Delaware's Global Threat

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This Article theorizes the under-examined long-term threat to Delaware's dominance: global competition. In a competitive global business environment, multinational firms and investors have more alternatives when considering where to entrust their investments, raise capital, and adjudicate their disputes. Delaware's dominance as a site of incorporation and corporate litigation is one of the most debated topics among corporate law scholars. Traditional accounts of Delaware's dominance overwhelmingly focus on, and at times overstate, potential domestic threats such as interstate competition and federal preemption. A common theme in this literature is the tension between the respective roles of the federal government and the state of Delaware in the regulation of internal corporate affairs. From a global perspective, this approach is too narrow because the destinies of Delaware and the nation are intertwined. The nascent global threat to Delaware and the nation is a confluence of factors including capital migration toward foreign markets, the growing appeal of foreign stock exchanges, multi-jurisdictional litigation, business firms eschewing courts for alternative dispute resolution, and corporate tax-inversion strategies. The new global narrative illuminates key issues such as the importance of Delaware's courts for resolving complex global business disputes and the contribution of Delaware's global brand to the strength of U.S. corporate governance. This Article posits that Delaware's key contribution to U.S. corporate governance is the production of substantially judge-made corporate law—a public good providing dynamic guidance to multinational firms and practitioners as well as a deterrent for wayward business behavior.

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I. INTRODUCTION

Delaware's legal regime is akin to a global brand, and the Delaware incorporation decision resembles the purchase of a branded product.[1] In a sense, the Delaware brand is to corporate law what the Apple brand is to personal computers. Whereas the personal computer has become a commodity, Apple products, nonetheless, continue to function like luxury goods—generating profits, withstanding periods of turbulence, and securing future demand. Similarly, Delaware's ability to provide a unique branded customer experience partly explains its dominant performance within a high-end market segment composed of large, publicly traded firms. Approximately sixty percent of U.S. publicly traded corporations are incorporated in Delaware, making it the nation's corporate capital.[2] And "[f]or at least half a century the Delaware courts have been the de facto 'national' U.S. corporate law courts."[3] Despite its preeminence as a site of incorporation and corporate

1. *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 228 (1985) (analogizing Delaware's law to a product that corporations purchase); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1129 (2008) (analogizing the Delaware incorporation decision to the purchase of a branded product); *see also* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1349 (2012) ("Finally, and crucially for our purposes, the court system is a key aspect of the Delaware 'brand.'"); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 60 (2009) (discussing Delaware's brand). For newer articles on Delaware's dominance using branding-related concepts, see Robert Anderson IV & Jeffery Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1050 (2015) ("Lawyers appear to turn to Delaware because it is the law they are most familiar with; they assume markets value Delaware law, and they regard Delaware as a safe default which would trigger no pushback from corporate managers."); William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 124–25 (2013) (compiling survey data from underwriter and issuer lawyers indicating that lawyers recommend either Delaware or their state of practice for incorporation because they are familiar with the corporate law of either Delaware or their state of practice); Darian M. Ibrahim & Brian J. Broughman, *Delaware's Familiarity*, 52 SAN DIEGO L. REV. 273, 276 (2015) ("[W]hile Delaware may have begun its ascent to the top of the corporate law hierarchy by offering more desirable law than its leading competitor, it stays there as much because it is *familiar* to business parties as for its substantive virtues."). For earlier articles discussing branding effects in the corporate and contractual contexts, see Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1589 (2006) [hereinafter Fleischer, *Brand New Deal*] (noting branding has received little attention from legal scholars outside of the trademark area); Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, 12 HARV. NEGOT. L. REV. 137, 140–41 (2007) [hereinafter Fleischer, *MasterCard IPO*] (describing the branding effect of legal infrastructure); *see also* D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189 *passim* (2007) (discussing branding effects in the contractual context). Delaware's legal regime includes multiple actors, such as the judiciary, the Delaware General Assembly, the corporate bar, and the Division of Corporations. This is an oversimplification, but useful nonetheless. The use of the word "product" in this instance captures both products and services.

2. *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 111 (2009) (discussing Delaware's dominance in the corporate law market); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 331 (2001) (discussing distribution of shareholding within a country); *id.* at 350 ("The aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the [DGCL] as a de facto national corporate law.").

3. Armour et al., *supra* note 1, at 1398. Armour, Cheffins, and Black comment on the ubiquitous nature of Delaware law:

> Delaware law is a central part of the business law curriculum in most major U.S. law schools. The official comments accompanying the Model Business Corporations Act (MBCA), a model law followed by twenty-four states, frequently refer to Delaware cases to provide examples to explain the drafters' choices. Courts in other states often cite and follow Delaware case law when their own case law is sparse. Courts in MBCA states sometimes cite Delaware jurisprudence in preference to

litigation, Delaware ranks as the forty-fifth most populous state in the United States and forty-ninth in physical size.[4] Delaware's dominance is one of the most debated topics among business law scholars. Historical and present theories of regulatory competition overwhelmingly focus on, and at times overstate, the potential domestic threats to Delaware's longstanding dominance, such as interstate competition for charters and federal preemption. A common theme in the regulatory competition literature is the tension between the respective roles of the federal government and the state of Delaware in the regulation of corporate governance. From a global perspective, this approach is shortsighted because the destinies of Delaware and the nation are intertwined in the face of the common threat of global competition. This Article fills this void by exploring the under-examined long-term threat to Delaware's dominance: global competition.[5] Although scholars have addressed the impact of globalization on securities regulation, the parallel impact on Delaware's role, as a de facto national regulator, remains largely underdeveloped.[6] Delaware's global narrative is relevant to important issues, namely (i) the importance of Delaware's courts in resolving complex business disputes with transnational implications, and (ii) the ways in which Delaware's global brand contributes to the strength of U.S. corporate governance by conferring a competitive advantage on multinational firms. Ultimately, this Article posits that Delaware's key contribution to U.S. corporate governance is the production of substantially judge-made corporate law—a public good providing dynamic guidance to multinational firms and practitioners as well as a deterrent for wayward business behavior.

Despite two economic disasters since the new millennium and resultant federal legislation (i.e., Sarbanes–Oxley and Dodd–Frank), Delaware's brand equity remains intact. Delaware's market share has arguably grown during the most recent period of economic turbulence.[7] Chief Justice Leo Strine of the Delaware Supreme Court asserts that "Delaware's comparative stability has made it even more attractive to those who form entities in the United States, as shown by the fact that 83[%] of domestic initial public offerings (IPOs) last year involved Delaware entities."[8] Notwithstanding, Chief Justice Strine also acknowledges "increasing globalization of the economy and the perception that the United States is a high-cost and slow place to resolve business disputes present two of the most important challenges Delaware must address."[9]

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decisions from other MBCA states.

Id. at 1398–99.

4. *Guide to 2010 Census State and Local Geography – Delaware*, U.S. CENSUS BUREAU (June 11, 2013), http://www.census.gov/geo/reference/guidestloc/st10_de.html.

5. *Compare* Lawrence A. Hamermesh, *The Challenge to Delaware's Preeminence in Corporate Law; Federal Interference May Not Pose the Greatest Danger to the State's Future Success*, 27 DEL. LAW. 8, 9 (2009) ("[F]ederal-state conflict has been exaggerated as a threat to Delaware, and that the more important issue is the effect of federal initiatives on business formation in the United States generally, and the possibility that a third source of competition—global, rather than federal or state—represents the greatest long-term threat to the interests of our State."), *with* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003) ("Delaware's chief competitive pressure comes not from other states but from the federal government.").

6. Christopher Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 U. CHI. L. REV. 1435, 1467 (2008).

7. Chief Justice Leo E. Strine, Jr., State of the Judiciary Address 2 (June 4, 2014), http://www.rcfp.org/sites/default/files/docs/20140620_151641_strine_speech.pdf.

8. *Id.*

9. *Id.*

Delaware's unique specialized court system is perhaps the key factor contributing to the strength of its global reputation. Globally, multinational corporations present courts with a range of challenging legal issues: corporate governance, mergers and acquisitions, finance, compliance, risk management, and other commercial matters. By routinely deciding these business disputes, Delaware courts—through well-established precedents—influence domestic and foreign courts as well as corporate stakeholders worldwide.[10] In today's competitive global business environment, however, multinational firms and investors have more alternatives when considering where to entrust investments, raise capital, and adjudicate disputes.

More transactions and capital are moving offshore. Notably, emerging markets "have developed sophisticated and highly liquid financial centers that now finance many of the world's largest transactions and attract the participation of U.S. [and foreign] investors."[11] Meanwhile, corporate tax-inversion strategies encourage foreign incorporations as a mechanism to reduce the tax burden on income earned abroad.[12] A future decline in U.S. capital markets could hasten this trend. In this environment, international firms and investors may decide to bypass U.S. incorporation or listing on a U.S.-based exchange altogether.[13] They are also more likely to eschew litigation in Delaware's courts for litigation and especially alternative dispute resolution in foreign jurisdictions.[14] This pattern could weaken the overall impact and reputation of U.S. corporate governance. The threat to Delaware's dominance is no longer a story about corporate migration to other states or federal preemption. The new narrative concerns global competition from nascent foreign jurisdictions and markets. Delaware's global threat is a confluence of factors, some of which fall outside the control of government actors.

Global forces threaten two separate but related aspects of Delaware's dominance—incorporations and corporate litigation that both contribute to the creation of Delaware's chief product, corporate law. Incorporation is company driven. Meanwhile, plaintiffs drive litigation. In the standard private contractual context, arms-length parties can use an array

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10. Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 786 (2009); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 212 (2011) ("The judicial opinions that result from frequent litigation benefit all members of the Delaware network, because such opinions provide firms with interpretive guidance on matters of Delaware corporate law."); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 475–78 (Jan. 2015).

11. Christopher Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327, 328 (2010); *see also* RICHARD N. DEAN & PAUL B. STEPHAN, DOING BUSINESS IN EMERGING MARKETS: A TRANSACTIONAL COURSE 1–23 (2010).

12. *See* Orsolya Kun, *Corporate Inversions: The Interplay of Tax, Corporate, and Economic Implications*, 29 DEL. J. CORP. L. 313, 313–15 (2004) ("The pre-inversion multinational's intra-corporate relations are generally governed by Delaware law. The applicable law, following the inversion, is the law of the offshore jurisdiction, where the corporate group continues."). *See generally* James R. Hines Jr., *Reconsidering the Taxation of Foreign Income*, 62 TAX L. REV. 269 (2008–2009) (comparing a regime where a home country taxes foreign income to a regime which does not in order to analyze the consequences of taxing active foreign business income).

13. *See* Brummer, *supra* note 11, at 328 (noting a decline in the SEC's reputation due in part to large high-profile supervisory lapses as well as more transactions and capital moving offshore); *see also* Brummer, *supra* note 6, at 1448. *See generally* Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785 (2009) (discussing the weaknesses of the SEC). Some firms have legal and business reasons for not listing on a U.S.-based exchange that might expose them to additional regulatory requirements and scrutiny.

14. *See generally* Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (discussing transnational litigation dynamics and policies in the absence of contractual forum-selection and related devices).

of devices—forum selection clauses, choice of law provisions, arbitration provisions, and fee-shifting provisions—to influence litigation. Presumably, management in publicly traded firms can also make use of these devices for intra-corporate disputes through charter and bylaw amendments to address issues such as multi-jurisdictional litigation, strike suits, and costs.[15] In the intra-corporate dispute context, however, shareholder consent is not a direct analog to arms-length contractual consent because it may be weakened by collective action problems and procedural hurdles.[16] According to some commentators, management's use of such devices, such as intra-corporate forum selection clauses and especially mandatory arbitration clauses, "implicate the relationship between shareholders and managers" and theoretically may "disadvantage shareholder efforts to engage in a rigorous monitoring of management agency costs [through class action and derivate litigation]."[17] Widespread use of these devices may also potentially impact Delaware's reputation and legitimacy among various corporate constituents.

Given the increased competition for capital in the global economy, Delaware's global brand is especially important to the overall strength of U.S. corporate governance and the United States' jurisdictional preeminence.[18] In a global context, Delaware's and the nation's destinies are intertwined.[19] A weak Delaware brand could reduce incentives for foreign firms to invest and resolve their corporate disputes in the United States.[20] The U.S. corporate governance system is a mixed system characterized by the interaction of state law competition with federal intervention.[21] Despite differences in scope (i.e., external trading and disclosure versus internal affairs), federal securities laws and state corporate law share a common core concern for investor protection.[22] This relationship is not as fragmented and adversarial as some legal scholars suggest, but rather "symbiotic" and complementary.[23]

From a demand-side perspective, large, publicly traded multinational firms that incorporate in the United States, in essence, purchase a package that most likely includes

15. *See generally* Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925 (2013) (discussing multi-jurisdictional litigation and the role shareholders play in limiting this corporate behavior).

16. Hamermesh, *supra* note 5; *see also* Thomas, *supra* note 15, at 1950–56 (providing a discussion of the trend toward the adoption of intra-corporate forum selection clauses in a manner that functionally avoids shareholder approval).

17. Thomas, *supra* note 15, at 1954.

18. Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 782 (2013) ("Developments in business and the capital markets such as globalization and changes in equity ownership will continue to bring new challenges to business regulation. In the United States, state-based regulation has proven itself well-positioned to respond to these challenges. Although a top-down federal mandate is a tempting response to a financial crisis, members of Congress should resist the temptation to interfere with Delaware lawmaking.").

19. Strine, *supra* note 7, at 3.

20. Fisch, *supra* note 18; Armour et al., *supra* note 1, at 1397–98 (discussing the potential reduction in the quality of judicial decisions regarding corporate law disputes in the event Delaware loses a significant number of its cases to rival jurisdictions or suffers damage to its brand).

21. *See* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1499–1508 (May 1992) (recognizing the potential of federal intervention as a detriment to state law competition and international competition).

22. Christopher Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067, 1074 (2008).

23. *See* Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1578 (2005) (discussing the complementary nature of state and federal corporate law).

Delaware corporate law, federal securities laws, and other types of business regulation (e.g., tax, anti-corruption, etc.).[24] Traditional economic theory asserts that consumers will migrate to jurisdictions providing regulations "most consonant with their preferences."[25] On the supply-side, Delaware functions as a de facto national regulator that, like the Securities and Exchange Commission (SEC), supplies law to increasingly mobile firms seeking to raise capital.[26] Additionally, foreign nations may act as "importers" of law, who emulate Delaware's example in order to enhance their own reputations for corporate governance and improve their business-related competencies.[27] Ultimately, these emulated laws are usually consumed by the foreign nations' corporate firms.

Part II of this Article examines key facets of Delaware's global brand. Specifically, this Part offers: (i) a description of branding and competitive advantage; (ii) an overview of theoretical concepts related to branding, such as reputation; (iii) an examination of the domestic and global markets for corporate law as well as the internal affairs doctrine (IAD); and (iv) a discussion of the key tangible component of Delaware's brand, that is, unique business courts with structural safeguards and incentives for principled decision making. Finally, Part III examines the key implications of Delaware's global threat narrative, namely, (i) the importance of Delaware's business courts to resolving complex global business disputes, and (ii) Delaware's contribution to U.S. corporate governance and firm competitiveness.

II. DELAWARE'S GLOBAL BRAND

A. Brands and Competitive Advantage

Whereas corporations often provide commercial goods and services, regulators and courts are producers of law. Similar to business firms, reputational concerns influence the behavior of regulators and courts. Reputation figures prominently into the regulatory competition discussion—particularly the preeminence of Delaware's courts in resolving corporate disputes.[28] Reputation-based theories, in the context of Delaware's preeminence, have received relatively modest treatment by legal scholars.[29] The brand concept, an integral part of the business lexicon, is more than empty jargon; it has a strong connection to reputation-based theories and related concepts in the business law literature. Admittedly, the branding concept often generates a degree of skepticism. This skepticism is "rooted in the belief that (i) consumers, with imperfect information, are duped into making decisions based upon intangible factors, and (ii) producers use branding to insulate their market share from price competition and create barriers to entry, which distort competition."[30] This view of branding is too narrow and negative. Brands are not inherently good or bad; and "[t]he overarching question of whether a brand has a positive or negative impact on customer

24. Brummer, *supra* note 22, at 1078–79.

25. *Id.*; *see generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (exploring consumer mobility); *see also* Cain & Solomon, *supra* note 10, at 373–75 (discussing corporate selective mobility based on choice of law preferences).

26. Brummer, *supra* note 11, at 333–34.

27. *Id.*

28. *See generally* Simmons, *supra* note 1 (suggesting Delaware's reputation is a result of its branding).

29. *See id.* at 1131 (asserting that the branding discussion "is a missing chapter in the story of Delaware's sustained dominance").

