From First-Best to Least-Worst: Emerging Threats to Delaware's Dominance that the Legislature Can't Fix

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It is generally assumed that legislatures can easily reverse judicial decisions. This Article explores the effects of a recent effort by the Delaware legislature to reverse the effects of certain controversial judicial decisions by the state's Court of Chancery and Supreme Court, finding that undoing the perceived harm caused by judges is quite difficult.

My focus is on the Delaware legislature statutory reforms aimed at shoring up Delaware's dominant position in the jurisdictional competition for corporate charters. I identify seven discrete factors that are conspiring to thwart the legislature's recent effort to undo the judicial decisions that the state's governor and legislature fear will undermine the state's ability to attract and retain the corporate chartering business.

The factors that I identify include the staunch opposition to the recent legislation on the part of the very judges who are charged with interpreting and applying it. Also relevant is the decline in the prestige corporations historically derived by incorporating in Delaware. Chartering in Delaware no longer constitutes virtue-signaling because it is no longer viewed by corporate law intelligentsia to have the most advanced, state-of-the art law. More recently, however, the academic community criticized the new Delaware statutes and the process leading up to their passage.

Also, interest group politics prevented the legislation from addressing Delaware judges' reputation for tolerating strike suits and frivolous litigation and for awarding very large attorneys' fees to plaintiffs' lawyers in cases that do not produce any discernible benefits to the corporation or its shareholders. Another problem that the legislature cannot solve is that various members of the Delaware judiciary have negative normative views of Delaware's most important constituencies: corporate managers, directors, founders, and high-profile CEOs. These decision-makers are understandably reticent about incorporating in a state where their decisions will be made by judges who do not value their contribution to the success of their companies. A fifth threat that the legislature cannot address is the erosion of the traditional "respectful coexistence among the branches of government" that long characterized Delaware's legal environment. The final two problems that the legislature cannot fix are that corporate law has become increasingly irrelevant because it is being displaced by private contracting. Finally, to the extent that corporate law has not been replaced by contract law, statutes are replacing judge-made law as both the primary, and the preferred source of corporate law. The legislature's attempt to replace judicial decision-making with statutory rules undermines Delaware's historical competitive advantage, which was the perceived superiority of its judges.

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INTRODUCTION

Corporate law scholars, along with practitioners who represent companies whose shares are publicly traded, remain intensely focused on whether Delaware will succeed in retaining its traditional dominant position in the jurisdictional competition for corporate charters. In the summer of 2025, following in the wake of Elon Musk's admonition to businesses to "[n]ever incorporate your company in the state of Delaware,"[1] Delaware's

1. Elon Musk posted this advice on Twitter at 5:14pm on January 30, 2024, and by July 21, 2025 it had garnered 52 million views and numerous references in the popular press. *See* Christiaan Hetzner, *'Never Incorporate in Delaware': Elon Musk Sees His Record-Breaking $56 Billion Tesla Pay Package Voided by Judge—and Is Now Polling His Followers over a Possible Texas Move*, YAHOO! FIN. (Jan. 31, 2024), https://finance.yahoo.com/news/never-incorporate-delaware-elon-musk-140007989.html [https://perma.cc/QY4J-ASYB]; *see, e.g.*, Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025), https://www.reuters.com/business/autos-transportation/teslas-wake-more-big-companies-propose-voting-dexit-to-depart-delaware-2025-05-14/ [https://perma.cc/2W7U-BRQ6] (regarding reference to the post in the popular press); Christiaan Hetzner, *'Never Incorporate In Delaware': Elon Musk Sees His Record-Breaking $56 Billion Tesla Pay Package Voided By Judge—and Is Now Polling His Followers over a Possible*

dominance appears more in doubt than at any time in memory as news stories about "DExit" proliferate.[2] DExit, serves as the moniker for the "wave of high-profile corporations threatening to reincorporate in other states like Nevada, following judicial rulings that rattled Delaware's boardroom elite" proliferate.[3] The somewhat surprising persistence of the threat to Delaware's dominance is the subject of this Article.

News of the persistence of the threat to Delaware's dominance is reflected in reports like the Business Insider story announcing that "[m]ultiple companies are leaving Delaware."[4] These reports that are consistent with empirical findings that increased attention to DExit is reflected by internet searches and articles in the business press "remain elevated."[5]

The loud buzz about threats to Delaware's dominance in the jurisdictional competition for corporate charters is a bit more than mere hype. During the period 2024 through the first half of 2025, only five public companies with a market capitalization greater than $250 million reincorporated to Delaware, while 16 such companies reincorporated away from Delaware.[6] Also during the 2025 proxy season,[7] there were 29 reincorporation proposals and one action by written consent of shareholders (Dropbox, Inc.) to reincorporate.[8] The number of proposals to reincorporate represents a 70.6% increase from the 2024 proxy season, and a 45% increase from the 2023 proxy season.[9]

Particularly important for Delaware's status as the hub of the nation's chartering business is its leadership in attracting incorporations by companies effectuating initial public offerings (IPOs) on U.S. stock markets. While Delaware retains its historical dominance, the historical trend is worrisome for the First State. As recently as 2020, 93% of all U.S.

Texas Move, FORTUNE (Jan. 31, 2024), https://fortune.com/2024/01/31/elon-musk-tesla-pay-package-delaware-court [https://perma.cc/Q6YX-DNC4].

2. Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. 823, 825 (2025). Sometimes, DExit is spelled "Dexit." *See* Andrew D. Santana & Kacey Fonner, *Stopping 'Dexit': Delaware Makes Significant Changes to Its General Corporation Law*, FOX ROTHSCHILD (Mar. 31, 2025), https://www.foxrothschild.com/publications/stopping-dexit-delaware-makes-significant-changes-to-its-general-corporation-law [https://perma.cc/DEQ3-8B6T] (explaining recent changes and the underlying rationale to DGCL).

3. Bryan Driscoll, *Delaware Overhauls Corporate Law to Stem 'DExit'*, BEST LAWS. (June 16, 2025), https://www.bestlawyers.com/article/delaware-overhauls-corporate-law-stem-dexit/6710 [https://perma.cc/8ANP-5U5V].

4. Lauren Edmonds & Lakshmi Varanasi, *Here Are the Biggest Companies That Have Followed Elon Musk Out of Delaware*, BUS. INSIDER (Nov. 12, 2025), https://www.businessinsider.com/list-corporations-leaving-delaware-elon-musk-spacex-tesla-dropbox-roblox-2025-7 [https://perma.cc/M3SH-XF2W].

5. Gaurav Jetley & Nick Mulford, *DExit: Reincorporation Data Seem to Support the Hype*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 23, 2025), https://corpgov.law.harvard.edu/2025/09/23/dexit-reincorporation-data-seem-to-support-the-hype [https://perma.cc/7KT3-W56D].

6. *Id.* ("Of the 16 companies that departed Delaware, ten (63%) were defined as 'controlled'."). Where 'controlled' is defined consistent with recently enacted Delaware statute (SB 21), which provides that companies in which a single entity or control group holds fewer than 33% of the company's voting power are not controlled. *See* DEL. CODE ANN. tit. 8, §144 (2025).

7. The proxy season in 2025 was from January 1, 2025 to June 30, 2025.

8. Sam Nolledo, Sarah Wenger & Aaron Wendt, *The State of U.S. Reincorporation in 2025: The Growing Threat and Reality of 'DEXIT'*, GLASS LEWIS (Oct. 9, 2025), https://www.glasslewis.com/article/state-of-us-reincorporation-2025-growing-threat-reality-dexit [https://perma.cc/WP2P-2P2S].

9. *Id.*

IPOs were registered as Delaware entities.[10] By 2024, this number had dropped to 84%, and in the first half of 2025, the number had fallen to 75%.[11] This "dip in IPO market share is consistent with the sentiment in the business press regarding a decline in the attractiveness of Delaware as the place to be incorporated."[12]

Among the departures gaining the most attention was the July 2025 announcement by the well-known venture capital firm Andreessen Horowitz that it was reincorporating its primary business vehicle, AH Capital Management, which boasts $42 billion in AI, biotech and healthcare, consumer, crypto, fintech and infrastructure assets under management, to Nevada.[13] Journalists also noted that 2024 was the first year in recent history in which more public companies reincorporated out of Delaware than reincorporated into the state.[14]

This is not the way it was supposed to be. At least it is not the way that I thought things would turn out. In early 2025, the Delaware legislature moved decisively to address the growing vulnerability to its competitive position, passing a "critical update to Delaware's corporate law, aimed at ensuring the state remains the premier home for U.S. and global businesses."[15] The legislation was meant to clarify recently emerged ambiguities in the law and "reinforce Delaware's reputation for equitable, predictable, and efficient corporate oversight."[16] Delaware's Governor, Matt Meyer, described the statute, known as Senate Bill 21 as a "'course correction' that will bring the Delaware business courts back into alignment with rulings from a decade ago."[17] Retaining the state's position is an existential issue for the state. In the most recent year for which data is available, Delaware collected approximately $1.86 billion in franchise taxes and fees, which accounted for fully 30% of the state's total revenue.[18]

Analyzing the new statute, I agreed that the new statute would fix things, predicting that the new provisions would reestablish Delaware's competitive position and stem the tide of company departures. My prediction was that Delaware would reestablish its competitive dominance if it enacted the then-pending legislative reforms:

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10. DEL. DIVISION OF CORPS., 2020 ANNUAL REPORT STATISTICS (2020), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf [https://perma.cc/M5N9-TYXL].

11. *See* Jetley & Mulford, *supra* note 5, at fig. 6.

12. *See* Jetley & Mulford, *supra* note 5.

13. Lauren Edmonds, *Andreessen Horowitz Is the Latest Company to Follow Elon Musk Out of Delaware*, BUS. INSIDER (July 9, 2025), https://www.businessinsider.com/andreessen-horowitz-delaware-nevada-elon-musk-corporate-law-2025-7 [https://perma.cc/MMM9-95L7].

14. *See* Hals, *supra* note 1 ("2024 was the first year that more companies in the Russell [3000] Index left Delaware than moved their incorporation to the state.").

15. Press Release, Off. of the Governor, Governor Meyer Signs SB21 Strengthening Delaware Corporate Law, (Mar. 26, 2025), https://news.delaware.gov/2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law/ [https://perma.cc/9JWD-TPPZ].

16. *Id.*

17. Anna Mobley, *A 'Course Correction' to Delaware's General Corporation Law May Be on the Horizon*, BUTLER SNOW (Mar. 18, 2025), https://www.butlersnow.com/news-and-events/a-course-correction-to-delawares-general-corporation-law-may-be-on-the-horizon [https://perma.cc/G4LZ-JT9D].

18. Xerxes Wilson, *Is Delaware's Tax Revenue at Risk amid Criticisms, Reforms to Its Business Court?*, DEL. NEWS J. (July 11, 2025), https://www.delawareonline.com/story/money/business/2025/07/07/is-delaware-tax-revenue-at-risk-amid-business-court-reforms-dexit/84372363007/ (on file with the *Journal of Corporation Law*).

> Though Delaware's legal environment is currently a toxic mess, the state still has what it needs to be America's corporate home if it makes these statutory fixes. For decades, lawyers have advised companies to incorporate in the state because the law is robust and clear enough to support complex transactions. Businesses need to know how to structure deals that can withstand or avoid judicial scrutiny. Delaware's repository of legal precedent is supplemented by a cadre of seasoned judges who can resolve disputes quickly and expertly.
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> If legislators follow through on these reforms, Delaware lawyers can proudly offer companies' clear answers, rather than embarrassed hemming and hawing.[19]

The purpose of this Article is to identify and evaluate the significant extant, remaining threats to Delaware's dominance. It is an effort to explain why the statutory reforms, while important and necessary, turned out to be insufficient to right the teetering ship and restore Delaware's competitive position. It turns out that the events in Delaware have much to teach us, not only about the jurisdictional competition for corporate charters, but also more generally about the separation of powers. In particular, events in Delaware make it clear that the judiciary's role of interpreting and applying statutes, which give judges the final word on how a case will be decided, is a binding constraint on the legislature's ability to affect changes to the legislative landscape.[20]

Here, I argue that several factors, such as the clear judicial hostility and opposition to the recent statutory enactments have undermined the pro-competitive effects of the statute. Thoughtful advisors considering how to counsel corporations about where to incorporate cannot base their decisions on the arid, unadorned words in the statute. They must try to anticipate how judges will interpret and apply those statutes. In addition, I argue that Delaware judges can profoundly affect Delaware's competitive position by alienating litigants even while ruling in favor of those litigants. In particular, Delaware decisions have been characterized by experienced practitioners and former Delaware judges has reflecting a "suspicious or negative tone toward corporate boards and management."[21] In recent work, Stephen Bainbridge has reported that "concerns about both the application of the law and the tone of the opinions [by Delaware Chancery Court judges] are mounting."[22] With one lawyer expressing concern that there was "a growing impression that certain Delaware

19. Jonathan R. Macey, *How to Make Delaware Safe for Incorporation: Senate Bill 21 and Concurrent Resolution 17 May Save the State from Losing the Business Activity that Funds 22% of Its Budget*, 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*).

20. The classic work on Congressional overrides of Supreme Court decisions is William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). For an analysis of judicial reactions to legislative efforts to overturn judicial decisions in the context of evolving legal standards, particularly in equal protection jurisprudence, *see generally* Deborah A. Widiss, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998).

21. Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ [https://perma.cc/E7CQ-RAJP].

22. Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. 823, 889 (2025).

