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Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?

Pierluigi Matera

DELAWARE'S DOMINANCE, WYOMING'S DARE: NEW CHALLENGE, SAME OUTCOME?

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ABSTRACT

Despite increasing criticism, Delaware's dominance in corporate law has not experienced a significant decline: as of today, 67.8 percent of Fortune 500 companies are still incorporated in its jurisdiction. Nevada is known as Delaware's most important competitor, with an aggressive strategy that has overridden the efforts of any other jurisdiction. Yet, its success has been limited to a specific market segment: small firms with low institutional shareholding and high insider ownership.

Scholars suggest several explanations for both the rise and the staying power of Delaware. These explanations are essentially subsumed under the credible commitment theory and the network theory. According to the former, investors rely upon Delaware's commitment towards the business community; while the latter emphasizes how Delaware is profiting from the position it has achieved. The credible commitment theory and the network theory sometimes overlap and combine. Both predict that Delaware is hard to dethrone.

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In recent years, commentators have argued that this hegemony might be endangered by two different threats: the migration of cases induced by Delaware courts' response to overlitigation; and the invasive growth of federal regulation — in particular, the possible introduction of a federal incorporation. Yet, criticisms and predictions on Delaware's decline are recurring and always follow the same pattern. In this instance, unsurprisingly, the migration turned out to be marginal, and although the debate on a federal incorporation was revived in conjunction with a political campaign, it fizzled out soon after the Democratic primaries ended.

I contend that a mounting challenge to Delaware's dominance is mostly flying under the radar. Wyoming is targeting a new segment of the market for corporate charters: digital asset businesses. This jurisdiction is attempting to attract these incorporators by enacting liberal legislation and providing their companies with a safe harbor.

Wyoming's aggressive stance provides the motivation to canvass causes and consequences, criticism, and challenges to Delaware's dominance. The investigation can generate insights as to why Wyoming's strategy will succeed or fail. In fact, this market segmentation approach is the same tactic that Nevada adopted, though Wyoming is applying the strategy to a sector that has meaningful growth potential and is pushing it to the point of introducing exemptions to state securities laws and banking regulation.

The application of the credible commitment theory and the network theory to Wyoming's approach suggests that this strategy of building a reputation and proving a commitment to tech-incorporators is on the right track, but success also requires a confluence of events that need time. To ensure supremacy in digital assets, Wyoming should develop an expertise that is too costly to be easily replicated by other jurisdictions and earn a share of the charters market before federal legislature and regulatory bodies pre-empt Wyoming's law for cryptocurrencies.

To the extent that Wyoming's strategy proves to be effective, it will gain this jurisdiction the lead only in the blockchain segment of the market, while Delaware will continue to dominate the rest of corporate law.

In light of all this, Wyoming's approach might be a dare. Yet, it is also the most promising—maybe the only possible—challenge to Delaware's dominance at the present time.

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I. INTRODUCTION

1209 North Orange Street in Wilmington,[1] Delaware, is an address that few would recognize as a site of American power.[2] Yet, it could probably rival 1600 Pennsylvania Avenue and any other address in Washington D.C. There, in a bland, single-story brick building one is unlikely to give a second glance while driving past, is the registered office of 67.8 percent of Fortune 500 companies.[3] This means that Delaware, having less than one-third of one percent[4] of the U.S. population, is by far the primary place of incorporation for the most important businesses in the world.

This numerical dominance would not matter—and would not exist—if it were not for the well-known internal affairs doctrine, according to which "the law of the state of incorporation normally determines issues relating to the internal affairs of the corporation."[5] Since the rules governing the internal affairs of a corporation originate from the state in which the corporation is chartered, all disputes over corporate governance involving companies incorporated in Delaware are adjudicated using Delaware law. As a consequence, Delaware courts adjudicate so many cases on corporations that they have developed a robust body of legal precedents, far outstripping any other jurisdiction. Even in cases where

1. Precisely, in the Brandywine neighborhood of Wilmington.

2. *See* Kent Greenfield, *End Delaware's Corporate Dominance*, DEMOCRACY, https://democracyjournal.org/magazine/39/end-delawares-corporate-dominance/ [https://perma.cc/GYF7-7N7A] (last visited Jan. 24, 2022). *See generally* Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 L. & CONTEMP. PROBS. 135 (2004).

3. The renowned annual list compiled by Fortune that ranks the largest U.S. corporations by total revenue in that fiscal year. More than one million business entities claim Delaware as their home state. 80 percent of recent IPO firms are incorporated in Delaware. *See A Message from the Secretary of State Jeffrey W. Bullock*, DEL. DIV. CORPS. 2019 ANN. REP. STATS., https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf [https://perma.cc/7KDH-EJUE] (last visited Oct. 17, 2021).

4. Approximately 950,000.

5. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983). To put it in other words, "[t]he internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).

Delaware corporate law does not apply, other jurisdictions often look to the precedents of Delaware courts. Businesses incorporate in this jurisdiction because they seek Delaware law and its court system; this is what maintains Delaware's prevalence over competitors in the corporate charters market. This hegemony and the resulting pre-eminence in corporate law constitute Delaware's dominance.

Such a by-product of American federalism[6] has persisted for over a century[7], although it has been regularly criticized by scholars and challenged by aspiring competitors.[8] Recently, commentators have focused on the migration of cases out of Delaware and on a possible federal incorporation law.[9] Others argue that entrepreneurial offshore jurisdictions have recently been using permissive rules in corporate governance and specialized business courts to attract American public corporations.[10] Yet, I contend that the current, most significant threat for Delaware's dominance has mostly gone under the radar: the mounting challenge posed by Wyoming through technological innovation, namely, through Distributed Ledger Technologies (DLTs) such as blockchain.

Wyoming's aggressive stance provides the motivation to canvass Delaware's dominance. In particular, an analysis of the causes and consequences, criticisms, and challenges can generate insights as to why Wyoming's strategy will succeed or fail.

In Part II, I illustrate the origins of Delaware's lead and the reasons for its endurance. Scholars have traditionally subsumed said reasons under two main theories: the credible commitment theory and the network theory. Under the credible commitment theory, managers and investors rely upon Delaware's commitment towards the business community: Delaware lawmakers respond promptly to the needs of corporate constituencies, and the efficiency and predictability of its judicial system permit businesses to thrive and flourish. This reliance is held to be the real asset from which this jurisdiction is benefitting. The network theory emphasizes how Delaware is profiting extensively from the reputation and position it has achieved. For instance, lawyers tend to encourage

6. *See* Robert B. Thompson, *Delaware's Dominance: A Peculiar Illustration of American Federalism*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 57, 75-77 (Stephen M. Bainbridge et al. eds., 2018).

7. *See* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 42-43 (2006); Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 271-72 (1976).

8. *See infra* Part III.

9. *See* discussion *infra* Section III.B.

10. *See infra* Section III.C.3.

clients to incorporate in Delaware because they are taught Delaware corporate law in law schools and because its courts grant higher attorneys' fees. These two theories often intertwine and combine. Both conclude that Delaware is hard to dethrone.

In Part III, I focus on criticism and challenges. Nevada is known as the traditional Delaware competitor, with an aggressive strategy that has overridden the efforts of any other jurisdiction. Yet, its success has been limited to a specific market segment (small firms), and Delaware's dominance ultimately persisted.

A second threat was posed by the migration of litigation out of Delaware. This migration occurred in response to some doctrinal shifts adopted by Delaware's courts to curb overlitigation in Mergers and Acquisitions (M&A). However, the migration was marginal and, in the end, did not undermine Delaware's dominance.

Finally, another potential obstacle comes from the federal erosion of state corporate law. This is a general threat since it would impact the whole corporate charter market. If federal legislation takes over corporate law, the room for competition shrinks; but also, the differentiation between state laws narrows, resulting in Delaware's attractiveness becoming less enticing, which would affect its authority. For instance, federal erosion could derive from Congressional attempts to curtail some inequalities allegedly caused by Delaware's lead in corporate law. In this regard, a recent federal bill, the "Accountable Capitalism Act," stimulated a vivid debate. The bill did not pass but, if enacted, would have introduced several significant amendments and required large companies to obtain a federal corporate charter in addition to the state incorporation. I argue that a federal incorporation requirement is unlikely to see the light of day. History proves that the federal lawmakers have never succeeded in pushing it very far. Usually, the debate gains strength in conjunction with a crisis or a presidential election and fades afterwards.

Some commentators contend that federal intervention might also be provoked by offshore corporate law havens. These jurisdictions have been attempting to attract American publicly traded corporations by offering a lax corporate law and enabling these firms to elude American mandatory rules in corporate governance. This would erode investor and shareholder protections that are guaranteed by the core of state corporate law. Yet, there are some conflicting indications and countervailing considerations on the threat posed by this international jurisdictional competition. Claims on this topic are premature anyway; further, any intervention to halt this state-to-nation state competition might not necessarily affect the state-based market.

In contrast—as I argue in Part IV—technological innovation has the potential to kick off a new competition in the market for corporate charters, one that centers around attracting blockchain businesses. Some jurisdictions see this technology as a risk to manage through regulation. Others see it as an opportunity to innovate corporate governance. Wyoming has a different, sophisticated strategy: it has passed avant-garde legislation to provide a safe harbor for digital asset companies, introduced a blockchain-dedicated chancery court, and replicated the initiatives put in place by Nevada to attract incorporators.

In essence, Wyoming aims to carve out a specific share of the corporate charters market, remove it from the sphere of Delaware's control, and dominate it. This market segmentation approach is the same tactic that Nevada adopted for its niche but, unlike Nevada, Wyoming is applying it to a sector that has meaningful growth potential and is pushing the differentiation to the point of implementing state securities and banking regulations.

The application of the credible commitment theory and the network theory indicates that Wyoming's strategy needs a distinct combination of factors to be successful. Above all, it needs time to build a credible reputation and a network from which to benefit. Further, a competitive advantage merely based on legislation might be transient; free-ride legal innovations are easy for other jurisdictions to copy and are likely to lead only to short-term gains in the market for corporate charters. Wyoming should achieve an expertise that other jurisdictions could not easily replicate, such as specialized courts and a body of case law on blockchain and virtual currencies. However, this would also need time to develop.

Nevertheless, in the face of particularly liberal laws, such as those passed by Wyoming for cryptocurrencies and tokens, federal legislature might intervene by enacting some regulation and halt the state's ambition.

That said, despite the doubts and the risky approach, 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.

II. THE RISE OF DELAWARE'S DOMINANCE

A. THE ORIGINS

1. The Market for Corporate Charters

The story of Delaware's dominance is mostly the story of American capitalism and American corporate law. The market for corporate charters did not start until the last quarter of the 19th century.[11] Previously, there was no such market for the simple reason that there was no need for it; state legislatures granted corporate charters by passing individual, customized pieces of legislation.[12] Besides, there was virtually no significant interstate trade, and local entrepreneurs had no reason to incorporate outside the state where they were conducting business.[13] Needless to say, state legislatures were inclined to grant more desirable and less restrictive charters to those incorporators who were able to "influence" them in some way.[14] This inclination generated inequalities and raised some criticism.[15]

In 1811, the State of New York passed the first general incorporation law.[16] Shortly after, many states followed suit and passed enabling laws that permitted incorporators to establish a corporation by simply meeting

11. In 1875, there was a shift from incorporations via special acts to incorporation under general laws; yet, the trend became dominant starting in 1878. *See* GEORGE HEBERTON EVANS JR., BUSINESS INCORPORATIONS IN THE UNITED STATES, 1800-1943 31-32 (1948). *See also* Robert E. Wright, *US Corporate Development 1790-1860*, PENNLIBRARIES (Jan. 26, 2015), https://repository.upenn.edu/mead/7/ [https://perma.cc/HFG9-CTRD]. On the intertwine among capitalism, corporate law, and American history, see JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES (1st ed. 2021).

12. *See* EVANS JR., *supra* note 11, at 31.

13. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 4 (2d ed. 1991).

14. *Id.* at 5-7.

15. Corporations, which are nowadays the basic vehicle for market and competition, were at the beginning a source of inequality: they were actually conceived in order to grant privileges, such as monopoly trading rights and tax exemptions – in addition to the limited liability that remains still today. *See* LORRAINE TALBOT, CRITICAL COMPANY LAW 8 (1st ed. 2008).

16. *See* Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States*, *in* ORGANIZATIONS, CIVIL SOCIETY AND THE ROOTS OF DEVELOPMENT 147, 152 (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017).

some requirements and filing an application.[17] The legislatures set a model corporate form but, unsurprisingly, did not repeal the system of special charters and did not start a competition for incorporation. As a matter of fact, the new legislations were not underpinned by the purpose of curbing inequalities.[18] Rather, they were merely intended to increase the number of incorporations and benefit further from the tax revenues.[19] The result was a two-tier market for incorporation based on price: the wealthiest capitalists could purchase special charters while the poorest had to meet the requirements set out in the state general incorporation laws and merely enjoy the standardized privileges provided therein.[20]

Then came the era of the constitutional prohibition of the special charter system. Louisiana was the first state to adopt an absolute prohibition in 1845.[21] Other states adopted a similar approach by passing partial prohibitions, and the granting of special charters became restricted to those cases "where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws."[22] This evidently did not mean much, since the same state legislatures had to decide when a case required a special act and, consequently, pass it.[23] Thus, despite the technical change, state legislatures substantially retained the power to grant special charters and continued to issue them.[24] The best law was simply for sale, and only the richest could afford it.

This system ended due to the growth of the previously state-based markets and a clarification on a question of law: whether a corporation incorporated in one state could trade in another. Before the industrial expansion of the second half of the 19th century, the question was not so pressing and it was generally considered not permitted.[25] In the post-

17. *Id.* at 153-54.

18. *Id.* at 159-60.

19. Since passing customized charters was time-consuming and state legislatures were unable to satisfy all the requests. *See* TALBOT, *supra* note 15, at 11.

20. *See* Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, J.L. STUD. 129, 143 (1977).

21. *See* TALBOT, *supra* note 15. For a discussion of the 1845 Louisiana Constitution, see Judith K. Schafer, *Reform or Experiment? The Louisiana Constitution of 1845*, *in* IN SEARCH OF FUNDAMENTAL LAW: LOUISIANA'S CONSTITUTIONS, 1812-1974 21, 21-36 (Warren M. Billings & Edward F. Haas eds., 1993).

22. N.Y. CONST. art. X, § 1.

23. *See* Butler, *supra* note 20, at 144.

24. *Id.* at 143.

25. *See* SARATH SANGA, THE ORIGINS OF THE MARKET FOR CORPORATE LAW 2 n.1 (2020), (quoting Bank of Augusta v. Earle, 38 U.S. 519 (1839): "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which

Jeffersonian, industrializing America, the dramatic acceleration of economic growth caused small, local firms to give way to large companies.[26] Thus, the question on whether a corporation could trade in any state regardless of the state of incorporation demanded an answer.

The 1869 U.S. Supreme Court's decision *Paul v. Virginia*[27] is traditionally considered to be said answer.[28] Although the Court upheld the restriction imposed by Virginia on insurance companies incorporated in other jurisdictions, it did not explicitly state that a corporation registered elsewhere could not trade in Virginia.[29] The by-product of this decision has been interpreted by many scholars as a judicial recognition of interstate business for "foreign" companies and the beginning of states' competition to attract incorporators (and the revenues associated therein) by offering the most suitable corporate law.[30]

In contrast, some argue that Supreme Court jurisprudence, including *Paul*, did not promote the competition for a national incorporation.[31] According to this view, *Paul* is "one in a long line of cases that opposed a national market and empowered states to discriminate against foreign corporations."[32] Instead, they argue, the incorporation market emerged as a result of industrial expansion and interstate commerce.[33]

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it is created."), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503628 [https://perma.cc/3JBV-8WJW]. Sanga adds, "No less than Alexander Hamilton, the champion of corporate America, believed that a corporation chartered in one state had no inherent power to operate in another." *Id.* at 2.

26. *See* TALBOT, *supra* note 15, at 10.

27. 75 U.S. 168 (1869).

28. "The traditional narrative paints a chain of causality that begins in the Supreme Court, moves to New Jersey, and ultimately settles in Delaware." SANGA, *supra* note 25, at 2. Sanga adds that these widely held beliefs are untrue. *Id.* at 1.

29. *See* TALBOT, *supra* note 21, at 10.

30. LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 228-31 (2014); TALBOT, *supra* note 21, at 10.

31. *See* SANGA, *supra* note 25, at 9-12.

32. *Id.* at 12. *See* Hooper v. California, 155 U.S. 648, 652, 656-59 (1895); Phila. Fire Ass'n v. New York, 119 U.S. 110, 118-20 (1886); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571 (1949); Doyle v. Cont'l Ins. Co., 94 U.S. 535, 542 (1876). In this view, the Supreme Court opposed a national market for corporate charters throughout the 19th century and into the 20th century, by regularly affirming the states' ability to discriminate against companies incorporated in other states.

33. "The market for corporate law emerged in spite of–not because of–the Supreme Court." *See* SANGA, *supra* note 25, at 4.

Regardless of whether it was a product, a by-product, an unintended consequence of Supreme Court jurisprudence, or the outcome of driving economic forces, by the late 19th century the market for incorporations was established and bustling.[34]

2. From New Jersey's Short-Lived Success to the Rise of Delaware's Dominance

As the market for corporate charters developed, New Jersey was the first to profit from the opportunity and establish a leading position.[35] This jurisdiction was already known for its innovative approach to corporate law. In 1875, it had passed the first of many acts considered to be the blueprint for modern general incorporation laws.[36] This act, combined with the 1889 amendments,[37] made New Jersey a desirable state of incorporation.[38] The physical proximity to New York might also have been a relevant factor.

In 1891, the state legislature enacted the New Jersey Holding Company Act, which permitted corporations to control or own stock in other entities.[39] In 1896, new amendments removed time limitations on corporate existence and general limitations on the corporation's capitalization.[40] These amendments also made mergers easier and permitted a wide scope of business activity.[41]

Modern corporate law was taking shape, and, above all, New Jersey's strategy of liberal corporate statutes was succeeding. Incorporations in New Jersey skyrocketed and so did the revenues from incorporation fees and franchise taxes.[42] As a result, by the turn of the

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34. *Id.* at 19. *See generally* EVANS JR., *supra* note 11.

35. SANGA, *supra* note 25, at 2-3.

36. *See* Fred Freedland, *History of Holding Company Legislation in New York State: Some Doubts as to the "New Jersey First" Tradition,* 24 FORDHAM L. REV. 369, 377 (1955).

37. "The 1889 statute authorized all corporations formed under the 1875 general corporation act, as amended, to purchase 'the stock of any company or companies owning, mining, manufacturing or producing materials, or other property, necessary for their business . . . .'" *Id.* at 400.

38. *Id.*

39. N.J. STAT. ANN. § 17:27A-1 et seq. (West 1891).

40. *See* SANGA, *supra* note 25.

