The Delaware Paradigm: Why America's Second Smallest State And Corporate Law Capital Will Sustain Its Dominance Despite Recent Shake-Ups

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Table of Contents

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David CHEKROUN,* Megha BANSAL** and Tanya BANSAL***

Company incorporation; Corporate governance; Delaware; Multinational companies; United States

ABSTRACT

Delaware's corporate law supremacy faces significant challenges from high-profile controversies, legislative interventions, and competing state initiatives. The Tesla reincorporation controversy, Senate Bill 21's comprehensive reforms, and Nevada and Texas's aggressive statutory innovations suggest significant pressures on Delaware's hegemony. Yet these developments ultimately demonstrate the state's longstanding institutional advantages while raising questions about their sustainability and direction.

This article examines Delaware's competitive advantages through four critical frameworks. Frameworks one and two explore the state's historical emergence as a corporate haven, followed by detailing its unique legal architecture which combines specialized courts with responsive legislation and a sophisticated framework governing corporate disputes. Third, we highlight the resulting products of Delaware's legal innovation. Finally, through a review of recent challenges and criticism, including the Musk compensation controversy and the "DExit" phenomenon, we demonstrate how Delaware's network effects, specialized expertise, and institutional coordination create durable competitive advantages.

Our analysis shows that Delaware's institutional infrastructure provides a long-term competitive advantage in the market for corporate charters. Its specialized Court of Chancery, enabling legal environment, and responsive legislature form a governance ecosystem that attracts corporations seeking legal certainty and board flexibility. The recent adoption of Senate Bill 21 ("SB 21")

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confirms Delaware's willingness to adjust its legal framework in response to competitive, economic and political pressures. These reforms aim to preserve its leadership position but also mark a shift in how Delaware calibrates control rights and governance mechanisms.

However, SB 21 often referred to informally as the "Billionaire Bill," has drawn attention for its potential to reshape corporate governance in ways that may disproportionately benefit controlling shareholders, including billionaire founders. The bill has sparked significant concern among corporate law scholars. Key provisions appear to weaken traditional safeguards for minority shareholders and may compromise judicial independence, two cornerstones of Delaware's legitimacy. By signaling a shift toward senior management and controlling shareholder interests, SB 21 raises serious questions about Delaware's commitment to balanced corporate governance standards. As Delaware continues to adapt its legal framework, the boundary between responsive legal innovation and regulatory capture becomes increasingly difficult to define.

For the international legal and business communities, Delaware offers a revealing case study in regulatory competition and institutional path dependence. Its legal trajectory illustrates how a jurisdiction can strategically deploy its legal infrastructure—courts, legislature, and bar—to reinforce its dominance in the market for corporate law and corporate governance. At the same time, it exposes the risks associated with shareholder primacy when essential checks and balances, such as fiduciary duties and judicial oversight, are diluted. The current phase in Delaware's evolution underscores a core challenge in corporate governance: designing legal frameworks that reconcile capital market efficiency with rising expectations around stewardship, stakeholder inclusion, and board accountability.

KEYWORDS

Delaware; corporate law; corporate governance; jurisdictional competition; fiduciary duties; controlling shareholders; executive compensation; Delaware General Corporation Law; Senate Bill 313; Senate Bill 21; DExit; legislative-judicial feedback loops; private ordering; minority shareholder protection; institutional investors; state competition

METHODOLOGICAL NOTE

This article relies exclusively on U.S. legal sources, including statutory provisions, case law, and scholarly publications from leading law journals. Our methodology combines doctrinal interpretation with case-based review and is enriched by comparative legal perspectives. In addition, we incorporate qualitative insights drawn from a series of exchanges[1]—including interviews, informal discussions, and panel debates—with legal scholars, practitioners, and members of the judiciary from both the U.S. and abroad. These contributions provide a practice-informed understanding of how Delaware's governance model operates under conditions of heightened regulatory competition. The article is intended for a global audience of legal academics, lawyers, policymakers, investors, and corporate governance professionals engaged in cross-border dialogue on institutional design and the future of corporate law. The article is written in American English—not British English—in order to reflect the terminology, style, and doctrinal structure specific to U.S. corporate law and Delaware's legal framework, which are central to the subject matter. Moreover, the citations conform to standard Bluebook 21st edition format.[2] Lastly, we note that this article is current as of August 9, 2025, and incorporates legal, legislative, and market developments through that date.

INTRODUCTION

The First State has become the final word in corporate law.[3] A striking feature of American federalism, one of the nation's smallest jurisdictions—ranking 45th in population and 49th in area among the fifty states[4]—serves as the legal domicile for nearly 70% of Fortune 500 companies and processes over $2.2 billion in corporate revenue annually.[5] This is the Delaware paradox. Though modest in scale, Delaware wields an outsized influence over the legal framework governing American, and increasingly global, corporate enterprise.

Unlike centralized corporate governance systems found in many OECD economies, the United States operates under a federal system where individual states compete to attract corporate charters.[6] Delaware not merely won this competition but entrenched itself as the default choice for incorporation for over a century, maintaining a market share unrivaled by any other state. The scope of this dominance is exemplified by America's corporate titans—Walmart, Amazon, UnitedHealth Group, Berkshire Hathaway, Alphabet, Meta, DuPont, and JPMorgan Chase, among others—legally domiciled in Delaware with minimal in-state operations.[7]

Delaware now stands at an inflection point. High-profile controversies and market realignments, legislative developments and competitive pressure from other jurisdictions, raise the fundamental question yet again—will the corporate haven finally be dethroned?

The phenomenon dubbed ''DExit'', a wave of corporate departures from Delaware, gained prominence following Chancellor Kathleen McCormick's invalidation of Musk's $56 billion compensation package. In the aftermath, Musk reincorporated Tesla in Texas, declaring ''Never incorporate your company in the state of Delaware'' and publicly denouncing the judiciary, fueling speculation that Delaware was becoming hostile to controlling shareholders.[8] With Tesla, at least five companies valued over $1 billion have reincorporated outside Delaware over the past year.[9] Trump Media & Technology Group, owner of Truth Social, has redomiciled to Florida, citing Delaware's ''increasingly litigious environment facing corporations with controlling stockholders.''[10] Meanwhile, during the 2025 proxy season, shareholders of seven additional publicly traded companies with market caps ranging from $1.5 billion to $71 billion approved proposals to reincorporate from Delaware to Nevada.[11]

These departures reflect deeper structural challenges beyond individual grievances. *Tornetta*, the Tesla compensation case, expanded ''controlling shareholder'' status to encompass influence-based rather than purely ownership-based control, creating new uncertainties for superstar CEOs and founder-controlled companies.[12] *Moelis* invalidated commonplace governance arrangements that had operated unchallenged for nearly a decade, highlighting tension between market practice and strict statutory compliance.[13] At the same time, Texas and Nevada actively positioned themselves as Delaware's principal competitors by adopting corporate statutes that favor controlling shareholders and reduce director liability, and launching specialized business courts.[14]

However, empirical studies caution against overstating the threat. Research suggests that Delaware continues to attract vastly more incorporations than it loses, with many of the proffered reasons for leaving ''seem[ing] implausible'', and that DExit is a ''manufactured corporate crisis,'' inflated by media coverage and strategic posturing.[15]

The question remains. Will contemporary pressures finally dethrone Delaware, or will the longstanding corporate haven weather this latest storm? We argue the latter. Decades of academic scholarship, from foundational jurisdictional competition theories to more recent empirical and doctrinal work, have explored Delaware's corporate law supremacy. Leading scholars have identified converging themes including network effects and structural barriers, judicial sophistication, market inertia and switching costs, political alignment with corporate needs and legislative responsiveness.[16] Together, these themes explain Delaware's preferred status in American corporate law amid recurring waves of critique and competition.

This article makes two distinct contributions to the rich and expanding literature on Delaware corporate law. *First,* we reconceptualize Delaware's judicial innovations as integrated ''legal engineering''—sophisticated tools designed to address novel transactional contexts. Rather than treating enhanced scrutiny, *MFW* cleansing, *Corwin* deference, oversight liability, and other doctrinal developments as piecemeal responses to litigation pressure, our analysis reveals these innovations as components of a coherent evolution of case-law that adjusts judicial scrutiny based on structural risk. *Second*, we situate Delaware's recent legislative responses within a broader framework showing how competitive pressures can ultimately reinforce its structural advantages. Drawing on detailed case studies of *Tornetta, Moelis*, and DExit—together with the ensuing Senate Bills 313 and 21 (''**SB 313**'' or ''**SB 21**'')—we spotlight the limitations confronting competing jurisdictions which lack Delaware's unique political economy and legal architecture comprising a specialized judiciary, deeply engaged corporate bar and responsive legislature.

We proceed as follows. *Part I* examines Delaware's political economy of path-dependent advantages, network effects, and political incentives.[17] We explore how a hundred and twenty five years of historical development have created switching costs and institutional inertia that competing states cannot easily replicate. *Part II* analyzes Delaware's legal architecture, focusing on the institutional coordination among courts, the legislature, and the bar. This coordination enables Delaware to adapt effectively to evolving business environments. Judicial innovation is refined through legislative response, creating a dynamic balance between legal certainty and business flexibility. *Part III* presents Delaware's world-class arsenal of tools and instruments, particularly fiduciary duties and a tripartite standard of review.[18] These legal instruments reflect sophisticated engineering designed to balance competing theories of corporate governance through a tripartite framework that adjusts judicial scrutiny based on transactional context while preserving consistent analytical structures. *Part IV* addresses the current period of crisis, marked by *Tornetta*, *Moelis* and systematic competitive pressures affiliated with DExit. Not isolated incidents, these challenges represent interconnected tests of Delaware's institutional resilience. We note how contemporary challenges differ qualitatively from historical competitive threats, analyzing *Tornetta's* expansion of controlling shareholder doctrine, *Moelis'* market disruption, and aggressive competition from Nevada, Texas and other states. Finally, *Part V* discusses the strategic SB 313 and SB 21, representing the most comprehensive statutory revisions in decades and perhaps, a fundamental paradigm shift. These legislative responses exemplify Delaware's enduring capacity for adaptation but raise deeper questions about the appropriate allocation of power among directors, controllers, minority investors, and other stakeholders, in a modern corporate governance system. Unlike §102(b)(7)'s widely lauded post–Van Gorkom recalibration, SB 313 and SB 21 moved on accelerated timetables that departed from the Delaware State Bar Association's (**SBA**) Corporation Law Section Council-led process. That procedural shift, coupled with the statutes' greater reliance on bright-line rules, raises a fair question whether Delaware risks diluting its judge-centric distinctiveness—particularly for public companies—even if the changes reduce frictions for closely held and private equity (''**PE**'')-backed firms.

Finally, we recognize segmentation in the charter market. For widely held and IPO-bound public companies, Delaware's adjudicative expertise, institutional lock-in, and network effects still command a premium. In parallel, however, a second race appears to be emerging for firms with concentrated control—PE–backed platforms and founder-or controller-led companies—where Nevada and, to a lesser degree, Texas compete by offering brighter-line protections and greater tolerance for contractual control. This product differentiation is consistent with recent organizational-theory accounts that emphasize how corporate law allocates power across coalitions within the firm and how legal rules shape which investors' capital—financial, labor, and even natural—are privileged in governance.[19] On that view, Moelis and SB 21 can be read as rebalancing toward insider control in the private or controlled company segment, while preserving Delaware's public-company distinctiveness—if that distinctiveness is maintained through judge-centered equity in the public market core.[20] However, we not undertake exhaustive empirical mapping of reincorporation flows or PE-specific uptake due to space and bandwidth constraints.

Overall, our analysis reveals that Delaware's network effects, specialized expertise, and dynamic feedback loops between courts, legislature, and bar create sustainable competitive advantages that extend far beyond American borders. For international business and legal leaders—from Silicon Valley to the City of London, from Wall Street to the financial districts of Paris, Hong Kong, and Abu Dhabi—understanding Delaware means understanding how global corporate governance norms are shaped.

I. DELAWARE'S POLITICAL ECONOMY, PATH DEPENDENCY, AND NETWORK EFFECTS

Beyond legal doctrine, Delaware's deep economic structures create path-dependent advantages and self-reinforcing network effects. This Part examines how historical contingency, geographic positioning, revenue incentives, and supporting infrastructure combine to create an institutional lock-in.[21] Over more than a century, these elements form high barriers to competitive entry for rival jurisdictions.

Critics contend that these same structures may produce problematic consequences that benefit Delaware at the expense of optimal regulatory competition.[22] Professor Lucian Bebchuk's influential ''race to the bottom'' critique argues that Delaware's revenue dependence on corporate franchise taxes creates systematic incentives to favor management interests over those of shareholders. However, this theoretical concern is challenged by empirical evidence: the continuing flow of incorporations to Delaware suggests that market participants view its legal regime investor-protective rather than structurally pro-management.[23] Our account does not hinge on a 'race to the top' narrative. The persistence of Delaware incorporation is better explained by institutional lock-in, switching costs, adjudicative expertise, and ecosystem complementarities than by any claim of globally optimal rules.

Viewing Delaware's dominance through an *institutional lock-in* lens helps explain Delaware's dominance through the self-reinforcing mechanisms of expertise concentration, regulatory optimization, and crisis capitalization. Such a view not only explains Delaware's historical rise but accurately predicts its continued dominance.

A. Historical Roots and Path Dependency

Delaware's corporate supremacy can be traced to the early 20th century, when the state deliberately positioned itself to attract corporate charters fleeing New Jersey's increasingly restrictive regime.[24]

New Jersey had emerged as the dominant corporate jurisdiction upon enactment of the 1896 General Corporation Act, which liberalized incorporation by allowing companies to form for ''any lawful business'', permitted perpetual duration, and crucially, authorized holding companies to own stock in other corporations.[25] Its ''enabling''[26] regime and proximity to New York's financial district created powerful network effects, making it the ''mother [state] of the trusts''[27] and home to Standard Oil, U.S. Steel, and American Tobacco by 1901.[28] This dominance ended abruptly in 1913 when Governor Woodrow Wilson, later U.S. President, championed Progressive Era antitrust reforms that drove corporations to reincorporate.[29] Delaware seized this opportunity.

As the second-smallest U.S. state with limited natural resources, Delaware strategically capitalized on its geographic proximity to major financial centers, including New York, Pennsylvania, and New Jersey, to attract corporate charters as a source of revenue.

Delaware General Corporate Law (''**DGCL**''), enacted in 1899 and revamped in 1913, was essentially a verbatim copy of New Jersey's 1896 statute.[30] Led by Josiah Marvel, a Wilmington native and former New Jersey corporate lawyer, the drafters deliberately maintained the corporate-friendly framework that Wilson eliminated.[31]

The Delaware story captures what economists call ''path dependency''; once Delaware established early advantage, network effects and institutional inertia reinforced its dominance.[32] As Delaware attracted an increasing number of incorporations, it developed a dense body of corporate jurisprudence, and legal practitioners across financial centers, particularly in New York, concentrated their expertise around Delaware law.[33] This generated substantial network effects that elevated Delaware's value proposition beyond statutory content alone.

In fact, Delaware's expertise concentration differs fundamentally from the simple ''network effects'' described in prior literature.[34] Unlike static advantages that depreciate over time, Delaware creates what we term increasing returns to specialization—each complex case handled by Delaware's courts generates institutional knowledge that makes the system better equipped to handle subsequent complex cases, creating a knowledge spiral that competitors cannot replicate through statutory copying alone.[35] Reincorporation entails fixed legal costs, disruption to charter and bylaw architectures, re-training of counsel and courts to a new doctrinal corpus, and coordination frictions with investors, creditors, and index providers. These path-dependence frictions, layered atop adjudicative expertise, help explain observed stickiness.

This dynamic manifests through several specific channels: judicial decisions create precedential knowledge that reduces uncertainty for future transactions; Delaware's specialized bar develops transaction-specific expertise that becomes embedded in institutional memory; legislative responses to judicial innovations create refined statutory tools unavailable in other jurisdictions; and sustained academic engagement generates theoretical frameworks that inform practical decision-making.[36] As Professors Edward Rock and Marcel Kahan demonstrate, this creates ‘‘symbiotic federalism’’ where Delaware’s institutional advantages become self-reinforcing rather than merely path-dependent.[37]

The state’s fiscal dependence on franchise taxes created political incentives to maintain a business-friendly climate.[38]

Professor Bebchuk and his colleagues emphasize that Delaware’s supremacy is now sustained through these entrenched network advantages and high switching costs,[39] arguing that institutional inertia and accumulated expertise discourage reincorporation, even when rival statutes may offer specific advantages.[40] However, this raises important questions about whether Delaware’s dominance represents optimal regulatory competition or merely institutional path dependence that may not serve broader economic efficiency.

Its institutional entrenchment is reinforced by Delaware’s commitment to an ‘‘enabling’’ approach. The DGCL offers predictability and stability shaped by corporate law experts and protected from influence of special-interest groups, creating what amounts to a specialized legal product tailored for business needs while maintaining judicial oversight through fiduciary duties.[41]

Notable statutory features exemplify this approach. Section 102(b)(7) authorizes corporations to eliminate personal liability for breaches of the duty of care; Section 141 affirms broad managerial authority in the board of directors; and Section 144 provides safe harbor protections for interested transactions when subject to appropriate procedural safeguards. Unlike detailed, prescriptive company codes characteristic of many civil law jurisdictions,[42] the DGCL is sparse in mandatory provisions and emphasizes flexibility in corporate governance design.[43] Its animating philosophy—*permettre plutôt qu’interdire*—has proven attractive to entrepreneurs, investors, and transactional lawyers alike. The statute delegates wide latitude to boards, constrained principally by fiduciary duties enforced through the Delaware Court of Chancery.[44] This corporate flexibility within judicially policed boundaries, creates sustainable competitive advantages rooted in institutional expertise rather than regulatory laxity.[45]

B. The Internal Affairs Doctrine, Jurisdictional Extraterritoriality, and Expertise Concentration

The *internal affairs doctrine* is central to Delaware’s hegemony. It is a long-established choice-of-law principle under which the law of the state of incorporation governs matters ‘‘peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders,’’ regardless of where business is conducted or shareholders reside.[46]

Hence, Delaware corporate law governs internal governance matters for Delaware corporations regardless of where business is conducted, lawsuits are filed, or shareholders reside[47]—a form of legally sanctioned extraterritorial regulation that would be impermissible in most other contexts.[48] When combined with Delaware’s dominance among Fortune 500 companies and NYSE listings, this doctrine ensures that Delaware law shapes corporate governance decisions with national and global implications.[49]

Former Delaware Supreme Court Justice, Jack Jacobs, has identified three mechanisms through which Delaware corporate law acquired this extraterritorial reach.[50]

First, anti-takeover statutes initially threatened to undermine the federalist model when states like Illinois attempted to regulate transactions involving minimal state connections.[51] However, the U.S. Supreme Court invalidated the most aggressive examples of these ‘‘first generation’’ statutes in *Edgar v. MITE Corp.*[52] led to more carefully crafted ‘‘second generation’’ statutes that operated within internal affairs doctrine constraints, ultimately reinforcing rather than challenging Delaware’s framework.[53]

Second, the internal affairs doctrine has a self-reinforcing effect. As more companies incorporate in Delaware, the more influential Delaware law becomes, leading to greater uniformity in governance practices and greater incentives for subsequent incorporations.[54]

Delaware courts have increasingly interpreted the doctrine to encompass not only traditional governance relationships, but also litigation procedures, fee-shifting provisions, and even aspects of federal securities law claims through corporate charter and bylaw provisions.[55] In fact, one Delaware Vice Chancellor recently cautioned against

"Delaware [determining] employment law for the country and for the world."[56]

This expansive interpretation has drawn criticism from legal scholars. Professor Ann Lipton contends that the internal affairs doctrine operates as "a sort of optical illusion: it looks absolute because its scope has been limited to the area in which it can operate absolutely."[57] She argues that Delaware has become too aggressive in expanding the doctrine beyond traditional corporate governance, particularly into employment relationships and other areas that affect non-Delaware residents.[58] Professor Lipton calls for "more modesty from Delaware" in applying the doctrine, noting that Delaware "has long been recognized as having an incentive to construe the internal affairs doctrine as broadly as possible."[59]

However, this expansion reflects legitimate business needs rather than mere jurisdictional overreach. By ensuring that Delaware law applies to internal corporate governance, this doctrine prevents companies from exploiting differences in state law that might otherwise favor states where corporations actually operate. This creates predictability—Delaware law will govern key governance questions regardless of where business disputes arise or where the corporation later relocates its operations.[60] Therefore, the legitimate efficiency served by the doctrine's broad application allays concerns about democratic accountability.[61]

Third, attempts by states like California and New York to impose their own governance mandates on foreign-incorporated entities—so-called "corporate outreach" statutes—have largely been rebuffed.[62] In *VantagePoint Venture Partners 1996 v. Examen, Inc.*, the Delaware Supreme Court held that California's effort to override Delaware's voting rules violated constitutional principles and must yield to the internal affairs doctrine.[63] This line of authority has cemented Delaware's supremacy in matters of internal corporate governance and neutralized regulatory competition from high-population states with expansive stakeholder protections.

