis*, a shareholder plaintiff challenged a governance agreement that empowered the company’s founder and controlling shareholder, Ken Moelis, to veto 18 categories of board actions, including issuing securities, incurring debt, removing or appointing senior officers, adopting a budget and business plan, and declaring dividends.<sup>139</sup> On February 23, 2024, Vice Chancellor Laster issued an opinion invalidating the governance agreement on the grounds that it was inconsistent with the principle of board centrality enshrined in DGCL §141(a) and endorsed by multiple Delaware Supreme Court precedents, including *Paramount* and *Quickturn*.<sup>140</sup>

In response, as discussed above,<sup>141</sup> deal lawyers complained that *Moelis* was inconsistent with “market practice” and demanded that the law be changed. In April 2024, as the battle over the proposed “market practice” amendments was raging, Wilson Sonsini released a memo, authored by prominent members of the firm, including former Chancellor William Chandler, with the provocative title “Delaware’s Status as the Favored Corporate Home: Reflections and Considerations.”<sup>142</sup> The memo was an unmistakable “shot across the bow,” comparable to Martin Lipton’s 1988 *Interco* memo. In a key section, the authors wrote:

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<sup>136</sup> *Paramount*, 571 A.2d at \_\_\_\_; *Interco Inc.*, 551 A.2d 787, 790-91, 796 (describing the board’s newly formulated restructuring and noting the pill’s remaining utility was to protect that restructuring).

<sup>137</sup> *Quickturn Design Systems v. Shapiro*, 721 A.2d 1281 (Del. 1998).

<sup>138</sup> DEL. CODE ANN. tit 8, § 141(a) (2025); *Paramount*, 571 A.2d at 1150, 1153-55 (recognizing directors’ § 141(a) authority to “charter a course”).

<sup>139</sup> *West Palm v. Moelis*, 311 A.3d 809 (Del. Ch. 2024); <https://corpgov.law.harvard.edu/2024/04/10/the-new-framework-provided-by-moelis/>

<sup>140</sup> *Moelis*, 311 A.3d 809 at 866-77 (holding multiple provisions facially invalid under § 141(a)). *See also id.* at 824-28 (describing the 18 pre-approval categories).

<sup>141</sup> *See supra* Section I.D.

<sup>142</sup> <https://www.wsg.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html>

In the conversations that we have had with clients, businesspeople, and others in the corporate bar, we have heard the following reasons given for reconsidering incorporation in Delaware:

- A growing number of cases that have addressed technical issues, in the M&A context and elsewhere, and reached unexpected results in a manner that has impacted corporate structuring and transaction planning
  - A perception that Delaware judges have in several opinions adopted an increasingly suspicious or negative tone toward corporate boards and management, and toward the corporate bar
  - The challenges that the case law can pose for companies with influential founders or significant stockholders, the process mechanisms that such companies are expected to use, and the remedies that have been reached in those cases
  - A sense that Delaware judges can be skeptical of the governance of venture-backed private companies and many Silicon Valley-based companies
  - The increasingly active, and successful, plaintiffs' bar in both technical and fiduciary claims, which can leave boards and management with the sense that they are planning around "gotcha" litigation driven by plaintiffs' lawyers more than those lawyers' individual clients<sup>143</sup>

The memo then discussed the advantages and disadvantages of the principal alternatives: Nevada, Texas and California. SB313, the bill overturning *Moelis*, was signed by Governor Carney on July 17, 2024.<sup>144</sup>

What is interesting about *Interco* and *Moelis* is not that some Delaware-incorporated companies and their out-of-state law firms disliked these decisions and pushed for change. That is to be expected. Lawyers and law firms have clients and regularly advocate for the interests of their clients. Moreover, in both, highly respected out-of-state lawyers sharply criticized the opinions.

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<sup>143</sup> The memo made explicit reference to the 1980s controversy and invoked that heritage: "This is also not the first time that Delaware's position has been questioned. For example, in the 1980s, a serious debate emerged about the ongoing favorability of Delaware.[14] Historical perspective is always valuable." Footnote 14 of the memo cited to Lipton's *Interco* memo.

<sup>144</sup> Eric Siegel, Mark Thierfelder, & Rick Horvath, *Delaware Governor Signs Controversial "Market-Practice" Amendments to General Corporation Law*, Harv. L. Sch. On Corp. Governance (July 30, 2024), <https://corpgov.law.harvard.edu/2024/07/30/delaware-governor-signs-controversial-market-practice-amendments-to-general-corporation-law/>

Rather, what is striking is how Delaware responded. On March 28, 2024,<sup>145</sup> a mere thirty-three days after the release of the Chancery Court’s opinion in *Moelis* and before any appeal had been taken, the Council proposed a complex, 250-word provision in the form of a new §122(18).<sup>146</sup> That provision broadly validated stockholder governance agreements against any challenge that they interfered with the allocation of governance powers to the board. It validated such agreements not just in the context of *Moelis*—in which the agreement had been adopted prior to the company’s IPO and described in the prospectus, and shareholders arguably bought *Moelis* stock with full knowledge of the limited board rights—but also for post-IPO agreements in which a board of a publicly traded company enters into such an agreement, effectively disempowering a future board and thereby depriving shareholders of the ability to elect a board that will pursue a different set of policies (the very issue decided by *Quickturn*).<sup>147</sup> In doing so, the amendment contravened the long-established general corporate governance principle that the board runs the corporation and undermined Delaware’s claim to technocratic expertise and apolitical neutrality. The legislation responded to threats to reincorporate and to lobbying, appeared rushed if not panicked, and effectively preempted Delaware Supreme Court review of Vice Chancellor Laster’s decision

## II. THREATS TO DELAWARE’S DOMINANCE

While Delaware had been long been able to navigate the twin threats of competition from other states and federal (or other state) intrusion, recent developments have amplified both threats. Delaware currently faces a tangible short-term threat that companies will choose a different state of incorporation and a more intangible, but in our view ultimately more severe, long-term threat of intrusion. Delaware’s dilemma is that the actions that may be helpful to counter the short-term threat of competition will heighten

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<sup>145</sup> Richards, Layton & Finger, P.A., *2024 Proposed Amendments to the General Corporation Law of the State of Delaware* (Mar. 28, 2024), <https://www.rlf.com/2024-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/>; Morris, Nichols, Arsht & Tunnell LLP, *Proposed Amendments to the Delaware General Corporation Law Would Address Recent Caselaw Regarding Stockholder Agreements and Merger Agreements* (Mar. 28, 2024), <https://www.morrisnichols.com/insights-proposed-2024-amendments-delaware-general-corporation-law>.

<sup>146</sup> S.B. 313, 152d Gen. Assemb., Reg. Sess. (Del. 2024) (bill synopsis and text describing proposed DGCL §122(18) and its non-exclusive list of governance-agreement terms).

<sup>147</sup> *Id.* (authorizing contracts with *current or prospective* stockholders and enforcing obligations triggered by failures of *current or future* directors) (emphasis added); *Quickturn*, 721 A.2d 1281, 1291-92 (striking down “dead-hand” pill that disabled a newly elected board).

the long-term threat of intrusion. Delaware has to chart a careful course to minimize risks along both dimensions.

### *A. The Competitive Threat*

For many years, no other state has made any serious efforts to compete with Delaware. In fact, other than Delaware, no state imposed a franchise tax structure that would lead the state to generate material revenue if out-of-state firms incorporated in the state.<sup>148</sup> Delaware, by contrast, charges significant fees. Its current maximum annual tax is \$250,000.<sup>149</sup>

This situation started to change, however, in 2001, when Nevada started to compete for, and attract, some firms by offering extremely lax corporate laws.<sup>150</sup> Nevada also raised its maximum franchise tax from a trivial \$85 to a more meaningful \$11,100 in 2003.<sup>151</sup> Currently, Nevada accounts for about 6–7% of incorporations by public firms not incorporated in their home state. At this point, Nevada has become a serious niche player in the market for incorporations with the potential to exploit weaknesses in Delaware’s appeal. It continues to develop its corporate law.<sup>152</sup>

A more recent entrant is Texas. While Texas statutory law does not differ fundamentally from Delaware’s and its corporate case law is practically non-existent, Texas has recently created a specialized business court,<sup>153</sup> and has amended its statute to limit derivative suits and books and records demands and to permit advanced waiver of jury trials in corporate disputes.<sup>154</sup> But the real attraction of Texas seems to be its general pro-business environment, combined with the boost Texas got when Musk waged an anti-Delaware PR campaign<sup>155</sup> and Tesla reincorporated from

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<sup>148</sup> See Kahan & Kamar, Price Discrimination (reviewing franchise tax structures in all states and concluding that only Delaware would stand to gain material additional revenue from incorporations by public companies).

<sup>149</sup> Del. Code Ann. tit. 8 § 503(c) (2024).

<sup>150</sup> Michal Barzuza, Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction, 99 Va. L. Rev. 935 (2012); see also Ofer Eldar & Lorenzo Magnolfi, Regulatory Competition and the Market for Corporate Law, 12 Am. Econ. J.: Microeconomics 60 (2020) (providing empirical evidence that Nevada law attracts small corporations).

