Delaware Law Mid-Century: Far from Perfect but Not Leaving for Las Vegas Quite Yet

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This Article examines controversies surrounding certain recent Delaware corporate law decisions from the perspective of the jurisdictional competition among states for corporate charters. I begin with the assumption that Delaware has state-of-the-art and up-to-date corporate law interpreted in a legal environment void of corruption. Delaware's dominance in the jurisdictional competition for corporate charters, however, may be in jeopardy nevertheless, as significant stockholders increasingly express an interest in fleeing Delaware for other states, and Delaware lawyers and corporate advisors express unprecedented unease about the legal environment in Delaware. The apparent vulnerability of Delaware is understandable when one recognizes that sometimes even outstanding products fail in the marketplace. Products sometimes fail because they are too complicated or risky to use, or because the people who make the decision to buy the product assign a low or even negative value to their supposedly superior characteristics. Here I argue that this is happening in Delaware. The problem is exacerbated by what is perceived to be the "suspicious and negative tone [adopted] toward corporate boards and management" in certain opinions that weaken the contracting power of controlling shareholders and afford legal "protection" to minority and noncontrolling shareholders who neither want nor value the "protections" foisted on them. These protections appear to be unwelcome by controlling shareholders and their advisors who are highly influential in the decision about where to incorporate. Their increasing dissatisfaction with the Delaware legal landscape explains the actual and threatened departures from Delaware.

The Article makes three points about the recent decisions and the intervention by the Delaware legislature to unwind those decisions. First, while these decisions alienated important Delaware constituents, particularly controlling shareholders, the minority shareholders who ostensibly were the beneficiaries of those decisions did not perceive any benefits from the decision and actually opposed the decisions when they had the opportunity to do so. Support for my contention that recent opinions "protecting" minority shareholders did not really protect them is found in: (a) empirical findings that Delaware law does not improve the value of controlled firms, and may decrease it; (b) votes of Tesla non-controlling shareholders to approve Tesla CEO Elon Musk's pay both before and after a ruling "protected" those very shareholders from Musk by striking down his pay; and (c) the willingness of non-controlling shareholders to invest in companies (like Moelis) after being fully informed of the very contractual arrangements between the controlling shareholder and the company that were subsequently struck down by the Delaware Chancery Court. Second, the Delaware constituents most involved in making chartering decisions

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are increasingly uncomfortable advising firms to charter in Delaware because they have been targeted by the recent decisions. Prominent among these constituents are controlling shareholders and transactional attorneys and their advisors. Finally, while the Delaware legislature can, and did, reverse decisions that harm Delaware's competitive position, the legislature cannot change the anti-controlling-shareholder tone in those decisions. As such, the risks to Delaware's competitive position seem to be higher than at any other time in recent history.

INTRODUCTION

The jurisdictional competition for corporate charters, and the dominant market position of the state of Delaware are popular topics among corporate law scholars and have been for years. As a historical matter, the conversation has not been about *whether* Delaware will retain its dominant position, because the State's dominance has never been seriously threatened until recently. Rather the discussion generally has focused on *why* Delaware is the dominant state for business incorporations and whether its dominant position is normatively positive for shareholders and/or for society in general.

However, things appear to be changing. In April, 2024, 20 or so distinguished practitioners in a major law firm, including one former Chancellor of the Delaware Court of Chancery,[1] joined together to issue a "client advisory" warning the firm's clients that "a conversation has emerged as to whether Delaware should remain the favored state of incorporation for business entities."[2] These practitioners and the former Chancellor opined that the "current conversation" about Delaware's market dominance "is, in our experience and based on markers in the market, serious."[3] Ultimately, however, the authors conclude, correctly, I believe, that "Delaware is likely to remain in use for some time."[4]

In this Article, I make three contributions to the conversation about whether Delaware will retain its dominant position in the jurisdictional competition for corporate charters. Preliminarily, building on a point originally made by my colleague Roberta Romano, I

1. *See, e.g., William B. Chandler III*, WILSON SONSINI https://www.wsgr.com/en/people/william-b-chandler-iii.html [https://perma.cc/XN6P-WY9E] ("He previously served as Chancellor of Delaware's Court of Chancery.").

2. Amy L. Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, WILSON SONSINI (Apr. 23, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html [https://perma.cc/DH5V-DGER].

3. *Id.*

4. *Id.*

observe that Delaware is offering a multi-faceted "product."[5] This product is an extremely important one, at least from Delaware's perspective as revenue associated with chartering various types of companies totaled $1.3 billion in 2023,[6] and "indirectly or directly" accounts for approximately one-third of the state's gross revenue, according to Delaware Chief Justice Collins Seitz.[7]

The product being offered by Delaware is comprised of services, not only from Delaware's acknowledgedly "*talented*" and "*knowledgeable*"[8] judiciary, but also from the legislature and the executive branch. The Delaware legislature not only offers an "*up-to-date and carefully considered*"[9] set of corporate law statutory provisions but also one that is *highly responsive* to the preferences of corporations that are chartered there,[10] as well as one that historically was "apoliticized and moderate."[11] The executive branch, through the offices of the Secretary of State, contributes to Delaware's success in the jurisdictional competition for corporate charters by being "*nimble and user-friendly*,"[12] with important filings such as certificates of incorporation, charter amendments, certificates of merger, and franchise tax documents are processed "quickly and effectively"[13] and without interference.

I argue that, while the Delaware judiciary remains uniformly talented, knowledgeable, and incorruptible, the legislature remains responsive, and the Secretary of State's office remains highly efficient, there is a concern that certain decisions reflect a "suspicious or negative" attitude towards business.[14] This change in perception about judicial attitude marks a sharp break with historic perceptions, and it is a change that matters. It is generally difficult, and often impossible, for public companies to avoid being sued, and, understandably, directors and officers do not like having their contributions to the success of their company challenged, as Elon Musk was in a recent decision generally deriding "superstar CEOs" and questioning their value-added.[15] For example, in the case invalidating Elon

5. *See generally* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (analyzing features of state corporate law).

6. Jonathan Macey, *How to Make Delaware Safe for Incorporation*, WALL ST. J. (Feb. 24, 2025), https://www.wsj.com/opinion/how-to-make-delaware-safe-for-incorporation-business-corporations-policy-law-46b2c03b (on file with the *Journal of Corporation Law*).

7. Sarah Petrowich, *Judicial Branch Requests Funding for New Positions to Decrease Judicial Officer Case Load*, DEL. PUB. MEDIA (Feb. 15, 2024), https://www.delawarepublic.org/politics-government/2024-02-15/judicial-branch-requests-funding-for-new-positions-to-decrease-case-load-of-judicial-officers [https://perma.cc/ZZX4-PJGF].

8. Simmerman et al., *supra* note 2.

9. *Id.*

10. Romano, *supra* note 5, at 226.

11. Simmerman et al., *supra* note 2. Roberta Romano has observed that an advantage to incorporating in Delaware is that the Delaware State Constitution requires that any revision to the corporate code be supported by a two-thirds supermajority of both houses of the state legislature. Romano, *supra* note 5, at 241; DEL. CONST. art. IX, § 1.

12. *See* Simmerman et al., *supra* note 2 (contrasting this with "reports from other states of routine delays—ranging from days to months—for the processing of routine corporate filings.").

13. *Id.*

14. *Id.*

15. Tornetta v. Musk, 310 A.3d 430, 448, 507–08 (Del. Ch. 2024). For example, the opinion indicated that the board was "perhaps starry eyed by Musk's superstar appeal," using the term "superstar CEO" or "superstar" 21 times and suggesting that Musk was not significantly different than other CEOs. *See generally id.* The concept of *superstar CEOs* is addressed frequently in the opinion; only five of the 21 uses of the term are for citations.

Musk's compensation package, there was no recognition of the fact that Elon Musk or any CEO might well have made truly unique and irreplaceable contributions to the company that might lead to unique forms of compensation and render the use of benchmarking the CEO's salary to that of other CEOs inappropriate.[16] Rightly or wrongly, it seems likely that many shareholders view the contributions of the CEOs of the companies they have invested in as unique and more entrepreneurial than managerial. Such shareholders likely would find fault with a legal regime that made it illegal for them to express this view in the compensation arrangements offered to retain such CEOs.

Additionally, this Article makes the point that what has been, rightly or wrongly, characterized as the "suspicious and negative tone [adopted] toward corporate boards and management"[17] by Delaware judges, occasionally stands in sharp contrast to the border-line veneration that Delaware judges have shown towards the plaintiff-side lawyers who sue these officers and directors.[18] It is important not to lose sight of the fact that the same agency costs that plague corporate officers and directors similarly plague the plaintiffs' lawyers who sue these officers and directors, as Chief Justice Seitz clearly recognized in his opinion in *In re Dell Techs. Inc. Class V S'holders Litig.*[19] In other words, just as officers and directors do not always act in the best interests of their shareholders, plaintiffs' lawyers do not always act in the best interests of the shareholders they ostensibly represent. In fact, *Tornetta v. Musk*, a case in which lawyers persisted in challenging a transaction

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The opinion also adduces examples of "visionaries" (including Jeff Bezos, Bill Gates, and Mark Zuckerberg) "with large pre-existing equity holdings foregoing compensation entirely." *Id.* at 537.

16. *Id.* at 518–19.

17. Simmerman et al., *supra* note 2. On the other hand, from the plaintiffs' lawyers' perspective, the deck appears to be stacked in favor of defendants because the path of least resistance is for a judge is to dismiss complaints, approve settlements, and not award significant damages. Joel Edan Friedlander, *Thoughts of a Jewish-American Plaintiffs' Lawyer on the Past and Present of Stockholder Litigation*, M&A J. Nov./Dec. 2023, at 1, https://themandajournal.com/articles/vol23/iss4/thoughts-of-a-jewish-american-plaintiffs-lawyer-on-the-past-and-present-of-stockholder-litigation/ (on file with the *Journal of Corporation Law*).

18. The recent decision in *Tornetta v. Musk II* to award the Plaintiff's counsel with $345 million in fees in a case in which the Defendants bore the burden of proof for showing what the court viewed to be obvious and massive corporate governance failures is tangible evidence of the benefit that courts see in the value of plaintiffs' attorneys. *See* Tornetta v. Musk, 326 A.3d 1203, 1262–63 (Del. Ch. 2024) (praising plaintiff's counsel for "litigat[ing] the action effectively and to great success"). *See also* Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024) ("TripAdvisor"), *rev'd*, Maffei v. Palkon, No. 125, 2024 WL 384054 (Del. Feb. 4, 2025), where Vice-Chancellor Laster described litigation rights as "first-class rights," and claiming that without legal rights enforceable through litigation, "an investor's capital becomes a gift." *Id.* at *11 (citations omitted).