30. *Id.* at 1133.

utility is often a matter of perspective."[31] Delaware's brand equity is tied to both the tangible aspects of its service, such as its courts, alongside intangible factors, such as reputation. Despite benefitting from difficult-to-quantify intangibles, Delaware offers domestic and global firms the valuable product of corporate law, as well as a unique "legal 'infrastructure' consisting of the country's most expert corporate court and bar."[32]

Among multinational firms, Delaware is a global brand of choice for corporate law, dispute resolution, and incorporations. It is also a popular source of emulation. Foreign jurisdictions, seeking to enhance their reputations, elevate their business competencies, and attract foreign direct investment adopt Delaware-style features and precedents. Delaware, a small market-dominant jurisdiction, is a success story from the perspective of multinational firms and nations with growth ambitions.[33] Prior to further discussing Delaware's preeminence, a brief discussion of competitive advantage and branding is instructive.

1. Competitive Advantage

Competitive advantage is simply an advantage a firm exercises over its competitors.[34] There are various types of competitive advantage, such as cost advantages and differentiation advantages.[35] A state or nation has a cost advantage if the cumulative cost of performing all value-producing activities is lower than the analogous costs in rival jurisdictions.[36] States or nations with a cost advantage can produce valuable outputs at a lesser cost than rival jurisdictions.[37] Alternatively, a state or nation has a differentiation advantage when it provides something unique and valuable to corporations beyond a lower price.[38] Delaware possesses both types of competitive advantage, but differentiation advantages, such as Delaware's courts, are a key source of Delaware's preeminence.[39]

2. Branding Effects

Branding generally describes a range of elements that form a complete service or product experience.[40] The concept has traditionally focused on unique benefits that set a

31. *See id.* at 1150 ("Yet, one potential metric, although not dispositive, would be the ratio of tangible brand attributes to intangible ones. Thus, a high ratio of intangibles could suggest limited customer utility.").

32. O'HARA & RIBSTEIN, *supra* note 2, at 118.

33. *See generally* Christopher Bruner, *Market-Dominant Small Jurisdictions in a Globalizing Financial World* (Washington & Lee Legal Studies Paper No. 2013-19, Oct. 21, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343111 (demonstrating Delaware's prominence as a global player from a small market).

34. Simmons, *supra* note 1, at 1152.

35. *See generally* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE xvi, 3 (1985) (stating that cost leadership and differentiation are two basic types of competitive advantage).

36. *Id.* at 97.

37. *See* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 720–23 (1987) (providing cost-based explanations for Delaware's competitive edge).

38. PORTER, *supra* note 35, at 120.

39. Simmons, *supra* note 1, at 1152.

40. *Id.* at 1145; *see also* KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 10–21 (1998) (describing the range of items that can be branded). There is also a journal dedicated to branding geographic locations. *See, e.g.*, David Gertner, Editorial, *Place Branding:*

product or service apart from the competition.[41] The purchase of a branded product involves the purchase of two bundled products: (i) a tangible product embodying physical features and performance characteristics, and (ii) an intangible product reflecting perceptions related to what the brand represents—that is, reputational aspects, which may or may not relate to performance characteristics.[42] Unlike commodity products, branded products have enduring competitive advantages. Brands are a "higher-order" competitive advantage requiring more "advanced skills and capabilities such as specialized and highly trained personnel, internal technical capability, and, often, close relationships with leading customers."[43] Delaware offers a unique "legal 'infrastructure'" consisting of expert business courts and a specialized corporate bar.[44] Accordingly, Delaware's legal regime is not a commodity, but a branded product or service. While certain brands create competitive advantage primarily through product and technological innovation (e.g., Apple), other brands create competitive advantage predominately through non-product-related factors (e.g., Louis Vuitton). Delaware, taking into consideration its court system, bears a stronger resemblance to the former rather than the latter. Many markets possess a trend toward commoditization and uniformity. Delaware, however, possesses unique features, such as expert courts that are not easily replicated by domestic and foreign competitors.[45]

a. Suppliers

For suppliers like Delaware, brands allow them to "secure profits, secure future demand, and withstand periods of turbulence."[46] In Delaware, "the importance . . . of maintaining a strong brand is not simply to extract a premium price in the form of franchise

Dilemma or Reconciliation Between Political Ideology and Economic Pragmatism?, 3 PLACE BRANDING & PUB. DIPL. 3, 4 (2007), http://www.palgrave-journals.com/pbljournal/v3/n1/full/6000053a.hml ("Positive brand images have helped many economies boost their exports and attract investments, businesses, factories, visitors, residents and talented people."). Branding is a way for countries to improve upon a negative image or reinforce a positive perception. In Delaware's case, it is the latter scenario. Notwithstanding, it is possible for something with low quality to have significant brand loyalty. *See* DAVID A. AAKER, MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME 39 (1991) (providing an investigation into links between brands, symbols, and slogans). Experts note "[c]ountry brands have both intangible and tangible elements, such as the products or services of the particular country." György Szondi, *The Role and Challenges of Country Brands in Transition Countries: The Central and Eastern European Experience*, 3 PLACE BRANDING & PUB. DIPL. 8, 9 (2007), http://www.palgrave-journals.com/pb/journal/u3/n1/full/000044a.hml.

41. Simmons, *supra* note 1, at 1145.

42. *See id.* at 1139 ("Tangible elements of the Delaware legal regime include a flexible corporate statute; case law and precedent; a specialized and proficient court system; and a stable political climate. Outside of Delaware's judicial system (i.e., case law and judiciary) and its stable political climate, Delaware's tangible differentiation advantages can be replicated by rival jurisdictions. Delaware's intangible elements, however, are not easily replicated and include reputation, visibility to top management, time-in-business, customer lists, competitors, academic curriculum, and discursive debate. These tangible and intangible elements are the building blocks of the Delaware brand.").

43. *Id.* at 1145 (citing MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 50 (1990)).

44. Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 699–700 (2008).

45. Simmons, *supra* note 1, at 1135; *see also* Anderson IV & Manns, *supra* note 1, at 1092 ("In theory other states could restore meaningful competition to Delaware simply by mimicking Delaware or creating more appealing alternatives. Some states, such as Nevada, have tried to do just that in tailoring corporate governance frameworks that largely mimic Delaware. But it is difficult to replicate fully Delaware's legal institutions and their track record with which lawyers are familiar.").

46. Simmons, *supra* note 1, at 1147.

taxes or attorney's fees; it is to secure future demand."[47] From the supplier perspective, the value of branding is prospective.[48] Branding arguably has three functions: to inform, to secure demand, and to persuade. The former two functions are much less controversial than the latter.[49] As a practical matter, it is often difficult to disentangle these functions. For suppliers, a brand is a potent device to distinguish one's product from competitors and create an aversion to substitutes.[50] In addition to insulating producers from competition, brands are durable sources of competitive advantage that provide added protection in the event of product or service failure.[51] Although the question of whether Delaware actively markets its brand is not germane to this Article, there is nonetheless anecdotal support for this proposition.[52] As a part of international trade missions sponsored by the Delaware Division of Corporations, lawyers, business people, and judges participate as part of delegations that interact with foreign lawyers, business people, and judges around the world to discuss corporate governance issues.[53] Delaware also hosts foreign delegations of lawyers and judges. Recent Delaware delegations have either traveled to, or the state of Delaware has hosted foreign delegations from, a range of countries including: Israel, Japan, Taiwan, Russia, Switzerland, India, Canada, the United Kingdom, Australia, Brazil, and South Africa.[54] These Delaware trade missions are arguably, in part, state marketing efforts intended to capture global market share of incorporations and attract foreign firms to Delaware and the United States.[55]

b. Consumers

For consumers such as multinational firms, "strong brands create customer value because they reduce both the effort and risk involved with purchase decisions" by allowing customers to "search less externally and think less internally."[56] Branding value to customers is not confined to the ability to limit search costs or to impart information concerning the functional qualities of a service or product. Conceptually, "[c]ustomers and brands may share a bond or 'implicit understanding' whereby, in exchange for the consumer's loyalty, the brand will behave a certain way and provide 'utility through consistent product performance.'"[57] Brands protect the customer's ex ante expectations concerning the product. This scenario resembles the concept of credible commitment in the corporate law literature.[58]

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Simmons, *supra* note 1, at 1147.
52. There is anecdotal evidence that Delaware's Division of Corporations markets the Delaware brand through international trade missions and other activities. *Supra* Section II.A.2.
53. *See* JEFFREY W. BULLOCK, DELAWARE SECRETARY OF STATE, DELAWARE DIVISION OF CORPORATIONS 2013 ANNUAL REPORT 1, 3 (2013), http://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf (describing the expanded international marketing of Delaware's corporate governance brand).
54. *Id.*
55. *Id.*
56. Simmons, *supra* note 1, at 1147.
57. *Id.* at 1149.
58. *Id.*

3. Brand Extensions

Delaware's corporate-law-related brand equity among large, publicly held firms is arguably strong enough to bolster the perception of its other service areas, for example, Limited Liability Corporation (LLC) charters, bankruptcy litigation, commercial disputes, and arbitration.[59] Stated differently, the positive associations with Delaware's corporate courts and their resolution of corporate litigation—its core brand features—can extend to other service areas falling within the jurisdiction.[60] This process of brand extension—much in the same way the influence of the Arm & Hammer brand extends beyond its core of baking soda—reduces the risk of launching new services and eliminates the expense and time building a reputation. Advantageously, Delaware has developed into a "one-stop shop" or "hub" for business-related litigation ranging from shareholder derivative suits to bankruptcy proceedings, and other standard commercial disputes in Delaware business courts.[61] Delaware is a legal jurisdiction exhibiting economies of scale and scope. Generally, "[a]n economy of scale is the savings resulting from the greater efficiency of large-scale processes."[62] Delaware courts produce greater economies of scale and efficiencies, compared to other jurisdictions, through the repetitive handling of complex corporate cases in the Court of Chancery and the Supreme Court. The additional exposure Delaware judges and lawyers receive cultivates additional skill, experience, and expertise. These acquired skills, experience, and expertise can then be used to promote economies of scope. Economies of scope generally pertain to the savings and efficiencies created by involvement in multiple activities.[63] In Delaware's case, this might include handling multiples types of business litigation (e.g., shareholder, bankruptcy, and commercial) or developing additional arbitration capabilities.

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59. David A. Aaker & Kevin Lane Keller, *Consumer Evaluations of Brand Extensions*, 54 J. MKTG. 27, 27 (1990) ("Brand extensions . . . provide a way to take advantage of brand name recognition and image to enter new markets. The leverage of a strong brand name can substantially reduce the risk of introducing a product in a new market by providing consumers the familiarity of and knowledge about an established brand. Moreover, brand extensions can decrease the costs of gaining distribution and/or increase the efficiency of promotional expenditures."); Jerre B. Swann, Sr. et al., *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 810 (2001) ("It is easier for a company with a strong, distinctive brand to expand its product offering to related goods. Brand extensions can be based on many different elements of brand equity, including quality reputation (HONDA lawn motors), customer franchise (VISA travelers' checks) and user image (NIKE watches), and there are many other types of brand associations that can provide a point of differentiation for an extension.").

60. Bankruptcy litigation and the market for LLC charters are potential examples of Delaware brand extensions. *See generally* G. Marcus Cole, *Delaware is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002) (examining the rise in Delaware bankruptcy cases); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 202 (2011) ("Of the fifteen LLCs that filed for or completed an initial public offering between March 31, 2004 and March 31, 2010, every one of them was chartered in Delaware.").

61. *See generally* LYNN LOPUCKI, COURTING FAILURE (2006); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1991–96 (2002) (discussing Delaware's rise as a capital for bankruptcy); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 178–82 (2013) (finding that the majority of corporations forum shopping for bankruptcy proceedings chose either Delaware or the Southern District of New York).

62. Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 136 (2011) (citations omitted).

63. *Id.*

B. Theoretical Concepts Related to Delaware's Brand

The Delaware brand discussion, with its theoretical grounding in the related concepts of reputation theory, trust, credible commitment, and legitimacy, provides an alternative descriptive narrative of Delaware's dominance. Admittedly, the branding concept encompasses multiple theoretical concepts that, in reality, share a common thread of reputation and are difficult to disentangle. Yet, it is useful to examine these concepts separately.

1. Trust

Trust is a foundational element of market activity, corporate governance, courts, and society. Although the topic is not new to business law scholars, its importance remains underestimated.[64] Some scholars "describe trust as a willingness to make oneself vulnerable to another, based on the belief that the trusted person will choose not to exploit one's vulnerability (that is, will behave trustworthily)."[65] Trusting and trustworthy behavior is also more cooperative behavior. This characterization of trust can extend to the behavior of individuals, firms, regulators, and courts. Many discussions in the business law literature—relational contracts, regulatory competition, financial regulation, corporate compliance, risk management, securities regulation disclosures, executive compensation, fiduciary duties, credible commitment, and shareholder voice—share a common thread: trust or the lack thereof.[66]

2. Reputation

Reputation, the way in which people think of someone or something, looms large in the trust and branding discussion. It helps explain why firms, individuals, and even regulators may act in a trusting or trustworthy manner when immediate external incentives and rewards may suggest otherwise. To help illustrate, consider the following scenario from a demand-side perspective:

> A wants to build a home. A can choose to contract with builders B, C, or D, all of whom insist they can perform great construction work for the same price. Who can A trust to perform quality work? Why should A choose B over C and D? How can A address their own lack of knowledge concerning homebuilding? Here, A may use B's good reputation in the community as a mechanism to limit transaction costs, a heuristic for quality, and protection against opportunism. In essence, reputation makes it easier for A to trust B in this situation compared to

64. *See generally* Margaret Blair & Lynn Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001) (arguing that "the behavioral phenomena of internalized trust and trustworthiness play important roles in encouraging cooperation within firms").

65. *Id.* at 1739–40.

66. *See generally* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009) (noting the inherently adversarial relationship between corporations, employees, and regulators in the wake of the financial crisis); Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61 (2011) (highlighting trust as an important factor between corporations and regulators); Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649 (discussing the role trust plays in relational contracts); Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503 (2006) (describing the history and interplay of trust between shareholders and the corporation).

other builders.

Now, let us consider the perspective from the supply-side of the transaction:

> In light of A's information deficit regarding homebuilding, what incentives are there for B to actually perform quality work rather than acting opportunistically to take advantage of A's trusting behavior and information deficit (i.e., charging a high price for inferior service quality)? Here, B may have strong incentives to preserve their reputation among existing and potential customers to capture future business opportunities. Stated differently, the importance of reputation makes it more likely that B, the service provider, exhibits trustworthy behavior.[67]

At the tactical level, corporations are well aware of the impact of reputation on transactional contexts. They invest billions of dollars to preserve and develop favorable reputations among various stakeholders. Consider the general theory underlying reputation:

> Firms invest in reputation so that customers will do business with them. Rational customers prefer to do business with companies with good reputations because a strong reputation for honesty and integrity serves as a sort of bond, or credible promise to customers that the business will not act in a dishonest or immoral way. The theory works like this: Reputations are easy to destroy but difficult and expensive to build. As such, it is downright irrational for a company with a good reputation to treat even a single customer dishonestly or unethically because the short-term, one-shot profit gained from doing this inevitably will be less than the long-term cost that will result from the diminution or destruction of the company's reputation. In other words, according to the traditional economic theory of reputation, simple cost-benefit analysis predicts that companies will invest in reputation because doing so enables them to attract customers who will pay a premium to deal with the company with the good reputation.[68]

Beyond traditional customer interactions, reputational concerns help explain why corporations might acquiesce to the rules, legal requirements, decisions, and regulations of a particular jurisdiction (e.g., Delaware), regulator (e.g., SEC), or stock exchange (e.g., New York Stock Exchange (NYSE)). One commentator elaborates how certain jurisdictions may exhibit market power based upon intangible reputational resources:

> States, like firms, command (domestic) resources. These resources can be

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67. David Kreps elaborates on the function of reputation:

> In transactions where one side must trust the other, the reputation of the trusted party can be a powerful tool for avoiding the transaction costs of specifying and enforcing the terms of the transaction. Indeed when the contingencies upon which the terms are based are observable, but not verifiable, reputation may be the only way to effect the transaction. Reputation works as follows: The trusted party will honor that trust because to abuse it would preclude or substantially limit opportunities to engage in future valuable transactions. Such a reputation . . . rests in a wholly intangible entity (the firm), as long as those who make decisions or take actions in the entity's name have a stake in preserving its reputation . . . . [T]he best reputation, from the point of view of effecting the type of arrangement we are talking about is one that is clear-cut and easy to monitor.

David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 116 (James E. Alt & Kenneth A. Shepsle eds., 1990).