<sup>151</sup> Barzuza, *supra* note \_\_, at 949.

<sup>152</sup> For a summary of recent changes, see Ben Edward, Nevada Legislature Passes Corporate Law Bill, <https://www.businesslawprofessors.com/2025/05/nevada-legislature-passes-corporate-law-bill/> (May 22, 2025).

<sup>153</sup> Tex. Gov’t Code § 25A.002 (2023).

<sup>154</sup> Tex. Bus. Orgs. Code §§ 2.115(b), 2.116; <https://corp.gov.law.harvard.edu/2025/07/05/summary-of-recent-changes-to-delaware-nevada-and-texas-corporate-law/>

<sup>155</sup> [https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?mod=article\\_inline](https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?mod=article_inline) “I recommend incorporating in

Delaware to Texas. After Tesla's move, Meta (the parent company of Facebook) announced that it was considering reincorporating into Texas<sup>156</sup> (though it so far has not done so) and some smaller companies moved to Nevada.<sup>157</sup> To stop this trend from accelerating, Delaware adopted statutory amendments that limited shareholders' ability to bring fiduciary duty lawsuits, particularly lawsuits against controlling shareholders.<sup>158</sup>

Nevada and Texas seem to have particular appeal to companies with controlling shareholders. But just as states can compete by offering corporate law more sensitive to the desires of controllers, states might also begin to compete in offering corporate law optimized for dispersed ownership corporations. Once genuine competition begins, a variety of competing "products" may appear.<sup>159</sup>

### *B. The Intrusion Threats*

The other threat Delaware faces is intrusion. The argument that the risk of intrusion has increased rests on less tangible factors. Each of these factors undermines the stability of the existing status quo and Delaware's traditional ability to remain in the technocratic shadows.

One factor is the politicization of corporate governance along conservative (red) and liberal (blue) lines.<sup>160</sup> There is no novelty in

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Nevada or Texas if you prefer shareholders to decide matters,' Musk posted on X on Jan. 30, the day a Delaware court threw out his \$55.8 billion Tesla pay package."

<sup>156</sup> [https://www.wsj.com/tech/meta-incorporation-texas-delaware-f06e8bab?gaa\\_at=eafs&gaa\\_n=ASWzDAhM\\_gEYwEQ5VKcSkuX32NPbVsalq4y8kUPqmswusagwDixY6rLjln2p&gaa\\_ts=6864046d&gaa\\_sig=nzs192xdbN0yvhMyEZTSGhd\\_x74j8bTOey4AQjowRtVFadzDC0WCBxXSZP7VwHXIJn1K1qXMEBxkT7jN8g-hxg%3D%3D](https://www.wsj.com/tech/meta-incorporation-texas-delaware-f06e8bab?gaa_at=eafs&gaa_n=ASWzDAhM_gEYwEQ5VKcSkuX32NPbVsalq4y8kUPqmswusagwDixY6rLjln2p&gaa_ts=6864046d&gaa_sig=nzs192xdbN0yvhMyEZTSGhd_x74j8bTOey4AQjowRtVFadzDC0WCBxXSZP7VwHXIJn1K1qXMEBxkT7jN8g-hxg%3D%3D)

<sup>157</sup> [https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?mod=article\\_inline](https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?mod=article_inline) (Tripadvisor and Match)

<sup>158</sup> See DEL. CODE ANN. tit. 8 §§ 144, 220 (2025), as amended by Senate Substitute 1 for S.B. 21, 153d Gen. Assemb. (Del. 2025) (amending Del. Code tit. 8, § 144 to provide safe harbor procedures for transactions involving controlling stockholders, directors, and officers, thereby limiting equitable relief and monetary damages for fiduciary breaches if approved by disinterested directors or stockholders).

<sup>159</sup> Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L.E.O. 225 (1985).

<sup>160</sup> See, e.g., PEW RESEARCH CENTER, *Political Polarization in the American Public* (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> (finding Republicans and Democrats "more divided along ideological lines" and partisan antipathy "deeper ... than at any point in the last two decades"); Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RESEARCH CENTER (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> (using DW-NOMINATE scores to show the parties are further apart ideologically than at any time in 50 years); PEW RESEARCH CENTER, *As Partisan Hostility Grows, Signs of*

observing that over the last twenty years, political polarization in the United States has increased.<sup>161</sup> Delaware is a blue state: Democrats control every branch of state government, and Delaware's Congressional delegation is exclusively Democratic. A rivalry between Delaware, on the one hand, and Texas, on the other, readily maps onto a blue versus red narrative. That means that a Republican administration could see political benefit in attacking Delaware as a perceived-blue opponent. It also means that realigned cultural and media forces stand ready to support attacks on Delaware. And it means that Delaware Congressional leaders likely cannot rely on support from Congressional Republicans to protect Delaware's interests. The blue-red dynamic makes it more likely that controversies will emerge that put Delaware in the national spotlight and under threat.

Another factor is the ability of wealthy individuals to initiate and sustain attacks on Delaware and its courts. After a Court of Chancery decision invalidating his pay package, Elon Musk waged an unprecedented social media attack on the Court of Chancery. Although not at Musk's level, Phil Shawe of TransPerfect similarly waged a multi-year attack on the Delaware Court of Chancery after an adverse decision. Both incidents show that adversely affected litigants have the ability to manufacture and sustain attacks on Delaware's legitimacy.

A more general concern for Delaware is that confidence in technocratic expertise in general, and in courts in particular, has declined. People place less trust in elites generally,<sup>162</sup> in what they read in newspapers,<sup>163</sup> in advice from scientists<sup>164</sup> and other experts,<sup>165</sup> in higher education,<sup>166</sup> and in

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*Frustration With the Two-Party System* (Aug. 9, 2022) <https://www.pewresearch.org/politics/2022/08/09/as-partisan-hostility-grows-signs-of-frustration-with-the-two-party-system/> (reporting sharp increases since the 1990s in "very unfavorable" views of the opposing party); Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANNU. REV. POLIT. SCI. 22:129-46 (2019).

<sup>161</sup> See <https://carnegieendowment.org/research/2023/09/polarization-democracy-and-political-violence-in-the-united-states-what-the-research-says?lang=en> ; <https://www.brown.edu/news/2020-01-21/polarization>

<sup>162</sup> <https://theimaginativeconservative.org/2025/06/why-we-dont-trust-elites-gary-houchens.html>; <https://www.theguardian.com/news/2018/nov/29/why-we-stopped-trusting-elites-the-new-populism>

<sup>163</sup> <https://news.gallup.com/poll/651977/americans-trust-media-remains-trend-low.aspx>

<sup>164</sup> <https://www.pewresearch.org/science/2024/11/14/public-trust-in-scientists-and-views-on-their-role-in-policymaking/>

<sup>165</sup> <https://www.trustsignals.com/blog/why-dont-americans-trust-experts-anymore>

<sup>166</sup> <https://news.gallup.com/poll/646880/confidence-higher-education-closely-divided.aspx>

courts.<sup>167</sup> To the extent that Delaware's legitimacy derives from technocratic expertise, it rests on less firm grounds than it used to.

Any corporate crisis that focused on Delaware could thus provide an opportunity for federal intrusion. The most extreme form of intrusion would be an attempt to "federalize" all or part of corporate law. The proposals by Senators Warren and Sanders during the 2020 Democratic primaries provide an example (and show that Delaware may not even be able to count on unified support from Democrats). They call for mandatory federal incorporation of publicly-traded companies and for a federally-imposed co-determination regime.<sup>168</sup>

In a politicized environment, Delaware therefore faces threats from both ends of the political spectrum. One can imagine Elon Musk teaming up with Senator Warren to propose federal incorporation. A ruling against a Trump-controlled entity might draw the president's attention and ire. An Enron-like scandal involving transactions in which a controller was interested that had been cleansed under amended DGCL §144 might make national headlines. The Democrats might regain control of the House of Representatives or the Senate and launch hearings that examine dual class controllers and how much they extract from their controlled companies. Or, in the wake of a financial crisis, Congress could extend the substantive corporate law provisions of Sarbanes-Oxley and Dodd-Frank in the direction identified in Leo Strine and William Chandler's contemporaneous critique of Sarbanes-Oxley, "What's next? A ban on going private transactions? Or on options-based compensation of executives? Or on interested transactions?"<sup>169</sup> As in the case of DExit, the danger is that, once such a dynamic is underway, it becomes much harder to stop.

But intrusion can also come from other sources. Courts could narrow their interpretation of the "internal affairs" doctrine.<sup>170</sup> For example, a shareholder might seek books and records from a Delaware incorporated airline by relying on an Illinois inspection statute and citing the airline's suspension and subsequent substantial reduction of air service to Tel

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<sup>167</sup> <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx>

<sup>168</sup> FRIENDS OF BERNIE SANDERS, Corporate Accountability and Democracy, <https://berniesanders.com/issues/corporate-accountability-and-democracy/> (last visited Aug. 1, 2020); Accountable Capitalism Act, <https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Page.pdf> (last visited Aug. 1, 2020).