19. *In re* Dell Techs. Inc. Class V S'holders Litig., 326 A.3d 686, 697 (Del. 2024) (noting that, despite certain safeguards, "an inherent conflict still arises between the class members and their attorneys . . . [because] [t]he more the attorneys receive, the less goes to the class."). Moreover, plaintiffs' lawyers bringing class action and derivative lawsuits are not subject to meaningful market constraints on their conduct. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991):

> Plaintiffs' class action and derivative attorneys . . . are subject to only minimal monitoring by their ostensible 'clients,' who are either dispersed and disorganized (in the case of class action litigation) or under the control of hostile forces (in the case of derivative litigation). Accordingly, plaintiffs' class and derivative attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit. The absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client.

overwhelmingly favored by minority shareholders seems to be an example of lawyers acting against the interests of a clear majority of the minority shareholders.

Considering these two points together generates a simple hypothesis for why Delaware's dominant competitive position as the *situs* of incorporation for United States businesses recently has been put into doubt. Simply put, Delaware corporations and their lawyers are feeling unwelcome and are raising concerns that the plaintiffs' side of the bar is entitled to more deference than the defense bar.

Additionally, this Article addresses the question of whether any of this matters. I predict that Delaware is highly unlikely to lose its dominant position despite the recent concerns expressed over a handful of recent opinions that have gone against directors and controlling shareholders. This prediction is based on two important facts. First, the judicial hostility towards management and controlling shareholders in particular, and the oddly unbalanced judicial views of the value added in litigation by the plaintiffs' bar and the defense bar, are isolated. Second, it is important to bear in mind that Delaware does not have to be perfect—or even particularly good in an absolute sense—to retain its dominant competitive position among the states. Rather, Delaware can retain its dominant competitive position simply by being perceived as marginally better than the next best alternative available to investors and entrepreneurs and their advisors. As of now, there is no clear superior alternative to Delaware.

This Article begins in Part I by making the point that the winner of the jurisdictional competition for corporate charters will not be decided based on which state has the "best law" in some abstract or aesthetic sense. Rather, the winner of the jurisdictional competition will be determined by which state's corporate law holds the greatest appeal to the relevant decision-makers, and those decision-makers may be concerned by factors other than the actual substantive content of a state's law and the technical mastery of the judges interpreting that law. Corporate agents, like lawyers and financial advisers, and fiduciaries, like directors and controlling shareholders, make the decision about where to incorporate. To be successful in the jurisdictional competition for corporate charters, a state must appeal to those decision-makers. Turning to the preferences of outside advisors, lawyers and other advisers want to be able to engage in corporate planning with confidence and certainty. Similarly, controlling shareholders want the agreements that they enter with the corporations they control to be respected by courts. From the perspective of these decision-makers, feuds, particularly public feuds between the legislature that promulgates statutes and the courts that interpret them, could be bad for business.

Certain judges in Delaware exercised their clear right to make their voices publicly heard about proposed law reform in the face of the legislative debates in the summer of 2024. From the perspective of the jurisdictional competition for corporate charters, the issue is not whether these judges had the right to speak out. Clearly, they did. Moreover, I am informed that the judges who spoke out publicly tried to provide input on the legislation confidentially and were criticized for doing so, thereby prompting them to go public.

The issue is not whether these judges had the right to express their opinion. Judges in Delaware have voiced their opinions on legislation in the past without being criticized.[20]

20. *See, e.g.*, Friedlander, *supra* note 17, at 7–8 (describing three different current and former members of the Delaware Chancery Court weighing in on DGCL provisions).

The issue is not even whether these judges were correct on the merits in their pronouncements. Rather, the issue is whether the public nature of the squabbles between Delaware judges and the Delaware legislature that occurred in 2024 harmed the Delaware franchise. In this Article I argue that it did.

In Parts II and III of this Article I discuss recent controversies in Delaware and ground the hypothesis that Delaware may be losing its appeal to incorporators on the factors identified in Part I. I discuss the decisions that have received the most criticism and argue that these decisions were unappealing to the very groups and individuals, lawyers and outside advisors and controlling shareholders, who have the most influence on companies' decisions about where to incorporate new companies and about whether existing companies should remain incorporated in Delaware.

I. INTEREST GROUPS AND DELAWARE CORPORATE LAW

Sometimes even outstanding products fail in the marketplace.[21] Products may fail because they are too complicated or too risky to use, or because the people making the decision about whether to buy the product do not assign sufficient value to their superior characteristics to justify the price being charged for the products. Thus, some products fail, not because they lack value, but because the companies that manufacture such products do not consider "whether [their] customers will recognize this value."[22] As argued below, I believe that this is the case in Delaware. Simply put, Delaware corporate law, while nuanced and sophisticated, may simply have become too complicated, particularly as it regards controlling shareholders. In recent years, a mystifying shadow law for corporate controllers has emerged that practitioners, investors, and controlling shareholders find frustrating and opaque. Decisions construing Delaware statutes and applying Delaware common law run hundreds of pages in length. The length of these opinions can be explained based on the length of the briefs that the judges receive and based on the number of arguments presented in such briefs, but all of this speaks to the growing complexity of Delaware corporate law.

As shown in this Article, Delaware law sometimes provides protections to minority and non-controlling shareholders from controlling shareholders, despite the lack of any evidence that such shareholders need or desire such "protections." In fact, it appears that these minority and non-controlling shareholders place little value on such benefits.[23] In any case, from the perspective of the jurisdictional competition for corporate charters, it matters that these non-controlling shareholders are, by definition, not the relevant decision-makers in the incorporation decision. The relevant decision-makers are the controlling shareholders and corporate managers, who often "make the decision about where to incorporate,"[24] along with their lawyers who are "[t]he most influential advisors to corporate

21. Duncan Simester, *Why Great New Products Fail*, MIT SLOAN MGMT. REV. (Mar. 15, 2016), https://sloanreview.mit.edu/article/why-great-new-products-fail/ [https://perma.cc/PD4W-LCMH] ("A lot of great new products fail . . . .").

22. *Id.*

23. *See, e.g.*, *infra* notes 32–33 and accompanying text.

24. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 485 (1987).

management,"[25] and their investment bankers,[26] particularly in the takeover context.[27] In other words, if "Delaware's dominance in the corporate chartering market stems from the fact that its substantive law rules benefit those ultimately responsible for the incorporation decision[,]"[28] then Delaware's dominance in the jurisdictional competition for corporate charters may be in doubt.

Recent decisions directly undermine the preferences of majority shareholders and their advisors, who are highly influential in the incorporation decision. These decisions have been applauded in the press, who publish articles with titles like "Elite Delaware Court Stands Up to 'Big Money-Powered People.'"[29] Thus, Delaware courts' standing against "big money powered people" may create a competitive problem for the state of Delaware to the extent that these "big money powered people" influence incorporation decisions.

The tension between these "big money powered people," particularly controlling shareholders, and the minority and non-controlling shareholders being supported in recent Delaware court decisions requires further exploration. Most importantly, as Michael Jensen and William Meckling observed decades ago, controlling shareholders have powerful incentives to accede to rules that provide protections for minority shareholders because such minority shareholders will anticipate that controllers will act self-interestedly in the future.[30] Without protections for minority shareholders in place, such minority and non-controlling shareholders simply will decline to invest, or will demand a substantial risk premium to compensate for the anticipated self-interested opportunism of the controllers. Specifically, an owner/manager attempting to raise outside funds from investors:

> [W]ill bear the entire wealth effects of these expected [agency] costs so long as the equity market anticipates these effects. Prospective minority [and non-controlling] shareholders will realize that the owner-manager's [i.e., controlling shareholder's] interests will diverge somewhat from theirs, hence the price which they will pay for shares will reflect the monitoring costs and the effect of the divergence between the manager's [controlling shareholder's] interest and theirs.[31]

As Ralph Winter similarly recognized in the context of the jurisdictional competition for corporate charters, the notion that Delaware managers and controlling shareholders can swindle or cheat or otherwise rip-off or disadvantage their firms' minority shareholders is

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25. *Id.* at 486; *see also* Romano, *supra* note 5, at 273–74 (describing survey results that show corporate lawyers' "active involvement" in reincorporation decisions).

26. Macey & Miller, *supra* note 24, at 487 ("[C]orporations often rely on the recommendations of investment bankers in deciding where to incorporate.").

27. Romano, *supra* note 5, at 275 n.72.

28. Macey & Miller, *supra* note 24, at 487.

29. Jennifer Kay, *Elite Delaware Court Stands Up to 'Big Money-Powered People*,*'* BLOOMBERG L. (Feb. 28, 2024), https://news.bloomberglaw.com/esg/elite-delaware-court-stands-up-to-big-money-powered-people (on file with the *Journal of Corporation Law*) (quoting University of Iowa Law Professor Robert Miller's views on the work of Delaware judges in holding "corporate founders and executives accountable to shareholders").

30. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 313 (1976) (describing how minority shareholders are willing to pay stock prices reflecting the cost of monitoring controlling shareholder managers and how controlling shareholder managers are willing to take on the costs of being monitored).

31. *Id.*

highly implausible under a wide range of real-world conditions.[32] Minority shareholders supply much-needed equity to the corporations in which they invest. A state that fails adequately to protect minority shareholders "will drive . . . equity capital away."[33] Put simply, providing additional legal rights and protections for minority shareholders is only sensible if, and to the extent that, minority shareholders place a positive value on the rights and protections that judges and legislatures create for them.

It seems clear, however, that the particular "protections" being provided to minority shareholders by the most controversial recent Delaware Chancery Court decisions are more illusory than real. The point here is that, in many contexts, the interests of minority or non-controlling shareholders and their majority or controlling shareholders are aligned. In particular, both controllers and non-controllers want the company to flourish and for the value of the company's equity to increase. This point applies in the context of executive compensation, where non-controlling shareholders, whose money is used to pay very high levels of executive compensation, may support such generous pay packages if they provide sufficient motivation and incentives for executives to work harder to maximize firm value.

In any case, it is very clear, as shown below, that minority shareholders in controlled companies in Delaware do not actually value the purported ostensible benefits being foisted upon them in certain recent decisions invalidating agreements between corporations and their controlling shareholders. The lack of appreciation for the protections being afforded to non-controlling shareholders by aggressive interpretations of Delaware law was strikingly illustrated by the non-controlling shareholders in the electric vehicle company Tesla, who overwhelmingly approved the pay package of company CEO Elon Musk shortly after that pay package had been invalidated supposedly for their benefit and protection.[34]

Similarly, in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*,[35] the Delaware Court of Chancery invalidated large swaths of a stockholder agreement between Moelis & Company and its founding and controlling shareholder that gave the founding and controlling stockholder control over various corporate governance matters.

The value added to minority shareholders from the restrictions placed on controlling shareholders in this case is far from clear. Although, as discussed below, the value to minority shareholders can be viewed as irrelevant because the case involved the interpretation of a statute, the value to minority shareholders and controlling shareholders is certainly relevant from the standpoint of the jurisdictional competition for corporate charters.

The case features the interaction between section 141(a) of the Delaware General Corporate Law,[36] which creates a default rule focusing corporate governance of Delaware corporations on boards of directors and modern internal governance arrangements reflected in what the Moelis court described as a "new-wave [of stockholder] agreements [that] contain

32. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 289 (1977).