C. Federal-State Division and Regulatory Optimization

Delaware has achieved a stable equilibrium that maximizes total stakeholder value while minimizing regulatory arbitrage opportunities—representing a Pareto-optimal solution to the multiparty optimization problem of corporate governance. This equilibrium operates through three key features that distinguish Delaware from competing jurisdictions. One, flexible standards that enable case-by-case optimization rather than rigid rules that create systematic over- or under-enforcement; two, calibrative legislative-judicial feedback loops that enable real-time adjustment to maintain optimal enforcement; and three, multistakeholder optimization that, unlike pure shareholder primacy or broad stakeholder governance models, optimizes across multiple constituencies simultaneously.[64] Delaware decisions over the last twenty years show that Delaware courts consistently balance competing interests in ways that maximize total transaction value while maintaining investor confidence—something Professor Bebchuk's pure race to the bottom critique theory cannot alone explain.[65]

Delaware's dominance cannot be understood without an appreciation of the evolution of American corporate federalism, characterized as "a patchwork of fifty separate bodies of state corporate law, plus the corporate law of the District of Columbia, all overlaid by a separate body of federal law."[66] This two-tiered system emerged from economic necessity. While nineteenth-century corporations were primarily local enterprises, the transformation of the twentieth century demanded federal intervention.[67]

The New Deal fundamentally reshaped this landscape by creating a clear division of regulatory authority. Delaware and other states retained control over internal corporate affairs—relationships between shareholders, directors, and officers—while federal law took jurisdiction over capital markets through not only the Securities Act of 1933[68] and Securities Exchange Act of 1934[69], but also the Investment Company Act of 1940 and the Investment Advisers Act of 1940, which shape governance practices for issuers and intermediaries and interact with Delaware's internal-affairs domain. This federal overlay has continued to expand through subsequent legislation including the Williams Act (1968),[70] the Sarbanes-Oxley Act (2002),[71] and recent economic stimulus measures regulating executive compensation for bailout recipients.[72]

The federal-state division has enabled corporations to strategically choose jurisdictions based on differences in corporate governance and federal oversight. For example, a California technology firm or New York financial institution can access Delaware's specialized corporate law while operating under uniform federal securities regulations.[73] As Justice Jacobs observed, this provides "a clear, easily applied rule that wherever a lawsuit involving the corporation's internal affairs is filed, only the law of the state of incorporation would govern the case."[74]

This division manifests in several key areas, particularly, (1) *disclosure requirements*, where federal law mandates extensive disclosures through SEC filings and Delaware focuses on internal governance processes; (2) *shareholder rights*, where federal law provides voting protections and information rights and Delaware governs fiduciary duties and transaction approval processes; and (3) *enforcement*, where federal agencies and private securities litigation operate alongside Delaware's specialized courts.[75]

Rather than posing a threat, the federal overlay has allowed Delaware to specialize within its regulatory niche while federal law handles matters requiring uniform national treatment.[76] Delaware's Court of Chancery, free from the burden of securities enforcement, focused on crafting jurisprudence on fiduciary duties, transaction structures, and governance arrangements, while federal agencies manage disclosure requirements, market regulation, and securities enforcement.[77] The result is a sophisticated system of divided regulatory labor that enhances overall governance quality while preserving Delaware's competitive position.

D. Revenue Incentives and Supporting Infrastructure

Delaware's revenue model creates powerful incentives to maintain business-friendly policies. The state generates substantial revenue from incorporation fees and franchise taxes. Domestic corporations pay a minimum annual franchise tax of $175 under the Authorized Shares method or $400 under the Assumed Par Value Capital method, with maximum liabilities of $200,000 for most entities and $250,000 for designated Large Corporate Filers.[78] Seemingly modest for individual firms, the fee structure generates enormous aggregate revenue given Delaware's dominance in the incorporation market: franchise taxes and related fees account for approximately one-third of the state's annual revenue.[79]

This fiscal dependence fundamentally shapes Delaware's political economy. Critics argue that Delaware's "race to the top" in corporate law may actually represent a "race to the bottom" that prioritizes managerial interests over broader stakeholder welfare in order to protect incorporation revenue. However, this theoretical concern is challenged by empirical evidence and market behavior. As Delaware legislators recently observed, corporate franchise revenue allows the state to "make meaningful investments in [Delaware] communities" such that the corporate franchise "doesn't just serve business; it serves our state".[80]

The franchise tax calculation methods allow corporations flexibility in minimizing their tax burden while ensuring stable revenue streams for the state. Large corporations often pay hundreds of thousands of dollars annually, creating what public choice theorists recognize as a "revenue trap" as the state becomes dependent on corporate tax revenues, creating powerful political incentives to resist policies that might drive incorporations elsewhere.[81] This creates a unique alignment where the special "interest" driving Delaware corporate law is, paradoxically, Delawareans as a whole rather than narrow corporate constituencies.[82]

Critics raise concerns about regulatory capture, but Delaware's continuing attraction to sophisticated institutional investors (including pension funds, university endowments, and activist investors who are particularly sensitive to governance quality) suggests that Delaware law provides genuine investor protection rather than systematic management favoritism. If Delaware truly engaged in a "race to the bottom," we would expect to see institutional investors leading exodus movements rather than continuing to support Delaware incorporation for their portfolio companies.

The revenue alignment critique also overlooks Delaware's unique political structure. The broad distribution of corporate tax benefits across Delaware's entire population creates incentives to sustain high-quality corporate law that serves all market participants rather than narrow interest groups. This differs markedly from regulatory capture scenarios where concentrated benefits flow to specific constituencies.

Delaware has developed a comprehensive infrastructure to support corporate operations, from registered agent services to specialized consulting firms.[83] Perhaps most importantly, the Delaware's Secretary of State's office is known for its exceptional efficiency, offering filing turnaround times in as little as thirty minutes, maintaining extended hours from 8:00 AM to midnight Monday through Friday, and providing procedures for both preclearing documents and effecting filings even when staff is not present.[84] This results in what is effectively 24/7 availability for corporate filings, proving particularly valuable for international transactions and urgent corporate actions.[85]

Unlike many government agencies, the Delaware Secretary of State's office operates with a customer service-oriented approach, reflecting decades of institutional commitment to preserving Delaware's competitive edge in the corporate franchise market.[86] This specialized expertise in corporate administration, combined with the broader ecosystem of service providers who understand the nuances of Delaware corporate law, creates operational efficiencies that competing states struggle to replicate.[87]

II. DELAWARE'S LEGAL ARCHITECTURE: GENIUS LOCI AND INSTITUTIONAL LOCK-IN

Building on the political economy foundations established in Part I, this part examines how Delaware has created sophisticated legal institutions to address core challenges in corporate governance. governance. Critics such as Professor Bebchuk argue that Delaware's institutional coordination may actually impede optimal rule-making by reducing competitive pressure. However, the ongoing evolution of Delaware doctrine through high-profile cases suggests the system remains vibrant and responsive to new challenges. Delaware's success stems not from singular doctrinal innovation but from the capacity to maintain legal certainty while adapting to evolving business needs through feedback mechanisms between courts, legislature, and specialized bar.

From a theoretical standpoint, Delaware's legal ecosystem challenges both pure contractarian models (which presume markets alone can optimize governance arrangements) and top-down approaches (which assume centralized rule-making can anticipate all business needs). Professor Stephen Bainbridge's ''director primacy'' theory, while generally supportive of Delaware's board-centric model, raises concerns about potential regulatory capture given revenue dependence. Yet Delaware's willingness to scrutinize even the most powerful corporate actors, as demonstrated in recent high-profile cases such as *Tornetta*, suggests the judiciary maintains genuine independence despite the state's economic interests. Instead, Delaware represents responsive legal structures that combine market signals with expert judgment to produce evolutionary lawmaking that serves neither pure shareholder primacy nor pure stakeholder governance, but rather enables efficient contracting within judicially-enforced fiduciary constraints.

A. The Court of Chancery Model: Equity Without Juries

Delaware's corporate judiciary operates on a bifurcated system, where the Court of Chancery and the Superior Court's Complex Commercial Litigation Division[88] serve distinct but complementary roles, delivering equitable and legal remedies respectively.

At the heart of the system is the Court of Chancery, which holds exclusive jurisdiction over all matters in equity, such as breach of fiduciary duties, shareholder derivative suits, and corporate control disputes, arising under the DGCL. Established in 1792, it is the oldest and prominent business court in the United States. As a court of equity, judges—not juries[89]—decide cases and must provide written reasons for their rulings. Rooted in the traditions of the English Court of Chancery, this structure eliminates the unpredictability of jury verdicts and decades of detailed judicial opinions have created comprehensive and high-quality caselaw.[90] Equity jurisdiction allows for flexible remedies unavailable in courts of law, making the Chancery Court particularly suited for corporate disputes where monetary damages may prove inadequate.

Some critics argue this structure may insulate corporate defendants from democratic accountability that jury trials provide, but the requirement for detailed written opinions and appellate review actually offers greater transparency and consistency than jury verdicts, which need not be explained.

The Chancery bench is composed of a Chancellor and six Vice Chancellors[91], all nominated by the Governor and confirmed by the State Senate to 12-year terms.[92] Delaware's constitution also requires partisan balance on the bench, a distinctive feature intended to preserve public confidence in judicial impartiality.[93] These jurists are selected for their deep expertise in corporate law, and many come from leading Delaware law firms or government service.

Critics note that this selection process may create a revolving door between the Delaware bar and bench, potentially compromising judicial independence. However, the 12-year terms and constitutional partisan balance requirements provide strong structural protections against capture, while the expertise gained from practice enables more sophisticated judicial decision-making than generalist courts could provide. This structure contrasts sharply with elected judiciaries or generalist courts that lack specialized business law competence.[94] Cases in the Court of Chancery are assigned to individual judges who manage litigation from filing through resolution, creating accountability. The court's limited jurisdiction enables expedited handling of complex corporate matters disputes, sometimes resolved within days or weeks when necessary, without compromising analytical rigor.[95]

Chancery decisions are appealable as of right to the Delaware Supreme Court[96], the state's highest appellate tribunal. This two-tier structure offers both expert trial-level adjudication and consistent appellate oversight.

B. Judicial Personalities and Thought Leadership

Delaware's judicial tradition of scholarly engagement extends across both current and former members of the bench, creating an unprecedented integration of academic rigor with practical jurisprudence.

Former Chief Justice Leo E. Strine Jr. and former Chancellor William T. Allen stand as perhaps the most prolific judicial scholars in corporate law, with over forty published articles in leading law reviews including the Harvard Law Review, Yale Law Journal, Columbia Law Review, Cornell Law Review, Northwestern Law Review, and Stanford Law Review.[9798] Hon. Strine's scholarship ranges from executive compensation to stakeholder governance, while Hon. Allen authored landmark decisions such as *Caremark* and influential academic work before joining NYU Law School faculty. Together, they established Delaware's distinctive template integrating practical jurisprudence with scholarly rigor that continues today.

Current Chief Justice Collins J. Seitz Jr. has contributed to legal scholarship on judicial administration and corporate dispute resolution and brings particular expertise in complex commercial litigation procedures. His work as Judicial Liaison to the Corporate Laws Committee of the American Bar Association and as an Adviser on the American Law Institute's Restatement of the Law, Corporate Governance reflects his engagement with both the practical and theoretical dimensions of corporate lawmaking.

Justice Karen L. Valihura has similarly advanced discourse on securities regulation and shareholder litigation, serving on the Advisory Board of the John L. Weinberg Center for Corporate Governance and as a member of the American Law Institute's board of advisors for its Restatement for Corporate Governance. Her academic engagement reflects the broader pattern of Delaware justices maintaining active intellectual engagement with corporate governance scholarship.

The current generation of Chancery judges continues its tradition of legal innovation. Chancellor Kathleen St. J. McCormick was sworn in as Chancellor of the Court of Chancery on May 6, 2021, becoming the first woman to lead the court in its 230-year history.[99] Her high-profile decisions, particularly in *Tornetta*, have demonstrated judicial willingness to scrutinize even the most powerful corporate actors.

Vice Chancellor J. Travis Laster, sworn in on October 9, 2009, has emerged as a particularly influential voice, authoring thoughtful opinions on controller fiduciary duties and the limits of private ordering.[100] His academic writings propose a "non-harm" framework for controlling shareholder duties, distinguishing between active harm and mere self-benefit.[101]

VC Laster has become known for his groundbreaking decisions that reshape corporate accountability law, especially in the area of

Caremark claims challenging directors and officers for ignoring mission-critical risks. Over the past several years, VC Laster has issued transformational rulings in shareholder litigation involving *McDonald's Corp., AmerisourceBergen Corp*., and *Walmart Inc.* that significantly expanded the legal exposure of officers and directors facing lack-of-oversight claims.[102] In *McDonald's*, Laster notably extended oversight duties from board members to company executives, while his *AmerisourceBergen* and *Walmart* rulings established a novel approach to calculating statutes of limitations in shareholder lawsuits.[103] These decisions have pushed Caremark cases from "long-shot lawsuits that were barely worth bringing into a staple of Delaware's corporate accountability regime."[104]

Among VC Laster's most significant recent decisions is *Moelis*, which addressed fundamental tensions between private ordering and statutory compliance in Delaware corporate law.[105] The decision established that "market practice is not law" and "when market practice meets a statute, the statute prevails," crystallizing the conflict between widespread market practices and strict statutory requirements.[106] *Moelis* created a framework for evaluating provisions in stockholder agreements that potentially conflict with Section 141(a)'s mandate regarding board authority, representing what scholars have characterized as a faithful application of statutory text to evolving governance structures.[107]

Indeed, Delaware judges are deeply embedded in the legal academy, often serving as thought leaders in corporate law scholarship.[108] Justice Strine held academic appointments at both the University of Pennsylvania Law School and Harvard Law School.[109] VC Laster, who has been described as "Strine on steroids," also maintains an active scholarly presence, lecturing at major law schools and participating in the Harvard Law School Program on Corporate Governance.[110] This scholarly engagement is not limited to current judges. Former Chancellor William T. Allen joined the faculty at NYU School of Law, former Chief Justice Myron T. Steele has taught at the University of Virginia School of Law, and former Justice Jack B. Jacobs has held teaching appointments at Columbia and Vanderbilt Law Schools.[111] This extensive interaction between Delaware's judiciary and the academy contributes to the depth, adaptability, and credibility of Delaware corporate law.

C. Specialized Legal Expertise: The Delaware Bar and Litigation Incentives

The Delaware SBA Corporation Law Section Council (the **Council**) serves as the institutional hub for corporate law development. Twenty-six highly qualified individuals, comprising a diverse representation of plaintiff-side and defense-side lawyers, litigators and transactional attorneys, are appointed to this body to review, recommend, and develop changes to DGCL.[112] The Council meets year-round and possesses the authority to propose amendments directly to the Delaware General Assembly (**General Assembly**), creating an institutionalized feedback mechanism between legal practitioners and legislative development.[113]

C1. The Economics of Corporate Governance Litigation

Corporate governance in the United States operates primarily through litigation rather than regulatory oversight, creating a unique legal ecosystem where the Delaware bar has adapted to serve both enforcement and advisory functions.[114] Whereas many European national systems, rely primarily on regulatory agencies, to oversee corporate conduct, the American corporate governance model places greater emphasis on private litigation to police fiduciary duties and assess the fairness of transactions. This litigation-driven model creates powerful economic incentives that shape both legal practice and substantive law development. Seen through an indirect investor-protection lens, a nonzero baseline of plaintiff activity is not a pathology but a feature: it feeds the case pipeline that generates Delaware's precedential substrate, sustains credible monitoring, and—in conjunction with judicial gatekeeping—anchors investor confidence.

C2. The Scale and Economics of Merger Litigation

The volume of shareholder litigation has reached extraordinary levels that fundamentally shape Delaware's legal market. Cornerstone Research found that 94% of merger and acquisition transactions valued over $100 million were subject to at least one shareholder lawsuit in 2013, with an average of five suits per deal.[115] These cases are filed with remarkable speed—averaging 11.7

days after deal announcement—suggesting systematic rather than merit-driven litigation patterns.[116]

Yet the outcomes reveal the economic dynamics at play: in the study conducted by Professor Bainbridge, none of the 612 lawsuits that went to trial, and "all judgments (including summary judgments or judgments on the pleadings) were granted to the defendants."[117] This pattern suggests that litigation serves economic rather than substantive governance purposes, creating what Professor Stephen Bainbridge characterizes as systematic "strike suits filed by the plaintiffs' bar."[118]

C3. The Circularity Problem and Wealth Transfers

Delaware's specialized bar operates within a litigation ecosystem characterized by what scholars term the "circularity problem."[119] Settlement payments in shareholder class actions typically come from corporate treasuries or insurance policies rather than individual defendants, meaning current shareholders effectively pay settlements for alleged wrongdoing that harmed previous shareholders.[120] This creates wealth transfers from current to former shareholders, minus substantial legal fees, without deterring future misconduct.[121]

The *Tornetta* litigation exemplifies these dynamics—involving millions in potential plaintiff attorney fees regardless of ultimate outcome—demonstrating how high-stakes cases generate substantial economic incentives that attract elite legal talent to both sides of corporate disputes.[122] Even in cases with substantial monetary recoveries, Professor Roberta Romano's research found that only about half resulted in meaningful shareholder compensation, with average recoveries of $9 million and median recoveries of only $2 million.[123]

C4. Capital Markets Competitiveness and Litigation Risk

This litigation-intensive nature of American corporate governance creates broader economic consequences that Delaware practitioners must navigate. Major studies of U.S. capital markets competitiveness—including the Bloomberg-Schumer Report, Paulson Committee Report, and Chamber of Commerce Report—identified shareholder litigation as a significant factor in declining market competitiveness relative to international alternatives.[124] Survey evidence reveals that 63% of senior executives view the UK as having a less litigious culture than the United States, with 85% of CEOs indicating London as preferable to New York for avoiding litigation risk.[125]

These perceptions translate into measurable economic effects: domestic issuers with prior securities fraud experience resort to offshore financing more frequently, while foreign companies increasingly protect themselves from litigation risk by moving out of the United States altogether.[126] The U.S. Supreme Court in *Stoneridge Investment Partners v. Scientific-Atlanta* recognized these dynamics, noting that extensive discovery and settlement pressure allow "plaintiffs with weak claims to extort settlements from innocent companies" while raising "the costs of doing business" and potentially shifting "securities offerings away from domestic capital markets."[127]

C5. Institutional Structure and Market Adaptation

Delaware's legal market has evolved sophisticated practices around these litigation economics. The merger litigation context exemplifies these dynamics, where every merger claim possesses inherent "hold-up value" because defendants face burdensome discovery and potential transaction delays regardless of claim merit.[128] This creates systematic settlement incentives where defendants prefer resolving cases through supplemental disclosures and attorney fee payments rather than risking transaction derailment.

The amendment process typically follows a refined stakeholder consultation model that reflects these litigation realities. Corporations, investors, and their counsel report experiences using the corporate franchise to local Delaware counsel, who may suggest amendments to the Council.[129] The Council considers such amendments through focused committees representing an even broader cross-section of the Delaware bar. Proposed amendments reach the General Assembly only after approval by both the Council and the executive committee of the SBA, ensuring that the legislature represents the "near-final, rather than first, stop" in the amendment process.[130]

Delaware's legal market features several prominent firms that collectively constitute ''Big Four''[131]—Morris Nichols[132], Potter Anderson[133], Richards Layton, and Young Conaway[134]. Other major firms including Wachtell and Skadden Arps, have maintained significant Delaware presences for over thirty years, developing expertise in both transactional planning and litigation management within Delaware's unique governance ecosystem.

The Delaware bar's influence extends through multiple institutions. The Delaware Journal of Corporate Law, at Widener University Delaware Law School, serves as a premier publication for corporate law scholarship. It publishes articles cited frequently by courts and leading national law reviews, hosts distinguished lectures and publishes unreported opinions from the Chancery.[135]

D. The Legislative-Judicial Feedback Loop: Institutional Learning

Delaware is unique in the dynamic interplay between its courts and legislature. When judicial opinions create uncertainty or impose ''unwelcome'' restrictions, the General Assembly responds with targeted statutory amendments, proposed by the Council. The legislature's approach reflects a ''philosophy which emphasize[s] the stability of Delaware corporate law'' with a ''guiding principle that underlies legislation affecting corporations in Delaware [being] to achieve a balanced law.''[136]

The Council serves as an informal advisory mechanism, enabling responsive legislative adaptation to judicial developments and changing business needs. This institution facilitates the feedback loops between courts, legislature, and practitioners that enable Delaware to maintain competitive advantages through continuous institutional evolution. Recent scholarship demonstrates that Delaware's legislative-judicial relationship operates more systematically than previously understood. Assaf Hamdani and Kobi Kastiel observed consistent patterns of legislative responses to court decisions, averaging 0.68 interventions per year with accelerating frequency in recent decades.[137] This responsive capacity enables Delaware to address judicial overreach or statutory gaps more effectively than jurisdictions lacking similar institutional coordination.

Our analysis suggests that these legislative responses serve three critical functions: (1) enabling courts to set norms without imposing out-of-pocket liability on directors and officers for non-conflicted decisions; (2) balancing fiduciary duties with private ordering by providing tailored rules that might otherwise conflict with universal fiduciary standards; and (3) devising arrangements that require political bargains across legal questions while providing certainty and addressing changing market practices.

This feedback mechanism appeared dramatically in 2024-2025 with the legislative response to notable Chancery Court decisions. SB 313 (2024) amended Section 122 to authorize stockholder agreements that might otherwise violate traditional board authority principles, directly responding to the Moelis decision.[138] SB 21 (2025) went further, fundamentally altering standards for controlling shareholder transactions.

Critics argue this legislative intervention undermines judicial independence. Representative Sean Lynn described it as ''taking out the most important leg of the stool by not allowing the Judiciary to conclude its process.''[139] However, defenders contend that responsive legislation ensures Delaware law remains practical and business-friendly rather than purely academic.

E. Institutional Coordination in Action: The Evolution of Delaware Corporate Law

Delaware corporate law has evolved through distinct litigation eras[140], each responding to the prevailing business challenges and governance crises of its time. As VC Laster documented, ''Delaware has offered a principles-based system in which judges shaped corporate law by ruling on the facts of a particular case within the context of a prevailing legal environment''.[141]

Delaware not only *resolves* crises; it *capitalizes* on them via institutional coordination to further reinforce its supremacy. Historical patterns reveal Delaware's crisis capitalization mechanisms operating consistently across decades. The 1980s hostile takeover crisis generated enhanced scrutiny doctrines that became influential;[142] 2000s federal preemption threats spurred specialized court development that increased institutional capacity; 2010s appraisal arbitrage problems produced market-based valuation frameworks that improved transactional efficiency;[143] and the *Moelis* backlash and recent DExit challenge triggered SB 313 and SB 21 reforms respectively, which clarified competitive advantages while preserving core governance protections.

E1. The Hostile Takeover Era (1980s): Constitutional Moments in Corporate Law

The 1980s marked what former Delaware Chancellor William Allen described as a period when ''the secure ground upon which the accepted suppositions of corporation law had been premised [up to the late 1970s, had broken] apart''.[144] This decade witnessed unprecedented hostile takeover activity fundamentally challenging traditional notions of managerial authority and shareholder primacy.