<sup>169</sup> William B. Chandler III & Leo E. Strine Jr., The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State, 152 U. PA. L. REV. 953, 974 (December 2003).

<sup>170</sup> Ann Lipton, Inside Out (or, One State to Rule them All): New Challenges to the Internal Affairs Doctrine, 58 Wake Forrest L. Rev. 321 (2013).

Aviv.<sup>171</sup> With the DExit Amendments having limited the ability of shareholders to obtain books and records in Delaware, non-resident shareholders are likely to take advantage of local inspection statutes. A judge who might have been inclined to dismiss the action in favor of Delaware might think twice before doing so. Similarly, states could enact quasi-foreign corporation statutes that apply their own law to companies incorporated in other jurisdictions as long as they conduct significant business in-state. The extent to which other states and their courts will defer to Delaware's rules can no longer be assumed.

Finally, both Eric Chiappinelli and Verity Winship have separately argued that Delaware's assertion of personal jurisdiction over directors and officers via its implied-consent-to-jurisdiction statute raises constitutional questions.<sup>172</sup> If they are right, the ability of Delaware courts to exercise jurisdiction could be in jeopardy. As long as Delaware corporate law maintained public confidence in its apolitical and technocratic nature, such a jurisdictional challenge may have had little traction. But as other courts lose confidence, it may be more likely to succeed.<sup>173</sup>

The breakdown of the traditional approach signified by the 2024 Market Practice and the 2025 DExit amendments thus carries the significant danger of undermining political support for Delaware—support that, for the reasons just discussed, is already likely to wane.<sup>174</sup> Indeed, one message

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<sup>171</sup> <https://www.businesslawprofessors.com/wp-content/uploads/sites/955/2025/06/2025-05-30-Complaint.pdf>. For a discussion, see

<https://www.businesslawprofessors.com/2025/06/the-monkeys-paw-curls/>

<sup>172</sup> Chiappinelli, supra note 66 and ; Winship supra note 66.

<sup>173</sup> These jurisdictional issues raise an interesting question: what was the basis for personal jurisdiction over Elon Musk in *Tornetta v. Musk*? The claim against Musk was in his capacity as the controller of Tesla, *Tornetta v. Musk* March 9, 2022 Amended Complaint, Count I, available at <https://static.blbgilaw.com/docs/March%209%2C%202022%20-%20Amended%20Derivative%20Complaint%20Tesla.pdf>. Yet even §3114's aggressive assertion of jurisdiction over corporate actors does not reach controllers. Aside from his extensive entanglements with the Delaware court system, does Elon Musk have any significant contacts with Delaware? As far as we can tell, the issue was not raised by Musk and thus would now be deemed waived, but it raises an interesting question: could controllers unhappy with Delaware judges avoid them on jurisdictional grounds without moving the corporation to a different state? A Delaware claim against Mr. Musk was recently dismissed for lack of personal jurisdiction. *Khalid v. Musk, et. al.*, C.A. No. 2024-0443-KSJM (Del. Ch. July 18, 2025).

<sup>174</sup> The Council for Institutional Investors sent letters in both 2024 and 2025 opposing both the process and substance of the proposed changes. July 10, 2024 letter from Jeff Mahoney (CII) to Governor John Carney, available at [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2024/July%2010,%202024%20CII%20letter%20to%20Delaware.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2024/July%2010,%202024%20CII%20letter%20to%20Delaware.pdf); March 6, 2025 letter from Jeff Mahoney (CII) to Governor Matt Meyer, available at [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2025/March%206%202025%20CII%20letter%20to%20Delaware%20Governor%20\(Final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2025/March%206%202025%20CII%20letter%20to%20Delaware%20Governor%20(Final).pdf).

they sent is that Delaware can be threatened and will quickly cave. This re-opens the question of Delaware’s democratic legitimacy. If Delaware corporate lawmaking is no less political than Congressional lawmaking, why should Delaware be making national corporate law to which other states should defer?

Ironically, some proponents of these interventions seem completely oblivious to Delaware’s vulnerability for lack of legitimacy. Thus, in his June 20, 2024 testimony to Delaware House of Representatives in connection with SB313, former Chancellor Chandler raised concerns about the criticism of SB313 by non-Delaware voices: “Secondly, this particular legislation was fully vetted, the process was robust, fulsome, and complete, everyone's voices were heard, and [including] *lots of voices that weren't even Delaware voices. Now, that gives me some pause and some concern.*”<sup>175</sup> But if Delaware wants to retain its status as de facto promulgator of national corporate law, then involvement by non-Delawareans is entirely appropriate and should cause neither pause nor concern. This has been true for changes to the law that are technical in nature and has been common since Delaware reached out to University of Virginia’s Ernest Folk in connection with the wholesale revision of the Delaware General Corporation Law. It has been even more true for politically controversial changes as reflected in the development of § 102(b)(7) and § 203. Telling non-Delawareans that Delaware legislation is none of their business carries the risk that these non-Delawareans will conclude that making national corporate law is none of Delaware’s business.

### III: FUNDAMENTAL CHANGES IN THE CAPITAL MARKETS AND THE LEGAL MARKET

What could have caused the significant departure from the traditional process by which Delaware corporate law is produced, a process that had served Delaware well for decades? We argue that a combination of capital

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<https://sg001-harmony.sliq.net/00329/Harmony/en/PowerBrowser/PowerBrowserV2/20240620/-1/4347> at 7:30-7:31. Transcript published by The Chancery Daily The Long Form - June 27, 2024. (emphasis added). Discussed in Joel Friedlander, Former Chancellor Chandler’s Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does it Signify? 51 J. Corp. L. – (2025). Later in his testimony, Chandler argued that, were the legislature to reject SB313, “the headlines will read that two judges and a lot of law professors succeeded in convincing this body – the House of Representatives – to vote down changes to the corporate law that would have preserved the continuity, preserved the predictability and stability that we had known.”

market and legal market changes have undermined the stability of the traditional process.

### *A. Capital Market Changes*

In 2004, Google went public with a dual class capital structure. The IPO and Google's later performance were a huge success. Since then, the (underwriter) gates that held back the spread of dual-class capital structures have swung open, with the number of dual class firms increasing at an accelerating pace over the last decade.

The data on IPOs collected by Jay Ritter illustrate this shift.<sup>176</sup> Prior to 1990, dual class IPOs were relatively rare. The 1990s saw a sharp increase in the number of dual class IPOs, though the percentage of dual class IPOs (both tech and non-tech) increased only modestly. By contrast, from the mid-2000s onwards, the percentage of dual class IPOs was never less than 10%. And from the mid-2010s onwards, dual class IPOs became particularly prevalent in the tech sector. Traditionally, the percentage of dual class IPOs in the tech sector was below the respective percentage for all IPOs. But all that changed as the percentage of dual class tech IPOs doubled and the number of dual class tech IPOs started to exceed the number of dual class IPOs in all other industries combined. The growth in the number of dual class companies since 2015 has been particularly dramatic, with 286 companies going public with dual class capital structures of which 146 were tech companies.<sup>177</sup>

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<sup>176</sup> See <https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf>

<sup>177</sup> While nearly all dual-class companies are controlled companies, they are not all controlled by the founder. Typically, Pollman et al show, in the early years after an IPO, the venture capitalists collectively control the company while they exit. Once the VCs exit, the founder then becomes the controlling stockholder. It is an interesting question beyond the scope of this article whether VC controllers looking to exit after an IPO are more like controllers who want to stay or VCs in dispersed ownership companies looking to exit.

Table 1: Dual Class and Total IPOs

Period	Dual-Class IPOs	Total IPOs	%
1980 - 1989	94	1,931	5.87
1990 – 1994	122	1,720	7.09
1995 – 1999	210	2,372	8.85
2000 – 2004	63	762	8.27
2005 – 2009	59	537	11.0
2010 - 2014	68	629	10.8
2015 – 2019	114	546	20.9
2020 – 2024	172	640	26.9

Table 2: Dual Class Tech IPOs

Period	Dual-Class Tech IPOs	Total Tech IPOs	% of Total Tech IPOs	% of Total Dual Class IPOs
1980 - 1989	17	595	2.9	18.1
1990 – 1994	20	460	4.4	16.4
1995 – 1999	62	1,138	5.5	29.5
2000 – 2004	25	384	5.2	39.7
2005 – 2009	17	189	9.0	28.8
2010 - 2014	21	207	10.1	30.9
2015 – 2019	59	165	35.8	51.8
2020 – 2024	87	196	44.4	50.6

While still a small fraction of all public companies, dual class companies represent a large number of public firms. As of February 2025, the Council of Institutional Investors identifies 385 dual- or multi-class companies.<sup>178</sup> After the March 2025 rebalance of the indices, 227 were in the Russell 3000, with 8 in the S&P 100 index. There were 36 in the S&P 500 index, and 100 in the S&P 1500 index. Each of these companies operates with outside counsel and law firms whose incentives align with the interests of controlling shareholders.