33. *Id.*

34. *See* Tornetta v. Musk, 310 A.3d 430, 446 (Del. Ch. 2024) (describing Musk and co-defendants as "unable to prove" that a vote on Musk's pay package, affirmed by a majority of Tesla's minority shareholders, was "fully informed"); *see also infra* note 148 and accompanying text (describing Tesla shareholders' approval of the pay package months after this holding).

35. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 881 (Del. Ch. 2024).

36. Section 141(a) provides that "the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." DEL. CODE ANN. tit. 8, § 141(a) (2020).

extensive veto rights and other restrictions on corporate action."[37] Moreover, the stockholder agreement with the Moelis board that was challenged in *Moelis* had been in place for almost a decade without causing any harm to minority shareholders that the plaintiffs challenging the agreement could identify.[38]

A primary justification for section 141(a) is to prevent some shareholders from entering into contracts with the company that harm other shareholders. Another justification is to make sure that the people making the decisions on behalf of the company and its shareholders are the people who owe fiduciary duties to the company and its shareholders. Of course, it is true that unavoidable conflicts between a contract and a mandatory statutory rule must be resolved in favor of the statute. The question is whether the conflict could have been avoided. There was not even an allegation in *Moelis* that the stockholder agreement being challenged had ever been invoked to block board-desired action or to have caused the stockholders any harm.[39] Thus, even if there was no way to reconcile the shareholder agreement with DGCL § 141(a), the entire dispute could have been avoided by a determination that the issue was not ripe for adjudication and it was unnecessary to resolve the issue.

While the issue of who was harmed and who benefited is irrelevant to the issue of whether the Delaware statute was violated, it would seem relevant to the issue of whether a court should exercise its discretionary power to decide a case that did not need to be decided. In this context, it is important to recognize that the controlling stockholder agreement that was invalidated in *Moelis* was put in place when the company sold shares to the public in a 2014 initial public offering (IPO). As the court in *Moelis* recognized, "[i]n the prospectus for the IPO, the Company disclosed that Moelis and the Company would enter into the Stockholder Agreement."[40] And as Larry Hamermesh observed in a letter supporting proposed amendments to the Delaware General Corporation law overturning *Moelis*, "the invalidated provisions were fully disclosed when the company went public ten years ago, and went unchallenged . . . ."[41] The fact that the provisions were disclosed is conclusive proof that non-controlling shareholders were not harmed because such disclosure enabled prospective any and all non-controlling investors who thought that they might be disadvantaged or harmed by the Company's agreement with its controlling shareholder to decline to invest, or to demand terms that would compensate them for any expected costs associated with the agreement.

The argument here is not that the court ignored the disclosure or the fact that the price paid by the Moelis minority shareholders reflected the risks associated with the challenged shareholder agreement. Rather the point is simply that these facts would be relevant to minority shareholders and to controllers.

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37. *Moelis*, 311 A.3d, at 817.

38. *See id.* at 868 (noting the defendant company's argument that plaintiffs have not pointed to a single incident of concrete harm to the plaintiffs).

39. Brief of Professors Joseph A. Grundfest et al. as Amici Curiae Supporting Reversal at 13, Moelis & Co. v. West Palm Beach Firefighters' Pension Fund, No. 340 (Del. Oct. 31, 2024).

40. *Moelis*, 311 A.3d at 824.

41. Lawrence Hamermesh, *Letter in Support of the Proposed Amendments to § 122 DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2024), https://corpgov.law.harvard.edu/2024/06/11/letter-in-support-of-the-proposed-amendments-to-%C2%A7-122-dgcl/ [https://perma.cc/979M-HFHN].

The interests of controlling shareholders and non-controlling shareholders sometimes conflict, but they do not always conflict. Over a wide range of corporate governance issues, both controlling and non-controlling shareholders share the same goal, which is to increase shareholder value for the benefit of all the investors. As such, Delaware law seems to be providing "protections" for non-controlling shareholders that are not wanted or valued by the non-controlling shareholders who are the intended beneficiaries of such supposed protections.

One way to defend the decisions in *Moelis* and *Tornetta* is to argue that the judges were compelled to render the decisions that they rendered in those cases, regardless of the preferences of the minority shareholders. Reasonable people can disagree about this. But even assuming for the sake of argument that Delaware law is compelling judges to reach outcomes that produce costs without concomitant benefits, it is difficult to see why the law should not be changed.

Another concern of those interested in having Delaware retain its dominant position in the jurisdictional competition for corporate charters is that undue emphasis is being placed on technicalities and formalities and that insufficient respect is being accorded to market practice.[42] *Sjunde AP-Fonden v. Activision Blizzard Inc*. provides a vivid illustration of these problems.[43] This lawsuit was brought on behalf of a shareholder in Activision Blizzard, Inc., which was acquired by Microsoft Corporation. Microsoft approached Activision about a takeover in 2021, and later that year the two companies reached a tentative agreement to merge.[44] The Activision Board of Directors approved the merger on January 17, 2022, based on a draft merger agreement that did not contain certain disclosure schedules and did not include the certificate of incorporation for the entity that would survive the merger as an attachment to the merger agreement.[45] Similarly, the merger agreement attached to the proxy statement did not contain the disclosure schedules or the certificate of incorporation for the surviving entity.[46]

The merger proposal was overwhelmingly popular with shareholders, receiving approval from more than 98% of the stockholders voting.[47] Chancellor McCormick sided with plaintiffs who sued the Activision Board of Directors, Microsoft, and its board and the special purpose merger subsidiary of Microsoft created to effectuate the merger, on the grounds that these entities violated section 251 of the Delaware General Corporation

42. For expressions of these two concerns by practitioners, see John Stigi & Eugene Choi, *How Activision Ruling Favors M&A Formalities Over Practice*, SHEPPARD MULLIN (Mar. 25, 2024), https://www.sheppardmullin.com/media/publication/2188_Law360%20 [https://perma.cc/29KY-5DZQ]; *see also* Michael Holmes et al., *Delaware Court of Chancery Holds That Common Practice of Boards Approving Draft Merger Agreements 'Needs to Check Itself'*, VINSON & ELKINS (Mar. 4, 2024), https://www.velaw.com/insights/delaware-court-of-chancery-holds-that-common-practice-of-boards-approving-draft-merger-agreements-needs-to-check-itself/ [https://perma.cc/95B2-VYVY].

43. Sjunde AP-Fonden v. Activision Blizzard, Inc., C.A. No. 2022-1001, 2024 WL 863290, at *1 (Del. Ch. Feb. 29, 2024).

44. *Id.*

45. *Id.*

46. *Id.* at *1–2.

47. *Id.* at *2. From a legal point of view, the relevant measure of approval is based on the percentage of outstanding shares, not the percentage of stockholders voting. The approval by voting shareholders is, however, a good measure of shareholder support for a proposal.

Law.[48] Section 251(a) requires that the resolution adopted by boards of directors to approve merger agreements must comply with section 251(b),[49] and 251(b) provides that "the board . . . shall adopt a resolution approving an agreement of merger. . . ."[50]

The court observed that section 251(b) requires that the merger agreement approved by the target company board be "essentially complete" and the court followed the statute despite its inconsistency with market practice or the lack of harm.[51] As one law firm noted in the wake of the opinion:

> [I]t also remains to be seen what, if any, damages or other relief a stockholder could plausibly seek. In *AP-Fonden*, for instance, it is unclear how the plaintiff could claim that Activision stockholders were harmed either by the merger (again, at a large premium) or by the board's alleged statutory violations in approving it, or how plaintiff could claim that its efforts conferred some benefit on stockholders warranting an award of attorney fees.[52]

The court also found that the Activision Board violated Delaware law by designating a board committee to approve the merger agreement.[53] Section 141(c)(2) of the DGCL empowers boards of directors of Delaware companies to designate boards of directors to exercise all of the powers of the board, with a few exceptions.[54] Among the exceptions is a provision that requires full board approval of matters requiring approving or recommending to the stockholders any matters (other than the election or removal of directors) that Delaware law expressly requires be submitted to stockholders for their approval.[55] The problem here was that the Activision Board delegated to an *ad hoc* committee of the Board the authority to declare and pay dividends while the merger was pending, and the *ad hoc* committee invoked that authority to authorize the Company to make certain dividend payments while the merger was pending.

Experienced practitioners analyzing the decision gingerly pointed out that the statutory violations identified in *Sjunde AP-Fonden* were illustrative of "an increasing focus on complying with the formalities of the DGCL."[56] Indeed, the headline of one analysis of the opinion was "How Activision Ruling Favors M&A Formalities Over Practice."[57] On the other hand, it is worth noting that the decision being criticized was rendered in the context of a motion to dismiss, and that issues related to market practice and the rationale for relaxing enforcement of statutes that some view as overly technical potentially would be considered at trial.

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48. *Sjunde AP-Fonden*, 2024 WL 863290, at *5, *8.

49. DEL. CODE ANN. tit. 8, § 251(a) (2020).

50. *Id.* § 251(b).

51. *Sjunde AP-Fonden*, 2024 WL 863290, at *7.

52. Holmes et al., *supra* note 42.

53. *Sjunde AP-Fonden*, 2024 WL 863290, at *9 ("[A] board cannot delegate the determination of the merger consideration to a committee.").

54. DEL. CODE ANN. tit. 8, § 141(c)(2) (2020).

55. *Id.* The draft merger agreement also did not address the ability of Activision to pay dividends while the merger was pending. *Sjunde AP-Fonden*, 2024 WL 863290, at *1.

56. RUSSELL L. LEAF ET AL., RECENT DELAWARE MAJOR CORPORATE LAW DECISIONS 4 (2024), https://www.willkie.com/-/media/files/publications/2024/03/recent_delaware_major_corporate_law_decisions.pdf [https://perma.cc/FU86-U42U].

57. Stigi & Choi, *supra* note 42.

While these practitioners were right in their description, it remains the case that market practice does not trump law. Further, the fact that a statute appears merely formalistic does not undermine its authority. On the other hand, if a statute imposes rules that do not benefit minority shareholders and interferes with legitimate, ordinary and customary market practice, then repealing or revising the statute seems like a good idea for a state that wants to remain the top competitor in the jurisdictional competition for corporate charters.

Moreover, practitioners made it clear that the result compelled by the statute would not improve the quality of board deliberations in the mergers and acquisitions context, and it would not cause boards of directors to be better informed. Although it would upset ordinary and customary market practice:

> M&A practitioners often do not attach the charter of the surviving entity (which will become a wholly owned subsidiary of the buyer and not be relevant to target stockholders) as an exhibit to the version of the merger agreement distributed to the target board of directors. Additionally, the Activision board would have been informed of the final merger price by the company's counsel and financial advisors at the Board meeting approving the merger agreement (this would be reflected in the applicable Board minutes and in the bankers' book presented to the Board in connection with the fairness opinion). A substantially final draft of the disclosure schedules would typically be distributed to the target board by counsel during the course of the negotiations, though these disclosure schedules would not typically be viewed as part of the merger agreement requiring approval under Section 141. Exclusion of the disclosure schedules and the charter of the surviving entity from the proxy statement relating to the transaction is also market practice. Also, the exception to the dividend restrictions in the interim operating covenants would often be contained in the disclosure schedules (though in the Activision merger agreement it was contained in the merger agreement in the interim operating covenants).[58]

Other practitioners warned about "[t]echnicalities" and "complexities around board approval of merger agreements that were introduced by *Sjunde AP-Fonden*."[59] The holding (until it was overturned by statute)[60] required more lawyer time and involvement in papering merger transactions to make sure that statutory requirements were rigidly adhered to and that "all documents, exhibits and schedules are in final form with no open or missing items."[61] Thus, the sole beneficiaries of the decision appeared to be the transaction attorneys, but the transaction attorneys did not seem to appreciate or value the additional responsibilities created by the court in *Sjunde AP-Fonden*.