The landmark trilogy of *Van Gorkom*, *Unocal* and *Revlon* established the foundational framework for modern corporate governance.[145] These decisions reflected Delaware's response to a ''constitutional moment'' for corporate law reflecting a period of fundamental doctrinal reconstruction in response to external pressures.[146] The era marked the apparent end of ''managerialism'' and the emergence of shareholder value as corporate law's normative anchor.[147]

E2. The Moderating Era (1990s-2000s): Refinement and Institutional Learning

Following the turbulent 1980s, Delaware courts entered the ''Moderating Era,'' characterized by judicial refinement of earlier doctrinal innovations and legislative responses to perceived judicial overreach.[148] The enactment of DGCL Section 102(b)(7) in 1986, allowing corporations to eliminate director liability for duty of care breaches, exemplified Delaware's unique institutional feedback mechanism whereby legislative action corrects judicial innovations that prove economically disruptive.[149]

This period witnessed the development of more nuanced approaches to defensive measures and the recognition that hostile takeovers, while potentially beneficial in some contexts, required sophisticated judicial frameworks that balanced managerial authority with shareholder protection.[150]

E3. The MFW Era (2010s): Rise of Controlling Shareholder Litigation

The 2010s ushered in what practitioners now term the ''MFW Era,'' following the Delaware Supreme Court's landmark decision in *Kahn v. M&F Worldwide Corp*. (2014) (**MFW**).[151] MFW created procedural mechanisms to allow controlling shareholder transactions to receive business judgment protection through dual protections–approval by both independent special committees and majority-of-minority stockholder votes.[152]

Paradoxically, rather than reducing litigation, MFW spawned increased plaintiff activity as sophisticated litigation tactics emerged to challenge the sufficiency of these protective mechanisms.[153] This era witnessed extortionary litigation, i.e., strategic lawsuits designed to extract settlements rather than remedy genuine governance failures.[154] The phenomenon of ''MFW creep''–extending dual protection requirements beyond traditional squeeze-out mergers–illustrated how doctrinal innovations can expand beyond their intended scope.[155]

E4. The Current Era (2020s): Legislative Corrections and Judicial Restraint

Delaware's Current Era reflects institutional maturation and legislative intervention to address perceived judicial overreach.[156] Enactment of SB 313 in 20244 and SB 21 in 2025 exemplifies Delaware's continuing institutional feedback mechanisms, providing statutory clarity to limit MFW creep and reduce litigation uncertainty.[157] Recent decisions demonstrate increased judicial skepticism toward weak disclosure-only settlements and heightened attention to attorney conduct in representative litigation.[158]

This historical evolution demonstrates Delaware's institutional capacity for adaptive response to changing business environments while maintaining core governance principles. The state's ability to evolve through distinct eras while preserving its fundamental competitive advantages illustrates the sophisticated institutional learning that distinguishes Delaware from competing jurisdictions.

III. DELAWARE'S LEGAL INNOVATION: JUDICIAL TOOLS AND TRANSACTIONAL INSTRUMENTS

Part III illustrates that Delaware's corporate law framework is not static legal doctrine, rather a dynamic portfolio of legal instruments, constantly-evolving doctrine, and expansion of statutory provisions.[159] These instruments—which we explore through examples such as enhanced scrutiny, *MFW* cleansing, *Corwin* deference, books and records innovation, oversight liability, market-based appraisal, and aiding-and-abetting doctrines—function as carefully calibrated judicial responses to recurring transactional dilemmas. Each emerged from a distinct governance context, that is, hostile takeovers, conflicted controller transactions, post-closing litigation, valuation uncertainty, shareholder information asymmetries, compliance failures, advisor misconduct, and threats to the stockholder franchise respectively.

Unlike statutory-driven jurisdictions such as Nevada or Texas, Delaware's common-law foundations enable courts to develop context-specific standards of review that reconcile legal certainty with evolving business realities.[160] These instruments embed procedural safeguards into corporate decision-making and allow the judiciary to fine-tune enforcement intensity in proportion to structural risk. We argue that the durability of Delaware's legal regime lies in its capacity for incremental adaptation through case-by-case adjudication.

Enhanced scrutiny has evolved to meet new defensive tactics, *MFW* has expanded beyond squeeze-out mergers, *Corwin* continues to be refined through scrutiny of disclosure and coercion, and Section 220 has matured into a robust investigative tool. In response to appraisal arbitrage and the limits of judicial valuation, the Delaware Supreme Court in *DFC* and *Dell* crafted a framework that defers to deal price when robust market processes exist, signaling a shift from judicial supremacy to institutional complementarity. This innovation reflects a form of judicial humility and recognition that courts may lack the tools to reliably second-guess efficient market outcomes, and that restraint may better serve corporate value preservation.

Even when legislative developments, notably SB 21, have updated the application of these doctrines, the foundational architecture illustrates how Delaware courts engineer legal instruments in response to shifting transactional contexts.[161] As Professor Edward Rock has argued, Delaware's jurisprudence is distinguished by its reliance on retrospective norm-setting, in which courts resolve disputes and shape behavioral expectations through narratives and precedents rather than ex ante statutory mandates.[162] What emerges is, in effect, an ex post governance regime—a model in which legal standards are refined iteratively through common-law evolution, reinforcing Delaware's position as the global benchmark for corporate adjudication.

A. Enhanced Scrutiny in Takeovers

The 1980s hostile takeover wave exposed the limits of default business judgment deference, particularly where board entrenchment created structural conflicts not captured by traditional self-dealing analysis.[163] Under traditional Delaware doctrine, courts applied either the business judgment rule (**BJR**) (for disinterested decisions) or entire fairness (strict scrutiny for conflicted transactions).[164] However, defensive measures against hostile takeovers introduced a middle category—situations in which directors had inherent conflicts, such as their own job security, without engaging in classic self-dealing.[165]

To address these structural dilemmas, Delaware developed enhanced scrutiny as an intermediate standard—appropriate when the assumptions underpinning BJR break down due to inherent conflicts.[166] This standard governs both defensive measures during takeover threats (*Unocal*) and sale-of-control circumstances (*Revlon*), reflecting judicial recognition that these contexts demand heightened oversight despite the absence of traditional fiduciary breaches.[167]

In *Unocal*, the Delaware Supreme Court crafted enhanced scrutiny by requiring boards to satisfy two prongs: (1) reasonable grounds to perceive a threat to corporate policy and effectiveness; and (2) a defensive response that was proportionate to that threat.[168] The court warned of ''the omnipresent specter'' that boards might act primarily in their own interests, especially when their tenure is jeopardized by takeover attempts.[169] Crucially, the proportionality inquiry guards against ''draconian'' defenses—i.e. measures that are either preclusive (insulating management entirely) or coercive (forcing shareholder support irrespective of merit).[170]

When companies enter sale process, *Revlon* duties require directors to act as ‘‘auctioneers charged with getting the best price for the stockholders’’ rather than defenders of corporate policy.[171] *Revlon* applies in three circumstances: (1) when corporations initiate active bidding processes seeking sale or breakup; (2) when targets abandon long-term strategy and seek alternative breakup transactions; or (3) when transaction approval results in sale or change of control.[172] The framework's contextual sophistication enables Delaware law to address complex business realities that simple rules cannot accommodate.[173]

Enhanced scrutiny exemplifies what scholars call ‘‘proportionality review’’—a reasonableness test assessing both threat legitimacy and prudential responses.[174] Sitting between the extremes of BJR and entire fairness, it offers structured yet deferential oversight, preserving managerial flexibility while curbing opportunism.[175] In *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009), the Delaware Supreme Court reaffirmed this contextual sensitivity. Revlon does not attach to every sale context. Duties arise when the board embarks on a transaction that will effect a change of control or break up the company, and not merely upon third-party interest. Courts have narrowed and contextualized the trigger[176]

B. MFW Cleansing in Controller Shareholder Transactions

Entire fairness review for all controlling shareholder transactions imposed litigation risk even on transactions with significant procedural safeguards, chilling efficient dealmaking. Under traditional Delaware law, any transaction where a controlling shareholder stood ‘‘on both sides’’ automatically triggered the demanding entire fairness standard, requiring courts to determine both fair process and fair price—an expensive, time-consuming analysis that discouraged legitimate controller transactions.[177]

In Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) (***MFW***), the Delaware Supreme Court introduced a doctrinal innovation that rebalanced this framework—where a transaction is conditioned ab initio upon both (a) the approval by an independent, fully empowered special committee and (b) a fully informed, uncoerced majority-of-the-minority stockholder vote, BJR is restored. These procedural safeguards, the Court reasoned, replicate the protections afforded in arm's-length transactions and thus warrant deferential review.

MFW reflects a deeper structural insight within Delaware jurisprudence—namely, that standards of fiduciary conduct and standards of judicial review serve distinct functions, and that rigorous process may, in certain contexts, substitute for substantive judicial inquiry. Delaware's cleansing doctrines operationalize judicial deference to a qualified independent decision-maker. If a conflicted board acts, courts look for an independent committee or for fully informed, uncoerced stockholder approval; for controllers, inherent coercion justifies requiring both active committee negotiation and minority approval in the MFW setting.

Since its adoption, the *MFW* framework has proven highly adaptable. Courts have extended it beyond its original context of freeze-out mergers to a broader set of controlling shareholder transactions. Academic observers have described *MFW* as a revolutionary framework that has become the prevailing template for managing controller conflicts, though concerns have emerged regarding its ‘‘cavalier’’ application as a default safe harbor for any form of controller involvement.[178] At its core, however, *MFW* exemplifies Delaware's capacity to transform the binary choice between entire fairness and BJR into a nuanced framework that rewards robust process design while preserving judicial oversight in instances of inadequate procedural safeguards.

C. Corwin's Shareholder Ratification Innovation

While *MFW* addressed the specific challenge of controlling shareholder conflicts through dual procedural safeguards, a parallel problem emerged in transactions involving director conflicts but no controlling shareholder, prompting Delaware courts to develop a complementary framework for stockholder ratification.

By the 2010s, enhanced scrutiny doctrines—originally designed for pre-closing injunctive relief—were being invoked in post-closing damages actions, even when fully informed stockholders had approved transactions.[179] In Corwin v. KKR Financial Holdings LLC, 125 A.3d 304 (Del. 2015) (***Corwin***), the Chancery Court held that when disinterested stockholders approve a transaction fully informed and uncoerced, BJR applies.

Corwin therefore acts as a cleansing mechanism that rebuts the presumption of fiduciary breach through stockholder ratification. Its elegance lies in operationalizing shareholder democracy as a litigation filter. As the Court explained, when the ‘‘real parties in interest’’—the disinterested equity holders—can protect themselves at the ballot box, the costs of intrusive judicial review may outweigh its benefits. However, Delaware courts have been careful to limit *Corwin's* scope, emphasizing that it ‘‘was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions’’, and that structural coercion can negate the cleansing effect of stockholder approval.[180]

Overall, *Corwin* clarifies the significance of process quality in post-deal litigation, incentivizing meaningful disclosures and enhancing ex ante certainty for deal planners. It is another case in point for Delaware's doctrinal responsiveness in line with modern deal contexts, creating a shareholder-centric mechanism that filters litigation risk through procedural integrity.

D. Books and Records as a Governance Tool

Traditional disclosure regimes proved insufficient for stockholders investigating potential misconduct, especially in the face of complex corporate structures, , following the mid-2010s decisions in *Corwin*, *MFW*, *Trulia*, and *C&J Energy*, which raised pleading standards while restricting post-filing discovery. In response, Delaware courts transformed Section 220 from a limited statutory right into a robust investigatory mechanism and perhaps the most significant governance tool, experiencing a thirteen-fold increase in usage from 1981-1994 to 2004-2018.[181] As Professor Roy Shapira demonstrated, these decisions created a ‘‘front-loaded’’ litigation environment where ‘‘most of the action in corporate law happens pre-filing,’’ with Delaware courts systematically expanding shareholders' inspection rights to restore investigative capacity.[182]

The judiciary developed doctrines around ‘‘proper purpose’’[183], ‘‘credible basis’’ (Delaware's ‘‘lowest possible burden of proof’’)[184], and the ‘‘tools at hand’’[185] rule, encouraging stockholders to use Section 220 before initiating derivative claims.

Recent decisions expanded the scope of discoverable material to include emails and text messages[186], recognized fee-shifting as remedy for obstructionist litigation conduct, and streamlined procedural management through magistrate assignments.[187] Beyond legal enforcement, Section 220 creates powerful reputational deterrence by generating market-relevant information about corporate behavior, such as seen in high-profile cases (Blue Bell's listeria crisis and Facebook's Cambridge Analytica scandal) which demonstrate the potential of inspection litigation. Delaware courts carefully balance this expanded access through sophisticated case-by-case analysis, requiring materials be ‘‘necessary and essential’’ rather than merely ‘‘relevant,’’ while qualifying traditional privileges and eliminating presumptive confidentiality.[188] The maturation of Section 220 into a sophisticated governance tool underscores how Delaware courts transform procedural mechanisms to address emerging corporate realities, despite its narrowing by SB 21 discussed *infra*.

E. Oversight Liability as Redefining Fiduciary Duties

Traditional BJR deference historically insulated directors from liability for oversight failures, creating accountability gaps in corporate compliance systems. Under conventional Delaware doctrine, directorial liability required proof of conscious wrongdoing or gross negligence—standards that rarely captured failures of corporate monitoring and information systems.

The Delaware Supreme Court's recognition of directorial oversight duties in *Stone v. Ritter* established that boards must implement reasonable compliance and information systems.[189] Building on Chancellor Allen's foundational analysis in *Caremark*, modern oversight jurisprudence requires directors to ensure that ‘‘information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.’’[190]

Recent decisions have revitalized Caremark liability, particularly in ''mission critical'' compliance areas. In *Marchand v. Barnhill*, the Delaware Supreme Court found Blue Bell Creameries' board liable for utterly failing to monitor food safety—the company's central compliance challenge, demonstrating that oversight duties vary based on industry-specific risks and company-specific vulnerabilities.[191] The court emphasized that boards cannot remain willfully blind to compliance risks that are central to their business model.[192]

Similarly, in *In re The Boeing Company Derivative Litigation*, the Chancery Court found Boeing's board liable under Caremark for complete failure to establish airplane safety reporting systems and turning a blind eye to safety red flags.[193] The court noted Boeing lacked any board committee for safety oversight, had no regular safety monitoring protocols, and received only ad hoc favorable reports from management—even after the first 737 MAX crash revealed critical safety deficiencies.[194]

This doctrinal evolution transforms oversight from aspirational governance best practice into enforceable fiduciary obligation. Rather than requiring proof of conscious disregard of known risks, modern *Caremark* doctrine imposes liability for complete abdication of monitoring responsibilities in areas where compliance failures pose existential threats to corporate value. The framework recognizes that effective corporate governance requires proactive information architecture, not merely reactive crisis management.

The July 2025 Meta settlement illustrates both Caremark doctrine's potential force and Delaware's unique institutional capacity for handling complex corporate governance disputes. Shareholders sought $8 billion from Mark Zuckerberg and other Meta directors for allegedly failing to oversee privacy compliance, reported in the media as the first time Caremark claims proceeded to trial.[195] This landmark case could only have emerged in Delaware, where Chancellor McCormick's specialized expertise in corporate oversight doctrine enabled sophisticated judicial management of novel legal theories that would likely have been dismissed or misunderstood in generalist courts lacking Delaware's institutional knowledge of fiduciary duty evolution.[196] However, the parties settled just one day into trial, leaving the doctrine's outer boundaries undefined despite the case's potential to clarify oversight liability standards—yet the very fact that such a complex Caremark case reached trial demonstrates Delaware's unparalleled judicial capacity to adjudicate cutting-edge corporate governance disputes.

F. Market-based Appraisals

Traditional appraisal doctrine granted courts broad discretion to determine ''fair value'' through independent judicial assessment, often disregarding deal prices in favor of discounted cash flow analysis based on expert testimony. This approach reflected an assumption that courts could reliably second-guess market outcomes through de novo review.

The rise of appraisal arbitrage in the 2000s exposed structural limitations in judicial valuation methodology. Professional arbitrageurs capitalized on gaps between deal prices and court-determined valuations, generating outcomes which signaled systematic judicial overvaluation that distorted deal markets and incentivized opportunistic litigation.[197]

In *DFC* and *Dell,* the Delaware Supreme Court reframed appraisal doctrine to emphasize deal price as the most reliable indicator of fair value, but only when transactions emerge from robust, competitive sale processes.[198] The Court recognized that arms-length negotiations, informed bidding, and absence of structural coercion often yield valuations superior to those derived from competing DCF models.

Rather than claiming universal valuation competence, Delaware courts developed a contextual framework that distinguishes between transactions requiring judicial intervention and those best evaluated through market mechanisms. As scholars have demonstrated, certain aspects of corporate value are ''inherently impossible''[199] to price objectively, warranting deference to private ordering where well-functioning markets exist. Judicial scrutiny remains essential in conflicted or distorted processes, but where competitive dynamics function effectively, market-determined valuations provide a more reliable path to fairness.[200]

G. Aiding and Abetting Liability: Extending Fiduciary Accountability to Third Parties

Traditional fiduciary enforcement in Delaware corporate law focused on directors and officers, leaving accountability gaps when third-party advisors contributed to governance failures. For decades, Delaware courts were reluctant to impose liability on these outside actors, even when their conduct shaped flawed board processes.

This changed with the development of aiding-and-abetting liability for professional advisors who knowingly participate in breaches of fiduciary duty. Delaware courts began holding investment banks accountable when their conflicted advice or failure to disclose material interests compromised board decision-making. As commentators have observed, this represents ''a doctrinal innovation in Delaware law'' through which ''Delaware courts, accepting the invitation of the stockholder-plaintiffs' bar, have begun to take on the task of regulating the M&A advisory function of investment banks.''[201]

In *Rural Metro*, the Court of Chancery awarded $76 million in damages against RBC Capital Markets for aiding and abetting breaches of the duty of care[202], a turning point in Delaware's willingness to extend liability beyond corporate insiders.

The innovation has continued in recent years, with Delaware courts increasingly receptive to aiding and abetting claims against third-party buyers who exploit target company fiduciary breaches. In *Columbia Pipeline*, the Court of Chancery held TransCanada (the buyer) liable for aiding and abetting Columbia Pipeline's officers' fiduciary breaches during the $13 billion sale process, awarding over $400 million in damages.[203] However, the Delaware Supreme Court unanimously reversed in June 2025, establishing that acquirers can be liable for assisting a seller's breach of fiduciary duty only if they have actual knowledge of the breach and know that their own conduct is wrong.[204] Regardless, *Columbia Pipeline* represented the fifth recent case where Delaware courts found aiding and abetting liability for fiduciary breaches, joining *Mindbody* (2023), *Presidio* (2021), *Morrison v. Berry* (2020), and *Rural Metro* (2014), signaling a significant.evolution in Delaware's approach to buyer accountability in M&A transactions, albeit with Delaware's commitment to rigorous standards for third-party liability.

These cases demonstrate that Delaware courts are increasingly willing to scrutinize the role of gatekeepers whose conduct distorts corporate governance processes. By incrementally expanding liability to encompass professional advisors, Delaware courts have reinforced the structural integrity of board decision-making and created powerful incentives for advisors to provide independent and candid counsel. The doctrine reflects Delaware's capacity to adapt its fiduciary framework in response to increasingly complex advisory relationships and transaction structures.

IV. DELAWARE UNDER PRESSURE: CRISES, CONTROVERSIES, AND JURISDICTIONAL COMPETITION

Part IV examines how recent high-profile controversies and systematic competitive pressures have created the most significant challenge to Delaware's corporate law hegemony in decades. Rather than isolated incidents, the Tesla compensation case, the *Moelis* decision, and coordinated DExit phenomenon represent interconnected challenges that test Delaware's capacity for institutional adaptation while illuminating both strengths and vulnerabilities in its governance framework.

The significance of these challenges extends beyond individual cases. As Professor Angela Aneiros observes, reincorporation movements often serve as ''Trojan horses'' that enable controlling shareholders to escape regulatory oversight, raising fundamental questions about whether jurisdictional competition serves broader stakeholder interests or primarily benefits management and controllers.[205]

Contemporary challenges differ qualitatively from historical competitive pressures. Previous periods of Delaware competition (such as the 1960s challenge from New York or the 1980s federal preemption threats) involved individual jurisdictions or specific doctrinal disputes. Current pressures reflect coordinated, multi-jurisdictional efforts specifically designed to exploit perceived Delaware weaknesses while offering systematic alternatives across governance dimensions.

A. Tornetta: Musk's Compensation And Testing the Limits of Executive Power

A1. Factual Background: The $56 Billion Question

The Tesla compensation case represents the largest executive pay package in corporate history, a plan that would award CEO Elon Musk stock options worth up to $56 billion based on achieving ambitious performance milestones.[206] The case fundamentally challenged traditional notions of control, board independence, and the limits of shareholder democracy in approving conflicted transactions.

Tesla's 2018 compensation plan offered Musk twelve tranches of stock options, each vesting if Tesla achieved both a market capitalization milestone (increasing by $50 billion increments) and either an EBITDA or revenue target over four consecutive quarters.[207] If fully achieved, the plan would deliver Musk roughly 1% of Tesla's outstanding shares per tranche, up to 12% in total, boosting his ownership from 21.9% to approximately 28.3%. At the time of approval, Tesla's market capitalization was approximately $50 billion; the plan required growth to $650 billion for full vesting. The package had a grant-date fair value of $2.6 billion but a potential realization value of $55.8 billion, which was over 250 times the median peer CEO compensation and over thirty-three times the total value of the next closest plan, which was Musk's own 2012 Tesla compensation arrangement.[208]

The plan's structure tied compensation entirely to performance: Musk would receive no salary or guaranteed compensation, earning stock only if Tesla achieved the specified targets. From Tesla's perspective, this created ''all upside'', offering Musk equity only upon transformative growth, framed as ''6% for $600 billion.''[209] However, critics noted that Musk's substantial existing stake already provided strong incentives to achieve those goals, and the plan required no minimum time commitment from someone simultaneously serving as CEO of SpaceX and engaged in other ventures.

From the outset, the process was atypical and compromised by conflicts of interest. Musk himself proposed the plan, with the board forming a working group led by long-time Musk associates: Ira Ehrenpreis, the compensation committee chair with a 15-year relationship with Musk, and Antonio Gracias, a friend and business partner of over two decades. The company's general counsel, Todd Maron (Musk's former divorce attorney) acted as liaison. Negotiations lacked adversarial rigor: witnesses testified there was no ''positional negotiation,'' and the working group deferred to Musk's proposed structure, adjusting only for technical translation of metrics.

