# SYMPOSIUM

# ALTERNATIVES TO DELAWARE? EVALUATING CORPORATE LAW IN NEVADA, TEXAS, AND WYOMING.

## WELCOME REMARKS

*Joseph Landau*[1]
*Fordham University School of Law*

**JOSEPH LANDAU**: It is great to see all of you here. My name is Joe Landau. I'm the dean of Fordham Law School. I'm really thrilled that this is happening today. I'm really excited about this conversation about alternatives to Delaware, new developments and corporate law in Nevada, Texas, and Wyoming.

This topic is more relevant than ever, as major corporations from Tesla to Tripadvisor, and more, are exploring incorporation options outside of Delaware. These moves raise really interesting questions and

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presents significant implications for corporate law practitioners, directors, stakeholders, shareholders, etc. This symposium is a unique opportunity to delve into these emerging trends.

I just want to say it's always so nice at events like this to have former students of mine, but more generally Fordham grads here presenting on panels, being here to engage in the conversation. That's what this is all about. I greatly appreciate that we could be together to have this conversation and learn from one another, as these dynamics continue to shift, and the factors driving the shift: rising costs, concerns about predictability in Delaware, or the kinds of regulatory and economic incentives that other states provide is what we're going to talk about today.

In these incredible panels, the first panel on "Shifting Landscapes: the View from Delaware, Nevada, Texas, and Wyoming," sets the stage by exploring the forces at play in this landscape, and what each State's governance framework offers as an alternative to Delaware, and Bailey and I were chatting earlier this week, and she was giving me different kinds of examples, and it was just incredible to hear about all this again. The second panel is really innovative, called "Navigating the Changing Landscape: A Problem-based Discussion" uses an actual hypothetical, a practical scenario to examine state-by-state approaches on key corporate issues, including executive compensation, squeeze-out mergers and other significant corporate events.

Let me thank our incredible faculty colleagues, Professor Caroline Gentile, Professor Sean Griffith, thank you both so much for all you do.

I want to thank Amy Martella, the executive director of the Corporate Law Center. I want to thank the entire Corporate Law Center. I know that a lot of hard work goes into being able to make this possible, and that work is so appreciated.

As I said, I'm so glad that we have incredible panelists, including, if I may say, some of our own, and the ties that you have to the business community and to the Fordham Community are deeply, deeply appreciated and deeply meaningful. And finally, I want to thank Bailey Swartz for being the mastermind and the energy behind all of this.

With that I'm going to turn it over to the first panel's moderator, for what I am confident will be a rich and thought-provoking discussion. Thank you again for being here. Welcome to Fordham, welcome back to Fordham, and welcome to the Symposium. Thanks, everybody.

# SYMPOSIUM

## –PANEL–
## SHIFTING LANDSCAPES IN CORPORATE LAW: THE VIEW FROM DELAWARE, TEXAS, NEVADA, AND WYOMING.

*Moderator: Bailey Swartz*[2]

*Anthony Rickey*[3]
*Margrave Law*

*Robert Ragazzo*[4]
*University of Houston School of Law*

*Benjamin Edwards*[5]
*University of Nevada William S. Boyd School of Law*

2. Bailey is the Symposium Editor for Volume XXX of the Fordham Journal of Corporate & Financial Law. Bailey is a graduate of Boston University's Questrom School of Business, where she completed concentrations in Business Law and Accounting. Bailey will earn her law degree from Fordham University School of Law in May 2025.

3. Founder, Margrave Law LLC.

4. Professor Ragazzo is a 1986 graduate of Harvard Law School, where he was a member of the Harvard Law Review. Following graduation, he clerked for the Hon. Jon O. Newman on the United States Court of Appeals for the Second Circuit. He then spent four years in the litigation department of Wachtell, Lipton, Rosen & Katz. Since 1990, Professor Ragazzo has been a faculty member at the University of Houston. He is currently a University of Houston Law Foundation Professor of Law and Business and has a joint appointment with the University of Houston Law Center and the C. T. Bauer College of Business. He regularly teaches courses in Business Organizations, Securities Regulation, Mergers & Acquisitions, and Civil Procedure. He co-authors treatises on Texas Business Organizations, Choice of Business Form under Texas Law, and the Law of Closely Held Corporations. He is the sole author of a casebook on Closely Held Business Organizations.

5. Benjamin Edwards teaches at the William S. Boyd School of Law at the University of Nevada, Las Vegas. He researches and writes about business and securities law, corporate governance, arbitration, and consumer protection. Prior to teaching, he practiced as a securities litigator. His writing has appeared in the Wall Street Journal, the Washington Post, law reviews, and other publications. He writes regularly for the Business Law Professor Blog. He currently serves as a director for the Public Investor Advocate Bar Association.

*George A. Mocsary*[6]
*University of Wyoming College of Law*

**BAILEY SWARTZ**: Thank you, Dean Landau, for your welcome remarks, and for your continuous support of the *Journal of Corporate and Financial Law (JCFL)*. My name is Bailey Swartz, and I am the Symposium editor of *JCFL*. Thank you all so much for coming to our Fall Symposium. I really appreciate you being here today. I would like to extend a huge thank you to my Symposium Committee for all their help with putting on this event, and to our faculty advisors, Professor Gentile and Professor Griffith, for all your support along the way.

We have an outstanding group of panelists with us here today, with expertise in Delaware, Texas, Nevada, and Wyoming corporate law. My first question, which I will pass along to Anthony, our Delaware representative, is why are we having this conversation now about alternatives to Delaware?

**ANTHONY RICKEY**: I think it's easy to start with some of the traditional pillars of Delaware's success, and some of the reasons that Delaware has been successful. We have an excellent, responsive Secretary of State. If you are a corporation who needs to do filings any hour of the day, they're very skillful. We have no intermediate appellate court, which means that if you need an answer, and you need that answer appealed, it's very fast. We have a skilled judiciary with an awful lot of experience, handling corporate issues and a flexible

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6. George A. Mocsary is an expert in corporate and small-business law, and the law of firearms. He is Professor of Law, Director of the Business Planning Practicum, and Director of Firearms Research Center at the University of Wyoming College of Law. Prior to his appointment at Wyoming, he served as an Associate Professor of Law at the Southern Illinois University School of Law and spent two years as a Visiting Assistant Professor at the University of Connecticut School of Law. He practiced corporate and bankruptcy law at Cravath, Swaine and Moore in New York, and clerked for the Honorable Harris L. Hartz of the U.S. Court of Appeals for the Tenth Circuit. Professor Mocsary holds a J.D. from Fordham Law School and an M.B.A. from the University of Rochester Simon School of Business. At Fordham, he graduated first in his class and served as Notes and Articles Editor of the Fordham Law Review. His scholarship has been cited by the Supreme Court of the United States, several U.S. Courts of Appeals, the Supreme Court of Illinois, the Delaware Court of Chancery, and other courts. Professor Mocsary thanks Martin Edwards for inspiring many of the ideas in this discussion.

corporate code, and none of that has changed. But I think there are two pillars that have changed recently.

First of all, there used to be a political balance requirement on the Court. The Court of Chancery and the Supreme Court were split between Republicans and Democrats. That's recently changed to become slightly weaker.[7] But I think the main issue that has been causing consternation is a sense that Delaware law has become less predictable. There have been a few cases in the last two or three years that have caused some consternation, probably the largest of those, or the most significant, is *West Palm Beach Firefighters Pension Fund v. Moelis & Co.*,[8] where you had a controlling stockholder who took his company public and had a stockholder's agreement that allowed him to have a great deal of control over the company. Over half a decade later that stockholder's agreement was invalidated, which caused a lot of potential confusion because many companies that have gone through an IPO recently had similar forms of agreement.