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58. LEAF ET AL., *supra* note 56, at 3–4.

59. Nicholas O'Keefe, *Delaware Enacts Controversial Market Practice Amendments to Its General Corporation Law*, FOLEY (July 18, 2024), https://www.foley.com/insights/publications/2024/07/delaware-market-practice-amendments-general-corporation-law/ [https://perma.cc/BS3Y-YBYU].

60. *See id.* ("The [recent statutory] amendments introduce several changes in order to overturn various procedural requirements in the merger approval process introduced in *Sjunde AP-Fonden v. Activision Blizzard, Inc*.").

61. William Mills & Claire McGuinness, *Sjunde AP-Fonden v. Activision Blizzard Inc.: What May be Common May not be Right*, CADWALADER (Apr. 10, 2024), https://www.cadwalader.com/resources/articles/sjunde-ap-fonden-v-activision-blizzard-inc-what-may-be-common-may-not-be-right [https://perma.cc/MB8Y-CUFA].

Again, I emphasize that this is not an argument against the result in the case. Rather it is an argument in favor of the law reform that followed the opinion. Similarly, the fact that the decision did not provide any discernible benefits to any group other than the plaintiffs' attorneys, who stood to collect fees for successfully suing a Delaware corporation, is an argument for overruling the result by statute.

The Delaware legislature moved quickly to reverse the outcome in *Sjunde AP-Fonden*, adding new sections 147 and 268 to the DGCL. Section 147 empowers boards to approve documents either "in final form or in substantially final form," and allowing specification that a document will be considered sufficiently "final" not only when all its material terms are set out in the document, but also when those terms are known to the board through other materials presented to it.[62] New section 268 responds to the *Sjunde AP-Fonden* court's determination that the Activision board was remiss because it did not approve the surviving company's charter amendments and certain disclosure schedules related to the merger in their final form.[63] New section 268 makes it clear that these documents will not be considered to be part of a merger agreement that must be approved by the board unless the merger agreement provides that such documents are part of the merger agreement.[64]

II. STATUTORY LANGUAGE MAY TRUMP MARKET PRACTICE, BUT NOT FOR LONG!

Recent concerns about the content of Delaware corporate law have, understandably, focused on the substantive content of certain Chancery Court decisions. Highly respected, reputable denizens of the Delaware bar like former Chancellor William Chandler and law professor Larry Hamermesh have sounded alarms. In testimony before the Delaware legislature, Chandler observed that "right now the corporate market is not feeling good about Delaware . . . because of the uncertainty and unpredictability of a few decisions by just two judges."[65] Many other interlocutors came to the vigorous defense of these judges and noted that singling out these two judges threatened judicial independence and was itself "potentially damaging to Delaware's authority in the realm of corporate law."[66] In addition, experienced practitioners argued that the recent decisions overturned or otherwise impacted by the statute "did not create 'uncertainty' or 'unpredictability' in any meaningful sense,"[67] but instead were "faithful efforts to apply Delaware law to scenarios that did not admit of predictable contrary outcomes."[68] In addition, Iowa Law Professor Robert Miller

62. DEL. CODE ANN. tit. 8, § 147 (2024).

63. *See* Sjunde AP-Fonden v. Activision Blizzard, Inc., No. 2022-1001, 2024 WL 863290, at *8–9 (Del. Ch. Feb. 29, 2024) (denying Activision's motion to dismiss plaintiff's DGCL 251(b) claim, as the Survivor's Charter, the Disclosure Schedules, and other materials were not included in the Draft Merger Agreement).

64. DEL. CODE ANN. tit. 8, § 268 (2024).

65. Alex (@ajtourville), TWITTER (June 22, 2024), https://x.com/ajtourville/status/1804599633831661803 [https://perma.cc/LT3P-EF37].

66. Joel Edan Friedlander, *The Political Significance of Former Delaware Chancellor Chandler's Criticism of Chancellor McCormick and Vice Chancellor Laster*, CLS BLUE SKY BLOG (Jan. 16, 2025), https://clsbluesky.law.columbia.edu/2025/01/16/the-political-significance-of-former-delaware-chancellor-chandlers-criticism-of-chancellor-mccormick-and-vice-chancellor-laster/ [https://perma.cc/N7MK-2Z27].

67. *Id.*

68. *Id.*

defended the judges as "fearless" in holding iconic corporate founders and executives accountable to their shareholders and for proving "that we stand up to big money-powered people," "that everybody gets a fair deal in Delaware," and that "you don't get a better deal just because you're the richest guy in the world."[69]

The two judges whose decisions are the focus of all the controversy over the future of Delaware corporate law are J. Travis Laster and Kathaleen St. J. McCormick.[70] On the surface, a core feature of the debate is the extent to which Delaware courts in general, and these two judges in particular, are willing to adapt Delaware law to conform to actual corporate practice. As Vice Chancellor Laster put it, "[w]hat happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law, so the statute prevails."[71]

In a similar vein, Professor Hamermesh went so far as to posit that "[t]o some extent, there's a war between the bench and the corporate bar, and it's got to stop because the Delaware franchise really is at stake with that kind of behavior."[72] Outside of Delaware (but not far outside of Delaware) the Committee on Mergers, Acquisitions and Corporate Control Contests of the New York City Bar Association also weighed in, urging the Delaware legislature to pass legislation to put a stop to "the disruptive uncertainty that now hangs over Delaware-incorporated companies, and towards restoring the clarity, predictability, and practicality which has long been the hallmark of Delaware corporate law."[73] The New York lawyers went on to warn that "allowing the current lack of clarity to persist beyond the current legislative session would be unduly damaging to the functioning of Delaware corporations and to Delaware's reputation and standing."[74] The letter warned that leaving the *status quo* intact would damage both "Delaware corporations and [] the Delaware corporate franchise."[75]

It is important to keep in mind, however, that there is nothing new about what has transpired recently. As discussed below, Delaware judges issued an opinion (or two) that was widely (though certainly not universally) viewed as wrong and misguided and a threat to Delaware's competitive position, and the Delaware legislature quickly stepped in and promulgated corrective legislation.[76] One chapter of the 2024 version of this story related to the legal validity of stockholder agreements that conferred governance rights on stockholders that interfered with the exclusive governance authority of the boards of directors of Delaware corporations provided for in section 141(a) of the Delaware General Corporation Law.

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69. Kay, *supra* note 29.

70. *See* Friedlander, *supra* note 66 (discussing the criticism of Laster and McCormick).

71. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 816 (Del. Ch. 2024).

72. Jeff Montgomery, *Delaware's Corporate Law Debate Left 'Blood on the Floor'*, LAW 360 (June 21, 2024), https://www.law360.com/articles/1850449 (on file with the *Journal of Corporation Law*).

73. Email from Iliana Ongun, Chair, Comm. on Mergers, Acquisitions & Corp. Control Contests, to the Hon. Bryan Townsend, Senate Majority Leader, Del. Senate (June 10, 2024), https://www.nycbar.org/reports/proposed-amendments-to-the-delaware-general-corporation-law/ [https://perma.cc/S3GZ-939Y].

74. *Id.*

75. *Id.*

76. *See infra* notes 91–99 and accompanying text (discussing *Smith v. Van Gorkom* and the Delaware legislature's response to that decision).

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*,[77] the Delaware Court of Chancery spent 131 pages explaining that "[a] provision in a stockholder agreement that purports to enable stockholders to manage the business and affairs of a corporation is invalid."[78] The provisions required the Moelis & Company board of directors to obtain the consent of the company's founder, Ken Moelis, before taking a variety of corporate actions that covered "virtually everything the Board can do."[79] Other provisions of the stockholder agreement required the board to organize itself so that Moelis could select a majority of its members, including a requirement that the board nominate Moelis' designated candidates to the board and recommend that the shareholders vote in favor of these candidates.[80] Finally, the stockholder agreement required the Moelis board to organize board committees such that Moelis' director nominees dominated those committees in the same way that those nominees dominated the board itself.[81]

While supportable as a matter of statutory interpretation, in light of the fact that "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation,"[82] the decision was jarring to those accustomed to seeing courts and academics exalting the primacy of private ordering. Also, "many practitioners considered [the result to be] inconsistent with prevailing market practice,"[83] a point that Vice Chancellor Laster recognized repeatedly in his 131-page opinion,[84] such as when he pointed out that "[c]orporate planners now regularly implement internal governance arrangements through stockholder agreements . . . . [that] contain extensive veto rights and other restrictions on corporate action."[85] In fact, the decision in *Moelis* "sent shockwaves through the corporate governance world by striking down provisions in stockholder agreements that favored stockholders' rights and effectively limited a board of directors' ability to use its own best judgment in governance matters."[86]

The opinion was a reminder of the limits on private ordering imposed on lawyers and M&A advisors who write contracts between shareholders and corporations that purport to encroach on the authority of boards of directors to run businesses. This is not to say that the opinion was wrongly decided. The corporate governance provisions in the shareholder

77. *Moelis*, 311 A.3d at 863.

78. *Id.*

79. *Id.* at 818.

80. *Id.* at 820–21 ("The Recommendation Requirement improperly compels the Board to recommend Moelis' designees for election. The Vacancy Requirement improperly compels the Board to fill a vacancy created by a departing Moelis designee with another Moelis designee.").

81. *Id.* at 821 ("Determining the composition of committees falls within the Board's authority. A stockholder cannot determine who comprises a committee. The Stockholder Agreement purports to give Moelis that power by contract.").

82. Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (citing DEL. CODE ANN. tit. 8, § 141(a) (2020)).

83. Amy Simmerman & Jason Schoenberg, *Significant Amendments to the DGCL Are Set to Become Effective*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 10, 2024), https://corpgov.law.harvard.edu/2024/08/10/significant-amendments-to-the-dgcl-are-set-to-become-effective [https://perma.cc/YR3Y-HK2H].

84. *Moelis*, 311 A.3d at 816–17 (describing the case as involving a conflict between "market practice" and "statutory law").

85. *Id.* at 817.

86. Jonathan Dolgin & Emily J. Yukich, *Closure on Moelis: Delaware Takes Action*, FOX ROTHSCHILD (June 26, 2024), https://www.foxrothschild.com/publications/closure-on-moelis-delaware-takes-action [https://perma.cc/9NH5-ZBAE].

agreement between Ken Moelis and his company certainly encroached on the decision-making power and autonomy of the Moelis board of directors. Rather the point is that, right or wrong, the opinion was unpopular with the controlling shareholders who, by definition, make the decisions about where to incorporate their companies.

