1

Introduction

Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law

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Delaware's dominance of corporate law arises in the first instance from its dominant position in the market for corporate charters. According to the Delaware Division of Corporations, as of April 2016, more than half of all public corporations were incorporated in Delaware, including 64 percent of Fortune 500 companies. In total, more than 1 million entities have been formed in Delaware, amounting to some 5 percent of all US business entities.

Delaware's numerical dominance would not matter – and, indeed, might not even exist – but for the conflict-of-laws rule known as the internal affairs doctrine. That doctrine provides that "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation."[1] As a result, disputes over corporate governance and related issues involving companies incorporated in Delaware must be resolved using Delaware law no matter in what jurisdiction they are litigated.[2] Given the substantial number of economically significant companies incorporated in Delaware, the volume of Delaware corporate law precedents vastly exceeds that of any other state.[3] Indeed, Delaware law is so dominant that courts in other states often look to Delaware law when deciding corporate law cases arising under the law of some other state.[4]

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1 First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) (emphasis in original).

2 *See, e.g.*, Paulman v. Kritzer, 219 N.E.2d 541, 543 (Ill. App. 1966), *aff'd*, 230 N.E.2d 262 (Ill. 1967) (applying Delaware fiduciary duties to the directors of a Delaware corporation).

3 *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061, 1063 (2000) ("The large volume of business litigation in Delaware, coupled with Delaware's specialized court system, results in a well developed collection of corporate law precedents.").

4 *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679, 749 n.94 (2002) (observing that "judges may follow Delaware precedent merely because of the lack of precedent in their own state and the recognized experience of Delaware courts in resolving corporate disputes"); Demetrios G. Kaouris, Note, *Is Delaware Still a Haven*

Although Delaware's domination of corporate law seems well entrenched, it has not always been the case. At the end of the nineteenth century, it was New Jersey that was the center of the corporate law world.[5] Before the twentieth century was much more than two decades old, however, New Jersey had permanently forfeited that position to Delaware, which has held it ever since.

The chapters in this volume were first presented at a conference sponsored by the Lowell Milken Institute for Business Law and Policy, which was held at the UCLA School of Law on Friday, February 17 and Saturday, February 18, 2017. They explore various aspects of Delaware's dominance, probing its origins, staying power, and future prospects. To set the stage for the discussion that follows, this chapter provides a brief history of Delaware's rise to dominance, evaluates the leading arguments as to why Delaware retains its dominant position, and discusses the political processes by which Delaware responds to challenges. It then provides a brief overview of each of the major themes developed at the conference.

1 FROM TRENTON TO WILMINGTON

Surprisingly, until recently it was quite difficult to form a corporation. Doing so required a special legislative act granting a charter to the specific company in question. During this period, states competed to attract companies to incorporate in them by offering specially tailored charter provisions advantageous to the particular company seeking the charter.[6] However, as states began adopting enabling statutes, which allowed corporate formation without the need for individual legislative action, the form of state competition began to shift. In that era, when most businesses were local, offering attractive incorporation terms was a way of boosting local industry and the state economy.

By the latter part of the nineteenth century, many businesses were becoming broader in geographic scope, with regional and even national operations. This opened the door for states to boost revenues by charging the companies they incorporated franchise taxes and various fees even if those companies did little or no business within the state. To be sure, whether or not New Jersey knew it was going to attract such revenues when it began liberalizing its laws in the 1880s is uncertain, but there is no doubt that it succeeded in attracting a "disproportionate share" of incorporations relative to neighboring states with larger economies.[7]

for Incorporation, 20 Del. J. Corp. L. 965, 1004 (1995) ("Courts [in other states] can elect to follow Delaware precedents, and have often done so.").

5 *See* Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. Corp. L. 323, 333 (2007) ("As early as 1881, New Jersey was receiving a disproportionate number of incorporations.").

6 *Id.* at 331–32.

7 *Id.* at 333.