Chancery Court judges have developed a skeptical attitude towards independence of directors of Silicon Valley firms."[23]

I identify seven significant persisting threats to Delaware's dominance. First, the Delaware judiciary has expressed significant opposition to recent important legislative enactments that were designed to make the state more competitive. I argue that this vocal and emphatic opposition is an existential threat to the success of Delaware's recently enacted reforms.

A second threat to Delaware is that its law simply appears to be falling out of fashion. For decades, corporations choosing Delaware could count the prestige of locating in the jurisdiction considered by the world's premier corporate law thought leaders to have the most advanced, state-of-the art law as a major plus. Since mid-2024, however, the academic intelligentsia have lined up in overwhelming numbers to criticize the new Delaware statutes and the legislative process in Delaware leading up to the passage of those statutes. Bordering on hysteria, some academics and plaintiffs' attorneys even alleged that the new statute would "enable corporate corruption."[24]

A third problem in Delaware is the amount of litigation and the size of the awards to plaintiffs' attorneys, which enable lawyers to obtain "generational wealth"[25] by winning a single case. Corporations operating in Delaware, particularly large public corporations with deep pockets, face constant litigation risk that they almost certainly can avoid by reincorporating in other states. This threat is difficult to alleviate because the plaintiffs' attorneys who benefit from massive legal fees generated in this litigation-rich environment face a "tragedy of the commons" problem: while the plaintiffs' bar as a whole would benefit from constraining the excessive litigation, individual plaintiffs' attorneys benefit massively by bringing suits. Delaware has developed a reputation for awarding very large attorneys' fees awards to plaintiffs' lawyers in cases that do not produce any discernible benefit for the shareholders on whose behalf such litigation ostensibly is brought.

A fourth problem facing Delaware is that important members of the Delaware judiciary appear to have embraced highly negative normative views of corporate managers and directors in general, and of founders and high-profile CEOs of high-tech firms in particular. Such managers and directors are understandably reticent about incorporating in a state where they will be scrutinized and evaluated by judges who do not value their contribution to the success of their companies.

A fifth threat to Delaware's dominance is the erosion of the cohesive legal culture that made Delaware a collegial, drama free forum. For example, the recent changes to Delaware corporate law effectuated by SB 21 generated fierce criticism that included "sponsored billboards, flyers, and lawn signs denouncing the law, labeling it the 'billionaire's bill' and

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23. *Id*. (alteration in original).

24. Xerxes Wilson, *Corporate Law Changes that Captured National Attention, Scrutiny Headed for House Vote*, DEL. NEWS J. (Mar. 20, 2025), https://www.delawareonline.com/story/news/politics/2025/03/20/controversial-changes-to-delaware-corporate-law-set-for-house-debate/82522911007/ (on file with the *Journal of Corporation Law*) (noting that a committee of the Delaware House of Representatives approved various changes to Delaware's corporate code after "hearing testimony from about two dozen attorneys and academics that said the rule changes would enable corporate corruption and harm the state's status as the nation's premier place to charter a business").

25. By the term "generational wealth," I mean financial resources that are sufficient not just to support a high standard of living for one generation, but enough to provide for a family over multiple generations and to support a financial infrastructure that will provide long-term security and access to luxury and abundance.

featuring images of Elon Musk holding a chainsaw."[26] The traditionally "respectful coexistence among the branches of government"[27] that long characterized Delaware's legal environment has eroded materially. Delaware judges have taken to openly swiping at the State's legislature. By way of example, in a recent opinion about stockholders' inspection rights, Delaware's Chancellor, Kathleen McCormick, lamenting the imposition of modest limitations on those rights by the legislature, sniped that "[b]ecause this action was filed before the General Assembly amended Section 220 to import a new legal regime, decades of carefully crafted judge-made law govern this scope analysis."[28] Professor Stephen Bainbridge astutely pointed out that this was tantamount to saying that the new statute reflected "minutes of sloppily thrown together statute writing by some unknown law firm associate."[29] Summarizing the new mood in Delaware, *The New York Times* observed that "[t]he clubby insular world of corporate law has entered the culture war."[30]

Here, I posit that the erosion of civility in the world of Delaware judges, lawyers and lawmakers is very bad for the future of Delaware's chartering business. The atmosphere of distrust, rancor and ad hominum attacks inevitably will translate into a more expensive litigation environment as cases become more expensive to litigate.

A sixth threat to Delaware discussed in this Article is that judge-made corporate law is become increasingly less important over time. Corporate law is becoming irrelevant due to the growing recognition that markets and private contracting provide sufficient protection for shareholders and other investors, and that corporate law therefore is less central to corporate governance than private contracting. Corporate law consists of mandatory rules and permissive, default rules that investors and corporations can opt-into (or out of) at very low cost. When corporate law consisted primarily of mandatory rules, contracting played a relatively small role in corporate governance. Permissive, default rules are increasingly "crowding out" and replacing mandatory rules, making the quality of judging relatively less important to corporations and their advisors.

A seventh threat to Delaware is that, to the extent that corporate law has not been replaced by contract law, statutes are replacing judge-made law not only as the *primary* source of corporate law, but also as the *preferred* source of corporate law. The recent statutory reform in Delaware reflects the fact that the legislature simply feels that it no longer can rely on the state's judges to generate legal rules and to decide cases that do not alienate the corporations that have chosen Delaware as their corporate home. Many attributed Delaware's historical success in the jurisdictional competition or corporate charters wholly to the sophistication, expertise, and reliability of Delaware's judges. With its recent legislative enactments, the Delaware legislature has strongly signaled that it wants to sideline the

26. Lawrence Cunningham, *What Is the Furor Behind Delaware SB 21?*, PROMARKET (Apr. 9, 2025), https://www.promarket.org/2025/04/09/what-is-the-furor-behind-delaware-sb-21/ [https://perma.cc/G323-LAM2].

27. *Id.*

28. *See* Steve Bainbridge (@PrawfBainbridge), TWITTER (Aug. 15, 2025 at 5:22 PM), https://x.com/PrawfBainbridge/status/1956481531096314265 [https://perma.cc/BWT5-FQXL] (quoting Operating Eng'rs Constr. Indus. and Misc. Pension Fund v. Pioneer Nat. Res. Co., No. 2024-0101-SEM, 2025 WL 2106580, at *4).

29. *Id.*

30. Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES (Feb. 8, 2025), https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html (on file with the *Journal of Corporation Law*).

judiciary, and to replace judicial decision-making with statutory rules as the primary source of Delaware corporate law. In other words, Delaware has now joined many other states in replacing judge-made law with statutes. This change, while necessary, has undermined Delaware's historical competitive advantage, which was the perceived superiority of its judges.

I argue that replacing judge-made law with statutes inevitably will result in the commodification of corporate law. States easily can imitate the corporate law statutes of other states, meaning that corporate law can be generated in wholesale form rather than in the bespoke case-by-case manner reflected in judicial opinions.

After providing background on the current competitive landscape of the jurisdictional competition for corporate charters in Section II, Section III discusses the competitive implications of Delaware's superior legal protections for minority shareholders. The seven sections that follow (sections IV-IX) discuss these emergent threats to Delaware's dominance of the jurisdictional competition for corporate charters. Following that, I discuss the implications of my analysis.

A. The Origins of the Threat to Delaware's Dominance: An Activist Judiciary

The threat to Delaware's competitive hegemony arose quickly. It was only in April 2024 that Wilson Sonsini, a major law firm with many significant, high-profile clients in the tech industry, and an active Delaware practice that boasted among its partners William B. Chandler III, a former Chancellor of the Delaware Court of Chancery,[31] trenchantly observed that: "[i]n recent months, a conversation has emerged as to whether Delaware should remain the favored state of incorporation for business entities. Indeed, many of our clients have asked us whether they should remain in Delaware or choose Delaware as the state of incorporation for their new ventures."[32]

Importantly, every single justification for leaving Delaware was attributable to growing problems in the Delaware courts. Specifically, Wilson Sonsini reported that clients and others were considering leaving Delaware in the phenomenon that became known as "DExit" for the following reasons:

- A growing number of cases that have addressed technical issues, in the M&A context and elsewhere, and reached unexpected results in a manner that has impacted corporate structuring and transaction planning
- A perception that Delaware judges have in several opinions adopted an increasingly suspicious or negative tone toward corporate boards and management, and toward the corporate bar
- The challenges that the case law can pose for companies with influential founders or significant stockholders, the process mechanisms that such companies are expected to use, and the remedies that have been reached in those cases
- A sense that Delaware judges can be skeptical of the governance of venture-backed private companies and many Silicon Valley-based companies

31. *William B. Chandler III*, WILSON SONSINI, https://www.wsgr.com/en/people/william-b-chandler-iii.html [https://perma.cc/4FFK-97UQ]; Simmerman, Chandler & Berger, *supra* note 21.

32. Simmerman, Chandler & Berger, *supra* note 21.

- The increasingly active, and successful, plaintiffs' bar in both technical and fiduciary claims, which can leave boards and management with the sense that they are planning around "gotcha" litigation driven by plaintiffs' lawyers more than those lawyers' individual clients[33]

The perceived problem with the Delaware courts posed a Hobbesian choice for Delaware because the only way to address the problem was to pass legislation clarifying the law and reducing judges' discretion. Passage of such a statute inevitably constituted an acknowledgement that the very judges who long had been viewed as the cornerstone of the state's success were now being considered its chief liability.

Delaware's value-added for corporations has long been recognized as being the high quality of its judicial decisions. After all, Delaware's corporate code is publicly available and enjoys no intellectual property protection. The Delaware General Corporation Law can be freely replicated by competing jurisdictions at zero cost or risk. Delaware's advantage lays in its "predictable jurisprudence, specialized courts, [and] developed precedent."[34]

Without a doubt, like most statutes, SB 21 imposed constraints on Delaware judges. Amending Section 144 of the Delaware General Corporation Law, it provides safe harbor procedures for acts or transactions in which one or more directors or officers as well as controlling stockholders and members of control groups have interests or relationships that might render them interested or not independent. This change limited the ability of judges to engage in free-wheeling inquiries into the "entire fairness" of transactions with interested officers, directors and controllers.

Under revised Section 144(a), certain acts or transactions involving such directors or officers are insulated from attack if approved or ratified by a majority of the disinterested directors (or by a majority of the votes cast by the disinterested stockholders entitled to vote on the transaction) if there is disclosure or full knowledge of the material facts creating the conflict or potential conflict.

In addition, SB 21 reduces judicial discretion by clearly defining when a party to a transaction or act is a controlling stockholder or control group and provides safe harbor procedures that can be followed to insulate from challenge specified acts or transactions from which such a controlling stockholder or control group receives a benefit that is not shared generally with shareholders. Under the new § 144(b), except for transactions that constitute a "going private transaction," a controlling stockholder transaction is entitled to the statutory safe harbor protection if it is approved or recommended, as applicable, by a committee consisting of a majority of at least two disinterested directors or approved or ratified by a majority of the votes cast by the corporation's disinterested stockholders.[35]

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33. *Id.*

34. Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/4X5G-QX43].

35. Under new § 144(c), a controlling stockholder transaction that constitutes a "going private transaction" also is entitled to the statutory safe harbor protection but it must be both: (a) negotiated and approved or recommended, as applicable, by a committee consisting of a majority of disinterested directors; and (b) approved or ratified by a vote of a majority of the votes cast by the disinterested stockholders entitled to vote thereon. *See* DEL. CODE ANN. tit. 8, § 144(b) (2025).

The amendments to § 144 also set forth criteria for determining the independence and disinterestedness of directors and stockholders. This statutory change significantly reduces the discretion of Delaware judges by eliminating the highly subjective, "gestalt" approach to determining whether a director is independent and replacing it with a statutorily prescribed, clear, objective methodology. Of particular note, under new Del. G.C.L. § 144(d)(2), if a Delaware corporation has a class of stock listed on a national securities exchange, a director of that company is presumed to be a disinterested director with respect to an act or transaction to which the director is not a party if the board of directors has determined that such director satisfies the applicable criteria for determining director independence from the corporation and, if applicable with respect to the act or transaction, the controlling stockholder or control group, under the rules (and interpretations thereof) promulgated by the exchange on which the company's shares are listed.[36]

The amendments contained in SB 21 also attempt to reduce judge's discretion by narrowing somewhat the scope of what constitutes a permissible inspection of a company's books and records, by clearly defining for the first time what constitutes "books and records" that shareholders have the right to inspect.[37] As discussed below, the Chancellor to the Delaware Court of Chancery sent a clear signal that the new discipline on judges imposed by the statute was annoying when she sniped that the books and records restrictions displaced the "decades of carefully crafted judge-made law" that used to guide judges in litigation regarding access by shareholders to corporate books and records.[38]

Thus, the one clear take-away from passage of SB 21 was, as Eric Talley, Sarath Sanga, and Gabriel Rauterberg trenchantly observed:

> These amendments amount to a direct rebuke of the Delaware judiciary. They impose a legislative clampdown on the very judicial discretion that, for decades,

36. DEL. CODE ANN. tit. 8, § 144(d)(2) (2025).

37. The documents that shareholders ordinarily can inspect are: (a) The certificate of incorporation; (b) The bylaws; (c) Minutes of stockholder meetings and signed stockholder consents for the three year period prior to the date of the stockholder demand; (d) All written or electronically transmitted communications to stockholders generally within the three years preceding the stockholder demand; (e) Minutes of meetings of, and records of actions by, the board of directors and its committees; (f) Materials provided to the board of directors or its committees in connection with actions taken by the board or such committees; (g) The corporation's annual financial statements for the three years preceding the stockholder demand; (h) Any agreement with a current or prospective stockholder entered under Section 122(18) of the Delaware General Corporation Law; (i) Director and officer independence questionnaires. With two exceptions, under the new statute, if a stockholder seeks to inspect records pursuant to § 220, the stockholder may only obtain access to these categories of documents. The first exception is that, if the corporation does not maintain a particular category of document identified in the statute, the Court of Chancery may order the corporation to produce their "functional equivalent." Second, the Court of Chancery may order inspection of documents not on the list if only if the demand satisfies various procedural requirements, including the usual requirements: (a) that the demand is made in good faith and for a proper purpose, describes the records sought with "reasonable particularity," (b) that the requested books and records are "specifically related" to the stockholder's proper purpose; and (c) that the stockholder has demonstrated "by clear and convincing evidence that such specific records are necessary and essential to further such purpose." Further, to gain access to additional records, a stockholder must make "a showing of a compelling need for an inspection of such records to further the stockholder's proper purpose" and have demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose. *See* DEL. CODE ANN. tit. 8, § 220 (2025).