68. JONATHAN R. MACEY, THE DEATH OF CORPORATION REPUTATION 8 (2013).

> tangible goods such as capital or machinery, or they can be intangible goods, such as the ability to endow firms with good reputations (such as for good corporate governance) or branding (as "honest"). Moreover, the market power that the state enjoys over these resources—that is, the ability for it to charge outsiders for use or access—will be dependent on the availability of that resource in other jurisdictions and the mobility of market participants. If a regulator exercises jurisdiction over a resource that is rare in the world, or inaccessible or costly to attain in other jurisdictions, it wields significant power in terms of the concessions it may extract from firms seeking that resource. Where, conversely, a resource is common and can be accessed with relatively few transaction costs in other jurisdictions by mobile consumers, the regulator has much less market power.[69]

Laws, regulations, and court opinions, in general, inform market participants on the parameters of appropriate behavior. A company's decision to incorporate in Delaware or list on the NYSE may also be driven, in part, by a need to signal reputational enhancement and that a company is more trustworthy.[70] Delaware is a focal point for incorporations. It functions as a common point of reference known to game theorists as a Schelling point.[71] Consider the following example: five start-up companies have big time ambitions and plan a future IPO and listing on a U.S.-based exchange. But first they desire to incorporate. A large investor decides to have a contest. They promise to make a sizable investment in each company that successfully chooses where the other start-ups are incorporating. Where does a start-up decide to incorporate when faced with a choice that could be anywhere among fifty states? If all the start-ups were asked where the other start-ups would incorporate, Delaware is the likely answer. Even if there is nothing that makes Delaware a location with a higher payoff, and one could just as easily incorporate in another state, Delaware's reputation as a corporate hub has salience. Delaware is a natural "focal point."[72]

3. Credible Commitment

There is an implicit understanding between Delaware and corporations known as credible commitment. In essence, credible commitment is the belief that Delaware's legal regime and its various actors, including courts, will continue to meet the ever-changing needs of the business community in a non-politicized manner.[73] This feeling of security, bond, or peace of mind, is independent of Delaware's tangible performance features.[74] From the firm or customer perspective, credible commitment is a backward-looking concept that reinforces a firm's ex ante expectations and investment.[75] Delaware's investment in legal capital (i.e., judicial expertise, case law, a specialized bar, and a business-like Division of Corporations) and its reliance on franchise taxes further instills

69. Brummer, *supra* note 6, at 1447–48.

70. MACEY, *supra* note 68, at 204; Brummer, *supra* note 6, at 1487–88.

71. *See* MACEY, *supra* note 68, at 195 (discussing how stock exchanges such as the NYSE became focal points for securities traders).

72. *See generally* THOMAS SCHELLING, STRATEGY OF CONFLICT (1980) (discussing game theory in situations where there is a common interest as well as a conflict between adversaries).

73. Simmons, *supra* note 1, at 1178.

74. *Id.*

75. *Id.* at 1179.

confidence among firms and their advisors that Delaware will continue to respond to their demands.[76] State investment in legal capital signals to corporations that Delaware will continue to provide experienced, skilled judges and lawyers to assist corporations.[77] Without the attraction of corporate charters and the related tax revenues, Delaware's investments in legal capital might lose their value.[78] The political climate in Delaware—characterized by a mild conservatism and distrust of large fluctuations—also serves as an additional guarantee against uncertainty and volatility.[79] Delaware's strong credible commitment is perhaps a disadvantage for other states because simply offering better law and lower costs without attention to intangible criteria will not adequately challenge Delaware's preeminence and competitive advantage.[80] For example, even if a rival state were to lower franchise taxes to attract charters, this could actually make that jurisdiction's commitment seem less credible and more fleeting compared to that of Delaware with a long-established brand.[81] Although franchise taxes serve as an explanation for the bond or credible commitment of Delaware, franchise taxes "cannot, however, be the only thing driving the corporate law market."[82] Importantly, credible commitment, from Delaware's supplier perspective, is about securing future demand. In the midst of state and global competition, the need to signal an enduring credible commitment is particularly acute.[83] Consequently, Delaware must find ways to sustain its competitive advantage after the incorporation decision. One way Delaware achieves this is through signaling a commitment that is not static, but dynamic.[84] Adaptable common law adjudication contributes to this dynamism.

4. Legitimacy

Courts, as a general matter, rely on their institutional legitimacy and acquiescence from the public. Judicial incentives, particularly for appointed judges, are nuanced and not one-dimensional. In the case of Delaware, large, publicly traded corporations and the federal government typically acquiesce to its de facto status as a national regulator.[85] The institutional legitimacy of Delaware courts extends beyond a single decision and, even where a decision is adverse to a particular party, all the parties generally acquiesce to the result.[86] Scholars suggest that institutional legitimacy perhaps matters more for Delaware's business courts (with a national and global profile) than more regionally focused courts.[87] In particular, "[j]udge-made law appears more neutral and distanced from the political

76. *Id.* at 1178.
77. *Id.*
78. Simmons, *supra* note 1, at 1178.
79. *Id.*
80. *Id.*
81. *Id.* at 1178–79.
82. O'HARA & RIBSTEIN, *supra* note 2, at 112.
83. *See* Simmons, *supra* note 1, at 1179 ("As business and court management become increasingly complex and other states seek fiercely to compete with us, we have to realize that we need to 'earn our wings every day' to justify that national respect and the respect and trust of our citizens.") (quoting E. Norman Veasey, *I Have the Best Job in America*, 13 DEL. LAW. 21, 21 (1995)).
84. Simmons, *supra* note 1, at 1179 n.236.
85. *Id.*
86. *See id.* (describing how public confidence and acquiescence to Delaware courts protects them from federal preemption).
87. *Id.* at 1181.

process than legislative enactments" because "court decisions—with majority, concurring, and dissenting opinions, along with supporting rationale—arguably deserve greater respect than pronouncements from other government branches whose procedures may appear more ad hoc, arbitrary, and less transparent."[88] The Delaware Supreme Court's unanimity norm could, in part, "be explained as a means for the court to solidify its standing as the nation's leading arbiter of corporate law issues."[89] Although a complete lack of dissents could potentially undermine legitimacy, infrequent dissents still remain a legitimizing mechanism. Additionally, Delaware's corporate judges regularly engage with and provide guidance to corporate stakeholders via conferences, articles, state-sponsored trade missions, and academic symposia.[90] These unique judicial interactions with the communities they regulate also bolster the legitimacy of Delaware's courts.[91]

Delaware judges arguably possess greater legitimacy in the corporate arena due to their experience and well-developed corporate expertise. In the context of shareholder derivative and class action lawsuits for public companies, one might ask: "How legitimate is a system that rarely leads to personal liability for directors and managers, but, at the same time, may create a windfall for plaintiffs' lawyers, and arguably provides limited deterrence due to insurance payments and exculpation?"[92] Although the prospects of personal liability are minimal, Delaware courts, nonetheless, provide valuable guidance in the form of procedures and protocols that guide boards, senior executives, and their advisors concerning a range of corporate issues (e.g., mergers and acquisitions, compliance, and executive pay).[93] Litigation or the threat thereof is a disciplining mechanism that still provides a lasting incentive in corporate boardrooms.

William T. Allen, Former Chancellor of the State of Delaware, describes the importance of Delaware's legitimacy:

> My speculation is that the entrepreneurs and venture capitalists that choose Delaware have it right. The IPO market and the secondary market trust the system of the Delaware corporation law to be systematically fair. That, of course, doesn't mean that all market participants will approve each element of the system—or each court ruling or statutory amendment. Any particular decision

88. *Id.* at 1158–59.

89. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 155–56 (1997) ("Given the historical uses of unanimity, the most obvious explanation for Delaware's unanimity norm might be judicial credibility. Just as Chief Justice Marshall fostered unanimity to enhance the standing of the early Supreme Court.").

90. Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 196–97 (2007).

91. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 591–92 (2012) (discussing the interaction of Delaware judges with the community they regulate). This is a legitimacy-enhancing process akin to amicus participation in the United States Supreme Court. *See generally* Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185 (2009) (describing how amicus briefs allow the United States Supreme Court to be representative).

92. In closely-held companies, minority shareholders—given the limited liquidity of their shares—often have limited choices beyond litigation to protect their interest. By contrast, shareholders in public companies can exercise the Wall Street Rule by selling their shares. In the public context, the market mechanism functions as an additional check on wayward directors and officers.

93. *See generally* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) ("[T]he triplet of restraints—legal, institutional, and market—seems to constrain managers generally to act for shareholders, despite their manifest looseness (if not impotence).").

> may generate disagreement, disapproval or dissent, but year upon year the system taken as a whole plausibly balances deference to management's need for broad discretion in deploying the firm's capital with protection of shareholder basic interest. . . . In doing so, Delaware law provides an outstanding public service to the nation.[94]

The above-mentioned concepts of legitimacy, credible commitment, trust, and reputation help explain Delaware's global dominance. These important concepts also provide a useful lens for examining regulator behavior toward multiple stakeholders—the public, other regulators, and corporations.

C. The Market for Corporate Law

1. The Internal Affairs Doctrine

Increasing mobility of corporations at the end of the 19th century led to development of the IAD, an informal arrangement between the federal government and the states.[95] Under the IAD, "the law of the state of incorporation, and not the operational headquarters, governs the internal affairs of the corporation."[96] Specifically, the law of the place of incorporation regulates corporate governance, which includes the relationships between officers, directors, and shareholders of a corporation. Conversely, "the federal government and federal law regulate [largely external matters, such as] the issuance and trading of securities on the national markets [and disclosure]."[97] The federal government has largely acquiesced to these separate spheres of influence—both state and federal—despite Congress retaining "the ultimate authority over interstate commerce via the Commerce Clause."[98] Although the federal government can preempt aspects of state corporate law within its discretion, it rarely exercises such discretion in an expansive manner.[99]

Pursuant to the IAD, "[e]ven if a Delaware-incorporated company, its managers, or controlling shareholders become defendants in out-of-state corporate lawsuits, Delaware's corporate statutes and fiduciary tenets will still govern."[100] This promotes more stable relationships among corporate stakeholders.[101] The IAD operates primarily as a choice of law regime. It does not mandate Delaware as a choice of forum, prevent jurisdictional competition for the interstate adjudication of claims, or necessarily prevent multi-

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94. William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, CORP. EDGE (Div. of Corp., Dover, Del.), Fall 1997, at 3 (on file with author). The Corporate Edge was a quarterly newsletter published by the Delaware Department of State's Division of Corporations. The newsletter went out of print in 2001.

95. *Id.* at 110; Simmons, *supra* note 1, at 1134.

96. Simmons, *supra* note 1, at 1134.

97. Holland, *supra* note 10, at 780–81.

98. Simmons, *supra* note 1, at 1134.

99. The federal government could preempt in two primary ways: (1) incremental legislation, and (2) creation of a federal charter. In practice, the federal government has opted for the former approach. Some commentators consider Dodd–Frank and Sarbanes–Oxley as examples of incremental legislation.

100. Stevelman, *supra* note 1, at 60; *see* Thomas, *supra* note 15, at 1926–27 ("[I]f two different investors choose to file complaints in two different state courts, perhaps one in Delaware . . . and another in New York . . ., then, while both the Delaware and the New York courts may have jurisdiction to hear the case, only Delaware law would apply to determine the validity of the investors' concerns.").

101. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987) ("A state has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.").

jurisdictional litigation.[102] The enforcement of the IAD or mutual recognition by other states allows the market for corporate law to function.[103] The absence of an operational connection requirement may actually lead other states, and even nations, to respect Delaware law to prevent migration from their own borders.[104] In other words, "states have incentives to abide by a general rule [of mutual recognition] that entitles their own corporate governance rules to respect in other states."[105] Theoretically, a court's "decisions denying recognition of the IAD could be used against their own state's corporations [as a form of retaliation]."[106]

The incorporation decision can be described as the purchase of a state's corporate law regime.[107] States can compete to supply corporate law.[108] And "[b]ecause only one state's law governs the 'internal affairs' of a corporation, competition can be effective."[109] The singularity or mutual recognition of the IAD choice of law interestingly "facilitates brand recognition and differentiation."[110] In essence, the IAD "helps consumers of corporate law (e.g., managers, shareholders, and the securities markets) distinguish which brand they prefer as most likely to enhance their wealth."[111]

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102. Stevelman, *supra* note 1, at 63.

103. Ribstein & O'Hara, *supra* note 44, at 685. Easterbrook and Fischel assert that the singular choice of corporate law through incorporation fosters efficiency and wealth maximization in corporate transactions because it promotes regulatory competition and the development of wealth-maximizing corporate laws. Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 690–91 (1984).

104. O'HARA & RIBSTEIN, *supra* note 2, at 117.

105. Ribstein & O'Hara, *supra* note 44, at 685.

106. *Id.*

107. Romano, *supra* note 1, at 228.

108. Roberta Romano describes this phenomenon:

> The genius of American corporate law is in its federalist organization. In the United States, corporate law, which concerns the relation between a firm's shareholders and managers, is largely a matter for the states. Firms choose their state of incorporation, a statutory domicile that is independent of physical presence and that can be changed with shareholder approval. The legislative approach is, in the main, enabling. Corporation codes supply standard contract terms for corporate governance.

ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1 (1993); *see also* O'HARA & RIBSTEIN, *supra* note 2, at 107. The IAD differs from other choice of law rules in that it is broader and enforced without any "fundamental policy" exception or any requirement of a connection between the corporation and the state of incorporation. *Id.* at 113. Publicly held companies in essence subscribe to Delaware common law that enables securities markets to accurately price their shares. *Id.* at 118.

109. Easterbrook & Fischel, *supra* note 103, at 697; *see also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 494–98 (discussing Delaware litigation dynamics).

110. *See* Stevelman, *supra* note 1, at 83 ("For those who believe that shareholders and the broader market are able to make such an informed, rational choice (i.e., discern the quality of a firm's state corporate laws as part of their investment decision), singularity in corporate choice of law is a valuable feature of the system."). The key to branding is that consumers perceive differences among brands in a product category. Simmons, *supra* note 1, at 1146.

111. Stevelman, *supra* note 1, at 83.

2. Domestic Market Dynamics

a. Firm Incorporation Decisions

The following passage briefly summarizes general incorporation decision patterns:

> [T]he incorporation decision occurs in two [general] scenarios: (i) new incorporations involving IPOs, and (ii) reincorporations involving mergers or other ownership changes. Pre-IPO incorporations are relatively costless compared with after a firm goes public. [Alternatively,] reincorporations generally require a vote by the shareholders and other regulatory requirements, such as the preparation of a proxy statement and sponsoring a general shareholder vote. Studies reveal the incorporation decisions of publicly traded firms are not necessarily a choice between Delaware and fifty other jurisdictions, as traditionally envisioned by race competition theorists. [Actually], firms experience a more limited choice between Delaware and their home state, that is, the site of principal operations.[112]

According to the weight of empirical evidence, Delaware faces no formidable domestic rival for incorporations of publicly traded firms, especially when firms decide to incorporate out-of-state.[113] But despite Delaware's seemingly unchallenged dominance, scholars have identified potential Delaware vulnerabilities such as federal preemption, reincorporations out of Delaware that are not offset by other Delaware reincorporations, and a decline in U.S.-based IPOs.[114]

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112. Simmons, *supra* note 1, at 1134–35; *see* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 557–76 (2002) (describing the impact of home-state bias). A number of studies have attempted to uncover why firms incorporate in their home state as opposed to incorporating out-of-state. Some explanations for home-state bias include local favoritism, lower transaction costs, and the preferences of law firms advising on IPOs. *Id.* at 573–74.

113. *See* Anderson IV & Manns, *supra* note 1, at 1054–55 ("Delaware charters a clear majority of publicly traded companies in the United States, even though almost all publicly traded companies are headquartered in other states. For example, 13 times more public companies are incorporated in Delaware than California, even though approximately 43 times more public companies are headquartered in California than in Delaware."); Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 386 (2003) ("Delaware confronts vigorous competitors for out-of-state incorporations. In fact, although a substantial fraction of public firms are not incorporated in Delaware, the great majority of these firms are simply incorporated in the state of their headquarters. When one focuses on out-of-state incorporations, Delaware's dominance of this market is greater than is commonly recognized."); Renee L. Crean, *Recent Development in New York Law*, 72 ST. JOHN'S L. REV. 695, 695 n.1 (1998) ("More public corporations, including a majority of publicly traded companies in the Fortune 500, are incorporated in Delaware than in any other state."); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1562 (2002) ("Firm choices are thus oddly 'bimodal'—they operate as if there is no national market but a single choice: their home jurisdiction or Delaware."); Ibrahim & Broughman, *supra* note 1, at 279 ("Delaware has attracted the majority of public incorporations for many decades . . . ."). The state competition for corporate charters is best described as a "leisurely walk" rather than a vigorous sprint. Bebchuk & Hamdani, *supra* note 112, at 586 ("For this reason, our questioning of the existence of a vigorous race leads us to refer to a 'leisurely walk' and not to Delaware's 'sitting still.'").