Despite the unprecedented size of the package, the board opted not to benchmark against peer plans or conduct any independent market analysis. Though the package was conditioned on a majority-of-the-minority stockholder vote, the proxy materials described conflicted directors as independent and failed to disclose key relationships, undermining the integrity of the vote. As the opinion stated, the board did not meaningfully benchmark the plan or ask whether a package of this magnitude was necessary; the court therefore found the process wanting and ordered rescission.

Tesla shareholders initially approved the plan in 2018 with approximately 73% support.[210] However, shareholder Richard Tornetta, who owned merely nine Tesla shares, challenged the compensation in Delaware Chancery Court, arguing that the board had breached its fiduciary duties in approving such an unprecedented package.

A2. Legal Analysis: Redefining Control in Modern Corporations

Chancellor McCormick's analysis turned on whether Musk qualified as a ''controlling shareholder'' despite owning only 21.9% of Tesla's stock.[211] The court found that Musk's influence extended far beyond his equity stake, characterizing him as the paradigmatic ''Superstar CEO''[212] regarded as critical to Tesla's management and business operations.[213] This expansive definition of ''control'' reflects a broader trend in Delaware jurisprudence toward recognizing ''soft'' control based on influence rather than voting power alone, prioritizing substance over form by examining actual power dynamics rather than formal ownership structures.

Having found control, the court applied the entire fairness standard, requiring defendants to prove both fair dealing and fair price.[214] The court also found that several directors who approved the plan lacked independence from Musk, and that the stockholder vote approving the compensation plan was not fully informed because Tesla's proxy statement omitted material information.[215] The court ultimately ordered rescission of the entire compensation package, reasoning that no lesser remedy would adequately address the process failures and conflicts of interest involved.[216]

The court applied principles from several key Delaware cases addressing the concept of control. *Lynch v. Vickers Energy* established that a shareholder can exercise control through ''ownership of a majority of the voting stock'' or through ''ownership of less than a majority of the voting stock, combined with such other factors, give such shareholder effective control.''[217] *Kahn v. Lynch Communications* recognized that control can exist through the combination of stock ownership and other factors that enable a shareholder to exercise actual control over corporate conduct.[218] *In re Tesla Motors Stockholder Litigation* was an earlier Delaware precedent finding that Musk's influence at Tesla, combined with his equity stake, could constitute control in certain contexts.[219]

The court found that Musk's influence extended far beyond his equity stake through several factors: (1) his status as a paradigmatic Superstar CEO making him indispensable to Tesla's identity and operations; (2) close personal and business relationships with several Tesla directors; (3) his social media presence and public statements that significantly influenced Tesla's stock price and corporate direction; and (4) the extensive operational control he exercised over Tesla's day-to-day operations beyond typical CEO responsibilities.[220] This expansive definition of ''control'' follows Delaware's broader trend toward recognizing ''soft'' control based on influence rather than voting power alone, consistent with precedents like *In re Volcano Corp.* and *In re Tesla Motors*.[221]

Having found control, the court applied the ''entire fairness'' standard under *Weinberger v. UOP*, requiring defendants to prove both fair dealing and fair price.[222] The court's analysis revealed several process failures.

Regarding fair dealing deficiencies: several directors who approved the plan lacked independence from Musk; the compensation committee process was compromised by Musk's influence; the board did not engage in meaningful negotiations with Musk; and no independent benchmarking or market analysis was conducted.[223]

The court also identified fair price concerns: the compensation amount vastly exceeded any reasonable benchmark; no analysis was conducted to determine optimal incentive alignment; and the performance targets, while ambitious, may have been achievable regardless of the compensation plan.[224] Ultimately, the court found that the stockholder vote approving the compensation plan was not fully informed because Tesla's proxy statement omitted material information about the board's process and the relationships between Musk and various directors.[225]

A3. The Ratification Attempt and Judicial Response

Following the initial adverse ruling, Tesla attempted an unprecedented remedy: a second shareholder vote to ''ratify'' the compensation package with full disclosure of the court's findings. This 2024 vote received even stronger support than the original (approximately 77% approval) leading Tesla to argue that informed shareholder approval should cure any earlier defects.[226]

Chancellor McCormick ruled that Tesla CEO Elon Musk still was not entitled to receive the $56 billion compensation package despite shareholders voting in June to reinstate it.[227] The court rejected the ratification argument on four independent grounds, holding that post-trial shareholder votes cannot cure breaches of fiduciary duty in controlling shareholder contexts.

First, the court held that the defendants [had] no procedural ground for flipping the outcome of an adverse post-trial decision based on evidence they created after trial, emphasizing that were the court to condone the practice of allowing defeated parties to create new facts for the purpose of revising judgments, lawsuits would become interminable.[228] Second, the court found that ratification was an untimely affirmative defense.[229] Third and most significantly, the court rejected the legal theory entirely, stating that ''what the defendants call 'common law ratification' has no basis in the common law—a stockholder vote standing alone cannot ratify a conflicted-controller transaction.''[230] Finally, the court held that Tesla's proxy statement contained material misstatements that would have voided the vote regardless, characterizing the defense as creative but noting that the defense's unprecedented theories [went] against multiple strains of settled law.[231]

This holding represents a shift in Delaware's understanding of shareholder democracy. Rather than resting on a generalized notion of shareholder democracy, the deference turns on compliance with process preconditions (e.g., *MFW* conditions) and on the integrity of an informed, uncoerced vote, tested through ordinary litigation procedures.

A4. The Challenge of Superstar CEOs: Managerial Power vs. Board Independence

The Musk decision reflects deeper tensions in modern corporate governance that extend far beyond individual compensation disputes. Musk's role as both Tesla's visionary leader and its largest individual shareholder creates inherent conflicts that challenge conventional governance models, highlighting the difficulty of applying traditional board independence concepts to companies dominated by charismatic founders.

As Professors Hamdani and Kastiel demonstrate, ‘‘superstar CEOs’’ create unique challenges.[232] When a CEO's personal brand and vision become inseparable from the company's success, as with Musk at Tesla, Steve Jobs at Apple, or Jeff Bezos at Amazon, traditional independence frameworks, which assume arm's length negotiations between independent boards and management, break down. These executives often exercise influence that transcends formal authority through various mechanisms:

First, superstar CEOs develop ‘‘cult-like followings’’ among shareholders, employees, and the public that can overwhelm independent board judgment. When shareholders view the CEO as indispensable to company success, traditional arm's-length negotiations become practically impossible, regardless of formal governance structures.

Second, the personal brands of superstar CEOs become inseparable from corporate value, creating what economists term ‘‘key person risk’’ that complicates traditional valuation and compensation analysis. Tesla's stock price movements often correlate more closely with Musk's public statements than traditional financial metrics, illustrating how individual executives can transcend normal market relationships.

Third, these leaders frequently blur boundaries between personal and corporate interests through concurrent ventures, social media presence, and public persona management that affects corporate reputation and performance. This blurring challenges Delaware's traditional focus on transactional conflicts rather than ongoing relationship management.

When such extraordinary leadership becomes central to a company's value proposition, the arm's-length negotiations assumed by Delaware's conflict rules may prove impossible or counterproductive.

A5. Implications for Delaware's Controlling Shareholder Doctrine

Tornetta's expansion of ‘‘controlling shareholder’’ status to encompass influence-based rather than purely ownership-based control represents a significant doctrinal development with implications extending beyond superstar CEOs. This evolution reflects Delaware courts' recognition that modern corporate power dynamics often operate through mechanisms that traditional voting control analysis cannot capture.

However, this doctrinal expansion creates new uncertainties. If 21.9% ownership combined with managerial influence constitutes control, what percentage of public company CEOs might face similar classification? The decision's emphasis on ‘‘indispensability’’ and ‘‘cult-like following’’ provides little guidance for routine corporate governance situations.

Moreover, the decision's rejection of post-trial shareholder ratification represents a significant restriction on shareholder democracy that may conflict with Delaware's traditional deference to informed stockholder judgment. This tension between judicial oversight and shareholder autonomy will likely influence future Delaware jurisprudence in ways that extend beyond compensation disputes.

The primary challenge is inherent coercion. Following *Kahn v. Lynch*, Delaware recognizes that controlling shareholders create ‘‘inherent coercion’’ over minority shareholders and corporate decision-making, even in the absence of explicit threats.[233] This manifests as the ‘‘3000-pound gorilla'' problem[234], where controllers can influence outcomes through their mere presence and implied power, making truly independent decision-making difficult even with procedural protections.

Modern controller relationships also challenge traditional voting mechanisms. Unlike many European countries where boards determine executive compensation unilaterally, the U.S. system includes ''say-on-pay'' votes that are typically advisory. However, these may prove ineffective when the CEO controls or significantly influences the shareholder vote through ownership, influence, or their indispensable status to the company's success.

The controller challenge is further complicated by the reality that in many modern corporations, particularly those built around transformative technology or visionary leadership, the very factors that make a CEO valuable—their unique vision, market influence, and stakeholder loyalty—simultaneously create the conditions for problematic control relationships that traditional governance frameworks struggle to address.

A6. Legislative and Market Responses

The decision's aftermath has prompted several responses. Tesla successfully reincorporated in Texas following a shareholder vote, though this reincorporation does not affect the ongoing Delaware litigation.[235] As Part V discusses in detail, SB 21 included specific provisions addressing controller transactions, potentially making future challenges to controller compensation more difficult.[236]

On August 4, 2025, Tesla's board approved a new interim pay package for Musk valued at approximately $29 billion, granting him 96 million stock options at a $23.34 strike price—the same as the invalidated 2018 award—but conditioned on his continued leadership through August 2027 and subject to a five-year lock-up period through 2030. The award is void if the original plan is reinstated on appeal. The board framed the grant as essential to ''retain [Musk's] attention and motivate him,'' citing ongoing strategic pivots toward AI and robotics, and emphasizing that the package ''mirrors'' the one invalidated by the Delaware court.[237] This development underscores the continuing governance complexities surrounding Musk's role at Tesla and raises additional questions about the scope of judicial review over compensation structures for superstar CEOs.

B. Moelis: Private Ordering vs. Statutory Mandate

B1. Factual Background: "New Wave" Stockholder Agreements

Moelis involved what VC Laster characterized as ''new wave'' stockholder agreements that ''contain extensive veto rights and other restrictions on corporate action'' rather than traditional agreements where ''stockholders contracting among themselves to address how they will exercise their stockholder-level rights''. The case concerned global investment bank Moelis & Company, founded by Ken Moelis, which operated as a private entity until going public in 2014.

Just before the company's initial public offering, Mr. Moelis and three affiliates entered into a comprehensive stockholder agreement with the company that granted extensive governance rights. The agreement required the company's board to obtain Mr. Moelis's prior written consent before taking eighteen different categories of action, encompassing virtually everything from major corporate decisions to operational matters. These ''pre-approval rights'' included incurrence of indebtedness above certain thresholds, equity issuances, M&A transactions, removal or appointment of Section 16 officers, amendment of governing documents, dividend declarations, and initiation of material litigation.

Beyond consent rights, the stockholder agreement also included extensive board composition provisions: the right to determine board size, designate a majority of directors, require the board to nominate Moelis's designees, mandate board recommendations for stockholder votes in favor of those designees, and fill any vacancies with additional Moelis designees. The agreement also granted proportionate representation on board committees.

What made this case particularly significant was that these provisions had operated without challenge for nearly a decade—the stockholder agreement was entered into in 2014 and fully disclosed to investors, yet was not challenged until 2023, demonstrating how such arrangements had become embedded in market practice.

B2. Legal Analysis: The Abercrombie Test Applied

VC Laster applied the two-part *Abercrombie* test to determine whether provisions violate Section 141(a) of the DGCL: (1) Does the challenged provision constitute part of the corporation's internal governance arrangements? (2) Does the provision have the effect of removing from directors ''in a very substantial way their duty to use their own best judgment on management matters?''

The Court found that the challenged provisions were ''prototypical'' internal governance provisions and thus subject to Section 141(a) analysis. Applying the Abercrombie test, the court concluded that the extensive rights granted to Moelis were ''overly broad to the effect of impeding the proper functioning of the board and, in the Court's words, 'render[ing] the Board an advisory body.'''

The court's analysis was particularly pointed regarding the practical effect of the arrangements. When defendants argued that Moelis had never actually disagreed with any board decision during the nine years the agreement was in effect, the court responded that this was ''powerful evidence'' of the chilling effect the pre-approval requirements had: ''Think of the myriad issues that the Company has confronted over those years. Yet Moelis and the Board have never disagreed? The best deterrents are never used.''

The court articulated a clear position on the relationship between statutory law and market practice: ''What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law, so the statute prevails.'' When defendants emphasized the disruptive effect on market practice, the court responded that ''market practice is not law'' and that the decision would not be ''overly disruptive'' given that ''statutorily permissible alternatives exist.''

This position represents a significant theoretical stance on the balance between private ordering and regulatory oversight. The court acknowledged Delaware's general policy favoring private ordering but insisted that the ability to engage in private ordering remains subject to the limitations imposed by the DGCL, and, when the private ordering involves restricting board authority, the tailoring must take place in the charter.

The court offered several alternatives that would have allowed Moelis to achieve most of his objectives legally: amending the certificate of incorporation to include the restrictions directly, or issuing a ''golden share'' of preferred stock conferring specific governance control rights but no economic rights. The court noted that such alternatives could have allowed the founder to achieve ''the vast majority of what he wanted'' while complying with statutory requirements.

B3. Market Disruption

Moelis decision created immediate market disruption precisely because it invalidated governance arrangements that had become standard practice across multiple sectors As Cleary Gottlieb observed, ''With a stroke of the pen, the Delaware Court of Chancery invalidated commonplace provisions in scores of stockholder agreements relating to public corporations and likely many more relating to private corporations.''[238] This disruption extended far beyond individual agreements to challenge fundamental assumptions about the relationship between statutory requirements and market innovation.

The scope of potential legal exposure was enormous. Corporate governance experts warned that ''the case is likely to embolden challenges to provisions in stockholder and activist settlement agreements that grant a particular investor (or its director designee) special governance rights.''[239] More significantly, the decision threatened to unravel financing structures that had become central to venture capital and private equity industries.

The market's reaction revealed a fundamental tension in Delaware's approach to corporate governance innovation. While Delaware courts pride themselves on doctrinal consistency and statutory fidelity, market participants increasingly rely on contractual innovations that push beyond traditional statutory boundaries. Moelis forced a reckoning between these competing approaches. VC Laster's opinion explicitly invited legislative intervention while simultaneously criticizing market practice, creating an unusual dynamic where the court both enforced statutory requirements and acknowledged their practical limitations.

B4. The MFW Framework and Controlling Shareholder Evolution

The *MFW* (M&F Worldwide) decision established dual protections for controlling shareholder squeeze-out mergers: approval by an independent special committee AND a majority-of-minority stockholder vote.[240] This framework aimed to replicate arm's-length negotiations in inherently conflicted transactions.

However, the MFW creep phenomenon has extended these requirements beyond their original squeeze-out context to other controlling shareholder transactions. Courts have applied MFW-style analysis to spin-offs, acquisitions, and even compensation arrangements, creating uncertainty about when dual protections are required.

SB 21's relaxation of MFW requirements represents a legislative judgment that dual protections impose excessive costs without commensurate benefits. Critics argue this change weakens minority shareholder protections in favor of controlling stockholder convenience, potentially undermining Delaware's reputation for balanced governance.

Contemporary corporate governance increasingly relies on bylaws rather than charter provisions to implement control mechanisms. Modern bylaws include forum selection clauses directing litigation to specific courts, fee-shifting provisions requiring unsuccessful plaintiffs to pay defendants' legal costs, and advance notice requirements for stockholder proposals.[241]

Delaware courts have generally upheld such provisions when properly adopted, recognizing them as valid exercises of private ordering. Recent decisions continue refining the boundaries of permissible bylaw provisions. The *Politan v. Masimo* litigation challenges the validity of aggressive advance-notice bylaw amendments that arguably limit the shareholder franchise and give favored insiders control over nominations.[242]

Despite legislative changes favoring controllers, Delaware law retains several mechanisms for minority shareholder protection. Appraisal rights allow dissenting stockholders to seek judicial valuation of their shares in certain transactions. Books and records actions under Section 220 enable stockholders to investigate potential wrongdoing, though SB 21 has restricted these rights.[243]

Derivative litigation remains available for stockholders to challenge breaches of fiduciary duty, though recent decisions have raised pleading standards and limited discovery rights. The overall trend suggests growing emphasis on procedural protections (like special committees) rather than substantive judicial review.

C. Competitive Pressures, Market Segmentation, and Dual Races

Debate over charter competition has often been framed as a single race to the top or bottom. The current moment looks more segmented. For public companies with dispersed ownership, Delaware's advantage remains sticky: adjudicative expertise, path dependence, and a dense bar–bench ecosystem create increasing returns. For firms with concentrated control—especially PE-backed platforms and dual-class or founder-led companies—a distinct product niche has become salient. Nevada, and increasingly Texas, market statutory packages that substitute bright lines and contractual freedom for Delaware's case-by-case equity.

An organizational-theory lens helps explain this differentiation: corporate law allocates power among coalitions inside the firm. Where insider or controller power is the overriding design objective, jurisdictions offering predictable safe harbors and broadened independence presumptions become attractive. Where public investors value adjudicative oversight and incremental precedent, Delaware's judge-centric distinctiveness retains comparative advantage.

C1. Empirical Evidence of Reincorporation Trends Quantitative Analysis of Corporate Migration Patterns

Recent empirical analysis reveals more sophisticated patterns than simple DExit narratives suggest. While high-profile departures generate headlines, the actual reincorporation data shows targeted rather than broad-based migration away from Delaware.

Despite media attention surrounding high-profile departures, DExit's significance may be overstated relative to Delaware's continuing attractiveness for new incorporations.[244] Delaware maintains 67.6% of Fortune 500 companies as of

2024, with 80% of U.S.-based IPOs in 2023 choosing Delaware as their corporate home.[245] From January 2021 to August 2024, only 18 Delaware corporations proposed reincorporation to other states, with 14 proposing Nevada, 2 proposing Texas, and the remainder distributed among Colorado and Maryland.[246] Research indicates that only 8 of these 18 corporations actually completed reincorporation (6 to Nevada, 2 to Texas), and all appear to have controlling shareholders.[247]

Professor Daniel Taylor's empirical analysis found that in 2024 the number of Delaware-registered companies grew by over 275,000, and Delaware had a net gain of 85 publicly traded companies, with 80 percent of all newly public companies incorporated in Delaware.[248]

These statistical patterns align with Michal Barzuza's sophisticated analysis of jurisdictional competition, which demonstrates that Nevada's competitive strategy succeeds primarily with ''small firms with low institutional shareholding and high insider ownership'' rather than broad-based corporate migration.[249] Professor Barzuza's research reveals that Nevada's approach creates ''insurmountable obstacles to shareholder litigation that diminish important pillars of Delaware corporate law,'' yet this strategy appeals only to a specific market segment rather than threatening Delaware's overall dominance.[250]

Recent notable departures include Tesla's Texas reincorporation[251], TradeDesk's Nevada move[252], and Dropbox's announced Nevada reincorporation.[253] However, this migration pales compared to continuing Delaware incorporations among newly public companies, private equity transactions, and established corporations considering jurisdictional changes. These patterns suggest that jurisdictional competition has become more sophisticated, with different states targeting specific corporate segments rather than attempting broad-based competition with Delaware.

The corporations choosing alternative jurisdictions often involve specific circumstances rather than broad dissatisfaction with Delaware's institutional framework. Tesla's reincorporation followed adverse compensation litigation, while TradeDesk involves small-minority controller dynamics that create particular governance challenges. These specific motivations differ from broader institutional advantages that attract most corporations to Delaware initially.

C2. Rationales for Jurisdictional Change Strategic Motivations and Stakeholder Alignment

Contemporary reincorporation motivations differ significantly from historical patterns. Corporate rationales for leaving Delaware typically emphasize three considerations: regulatory predictability, litigation exposure, and governance flexibility. Tesla's proxy materials emphasized enhanced regulatory predictability (such as Texas had invested in specialty business courts) and alignment with operational geography (''our largest manufacturing facility is based there'') as primary motivations for Texas reincorporation, recognizing value inherent in home-state incorporation can strengthen stakeholder relationships.[254]

Professor Angela Aneiros's critical analysis reveals that modern reincorporation efforts function as ''a tactic designed to entrench greater power for directors and controlling shareholders, often concealed as granting shareholders greater decision-making authority''.[255] She argues that by opting to reincorporate in Texas or Nevada, directors are deliberately choosing to diminish the rights of shareholders, ultimately ensuring their own increase in power. This scholarly perspective suggests that contemporary reincorporation represents systematic rather than idiosyncratic concerns, creating structural competitive pressure on Delaware.

Primary reincorporation drivers include *litigation costs*, *protection for controllers*, *operational geography*, and *regulatory predictability*.

Starting with litigation costs, Delaware's sophisticated judicial oversight, though providing predictability for most transactions, creates risks and expensive litigation environments for controlling shareholders engaged in potentially conflicted dealings. Alternative jurisdictions offer statutory protections that may reduce both litigation frequency and discovery costs, particularly appealing to companies with controlling shareholders or complex governance structures.

Two, controllers value protection. Professor Barzuza's empirical research demonstrates that Nevada provides ''clear, no-liability law'' that makes Delaware's competitive advantages less significant and leaves it unable to respond effectively.[256] Texas and Nevada's statutory approaches may provide greater protection for controlling shareholders through bright-line rules rather than judicial case-by-case analysis. However, this apparent advantage comes at the cost of legal uncertainty in novel situations where statutory provisions provide inadequate guidance. Alternative jurisdictions provide more explicit protection for controlling shareholder transactions through statutory safe harbors rather than Delaware's case-by-case judicial analysis. This appeals particularly to founder-controlled companies and private equity-backed enterprises.

Third, governance flexibility motivations often involve specific corporate structures, particularly dual-class corporations with small-minority controllers, that face heightened scrutiny under Delaware's evolving fiduciary doctrines. Nevada's narrow definition of controlling shareholder duties and Texas's higher derivative litigation thresholds may appeal to corporations seeking reduced governance constraints. Unlike historical reincorporations driven purely by legal advantages, contemporary moves often align legal domicile with operational headquarters, reflecting stakeholder preferences for local governance oversight.