That's probably the most significant case. There's a couple of others that we could discuss, but I want to go kind of deeper than that, because I have to admit I've watched at least six panels on what is going on with Delaware this year, and they tended to cover the same issues. I would like to look at how the cases in Delaware are changing, in a way that is affecting the predictability of Delaware law. One of the key issues is that the cases more often now involve continuing relationships between stockholders and management.

When I started practicing almost two decades ago, most of the Delaware cases involved mergers, and one thing about a merger case is that it's an end stage case. The parties who are litigating against each other, the defendants and the stockholder plaintiffs, are not going to have a continuing relationship. You look at cases like *Tornetta v. Musk*,[9] the *Moelis*[10] case, and non-employee director compensation cases. Those are cases where the decisions are governing how the corporation is going to operate going forward, which somewhat raises the stakes. It's not just a matter of do you get disclosures or a deal bump: it's how is the

7. *See infra* note 82.
8. *See generally* W. Palm Beach Firefighters Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).
9. *See generally* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).
10. *See Moelis*, 311 A.3d 809.

company going to be operated. And that, I think, is making the cases more significant.

Another key factor is the advent of retail stockholders. To kind of put my cards on the table, I've represented Professor Griffith and a lot of stockholder objectors in objections to class action settlements. In the last two years, I have been involved in two cases that had over a thousand stockholders show up to object. There has always been an underlying assumption in Delaware corporate law that cases were stockholders versus directors and the stockholders all agreed with whoever the plaintiff was. We're now seeing, with the rise of both retail stockholders and what some have called 'superstar' CEOs, situations where the stockholders who are suing are not in agreement with sometimes the majority of stockholders. I mean, one of the things about a stockholder or a superstar CEO is they have fans.

The other factor, that has been mentioned, and I'm not sure I agree with it, but it has been mentioned in some of the proxies as companies are trying to leave Delaware, is an increasingly aggressive plaintiff's bar.

One of the things that is unusual in Delaware is that there is a possibility of getting ten, fifteen, twenty times a multiple to your lodestar as an attorney, as a fee award.[11] That's very uncommon outside of Delaware, and I think that is having an effect. It was certainly mentioned in the recent Trade Desk, Inc. proxy which said the "increasingly litigious environment facing corporations with controlling stockholders has created unpredictability in decision making and has started to impede our ability to act quickly."[12]

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11. *See, e.g.*, West Palm Beach Firefighters' Pen. Fund v. Moelis & Co., C.A. No 2023-0309-JTL at 33 (Del. Ch. July 18, 2024) (Trans.) (calculating a $6 million fee to represent a 15x multiplier to lodestar); *id.* at 60 (awarding $6 million in fees); Garfield v. Boxed, Inc., 2022 WL 17959766, at *15 (Del. Ch. Dec. 27, 2022) (awarding $850,000 in fees and expenses while "giv[ing] no weight to the hours expended" by counsel); Plaintiff's Brief in Support of His Motion for Summary Judgment and Application for an Award of Attorneys' Fees and Expenses, Garfield v. Boxed, Inc., C.A. No. 2022-0132-MTZ at 42 (Del. Ch. Jul. 22, 2022) (disclosing lodestar of $35,287.50 for 42.75 hours of work). The *Boxed, Inc.* fee amounts to more than a 20x multiplier to lodestar.

12. The Trade Desk, Inc., Notice of Special Meeting of Stockholders at 11 (Schedule 14-A) (Oct. 3, 2024).

So again, that's bringing it back to what I said about these are now cases that involve how the company is operating, going forward as opposed to being in end-stage merger cases.

**BAILEY SWARTZ**: Thank you. To our representatives from Texas, Nevada, and Wyoming, why may a corporation seek to incorporate outside of Delaware, and does your state offer a solution to the problems that are currently being had in Delaware?

**ROBERT RAGAZZO**: Well, let me just say that I agree with a lot of what Anthony said about why Delaware law is the jurisdiction of choice for most people who incorporate. In Texas, we're sort of trying to copy that.

I would say that Delaware has three big advantages over most other states. The first is its enabling philosophy of corporate regulation. Delaware's basic view is that the point of corporate law is to facilitate transactions and to help managers run their business and to place the fewest restrictions in their path, and generally it does a pretty good job of that.

I think Texas has successfully copied most of that. There's a place or two where Texas law is a little more restrictive than Delaware's. For example, in Delaware it takes a simple majority shareholder vote to approve fundamental transactions like charter amendments,[13] mergers,[14] sales of all your assets,[15] dissolutions,[16] and the like. In Texas, that takes a two-thirds vote, so it's a little tougher to accomplish those kinds of transactions.[17]

On the other hand, there's some places where Texas law is a little more generous to managers than Delaware law is. So, for example, the default rule in Delaware is that shareholders owning enough shares to win a vote can sign a written consent.[18]

In Texas, our default rule is that shareholders can act by written consent only if that consent is unanimous.[19] That is, all the shareholders sign it. So obviously, it's a little easier in in Delaware for shareholders or insurgents, you know, to challenge a board of directors. On balance,

13. DEL. CODE ANN. tit. 8, § 242 (2023).
14. DEL. CODE ANN. tit. 8, § 251 (2020).
15. DEL. CODE ANN. tit. 8, § 271 (2010).
16. DEL. CODE ANN. tit. 8, § 275 (2022).
17. TEX. BUS. ORGS. CODE ANN. § 21.364 (West 2007).
18. DEL. CODE ANN. tit. 8, §228 (2023).
19. *See* TEX. BUS. ORGS. CODE ANN. § 6.201 (West 2023).

I'm not sure any of this makes much difference. That is, I think that's a wash. That's not a good reason for anybody to run away from Delaware to run toward Texas.

But Delaware has two other big advantages that make a very big difference. First, they have a talented, specialized judiciary at both the Chancery Court or Trial Court level and at the Supreme Court level. And second, they have a rich body of case law that no other state can match. And you know that's good for transaction planners, because you can tell what's allowed and what's not. There's certainty in Delaware.

Now in Texas we've tried to copy that. So, in our last legislative session, we passed legislation that created a new business court that was meant to be the equivalent of the Delaware Court of Chancery.[20] And we created a new 15th Court of Appeals that would hear appeals from this business court.

I am not so sure that that's going to put these courts on a par with the Delaware courts, for a few reasons. First of all, the business court judges serve two-year terms, and I'm not sure they're going to be around for all that long, whereas Delaware judges serve 12-year terms, generally. Moreover, they can be reappointed. But in Texas, for whatever reason, being appointed to the judiciary is not thought to be the achievement of the pinnacle of your professional career. In Texas, becoming a judge is a steppingstone to private practice or to higher political office.

So, just to take some famous examples: Tom Phillips, who was a well-respected Chief Justice of the Texas Supreme Court, left the Supreme Court 20 years ago to be a partner at Baker Botts, and he's still there. John Cornyn, who's going to run for majority leader for the United States Senate next week, was once a Texas Supreme Court judge. Representative Lloyd Doggett, a Democrat, was once a Texas Supreme Court Judge. So, we shouldn't assume that these people are going to be around for long enough to be the equivalent of Delaware Chancellors and Vice Chancellors.

Secondly, the requirements for expertise don't necessarily guarantee a specialized expert judiciary. In Texas, to be on the new business court, you're going to have to have 10 years' experience, either as a practitioner, or as a judge, or as some combination of both that adds up to 10 years. If you think about that for a minute, if you were a prosecutor before you went on the bench, and you sat on a smattering of

20. *See* H.B. 19, 88th Leg., Reg. Sess. (Tex. 2023).

business cases over a ten-year judicial career, that's not going to make you a business expert in a way that competes with anybody who's on the Delaware Court of Chancery. So, I wonder a little bit about that.

Despite the sort of loosening of the partisanship restrictions in Delaware, Texas is much worse, from a partisanship perspective. The Governor generally is going to appoint Republicans to the Texas Business Court. He's going to initially appoint all Republicans to the 15th Court of Appeals. Ultimately, the Court of Appeals members will be elected, but initially, they'll all be Republicans, and at the statewide level, currently, when they're elected, they'll still all be Republicans.