### *B. Changes in the Legal Market*

Evolving in parallel with changes in the capital markets have been changes in the Delaware legal market. That is significant to the political economy of Delaware corporate lawmaking for two reasons. First, other than the Delaware fisc, Delaware lawyers are the most important in-state constituency for corporate lawmaking. Second, Delaware lawyers play an out-sized role in the legislative amendment process. As discussed above, the Council traditionally led the legislative process.<sup>179</sup> In effect, Delaware subcontracts the design of its corporate law to the Delaware bar.

Understanding the interests of the Delaware bar is therefore essential to understanding Delaware legal developments, and, in particular, the extent to which lawyers can be relied upon to write corporate law that furthers Delaware's long term interests. In general, the interests of Delaware lawyers and Delaware align reasonably well. Both want to maximize the number of firms incorporated in Delaware—lawyers because these firms generate legal business and the state because these firms generate franchise tax revenues. To be sure, lawyers also care about the amount of legal business per firm, an issue that does not directly affect franchise taxes. Lawyers may thus favor rules generating litigation in Delaware courts to a degree that the state does not. But the state also has an indirect, if lesser, interest in such rules, both because the state also cares about benefits to in-state lawyers (who pay taxes), because litigation in Delaware generates business for Delaware's hospitality industries (that also pay taxes), and because Delaware litigation enhances the value of the Delaware's judiciary, traditionally a main attraction of incorporating in Delaware.<sup>180</sup> Thus, we saw that Delaware acted quickly to protect its personal jurisdiction over corporate directors after *Shaffer* in 1977 and acted more deliberately in 2003

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<sup>178</sup> Council of Institutional Investors, *Dual Class Companies List* (last updated Feb. 20, 2025), available at [https://councilofinstitutionalinvmym.sharepoint.com/:x/g/personal/onedrive\\_cii\\_org/EZhCaASpEnJHmdnotaJvGQMbb9Q71bQ\\_sBPCBz-YBX\\_2ng?rttime=rB3BBn7h3Ug](https://councilofinstitutionalinvmym.sharepoint.com/:x/g/personal/onedrive_cii_org/EZhCaASpEnJHmdnotaJvGQMbb9Q71bQ_sBPCBz-YBX_2ng?rttime=rB3BBn7h3Ug)

<sup>179</sup> See *supra* Section I.A.

<sup>180</sup> See Kamar, *supra* note \_\_.

to extend its jurisdiction to include officers.<sup>181</sup> We also saw that in 2015, Delaware amended its law to prohibit fee shifting provisions which could have had a chilling effect on corporate litigation.

By contrast, the interest of individual lawyers (or individual firms) may deviate from the state's interests more significantly. First, an individual lawyer's interests will be closely associated with the specific interests of the lawyer's clients and with the interests of the out-of-state law firms that refer business to that lawyer. If an individual lawyer acts contrary to the interests of a client or the out-of-state referral firm, they risk losing that business to other lawyers. Second, practicing lawyers will have a shorter time horizon than the state because lawyers at some point retire from the practice of law. Lawyers may therefore favor changes with short-term benefits for their clients even if those changes harm Delaware in the long run.

Since the 1980s, there have been several changes in the legal marketplace that could cause Delaware lawyers to emphasize their own interests over the long-term interests of the state and Delaware lawyers as a whole.

The first is the fracturing of the Delaware bar. In the 1980s, four Delaware firms with major corporate practices dominated the legal landscape: Morris Nichols, Richards Layton & Finger, Young Conaway, and Potter Anderson. Those four firms were well represented in the Council and, through the Council, they dominated corporate lawmaking. The firms were small by today's standards: Richards Layton & Finger had 45 lawyers in 1985;<sup>182</sup> Morris Nichols had 42 lawyers in 1988;<sup>183</sup> Young Conaway had 34 lawyers in 1986;<sup>184</sup> and Potter Anderson had 34 lawyers in 1985.<sup>185</sup> Skadden Arps, the first national firm to open a Delaware office, had only just opened a Wilmington branch in 1979.<sup>186</sup>

During the 1980s, firm governance practices promoted the interests of the firm over individual lawyers. Even in the large firm New York market,

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<sup>181</sup> Supra .

<sup>182</sup> Charles F. Richards, Jr., Letter to Vice Chancellor Berger re: Mesa Petroleum Co., et al.v. Unocal Corp. et al., C.A. No. 7997 (Apr. 26, 1985), <https://www.law.upenn.edu/live/files/8595-1f-april-26-1985-unocal-c-richards-letter-to>

<sup>183</sup> A. Gilchrist Sparks, III., Letter to S. Del Pesco re: Proposed Section 203 (Jan. 4, 1988), <https://www.law.upenn.edu/live/files/8178-1-lett1pdf>.

<sup>184</sup> Bruce M. Stargatt, Letter Withdrawing Opposition (June 2, 1986), <https://www.law.upenn.edu/live/files/6691-860602-stargatt-letter-withdrawing-oppositionpdf>.

<sup>185</sup> David B. Brown, Letter to G. Sparks re: Corporation Law Section (Oct. 21, 1985), <https://www.law.upenn.edu/live/files/6679-851021-letter-to-gsparks-from-dbussardpdf>

<sup>186</sup> See Rose Krebs, *Skadden's Del. Office Founder Leaves Legacy of Mentorship*, Law360 (Mar. 21, 2023), <https://www.law360.com/pulse/articles/1588398/skadden-s-del-office-founder-leaves-legacy-of-mentorship> .

the tradition of compensating partners based on lockstep seniority was just starting to break down and stories of partners leaving one firm to join another were still newsworthy.<sup>187</sup>

The small number of corporate firms also enabled these firms to resist pressure by clients and out-of-state referring law firms to advance client interests. With a limited number of firms to choose from, and the likelihood that some of these firms will have conflicts, the ability to take work elsewhere was limited.

The resulting market structure promoted loyalty by partners to their firms and cooperation among firms to further their collective long-term interests. The small number of partners per firm and the expectation that partners would stay with their firm gave partners a larger stake in the firm's long-term success. The gigantic increase in demand for high end Delaware legal services that accompanied the M & A boom of the 1980s also signaled to partners that their success aligned with Delaware's success. To the extent partners and firms collectively promoted the Delaware brand, they all benefited. The rising tide lifted all boats.

In this context, the Council's clubiness was a key strength. Through the Council, the major players in the Delaware legal market could reinforce their commitment to their collective interests.<sup>188</sup> The secrecy of the Council deliberations, combined with its small size, meant that a member of the Council could always claim to have tried to effect a change but was blocked by others.<sup>189</sup>

The Delaware legal market today is vastly different. First, the four traditional firms are three or four times as large: Richards Layton now has 167 lawyers; Morris Nichols has 92; Young Conaway has 136; and Potter Anderson has 90.<sup>190</sup>

Second, the number of Delaware-based firms has increased. In addition to the traditional "big four," there are smaller Delaware based firms with significant corporate practices, including Abrams & Bayliss (25), Ross Aronstam (19) and Heyman Enerio (13). In addition, the number and size

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<sup>187</sup> Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313 (1985).

<sup>188</sup> For a documented example, Bruce Stargatt noted that after he considered going to Dover to lobby against Section 201(b)(7), members of the Council visited him personally to argue against that move. According to Stargatt, they told him it would be contrary to the culture and the interests of the Delaware bar. He agreed and accepted the Council's decision.

<sup>189</sup> In 1987, the Corporation Law Council numbered seventeen. See October 13, 1987 memorandum from David Brown to the members of the Corporation Law Council, available at <https://www.law.upenn.edu/live/files/8188-11-mem1pdf>.

<sup>190</sup> All numbers based on websites.

of Delaware based firms that primarily represent shareholders has increased including Grant and Eisenhofer (90), Prickett Jones (17), and Friedlander and Gorris (5). The larger size and number of law firms means that competition among lawyers has intensified with competition taking place not just between firms but also among lawyers within the same firm. A lawyer at one firm who mostly represents the interests of controllers may care more about retaining his or her clients than about the interests of partners at the same firm with a different practice. The larger number of lawyers and firms also contributes to greater lawyer mobility between firms and to the establishment of new firms. By increasing the value of a lawyer's "personal brand," the greater mobility undermines the stability of firms and thus the ability of firms to take the long view either for Delaware, for Delaware law firms as a group, or for the specific firm.

Third, the number, size and importance of local offices of national firms has grown significantly. Currently, national firms with significant Delaware offices that represent companies include Skadden (45 lawyers), Wilson Sonsini (35, including former Chancellor Chandler and former Vice Chancellor Slight), DLA Piper (23), Faegre Drinker (20), Greenberg Traurig (18), K & L Gates (13), and Paul Weiss (8, including former Chancellor Bouchard).<sup>191</sup> At the same time, national firms specializing in representing shareholders have also opened Delaware offices. Bernstein Litowitz opened its Delaware office in DATE and now has ten lawyers including long-time leading defense side lawyer, Greg Varallo.