Finally, Professor Aneiros's analysis suggests that given ''directors' inherent self-serving interests in reincorporating,'' Delaware courts should apply the entire fairness standard as the presumptive standard of review for reincorporation decisions involving controlling shareholders.[257] Yet these apparent advantages may prove illusory if institutional investors and sophisticated stakeholders continue expecting Delaware-level governance standards regardless of incorporation jurisdiction.

C3. Competitive Responses: Developments in Texas and Nevada

The charter market increasingly resembles a set of differentiated product niches: Delaware continues to dominate the public-company core where adjudicative expertise and path dependence carry the greatest premium, while Nevada and, to a lesser extent, Texas supply a controller- and PE-friendly bundle of bright-line protections that substitutes procedural certainty for Delaware's case-by-case equity.

(a) Texas

Texas has positioned itself as Delaware's primary competitor through institutional innovations designed to attract corporate reincorporations.

The Texas Business Court, operational since September 2024, provides specialized commercial litigation with governors-appointed judges serving two-year terms.[258] SB 29, enacted May 2025, codifies BJR in statute, permits charter provisions waiving jury trials for internal affairs disputes, and establishes minimum ownership thresholds for derivative litigation.[259] However, the codification of BJR protection rather than reliance on common law development may reduce the flexibility that enables Delaware law to adapt to novel business situations.

Texas SB 29's provisions explicitly reject interpretation based on other states' laws or judicial decisions, stating that the Texas Business Organizations Code § 1.056(a) that ''the plain meaning of the text of this code may not be supplanted, contravened, or modified by the laws or judicial decisions of any other state.'' This isolationist approach contrasts with Delaware's interconnected legal ecosystem that benefits from intellectual cross-pollination and scholarly engagement. Texas also opened the Texas Stock Exchange in 2025, creating infrastructure supporting the state's incorporation ambitions.

(b) Nevada

Nevada enacted Assembly Bill 239 in May 2025, permitting corporations to waive jury trials for internal affairs disputes and clarifying controlling shareholder fiduciary duties.[260] The legislation limits controlling shareholder duties to refraining from ''exerting undue influence over a director or officer with the purpose and proximate effect of inducing a breach of fiduciary duty.''[261] Nevada also proposes constitutional amendments establishing specialized business courts, though implementation requires legislative approval in 2027 followed by voter ratification.

Professor Barzuza's empirical research demonstrates that Nevada's strategy reflects deliberate market segmentation: ''Nevada has embarked on a strategy of market segmentation with a differentiated product—a shockingly lax corporate law.''[262] Her analysis reveals that Nevada law generally protects directors and officers from liability for breaches of the duties of loyalty, good faith, and care that are widely believed to be staples of U.S. corporate law.

(c) Both Texas and Nevada face legitimacy challenges that Delaware has overcome through institutional development over decades. Texas Business Court judges serve only two-year terms, creating uncertainty about judicial continuity and expertise development. Nevada's proposed business court remains constitutionally unauthorized and practically non-operational. Neither state has developed the comprehensive legal ecosystem (for instance, specialized bar, responsive legislature or scholarly engagement) that supports Delaware's institutional advantages. These scholarly analyses collectively suggest that while jurisdictional competition has intensified, Delaware's institutional advantages remain largely intact, with competing states succeeding primarily in narrow market segments rather than achieving broad-based corporate migration.

Wyoming

In addition to Texas and Nevada's competitive pressures, Wyoming has pursued the most targeted competitive strategy, focusing specifically on blockchain and digital asset companies rather than attempting comprehensive Delaware competition. Pierluigi Matera's analysis demonstrates that Wyoming's approach represents ''market segmentation'' similar to Nevada's strategy, but applied to a sector that has meaningful growth potential.[263] Matera's analysis suggests that Wyoming's success requires developing a level of expertise that other jurisdictions could not easily replicate, such as specialized courts and a body of case law on blockchain and virtual currencies. However, he cautions that Wyoming's competitive advantage ''merely based on legislation might be transient'' because free-ride legal innovations are easy for other jurisdictions to copy.

C4. Implications for Private Equity and Controllers

The expansion of private capital—enabled in part by federal deregulatory inflections in Reg D, the JOBS Act, and later private-offering reforms—has increased the footprint of firms whose governance is organized around concentrated control and tight creditor–equity contracting.

Read in this light, SB 21's single-cleansing path for many controller transactions, its enhanced independence presumptions, and narrowed information-rights baseline can be seen as a controller-segment product. By contrast, for widely held public companies, the adjudicative calibration of loyalty standards, information rights, and remedial discretion is the product attribute Delaware historically sells.

A plausible equilibrium, therefore, is dual races: Delaware remains the destination for large publics and IPO-bound issuers, while Nevada competes credibly for controller-centric firms. This nuance does not refute Delaware's stickiness; it cabins it by ownership structure and the firm's organizational needs.

V. DELAWARE'S STRATEGIC RESPONSE: RECALIBRATION FOR CONTINUED DOMINANCE

Delaware's institutional response to competitive pressures and doctrinal challenges has occurred through unprecedented legislative interventions that represent fundamental shifts in the state's approach to corporate governance regulation. These responses, principally SB 313 and SB 21, illustrate both Delaware's adaptive capacity and potential tensions between judicial independence and competitive pressure.

A. Senate Bill 313

A1. From Moelis to SB 313: Emergency Legislative Response

SB 313 was introduced on May 23, 2024, just three months after the *Moelis* decision. The legislation was remarkable for both its speed and its departure from Delaware's traditional law-making process. Unlike typical DGCL amendments, which originate from the Council's recommendations, SB 313 was fast-tracked through an emergency legislative process.

The bill's sponsors and timing reflected the urgency Delaware felt in responding to perceived threats to its competitive position. The legislation was introduced by Senate Majority Leader Bryan Townsend, himself a corporate attorney with Morris James LLP, and quickly attracted bipartisan support with 18 of 21 Senate members as sponsors. The Senate passed the bill unopposed without debate on June 13, just three weeks after introduction, and the House approved it 34-7 on June 20.

SB 313 created the new Section 122(18), which provides bright-line authorization for contractual provisions that would otherwise violate Section 141(a). The statute specifically authorizes corporations to enter into contracts with stockholders that: (a) restrict or prohibit future corporate actions specified in the contract; (b) require the approval or consent of one or more stockholders before the corporation may take actions specified in the contract; and (c) covenant that the corporation will take, or refrain from taking, future actions specified in the contract.

The legislative rationale explicitly referenced *Moelis* and market disruption concerns. The official synopsis noted that the Court of Chancery recently observed that "[t]he expansive use of stockholder agreements suggests that greater statutory guidance may be beneficial" and explained that the new section would "provide for a different rule than the portion of the *Moelis* decision in which the Court held that contract provisions of this nature must be included in the certificate of incorporation to be valid."[264]

A2. Academic and Judicial Criticism of the Legislative Process

The rushed legislative process attracted significant criticism from corporate law academics and even sitting judges. In June 2024, a group of more than 50 law professors opposed the bill in a letter to the Delaware Legislature, writing that beyond overturning Moelis, the proposal "would allow corporate boards to unilaterally contract away their powers without any shareholder input." The professors argued: "We are professors of corporate law, and we routinely disagree over corporate law issues. Yet we are unanimous in our belief that the appropriate response to the Moelis decision is to allow the appellate process to proceed to the Delaware Supreme Court. The issues at stake warrant careful judicial review, not hasty legislative action."

Even more unusually, sitting judges criticized the legislative intervention. Chancellor McCormick, in an April 12, 2024 letter to the Delaware State Bar Association that became public, wrote that the proposal was rushed and "moved forward at a pace that forecloses meaningful deliberation and input from diverse viewpoints."[265]

The academic criticism highlighted fundamental concerns about Delaware's institutional balance. Professor Charles Elson, often called the "Godfather" of corporate governance, testified before the state legislature that SB 313 was "more dangerous than just changing the rules" and represented a departure from Delaware's traditional reliance on judicial development of corporate law.[266]

A3. Implications for Delaware's Institutional Balance

SB 313's emergency enactment represents a significant shift in Delaware's institutional balance between courts, legislature, and bar. Traditionally, Delaware corporate law develops through judicial innovation refined by legislative correction following extensive stakeholder input. SB 313 bypassed this process entirely, suggesting that competitive pressures may overwhelm institutional norms.

The legislation also raises questions about democratic accountability and minority shareholder protection. By permitting majority stockholders to restrict board authority through private agreements, SB 313 potentially enables controlling shareholders to circumvent traditional governance safeguards while claiming statutory authorization.

B. Senate Bill 21

B1. From Emergency Response to Comprehensive Reform

SB 21, introduced February 2025 and signed into law March 25, 2025, represents the most comprehensive revision to Delaware corporate law in decades. Unlike SB 313's narrow focus on stockholder agreements, SB 21 addresses systematic competitive challenges by wide-ranging reforms that fundamentally alter Delaware's approach to controlling shareholder regulation, minority stockholder rights, and judicial oversight. The legislation's scope reflects Delaware's recognition that competitive threats required coordinated rather than piecemeal responses.

First, SB 21 amends DGCL Section 144 to provide safe harbors for transactions involving conflicted directors, officers, or controllers or controlling groups. Historically, Section 144's text did not operate as a self-executing safe harbor. SB 21 creates a statutory cleansing pathway for certain controller transactions, with scope and key definitions limited to that provision and with interpretive questions remaining. This modification provides statutory immunity from equitable relief for controller transactions that satisfy procedural requirements, reducing judicial oversight while potentially enabling abuse.

Most significantly, SB 21 relaxes *MFW* requirements. It permits either special committee approval OR majority-of-minority stockholder approval (rather than both) to cleanse controller transactions. The relaxation of dual protection requirements reflects legislative judgment that *MFW's* procedural safeguards impose excessive costs without commensurate benefits. However, academic criticism argues that either-or requirements may prove inadequate to address inherent controller conflicts, particularly in complex transactions.

Next, SB 21 defines controlling shareholders as holders of a majority of the corporation's voting power or their functional equivalents (if minority holders), if they own at least one-third of voting power.[267] SB 21's bright-line approach to control determinations provides predictability (reducing judicial discretion) but may enable manipulation through ownership structuring designed to avoid statutory thresholds. The legislation's emphasis on voting control rather than influence-based control partially reverses *Tornetta's* doctrinal expansion.

Notably, SB 21 restricts Section 220 inspection rights. The exclusion of director and officer communications from Section 220 inspection rights addresses business concerns about costs of invasive discovery while potentially limiting shareholder oversight capacity. This change particularly affects activist investors and institutional stockholders who rely on internal communications to identify governance failures.

Finally, SB 21 creates enhanced director independence presumptions, by creating statutory presumptions favoring director independence and making successful challenges of board decisions more difficult.

B2. How SB 21 Goes Beyond SB 313

The evolution from *Moelis* through SB 313 to SB 21 represents a dramatic transformation in Delaware's approach to private ordering. While *Moelis* established that private ordering must operate within statutory constraints, the legislative responses—particularly SB 21—have progressively dismantled these guardrails in favor of controller-friendly rules. SB 21 goes significantly further than SB 313 by expanding beyond mere validation of stockholder agreements to fundamentally restructuring how controller transactions are reviewed. SB 21 explicitly limits equitable relief that SB 313 preserved, creates bright-line rules that shield controllers from litigation, and bypasses normal legislative processes to expedite its passage.

This legislative reordering represents a fundamental shift in Delaware's corporate jurisprudence from a balanced approach that respected judicial discretion to a more rigid statutory framework favoring controllers. The implications for minority shareholders and Delaware's reputation for fair adjudication could be profound.

The speed of the process again drew criticism. SB 21 was rushed through to the Delaware Senate in mid-February, similar to SB 313, bypassing the normal process that involves recommendation by the Council.[268] Rep. Sophie Phillips proposed an opt-in mechanism allowing corporations to choose whether to adopt SB 21's provisions, but this amendment failed as House sponsor Rep. Krista Griffith argued that optional compliance would undermine Delaware's competitive objectives.[269]

As Stanford Law lecturer Jim An aptly noted during public comment on SB 313: "Simply because something is market practice doesn't make it good, or right. Nor is it a reason to change the law to legalize that."[270] This concern applies with even greater force to SB 21, which represents not just an accommodation of market practice but a sweeping realignment of Delaware corporate law's fundamental balance of power between controllers and minority investors.

B3. Professional Commentary and Market Implications

Despite these procedural criticisms, SB 21 received overwhelming support from Delaware's legal establishment. Delaware-based law firms that have practiced in the state for decades and collectively employ more than 1,350 employees in Delaware have been unwavering in their support of the legislation, actively promoting its passage as a means of burnishing Delaware's global reputation in the broader corporate law community.[271] The Corporation Law Section of the Delaware bar endorsed the legislation by a 74% margin, and several former Delaware judges have publicly spoken in favor of the legislation, citing the need for clarity and predictability in the core areas of Delaware corporate law.[272]

This professional support was echoed by major national law firms which characterized SB 21 as a necessary legislative correction to ensure Delaware remains the jurisdiction of choice for corporate America.[273] Firms further observed that SB 21's amendments restore balance in transactions involving directors and controlling stockholders, aligning statutory safe harbors with market expectations and reducing litigation uncertainty, and noted that these changes should make deal-making more efficient by providing a more predictable path to avoiding protracted deal litigation.[274]

However, the professional response revealed deep divisions within the broader corporate law community. In March 2025, a group of 26 corporate law and governance professors co-signed a letter sent to the Delaware General Assembly calling for a pragmatic resolution to the debate over SB 21, advocating for making the changes voluntary for corporations rather than mandatory.[275] Leading corporate law scholars characterized SB 21 as the ''billionaire's bill'' that prioritizes controlling shareholder interests over minority protection and institutional investor rights.[276]

While business groups and law firms largely supported the bill as necessary to preserve Delaware's global competitiveness, prominent academics and investor advocates expressed concern that the statute undermines judicial independence and reverses Delaware's long-standing reliance on judge-made doctrine.[277] An economic analysis suggested that SB 21 could cost Delaware millions in decreased economic activity, estimating ''annual economic activity lost due to SB 21's passage is $117 million–$235 million in decreased economic activity and 450–900 lost jobs, statewide.''[278] Recent empirical research contends that SB 21 appears to have destroyed shareholder value, with Delaware companies experiencing abnormal negative returns of 1.4% relative to non-Delaware peers, representing approximately $700 billion in lost market capitalization.[279]

Critics argued that SB 21 represented dangerous regulatory capture, with one academic characterizing the passage as revealing ''regulatory capture operating with the same efficiency that characterized'' historical corporate influence over state policy, noting that ''records obtained by CNBC show that the February 2025 meetings in Delaware included not only state officials but also attorneys from law firms representing Meta, Musk, and Tesla.''[283]

Nevertheless, substantial academic commentary supported Delaware's strategic response and rebutted these criticisms. Professor Bainbridge described SB 21 as a measured legislative response to judicial developments that threatened Delaware's incorporation dominance, noting that the bill modernizes the DGCL while preserving its investor protections.[280] Professor Eric Talley underscored the contractarian logic underlying Delaware's reforms, noting that ''the genius of Section 102(b)(7) substantially lies in its contractarian nature: It provides a default rule of liability exposure but allows corporations to contract around it through a waiver. This flexibility—manifest time and again in other provisions of the DGCL—has been crucial to Delaware's incorporation market.''[281] Academic supporters emphasized that Delaware's dominance in corporate law stems from legislative agility and judicial expertise, noting that competing states like Texas lack Delaware's depth of corporate jurisprudence and legislative responsiveness.[282]

Evidence on market reaction is mixed and evolving; however, market reactions generally provided additional validation, contradicting critics' dire predictions. An empirical analysis comparing Delaware-incorporated companies to non-Delaware companies found ''no discernible effect on the shareholder value of companies incorporated in Delaware'' following SB 21's passage, suggesting the market viewed the passage of SB 21 as [not] negative for shareholders of DE-incorporated companies.[283] Another working paper reports negative abnormal returns for Delaware issuers around SB 21, with effects concentrated among controlled and dual-class firms: using an event-study centered on the first trading day after SB 21's public announcement (February 18, 2025), Professors Kenneth Khoo and Roberto Tallarita found that Delaware-incorporated firms underperformed non-Delaware peers by roughly 1.4% over the main window—approximately $700 billion in aggregate market value for the Delaware sample[284].

Governor Matt Meyer characterized the legislation as ensuring ''that Delaware remains the premier home for U.S. and global businesses,'' developed ''in collaboration with corporate leaders and legal experts'' to ''clarif[y] key governance structures to reinforce Delaware's reputation for equitable, predictable, and efficient corporate oversight.''[285] The enactment of SB 21 reaffirms Delaware's position as the nation's premier corporate law jurisdiction, despite headline challenges such as Tesla's reincorporation, vocal criticism from DExit, and rising legislative competition from Texas and Nevada. Rather than reflecting institutional fragility, SB 21 exemplifies Delaware's capacity to adapt with precision, maintaining doctrinal coherence while updating its statutory architecture to meet evolving market realities. The swift and sophisticated adoption of SB 21, supported by overwhelming majorities in both the legal profession and the legislature, demonstrates Delaware's enduring institutional strength and its continued dominance at the apex of American corporate governance.

Seen through an organizational-theory lens, SB 21 also functions as a product feature targeted at firms with concentrated control, aligning the legal allocation of power with those firms' internal coalitions. That targeting helps explain why public-market investors—who value Delaware's judge-centered equity—may view the reform skeptically, even as private or closely held firms see reduced friction. The same segmentation logic reconciles how Delaware can remain dominant in the public-company core while ceding meaningful niche ground to Nevada and Texas in the controller/PE segment.

CONCLUSION

This analysis supports three principal conclusions about Delaware's leadership in corporate law and corporate governance amid contemporary challenges.

First, Delaware's institutional foundations create durable competitive advantages that recent crises have validated rather than undermined. *Tornetta* and *Moelis* initially appeared to threaten Delaware's business-friendly reputation. Yet these controversies ultimately demonstrate judicial independence and doctrinal consistency that distinguish Delaware's framework. Chancellor McCormick's willingness to scrutinize even the world's most prominent CEO in *Tornetta* validates Delaware's governance quality, while VC Laster's *Moelis* decision exemplifies commitment to statutory fidelity over market convenience. The empirical evidence contradicts narratives of Delaware decline: despite headline-grabbing departures, Delaware's market share among public companies has grown from 56% to 62% between 2020 and 2024[286], with 80% of newly public companies choosing Delaware incorporation.[287]

Second, competing jurisdictions face fundamental institutional limitations that Delaware's century of development has overcome. Texas's two-year judicial terms create uncertainty about expertise continuity, while Nevada's non-operational business courts lack institutional infrastructure for complex disputes. Most significantly, these competitors lack the dense ecosystem of specialized practitioners, responsive legislative processes, and scholarly engagement that sustains Delaware's adaptive capacity. The corporations departing Delaware, primarily small-minority controller situations and founder-controlled entities, represent specific governance challenges rather than broad institutional dissatisfaction.

Third, Delaware's legislative responses through SB 313 and SB 21 demonstrate institutional learning mechanisms while raising questions about the appropriate balance between competitive pressure and governance quality. These interventions illustrate Delaware's capacity to evolve while preserving core principles, but the rushed legislative process that bypassed traditional stakeholder consultation mechanisms raises concerns about democratic accountability. SB 21's relaxation of dual protections for controlling shareholder transactions may weaken minority protections in favor of controlling stockholder convenience.

For international observers, Delaware's evolution offers insights into how regulatory competition operates in practice. The state's success stems not from a ''race to the bottom'' but from institutional coordination enabling responsive law-making within judicially-enforced fiduciary constraints.

Looking ahead, Delaware's leadership remains robust, but by no means inevitable. Its continued relevance will depend on its ability to innovate in response to evolving business models, technological disruption, the global rise of stewardship expectations, and the increasing integration of ESG mandates, albeit pursued with varying degrees of intensity across jurisdictions.

Our account therefore supports a dual-race equilibrium: Delaware's adjudicative distinctiveness and institutional lock-in continue to anchor the public-company core, while Nevada and Texas compete in a controller- and PE-oriented niche with brighter-line protections. We acknowledge this bifurcation as a live possibility, but we do not attempt an exhaustive empirical mapping of firm movements or PE-specific reincorporations in this Article.

The core challenge for Delaware is to preserve its foundational legal principles while adapting to new forms of agency costs and increasingly complex governance dynamics. These include shifting power relations between majority and minority shareholders, boards of directors, corporate management, and the judiciary, as well as heightened scrutiny from institutional investors. Delaware's capacity to navigate these pressures will determine whether its corporate governance model remains the global benchmark in the decades to come.

Notes

1. We are grateful for the valuable insights gained through a series of exchanges—including interviews, meetings, informal discussions, and panel debates—with legal scholars, practitioners, and members of the judiciary, as well as leading figures in law and finance, corporate governance, communications, and business leadership. These exchanges involved corporate attorneys, financial and communications experts, senior executives, board members, and representatives of organizations such as the American College of Governance Counsel (ACGC) and other governance institutions. In particular, we wish to thank David Berger, Dorothy Lund, Pierluigi Matera, Steven Solomon, Edward Rock, Theodore Mirvis, Emiliano Catan, Elina Tetelbaum, David Lakhdhir, Deborah Burand, Patrick Corrigan, Drew Shagrin, Geneviève Helleringer, and many others for their time, expertise, and thoughtful contributions, which significantly enriched the depth and practical relevance of our analysis. The views expressed in this article are solely our own and do not necessarily reflect those of the individuals or institutions with whom we engaged. We alone bear responsibility for any errors or omissions.

2. The Bluebook: A Uniform System of Citation is a legal citation style manual used in the United States. It is the standard for legal citation in academic and professional legal writing, including law reviews, court documents, and legal memoranda. The current edition is the 21st, published in 2020.

3. The first of the original thirteen colonies to ratify the U.S. Constitution, Delaware officially became a state in 1787.

4. U.S. Census Bureau, *Quick Facts: Delaware*, *https://data.census.gov/profile?q=Delaware* (last visited Nov. 2, 2025).

