Will a Little DAB Do Ya?: A Comment on *Should Corporate Law Go Private?*

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The picture book "Lunchbox Bully" retells a familiar childhood tale.[1]

Big Jim, an apparent warthog, steals the lunch of a bunny named Max. As Big Jim lobs bunny Max's lunch into his own gaping maw, Big Jim remarks, "Good lunch."[2]

I do not condone the snatching of others' lunches. But in their provocative new article, *Should Corporate Law Go Private?*, Professors Dorothy Lund and Eric Talley bring a very nice lunch indeed: the proposal of a Delaware Arbitration Board (the "DAB").[3] I fear that this lunch might just be too tempting for a competitor (such as an existing arbitration forum) *not* to snatch.

This essay considers the tastiness of said lunch. In Part I, I briefly highlight my favorite parts of Lund and Talley's new article. I focus on their clever expansion of the traditional "race to the top"/"race to the bottom" debate in corporate law, which considers the outcome of interstate regulatory competition. Lund and Talley provide a thought-provoking (and I believe accurate) addition to this debate. Their contribution provides insight on why we have not yet seen convergence on corporate law across states, and also opens the door for their bold proposal for the establishment of the DAB. Lund and Talley asked me to focus my comments on the DAB, so in Part II, I turn to that. Specifically, I indulge my own fears that Lund and Talley's DAB-shaped lunch might be eaten by existing arbitration forums, by Delaware-adjacent arbitration mechanisms, or even by the Delaware state courts themselves. I also consider whether the time is yet ripe for the privatization of corporate law and the establishment of the DAB, and whether we might wait to see how this current wave of interstate competition shakes out.

But to put the punchline right up front: This is an article that breathes fresh life into an important and age-old corporate law debate. It offers theoretical insights and practical solutions. It's a pleasure to have the chance to comment on it.

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1. HANS WILHELM, LUNCH BOX BULLY (2020).

2. *Id.* at 3–4.

3. Dorothy S. Lund & Eric L. Talley, *Should Corporate Law Go Private?*, 52 J. CORP. L. (forthcoming 2026).

I. THE PRIVATIZATION OF CORPORATE LAW?

Since the 1890s, Delaware has dominated the market for incorporations.[4] But the recent splashy exodus of some corporations from Delaware, followed by the Delaware legislature's hurried response via the new SB 21 statutory amendments, has called into question the longevity of Delaware's continued dominance.[5]

It is in this debate on interstate regulatory competition that Lund and Talley intervene. This literature on regulatory competition is a well-trodden one, often framed as a battle between interstate competition that makes jurisdictions more shareholder-friendly (a "race to the top") or more management-friendly (a "race to the bottom").[6]

Lund and Talley cleverly note that existing discussions have largely assumed that interstate competition would cause states to converge on *one* type of corporate-law product.[7] Yet there are "heterogeneous corporate and jurisdictional goals" that might instead cause corporations to "self-sort across the menu of distinct jurisdictional specialties, which revenue-oriented jurisdictions will readily offer. The end result [is] neither a race to the top, bottom nor the ill-defined middle, but rather a landscape of differentiated jurisdictional offerings."[8]

This descriptive (and perhaps soon-to-be oracular) account of interstate regulatory competition is one of their article's most exciting contributions. In particular, it recasts interstate competition as three-dimensional, rather than a two-dimensional, competition.

Consider Hotelling's Law: that mainstay of undergraduate economics courses that predicts that, in a linear market, competing suppliers will move to the middle of the line in

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4. *See generally How Delaware Became No.1*, N.Y. TIMES, May 9, 1976, at 112 (detailing Delaware's incorporation dominance).

5. *See, e.g.*, Kenneth Khoo & Roberto Tallarita, The Price of Delaware Corporate Law Reform (Aug. 4, 2026) (unpublished manuscript), https://ssrn.com/abstract=5318203 [https://perma.cc/7SVY-C4KZ] (discussing the new permissive rules for transactions involving conflicted controlling shareholders and other issues relating to SB 21); Arthur R. Bookout, Edward B. Micheletti & Joseph O. Larkin, *Delaware Supreme Court Upholds Constitutionality of SB21 Provisions Providing Safe Harbors for Controlling Stockholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 14, 2026), https://corpgov.law.harvard.edu/2026/03/14/delaware-supreme-court-upholds-constitutionality-of-sb21-provisions-providing-safe-harbors-for-controlling-stockholder-transactions/ [https://perma.cc/ATS9-WNXL]; Lucian A. Bebchuk & Kobi Kastiel, *Controllers Unbound*, 105 TEX. L. REV. (forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6111106 [https://perma.cc/Y6SF-FX78] (arguing that there are "substantial risks to public investors and to the economy that are expected to be brought about by the relaxation of constraints on controlling shareholders").

6. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (reflecting on Delaware's leading role in the race to the bottom); *see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 251–52 (1977) (asserting that "state corporate legal systems are protective of shareholders and that state regulation is generally preferable to federal"); *see* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 281 (1985) (asserting that a centralized federal system of regulation could impose an overall welfare loss on firms). For an excellent recent discussion of this literature, see generally William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403 (2020) (evaluating competition within international markets for attractive corporate charters).

7. Lund & Talley, *supra* note 3, at 3.

8. *Id.* at 6.

an attempt to capture more of the market.[9] Hotelling's linear market has been used to explain why, for example, political parties become more and more moderate (and similar) in their attempt to capture a larger share of voters.[10]

In the provision of corporate law, we might expect that states' attempt to capture more incorporations would lead them to converge around the same level of shareholder- and management-friendliness—and the only question that remains, for corporate governance wonks, is the normative question of whether that bundle of rights for shareholders and managers is a good one.[11]

But suppose the options are not just "a more management-friendly jurisdiction" and "a more shareholder-friendly jurisdiction"?[12] Suppose that firms have other preferences, such as preferences around liability for directors and officers, or preferences for how fiduciary litigation might shake out? Well, in that case, some firms might step off the linear path assumed by the "race to the top" and "race to the bottom" debaters, seeking instead something else entirely.

This insight—that firms have different preferences and jurisdictions will provide for them—is at the heart of Lund and Talley's paper. By Lund and Talley's reckoning, Delaware can provide a certain product that some firms like, and so can Nevada.[13] Heck, Texas can get in on the action, too—and for the really risk-seeking (let's call them "pioneering"), maybe even my home state of California.[14]

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9. In a 1929 article, economist Harold Hotelling considered a linear market—think a Main Street—with buyers of a good uniformly distributed along that line. There are two sellers on this Main Street selling the same good, and buyers prefer the two just the same, except that buyers prefer to minimize their distance traveled to obtain the good. An optimal arrangement would put the two sellers a quarter of the way from each end of the Main Street—one a quarter of the way from the west end of the street, and the other a quarter of the way from the east end of the street, for example. That way, no buyer travels more than a quarter of the way to get their goods, and each seller would capture half the market (all the buyers from the end of the street to the middle of the street). *See* Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929).

10. Timothy Taylor, *The Excessive Sameness of Politics and Hotelling's Main Street*, CONVERSABLE ECONOMIST (Nov. 4, 2014), https://conversableeconomist.com/2014/11/04/the-excessive-sameness-of-politics-and-hotellings-main-street/ [https://perma.cc/T3TA-36VW].

11. For more on the balance of power between shareholders and managers, see Cathy Hwang, Yaron Nili & Jeremy McClane, *The Lost Promise of Private Ordering*, 109 CORNELL L. REV. 1, 11–14 (2023) (providing an overview of the agency problem in corporate law); *see also* Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (2020).

12. Indeed, in prior work, Talley and others (including me) reviewed the effect of different jurisdictions' mixes of management- and shareholder-friendliness on firm returns. *See* Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1 (2021). In other prior work, Yaron Nili and I also found that firms engage in a variety of different voluntary disclosures—which can be considered shareholder-friendly. *See* Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097 (2020).

13. For more on Nevada's corporate governance product, see Benjamin P. Edwards, *Exit Matters: Why Delaware Needs Nevada and Texas*, YALE L.J.F. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7244061 [https://perma.cc/3CAQ-LTHH]; *see also* Benjamin P. Edwards & Carliss Chatman, *How Misinformation is Muddying the Dexit Debate*, CLS BLUE SKY BLOG (July 16, 2026), https://clsbluesky.law.columbia.edu/2026/07/16/how-misinformation-is-muddying-the-dexit-debate/ [https://perma.cc/CVG6-STFE].

14. For more on Texas's corporate governance product, see Carliss N. Chatman, *New Corporate Geography: Reframing the Incorporation Decision*, 46 REV. LITIG. (forthcoming 2027); Benjamin P. Edwards & Carliss Chatman, DExit for Dollars: A Response to Professor Bainbridge (unpublished manuscript) (manuscript on file with author); Carliss Chatman, *Texas, Nevada Laws Can't Be Measured Against Delaware Benchmark*, BL (May

Delaware's problem, though, is that it enacted SB 21: a set of reforms that have been criticized for being hastily adopted through a politicized process.[15] And, as Lund and Talley note, "[t]he bill's progress through the General Assembly appears correlated with negative abnormal returns of Delaware-incorporated firms."[16] All the while, other states continue to pitch themselves as alternatives to Delaware, with Texas Governor Greg Abbott going as far as to write an op-ed in the *Wall Street Journal* entitled "Forget Delaware—Y'all Street is Open for Business."[17]

In short, for Delaware, the century-long leader in incorporations and business litigations, the forecast looks a bit gloomy. In this time of turmoil, is there anything that can restore Delaware's reputation as a leader in stability and predictability?