41. *Id.*

42. *See* Hilt, *supra* note 16, at 153-54.

new century,[43] New Jersey had paid off its state debt and abolished property taxes.[44]

Predictably, other states followed New Jersey's example and adopted similar corporate statutes.[45] Delaware in particular mirrored New Jersey's legislation on corporations, to such an extent that, in a 1900 case, a Delaware court upheld that New Jersey's legal precedents on corporations had authority in Delaware as well.[46] Fundamentally, this allowed Delaware's courts to exploit New Jersey's more mature body of case law and attract incorporators. Thus, starting from 1904, incorporations in Delaware began to grow more rapidly than in other states.[47]

In 1910, with the election of Woodrow Wilson as governor,[48] the success of New Jersey as incorporators' favorite destination came to an end. Wilson had based his political campaign on a fierce opposition to large corporations and their alleged abuses.[49] Once elected, he made the state legislature pass a series of bills, known as the Seven Sisters, which enhanced regulators' powers and restricted corporate ones.[50] Some suggest that this shift to a more regulatory approach was the main reason why incorporators migrated from Trenton to Wilmington to incorporate (or even re-incorporate) their businesses in Delaware.[51] Others see it as a

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43. Precisely in 1902.

44. *See* Cristopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 667, 681-82 (1989).

45. *See* P. M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEG. HIST. 237, 274 (2010); TALBOT, *supra* note 15, at 15.

46. Since "legislature, in adopting the language of the New Jersey statute, had in mind the construction given to it by the New Jersey courts . . . ." Wilmington City Ry. Co. v. People's Ry. Co., 47 A. 245, 254 (Del. Ch. 1900).

47. Specifically, from 1904 to 1917 the trends diverge: the number of incorporations in Delaware and New York climbed significantly, while in other states, such as Maine, they plummeted. *See* EVANS JR., *supra* note 11, at 31.

48. Woodrow Wilson later became the 28th President of the United States.

49. *See* Saladin Ambar, *Woodrow Wilson: Campaigns and Elections*, UVA MILLER CENTER, https://millercenter.org/president/wilson/campaigns-and-elections [https://perma.cc/E7SZ-9VZX] (last visited Jan. 22, 2022); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 84 YALE L.J. 663, 664 (1974).

50. *See* Joseph F. Mahoney, *Backsliding Convert: Woodrow Wilson and the "Seven Sisters"*, 18 AM. Q. 71, 71-73, (1966); Cary, *supra* note 49.

51. *See* Mahoney, *supra* note 50; Cary, *supra* note 49. *See also* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 270 (1976); Grandy, *supra* note 44, at 687-88; Lyman Johnson, *Dominance by Inaction: Delaware's Long Silence on Corporate Officers*, *in* CAN DELAWARE BE DETHRONED?

factor that only contributed to a process that was already underway. They argue that "New Jersey was likely a victim of its own success," since other jurisdictions simply copied its legislation and reduced its competitive advantage.[52]

In any event, by the end of the 1920s, the success of Delaware in attracting incorporators was clear, and the gap between Delaware and other states became more pronounced.[53] Delaware's dominance had begun. Their success in the market for incorporation carried with it a pre-eminence in corporate law: the cases and opinions issued by Delaware's courts proliferated, and its corporate legislation became progressively more elaborate.[54]

However, the true achievement of Delaware's policy was the consolidation of this dominance; a dominance that brings over a quarter of state revenues through incorporation fees and franchise taxes,[55] makes Delaware's lead unquestionable still today, and significantly affects the evolution of corporate law, even outside the United States.[56]

EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 182, 182 (Stephen M. Bainbridge et al. eds., 2018); Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880 1910*, 32 J. CORP. L. 323, 324-26, 329 (2007); Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 869 (2016); Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 225, 226 (Stephen M. Bainbridge et al. eds., 2018).

52. SANGA, *supra* note 25, at 5. Sanga emphasizes that New Jersey's decline as the leading site of incorporation began shortly after 1903—that is nearly a decade before the Seven Sisters bills were passed and nearly seven years before Woodrow Wilson campaigned for governor. According to this view, New Jersey's earlier decline was simply the result of the basic competition from other states which had copied its liberal pre-1913 corporate legislation. *Id.* at 16-18. Sanga adds: "[L]iberal corporate laws were specifically designed to attract out-of-state firms. Having clearly achieved that goal, they were then simply copied by other states. For example, New Jersey's holding company statute–its signature creation–was copied by Pennsylvania, Maine, West Virginia, Ohio, and others within a few years." *Id.* at 5.

53. Another factor may be the proximity to New Jersey and to New York. *See* SANGA, *supra* note 25, at 3.

54. *See* Thompson, *supra* note 6, at 75.

55. *Financial Summary: Governor's Recommended Budget*, DEL. OFF. MGMT. 6, 6–7, https://budget.delaware.gov/budget/fy2020/documents/operating/financial-summary.pdf [https://perma.cc/5WWA-SB7V] (last visited Oct. 18, 2021).

56. *See* Brian Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 75-76 (2015); Roberta Romano, *The States as a*

B. STAYING POWER: CAUSES AND CONSEQUENCES

1. *Credible Commitment Theory and the Delaware Court System*

Delaware succeeded exactly where New Jersey failed, in securing and consolidating its leadership and thereby retaining its position. The reason for this achievement is a combination of factors that is not easy to replicate. The causes and consequences sometimes coincide or overlap since some effects also become factors that support Delaware in preserving its hegemony.[57] As I articulated above, the explanations provided for Delaware's continuing success can be aligned into two key theories: the credible commitment theory and the network theory.[58]

The credible commitment theory postulates that Delaware offers an attractive blend of attributes and is committed towards corporations.[59] Firstly, the state legislature pays specific attention to the business community's needs; and, in amending its legislation on corporations, Delaware's approach is prudent yet not conservative. The corporate bar and corporate constituencies embraced the legislative process, fostering a historic and reasonable relationship that makes the fortune of Delaware's corporate law.[60]

Secondly, the Delaware court system contributes decisively to this success.[61] Its courts have accumulated a considerable expertise over the years and developed a large body of case law to resort to when

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Laboratory: Legal Innovation and State Competition for Corporate Charters, 23 YALE J. ON REGUL. 209, 246 (2006).

57. *See, e.g.*, Brian J. Broughman & Darian M. Ibrahim, *Delaware's Familiarity*, 52 SAN DIEGO L. REV. 273, 275 (2015).

58. *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L., ECON., & ORG. 225, 276-78 (1985); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 9 (1993) [hereinafter ROMANO, THE GENIUS]. *See also* Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111, 1114-17 (2021).

59. *Id.*, at 1123.

60. The scholars supporting this theory usually hold that Delaware is relatively immune from outside pressure to enact unbalanced rules. *See, e.g.*, Roberta Romano, *The Market for Corporate Law Redux*, *in* 2 OXFORD HANDBOOK OF LAW AND ECONOMICS 358, 388–90 (Francesco Parisi ed., 2017). *But cf.* Bainbridge, *supra* note 51, at 870-75 (discussing the legislative prohibition of fee-shifting bylaws as the evidence of an alteration of the healthy relationship between the corporate bar and the state government).

61. *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000).

interpreting the Delaware General Corporation Law (DGCL).[62] Delaware has a separate, highly efficient court, the Court of Chancery, that is mainly devoted to corporate law.[63] Decisions are quick, predictable, and usually relatively time sensitive.[64] Since business flourishes and thrives in an environment of predictability and certainty, this is a remarkably important component of Delaware's dominance in the corporate sector.[65]

What is more, Delaware case law is so influential that other jurisdictions, even when adjudicating cases on corporations with no connection to Delaware, show a deference to the Delaware courts' authority.[66] Like in a virtuous (or vicious) circle, this reinforces and solidifies Delaware's position.

Delaware has strong incentives to maintain the dynamic that attracted incorporators because, among other things, it is interested in retaining the revenue stream coming from incorporation fees and franchise taxes.[67] All these attributes make entrepreneurs, investors, and lawyers believe that this jurisdiction is committed to supply responsive corporate law also in the future.[68] For managers and investors, who are a naturally forward-looking "species," Delaware's reliability is a powerful motivation to pick this jurisdiction as the state to incorporate.

Some commentators have argued that other factors might also be crucial for Delaware's dominance: the DGCL—the foundation on which Delaware corporate law rests—is a very liberal statute. It does not provide a detailed and prescriptive framework, but instead relies upon few mandatory requirements and otherwise grants a wide range of flexibility for corporations.[69]

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62. *See* Johnson, *supra* note 51, at 241; Molk, *supra* note 58, at 1117 n.26, 1123 n.54, 1127 n.77.

63. Molk, *supra* note 58, at 1115-16.

64. *Id.* at 1116.

65. *Id.*

66. *See* Jens Dammann, Deference to Delaware Corporate Law Precedents and Shareholder Wealth: An Empirical Analysis 2 (May 30, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384446 [https://perma.cc/VDK9-79NR]; William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1696 (2021).

67. *See* Molk, *supra* note 58, at 1115.

68. *See* Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Debate on State Competition over Corporate Charters*, 112 YALE L.J. 553, 584 (2002).

69. *See Why Businesses Chose Delaware*, DELAWARE.GOV, https://corplaw.delaware.gov/why-businesses-choose-delaware/ [https://perma.cc/P9EM-J3K6] (last visited Dec. 24, 2021).

Additionally, Delaware's courts have formulated, developed, and virtually imposed on other jurisdictions some of the most notable doctrines in American corporate law.[70] These doctrines also set a very pro-director corporate law that is highly desirable for incorporators.[71] For example, Delaware corporate law allows directors to comply with less onerous duties than those imposed by English, German, French, or Italian law.[72] It is well known that, when a court applies the so-called business judgment rule as the appropriate standard of judicial scrutiny, the plaintiff is essentially required to allege and prove that the directors' conduct amounts to bad faith or waste.[73] Otherwise, the court will refrain from scrutinizing the business decision.[74] No liability arises for losses caused

70. *See Why Delaware Corporate Law Matters So Much*, DELAWAREINC.COM, https://www.delawareinc.com/blog/why-delaware-corporate-law-matters-so-much/ [https://perma.cc/NDX8-XHES] (last visited Dec. 24, 2021).

71. *See, e.g.*, Gilchrist Sparks III & Daniel D. Matthews, *Delaware's Continued Resilience: The Next Hundred Years*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 238, 244-48 (Stephen M. Bainbridge et al. eds., 2018); Leo E. Strine Jr., *The Delaware Way: How We Do Corporate Law and Some of The New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 675-76 (2006). This can become a determinant if a corporation elects to re-incorporate and needs to choose the jurisdiction where to re-incorporate a decision about which directors play an important role.

72. *See* Elson, *supra* note 51, at 237.

73. *See* Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U.J.L. & BUS. 27, 55 (2017).

74. There is a vast amount of case law and literature discussing the rule. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (defining the business judgment rule as the well-known "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company" and defining the business judgment rule as the well-known "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company), *overruled by* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (explaining that the business decision will be "insulated" and protected from any judicial second-guessing, as long as the board was not conflicted and, of course, unless the plaintiff proves the absence of any rational business purpose). *See also* Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66, 74 (Del. 2006); William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. L. 1287, 1289 (2001); Douglas M. Branson, *The Rule That Isn't a Rule - The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 632 (2002); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*,

by imprudence or honest errors of judgment.[75] However, even when the court in *Smith v. Van Gorkom* held that business judgment rule did not apply to gross errors such as the hasty actions of an ill-informed board,[76] the Delaware legislature passed a statute eliminating directors' liability for negligence.[77] As a further example, the much-debated shareholder value doctrine[78] is also a product of Delaware's dominance.

Some also contend that Delaware's dominance is in part a "dominance by inaction."[79] This evocative expression refers to Delaware's long silence on a central aspect of corporate governance: the duties and liability pertaining to executive corporate officers.[80] Delaware has never clarified some basic legal issues on this topic, such as whether the business judgment rule applies to officers; whether the *Unocal/Unitrin* or *Revlon* test applies to officers;[81] which standard of care is the appropriate one for officers; why shareholders can bring direct actions to corporate officers if they are employees and agents of the company but not if they are shareholders.[82]

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66 MD. L. REV. 398, 401 (2007); Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 935 (2013).

75. *See* Sharfman, *supra* note 73, at 33.

76. 488 A.2d 858, 864 (Del. 1985).

77. *See* Stephen A. Radin, *The Director's Duty of Care Three Years after* Smith v. Van Gorkom, 39 HASTINGS L.J. 707, 707, 711 (1988); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of* Smith v. Van Gorkom *and the Business Judgment Rule*, 96 NW. U. L. REV. 675, 676, 680 (2002); Bernard S. Sharfman, *The Enduring Legacy of* Smith v. Van Gorkom, 33 DEL. J. CORP. L. 287, 288 (2008).

78. According to which directors' primary duty is to maximize the value of corporation for the benefit of stockholders and not of stakeholders. *See, e.g.*, Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 910 (2005); Randall Morck, *The Social Value of Shareholder Value*, 22 CORP. GOV.: INTL'L REV. 185, 192 (2014).

79. Johnson, *supra* note 51.

80. *Id.*

81. *Id.* In a vast majority of cases, courts explicitly refer to 'boards' and 'directors', not to officers. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 949 (Del. 1985) ("The factual findings of the Vice Chancellor, fully supported by the record, establish that Unocal's board, consisting of a majority of independent directors, acted . . . in the proper exercise of sound business judgement"); Unitrin Inc. v. American General Corp., 651 A.2d 1366 (1995) ("The Court of Chancery should have directed its enhanced scrutiny: first, upon whether the Repurchase Program the Unitrin's Board was draconian . . . ."); Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 175 (1986) ("The actions taken by the Revlon directors, however, did not meet this standard.").

82. *See* Johnson, supra note 51, at 183-88.

Although it might sound ironic, this statutory and case law silence has arguably contributed to Delaware's historical predominance. By articulating very little on officer-related issues, Delaware has allowed directors and officers to largely address the matter in other, more desirable ways, mainly through *ex-ante* employment agreements and *ex-post* severance arrangements.[83] This has served Delaware's dominance so well that, even if the state legislature and courts turned to a more regulatory approach in the future, Delaware's long-established pre-eminence would hardly be affected.[84]

2. *"Network" Theory and "Delaware Trap" Argument*

The network theory is equally captivating and sheds further light on Delaware's staying power. Like the credible commitment theory, the network theory holds that Delaware's reputation is a critical factor, but for a less optimistic reason. The network theory refers to the lock-in effect created by popularity in the market for corporate charters and posits that a jurisdiction, once it has attracted a critical mass of incorporations, becomes more attractive for subsequent company formations.[85] This subsequent attraction does not necessarily relate to the quality of the law delivered by that jurisdiction.[86] Thus, Delaware has achieved a dominant position and, under this theory, now benefits from the "sticky" nature of incorporation decisions.[87]

83. *Id.* at 184.

84. *Id.* at 183-84.

85. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 813 (1995); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1923 (1998). *See also* S. J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSPS. 133, 134-35 (1994); Molk, *supra* note 58, at 1117; Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1, 7 (2020).

86. *See* Sanga, *supra* note 85, at 2.

87. *See* Stephen M. Bainbridge, *Introduction: Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 1, 5 (Stephen M. Bainbridge et al. eds., 2018); Robert IV Anderson, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 694-96, 710 (2018).

An argument stemming from this theory emphasizes how lawyers play a major role in a client's choice over the state of incorporation.[88] In law school, students learn Delaware corporate law and sometimes that of their home state.[89] In order to minimize learning costs, lawyers tend to advise Delaware incorporation regardless of the quality of legal rules or the needs of the client.[90] This creates a closed loop, where lawyers choose Delaware to incorporate clients' businesses because they learned Delaware corporate law in law schools; and law schools teach Delaware corporate law because most corporations choose Delaware as its jurisdiction.[91] This cycle of efficiency, perhaps also of mediocrity, works as a "trap" into which corporations inadvertently fall and from which reincorporation out of state is nearly impossible.[92]

The implications are quite interesting: demographic markers of sophistication, such as the use and choice of law firm or headquarters location, can predict the jurisdictional incorporation choice better than any other factor.[93] Accordingly, the home state or the business attributes of the firm are less crucial in predicting the jurisdiction where a company will register.[94] Companies with more demographic markers of sophistication tend to choose Delaware incorporation, while companies with fewer demographic markers of sophistication are inclined to incorporate in their home-state.[95] A national legal counsel is likely to choose Delaware; a local might go for a local incorporation.[96] This makes the competition in the charters market a feud between the company's home state on one side and Delaware on the other.

There is another implication of the network theory: if the quality of legal rules or the needs of the client do not drive the decision, the corporate charters competition no longer depends upon the attributes of a

88. *See* Bainbridge, *supra* note 87; Anderson, *supra* note 87, at 694-95; Molk, *supra* note 58, at 1128-29. *See also* William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 148 (2012).

89. *See* Bainbridge, *Introduction*, *supra* note 87, at 6; Molk, *supra* note 58, at 1128-29; Anderson, *supra* note 87, at 694-95, 708-09.

90. Molk, *supra* note 58, at 1128-29, 1132; Bainbridge, *supra* note 87.

91. Bainbridge, *supra* note 87, at 6. *See also* Molk, *supra* note 58, at 1128-29.

92. *See* Anderson, *supra* note 87, at 694-95, 708-09. *See also* Bainbridge, *supra* note 87, at 6.

93. *See* Anderson, *supra* note 87, at 694-95.

94. *Id.* at 657-58. This empirical research was conducted on a large dataset of corporate financings. The data are consistent regardless of the industry classification, the amount of money raised, or whether the company is public or private. *Id.* at 682-93.

95. *Id.* at 695-99.

96. *Id.* at 702-03.

jurisdiction and does not push competitors to do better.[97] This means that Delaware's position in the market for corporate charters has eliminated any meaningful competition over the quality of corporate law among the jurisdictions.[98] It also means that any doctrinal shifts or amendments in Delaware legislation would only marginally affect the decision of incorporating in Delaware and the resulting dominance.

This does not necessarily imply that Delaware is free to enact poor quality or unbalanced corporate law without paying the consequences. There is always the federal "threat," which I will canvass in due course. Additionally, should a new competitor provide an incentive strong enough for a corporation to incorporate outside of Delaware and prevail against the "sticky" [99] nature of the incorporation choice, competition might revive.

C. THE RACE-TO-THE-TOP / RACE-TO-THE-BOTTOM DEBATE

The credible commitment theory and the network theory are intertwined and sometimes overlap. Yet, the credible commitment theory more often concludes that the competition resulting in Delaware's dominance is a race to the top, meaning that the corporate charters market has induced jurisdictions to deliver balanced and efficient corporate law. By contrast, the network theory is more inclined towards the race-to-the-bottom position and implies that Delaware is just producing corporate law to appease managers.[100] However, both theories predict that Delaware is destined to remain the preferred jurisdiction for incorporations.[101]

Whether Delaware is prevailing in a "race to the bottom" or a "race to the top" is a question that has been debated for decades. Some argue that the competition to attract incorporators has facilitated the emergence

97. *Id.* at 703-05; Molk, *supra* note 58.