38. I am grateful to Stephen Bainbridge for noting this "zinger" in a post on X. Bainbridge, *supra* note 28; *see generally* Operating Eng'rs Constr. Indus. & Misc. Pension Fund v. Pioneer Nat. Res. Co., No. 2024-0101, 2025 WL 2106580, at *4 (Del. Ch. July 28, 2025).

has defined Delaware's distinctive brand of corporate governance. Critics of Chancery may celebrate the move, but in doing so they risk undermining Delaware's greatest asset: the feedback loop between sophisticated litigation and careful case-by-case refinement of fiduciary law.[39]

B. Virtue Signaling: A Note on Shareholder Rights and Shareholder Voting on Reincorporation

For companies incorporated in Delaware, a shareholder vote is required in order to effectuate "DExit." This requirement potentially limits the extent to which companies can reincorporate to Delaware for nefarious reasons such as enabling self-dealing or reducing officer and director accountability. During the 2025 proxy season, shareholder support for reincorporation proposals declined somewhat, "from 88.7% in 2024 to 81.1%".[40]

In companies with controlling shareholders, however, minority shareholders cannot prevent reincorporation by voting against it because they do not have the votes. In some cases, such as the reincorporation votes of AMC Networks, Inc. and Madison Square Garden Sports Corporation, both of which have a controlling shareholder, reincorporation was approved over the dissenting votes of a majority of the unaffiliated shareholders.[41]

Importantly, survey results from 2025 indicate that shareholders view stronger protections for shareholder rights increasingly favorably and protections for directors, officers and controlling shareholders unfavorably when assessing reincorporation proposals.[42] Another strong motivation for retaining strong protections for shareholders is that it lowers capital costs.

Prospective minority shareholders and current shareholders voting on reincorporation proposals realize that the owner-manager's (controlling shareholder's) interests will diverge somewhat from their interests and that controllers or officers and directors will act self-interestedly at the expense of minority investors. The threat of such self-interested behavior will cause non-controlling shareholders to decline to invest or else depress the price such non-controlling investors will be willing to pay for stock to a level that reflects the anticipated costs of future self-interested actions by managers and controlling shareholders.[43] Similarly, rational shareholders will vote against proposals to reincorporate where the benefits from reducing frivolous and opportunistic litigation and lowering D&O insurance premiums are outweighed by the costs of weaker protections against self-dealing.

An important question for the future of Delaware is the extent to which the state's relatively strong protections for non-controlling shareholders will attract chartering

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39. Talley, Sanga & Rauterberg, *supra* note 34.

40. *See* Nolledo, Wenger & Wendt, *supra* note 8 (providing commentary on reincorporation proposals during the 2025 proxy season).

41. *Id.*

42. *Id.*

43. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 280–81 (1977) (discussing the tradeoff between "eliminating all defeated minority expectations and the cost of injuring shareholders generally"); *see also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 313 (1976) ("Prospective minority shareholders will realize that the owner-manager'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 interest and theirs.").

business. Historically, incorporating in Delaware was the strategy of choice for companies seeking to reduce capital costs by locating themselves in a state that provides robust protection for non-controlling shareholders. Another, potentially superior tactic for protecting non-controlling shareholders has emerged. This tactic is to incorporate in a state, like Nevada, that offers great flexibility in contracting, and lower costs than Delaware, and then to ***voluntarily opt in to enhanced legal protection for minority shareholders***.[44] In this way, a corporation can achieve the advantages of virtue-signaling by committing to a rigorous set of legal protections for minority shareholders, while avoiding the substantial risks and costs of incorporating in Delaware.[45] The redomestication of Fidelity National Financial, Inc. (Fidelity) from Delaware to Nevada provides a vivid illustration of this phenomenon in operation.[46]

In 2024, Fidelity's shareholders voted down a proposal to leave Delaware for Nevada, and the rejection of management's proposal to relocate was attributable to voters' concerns about officers' and directors' reduced litigation exposure related to losing protections from violations of the duty of loyalty or other acts of bad faith by officers and directors.[47] Rather than remain in Delaware, however, the Company's response was to update its corporate charter to preserve various stockholder rights and declining to limit the individual liability of directors and officers to the full extent permitted by Nevada law.[48] After securing these

44. Nevada law allows corporations to provide for stronger shareholder protections than those provided for by statute. The relevant statute, NEV. REV. STAT. § 78.138 (2025), provides in pertinent part that "unless the articles of incorporation or an amendment thereto . . . provide for greater individual liability," a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: (a) the statutory presumption that officers and directors have acted in good faith, on an informed basis and with a view to the interests of the corporation has been rebutted; and (b) it is proven that (1) "the director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law." The Nevada Supreme Court set a very high bar for imposing liability on directors or officers, opining that a plaintiff "must establish that the director or officer had knowledge that the alleged conduct was wrongful in order to" meet the statutory requirement for liability of proving a "knowing violation of law" or "intentional misconduct" under NRS 78.138(7)(b). Chur v. Eighth Judicial Dist. Court of Nev., 136 Nev. 68, 75 (2020). Under this legal standard, an officer or director must know that what they were doing was wrong in order to be liable for breaching a fiduciary duty.

45. In their 2025 Proxy Statement, Fidelity National Financial, Inc. identified the following financial benefits and costs savings achieved by leaving Delaware for Nevada: (a) "tax savings of close to $250,000" (from approximately $250,000 in Delaware franchise taxes to about $900, consisting of a Nevada state business license fee of $500 and a fee for filing the Company's annual list of directors and officers of $400); (b) "potential cost savings in D&O insurance premiums from reduced litigation and litigation costs, including attorneys' fees, which can be significant for corporate litigation" (the Company's D&O premium had increased from $3.68 million in 2021–2022 to $4.89 million in 2022–2023); and (c) avoiding the "increased risk of opportunistic litigation" faced by Delaware public companies, "which has made Delaware a less attractive place of incorporation due to the substantial costs associated with defending against such suits", which come from "indemnification obligations, distraction to Company management and employees, and increased insurance premiums." Fidelity Nat'l Fin. Inc., Proxy Statement 32 (Schedule 14A) (Apr. 2025) [hereinafter Fidelity Proxy Statement], https://www.sec.gov/Archives/edgar/data/1331875/000110465925035169/tm252368d1_pre14a.htm#V8 [https://perma.cc/D4ZX-674A].

46. *Id.*

47. *Id.* at 31.

48. *Id.*

protections for shareholders, Fidelity shareholders took a second vote and approved moving to Nevada.[49]

Specifically, the Company stipulated:

> [T]he limitation on individual liability afforded to our directors and officers under the Nevada Revised Statutes . . . does not apply to any breach of fiduciary duty that (i) constitutes a breach of the duty of loyalty, (ii) involves acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) results in a transaction from which a director or officer derived an improper personal benefit.[50]

In addition, the Company adopted a set of best corporate governance practices that in some respects provided protection for shareholders exceeding those of many Delaware corporations. These included requiring that a majority of directors be independent and that key board committees (audit, compensation, and nominating) be comprised solely of independent directors, a lead independent director, plaintiff's choice of litigation forum, allowing shareholders to act by written consent, forbidding dual class voting stock and allowing stockholders to remove directors without cause.[51]

Thus, incorporating in Nevada does not necessarily send a negative signal to the market that the company wishes to allow its senior officers and directors to avoid strict legal accountability. In fact, reincorporation to Delaware's chief rival can be accompanied by strong "virtue signaling" that a company is voluntarily opting into strong legal protections for its shareholders.

C. Reason #1 for Worrying About Delaware's Competitive Position: Documented Judicial Hostility to the New Statutes Undermines Their Utility for Corporations

The fact that the new statutes inevitably must be interpreted and applied by judges who have expressed outright hostility to their content sends a strong signal to companies considering Delaware that the outcomes they might receive in actual litigation are likely to be considerably less than they would expect from judges who lack hostility to the statutes they are applying. After all, as Lawrence Cunningham, a professor at the University of Delaware and a staunch defender of Delaware's competitive position, recently pointed out, "[s]tatutory codes alone do not govern corporations. They require interpretation, application, and evolution . . . . No statute is fully self-executing."[52] Here it seems likely that certain Delaware judges interpreting the new statutes will be strongly inclined to use their interpretive powers to "execute" those statutes in the most literal sense of the term.

49. *See* Fidelity Nat'l Fin. Inc., Significant Material Event (Form 8-K) (June 11, 2025), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001331875/000133187525000046/fnf-20250611.htm [https://perma.cc/DND4-E364] ("On June 11, 2025, at the Annual Meeting of Shareholders (the 'Annual Meeting'), the stockholders of Fidelity National Financial, Inc. (the 'Company') approved the proposed redomestication by conversion of the Company from the State of Delaware to the State of Nevada (the 'Redomestication').").

50. Fidelity Proxy Statement, *supra* note 45, at 31.

51. *Id.* at 33.

52. Lawrence Cunningham, *The Big Picture on a Small State: The Charter Competition Debate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 31, 2025), https://corpgov.law.harvard.edu/2025/07/31/the-big-picture-on-a-small-state-the-charter-competition-debate/ [https://perma.cc/W6YL-YKHD].

It is well understood that judges have broad freedom to interpret statutes broadly or narrowly. Judges have a host of interpretive tools at their disposal when construing statutes, and can identify ambiguities in statutory language that then give them the power to make law by clarifying the ambiguity and determining either what the legislature meant or what the legislation intended.[53] The power of courts to "act as the arbiters of statutory meaning and necessarily shape the way a statute is implemented"[54] fundamentally curtails the ability of legislatures to eliminate judicial discretion. As Frank Easterbrook observed years ago, "[j]udges interpret words. And words do not bind the interpreters; rather the interpreters give meaning to the words."[55]

In particular, Delaware judges have harshly criticized new legislation aimed at reversing important decisions made by Chancery Court judges. The attacks began in earnest in mid-2024 in the context of the consideration of SB 313. This statute added a new subsection (18) to Section 122 of the DGCL, which clarified that contracts between Delaware corporations and their shareholders (including controlling shareholders) that allocated managerial and governance authority to such shareholders were valid and enforceable, even if such allocations of authority were not authorized in the corporation's certificate of incorporation.[56]

Such contracts had been ruled illegal for Delaware corporations by Vice-Chancellor Travis Laster on the grounds that they violated the statutory provision requiring that Delaware corporations be managed or under the authority of their boards of directors,[57] in his controversial decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*.[58] Judges, academics and plaintiffs' lawyers were apoplectic over the new statute, and their allies in academia have expressed similar disdain for SB 21. Chancellor McCormick and Vice-Chancellor Laster raised objections, with Vice-Chancellor Laster "questioning the scope, draftsmanship, logic, desirability, and potential unintended consequences of Senate Bill 313."[59]

Serious concerns about how Delaware statutes will be interpreted and applied are justified by the fact that they will be interpreted by judges in the Delaware Chancery Court who were clearly hostile to their enactment, believe that they were sloppily drafted and hastily considered, and rue the day that they became law. Evidence of such hostility is abundant.

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53. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 5 (2d ed. 2006) (contrasting common law approach to statutory interpretation); *cf. generally* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015) (describing various arguments for and against applying common law principles of reasoning to statutory interpretation); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10 n.26 (2006).

54. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 48 (2023), https://www.congress.gov/crs-product/R45153 [https://perma.cc/PQ5C-BZGF].

55. Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 87 (1984).

56. *See* DEL. CODE ANN. tit. 8, § 122(18) (2025).

57. *See* DEL. CODE ANN. tit. 8, § 141(a) (2025).

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

59. Joel Edan Friedlander, *William Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?*, 51 J. CORP. L. (forthcoming Jan. 2026) (manuscript at 45), https://friedlandergorris.com/assets/files/chandler's%20unjust%20criticism%20(8-19-25)%20(w0523224xaebec).pdf [https://perma.cc/583U-2JUK].

On March 26, 2025, less than 24 hours after SB 21 was signed into law, Vice-Chancellor Laster harshly criticized the untested statute, calling it "a significant departure 'from the way other areas of the law define control.'"[60] He then went further, predicting, according to *Bloomberg Law*, that "the legislation will backfire, pushing judges into unfamiliar territory where they'll be forced to make it up as they go along."[61] He even was quoted as saying that: "'[w]e have a test with a lot of language that is left for courts to interpret,' he said. 'That means a lot of litigation to try to find out what we have.'"[62] When the judge interpreting a statute predicts that the statute will fail, it is likely, indeed inevitable, of course, that the statute will, in fact, fail because the judge literally has the power to make such failure a self-fulfilling prophecy.