Now, Texas is becoming, you know, more competitive and I expect that to continue over time. That means, someday, Democrats are going to be legitimately contesting the governorship. Someday one of them is going to win. And when that happens, the entire Business Court is going to shift from Republican to Democrat. And then, let's say, a Republican takes the governorship back four years later; the Business Court is going to shift from Democrat back to Republican. Delaware courts don't play that game of ping pong with their judges.

Whatever you think of the business court, you have to remember that our appellate courts are all elected, and that's required by our State Constitution.[21] So, all the members of the 15th Court of Appeals are going to be elected, and all the members of the Texas Supreme Court are elected. There's no way that elected judges are going to be the equivalent of the people who sit on the Delaware Supreme Court. There's just no way that's going to happen.

And finally, the Delaware Court of Chancery sits without a jury. Under the Texas Constitution, we have a provision that says the right to trial by jury shall be inviolate.[22] Now, that means sort of what you think it means. Like under the 7th Amendment in federal court, it means that cases traditionally heard with a jury give you the constitutional right to a jury trial in the Texas state court system. But it means much more than that. In Texas, you have a constitutional right to a jury in an equitable case.

And once you introduce a jury into the decision-making process, by definition, you've reduced the business expertise of the decision makers, you've reduced the consistency of the decision making, and you've created something which managers who are often defendants in business

21. *See* TEX. CONST. art. 5, § 6.
22. *See id.*

cases will not find attractive. They'll view that as a pro plaintiff element of the system, and they are, after all, the people who decide where to incorporate. So, I'm a little sanguine about the idea that, somehow, because we have these new business courts, that our judicial system is going to rival Delaware's. I tend to think that's probably not true.

Most importantly, I think this third advantage Delaware has is something we can't challenge. On most major corporate issues, Delaware has a well understood structure of law that governs the issue. In individual cases, we might quibble with the result that some court makes, and Anthony mentioned a couple of areas where people criticize things the Delaware courts have done recently, but, in general, there's a well-developed body of law and a structure that everybody understands, that settles issues. In Texas, we may be the second biggest state in the country, but on most major issues, we have literally no common law. And that will be clearer when we do our second set of panels and we go through the hypotheticals. You'll see how little law Texas really has. As a consequence of which, although we're trying to compete with Delaware, my sense is that people aren't leaving Delaware for Texas anytime soon.

**BENJAMIN EDWARDS**: Okay, so I'll jump in here, from the State of Nevada. So, thinking about this, why are we having this conversation now? And one person has not been mentioned so far, and it's an 800-pound gorilla—Elon Musk. He has moved Twitter, now X, to Nevada. Neuralink is a Nevada corporation. The Boring Company is a Nevada corporation. Tesla is the outlier as a Texas corporation. And so his influence has shifted the way corporate directors are thinking about this.

So, why are we having this conversation now? In reality, this conversation has been going on for decades. So many law professors have earned tenure by writing about the possibility of competition on corporate chartering between the States, and it was one of these sorts of tired old discussions within the legal academy. Yet now everybody else is tuning in because it's a live issue now. Boards of Directors are thinking about this issue. The Council of Institutional Investors held a panel on it. The National Association of Corporate Directors is holding panels on it, and the idea is that it used to be you would incorporate in Delaware because your lawyers told you to incorporate in Delaware.

Many of the people who run companies are not lawyers. They did not go to law school and take business law. When I teach business law, and I'm sure pretty much everyone else does, you have a little spiel you give about why Delaware. And everything you've heard is true. The Delaware judiciary is incredibly sophisticated. The Secretary of State's office is great. The body of case law simply cannot be matched. And so, there's a strong theoretical justification. There's a strong practical justification. And Delaware law is sort of the common language of business lawyers. So, anything you hear about Nevada, or Texas, or Wyoming, or other states, all of our laws have to be understood as against the backdrop of Delaware law.

So, now, more companies are deciding that maybe they don't want to be in Delaware for particular reasons. So, Delaware law does provide a very good procedural framework for dealing with conflicts of interest, and there are good ways to do that. The challenging thing is, if you have a lot of conflicts of interest and you're a controlled corporation -- you usually have a controlling stockholder who ends up on both sides of a lot of deals -- then that process can be a little less predictable for them, and it can be a little bit more uncomfortable.

And so, if it's easier to bring claims in Delaware against these corporations, then they have to think whether they want to stay in Delaware. And even if they keep winning these claims, the cost of litigating them is high. Delaware allows something called a 220 action, where you can seek books and records from a Delaware corporation if you're a shareholder.[23] You don't have to own a particular number of shares. You just have to be a shareholder. So, corporations get a lot of these demands, and it costs money to answer them.

Nevada takes a different approach. If you want books and records, you can get them, if it's not a public corporation.[24] If it's a public corporation, you have to go to the securities filings, and you just don't have access to the same level of information. And so that is, from Nevada's perspective, an efficiency benefit.

Thus, a lot of controlled companies are looking at Nevada as an alternative because of things like that. If you're thinking, well, why shift? If you spend a lot of time paying your in-house counsel and outside counsel to deal with 220 requests[25] and litigate, maybe you would prefer a forum where you don't have as much litigation. When we think about predictability, deal cost, all these factors are always going to be there. Some of the more recent proxies lay out why

23. *See* DEL. CODE ANN. tit. 8, § 220 (2010).
24. *See* Nev. Pub. Recs. Act, N.R.S. § 78.257.
25. *See* tit. 8, § 220.

companies have been considering Nevada. For example, there may be deals that they would do under Nevada law, but they don't want to do under Delaware law because of the cost and the uncertainty associated with it, and by shifting to a different jurisdiction, they might avoid it. Now, no one is going to be able to credibly convince anyone that the Nevada judiciary has the same level of expertise as Delaware—because no state does. But, if you're willing to take your chances with an elected judge—often a former prosecutor or public defender—who's been slotted to serve on the business docket, handling business court cases while also handling their civil docket and their criminal docket, Nevada offers an alternative.

**GEORGE MOCSARY**: First, it's a pleasure to be here. I'll start by talking about the Delaware question. It's easy to forget that this question of why Delaware, or is there another alternative, isn't new. It's been going on since before *Van Gorkom* in '85. [26] There's always this movement in Delaware along the spectrum of judicial accountability and managerial independence. Then you've got this wild card with the Feds, and they either pull in a third direction, or, if they don't like what's going on along on the spectrum, they might try and federalize something. And goodness knows, we don't want the SEC involved in our businesses any more than it already is.

The answer to why we're having this discussion now is best illustrated by a few cases in the last five years or so that shift the balance in Delaware toward judicial accountability and away from managerial independence. I'll talk about three of them and critique them a little bit quickly, and maybe we'll talk about some others later as we delve deeper into the topic.

One case is *Moelis*, which we heard about. [27] Moelis had this shareholder agreement where he basically had veto rights over roughly eighteen different categories of things. The shareholder agreement was public, and everyone knew about it. It was filed with the SEC when his company went public. Vice Chancellor Laster struck that as contrary to DGCL § 141(a).[28] I would say he did so properly, following Delaware statutory and common law. But I would also say that many, most, or perhaps almost all modern shareholders just don't care about control.

26. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
27. *See generally* W. Palm Beach Firefighters Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).
28. *See* DEL. CODE ANN. tit. 8, § 141(a) (2020).

They want people who have shown themselves capable of creating value to be able to do that unhindered. Economist Henry Manne said years ago that public shareholders don't care about governance rights. I think a case in point is the price convergence of the stock prices of Alphabet A Shares and Alphabet C Shares, the ones with control and those without. There was all this talk about who's going to buy the C Shares, because they don't come with any control. However, they're priced almost exactly the same now, and no one cares. No one cares that all the control is in the A shares.