98. *See* Anderson, *supra* note 87, at 703-05.

99. *Id.*, at 710 (using the expression "sticky status quo jurisdictions").

100. *See* Cary, *supra* note 49, at 663, 666 (denouncing the efficiency argument and specifically defining it as a regime benefitting managers). *Cf.* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919-20 (1982). *See also* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1440 (1992); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 681 (2002); Greenfield, *supra* note 2, at 135-39.

101. *See* Cary, *supra* note 49, at 663, 666; Fischel, *supra* note 100.

of large conglomerates, able to organize a complicated network to control businesses through stock ownership and interlocking directorates. [102] That consolidation reached a peak at the turn of the 20th century,[103] before antitrust legislation started to operate effectively.[104] Since then, the issue has been addressed, and Delaware cannot be blamed for conglomerates' rise any more than competition of the charters market.

That said, resolving the race-to-the-bottom/race-to-the-top dilemma is crucial in assessing the result of Delaware's dominance and understanding whose interests this hegemony is serving.

Some commentators contend that Delaware won a race to the bottom and continues to prevail in a contest to provide management-friendly legislation and case law, since it has a strong interest in retaining its dominance and is very focused in appeasing incorporators.[105] The Delaware State Bar Association and other interest groups lobby the legislature, which, in turn, enacts statutes that essentially allow managers to exploit shareholders. [106]

Others argue that this competition cannot be a race to the bottom, since investors would never purchase securities of a company incorporated in a jurisdiction where managers can abuse their powers

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102. *See* M. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, AM. J. LEG. HIST. 160, 166-68 (1982); ERIC J. HOBSBAWM, THE AGE OF CAPITAL 1848-1875 247-51 (1997).

103. The story of the U.S. Steel Corporation and J.P. Morgan is an example: after succeeding to his father Junius, he took over a re-organisation of railroads, exploited the opportunities offered by the most profitable legislation available and created a voting trust. In few years, he was controlling all the railroads in the nation, most of its mines, and other manufacturing companies. His corporation became the first billion-dollar corporation in the world, encompassing finance, industry, fuel, and transport *See* TALBOT, *supra* note 15, at 16. A similar case was Rockefeller's Standard Oil Company, a conglomerate which became the centre of the whole petroleum industry. *Id. See also* LEVY, *supra* note 11, at 285; HOBSBAWM, *supra* note 102, at 260-69.

104. Sherman Antitrust Act, 15 U.S.C. §§ 1-7. For application, see the so-called "Sugar Trust Case," United States v. E.C. Knight Co., 156 U.S. 1 (1895). The protection of investors was famously advocated for by Louis D. Brandeis, whose campaign exposed distortions and abuses associated with the rise and dominance of financial capital. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 4-8 (18th ed. 1993).

105. For the seminal argument of the race-to-the-bottom hypothesis, see Cary, *supra* note 49, at 663, 705.

106. *Id.* On the influence of interest group on Delaware corporate law, see Johnathan R. Macey & Geoffrey Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987).

without consequence.[107] Similarly, they argue, moneylenders would never lend money to a company incorporated in states where managers are hardly accountable.[108] In other words, according to these commentators, a corporation incorporated under an undesirably unbalanced corporate law would discourage investors, cause the price of its shares to decline, and force the company to pay higher interest rates.[109] This would also make said corporation less profitable and more vulnerable to hostile takeovers, which would result in the replacement of managers—as the ultimate consequence of a bad decision regarding the incorporation place.[110]

Therefore, it is thought, the competition for corporate charters deters managers from selecting a jurisdiction that provides bad corporate law, and state legislatures from adopting excessively pro-management laws.[111] Instead, this mechanism promotes the selection of an efficient corporate law, since it motivates managers to incorporate where the law is efficient and balanced.[112]

The dichotomy between the race to the top and the race to the bottom is actually an oversimplification. The truth probably lies somewhere in the middle. Both positions rely on some faulty premises. For instance, it is arguable that takeovers and their regulation are an efficient monitoring mechanism that replaces managers each time they make bad business decisions (such as a bad choice on where to incorporate) and fail to keep the share price high.[113]

107. The traditional statement of the race-to-the-top theory (and the classic response to Cary), is found in Ralph K. Winter Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254-58 (1977).

108. *Id.* at 255-57. On the contrary, this race enables firms to "seek the state whose code best matches their needs so as to minimize their cost of doing business." ROMANO, THE GENIUS, *supra* note 58, at 1.

109. Winter Jr., *supra* note 107.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See, e.g.*, F. M. Scherer, *Corporate Takeovers: The Efficiency Arguments*, 2 J. ECON. PERSPS. 69, 79 (1988); Simon Deakin & Giles Slinger, *Hostile Takeovers, Corporate Law, and the Theory of the Firm*, 24 J.L. & SOC'Y 124, 127 (1997); Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 2148, 2172-73 (2008); B. Espen Eckbo, *Corporate Takeovers and Economic Efficiency*, 6 ANN. REV. FIN. ECON. 51, 52 (2014); Nihat Aktas et al., *Corporate Governance and Takeover Outcomes*, 24 REV. CORP. GOV.: INT'L REV. 242, 245 (2016).

Moreover, the story of states strongly competing to attract incorporators and "steal" tax revenues away from Delaware is far from reality.[114] Theoretically, a jurisdiction might offer inducements such as tax regimes or statutes whose terms are attractive to those who make the incorporation (or re-incorporation) decision.[115] In practice, Delaware usually anticipates the adoption of a regulation that is valued by incorporators or can swiftly replicate any appealing provision that is introduced by other jurisdictions.[116] By contrast, the business environment that Delaware can offer, including the expertise of its courts and legislature, cannot be reproduced by other states in the short term and without significant costs.[117]

In fact, Delaware has effectively discouraged other jurisdictions or neutralized their efforts. With very few exceptions,[118] other states compete just to retain local incorporations, while Delaware attracts incorporators from all over the United States.[119] To put it another way, to the extent there is a competition, it is between the company's home state on one side, and, always, Delaware on the other.[120] Not to mention that, if the Delaware "trap" argument is grounded and the quality of legal rules does not affect the decision on the incorporation place, both sides in the "race" debate are focusing on the wrong issue.[121]

Something else is keeping Delaware on the path of efficiency and away from a race towards an exploitative corporate law. It might be true that Delaware courts and lawmakers attempt to avoid a bad run of legislation or case law since, as the Seven Sisters package of laws proved, it could trigger—or contribute to—a massive migration and end Delaware's dominance.[122] But more importantly, if this jurisdiction tolerated blatant abuses from managers to the detriment of its shareholders or damaged the national economy, the federal legislature could not refrain from intervening—especially in these current times of

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114. *See* Bainbridge, *supra* note 87, at 4.

115. *See* ROMANO, THE GENIUS, *supra* note 58, at 4.

116. Christopher M. Bruner, Leveraging Corporate Law: *A Broader Account of Delaware's Competition*, 80 MD. L. REV. 72, 81 (2020).

117. *See* ROMANO, THE GENIUS, *supra* note 58, at 54-55.

118. *See infra* Section III.A.

119. *See* ROMANO, THE GENIUS, *supra* note 58, at 213; Bainbridge, *supra* note 87, at 4.

120. *See* ROMANO, THE GENIUS, *supra* note 58; Bainbridge, *supra* note 87, at 4.

121. *See* Anderson, *supra* note 87, at 703.

122. *See* Elson, *supra* note 51, at 225-26. *See also* Sparks III & Matthews, *supra* note 71, at 256-59.

crisis and criticism.[123] Thus, some commentators view the tradition of the federal legislature intervening after a crisis or in the face of a gross distortion as further evidence that the race-to-the-bottom/race-to-the-top debate is substantially misconceived.[124]

Delaware is aware that the Congress, if provoked, could take over significant corporate law sectors.[125] Thus, the market for corporate law is not a competition among states but rather between the federal government and Delaware, where "Delaware gets to say the words, but only as long as the federal authorities tolerate its script."[126] When key issues attract media attention or public anxiety, the federal government intervenes.[127] As long as the issue stays in Delaware, this dynamic favors state-level deals between managers and investors, excluding outside interest groups—such as unions and other public interest groups that would otherwise be involved in a federal legislative process.[128]

Therefore, the process underlying Delaware's dominance is hardly a free race to the top or bottom. Instead, it appears to be the search for a balance of interests and for a compromise between corporate constituencies, which takes place under the threat of a federal intrusion. In light of this, Delaware has a strong incentive not to abuse its leading position; that is, to keep the federal legislature at arm's length, the debate must remain technical, *local*, and without broad political concerns.

This view emphasizes that Delaware is under constant federal threat, despite its preeminent role among the jurisdictions.[129] Perhaps this does not guarantee the selection of the most efficient law, but at least it keeps state corporate law in check.

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123. *See infra* Section III.C.

124. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 591-92 (2003). *See also* Mark J. Roe, *Regulatory Competition in Making Corporate Law in the United States - and Its Limits*, 21 OXFORD REV. ECON. POL'Y 232, 233-34 (2005); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748 (2002); Lucian A. Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CALIF. L. REV. 1775, 1820-1821 (2002); Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1798-1800 (2006).

125. *See* Bruner, *supra* note 116, at 75.

126. Roe, *Delaware's Competition*, *supra* note 124, at 591 ("If fundamental issues of corporate governance often move into federal area, then Delaware is not deciding all key corporate law matters.").

127. *Id.* at 600.

128. *Id.* at 641.

129. *Id.* at 591-92.

III. OLD AND RECURRING CHALLENGES

A. NEVADA: THE TRADITIONAL CONTENDER

Within the illustrated context, a successful challenge to Delaware's dominance from another state is predictably difficult, requires significant effort, and usually fizzles out.

The cases of North Dakota and Connecticut exemplify this idea. In 2007, North Dakota adopted the Publicly Traded Corporations Act,[130] which was designed to "improve the performance of publicly traded corporations" and attract incorporators.[131] As predicted by some commentators,[132] the strategy failed to achieve any significant results, and after a few years the state gave up on its ambitions.[133] Connecticut's

130. N.D. CENT. CODE § 10-35 (2007).

131. *See* NORTH DAKOTA CORPORATE GOVERNANCE COUNCIL, EXPLANATION OF THE NORTH DAKOTA PUBLICLY TRADED CORPORATIONS ACT 1 (2007), https://www.law.du.edu/images/uploads/corporate-governance/legislation-nd-explanation.pdf [https://perma.cc/969A-ZJVV]. As gathered by Stephen M. Bainbridge, the idea underlying the law was presumably that North Dakota would have attracted "incorporations away from Delaware by becoming more shareholder-friendly than Delaware." Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043, 1045 (2008). *See also*, Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 146 (2009); Joshua P. Fershee, *The North Dakota Publicly Traded Corporations Act: A Branding Initiative Without a (North Dakota) Brand*, 84 N.D.L. REV. 1085, 1085 (2008); Larry Ribstein, *The North Dakota Experiment*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL., (Apr. 23, 2007), https://corpgov.law.harvard.edu/2007/04/23/the-north-dakota-experiment/ [https://perma.cc/PQ85-QUPG].

132. *See* Bainbridge, *supra* note 131, at 1045-46, arguing that North Dakota would have inevitably lose the challenge, no matter whether state competition was a race to the top or to the bottom. In fact, if state competition was a race to the bottom—in which Delaware prevails by catering to management interests at the expense of shareholders—North Dakota's Publicly Traded Corporations Act would have deterred managers from (re)incorporating in that jurisdiction, since it would have limited their ability to extract private rents. If state competition was a race to the top and investors valued the shareholder-friendly provisions of the North Dakota Act, "Delaware would have gotten there first." *Id.* at 1047. However, since North Dakota's statute offered to replace the efficient and long-established system of director primacy with an inefficient consensus-based decision-making structure, the challenge was doomed to fail. *Id.* at 1046. *See also* Roe, *supra* note 131, at 148 ("North Dakota has a competitive corporate law—a different product—in place, but it lacks both a base of North Dakota corporations and well-developed corporate law courts." Arguably, a lack precluding North Dakota from being able to meaningfully compete with Delaware).

133. *See* Ribstein, *supra* note 131.

challenge lasted an even shorter period of time. In 2014, the state legislature announced an agenda to "create a 10-year plan to challenge and eventually overtake Delaware as the leading state in the country for businesses and corporations to locate, incorporate and do business."[134] After less than a year, Connecticut concluded that Delaware was too hard (and probably too expensive) to dethrone and abandoned the plan.[135]

The only competitors that achieved some results were Nevada and, to a certain extent, Maryland and Pennsylvania.[136] In particular, Nevada turned out to be more resilient than any other contender. Its strategy was aggressive and distinctive, consisting of a mix of "shockingly lax corporate law" and tax regimes.[137] In Nevada, directors and officers are generally protected from liability for breaches of fiduciary duties.[138] Scholars pointed out that:

> Nevada has shielded corporate actors from liability for various acts and omissions, allowing officers and directors to avoid liabilities that are considered almost axiomatic, such as those for breaches of the duty of loyalty, acts or omissions not in good faith, and transactions from which an officer or a director derived an improper personal benefit.[139]

The purpose of this extreme leniency is no mystery. On the contrary, Nevada conspicuously advertised and emphasized that its law protected director and officer conduct in situations where Delaware law left them

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134. *See* Molk, *supra* note 58, at 1113-14.

135. *Id.* at 1114.

136. *See* Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3593 (2014) (noting that Nevada is the "second-most popular state for out-of-state incorporations"). *See generally* Edwin J. Bradley, *A Comparative Evaluation of the Delaware and Maryland Close Corporation Statutes*, 1968 DUKE L. J. 525 (1968); Robert C. Martin, *A Comparison of the Pennsylvania and Delaware Corporation Statutes*, 89 DICK. L. REV. 809 (1985).

137. *See* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 935 (2012). *See also* Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 919-20 (2014) (noting that Nevada is a "liability-free" jurisdiction); Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada*, 61 J.L. & ECON. 555, 555-56 (2018) (discussing Nevada's "lax corporate law"); Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12 AM. ECON. J.: MICROECONOMICS 60, 60-61, 72 (2020).

138. *See* Barzuza, *supra* note 137, at 941.

139. *Id.*

exposed.[140] "Nevada has all but hung up a 'no law for sale' sign," suggested a commentator.[141] Nevada even posted a number of reasons to incorporate in Nevada rather than in Delaware on a website that it owns and runs (whynevada.com).[142] Among these reasons, it explicitly referred to stronger protections from personal liability for directors and officers.[143]

In truth, Nevada's 1987 exculpation statute was originally broader than Delaware's, and allowed companies to waive liability for all categories but one: intentional misconduct, fraud, or knowing violation of law.[144] Yet, the liability exemption operated with an opt-in mechanism, since it required shareholder approval to apply.[145]

In 2001, Nevada passed an amendment to its legislation and flipped its default rule from liability to no liability.[146] Possibly, it relied on the

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140. *Id.*

141. *Id.* (citing Harry First, Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 861 (1969)).

142. WHY NEVADA, http://www.whynevada.com [https://perma.cc/V4TB-V9VC] (last visited Jan. 24, 2022).

143. The website's campaign was amplified by other websites that encouraged incorporation in Nevada by enumerating the acts for which officers and directors would be protected under Nevada law and exposed under Delaware law. *See* Barzuza, *supra* note 137, at 941. Nowadays, the same website (whynevada.com) showcases a different strategy and focuses on the gambling market.

144. *See* Barzuza, *supra* note 137, at 951-52.

145. *Id.* at 952. According to Eldar, in a sample of firms incorporated in Nevada in 2001, almost 40 percent did not opt in to the fullest extent of liability protection that legislation already permitted for managers prior to the amendment. *See* Eldar, *supra* note 137, at 580.

146. *See* Barzuza, *supra* note 137, at 953. Also adding that:

> In one day, all of Nevada's directors and officers were granted protection from most sources of liability. Shareholders could continue to avoid protection and subject directors and officers to liability for breach of the duty of loyalty, but only if they were able to secure the approval of management. This change was not specifically approved by the shareholders of Nevada companies. The legislation applied to all of Nevada's existing companies. Thus, shareholders who chose Nevada incorporation prior to the change in the law were forced to accept significant liability protections for directors and officers.

Id. at 953.

inclination of firms to almost never opt out of default provisions that benefit managers.[147]

Before the state legislature passed the amendment to broaden this protection and become a truly liability-free jurisdiction, the strategy was debated, and the potential consequences denounced.[148] However, the amendment was enacted just on the assumption that offering a highly permissive law was necessary to differentiate Nevada from Delaware and attract incorporators.[149]

As a result, Nevada did increase its market share of publicly-traded firms, which rose by 20 percent, followed by a rise of more than 10,000 percent in its corporate tax revenues.[150] It also gained the label of liability-free jurisdiction[151].

The policy underlying this strategy was clear and openly pursued. Nevada intended to carve out and become the leader of a specific segment of the corporate charters market: namely, that of firms with a preference for a no-liability regime concerning directors and officers[152]. Crucially, this is a market segment that Delaware had not targeted.

There were two additional factors that, combined with this strategy, allowed Nevada to consolidate the relative success achieved. First, Delaware could not follow Nevada on the path of a very permissive law. Otherwise, the impact would have been so significant that it would have invited federal intervention in order to halt the United States from becoming a no-liability harbor for directors[153]. Some commentators presented evidence that Nevada's approach does not harm shareholder value, particularly in small firms with low institutional shareholding and high insider ownership.[154] This is because Nevada's pro-managerial legislation reduces the "likelihood of takeovers and litigation, thereby

147. *See* Eldar & Magnolfi, *supra* note 137, at 11 (citing Yair Listokin, *What do Corporate Default Rules and Menus Do? An Empirical Analysis*, 6 J. EMPIRICAL. LEGAL STUD. 279, 279, 295 (2009)).

148. *See* Barzuza, *supra* note 137, at 953-54.

149. *Id.* at 953, 955.

150. *Id.* at 942. The argument that Nevada's low taxes are the true reason for its attractiveness is not persuasive. "[A]lthough Nevada's tax rate is significantly lower than Delaware's, it is significantly higher than the rates of other states." *Id.* at 974.

151. *See* Barzuza, *supra* note 137, at 935.

152. *Id.* at 935.

153. *Id.* at 943.

154. *See* Eldar, *supra* note 137, at 555; Eldar & Magnolfi, *supra* note 137, at 65, 92-93.

benefiting a segment of small firms for which the costs of corporate governance may outweigh the benefits."[155] Clearly, a similar approach would get a different outcome in Delaware, where most large corporations have their registered offices, and the federal legislature would necessarily intervene[156].

The second factor that favored Nevada's successful consolidation of its niche was its open commitment to the liability-free policy[157]. This commitment demonstrated to incorporators that Nevada would continue to provide permissive laws of this kind in the future[158]. To put it differently, Nevada's commitment was so credible that it encouraged firms looking for this kind of safe harbor to incorporate or move there.