114. *See* Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 136 (2009) ("Even if no firm ever leaves Delaware for another state and even if no other state actively seeks to sell corporate charters, Delaware still must keep itself attractive enough to keep reincorporations of newer and reorganizing firms flowing in. Otherwise, the tax base will erode. It will erode because over time, Delaware firms will merge, decline, and reorganize."); *see also* Brummer, *supra* note 6, at 1093–96 (discussing the declining trend in the United States' capture of IPOs); Hamermesh, *supra* note 5, at 12 (citing the decline in U.S.-based IPOs).

Under the above circumstances, Delaware's jurisdictional brand becomes a significant factor in the firm incorporation decision.[115] Delaware adjudication of high stakes and high profile corporate law cases helps ensure the popularity of the brand.[116] Incorporation in Delaware generates direct benefits for local lawyers and service providers, but it also generates significant indirect benefits for out-of-state service providers (e.g., investment bankers, lawyers, and accountants). These indirect benefits from Delaware incorporation may influence advisors to recommend Delaware incorporation.[117] Simply put, the Delaware brand, like a popular brand in a product market, makes incorporating firms and their advisors feel more secure compared to other jurisdictions. This security or bond is the belief that the Delaware legal regime and its various actors will continue to meet the ever-changing needs of the business community in a non-politicized manner.[118]

"Incorporating firms may even choose Delaware based upon perceptions held by third parties."[119] Delaware boasts an impressive customer list of "who's who" among publicly traded firms.[120] As previously mentioned, firms incorporate in Delaware usually as a result of an IPO or expansion via merger or acquisition.[121] "Given this context, a firm's Delaware incorporation communicates or signals to equity markets that the firm has 'major league growth ambitions.'"[122] A majority of publicly held companies in essence subscribe to Delaware common law.[123] This, in turn, gives rise to a number of network-related benefits and herding behaviors among companies.[124] The mere presence of less successful competitors can also serve as a heuristic for jurisdictional quality. Thus, reputational dynamics play a significant and nuanced role in incorporation decisions.

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115. *See* Simmons, *supra* note 1, at 1133–34 ("This article does not focus on how Delaware actively works to cultivate its brand, but simply acknowledges the undeniable impact of branding effects on incorporation decisions and U.S. corporate governance.").

116. *See* Stevelman, *supra* note 1, at 130 (asserting that Delaware "must stay at the forefront of adjudicating novel issues in high-profile, high-stakes Delaware corporate law cases if Delaware is to maintain control over its brand and ensure the flourishing of its chartering business").

117. Macey & Miller, *supra* note 109, at 498.

118. *See* Simmons, *supra* note 1, at 1150 ("Similar to a popular brand in product or service markets, Delaware's brand allows it to secure profits (e.g., franchise taxes and attorney's fees), secure future demand, and withstand periods of turbulence. In addition to being perceived as business friendly, the Delaware brand has other key associations, such as judicial integrity and competence; the understanding of corporate complexity; flexibility; and apolitical decision making.").

119. *Id.* at 1151.

120. A list of popular companies incorporated in Delaware includes: Apple, Berkshire Hathaway, Coca-Cola, Ford, and Google. Leslie Wayne, *To Delaware, With Love*, N.Y. TIMES, July 1, 2012, at BU1.

121. Simmons, *supra* note 1, at 1151.

122. *Id.* at 1150–51.

123. There are many other network related benefits associated with broad use of Delaware law. One example is that broad use enables securities markets to accurately price their shares. O'HARA & RIBSTEIN, *supra* note 2, at 117–18.

124. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 703 (1999) ("Another factor that could confer dominance on the largest and most popular exchange is 'herding.' Corporations may prefer to locate in a popular jurisdiction of incorporation for reasons that are simply based on its popularity, not the inherent superiority of its law."); *see generally* David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment,* 80 AM. ECON. REV. 465 (1990) (discussing herding).

b. State Business Courts

The domestic influence of the Delaware brand is further illustrated by the growth of specialized business courts in other states patterned, in part, after Delaware's judiciary.[125] Over the past two decades there has been a proliferation of specialized trial courts presiding over business disputes.[126] The reason for this growth is subject to debate. Most scholars posit that some form of interstate competition to retain or attract companies is behind the surge. The list of proffered rationales for establishing specialized business courts includes: reincorporations, attracting out-of-state companies, generating litigation business for local lawyers, and preventing corporate migration. Part of this phenomenon is driven by an attempt to emulate Delaware's success.[127] It is unlikely, however, that another domestic jurisdiction with business courts will immediately challenge the Delaware judiciary's reputation and expertise developed over years.[128]

3. Global Market Dynamics

Delaware influences "not only the corporate law of other jurisdictions in the United States, but has also impacted international developments in corporate law."[129] Branding and reputational concerns also figure prominently at the international level.[130] As a result of globalization, more transactions and capital are moving offshore. In this context, international firms and investors have more choices and may decide to bypass U.S. incorporation or listing on a U.S.-based exchange altogether. As discussed previously, multinational firms can "purchase" Delaware law via incorporation, and foreign nations may also emulate or import Delaware-style legal features to attract foreign capital or prevent capital migration.[131] Jeffrey Gordon and Mark Roe assert that "internationalization

125. *See generally* John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012) (noting "the recent surge of interest in these courts").

126. *Id.* at 1952, 1960–61 (discussing business courts in Nevada and North Carolina); Andrew A. Powell, *It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 824 (2010) ("A movement began in the early 1990s for states to create business courts to address corporate issues better and to curtail the increased use of the federal judicial system and alternative dispute resolution by business litigants."); *id.* at 824 n.8 ("The following states have created business court programs since 1993: Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, and South Carolina. Prior to the early-1990s movement, Delaware was the only state with a specialized court dedicated to business.") (citation omitted).

127. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665–66 (1974) (describing attempts by other states to emulate Delaware's statutory scheme in order to attract corporations).

128. *See, e.g.*, Michal Barzuza & David C. Smith, What Happens in Nevada? Self-Selecting Into Lax Law 15–16 (Dec. 30, 2013) (unpublished manuscript), http://ssrn.com/abstract=1644974 (finding there is a premium for Delaware incorporation compared to Nevada corporations); Carney et al., *supra* note 1, at 125 ("Delaware is chosen because of the ignorance of investors. Because so many corporations are incorporated in Delaware—especially most large ones—many investors are familiar only with Delaware corporate law and with businesses that are incorporated there. Even if other states' laws are superior, investors prefer incorporation in familiar Delaware.").

129. Holland, *supra* note 10, at 786.

130. The market for corporate law has a global dimension law market, which applies to other nations. *See* O'HARA & RIBSTEIN, *supra* note 2, at 224 ("We have focused substantially but not exclusively on competition among U.S. states, but we wish to make clear that our law market analysis applies also to competition among nations.").

131. *See supra* Part I ("From a demand-side perspective, large, publicly traded multinational firms that

of capital markets has led to more cross-border investing" and that the "internationalization of capital markets means that investment flows may move against firms perceived to have suboptimal governance and thus to the disadvantage of the countries in which those firms are based."[132] They further highlight how convergence pressures may influence local regimes to opt into higher-quality foreign regimes.[133] Within a global context, the Delaware brand exerts international influence in multiple ways, both direct and indirect, on foreign jurisdictions and firms. Recent global initiatives by Delaware's Division of Corporations provide anecdotal support for an emerging global focus.[134]

a. Multinational Firm Subscription of Delaware Law

More than a century of established precedents from the Delaware Supreme Court and the Court of Chancery allow businesses to approach decisions with greater confidence and efficiency.[135] For example, Delaware incorporation by foreign subsidiaries may signal stability and predictability—potentially lowering a firm's cost of capital. Moreover, "Delaware lawmaking offers Delaware corporations [domestic and foreign] a variety of benefits, including flexibility, responsiveness, insulation from undue political influence, and transparency."[136] Delaware corporate law functions as a common language or *lingua franca* among domestic and foreign firms, investors, bankers, and legal advisors.[137] Delaware incorporation can be analogized to the purchase of a subscription to a dynamic self-updating legal treatise. From a firm perspective, this provides greater clarity, efficiency, predictability, finality, and a valued sense of neutrality.

b. Delaware Courts as an International Dispute Forum

From a demand-side consumer perspective, multinational companies may directly choose Delaware courts and law for multiple purposes such as speed, expertise, and predictability. The Court of Chancery has a strong reputation for resolving large complex

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incorporate in the United States . . . purchase a package that most likely includes Delaware corporate law, federal securities laws, and other types of business regulation . . . . Traditional economic theory asserts that consumers will migrate to jurisdictions providing regulations 'most consonant with their preferences.'").

132. Jeffrey N. Gordon & Mark J. Roe, *Introduction* to CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 2 (Jeffrey N. Gordon et al. eds., 2004).

133. *Id.* at 4.

134. *See, e.g.*, *Explore New Markets*, GLOBAL DEL., http://global.delaware.gov/expand/export-assistance/explore-markets.shtml (last visited Oct. 22, 2015).

135. In 1899, Delaware enacted its first general corporation law. *See* Holland, *supra* note 10, at 778 (citations omitted); *see also* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992–1993) (asserting how Delaware courts have issued "thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court [system] can make such a claim").

136. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000).

137. *See* Brian J. Broughman et al., *Delaware as* Lingua Franca*: Theory and Evidence*, 57 J.L. ECON. 865, 868 (2014) ("[T]he lingua-franca effect appears to be more important than other factors that have been shown to influence corporate domicile, such as corporate-law flexibility and the quality of a state's judiciary."); Daines, *supra* note 113, at 1581 ("Delaware is thus much like a common language and such lawyers are 'bilingual,' speaking Delaware law plus the local dialect. Thus, lawyers will know the law of the state in which they practice, and some (particularly those with a multistate practice) will know Delaware law.").

corporate disputes on an expedited basis.[138] Additionally, "[t]he Internal Operating Procedures of the Delaware Supreme Court require that the Court decide all cases, not just corporate matters, within 90 days after oral arguments or submission on the briefs."[139] Based upon 2012 statistics, the average time from submission to a decision by the Delaware Supreme Court was 29.7 days.[140] Other states with intermediate courts have difficulty resolving disputes in an expeditious manner. The quick resolution to business disputes provides the speed and finality preferred for business planning.[141] In the fast moving global marketplace, undue delay can compromise a company's vital opportunities, strategic interests, and financial well-being. Speed is especially important in a litigious business environment.

Multinational companies may exhibit a preference for Delaware courts as a forum for corporate disputes.[142] Delaware courts offer specialized points of differentiation: unique features, which other states and nations cannot easily replicate.[143] Foreign subsidiaries incorporate in Delaware, in part, to take advantage of its expert courts. In certain circumstances, the Delaware choice of forum offers more stability and less volatility than other domestic dispute resolution systems.[144] Chief Justice Leo Strine reflects on Delaware's dispute resolution advantages when compared to emerging markets:

> The purpose is to give entrepreneurs around the world an incentive to form entities in Delaware, because if they do, those entities will have the advantages not only of our well-developed corporate law, but of our state's proven ability to help them resolve commercial disputes swiftly and expertly. In dynamic, emerging markets like Brazil and Chile, which lack dispute resolution institutions adequate to the demand, Delaware's dispute resolution capacity provides a needed answer for international joint ventures. In our own domestic market, Delaware's dispute resolution capacity helps key industries, such as our technology sector, solve disputes faster and cheaper, and thus be more competitive.[145]

When faced with uncertainty, managers, investors, and their lawyers gravitate toward the familiar and trusted brand. For international firms, Delaware's brand is a decision

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138. Fisch, *supra* note 18, at 742; *see also* Holland, *supra* note 10, at 778 ("The Time/Warner litigation illustrates how the Delaware Supreme Court and the Court of Chancery regularly work together to resolve expedited, complex corporate cases in an efficient and economical manner.").

139. Holland, *supra* note 10, at 777–78.

140. DEL. ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT OF THE DELAWARE JUDICIARY 17 (2013).

141. *See, e.g.*, Thomas, *supra* note 15, at 1939–40 (discussing motions for expedited proceedings).

142. *See* Holland, *supra* note 10, at 788 (quoting Taiwan's former President of the Judicial Yuan and Chief Justice of the Constitutional Court, Dr. Lai In-Jaw, asserting well-known Taiwanese overseas subsidiaries incorporate in Delaware).

143. *See* Ann M. Scarlett, *Investors Beware: Assessing Shareholder Derivative Litigation in India and China*, 33 U. PA. J. INT'L L. 173, 236–37 (2011) [hereinafter Scarlett, *Investors Beware*] ("Although the recognition of derivative litigation by India and China is appealing for symbolic reasons, it provides only false comfort because their current legal systems are unable to resolve the internal corporate disputes presented by such litigation. Until substantial judicial reform occurs, the simple message is buyer beware."); *see also infra* Section III.B.3 (discussing Delaware's advantage).

144. *See* Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 79 (2008–2009) ("Delaware has provided a stable and efficacious but responsive corporate law for decades. It reacts to business changes, it innovates when needed, and, if it errs, it corrects the errors quickly.").

145. Strine, *supra* note 7, at 2–4.

making heuristic that serves as a risk reduction strategy.[146] Three recent Delaware cases further illustrate the unique position of Delaware as a hub for global business disputes.

In *National Industries Group (Holding) v. Carlyle Investment Management LLC*, the Delaware Supreme Court upheld an anti-suit injunction restraining a Kuwaiti company, subject to its jurisdiction, from proceeding with a suit in a foreign court.[147] The case involved a contractual dispute regarding a subscription agreement between globally sophisticated parties—the Carlyle Group, a U.S. private equity firm with "over $150 billion under management" and National Industries Group (NIG), an investment company with over $5.5 billion in assets traded on the Kuwait and Dubai stock exchanges.[148] NIG's investment in various Carlyle funds was governed by a subscription agreement, which contained both a Delaware forum selection clause and a Delaware choice of law clause.[149] NIG brought suit against Carlyle Group in Kuwait.[150] In response, Carlyle Group successfully brought a declaratory action to enforce a forum selection clause and impose an anti-suit injunction to prevent NIG from litigating in foreign courts matters related to the subscription agreement. On appeal, the Delaware Supreme Court upheld the Court of Chancery's decision. The following passage from the court's opinion regarding the policy behind forum selection clauses highlights the important role Delaware courts play in the resolution of complex business disputes between large sophisticated multinational parties:

> Forum selection clauses have become a vital part of interstate and international commercial agreements. Undoubtedly, the parties to the Subscription Agreement in this case conducted their negotiations "with the consequences of the forum clause figuring prominently in their calculations." "A clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended . . . ." Forum selection clauses afford the parties an opportunity to agree to have any disputes between them resolved in a neutral forum of their mutual

146. *See* Ibrahim & Broughman, *supra* note 1, at 300 ("[B]usiness parties choose Delaware corporate law for its familiarity as much as for its quality."); Anderson IV & Manns, *supra* note 1, at 1086 ("Among the lawyers surveyed, the most common reason given for recommending Delaware incorporation was investors' familiarity with Delaware law, which mattered far more than most of the legal considerations.").

147. Nat'l Indus. Grp. (Holding) v. Carlyle Investment Mgmt. LLC, 67 A.3d 373, 387–88 (Del. 2013).

148. *Id.* at 376.

149. The forum selection clause read as follows:

> The courts of the State of Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to this Subscription Agreement and the Investor hereby irrevocably waives, to the fullest extent permitted by law, any objection that it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each of such courts for the purposes of any such suit, action, proceeding or judgment and further waives any claim that any such suit, action, proceeding or judgment has been brought in an inconvenient forum, and the Investor hereby submits to such jurisdiction.

Id. at 377. The choice of law provision read as follows:

> Notwithstanding the place where this Subscription Agreement may be executed by any of the parties, the parties expressly agree that all terms and provisions hereof shall be governed, construed and enforced solely under the laws of the State of Delaware, without reference to any principles of conflicts of law (except insofar as affected by the state securities or "blue sky" laws of the jurisdiction in which the offering described herein has been made to the Investor).

Id.

150. *Id.* at 375.