Many of the liberalized rules adopted by New Jersey in a series of corporate laws between 1875 and 1889 have since become commonly accepted features of the corporate law landscape, which may lead modern readers to discount how revolutionary they were.[8] Although other states (including Delaware) soon followed New Jersey's lead, New Jersey benefited from a first-mover effect that allowed it to retain a dominant position in the competition for corporate charters.[9]

But then came the election of Woodrow Wilson as governor of New Jersey in 1910. As a Progressive, Wilson was strongly opposed to monopolies and other alleged abuses by corporations. At his urging, the New Jersey legislature passed a group of laws known as the "Seven Sisters," which were designed to restrict corporate powers and enhance the power of New Jersey's regulators.[10] Although incorporation choices tend to be sticky for reasons to be discussed in the next section, the Seven Sisters were regarded by the businessmen and lawyers of the day as sufficiently onerous as to trigger a "migration to Delaware."[11] Modern New Jersey legislators must contemplate that migration with some regret, as Delaware now gets a significant percentage of state revenues from incorporation fees and franchise taxes, typically over 20 percent of the state's budget.[12]

2 WHICH RACE DID DELAWARE WIN?

Why did Delaware succeed in picking up the baton New Jersey had cast aside? Some commentators contend that Delaware won a race to the bottom and continues to prevail in an ongoing contest to provide the most management-friendly laws. Others contend that Delaware won a race to the top and continues to prevail in an ongoing contest to provide the most shareholder-friendly laws. The truth is probably somewhere in the middle and, moreover, requires us to consider factors extrinsic to the race metaphor.

Both versions of the race theory assume that states compete in granting corporate charters. After all, the more charters (certificates of incorporation) the state grants, the more franchise and other taxes it collects. According to the race-to-the-bottom

[8] For a review of the major changes effected by New Jersey during this period, *see* Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. Pa. J. Bus. L. 573, 583–85 (2009).

[9] *See* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. Ill. L. Rev. 1, 3 (2009) ("While Delaware was swift to imitate the New Jersey law, New Jersey retained a first-mover advantage and with it, most of the chartering business.").

[10] David Skeel, Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From 64–65 (2006).

[11] *See* E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 Del. L. Rev. 163, 167 (2004) (arguing that the Seven Sisters "caused a migration to Delaware"); *see also* Christopher J. Bebel, *Why the Approach of Heckmann v. Ahmanson Will Not Become the Prevailing Greenmail Viewpoint: Race to the Bottom Continues*, 18 Tex. Tech L. Rev. 1083, 1116–17 (1987) ("The Seven Sisters Acts made New Jersey a less desirable home for incorporators.").

[12] *See* Alex Righi, *Shareholders on Shaky Ground: Section 271's Remaining Loophole*, 108 Nw. U. L. Rev. 1451, 1462 (2014) (stating that "corporate franchise taxes typically constitute well over 20% of Delaware's annual budget").

version of the story, because it is corporate managers who decide on the state of incorporation, states compete by adopting statutes allowing corporate managers to exploit shareholders.[13]

In contrast, the race-to-the-top version argues that investors will not purchase, or at least not pay as much for, securities of firms incorporated in states that cater too excessively to management. Lenders will not make loans to such firms without compensation for the risks posed by management's lack of accountability. As a result, those firms' cost of capital will rise, while their earnings will fall. Among other things, such firms thereby become more vulnerable to a hostile takeover and subsequent management purges. Corporate managers therefore have strong incentives to incorporate the business in a state offering rules preferred by investors. Competition for corporate charters thus should deter states from adopting excessively pro-management statutes.[14]

As many advocates of the race-to-the-top hypothesis concede, however, there are exceptions to the rule. Most obviously, few race-to-the-top proponents would argue that state regulation of corporate takeovers is the product of a competition leading to the most efficient outcome.[15]

The larger problem is that both race stories start from the faulty premise that other states are vigorously trying to steal franchise tax revenue away from Delaware. In fact, however, it seems that states compete with Delaware mainly to retain local incorporations. With few exceptions (perhaps Pennsylvania and Nevada), states generally are not competing with Delaware for out-of-state incorporations. To the extent there is competition for charters, it is most accurately described as a case-by-case competition between the firm's home state and Delaware, rather than a fifty-state free-for-all.

If Delaware law is neither uniquely pro-management nor pro-shareholder, how has it managed to retain its dominant position? One important answer points to the Delaware court system. There is a considerable body of case law interpreting the Delaware corporate statute (the Delaware General Corporation Law), which allows legal questions to be answered with confidence. Delaware has a separate court, the Court of Chancery, devoted largely to corporate law cases. The Chancellors have great expertise in corporate law matters, making their court a highly sophisticated forum for resolving disputes. They also tend to render decisions quite quickly, facilitating transactions that are often time sensitive.[16] Only a handful of other states offer such specialized business courts and none of them have the established body of law on which Delaware courts can draw.