The effect of the opening of Delaware branches of out-of-state firms on the political economy is complex but, on balance, likely negative for the traditional lawmaking process. Most significantly, the interest of the lawyers in a Delaware office are tied to the interest of the national firm as a whole, and the ability of those lawyers to act independently of the national firm will be sharply limited. To that extent, lawyers in Delaware offices of national firms would have a lesser interest in Delaware's continued pre-eminence than Delaware-based firms. They also would have lesser ability to speak out against measures that could help the clients of the national firms but hurt Delaware's long-term interest. The effect of local offices of national firms is also destabilizing on the cohesion of Delaware firms. To the extent a Delaware lawyer is thinking about leaving, that lawyer has more options.<sup>192</sup>

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<https://www.paulweiss.com/professionals?pageId=1492&pageSize=&pagingNumber=&position=&practices=&industries=&offices=Wilmington&schools=&lastname=&searchText=>

<sup>192</sup> In addition, the increase in the number of out-of-state firms reduces the overall availability of work for Delaware lawyers because the referring firm can now keep its

There is a potential countervailing effect. When a national firm opens a Delaware office, that firm's influence on the Council may decrease. Take Wilson Sonsini as an example. Prior to opening its own Delaware office, it would often partner with leading Delaware litigators at Morris Nichols and Richard Layton & Finger.<sup>193</sup> After opening a Delaware office, it stopped retaining Delaware counsel,<sup>194</sup> yet its local office lacked representation on the Council.

By far the dominating effect, however, is the rational indifference of clients and the out-of-state law firms that represent them in major transactions and litigation to Delaware's long-term success. Clients retain out-of-state firms in major commercial centers without regard to where the clients are incorporated, what law governs the deal, or where litigation takes place. Their lawyers have a professional interest in pursuing the best interests of those clients without regard to the effects on Delaware's incorporation business. Moreover, many lawyers in national firms have only limited Delaware-specific human capital. They may enjoy working on transactions governed by Delaware law or like litigating in Delaware courts, but they also work on other types of deals, and they litigate wherever the case is.

The changes in the legal marketplace, combined with the lucrative nature of high-end Delaware practice, may have also caused a shortening of Delaware lawyers' time-horizons, both in terms of annual metrics and length of career. The desire to maximize annual income may result from the decreased allegiance of lawyers to their law firms, increased competition among lawyers in the same firm, increased inter-firm mobility, and eat-what-you-kill compensation structures. The shortening of career length may result from making more money in a metropolitan area where the cost of living is comparatively low. When lawyers had strong allegiances to their firms, and when firms paid annual retirement payments out of profits, lawyers may plausibly have adopted a longer-term outlook corresponding more closely to the firm's time horizon. Today, a lawyer might be more focused on the current year in order to show impressive numbers to a potential new firm. In any event, the lawyer's time horizon is likely to extend not much further than the end of his or her own legal career.

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Delaware work in-house. On the margin, that factor increases the competition that Delaware lawyers face and the potential need to please clients.

<sup>193</sup> See, e.g., *In re Trados*, 73 A.3d 17 (Del. Ch. 2013) (Wilson Sonsini worked with Ray DiCamillo at RLF) and *Quickturn Design Systems, Inc. v. Mentor Graphics*, 721 A.2d 1281 (Del. 1998) (Wilson Sonsini worked with Kenneth Nachbar at Morris Nichols).

<sup>194</sup> See, e.g., *In re Fox Corp.*, 312 A.3d 636 (Del. 2024) (Fox represented by Wilson Sonsini's Wilmington office).

A change in time horizon is of particular significance in the context of the current threats Delaware is facing. By taking measures that responded to the potential flow of controlled companies out of Delaware in the short term, Delaware potentially undermined its perceived legitimacy as promulgator of the de facto national corporate law and thereby potentially increases the long-term threat of intrusion. From the perspective of Delaware, these long-term risks must be balanced against the benefits derived from reducing the shorter-term outflow. From the perspective of individual lawyers with a shorter time horizon, however, the benefits derived from reducing the shorter-term outflow loom much larger in comparison to the longer-term risks of increasing the threat of intrusion.

*C. How these Changes Make it Harder to Leave Client Interests at the Door*

The ability to leave “client interests at the door” is essential to the justification for delegating primary statutory lawmaking to the Council because, as discussed above, letting corporate lawyers who are responsive to their corporate clients write the laws that regulate those clients and their relationship with their shareholders cannot be defended. The changes described above help explain why Delaware lawyers found it harder to resist out-of-state pressure in 2024 and 2025 than in the 1980s.

1. Controllers can credibly threaten Reincorporation

The key players in the recent amendments are Silicon Valley firms and companies with controlling shareholders. Controllers have significant power over reincorporation decisions. For existing public companies with dispersed shareholdings, reincorporations require the approval of both the board of directors and a majority of shareholders.<sup>195</sup> These dual approval requirements reinforce the desirability of the middle-of-the-road approach that Delaware has traditionally pursued.

Reincorporations by controlled companies also technically require approval of both the board of directors and a majority of shareholders. But in controlled companies, the controller typically has substantial influence if not outright control over the board decision and controls a sufficiently large share of the votes to permit a reincorporation with no or only minimal support of minority shareholders (and for that matter, without any other legal checks).<sup>196</sup>

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<sup>195</sup> Del. Code Ann. tit. 8 §§ 251(b)–(c), 390(b) (2025).

<sup>196</sup> Current Delaware law does not generally apply either enhanced scrutiny or entire fairness review to reincorporation decisions by controlled companies. In re Dropbox (Del.

This enables controllers to more-or-less unilaterally decide to leave Delaware for a more controller-friendly climate. A controller can use this power to actually pursue a reincorporation. At Trade Desk, Jeff Green's votes made a reincorporation a fait accompli.<sup>197</sup> Similarly, at TripAdvisor, the reincorporation passed with Maffei's votes but without a majority of the non-controlling votes. At DropBox, the reincorporation proceeded by written consent so non-controlling shareholders did not even have the illusion of influence. Importantly, this also means that controllers and their lawyers and lobbyists can credibly threaten to leave.

## 2. Controllers' Goals Put More Stress on Delaware Law

As Bebchuk and Kastiel pointed out, dual class controllers who control with a majority or near majority of votes but a small fraction of the equity ("small minority controllers") have vastly greater financial incentives and abilities to take private benefits of control relative to either controllers with a large equity stake or managers in dispersed ownership companies.<sup>198</sup>

Compare, for example, Bill Gates, the co-founder, then CEO and 45% owner of Microsoft with Jeff Green, the founder/CEO of Trade Desk, who has 48.5% of the voting power but only has 9.3% of the equity.<sup>199</sup> Gates took a very modest salary as CEO, peaking at \$623,000 in his final year. There are good financial reasons for such a decision: it limits salary demands by other senior managers; it sent a powerful signal to the Microsoft

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2025). Over time, if investors care about controls on self-dealing, one might expect IPO charters to include a majority of minority vote requirement for reincorporation out of Delaware. But as of now, such provisions are missing.

<sup>197</sup> Interestingly, sunset provisions that were promoted as a means of reducing the harm of dual class capital structures exacerbate this problem. Trade Desk went public as a Delaware corporation with a X year sunset provision. Under Delaware case law, the extension of a dual class control structure would likely be considered a transaction or decision in which a controller is interested (in extending its control). As a result, under the law in effect prior to SB21, for a controller to extend control, the controller would have to establish that it was entirely fair unless the extension was approved by disinterested directors and by a majority of the non-controlling shares. When the first sunset arrived, the dual class was barely extended. As Trade Desk approached the second sunset, it reincorporated into Nevada where the controller would be able unilaterally to extend control. The decision to reincorporate, according to the Delaware Supreme Court's Dropbox decision, was not an interested transaction or decision and not subject to any enhanced scrutiny.

<sup>198</sup> Lucian Bebchuk and Kobi Kastiel, The Perils of Small-Minority Controllers, 107 *Geo. L. J.* 1453 (2019).

<sup>199</sup> Trade Desk 2024 Proxy Statement at p. 58. <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001671933/da5882da-5eb2-4190-933e-f5b2d70ca74a.pdf>.

employees (many of whom held options) that their fortunes were linked; and, as 45% equity holder, a big chunk of Gates' salary would come out of his own pocket. By contrast, Green, a classic "small-minority" controller, would bear only bear 9.3% of the cost of any additional compensation (both the out of pocket and any loss of firm value from other executives now seeking high salaries, not to mention the reduction in morale). Perhaps unsurprisingly, in 2021, Green received options with a Black-Scholes value of \$828 million (vesting over ten years based on meeting targets).<sup>200</sup>

Because they stand to gain so much from taking private benefits, dual class controllers have substantial financial incentives to pursue interested transactions even if they are not in the interest of the company as a whole. They also have substantial incentives to dilute the strength of the legal mechanisms that constrain their ability to obtain private control benefits.<sup>201</sup> One of these mechanisms is independent director approval.<sup>202</sup> While controlled companies have independent directors, these directors serve at the pleasure of the controller. While the controller has an incentive to make sure that these directors qualify as independent for stock-exchange<sup>203</sup> and for corporate law purposes,<sup>204</sup> the controller also has an incentive to select individuals who, while notionally independent directors, are less likely to oppose anything the controller wants to do. Finally, controllers have an incentive to change the definition of "independent director" from a substantive test that takes conduct into account to a formal test, as in the stock exchange rules, that leads to predictable results. During the 1980s, scholars complained about the power of a CEO to populate the board with supporters.<sup>205</sup> The controller's power in this regard substantially exceeds that of a non-controller CEO.