5. Delaware Div. of Corps., Annual Report Statistics (2024), *https://corp.delaware.gov/stats/* (last visited Nov. 2, 2025); Marc Levy, Delaware Rattled by Big Business Moving Their Legal Homes. Here's a Look by the Numbers, AP NEWS (Mar. 25, 2025).

6. *See* Roberta Romano, *The Genius of American Corporate Law* 6–7 (1993); OECD, Corporate Governance Factbook, 48 (2025) (noting that ''In the United States, state law is the primary source of corporate governance law, but the federal securities regulator, the Securities and Exchange Commission (SEC), and exchanges regulate certain governance matters.''), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/*https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/10/oecd-corporate-governance-factbook-2025_56febc0d/f4f43735-en.pdf.*

7. Incorporation status confirmed through analysis of Form 10-K annual reports filed with the SEC.

8. Will Oremus, *Delaware's Grip on Corporations Seemed Solid. Elon Musk Led a Revolt.*, WASH. POST (Mar. 4, 2025) (noting Musk's post on X: ''Never incorporate your company in the state of Delaware''), *https://www.washingtonpost.com/technology/2025/03/04/delaware-corporate-law-elon-musk/*; *see also* Elon Musk (@elonmusk), X (Dec. 2, 2024), *https://x.com/elonmusk/status/1863728056474419580?lang=en*, (''Absolute corruption.'').

9. 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-votingdexit-to-depart-delaware-2025-05-14/#:~:text=WILMINGTON%2C%20Delaware%2C%20May%2014%20(,America's%20capital%2C%20Reuters%20has%20found*, (reporting that five companies with a stock market value of at least $1 billion have moved their legal home out of Delaware since last year, in what some have nicknamed 'Dexit'. The companies that have reincorporated include Tesla and SpaceX (to Texas), Trump Media & Technology Group (to Florida), and Dropbox, The Trade Desk, and Cannae Holdings (to Nevada)).

10. Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025) (noting that Trump Media states in its proxy statement that Delaware's ''increasingly litigious environment facing corporations with controlling stockholders has created unpredictability in decision-making'' and citing the Musk pay ruling as an example).

11. Alexis Keenan, *The Early Winner in the 'DExit' War for Corporate Relocations: Nevada*, YAHOO FINANCE (July 10, 2025) (reporting that seven publicly traded companies with market caps ranging from $1.5 billion to $71 billion asked shareholders to vote in favor of reincorporating from Delaware to Nevada during the current proxy season, and all such proposals passed, with investor support ranging from just over 50% to 85%) (citing Freshfields analysis); *See also* Renee Zaytsev, *Catching Up On DExit,* Mondaq (May 30, 2025) (noting that since the passage of SB 21, ten public companies—Tempus AI, Roblox, Sphere Entertainment, Madison Square Garden Entertainment, Madison Square Garden Sports, Xoma Royalty, BAIYU Holdings, Fidelity National Financial, AMC Networks, and Affirm—moved from Delaware to Nevada and two—Zion Oil & Gas and Mercado Libre—moved from Delaware to Texas).

12. Tornetta v. Musk, 310 A.3d 430, 446, 449 (Del. Ch. 2024) (Del. Ch. Jan. 30, 2024) (finding Elon Musk a controlling shareholder despite owning only approx. 22% due to ''transaction-specific control'' and board dominance)

13. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 821 (Del. Ch. 2024) (holding that stockholder agreements granting pre-approval rights (whereby the Board must obtain Moelis' prior written consent before taking eighteen different categories of action) and certain board composition provisions violated DGCL § 141(a)); *see also Moelis Decision Shakes Up Governance and Management of Delaware Corporations,* Taft Law (2024) (noting that the court acknowledged that corporate planners now regularly implement internal governance arrangements through stockholder agreements providing favored stockholders with extensive veto rights, and that the decision was ''potentially 'highly disruptive' to market practice'' as it invalidated governance arrangements that had been commonplace for nearly a decade).

14. *The U.S. Reincorporation Race: Who's in the Lead?*, ISS GOVERNANCE (Jul. 16, 2025) (reporting eighteen Delaware companies proposing reincorporation outside Delaware, with twelve to Nevada and one to Texas).

15. *See* Daniel Taylor*, Delaware's Manufactured Corporate Crisis,* CLS Blue Sky Blog (Mar. 6, 2025); *see also* Hals, supra note 12 (noting that the number of companies reincorporating out of Delaware remains minimal relative to the volume of new incorporations, and the percentage of Delaware-based companies in the Russell 3000 index—nearly all U.S. public companies—has increased from 56% in 2020 to 62% in 2024).

16. Theories explaining Delaware's continued dominance in corporate chartering have evolved significantly, beginning with the foundational Cary-Winter debate. *See William L. Cary, Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (''race to the bottom'' thesis arguing Delaware courts favor managerial interests at the expense of shareholders); *Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (''race to the top'' theory positing that market discipline drives legal efficiency). *See also* Roberta Romano*, The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006) (empirical account showing Delaware's legal innovation and bar-legislative coordination underpin its dominance); *Michael Klausner, Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 779 (1995) (''network effects'' theory arguing Delaware's accumulated legal infrastructure creates standardization benefits through the interpretation of contract terms (''[A]n attraction of the Unocal- Revlon rule is that many firms are incorporated in Delaware and are governed by the rule. Moreover, these interpretive network externalities will continue to accrue even after many firms have adopted a particular [contract] term.'')); *Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) (arguing that other states lack sufficient economic or institutional incentives to challenge Delaware's entrenched position (''Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.'')); *Peter Molk, Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111 (2021) (emphasizing Delaware's ''credible commitment'' mechanisms. institutional responsiveness, such as Delaware courts' streamlined case management system, and network advantages as foundations of its durability). Recent scholarship acknowledges Delaware's adaptability amid high-profile governance disruptions; *See Pierluigi Matera, Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 79 (2022) (arguing that Delaware's structural advantages and legal predictability shield it from niche competitors such as Wyoming)'' I contend that Wyoming's ambition constitutes the most significant threat which is currently looming over Delaware's leading position. Specifically, I argue that Wyoming's tactic is the most promising—if not the only possible— strategy that can challenge Delaware in the current context. However, it is a limited threat in the sense that, if successful, would only make Wyoming the leader of the market segment of cryptocurrency and token based businesses incorporations.'')); *Jill E. Fisch & Steven Davidoff Solomon, Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025) (analyzing how Delaware courts recalibrate fiduciary doctrine in controlled company transactions, exemplified by the *Tesla* and *Match Group* cases); *Joseph Landau et al., Alternatives to Delaware? Evaluating Corporate Law in Nevada, Texas, and Wyoming*, 30 FORDHAM J. CORP. & FIN. L. 265 (2025) (comparing Delaware's procedural and dispute-resolution strengths to emerging competitor states); Stephen M. Bainbridge, *DExit Drivers, supra* note 18 (empirical analysis concluding mass corporate exodus unlikely while identifying strategic factors driving select departures); Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law,* European Corporate Governance Institute – Law Working Paper No. 761/2024 (2024) (documenting competitive pressure from Nevada and Texas, arguing market segmentation challenges could pressure Delaware toward laxer corporate governance standards). Contra *William J. Carney & George B. Shepherd, The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L'' REV. 1 (arguing that Delaware law may be ''inferior'' to some other laws such as the Mode Business Corporation Act).

17. Scholars have extensively analyzed Delaware's corporate law dominance through a ''political economy'' framework, examining how political structures, economic incentives, and interest group dynamics interact to shape corporate governance outcomes. *See* William T. Allen, *Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law*, 4(2) Comparative Research in Law & Pol. Econ., Paper No. 06/2008, available at *http://www.ssrn.com/abstract=1105591* at 9 (''It seems hardly an exaggeration to say that together change in these primal forces –the intensity of global product market competition, the application of scientific and technological discovery to new products and product improvements, the emergence of a market centered political ideology, and the growth and organization of institutional investors – have driven change in corporate governance as in much else in our social life.''); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 63 (2005) (''This episode fits nicely with the standard political economy account of Delaware corporate law: legislators are sensitive to changes in the law that might cause corporations to leave and, when they can be persuaded that the courts have made such changes, are apt to undo them.''); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 120-22 (1987) (describing the coalition explanation of takeover legislation); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 644-45 (2003) (analyzing Delaware-Washington interaction rather than traditional state competition. (''The reality of American corporate law is that the United States has never had a pure interstate race. If the issue is important, federal authorities act on it immediately, take it away from Delaware, or threaten to do so.'')). This political economy perspective recognizes that Delaware's legal framework emerges not merely from abstract legal principles, but from the complex interplay between revenue incentives, interest group pressures, and institutional dynamics that create path-dependent advantages reinforcing the state's competitive position.

18. Scholars consistently refer to Delaware's standards of review as a ''tripartite'' framework, recognizing the three distinct levels of judicial scrutiny that courts apply based on the nature of the challenged transaction. *See* Lijun K. Yang, *First Union v. Suntrust Banks: The Fight for Wachovia and Its Impact on North Carolina Corporate Law*, 6 N.C. BANKING INST. 335, 354 (2002) (''The most influential state law on corporate boards' fiduciary duties in a takeover context is the Delaware law which applies a tripartite standard.''); John Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 333 (2016) (describing ''proposed tri-partite review standards'' for derivative litigation); Lawrence A. Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 330 (2022) (noting that ''the goal of simplifying standards of review into a tri-partite functional framework requires making policy choices.''). This tripartite structure encompasses: (1) the business judgment rule for disinterested decisions, (2) enhanced scrutiny for defensive measures and sale transactions, and (3) entire fairness for conflicted transactions. The framework reflects Delaware's sophisticated approach to calibrating judicial oversight based on the presence and severity of conflicts of interest, creating what scholars recognize as a decision tree for determining appropriate levels of judicial intervention in corporate governance disputes. *See also infra* note 166 and accompanying notes.

19. Emilie Aguirre, Julie Yen & Julie Battilana, *An Organizational Theory of Corporate Law*, 50 J. Corp. L. 567, 572 (2025) (''[W]e draw from organization theory to show how shareholders are not the only capital investors in the firm, with workers and the environment also investing labor capital and natural capital that are vital to the firm's existence.'').

20. Aguirre et al., *Organizational Theory*, supra note 22, at 600 (''Within law, corporate law sets the specific rules that order the relationships in the firm, establishing who controls access to critical firm resources and deployed capital, and the extent to which those parties will be held accountable or subject to external oversight.'').

21. *See* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 Cornell L. Rev. 1205, 1219–22 (2001) (asserts that Delaware exercises market power in the market for corporate charters by leveraging its franchise tax regime and the litigation environment, thereby creating economic lock-in. This structure discourages firms from departing, even when competing jurisdictions may offer seemingly more attractive governance frameworks (''Delaware's method of assessing annual franchise taxes is thus unique in two respects. First, Delaware is the only state where the additional charge for incorporating is often substantial. Second, no state but Delaware uses a system where the annual franchise tax is the lower of two figures: one based on the number of authorized shares and the other on APVC [Assumed Per Value Capital]'')).

22. Professor Lucian Bebchuk of Harvard Law School has been one of Delaware's most influential academic critics. He argues that the state's dominance may reflect a ''race to the bottom'' driven by managerial preferences, rather than shareholder welfare or efficient competition. *See* Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law,* 105 HARV. L. REV. 1435 (1992). In co-authored work with Assaf Hamdani, Bebchuk contends that ''the competitive threat to Delaware's dominant position [in the incorporation market], we have shown, is rather weak. *See* Bebchuk & Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 615 (2002).

23. *See* note 251 *infra* and accompanying notes.

24. For a general discussion of New Jersey's original position as the founder of modern corporate law, see, e.g., Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 Del. J. Corp. L. 249, 265-70 (1976) (cited in Ann E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 Del. J. Corp. L. 789, 818 (2008)). By 1917, New Jersey had repealed most of its restrictive antitrust reforms of 1913. However, those reforms had the enduring effect of eliminating the state's hegemony of the incorporation of giant companies.

25. Seligman, *A Brief History*, supra note 27.

26. William L. Cary, *Federalism,* supra note 19, at 665-70 (1974).

27. *History of the New Jersey Chamber of Commerce*, NJ CHAMBER OF COMMERCE, *https://www.njchamber.com/about/nj-chamber-history* (last visited Nov. 2, 2025).

28. Floyd Norris, *Will 'Business Judgment' Rule Again in Delaware Courts?*, N.Y. TIMES (Jun. 15, 2001).

29. *See* Seligman, *supra* note 27; see also Shane Goodwin., *Jurisdictional Competition and Corporate Law: The Rise of Delaware and the Fall of New Jersey*, SMU Cox School of Business Research Paper No. 25-12 (Apr. 21, 2025), available at Goodwin, Shane, Jurisdictional Competition and Corporate Law: The Rise of Delaware and the Fall of New Jersey (April 21, 2025). SMU Cox School of Business Research Paper No. 25-12, Available at SSRN: *https://ssrn.com/abstract=5224784* (observing that Wilson's ''Seven Sisters Acts'' of 1913 prohibited holding companies from acquiring competing corporations, imposed stringent disclosure requirements, and authorized charter revocations for anti-competitive behavior. The impact was immediate, dramatic and enduring as major corporations began reincorporating elsewhere, and the state's incorporation revenue plummeted.

30. Siegelman, *supra* note 27 (noting that the New Jersey code however served as a template for other states and in 1899, Delaware had become one of the first imitators of New Jersey's ''liberal'' statute).

31. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 490 (1987).

32. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 229–32 (1985).

33. Romano, *Law as a* Product, supra note 35, at 230-231

34. *Compare* Romano, *Law as a Product,* supra note 35, at 229–32 (1985) (describing static network advantages) with our dynamic model of expertise concentration.

35. William T. Allen, Jack B. Jacobs, Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 Del. J. Corp. L. 859, 861 (2001) (describing how Delaware's case-by-case approach creates institutional learning) (''Over the course of the twentieth century, the mandatory features of the statutory law gradually decreased. Statutes became increasingly elegant and flexible, continuously moving away from a mandatory or prescriptive model and ever closer to a pure contractual or enabling model. As a consequence, what emerged as a counterpoint to the evolution of the enabling model of corporation law was the second key function of the law of corporations: the ex post judicial review of the actions of corporate officers and directors, measured by fiduciary principles.'').

36. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–17 (1997) (analyzing how Delaware's ''corporate law sermons'' create normative frameworks that inform subsequent decision-making).

37. Marcel Kahan & Edward B. Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1607–10 (2005).

38. Kahan & Rock, *Symbiotic Federalism*, supra note at 1588 (''As Delaware caters anyway to investors and managers in order to keep attract corporations, keeping [them] sufficiently satisfied that they do not lobby for federal intervention should not require much additional effort or adjustment.'').

39. *See* Bebchuk & Hamdani, *Vigorous*, *supra* note 25, at 576–78 (2002).

40. Lucian Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate,* 46 J.L. & ECON. 383, 386–88 (2003) (documenting Delaware's persistent dominance in incorporation and explaining it in part by reference to path dependence and institutional advantages that grow more valuable with each new firm incorporation).

41. Delaware Division of Corporations, *Why Businesses Choose Delaware* (last visited Nov. 2, 2025), *https://corplaw.delaware.gov/why-businesses-choose-delaware/.*

42. Reinier Kraakman Et Al., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, OXFORD UNIV. PRESS (3d Ed. 2017) (explains how civil law jurisdictions often use detailed statutory company codes with less discretion to boards compared to common law systems like Delaware).

43. *See generally* Del. Code Ann. tit. 8, §§ 101–398.

44. *See, e.g.,* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some New Challenges for It*, 30 DEL. J. CORP. L. 673, 678–80 (2005).

45. *See* Romano, *Laboratory*, *supra* note 19, at 213 (highlighting Delaware's judicial infrastructure (Court of Chancery) and deep case law as ''relation-specific legal capital,'' reinforcing that boards have wide latitude bounded by fiduciary duties enforced by a sophisticated judiciary (''In addition to a reputation for responsiveness created by dependence on franchise fee revenues, Delaware has made a substantial investment in assets that have no alternative use at any comparable value besides the corporate chartering business. Such assets can be characterized as relation-specific legal capital–that is, legal capital specific to the corporate chartering relation.'')); Bebchuk & Hamdani, *Vigorous*, *supra* note 25, at 608-09 (noting that Delaware's entrenched position results from network effects and switching costs, not necessarily superior substantive rules (''A recurring theme voiced by supporters of state corporate law is that, because this law is the product of active competition among states, it is likely to be superior to the corporate law produced by a monopolistic federal government... Our analysis, however, casts doubt on the magnitude of this advantage of state law rules. The competitive pressure on states, including the dominant state of Delaware, is actually much weaker than has been previously recognized.'')).

46. *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112–13 (Del. 2005) (''The internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation.. It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs...By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation.'')); *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del.1987). *Accord State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal.App.4th 434, 442, 8 Cal.Rptr.3d 56 (2d Dist.2003), citing *Edgar v. MITE Corp*., 457 U.S. 624, 645, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982).

47. *See McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987) (defining internal affairs as ''those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.'').

48. Ann M. Lipton, *Inside Out (Or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 323 (2023) (''A number of justifications have been offered for this rule, including the need for consistency and the constitutional demands of due process and the dormant Commerce Clause, but none provides full explanatory power for the doctrine as it has evolved today.''). *See also VantagePoint Venture Partners 1996 v. Examen, Inc*., 871 A.2d 1108, 1113 (Del. 2005) (''The internal affairs doctrine is not, however, only a conflicts of law principle. Pursuant to the Fourteenth Amendment Due Process Clause, directors and officers of corporations ''have a significant right ... to know what law will be applied to their actions'' and ''[s]tockholders...have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs.'' Under the Commerce Clause, a state ''has no interest in regulating the internal affairs of foreign corporations.'')).

49. The Honorable Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism*, 84 N.Y.U.L. REV. 1149 (2009).

50. Jacobs, *Reach*, supra note 52, at 1154-67 (identifying and analyzing the ''three quite different forms'' of divergence from the federalist model).

51. See Illinois Business Take-Over Act, Pub. Act No. 80-1421, 1978 Ill. Laws 1581 (codified at Ill. Rev. Stat., ch. 121 1/2, ¶ 137.51-.70 (1979)), invalidated by *Edgar*, 457 U.S. 624, 643 (1982).

52. *Edgar*, 457 U.S. 624, 643 (1982) (holding that Illinois had ''no legitimate interest in protecting nonresident shareholders'' and that the statute violated the Commerce Clause).

53. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (upholding Indiana's ''second generation'' antitakeover statute as constitutional because it applied only to Indiana corporations).

54. Bebchuk & Cohen, *Decisions*, supra note 43.

55. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 128-29 (Del. 2020); ATP Tour Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014).

56. *See* Lipton, *Inside Out*, *supra* note 51, at 322 (citing Transcript of Oral Argument at 43, Strategic Funding Source Holdings LLC v. Kirincic, No. 2021-0107-JTL (Del. Ch. Oct. 12, 2021).

57. *See* Lipton, *Inside Out*, *supra* note 51, at 327 (2023) (citing Erin O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1194 (2000)).

58. *See* Lipton, *Inside Out*, *supra* note 51, at 345-50 (discussing employment disputes being ''shoehorned into entity law via partnership and LLC agreements''); *see also* Ann M. Lipton, *New Challenges to the Internal Affairs Doctrine*, Oxford Law Blogs (Feb. 9, 2023), *https://blogs.law.ox.ac.uk/oblb/blog-post/2023/02/new-challenges-internal-affairs-doctrine.*

59. Lipton, *supra* note 51, at 375; *see also* Keith Paul Bishop, *Delaware's Immodest Embrace Of The Internal Affairs Doctrine*, NAT'L L. REV. (Feb. 28, 2023), *https://www.natlawreview.com/article/delaware-s-immodest-embraceinternal- affairs-doctrine.*

60. Lipton, *supra* note 51, at 330-31 (explaining how the internal affairs doctrine permits chartering states to exercise extraterritorial regulation).

61. Lipton, *supra* note 51 (critiquing that Delaware law governs relationships involving non-Delaware residents overlook the voluntary nature of Delaware's jurisdiction and the efficiency benefits it provides. Corporations and their stakeholders choose Delaware incorporation voluntarily, with full knowledge that Delaware law will govern internal affairs regardless of where business is conducted). *See VantagePoint*, 871 A.2d. 1108, 1113 (Del. 2005) (emphasizing the voluntary nature of incorporation choice).

62. Jacobs, *supra* note 52, at 1162-64 (discussing how Delaware courts have consistently held that "Delaware corporate law trumped the conflicting California statutory rules").

63. *VantagePoint*, 871 A.2d at 1113.

64. Cf. Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 787–91 (2015) (explaining that the DGCL establishes a "clear-eyed" allocation of power in which directors retain primary authority to manage the corporation, subject to judicially enforced fiduciary duties that protect stockholder interests, thereby balancing managerial discretion with accountability mechanisms).

65. *Contra* Lucian A. Bebchuk, *Federalism, supra* note 25 at 1482–84 (1992).

66. Jacobs, *supra* note 52, at 1150.

67. *See* Jacobs, *supra* note 52, at 1152-53 (describing how nineteenth-century corporate law was "local" because "most corporations chartered under the new state statutes—and their officers, directors, stockholders, and business operations—were located in a single state")

68. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)).

69. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (2006)).

70. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d), 78n(d)-(f) (2006)).

71. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

72. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. B, tit. VII, § 7001, 123 Stat. 115, 516- 20 (amending 12 U.S.C. § 5221).

73. *See* Roberta Romano's work generally; Professor Romano frames incorporation choice as a market-based decision, with firms selecting Delaware for its governance advantages despite being based elsewhere). *See e.g.*, Romano, *Law as a* Product, supra note 35, at 240-41(1985) (offering a theoretical account of incorporation "shopping," documenting extensive out-of-state incorporations into Delaware by companies headquartered elsewhere, and emphasizing Delaware's institutions (e.g., Court of Chancery); Romano, *Genius*, *supra* note 9, (explaining that the federal-state division enables a market for corporate charters: firms can access Delaware's specialized corporate law regardless of headquarters location, while federal securities regulation remains nationally uniform).

74. Jacobs, *supra* note 52, at 1167.

75. See Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 733–35 (2013) (contrasting federal and Delaware approaches to corporate regulation).