Another case is the *Activision* case, where Microsoft was going to acquire Activision.[29] By the way, in Senate Bill 313 in Delaware, the synopsis mentioned the *Moelis* case as a reason for its enactment in Delaware. [30] I think the Delaware Legislature saw this as too big of a chunk of business to allow to be taken away even if it means losing other business. I throw that out there now because, as we go on, I'll come back to this idea of how you threaten Delaware. How might you take some of Delaware's business? But we'll table that for just a little bit.

In the "*Activision*" case, Microsoft was going to buy Activision. The board was sued for not properly reviewing the merger agreement. The claims survived a motion to dismiss. The board reviewed a near final version of the merger agreement rather than the final one. A copy of the charter was omitted from the notice of stockholder meeting, and the required summary of the merger agreement wasn't attached to the notice. Rather, it was attached to the proxy statement, which also contained the notice. There was a question about what dividends Activision could pay that was delegated to a board of directors committee, and that wasn't okay because it was part of the merger agreement, and thus the whole board had to decide it. All this stuff is normal market practice, which presumably developed organically to make the merger process more efficient. Just to give you a sense of the transaction, the ninety-five dollars per share offered was about a forty-five percent premium and it was approved by ninety-five percent to two percent. I think the numbers speak for themselves. At the same time, it's hard to disagree with Chancellor McCormick that, "where market practice exceeds the generous bounds of private ordering offered by the

29. *See* Sjunde AP-fonden v. Activision Blizzard, Inc., et al., No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024).

30. S.B. 313, 152$^{nd}$ Gen. Assemb., Reg. Sess. (Del. 2024) (enacted).

DGCL, then market practice needs to check itself."[31] It's hard to disagree with her analysis in finding a problem with the merger. But I think this *Van Gorkom*[32]–style formalism which incentivizes over-lawyering and over-documenting, and which DGCL § 102(b)(7)[33] wanted to do away with is something that many shareholders may understandably not want in their firms or not want their firms to spend managerial time, money, and resources on. Sure enough, S.B. 313's synopsis[34] also mentioned this case as a reason for its enactment. Again, I think that Delaware saw this as creating too high a price for most firms to stay in Delaware.

The last case I'll talk about as to where a door might be opening somehow is *Tornetta*.[35] This is basically *Ovitz II*.[36] In *Tornetta*, the claim was that Elon Musk was overpaid. He got zero dollars salary, but there were various aggressive milestones, which, if he met, would cause some of his options to vest. If met, the share price would grow substantially and obviously the minority would share in that. Chancellor Slights applied *MFW*-style[37] reasoning and found some process issues relating to the director recommendation. Chancellor McCormick later applied entire fairness and invalidated the transaction on the ground that, in addition to this and other process issues, and given the size of Musk's package, Musk was just getting paid too much. She started her opinion by asking, "was the richest person in the world overpaid?"[38] I'm not creative enough to make that up, by the way. She really said that.

A few months later, an independent committee of one director, followed by a vote of the majority of the minority, voted to reinstate Musk's pay and get out of Delaware. I think again here, the uber-unconflicted model that is ascendant in Delaware doesn't serve firms like Tesla well. Elon should be out there building Teslas and rocket ships and satellites and whatever next crazy thing he's going to come up with that's going to create trillions and trillions of dollars in value. He shouldn't be worried about getting sued for having incentives that are a literally one hundred percent aligned with those of his fellow

31. *See Activision*, 2024 WL 863290, at *6.
32. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
33. DEL. CODE ANN. tit. 8, § 102(b)(7) (2022).
34. S.B. 313, 152nd Gen. Assemb., Reg. Sess. (Del. 2024) (enacted).
35. *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).
36. *See* In re Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005).
37. *See generally* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).
38. *Tornetta*, 310 A.3d at 445.

shareholders. More broadly, there are stockholders out there who don't want *MFW*,[39] the return of *Van Gorkom*,[40] or a new loyalty version of *Caremark*,[41] which we might talk about a little later. All of this is re-growing the limb that 102(b)(7)[42] tried to cut off, and it's showing up all over Delaware law.

The point is, that might not be a good model for the modern, more entrepreneurial firm, which will one day be the big firm, or which is the big firm like Tesla, which still operates like a smaller one, because it still has a great deal of growing to do, and a great deal of value to create. It's an easy case to make that shareholders would be acting irrationally if they stripped Elon of his power.

So, those are reasons firms might incorporate outside of Delaware. I think a more interesting question that I'll save for later is how can other states attract this business and keep it? There's some game theory involved in all of that. Wyoming is trying to compete in the crypto area. I think so far we're doing well, but can we keep it? I don't know. We invented the LLC, and lost that. The LLC is now a Delaware entity when it comes to a firm of any size.

**BAILEY SWARTZ**: Thank you all. After looking at all the reasons why we are having this conversation right now, do we think that there is a legitimate threat to Delaware's dominance?

**ANTHONY RICKEY**: One of the things that you might find interesting on this panel is we may have the representative from Texas being less worried about Delaware than the representative from Delaware. If Professor Edwards asked me to put a bet on it in Vegas, I would say there may be a five, ten, maybe fifteen percent chance that ten years from now we're going to be talking about why <u>was</u> Delaware dominant at a conference like this. My biggest personal asset, since I'm not a professor, is my Delaware law license, and if you told me that my house had a ten percent chance of burning down in the next decade, I'd be looking for some fireproofing. And let me explain my worry, because, as I said, I've watched a number of these conferences, and I'm not going to give you the same story about Woodrow Wilson, the seven

39. *See generally M & F Worldwide*, 88 A.3d 635.

40. *See generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

41. *See generally* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

42. DEL. CODE ANN. tit. 8, § 102(b)(7) (2022).

sisters, and how Delaware took the business from New Jersey.[43] I want to ground my worry in something that's a little closer to the hearts of anyone here who's a law student, and that's New York City taxicabs.

Back when I was in law school, way back in the Dark Ages, New York City taxi medallions went for millions of dollars. It was the go-to example for regulatory state professors who wanted to explain public choice theory, regulatory check capture, or anything like that. It was very easy to explain to law students because you asked how many of you have ever had a bad New York City taxi ride, and everybody raised their hand. But when asked how many of you ever complained to the Taxi Commission, in a room full of people who are temperamentally designed to complain because they're going to be litigators, most of the hands still went down.

There were all kinds of law review articles and professors talking about the problems in New York City with New York City taxis, and none of them said: "Here's the solution. We should have an app that matches, drivers, and passengers, and we'll have a big overarching thing that exists in the cloud and matches them all together. And, by the way, it'll all be backed by venture capitalists who are able to go in and challenge whatever jurisdiction where the laws would otherwise keep a monopoly for the people running taxis."

The reason they didn't do that is, as I've told you, I went to law school in the Dark Ages. We didn't have iPhones. The solution to the problem wasn't obvious to the people who were looking at it because the technology that was eventually going to resolve that problem didn't exist. My concern is that the same thing might be a problem for Delaware. I'm worried that as we get sets of lawsuits that are far more theoretical than real, that is going to raise the cost of governance. And when I say theoretical or real, I'll go back to the *Moelis*[44] case that we've discussed.

In that case the Court of Chancery examined, I think, about 20 cases and divined a rule for dealing with stockholder agreements. It's a masterclass in statutory and case law analysis. It is a great opinion on

43. For a discussion of the "Seven Sisters" and Delaware's rise to corporate prominence, *see* Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 Del. J. Corp. L. 851, 869 (2016); State of Delaware, *Delaware Corporate Law: Facts and Myths*, https://corplaw.delaware.gov/facts-and-myths/.

44. *See generally* W. Palm Beach Firefighters Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

that ground. But what it doesn't look at is, in most of those 20 cases there were either allegations of skullduggery between the stockholder agreement or the directors--you know, there was something that was hidden as opposed to *Moelis*, where, as was mentioned, stockholder agreement was fully disclosed--or it was part of a contest of control between a stockholder director and somebody who wanted to take over the company.