The issues raised by controllers are old and fundamental topics for corporate law.<sup>206</sup> In response to the controller's greater influence, Delaware had developed two somewhat separate bodies of common law—one dealing with controller conflicts and another dealing with conflicts in companies with dispersed ownership. Delaware's judiciary has been particularly attuned to the problems of controllers and fashioned case law that tries to identify (i) notionally independent but in practice compliant directors, (ii)

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<sup>200</sup> Trade Desk 2024 Proxy Statement at p. 39-40.

<sup>201</sup> Edward Rock, Kobi Kastiel, & Lucian Bebchuk, *Delaware and the Perils of Small Minority Controllers*, Harv. L. Sch. On Corp. Governance (Mar. 5, 2025) <https://corpgov.law.harvard.edu/2025/03/05/delaware-and-the-perils-of-small-minority-controllers/>.

<sup>202</sup> *Kahn v. Lynch Communication Systems*, 638 A.2d 1110 (Del. 1994).

<sup>203</sup> N.Y. Stock Exch. LLC, *Listed Company Manual* § 303A.02(a); *id.* § 303A.01.

<sup>204</sup> *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002).

<sup>205</sup> Jay Lorsch.

<sup>206</sup> Kraakman, et al, *The Anatomy of Corporate Law*, Chapter ?.

notionally non majority but in actuality controlling shareholders,<sup>207</sup> and (iii) additional procedural protections that should be deployed in controlled companies.<sup>208</sup> Even if, as some argue, the dual class structure is optimal for wealth creation in innovative companies, the fit with Delaware doctrine is inevitably problematic. When Delaware law or judges, applying the traditional standards, are an obstacle to what small-minority controllers want to do, the resulting client pressure—channeled through law firms—becomes extreme.

### 3. The Legal Market is Different

The ability of the Delaware bar to act in unified fashion has diminished. When there were only four major corporate firms in Delaware, and none affiliated with a national firm, and little competition among lawyers in the same firm, Delaware lawyers were able to resist out-of-state pressure. Between client conflicts and the smallness of the bar, an out of state firm unhappy with the resistance of a united Council—even one as prominent as Wachtell Lipton—would have no place to go.

Now, with the wealth of alternatives available, and lawyers and firms competing for referrals from the same out-of-state firms, resisting pressure from significant referring firms is more difficult. For national firms with local offices, the line of influence is even more direct. Wilson Sonsini has a direct presence in Delaware in the form of its Delaware office and through former Chancellor Chandler, a highly-respected advocate for change.

Moreover, the Council has grown in size. In 1987, when Section 203 was amended, the Council had 17 members.<sup>209</sup> As of 2006, it had 21.<sup>210</sup> By 2025, it had grown to 30 members.<sup>211</sup> While the Council's greater size makes it more diverse and representative, it also makes it harder to present a united front and to keep deliberations confidential. Individual council members who oppose legislation favored by referring firms can be outed and lose business. With many options, such firms can threaten to withhold business from lawyers who oppose what they seek.

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<sup>207</sup> See, e.g., *Kahn v. Lynch*, *Kahn v. Tremont*, other

<sup>208</sup> In particular, Delaware case law required dual approval—by independent directors and disinterested shareholders—to fully cleanse a controller conflict and requires that for freeze-out mergers, such shareholder approval must be given by a majority of shareholders entitled to vote. *In re Match*, PNB

<sup>209</sup> See October 13, 1987 memorandum from David Brown to the members of the Corporation Law Council, available at <https://www.law.upenn.edu/live/files/8188-11-mem1pdf>.

<sup>210</sup> *Hamermesh* at X.

<sup>211</sup> <https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/>.

Finally, Delaware lawyers themselves may view the balance between short-term and long-term interests differently. In the current legal market place, lawyers may weigh the short-term risks from antagonizing some out-of-state companies and their out-of-state law firms more heavily than the long-term risks of undermining Delaware's legitimacy as de facto promulgator of national corporate law.

In aggregate, these forces increase the pressure for legislative interventions whether on an accelerated basis through the existing framework or outside it.

The balance of interests generates a dynamic in which clients and large out-of-state firms have incentives to use their economic leverage over Delaware firms to promote their clients' and their own interests without regard to the long-term interests of Delaware as a state and Delaware lawyers as a whole. We do not claim that there is anything wrong or unethical when large out-of-state firms and their clients act in this manner. It is simply that Delaware policymakers should understand and take account of that dynamic.

*D. Is Greater Sensitivity to Out-of-state Client and Law Firm Interests the Solution rather than a Problem?*

But there is an important potential counterargument. Some of our greatest companies are controlled through dual class capital structures. Some commentators argue that, in a capital market dominated by institutional investors and activist hedge funds, dual class capital structures are necessary to give founders the control necessary to pursue long-term shareholder value.<sup>212</sup> One prominent Silicon Valley lawyer posed the issue this way:

The core reality is that economic activity, in both the private and public markets, has gone from a system that you may prefer (one share/one vote) to a system of visionary founders, PE control and VCs, with the view that this leads to greater innovation and economic success. Tech founders, as well as many prominent PE leaders and VCs, will tell you that they do not believe in a governance model or system run by the large institutional investors and activists, and they do not think that such a model is good for companies. As a result, a number of alternative governance structures were created to meet this reality, from dual-class to other models. For various reasons Delaware did not do a particularly good job navigating these new economic

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<sup>212</sup> Zohar Goshen and Assaf Hamdani, Corporate Control and Idiosyncratic Vision, 125 Yale L. J. 560 (2016).

developments/governance changes, beginning with Trados but then going on to MFW, Moelis and a series of other cases. The message sent by Delaware judges in these cases seemed to be that controlled companies, especially companies controlled by founders, were not to be trusted. Of course, Delaware can adopt this view but there is nothing mandatory about being in Delaware, there is no “Delaware premium”, and companies that feel they will be more successful in other jurisdictions can move.

Suppose that innovative dual class companies would indeed benefit from a governance structure that entails more flexibility and less judicial review than is provided by Delaware’s traditional doctrines? Suppose further that (some) Delaware lawyers and judges are too slow to realize it and that greater sensitivity to client pressure and more frequent legislative intervention is the only way to generate the requisite legal change.

But even if one were to accept these suppositions as correct, they relate primarily to the need for and the substance of the 2024 and 2025 amendments. They do not address the threat that the manner in which they were adopted poses to Delaware’s legitimacy. The 2024 Market Practice Amendments would have been far less damaging to Delaware had they followed the traditional process of letting the litigation play out on appeal before intervening legislatively and had they taken the time for a deliberative process that would have produced technically better provisions. This would have preserved the traditional allocation of lawmaking responsibility with most occurring through adjudication and would have allowed for the deliberation to occur. The 2025 DExit Amendments likewise would have been far less damaging had they followed the traditional process rather than circumventing it entirely. As the examples we discussed in Part I illustrate, taking an extra year, even in the face of substantial need for legislation, ultimately produces a better product and helps insulate Delaware against external threats.

Furthermore, even to the extent that legislative intervention is necessary to generate the degree of legal change necessary to safeguard the wealth generating potential of innovative technology companies, it is less clear that such intervention is in Delaware’s interest. Major and controversial legislative interventions shift the allocation of lawmaking from the courts to the legislature. When that is done, the legitimacy question becomes especially pressing because, as we noted above, we already have a legislature fully authorized to adopt national legislation, namely, the U.S. Congress. What is the argument for giving the responsibility for developing national corporate law policy to the Delaware state legislature, rather than to Congress or the S.E.C.?

Accommodating the governance needs of dual class companies—a minority of public companies—also carries an additional risk for Delaware. As noted above, because of the distinct governance challenges posed by controllers, Delaware has developed two somewhat separate bodies of common law—one dealing with controller conflicts and another dealing with conflicts in companies with dispersed ownership. But the two bodies of law are related because many corporate law doctrines do not differentiate between the two types of companies, the same judges render decisions for both sets of companies, and Delaware’s reputation in one market affects its reputation in the other market.

Delaware competes for both controlled companies and dispersed ownership companies and has a significant market share of both types. This raises the question whether optimizing Delaware corporate law for the needs of dual class companies is consistent with optimizing Delaware law for dispersed ownership companies. If there is a tradeoff between the two, then increased sensitivity to the governance needs of the most demanding clients might optimize Delaware law for dual class companies at the expense of the corporate law for the much larger universe of dispersed ownership companies and lead to market share losses in that market segment.<sup>213</sup>

#### IV: PRESERVING DELAWARE’S LEGITIMACY

In the previous Parts, we have argued that the recent politicization of the lawmaking process has undermined Delaware’s traditional process and threatens Delaware’s legitimacy as de facto promulgator of national corporate law. As a result, Delaware is more exposed to the threat of intrusion by other states or by the federal government. If we are right, how should Delaware respond?