However, the policy of market segmentation was also a limit to Nevada's success, as it made Nevada competitive only for that niche market. In truth, Nevada predominantly attracted small firms.[159] Understandably, institutional investors would be deterred from investing in a corporation registered in a jurisdiction with Nevada's characteristics, severely limiting its appeal to larger corporation.[160]

Some commentators contend that recent developments might increase Nevada's attractiveness.[161] In an opinion issued on March 25, 2021, the Nevada Supreme Court held that a plaintiff cannot rebut the business judgment rule as a matter of law simply by alleging that a director was an interested party.[162] In this regard, the court concluded that NRS 78.138(7), the local corporation statute, precludes the "inherent fairness standard" as adopted in an earlier case, *Foster v. Arata*:[163]

155. *See* Eldar, *supra* note 68, at 555.

156. *See* Barzuza, *supra* note 137, at 967.

157. *See* Eldar & Magnolfi, *supra* note 137, at 72; Barzuza, *supra* note 137, at 966. *See also* Roe, *supra* note 124, at 636.

158. *See* Barzuza, *supra* note 137, at 943.

159. *See* Eldar, *supra* note 137, at 555; Eldar & Magnolfi, *supra* note 137, at 62, 66, 92.

160. Eldar & Magnolfi, *supra* note 137, at 93.

161. *See* Yolanda C. Garcia et al., *Nevada Splits from Delaware, Applies Business Judgment Rule Broadly*, LEXOLOGY (May 27, 2021), https://www.lexology.com/library/detail.aspx?g=8327a48d-d171-40a3-99a8-5d78811630a0 [https://perma.cc/R8NL-59CC].

162. Guzman v. Johnson, 483 P.3d 531, 533-34 (Nev. 2021).

163. 325 P.2d 759, 765 (Nev. 1958) (quoting Pepper v. Litton, 308 U.S. 295, 306 (1939)).

> A director is a fiduciary . . . . Their powers are in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any

> As is well known, under *Foster* the mere allegation that a director was an interested party in the transaction rebuts the business judgment rule and requires the director to prove the inherent fairness of the deal.[164] In contrast, NRS 78.138(7) provides that the plaintiff must establish a breach involving intentional misconduct, fraud, or a knowing violation of law. Therefore, in *Guzman*, the court argued that if the mere allegation were sufficient to shift the burden of proof and trigger the inherent fairness standard, the express provisions of NRS 78.138(7) would be meaningless.[165]

Not only does *Guzman* confirm the Nevada Supreme Court's director-friendly position, but it renders unlikely the application of a review standard stricter than the business judgment rule in Nevada.[166] This is a marked difference from the Delaware courts, which are inclined

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> of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.

Id. See also Chur v. Eighth Judicial District Court, 458 P.3d 336, 340-41 (Nev. 2020); *Guzman*, 483 P.3d at 532.

164. *See Guzman*, 483 P.3d at 533-34.

165. *Id.* at 537. There, the court also noted that "NRS 78.138(7) plainly requires the plaintiff to *both* rebut the business judgment rule's presumption of good faith *and* show a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of the law. The statute's language is straightforward and must be given effect." As remarked in *Chur*, the *Guzman* court added that the NRS 78.138(7) "provides the sole method for holding individual directors liable for corporate decisions." *See* Chur, 458 P.3d at 339; *Guzman*, 483 P.3d at 535. Therefore, unless the plaintiff had not pled facts showing that the relevant directors were motivated by self-interest, the business judgment rule would apply. In *Guzman*, the Supreme Court affirmed the dismissal of the plaintiff's complaint. *Id.* at 540. *See also* Kelsey DeLozier, Guzman v. Johnson, 137 Nev. Adv. Op. 13 (Mar. 25, 2021), 4 NEVADA SUPREME COURT SUMMARIES 1400 (2021).

166. *Guzman* at 534. The court stated that:

> We now clarify that NRS 78.138 and *Chur* control, foreclosing the inherent fairness standard that previously allowed a shareholder to automatically rebut the business judgment rule and shift the burden of proof to the director. Further, because Guzman failed to rebut the business judgment rule and allege particularized facts demonstrating the requisite breach of fiduciary duty, we affirm the district court's dismissal of her complaint.

Id.

to apply the entire fairness review at the mere presence of a controller on both sides of a merger—unless the transaction meets the *MFW* test.[167]

Nevertheless, the implications in terms of the market for corporate charters are questionable. The Nevada Supreme Court's doctrinal shift is consistent with the state's traditional strategy and, consequently, might encounter the limits already illustrated with respect to large corporations.[168]

That said, Nevada's market segmentation policy generates insights that can be used to investigate and understand Wyoming's strategy and potential to challenge Delaware's dominance. Wyoming is replicating the logic behind Nevada's approach, although on a different market niche. Essentially, Wyoming is attempting to operate a market segmentation with reference to blockchain and capture said segment. A comparison between both States' initiatives reveals that Wyoming is enacting many of the strategies successfully implemented by Nevada and applying untested measures that enhance its chance at success.

B. MIGRATION OF LITIGATION OUT OF DELAWARE: A SELF-INFLICTED WOUND?

It is a known fact that U.S. corporate law adopts a regulation-by-litigation model.[169] It relies heavily upon private lawsuits to police both potential conflicts and disclosures, particularly in M&A.[170] In a regulation-by-litigation model, the monopoly over adjudication is essential to retain the leading role in the relevant sector.[171] Thus, it is

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167. As is well known, in a transaction where the presence of controlling stockholder would imply the application of the entire fairness standard, the business judgment rule will apply anyway if the transaction was structured ab initio as to meet to the MFW test and in its execution did satisfy said test. *See infra* note 184.

168. *See* Barzuza, *supra* note 137, at 959.

169. *See* Dan Awrey Blanaid Clarke & Sean J. Griffit*h*, *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. ON REG. 1, 10, 57 (2018); Pierluigi Matera & Ferruccio M. Sbarbaro, *From* Trulia *to* Akorn*: A Ride on the Roller Coaster of M&A Litigation*, 44 DEL. J. CORP. L. 61, 64-66, 104-09 (2020).

170. *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 REGUL. 1, 10, 57 (2018); Matera & Sbarbaro, *supra* note 169, 64-66.

171. Matera & Sbarbaro, *supra* note 169, at 65. More generally, on the role of the enforcement, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good,* 8 J. LEGAL STUD. 235, 235-44 (1979).

crucial for Delaware to issue a conspicuous number of opinions and maintain other courts' traditional deference to its authority.[172]

In 2012, some commentators noted a gradual erosion of Delaware's dominance in corporate law.[173] Relying on four separate data sets,[174] they demonstrated a decline in the Delaware courts' market share of cases and opinions.[175] Among other points, they emphasized a trend toward suits being filed outside Delaware in both large M&A and leveraged buyout (LBO) transactions, and in cases generating opinions.[176] The same commentators also found evidence that the "timing of specific Delaware court decisions that affected plaintiffs' firms coincides with the movement of cases out of Delaware."[177]

This movement is because Delaware courts periodically address overlitigation; accordingly, they adopt new standards and rules to reduce the incentives for plaintiffs' attorneys to bring lawsuits before a Delaware court.[178] Each time this occurs, plaintiffs' attorneys react by filing claims in other jurisdictions.[179] Usually, Delaware courts and the state legislature adapt accordingly so as to halt the migration and retain their leading position in adjudication.

This same chain of events recurred more recently when, in a line of cases, Delaware courts responded to the excess of M&A litigation.[180] The decision in *C&J Energy Services v. Miami* made it more difficult to award plaintiffs with an injunction for enjoining the transaction and

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172. *See* Dan Awrey et al., *supra* note 170, at 57.

173. *See* John Armour et al., *Is Delaware Losing its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 605 (2012). *See also* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 607 (2018); Thompson, *supra* note 6.

174. Namely: "(1) large M&A and (2) leveraged buyout transactions over 1994–2010; (3) derivative suits alleging option backdating; and (4) cases against public company directors that generate one or more publicly available opinions between 1995 and 2009." Armour et al., *supra* note 173.

175. *Id.* at 625. "It shows a steady drop in Delaware's share of suits involving Delaware companies undergoing LBOs. During the late 1990s, a large majority of these suits were filed in Delaware. This proportion first fell below 50 percent in 2005 and has generally continued to fall since then." *Id.*

176. The evidence suggested that both serious and nuisance cases were leaving Delaware. *Id.* at 605.

177. *Id.* That is the result of an adaptive response by plaintiffs' attorneys.

178. *See* Matera & Sbarbaro, *supra* note 169, at 71-72.

179. *Id.* at 78.

180. *Id.* at 66-68.

consequently reduced the incentive for pre-closing litigation.[181] Similarly, the courts in *Trulia*, *Walgreen*, and *Akorn* ruled that they would no longer approve disclosure—only settlements or mootness fees when such agreements only procure "worthless benefits for the class" of shareholders bringing the action—this also reduced the incentive to file a vexatious lawsuit.[182] In *Corwin v. KRR Financial Holdings*, a post-closing action, the court held that the business judgment rule is the appropriate standard of judicial scrutiny even in a *Revlon* context, provided that the merger was approved by a "fully informed, uncoerced majority of the disinterested stockholders."[183] In *Kahn v. M & F Worldwide Corp.*, the court stated that the business judgment rule, rather than the entire fairness standard, applies to a controlling stockholder transaction each time the transaction is "conditioned *ab initio* upon both the approval of an independent, adequately-empowered Special Committee [of directors] . . . and the uncoerced, informed vote of a majority of the minority stockholders."[184]

Some argued that this series of decisions made Delaware "remarkably less desirable for plaintiffs' attorneys," and triggered a migration of litigation to more tolerant jurisdictions and eventually called

181. 107 A.3d 1049, 1067-71 (Del. 2014).

182. *See In re* Trulia Stockholder Litig., 129 A.3d 884, 898-99 (Del. Ch. 2016); *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 723-24 (7th Cir. 2016); House v. Akorn, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019). *See also* Matera & Sbarbaro, *supra* note 169, at 62.

183. 125 A.3d 304, 306, 312-14 (Del. 2015). After an initial surge, the trend on the cleansing effect under *Corwin* is relentlessly declining: in 2016 to 2017 the cleansing effect was granted fourteen times out of nineteen cases (data refer to publicly announced mergers litigated under *Corwin* whose decisions were published); in 2018 six cases out of seven the *Corwin* effect was denied; the trend continues along 2019 and 2020.

184. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644-45 (Del. 2014). The case holds that the business judgement rule applies:

> *[I]f and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

Id. at 645. *See also* Pierluigi Matera & Ferruccio M. Sbarbaro, Cleansing Effect *e* Standard *di* Judicial Review *nella Recente Giurisprudenza Statunitense*, 1 COMPARAZIONE DIRITTO CIVILE 1, 23 (2017) (It.).

Delaware's dominance into question.[185] In this respect, these decisions could be seen as a "self-inflicted wound" to the supremacy that Delaware has enjoyed for over a century.[186]

Others have questioned the regulation-by-litigation model and advocated for a radical shift to a pure regulatory approach, such as the Anglo-Irish code and panel-based model.[187]

Regardless of concerns and criticism, these doctrinal shifts have only had a marginal impact on Delaware's lead.[188] Some subsequent adjustments by the courts neutralized the risk of losing the significant cases, and the sources of Delaware's dominance prevailed.[189]

Because attorneys' fees are typically higher in cases litigated before Delaware courts, a plaintiff's attorney with a plausible claim would rather file his case in a Delaware court than elsewhere.[190] Therefore, a possible migration is most likely to concern frivolous suits, leaving Delaware with meritorious cases.[191] Since nuisance litigation does not involve precedent-setting decisions and does not help in gaining a dominant position in adjudication, other jurisdictions have no interest in attracting it.[192]

In summary, Delaware's courts and legislature have proven to be highly responsive to corporate constituencies' needs and most interested

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185. Matera & Sbarbaro, *supra* note 169, at 77, 104; Matthew D. Cain et al., *Mootness Fees*, 72 VAND. L. REV. 1777, 1782 (2019).

186. Bainbridge, *supra* note 51, at 851 (arguing that the Delaware General Assembly's ban on fee-shifting bylaws was a "self-inflicted wound"). With respect to the fee-shifting bylaws story, the validity of such bylaws was first upheld by the Supreme Court of Delaware in *ATP Tour v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (establishing the validity of fee-shifting bylaws under Delaware common law). But, due to heavy criticism, Delaware General Corporation Law was amended to introduce a ban on fee-shifting bylaws or articles. S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015).

187. *See* Dan Awrey et al., *supra* note 170, at 21-53, 64; Sean J. Griffith, *Product Differentiation in the Market for Corporate Law: A Regulatory Alternative to Delaware Corporate Law*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 16, 21, 24-28 (Stephen M. Bainbridge et al. eds., 2018).

188. *See* Matera & Sbarbaro, *supra* note 169, at 105-07.

189. *Id.* *See also* Ryan Lewis, *What Happens in Delaware Need Not Stay in Delaware: How Trulia Can Strengthen Private Enforcement of the Federal Securities Laws*, BYU L. REV. 715, 718-19, 738-40 (2017).

190. *See* Cain et al., *supra* note 185, at 1814.

191. *See* Matera & Sbarbaro, *supra* note 169, at 102.

192. *Id.* at 105-06 ("[S]ince meritless cases are in fact of little significance in the state competition . . . other courts are likely to adopt the *Trulia-Walgreen-Akorn* approach to avoid to a flood of nuisance litigation."). *See also* Cain et al., *supra* note 185, at 1814.

in maintaining the leading position in corporate law. Doctrinal shifts and legislative amendments are usually prudent and carefully contemplated. Thus, I contend that Delaware is likely to react to any migration of important cases and address the cause. Conversely, it is unlikely to endanger its leading role by precipitating a ruling and making hasty decisions to retain meaningless cases.

C. FEDERAL EROSION

1. Gradual Erosion and Recent Debate

Some critics of Delaware's dominance argue that federal legislation should regulate large areas of corporate law, not only securities and disclosure.[193] These commentators claim that state legislatures are unfit to curb the ambitions of capitalism, because managers and their lobbyists are more likely to succeed in influencing the state legislative process than the federal one.[194]

Indeed, a federal erosion of state corporate law has been gradually progressing for decades.[195] Periodically, when crises and corporate scandals put pressure on the federal legislature, it multiplies its incursions into corporate matters; examples of this include the New Deal (following the Great Depression),[196] the Sarbanes-Oxley Act of 2002 (following the

193. *See* Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259, 260, 266 (1980).

194. *See, e.g.*, Bainbridge, *Fee-Shifting*, *supra* note 51, at 874-75 (discussing fee-shifting bylaws). *See also* Bainbridge, *supra* note 87, at 6-9.

195. *See* Matera & Sbarbaro, *supra* note 169, at 104.

196. For examples of New Deal era legislation touching on corporate matters, see Reconstruction Finance Corporation Act of 1932, U.S.C. §§ 601-619 (repealed 1957); Banking Act of 1933, Pub. L. 73-66, 48 Stat. 162; Securities Act of 1933, 15 U.S.C. § 77a-77mm; Securities Exchange Act of 1934, U.S.C. §§ 78a-78qq; Banking Act of 1935, Pub. L. 74-305, 49 Stat. 684.

Enron scandal),[197] and the Dodd-Frank Act (following the subprime mortgage crisis).[198]

As such, federal law can–and periodically does–displace state law, which affects the state market for incorporations. In fact, any uniform federal legislation reduces the room for differentiation of state regulations, and thus reduces state law attractiveness and competitive advantage.[199] This has already occurred in some areas of corporate law, such as disclosure, audit oversight, and executive compensation.[200] Delaware lawmakers know that federal authorities could also displace those decisions that remain in the state's control if the state's actions seriously damaged the national economy or riled powerful national interests.[201]

Put in other words, the state race in corporate law is limited not only because Delaware has a dominant position which is virtually impossible to override. It is also restricted in the sense that this vertical federal-state competition is more significant than the horizontal state-to-state race.[202] From this standpoint, Delaware's strongest competitor in providing the leading law for corporation is Washington D.C.[203]

For example, the Accountable Capitalism Act (ACA) was introduced in Congress in 2018.[204] Assuming that employees, customers, and the

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197. Sarbanes-Oxley Act 15 U.S.C. §§ 7201-7266. *See* Alton B. Harris & Andrea S. Kramer, *Corporate Governance: Pre-Enron, Post-Enron*, *in* CORPORATE AFTERSHOCK: THE PUBLIC POLICY LESSONS FROM THE COLLAPSE OF ENRON AND OTHER MAJOR CORPORATIONS 49, 49, 53 (Christopher L. Culp & William A. Niskanen eds., 2003); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J., 1521, 1538, 1544-46 (2005); James S. Linck et al., *The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand for Directors*, 22 REV. FIN. STUD. 3287, 3294 (2009).

198. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301-5641. *See* Cheffins, *supra* note 56, at 4.

199. *See* Elson, *supra* note 51.

200. *See* Roe, *supra* note 124, at 590, 644-45. *See also* Bebchuk & Hamdani, *supra* note 124, at 1793, 1815-16 (indicating the main areas now regulated by federal law).

201. *See* Roe, *supra* note 124, at 590, 644-45.

202. *Id.* Therefore, the state race debate must take into account this heavy vertical federal-state competition pattern; otherwise, the model would be largely misconceived. *Id.*

203. *See id.* at 600.

204. Accountable Capitalism Act, S. 3348, 115th Cong. (as introduced in the Senate, Aug. 15, 2018). *See also* Workplace Democracy Act, H.R. 5728, 115th Cong. (2018); Workplace Democracy Act, S. 2142, 114th Cong. (2015) (reintroduced 2018); Employees' Pension Security Act of 2009, H.R. 4281, 111th Cong. (2009); Employees'

community at large do not substantially benefit from economic growth, the ACA aimed to achieve a federal "reorientation" of corporate law and corporate governance in particular. Those advocating for this approach quoted two Business Roundtable statements as a clear indication that the focus has dramatically shifted away from shareholders in American corporate law.[205]

Security Pension Act of 2008, H.R. 5754, 110th Cong. (2008). The ACA was introduced by Senator Elizabeth Warren, a leading candidate for the 2020 Democratic presidential nomination. The goal of deeply reconsidering business and corporate law (in order to rethink capitalism) was also pursued by the Reward Work Act, which accompanied the ACA. Reward Work Act, S. 2605, 115th Cong. (as introduced in the Senate, Mar. 22, 2018). The Reward Work Act was co-sponsored by Senators Warren, Sanders, and others. The Reward Work Act was in line with the Workplace Democracy Act and Employees' Pension Security Acts re-introduced from 1992 to 2018 by Senator Sanders. The ACA, along with the other aforementioned bills, would have established the right for employees to elect 40 percent of directors on less than or equal to $1 billion company boards and the right for employees to elect one-third of directors on other listed company boards. It would have also required one-half employee representation on single-employer pension plans. *See* Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, 697 (2019). The Reward Work Act also provided for a ban of open-market stock buybacks, which might be seen as overwhelmingly benefitting executives and activist hedge funds at the expense of workers and retirement savers. Warren and Sanders' proposed reforms advocated the so-called codetermination system, which is inspired by Germany's corporate governance. This would have resulted in a critical shift from shareholder-centric governance to a more stakeholder-friendly approach. *See* Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. L. 381, 386-87 (2016). For criticism of this approach in the context of the American corporate system, see Jens Dammann & Horst Eidenmueller, *Codetermination: A Poor Fit for U.S. Corporations*, 3 COLUM. BUS. L. REV. 870, 875-77. On ACA, see Carew S. Bartley, *The Accountable Capitalism Act in Context and Its Implications for Legal Ethics*, 33 GEO. J. LEGAL ETHICS 373 (2020).

205. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNTABLE, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/U837-K7JP] (last visited Jan. 24, 2022). The two statements are actually quite dated: the first dated 1981 and the second 1997. *Compare* Letter from Senator Elizabeth Warren to Business Roundtable Immediate Past Chairman of the Board of Directors Jamie Dimon and Chairman Doug McMillon, https://www.warren.senate.gov/imo/media/doc/2020.09.17%20Letter%20to%20the%20Business%20Roundtable%20re%20one-year%20anniversary%20of%20their%20Statement%20of%20Principles.pdf [https://perma.cc/2CUW-ZY85] (last visited Dec. 25, 2021) *with* BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE (1997), http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf [https://perma.cc/W485-HMPD].

What matters for the debate on Delaware's dominance is that the ACA calls to mind the original purpose of the public privileges deriving from the incorporation. The ACA would have required large American corporations[206] to obtain both a federal and state corporate charter.[207] The federal incorporation could, among other things, have been revoked if the corporation engaged in illegal activities. Additionally, the ACA contained a "constituency statute," imposing a duty of "creating a general public benefit" on directors—meaning a benefit for all stakeholders, including employees, the environment, and the long-term interests of the enterprise.[208]

Large investors and eminent academics supported the ACA and published a letter to endorse the bill. [209] Nevertheless, the debate soon started to shift focus to the corporate purpose and shareholder value doctrine—a reform not necessarily intertwined with a federal incorporation.[210] Subsequently, the Business Roundtable redefined its

206. This applies to corporations that have revenues over $1 billion. *See* Dammann, *supra* note 66, at 5.

207. *See Accountable Capitalism Act*, WARREN.SENATE.GOV, https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf [https://perma.cc/93SC-JDAX] (last visited Dec. 25, 2021).

208. *Id.*

209. *See, e.g.*, Letter from Cornell University Law School to Senator Elizabeth Warren, https://www.warren.senate.gov/imo/media/doc/Federal%20Corporate%20Charter%20Letter%20of%20Support.pdf [https://perma.cc/RT69-VLVK] (last visited Dec. 25, 2021).

210. *See* David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. L. 659, 662-64, 671-73 (2019); Jean-Philippe Robé, *The Shareholder Value Mess (And How to Clean it Up)*, 10 ACCT., ECON., & L.: A CONVIVIUM 1, 11-12, 25 (2019); Matteo Gatti & Chrystin D. Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 12-16 (2020); Martin Lipton et al., *On the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 27, 2020), https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/[https://perma.cc/SGE8-S2NF]; Bernard S. Sharfman, *A Fuller Sense of Corporate Purpose: A Reply to Martin Lipton's 'on the Purpose of the Corporation'*, OXFORD BUS. L. BLOG (June 9, 2020), https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/fuller-sense-corporate-purpose-reply-martin-liptons-purpose [https://perma.cc/C5MC-8KY8]; Martin Lipton et al., *On the Purpose and Objective of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2020), https://corpgov.law.harvard.edu/2020/08/05/on-the-purpose-and-objective-of-the-corporation/ [https://perma.cc/K4NV-2RNU]; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* 106 CORNELL L. REV. 91, 94-95, 176-77 (2020). *See generally* Edward B. Rock, *For Whom is the Corporation Managed in*

statement on the purpose of corporations as one that promotes an economy that serves all Americans.[211] And this, to some extent, diverted the attention away from federal incorporation and reduced the risks for Delaware's dominance and the incorporation market as a whole.

Furthermore, I doubt the ACA ever constituted a significant threat to Delaware's dominance. By way of illustration, it is uncertain whether a statute that requires large companies to obtain a federal charter as an additional charter (not as a replacement of the state charter) can cause a meaningful erosion of state corporate law.

2. The Federal Incorporation: A Losing Battle?

Crises are very often a vehicle for reform.[212] However, the economic crisis triggered by the current pandemic is unlikely to prompt the introduction of a federal incorporation for at least three reasons.

First, the crisis is a direct consequence of the containment measures against Covid-19, and not the result of financial abuses or corporate scandals. As such, neither corporate law nor the state market for corporate charters can be held accountable.

Second, as I mentioned above, a debate on capitalism and wealth inequality is already underway. With regard to corporate governance, a possible federal incorporation is no longer in the spotlight.

Third, as a matter of fact, the federal legislature has never succeeded in enacting a law which requires companies to obtain a federal charter. So far, the closest attempt to passing a federal incorporation law was the 1908 *Hepburn Bill*,[213] which was introduced during the last term of Theodore

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2020? The Debate over Corporate Purpose 1, 6, 21 (Eur. Corp. Governance Inst., Law Working Paper No. 515, 2020), https://ssrn.com/abstract=3589951 [https://perma.cc/DU85-RLQB].

211. "Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity." *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/PPK9-RNR5]. According to the statement, since businesses play a key role in the economy by creating jobs, providing essential goods, and fostering innovation, subscribers (181 CEOs including Tim Cook, Jeffrey P. Bezos, James Quincey, and many others) commit to lead their companies for the benefit of all stakeholders, including shareholders, customers, employees, suppliers, and the communities in which the businesses sit. *Id.*

212. *See supra* note 196 and accompanying text.

213. *Hepburn Bill*, S. 6440, 60th Cong. (1908). This is not to be confused with the *Hepburn Act*, 49 U.S.C. § 1 (1906) about railroads rates. *See* Sung Hui Kim, *The Failure of Federal Incorporation Law. A public Choice Perspective*, *in* CAN DELAWARE BE

Roosevelt's administration. The sequence of events that took place around the Hepburn Bill is the perfect illustration of the pattern that this debate usually follows. The context was the 1907 Panic, a bank panic triggered by a failed attempt to corner the stock of United Copper.[214] Once the rescue was orchestrated, the cries for reform faded away. Many opposed the bill, contending that the proposed reform was too radical, and Roosevelt himself refused to compromise.[215] When two decisions by the Supreme Court[216] managed to limit some corporate consolidations, the concerns declined further, and the opposition became stronger.[217] Finally, President Taft abandoned the program.[218] As some contended, the alignment was just not right,[219] and the federal legislature never came that close to passing a federal incorporation statute again.

I argue that, while limited federal intervention into corporate matters is possible–especially following a crisis correlated to corporate or financial failings–a federal incorporation is unlikely to be enacted. At least in the short-term, the federal incorporation debate will follow the same patterns; it will gain strength in conjunction with a crisis or a major election and fade afterwards.

More likely, the federal erosion of state corporate law will gradually continue.

DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 78, 80, 92-98 (Stephen M. Bainbridge et al. eds., 2018). *See also* Urofsky, *supra* note 102, 160-62, 181-82; MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 280-81, 373-76 (1988).

214. The third largest trust company of New York went bankrupt because it could not meet a run on its deposit. Consequently, the panic spread, until J.P. Morgan orchestrated an intervention to rescue the banking system. Kim, *supra* note 213, 88.

215. *Id.* at 92-96, 100.

216. For the United States Supreme Court's long-awaited implementation of the Sherman Antitrust Act, see *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 505 (1911) and *United States v. Am. Tobacco Co.*, 31 S. Ct. 632, 651 (1911).

217. *See* Kim, *supra* note 213, 98. *See also* TALBOT, *supra* note 15, 17-18.

218. *See* Kim, *supra* note 213, 98; Urofsky, *supra* note 102, 182; SKLAR, *supra* note 213, 283, 375-76.

219. *See* Roe, *Delaware's Competition*, *supra* note 124, at 602, 608-10; Kim, *supra* note 213, 98-100.

3. Offshore Jurisdictions, Competition for Incorporations, and Federal Intervention

According to some commentators, there exists an additional reason for the federal legislature to intervene in the jurisdictional competition to attract incorporators.[220] I further contend that this reason might also constitute a significant challenge for Delaware's dominance.[221]

The premise is that U.S. courts routinely extend the internal affairs doctrine to firms incorporated abroad.[222] Consequently, the standard account of the state-based competition for the incorporations might, in reality, be incomplete, and Delaware might face increasing competition on a globalized market for corporate law. While most foreign nations do not pose a competitive threat in this regard, a handful of foreign jurisdictions—in particular, Bermuda, the British Virgin Islands, and the Cayman Islands—have been offering permissive rules to attract publicly traded corporations that mainly operate outside of those jurisdictions.[223]

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220. *See* William J. Moon, *Delaware's New Competition*, 114 NW. U.L. REV. 1403, 1406, 1418-20, 1422 (2020) [hereinafter Moon, *Delaware's New Competition*]; Moon, *supra* note 66, at 1698-1709. *See also* Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649, 1748-51 (2015). On the impact of globalization on Delaware's role, see Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 219, 234-35 (2015).

221. *See also* Moon, *Delaware's New Competition*, *supra* note 220; Talley, *supra* note 220.

222. For the application of foreign corporate laws under the internal affairs doctrine by United States courts, see Moon, *Delaware's New Competition*, *supra* note 220, at 1420 nn.79-84, 86. *See, e.g.*, Vaughn v. LJ Int'l, 94 Cal. Rptr. 3d 166, 169, 174 (Cal. Ct. App. 2009) (applying British Virgin Islands law regarding a firm incorporated in the British Virgin Islands with no other connection to that jurisdiction); NatTel v. SAC Capital Advisors, 370 Fed. App'x 132, 134 (2d Cir. 2006) (applying Bahamas law regarding an entity established in the Bahamas); Kostolany v. Davis, No. 13299, 1995 WL 662683, at *3 (Del. Ch. Nov. 7, 1995) (applying Dutch law in a Delaware court regarding a firm incorporated in the Netherlands); Pittway Corp. v. United States, 88 F.3d 501, 503 (7th Cir. 1996) (applying French law regarding an entity incorporated in France and describing France as a "State in the international sense" under the internal affairs doctrine); Tomran v. Passano, 891 A.2d 336, 342 (Md. 2006) (applying Irish law regarding a firm incorporated in Ireland); Varga v. U.S. Bank Nat'l Ass'n, 952 F. Supp. 2d 850, 855 (D. Minn. 2013) (applying Cayman Islands law to The Palm Beach Funds because it was incorporated in the Cayman Islands), *aff'd*, 764 F.3d 833 (8th Cir. 2014); Krys v. Aaron, 106 F. Supp. 3d 472, 484-86 (D.N.J. 2015) (applying Cayman Island law).

223. Moon, *Delaware's New Competition*, *supra* note 220, at 1406.

Unsurprisingly, then, these islands have been labeled as "offshore corporate law havens."[224]

These small jurisdictions feature a peculiar combination of factors. Their physical proximity to the United States certainly is a relevant circumstance; so are the favorable tax regimes.[225] But there is more at play. With the aid of some private-sector lawyers, these lawmakers have enacted director-friendly legislation specifically designed for "exempted" or "excepted" companies—i.e., foreign firms that do not (and in many cases legally cannot) conduct any business on their soil.[226] These laws might allow American corporations to opt out of some mandatory rules of American corporate law.[227]

In addition, these jurisdictions have established specialized business courts, where disputes are resolved in a manner similar to that of commercial arbitration: in secret, without juries, or published, well-reasoned, and fact-specific opinions.[228]

Further, the commitment by these jurisdictions to keep providing lax corporate law is supported by at least three circumstances: (1) these nations usually "do not confront the type of democratic accountability facing larger nations, or even large states like New York or California, in part because they specialize in producing laws for corporations that do not physically operate within their territories;"[229] (2) their governments have a strong interest in attracting and retaining foreign corporations since they heavily rely on incorporation fees; and (3) the legislative process is easily captured by interest groups endorsing this approach.[230]

These offshore corporate law havens are already global market leaders for closely held business entities such as mutual funds, hedge funds, and trusts.[231] But they might be pursuing a broader strategy, thereby creating a state-to-nation state competition for public companies.[232] As of

224. *Id.* at 1408.

225. *Id.* at 1407-23.

226. *Id.* at 1403, 1408 n.22. *See also* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 12-15 (2019).

227. Moon, *Delaware's New Competition*, *supra* note 220, at 1410, 1423, 1444.

228. *Id.* at 1408-09, 1437-38. "Judges serving in these courts, like arbitrators, are credentialed business law jurists, including partners at major international law firms who fly in from overseas to preside over cases ad hoc." *Id.* 1409.

229. *Id.* at 1408.

230. *Id.* at 1429-37.

231. Moon, *supra* note 226, at 3-4.

232. Moon, *Delaware's New Competition*, *supra* note 220, at 1409.

2020, "over 14 [percent] of large publicly traded corporations listed in American securities markets" were already incorporated in a foreign jurisdiction.[233] Some commentators also demonstrated that some foreign firms operating within vastly different market environments may be less inclined or even averse to Delaware's corporate governance model.[234]

Certainly, the issue calls for further investigation. [235] Regarding jurisdictional competition, however, I believe there are some countervailing considerations that might come into play in incorporating an American business outside of the United States: reputational implications or a potential reduction in the attractiveness for investors might come into account when considering whether re-incorporating in these offshore jurisdictions.[236] In addition, some of the limits illustrated about Nevada's strategy are relevant for this case too: the strategy that these corporate law havens adopt has, for example, the typical limits of Nevada's market segmentation in terms of capability to capture only a particular type of corporations—mainly foreign firms listed on U.S. markets.[237]

Finally, I agree that the federal legislature might intervene to halt large American corporations from opting out of the mandatory rules of American corporate governance by incorporating in these offshore jurisdictions. Yet, this intervention might not necessarily imply a further erosion of state corporate law. For example, it might mandate some specific disclosure; or, it might simply exclude the application of the internal affairs doctrine for those firms incorporated in offshore jurisdictions but with no connection with them. This approach would remove any incentive for American businesses to incorporate in a corporate law haven, as the sole purpose of this sort of foreign incorporation is to elude the mandatory provisions of American corporate governance.

In other words, even if the federal legislature interceded, this intervention would probably not affect the state-based market for corporate charters.

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233. *Id.* at 1407, 1424.

234. Moon, *supra* note 66, at 1720, 1734-36.

235. *See, e.g.*, Moon, *supra* note 66, at 1708-16.

236. *But cf. id.* at 1730-34. There, Moon discusses the role of market infrastructures on the choice of incorporation.

237. *Id.* at 1685, 1700-07, 1720-28 (showing the types of companies considered).

IV. A NEW CHALLENGE: WYOMING AND BLOCKCHAIN COMPANIES

A. BLOCKCHAIN INNOVATION AND LEGISLATIVE REFORMS

While Nevada's success was limited, and neither the migration of cases nor federal incorporation currently constitute a serious threat, a new challenge to Delaware's dominance could originate from technological innovation, in particular blockchain. This technology has become increasingly popular in recent years. The interest was first due to a particular application of blockchain, i.e., cryptocurrencies such as Bitcoin, though later the importance of this technological innovation expanded beyond virtual currencies.[238] Blockchain is now considered the most transformative technology since the creation of the World Wide Web, with the potential to revolutionize our society and economic system.[239]

Interestingly, blockchain technology can offer important business opportunities and significantly affect corporate governance and financial intermediation. In this respect, blockchain is not only an opportunity for corporations[240] but also for states that aim to attract incorporators and challenge Delaware's position. The question is whether it can be a game-changer in the market for corporate charters.

The answer is far from simple and, before making some progress towards it, I will briefly outline the potential of this technology in corporate governance and how jurisdictions are approaching this innovation.

A blockchain is essentially a distributed database, having the form of a digital public ledger that is resistant to modification and contains a certain and verifiable record of every single transaction made.[241]

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238. *See* MICHÈLE FINCK, BLOCKCHAIN REGULATION AND GOVERNANCE IN EUROPE 34 (2019); *Florian* Möslein, *Blockchain Applications and Company Law*, *in* LEGAL TECHNOLOGY TRANSFORMATION. A PRACTICAL ASSESSMENT 1, 237 (Andrea Caligiuri ed., 2020).

239. *See* FINCK, *supra* note 238; Möslein, *supra* note 238.

240. In a sense, blockchain is a business opportunity but also an opportunity for businesses.

241. *See* Michael Crosby et al., *Blockchain Technology: Beyond Bitcoin*, 2 APPLIED INNOVATION REV. 6, 6-8 (2016).

> A blockchain is essentially a distributed database of records, or public ledger of all transactions or digital events that have been executed and

Therefore, this technology can provide the business community with certainty and disintermediation; it could innovate corporate governance by delivering certain, readily available information and eliminating the costs and failures of intermediation.[242] Its applications range from participation in general meetings to remote voting (without a proxy) to shareholder identifications to the direct holding systems of securities to the maintenance of corporate records to their transmission.[243]

> shared among participating parties. Each transaction in the public ledger is verified by consensus of a majority of the participants in the system. Once entered, information can never be erased.

Id. Blockchains can be permissionless, i.e., open for anyone to view and participate, or permissioned, which are the blockchains limiting the participation to a single administrator or a specific group of participants. *Id.*

242. *See* David Yermack, *Corporate Governance and Blockchains*, 21 REV. FIN. 7, 9-10, 18, 23 (2017); Pierluigi Matera, *Note in Tema di* Blockchain *e Assemblee delle Società Quotate nell'Età della Disintermediazione*, COMPARAZIONE E DIRITTO CIVILE 1, 3-4 (2018) (It.); Usha R. Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 683 (2019); Federico Panisi et al., *Blockchain and Public Companies: A Revolution in Share Ownership Transparency, Proxy Voting and Corporate Governance?*, 2 STAN. J. BLOCKCHAIN L. & POL'Y. 189, 206 (2019); Wulf A. Kaal, *Blockchain Solutions for Agency Problems in Corporate Governance*, *in* INFORMATION FOR EFFICIENT DECISION MAKING 313, 326-27 (Kashi R. Balachandran ed., 2020); Philipp Hacker, *Corporate Governance for Complex Cryptocurrencies? A Framework for Stability and Decision Making in Blockchain-Based Organizations*, *in* REGULATING BLOCKCHAIN: TECHNO-SOCIAL AND LEGAL CHALLENGES 140, 161-62 (Philipp Hacker et al. eds., 2019); Vedat Akgiray, *The Potential for Blockchain Technology in Corporate Governance* 1, 6 (OECD, Working Paper No. 21, 2019), https://doi.org/10.1787/ef4eba4c-en [https://perma.cc/M9K3-GW84]; Alexandra Sims, *Blockchain and Decentralised Autonomous Organisations (DAOs): The Evolution of Companies?*, 28 N.Z. UNIV. L. REV. 423, 423 (2019); Dulani Jayasuriya Daluwathmullagamge & Alexandra Sims, *Blockchain-Enabled Corporate Governance and Regulation*, 8 INT'L J. FIN. STUD. 36, 36 (2020); Alexandra Andhov, *Corporations on Blockchain: Opportunities & Challenges*, 53 CORNELL INT'L. L.J. 1, 3 (2020); Mark Fenwick & Erik P.M. Vermeulen, *The End of the Corporation: Transformation in Corporate Governance*, *in* CHALLENGES AND OPPORTUNITIES OF CORPORATE GOVERNANCE TRANSFORMATION IN THE DIGITAL ERA 1, 12 (Mikhail Y. Kuznetsov & Maria I. Nikishova eds., 2020), at 12.