> choice that has expertise in the subject matter.
>
> *In this case, the parties agreed that the courts of Delaware meet their standards of neutrality and expertise in commercial litigation. The choice of Delaware as a forum was made in an arm's-length negotiation by experienced and sophisticated parties.* Thus, "absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."[151]

In another case, *American Mining Corporation v. Theriault*, the Delaware Supreme Court upheld a Court of Chancery decision ruling that a corporation's purchase of a Mexican mine, owned by its controlling shareholder, was not entirely fair.[152] Grupo Mexico, the controlling shareholder of Southern Peru, a NYSE-listed company, proposed that Southern Peru purchase its stake in Minera Mexico, a Mexican mining company.[153] Grupo Mexico is a Mexican holding company listed on the Mexican stock exchange and is controlled by the Larrea Family.[154] Grupo Mexico owned its stake in Southern Peru through its wholly-owned subsidiary Americas Mining Corporation (AMC), a named defendant-appellant in the case.[155] The Court of Chancery determined that Southern Peru's special committee, approving the merger, operated with a controlled mindset and negotiated a price that was not fair to the corporation.[156] The Court of Chancery also awarded more than "$2 billion in damages and more than $304 million in attorney's fees."[157] Ultimately, the Delaware Supreme Court upheld the Court of Chancery's ruling that the controlling shareholder and the board of directors breached their fiduciary duty of loyalty.

In another Delaware Supreme Court decision, *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, Wal-Mart unsuccessfully argued that a Court of Chancery decision ordering the production of Wal-Mart documents went beyond the proper scope of a section 220 books and records action.[158] Moreover, Wal-Mart unsuccessfully challenged the Court of Chancery's decision refusing to allow attorney-client privilege and the work-product doctrine to shield the production of certain corporate documents related to fiduciary duty claims.[159] Specifically, the Indiana Electrical Workers Pension Trust Fund (IBEW), pursuant to a section 220 action, sought information related to serious bribery allegations involving WalMex, Wal-Mart's Mexican subsidiary, as well as the potential cover-up of these violations by senior Wal-Mart executives.[160] The

151. *Nat'l Indus. Grp.*, 67 A.3d at 385 (emphasis added) (footnotes omitted).
152. Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1249 (Del. 2012).
153. *Id.* at 1219.
154. *Id.* at 1220–21.
155. *Id.* at 1218 n.4.
156. *Id.* at 1218.
157. *Americas Mining Corp.*, 51 A.3d at 1218.
158. Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1283 (Del. 2014).
159. *Id.* at 1275–81.
160. These allegations were also the subject of an April 2012 Pulitzer Prize-winning New York Times article. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1; *see also Wal-Mart Stores, Inc.*, 95 A.3d at 1267–68 (summarizing David Barstow's New York Times article). According to the article, Wal-Mart senior executives rejected a proposal for an independent internal investigation made by their outside law firm following reports of "irregularities." *See* Barstow, *supra*. Instead, the article further claimed that senior executives transferred responsibility for investigating bribery allegations to the Mexican subsidiary under investigation. *Id.* According to the article, Wal-Mart International's General Counsel questioned the wisdom of senior leadership's decision to transfer responsibility for the

Delaware Supreme Court ultimately held that the Court of Chancery properly exercised its broad discretion requiring Wal-Mart to produce, along with other items, officer-level documents and documents "known to exist" by Wal-Mart's Office of the General Counsel.[161] The *Wal-Mart* decision recognizes the procedural hurdles plaintiffs face in surviving a motion to dismiss in derivative actions, and it also acknowledges the operational dynamics associated with corporate compliance, such as the multiple reporting relationships within a complex multinational organization. Wal-Mart, operating in twenty-seven countries with approximately 2.2 million employees, is a prime example of operational complexity.

The above cases are examples of sophisticated multinational parties falling under Delaware's dispute settlement jurisdiction. They illustrate the complex issues and high visibility of disputes that are regularly litigated in Delaware courts.[162] Such visibility strengthens Delaware's global reputation and influence.

c. Modeling Delaware-Style Adjudication and Precedents

From a supply perspective, foreign jurisdictions desiring to attract foreign capital investment or prevent corporate migration may model or adopt Delaware-style adjudicative features and legal precedents to both create value for business litigants and enhance their reputations as business hubs.[163] In the latter case, foreign jurisdictions, particularly emerging markets that are perceived as volatile, inefficient, or unstable, may adopt Delaware-style features because of their branding, signaling, or reputational effects, and not solely based upon tangible performance characteristics.[164] In other circumstances, foreign jurisdictions may find it more pragmatic to acquiesce to companies' choices of Delaware law and the Delaware courts as the desired adjudicative forum. Ribstein and O'Hara assert that "[n]ations wish to be seen as desirable places to locate transnational commercial activities, and allowing parties to choose their courts and their governing law

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investigation to the Mexican subsidiary and subsequently resigned. *Id.*

161. *Wal-Mart Stores, Inc.*, 95 A.3d at 1272–75. The Court of Chancery, however, did not limit its ruling to officer communications *with* directors, but also included officer-level documents from which directors' awareness may be inferred. *Id.* at 1273.

162. *See* Cain & Solomon, *supra* note 10, at 471–74 (discussing Delaware's attractiveness for corporate litigation).

163. *See* Luca Enriques & Matteo Gatti, *The Uneasy Case for Top-Down Corporate Law Harmonization in the European Union*, 27 U. PA. J. INT'L ECON. L. 939, 948–49 (2006) ("At most, the greater freedom to shop for a friendlier corporate law, resulting from recent ECJ case law on freedom of establishment, could marginally increase regulatory arbitrage by European corporations. National legislatures might consequently feel pressure to emulate other jurisdictions' friendlier rules. The outcome could therefore be a sort of 'defensive regulatory competition,' no country seeking to attract reincorporations but all countries intent on retaining their own corporations. This resembles what happens in the United States today, except that Europe would have no Delaware."); *see also* Ann Scarlett, *Imitation or Improvement? The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada, and Australia*, 28 ARIZ. J. INT'L & COMP. L. 569, 572 (2011) [hereinafter Scarlett, *Imitation or Improvement*] (discussing statutory enactments by the United Kingdom, Canada, and Australia that emulate U.S. corporate statutes and how shareholder derivative litigation is perhaps a means through which foreign countries seek to attract investors). *See generally* Scarlett, *Investors Beware*, *supra* note 143 (analyzing shareholder derivative litigation in emerging markets influenced by the U.S. experience).

164. *See* Coffee, Jr., *supra* note 124, at 700, 703 (describing a herding theory for analyzing Delaware's preeminence); *see also* Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 NW. J. INT'L L. & BUS. 2 335 (2009) (arguing local characteristics may prevent comprehensive corporate governance convergence).

is faster and cheaper than reforming domestic laws and court systems."[165] A jurisdiction's perceived unpredictable legal framework, including courts, will deter foreign investment.

i. Adjudication

Without question "[i]mproving the functioning of legal institutions [such as courts] is an essential component of economic development."[166] A well-functioning legal system supporting economic growth requires, inter alia: (1) a supply of market-friendly laws, (2) adequate institutions to implement and enforce them, and (3) a demand for those laws from market participants. Therefore, "[i]f a dense and efficient network of commercial relationships is to flourish in an economy, it needs a credible and low-cost formal legal process to which aggrieved parties can turn when all else fails."[167] A number of foreign jurisdictions, borrowing in part from Delaware's model, have invested in their corporate adjudicative capabilities to enhance their reputations for adjudicating business-related disputes.[168] Pragmatically, foreign jurisdictions—civil, common law, and other systems—may choose to adopt certain elements rather than a complete adoption because they must take into account local, institutional, political, and cultural concerns when devising an effective regime. The following interview remarks from Taiwan's former President of the Judicial Yuan and Chief Justice of the Constitutional Court, Dr. Lai In-Jaw, regarding the quality of court systems and their impact on a country's economic development are instructive:

> Delaware's corporate law, tax system, and court system (Court of Chancery and Supreme Court) have contributed to Delaware's success. Judges there are very familiar with the business essence of the companies. The law and court decisions relating to company operations balance shareholder interest with company management needs. All these attributes earned Delaware the "Corporate Capital of the World" title.[169]

When asked whether Taiwan specifically could replicate Delaware's success, Dr. Lai In-Jaw asserted: "Our legal system is different from the Delaware system and cannot follow it exactly the same way. But, a comprehensive and efficient business law and judicial system will be helpful in promoting the country's economic development and the competitiveness of its enterprises."[170]

As part of an effort to "attract international business and financial services," Qatar established its Qatar International Court and Dispute Resolution Centre (QICDRC).[171] The articulated vision of the QICDRC is as follows:

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165. O'HARA & RIBSTEIN, *supra* note 2, at 104.

166. Cheryl W. Gray, *Reforming Legal Systems in Developing and Transition Countries*, 34 FIN. DEV. 3, 14–15 (Sept. 1997), https://www.imf.org/external/pubs/ft/fandd/1997/09/pdf/gray.pdf.

167. *Id.*

168. *See generally* George O. White III et al., *Legal System Uncertainty and FDI Attraction in Southeast Asia*, 10 INT'L J. EMERGING MKTS. 3 (2015) (finding that FDI attraction decreases with legal system uncertainty and that FDI attraction is greater when government intervention is high).

169. Holland, *supra* note 10, at 788.

170. *Id.*

171. *See* QATAR INT'L CT. & DISP. RESOL. CTR., http://www.qicdrc.com.qa/ (last visited Oct. 22, 2015) (describing the Qatar International Court and the services QICDRC provides).

> To develop a world class International Court and Dispute Resolution Centre and provide national and international civil and commercial dispute resolution services within Qatar and the Middle East region that are accessible, modern, expeditious, economical and responsive to the needs of global business markets.[172]

Although Qatar is a civil law jurisdiction, the International Court's procedures resemble those found in common law jurisdictions.[173] But perhaps the most important "distinguishing feature of the [International] Court is its judges who have considerable experience of resolving complex disputes and who are renowned internationally for being totally impartial and independent."[174] Members of the International Court are primarily experienced judges from the United Kingdom.[175] Despite the apparent British bias, the judges overall reflect a diversity of citizenship, religion, gender, and ethnic backgrounds.[176] Here, the selection of reputable judges, a majority of whom are foreigners from common law jurisdictions, boosts the reputation of the QICDRC by signaling a serious commitment to the efficient resolution of business disputes and stability. Taiwan and Qatar are both examples of small jurisdictions in emerging regions, who recognize the importance of dispute settlement and reputable courts to establishing a hub of business activity. Similarly, Delaware, a market-dominant small jurisdiction, has cemented itself as a hub of complex business activity through its courts, law, and incorporations.[177] The Delaware global narrative, therefore, should be of great interest to large, medium, and especially small jurisdictions seeking to boost their reputations, assure investors, and strengthen their business competencies. From this vantage-point, Delaware is largely a success story that other nations would like to emulate in an increasingly globalizing financial world.[178]

ii. Precedents

Nations may adopt Delaware-style law and precedents to address a range of corporate law issues that may be matters of first impression in foreign jurisdictions.[179] Delaware courts have decided high profile cases on a wide range of corporate issues that provide guidance. These precedents add greater clarity and predictability to business dispute outcomes. For example, Delaware, in the merger and acquisitions context, has influenced

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172. *Vision*, QATAR INT'L CT. & DISP. RESOL. CTR., http://www.qicdrc.com.qa/Vision.aspx (last visited Oct. 22, 2015).

173. *See* QATAR INT'L CT. & DISP. RESOL. CTR., *supra* note 171 (describing QUICDRC's legal framework and international court system).

174. *Id.*

175. *See Biographies of the Justices*, QATAR INT'L CT. & DISP. RESOL. CTR., http://www.qicdrc.com.qa/Biographies.aspx (last visited Oct. 22, 2015) (giving biographies and home countries for all justices in the court).

176. *Id.*

177. *See generally* Christopher Bruner, *Market-Dominant Small Jurisdictions in a Globalizing Financial World* (Washington & Lee Public Legal Studies Research Paper Series, Paper No. 2013-19, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343111 (analyzing the market success of small jurisdictions such as Delaware).

178. *Id.*

179. *See generally* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015) (recognizing an increasingly interconnected global world and the effect foreign law has on domestic courts).

developments in Japanese takeover law, as well as statutory and other legal innovations in the United Kingdom, Canada, Australia, China, and India.[180] Even where foreign jurisdictions decide to deviate from Delaware law, partially or completely, foreign courts still reference Delaware decisions and legal standards underscoring Delaware's global importance.[181]

D. Delaware Courts

Delaware's courts are a key feature contributing to Delaware's reputation and brand. It has one of the most important judiciaries in the country, functioning as a de facto national regulator of publicly traded corporations. Relatedly, Delaware's courts are essential to the production of corporate law that is largely judge-made. Since the late-19th century, following New Jersey Governor Woodrow Wilson's sponsorship of the Seven Sisters legislation that led to the migration of corporations from New Jersey, Delaware has been the corporate capital of the United States.[182] Today, the influence of Delaware's judicial branch extends beyond state and national borders.[183]

1. Two Courts and Ten Judges

According to Ronald Gilson, "[t]he aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the Delaware General Corporation Law (DGCL) as a de facto national corporate law."[184] The fact that numerous

180. *See* Holland, *supra* note 10, at 786–87 (discussing Delaware's influence on corporate law in other jurisdictions); *see also* Jack B. Jacobs, *Implementing Japan's New Anti-Takeover Defense Guidelines Part I: Some Lessons from Delaware's Experience in Crafting "Fair" Takeover Rules*, 2 N.Y.U. J.L. & BUS. 323, 324 (2006) (outlining Japan's recent developments in takeover laws); Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2173 (2005) (discussing Japan's embracing of Delaware's takeover jurisprudence); Scarlett, *Imitation or Improvement*, *supra* note 163, at 627 (discussing the United States' influence on shareholder derivative statutes and litigation); Scarlett, *Investors Beware*, *supra* note 143, at 236–37 (explaining shareholder derivative litigation in India and China and its resemblance to that of the United States).

181. Even when foreign courts choose to not follow Delaware law, many foreign courts still discuss Delaware law in order to further explain their decision. *See* HR 13 juli 2007, OK 135 (ann. MK) (Neth.) Bank of Am. Corp./ABN AMRO Holding N.V., Hoge Raad der Nederlanden (Supreme Court of Netherlands) (overruling the Enterprise Chamber's attempt to introduce Delaware law due to it not being within the Dutch written law as the Netherlands is a civil law country though encouraging future adoption by legislation); BCE Inc. v. 1976 Debentureholders 2008 SCC 69 (BCE (SCC)) (choosing to not follow Delaware's approach to board director duties in change of control transactions decided in Lyondell Chemical Co. v. Ryan); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 21, 2005, Neue Juristische Wochenschrift [NJW] 522 (Ger.) (exemplifying a different approach to executive compensation than the Delaware courts).

182. *See* J. Travis Laster & Michelle D. Morris, *How to Avoid a Collision Between the Delaware Annual Meeting Requirement and the Federal Proxy Rules*, 10 DEL. L. REV. 213, 228 (2008) ("Delaware law developed in competition with and in response to the laws of other jurisdictions and, when it arrived, federal regulation of corporate affairs. New Jersey was the early leader as a state of incorporation, and when Delaware attempted to enter the field in 1897, it adopted much of the text of New Jersey's law and deliberately instituted corporate taxes slightly lower than New Jersey's. New Jersey's preeminence was short-lived: When then-Governor Woodrow Wilson adopted the restrictive 'Seven Sisters Acts' in 1913, the flow of incorporations shifted to Delaware."); *see also* Macey & Miller, *supra* note 109, at 490 (describing New Jersey as an early hub of corporate activity).

183. WILLIAM W. BOYER & EDWARD C. RATLEDGE, DELAWARE POLITICS AND GOVERNMENT 103 (University of Nebraska Press, 2009).

184. Gilson, *supra* note 2, at 350.

jurisdictions have replicated Delaware's corporate code, and yet are unable to even begin to challenge Delaware's preeminence, suggests that there is more to the story of Delaware's dominance—its courts. According to another commentator, "Delaware courts have a quasi-monopoly over the growth of corporate law, which affects public companies everywhere."[185] Delaware's proficient court system is an enduring form of competitive advantage, which is extremely difficult to replicate, because "[e]ven before a state can develop a specialized court system with experienced and highly skilled judges the state must have a significant number of corporate franchises and cases to create opportunities to build a body of jurisprudence."[186]

Unlike other states where corporate cases are heard by numerous judges in courts of general jurisdiction, Delaware limits corporate litigation to two courts and ten judges.[187] This creates greater stability and predictability.[188] The DGCL is a flexible statute that takes an "enabling" approach complemented by a well-developed body of case law and precedents.[189] Unlike its corporate statute, Delaware's case law and precedents are unique and not easily replicated by other states or foreign jurisdictions. Commentators highlight Delaware's preference for incrementally developing corporate law through the common law decision-making process.[190] Plaintiffs, rather than political upswings, drive the dockets of the Delaware Supreme Court and Court of Chancery.[191] On a global scale, the ability to replicate features of Delaware's judicial system is made more difficult due to the presence of non-common law jurisdictions. Delaware courts are often the first responders to corporate law controversies and their expert adjudication of novel high profile corporate disputes further strengthens their reputation and brand.[192]

a. Court of Chancery

The Delaware Court of Chancery has an international reputation for its sophistication and expertise in handling corporate cases. A rarity among states, the Court of Chancery is a separate equity court from which appeals go directly to the Delaware Supreme Court.[193] The court's jurisdiction is limited largely to business matters, such as contracts, fiduciary duties, corporate law issues, land purchases, as well as trusts and estates. Delaware has one chancellor and four vice chancellors, who sit individually without the presence of juries.[194]

185. Thomas, *supra* note 15, at 1941.

186. Simmons, *supra* note 1, at 1165–66.

187. *See id.* at 1165 (analyzing features of the Delaware court system).