During the month prior to the vote on SB 313, Vice Chancellor Laster posted no less than 12 essays to his public LinkedIn account,[63] along with an essay on the popular blog *Harvard Law School Corporate Governance Forum*,[64] excoriating the new statute and, at least implicitly, defending his earlier decision in the *Moelis* case. One of the Vice-Chancellors supporters, plaintiffs' attorney Joel Friedlander, reported that "[i]n early 2025, Vice Chancellor deactivated his LinkedIn account."[65]

D. Reason #2 for Worrying About Delaware's Competitive Position: Delaware Has Fallen Out of Favor With The Cognoscenti

Yet another problem for Delaware is that the state's corporate law appears to have fallen out of favor with academics. The recent overhaul of Delaware corporate law was loudly opposed by legal academics. It was widely reported that:

> [M]ore than 50 legal experts from Yale, Harvard, Columbia, and other universities signed an open letter to Delaware lawmakers, urging them to vote no on the measure, which they called a "hasty legislative action" that "would allow corporate boards to unilaterally contract away their powers without any shareholder input."
>
> "These would be the most consequential changes to Delaware corporate law of the 21st century, and they should not be made hastily — if at all," the letter stated. In response to the letter, Vice Chancellor Travis Laster – a judge in Delaware's Court of Chancery – said in a LinkedIn post Saturday that he had "never seen so many corporate law professors agree on anything. Wow!"[66]

60. Mike Leonard, *Musk-Linked Corporate Law Overhaul Criticized by Delaware Judge*, BLOOMBERG L. (Mar. 27, 2025), https://news.bloomberglaw.com/esg/musk-linked-corporate-law-overhaul-criticized-by-delaware-judge [https://perma.cc/CH53-QLXE].

61. *Id.*

62. *Id.*

63. *See* Friedlander, *supra* note 59, at 44, n. 159 (cataloguing Vice-Chancellor Laster's posts).

64. Hon. J. Travis Laster, *After Section 122(18), What Happens to the Merger Recommendation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 19, 2024), https://corpgov.law.harvard.edu/2024/06/19/after-section-12218-what-happens-to-the-merger-recommendation/ [https://perma.cc/TWB8-L8JH].

65. Friedlander, *supra* note 59, at 44, n.159.

66. Karl Baker, *'Major Surgery' - Wave of Outcry Erupts Over Delaware Corporate Law Bill,* SPOTLIGHT DEL. (June 10, 2024), https://spotlightdelaware.org/2024/06/10/delaware-corporation-law-debate/ [https://perma.cc/A76L-W5GE].

The lack of support in academia for the new Delaware legislation and the strong support in the academic community for the two Delaware judges who are the most openly hostile to the new statute is highly significant. As Circuit Judge Kenneth Ripple once observed, "[i]n the United States, the judiciary has long regarded itself as having a special relationship with the legal academic community."[67] Richard Posner observed that legal "scholarship should eventually seep into the judicial process, via law clerks, the bar, and the increasing number of academics being appointed to the judiciary."[68] With specific regard to Delaware, it seems clear that, as Joel Friedlander recently observed, "Delaware judges often look to academic scholarship as a source of law."[69] William Chandler, a strong proponent of the recent legislative reform in Delaware once observed that "[t]he academic world provides an extremely relevant and timely voice as an agent of proposed change in the corporate field."[70]

Moreover, the disparagement of the new Delaware statute by a host of academics threatens to reverse the reputational effect on incorporating in Delaware from a positive to a negative. It used to be the case that companies incorporating in Delaware sent a strong signal that those making the incorporation decision wanted to opt-into the corporate law jurisdiction with the strongest protection for investors. Now academics are writing articles specifically directed at corporate officers and directors telling them that statutes like SB 313, while touted as a "purported 'cure' for dealing with [the legal uncertainty facing controlling shareholders contracting with the corporation] was worse than the disease,"[71] and that the state was selling out to controlling shareholders, leaving investors unprotected and thereby putting "its corporate law dominance at risk."[72]

Some of the criticisms of Delaware's statute were borderline hysterical in tone. For example, the executive editor-at-large of *Directors & Boards* magazine announced that the new Delaware legislation so denuded investors of their rights that "[f]ew investors will opt for so little protection from a one-sided law. They will seek other jurisdictions for incorporation or, ultimately and sadly, federal relief."[73]

Another academic authored a blog post with the title "Delaware Decides Delaware Law Has No Value," and accused the state of duplicity by creating the false appearance of providing protections for investors:

> Delaware could have proposed to eliminate shareholder litigation altogether. It would have been simpler, and more honest: a straightforward declaration that litigation does little to substantively protect shareholder value. That's not even a crazy position; it's certainly a vibrant debate among academics.

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67. Kenneth F. Ripple, *The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237, 1237 (1989).

68. Richard A. Posner, *The Judiciary and the Academy: A Fraught Relationship*, 29 U. QUEENSLAND L.J. 13, 18 (2010).

69. Friedlander, *supra* note 59, at 4.

70. William B. Chandler III, *The Delaware Court of Chancery: An Insider's View of Change and Continuity*, 2012 COLUM. BUS. L. REV. 411, 422 (2012).

71. Usha Rodrigues, *Delaware Puts Its Corporate Law Dominance at Risk*, DIRS. & BDS. (Aug. 26, 2024), https://www.directorsandboards.com/board-issues/delaware-puts-its-corporate-law-dominance-at-risk [https://perma.cc/6A8P-YXPC].

72. *Id.*

73. Charles Elson, *Directors and the New Delaware*, DIRS. & BDS. (Mar. 27, 2025), https://www.directorsandboards.com/legal-and-regulatory/directors-and-the-new-delaware/ [https://perma.cc/WC3W-9MRJ].

> But rather than be so forthright, the proposal retains the veneer of governance, to create the appearance that conflicts are being policed – but, with no actual substance to back it up. That is, of course, the thesis of my article. The law itself isn't doing any work except to launder managerial power.
>
> . . . .
>
> . . . "The more freedom Delaware accords corporate managers, and the less scrutiny it applies to their transactions, the less there is for Delaware to, well, actually do." Delaware could wind up deregulating itself out of relevance entirely.[74]

These odd polemics are wholly unconvincing because they fail to identify any existing, alternative jurisdiction that offer better protections for investors than Delaware. In fact, some of the very professors most critical of Delaware's law reform have indicated other state law is much worse.[75] But for purposes of this Article, which is about the recently emergent threats to Delaware's competitive position, the merits of these arguments is not what matters; what matters is the fact that these attacks on Delaware provide cover for directors and officers searching for a pretext or justification for leaving Delaware.

E. Reason #3 for Worrying About Delaware's Competitive Position: The Tragedy of the Commons Facing Plaintiffs' Lawyers

The herculean efforts of the Delaware executive and legislative branches to rescue Delaware from losing its dominant position in the jurisdictional competition for corporate charters is also threatened because the powerful plaintiffs' bar appears to be trapped in a tragedy of the commons in which the common resource is legal fees. The tragedy of the commons describes the phenomenon that occurs when rational individuals have free access to a valuable, shared resource (known as a commons), act in their own interest by exploiting that resource to the fullest possible extent, and, in doing so, ultimately deplete the resource.[76]

For example, if a large number of ranchers make use of a shared pasture to graze their sheep, each farmer has the incentive to introduce additional sheep to their herd. While each individual rancher captures the full benefit of the profit generated by putting additional sheep out to graze in the common pasture, the costs of the additional sheep, which comes from the ultimate depletion of the shared resource due to over-grazing, is borne by all the other ranchers.

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74. Ann M. Lipton, *Delaware Decides Delaware Law Has No Value*, BUS. L. PROF BLOG (Feb. 17, 2025), https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/ [https://perma.cc/WU2A-L9RH].

75. One of the most vocal critics of the legislative reforms in Delaware has described Nevada, one of Delaware's principal competitors, as follows: "Nevada is where you incorporate if you want to do frauds." Ann Lipton (@AnnMLipton), TWITTER (Apr. 10, 2023, 4:48 PM), https://x.com/AnnMLipton/status/1645544410665435137 [https://perma.cc/2ZA2-CU9J]. The quotation has appeared in press reports, see, for example, Alison Frankel, *In New TripAdvisor Suit, Delaware Lawyers Deride Nevada's 'No-Liability Regime'*, REUTERS (Apr. 24, 2023), https://www.reuters.com/legal/government/column-new-tripadvisor-suit-delaware-lawyers-deride-nevadas-no-liability-regime-2023-04-24/ [https://perma.cc/66S2-TD8G].

76. The term "Tragedy of the Commons" was first used by Garrett Hardin in Garrett Hardin. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

The tragedy of the commons is that the shared property rights in the common pasture ultimately harms all of the ranchers because it leads to depletion of the shared resource. The solution to the shared resource is coordinated, collective action either in the form of granting property rights in the common asset to a single user or working out some sort of compulsory, cooperative arrangement in which each rancher agrees to limit her use of the common asset.

Plaintiff's lawyers bringing class action and derivative claims against Delaware companies, acting rationally from their own, individual perspectives, appear to be "overgrazing" or "overfishing" the accessible financial assets, which come in the form of defendants' ability to pay, to the detriment of the plaintiffs' bar as a whole.[77] The basic problem is that the companies incorporating in Delaware are the source of the considerable revenue generated by the plaintiffs' bar.[78] The willingness of these companies to pay the legal fees of their own lawyers and the plaintiffs' lawyers who sue them is significant, but finite. The massive, eye-popping award of $345 million in attorney's fees (or $370,000 per hour),[79] to the lawyers who successfully challenged Elon Musk's equity-based compensation agreement with Tesla attracted considerable attention, particularly because it translated into compensation to the lawyers of almost $18,000 an hour.[80]

Adding fuel to the fire, a recent article by Joseph Grundfest and Gal Dor examined various characteristics of attorney fee awards in Delaware and found a pattern of fees that were many multiples of the standard baseline fee (known as a "lodestar") normally paid to lawyers.[81] The study found that Delaware had applied multiples as high as 66X the standard, baseline lodestar fee, which is almost quadruple (3.82x) the federal maximum lodestar of 17.3.[82] The study also found that Delaware awarded "by a wide margin, the largest multiplier" of any court in the country.[83] Several Delaware awards generated multipliers exceeding the federal maximum, with most of these fee awards being bestowed in the past five years.

77. *See id.* (explaining the collective action problem posed by a common resource).

78. Evidence of the full extent of the attorneys' fee awards in Delaware is hard to come by because there is no data base or repository of information about fee awards and not even judges "have the information they need to award fees." Adam C. Pritchard & Jessica M. Erickson, *Opening Delaware's Black Box of Attorneys' Fees*, HARV. L. SCH. F. CORP. GOVERNANCE (2025), https://corpgov.law.harvard.edu/2025/03/19/opening-delawares-black-box-of-attorneys-fees/ [https://perma.cc/V3GH-UQ9H]. There is, however, reason to believe that such awards are substantial. Recently, a bipartisan group of Delaware legislators has proposed asking the Council of the Corporation Law Section of the Delaware State Bar Association to prepare recommendations for legislative action regarding fee awards in common fund stockholder litigation. *Id.*

79. Andrew Miller, *'Very Wrong': Elon Musk Case Sparks Calls for Reform After Judge Awarded Massive Judgment for Lawyer Fees*, FOX BUS. (Dec. 18, 2024), https://www.foxbusiness.com/politics/very-wrong-elon-musk-case-sparks-calls-for-reform-judge-awarded-massive-judgement-lawyer-fees [https://perma.cc/2YPR-TR72].

80. *Id.*

81. Joseph Grundfest & Gal Dor, *Lodestar Multipliers in Delaware and Federal Attorney Fee Awards* 5–6 (Rock Ctr. Corp. Governance, Working Paper No. 604, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5237545 [https://perma.cc/A9NT-NHDQ].

82. *Id.* at 4.

83. *Id.*

The Grundfest and Dor article has received considerable attention.[84] A widely read piece in the *New York Times*, DealBook observed that the article was circulating among corporate directors. The *Times* piece focused on the revelations that the trend towards unusually high fees has increased over the past five years in that Septuple fee awards (awards of 7X the lodestar) are 23 times more common in Delaware than in federal court. Decuples (awards of 10X the lodestar) were 57 times more common in Delaware than in federal court. Other findings that received attention were that "[o]ne payout for a lawyer practicing before Delaware's Court of Chancery worked out to an astonishing $35,000 an hour," and that "[s]ome lawyers are walking away with multipliers of 66 times their standard rates."[85]

The article did offer some consolation for the defendants paying these legal fees. An argument could be made that the (real or perceived) runaway fee problem in Delaware was isolated as "[j]ust two chancery court judges handed out a majority of those supersize awards."[86]

The perception that legal fees are out-of-control in Delaware is a significant problem. At some point companies will prefer to move out of Delaware rather than pay the premium (which might be called a "plaintiffs' lawyers' premium") to remain in the state. As the reputational advantages of remaining in Delaware decline and the reputational costs of leaving Delaware decline, corporate fiduciaries have strong arguments that it would be irresponsible to remain in Delaware and continue to be subject to such exorbitant legal fees.