Lund and Talley's bold proposal is for the "privatization" of corporate law. Thanks to Section 122(18) of the Delaware General Corporation Law, which greatly expanded the potential role of stockholder agreements, "a Delaware corporation could privatize virtually all of its governance . . . through a stockholder agreement. . . . [T]he corporation would remain incorporated in Delaware."[18]

Of course, a single stockholder agreement could not capture all of the corporate law that a firm wants to opt into—especially if the firm had been previously relying on Delaware's full slate of well-developed corporate law.[19] Lund and Talley suggest, then, that "the agreement should import a body of default rules delineating background rights and obligations of the relevant parties to fill any surviving gaps."[20] And while corporations can choose any background law they wish, they "expect that the contract will expressly import a pre-existing state corporate-law template of a specific date, which would supply a familiar system of default rules."[21] Delaware Vice Chancellor Travis Laster dubbed this "Delaware 1.0": a state of affairs that existed before the hullabaloo of DExit and SB 21.

4, 2026), https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/texas-nevada-laws-cant-be-measured-against-delaware-benchmark [https://perma.cc/UN84-3NHR].

15. Lund & Talley, *supra* note 3, at 31–33.

16. *Id.* at 4 (citing Benjamin P. Edwards, *Pending Nevada Commission on Nevada Business Court*, BUS. L. PROF. BLOG (July 1, 2025), https://www.businesslawprofessors.com/2025/07/pending-nevada-commission-on-nevada-business-court/ [https://perma.cc/4CWD-WV5R].

17. Greg Abbott, *Forget Delaware—'Y'all Street' Is Open for Business*, WALL ST. J. (Mar. 5, 2025), https://www.wsj.com/opinion/forget-delaware-yall-street-is-open-for-business-texas-corporate-law-cb9088d1 (on file with the *Journal of Corporation Law*).

18. Lund & Talley, *supra* note 3, at 37–38.

19. *Id.* at 44 ("because all contracts are necessarily incomplete . . . ."). For more on contractual incompleteness, see Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 MINN. L. REV. 1267 (2022) (discussing how third-party readers of contracts contributes to contractual incompleteness); Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1034 (2019) (noting that "complex deals are incompletely contracted"); Cathy Hwang, *Collaborative Intent*, 108 VA. L. REV. 657, 665 (2022) (showing that complex business contracts are incomplete because there are many drafters of the contract); Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403 (2016) (describing the process by which many attorneys work on one M&A contract); *see generally* Cathy Hwang, *Value Creation by Transactional Associates*, 88 FORDHAM L. REV. 1649 (2020) (arguing that one of a transactional associates' primary jobs is to re-unify contracts after many parties have worked on it).

20. Lund & Talley, *supra* note 3, at 44.

21. *Id.*

To further sweeten the deal for corporations staying in Delaware, Lund and Talley propose the creation of a Delaware Arbitration Board, which is a subscription-based service in which Delaware-incorporated firms are able to resolve disputes, including internal affairs disputes, using the DAB's Delaware-expert arbitrators.[22] The DAB would have a number of advantages compared to Delaware state courts, but the chief advantage would be that the DAB will be "better inoculated than state actors against the whipsaw forces of clientelist politics."[23] In other words, because they are not state-appointed judges, DAB arbitrators can do a better job of providing adjudication that is in line with what subscribing firms need and want.

Their proposal is clever and interesting. In particular, their weaving together of SB 21, Section 122(18), the Federal Arbitration Act, and a very voluminous debate on regulatory competition is the kind of sophisticated, doctrinally innovative, and practically applicable work that I have come to expect of both Lund and Talley separately, and which I am pleased to see in this joint work. But that's not what Lund and Talley asked me to comment on. Instead, they asked me to think through the DAB and whether I think it's practicable. I now turn to that evaluation.

To preview (foreshadow?): I fear their idea is too good—and someone might steal their lunch.