*Moelis* involved a public sector pension fund as a plaintiff, and I've looked at their board minutes for about a decade up until they filed the case. And there's nothing that says that the board was ever concerned about Moelis until an attorney came to the board and said, "we'd like to file a lawsuit." This is a case that developed out of a law review article that said these stockholder agreements are becoming more and more common.[45] This isn't a conflict between two people or two sides that have skin in the game. And my concern is that it raises the price of governance. And it turns Delaware into kind of a Bugatti jurisdiction. We have incredibly well engineered corporate law. We have an excellent judiciary. But the cost is very high, and, as Professor Edwards was saying, for some corporations, the cost of litigation to get good governance and just the cost of compliance may become lower in other jurisdictions and become more attractive. The real thing that worries me is what happens when D&O insurers say, well if you reincorporate to Nevada, the cost of litigation is lower, and your D&O insurance goes down.[46] That's where I perceive the threat. Again, I don't think it's very likely. I think you're looking at a 5- 10% possibility. But that's more than I'd like to see.

**BAILEY SWARTZ**: Professor Ragazzo, do you have a response to that?

**ROBERT RAGAZZO**: I basically agree with Anthony that I don't think it's likely. You're always going to have disgruntled shareholders like Elon Musk, who are unhappy that they lost cases in Delaware. When we do our hypothetical during our second panel, I'll explain why

45. *See* id. at 878 ("[A]ddressing the issue now is important because Professor Rauterberg has uncovered a trend."); *see id.* at 817 n.10 (discussing Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. REG. 1124 (2021)).

46. *See* Kevin M. LaCroix, *Does a Del. Corp.'s Reincorporation in Another State Reduce D&O Liability Exposure?*, THE D&O DIARY (Mar. 17, 2024), https://www.dandodiary.com/2024/03/articles/director-and-officer-liability/does-a-del-corp-s-reincorporation-in-another-state-reduce-do-liability-exposure/.

the law of Texas is a little more favorable to him, and why he might rather have his compensation package adjudicated under Texas law. But you know, as I think about it, it really isn't that hard for somebody like Elon Musk to win this case in the Delaware courts if he sets it up right. The reason why he lost this case is the Delaware Chancellor said that he couldn't prove that his compensation package was entirely fair.[47] She held that he was a controlling shareholder, and therefore he had that burden.[48] But you know, if you condition the transaction on getting approval from disinterested directors and disinterested shareholders after full disclosure, and you get those approvals, then the business judgment rule protects your transaction in Delaware. The reason why the Chancellor said he didn't get disinterested board approval is basically that he dominated the board process in a way that made it clear that the Board was not independent.[49]

Well, you know, properly advised, he could have handled that differently. He could have had a special committee of directors that he had no particularly close relationship with who would have operated independently, made exactly the same recommendation, and done it after full disclosure. That would have been fine. The reason why the Chancellor thought he didn't get disinterested shareholder approval after full disclosure was that she thought he hadn't made full disclosure, which he could also easily have fixed.[50] It's not that hard for somebody like Elon Musk to win this case under Delaware law, if your lawyers know what they're doing. As a result, I don't see that it's all that big a threat to Delaware.

**ANTHONY RICKEY**: Can I just back up on that? I'd like to modify something because we keep on talking about the *Tornetta v. Musk* case. First of all, I represent someone in that case. So, I'm not going to comment on it. But, secondly, if we were just talking about *Tornetta v. Musk*, I wouldn't even be saying 5%. Those aren't the cases that worry me.

**BENJAMIN EDWARDS**: If we're going to think about threats to Delaware, in the words of Taylor Swift, "who's afraid of little old me?" Really, I don't think Delaware is afraid of Nevada. I don't think it should be. States offer different alternatives. There are just so many

47. *See Tornetta v. Musk*, 310 A.3d 430, 526-27 (Del. Ch. 2024).
48. *Id.*
49. *Id.* at 511.
50. *Id.* at 522.

factors that lead people to incorporate in Delaware. I don't see that changing anytime soon. Every law school class talks about Delaware law. Law firms all across the country are set up to go to Delaware. The National Venture Capital Association has model agreements and forms that streamline moving to Delaware, and Carta provides cap table solutions for Delaware companies. The infrastructure for Delaware is just incredibly strong. What I think might happen is as we continually have more and more businesses created in the United States, some of that might shift to other jurisdictions. You might begin to see other States pick up a little bit more of the pie. This doesn't mean that Delaware isn't going to continue to eat very high on the hog. It is a state that is in just in an incredibly dominant position. Nevada is number two. When I when I teach my students about this, I explain, you should think we're running a race with Delaware. And we're running around a high school track. Delaware has lapped us. They've lapped us repeatedly, and so we're not nipping at their heels in any meaningful way. But it may be that particular categories of firms think other states' rules are better. The bigger threat to Delaware, I think, is probably federal intervention. Because of that, they may actually benefit, to some degree, from sharing a little bit of the pie with other states. So let me read you a statement that Mr. Musk put out. I believe it was on the 7th, so I think that was yesterday.

"When there are egregiously wrong legal judgments in a single State that substantially harm American citizens in all other 48 States, the Federal Government should take immediate corrective action."[51]

I assume he's commenting about Delaware courts blocking his compensation package. To the extent that this is a threat to federalize corporate law, it's a threat aimed at the whole state of Delaware. The risk that Delaware has always faced—it's been perceived as constraint on Delaware's ability to race to the bottom—is that if you have the federal government step in and take this issue away from Delaware, then Delaware is going to lose more than any other state. So, Delaware is going to restrain itself to avoid the possibility of federalization. In my view, if more states offer alternatives to Delaware, and they have robust corporate law of their own, you end up picking up more U.S. Senators who might be less inclined to support federalizing corporate law in the United States. When you concentrate bulk of the revenue from

51. Elon Musk (@elonmusk), X (formerly Twitter) (Nov. 7, 2024, 11:50 AM), https://x.com/elonmusk/status/1854567200113533325 (last visited Nov. 28, 2024).

incorporations in one state, other Senators may not have an interest in protecting state chartering.

**GEORGE MOCSARY**: When I first thought about what I was going to say today, I thought about, as Tony said, how New Jersey lost its corporate law business to Delaware by making some unforced errors. The Seven Sisters and all of that[52], and I quickly realized that Delaware wasn't going to make a similar unforced error. Delaware knows the value of its corporate law business. It knows that this is why there's no sales tax in Delaware, but Delaware does have vulnerability to competition around the edges if that competition doesn't get too large. If it does get too large, Delaware will respond. Being a law professor, I'll get a bit ivory tower for a moment and then bring us back to reality.

There was this concept called "judo economics," introduced by a couple of business law scholars in 1983.[53] Gelman and Salop are their names. They posited that firms with limited capacity can enter incumbent controlled markets if the incumbent has to serve all customers at the same price. The theory was expanded to multiple entrants, multiple incumbents, and various asymmetries by various other scholars. All this has been empirically shown to be successful in several contexts. The requirements of it are: one, as we said, the incumbents have to serve all customers at the same price; and, two, the entrants have to be able to credibly commit to serving only so much of the incumbent market that the incumbent would lose more by fighting the entrant than by accommodating the entrant's entry into the market.[54]

Transpose this to corporate law. Delaware's product is its corporate law as embodied in the common law and the DGCL. The price for our purposes is the DGCL's impact on firms and businesses. It's also things like filing fees and franchise taxes. I think those are negligible for our status quo, where most small businesses are already incorporated at home. We might come back to that. That might actually be one of these things around the edges that other states are taking, but table that for now.

There was an organizational theory scholar, Henry Mintzberg, a Canadian gentleman. He would group firms into five categories that

52. *See* Bainbridge, *supra* note 43.