Plaintiffs' lawyers in Delaware, acting rationally from their own private perspectives, are vigorously pursuing lawsuits against Delaware corporations for any and all real or imagined violations of Delaware law. As indicated above, one of the ways that a tragedy of the commons can be avoided is by having a central authority ration access to the common resource by various means such as barring access to the common resource at certain times or by rationing access to the common resource to certain quantities in order to prevent overutilization. In the litigation context, judges serve the important function of rationing access to the common resource that comes in the form of defendants' assets.

Of course, as suggested here, one way that judges ameliorate the tragedy of the commons problem is by limiting legal fees. Here the available evidence indicates that, far from limiting plaintiffs' lawyers' fees, judges give the appearance of doing the opposite. It seems that they are exacerbating the tragedy of the commons problem by granting enormous fees and doing so more frequently than other judges are.

Another judicial mechanism for addressing the tragedy of the commons problem facing plaintiffs' attorneys is by following the so-called "American Rule," which requires that each party to a lawsuit bear its own legal fees and expenses, win or lose. However, a significant exception to the American Rule is the "corporate benefit exception," which provides for fees to be paid in litigation brought against a corporation if such litigation results in the corporation receiving a substantial benefit to the corporation or its stockholders.

Delaware judges developed a reputation for awarding substantial attorneys' fees under the "corporate benefit" rule, even when litigation did not appear to generate any discernible

84. The New York Times reported that the study was "quietly making its rounds in corporate boardrooms." Andrew Ross Sorkin et al., *Companies Rely on Delaware Courts. Lawyers Reap Huge Fees There.*, N.Y. TIMES (June 2, 2025), https://www.nytimes.com/2025/06/02/business/dealbook/delaware-courts-legal-fees.html (on file with the *Journal of Corporation Law*).

85. *Id.*

86. *Id.*

benefit for the corporation or its shareholders. In 2015, respected corporate law professor Sean Griffith, writing about shareholder litigation in Delaware, pointed out that:

> [T]here is plenty of evidence that American corporations [in Delaware] are suffering under an epidemic of shareholder litigation. The problem is especially pronounced in merger litigation, where shareholder suits are brought in 98% of deals, and settled 70% of the time. Such settlements hardly ever result in monetary relief for the shareholder class. A typical settlement instead contains a package of supplemental disclosures in the merger proxy and, occasionally, revision of the merger agreement's deal protection terms. Judges routinely award fees to plaintiffs' attorneys for having produced this meager "corporate benefit."
>
> The easy availability of fees caused the outbreak of shareholder litigation and fueled its spread. The [Delaware State Bar Association's Corporation Law] Council's hope appears to be that judges—specifically Delaware judges—will contain it. But judges have not solved the problem yet. Instead, most judges continue to award mid-six figure fees for highly questionable disclosure settlements. Moreover, empirical analysis shows no meaningful relationship between fees awards and shareholder voting patterns, suggesting that judges are not doing a good job of awarding high fees when disclosures are meaningful and low fees when they are not.[87]

Multiple groups, including judges, legal scholars and corporate defense attorneys have criticized the excessive award of attorneys' fees under Delaware's corporate benefit rule.[88]

The message appears to be getting across, to a limited extent. In a well-known decision in *In re Trulia*, in 2016, the Delaware Court of Chancery found shareholder litigation in the wake of mergers and acquisitions and other major corporate transactions to have gone "beyond the realm of reason."[89] That opinion denied fees in a case urging for a company to make disclosures that were not only immaterial but not even "helpful" to investors,[90] and was "widely seen as a corrective to a plague of disclosure-only settlements."[91]

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87. Sean Griffith, *Correcting Corporate Benefit: Curing What Ails Shareholder Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 19, 2015), https://corpgov.law.harvard.edu/2015/03/19/correcting-corporate-benefit-curing-what-ails-shareholder-litigation/ [https://perma.cc/FHP3-RU4J].

88. *See* Jonathan D. Fortney, Brian M. Lutz & Mark H. Mixon Jr., *Delaware Chancellor Raises the Standard for Pricing Mootness Fees for Supplemental Disclosures*, GIBSON DUNN (Aug. 2, 2023), https://www.gibsondunn.com/delaware-chancellor-raises-the-standard-for-pricing-mootness-fees-for-supplemental-disclosures/ [https://perma.cc/N99L-F6XN] (providing an analysis of the *Magellan* decision); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder. Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 22 (2015) (noting that "[w]hen . . . the only relief is non-pecuniary in nature, fees can be awarded only on the basis of the corporate benefit doctrine").

89. *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 894 (Del. Ch. 2016).

90. *Id.*; *see also In re* Xoom Corp. S'holder Litig., No. 11263, 2016 BL 252274, at *8–9 (Del. Ch. 2016) (requiring only that disclosures be "helpful" to the corporation or its shareholders to justify the granting of attorneys' fees awards in cases in which the defendants make supplemental disclosures or take other actions that render the plaintiff's complaint "moot.").

91. William B. Chandler III & Anthony A. Rickey, *The Trouble with* Trulia*: Re-Evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 11, 2017), https://corpgov.law.harvard.edu/2017/05/11/the-trouble-with-trulia-re-evaluating-the-case-for-fee-shifting-bylaws-as-a-solution-to-the-overlitigation-of-corporate-claims/#1 [https://perma.cc/WG8Q-T23A].

Recent trends indicate a stricter and more demanding approach to fees under the corporate benefit rule.[92] Among the primary tools judges are turning to in limiting fees are requiring that the litigation generate a "material" benefit, not just a "helpful" benefit to the corporation or its shareholders.[93] The older "helpful" standard, judges were criticized for awarding fees to plaintiffs' counsel for achieving trivial changes in disclosure documents.[94] Judges often now require that a lawsuit have been meritorious at the time it was filed to justify an award. This has limited the award of fees for baseless litigation.[95] Courts also are requiring some sort of causal link between the litigation and the corporate benefit achieved and will sometimes deny fees if the benefit was not the result of the plaintiff's efforts.[96]

Thus, while Delaware has a history of robustly applying the corporate benefit rule, the current trend is one of increased scrutiny. The courts are focusing on a more demanding standard that requires evidence of a truly material benefit directly caused by meritorious litigation. This shift aims to curb the filing of opportunistic, low-value lawsuits that serve no purpose other than generating attorneys' fees.

The critical question is whether the recent trend to limit runaway attorneys' fees in Delaware is sufficient to discourage exit by litigation weary corporations. It seems doubtful that it is enough. In particular, the effort appears to be too little, too late. Delaware's previous efforts to limit attorneys' fees have been afforded only a "short-lived respite."[97]

Second, Delaware appears to be playing catch-up to other jurisdictions. For example, Texas, a competitor to Delaware in the jurisdiction for corporate charters, caps fees at four times the lodestar amount.

Perhaps most importantly, it does not appear that Delaware judges have convinced anyone that that they are truly committed to either recognizing or addressing the problem of excessive legal fees. For example, after granting a rather modest fee award of $75,000 in a stockholder class action challenging a merger agreement between Centene Corporation and Magellan Health, Inc. that generated supplemental disclosures by the company that rendered the lawsuit moot,[98] lawyers heralded "another initiative from the Court of Chancery to crack down on excessive M&A litigation."[99] However, it is highly doubtful that any value was added by the litigation in the *Magellan* lawsuit, which the plaintiff moved to dismiss a mere "ten days after it was filed."[100] One wonders whether fees would have

92. *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG (Del. Ch. 2024); Anderson v. Magellan Health Inc., 298 A.3d 734, 741–44 (Del. Ch. 2023).

93. Ethan A. Klingsberg, *When Do Merger Benefits to Directors Constitute Disabling Conflicts?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 6, 2016), https://corpgov.law.harvard.edu/2016/10/06/when-do-merger-benefits-to-directors-constitute-disabling-conflicts/ [https://perma.cc/DR53-AQKV].

94. Corwin v. KKR Fin. Holdings, 125 A.3d 304, 308–14 (Del. 2015).

95. Rational defendants will settle entirely baseless litigation, including even litigation in which the plaintiffs' probability of success is literally zero; if the costs of litigating to victory exceed the costs of the settlement.

96. *Magellan Health Inc.*, 298 A.3d at 740.

97. Chandler III & Rickey, *supra* note 91.

98. *Magellan Health Inc.*, 298 A.3d at 755.

99. Jeffrey L. Rothschild & Jeffrey J. Chapman, *Delaware Court of Chancery Raises Bar for Supplemental Disclosures in Mootness Fee Awards*, MCGUIREWOODS (Oct. 9, 2023), https://www.mcguirewoods.com/client-resources/alerts/2023/10/delaware-court-of-chancery-supplemental-disclosures-mootness-fee-awards/ [https://perma.cc/M542-7DQG].

100. *Id.*

been available in any other jurisdiction for bringing vexatious litigation and moving to dismiss it a mere ten days after filing it.

The prospect that Delaware would reign in attorneys' fees was short-lived indeed. A year after *Magellan*, Chancellor Kathleen McCormick, the judge in the case, celebrated the Delaware tradition of granting massive attorneys' fees on the grounds that the practice "incentivizes counsel to accept challenging cases."[101] The celebration came in the context of the Chancellor's ruling in *Tornetta v. Musk* that the lawyers suing the Tesla board for approving Elon Musk's 2018 equity compensation package were entitled to the $345 million in fees previously discussed.

There is a prevailing sense that the fee awards in the Delaware courts are not the result of systematic disciplined analysis, but rather the result of "judges' intuition [which] creates a black box that only the judges themselves can understand."[102] While the empirical results showing that Delaware is a bastion of excessive legal fees have been challenged,[103] the specific concerns that some "Delaware judges"[104] consistently award higher fees and some "repeat-player" law firms earn the highest fees has not been challenged, much less refuted. As Stephen Choi, Jessica Erickson, and Adam Pritchard recently showed, based on a "comprehensive dataset that includes all derivative and class actions involving public companies filed in the Delaware Court of Chancery between 2017 and 2022,"[105] there appears to be a "Delaware premium."[106] Specifically, "Delaware awards significantly higher fees—especially higher multipliers—than comparable federal cases, even though the underlying litigation risk looks quite similar. We also find no evidence that Delaware's fee awards systematically account for the risks attorneys bear or the results they achieve."[107]

Those who claim that there is a comprehensible methodology for determining legal fees do not articulate what that methodology is. They can only assert that fee decisions "are based on a multi-factor analysis that includes the benefits conferred by the litigation, the

101. Tornetta v. Musk, 326 A.3d 1203, 1238 (Del. Ch. 2024).

102. Pritchard & Erickson, *supra* note 78.

103. Gilda Sophie Prestipino & Michael Klausner, *Attorneys' Fee Awards in Delaware: A Normative and Empirical Analysis* 7–11 (Eur. Corp. Governance Inst., Working Paper No. 885, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5708222 [https://perma.cc/3XYV-KME7]; Gilda Sophie Prestipino & Michael Klausner, *Attorneys' Fee Awards in Delaware: Some Much-Needed Data to Calm the Waters*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 20, 2025), https://corpgov.law.harvard.edu/2025/11/20/attorneys-fee-awards-in-delaware-some-much-needed-data-to-calm-the-waters/ [https://perma.cc/3855-VVKY].

104. *See* Stephen J. Choi, Jessica M. Erickson & A. C. Pritchard, *Is Delaware Different? Stockholder Lawyering in the Court of Chancery* 7 (U Mich. L. & Econ. Rsch., Working Paper No. 25-031, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5748607 [https://perma.cc/A3YJ-82V5] (noting the existence of the so-called "Delaware premium"); *see also* Stephen J. Choi, Jessica M. Erickson & A. C. Pritchard, *Is Delaware Different? New Empirical Evidence on Attorneys' Fees in Stockholder Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 25, 2025) [hereinafter *New Empirical Evidence*], https://corpgov.law.harvard.edu/2025/11/25/is-delaware-different-new-empirical-evidence-on-attorneys-fees-in-stockholder-litigation/ [https://perma.cc/9JYH-PTWJ] (explaining that "Delaware awards significantly higher fees—especially higher multipliers—than comparable federal cases").

105. *New Empirical Evidence*, *supra* note 104.

106. *Id.*

107. *Id.*

stage of litigation, the time and effort of counsel, the complexity of the litigation and other case specific factors."[108]

The poorly specified "multi-factor" analysis does not generate a comprehensible framework for estimating what attorneys' fees are likely to be awarded in a particular case. This is not a criticism: awarding attorneys' fees is inherently subjective. Fee awards by judges who want to encourage the plaintiffs' bar to bring lawsuits because they view litigation against corporations as generally beneficial to the corporations being sued are likely to result in higher fee awards than those offered by judges who are skeptical of the value of contingent fee litigation against corporations.

As is the case in the classic "tragedy of the commons," an inability to control shareholder litigation against Delaware corporations will remain an existential problem unless it can somehow be brought under control by some central authority. The litigation paradise that Delaware has become has led to significant over-grazing in the form of excessive litigation in Delaware as compared with other states.[109] From a competitive perspective, the sheer number of lawsuits and the extremely high legal fees awarded in some of these suits, has brought unwanted attention to the fact that Delaware has become a litigation machine that transfers wealth from shareholders to local lawyers.[110] Unless Delaware can find a solution to this problem, its ability to continue to attract chartering business is subject to considerable doubt.