188. *Id.*

189. *Id.* at 1158.

190. *Id.* at 1158 n.127.

191. Cain & Solomon, *supra* note 10, at 490–91.

192. *See* Stevelman, *supra* note 1, at 130 ("[I]t is clear that Delaware must lead the way—must stay at the forefront of adjudicating novel issues in high-profile, high-stakes Delaware corporate law cases—if Delaware is to maintain control over its brand and ensure the flourishing of its chartering business.").

193. Delaware recognizes the division of law and equity. BOYER & RATLEDGE, *supra* note 183, at 114. In this respect, Delaware is an outlier in the United States (excluding Tennessee and Mississippi). Even in England, the distinction is less pronounced due to the Judicature Acts of 1873 and 1875 that combined courts of law and equity. Delaware has been referred to as "[a] museum of the common law." *Id.* "Courts of Chancery, with the concomitant denial of trial by jury . . . were viewed in many parts of the United States as vestiges of royal government and centralized authority, ill-suited to an egalitarian society." *Id.*

194. *Judicial Officers of the Court of Chancery*, DEL. ST. CTS., http://courts.delaware.gov/chancery/judges.stm (last visited Oct. 22, 2015).

All chancellors and vice chancellors are appointed by the Governor and confirmed by the state senate for twelve-year terms.[195] The Court of Chancery functions, in a sense, as a quasi-arbitrator. The court's special attributes are its speed and expertise, which are aided by experience.[196]

b. Delaware Supreme Court

Most Court of Chancery decisions do not receive appellate review. The Delaware Supreme Court, however, plays a key role by swiftly handling Court of Chancery appeals and rendering influential decisions. The Delaware Supreme Court has five justices—one chief justice and four associate justices—who, similar to chancellors and vice chancellors, are appointed by the Governor and confirmed by the state senate for twelve-year terms.[197]

2. Structural Safeguards

In the search for alternative explanations for Delaware's sustained dominance—such as franchise tax revenues, interest groups, or politics—scholars tend to downplay structural safeguards intended to minimize actual, as well as perceived, judicial bias. They also underestimate the incentives for principled judicial lawmaking. This approach leads to an incomplete descriptive assessment of Delaware's judicial lawmaking.

a. Expertise and Impartiality

i. Judicial Selection Process

In contrast to many other jurisdictions across the country, Delaware does not use elections to choose Delaware Supreme Court or Court of Chancery judges.[198] Consequently, the judicial nominating process is an important feature in Delaware's judicial system. In 1977, then Governor Pierre S. du Pont IV issued an executive order creating a judicial nominating commission (Commission) to supply qualified nominees from which to fill judicial vacancies. All subsequent Delaware Governors have adopted this process. Commission procedures require political balancing to reduce partisan excess. The Commission has nine members: an appointee of the President of the Delaware State Bar Association (with the Governor's consent), four members of the Bar of the Supreme Court of Delaware, and four members who are not members of the bar in any state.[199] Only a bare majority of one political party is permitted among the Commission's nine members.

As previously mentioned, Court of Chancery and Delaware Supreme Court judges are appointed by the Governor and confirmed by the state senate for twelve-year terms. Because the appointment terms are not life-long in Delaware, there is no guarantee a sitting judge will be re-nominated by the Commission or selected by the Governor for another term. Judges, who have completed their twelve-year terms, however, are free to reapply to the Commission. Unless two-thirds of the Commission members agree not to submit the

195. *Id.*

196. Simmons, *supra* note 1, at 1163 n.154.

197. *Id.* at 1163–66.

198. Since the passage of the Delaware Constitution of 1776, Delaware has not elected Article III judges. BOYER & RATLEDGE, *supra* note 183, at 104.

199. *Id.* at 105–06.

judge's name for reappointment, the incumbent will be nominated for another term. This state of affairs has only happened once since the judicial nominating process was implemented.[200]

ii. Political Balancing

In addition to a rigorous vetting process by the Commission that places a premium on expertise, the Delaware State Constitution mandates a political balance or bipartisan judiciary.[201] On the Delaware Supreme Court, for example, "three justices must represent one of the major political parties while the other two justices must be members of the other major political party."[202] The Court of Chancery maintains a similar political balance. Overall, Delaware's political balancing requirements and the appointments process signal to sitting judges that their work will be subject to bipartisan commission review.[203]

b. Finality and Certainty

i. Unanimity Norm

Delaware Supreme Court decisions are an authoritative statement on corporate law matters and are of great interest to multinational corporations.[204] The Delaware Supreme Court often speaks with a single voice and rarely issues separate opinions even concerning controversial issues.[205] This is called the "unanimity norm."[206] A number of features contribute to this greater consensus. Justices, pursuant to the court's internal procedures, do not discuss cases until after oral argument.[207] Case assignments often discourage the development of specialties among the justices.[208] Notably, "[b]oth the Supreme Court Rules and the Internal Operating Procedures provide for an automatic en banc hearing in the event of any panel disagreement."[209] This makes dissent unlikely to occur, except under extraordinary circumstances, because "a justice can write separately only if he or she is willing to force a full court hearing and continues to adhere to his or her original position."[210] The "unanimity norm" arguably gives the court's decisions greater authoritative legitimacy and is a tacit recognition of the broad reach of the court's

200. *See id.* at 108–09 (discussing the contentious reappointment of Associate Justice of the Delaware Supreme Court, Andrew G. T. Moore II, in 1994).

201. *See* DEL. CONST. art. IV, § 3 (imposing conditions of party affiliation in the makeup of the Delaware Supreme Court).

202. Simmons, *supra* note 1, at 1164.

203. *See* BOYER & RATLEDGE, *supra* note 183, at 106 (discussing the chronology of "extraordinary lengths to keep politics out of the judiciary").

204. Holland, *supra* note 10, at 781.

205. *See* Skeel, *supra* note 89, at 129 ("The Delaware supreme court, which has long been recognized as our preeminent authority on state corporation law, rarely issues separate opinions. Even on deeply controversial issues, such as those that arose during the takeover wave of the 1980s, Delaware's justices almost invariably speak with a single voice.").

206. *Id.* at 130.

207. *Id.* at 136.

208. *See id.* ("Under the court's internal procedures, the justices ordinarily do not discuss cases until after oral argument. Further, cases are assigned with an eye to discouraging the development of specialties. Both practices tend to encourage the kind of consensus that is reflected in the court's opinions.") (footnotes omitted).

209. *Id.*

210. Skeel, *supra* note 89, at 136.

decisions.[211] Notwithstanding unanimity, the prospect of dissent remains important to legitimacy because dissent may signal the absence of "group think" and diversity of thought among judges. In recent years, there has been considerable turnover on the Delaware Supreme Court. For example, four out of the five current justices on the Delaware Supreme Court were not on the court less than two years ago.[212] Yet, it is too early to surmise what impact, if any, this will have on the Delaware Supreme Court and corporate law developments in the future.

ii. Certified Question Procedures

Delaware's Constitution "vests the Delaware Supreme Court with the power to accept and decide certified questions of law."[213] Specifically, the constitution "permits the certifying court to receive an authoritative answer to an otherwise unresolved legal issue rather than having to predict what the Delaware Supreme Court would decide."[214] Delaware state trial courts, other states' highest appellate courts, all federal courts—including the United States Supreme Court—and the SEC can avail themselves of the certified question procedure.[215] Certified question procedures allow the Delaware Supreme Court to "speak first and authoritatively on emerging issues of Delaware corporate law" and this promotes an environment for greater business stability and continuity.[216] These procedures also reflect the complementary roles between state and federal law.[217]

3. Principled Decision Making

There are strong incentives for Delaware's judiciary to engage in principled lawmaking. A perception of judicial bias and arbitrariness has dangerous implications for Delaware and the nation. It raises the possibility of federal preemption, undermines the legitimacy of Delaware courts, and damages the Delaware brand. If Delaware's judiciary is perceived as unbalanced (e.g., biased, ad hoc, arbitrary), offending managers, investors, and other key interest groups, such groups may lobby Congress to act. Plaintiff's lawyers

211. *See id.* at 172 ("But in order to more fully explain the norm, we need to consider the moral dimension in Delaware corporate law, and the importance of unanimity to the court's role in fostering appropriate directorial behavior. However persuasive the account I have developed may be, it is also important not to forget a far more basic factor—Delaware's justices shoulder the added costs of unanimity because they take their responsibilities as justices very seriously, and because the legal culture in Delaware reinforces this.").

212. Four of five of the current Delaware Supreme Court Justices were nominated within nine months of each other beginning in February of 2014. The Honorable Randy J. Holland is currently the most senior justice on the Delaware Supreme Court having been appointed and confirmed in 1986. *See Judicial Officers of the Delaware Supreme Court*, DEL. ST. CTS., http://courts.delaware.gov/supreme/justices.stm (last visited Oct 22, 2015) (describing current composition of the Delaware Supreme Court); *see also* Tom Hals, *Dramatic Turnover Continues on Delaware Supreme Court*, REUTERS (Nov. 7, 2014, 4:10 PM), http://www.reuters.com/article /2014/11/07/us-usa-delaware-courts-idUSKBN0IR2BC20141107 (noting the rapid leave of four justices on the Delaware Supreme Court within 15 months after nine years of no justice turn-over).

213. Holland, *supra* note 10, at 784.

214. *Id.*

215. DEL. CONST. art. IV, § 11(8); RANDY J. HOLLAND, THE DELAWARE CONSTITUTION: A REFERENCE GUIDE 137 (2002).

216. Holland, *supra* note 10, at 784.

217. *See id.* at 784–85 (quoting SEC General Counsel discussing the "side-by-side" existence of state and federal law with each having a distinctive role).

and their clients may pursue litigation in other jurisdictions and firms may eschew Delaware's courts for alternative dispute resolution. Mandatory political balancing on Delaware's business courts and well-developed judicial nominating procedures reduce potential bias. Scholars also recognize a market feedback mechanism present in the state competition context that is often absent at the federal level.[218] Whereas the federal government is, to a greater extent, insulated from market forces, threats of jurisdictional competition and federal preemption provide for greater discipline and arguably a stronger market recourse against states like Delaware for making poor decisions.

Delaware's judge-made law is "technical" and "apolitical" because it is created by experienced appointed judges rather than through more volatile legislative and political processes.[219] Delaware has a preference for developing corporate law through the incremental common law decision-making process.[220] Fiduciary duties are equitable and fact-driven and reflect an attempt to balance economic efficiency with equitable principles. They reflect the complexity of modern corporations and this, in part, explains the perceived indeterminacy of Delaware corporate law.[221] Former Chief Justice E. Norman Veasey describes the Delaware approach:

> The enabling model, patterned after the Delaware approach, is based on a few fundamental statutory guideposts and latitude for private ordering, with primary reliance on self-governance centered around judicial decisionmaking in applying

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218. Brian R. Cheffins et al., *The Race to the Bottom Recalculated: Scoring Corporate Law Over Time* 80 (European Corporate Governance Inst. Law Working Paper No. 261, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475242; Easterbrook & Fischel, *supra* note 103, at 698; Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 216 (2005) ("In short, regulatory competition offers a distinctive advantage over a single regulator in the corporate law setting: it better aligns the incentives of issuers, and of regulators, with the perspective of investors, and has thereby an increased likelihood of promulgating rules that investors prefer. That is because issuers will be drawn to the regime preferred by investors in order to lower their cost of capital. Issuers respond to investors' preferences over the choice of regime because financial capital is mobile, and the number of investment options is virtually unlimited with derivatives. The richness of modern capital markets enables investors to set the price, that is, the securities of firms operating under regimes with fewer provisions or defaults that investors prefer will trade at a discount to those of firms operating under regimes offering greater protection. And the feedback mechanism of firm movement across competing regimes spurs regulators to respond to the investor-derived preferences of firms.").

219. *See* Kahan & Rock, *supra* note 23, at 1612 (describing Delaware judge-made law as technical and apolitical because it is created by experienced appointed judges rather than through legislative and political processes); *see also* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 594–97 (2012) (arguing that Court of Chancery judges do not harbor common biases in common law decision making such as "selection effects" and the "availability heuristic").

220. *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1777 (2006) (noting Delaware's "deference to the judicial branch"); *see also* E. Norman Veasey et al., *Federalism vs. Federalization: Preserving the Division of Responsibility in Corporation Law* 77, 94 (Yale Law School Center for Law, Economics, and Public Policy, Research Paper No. 324, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878246 (noting that Delaware law provides a cause of action for minority stockholders).

221. *See* E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 394 (1997) (discussing the types of decisions Delaware courts address, which include enterprise, ownership, and oversight decisions). Enterprise decisions are standard decisions made by management, such as the decision to build a foreign production plant or what products to produce. *Id.* Ownership decisions involve ownership changes, such as mergers, acquisitions, and corporate takeovers. *Id.* Oversight decisions concern managers' monitoring role, such as ensuring employees execute their responsibilities in compliance with the law. *Id.*

fiduciary duties to fact-intensive settings.

> *A word of caution is that the judge-made law must not be of a free-wheeling or ad hoc quality. It must involve a disciplined and stable* stare decisis *analysis based on precedent and a coherent economic rationale.* The private ordering aspect of it must provide ex ante the contractual stockholder protections deemed important, as distinct from ex post judicial rewriting of the contractual framework.[222]

Stockholders, managers, and other stakeholders ultimately look to courts to fulfill key obligations: clarity, balance, promptness, stable decisions falling within an overall continuum, and a coherent rationale.[223] The above analysis of Delaware's safeguarding features and its judicial processes further illuminates how its courts create value for domestic and foreign-owned businesses.

III. GLOBAL THREAT IMPLICATIONS

A. The Importance of Delaware Courts for Complex Global Business Disputes

1. Are Courts the Proper Forum?

Are Delaware courts a proper forum for resolving global business disputes? As previously discussed, Delaware holds key advantages compared to other domestic and foreign courts with respect to corporate and other types of business litigation. Notwithstanding, a common critique against courts adjudicating business disputes is the concern that many judges and courts often lack expertise in sophisticated financial affairs and commercial transactions. The historical movement toward arbitration and alternative dispute resolution was due in part to these concerns.[224] The Delaware experience, however, provides a slight counter-narrative to the trend toward alternative dispute resolution. This counter-narrative is perhaps strongest in the area of intra-corporate stockholder disputes and evolving fiduciary duty jurisprudence.[225] The purpose here is not to dismiss the

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222. E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa?*, 149 U. PA. L. REV. 2179, 2179–80 (2001) (emphasis added); *see also* Fisch, *supra* note 18, at 742 (noting the flexibility of Delaware's corporate law).

223. E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. LAW. 681, 694 (1998).

224. Ribstein argues that the courts' movement to "generally enforce . . . arbitration awards" led to a shift in attitudes from historical hostility from courts to greater judicial enforcement of choice of law and forum clauses. O'HARA & RIBSTEIN, *supra* note 2, at 103–04; *see also* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 257 (2002) ("W. Michael Reisman has questioned the motives behind reforms that have limited the interference and control of national courts over international arbitrations. Reisman argues that a number of jurisdictions loosened such controls not because of a genuine belief that international commercial arbitration is the best system for dispute resolution, but rather in an effort to attract the 'business' of international commercial arbitration to their state. The analysis is modeled on the process of regulatory competition in the U.S. incorporation example, in which the state puts aside genuine regulatory preferences in order to attract business for its lawyers, accountants, and other attendant services. Reisman identifies such competition for arbitration business as motivating, for example, reforms in Belgian and Swiss legislation. The role of such interests in influencing and frequently lobbying state authorities also figures at least partly in the study by Dezalay and Garth of the world of international commercial arbitrators.").