Moreover, the opinion is arguably at odds with Delaware judges' traditional reluctance to issue abstract judgments about potential future legal issues that have yet to galvanize into a problem that imposes tangible or cognizable harm on minority shareholders.[87] In particular, the court accepted the Moelis plaintiffs' abstract complaints about the power afforded to a company's founder without identifying any instances in which that power was exercised in a way that caused harm to the plaintiffs or anyone else. Of course, this meant that the Company's board was never provided any opportunity to demonstrate that their fiduciary obligations to minority shareholders and to the company prevented them from allowing the powers created by the agreement to be exercised in any way that might cause harm to the company or its minority investors.

Vice Chancellor Laster characterized Delaware statutory law as an "immovable object."[88] From his perspective as a judge this was true because judges cannot overturn statutes. Statutes, however, are not immovable objects from the perspective of the legislature. Delaware acted quickly to remove the immovable object and to correct what many transactional lawyers perceived to be overreaching and activism by the Chancery Court. In less than six months, the Delaware legislature overruled *Moelis* by enacting amendments to the Delaware General Corporation Law creating a new subsection (18) to section 122. The new statutory language makes it clear that "notwithstanding the provisions of Section 141(a) of the Delaware corporate code," corporate boards of directors have the authority to enter into the very sorts of agreements that were invalidated in *Moelis*.[89] Such agreements can: (a) give stockholders the right to restrict or prohibit a corporation from taking actions specified in a contract, regardless of whether the taking of such action would require approval of the board under other provisions of Delaware law; (b) require the approval or consent of non-board members before the corporation may take action; and (c) require the corporation and its officers and directors to take, or refrain from taking, actions specified in the contract.[90]

Certain aspects of the legislative overruling of *Moelis* (and other cases) are worth emphasizing. In particular, it is worth noting that this is far from the first time that Delaware legislature has stepped in to protect Delaware's competitive position in the jurisdictional competition for corporate charters when that competitive position was threatened by judicial decisions that were deemed improvident from a competitive perspective.

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87. On the ripeness issue, I acknowledge that the claim that the challenged contract was invalid was based on its alleged conflict with a statute. No fiduciary claims or questions about standards of review were raised. The court in *Moelis* argued that Delaware courts previously have found facial challenges to statutory validity to be ripe. *See* West Palm Beach Firefighters' Pension Fund v. Moelis Co., 310 A.3d 985, 1005 (Del. Ch. 2024) (citing precedent that a plaintiff's claim contesting statutory rights under the DGCL is ripe, even when there is not yet a putative breach of fiduciary duty).

88. *Moelis*, 311 A.3d at 816–17.

89. *See* DEL. CODE ANN. tit. 8, § 122(18) (2024) (providing that Delaware corporations have the right to contract with current and prospective shareholders with such consideration as, for example, "requir[ing] the approval or consent of 1 or more persons or bodies before the corporation may take actions specified in the contract").

90. *Id.*

There was a strong legislative response to the Delaware Supreme Court's infamous decision in *Smith v. Van Gorkom*,[91] which has been described as "the most controversial decision in the history of Delaware corporate law."[92] The legislative response to *Van Gorkom* was not slow, but it took seventeen months.[93] In *Van Gorkom*, the Delaware Supreme Court found that the experienced and unconflicted directors of a public company, TransUnion Corporation, were grossly negligent in agreeing to sell the company in a friendly acquisition that garnered an impressive 62% premium over market price.[94] The uproar that followed *Van Gorkom* was significantly greater than the tumult caused by the *Moelis* decision. Even so, the Delaware legislature did not overrule *Van Gorkom* and the case remains good law. In contrast, the state legislature acted almost immediately in the wake of *Moelis*, and the statute passed in response was intended to prevent the result in future cases.

The decision in *Van Gorkom* potentially subjected the target company's directors to millions of dollars in personal liability, far in excess of their directors' and officers' liability insurance policy limits, for making a decision that involved no conflicts of interest and produced a result overwhelmingly beneficial to shareholders. A distinguished academic, the University of Chicago's Dan Fischel, called the holding "one of the worst decisions in the history of corporate law."[95] The decision was shocking, and "[c]orporate America howled" in its wake.[96] Not long after, on July 1, 1986,[97] "[t]he Delaware legislature then eviscerated *Van Gorkom*"[98] by enacting Delaware General Corporate Law § 102(b)(7), which authorized corporations to include in their corporate charters provisions that limit or eliminate the personal liability of corporate directors for negligence, although not for violations of the duty of loyalty.[99]

There was a striking difference between what happened in the wake of the legislative response to *Smith v. Van Gorkom* and in the wake of the legislative response to *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* Specifically, the Delaware judiciary appropriately accepted the legislature's decision to change Delaware's legal landscape in the wake of *Smith v. Van Gorkom*, while the effort to undo the result in *Moelis* resulted in a strong reaction by Vice Chancellor Laster, the judge whose decision was called into question, and by his allies. Writing in his personal, non-judicial capacity, Vice Chancellor Laster "took to his public LinkedIn site to offer his views."[100] While Vice Chancellor

91. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

92. Robert Miller, Smith v. Van Gorkom *and the* Kobayashi Maru*: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 70 (2017).

93. The opinion in *Smith v. Van Gorkom* was issued in January of 1985, and section 102(b)(7) of the Delaware General Corporation Law was enacted in June of 1986. *Id.* at 72, 123–24.

94. *Van Gorkom*, 488 A.2d at 869 n.9 ("[T]he merger price offered to the stockholders of Trans Union represented a premium of 62% over the average of the high and low prices at which Trans Union stock had traded in 1980." (quoting the trial court)).

95. Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1455 (1985).

96. Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 88 (2008).

97. Miller, *supra* note 92, at 123–24 ("Ultimately on July 1, 1986, the Delaware General Assembly enacted what is now Section 102(b)(7) of the DGCL.").

98. Roe, *supra* note 96, at 88.

99. DEL. CODE ANN. tit. 8, § 102(b)(7) (2022).

100. Montgomery, *supra* note 72.

Laster did not oppose a statutory fix, he did oppose the breadth of the statutory fix being offered.

Among other things, in his posts,[101] Vice Chancellor Laster, defended his decision in *Moelis,* pointing out that the shareholder agreements he invalidated were "not traditional agreements among stockholders about how to exercise their stockholder rights"[102] because they "operate purely to address the internal allocation of control among corporate actors."[103] Despite assertions by experienced practitioners that the *Moelis* decision "invalidated commonplace provisions in scores of stockholder agreements relating to public corporations and likely many more relating to private corporations,"[104] Vice Chancellor Laster characterized the claims that the *Moelis* decision put "thousands of financings at risk"[105] as "dubious"[106] and argued that assertions that financings of Delaware companies were at risk "smacks of hyperbole."[107] Neither side offered empirical support for their position.

Vice Chancellor Laster did not restrict himself to merely defending his opinion in *Moelis* from attacks that it interfered with private ordering and threatened to invalidate numerous contracts between corporations and investors. He also wrote and posted about the proposal to overrule his decision in *Moelis*. He predicted that the (then) proposed provisions of section 122(18) of the DGCL would "fundamentally change Delaware law."[108] Vice Chancellor Laster also argued that special interests, including lawyers and "repeat players" in advising Delaware companies, particularly those that wanted to go public, were "[t]he intended beneficiaries" of the new legislation.[109] Other special interest group beneficiaries included activist hedge funds and the "Big Three" institutional investors (State Street, Vanguard and Blackrock), along with "plaintiff's lawyers."[110]

Similarly critical of the proposed legislation, Chancellor McCormick, wrote a letter to the Council of the Corporation Law Section of the Delaware State Bar Association (the Council), which is responsible for reviewing, recommending, and developing changes to the Delaware General Corporation Law,[111] complaining about the speed with which the

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101. Travis Laster (Not Posting as a Vice Chancellor at the Court of Chancery of the State of Delaware), *Moelis, Novelty, and Hyperbole*, LINKEDIN (May 30, 2024), https://www.linkedin.com/pulse/moelis-novelty-hyperbole-travis-laster-5vvge/?trackingId=qpcz3HalScqdvonnvWKefg%3D%3D [https://perma.cc/9ZNK-PVKE].

102. *Id.*

103. *Id.*

104. Matthew P. Salerno et al., *Delaware Court of Chancery Invalidates Common Provisions in Stockholder Agreements*, CLEARY M&A & CORP. GOVERNANCE WATCH (Mar. 4, 2024), https://www.clearymawatch.com/2024/03/delaware-court-of-chancery-invalidates-common-provisions-in-stockholder-agreements/ [https://perma.cc/VXH3-3RDF].

105. Laster, *supra* note 101.

106. *Id.*

107. *Id.*

108. Travis Laster (Not Posting as a Vice Chancellor at the Court of Chancery of the State of Delaware), *The Unintended Beneficiaries of Section 122(18)*, LINKEDIN (May 29, 2024), https://www.linkedin.com/pulse/unintended-beneficiaries-section-12218-travis-laster-oruze/?trackingId=0aOhuzmST32wZstuD3tHQg%3D%3D [https://perma.cc/5H39-2DQ4].

109. *Id.* ("So who benefits from this? The intended beneficiaries are easy to find. The biggest are the repeat players who want the ability to take companies public, avoid the valuation penalty of a dual-class structure, and sell down without giving up control. Right behind them are the lawyers who structure their deals.").

110. *Id.*

111. *See DSBA – Corporate Council*, DEL. COUNS. GRP. LLP (2025), https://delawarecounselgroup.com/dsba-corporate-council/ [https://perma.cc/FQ4Y-4YHB] (explaining the purpose of the Council); *see also Corporation Law Section*, DEL. STATE BAR ASS'N https://www.dsba.org/sections-committees/sections-

legislature was moving to enact amendments to the Delaware corporate code in response to two opinions she had authored.[112] The letter described in the press as "perhaps the most direct intervention into Delaware's legislative process in recent memory by the Court of Chancery,"[113] Chancellor McCormick argued that the then-proposed 2024 legislative amendments had "[n]one of the hallmarks" of "reasoned legislative intervention"[114] and claimed that the legislative proposal "was not the product of a cautious and deliberative process."[115]

Thus, one anomaly in the story of Delaware corporate law in 2024 is that certain members of the judiciary, specifically Vice Chancellor Laster and Chancellor McCormick, were willing to challenge the powerful Delaware State Bar Association Executive Council. Nothing like this happened in the wake of the legislative intervention after the *Van Gorkom* decision, and it did not go unnoticed.