II. A LITTLE DAB'LL DO YA[24]

If there was a portal to a happy yesteryear, many of us would take it. For me, that time was approximately 1995: before social media, when I believed that single-stream recycling really made a difference, and when my exemplary work at selling school-fundraiser wrapping paper was rewarded with such prizes as scratch-and-sniff stickers, slap bracelets, and trips to Six Flags Magic Kingdom. Sure, there was the occasional lunchtime bully that might make a swipe at my lunch, à la warthog Big Jim. But that price was worth it. Given the chance, I—and most of us—would consider walking through that portal.

Lund and Talley propose a version of that clock-turning, but for corporate law and corporate dispute resolution: walk right into the portal (via a stockholder agreement and binding arbitration via DAB) and find yourself in a pre-SB 21 world. But as I will soon discuss in more detail, walking through that portal brings about the same challenges as reappearing in 1995: one's lunch might get snatched.

One might fear lunch-snatching from other, already-established arbitral forums such as Judicial Arbitration and Mediation Services (JAMS) or the American Arbitration Association (AAA). If I were in a leadership position at JAMS or AAA and I read Lund and Talley's excellent paper, I would immediately add several Delaware-expert arbitrators to my bench, advertise widely, and effectively steal DAB's lunch. And, indeed, the practical aspect of this is, I believe, all too easy.

One of arbitration's main benefits is that there is a lot of room for private ordering and tailoring of rules: In general, parties can select the laws that apply, the procedures they

22. *Id.* at 5.

23. *Id.* at 48.

24. TVDAYS, *Brylcreem Hair Cream Commercial Song*, (YouTube, June 9, 2021), https://www.youtube.com/watch?v=cmoDx2wJy1c [https://perma.cc/3DQ8-FLMX].

want, and even which arbitrators (or types of arbitrators) they want to hear the dispute.[25] JAMS, AAA, and other established arbitral forums specifically market themselves as being able to provide that kind of flexibility, which means that Delaware litigants could just as easily choose JAMS or AAA arbitration instead of DAB arbitration.

And, of course, JAMS and AAA arbitration come with some advantages over DAB, at least in the short run. Perhaps the most obvious is that JAMS and AAA (and other forums like them) already exist—and firms are familiar with them. Indeed, firms already have mandatory arbitration provisions in many consumer contracts,[26] and enter into arbitrations with consumers regularly.[27] Sticking with arbitration forums with which they are already familiar would make sense: Learning costs are lower, and firms may feel more comfortable with forums they have dealt with before in other contexts.

Of course, there is the small problem that existing arbitration forums seem to lack the expertise that the DAB promises—that is, arbitrators who are Delaware lawyers and jurists, who are well-equipped to litigate the high-stakes disputes that trouble Delaware firms.[28] The JAMS website, for example, revealed only one Delaware-affiliated jurist—a retired federal judge seated in Delaware—on its roster.

Still, nothing prevents JAMS or AAA (or others) from quickly adding Delaware jurists onto its bench, immediately making it a strong competitor to new-kid-on-the-block DAB. I should also note that the lack of Delaware-affiliated arbitrators on the JAMS website also sparked a new fear: that perhaps relatively few Delaware experts are interested in becoming arbitrators. If that is the case, one might expect that DAB will, like JAMS and AAA, have trouble filling its ranks with enough arbitrators to provide the kind of speedy dispute resolution for which Delaware courts are known—meaning that the DAB will be a disadvantage to Delaware state courts.

Existing arbitration forums are not the only potential lunch-stealer: One must worry about the Delaware courts themselves, too. In a new paper, David Hoffman, Matthew Jennejohn, Luiza Pedroso and I explore the incidence of arbitration in mergers and acquisitions (M&A) agreements over a twenty-year period from 2000 to 2020.[29]

We find that overall, the rate of public M&A deals that elect dispute resolution via whole-agreement arbitration has remained relatively steady over twenty years—holding steady at under 10% of all deals.[30] Parties choosing Delaware to govern their agreements,

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25. Lindsey D. Schmidt, *ICDR, JAMS, and CPR Comparison Chart (International)*, LEXISNEXIS: PRAC. GUIDANCE (Dec. 2021), https://www.gibsondunn.com/wp-content/uploads/2022/02/Schmidt-ICDR-JAMS-and-CPR-Comparison-Chart-International-Practical-Guidance-December-2021.pdf [https://perma.cc/4MQC-ZX3Z].

26. *See* Thomas D. Haley, *Illusory Privacy*, 98 IND. L.J. 75, 99 (2022) (illustrating that platform terms for top websites on the English-speaking internet often include an arbitration clause).