53. *See* J.R. Gelman & S.C. Salop, *Judo Economics: Capacity Limitation and Coupon Competition*, 14 BELL J. ECON. 315, 315-25 (1983).

54. *See id.*

roughly, sometimes nonlinearly, correspond to a firm's growth. [55] One was the "Simple Structure," as he called it. These firms are characterized by centralized control, lots of direct supervision. They're small. They tend to be in their formative years. "Above all, they're organic."[56] They're very dynamic. Then there are three categories kind of in the middle that he calls the Machine Bureaucracy, the Professional Bureaucracy, and the Divisionalized Form.[57] And these are all various versions of the big firms that we think of out there. The blue chips, the Fortune 500s, and something short of that. The large firms that are going to be the ones that start thinking about going to Delaware, with lots of managerial levels, lots of decentralization, all of this kind of stuff. And then he's got a form called the Ad Hocracy, which is kind of all over the place. These he characterizes as being about mutual adjustment, very selective decentralization, still very organic.[58] They operate in a very dynamic business environment, and they tend to be pretty complex. The question is, which one of these firms is Delaware good at serving? I would say that Delaware, as I described, is best at serving those three firms in the middle — the big, traditional public or public-ish types of firms. Then the question is, did Delaware's courts, over the last five or however many years, change Delaware's product in a way that opens the door for other States to take away too much? Elon, Inc., is a big fish to let go. S.B. 313[59] was Delaware finding that it'll lose too much if it doesn't change a few things, even if those changes have some other costs.

So, the question is, how do you compete at the right scale? Is Delaware able to accommodate these Simple Structures and these Ad Hocracies? The Starlinks and these kinds of firms in Elon, Inc.'s portfolio. Is it able to accommodate those firms along with the Machine Bureaucracies, the Professional Bureaucracies, and the Divisionalized Forms? Case law suggests maybe not. S.B. 313 suggests maybe yes, that Delaware is responding and bringing back these chunks that it, as a State, sees are too big to let go of. If not, if the answer is, no. Delaware is then faced with a choice. It can keep the larger mass of these

55. *See* HENRY MINTZBERG, STRUCTURE IN FIVES: DESIGNING EFFECTIVE ORGANIZATIONS §157 (1st ed. 1993).
56. *Id.*
57. *Id.*
58. *Id.*
59. S.B. 313, 152nd Gen. Assemb., Reg. Sess. (Del. 2024) (enacted).

traditional firms for which its laws are arguably the better fit, in how they rein in control and all of that. Or we can go with the entrepreneurial firms by adapting but lose some of the traditional firms.

And that's a balancing act. What are the costs and benefits of all of these? An upstart state might be able to pick off some of Delaware's business by differentiating around the edges and the logical thing for Delaware to then do is to keep the larger share of the business out there, which is probably still these typical IBM-ish Microsoft-ish kinds of firms. And we see some examples of bits getting picked off. South Dakota has its credit card business. Wyoming is pretty good with trust companies. It has crypto, which maybe we'll talk about later.

I think for a state to threaten Delaware, it has to do it this way, it has to do it around the edges. Because if a state does something that will suddenly attract all of Delaware's business, let's say in one shot changes its laws, Delaware will respond. And Delaware will still have the best judiciary, the most sophisticated judges, and the best common law.

**BAILEY SWARTZ**: We've mentioned a lot about the role of the Delaware Chancery Court, driving the direction of corporate law in Delaware for each of the states, can we hear a bit more about the role of statutory law versus common law, and how that affects corporations and stockholders?

**ANTHONY RICKEY**: The Delaware situation is well known. I'm not going to speak at length about this. But the famous formulation is that all fiduciary action is twice-tested, first, to see if it complies with statutory law, and then to see if it complies with a director or fiduciary's fiduciary duties to stockholders.[60] That twice-tested element is largely what results in this body of law that we've been talking about that does provide a great deal of certainty. On the other hand, it can lead to uncertainty in a different way and the example I'd like to use is non-employee director compensation.

There's a practitioner and blogger called Keith Paul Bishop from California, who has a common complaint about Delaware, which is, you can read the DGCL from cover to cover as a director and still not know what your fiduciary duties are.[61] And the reason I use non-employee

60. *See, e.g.,* W. Palm Beach Firefighters Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (summarizing Adolf A. Berle, Jr.'s "twice tested" framework of corporate law).

61. Keith Paul Bishop, *Are Recent Delaware Decisions Causing Corporations to Look for the Exit?*, CALIFORNIA CORPORATE & SECURITIES LAW,June 14, 2024 ("I have

director compensation is the DGCL is absolutely clear on this: directors can set their own compensation. There is nothing that says that anything further is required to comply with Delaware law. But, it's an inherently self-interested act because you're setting your own compensation. A few years ago, in the *Investors Bancorp* case, the Delaware Supreme Court stated that basically, this is judged by entire fairness unless you get a stockholder vote. [62] Now, that creates a kind of weird dichotomy. If you are a corporation, this goes into what we were talking about with different types of corporations. If you are a corporation who's just fairly typical, and you pay your directors at or near all of your other peers, you probably don't need a stockholder vote on your compensation. But, if you've decided you want to have the best directors, and in order to get the best directors, you'd like to pay them more, well, now it's very easy under an entire fairness standard to sue whoever is at the top of the league table and get past a motion to dismiss based on entire fairness. And now you pretty much have to have that stockholder vote. Even though there is nothing in the Delaware statute that says you need to have a stockholder to vote on non-employee director compensation.

As a practical matter I think one of the things that we're going to hear is that when states try to differentiate themselves, they're going to try to differentiate themselves by at least in part, creating a greater degree of statutory certainty.

**ROBERT RAGAZZO**: I would say, the Texas courts have no particular judicial philosophy on corporations. But the Texas legislature definitely does and I'll just take two examples. The Texas courts once recognized the de facto merger doctrine, and the Texas legislature fixed that very quickly. We now have a statute that says there are no de facto mergers in any context. And in the creditor's rights context, the company that buys all the assets of another company is not responsible for the selling corporation's liabilities unless it expressly assumes them. We've had that for a long time, and just to make sure that nobody was confused, in our last legislative session, our legislature literally adopted the Delaware principle of independent legal significance, which the

somewhat waggishly observed . . . that you can read the DGCL cover to cover and still [know] very little about Delaware corporate law."), https://www.calcorporatelaw.com/has-delaware-law-become-too-unstable-and-unpredictable.

62. *See* In re Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208 (Del. 2017).

Delaware courts used to justify the fact that there should be no de facto mergers.

The second example I'll give is in the area of veil piercing. Here, Delaware law, I don't think is anything special. There's sort of an eight factor test that governs veil piercing. It's amorphous. As the law in most states, the Texas Supreme Court once took a very broad view of equitable fraud in the veil piercing context, and the Texas Legislature cut way back on that to the point where today Texas is one of the most difficult states in the country in which to pierce the corporate veil. We have a statute that has more or less eliminated veil piercing in contract cases, and we have a statute that says that failing to follow corporate formalities is no factor in a veil piercing case. There are two good examples of how the Texas Legislature is doing its best to create a facilitating, enabling pro-management view where, I would say, the Texas courts have no basic philosophy at all.

**BENJAMIN EDWARDS**: Nevada has, I think, taken an explicitly statutory approach. And so you can read the Delaware corporate code, and you will not understand Delaware law. If you read the Nevada code, you'll have a pretty good idea of what it means. There is a specific statutory provision that says, Nevada courts should interpret Nevada law to be clear and comprehensible.[63] It also says that we should not be especially deferential to the law of other states. The Nevada law is independent and in interpreting the Nevada statute, the Nevada Supreme Court has relied on it and said, you know, we're not going to recognize entire fairness for cases against officers and directors because we have a business judgment statute that says the only way you can hold officers and directors liable is, if you can show that they knew that they were breaching their fiduciary duty and doing something wrong when they did it.[64] And so that's it was just a different approach. And Nevada's judiciary doesn't have as many at bats as the Delaware judiciary. And so you just you don't have as many cases. There will always be, you know, areas where you're going to need a court to somehow interpret something or resolve. You know what something means, and

63. NEV. REV. STAT. § 78.012(1) (2017) ("It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible").

64. NEV. REV. STAT. § 78.138(7) (2021) (requiring a fiduciary breach to involve "intentional misconduct, fraud or a knowing violation of law" for personal liability).