The point is not that there is anything wrong either with speaking out about pending legislation in general or with posting on social media sites such as LinkedIn and/or lobbying the state bar association to complain about the speed with which proposed amendments to statutes are moving through the legislative process. Vice Chancellor Laster's posts contain a fulsome disclaimer that makes it clear that he is offering the comments in his LinkedIn posts in his personal capacity.[116] Vice Chancellor Laster is careful to point out that his activities are specifically authorized by the Delaware Judges' Code of Judicial Conduct.[117] However, these sorts of intervention must be consistent with other judicial obligations, such as those that govern *ex parte* contacts and expressing opinions on pending cases, and with norms that require judges to be neutral and unbiased.[118]

Corporate lawyers and those affected by Delaware corporate law all over the country were witnessing the internecine domestic squabble between the judiciary and the legislature with rapt attention. Delaware judges were openly criticizing the legislative process in general, but also specific provisions of Delaware corporate law that could—and ultimately did—become law. Practitioners planning to draft or to litigate agreements that arguably

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of-the-bar/corporation-law/ [https://perma.cc/Y7ZB-GWAK] (outlining the hierarchical structure of the Delaware State Bar Association).

112. *See* E-mail from Kathaleen St. Jude McCormick, Chancellor, Del. Ct. of Chancery, to Del. State Bar Exec. Comm. 6 (Apr. 12, 2024), https://s3.documentcloud.org/documents/24692528/mccormick-ltr-to-dsba.pdf [https://perma.cc/6EDA-H5BU] (articulating her concern that the Council was moving too quickly and suggesting that Council members may not even have time to read the proposal).

113. Jordan Howell, *Top Delaware Judge Calls for More Debate over Contentious Corporate Amendments*, DEL. CALL (May 29, 2024), https://delawarecall.com/2024/05/29/top-delaware-judge-calls-for-more-debate-over-contentious-corporate-amendments/ [https://perma.cc/6A6N-M9W7].

114. McCormick, *supra* note 112, at 4–5.

115. *Id.* at 5.

116. Laster, *supra* note 108 ("Disclaimer: I offer the comments in this post in my personal capacity . . . . By writing this post, I am attempting to 'write' on an issue concerning 'the law, the legal system, and the administration of justice.' If someone had scheduled a CLE about the market practice amendments, I would have said the same things there.").

117. *Id.* ("Canon 4 of the Delaware Judges' Code of Judicial Conduct permits a judge to engage in 'activities to improve the law, the legal system, and the administration of justice.' That canon says that '[a] judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice (including projects directed to the drafting of legislation).'").

118. *See* DEL. CODE OF JUD. CONDUCT § 2.9 (Del. 2008) (generally prohibiting *ex parte* communications); *id.* § 2.3(a) (requiring judges to act without bias).

intrude on the traditional authority of boards of directors became acutely aware of the fact that at least two prominent Delaware judges were wary of the scope if not the content of new legislation that established the validity of the very agreements they were drafting and/or seeking to enforce. Lawyers, especially litigators, may prefer to have their contracts interpreted in a less fraught environment. Of particular concern, in my view, is how the new statute will interact with complex issues, like the extent of controllers' fiduciary duties and the impact that contracts between controllers and companies will have on directors' fiduciary duties.

The point is that the squabble between the Delaware bar[119] and legislature, on the one hand, and Vice Chancellor Laster and Chancellor McCormick, on the other hand, is both unusual and unusually public. And in this squabble, Vice Chancellor Laster and Chancellor McCormick have expressed discomfort with Delaware statutes that they likely will be called upon to construe. A reasonable corporate planner thinking about how a statute will be interpreted and applied would expect that the judges' apprehensions about a statute inevitably would affect these interpretations and applications.

The focus here is not on the wisdom or desirability of the new Delaware legislation or on the legal soundness of the judicial decisions that such legislation modifies and overturns. Rather, the focus is on the potential effects of the very public controversy over the new legislation on Delaware's primacy in the jurisdictional competition for corporate charters. This controversy, which has been described as a "rare, bitter national fight over director rights to cede some powers to big stockholders,"[120] is likely to weaken Delaware's competitive position. As Larry Hamermesh trenchantly observed, "the Delaware franchise really is at stake . . . ."[121] This observation seems to be borne out by the observation in a recent memorandum by the law firm Sullivan & Cromwell that, rather startingly, referenced "the stated desire by large stockholders of several publicly traded Delaware corporations to reincorporate those companies in other states."[122]

In 2024 there was a rupture in the historically smooth relationship between the courts and the legislature. Judges appeared to be somewhat less enthusiastic about restricting themselves to interpreting and applying otherwise constitutional statutes. It is difficult to imagine sophisticated lawyers failing to take notice of this Delaware family feud. Then, in March 2025, following a "bitter debate in Delaware that had [both sides] arguing that their

119. In using the term "Delaware bar," I do not confine myself to those lawyers who practice in Delaware and/ or are members of the Delaware bar, but rather to the vast swathes of attorneys nationwide who have expertise in, and who regularly advise clients on, matters of Delaware corporate law.

120. Montgomery, *supra* note 72.

121. *Id.*

122. SULLIVAN & CROMWELL, DELAWARE COURT DECLINES TO ENJOIN CORPORATION'S MOVE TO NEVADA, BUT ALLOWS CLAIM FOR DAMAGES TO PROCEED 2 (2024), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Chancery-Court-Declines-Enjoin-Corporations-Move-Nevada.pdf [https://perma.cc/332Y-4GVR].

position was the one that would preserve the state's lucrative corporate franchise industry,"[123] Delaware acted decisively to protect its franchise, enacting further changes to Sections 144 and 220 of the Delaware General Corporation Law.[124] One of its proponents

123. Karl Baker & Jacob Owens, *Meyer Signs Controversial Senate Bill 21 into Law After Bitter House Debate*, Spotlight Del. (Mar. 26, 2025), https://spotlightdelaware.org/2025/03/26/meyer-signs-senate-bill-21/ [https://perma.cc/SS7W-VBWX]

124. Jonathan Macey, *How to Make Delaware Safe for Incorporation*, WALL ST. J. (Feb. 24, 2025), https://www.wsj.com/opinion/how-to-make-delaware-safe-for-incorporation-business-corporations-policy-law-46b2c03b (on file with the *Journal of Corporation Law*); S. Substitute 1 for S.B. 21, 153rd Gen. Assemb., 1st Sess. (Del. 2025) (enacted), https://legis.delaware.gov/BillDetail/141930 [https://perma.cc/E7QZ-SCBV]. The statute provides safe harbor protection for acts or transactions involving directors, officers or controlling stockholders if, the acts or transaction are either: (a) approved by a majority of the disinterested directors; or (b) approved or ratified by a majority of the votes cast by the disinterested stockholders if there is disclosure (or full knowledge) of the material facts giving rise to the conflict. *Id.* The amendments also clarify the definition of the legal terms "controlling stockholder" and "control group" and provide safe harbor procedures that, when followed, "insulate from challenge specified acts or transactions from which a controlling stockholder or control group receives a unique benefit." *Id.* Specifically, under § 144(b), unless a controlling stockholder transaction constitutes a "going private transaction," which is a transaction in which a controlling shareholder purchases the shares owned by the minority investors, a controlling shareholder is entitled to statutory safe harbor protection if the act or transaction "is negotiated and approved or recommended, . . . [either] by a majority of the disinterested directors then serving on the committee, ***or*** [if it] is conditioned on the approval or ratification by disinterested stockholders and is approved or ratified by a majority of the votes cast by the disinterested stockholders." *Id.* (emphasis added). Under new § 144(c) of the Delaware General Corporation Law, a controlling stockholder transaction that constitutes a "going private transaction" is "entitled to the statutory safe harbor protection if it is negotiated and approved or recommended . . . by a majority of the disinterested directors then serving on the committee ***and*** is conditioned on the approval of or ratification by disinterested stockholders and is approved or ratified by a vote of a majority of the votes cast by the disinterested stockholders. With respect to any approval or recommendation by a committee, the safe harbor only applies if the act or transaction or controlling stockholder transaction, as applicable, was approved by a committee consisting of at least 2 directors, all of whom, in the first instance, have been determined by the board of directors to be disinterested directors. Revised § 144 provides that any approval or recommendation, as applicable, of disinterested directors or a disinterested director committee must be made in good faith and without gross negligence, making clear that the statute does not displace the common law requirements regarding core fiduciary conduct . . . . Revised § 144 does not limit the right of any person to seek relief on the grounds that a stockholder or other person aided and abetted a breach of fiduciary duty by one or more directors. Consistent with existing case law, the stockholder or other person must have knowingly participated in a breach of fiduciary duty to establish an aiding and abetting claim." *Id.* (citations omitted) (emphasis added). The amendments to § 144 also set forth clear criteria for determining whether directors and stockholders qualify as "independent." S. Substitute 1 for S.B. 21, 153rd Gen. Assemb., 1st Sess. (Del. 2025). "The amendments [also] provide that controlling stockholders and control groups, in their capacity as such, cannot be liable for monetary damages for breach of the duty of care." *Id.*

Finally, Section 2 of the Act amends § 220 of the Delaware General Corporation Law "to define the materials that a stockholder may demand to inspect pursuant to a request for books and records of the corporation." *Id.* Books and records include official corporate documents, including minutes of board meetings and materials provided to the board in connection with actions taken by the board. The new provisions require that stockholders describe with "reasonable particularity" the purposes of their document request and the books and records they are seeking to inspect. DEL. CODE ANN. tit. 8, § 220(b)(2) (2025). Books and records sought must be "specifically related to the stockholder's purpose" to access formal materials (e.g., stock ledger, financial statements, board minutes and books) through a "reasonable particularity" standard. *Id.* The new provision creates a higher "compelling need" standard for access to any informal materials like emails and text messages. *Id.* § 220 (g)(2). And it provides that companies can impose reasonable restrictions on books and records access and that produced books and records will be incorporated by reference into legal complaints. *Id.* § 220 (b)(3). New § 220(f) provides that if the corporation does not have specified books and records, including minutes of board and committee meetings, descriptions of actions taken by the board or a committee, financial statements and director and officer

described the changes as containing "landmark amendments" that "respond to recent concerns over Delaware law that had arisen in the market and should, in our view, restore the stability, predictability, and balance that long characterized Delaware law."[125] Critics of the amendments lamented the fact that they constituted a "direct rebuke" of the Delaware courts and limited Delaware judges' "ability to grant equitable relief going forward."[126]

III. JUDICIAL INDIFFERENCE TO DELAWARE'S COMPETITIVE POSITION AND HOSTILITY TO IMPORTANT CONSTITUENCIES

An interesting component of the recent national fight over Delaware corporate law is how little attention was paid to Delaware's competitive position in the jurisdictional competition by the judges writing the decisions that the Delaware legislature chose to reverse. While Chancellor McCormick and Vice Chancellor Laster expressed a commendable indifference to the potentially negative competitive effects of its decisions, concerns about retaining Delaware's reputation and competitive position as an attractive forum for corporate chartering was the critical factor that galvanized the Delaware bar into action and motivated the legislature to reform the Delaware code.[127]

From this perspective, Vice Chancellor Laster's May 29, 2024, LinkedIn post about the new market practice amendments of 2024 is striking. Vice Chancellor Laster not only explicitly recognizes but actually identifies a long list of important Delaware constituents who stand to *benefit* from the proposed statutory amendments that he is attempting to delay. Among the intended and unintended beneficiaries, he identifies: (a) "the repeat players [in business transactions that are likely to be litigated] who want the ability to take companies public . . . without giving up control"; (b) "the lawyers who structure [transactions]" involving Delaware public companies; (c) activist hedge funds; (d) the nation's largest institutional investors, all of whom have "governance objectives"; (e) plaintiffs' lawyers; and (f) lawyers who specialize in arbitration.[128]

Vice Chancellor Laster took the position in his LinkedIn post that the statute might have unintended consequences. He identified what he regarded as the intended and unintended beneficiaries of the statute to show that various implications in the quickly drafted statute were not entirely thought out and argued against a broad and open-ended statutory fix. While the fact that all these groups favored the legislation does not necessarily mean

independence questionnaires, the Court of Chancery may order the production of additional corporate records necessary and essential for the stockholder's proper purpose. *Id.* § 220(f). New § 220(g) also provides that a stockholder may obtain additional specific records if the stockholder has made a showing of a compelling need to further a proper purpose for the inspection and has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose. DEL. CODE ANN. tit. 8, § 220(f) (2025).