13 *See generally* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974) (classic statement of race-to-the-bottom hypothesis).
14 Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1977) (the seminal response to Cary).
15 *See, e.g.*, Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 Fordham L. Rev. 843 (1993); Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 Colum. L. Rev. 1526 (1989).
16 *See generally* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061 (2000).

The result is that Delaware corporate law has an answer for most questions. Because business thrives best in an environment of predictability and certainty, being able to answer legal questions so as to provide assurances with a high degree of confidence makes Delaware's body of law highly valuable. In contrast, in many other states, very significant legal questions remain unanswered, which makes conducting business under their laws less certain and predictable.[17]

Having achieved a dominant position, moreover, Delaware benefits from the sticky nature of incorporation decisions. Everyone knows that lawyers play a major role in their client's choice of the state of incorporation.[18] But does anyone really think that before making a recommendation the lawyer sits down and reviews the laws of all fifty states to determine which is most advantageous for the specific client at hand, as both versions of the race story assume, at least in their extreme forms? Or that the lawyer even does so on an occasional basis as a matter of general professional education?

Of course not. Lawyers are subject to the same bounded rationality constraints as everyone else, as well as the familiar incentives of agency cost economics. Under such conditions, lawyers naturally will seek to minimize effort by constraining the array of choices available to them. It is thus logical for lawyers to limit themselves to mastering home state and Delaware corporate law rather than trying to master the laws of all fifty states.[19] In turn, once lawyers began to settle on Delaware as the principal out-of-state option, Delaware law began generating substantial network benefits that enhanced its attractiveness.[20]

[17] *See generally* Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 Mo. L. Rev. 299, 340 (2004) ("Specifically, Delaware has been said to have won the competition by offering advantages other states cannot readily duplicate, including a sophisticated bar and judiciary, well-developed case law, a convenient location and ability to credibly commit to continuing to supply high-quality law.").

[18] *See* William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 Harv. Bus. L. Rev. 123, 148 (2012) (concluding from an analysis of IPOs that "although both the issuer's lawyer and the underwriter's lawyer influence the choice of state of incorporation, the influence of the lawyer [for] the issuer is greater"); Usha Rodrigues, *The Fetishization of Independence*, 33 J. Corp. L. 447, 489 (2008) (arging that "clients generally defer to their lawyers as to choice of state of incorporation").

[19] Carney, *supra* note 18, at 131–32 ("An attorney who represents many corporations can economize on learning by having all her clients incorporated in one state").

[20] Carney, Shepherd, and Bailey explain:

> It is rational for these lawyers not to be familiar with the law of other states. They simply lack the time and incentives to learn other states' laws. These lawyers must already learn three sets of laws: Delaware law, their home state's law, and federal law. Their focus not only on the laws of Delaware and their home state, but also on the intricacies and complexities of a changing body of federal securities laws, will dissuade them from investing heavily in the nuances of laws in other jurisdictions.
>
> In addition, lawyers may rationally learn the corporate law of only Delaware and their home state because of network effects.

Id. at 131.

This reality has several important consequences. First, there will always be a strong incentive for corporate lawyers to select a single state to dominate the market for corporate charters so as to minimize their learning costs. Second, having done so, that choice will be sticky. Duplicating the vast cumulative investment in learning Delaware law by thousands of lawyers around the country would be hugely expensive, creating a substantial disincentive to moving away from Delaware. This would be true even if Delaware law were suboptimal:

> Delaware could maintain its dominance not because its law is superior, but because of network effects and path dependence. Lawyers choose Delaware for incorporation because they learned its law in law school or learned it on their own. Law schools teach Delaware corporate law, or lawyers learn it on their own, because most corporations choose it.
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> A cycle of mediocrity could roll along. Because so many businesses incorporate in Delaware, law schools teach only Delaware's corporate law. Lawyers, because they know only Delaware law, then advise even more businesses to incorporate there. The cycle's snowballing effect creates a high barrier to entry for new states into the market for incorporations. Regardless of how much better another state's corporate law might be, lawyers are unlikely to recommend incorporation there because they know little about it.[21]

3 DELAWARE'S INTERNAL POLITICS

While Delaware benefits from a lock-in effect created by path dependence and network effects, the lesson of New Jersey's Seven Sisters is that a sufficiently bad run of legislation could likewise trigger a flight from Delaware. The legislative process in Delaware is uniquely designed to prevent such an eventuality, but it does have a major weakness.