243. *See* David Yermack, *Corporate Governance and Blockchains*, 21 REV. FIN. 7, 9-10, 18, 23 (2017); Matera, *supra* note 242, at 2-4; Usha R. Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 683 (2019); Federico Panisi et al., *Blockchain and Public Companies: A Revolution in Share Ownership Transparency, Proxy Voting and Corporate Governance?*, 2 STAN. J. BLOCKCHAIN L. & POL'Y. 189, 206 (2019); Wulf A. Kaal, *Blockchain Solutions for Agency Problems in Corporate Governance*, *in* INFORMATION FOR EFFICIENT DECISION MAKING 313, 326-27 (Kashi R. Balachandran ed., 2020); Philipp Hacker, *Corporate Governance for Complex Cryptocurrencies? A*

What blockchain means in terms of digital assets (i.e., cryptocurrencies and tokens) is renowned. With an "explosive growth and wild price swings," the cryptoasset market has already reached a value of $1.6 trillion.[244]

In the face of this potential, neither Congress nor any federal agency has yet passed specific regulation. In theory, although they lack explicit authority, several federal regulatory bodies might have jurisdiction over digital assets, including the Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC).[245] In

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Framework for Stability and Decision Making in Blockchain-Based Organizations, *in* REGULATING BLOCKCHAIN: TECHNO-SOCIAL AND LEGAL CHALLENGES 140, 161-62 (Philipp Hacker et al. eds., 2019); Vedat Akgiray, *The Potential for Blockchain Technology in Corporate Governance* 1, 6 (OECD, Working Papers No. 21, 2019) https://doi.org/10.1787/ef4eba4c-en [https://perma.cc/ER9X-NT4L]; Alexandra Sims, *Blockchain and Decentralised Autonomous Organisations (DAOs): The Evolution of Companies?*, 28 N.Z. UNIV. L. REV. 423, 423 (2019); Dulani Jayasuriya Daluwathmullagamge & Alexandra Sims, *Blockchain-Enabled Corporate Governance and Regulation*, 8 INT'L J. FIN. STUD. 36, 36 (2020); Alexandra Andhov, *Corporations on Blockchain: Opportunities & Challenges* 3 (U. Copenhagen Fac. of L., Legal Studies Research Paper Series No. 2019-85, 2019) (forthcoming in CORNELL INT'L. L.J.); Mark Fenwick & Erik P. M. Vermeulen, *The End of the Corporation: Transformation in Corporate Governance*, *in* CHALLENGES AND OPPORTUNITIES OF CORPORATE GOVERNANCE TRANSFORMATION IN THE DIGITAL ERA 1 (Mikhail Y. Kuznetsov & Maria I. Nikishova eds., 2020), at 12. *But see* Luca Enriques & Dirk A. Zetzsche, *Corporate Technologies and the Tech Nirvana Fallacy*, 72 HASTINGS L.J. 55 (2020), at 62. According to Enriques and Zetzsche, corporate technologies, also referred to as "CorpTech", including blockchain, can affect corporate governance to a certain extent: "So long as humans yield influence over the firm, the question of who decides what code is deployed and what data is processed will be key, and traditional corporate governance mechanisms will retain their core function of curbing agency problems within the firm." *Id.* at 62. Moreover, in the short term, the transition to a CorpTech-dominated governance environment might even aggravate agency problems within firms. This would be due to an insufficient understanding or an over-confidence in these technologies deriving from a "tech nirvana fallacy", i.e. the tendency of comparing supposedly perfect machines with failure-prone humans. *Id.* at 61, 71-96.

244. *See* Robert Schmidt & Benjamin Bain, *New SEC Boss Wants More Crypto Oversight to Protect Investors*, BLOOMBERG (Aug. 3, 2021, 12:01 AM), https://www.bloomberg.com/news/articles/2021-08-03/will-government-regulate-crypto-sec-chair-gary-gensler-on-bitcoin-and-oversight [https://perma.cc/4KAZ-HGKG].

245. *See The Role of the SEC*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/role-sec [https://perma.cc/85NX-GJVC] (last visited Oct. 13, 2021); *About the CFTC-The Commission*, CTFC, https://www.cftc.gov/About/AboutTheCommission [https://perma.cc/SS4E-CQWF] (last visited Oct. 13, 2021). *See*

practice, both agencies operate on a case-by-case basis. In particular, the SEC is adopting a regulation-by-enforcement approach[246] in an attempt to claim a role in the policing of cryptoassets. Nevertheless, this agency is struggling to adapt existing authorities to such an innovative product. For instance, to qualify a transaction as an "investment contract" for the purposes of federal securities laws, the SEC employs the standard formulated in the 1946 case *SEC v. Howey*[247] (the "*Howey* test").[248] Unsurprisingly, the application of such a dated test to determine whether an initial coin offering (ICO) is equivalent to an initial public offering (IPO) (and, as such, subject to registration under the Securities Act of 1933 and possibly under the Securities Exchange Act of 1934) has turned out to be rather challenging.[249]

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also Michele B. Neitz, *How to Regulate Blockchain's Real-Life Applications: Lessons from the California Blockchain Working Group*, 61 JURIMETRICS J. 185, 202 (2021); Yulya Guseva, *A conceptual framework for digital-assets securities: Tokens and Coins as Debt and Equity*, 80 MD. L. REV. 166, 174 (2020).

246. *See* Douglas S. Eakeley et al., *Crypto-Enforcement Around the World*, 94 S. CAL. L. REV. POSTSCRIPT 99, 100 (2021).

247. 328 U.S. 293, 293, 297, 300 (1946).

248. After some initial uncertainties, the SEC began to pursue this policy and, in 2017, explicitly stated that the Howey test applied to digital assets. SEC, 25-7-2017, "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO". In the following years, this approach has been consolidated through a line of cases. *See* In the Matter of TokenLot, LLC, Lenny Kugel, and Eli. L. Lewitt, Securities Act Release No. 10543 (Sept. 11, 2018); In the Matter of Zachart Coburn, Securities Act Release No. 84553 (Nov. 8, 2018). *See also* Press Release No. 227, Sec. & Exch. Comm'n, SEC Proposes Rules to Extend Regulations ATS and SCI to Treasuries and Other Government Securities Markets; In the Matter of Carrierq, Inc., D/B/A AirFox, Securities Act Release No. 10575 (Nov. 16, 2018); SEC v. Kik Interactive Inc., 492 F.Supp.3d 169 (S.D.N.Y. 2020); SEC v. Telegram Grp. No. 19 CIV. 9439 (PKC), 2020 WL 61528, at *1 (S.D.N.Y. Jan. 3, 2020). *See generally* Muhammed Kus, A Critical Review of U.S. Securities Laws and the Status of Initial Coin Offerings: Potential Solutions for Issuers (2018) (LLM dissertation, Indiana University).

249. *See* STRATEGIC HUB FOR INNOVATION & FIN. TECH., FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS 1-2 (2019), https://www.sec.gov/files/dlt-framework.pdf [https://perma.cc/4YPR-XL6F]. *See also* Cease-and-Desist Order, Securities Act Release No. 10445 (Dec. 11, 2017); William Hinman, Director, Div. Corp. Fin., Remarks at the Yahoo Finance All Markets Summit: Crypto: Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 [https://perma.cc/T8HG-GWPY]; James J. Park, & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99, 100 (2020). In recent cases, contradictions are emerging—and this might be a turning point for this policy. *See generally* Complaint, Sec. & Exch. Comm'n v. Ripple Labs, (No. 20-CV-10832); Press

The regulatory responses by state legislatures have been varied. New York State focused on virtual currency businesses and in 2015 issued a controversial regulation[250] known under the name of "BitLicense,"[251] which requires all virtual currency operators to obtain a license from the state.[252] Predictably, this regulation resulted in an exodus of blockchain and virtual currency businesses from New York.[253]

Release, Sec. & Exch. Comm'n, SEC Charges Ripple and Two Executives with Conducting $1.3 Billion Unregistered Securities Offering (Dec. 22, 2020), https://www.sec.gov/news/press-release/2020-338 [https://perma.cc/SX39-EPSV]; Roslyn Layton, *Toward a Ripple Test at the SEC*, FORBES (July 22, 2021, 6:35 AM), https://www.forbes.com/sites/roslynlayton/2021/07/22/toward-a-ripple-test-at-the-sec/?sh=1ea1611b2e67 [https://perma.cc/DZ3F-KEZ4]; David H. Freedman, *Why Ripple's SEC Lawsuit Could Have a Lasting Impact on Crypto*, FORTUNE (July 29, 2021, 5:20 AM), https://fortune.com/2021/07/29/ripple-xrp-sec-lawsuit-impact-on-crypto-industry/ [https://perma.cc/6HTC-Y2UY]. Cryptoassets might also be qualified as commodities, and as such, subject to the relevant federal regulation and the authority of the CFTC. *See* Commodity Future Trading Comm'n v. McDonnell, 287 F.Supp.3d 213, 226 (E.D.N.Y. 2018); Commodity Future Trading Comm'n v. My Big Coin Pay, 334 F.Supp.3d 492, 496–97 (D. Mass. 2018); Press Release, Commodity Future Trading Comm'n, Agency Ordered Over $1.3 Billion in Monetary Relief and Brought Record Number of Actions in FY 2020 (Dec. 01, 2020), https://www.cftc.gov/PressRoom/PressReleases/8323-20 [https://perma.cc/TJQ7-2L2P].

250. *See* N.Y. COMP. CODES R. & REGS. *tit. 23, § 200.3 (2015).*

251. Neitz, *supra* note 245, at 215.

252. *See* N.Y. COMP. CODES R. & REGS. *tit. 23, § 200.3 (2015).*

> (a) License required. No Person shall, without a license obtained from the superintendent as provided in this Part, engage in any Virtual Currency Business Activity. Licensees are not authorized to exercise fiduciary powers, as defined under Section 100 of the Banking Law.
>
> (b) Unlicensed agents prohibited. Each Licensee is prohibited from conducting any Virtual Currency Business Activity through an agent or agency arrangement when the agent is not a Licensee.

Id. According to this approach, virtual currency operators must be treated equally as traditional money transmitters. Nevertheless, traditional, long-established operators are usually better equipped to deal with an extensive regulatory framework. A proposal to amend this regulation is pending.

253. Commentators labeled New York's policy on the matter as a "boomerang approach." *See* Neitz, *supra* note 245, at 188, 215-16. In June 2020, in response to criticism, the New York State Department of Financial Services announced a "conditional license" framework according to which companies may participate in the issue of currencies even before a BitLicense is released, for example, if the applicant

In other jurisdictions, the framework is still uncertain.[254] Delaware is hedging its bets. Yet, other states are enacting more liberal regulations in the attempt to entice entrepreneurs to register or move there. The comparison among these approaches is essential to understand how they can affect the corporate charters market.

In 2017, Delaware passed an innovative piece of legislation[255] that amended the DGCL and allowed its corporations to keep corporate records on electronic networks or databases, including blockchain.[256]

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partners up and collaborates with already-licensed entities. *Notice of Virtual Currency Business Activity License Application Procedures*, N.Y. DEP'T FIN. SERV. (Oct. 13, 2021, 5:45 PM), https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/gn/notice_vc_busact_lic_app_procedure [https://perma.cc/8XGF-QX3R]. Since 2020, New Jersey has been working on a "Digital Asset and Blockchain Technology Act." *See* S. 3132, 219th Leg. (N.J. 2020); H.R. 3132, 219th Gen. Assemb., Reg. Sess. (N.J. 2020). If passed, this bill would impose a license on anyone engaging or holding out to engage in a digital asset business activity—similarly to the BitLicense, which the neighboring New York State mandates. The bill has been introduced in both houses, which suggests that it is likely to become law.

254. For instance, in California, the Money Transmission Act does not address virtual currencies, and the state has not issued official guidance on the applicability of that statute to cryptocurrencies. This has been defined as a "tortoise approach." Neitz, *supra* note 245, at 212-15. California Blockchain Working Group, a legislature-created committee, published its final report in July 2020. *See* Crittenden et al., BLOCKCHAIN IN CALIFORNIA: A ROADMAP, CALIFORNIA BLOCKCHAIN WORKING GROUP 14 (2020), https://www.govops.ca.gov/wp-content/uploads/sites/11/2020/07/BWG-Final-Report-2020-July1.pdf [https://perma.cc/5ACD-7EJL]. Similarly, Florida has not amended its Money Transmitter Act. This statute does not expressly include the concepts of "virtual currencies" or "monetary value," and the State's Office of Financial Regulation has not provided direct guidance as to the applicability of this law to virtual currency users and issuers. However, it is reasonable to believe that, under Florida law, persons who offer cryptocurrency wallets, or buy, sell, or exchange cryptocurrencies, are not to be considered necessarily outside the scope of the activities subject to the Act. *See* Carlton Fields, *State Regulations on Virtual Currency and Blockchain Technology*, https://www.carltonfields.com/insights/publications/2018/state-regulations-on-virtual-currency-and-blockchain-technologies [https://perma.cc/8DQG-VEB6] (last updated Aug. 29, 2019). *See also*, Florida v. Espinoza, 264 So. 3d 1055, 1071 (Fla. Dist. Ct. App. 2019) (reversing the trial court decision and interpreting the state's money laundering legislation extensively, holding that selling bitcoin directly to another person is covered under the law). Ironically, in June 2017 state legislature had passed an amendment to the Money Laundering Act in response to the trial court's decision in this case, expressly prohibiting the laundering of virtual currency. *See* H.R. 1379, 2017 Leg. (Fla. 2017).

255. S. 69, 149th Gen. Assemb., Reg. Sess. (Del. 2017) (the so-called "Blockchain Bill").

256. *See* DEL CODE ANN. tit. 8, § 224 (West 2017).

Additionally, these kept records can be used to prepare the list of stockholders,[257] record information,[258] and record transfer of stock,[259] thereby enabling corporations to trade corporate stock using a blockchain.[260] Nevertheless, Delaware law also provides that the records must be convertible "into clearly legible paper form upon the request of any person entitled to inspect such records."[261]

> Any records administered by or on behalf of the corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases).

Id.; Joanna D. Caytas, *Blockchain in the U.S. Regulatory Setting: Evidentiary Use in Vermont, Delaware, and Elsewhere*, COLUM. SCI. & TECH. L. REV. 1, 1-2 (2017). *See generally* Wonnie Song, *Bullish on Blockchain: Examining Delaware's Approach to Distributed Ledger Technology in Corporate Governance Law and Beyond*, 8 HARV. BUS. L. REV. 9 (2018); Andrea Tinianow & Caitlin Long, *Delaware Blockchain Initiative: Transforming the Foundational Infrastructure of Corporate Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 16, 2017), https://corpgov.law.harvard.edu/2017/03/16/delaware-blockchain-initiative-transforming-the-foundational-infrastructure-of-corporate-finance/ [https://perma.cc/6HTY-VWS7]; J. Travis Laster & Marcel T. Rosner, *Distributed Stock Ledgers and Delaware Law*, 73 BUS. L. 319, 336 (2018).

257. *See* DEL CODE ANN. tit. 8, §§ 219-220 (West 2017).

258. *See* DEL CODE ANN. tit. 8, §§ 156, 159, 217(a), 218 (West 2017).

259. *See generally* DEL CODE ANN. tit. 6, §§ 8-101-8-602 (West 1998).

260. The definition of "electronic transmission" was amended to include blockchain technology. *See* DEL. CODE ANN. tit. 8, § 232 (West 2017); S. 69, 149th Gen. Assemb., Reg. Sess. (Del. 2017). The certificate of incorporation and bylaws can now be transmitted via blockchain, in addition to the traditional means. DEL CODE ANN. tit. 8, § 116(a)(3) (West 2017). The state legislature also updated the Delaware Limited Liability Company Act to enable domestic limited liability companies to use networks of electronic databases, such as blockchain, for the creation and maintenance of limited liability company records and for certain electronic transmissions. S. 183, 149th Gen. Assemb., Reg. Sess. 1, at 58-59 (Del. 2018). Similarly, the Delaware Revised Uniform Limited Partnership Act was amended in order to provide specific statutory authority for Delaware limited partnerships to do the same. S. 182, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

261. DEL CODE ANN. tit. 8, § 224 (West 2017).

> When records are kept in such manner, a clearly legible paper form prepared from or by means of the information storage device, method,

Vermont adopted a more liberal approach. This jurisdiction also passed a bill that makes a fact or record verified through blockchain technology "authentic" for use in court proceedings[262] with no immediate need for conversion into paper.[263] Moreover, it enabled blockchain records to be governed under the authentication, admissibility, and presumptions requirements of the Vermont Rules of Evidence.[264] With specific reference to cryptocurrencies, it is worth noting that Vermont applies its money transmission laws to virtual currency, but also allows companies to hold virtual currency as a permissible investment.[265]

Yet, the most interesting innovation the Vermont state legislature enacted is the creation of "blockchain-based limited liability companies" (BBLLCs).[266] Passed in 2018, this statute allows entities to incorporate or re-incorporate their businesses under this form, which the statute defines as a company organized "for the purpose of operating a business that utilizes blockchain technology for a material portion of its business activities."[267] Once established, incorporators must also "specify whether the decentralized consensus ledger or database utilized or enabled by the BBLLC will be fully decentralized or partially decentralized and whether such ledger or database will be fully or partially public or private."[268]

> or one or more electronic networks or databases (including one or more distributed electronic networks or databases) shall be valid and admissible in evidence, and accepted for all other purposes, to the same extent as an original paper record of the same information would have been, provided the paper form accurately portrays the record.