In recognition of the problem, hope that regulation might coordinate the behavior of the relevant actors to moderate the litigation crisis came in the spring of 2025. When a bipartisan group of Delaware legislators recommended asking the Delaware Council of the Corporation Law Section of the Delaware State Bar Association to prepare recommendations for legislative action regarding fee awards in common fund stockholder litigation.[111] This recommendation came from what a strong opponent of reform called "Democrats and Republicans who are opponents of stockholder litigation, not to a mix of legislators with divergent views."[112] At present, it does not appear that any reforms are in the works.[113]

F. Reason #4 for Worrying About Delaware's Competitive Position: Managers and Directors are Shamed by Delaware Judges Even When They Win Cases

Delaware judges are known for the unusual practice of criticizing corporate managers and directors in their opinions, even when the defendants technically win the case, and

108. Michael Hanrahan, *The Delaware Courts' Multi-Factor Approach to Attorneys' Fees Is No 'Black Box': A Response to Professors Pritchard and Erickson*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 15, 2025), https://corpgov.law.harvard.edu/2025/05/15/the-delaware-courts-multi-factor-approach-to-attorneys-fees-is-no-black-box-a-response-to-professors-pritchard-and-erickson/ [https://perma.cc/5MRT-NV9V].

109. *See* Kevin M. LaCroix, *But ARE Plantiffs' Counsel Fee Awards in Delaware Excessive?*, D&O DIARY (Nov. 23, 2025), https://www.dandodiary.com/2025/11/articles/corporate-litigation/but-are-plaintiffs-counsel-fee-awards-in-delaware-excessive/ [https://perma.cc/J82G-U4UF] (commenting on Delaware's high costs to pay for litigation).

110. *Id.*

111. *See generally* Del. S. Con. Res. No. 17, 153rd Gen. Assemb. (Del. 2025).

112. Hanrahan, *supra* note 108 at n.18.

113. *Id.* (pointing out that "[t]here is no 'set of pending reforms,'" and observing that if a solution is ever proposed it is likely to be a lodestar multiplier fee cap).

often when the subjects of their ire are not even named defendants.[114] This practice is part of the Court of Chancery's well-known effort to police corporate conduct by using public shaming as a form of judicial sanction.[115] As one corporate law scholar observes, it appears that Delaware's judge-made law "operates as much by singling out particular corporate actors for scathing criticism [as] by imposing formal sanction."[116]

Decisions by Delaware judges often highlight poor decision-making or governance lapses that, while not rising to the level of legal liability, are deemed unacceptable.[117] Judges engage in shaming for employing weak decision-making procedures. This occurs most often in cases where liability against directors cannot be imposed because the board's decision is protected by the Business Judgment Rule, where the Delaware Chancery Court sometimes will criticize directors for a sloppy or rushed decision-making process when making decisions about mergers or executive compensation.[118] Even in cases in which a special committee of independent directors is used to approve a transaction involving a controlling shareholder, Delaware judges may criticize a board that it perceives to be too deferential or too lenient to the controller. Delaware judges deciding corporate law cases are described as having, "a prophetic function. Like the minor prophets of old, Delaware judges call out sinners among the rich and powerful and hold them up as examples of what not to do."[119]

The Delaware Supreme Court itself has defended the "naming and shaming" practices employed in Delaware as promoting the "institutional aspirations that boards of directors

114. *See* Stephen M. Bainbridge, *Shaming as Sanction in Delaware Corporate Law*, BAINBRIDGE ON CORPS. (July 5, 2025), https://www.bainbridgeoncorporations.com/p/shaming-as-sanction-in-delaware-corporate/ [https://perma.cc/C76Z-ATKJ] (commenting on how Delaware's judges shame corporate defendants in their opinions).

115. *See id.*

116. *Id.* (describing Rock's thesis).

117. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (referring to the role of courts as "preachers" to corporations). See the examples discussed in the text below as well as Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014), a case involving 2010 acquisition of Occam Networks by Calix Inc., where a post-closing lawsuit alleged a sales process marred by several flaws including a failure by the board to pursue other options, including a higher all-cash offer from a competing bidder and inadequate disclosures in the proxy statement, namely the omission of revenue projections for a future year. The outside directors were protected by the charter provision enacted pursuant to Delaware General Corporation Law § 102(b)(7), which protected these directors from liability for a duty of care breach. The case against the CEO moved forward, but the court strongly criticized the board's actions anyway, calling them "unreasonable." *Id.* at 675; *see also In re* Rural/Metro Corporation Stockholders Litigation 105 A.3d 398 (Del. Ch. 2014) (strongly criticizing the board's decision-making process as unreasonable, even though the directors could not be found personally liable because the corporation's charter exculpated directors for violations of the fiduciary duty of care). The company's financial advisor, RBC Capital Markets, was found liable for aiding and abetting the board's breaches of fiduciary duty. *Id.*; *see also* David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 163 (1997).

118. Alexandra R. Lajoux, *Latest Delaware Decisions Reveal the Limits of the Business Judgment Rule*, NAT'L ASS'N CORP. DIRS. (June 4, 2024), https://www.nacdonline.org/all-governance/governance-resources/directorship-magazine/online-exclusives/2024/june/latest-Delaware-decisions-reveal-limits-business-judgement-rules/ [https://perma.cc/KQ9S-KGLV].

119. Francis Pileggi, *Commentary on Chancellor Leo Strine, Jr. of the Delaware Court of Chancery*, DEL. CORP. & COM. LITIG. BLOG (Mar. 3, 2012), https://www.delawarelitigation.com/2012/03/articles/chancery-court-updates/commentary-on-chancellor-leo-strine-jr-of-the-delaware-court-of-chancery/ [https://perma.cc/V3ZX-D4Z3] (quoting Stephen Bainbridge).

of Delaware corporations live up to the highest standards of good corporate practices."[120] Notably, Delaware judges consider these shaming practices as appropriate even in cases in which there is no legal basis for penalizing the directors or officers appearing before them.

Examples of shaming abound. One particularly high-profile recent example is Vice Chancellor Laster's opinion in *Leo Investments v. Tomales Bay Capital Anduril III*.[121] The case involved the manager of an investment fund called Tomales Bay Capital (Anduril III) removing an investor, Leo Investments Hong Kong Limited, from the fund because a fund portfolio company, Space Exploration Technologies Corp. (SpaceX) was concerned that the investor, which was a publicly traded entity headquartered in the People's Republic of China, would cause problems for SpaceX's ability to compete for sensitive contracts with the U.S. government.[122] The investor sued the fund and the fund manager, claiming breaches of contract and breaches of fiduciary duty.[123] The investor prevailed on a single claim, which was that the fund and the fund manager had breached their fiduciary duty of candor. However, the Court of Chancery found that this breach did not lead to any meaningful loss for the investor or benefit for the fund principal.[124]

Vice Chancellor Laster found that the Tomales Bay Capital fund manager, Iqbaljit Kahlon, breached his duty of candor by being untruthful with Leo Investments after SpaceX insisted on their removal from the fund.[125] Attempting to convince Leo to withdraw from the fund consensually, Kahlon withheld information about his role in approving the regulatory disclosures that drew SpaceX's attention.[126] However, the court ruled that Kahlon did not breach his duty of loyalty because the Fund's interest in maintaining its relationship with SpaceX was aligned with the Fund's primary purpose which was to acquire SpaceX shares.[127] Therefore, Kahlon's decision to remove Leo Investments was protected by the business judgment rule.[128] The court awarded only nominal damages of $1 for the breach of candor violation because the court found that Leo Investments did not suffer any meaningful financial loss as a result of the deception, since their removal from the fund was going to occur regardless of what Kahlon had disclosed.[129]

On the way to essentially absolving Kahlon of liability, Vice Chancellor Laster could not resist taking a few swipes at Kahlon's conduct, saying that he had "acted callously," and observing not only that Leo Investments "would be justified in never doing business with Kahlon again," but also that "other investors might want to think twice" before doing business with him.[130] Not surprisingly, the case has been described as a "shining example" of the Delaware practice of "singling out particular corporate actors for scathing criticism" as much as by imposing formal sanction.[131]

120. Brehm v. Eisner, 746 A.2d 244, 249 (Del. 2000).

121. *See generally* Leo Invs. H.K. Ltd. v. Tomales Bay Cap. Anduril III, L.P., 342 A.3d 1166 (Del. Ch. 2025).

122. *Id.* at 1177.

123. *Id.* at 1176.

124. *Id.* at 1208.

125. *Id.*

126. *Leo Invs. Hong Kong Ltd.* 342 A.3d at 1208.

127. *Id.* at 1198.

128. *Id.* at 1208.

129. *Id.* at 1208.

130. *Id.* at 1202.

131. Ann Lipton, *Stuff That Has My Attention*, BUS. L. PROF BLOG (July 3, 2025), https://www.businesslawprofessors.com/2025/07/stuff-that-has-my-attention/ [https://perma.cc/83UT-4VF2].

In re Straight Path Communications, *Inc.*, *Consolidated Stockholder Litigation*, provides another example of shaming litigants even in the absence of measurable harm to the corporation or substantive wrongdoing.[132] In this case the court found that plaintiff, a former stockholder of Straight Path Communications, who sought approximately $1.2 billion in damages was not entitled to any recovery whatsoever.[133]

In an 82-page post-trial memorandum opinion, the Court held, following over six years of litigation and an 11-day trial, that the plaintiffs "suffered no damages."[134] Straight Path was spun off from IDT in 2013 and subsequently sold to Verizon Communications for $3.1 billion in 2017.[135] The lawsuit, filed by the plaintiffs in 2017, alleged an unfair settlement of legal claims between Straight Path and IDT in connection with the sale of Straight Path.[136] The Court of Chancery found that the amount paid in settlement actually exceeded the value of the claims, and therefore there was no harm to Straight Path stockholders.[137]

The lack of harm to shareholders did not stop the court from giving a sharp bench slap to the controlling shareholder of IDT, Howard Jonas, who "drove an unfair transaction in breach of fiduciary duty," and "made every effort to bully the Special Committee towards his desired outcome," and orchestrated a process that was a "campaign of abuse and coercion."[138]

In 2019, in what he described as a "[a] morality play for our times,"[139] Vice Chancellor Laster sharply rebuked directors of PLX Technology, a semiconductor firm, for a flawed sales process in which the board of directors of PLX, which was selling itself, was found to have breached its fiduciary duties by selling the company under pressure from an activist investor, Potomac Capital Partners.[140] The activist director, Eric Singer, failed to disclose material information to his fellow directors.[141] The sale price of $6.50 per share was also criticized for being far below management's existing discounted cash flow valuation.[142] Despite the breaches, the directors technically won because the plaintiffs failed to prove that the company's standalone value was higher than the deal price. As a result, no damages were awarded against the board or the activist fund.[143] This did not stop the judge from faulting the directors for "surrendering" to activist pressure and for criticizing activist hedge funds for being "impatient shareholders," who "espouse short-term investment strategies and structure their affairs to benefit economically from those strategies, thereby

132. *In re* Straight Path Commc'ns Inc. Consol. S'holder Litig., No. 2017, 2023 WL 6399095, at *31 (Del. Ch. Oct. 3, 2023).

133. *Id.*

134. *Id.* at 31.

135. *Id.* at 2.

136. *Id.* at 16.

137. *Straight Path Commc'ns Inc.*, 2023 WL 6399095, at *1–2.

138. *Id.* at 1, 17.

139. Trevor S. Norwitz, In re PLX*: A Morality Play for Our Times*, BUS. L. TODAY, (Nov. 19, 2019), https://businesslawtoday.org/2019/11/re-plx-morality-play-times/ [https://perma.cc/9UGR-ANQZ].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

creating a divergent interest in pursuing short-term performance at the expense of long-term wealth."[144]

Controlling shareholders are held out for particularly rough verbal treatment in Delaware. Perhaps most famously, then Vice Chancellor (later Supreme Court Chief Justice) Leo E. Strine, Jr., famously described the controlling shareholder of a public corporation as "the 800-pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support)."[145] Chancellor McCormick went further in *Tornetta v. Musk*, casting doubt on the value-added of CEOs generally, and speculating that Elon Musk in particular should not have been paid at all by Tesla because, as "an executive has a sizeable pre-existing equity stake, there is a good argument that the executive's interests are already aligned with those of the stockholders."[146]

Reasonable people can disagree about the "scathing criticism" of corporate actors by Delaware judges, but it is undoubtedly true that "whatever the correct direction of Delaware law, this kind of open warfare (and, frankly, attempted deployment of political muscle) challenges the reputation Delaware has built for comity and a technocratic approach to lawmaking. That's the kind of thing that undermines Delaware's legitimacy . . . ."[147]

G. Reason #5 for Worrying About Delaware's Competitive Position: The Demise of Civility

For decades, the governance of Delaware corporations and the practice of corporate law in Delaware has been characterized by civility. Attention to the norm that opposing sides should treat each other with civility and respect has been characterized as "The Delaware Way."[148] The Delaware Way "has always been to sit down over a cup of coffee and talk things through, person to person, and let go of the egos, so to speak."[149] The Delaware Department of State's Division of Corporations prints, distributes and highlights on its website a monograph titled "Why Corporations Choose Delaware," by Lewis S. Black, Jr., which answers the questions "[s]o what is the source of Delaware's prestige—even cachet? Why do corporations choose Delaware? I think the answer . . . includes . . . the civility and respect with which both sides [in litigation] are treated."[150]

The traditional civility that characterized dealings among the various factions of the Delaware legal community appears to have broken down completely. The dignity and

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144. *In re* PLX Tech. Inc. S'holders Litig., No. CV 9880, 2018 WL 5018535, at *41 (Del. Ch. Oct. 16, 2018).

145. *In re* Pure Res., S'holders Litig., 808 A.2d 421, 436 (Del. Ch. 2002) (citing Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1110 (Del. Ch. 1994)).