The Corporate Law Council of the Delaware State Bar Association (DSBA) annually submits proposed changes to the Delaware corporation statute to the Delaware legislature.[22] These proposals are usually rubber stamped by the legislature.[23] Accordingly, as Professors Jonathan Macey and Geoffrey Miller have demonstrated, the Delaware bar is the group with the most influence over the legislature when it comes to Delaware corporate law.[24]

[21] *Id.* at 132.

[22] Francis Pileggi, *Delaware Proposes New Fee-Shifting and Forum Selection Legislation*, Del. Corp. & Comm'l Litig. Blog (Mar. 6, 2015), www.delawarelitigation.com/2015/03/articles/commentary/delaware-proposes-new-fee-shifting-and-forum-selection-legislation/.

[23] *See id.* (explaining in more delicate terms that "'routine' amendments are often passed by the Delaware Legislature 'routinely'").

[24] Jonathan R. Macey & Geoffrey Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 472 (1987) (reviewing the various interest groups that might influence the production of Delaware law and concluding that "the bar is the most important interest group within this equilibrium").

> Delaware lawyers have all of the attributes of a politically powerful interest group: they are already organized into bar associations and maintain an advantage over other groups because they continually learn about the law as a consequence of their profession; they are centered in a single city (Wilmington), in a small state and, therefore, can communicate with each other at minimal costs; and they provide an important service for legislators in drafting legislation on complex commercial and corporate matters.
>
> Delaware lawyers, in essence, *are* the Delaware legislature, at least insofar as corporate law is concerned. Delaware has one of the three smallest legislatures in the country. Its legislative committees are virtually inactive. Most striking, however, is that few of Delaware's legislators are lawyers. Such legislators are likely to rely on lawyers to supply sophisticated commercial and business legislation. As a result, virtually all of Delaware corporate law is proposed by the Delaware bar, and the bar's proposals invariably pass through the legislature.[25]

Macey and Miller therefore argue that "the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state."[26]

In most cases, the interests of Delaware lawyers and of the state government are aligned. Just as the state wants to maximize the number of firms incorporated in Delaware, so as to maximize franchise and other tax revenues, Delaware lawyers also want to maximize in-state incorporations, because – all else being equal – an increasing number of firms will generate an increasing volume of legal work.[27] In some cases, however, the interests of the Delaware bar and those of the state will diverge. As Macey and Miller explained, the bar 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."[28] Accordingly the bar would support a rule that reduces the number of in-state incorporations and, thereby, the state's revenues if that rule would increase – or at least prevent a decrease – in legal fees.[29] In turn, the bar's domination of the state legislature enables it to force adoption of rules contrary to the state's self-interest.

25 Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 Del. J. Corp. L. 999, 1009–10 (1994).
26 Macey & Miller, *supra* note 24, at 472.
27 *See id.* at 503–04 ("The Delaware bar is interested in maximizing one specific portion of the indirect costs of Delaware incorporation—fees to Delaware lawyers paid for work on behalf of Delaware corporations. These legal fees are functionally related to the number of charters in Delaware in the sense that the expected legal revenues will increase as the number of corporations chartered in the state increases.").
28 *Id.* at 504.
29 *See id.* ("If the legal fees gained exceed the fees lost by deterring Delaware incorporation, the bar would prefer to adopt rules that did not serve the interests of the other interest groups within the state.").