225. E. Norman Veasey & Christine T. DiGuglielmo, *What Happened in Delaware Corporate Law and*

benefits of alternative dispute resolution, international or domestic, but instead to highlight unique benefits Delaware's "lawmaking" courts offer. Without question, arbitration and other forms of alternative dispute resolution complement litigation in courts. Notwithstanding, a discussion of desirable scope and limitations is useful.[226]

Domestic and international arbitration offers a private contractual resolution to disputes.[227] Arbitration's greatest virtue is that it is contractually-based: parties can pick the rules, select the arbitrator, and achieve greater privacy.[228] Judges, on the other hand, are randomly assigned cases and, unlike arbitrators, are not compensated by the parties before them.[229] Arbitration's biggest virtue, however, is also its greatest vice. Arbitration can be slow, expensive, bureaucratic, opaque, and ad hoc.[230] For example, contracts do not always lead to greater certainty. They contain gaps and multiple issues that are neither covered nor contemplated. Such issues require interpretation, time, and expense. Disputes may also arise concerning whether a particular issue is arbitrable, that is, falling within the scope of the arbitration agreement.[231] In short, parties and their attorneys have the ability, and sometimes the incentives, to delay and impede an expeditious resolution. This state of affairs undermines the predictability and finality that businesses desire. Moreover, there is generally no public record to guide future parties in their disputes and serve as a learning tool to channel appropriate behavior in an ex ante manner.[232] Despite the popularity and appearance of greater certainty as well as neutrality, arbitration may not always serve as a better dispute settlement mechanism than Delaware courts, especially for intra-corporate disputes implicating management's fiduciary duties to shareholders.[233] In the intra-corporate context, there is a perceived risk that arbitration would potentially strengthen the hand of management and deprive shareholders of a key disciplining mechanism in the form

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Governance from 1992-2004? A Retrospective on Some Key Developments, 153 U. PA. L. REV. 1399, 1436 (2005).

226. *See generally* E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions*, 70 BUS. LAW. 407 (2015) (providing an extensive discussion of the pros and cons of arbitration and situational factors influencing general counsels' decisions to litigate in courts versus pursuing alternative dispute resolution).

227. Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 502–04 (2006).

228. *See* 92 AM. JUR. 3D PROOF OF FACTS § 1 ("The parties to an arbitration agreement may agree to limit issues they choose to arbitrate, may agree on rules under which an arbitration will proceed, and may specify with whom they choose to arbitrate their disputes."). General Counsel's cited the ability to choose the arbitrators, the venue, the timing of arbitration, and the flexibility and access of the arbitration process as the biggest benefits of arbitration. Veasey & Brown, *supra* note 226, at 416.

229. Franck, *supra* note 227, at 516–19.

230. Strine, *supra* note 7, at 2–4; *see also* Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 796 n.46 (1997) ("Arbitration has the potential to provide a low cost and informal alternative to litigation, but some critics find that it can still be 'slow, expensive, and formal.'") (citations omitted).

231. *See* Thomas J. Lilly, Jr., *Participation in Litigation As a Waiver of the Contractual Right to Arbitrate: Toward A Unified Theory*, 92 NEB. L. REV. 86, 94 (2013) ("The issue of whether the parties have agreed to arbitrate a particular dispute is for a court to decide in the first instance. In making that decision, however, the court must resolve 'any doubts concerning the scope of arbitrable issues' in favor of arbitration.").

232. *See* Franck, *supra* note 227, at 510.

233. General Counsels have cited several concerns with arbitration including: the need for an important legal determination or precedent, the dispute includes specialized subject matter, and the arbitrator's tendency to "split the baby." Veasey & Brown, *supra* note 226, at 416.

of class action and derivative lawsuits.[234]

2. Imagining a World with No Courts

Imagine a world with simply markets and no courts, but the need for dispute resolution. Within this context, one can surmise how arbitration might evolve. Assume someone wishes to resolve disputes for a fee. There is no way to make it worthwhile unless the arbitrator can secure repeat business and can rely on referrals. Within this context, what should the arbitrator do to secure business? Pragmatic steps might include: (i) being fair; and (ii) developing a reputation as neither pro-plaintiff nor pro-defendant, that is, aiming for neutrality.

Unsurprisingly, the parties to an arbitration may prefer confidentiality.[235] Also, arbitrators themselves, unlike courts, have limited incentives to publish or explain their decisions. Arbitrators face an interesting free rider problem and, in theory, would not want third parties such as other arbitrators and parties outside of the extant dispute to benefit, especially where they have not paid for the particular arbitrator's services. Ultimately, arbitration is a private service provided in exchange for a fee. With published precedent, the actual parties in a dispute might be able to resolve their own disputes or perhaps even channel their behavior to avoid future issues. But, in theory, arbitrators would produce a written record only if it provides them with a competitive advantage over other arbitrators or is desired by the parties to a dispute. Unlike courts, arbitrators can apply all private law principles or no particular law at all, completely avoiding a state's substantive law.[236] Arbitrators are "not necessarily bound by precedent—nor do they create *de jure* precedent."[237] With arbitration there is also the potential absence of a litigation safeguard in the form of appeals. In contrast to mandatory arbitration, a court enforced forum selection clause "avoids the threat of complete lawlessness."[238] Notably, a court's source of authority derives from the state, "whereas arbitrators derive their jurisdiction from parties."[239] As a key distinguishing feature, courts provide a public good and useful service that is free and available to third parties in the form of published decisions and precedent.[240] These processes promote greater predictability allowing multiple business parties to channel their behavior and better predict outcomes. The public nature of litigation also performs a preventative function against certain types of wayward business behavior.[241]

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234. Thomas, *supra* note 15, at 1949; *see also* Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes*, 39 DEL. J. CORP. L. 751, 809 (2014) (discussing the legal arguments surrounding mandatory arbitration of intra-corporate stockholder disputes); *but see* Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1209–11 (2013) (arguing the benefits of arbitration for intra-corporate stockholder disputes).

235. In this context, the value of confidentiality includes: "recurring future business with the counterparty; secret commercial or scientific information; concerns about the company's reputation; not revealing certain business or litigation strategies; not upsetting customers with a public display of problems, such as uncertain supply; and the like." Veasey & Brown, *supra* note 226, at 416.

236. O'HARA & RIBSTEIN, *supra* note 2, at 106.

237. Franck, *supra* note 227, at 510.

238. O'HARA & RIBSTEIN, *supra* note 2, at 105.

239. Franck, *supra* note 227, at 508.

240. *See* Brummer, *supra* note 22, at 1087 (showing that firms can free ride on the information gleaned from other decisions in Delaware's Court of Chancery).

241. In theory, arbitration could be "customized" and designed to address some public concerns.

From a global competition standpoint, the prospect of firms eschewing national courts for alternative dispute resolution is perhaps one of the greatest potential threats to Delaware's dominance. Whereas foreign jurisdictions may have difficulty competing with Delaware's courts, this is not the case with alternative dispute resolution, particularly international arbitration.[242] According to a recent study, international arbitration is favored among general counsels.[243] One feature that distinguishes domestic arbitration from international arbitration is that discovery is typically limited in the international arbitration context due to the practices, rules, and customs in foreign nations.[244]

The popularity of arbitration as a method of dispute settlement also raises the important question of whether private ordering and the contractual metaphor have limits in the corporate law context. For example, firms, through changes to corporate bylaws or charter amendments, may create a number of private ordering devices that influence the litigation of intra-corporate disputes, such as forum selection clauses, fee-shifting provisions, and exclusive arbitration provisions.[245] Despite the apparent legal permissibility of certain devices, the suitability of these devices remains a subject of dispute.[246] Such devices often raise important concerns regarding the quality of shareholder consent and the ability of shareholders to hold firm managers accountable through litigation.[247] The Delaware legislature's recent passage of legislation prohibiting the use of charter and bylaw fee-shifting provisions for "internal corporate claims" reflects this concern.[248] Exclusive arbitration bylaw provisions addressing shareholder suits (particularly those with a waiver of class actions or derivative suits) raise similar concerns. Such provisions potentially undermine a key value created by Delaware's business courts: evolving guidance and the creation of a public good. The limited use of such provisions by Delaware's publicly traded corporations, *at present*, may support the notion that management does not *currently* view arbitration of shareholder disputes as much of an

242. *See generally* ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION (Cambridge Univ. Press, 2015) (listing extensive research into over twenty countries regulations and case law regarding their foreign and domestic arbitration).

243. *See* Veasey & Brown, *supra* note 226, at 415 ("A key advantage of international arbitration is the relative certainty (if all goes well in the process) of being able to enforce the award through the available international conventions . . . .").

244. *Id.* at 416.

245. Thomas, *supra* note 15, at 1937–41, 1949–51; *see generally* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses*, 37 DEL. J. CORP. L. 333 (2012) (providing an empirical analysis and history of intra-corporate forum selection clauses).

246. *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (upholding a mandatory arbitration clause, including a class action waiver, in a commercial contract); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 559–60 (Del. 2014) (upholding a board-adopted fee-shifting bylaw and finding that stockholders are bound to a board-adopted bylaw whether or not they purchased their stock prior to or after adoption of the bylaw); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013) (emphasizing bylaws are contracts between a corporation and its stockholders and upholding a board-adopted exclusive forum selection bylaw); *but see* Thomas, *supra* note 15 (exploring whether the current culture of corporate arbitration bylaws can be maintained); Allen, *supra* note 234 (raising issues brought on by mandatory arbitration bylaws).

247. *See* Hazel Bradford, *Investors, Companies Fight Over Who Pays Litigation Fees*, PENSIONS & INV. (Jan. 12, 2015), http://www.pionline.com/article/20150112/PRINT/301129981/investors-companies-to-fight-over-who-pays-litigation-fees (citing an increase in corporate interest toward fee-shifting bylaws); *see generally* Lawrence A. Hamermesh, *Consent in Corporate Law*, 40 BUS. LAW. 161 (2014) (arguing that fee-shifting provisions may exceed the limits of the application of corporate consent).

248. UK DEP'T FOR COMM. AND LOCAL GOV. §§ 102(f), 115 (2014).

improvement over litigation in the Court of Chancery.[249] But, at a global level, arbitration is more likely to be favored over less reputable national courts for multiple reasons, including the desire of both countries and powerful interest groups to attract lucrative arbitration business.[250] These international arbitration hubs, such as London and emerging venues like Singapore, are a potential long-term threat to Delaware's dominance.[251] It is easier for these foreign jurisdictions to compete with Delaware as a site of arbitration rather than as a forum for court-based litigation.

Delaware's recent unsuccessful attempt to establish a private arbitration system, utilizing Delaware judges to arbitrate confidential business disputes without public access, is evidence that Delaware is mindful of global competition and trends.[252] Additionally, this initial failed attempt, resulting in the United States Court of Appeals for the Third Circuit striking down Delaware's private arbitration experiment as unconstitutional,[253] revealed a broader tension and uneasiness with the scope of arbitration whereby shareholder interests could be compromised.[254] On April 2, 2015, Delaware's Governor Jack Markell signed into law the Delaware Rapid Arbitration Act (DRAA) replacing Delaware's previous arbitration regime that the Third Circuit had previously ruled as unconstitutional in 2013. The DRAA was "designed not only to pass constitutional muster but also to provide for mandated expedition of proceedings for parties specifically electing to use the Act."[255] Under the DRAA, sitting Delaware judges do not serve as arbitrators, at least one of the parties to an arbitration agreement must be incorporated in Delaware or have its principal place of business in Delaware, and arbitration agreements must specify that they are governed by Delaware law and mention the DRAA. The DRAA's passage and features signal that Delaware lawmakers and interest groups have global aspirations in establishing Delaware as a leading global venue offering multiple dispute resolution options for business entities.[256]

Despite conferring benefits on contracting parties, a complete migration from courts

249. The arbitration of intra-corporate disputes is perhaps more common in the LLC and the closely-held business context.

250. Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 831–32 (2013).

251. *Id.* at 832. New York is also a hub for international arbitration and consequently is a threat to Delaware from an arbitration perspective.

252. Steven Davidoff Solomon, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES DEALBOOK (Aug. 31, 2012, 11:58 AM), http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/?_r=0. Chief Justice Leo Strine of the Delaware Supreme Court has also made statements acknowledging a global threat to Delaware. Notably, New York has developed a strong reputation for arbitration.

253. Specifically, the Third Circuit found that the arbitration act violated the First Amendment's guarantee of public access to court proceedings.

254. *See* Scarlett, *Investors Beware*, *supra* note 143, at 237 ("Corporations that adopt arbitration provisions to eliminate investors' ability to file shareholder derivative litigation may place themselves at a competitive disadvantage. To the extent that corporations feel shareholder derivative litigation is broken, then corporations should work with investors to improve the current system. As recent developments in India and China demonstrate, such efforts will likely influence other countries, especially in light of efforts to harmonize corporate governance standards within the global economy.").

255. Veasey & Brown, *supra* note 226, at 420.

256. The DRAA intends to attract business entities by giving them an option to arbitrate under DRAA, which allows private arbitrators to be neutrals, mandates incentives to speed up arbitration, requires prompt confirmations of awards and judgments by the Court of Chancery, and allows appeals to the Delaware Supreme Court. *Id.* at 420.

for alternative dispute resolution has systemic implications worth mentioning. One can imagine a world without courts where legislatures and executive branches are also captured by the firms they regulate. Under this scenario, firms could theoretically opt out of, or altogether, thwart government supervision, which is an unsettling result. Courts, although imperfect, can function as a last resort when markets and interest group dynamics fail to protect vulnerable stakeholder interests. Indeed, firm managers as well as certain shareholders, might prefer to extend private arbitration to previously public domains for perfectly good reasons such as avoiding expensive frivolous litigation.[257] Yet, the scope and impact of arbitration remains a matter of concern for some shareholders especially in the area of intra-corporate disputes implicating shareholder interests and managerial duties.[258] The law in this area is still developing and will inevitably present courts and corporate constituents with interesting questions to resolve.

3. Delaware's Courts as a Mediator Among Interest Groups

Traditional theories of Delaware's corporate law dominance—race-to-the-bottom and race-to-the-top perspectives—provide an incomplete assessment of judicial behavior and incentives. William Cary's seminal race-to-the-bottom article argued that the Delaware judiciary was conflicted and could not be relied upon to provide independent judgment.[259] More recently, Ehud Kamar argued that indeterminacy in Delaware's fiduciary duty case law enhances Delaware's market position.[260] In making this claim, Kamar, as with Cary, raises the possibility that Delaware uses its judge-oriented corporate law to stifle its rival jurisdictions.[261] The indeterminacy claim makes a negative inference concerning the motivations and behavior of Delaware's appointed bipartisan judiciary. It characterizes Delaware judicial decisions as defensive, calculating, rent-seeking, or opportunistic.[262] As

257. *See* Solomon*, supra* note 252 (discussing how business may prefer private arbitration).

258. *Id.*

259. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663 (1974) ("Perhaps now is the time to reconsider the federal role.").

260. *See generally* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998) (arguing that indeterminate case law enhances Delaware's position in the charter market).

261. *See id.* at 1955 ("Rather than being a virtue, judicial predominance is what allows one state to maintain its dominance in the market for corporate law. By being judge-oriented, Delaware corporate law becomes a proprietary product of Delaware, one that other states find difficult to match."); *but see* Rock, *supra* note 93, at 1017 (arguing that "despite the fact-specific, narrative quality of Delaware opinions, over time they yield reasonably determinate guidelines"). Other scholars have subsequently adopted the indeterminacy theory's application to Delaware judging, but this claim remains flawed in several respects. *See* Bernhard Grossfeld, *Comparative Corporate Governance: Generally Accepted Accounting Principles v. International Accounting Standards?*, 28 N.C. J. INT'L L. & COM. REG. 847, 867–68 (2003) ("[Delaware] stands for the fact that the real power in any semiotic system goes to those who have the power to interpret. Whoever defines the hermeneutics defines the outcome and receives benefits from it . . . . Delaware takes advantage by an indeterminate, judge-oriented law that makes application by Delaware courts a necessity and excludes non-Delaware corporations from network benefits. It is also clear that Delaware corporation law is a proprietary product of Delaware, which uses her interpretative power first in her interest."); Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance—Internet v. Geography*, 34 INT'L L. 963, 969 (2000) ("Delaware enhances these advantages by an indeterminate, judge-oriented law that makes application by Delaware courts a necessity and 'thus excludes non-Delaware corporations from network benefits.'" (quoting Kamar, *supra* note 260, at 1908)).