125. Delaware Enacts Landmark Corporate Law Amendments, WILSON SONSINI: ALERTS (Mar. 26, 2025), https://www.wsgr.com/en/insights/delaware-enacts-landmark-corporate-law-amendments.html (on file with the Journal of Corporation Law).

126. Jeff Mahoney, Letter on Delaware Senate Bill 21, Harv. L. Sch. Corp. Governance F. (Mar. 12, 2025), https://corpgov.law.harvard.edu/2025/03/12/letter-on-delaware-senate-bill-21/ [https://perma.cc/W85D-TZFZ] (internal citations omitted).

127. Montgomery, *supra* note 72.

128. Laster, *supra* note 108.

that the legislation was a good idea from a societal point of view, the fact that some shareholders were identified as benefitting from the legislation would seem to be a point in its favor.

From a competitive point of view, the ineluctable reality is that these important and powerful interest groups have significant input and influence in corporations' decisions about where to incorporate. Viewed from the narrow perspective of the jurisdictional competition for corporate charters, ironically, Vice Chancellor Laster was making a powerful case that the new provisions would benefit Delaware's competitive position by benefitting some of Delaware's most important constituencies. Interestingly, he seems simultaneously uninterested, unmoved, and unaware of the competitive implication of the proposed legislation. This approach, though laudable in its refusal to bow to commercial interests, is entirely inconsistent with legal theories about the jurisdictional competition for corporate charters that posted that "Delaware courts appear to decide cases with an eye on keeping companies incorporating in Delaware . . . ."[129]

Maintaining Delaware's dominant position in the jurisdictional competition for corporate charters is important for Delaware's fiscal health and for the state's capacity to deliver high-quality, low-cost goods and services to its constituents. The fact that a statutory revision would solidify Delaware's position as the dominant state for incorporation and protect a vital source of revenue might seem like a strong point favoring the passage of such a revision. But that does not appear to be the case.

A significant vulnerability for Delaware in its quest for continued dominance in the jurisdictional competition for corporate charters relates to the treatment of controlling stockholders under Delaware law. The law related to the treatment of transactions involving controlling shareholders is simultaneously murky, confusing,[130] and downright hostile, particularly when the controlling shareholder is actively involved in management.[131] 2024 was a particularly active year for Chancellor McCormick and Vice Chancellor Laster, who have been lauded by members of the legal academy for being "'fearless' in holding iconic corporate founders and executives accountable to their shareholders,"[132] and whose decisions have been praised for "applying really heavy scrutiny to actions taken by companies with controlling shareholders."[133]

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129. Edward Fox, *Is There a Delaware Effect for Controlled Firms?*, 23 U. PA. J. BUS. L. 1, 27 (2020).

130. KERRY E. BERCHEM, RON E. DEUTSCH & NICHOLAS JAY HOUPT, DUTIES OF CONTROLLING STOCKHOLDERS—MURKY WATERS: TREAD CAREFULLY 1 (2012), https://www.akingump.com/a/web/22475/aohG6/duties-of-controlling-stockholders-pli_article_june-2012.pdf [https://perma.cc/ARN2-UJ4G] ("Fiduciary duties of directors are fairly clear and well established. For controlling stockholders, however, the water is murky."); *see also In re* S. Peru Copper Corp. S'holder Derivative Litig., 30 A.3d 60, 89 (Del. Ch. 2011) ("To my mind, which has pondered the relevant cases for many years, there remains confusion.").

131. *See, e.g.*, Tornetta v. Musk 310 A.3d 430, 546 (Del. Ch. 2024) (ordering the recission of Elon Musk's board and shareholder-approved compensation plan); *see also* Jonathan Macey & M. Todd Henderson, *Is a Trial Lawyer Worth 100 Elon Musks?*, WALL ST. J. (May 13, 2024), https://www.wsj.com/articles/is-a-trial-lawyer-worth-100-elon-musks-ebaec6c3 [https://perma.cc/GV3E-SY8T] (noting that in *Tornetta v. Musk* "[t]he court spends much of its 201-page opinion attacking the value of 'superstar' CEOs and the importance of individuals to corporate achievement," suggesting that CEOs who own large block of the companies they manage might not deserve compensation beyond the returns associated with their share ownership, and raising doubts about whether CEOs make a unique contribution to company value).

132. Kay, *supra* note 29 (quoting University of Iowa Law Professor Robert Miller).

133. *Id.* (quoting University of Pennsylvania Professor Jill Fisch).

The suspicion towards controlling shareholders in some Delaware courts seems to contrast with the courts' veneration of the plaintiff's bar in general. Litigation rights are considered "foundational to a civil society and necessary to protect all other rights."[134] Indeed, Vice Chancellor Laster has gone so far as to say that shareholder "[v]alue ultimately depends on legal rights."[135] It is clearly true that litigation is sometimes necessary to protect contract and property rights. Nevertheless, litigation can also be used to hold up and extract settlement payments from companies and directors that are trying to comply with all relevant laws and fiduciary obligations. Shareholder litigation (including but not limited to litigation against controllers) has both benefits and costs. Suing controlling shareholders and directors is viewed in some circles in Delaware as having only benefits and no costs. Such a position is a serious threat to Delaware's continued dominance in the jurisdictional competition for corporate charters.

Not surprisingly, while academics generally praise the tough scrutiny applied to the transactions involving controlling shareholders, controlling shareholders and their advisors appear far less thrilled with Delaware's increasingly unforgiving legal landscape. In March 2023, Gregory Maffei, the controlling shareholder, CEO, and Chairman of Liberty TripAdvisor Holdings, Inc., raised the possibility of reincorporating the company from Delaware to Nevada with his board of directors.[136] The first bullet point in the presentation highlighted the litigation risks for controlling shareholders, noting that "[r]ecent case law developments in Delaware, in particular with respect to conflicted controller and 'change of control' transactions, have increasingly emboldened plaintiffs' law firms to bring claims against directors and officers, significant stockholders and the company and have increased potential exposure for these parties."[137]

Interestingly, in February 2024, Iowa Law Professor Robert Miller astutely observed that the Delaware decisions holding controlling shareholders to strict account put "the Delaware franchise . . . on the line" by standing up to powerful interests that might be involved in decisions about where to incorporate.[138] Delaware's strict scrutiny of transactions involving controlling shareholders, though widely applauded by academics, does not appear to be benefitting shareholders. In fact, it appears that Delaware firms with a controlling shareholder "are actually *slightly less valuable* than similar companies incorporated elsewhere"[139] and even that "Delaware provides little value for controlled firms."[140] These empirical results should be concerning to those with a stake in maintaining Delaware's prominent position in the jurisdictional competition for corporate charters because they indicate that the market does not value the protections that Delaware is offering for

134. Palkon v. Maffei, 311 A.3d 255, 283 (Del. Ch. 2024). The discussion was in the context of a consideration of the role of litigation rights in safeguarding the rule of law. *Id.*

135. *Id.* at 284 ("Value ultimately depends on legal rights, because 'the market will only value rights that the law would protect, and, thus, the price of an asset is inescapably dependent on the legal entitlements of the holder of that asset.").

136. *See* Matthew Bultman, *TripAdvisor's Planned Nevada Move Puts Delaware in Tricky Spot*, BLOOMBERG L. (May 11, 2023) https://news.bloomberglaw.com/securities-law/tripadvisors-planned-nevada-move-puts-delaware-in-tricky-spot (on file with the *Journal of Corporation Law*) (discussing Maffei's proposal to move TripAdvisor to Nevada as well as the legal hurdles and the implications for Delaware).

137. *Palkon*, 311 A.3d at 265.

138. Kay, *supra* note 29 (quoting University of Iowa Law Professor Robert Miller).

139. Fox, *supra* note 129, at 2.

140. *Id.* at 8.

minority shareholders of closely held corporations. It is important to note, however, that the empirical result discussed here is from 2020, long before the recent decisions. The recent decisions that have sparked so much controversy have not been shown to have reduced the value of incorporating in Delaware.

From the perspective of controlling shareholders, who, by definition, determine where their corporations will be chartered, this indicates that incorporating their controlled company in Delaware is a lose-lose proposition. First, controllers lose when they charter their companies in Delaware because incorporating in Delaware makes them particularly susceptible to being sued by their minority shareholders and to ultimately losing those lawsuits. Second, controllers lose because the litigation costs and risks of incorporating in Delaware are not offset by a concomitant increase in the value of their stock. And these losses do not come with any corresponding benefits such as a willingness of minority shareholders to invest in controlled companies that are chartered in Delaware.[141]

Professor Miller's point about Delaware's opinions concerning controlling shareholders appears to be correct. On June 13, 2024, in the wake of Chancellor McCormick's decision to rescind Tesla CEO Elon Musk's compensation package for the past several years, Tesla held its Annual Stockholders meeting, at which its stockholders "overwhelmingly approved the ratification of the 2018 CEO Performance Award and the [reincorporation] of the Company to Texas."[142] The headline of Tesla's Press Release proudly proclaimed that "Tesla is Now a Texas Corporation."[143] Consistent with the hypothesis that jurisdictional competition for corporate charters is alive and well, on the day following the shareholder vote, Texas Secretary of State Jane Nelson posted a photo on the social media platform X (formerly known as Twitter), welcoming Tesla to Texas.[144]

Two aspects of the shareholder vote stand out. First the proposal to move to Texas from Delaware was approved by a significantly higher percentage of noncontrolling shareholders than the proposal to ratify Elon Musk's 2018 CEO Performance Award. Specifically, the Proposal on Elon Musk's salary obtained the approval of approximately 72% of all votes cast at the Annual Meeting not counting the votes of shares owned, directly or indirectly, by Elon and Kimbal Musk.[145] In contrast, approximately 84% of the total votes of shares of Tesla common stock not owned, directly or indirectly, by Elon Musk or Kimbal Musk, voted in favor of reincorporating from Delaware to Texas, as shown on the following charts.[146]

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141. *Id.* (noting that, as of the time of the study, "minority shares in Delaware firms were not more valuable than those in similar non-Delaware firms").