Delaware's probably more predictable there but generally, you know, the Nevada approach is to look to the statute, and usually the former prosecutor, who was elected and now serving on the business court, will be reading the statute alongside you, probably for the first time.

**GEORGE MOCSARY**: Wyoming is in an interesting place here at a broad level. Statutory law is very important. If you talk to Wyoming business law and corporate law attorneys and ask them whether Delaware law applies or how we compare to Delaware law, they'll reply that we pretty much follow Delaware law, that Delaware is what we've got here. So I went into my Westlaw account and I searched on a handful of cases, *MFW*,[65] *Caremark*,[66] these kinds of well known cases. None of them were cited by Wyoming courts. I didn't do a thorough analysis, but you would think that something like *Caremark*[67] and *MFW*[68] would be cited. I did a search for squeeze out merger. No *MFW*[69] and seven cases came up for squeeze out mergers in Wyoming courts.

Now, part of the reason for that, of course, is that everyone litigates this stuff in Delaware, which we've been talking about so far. So statute is very important, and I think statute, more to the point, is especially important for a state that wants to compete with Delaware. I mentioned crypto and the intersection of cryptocurrency and blockchain and corporate law in Wyoming. The interesting question is will it take hold, and will Wyoming take the lead. So far, the space doesn't seem to be big enough for Delaware to act, but maybe it will. Maybe it does become big enough in a decade or two. And then the question is, can Wyoming build and solidify a competence in the space before it gets too big, starts looking good to Delaware, and Delaware decides it wants it like it did with our LLC invention.

What did Wyoming do? Wyoming matched legacy, corporate law, terms to token and blockchain language to make it possible for corporations more or less instantly to implement digital ledger technology for shareholding. The Business Corporation Act says that references to things like share certificate, share stock, and all of these

65. *See generally* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).
66. *See generally* In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).
67. *See id.*
68. *See generally M & F Worldwide*, 88 A.3d at 635.
69. *See id.*

kinds of things have to be construed as including tokens on a blockchain.[70] Any requirement that something be printed on a certificate or otherwise can be done on the blockchain. Certificated shares can be represented by certificate tokens.[71] Delivery, or the deposit of shares to a person or with a depository institution has to be construed to refer to any method of granting control of the tokens of the corporation.[72] You can transfer shares of stock on the blockchain—quite literally go into your wallet and transfer the tokens representing your shares if you want to. It doesn't have to be a custodial arrangement. I'll get to that in a second. In other words, what Wyoming is trying to do here is enable corporations to bypass investment banks entirely and just mint a token, put it on a blockchain and let people trade it.

But we're not trying to get around anything the SEC is doing. All of this is SEC neutral. It's just that it takes investment banks and the whole underwriting process entirely out of the picture. If it works, you'll be able to retain corporate records in electronic format, including on a distributed network.

Wyoming also amended its banking statute to provide for something called "special purpose depository institutions" that provide custodial and non-lending banking services for token depositors. If you want to keep your tokenized stock somewhere instead of keeping it in your Fidelity account, you're keeping it at a bank, an FDIC style bank. If the FDIC actually lets it in, which it should because there's no lending involved.

There are digital identity laws that allow individuals to act and interact through digital identities pseudonymously, not anonymously.

There's a new Chancery Court, which, if the legislature follows my advice, is going to be populated with crypto experts rather not corporate law experts. We should almost make an effort to put bad corporate law people and good crypto people onto our New Chancery Court is what I would recommend.

There's a financial technology sandbox. There are also decentralized autonomous organization LLCs (DAO LLCs) that you can create. These are basically organizations run by smart contracts that can have shares or units.

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70. WYO. STAT. ANN. § 17-16-605(a)(i) (2019).
71. *Id; see also W*YO. STAT. ANN. § 17-16-605(a)(ii) (2019); WYO. STAT. ANN. § 17-16-625(g) (2019).
72. WYO. STAT. ANN. § 17-16-605(a)(iii) (2019).

The result of all this is that when you go to Crypto conferences all around the world, everyone who is in the space and wants to start a corporation says two places, Wyoming and Zug, Switzerland. But the reason they do that is because the statute has set up this environment. And hopefully, this environment that's been set up by the statute will then be worked with by the courts to create the needed common law. And so on. I think if you start with the courts, you can't catch up to Delaware. It's just not possible with the massive common law that's out there, and common law is more easily copied than statutes. The judge who needs a decision rule just says, "hey, there's one in Wyoming in this corporate law situation we haven't encountered yet in Delaware, that's our rule now, too." End of story.

So, I think if you're going to compete with Delaware, you have to set up some kind of basic framework in which to do it, and you can only do that by statute.

**BAILEY SWARTZ**: I'd love to shift the perspective to that of the corporation. What should a corporation actually think about when deciding where to incorporate, and, why does this decision matter to them?

**ANTHONY RICKEY:** Well, I think we've spoken about having a solid Secretary of State and all of the advantages of Delaware that I mentioned in the answer to the first question.

I think the reason it matters is that there is a perception, and there is some empirical basis for this, that if you incorporate in a jurisdiction that has good corporate governance, stockholders are going to be willing to provide capital at a lower price, and you will have more efficient businesses. And I think that's pretty much the standard theory behind this.

**ROBERT RAGAZZO**: Yeah, that's certainly the economic theory. And scholars argue whether we're racing to the top or the bottom in this regard, and people cite studies on both sides, saying that incorporating Delaware helps your stock price, hurts your stock price, or people think it's neutral. I wonder whether managers are truly concerned, though, about what stockholders want in this regard. They should be incorporating in the state where stockholder value is increased to the highest extent. If you think that's an enabling jurisdiction like Delaware, that's great. If you think it's somewhere else, that's fine. But I hate to say this—I think a lot of managers like to incorporate where the rules are best for managers. That's basically just an agency cost, and they're not always going to be so concerned about where the stock price is maximized by incorporating. I hate to say that, but I think it might be true.

**BENJAMIN EDWARDS**: So, I largely agree. Recent evidence tends to indicate that there doesn't seem to be much of a premium, if any, for being inside Delaware or outside Delaware. Stephen Davidoff Solomon looked at this and provided a memorandum in connection with The Trade Desk's attempt to move to Nevada.[73] He did not find any significant premium for firms staying in Delaware. There is some evidence that for controlled firms (i.e., firms with a dominant shareholder), there might be a 4.9% discount if they stay in Delaware.[74] So, ultimately, when you're thinking about this as management or as a board, you don't want to go to a jurisdiction where shareholders are going to say "they're going there to steal our money, so we're going to sell the stock and get out." Any state that develops a stink on its corporate law that it's a place where you go to steal your shareholders' wealth is going to lose business because nobody is going to want to buy shares in a corporation that incorporates in a jurisdiction that allows for something like that. At the same time, we have a lot of lawyers here, and you probably have friends who like to argue, and don't let things go necessarily when they should; they want to be right, and they want to win. Imagine you start a business with one of them, and you make a decision, and you need to move on. If they want to keep arguing about it, and they drive up the cost over it, then it's hard to do business unless you have some way to at some point shut that down. So, every state is going to offer some way to resolve these disputes and move forward. Nevada tends to do it at a low cost. It probably increases your opportunity, perhaps, to get away with some things, but that doesn't necessarily mean that because some people could do something wrong potentially, and get away with it, that it's the right decision to subject every company to that kind of oversight. So, it's ultimately going to be a trade-off.