A recent example of the potential risk this conflict poses to Delaware's dominance is the 2015 Delaware legislation banning fee-shifting bylaws.[30] Such "bylaws impose a 'loser pays' rule that transfers a company's costs and expenses in shareholder litigation to the plaintiff shareholder if the plaintiff is unsuccessful."[31] Although the court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*[32] validating such bylaws facially involved only nonprofit corporations, most observers predicted that it would be extended to for-profit corporations in short order.[33]

As proposed by the Corporate Law Council of the DSBA, and subsequently adopted by the Delaware legislature, S.B. 75 limits *ATP* to its factual setting – that is, nonstock corporations – by amending § 102 of the Delaware General Corporation Law to provide 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 intracorporate claim, as defined in § 115 of this title."[34] The bill likewise bans such provisions from being contained in the bylaws of a stock corporation.[35]

Some commentators argue that S.B. 75 could trigger "interjurisdictional competition, as other, more conservative states (think, Texas)" adopt statutes authorizing

30 *See generally* Stephen M. Bainbridge, *Fee Shifting: Delaware's Self-Inflicted Wound*, 40 Del. J. Corp. L. 851 (2016).

31 DavisPolk, *The Latest on Fee-Shifting Bylaws*, Briefing: Governance, (*Oct. 23, 2014), www.davispolk.com/briefing/corporategovernance/latest-fee-shifting-bylaws/.

32 91 A.3d 554 (Del. 2014).

33 As one post-ATP commentary observed:

> Although ATP involved a closely held nonstock corporation, and the certified questions were framed accordingly, the reasoning in ATP should be equally applicable to stock corporations. The court's interpretation of the Delaware General Corporation Law, the contract theory of bylaws endorsement, and the precedents cited were not limited to non-stock corporations. Moreover, there does not appear to be any principled basis to suggest that the decision does not apply to Delaware companies generally.

Robert W. Gaffey et al., *Break Point? Delaware Supreme Court Upholds Validity of Fee-Shifting Bylaw*, 18 No. 6 Wallstreetlawyer.com: Sec. Elec. Age 16 (2014). *See also* Henry DuPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, Delaware Corporate & Commercial Litigation Blog 19 (2014), www.delawarelitigation.com/files/2014/11/The_Emerging_Role_of_Bylaws_in_ Corporate_Governance-copy.pdf ("Since the court's decision in ATP Tour, a number of commentators have assumed that it applies equally to for-profit, stock corporations.").

34 Proposed Amendments to Del. Code. Ann. tit 8, § 102, adopted as S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015), www.wsgr.com/PDFs/1182013.pdf. The bill further proposed a new § 115, which defined intracorporate claims as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." Proposed Amendments to Del. Code. Ann. tit 8, § 115, adopted as S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015). The legislative synopsis accompanying the bill made clear that the bill is not intended to "disturb [the ATP] ruling in relation to nonstock corporations." S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015).

35 Proposed Amendments to Del. Code. Ann. tit 8, § 109, adopted as S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015).

fee-shifting bylaws in order "to lure companies to reincorporate there to exploit their tolerance for such provisions."[36] In fact, the first step towards such a competition has already occurred. In September 2014, Oklahoma passed legislation "providing that in a shareholder initiated derivative action against a domestic or foreign corporation, the court 'shall require the nonprevailing party or parties to pay the prevailing party or parties the reasonable expenses including attorneys' fees, taxable as costs, incurred as a result of such action.'"[37] The Oklahoma legislation differs from the pre–S.B. 75 state of Delaware law in two respects. First, it applies only to derivative suits, leaving the fee rules for class actions for both direct corporate law and securities law claims unchanged.[38] Second, it is a genuine "loser pays" provision, because prevailing shareholders also can recover their expenses.[39]

To date, however, Delaware remains the dominant player in the competition for corporate charters. Despite self-inflicted wounds and the nagging long-term problem of the indeterminacy of its law, Delaware still rarely loses corporations to other states and attracts most new public corporations. Various explanations are advanced for this phenomenon. Among the more plausible ones are inertia, network effects, attorney conservatism, and the high quality of its courts.

4 AN OVERVIEW OF THIS VOLUME'S CONTRIBUTIONS TO THE DEBATE

The first two chapters in this volume focus on potential alternatives to Delaware. In Chapter 2, Sean Griffith contends that the Delaware model of corporate law is regulation by litigation. But shareholder regulation is in crisis. Neither side of the "v" has an incentive to look out for shareholder interests. As a result, nuisance claims