142. Press Release, Tesla, Tesla Releases Results of 2024 Annual Meeting of Stockholders (June 13, 2024), https://ir.tesla.com/press-release/tesla-releases-results-2024-annual-meeting-stockholders [https://perma.cc/UY6V-ZSRN].

143. *Id.*

144. Secretary Jane Nelson (@SecJaneNelson), TWITTER (Sept. 17, 2024), https://x.com/SecJaneNelson/status/1836186379996266516 [https://perma.cc/6ZXU-FDBU]; *see also* Tom Krisher & David Hamilton, *Shareholders Vote, Approve Texas as Legal Home for Tesla*, KXAN (June 14, 2024), https://www.kxan.com/news/texas/ap-future-of-elon-musk-and-tesla-are-on-the-line-as-shareholders-vote-on-massive-pay-package/ [https://perma.cc/PGF6-RXQC] (reporting on Tesla's reincorporation in Texas and the Texas Secretary of State's post).

145. *See* Tesla, Inc., Current Report (Form 8-K) (June 13, 2024) [https://perma.cc/882H-WL25] (providing the figures in the tables above, which are the basis of these percentages).

146. *Id.*

Proposal to Approve the Re-Domestication of Tesla from Delaware to Texas[147]			
For	Against	Abstain	Broker Non-Votes
Majority of Outstanding Shares not owned by Elon Musk or Kimbal Musk			
1,588,203,007	293,910,071	15,485,016	335,111,943

Proposal to Ratify the 100% performance-based stock option award to Elon Musk that was proposed to and approved by our stockholders in 2018[148]			
For	Against	Abstain	Broker Non-Votes
Majority of Outstanding Shares not owned by Elon Musk or Kimbal Musk			
1,348,109,854	528,908,419	20,579,821	335,111,943

Second, and relatedly, the move from Delaware to Texas attracted the support of sophisticated investors who are well-equipped to evaluate the relative merits of the competing jurisdictions. Leading the way were bell-weather professional investors Vanguard, Tesla's largest outside investor, with a seven percent ownership stake,[149] who voted in favor of the departure to Texas,[150] and Tesla's second largest institutional investor, BlackRock, who voted the same way.[151] All in all, the move to Texas garnered 1.12 billion votes from institutional investors, or 78% of all shares in the hands of institutional investors.[152] Even excluding BlackRock and Vanguard, the reincorporation proposal passed overwhelmingly with 706 million non-BlackRock, non-Vanguard institutional investor shares voting in favor of the move and 293 million non-BlackRock, non-Vanguard institutional investor shares voting against the move.[153] Some commentators expressed surprise at this outcome because they "expected institutions to care more about the relative shareholder protection environments in Delaware and Texas."[154] But the results are not surprising. It long has

147. *Id.*

148. *Id.*

149. David Love, *Vanguard's Vote Paves Way for Tesla's Incorporation Move to Texas*, NASDAQ: NEWS & INSIGHTS (June 14, 2024), https://www.nasdaq.com/articles/vanguards-vote-paves-way-teslas-incorporation-move-texas [https://perma.cc/7LRD-JBTM]. Elon Musk is Tesla's largest shareholder with a 13% stake in the company. *Id.*

150. VANGUARD, REDOMESTICATION AND EXECUTIVE PAY PROPOSALS AT TESLA, INC. 1 (2024), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/tesla_insights.pdf [https://perma.cc/39AL-LE5A] ("At the 2024 annual meeting of Tesla, . . . the Vanguard advised funds supported a management proposal to approve the redomestication of Tesla from Delaware to Texas.").

151. Michael R. Levin, *How Tesla Pumped the Vote*, CLS BLUE SKY BLOG (July 1, 2024), https://clsbluesky.law.columbia.edu/2024/07/01/how-tesla-pumped-the-vote/ [https://perma.cc/ND88-NDLZ]; *see also* BLACKROCK, VOTE BULLETIN: TESLA, INC. 3 (2024), https://www.blackrock.com/corporate/literature/press-release/vote-bulletin-tesla-june-2024.pdf [https://perma.cc/AD4T-RFMD] ("[BlackRock Investment Stewardship] supported the management proposal to reincorporate Tesla from Delaware to Texas.").

152. Levin, *supra* note 151.

153. *Id.*

154. *Id.*

been the case that "the market does not greatly value Delaware's highly skilled judiciary and extensive case law," at least in the context of controlled corporations.[155]

IV. DOES ANY OF THIS MATTER?

In the 1996 film *Big Night*, culinary genius Primo (Tony Shalhoub) and his ambitious and entrepreneurial *maître d'hotel* brother Secondo (Stanley Tucci) are Italian immigrant brothers who arrive in the United States in the 1950s and open a restaurant called Paradise on the New Jersey shore.[156] Despite serving brilliant and impeccably prepared dishes, the restaurant is out-competed by its enormously successful neighbor, Pascal's, which caters to the unsophisticated palates of the locals by serving massive portions of mediocre food.[157] Among the most amusing vignettes in the film are the constant efforts by Secondo to induce his perfectionist brother to cater to the unrefined culinary tastes of the boors of the local population. As movie critic Roger Ebert recounts one scene, Primo becomes enraged when a customer complains that she cannot find large chunks of seafood in the seafood risotto and then asks for spaghetti and meatballs as a side dish for her risotto. Primo becomes enraged and refuses to serve the customer, calling her a "philistine."[158]

Primo's intransigence is an existential threat to the restaurant. Paradise is going broke and facing foreclosure by its bank. But Primo refuses to sacrifice the purity of his culinary craft to achieve base commercial success. In contrast, the owner of the rival eatery Pascal's (Ian Holm) is well-aware of what is required to succeed as an Italian restaurant on the Jersey shore in 1950.

We are witnessing a similar saga in Delaware. Vice Chancellor Laster and Chancellor McCormick are sophisticated and skilled jurists, just as Primo was a skilled chef. The Delaware legislature is rather like Stanley Tucci's Secondo, who understands what is required: you must give the customers what they want. Secondo wants to placate both his customers and Primo, but he can't do both.

There is one important difference between the precarious competitive position of Primo and Secondo's Paradise restaurant and the far more stable competitive position in which Delaware finds itself. Unlike Delaware, Paradise had to compete with a formidable rival, Pascal's, which was highly adept at catering to local tastes. In contrast, it is not at all clear where controlling shareholders and others who would prefer a more user-friendly legal environment will turn. No state has emerged as the obvious alternative to Delaware. Nevada clearly wants to compete with Delaware, but some claim that Nevada has gone too far in insulating managers from accountability. Indeed, one professor claims that she tells her students that "Nevada is where you incorporate if you want to do frauds."[159]

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155. Fox, *supra* note 129, at 47.

156. BIG NIGHT (Rysher Entertainment 1996).

157. *Big Night*, IMDB, https://www.imdb.com/title/tt0115678/ [https://perma.cc/68KJ-ZLN2].

158. Roger Ebert, *Big Night*, ROGEREBERT.COM (Sept. 27, 1996), https://www.rogerebert.com/reviews/big-night-1996 [https://perma.cc/T6CS-MYCY].

159. Ann Lipton (@AnnMLipton), TWITTER (Apr. 10, 2023), https://x.com/AnnMLipton/status/1645544410665435137 [https://perma.cc/3KQ3-Y8TV]; *see also* Allison Frankel, *In New TripAdvisor Suit, Delaware Lawyers Deride Nevada's 'No-Liability Regime'*, REUTERS (Apr. 2, 2023), https://www.reuters.com/legal/government/column-new-tripadvisor-suit-delaware-lawyers-deride-nevadas-no-liability-regime-2023-04-24/

Texas has enacted legislation establishing specialized business courts in Texas.[160] Additional legislation proposed in February 2025 aims to make Texas competitive with Delaware.[161] The proposed reforms codifies the business judgment rule, and specifies that a plaintiff bears the burden of proof when bringing a claim for breach of fiduciary duty. [162] The statute also directly addresses the problem of plaintiff lawsuits brought to harass directors and managers by: 1) imposing a minimum ownership percentage before a shareholder can pursue a derivative lawsuit, 2) prohibiting the recovery of attorney's fees in "disclosure-only" settlements that do not produce material changes for the defendant corporation, and 3) allowing companies to seek a conclusive determination that directors approving transactions with controllers, directors and officers are "independent" for purposes of the statute.[163]

But Texas has obstacles to overcome if it is to displace Delaware. Texas is far more politicized and ideological than Delaware. Texas has the "strongest legislation in the country to end DEI (diversity, equity and inclusion) and its ideological framework. . . ."[164] Reflecting the political climate in the state, in a widely reported case, a federal judge ruled that American Airlines violated federal employee benefits law by failing to prevent its investment advisor, Blackrock Inc. from pursuing a "green" shareholder activism agenda.[165] It is easy to imagine directors and officers of publicly traded Texas corporations being sued for breaching fiduciary duties to shareholders if corporate funds are used to provide funding for employee health care plans that fund abortions or birth control, or for corporate programs promoting DEI initiatives, green energy or other "woke" policies. Adding to the confusion, there also seems to be uncertainty as to the extent to which juries will be required in cases before these courts.[166] While undoubtedly more companies will defect from Delaware to other states, until a viable alternative to Delaware emerges, the refined jurisprudential fare served in Delaware is likely to continue to be in high demand.

CONCLUSION

The historically tranquil, collegial and harmonious corporate law landscape in Delaware has become highly fraught and emotional. But the reason is less obvious than it seems. The battles ostensibly are about some recent decisions by Vice Chancellor Laster and

[https://perma.cc/QBS9-RXG7] (reporting on shareholder litigation in Delaware related to TripAdvisor's decision to reincorporate in Nevada and providing context for Professor Ann Lipton's post as a response to Twitter, Inc.'s reincorporation in Nevada as X Corp).

160. Adolfo Pesquera, *The Business Courts Are Coming—Can They Meet Expectations?*, LAW.COM (July 20, 2023), https://www.law.com/texaslawyer/2023/07/20/the-business-courts-are-coming-can-they-meet-expectations/?slreturn=20250227131102 [https://perma.cc/KQT7-7LET].

161. *See* S.B. 29, 2025 Leg., 89th Sess. (Tex. 2025).

162. *Id.* § 10.

163. *Id.* § 11.

164. Sherry Syvester, *Texas is Winning the War Against 'Woke'*, TEX. PUB. POL'Y FOUND. (June 19, 2023), https://www.texaspolicy.com/texas-is-winning-the-war-against-woke/ [https://perma.cc/QPQ5-ZT5A].

165. Spence v. American Airlines, Inc, No. 4:23-cv-00552, 2025 WL 225127, at *31 (N.D. Tex. Jan. 10, 2025).

166. *See, e.g.*, Simmerman et al., *supra* note 2 (vaguely alluding to the right to a jury trial "when required by the Texas Constitution"); *see also* TEX. GOV'T CODE ANN. § 25A.015(a) (2023) ("A party in an action pending in the business court has the right to a trial by jury when required by the constitution.").

Chancellor McCormick. But the fight is less about the substance of the narrow legal doctrines in dispute than it is about concerns over judicial hostility toward the legitimacy of private ordering in general and the role of controlling shareholders in particular.