76. Jacobs, *supra* note 52, at 1154 (describing how federal and state law "operated independently of the other and with different functions").

77. Jacobs, *supra* note 52, at 1153-54 (explaining the division where "most internal affairs of corporations continued to be regulated by state law" while "some were removed from the state law domain and transferred to the federal").

78. Del. Div. of Corporations, *Annual Report and Tax Instructions*, *https://corp.delaware.gov/paytaxes/* (last visited Nov. 2, 2025).

79. See Nicole Poore & Melissa Minor-Brown, *Delaware's Corporate Laws Sustain the First State. We Have To Protect Them*, DELAWARE ONLINE (Feb. 6, 2025), *https://www.delawareonline.com/story/opinion/2025/02/06/delawares-corporate-franchise-is-under-attack-opinion/78210109007/*; *see also* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 721-22 (2002) (analyzing Delaware's revenue dependency on corporate franchise taxes).

80. Poore & Minor-Brown, *supra* note 82.

81. Bebchuk, *Federalism*, *supra* note 25, at 1482-84 (1992).

82. Morris, Nichols, Arsht & Tunnell LLP, *Thirty Years Later – Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on Proposed Amendments 2* (Feb. 2025) (noting that "to the extent there is a 'special interest' driving Delaware corporate law, it is Delawareans as a whole").

83. *See* William Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71-72 (2000), Allen, William T., The Pride and the Hope of Delaware Corporate Law. Symposium Presentation, Available at SSRN: *https://ssrn.com/abstract=263798.*

84. Morris, Nichols, Arsht & Tunnell LLP, *supra* note 85, at 4-5.

85. Morris, Nichols, Arsht & Tunnell LLP, *supra* note 85.

86. Morris, Nichols, Arsht & Tunnell LLP, *supra* note 85, at 5.

87. *See* Lewis S. Black, Jr., *Why Corporations Choose Delaware*, DEL. DEP'T OF STATE DIV. OF CORPS. 1, 6 (2007).

88. Parallel to the Chancery, Delaware's Superior Court is a court of general jurisdiction over civil and criminal matters at law but lacks equitable authority. Housed within it, the Complex Commercial Litigation Division, addresses contract breaches, business torts, and insurance disputes—often involving claims over $1 million or governed by forum selection clauses—while deferring all equitable matters to the Chancery Court, which remains the preeminent and defining forum for Delaware corporate litigation. See Complex Commercial Litigation Division (CCLD), Delaware Courts, *https://courts.delaware.gov/superior/complex.aspx* (last visited Nov. 2, 2025).

89. Under the American legal tradition, the Seventh Amendment to the U.S. Constitution guarantees the right to jury trials in civil cases involving over $20. However, this right applies only to actions ''at law'' seeking monetary damages, not to equitable proceedings seeking injunctions and other non-monetary remedies. Since the Chancery Court operates as a court of equity, it bypasses jury trial rights entirely.

90. *See* Delaware Court of Chancery, *A Short History of the Court of Chancery* (2024), *https://courts.delaware.gov/chancery/history.aspx* (last visited Nov. 2, 2025).

91. The Delaware Court of Chancery consists of seven judges: Chancellor Kathaleen St. Jude McCormick (the first female Chancellor in Delaware history, serving since 2021), and six Vice Chancellors: J. Travis Laster, Morgan T. Zurn, Paul A. Fioravanti Jr., Lori W. Will, Nathan A. Cook, and Bonnie W. David.

92. Del. Const. art. IV, § 3; see also Appointment of Judges, Del. Cts., *https://courts.delaware.gov/judges/appointment.aspx* (last visited Nov. 2, 2025).

93. *Del. Const. art. IV, § 10* (constitutional ''bare-majority'' and ''major-party'' rules); *See* Brian D. Feinstein & Daniel J. Hemel, *The Market Value of Partisan Balance*, in Northwestern Univ. L. Rev. 1201, 1203-04 (2024) (noting that Delaware uniquely requires partisan balance across its courts (''Partisan-balance requirements are less prevalent at the state level, where effective one-party control over all branches of government is more common...And Delaware—alone among U.S. states—has enshrined a judicial partisan-balance regime into its constitution.'')).

94. Delaware's judicial selection system is distinctive among American states through its constitutionally mandated bipartisan balance requirement. Both the Supreme Court and Court of Chancery judges are nominated by the Governor from a list provided by a twelve-member Judicial Nominating Commission, confirmed by the Delaware Senate, and serve twelve-year terms. Delaware's Constitution requires partisan balance: for courts with odd numbers of judges (like the five-member Supreme Court), no more than a bare majority may belong to one major political party, while the remainder must belong to the other major political party. The Judicial Nominating Commission itself reflects this balance principle, with eleven members appointed by the Governor (including at least four lawyers and three nonlawyers) and one member nominated by the SBA President. This system differs markedly from other states where judges are either elected by popular vote or appointed without partisan balance requirements. Delaware has maintained this bipartisan requirement for over 120 years, and it was challenged in federal court in *Carney v. Adams*, where the U.S. Supreme Court ultimately ruled in 2020 that the plaintiff lacked standing to challenge the law. Scholars and practitioners have noted that this system promotes judicial independence while ensuring neither major political party can dominate the courts, contributing to Delaware's reputation as the premier forum for corporate law disputes. *See Carney v. Adams*, 141 S. Ct. 493 (2020); Amy Howe, *Case Preview: Justices to Consider Delaware Rules on Bipartisanship in Judiciary*, SCOTUSBLOG (Oct. 4, 2020), *https://www.scotusblog.com/2020/10/case-preview-justices-to-consider-delaware-rules-on-bipartisanship-in-judiciary/*; Marcel Kahan & Edward B. Rock, *Symbiotic Federalism and the Structure of Corporate Law,* 58 VAND. L. REV. 1573, 1607–10 (2005); and Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 29–30 (2015).

95. *See* Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. Corp. L. 771, 777 (2009) (noting the expediency of Delaware courts. (''In Delaware, the phrase ''justice delayed is justice denied'' is not a platitude. The Delaware judicial system decides all matters promptly. Although business litigation in the Court of Chancery and the Delaware Supreme Court is routinely disposed of in a timely manner, proceedings in both courts may be expedited to meet exigent circumstances.'')); Del. Ch. Ct. R. 125 (expedited proceedings); Leo E. Strine Jr., T*he Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 681-85 (2005); *Supreme Court Case Scheduling FAQs*, Delaware Courts, *https://courts.delaware.gov/supreme/faqs.aspx* (last visited Nov. 2, 2025) (noting that the Delaware Supreme Court has established goals for timely resolution of its docket, with ''appeals decided an average of 29.7 days from the date of submission to the date of final decision'').

96. The Delaware Supreme Court consists of Chief Justice Collins J. Seitz Jr. (serving since 2019) and four Associate Justices: Karen L. Valihura, Gary F. Traynor, Abigail M. LeGrow, and N. Christopher Griffiths. Similar to the Court of Chancery, the justices are nominated for twelve-year terms maintaining partisan balance.

97. *See e.g.*, Leo E. Strine Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014); Strine, *Denial,* supra note 67.

98. *See e.g.*, William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992); William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395 (1993); In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

99. Chancellor Kathaleen McCormick of the Delaware Court of Chancery, Notre Dame Law School (May 6, 2021).

100. *See* Judicial Officers - Court of Chancery - Delaware Courts, *https://courts.delaware.gov/chancery/judges.aspx.*

101. J. Travis Laster, *The Distinctive Fiduciary Duties That Stockholder Controllers Owe*, 20 N.Y.U. J.L. & BUS. 461 (2024) (V.C. Laster's ''non-harm'' framework distinguishes controlling shareholders' fiduciary duties from directors' duties by arguing that controllers face only *proscriptive* obligations (prohibitions against harm) rather than *prescriptive obligations (affirmative duties to act in the corporation's best interests). Under this framework, controlling shareholders have ''only an obligation not to harm the corporation or the minority stockholders through intentional, knowing, or grossly negligent action,'' but unlike directors, they ''need not believe in subjective good faith that [they are] acting in the best interests of the corporation and its stockholders as a whole.'' This allows controlling shareholders to pursue self-benefit as long as they do not actively harm minority shareholders or the corporation. Laster argues this distinction clarifies that ''the duty of loyalty is only a proscriptive obligation of non-harm'' for controllers, potentially reducing judicial reluctance to recognize control relationships while providing clearer boundaries for permissible controller conduct).*

102. Jennifer Kay & Mike Leonard, *Delaware's Judge Laster Is Making His Mark on Corporate America*, Bloomberg Law (Jul. 31, 2023), *https://news.bloomberglaw.com/us-law-week/delawares-judge-laster-is-making-his-mark-on-corporate-america.*

103. Kay & Leonard, supra note 105.

104. Kay & Leonard, supra note 105.

105. Joel E. Friedlander, *Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?,* U. of Penn, Inst for Law & Econ Research Paper No. 24-24, J. of Corp. Law forthcoming (2025), Friedlander, Joel Edan, William Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify? (July 21, 2024). U of Penn, Inst for Law & Econ Research

Paper No. 24-24, Journal of Corporation Law, forthcoming, Available at SSRN: *https://ssrn.com/abstract=4901375* or *http://dx.doi.org/10.2139/ssrn.4901375*; *See also W. Palm Beach Firefighters' Pension Fund v. Moelis & Co*., 311 A.3d 809 (Del. Ch. 2024).

106. *Moelis,* A.3d 809, at 878.

107. *Moelis,* A.3d 809.

108. *See generally* J. Haskell Murray, *The Social Enterprise Law Market*, 75 Md. L. Rev. 541, 607 (2016).

109. See Leo Strine Author Page, Soc. Sci. Res. Network, *https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=4175908* (last visited Nov. 2, 2025). Strine has coauthored influential articles with leading corporate law scholars. *See, e.g.,* Leo E. Strine, Jr. et. al*., Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo. L.J. 629 (2010); Lawrence A. Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead, 77 Bus. Law. 321 (2022).

110. See Ashby Jones, *On Delaware Vice Chancellor Travis Laster: 'Strine on Steroids'*, WALL ST. J. L. BLOG (Feb. 11, 2011), *http://blogs.wsj.com/law/2011/02/11/on-delaware-vice-chancellor-travis-laster-strine-on-steroids/*; Vice Chancellor J. Travis Laster, HARVARD LAW SCHOOL PROGRAM ON CORPORATE GOVERNANCE, *http://www.law.harvard.edu/programs/corp_gov/laster-bio.shtml.*

111. *See In Memoriam: William Allen*, NYU SCHOOL OF LAW, https://www.law.nyu.edu/news/in-memoriam-williamallen (last visited Aug. 6, 2025); Myron T. Steele, Potter Anderson, *https://www.potteranderson.com/people/Myron- Steele* (last visited Aug. 6, 2025); Jack B. Jacobs, SIDLEY AUSTIN LLP, *http://www.sidley.com/people/jack-b-jacobs* (last visited Aug. 31, 2015).

112. Del. State Bar Ass'n, Corporate Council, *https://delawarecounselgroup.com/dsba-corporate-council/* (last visited July 12, 2025).

113. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 906- 12 (1990).

114. *See* Dan Awrey et al., *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 Yale J. on Reg. 1, 60 (2018) (''This guild of local corporate practitioners controls amendments to the Delaware General Corporation Law. Although they work subject to the norm that they ''leave parochial client interests behind when proposing corporate legislation,'' their deliberations are secret.'').

115. *See* Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 Del. J. Corp. L. 851, 860-61 (2016).

116. Bainbridge, *Fee-Shifting*, supra note 120, at 861.

117. Bainbridge, *Fee-Shifting*, supra note 120.

118. Bainbridge, *Fee-Shifting*, supra note 120.

119. Bainbridge, *Fee-Shifting*, supra note 120, at 861-62.

120. Bainbridge, *Fee-Shifting*, supra note 120, at 862.

121. Bainbridge, *Fee-Shifting*, supra note 120, at 862-63.

122. *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM (Del. Ch. Dec. 2, 2024).

123. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 209 (2004), citing Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, 7 J.L. Econ. & Org. 55, 61 (1991) (reiterating Roman's possible explanations: the first that most fiduciary breaches are minor and tend not to harm shareholders; the other that a large proportion of shareholder suits are ''without merit.'').

124. Stephen M. Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford Univ. Press 2012); available at *https://doi.org/10.1093/acprof:oso/9780199772421.003.0009.*

125. Michael R. Bloomberg and Charles E. Schumer, *Sustaining New York and the US' Global Financial Services Leadership* (2007), Exhibit 20.

126. Michael R. Bloomberg and Charles E. Schumer, *Sustaining New York and the US' Global Financial Services Leadership* (2007).

127. Stoneridge Inv. Partners v. Scientific-Atlanta, 552 U.S. 148, 163-64 (2008).

128. Awrey et al., *supra* note 117, at 11-12.

129. Morris, Nichols, *supra* note 85, at 3-4.

130. Morris, Nichols, *supra* note 85.

131. Morris, Nichols, *supra* note 85.

132. Morris, Nichols, Arsht & Tunnell LLP.

133. Potter Anderson & Corroon; *See* Morris, Nichols, Arsht & Tunnell LLP, *supra* note 77 (noting Potter Anderson, as Delaware's oldest law firm, exemplifies the institutional continuity that characterizes Delaware's legal community. This concentrated expertise has attracted out-of-state firms seeking to establish Delaware presences, with firms like McDermott Will & Emery and Robinson+Cole opening Wilmington offices to expand their bankruptcy and corporate practice).

134. Young Conaway Stargatt & Taylor.

135. See *About the Journal*, DEL. J. CORP. L., *https://djcl.org/about/* (last visited July 12, 2025) (the journal is cited by the Delaware judiciary and leading corporate scholars, and that it sponsors Francis G. Pileggi Distinguished Lecture in Law, featuring noted corporate law authorities, and publishes unreported corporate opinions from the Delaware Court of Chancery).

136. Morris, Nichols, *supra* note 85, at 1.

137. Assaf Hamdani & Kobi Kastiel, *What Happens in Delaware: Courts, Legislatures and Corporate Law (unpublished manuscript, Apr. 2024) (on file with authors). [Note: To be updated with SSRN citation and page numbers. Prof. Kastiel confirmed that SSRN publication is forthcoming]*

138. S.B. 313, 154th Gen. Assemb. (Del. 2024).

139. Jordan Howell, *Dissent In House Judiciary Over Controversial Corporate Amendments*, DELAWARE CALL (June 19, 2024).

140. Hon. J. Travis Laster, *An Eras Tour of Delaware Corporate Law*, 50 J. CORP. L. (2025) (identifying nine distinct eras in Delaware corporate law since 1776).

141. Laster, *Eras*, *supra* note 147.

142. *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43–44 (Del. 1994); Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247 (1989).

143. *See* DFC Global Corp. v. Muirfield Value Partners, 172 A.3d 346 (Del. 2017); Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1589–92 (2015).

144. Asaf Raz, *Taking Personhood Seriously*, 2023 Colum. Bus. L. Rev. 729 (2024) (quoting William T. Allen).

145. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). These cases established, respectively, heightened judicial scrutiny for uninformed board approval of a merger, intermediate review for defensive measures adopted in response to takeover threats, and the auction-duty imperative when a company initiates a change-of-control transaction.

146. The concept of ''constitutional moments'' in corporate law draws from Bruce Ackerman's constitutional theory. *See* Bruce A. Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998). In corporate law, these moments represent periods when external pressures force fundamental doctrinal reconstruction.

147. Dalia Tsuk Mitchell, *The 1980s, Managerialism, and Corporate Law*, 7 U. CHI. BUS. L. REV. (2024). The shift from managerialism to shareholder primacy reflected broader economic changes, including the rise of institutional investors, increased capital market sophistication, and academic theories emphasizing shareholder wealth maximization.

148. Laster, *Eras*, *supra* note 147.

149. DEL. CODE ANN. tit. 8, § 102(b)(7) (2021). This provision allows corporations to eliminate or limit director personal liability for monetary damages for duty of care breaches while preserving liability for loyalty violations, bad faith conduct, and improper personal benefit. The provision exemplifies Delaware's institutional capacity for legislative correction of judicial innovations that prove economically disruptive.

150. See Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871 (2002) (analyzing the evolution of takeover defenses and judicial responses).

151. Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). The decision created a mechanism allowing controlling shareholder transactions to receive business judgment protection when conditioned ab initio on both independent committee approval and majority-of-minority stockholder vote.

152. The ''dual protections'' mechanism requires that transactions be conditioned from the outset on: (1) approval by an independent, fully-empowered special committee, and (2) an informed, uncoerced majority-of-minority stockholder vote. When both protections are satisfied, entire fairness review is replaced by business judgment rule deference.

153. *See* Columbia Law School Blue Sky Blog, *Recent Delaware Cases on Managing Conflicts: Board- and Stockholder-Level Measures from MFW Case Law* (Sept. 11, 2020) (documenting increased litigation challenging *MFW* compliance in transactions ranging from $20 million to $15 billion)

154. The term ''extortionary litigation'' describes strategic lawsuits designed primarily to extract settlements rather than remedy governance failures. Such litigation exploits Delaware's fee-shifting provisions and settlement dynamics to create nuisance value exceeding litigation costs.

155. ''*MFW* creep'' refers to judicial extension of dual protection requirements beyond traditional squeeze-out mergers to other controlling shareholder transactions, expanding the decision's scope beyond its original context.

156. Laster, *Eras*, *supra* note 147 (''a four-year trend involving increasingly significant legislative interventions suggests that the Current Era may be remembered as the Legislative Era.'').

157. Delaware Senate Bill 313 (2022) clarified that controlling shareholder transactions not resulting in minority elimination, are not automatically subject to entire fairness review solely because of controller involvement. The legislation addressed concerns about ''*MFW* creep'' and provided greater predictability for controlling shareholder transactions.

158. *See* Hon. J. Travis Laster, Big Law Ethics, Presentation at University of Iowa College of Law (2022), available at *https://www.delawarelitigation.com/2022/08/articles/commentary/big-law-ethics/* (criticizing attorney conduct in representative litigation and emphasizing need for enhanced judicial oversight).

159. Delaware corporate law recognizes two core fiduciary duties owed by those in control of corporate decision making— the duty of care (which requires informed, good-faith decision-making) and the duty of loyalty (which prohibits self-dealing and conflicts of interest). See *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (describing ''loyalty and care'' as the core fiduciary duties and subsuming good faith under the duty of loyalty). While directors are the primary fiduciaries, Delaware courts have also held that officers and controlling shareholders may owe fiduciary duties in appropriate circumstances. See *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (holding that ''corporate officers owe fiduciary duties that are the same as those of corporate directors''); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113–14 (Del. 1994) (applying entire fairness to controller transactions). Alleged breaches of fiduciary duty are assessed under one of three judicial standards of review: (1) the business judgment rule, the default standard, which presumes that directors acted on an informed basis, in good faith, and in the honest belief that their actions were in the best interests of the company, see *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); (2) enhanced scrutiny, applied in specific, recurring contexts such as defensive measures or change-of-control transactions, see *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43–44 (Del. 1994) (applying enhanced scrutiny to a change-of-control transaction); and (3) entire fairness, Delaware's most exacting standard, triggered when fiduciaries are conflicted or stand on both sides of a transaction, requiring a showing of both fair dealing and fair price. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

160. *See* Marc Levy, *Texas, Oklahoma and Nevada Make Changes to Lure Business Amid Delaware's 'Dexit' Concern*, ASSOCIATED PRESS (June 24, 2025) (reporting statutory reforms in Texas and Nevada while noting the absence of comparable judicial expertise found in Delaware); Amy Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. FORUM CORP. GOV. (May 8, 2024) (highlighting that Texas and Nevada have enacted reforms to attract incorporations, but lack the institutional depth of Delaware's corporate law system. ''No state comes close to Delaware in the depth and breadth of corporate case law'' developed from ''thousands of cases over time—built up from the early 1900s forward'').

161. Some of the innovations discussed in Part III have been modified or restricted by recent legislative developments, particularly SB 21, which narrowed stockholder inspection rights under Section 220 and altered various procedural protections. The purpose is not to describe current Delaware law in detail, but to illustrate a historical pattern of judicial innovation in response to emerging business challenges, which we argue distinguishes Delaware from competing jurisdictions and supports its continued dominance despite recent pressures.

162. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–17 (1997) (Professor Rock argues that Delaware's corporate law functions less through rule declaration than through retrospective norm-setting, in which courts ''function more as preachers than as policemen.'' Rather than simply applying doctrine, Delaware judges provide ''richly detailed and judgmental factual recitations,'' delivering ''corporate law sermons'' that depict saints and sinners, good guys and bad guys. These cases ''can be understood as providing a set of parables'' that ''fill out the normative job description'' of corporate managers, directors, and their legal advisors).

163. Kahan & Rock, *supra* note 157 (describing how boards adapted structurally to hostile takeover pressures).

164. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (articulating BJR); *see also* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (establishing the entire fairness test).

165. Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005*, 59 STAN. L. REV. 1465 (2007) (analyzing structural conflicts and the shift in board independence norms).

166. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995) (confirming enhanced scrutiny as an intermediate standard distinct from business judgment and entire fairness).

167. Unocal, 493 A.2d at 954–56 (defensive measures); Revlon, 506 A.2d at 182 (sale-of-control duties).

168. Unocal, Revlon, *supra* note 174 (two-pronged judicial test).

169. Revlon, *supra* note 174 at 954 (''omnipresent specter'' of board self-interest in defensive contexts).

170. Unitrin, 651 A.2d at 1387–88 (describing test for ''draconian'' defenses—preclusive or coercive).

171. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). The case involved Revlon's board favoring a $57.25-per-share offer from Forstmann Little over Pantry Pride's $58-per-share bid, partly to protect noteholders' interests under various covenants.

172. The Revlon framework has been refined to recognize three circumstances triggering enhanced review: Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994)

173. The framework's contextual sophistication enables Delaware law to address complex business realities that simple rules cannot accommodate

174. Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 250 (1989).

175. William T. Allen, Jack B. Jacobs & Leo E. Strine Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1290 (2001).

176. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) (narrowing when *Revlon* duties arise).

177. For background on controlling shareholder doctrine, *see* Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994) (establishing that controlling shareholder transactions are automatically subject to entire fairness review).