146. *See* Jonathan Macey & M. Todd Henderson, *Is a Trial Lawyer Worth 100 Elon Musks?*, WALL ST. J. (May 13, 2024), https://www.wsj.com/opinion/is-a-trial-lawyer-worth-100-elon-musks-ebaec6c3 (on file with the *Journal of Corporation Law*).

147. Ann Lipton, *The Delaware Contretemps Continues*, BUS. L. PROF BLOG (Apr. 26, 2024), https://www.businesslawprofessors.com/2024/04/the-delaware-contretemps-continues/ [https://perma.cc/ENJ8-NVXC].

148. Bradley Vasoli, *State Sees Growing Signs of Drift Away from 'The Delaware Way'*, DEL. LIVE (Nov. 26, 2024), https://delawarelive.com/the-delaware-way-drift/ [https://perma.cc/PM2X-UDSX].

149. *Id.*

150. LEWIS S. BLACK, JR., DEL. DEP'T. STATE, WHY CORPORATIONS CHOOSE DELAWARE 1–6 (2007).

respect with which parties on opposite sides of cases and issues has been replaced by civil war, a situation that had become so dire by late 2025 that Delaware Vice Chancellor Morgan T. Zurn issued a postscript to a bench ruling expressing her concerns about the change in the behavior of lawyers, in which she characterized herself as "heartbroken" over the fact that "[t]he mutual respect and civility that bind us have broken down."[151]

In addition to the breakdown in civility among litigants, criticisms of judges has become more pointed, as practitioners have come to fear an activist, pro-plaintiff tilt on the Court of Chancery. Recently, for example, William Chandler, a former Chancellor of the Delaware Court of Chancery who is now in private practice at Wilson Sonsini,[152] pointedly observed that the "corporate market is not feeling good about Delaware . . . [because of] the uncertainty and unpredictability of a few decisions by just two judges"[153] (namely Vice Chancellor Travis Laster and Chancellor Kathaleen McCormick).[154] This, in turn prompted a lengthy and spirited reprisal from Joel Fleming, a leading plaintiff's lawyer (whose current and prior law firms appear to have been in a position to receive fee awards in cases before these judges).

Attorney Fleming simultaneously attacked both former Chancellor Chandler and the civility norms themselves, alleging that "[T]he Chancellor [McCormick] and Vice Chancellor [Laster] are dedicated public servants who enforce the law. Bill Chandler is a dedicated servant of Wilson Sonsini's venture capital clients who didn't feel like following [the law]. What he said was shameful and reveals the cynicism of [Delaware's] civility norms."[155]

In the context of the jurisdictional competition for corporate charters, the problem with the decline in civility is not merely that it is unseemly, but that it makes Delaware a less attractive place to incorporate. A Delaware practitioner observed that: "[a] more boorish atmosphere could tarnish Delaware's reputation for setting the 'gold standard' in corporate law . . . It would make Delaware less unique."[156] In addition, as one Chancery Court Vice-Chancellor observed, less civility "leads to a lot of inefficiency in litigation," and "impedes the course of justice."[157]

151. Jeff Montgomery, *Delaware Judge Calls for Civility After 'Annus Horribilis'*, LAW360 (Sept. 18, 2025), https://www.law360.co.uk/articles/2389818 (on file with the *Journal of Corporation Law*) (discussing Chancellor Zurn's comments and providing the full text of her statement from the bench).

152. *See* WILSON SONSINI, *supra* note 31.

153. This statement was made by former Chancellor Chandler on the floor of the Delaware House of Representatives. Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES (Feb. 8, 2025), https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html (on file with the *Journal of Corporation Law*).

154. *Id.* (identifying the judges to whom Chancellor Chandler was referring).

155. Jordan Howell, *Sparks Fly in Final Hearing on Corporate Law Amendments*, DEL. CALL (June 22, 2024), https://delawarecall.com/2024/06/22/sparks-fly-in-final-hearing-on-corporate-law-amendments/ [https://perma.cc/69BC-PHGT].

156. Leslie A. Pappas, *Vexatious Vs. Virtuous: Del. Chancery Battles Dip in Decorum*, LAW360 (Sept. 22, 2023), https://www.law360.com/articles/1714379/vexatious-vs-virtuous-del-chancery-battles-dip-in-decorum (on file with the *Journal of Corporation Law*).

157. *Id.*

In a case that Chancellor McCormick observed "epitomizes a trend"[158] of overly aggressive defense strategies, she ordered Gilead Sciences Inc. to pay approximately $1.76 million in attorney fees for "glaringly egregious litigation conduct" based on its unjustified refusal to provide stockholders access to corporate books and records under DGCL § 220.[159] In this case, which arose after multiple stockholders requested internal documents related to Gilead's development and marketing of HIV drugs, amid allegations that Gilead engaged in anticompetitive conduct to protect its profits at the expense of patients and delayed safer drug developments, the company refused to turn over a single document.

The decline in civility hurts Delaware. Those who promote a return to civility observe that, from a practical perspective, "incivility . . . prolongs litigation, makes it more expensive and can derail settlements and other transactions beyond the courtroom . . . Court officers [have] noted that often when manners disappear, so do the quality and precision of legal arguments."[160]

H. Reason #6 for Worrying About Delaware's Competitive Position: Contracts Have Replaced Corporate Law

Delaware differentiates itself from other jurisdictions on the grounds that its judges have special expertise in construing and applying its common law and statutes to pending cases that present novel fact patterns. Delaware law has become increasingly more contractual and specifically, more "enabling" over time.[161] As Dorothy Lund and Eric Talley recently have observed, the line between corporate law and intra-firm contracting long has been converging:

> The Delaware General Corporation Law . . . has traditionally followed a broadly enabling approach that gives business planners ample flexibility in customizing their procedures and governance to meet their firm-specific needs. For example, founders can customize their corporate charter to adopt a dual-class structure, can stagger their board or adopt majority voting provisions, and can even adopt a bespoke corporate purpose. The state's general practice of treating its statutory structure as a default (and not immutable) rule translates into a readily adaptable contractarian landscape. When viewed through the lens of our framework, Delaware law facilitates low-cost adaptation and tailoring for firms wishing to alter the provisions of the DGCL.[162]

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158. *See* Pettry v. Gilead Scis, Inc., No. 2020, 2020 WL 6870461, at *2 (Del. Ch. 2020) (explaining how Gilead's conduct in this case "epitomizes a trend" toward obstructive tactics in Section 220 litigation that warrants fee-shifting).

159. Pettry v. Gilead Scis., Inc., No. CV 2020, 2021 WL 3087027, at *2 (Del. Ch. July 22, 2021).

160. Pappas, *supra* note 156.

161. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005) ("[T]he Delaware approach to corporate law keeps statutory mandates to a minimum. And even some of the mandatory terms are subject to being overridden through charter and bylaw provisions. In particular, our law gives corporate planners tremendous power to use the charter—the equivalent of the corporate constitution—to vary otherwise mandatory terms.").

162. Dorothy S. Lund & Eric L. Talley, *Should Corporate Law Go Private?*, 22 (Eur. Corp. Governance Inst., Working Paper No. 877, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5534959 [https://perma.cc/AZ6H-JMM5].

Lund and Talley argue that private ordering in corporate law now can play an even more central role through the use of agreements between controlling shareholders (and others) and corporations in what they call (inaccurately) an "unprecedented (and [accurately] contentious) statutory change that allowed firms to displace nearly all of state-provided corporate law with private ordering via stockholder agreement."[163] Lund and Talley call such agreements a "newly unleashed power [that] . . . emancipates Delaware corporations to develop or otherwise acquire their own privately crafted law, largely excluding state courts from the dispute resolution process."[164]

Lund and Talley posit that this "unbridled" private ordering holds the promise of protecting and "reaffirming" Delaware's central role in attracting and retaining corporations.[165] Private ordering solidifies Delaware's dominant position by allowing parties "maximal freedom for parties to tailor terms and/or contract out of . . . precedents that they dislike."[166] Lund and Talley are correct that Delaware long has been contractual in nature and that it has only become more contractual over time. But their analysis is flawed in failing to acknowledge the critical role that judges play in interpreting contracts.

This failure is odd because the authors acknowledge that some Delaware "corporations . . . view recent judge-made controller law in Delaware as radical and . . . are concerned about the ongoing presence of certain judges even" after the recent statutory reforms in SB 21.[167] Lund and Talley make a radical proposal to create a private system of adjudication, which they call the "Delaware Arbitration Board," which would be a "subscription-based private tribunal composed of expert arbitrators"[168] that would allow contracting parties to sidestep Delaware courts.

This analysis acknowledges that the Delaware judiciary, which used to be the State's most important weapon in the jurisdictional competition for corporate charters, but has become a major liability. But, by failing to account for important differences between the jurisdiction of arbitrators and the jurisdiction of state courts, Lund and Talley ignore the fact that the dedicated, professional arbitration board they propose would be a major competitive liability and not an asset for the state. This is because it would be trivially easy for other states, who charge far less in franchise fees and taxes than Delaware does to allow shareholder disputes to be settled by the very same tribunal (and/or the same arbitrators) as those on the Delaware Arbitration Board.

Put simply, at present, in order to have a case heard before a Delaware judge, one must be a Delaware corporation, or have some other claim to be subject to the jurisdiction of a Delaware judge. Parties seeking to arbitrate their claims have far more leeway to select arbitrators who will be responsive, efficient and sophisticated in their understanding of the relevant law and policy.[169]

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163. *Id.* at 5.
164. *Id.*
165. *Id.*
166. *Id.* at 48.
167. *See* Lund & Talley, *supra* note 162, at 47.
168. *Id.* at 5.
169. *See* REVISED UNIF. ARB. ACT §§ 9–12 (2000) (allowing parties to select arbitrators and specifying that if the parties specify an arbitrator or a method for selecting the arbitrator, that method controls). The selection on arbitrator is subject to a requirement that the arbitrator be impartial.

Thus, far from solidifying Delaware's dominant position in the jurisdictional competition for corporate charters, a secular move towards private arbitration would only further erode Delaware's distinctive competitive position. Such a move also would be tantamount to a public admission that the Delaware judiciary is a problem for the state, rather than a solution.

As intra-firm corporate contracting increasingly replaces both statutory and judge-made corporate law, Delaware's distinct corporate law becomes irrelevant for the simple reason that corporate law becomes irrelevant when it is replaced by contract law. An example of this phenomenon is reflected in registration patterns for limited liability companies (LLCs), which are a relatively new form of business organization that are governed almost entirely by contract rather than by statute or common law. Most LLCs are incorporated in the state where the LLC's underlying business has its headquarters or principal operations. Tellingly, Delaware leads the jurisdictional competition for LLC formation, largely because of its reputation for protecting non-controlling LLC members.[170]

Importantly, however, Delaware's purported commitment to freedom of contracting has important limits where such freedom to contract threatens the powerful plaintiffs' bar. In a recent speech to Delaware lawyers and judges, SEC Chair Paul Atkins expressed concern about the extent to which "meritless, vexatious, or frivolous litigation"[171] is driving capital away from U.S. public markets as the risk that "frivolous lawsuits and exorbitant plaintiffs attorneys' fees masked as recoveries for shareholders" rises.[172]

Chairman Atkins bluntly indicated that Delaware was "not only uninterested in reform [aimed at reducing litigation], but instead, seems to embrace the litigation costs that abusive lawsuits impose on companies franchised in Delaware."[173] While applauding recent statutory provisions permitting forum selection in Delaware for federal securities law claims, Atkins expressed disappointment with two anti-contractarian components of Delaware corporate law. First, there is a statutory prohibition in Delaware on intra-firm arbitration of any kind, including not just bars on arbitrations of claims for breaches of fiduciary duty, but also a bar on securities law claims.[174] In addition, when claims are brought in court, Delaware law prohibits corporations and shareholders from reaching agreements over fee-shifting of such claims.[175]

These statutory provisions are clearly designed to benefit Delaware lawyers by avoiding arbitration, encouraging litigation against corporations and keeping that litigation in Delaware. For example, Delaware corporations are permitted to include a forum selection provision in their certificate of incorporation or bylaws that require internal corporate claims to be brought exclusively in Delaware courts.[176] But freedom of contract stops there.

170. CHARUNI PATIBANDA-SANCHEZ & KRIS KNIGHT, DELAWARE DIVISION OF CORPORATION: 2024 ANNUAL REPORT 3 (2024) (noting that 1,403,986 LLCs were formed in Delaware in 2022 and 1,489,299 LLCs were formed in Delaware in 2023).

171. Paul S. Atkins, Chairman, Sec. Exch. Comm'n, Keynote Address at the John L. Weinberg Center for Corp. Governance's 25th Anniversary Gala (Oct. 9, 2025).

172. *Id.*

173. *Id.*

174. *See e.g.*, DEL. CODE ANN. tit. 8, § 115 (2025); DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2025).

175. *See e.g.*, DEL. CODE ANN. tit. 8, § 115 (2025); DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2025).