262. At the other extreme, scholars may romanticize the judicial role. This is equally problematic.

previously discussed, this perspective downplays the incentives for judges to engage in principled decision making and ignores other plausible explanations.[263]

It is an oversimplification for commentators to assume that Delaware's judiciary is conflicted, politically-oriented, as well as interchangeable or aligned with other state interest groups. Macey and Miller, in their seminal article regarding interest group theory, find it "difficult to see how the Delaware judiciary is interested in the state's revenue raising scheme [or generating legal fees]."[264] They do, however, acknowledge these potential dynamics among the Delaware Bar and legislature:

> Delaware could stimulate litigation by supplying legal rules that are unclear in application. The bar therefore has some interest in reducing the clarity of Delaware law to enhance the amount of litigation. *But the bar risks killing the proverbial goose that laid the golden egg because it is primarily the certainty and stability of Delaware law that creates the opportunities for profits in the first place. The bar as a whole does not have an interest in making the law so unclear that corporations begin to move elsewhere in large numbers. The bar should instead favor an equilibrium point of uncertainty at which the marginal increase in bar revenues from litigation fees equals the marginal loss in revenues due to reduced incentives to incorporate in Delaware.*[265]

Macey and Miller reject the notion that Delaware's judiciary is subject to the same interest group pressures as legislatures, noting that Delaware's judiciary is actually exogenous to their model of interest group equilibrium.[266] At the same time, they acknowledge the context in which independent courts operate, whereby "courts can further the goals of interest groups through statutory interpretation as easily as they can thwart them."[267] Interest group bargains are more likely struck between the legislative branch and interest groups. And even where a judicial decision may strike down an interest group bargain, the legislature can, through subsequent statutory enactment, nullify a court's decision restoring the initial bargain.[268] Professional background, however, could indeed influence the

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263. *See generally* Steele & Verret, *supra* note 90 (highlighting the shortcomings of Kamar's indeterminacy theory). The indeterminacy critique, as it pertains to judicial lawmaking, could simply reflect a preference for regulation versus common law adjudication: a critique not unique to the corporate law context. Commentators argue that Delaware's preference for judge-made law provides advantages of balance and flexibility. The following statement by former Chief Justice E. Norman Veasey provides a pragmatic alternative explanation for indeterminacy:

> The judicial articulation of fiduciary duty law in Delaware is constantly evolving and has developed over about eight or nine decades. It is the quintessential application of the common law process. Directors are fiduciaries, duty-bound to protect and advance the best interests of the corporation. When those interests conflict—or may conflict—with the personal interests of the fiduciaries, the fiduciaries' interests must be sublimated to those of the corporation. The evolution of fiduciary principles occurs not only because courts must decide only the cases before them, but also because business norms and mores change over time . . . . Delaware's corporate law—in its judge-made mode—also provides advantages over a codified model to both stockholders and managers because of its balance and flexibility.

Veasey & DiGuglielmo, *supra* note 225, at 1413.

264. Macey & Miller, *supra* note 109, at 475.

265. *Id.* at 505 (emphasis added).

266. *Id.* at 500–01.

267. *Id.* at 501–02.

268. *Id.*

Delaware judiciary's perspective on corporate law, but this rationale falls well short of the cynical idea that Delaware judges generate rules to "increase revenues for former colleagues."[269] Judges may not operate like traditional interest groups. Yet judges, like other human actors, are complex: they can be publicly-motivated, observe professional values, and be shaped by institutional environments and structures. An existing well-developed body of scholarship already explores these important issues.[270]

In a sense, the Delaware judiciary functions more as a mediator among multiple interest groups—corporate managers, directors, shareholders, defense lawyers, plaintiff's lawyers, investment bankers, and the federal government—rather than as an active participant in adversarial interest group struggle. Delaware's judiciary inevitably weighs in on issues that generate gains and losses for various interest groups. Recent statistics indicate that shareholder suits are a relative certainty in the event of a sizeable corporate merger.[271] More litigation in Delaware's courts effectively means more fees for Delaware lawyers and other interest groups, but it also could undermine what corporate managers value most about Delaware law: stability. Whereas plaintiff's lawyers, and the shareholders they represent, may desire greater ease in filing class action and shareholder derivative suits to monitor managers and generate fees. Corporate managers prefer rules that inhibit numerous class actions and derivative suits (especially frivolous strike suits) that can delay corporate action and serve as a financial penalty on the corporation.[272] If Delaware courts are perceived as overly biased against plaintiff attorneys, members of the plaintiff's bar may eschew Delaware and encourage their clients to file cases elsewhere.[273] Similarly, overburdening firms with a deluge of strike suits and legal expenses could tarnish Delaware's reputation. Within this context, Delaware's judiciary mediates among various interest groups, some of whom will be dissatisfied with a particular decision. Yet, irrespective of the decisional outcome, parties will ultimately acquiesce to the institutional legitimacy of the Delaware courts. The recent attention being given to private ordering devices, such as forum selection clauses, fee-shifting bylaws or charter amendments, amplifies the Delaware judiciary's historical and present function as a mediator of corporate constituent concerns.[274] For example, bylaw or charter amendments restricting

269. Macey & Miller, *supra* note 109, at 502.

270. Thomas Brennan et al., *The Political Economy of Judging*, 93 MINN. L. REV. 1503 (2009); Harry T. Edwards, *The Effect of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Tracey E. George & Albert Yoon, *Chief Judges: The Limits of Attitudinal Theory and the Paradox of Managerial Judging*, 61 VAND. L. REV. 1 (2008); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); *see also* Cain & Solomon, *supra* note 10. Interestingly, the corporate law literature largely ignores this scholarship.

271. Cain & Solomon, *supra* note 10.

272. A fee-shifting statutory provision that required plaintiffs to post security for expenses could indeed impact Delaware litigation dynamics. Macey & Miller, *supra* note 109, at 510–12. Such provisions have been adopted by states to limit strike suits,

273. Cheffins et al., *supra* note 218, at 80.

274. Hamermesh, *supra* note 22, at 1752; *see also* Thomas, *supra* note 15, at 1949–60 (analyzing forum selection clauses and comity as two potential policy responses to multi-jurisdictional litigation). Debate among scholars and practitioners ensued after the recently enacted legislation, amending sections 102 and 109 and adding Section 115 to the DGCL. The legislation limited the use of fee-shifting by-laws for internal corporate claims. *See* Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, THE INST. OF DEL. CORP. & BUS. L., WIDENER U. (June 29, 2015), http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism/#sthash.WTx3qqji.bwtvE8xR.dpbs (arguing the recent legislation does not affect the validity of bylaws providing for fee-shifting in federal securities class action nor does the legislation

litigation, such as forum selection clauses, are often viewed as favoring management (i.e. defendants) who desire greater predictability, lower costs, and less business interruption.[275] On the other hand, policies preserving access to multi-jurisdictional litigation, such as judicial comity, are perceived as pro-plaintiff or pro-shareholder in the sense that they preserve litigation as a key monitoring mechanism on management misconduct.[276] Delaware courts, in their quasi-regulator role, inevitably must attempt to balance between plaintiff, defendant, and other group interests.

B. Delaware's Contribution to United States Corporate Governance in the Face of the Common Global Threat

1. The Salience of Reputation

Delaware operates in an international context where reputation has salience. Domestic and foreign firms choose Delaware law and business formation to guide their internal affairs; concomitantly, many firms choose Delaware courts to resolve complex corporate and commercial disputes. The traditional charter competition debate—race-to-the-top versus race-to-the-bottom paradigm—has, in essence, served as a referendum on Delaware's legitimacy and quality as a de facto regulator of U.S. corporations.[277] Despite this longstanding, multi-decade-spanning debate, recent studies find limited empirical support for the traditional binary paradigm—vacillating between the agency costs associated with managerial power and the short termism associated with shareholder primacy. For example, one study finds that the erosion of shareholder protection was not a hallmark feature of state corporate law post-1899.[278] This finding casts doubt as to whether there was ever a robust race-to-the-bottom among states in the twentieth century.[279] Other recent studies also find limited empirical support for the traditional paradigm. Alternatively, these studies posit that "familiarity" has a significant influence on Delaware's dominance.[280] The notion of familiarity in the context of Delaware's dominance is similar to the branding discussion in the sense that both concepts relate to reputational concerns. A jurisdiction can be quite familiar yet infamous. Branding, by contrast, recognizes the interplay between tangible expertise that firms value and intangible reputational assets. Interestingly, "messy" or "soft" factors like reputation, branding effects, and familiarity reveal how an abundance or dearth of competition alone may not

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authorize such bylaws).

275. Thomas, *supra* note 15, at 1949–56.

276. *Id.* at 1956–59.

277. Simmons, *supra* note 1, at 1180.

278. Cheffins et al., *supra* note 218, at 76–77.

279. *Id.* at 77. Although the study finds that the erosion of shareholder rights is not a prominent feature of state competition dynamics, their analysis of federal reforms, however, reflects a significant increase in the level of shareholder protections over time. *Id.* at 78–79. This finding supports the interplay between federal and state law, particularly with regard to the incremental enhancement of shareholder voice. This trend also appears to coincide with the increased role of institutional investors. *See generally* LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION (2011) (describing a succinct, practical, and comprehensive guide to the key concepts of shareholder democracy, highlighting and analyzing several debates surrounding the effectiveness of enhanced shareholder power).

280. Anderson IV & Manns, *supra* note 1, at 1086; Carney et al., *supra* note 1, at 132; Ibrahim & Broughman, *supra* note 1.

serve as an adequate proxy for legal quality.[281]

2. Credence Characteristics of Corporate Reform

"The corporate reform quality inquiry is constrained by credence characteristics."[282] Under such circumstances, reputational considerations become a significant factor in firm decision-making processes both domestically and globally.[283] "[C]orporate governance reform is like a service: corporate constituents (e.g., managers, shareholders, employees, and populist groups) function like consumers, and corporate lawmakers (e.g., the federal government and the State of Delaware) function as . . . suppliers of reform services."[284] These reform services may exhibit credence characteristics, which are service attributes whose quality cannot be fully determined prior to and sometimes even after significant use. Services—where the supplier both diagnoses and supplies the service—such as automobile repairs, certain medical treatments, and regulatory reform often exhibit a higher incidence of credence characteristics.[285] "Credence characteristics, at least in the short-term, make it difficult for corporate constituents to discern the impact of corporate reform due to information asymmetries."[286] Due to "informational constraints, corporate constituents normally rely on an array of decision-making heuristics as a risk reduction strategy . . . (i) third parties and reputational intermediaries (e.g., gatekeepers, institutional investors, advisory services, corporate watchdogs, and academics); [(ii)] legitimizing democratic procedures and protocols (e.g., participation, independence, and disclosure);" and (iii) regulator reputation, credible commitment, and brand equity.[287] Beyond credence characteristics,

> the answer to the substantive question of [corporate reform quality is further] complicated because it depends on a number of contextual variables, including (i) the type of corporate decision at issue—ownership, enterprise, or oversight; (ii) the corporate constituent's vantage point—management, shareholders, or populist groups; (iii) the desired policy value—efficiency or fairness; (iv) inter-temporal considerations—short-term versus long-term impact; and (v) the degree of legal enforcement.[288]

Additionally, the absence of robust empirical support or inconclusive findings surrounding an array of corporate governance reforms complicates the reform quality discussion.

Many popular brands have the potential to exploit customers—especially where intangible value significantly outweighs tangible performance features. One might argue

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281. From the global perspective, Delaware provides a unique service. This arguably provides additional support for Delaware's dominance and highlights potential downsides of federal preemption.

282. Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 S.M.U. L. REV. 299, 320 (2009).

283. Simmons, *supra* note 1, at 1150.

284. Omari Scott Simmons, *Corporate Reform As A Credence Service*, 5 J. BUS. & TECH. L. 113, 113 (2010).

285. *Id.* at 113–14.

286. *Id.* at 114.

287. *Id.* at 113–14.

288. Simmons, *supra* note 1, at 1141.

that the preference for Delaware is nothing more than a form of market irrationality, which allows Delaware to perpetuate its market power while offering a suboptimal product.[289] Delaware's global brand, however, is not an illusory marketing ploy—it has valuable content to counterbalance its intangible features. As previously mentioned, there are, inter alia, structural and public benefits to Delaware's courts resolving business disputes. Delaware's business courts are a leader in this arena because they offer unique features, which provide greater stability for capital investment and business planning. Additionally, the threats of federal intervention and preemption along with capital migration operate as additional checks and balances on Delaware's potential abuse of its market power.[290]

3. Delaware's Key Contribution

Delaware provides greater stability for capital investment and a trusted forum for dispute settlement, but Delaware's key contribution to U.S. corporate governance is its production of corporate law that is substantially judge-made. Delaware offers a public good: interpretive network benefits in the form of judicial decisions that provide guidance and reduce uncertainty for multinational firms and practitioners, as well as serve as a deterrent for bad business behavior.[291] By incorporating in Delaware, business firms and practitioners can free ride on information produced by litigation in Delaware courts.[292] Thus, litigation in Delaware's courts makes Delaware incorporation more valuable by providing dynamic legal guidance and timely dispute resolution.

Existing debates about federal preemption of state corporate law are too narrow and do not adequately portray the global threat to Delaware and the nation. Mark Roe reflects on the impact of federal preemption: "[t]he threat to Delaware isn't that Washington would take away the right to charter corporations (that's possible, but unlikely), but that if Washington makes much of what's important to corporate law, there's less reason for firms to move to Delaware, since it couldn't provide enough distinctive value."[293] Federal preemption could indeed weaken Delaware, but would not necessarily make other states or the nation more competitive in attracting corporate charters and investment.[294] An adequate evaluation of Delaware's impact on U.S. corporate governance must consider the complementary interaction Delaware and its courts have with other regulators (e.g., SEC and Congress) and with other bodies of law (e.g., tax, antitrust, banking, bankruptcy, environmental, and labor law).[295] One should also perform an analytic comparison of Delaware courts to existing and available dispute settlement alternatives, taking into consideration their public function and systemic benefits, such as channeling boardroom behavior and process. The following quote by former Chief Justice William Rehnquist of the United States Supreme Court captures the importance of Delaware's business courts to

289. Carney et al., *supra* note 1, at 124–25.

290. Simmons, *supra* note 1, at 1189–90.

291. Brummer, *supra* note 22, at 1087; Thomas, *supra* note 15, at 1949.

292. Brummer, *supra* note 22, at 1087.

293. Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 148 (2009).

294. *See* Hamermesh, *supra* note 5, at 12 ("Such encroachments are unlikely to make other states' systems more attractive, and they would do little if anything to detract from the advantages of Delaware's system identified above, or to divert new public company formations from Delaware to other U.S. states.").

295. *See* Simmons, *supra* note 1, at 1190 ("While some critics would describe the current relationship between Delaware and the SEC as a 'good cop, bad cop' routine with publicly traded firms, the more accurate characterization is a complementary relationship where both regulators provide security for investors.").

the nation:

> In light of its 200 year history, the Delaware Court of Chancery deserves our celebration, not only as a unique and vibrant Delaware institution, but as an important contributor to our national system of justice. The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery. Because the Court of Chancery, by design, has no jurisdiction over criminal and tort cases—matters which create huge backlogs in other judicial systems—corporate litigation can proceed quickly and effectively. The Delaware Supreme Court, similarly, is poised to act quickly in important corporate cases.
>
> Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court can make such a claim . . . . Over 50% of the country's major public corporations have chosen to incorporate in Delaware, and the judges of the Court of Chancery and the Delaware Supreme Court are well aware of the national importance their decisions hold.[296]

Today, Delaware and its courts continue to respond to complex business disputes, but in a more globalized context. Global competition—as reflected in capital migration toward foreign markets, the growing appeal of foreign securities exchanges, multi-jurisdictional litigation, tax-inversion strategies, and international arbitration—poses the greatest threat to Delaware's preeminence. This is, however, a common threat shared by Delaware and the nation. Globalization may bring greater economic integration and interconnectedness, but it is also characterized by political volatility and fragmentation.[297] Under such circumstances, trusted jurisdictions do not lose their salience—they become more attractive. Jill Fisch reflects on the advantages Delaware may have in responding to globalization challenges:

> Developments in business and the capital markets such as globalization and changes in equity ownership will continue to bring new challenges to business regulation. In the United States, state-based regulation has proven itself well-positioned to respond to these challenges. Although a top-down federal mandate is a tempting response to a financial crisis, members of Congress should resist the temptation to interfere with Delaware lawmaking.[298]

By eliminating Delaware's advantages and potentially raising the cost of capital for firms, federal preemption could potentially strengthen the hand of foreign jurisdictions in attracting investment capital, spur corporate migration, and undermine the United States' global significance in the corporate governance arena.[299] Damage to Delaware's global

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296. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992).

297. *See* Phillip Stephens, *'Fragmentation' and 'Identity' are Reshaping the World*, FIN. TIMES (Dec. 18, 2014, 2:42 PM), http://www.ft.com/cms/s/0/d77395b6-8561-11e4-ab4e-00144feabdc0.html#axzz3pLaLLPX7 (discussing the fragmentation that has resulted from global integration, particularly in the Middle East).

298. Fisch, *supra* note 18, at 782.

299. *See* Ribstein & O'Hara, *supra* note 44, at 708 ("Second, as would be expected from legislation at the level of the nation rather than a small state like Delaware, interest groups are likely to interject their concerns into

brand could undermine firm value to the extent that equity markets discount for weak or unpredictable governance structures—including courts. Through providing a valuable service to multinational firms in times of relative peace and crisis, Delaware and its business courts strengthen the reputation and function of U.S. corporate governance.

corporate law.").