262. H.R. 868, 2016 Gen. Assemb., Reg. Sess. (Vt. 2016).

263. VERMONT STATE ARCHIVES AND RECORDS ADMINISTRATION, BLOCKCHAINS FOR PUBLIC RECORDKEEPING AND FOR RECORDING LAND RECORDS, 26 (2019), https://legislature.vermont.gov/assets/Legislative-Reports/2019-Blockchain-Legislative-Report-VSARA.pdf [https://perma.cc/L7XB-HHC3].

264. VT. STAT. ANN. tit. 12, § 1913 (West 2018).

265. H.R. 182, 2017 Gen. Assemb., Reg. Sess. (Vt. 2017). Digital currency businesses with money transmitter licenses are required to hold a certain amount of permissible investments, and this law explicitly holds that virtual currency is a permissible investment in this respect. *Id.* § 16(a)(5).

266. *Id.*

267. S. 269, 2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

268. *Id.* For a discussion regarding a proposed crypto-corporation form, see Timothy Nielsen, *Cryptocorporations: A Proposal for Legitimizing Decentralized Autonomous Organizations*, 5 UTAH L. REV. 1105, 1129 (2019). "By borrowing from and building upon the attributes of partnerships, LLCs, and corporations, the concept of the Cryptocorporation has the potential to foster the productive use and development of smart

From the governance to the maintenance of corporate records, this type of company adopts blockchain as a primary tool, not only as an alternative permitted under some conditions. Arguably, Vermont is using BBLLC as a laboratory where to experiment the potential of blockchain technology.

B. WYOMING'S STRATEGY

1. Wyoming's Blockchain Legislation

Wyoming is the state that has pushed the challenge even further and has emerged as the most blockchain-friendly jurisdiction so far.[269] It has focused on the business opportunities deriving from digital assets more than the potential of blockchain for corporate governance.[270] In fact, Wyoming has passed more than a dozen liberal bills to attract blockchain, cryptocurrency, and token-based businesses.[271]

Wyoming's tech bet did not come as a complete surprise. This jurisdiction has a history of using innovation in corporate law as a strategy to attract incorporators: it is a known fact that Wyoming was the first U.S. jurisdiction to introduce the limited liability company form in March 1977.[272]

Interestingly, what Wyoming has done about attracting blockchain businesses thus far relates as much to corporate law as to securities law. In particular, what this jurisdiction is doing with regard to blockchain and securities laws is unique to Wyoming's policy on blockchain business and calls for further clarification. As is well known, although federal law regulates most aspects relating to securities, some regulation is left to state laws to dictate. These laws—commonly referred to as "Blue Sky Laws"—

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contract technology for decentralized organizations, while mitigating the risks to investors and facilitating a more frictionless secondary market." *Id.*

269. *See* Neitz, *supra* note 245, at 214-15 (criticizing Wyoming for using a "hare approach").

270. *Id.*

271. Gregory Barber, *The Newest Haven for Cryptocurrency Companies? Wyoming*, WIRED (June 13, 2019, 7:00 AM), https://www.wired.com/story/newest-haven-cryptocurrency-companies-wyoming/ [https://perma.cc/2LBR-SM2M].

272. *See* Wyoming Limited Liability Company Act, ch. 158, 1977 Wyo. Sess. Laws 577 (enacted); Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 400 (1996); Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, *in* BUSINESS TAX STORIES 296 (Steven A. Bank & Kirk J. Stark eds., 2005).

impose disclosure and filing requirements to protect the public from fraud.[273] Wyoming is essentially exempting digital assets from these laws. Certainly, providing exemptions to Blue Sky Laws for an entire business sector might defeat the *raison d'être* of such laws; but it must also be interpreted as a clear indication of Wyoming's determination to become the most desirable jurisdiction for blockchain companies.

The story of the Utility Token Bill[274]—signed into law by Wyoming state legislature in 2018—exemplifies this strategy. First, pursuant to this statute, "utility tokens" were exempted from state securities laws–in the sense that a developer or seller of an open blockchain token was not considered as the issuer of a security.[275] In particular, the securities exemption was granted to utility tokens under three conditions: that (1) the developer or seller of the token[276] had filed a notice of intent with the secretary of state; (2) the purpose of the token was consumptive–the token had only be exchangeable or provided for the receipt of goods, services, or content;[277] and (3) the developer or seller of the token had not sold the

273. They were originally conceived to regulate the offering and sale of securities and protect the public from fraud by imposing disclosure and filing requirements (the registration of stockbrokers, brokerage firms, and any offering and sale of securities). Traditionally, Kansas is thought to be the first jurisdiction to enact Blue Sky Laws in 1911. *See* Act of March 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210; Rick A. Fleming, *100 Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky*, 50 WASHBURN L.J. 583, 583 (2011). Some commentators claim that a previous example of state securities laws can be found in a 1909 Nevada law imposing disclosure and filing requirements on mining companies. *See, e.g.*, Keith P. Bishop, *No Blue Sky for Almost a Half Century*, NAT'L L. REV. (Mar. 10, 2020), https://www.natlawreview.com/article/no-blue-sky-almost-half-century [https://perma.cc/R888-3S3Q]. *See also* 1909 Nev. Stat. 100-01 (repealed 1915). Since the National Conference of Commissioners on Uniform State Laws adopted the Uniform Securities Act—a model statute for state securities law—in 1956, most Blue Sky laws are patterned after this model. State securities laws and federal securities laws complemented for years, with some overlap and duplication. In the last 25 years, federal regulation on securities and the SEC has largely preempted Blue Sky laws. *See* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C. 2006)); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified); Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 234 (2003); Amy Westbrook, *Blue Skies for 100 Years: Introduction to the Special Issue on Corporate and Blue Sky Law*, 50 WASHBURN L.J. xxv, xxxii (2011).

274. H.R. 70, 64th Leg., Budget Sess. (Wyo. 2018).

275. Usha R. Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 683 (2019).

276. Or the registered agent of the developer or seller.

277. Including rights of access to goods, services, or content.

token to the initial buyer as a financial investment.[278] By virtue of this statute, "a person who facilitates the exchange of an open blockchain token [was] not be deemed a broker-dealer or a person who otherwise deals in securities"—with few exceptions made.[279]

Subsequently, Wyoming went even further: in 2019 the state legislature repealed these provisions[280] and established that open blockchain tokens with specified consumptive characteristics are intangible personal property.[281] As such, these utility tokens are not qualifiable as securities and, therefore, they avoid needing a securities exemption altogether.

This liberal approach is not shared by the SEC, which is currently more inclined to conclude that tokens are securities in most cases.[282] This agency is advocating for the enactment of a federal legislation and aiming to pass its own regulation—if conferred specific authority on the matter.[283] Should Congress or the SEC intervene, Wyoming would fail to provide issuers of "utility tokens" with a completely safe harbor. More generally, a federal regulation would narrow how much state legislatures could differentiate their policies, thereby limiting Wyoming's strategy to attract tech companies through a favorable legislation.

This federal intervention may not be just a remote possibility. The failed attempts by Congress to legislate suggest that the federal legislature is in fact considering filling the gap and regulating the matter. For example, in March 2020, a federal bill named the Crypto-Currency Act

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278. WYO. STAT. ANN. § 17-4-206(a) (2018) (repealed 2019).

279. WYO. STAT. ANN. § 17-4-206(b) (2018) (repealed 2019).

280. Wyoming Utility Token Act - Property Amendments, H.R. 0062, 65th Leg. § 4 (2019).

281. WYO. STAT. ANN. § 34-29-101(b) (2019).

282. Jay Clayton, Former Chairman, Sec. & Exch. Comm'n, Statement on Cryptocurrencies, and Initial Coin Offerings (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 [https://perma.cc/L5GT-5A6V]. As anticipated, this statement regards ICOs. The cryptoasset policy of the SEC is built on enforcement of pre-crypto regulations. Critics emphasise that the SEC has used existing authorities to evaluate new product approval, while digital assets would call for policy solutions more tailored to the different nature of these products. *See* Yuliya Guseva, *When the Means Undermine the End: The Leviathan of Securities Law and Enforcement in Digital-Asset Markets*, STAN. J. BLOCKCHAIN L. & POL'Y (forthcoming 2022). *See also* Dan Awrey, *The Crypto Puzzle*, OXFORD BUS. L. BLOG (June 22, 2018), https://www.law.ox.ac.uk/business-law-blog/blog/2018/06/crypto-puzzle [https://perma.cc/S5YW-JMF9].

283. *See* Schmidt & Bain, *supra* note 244.

of 2020 was introduced into Congress.[284] It contained a comprehensive reform of U.S. cryptocurrency regulation.[285] The bill failed to be enacted—it was probably doomed from the start.[286] Yet, it offers an "insight into what a top-to-bottom new law governing crypto could look like one day" [287] and suggests that the federal legislature might intervene.[288]

A further indication of possibly imminent federal regulation comes from the digital asset provision in a bill Congress passed in November 2021, the "Infrastructure Investment and Jobs Act"[289] (commonly referred to as the "Infrastructure Bill"). Three pages of this 1039-page piece of legislation are dedicated to cryptoassets and mandate tax information reporting for some cryptocurrency transactions.[290] Unsurprisingly, the

284. H.R. 6154, 116th Cong. (2020).

285. *See* DEL. CODE ANN. tit. 8, § 232 (West 2017); S. 69, 149th Gen. Assemb., Reg. Sess. (Del. 2017).

286. Daniel Kuhn, *The Cryptocurrency Act of 2020 is 'Dead on Arrival,' Washington Tells Sponsors*, COINDESK (Mar. 10, 2020, 2:32 PM), https://www.coindesk.com/the-cryptocurrency-act-of-2020-is-dead-on-arrival-washington-dc-tells-sponsors [https://perma.cc/L38T-HYMT].

287. *Id.*

288. In March 2021, another bill, the Token Taxonomy Act, was introduced into the House of Representatives. *See* H.R. 1628, 117th Cong. (2021). Actually, this bill was already introduced in 2019 but ended up being a dead end. *See* H.R. 2144, 116th Cong. (2019). The bill specified that digital tokens, such as those used in virtual currencies, were not securities for regulatory purposes. Additionally, it provided for the tax treatment of virtual currencies and excluded from gross income any gains from virtual currency transactions up to $600. *See* Securities Clarity Act, H.R. 8378, 116th Cong. §2(b) (2020); Guseva, *supra* note 282, at 10 n.50.

289. *See* H.R. 3684, 117th Cong. (2021). The changes concerning digital assets will be effective to any information return required to be filed after December 31, 2023. *Id.*

290. In particular, the new reporting requirements regard (1) cryptocurrency asset exchanges and custodians (on an IRS Form 1099) and (2) certain persons who accept large payments in cryptocurrency in such person's trade or business (on an IRS Form 8300). With respect to the former, the Bill redefined the term "broker" under IRC 6045 to include "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person." H.R. 3684, 117th Cong. (2021), §6045(c)(3)(D). Consequently, under the new provisions, cryptocurrency exchanges will be treated like traditional brokerage houses. *See id.* at §6045(d). Regarding the latter, the Bill expanded the definition of cash to include cryptocurrency. *Id.* at §6045(d)(3). As a result, any person who, in the course of such person's trade or business, receives more than $10,000 in value via cryptocurrency (in one or two or more related transactions) will be required to file an IRS Form 8300 indicating (1) the identifying information of the payer (including such individuals name, address, occupation, and taxpayer identification number) (2) the identifying information

Blockchain Association[291] expressed some concerns about the newly-introduced provision; clearly this debate is gaining momentum.[292]

However, even if there were a federal intervention, Wyoming's position might be only partly affected, since its strategy is broader and not limited to said exemptions for utility tokens. This jurisdiction made the development of blockchain business a true priority and introduced further exemptions to banking and financial services regulation in 2019 after rejecting[293] the Uniform Law Commission's regulatory model for crypto and blockchain assets.[294] For instance, Wyoming's lawmakers considered that many blockchain and cryptocurrency innovators are unable to secure reliable banking services under normal conditions, and this might hamper the development of these kinds of services and products. Thus, the state legislature enacted bill that introduced "special purpose depository institutions" (SPDIs).[295] These institutions are allowed to receive deposits and conduct a range of other traditional banking activities (including fiduciary asset management, custody, and related activities) without being required to secure insurance from the Federal Deposit Insurance Corporation (FDIC).[296] As a result, those Wyoming institutions that were unable to obtain FDIC insurance due to their dealings with cryptocurrencies can now apply for the SPDI bank charter and offer banking services.[297]

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of the person on whose behalf the transaction was conducted and (3) a description of the transaction and method of payment. *See* Timothy L. Jacobs et al., *New Cryptocurrency Information Reporting Regime Required on Form 1099 and Form 8300*, 11 NAT'L L. REV. (2021), https://www.natlawreview.com/article/new-cryptocurrency-information-reporting-regime-required-form-1099-and-form-8300 [https://perma.cc/A8QC-BAJX].

291. The lobby of blockchain and cryptocurrency industry. The association is "dedicated to improving the public policy environment for crypto networks." *See* BLOCKCHAIN ASS'N, https://theblockchainassociation.org/about-us/ [https://perma.cc/3ABB-V6TE] (last visited Jan. 24, 2022).

292. *See* Benjamin Pimentel, 'Twitter is Our Superpower': The Crypto Lobby Mounts a D.C. Offensive, PROTOCOL (Nov. 10, 2021), https://www.protocol.com/fintech/ crypto-blockchain-association-lobby [https://perma.cc/UAS9-TGYS].

293. *See* S. 125, 65th Leg., Gen. Sess. (Wyo. 2019).

294. Both the Uniform Regulation of Virtual Currency Businesses Act (URVCBA) and Supplemental Act, thereby inducing the Commission to reconsider its approach. *See* H. 5847, Gen. Assemb., Reg. Sess. (R.I. 2019).

295. H.R. 74, 65th Leg., Gen. Sess. (Wyo. 2019).

296. *Id.*

297. Unlike traditional banks, SPDIs are prohibited from making loans with customer deposits, which is the reason why they are not required to obtain FDIC insurance

Wyoming also enacted a statute which created a financial technology sandbox for blockchain companies to test or manage innovative financial products and services in the state.[298] Furthermore, this jurisdiction exempts virtual currencies that are used within the jurisdiction from money transmitter laws and regulations.[299] Regarding tax regimes, Wyoming exempts these currencies from state property taxes.[300]

Finally, with respect to corporate law, Wyoming passed legislation authorizing the maintenance of corporate records in a blockchain.[301] More interestingly, it established a chancery court and gave it jurisdiction over "disputes involving commercial, business, trust and similar issues".[302] This legislative amendment[303] is perhaps the strongest indication that Wyoming is trying to follow Delaware's steps towards a leading position in the corporate charters market. Significantly, the jurisdiction of this court recalls the one established for the Delaware Chancery Court, which is an essential part of Delaware's success—as articulated above. The development of a body of precedents on corporations, and blockchain companies in particular, by a specialized court is crucial to achieving a competitive advantage that other jurisdictions cannot easily replicate.

In addition to the statutes already enacted, Wyoming's Blockchain Task Force, a legislature-created committee that has drafted many of the new laws, appears to have forthcoming an ambitious blockchain agenda.[304]

(although they are permitted to do so). Therefore, the SPDI charter is designed for those financial institutions that focus on digital assets, such as virtual currencies, digital securities, and utility tokens. *Special Purpose Depository Institutions*, WYO. BANKING DIV., https://wyomingbankingdivision.wyo.gov/banks-and-trust-companies/special-purpose-depository-institutions [https://perma.cc/98YT-V2V6] (last visited Jan. 24, 2022).

298. H.R. 57, 65th Leg., Gen. Sess. (Wyo. 2019) (defining an "innovative" financial product or service as a product or service that uses "new or emerging technology, or new uses of existing technology, that provides a product, service, business model, or delivery mechanism to the public and has no substantially comparable, widely available analogue in Wyoming, including blockchain technology"). *Id.* at § 40-28-102 (a)(vi). These innovative financial products or services can be run in a financial sandbox for two years and extendable for an additional year.

299. H.R. 19, 64th Leg., Gen. Sess. (Wyo. 2018).

300. S. 111, 64th Leg., Gen. Sess. (Wyo. 2018).

301. H.R. 101, 64th Leg., Gen. Sess. (Wyo. 2018). This law requires that for electronic keys, network signatures, and digital receipts are used.

302. S. 104, 65th Leg., Reg. Sess. Art. 1, §§ 5-13-101, 5-13-115(a) (Wyo. 2019).

303. *Id.*

304. *2020 Select Committee on Blockchain, Financial Technology and Digital Innovation Technology*, WYO. LEG. (2020), https://www.wyoleg.gov/Committees/

The most recent development is the enactment of the first law in the United States on decentralized autonomous organizations (DAOs)—effective from July 1, 2021.[305] A DAO is a blockchain-based organization that is governed by rules embedded into computer programs—an interconnected system of smart contracts, to be accurate. This entity is autonomous and decentralized in the sense that said computer programs are stored and executed automatically on a decentralized network of participating computers—in other words, a blockchain. This ensures great efficiency, since the programs are not governed by a single source (person or computer), and the systems apply and enforce the rules automatically.[306]

Wyoming's legislation now grants DAOs the same rights as a limited liability company. Actually, pursuant to § 17-31-104(a), a decentralized autonomous organization is precisely a limited liability company whose articles of organization contain a statement that the company is a decentralized autonomous organization.[307]

Arguably, since DAOs have remarkable growth potential, these recent provisions indicate additional significant differentiation of

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2020/S19 [https://perma.cc/4PD3-XE9T]. In 2021, the House passed a bill (H.R. 43), which amends the definition of digital asset and the provisions related to the nature of digital assets under commercial law. It also clarifies provisions on the custody of digital assets by banks and establishes that certain digital assets provisions are consumer protection statutes for commercial law purposes. H.R. 43, 66th Leg., Gen. Sess. (Wyo. 2021). Also, the Senate passed a bill (S. 38), which provides for the definition, formation, and management of decentralised autonomous organizations. This confirms Wyoming's attention to technological innovation and its intention to exploit any related business opportunity. S. 38, 66th Leg., Gen. Sess. (Wyo. 2021).

305. Similarly to 1977, when this state innovated corporate law and became the first U.S. jurisdiction to introduce the limited liability company form. *See supra* note 272 and accompanying text. Wyoming is now the first U.S. state to legally recognize DAOs as limited liability companies, for that matter. *See* S. 38, 66th Leg., Gen. Sess. (Wyo. 2021) (codified at WYO. STAT. ANN. §§ 17-31-101 to 17-31-112 (2021)).

306. "A DAO is a blockchain-based system that enables people to coordinate and govern themselves mediated by a set of self-executing rules deployed on a public blockchain, and whose governance is decentralised (i.e., independent from central control)." Samer Hassan & Primavera De Filippi, *Decentralized Autonomous Organization*, 10 INTERNET POL'Y REV. 1, 2 (2021).

307. WYO. STAT. ANN. § 17-31-104(c) (2021). Interestingly, pursuant to the new section 17-31-112)), members of a DAO have no right to separately inspect or copy records of the organization, and the organization has no obligation to furnish any information concerning its activities "to the extent the information is available on an open blockchain." WYO. STAT. ANN. § 17-31-112 (2021).