[36] John C. Coffee, Jr., *Fee-Shifting and the SEC: Does It Still Believe in Private Enforcement?*, THE CLS BLUE SKY BLOG (Oct. 14. 2014), http://clsbluesky.law.columbia.edu/2014/10/14/fee-shifting-and-the-sec-does-it-still-believe-in-private-enforcement/. *See, e.g.*, Keith Paul Bishop, *SB 75 May Prove To Be Delaware's Seven Sisters*, CALIFORNIA CORP. & SEC. L. (May 14, 2015), http://calcorporatelaw.com/2015/05/sb-75-may-prove-to-be-delawares-seven-sisters/ ("Delaware should understand that its primacy is not guaranteed and can be quickly lost. Will SB 75 reprise the role of New Jersey's seven sisters for the benefit of the next Delaware?"); Kevin M. LaCroix, *Battle Builds in Delaware Over Fee-Shifting Bylaws*, THE D&O DIARY (Dec. 1, 2014), www.dandodiary.com/2014/12/articles/director-and-officer-liability/battle-builds-in-delaware-over-fee-shifting-bylaws/ ("Oklahoma's legislature recently adopted a provision authorizing Oklahoma corporations to extend loser-pays to all shareholder suits involving board members. It is entirely possible that these kinds of developments could simply overtake legal developments in Delaware, as companies could seek to form or reconstitute themselves in jurisdictions that allow fee-shifting bylaw.").

[37] Kevin LaCroix, *Oklahoma Legislature Adopts Derivative Litigation Fee-Shifting Provision*, THE D&O DIARY (Sept. 25, 2014), www.dandodiary.com/2014/09/articles/corporate-governance/oklahoma-legislature-adopts-derivative-litigation-fee-shifting-provision/.

[38] J. Robert Brown, Jr., *Fee Shifting in Derivative Suits and the Oklahoma Legislature*, THERACETOTHEBOTTOM.ORG (Sept. 24, 2014), www.theracetothebottom.org/home/fee-shifting-in-derivative-suits-and-the-oklahoma-legislatur.html.

[39] *Id.*

proliferate, and shareholders are being forced to part with potentially valuable litigation rights for no real consideration. There is an alternative to regulation by litigation – that is, administrative regulation. This model is exemplified by the Takeover Panel in the United Kingdom and Ireland. Griffith's chapter explores the Anglo-Irish regulatory alternative to regulation by litigation, demonstrating the potential of an administrative panel to address the crisis in shareholder litigation. Nevertheless, no US state has adopted a regulatory approach to corporate law. Instead, every state follows Delaware's model of regulation by litigation. To account for this strange result, his chapter considers potential defects in the market for corporate charters and the potential for interest group capture in the Delaware model, ultimately concluding that the corporate bar's interest in obstructing any shift away from regulation by litigation explains the persistent differences on either side of the Atlantic Ocean.

Lynn LoPucki's in Chapter 3 draws on the theoretical and empirical insights from that vast literature to present a systems analysis of the competition. The analysis shows the competition to be a system composed of three subsystems, joined by the internal affairs doctrine. The subsystems are those by which (1) corporations choose incorporation states, (2) states decide what packages to offer, and (3) states and stakeholders choose the courts that interpret and enforce corporate law. The analysis suggests that the standard account of charter competition should be revised in five major respects. First, the charter competition is neither dormant nor merely a competition between Delaware and the corporations' home states. Other states not only compete but have also captured 19 percent of the public company charter market. Second, charter competition should be modeled not as an attempt to strike the right balance between managers and shareholders, but as a delegation of power to managers who then strike that balance through implicit contracting. That reconceptualization leads to the insight that states do not need corporate law expertise to compete for incorporations. Third, corporate charter competition as a system is neither a race to the top or the bottom. It is capable of generating only one result: deregulation. What remains of corporate law is not regulation, but mere obfuscation. Fourth, Delaware employs a principally judicial strategy in the competition. That strategy, which requires Delaware to attract litigation as well as incorporations, is faltering. The shift to arbitration of shareholder litigation that is already in progress may strip Delaware of its competitive advantage and eliminate its monopoly. Fifth, regardless of what happens to Delaware, for the foreseeable future charter competition will remain a highly stable system that is effectively beyond democratic control.

The next three chapters turn to Delaware's increasingly fraught relationship with the federal government. Robert Thompson's chapter (Chapter 4) argues that Delaware rose to preeminence in the incorporation market at a key point of inflection for corporate law. For the first half of American history (to date) corporate law moved through waves of significant changes – limited liability, general incorporation statute, a strong shift to director-centric corporate governance, and authorization