##### *A. Putting the Genie Back in the Bottle*

Greg Varallo, Andrew Blumberg and Ben Potts identify some of the same challenges to Delaware’s legitimacy going forward and urge Delaware to return to its “golden age” when the Council in particular, and Delaware law making more generally, would leave client interests and pressures “at the door.”<sup>214</sup> To achieve this, Varallo and his co-authors argue

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<sup>213</sup> See Kahan, *supra* note \_\_; Dorothy Lund and Eric Talley, *Should Corporate Law Go Private?* (working paper available at SSRN link).

<sup>214</sup> Greg Varallo, Andrew Blumberg & Ben Potts, *Optimizing Delaware’s Corporate Law Amendment Process: Ideas for the Next 20 Years*, 50 Del. J. Corp. L. (forthcoming 2025) (manuscript at 27-29), <https://ssrn.com/abstract=5283642>.

that the composition of the Council should be broadened to include firms that actively represent investors. They argue that will break the lock that the large Delaware firms have on the process and bring more perspectives into the mix.

This may be better than letting the lawyers who represent corporations write the rules that regulate the internal affairs, but we are skeptical that it will be sufficient to return to the traditional process. First, nothing in the Varallo proposal addresses the underlying influences that we argue caused the breakdown of the traditional process: the change in the capital markets and the change in legal markets that made it increasingly difficult for Delaware lawyers to resist out-of-state client demands channeled through out-of-state law firms. Indeed, as we discussed, the changes in the legal marketplace have also affected plaintiff firms. Although these changes play out differently—plaintiff firms, for example, are subject to less or different pressure from out-of-state law firms—they have broadly similar effects of making lawyers more likely to pursue their personal short-term interests than the long-term interests of Delaware lawyers as a group. While increasing plaintiff firm representation on the Council may or may not be a good idea for other reasons, we do not think it address the root causes contributing to the decline in Delaware’s legitimacy. Indeed, the politically driven process that led to the DExit amendments suggests that, for significant changes, some already view the Council as an obstacle to be avoided.

Second, everyone now knows that legislative intervention unmediated by the traditional Council process is possible and that Delaware will respond to DExit threats. Out-of-state interests will not willingly close down this channel and the option of going around the Council may affect the Council even the Council’s work even when it is not taken.

Third, the politicization of the Delaware corporate lawmaking process creates the possibility that the equilibrium of lawyers on the Council will change. Once firms with representatives on the Council, or the representatives themselves, see the benefits of promoting client and referring-firm interests (and the costs of opposing those interests), and once other firms and representatives do so, the temptation to do so will increase. The traditional cooperation game could devolve into a competition game.

Continuing business as usual with modifications such as the ones suggested by Varallo and his co-authors might work, at least for a while. But it might not. One can rarely predict the origin of destabilizing threats or whether, once they emerge, they can be contained. One of the key arguments made by proponents of amending Section 144 in response to threats of “DExit” was that, once firms started leaving, it could quickly

become an irreversible trend. But a DExit trend is not the only trend that might be irreversible.

*B. Reestablishing Legitimacy: A Corporation Law Commission*

If Delaware wants to safeguard its legitimacy, what might it do? The key for Delaware, in our view, is to address the underlying causes that led to the breakdown of the traditional mode of lawmaking and to design a structure that prioritizes the long-term benefits to Delaware even when it conflicts with short-term client interests. Delaware can do little to change the number of dual class companies or to prevent them from changing their state of incorporation.<sup>215</sup> Delaware likewise cannot reverse the changes to the legal markets. It cannot restore the four-firm oligopoly that once existed, reverse the trend of out-of-state firms opening Delaware offices, or reduce the number of Delaware lawyers. Delaware can change its law-making process to boost its ability to resist client/national firm pressure and produce results that are more likely to promote its long-term interest.

Specifically, Delaware should create a new law-proposing body to replace the Council. In contrast to the Council's informal role, the new body should be legislatively empowered as the sole initiator of amendments to the DGCL. We call it the "Corporation Law Commission" ("Commission").

The membership, structure and procedures of the Commission should seek to achieve three goals. First, reinforce the overall legitimacy of Delaware as a promulgator of national corporate law. Second, reduce (but not eliminate) the influence of lawyers who may favor provisions beneficial to their clients but adverse to Delaware's long-term interests, including lawyers who are susceptible to pressure from out-of-state firms and their clients. Third, ensure that the body's work product bears the hallmarks of technical excellence.<sup>216</sup>

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<sup>215</sup> A recent Chancery Court opinion in *TripAdvisor* held that a change from Delaware to Nevada by a company with a controlling shareholder was a conflict transaction subject to (given the lack of cleansing acts) entire fairness, but refused to enjoin the reincorporation. The Supreme Court reversed. Setting aside the doctrinal merits of the issue, the analogies between the Chancery Court ruling and *Hotel California* may have been too much for the Supreme Court to countenance. <https://thefulcrum.us/pop-culture/hotel-california-meaning>. The most that one can expect the Delaware Supreme Court to do is to enforce charter provisions that require a vote of a majority of the non-controlling shares for reincorporation. Post-TripAdvisor, such provisions are the principal (ex ante) way that non-controlling shareholders can push back against controller threats to reincorporate.

<sup>216</sup> Charles Whitehead has similar proposal but his aim is different from ours. Charles Whitehead, *Delaware's Agency Problem*, working paper available at SSRN: <https://ssrn.com/abstract=5380168> or <http://dx.doi.org/10.2139/ssrn.5380168>.

To maintain technocratic focus and competence, we suggest the following membership structure:

- Eight members from the Delaware bar, designated by the Delaware State Bar Association, at least two of whom should be retired from the practice of law and have no financial ties with any law firm. Ideally, these lawyers would have diverse backgrounds and experiences, covering transactional practice, litigation practice, defense side, and plaintiffs' side.
- One sitting justice from the Supreme Court, designated by the Chief Justice;
- One judicial officer from the Court of Chancery, designated by the Chancellor.

These members will provide the requisite technocratic expertise and some diversity in perspective, but are less likely to be susceptible to pressure from out-of-state firms than the current Council members. Retired lawyers and judges will not have the client conflicts of practicing lawyers and thus may be more likely to pursue Delaware's long-term interests. Providing for formal participation by a designated representative of the Supreme Court and the Chancery Court would replace the private, back-channel discussions that occur in the current system and promote transparency.

In addition, some members should be selected to represent various groups interested in corporate law including:

- One member from the Department of State, designated by the Secretary of State;
- One member designated by the Delaware State Chamber of Commerce;
- One member designated by the Council of Institutional Investors;
- Two members who are non-Delaware residents and professors at law schools located outside of Delaware, designated by the Chief Justice.

The Secretary of State's designee will provide input on the technical feasibility of various proposals from the standpoint of that office. The designee of the Chamber of Commerce can be expected to represent the director perspective while the CII designee can be expected to represent the institutional investor perspective. Members of the academic community may be expected to pursue "good law" rather than Delaware's interests.

Having some formal participation by out-of-state representatives is important given Delaware's national role. Having non-Delaware academics will widen the perspectives represented and enhance technocratic legitimacy, even if Delaware's interest in competing for incorporations may sometimes conflict with their academic views of what constitutes "good law."

Critically, the Commission should have procedural rules that are designed to enhance opportunities to provide input and make the lawmaking process more deliberative and transparent. Before proposing a new bill, the Commission should issue a notice of proposed amendment and provide an opportunity for public comment. These comments should be considered by the Commission before a final proposal is issued and published.

The role of the General Assembly would need to be thought through. It may be that, to avoid after-the-fact amendments, the General Assembly should have to vote up or down on the Commission's proposed bill. Without that constraint, the same forces that generated the 2024 and 2025 interventions could hijack the Commission's work. The General Assembly would retain the ultimate authority to pass legislation bypassing or eliminating the Commission, but the high-profile nature of such a move should limit the General Assembly's willingness to engage in the nuclear option.

Not coincidentally, the Commission bears certain similarities to a federal administrative agency with rule-making authority.<sup>217</sup> That is an apt comparison because administrative agencies likewise fall short on democratic legitimacy while seeking legitimacy through technocratic expertise and a transparent process. Notice informs affected groups of the direction the agency is considering. The comment period allows affected groups to provide input. Requiring the agency to consider the comments encourages reasoned decisions that can be reviewed. Publishing the final rule provides clarity and an opportunity to challenge it.

The Commission concept modifies this model by not allowing the Commission to implement its own laws. The General Assembly must approve a bill and the Governor must sign it. The Commission only recommends.<sup>218</sup>

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<sup>217</sup> For an explicit adoption of the Administrative Law approach, see Charles Whitehead, *supra*.

<sup>218</sup> In the federal administrative context, each of these steps is backed by a degree of judicial oversight. While that provides one assurance that rule making will actually follow these steps and take outside input into account, it is not the only way to assure that. Judicial oversight is not necessary for the Commission, which is not making the final decision.