Wyoming's legislation in corporate matters and further incentivize tech companies to elect this jurisdiction as their home state. Moreover, it is a legislative innovation that is unlikely to be affected by possible federal intervention. I predict that, if a federal regulation is introduced in the short term, it would probably regard digital assets and leave DAOs' regulation untouched. Therefore, with its enabling regulation on DAOs, Wyoming has secured another area that will remain attractive for tech incorporation even in the event of federal intervention on cryptocurrencies and tokens.

In this respect, the new provisions on DAOs confirm both Wyoming's ability to adopt strategic moves to captivate blockchain companies, as well as its determination to lead the tech challenge to Delaware's dominance.[308]

2. *Other Jurisdictions on the Same Path*

Certainly, other jurisdictions are attempting to exploit the opportunity provided by blockchain and attract the companies operating in this sector. For instance, in March 2019, the state of Colorado passed the noteworthy Colorado Digital Token Act[309]. This statute addressed digital tokens and facilitated the sale and transfer of these tokens within its territory—something that most states have not focused on.[310] Specifically, this act exempts the offer or sale of digital tokens that primarily have a "consumptive purpose" from state securities registration as long as certain transactional conditions are met.[311] It also exempts the digital token issuer—and those persons acting on its behalf—from the broker-dealer and salesperson licensing requirements of the Colorado Securities Act.[312] Yet, this jurisdiction has pursued no meaningful legislative innovation on blockchain and digital assets since then.

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308. *See* S. 38, 66th Leg., Gen. Sess. (Wyo. 2021) (codified at WYO. STAT. ANN. §§ 17-31-101 to 17-31-112 (2021). Interestingly, pursuant to the new section 17-31-112, members of a DAO have no right to separately inspect or copy records of the organization, and the organization has no obligation to furnish any information concerning its activities "to the extent the information is available on an open blockchain." WYO. STAT. ANN. § 17-31-112.

309. S. 19-023, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019) (codified at COLO. REV. STAT. § 11-51-308.7 (2019)).

310. Michele A. Kulerman and Jason K. Zachary, *Colorado Digital Token Act Exempts Certain Cryptocurrency Transactions from Colorado Securities Laws*, DENV. BUS. J. (Oct. 1, 2019), https://www.bizjournals.com/denver/news/2019/10/01/colorado-digital-token-act-exempts-certain.html [https://perma.cc/JM6G-595A].

311. COLO. REV. STAT. § 11-51-308.7(3)(a) (2019).

312. COLO. REV. STAT. § 11-51-308.7(3)(b) (2019).

Kentucky has recently introduced tax exemptions for commercial cryptocurrency miners on tangible property and electricity used for the mining activity.[313] In Montana no license is required to operate in the digital asset business.[314] Texas has given state-chartered banks the authority to provide services such as custody or safekeeping services for virtual currencies.[315] Further, like in Wyoming, the state legislature amended the Uniform Commercial Code and included virtual currencies.[316]

Most recently, at end of May 2021, Nebraska enacted the Financial Innovation Act,[317] which enables digital asset depository institutions. Consequently, in this jurisdiction, existing banks may create dedicated divisions for digital assets, and new institutions may easily be established by obtaining a specific digital asset depository charter.[318]

Nevertheless, most of these efforts to attract tech incorporators are too recent to exhibit any meaningful results and, certainly, one-off provisions cannot be decisive on whether a state will continue to pursue this sort of legislation. Wyoming's legal framework for digital assets consists of a coordinated series of laws which, as a whole, has no equal. This jurisdiction has been persistent in its strategy, and its competitive advantage is currently significant.

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313. H.R. 230, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021). Most likely, the purpose of these exemptions was to catch the windfall of Chinese crackdown. *See* Cheyenne Ligon, *Blockware Raises $25M to Expand Bitcoin Mining Operations in Kentucky*, COINDESK (June 30, 2021, 8:22 AM), https://www.coindesk.com/blockware-raises-25m-to-expand-bitcoin-mining-operations-in-kentucky [https://perma.cc/5NNY-NR BG]. Nevertheless, given the low cost of electricity, many blockchain businesses relocated in Kazakhstan (Note for editor: none of the materials here mention Kazakhstan, only Texas and Tennessee) or Texas or Tennessee, after leaving China. *See, e.g.*, Dalvin Brown, *Bitcoin Miners Break New Ground in Texas, a State Hailed as the New Cryptocurrency Capital*, WASH. POST (July 8, 2021, 4:12 PM), https://www.washingtonpost.com/ technology/2021/07/08/bitcoin-mining-texas-electricity/ [https://perma.cc/B3EF-VW UX].

314. Actually, there is no legislation at all from the Montana Division of Banking regulating money transmitters. This means that in Montana money transmitters do not have to be licensed with the Division. However, they do need to be registered as a business with the Montana Secretary of State. *Money Service Businesses*, MONTANA.GOV, https://banking.mt.gov/moneytransmitters [https://perma.cc/K94M-JBRN] (last visited Jan. 24, 2022).

315. TEX. FIN. CODE ANN. § 32.001 (West year).

316. H.R. 4474, 87th Leg., Reg. Sess. (Tex. 2021).

317. Leg. 649, 107th Leg., 1st Sess. (Neb. 2021).

318. *Id.*

3. *The Segmentation of the Corporate Charters Market*

Blockchain offers clear promise and potential both to business and corporate life. Some argue that blockchain technology will continue to develop quickly, as will its use in business and corporate life, regardless of how legislatures frame regulation.[319] Therefore, "everyone—including industry players, members of the public, and governments themselves—will gain if lawmakers can strike the right balance between innovation and public protection."[320]

What Wyoming is attempting to achieve is clearly something different and is going mostly unnoticed in terms of competition for the corporate charters market. As I have argued above, this jurisdiction is targeting a specific segment of this market: the incorporations of digital asset businesses. Other jurisdictions, such as Vermont, although not disinterested in cryptocurrencies and tokens, are more inclined to attract corporations that aim to explore what blockchain can do to simplify corporate life and make it more efficient.[321] Delaware is being prudent yet not undaring: its amendments to the DGCL are focused on how this technological innovation can provide a better governance and reduce intermediation costs.[322] By contrast, Wyoming is exploiting blockchain to get ahead on this new segment of the corporate charters market and take it away from Delaware.

In this respect, Wyoming is replicating the market segmentation strategy already conceived and put in place by Nevada for small firms. There are some similarities. As in Nevada's case, Delaware is unlikely to follow Wyoming in adopting such liberal laws for digital asset businesses for a simple reason: should Delaware introduce laws that are too lax, the federal legislature might intervene.

However, unlike Nevada, Wyoming is creating a safe harbor by introducing exemptions or custom-made provisions in multiple fields of regulation, including state securities regulation.[323] This is consistent with the aims of the blockchain industry.

Finally, Wyoming's strategic choice of targeting a market segment that might have real growth potential marks an important difference from

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319. Michele Benedetto Neitz, *How to Regulate Blockchain's Real-Life Applications: Lessons from the California Blockchain Working Group*, 61 JURIMETRICS J. 185, 185 (2021).

320. *Id.*

321. *See* Caytas, *supra* note 256.

322. *See id. See also supra* Section II.B.3.

323. *See* Neitz, *supra* note 245, at 214-15.

Nevada's approach: the market segment of small firms (looking for a liability-free jurisdiction) is not comparable in terms of size and return on investment (ROI) with the blockchain market.[324] This consideration might have two implications. On the one hand, if the blockchain market continues to grow steadily and Wyoming's strategy eventually succeeds, Wyoming might earn the "tech dominance" label for which it is aiming. On the other hand, if this market segment grows significantly and Wyoming succeeds in attracting cryptocurrency businesses, the federal legislature is likely to intervene and regulate the sector.

C. Calculated Risk or Unreasonable Hazard?

Speculators contend that Wyoming's lawmakers are writing these provisions "under dictation" of cryptocurrency wealth holders and without a full understanding of the matter—which is undoubtedly technical.[325] However, it is also true that the novel nature of this young industry and a lack of model legislation calls for a close coordination with the businesses involved.

Regardless of whether this particular criticism is justified, Wyoming seems to be succeeding in attracting some tech-incorporators so far.[326] Yet, it is taking a risky gamble.

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324. A survey released in October 2020 revealed that more than half of U.S. investors (55 percent) would be interested in investing in virtual currencies. This marks a substantial increase in interest from 2019, when 36 percent of investors said they would consider a Bitcoin investment. *See Grayscale Investments Study Shows More than Half of U.S. Investor Survey Respondents Would Consider Investing in Bitcoin and 23% Already Have*, GLOBE NEWSWIRE (Oct. 27, 2020, 9:00 AM), https://www.globenewswire.com/news-release/2020/10/27/2115198/0/en/Grayscale-Investments-Study-Shows-More-than-Half-of-U-S-Investor-Survey-Respondents-Would-Consider-Investing-in-Bitcoin-and-23-Already-Have.html [https://perma.cc/3GSH-HKGL]. Nevertheless, there may be a significant number of investors interested in investing in blockchain technologies or simply in trading using a blockchain. Similarly, there may be a large number of corporations interested in experimenting with blockchain innovation. The question is how much the number of corporations mining cryptocurrencies or offering the related services might grow.

325. *See* Andrew Graham, *Links Drive Allegation of Insiders Writing Crypto Bills*, WYOFILE (Nov. 26, 2019), https://wyofile.com/links-drive-allegation-of-insiders-writing-crypto-bills/ [https://perma.cc/Z3TY-9A8W].

326. Data are uncertain because Wyoming laws do not require an entity to provide the Secretary of State's Office with a purpose or the type of business. In a search for certain keywords like "blockchain" or "crypto," only the entities having those keywords in their names will come up. An indication of the success in attracting tech-incorporators can be

Certainly, New Jersey's and Nevada's experiences generate insights as to whether Wyoming is likely to succeed or not. The theories and arguments that I set forth above may be applied to assess Wyoming's strategy.[327] For example, the application of the credible commitment theory and of the network theory to this case suggests that Wyoming's challenge requires an unlikely, albeit not impossible, combination of circumstances to succeed.[328]

The reason can be easily explained by considering the dynamics of these theories as I articulated above. In particular, Wyoming is emerging as a jurisdiction committed to providing the blockchain community with a favorable legal framework and it is trying to capitalize on this reputation.[329] This strategy is consistent with both the credible commitment and network theories. Nevertheless, setting up a securities framework that features little to no control can be a short-sighted strategy, if not a hazard. This approach might succeed in enticing blockchain corporations on one hand but, on the other, might be detrimental for clients, users, and even investors to a certain extent. Such a permissive line of legislation might endanger the public and be at risk for exploitation. In this case, the repercussions might end up damaging Wyoming's reputation and ambitions.

Moreover, building popularity either to generate the credible commitment effect or the network effect needs time.[330] As I explained, should the federal legislature intervene, the room for Wyoming to differentiate its legislation from that of other states would shrink. Since Wyoming is using this differentiation to attract cryptocurrency incorporators, the result of such federal action would be a dramatic decrease of its competitiveness.

On a different note, the application of the Delaware trap argument[331] to Wyoming's strategy enables some favorable conclusions. The plan of focusing on blockchain companies by crafting innovative, specialized legislation might earn this jurisdiction some advantage in terms of the

that, after the first wave of laws in favor of these businesses in 2018, more than 200 corporations with names relating to blockchain technologies or cryptocurrencies registered in Wyoming. *See* Ben McLannahan, *Wyoming's Pioneering Crypto Cowboys Beef Up the Supply Chain*, FIN. TIMES (July 1, 2018), https://www.ft.com/content/da69a410-6972-11e8-b6eb-4acfcfb08c11 [https://perma.cc/B2NL-9BJ7].

327. *See* Caytas, *supra* note 256, at 9.

328. *See* Molk *supra* note 58, at 1170.

329. *See* Neitz, *supra* note 245, at 214-15.

330. *See* Molk, *supra* note 58, at 1173-74.

331. *See* discussion *supra* Section II.B.2.

charters market. This might also induce law schools to teach Wyoming's blockchain law. Additionally, if Wyoming mirrors Delaware corporate law in the other areas, it might benefit from the educational cycle illustrated above.[332] In other words, if legal counsels become familiar with Wyoming's law on blockchain, they could minimize learning costs by recommending tech-incorporators to incorporate in Wyoming. Thus, this jurisdiction might even prevail over the trap in which corporations fall and which reinforce Delaware's leading position.

However, under another line of argument, Wyoming—like any other jurisdiction—is unlikely to gain and retain an advantage in the market for corporate charter only because of favorable blockchain legislation. As I have reported, some hold that New Jersey did not lose its leading position because of the Seven Sisters package of laws, but rather because of competition from other jurisdictions.[333] Viewed in this way, a competitive advantage merely based on legislation is transient. The lesson to draw from New Jersey's experience is that other state legislatures could replicate the most favorable provisions of a successful jurisdiction or even the whole legislation, thereby neutralizing the competitive advantage. While free-ride legal innovations are easy to copy and likely to lead merely to short-term gains in the market for corporate charters, innovations that are costly to copy can secure more enduring gains.[334] As I argued above, except Delaware, other jurisdictions could mirror—and in some cases are already mirroring—Wyoming's laws on digital assets and frustrate its efforts.[335] Therefore, Wyoming should aim to develop an expertise that other jurisdictions could not quickly replicate, such as a body of case law about this matter. The establishment of a chancery court is, in light of this, an astute initiative. However, this plan needs time and commitment; it also requires that other jurisdictions do not immediately follow the same path—at least not with Wyoming's persistence and coordination.

332. *Id.*

333. *See* discussion *supra* Section II.A.2.

334. *See* SANGA, *supra* note 25, at 5 (discussing New Jersey's historical lesson and maintaining that "a free-rideable innovation such as New Jersey's liberalizing experiment can only lead to short-term gains in the charters market. Only innovations that are costly to copy are capable of yielding lasting gains"). In applying this line of reasoning to Wyoming's strategy, the obvious conclusion is that this jurisdiction is unlikely to achieve a valuable result.

335. *See supra* Section II.B.2.

To sum up, Wyoming's challenge to Delaware's dominance is surely ambitious, and its success is conditioned upon the alignment of several factors. Speculating on the outcome of this strategy is not easy. In an innovative market like blockchain there are several variables, and accommodations in the new legislation are probable. Accurate data on blockchain companies' incorporations in Wyoming are missing,[336] and the track record stacks the deck against challengers.

Wyoming is following the market segmentation strategy adopted by the only relatively successful Delaware contender—Nevada—and is pushing it further. Nevertheless, to the extent that Wyoming's strategy pays off, it will secure a leading position only in that niche segment of the corporate charters market, while Delaware will continue to dominate the vast majority.

That said, it is currently uncertain whether Wyoming's policy is a calculated risk or an unreasonable hazard. Since Delaware is not easy to dethrone and market segmentation appears to be the only way to capture a fragment of the charters market, Wyoming's current approach is the most realistic, promising, and maybe the only possible strategy.

Therefore, the question is whether Wyoming can achieve a leading position in this segment before a federal legislation regulates the matter or displaces Wyoming state laws on blockchain. Should Wyoming gain the lead before federal intervention, it might retain an advantage even after it.

V. CONCLUSION

After more than a century, Delaware is still dominating the market for corporate charters. Other jurisdictions are becoming more important, but there is no end in sight to Delaware's dominance in this area.

Some contend that Delaware's response to overlitigation in the M&A field might trigger a migration to other jurisdictions that are less restrictive for shareholder lawsuits—and this might question Delaware's leading position. I argue that these lawsuits are mostly frivolous and other states would have no incentive to attract them, since such cases entail no significant judicial opinion. Legitimate cases would stay in Delaware, where attorneys' fees are traditionally higher. Besides, the new standard Delaware adopted in *Trulia* was already followed by federal courts in *Walgreen* and extended to mootness fees cases in *Akorn*. I contend that Delaware will perfect the *Trulia* standard and adjust its case law; soon

336. *See supra* notes 188-89 and accompanying text.

enough, even the more reluctant jurisdictions will follow. Therefore, the impact of this line of cases on Delaware's dominance is unlikely to be remarkable.

I also contend that the federal legislature does not constitute an imminent threat to this dominance. I submit that a federal incorporation is only a remote possibility. Congress has never succeeded to enact a federal incorporation law and, even if there was a federal charter, it would not replace state incorporation. A federal intervention, possibly provoked by the permissive corporate laws of offshore jurisdictions, need not affect state-to-state competition and, consequently, Delaware's position.

More generally, with respect to the gradual erosion of state corporate law by federal legislation, the process has endured for almost a century. Although the federal legislature is increasingly important for business regulation, it will not end Delaware's dominance in the short-term.

Furthermore, Delaware is aware that the federal legislature could intervene if Delaware lawmakers fail to address corporate law issues that generate public anxiety or media attention. Yet, Delaware has a strong incentive to keep this dynamic under control and, so far, has succeeded in doing so.

As I illustrated, Nevada is the only challenger of Delaware that has achieved success, albeit limited. Its market segmentation strategy proved to be effective to some extent and made this jurisdiction a desirable place of incorporation for small firms.

More interestingly, Nevada's experience offers some insight for the new challenge to Delaware's dominance posed by Wyoming through blockchain technology.

Wyoming is attempting to exploit the opportunities provided by blockchain to attract incorporators. In particular, this jurisdiction is creating a safe harbor for a specific segment of the market that involves the incorporations of digital asset businesses and is introducing custom-made provisions or exemptions in multiple fields of regulation—including state securities laws. Although Wyoming is targeting a different sector and displaying a greater commitment, it is essentially replicating the market segmentation strategy that Nevada adopted years ago to attract small firms. Yet, unlike Nevada, Wyoming is targeting a market segment that might have real growth potential. This might make Wyoming the leader of a significant market segment, but it could also induce the federal legislature to intervene and regulate the sector.

Wyoming's challenge is mounting, but time is the key factor. The application of the credible commitment theory and the network theory to

Wyoming's approach suggests that the strategy of building a reputation and proving a commitment to tech-incorporators is correct but is also conditioned upon a confluence of events which needs time. I argue that Wyoming setting up a chancery court dedicated to business and corporate matters was the right move. The state should develop an expertise that is too costly to be easily replicated by other jurisdictions and earn a share of the charters market before federal legislature and regulatory bodies pre-empt Wyoming's laws for tokens and cryptocurrencies.

However, to the extent that Wyoming's tactic proves to be effective, it will earn this jurisdiction a leading position only in a segment of the corporate charters market, while Delaware will continue to dominate the rest of it. Clearly, the significance of this segment will depend upon the growth of cryptocurrencies.

In light of all this, Wyoming's approach might look like a dare. In fact, this new challenge is likely to end up with the same result: Delaware's dominance. Yet, it is currently the most promising strategy, if not to dethrone Delaware, to at least to dent its enduring hegemony.

Notes & Observations