176. DEL. CODE ANN. tit. 8, § 115(a) (2025) ("The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought

Corporations are not permitted to require that claims be brought in courts outside of Delaware,[177] and contracting with shareholders cannot contain fee-shifting provisions that require a stockholder who brings a frivolous or unsuccessful claim to shoulder the corporation's litigation costs.[178] The prohibition on fee shifting is extremely broad. Section 102(f) of the Delaware General Corporation Law provides that:

> The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title, or in connection with any other claim that a stockholder, acting in its capacity as a stockholder or in the right of the corporation, has brought in an action, suit or proceeding.[179]

And, somewhat redundantly, Section 109(b) of the Delaware GCL provides that:

> The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title, or in connection with any other claim that a stockholder, acting in its capacity as a stockholder or in the right of the corporation, has brought in an action, suit or proceeding.[180]

Delaware's prohibition on arbitration is perplexing in light of the well-known "liberal federal policy favoring arbitration agreements,"[181] and in light of the plain language of Section 2 of the Federal Arbitration Act's clear statement that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."[182] Delaware's particular prohibition on the arbitration of securities law claims is striking in light of the SEC's recent pronouncement that the Federal securities law "do not override the [Federal] Arbitration Act's policy favoring enforcement of arbitration agreements."[183]

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solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.").

177. *Id.* ("[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State").

178. Fee shifting refers to a legal provision or rule that requires one party in a lawsuit to pay the attorney's fees and other legal costs of the opposing party. Fee shifting provisions often are triggered when one party loses the case, and the court determines that they should bear the legal expenses incurred by the winning party. In ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 559–60 (Del. Ch. 2014), the Delaware Supreme Court held that the fee-shifting bylaw of a non-stock corporation, ATP Tour, was valid. Immediately thereafter, more than 50 public companies adopted such bylaws providing for fee-shifting. In mid-2015, Delaware enacted Senate Bill 75, which prohibited fee-shifting for internal corporate claims. S.B. 75, 148th Gen. Assemb., (Del. 2015).

179. DEL. CODE ANN. tit. 8, § 102(f) (2025).

180. DEL. CODE ANN. tit. 8, § 109(b) (2025).

181. CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

182. 9 U.S.C. § 2 (2018).

183. Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions, 17 C.F.R §§ 231, 241 (2025).

While lawyers in Delaware have a clear incentive to oppose fee-shifting bylaws and arbitration provisions, doing so, especially at this particular moment in time when other states are energetically maneuvering to displace Delaware in the jurisdictional competition for corporate charters is a risky strategy.[184] Flatly banning consensual agreements that requires fee-shifting and arbitration is particularly troubling in light of the fact that less drastic approaches, such as requiring that arbitration and fee-shifting provisions be adopted on a "clear day" when the corporation is not facing litigation and/or that such provisions be approved by a shareholder vote were available to the Delaware legislature.

The anti-arbitration provisions reflect the extent to which corporate lawyers dominate the law-making process in Delaware, and the extent to which the interests of those lawyers in encouraging high-fee litigation conflicts with the interests of the state in attracting and maintaining its corporate chartering franchise. As Stephen Bainbridge explained "all corporate lawyers—litigators and transactional—have a strong incentive to oppose fee–shifting bylaws. Hence, it was no surprise that the General Assembly—dominated in this area by the Delaware bar—leaped to ban such bylaws."[185] As Geoff Miller and I previously have observed, Delaware lawyers can "benefit from legal rules that increase the amount of expected legal fees per corporation, even if such rules, by imposing additional costs on Delaware corporations, reduced the absolute number of firms chartered in the state."[186]

Thus, it is not surprising that, despite a Senate Concurrent Resolution requesting that the powerful Delaware Council of the Corporation Law Section of the Delaware Bar Association prepare a report of recommendations for legislative action regarding awards of attorneys' fees in corporate litigation,[187] introduced in in February 2025, over a year later, Elena Norman, the chair of the Delaware State Bar Association's Corporation Law Section, said that no recommendations to deal with fees were on the horizon.[188] Ms. Norman did say that the Bar Association's Corporation Law Section "will continue to monitor the issue."[189]

Thus, two phenomena related to the growing practice of contracting around corporate law poses challenges for Delaware's ability to continue its domination of the jurisdictional competition for corporate charters. The first is the replacement of both statutes and judge-made law with contract, which threatens to render a corporation's choice of jurisdiction largely, if not entirely, irrelevant. Second, to the extent that corporate actors want to customize the relationship between and among boards of directors, controlling shareholders and the corporation, Delaware's continuing refusal to enforce a few contracting options, particularly mandatory arbitration and fee-shifting, make Delaware less attractive than competitor jurisdictions.

184. Stephen M. Bainbridge, *Fee Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851 869–75 (2016).

185. *Id.* at 875.

186. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 504 (1987).

187. Del. S. Con. Res. No. 17, 153rd Gen. Assemb. (Del. 2025) (enacted).

188. Rose Krebs, *Musk Cases, Atty Fees Draw Spotlight at Tulane Conference*, LAW360 (Mar. 19, 2026), https://www.law360.com/pulse/articles/2455100/musk-cases-atty-fees-draw-spotlight-at-tulane-conference (on file with the *Journal of Corporation Law*).

189. *Id.*

I. Reason #7 for Worrying About Delaware's Competitive Position: Statutes Have Replaced Judges, Undermining Delaware's Historical Competitive Advantage, the Expertise of Its Judges

The final threat to Delaware's dominance is that the recent secular shift in corporate law to statutory law in place of judge-made law is hurting the state's historic dominance in the jurisdictional competition for corporate charters. Experts' views on the value-added by Delaware's vaunted judiciary fall into one of two camps. The first camp views Delaware judges as a competitive drag on the state's competitiveness in the jurisdictional competition for corporate charters. The second camp views the role played by Delaware judges as an asset to the state in that competition.

Group #1: Delaware Judges as a Motivation for Re-incorporating

The most prominent (or at least the most powerful) group are those who think that Delaware judges have been the principal reason for the reincorporation movement. Those who subscribe to this theory have been very concrete in expressing their concerns, pointing succinctly to a number of problems created by certain Delaware judges:

> A growing number of cases that have addressed technical issues, in the M&A context and elsewhere, and reached unexpected results in a manner that has impacted corporate structuring and transaction planning.
>
> A perception that Delaware judges have in several opinions adopted an increasingly suspicious or negative tone toward corporate boards and management, and toward the corporate bar.
>
> The challenges that the case law can pose for companies with influential founders or significant stockholders, the process mechanisms that such companies are expected to use, and the remedies that have been reached in those cases.
>
> A sense that Delaware judges can be skeptical of the governance of venture-backed private companies and many Silicon Valley-based companies.
>
> The increasingly active, and successful, plaintiffs' bar in both technical and fiduciary claims, which can leave boards and management with the sense that they are planning around "gotcha" litigation driven by plaintiffs' lawyers more than those lawyers' individual clients"[190]

It is important to recognize that those criticizing Delaware judges for being too unpredictable, too suspicious of boards and management, and unreasonably hostile both to founding and controlling shareholders as well as to companies guided by venture capitalists and private equity funds activists, recognize the historically important role that Delaware judges have played in Delaware's ascendancy to its pole position in the corporate chartering race among the states. Those criticizing Delaware judges recognize that "[a] key reason for Delaware's success" is the state's "talented, responsive, and knowledgeable judiciary" and the "core belief that corporate governance and business disputes will be heard by smart, unbiased, responsive, and thoughtful judges."[191]

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190. Simmerman, Chandler & Berger, *supra* note 21.
191. *Id.*

The problem, according to those critical of Delaware's judges is that Delaware corporate law has undergone a recent transformation in three principal ways. First, Delaware judges departed from prior law by "steadily" expanding the definition of controlling shareholder, increasingly recognizing shareholders with less than a majority of voting power as controllers if they possess significant influence or soft control over corporate decisions.[192] This includes cases where shareholders exert influence through contractual rights, managerial authority, or even superstar CEO status.[193]

The second significant problem identified by those critical of recent decisions by Delaware judges is that, as noted above, just as the rules for determining whether a director was independent were becoming increasingly vague, Delaware courts were becoming more skeptical of director independence. The definition of independence has expanded to include not only financial and familial ties but also personal relationships and personal interactions that potentially could engender a director to be biased in favor or another director or a CEO.

Third, those advising corporations became increasingly concerned that the lenient, pro-defendant business judgment rule was being replaced by application of the entire fairness standard in an increasingly broad range of transactions, especially those in which a controlling shareholder received unique or non-ratable benefits, even when those benefits do not come at the expense of minority shareholders.[194] Of particular concern were a series of decisions in which Delaware courts determined that the particularly rigorous conditions established in *Kahn v. M & F Worldwide Corp*. (MFW)[195] that must be met in order for a transaction to receive deferential business judgment rule treatment applied not only in the narrow context of a freezeout merger in which a controlling shareholder acquired the stock of the minority or non-controlling shareholders, but in an increasingly large number of transactions. The culmination of this trend came in 2024 when the Delaware Supreme Court in *In re Match* determined that the *MFW* conditions must be met in any and all transactions involving controlling shareholders.[196]

This determination, of course, meant that the *MFW* conditions had to be satisfied even in executive compensation cases. Thus, once Elon Musk was determined to be the controller of Tesla, the daunting *MFW* conditions had to be satisfied in order for his compensation to be approved. This led to Musk's compensation being rescinded as unfair, and to Tesla's DExit to Texas.

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192. Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 531 (2025).

193. *Id.*

194. *Id.* at 566–67; *see also* Jonathan R. Macey, *Delaware Law Mid-Century: Far from Perfect but Probably Not Leaving for Las Vegas*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 17, 2024), https://corpgov.law.harvard.edu/2024/12/17/delaware-law-mid-century-far-from-perfect-but-probably-not-leaving-for-las-vegas/ [https://perma.cc/K8SC-YW2L].

195. The *MFW* conditions are as follows: "[I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority." Kahn v. M & F Worldwide Corp., 388 A.3d 635, 645 (Del. 2014). In addition, in order to receive business judgment rule protection, the controller must ensure that the *MFW* conditions are in place before any substantive negotiations over the economic terms of the transaction begin, and every single member of the Special Committee, not just a majority, must be determined to be independent.

196. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 462–63 (Del. 2024).

The point here is that, from the perspective of the many corporate advisors who were critical of the recent ratcheting-up of Delaware law, what was needed was not new law, but rather what Governor Matt Meyer called a "course correction"[197] to "bring the Delaware business courts back into alignment with rulings from a decade ago."[198] Thus, even from the perspective of its most fervent supporters and proponents, the new statute was a second-best strategy for protecting Delaware's competitive position.

The first-best solution would have been somehow to cajole or force the Delaware judiciary to reverse course and return its focus to private-ordering and respect for decisions by non-self-interested boards of directors. Statutory change came because, and only because this first-best solution was not attainable. At their core, the statutory changes removed discretion from judges thereby weakening Delaware's competitive position.

Group #2: Delaware Judges as Reason to Incorporate in Delaware (or at Least to Remain There for Now)

Of course, those who support recent business law decisions in Delaware reject the proposition that Delaware needed a course correction at all. Those who applauded the increasing judicial activism are even stronger in their condemnation of the recent efforts to remove judicial discretion and impose statutory directives. These observers complain that this recent "statutorification"[199] of Delaware law "not only takes equitable authority away from the state's expert judges," but had the concomitant effect of "effectively removing those metaphorical stars from the doctrinal sky that legal professionals have used as guidance."[200]

Thus, Group #1, the anti-judicial activists, supported the legislative changes in Delaware, because the new statute because removed judicial discretion. Group #2, the pro-judicial activists, opposed the legislative changes for exactly the same reason. Thus, there is universal consensus that the statue removed judicial discretion by providing judges with mandatory statutory protocols for determining who is a controlling shareholder, for determining who is an independent director, and for determining when the "entire fairness" standard rather than the business judgment rule must be applied to evaluate a corporate decision.

As statutes rather than judicial decisions come to occupy a larger part of Delaware's legal landscape, Delaware law becomes easier for other states to copy. It is hard to get judges in other states to accurately apply Delaware decisions. It is trivially easy for another state to copy a particular Delaware statutory provision or even an entire title of the Delaware Code.

As such, Delaware's success in attracting corporations on the basis of its superior judiciary has been fundamentally weakened by the recent statutorification of the state's corporate law.

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197. Karl Baker, *Gov. Meyer to Defend Landmark Corporate Law Against Constitutional Challenge*, SPOTLIGHT DEL. (June 6, 2025), https://spotlightdelaware.org/2025/06/06/gov-meyer-to-defend-landmark-corporate-law-against-constitutional-challenge/ [https://perma.cc/8LK8-EJWG].

198. Mobley, *supra* note 17.

199. The term "statutorification" is closely associated with Guido Calabresi. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 79 (1982).

200. Lund & Talley, *supra* note 162, at 33.

CONCLUSION

This Article identifies seven remaining threats to Delaware's dominance in the jurisdictional competition for corporate charters that persist despite recent legislative reforms squarely aimed at maintaining or solidifying the state's historical position. The threats include judicial hostility to new statutes, the declining favor of Delaware law among academics, excessive litigation and attorney fee awards, judicial criticism of corporate managers and directors, the erosion of civility in Delaware's legal community, the increasing replacement of corporate law with private contracts, and the shift from judge-made law to statutory law. These factors collectively undermine Delaware's historical competitive advantage, which was built on the expertise and predictability of its judiciary. The article concludes that while legislative reforms like Senate Bill 21 were necessary, they were second-best responses to emerging threats to Delaware's dominance that are likely to be insufficient fully to restore Delaware's competitive position.

More generally, the Article casts doubt on the assumption that legislatures easily can overturn the results of judicial decisions. Many factors that are entirely outside of the control of the legislature can conspire to render the legislature virtually powerless to undo the impact of judicial decisions, even when the legislature's effort to overturn judicial decisions is clear, decisive and emphatic.