178. Alex Lindsey, *Expanding MFW: Delaware Law Should Offer a Business Judgment Rule Safe Harbor for All Conflicted Controller Transactions*, 29 FORDHAM J. CORP. & FIN. L. 339, 350 (2023).

179. This tension reflected a broader evolution in M&A litigation from seeking injunctive relief to pursuing post-closing damages, as documented in Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2015).

180. Delaware courts have cautioned that *Corwin* ''was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained.'' *In re Massey Energy Co. Deriv. & Class Action Litig.*, C.A. No. 5430-CB, at 19 (Del. Ch. May 4, 2017) (Bouchard, C.); *See also Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at 20 (Del. Ch. May 31, 2017) (holding that a structurally coercive vote negates Corwin cleansing).

181. *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 Cardozo L. Rev. 1949, 1954 (2021) (citing James Cox et al., *The Paradox of Delaware's ''Tools at Hand'' Doctrine: An Empirical Investigation*, 75 Bus. Law. 2123 (2020)).

182. Shapira, *Retooled*, *supra* note 188.

183. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997).

184. Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 123 (Del. 2006).

185. King v. VeriFone Holdings, Inc., 12 A.3d 1140, 1146–47 (Del. 2011); *see also* Grimes v. Donald, 673 A.2d 1207, 1216 & n.11 (Del. 1996) (describing Section 220 as among the ''tools at hand'' available to stockholders for investigating corporate wrongdoing before filing derivative suits); James D. Cox et al., *The Paradox of Delaware's ''Tools at Hand'' Doctrine: An Empirical Investigation*, 75 BUS. LAW. 2123 (2020) (analyzing the judicial development of the ''tools at hand'' principle encouraging pre-suit Section 220 inspections).

186. The most revolutionary development involved expanding discoverable materials to include electronically stored information (ESI)—emails, text messages, and private social media communications. The 2019 *KT4 Partners* decision ''kicked the doors wide open'' by requiring production of informal electronic communications alongside formal board minutes, recognizing that while formal documents are ''drafted after the fact, by paper-trail-generating lawyers,'' informal communications ''are done in real time and are usually less carefully edited.'' *See* KT4 Partners LLC, 203 A.3d at 756-58. This expansion enables stockholders to overcome modern pleading hurdles by extracting internal communications that contradict public disclosures (defeating *Corwin* defenses), demonstrate compromised committee independence (challenging *MFW* compliance), or reveal board-level oversight failures (revitalizing *Caremark* claims). *See* Shapira*, Retooled, supra* note 188*,* at 1965, 1981.

187. Pettry v. Gilead Scis., Inc., C.A. No. 2020-0173-KSJM, 2020 WL 6870461, at *1, *26 (Del. Ch. Nov. 24, 2020) (awarding $1.8 million in fees for ''glaringly egregious litigation conduct'' during Section 220 proceedings); *K*T4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 751–52 (Del. 2019) (reversing Court of Chancery's denial of email production where company failed to maintain traditional board-level records); Schnatter v. Papa John's Int'l, Inc., 2019 WL 194634, at *16 (Del. Ch. Jan. 15, 2019) (recognizing that text messages on personal devices may be subject to Section 220 if necessary and essential to stated investigative purpose); *I*nter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp., 2019 WL 479082, at *1 (Del. Ch. Jan. 25, 2019) (enforcing Section 220 demand for board materials and formal records).

188. Shapira, *Retooled*, *supra* note 188*,* at 1967.

189. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

190. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996). The *Caremark* decision represents perhaps the most significant development in corporate governance of the late 20th century, establishing the duty of oversight that requires boards to implement compliance systems to monitor corporate operations. The case arose from criminal and civil enforcement actions against Caremark, a healthcare company that paid kickbacks to physicians in violation of federal law. Chancellor Allen faced a fundamental question: when can directors be held liable for corporate misconduct they did not directly authorize or participate in? The Chancellor articulated a new duty requiring directors to ensure that ''information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.'' *Id.* Caremark established two circumstances where directors face liability for oversight failures: (1) where directors utterly fail to implement any reporting or information system; or (2) where, having implemented such systems, they consciously fail to monitor or oversee operations, thus disabling themselves from being informed of problems requiring their attention.

191. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019). *Marchand* heralded an era of greater Caremark scrutiny. Two subsequent Chancery decisions built upon its holdings. In *In re Clovis*, the court found sufficient pleadings where a biotechnology company's board ignored red flags about clinical trial protocols for its ''mission critical'' drug, noting enhanced oversight duties ''when a monoline company operates in a highly regulated industry.'' *In re Clovis Oncology, Inc. Derivative Litig.*, C.A. No. 2017-0222-JRS, 2019 WL 4850188, at *9–*10 (Del. Ch. Oct. 1, 2019). Similarly, in *Hughes*, VC Laster held that audit committee members who ''met sporadically, devoted inadequate time to their work, had clear notice of irregularities, and consciously turned a blind eye'' failed to establish reasonable monitoring systems. *Hughes v. Hu*, C.A. No. 2019-0112-JTL, 2020 WL 1987029, at *9 (Del. Ch. Apr. 27, 2020). These cases suggest three developments: (1) enhanced duties for ''mission critical'' compliance risks; (2) industry context matters, with heightened oversight required in regulated industries; and (3) clearer distinction between business risks (where Caremark claims fail, see *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 131 (Del. Ch. 2009)) and legal compliance failures (where liability may attach).

192. Notably, *Marchand* clarified the pleading requirements for *Caremark* claims. An increase in pre-suit Section 220 demands has provided a roadmap for plaintiffs to obtain internal documents such as board minutes to demonstrate the lack of board-level attention to mission-critical risks While *Marchand* didn't fundamentally changed *Caremark's teaching that these claims are difficult to plead, it highlights a crucial aspect: the plaintiff in Marchand* had used a books and record inspection under Section 220 to plead facts demonstrating that the board had not addressed food and safety issues, which the Supreme Court treated favorably. This allowed for more substantive and particularized allegations in the complaint, increasing the chances of surviving a motion to dismiss. Subsequent cases, such as *In re Clovis* and *In re Boeing*, also saw *Caremark* claims proceed past dismissal, often supported by facts obtained through Section 220 inspections.

193. *In re The Boeing Co. Derivative Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

194. *In re The Boeing Co. Derivative Litig, supra* note 200.

195. Tom Hals, *Meta Investors, Zuckerberg Reach Settlement To End $8 Billion Trial Over Facebook Privacy Violations*, REUTERS (Jul. 17, 2025).

196. Mike Leonard & Jennifer Kay, *Meta Deal Cuts Short Landmark Test of Corporate Oversight Law*, BLOOMBERG LAW (Jul. 18, 2025) (noting this was ''the most promising test to date for one of corporate law's most potent, yet elusive, liability theories'').

197. Randall S. Thomas, Wei Jiang & Tao Li, *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. Rev. 2133, 2148–49 (2020) (reporting that appraisal arbitrageurs achieved average litigation-driven returns of 98.2%).

198. *DFC Global Corp. v. Muirfield Value Partners*, 172 A.3d 346 (Del. 2017); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017).

199. Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 COLUM. L. REV. 941, 985–88 (2020).

200. Delaware courts retain discretion to rely on other valuation methods where market processes are inadequate. *See, e.g.*, In re Appraisal of Jarden Corp., 2019 WL 3244085 (Del. Ch. July 19, 2019) (rejecting deal price where sale process was flawed); cf. In re Appraisal of Stillwater Mining Co., 2019 WL 3943851 (Del. Ch. Aug. 21, 2019) (finding deal price a reliable indicator of value).

201. Martin Lipton, *The Delaware Courts and the Investment Banks*, HARV. L. SCH. FORUM CORP. GOV. (Oct. 30, 2015).

202. *I*n re Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 95–98 (Del. Ch. 2014) (The court found that RBC's undisclosed conflicts and self-interested conduct undermined the board's deliberations, thereby inducing fiduciary breaches).

203. V.C. Laster found that Columbia's CEO and CFO breached their fiduciary duties by unreasonably favoring TransCanada based on personal desires to trigger change-in-control benefits and retire, while TransCanada ''knowingly participated'' in these breaches by exploiting the officers' conflicts to secure a better deal. *See* In re Columbia Pipeline Grp., Inc. Merger Litig., 299 A.3d 393, 406 (Del. Ch. 2023), judgment entered, (Del. Ch. 2024), and rev'd, 2025 WL 1693491 (Del. June 17, 2025). The court emphasized that TransCanada's conduct reached the ''level of culpable participation'' when it reduced its offer price at the last minute and made coercive threats. *Id.* at 480. *See also* Gail Weinstein and Michael P. Sternheim, *Buyer Found Liable for Aiding and Abetting Target's Sale Process Fiduciary Breaches*, HARV. L. SCH. FORUM CORP. GOV (Jul. 24, 2023).

204. *See* In re Columbia Pipeline Grp., Inc. Merger Litig., 2025 WL 1693491 (Del. June 17, 2025). Justice Traynor's 100-page opinion found that because TransCanada ''lacked the required actual knowledge of these breaches'', there was no support for a finding of aiding-and abetting liability. *Id.* at *34. This reversal significantly raises the bar for successful aiding and abetting claims against buyers, requiring proof of actual rather than constructive knowledge of target fiduciary breaches.

205. Angela N. Aneiros, *Reincorporation: The Trojan Horse of Self-Dealing,* 77 BAYLOR L. REV. 67, 68 (2025) (arguing that ''reincorporation is a tactic designed to entrench greater power for directors and controlling shareholders, often concealed as granting shareholders greater decision-making authority'')

206. *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024).

207. *Tornetta, supra* note 213.

208. *Tornetta, supra* note 213.

209. *Tornetta, supra* note 213, at 6. *See also* Holger Spamann, *Implications of Tornetta v. Musk II for Executive Compensation and for Stockholder Ratification*, HARV. L. SCH. FORUM CORP. GOV. (Feb. 15, 2025).

210. *Tornetta, supra* note 213.

211. *Tornetta, supra* note 213.

212. The concept of a ''superstar CEO'' refers to executives whose personal brand and vision become inseparable from their company's success and market valuation. These leaders, exemplified by figures like Musk at Tesla, Steve Jobs at Apple, or Jeff Bezos at Amazon, exercise influence far beyond their formal authority through several characteristics: (1) they maintain cult-like followings among shareholders, employees, and the public; (2) their personal statements and actions significantly impact company stock prices and strategic direction; (3) they are perceived as indispensable to their company's operations and future success; and (4) they often blur the lines between personal and corporate interests. This phenomenon creates unique challenges for traditional corporate governance frameworks, which assume arm's-length negotiations between independent boards and management. *See* Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 Wash. U. L. Rev. 1353 (2023).

213. *Tornetta, supra* note 213.

214. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

215. *Tornetta, supra* note 213.

216. *Tornetta, supra* note 213.

217. Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977).

218. Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110, 1113-14 (Del. 1994).

219. *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

220. *Tornetta, supra* note 213.

221. *See In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727 (Del. Ch. 2016); *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

222. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

223. *Tornetta, supra* note 213.

224. *Tornetta, supra* note 213.

225. *Tornetta, supra* note 213.

226. Tom Kircher & David Hamilton, *Elon Musk Gets 77% Approval from Shareholders to Get Back His Big, $44.9 Billion Tesla Pay Package*, Associated Press (Jun. 14, 2024).

227. *Tornetta v. Musk*, No. 2018-0408-KSJM, 2024 WL 4930635 (Del. Ch. Dec. 2, 2024).

228. *Tornetta, supra* note 234.

229. *Tornetta, supra* note 234.

230. *Tornetta, supra* note 234.

231. *Tornetta, supra* note 234.

232. *See* Hamdani & Kastiel, *supra* note 219.

233. Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994).

234. The ''3000-pound gorilla'' theory describes the phenomenon where controlling shareholders or powerful executives can dominate corporate decision-making through their sheer presence and implied power, without needing to make explicit threats or engage in overt coercion. Named after the old joke ''Where does a 3000-pound gorilla sit? Anywhere it wants to,'' this concept captures how overwhelming influence creates inherent coercion. This dynamic undermines traditional corporate governance assumptions about arm's-length negotiations and independent decision-making, as the mere presence of the ''gorilla'' taints the entire process, making procedural protections like special committees or shareholder votes potentially ineffective safeguards against self-interested transactions. See Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994) (establishing the ''inherent coercion'' doctrine for controlling shareholders); see also In re Pure Res., Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (discussing how controlling shareholders create coercive risks).

235. Mike Leonard, *Tesla Corporate Shift to Texas Ruled Valid by Delaware Judge*, BLOOMBERG LAW (Mar. 4, 2025).

236. S.B. 21, 155th Gen. Assemb. (Del. 2025).

237. See Aditya Soni, *Tesla Approves Share Award Worth About $29 Billion to CEO Elon Musk*, REUTERS (Aug. 4, 2025), *https://x.com/Tesla/status/1952310686937190721,*(noting that the package could be voided if the court allows the previous plan to be reinstated, and that the board ''reiterated its confidence'' in Musk's leadership through an AI-focused transition).

238. Matthew P. Salerno et al., *Delaware Court of Chancery Invalidates Common Provisions in Stockholder Agreements*, Cleary Gottlieb (Mar. 4, 2024).

239. Douglas Rappaport, Jason Koenig & Jacqueline Yecies, *Delaware Chancery's Moelis II Decision Provides Cautionary Tale for Boards and Activists*, Harv. L. Sch. Forum on Corp. Gov. (Mar. 20, 2024).

240. M&F Worldwide Corp. v. MacAndrews & Forbes Holdings, Inc., 88 A.3d 635 (Del. 2014).

241. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013), *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014); 8 Del. C. § 102(f), § 109(b).

242. Politan v. Masimo Corporation, C.A. No. 2022-0948-NAC (Del. Ch. Oct. 21, 2022).

243. Del. Code Ann. tit. 8, § 220.

244. Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, UCLA SCH. OF L., Law-Econ Research Paper No. 24-04 (July 29, 2024).

245. Delaware Division of Corporations, Annual Report Statistics (2024), *https://corp.delaware.gov/stats/.*

246. *Supermajority Requirement Inapplicable to Reincorporation Vote to Nevada, Says Delaware Court*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 3, 2024) (citing data compiled by Prof. Stephen Davidoff Solomon showing that, from Jan. 1, 2021 to Aug. 19, 2024, 18 Delaware corporations proposed reincorporation to other states—14 to Nevada, 2 to Texas, and 1 each to Colorado and Maryland).

247. *Supermajority,* HARV. L. SCH. FORUM CORP. GOV.*. supra* note 253.

248. Daniel Taylor, *Delaware's Manufactured Corporate Crisis*, CLS BLUE SKY BLOG (Mar. 5, 2025).

249. Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law*, EUR. CORP. GOVERNANCE INST. Law Working Paper No. 761/2024, at 1 (2024).

250. Barzuza, *Nevada v. Delaware, supra* note 256.

251. Tesla, Inc., *Tesla Releases Results of 2024 Annual Meeting of Stockholders* (June 13, 2024).

252. The Trade Desk, Inc., *The Trade Desk Announces Approval of Reincorporation to Nevada* (Nov. 14, 2024).

253. Dropbox, Inc., *Information Statement on Schedule 14C* (filed Feb. 10, 2025).

254. Tesla, Inc., *Preliminary Proxy Statement on Schedule 14A* (filed Apr. 17, 2024).

255. Aneiros, *Reincorporation, supra* note 212.

256. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 938 (2012) (''Nevada has reformed its laws to free officers and directors from virtually any liability arising from the operation and supervision of their companies. This strategy has allowed Nevada to attract...firms with a preference for strong management protection that is not satisfied by Delaware law.''). *See also* Aneiros, *Reincorporation*, *supra note 212 (noting that Nevada law offers fewer litigation rights to stockholders and provides greater litigation protections to fiduciaries such as directors and executive officers and that Nevada has been coined the ''no liability regime'').*

257. Aneiros, *supra* note 212.

258. Vinson & Elkins LLP, *Texas Business Court* (series), Vinson & Elkins LLP Insights (last updated July 2025) (describing the creation of a statewide specialized business court in Texas for high-stakes governance and complex corporate litigation, first operational in September 2024).

259. Tex. S.B. 29 (2025).

260. Nev. A.B. 239 (2025); Fenwick & West LLP, *Nevada Adopts Significant Amendments to its Corporate Law* (May 28, 2025).

261. Nev. Rev. Stat. § 78.240 (as amended by A.B. 239); *see* Brownstein Hyatt Farber Schreck, *Nevada Enacts Corporate Legislation and Advances Dedicated Business Court* (June 24, 2025).

262. Barzuza, *Market Segmentation, supra* note 263.

263. Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 74 (2022).

264. See Synopsis, Del. S.B. 313, 152d Gen. Assemb., Reg. Sess. (2024), *https://legis.delaware.gov/BillDetail/141480* (''The Court of Chancery recently observed that '[t]he expansive use of stockholder agreements suggests that greater statutory guidance may be beneficial.' This legislation provides that guidance and provides for a different rule than the portion of the Moelis decision in which the Court held that contract provisions of this nature must be included in the certificate of incorporation to be valid.''); see also *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1838002 (Del. Ch. Apr. 29, 2024) (invalidating stockholder agreement provisions inconsistent with board authority under the DGCL).

265. Letter from Hon. Kathaleen S. McCormick, Chancellor, Del. Ct. of Ch., to Exec. Comm., Del. State Bar Ass'n (Apr. 12, 2024), excerpted in Jordan Howell, *Top Delaware Judge Calls for More Debate Over Contentious Corporate Amendments*, Del. Call (May 29, 2024).

266. See *Controversial Corporate Law Bill Moves to Final Vote*, *Delaware Business Times* (June 20, 2024) (quoting Elson: ''this kind of revision ... more dangerous than just changing the rules ... destroys our brand of neutrality'').

267. S.B. 21, § 1. In addition, S.B. 21 defines a control group as ''2 or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.'' *Id. See also* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 Del. J. Corp. L. 525, 555 (2025).

268. Foley & Lardner LLP, *SB21: Delaware Responds In The DExit Battle* (Mar. 12, 2025) (also noting that Delaware's hurried process can be seen as a response to a gathering movement by corporations to reincorporate in other jurisdictions, dubbed 'DExit', which threatens Delaware's mantle as the undisputed leader in state corporate law, and a material revenue source for the State).

269. Sarah Petrowich, *Delaware House Passes Corporate Law Overhaul After Rejecting Five Proposed Changes, Gov. Meyer Signs It*, Delaware Public Media (Mar. 25, 2025), *https://www.delawarepublic.org/politics-government/2025- 03-25/delaware-house-passes-corporate-law-overhaul-after-rejecting-five-proposed-changes.*

270. Jordan Howell, *Dissent In House Judiciary Over Controversial Corporate Amendments*, DELAWARE CALL (Jun. 19, 2024), *https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporateamendments/.*

271. *Protecting Delaware's Future: Debunking the false SB 21 'controversy*', Spotlight Delaware (Mar. 25, 2025).

272. *Delaware lawmakers to hear SB 21 derided as a 'billionaires' bill', Spotlight Delaware (Mar. 11, 2025) (*noting that a group of attorneys from 21 law firms sent an open letter to lawmakers stating that Townsend's bill would clarify Delaware law and allow it ''to modernize and respond to market developments).

273. *See* Sullivan & Cromwell LLP, Client Memorandum, *Senate Bill 21: Delaware Legislature Responds to Judicial Developments in M&A Transactions* (Feb. 18, 2025).

274. *See Delaware Changes Its Corporate Law: What Litigators and Clients Need To Know About Senate Bill 21,* Mayer Brown LLP (Apr. 3, 2025) (characterizing the legislative interventions as responses to judicial decisions that were ''sharply at odds with prevailing M&A practice'' and ''unusually formalistic'' in ways that ''ran contrary to common M&A practices.''); *also see Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions,* Debevoise & Plimpton LLP (Mar. 28, 2025).

275. *See* Eric Talley, Jeffrey N. Gordon & Stephen M. Bainbridge, *A Proposed Opt-In Feature for Delaware Senate Bill 21*, CLS BLUE SKY BLOG (Mar. 19, 2025).

276. See, e.g., Lawrence A. Cunningham, *What Is the Furor Behind Delaware SB 21?*, ProMarket (Apr. 9, 2025).

277. *See* Council of Institutional Investors, *CII Opposes Delaware Senate Bill 21* (Mar. 21, 2025) (criticized SB 21 as a legislative overreach that could reduce oversight over conflicted transactions and limit equitable remedies).

278. *VIEWPOINT: SB 21 could cost Delaware millions*, DELAWARE BUSINESS TIMES (Mar. 17, 2025).

279. Kenneth Khoo and Roberto Tallarita, *The Price of Delaware Corporate Law Reform* (Jun. 24, 2025); available at *http://dx.doi.org/10.2139/ssrn.5318203* (further noting The damage was concentrated among firms with controlling shareholders, with dual-class companies suffering 2.3% worse abnormal returns and companies with voting blocks over 15% declining an additional 1.5%, suggesting investors viewed the reform as facilitating excessive extraction of private benefits by controllers at minority shareholders'expense).

280. *See* Stephen M. Bainbridge, *Delaware Senate Bill 21: What It Does and What Questions Remain Open*, SSRN Paper No. 25-02 (May 6, 2025).

281. Eric Talley, *A Contractarian Path Forward for Delaware: A Modest Proposal for SB 21*, CLS BLUE SKY BLOG (Mar. 7, 2025).

282. *Delaware's Corporate Law Reform Would Fortify Stable Governance*, BLOOMBERG LAW (Mar. 18, 2025).

283. *Did SB 21's Changes to Delaware Corporate Law Harm Shareholders?*, CLS BLUE SKY BLOG (Apr. 15, 2025).

284. Kenneth Khoo & Roberto Tallarita, The Price of Delaware Corporate Law Reform (working paper, June 24, 2025, last revised Oct. 15, 2025) at 3, *https://ssrn.com/abstract=5318203.*

285. *Governor Meyer Signs SB 21 Strengthening Delaware Corporate Law*, STATE OF DELAWARE NEWS (Mar. 26, 2025).

286. Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'DExit' to Depart Delaware*, Reuters (May 14, 2025).

287. Daniel Taylor, *Delaware's Manufactured Corporate Crisis*, THE CLS BLUE SKY BLOG (Mar. 6, 2025) (noting that ''There is zero evidence of any crisis of reincorporation, let alone one that would put the people of Delaware at risk.'').