This structured rule-making process has a variety of advantages. First, it provides time which plays a variety of roles. Time provides an opportunity for input from the relevant constituencies, however defined. Because the drafting of rules is difficult, time is necessary for technically competent provisions. Finally, this structure also has the virtues of transparency. While, as discussed below, transparency has its vices, there is nothing like a backroom deal of the sort that produced the DExit Amendments to demonstrate transparency's value both in the substance and clarity of the rule ultimately adopted, and the process's legitimacy.

Indeed, Delaware itself provides a model for such an approach to expert rule-making in areas other than corporate law. In 2011, the General Assembly established "The Guardianship Commission for the State of Delaware" that is composed of members of the judiciary, members of the house and Senate, public officials, and community representatives.<sup>219</sup> The

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<sup>219</sup> 12 Del. C. § 3991. By statute, it is comprised of:

- (1) One member from the Court of Chancery, designated by the Chancellor.
- (2) A representative from the Department of Justice, designated by the Attorney General.
- (3) The Director of the Guardianship Monitoring Program, or the Director's designee.
- (4) One member of the House of Representatives, designated by the Speaker of the House.
- (5) One member of the Senate, designated by the President Pro Tempore of the Senate.
- (6) The Director of the Division of Services for Aging and Adults with Physical Disabilities, or the Director's designee.
- (7) The Director of the Division of Substance Abuse and Mental Health, or the Director's designee.
- (8) The Director of the Division of Developmental Disabilities Services, or the Director's designee.
- (9) The Secretary of the Department of Health and Social Services, or the Secretary's designee.
- (10) A representative from the Disability Community, designated by the Secretary of Health and Social Services.
- (11) A representative from the Senior Citizen Community, designated by the Secretary of Health and Social Services.
- (12) A representative from the hospital community, designated by the Delaware Healthcare Association.
- (13) The Chair of the Elder Law Section of the Delaware State Bar Association, or the Chair's designee.

Its responsibilities are likewise prescribed by statute:

The Commission shall advocate for the welfare of individuals who are incapacitated; shall work with advocacy groups and state agencies to promote systemic reform; recommend changes in the law, procedure and policy necessary to enhance the provision of guardianship services and the protection of those unable to protect themselves; and act as an informational resource for the public.<sup>219</sup>

To achieve that end, the Commission is required to meet quarterly and, among other things, "Advocate for legislation and make legislative recommendations to the Governor and the General Assembly." 12 Del. C. §3992.

Corporation Law Commission can benefit from the experience of the Guardianship Commission over more than a decade.<sup>220</sup>

Pursuing the Commission model carries significant costs. First, it may well be inferior to the way the traditional Council model has functioned in the past. As our discussion of prior amendments makes clear, the old Council process served Delaware well for many decades. But we do not believe that a return to the traditional model is possible.

Second, for those who think that a new mode of lawmaking that is more responsive to out-of-state pressures is the best way to optimize Delaware law for the governance needs of innovative dual class corporations, the Commission model moves in precisely the wrong direction.

Third, this model may well lead some firms with controlling shareholders to leave Delaware because they think the law of another state is better suited to their needs. This is already happening. It is the inevitable consequence of not doing the bidding of these firms. The alternative, however, could be much more costly to Delaware.

Fourth, by opening up the process of lawmaking, the Commission gives greater voice to interests that currently have no stake in Delaware's success and lack any power over incorporation decisions. As Leo Strine once pointed out, the interests that traditionally influence Delaware corporate law are limited to those of shareholders and managers.<sup>221</sup> Opening up the process and making it transparent enables input from interest-groups. That may be a price that must be paid to re-establish legitimacy. From a national perspective, Delaware's legitimacy cannot rest on the fact that its incorporation business generates revenue for the state. It must rest on the grounds of technical expertise and balanced outcomes.

Finally, the Commission would confront the standard problems that afflict administrative agency rulemaking. It would be slow, with many opportunities for blocking changes to the status quo. This is as much a feature as it is a bug. As with other controls on administrative law making, a Commission will slow down statutory interventions, redirect energies away from controversial policy proposals (which are likely to attract substantial opposition) and towards largely technical adjustments. That is consistent with the traditional role of legislation in Delaware.<sup>222</sup>

On the whole, we believe that the approach we put forth is best calculated to preserve Delaware's role in corporate law. An activist Delaware legislature that goes beyond rubber stamping technical reforms to

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<sup>220</sup> <https://legis.delaware.gov/SessionLaws/Chapter?id=14886>

<sup>221</sup> Strine, *The Delaware Way*.

<sup>222</sup> Hamdani and Kastiel.

the DGCL and adopting balanced changes backed by wide consensus is neither technically competent nor democratically legitimate at the national level. Delaware's role as the custodians of national corporate law requires it to do better.

## CONCLUSION

Traditionally, the Delaware courts oversaw the development of Delaware's corporate law. Legislative interventions have been largely technical and interstitial. Any amendments were drafted by an apolitical Corporation Law Council, with the legislature and political interests playing no material role. Leading Delaware lawyers served on the Council, its deliberations were confidential, and proposed amendments did not interfere with pending litigation. In the rare cases when amendments were controversial, the Council moved deliberately, obtained input from affected constituencies over a prolonged period of time and developed a measured proposal that balanced the competing interests.

The critical feature of the traditional process was the ability of the Council members to "put on their Delaware hat" and to prioritize Delaware's long-term interests, or at least the long-term interests of Delaware lawyers as a group, over the immediate (and often pressing) interests of their clients.

The events of 2024 and 2025 show that the system has broken down. In 2024, the Council proposed a set of controversial amendments that responded to out-of-state pressure and related to issues that the Supreme Court had not yet had a chance to review. The proposals moved through the Council at great speed and were not balanced. In 2025, even more controversial proposed amendments were drafted over two weeks by an ad hoc committee in response to threats by controlled companies to reincorporate out of Delaware. The proposed amendments were submitted to the Council for limited review only after having already been introduced in the General Assembly. They were adopted by the legislature on an accelerated basis, with limited opportunity for external input or changes to the proposed legislation. The process was nakedly political.

These departures from the traditional process have already focused national attention on the political nature of Delaware corporate lawmaking and rekindled debate over why Delaware, one of the smallest states in the nation, is the de facto promulgator of national corporate law. The traditional process effectively responded to Delaware's democratic legitimacy deficit by cloaking corporate law in apolitical, technocratic expertise: law was made largely by expert judges, while legislative amendments were drawn up by expert lawyers and largely confined to technical issues and the few

controversial amendments went through significant vetting and were balanced in substance. Under this traditional approach, it mattered little that the judges were Delaware judges or that the lawyers were Delaware lawyers.

The traditional process served Delaware well and, we believe, produced high quality balanced corporate law. But changes in the capital markets and the Delaware legal market have combined to undermine the ability of the traditional process to prioritize Delaware's long term interests in remaining the de facto promulgator of national corporate law.

Since the early 2000s, capital markets have been transformed by the rise of dual-class companies with controlling shareholders who have the ability to reincorporate in a different jurisdiction. They also have powerful reasons to push for special rules that are difficult to accommodate within the traditional board-centric Delaware framework, making their demands particularly disruptive.

Since the 1980s, the Delaware legal market has transformed as well. In the 1980s, four large Delaware firms dominated the legal market and had the ability to resist pressure from clients and referring counsel. The legal market today is different. Delaware lawyers face incentives to further their personal or firm's shorter-term interests over the long-term interests of Delaware or its law firms as a whole. The dominant firms have dramatically increased in size, leading to more intrafirm competition. A number of significant boutique firms have emerged, giving both Delaware lawyers and out-of-state referring firms more options. And national firms have opened significant Delaware offices whose economic fortunes are more closely tied to the national firm. Delaware lawyers today are just as ethical and upright as their forebears but operate in a fundamentally different environment.

The breakdown of the traditional process shines a spotlight on the anomaly of Delaware's status as de facto promulgator of national corporate law and carries fundamental risks for Delaware. Delaware thrives when no one notices its role. The spotlight carries potentially existential risk for Delaware's role in corporate law. Faced with a financial crisis or pressure from constituents, Congress could wholly or partially federalize corporate law. States could change or narrow the scope of the internal affairs doctrine and reduce their level of deference to Delaware.

If Delaware wants to fend off these threats, it must enhance its legitimacy and reform its mode of lawmaking. The key is to boost its ability to act independently even when that requires resisting client and national firm pressure. To do so, we suggest the creation of a legislatively authorized "Corporation Law Commission" that will replace the Council as the initiator of amendments to the DGCL. The membership of that body would differ

from the current Council membership by having fewer lawyers in active practice. It would substitute retired lawyers and members selected to represent various groups with a stake in Delaware corporate law such as the Chamber of Commerce and the Council of Institutional Investors. The Commission would have procedural rules that are designed to enhance transparency and opportunities to provide input, such as notice and comment periods.

Pursuing such a course carries significant costs and the result may well be inferior to the traditional process, a return to which, in our view, is no longer possible. But it is a risk worth taking. After the experiences of 2024 and 2025, a change is necessary.

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