27. Charles Edward Harris, Amber Masha & Trenten Swinton, *The Evolution of Mass Arbitration: Understanding Changes to the Arbitration Rubric*, ABA: BUS. L. TODAY (Mar. 14, 2025), https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-march/evolution-of-mass-arbitration/ [https://perma.cc/3FP3-CT2C].

28. Lund & Talley, *supra* note 3, at 52.

29. David A. Hoffman, Cathy Hwang, Matthew Jennejohn & Luiza Pedroso, Mergers & Arbitrations 1 (July 28, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7198566 [https://perma.cc/72X6-JD44].

30. *Id.*

as well as those who have the option to resolve their disputes in Delaware state courts, are significantly less likely to choose arbitration.

The findings in this paper help us hang two little ornaments on the Christmas tree that is Lund and Talley's paper.

First, it seems that Delaware is the forum of choice even when parties *can* choose arbitration. I wonder whether DAB can overtake the star power that is a *real Delaware court*, with its speedy dispute resolution, its speedy appeals process, and its good reputation.[31] Is it possible that DAB will go through the trouble of setting itself up, only to watch its business being steadily munched away by real Delaware courts?

Second, our study also covers a variety of other interesting changes that should have perhaps pipped parties away from litigation and toward arbitration.

The most important change was the Delaware Chancery Court's 2009 foray into private arbitration. This change, enacted via a statutory amendment that allowed Chancery judges to sit as arbitrators in private disputes for $6,000 a day, was subsequently gutted by a federal court on First Amendment grounds. When discussing this little episode of Delaware history, I often remark that I am not sure why this arbitration option was not used more widely. Six thousand dollars seems like an eminently low price for daily rental of a Delaware jurist. But surprisingly, before it was gutted by the federal court,[32] it appears that the arbitration mechanism was used a grand total of one time—suggesting that for whatever reason, parties to disputes still preferred Delaware state court *litigation* over even *arbitration* presided over by the exact same Delaware judges.

Of interest, an adjusted version of state-sponsored arbitration remains available today. The Delaware Rapid Arbitration Act (DRAA), which became law in 2015, established a Delaware-seated expedited arbitral forum with some Chancery Court involvement and some limited ability to appeal to the Delaware Supreme Court.[33]

But despite these changes and opportunities for various types of Delaware-adjacent arbitration, my co-authors and I have found that sophisticated deal parties still consistently prefer real Delaware arbitration over even Delaware-involved arbitration. Indeed, although the nature of arbitration is that statistics are hard to come by, practitioners have noted that "[r]umors are . . . that [the DRAA] has not been used with the frequency that its original proponents had envisioned."[34]

Which is to say: It is possible that real Delaware courts are so preferred that even Delaware-flavored—*heavily* Delaware-flavored—arbitration doesn't hold a candle to real Delaware courts? And, if parties preferred arbitration but did not prefer JAMS, AAA, or one of the other existing forums, could they get what they wanted through Delaware Rapid Arbitration, rather than through DAB?

Given my lunch-eating concerns—and my observation, in another paper with coauthors, that sophisticated parties seem to prefer Delaware *courts* over other types of dispute

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31. Hoffman, Hwang, Jennejohn & Pedroso, *supra* note 29, at 43.

32. *See* Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013).

33. *See* DEL. CODE. ANN. tit. 10, §§ 5801–12 (2026).

34. Richard L. Renck, *Delaware Rapid Arbitration Act–After a Decade, Has Its Day Arrived?*, DUANE MORRIS LLP (Oct. 20, 2025), https://blogs.duanemorris.com/delawarebusinesslaw/2025/10/20/delaware-rapid-arbitration-act-after-a-decade-has-its-day-arrived/ [https://perma.cc/2URD-62RA].

resolution—I perhaps do not share Lund and Talley's urgency for the establishment of a DAB.

To be sure, I think that their idea is sophisticated and clever, and takes advantage of stockholder agreements to create a nice portal into the past for those parties that desire it. And, given the uncertainties of current Delaware lawmaking and the new litigation opportunities presented by Nevada and Texas, many parties might desire such a portal. An enterprising individual should certainly take on the task of creating the DAB, as its start-up costs may not be high, and see if there are any takers. And I observe with interest the uptake on this forum as compared to Delaware courts, other arbitration forums, and the DRAA.

III. CONCLUSION

In their new article, Professor Lund and Talley propose the creation of a DAB, which allows parties to opt into a pre-SB 21 world. This idea is novel and exciting, and presents a real opportunity for some parties. In this response to their thought-provoking article, I consider whether their idea is *too* good, and thus likely to be eaten by existing arbitration forums. I also consider whether any arbitration mechanism can hold a candle to the exceptional star power of the Delaware courts themselves.