There are other major factors to think about. These are things states have to think about such as how good is your infrastructure? Our Secretary of State's website in Nevada needs to be modernized, and our

73. The Trade Desk, Inc., Definitive Proxy Statement (Form 14A), E-1 (Oct. 3, 2024).

74. Edward Fox, *Is There a Delaware Effect for Controlled Firms?,* 23 U. PA. J. BUS. L. 1, 40 (2020) ("controlled Delaware firms are on average worth 4.9% less than similarly situated firms incorporated elsewhere.").

leaders know this. I expect they will go to the Legislature and ask for money and an appropriation to update it. I had a little personal experience with this very recently. I have an LLC I use for consulting purposes. I had to go in and file an updated list of managers, and the website was down for a couple of days as my deadline was approaching. And it caused me to worry that I would have to figure out how to cure not meeting this deadline with the website not working and not processing my payment. So that's a problem. And you have to think about that as well.

**GEORGE MOCSARY**: Yeah, I agree with what everyone has said. You know, I've critiqued Delaware a bit today. But none of that is to say that these features of Delaware law and some others that we haven't spoken about aren't good for a great many firms. In fact, I suspect they are very good for the great bulk of firms in in those three categories that I talked about. I think it's also safe to say that for some firms, Delaware isn't the right place. In some sense, I don't think we need to answer the question of what a corporation should think about, because the corporation and its board and its controllers will know best what its needs are, and which jurisdiction will serve it well. If I had my former management consultant hat on, and a client came and asked, "where should we incorporate," I would start asking them questions about their business. I would try and draw out what features of the different state's laws the client fits into. And then I would add that you should think about the possibility of the future. You should figure out for yourself in some sort of vague present value calculation the possibility that the state will change from the corporate business model that now works best for you but that might not work best later, either because the state changes as we saw happen in Delaware recently or because your firm changes. And then figure out what are the costs of leaving that state to go to a better one, including the possibility, and this is one of the other cases, the *Maffei*[75] case, where Tripadvisor wanted to leave, but Vice Chancellor Laster said, no, you have to stay unless you want to be subject to a cause of action for damages. I'm thinking the Iron Curtain here. So, there's a possibility that you (directors) might be stuck in a state even if you don't want to be. Directors have to account for all this and figure it out, and have to do that with specialized knowledge of their business.

75. *See* Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024).

**BAILEY SWARTZ**: Ben, can you share more about how this impacts stockholders, and whether they should be concerned about the jurisdiction that the company that they're invested in is incorporated?

**BENJAMIN EDWARDS**: So, stockholders should think about this as well. At some point, you might prefer to own stock in a corporation with lower governance cost. There's some evidence that smaller cap firms may benefit from Nevada or other similar jurisdictions with low cost. If you're Apple, it does not matter to you that Delaware is charging you two hundred something thousand dollars a year for your incorporation. It just doesn't matter. If Apple buys, Beats and pays three billion dollars for it, also not material — you just have so much money. But, if you're a small publicly traded firm, where perhaps one of the most valuable assets you have is that you're a publicly traded firm, then paying out a million dollars every five years to remain a public company incorporated in Delaware may not make sense for you. Ofer Eldar did a paper on this titled, "Can Lax Corporate Law Benefit Some Firms?"[76] His finding was that there doesn't seem to be any problem with it, and for some firms, it may make more sense. I think these cost-conscious firms are able to save by switching to a different jurisdiction. But at the same time, when you have a dispute show up, if you need to get a quick resolution, and you need access to the Delaware judiciary, you might not have it if you're incorporated in some other state. So that could be a problem for you.

So as a stockholder, I'd want to think about if market evidence is showing that firms that have a controlling shareholder and are incorporated in a jurisdiction trade at a discount or a premium. A state will not want its firms to trade at a discount because it would be evidence of its law impairing economic value. There doesn't seem to be any evidence of that now. I'd be concerned about that as a stockholder and I think the state should be concerned about that, if that emerged. But, if you're a stockholder and you want to buy a particular stock because you like a controlling shareholder, you may be drawn to some firms. For example, let me give you Jeff Green, the CEO and founder of The Trade Desk. About 3 years ago the stock was trading at about forty dollars a share. Today, it's at one hundred twenty. And that's significant. So, if you want to bet on a controlling shareholder, and you want them to run the company as they see fit and you trust them, maybe

76. *See* Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada,* 61 J.L. & ECON. 555 (2018).

the different jurisdiction matters for you. The challenge here is these issues are always going to be decided in the shadow of what the market reaction is. I think you just have to watch and see whether any real premium or discount emerges for one jurisdiction over another.

**GEORGE MOCSARY**: You know, I think you can characterize corporate law, or maybe one feature of corporate law, as a hands-tying mechanism. You can think of corporate law as protecting managers from shareholders and shareholders from managers, but also shareholders from each other. And what you want to do as a stockholder is to find the jurisdiction that gives you the best balance given the characteristics of your firm. Just to complicate that a little more, the answer to which jurisdiction you prefer might be different if you're a founding stockholder, you're growing the firm and becoming large and maybe going public versus do you want to buy an interest in a firm that is potentially a controlling interest. The answer might be different. Maybe you don't want your fellow stockholder being able to hold up business because some schedule was stapled to the wrong document in a merger. Then again, maybe you do. Maybe you don't trust the board. Maybe you're in the type of business where there's too much going on and not everyone can watch everything, so centralized control wouldn't work. Then, maybe you want all these extra features of Delaware corporate law to keep the managers honest for you. So, it's very situation- and firm-specific.

**BENJAMIN EDWARDS**: To jump back in, when firms are looking to move to Nevada, a lot of times they don't necessarily have all the votes they need from a controlling stockholder. They're going to need to convince institutional investors to also move. So, proxy advice firms split on these kinds of decisions. When Fidelity National was looking to move, ISS went one way, and Glass Lewis went the other. They're placing different value on different kinds of governance rights and governance provisions. Some stockholders may really want something like the Delaware 220[77] action so you can get books and records more easily. But, some stockholders might see that as driving up cost. As a jurisdiction, states have to be thinking about the right way to balance that. You've got to be able to win these shareholder votes if you're going to be able to compete with Delaware.

**GEORGE MOCSARY**: This is where competition is nice. It's nice to have an alternative to Delaware. Think of the different states'

77. DEL. CODE ANN. tit. 8, § 220 (2010).

rules as off-the-rack alternatives just like the corporation is one off-the-rack form, the LLC is another, and so on. Except these are alternatives that you can't really change by contract or at least cannot change as easily as you can change corporate form. You can't really do that with the state's laws. So, it's nice to have these alternatives out there and it's nice to have the competition.

**BAILEY SWARTZ**: I know it was mentioned that one of the alternatives to Delaware is the federal government, which we touched upon because of the previously mentioned tweet from Elon Musk.[78] Robert, you mentioned the role of politics in the Texas courts, so I was hoping to hear a bit more about the interplay of corporate law and politics, especially in light of the recent election.

**ROBERT RAGAZZO**: In Texas, our politics had a lot to do with the creation of our new business court, that was heavily opposed by the Democratic party in Texas because everybody knows the business court judges are generally going to be Republican, and that involved in the view of the Democrats, a usurpation of power from Democrat judges in elected positions in Democratic counties to Republican judges. It was very, very controversial for that reason. We'll see if that continues. However, for that reason, the court is not overwhelmingly supported in Texas. It's almost viewed as a partisan political measure more than an attempt to compete with Delaware.

**ANTHONY RICKEY**: So, when I'm thinking about the interplay between corporate law and politics, I think a couple of issues have arisen recently in Delaware. We picked a great week to have this conversation right after the election. You may remember that the Washington Post didn't endorse anyone, and Jeff Bezos wrote an article in the Washington Post that I think is a good analogy to Delaware as well.[79] He analogized voting machines to newspapers. Voting machines must meet two requirements. They must count the vote accurately, and people must believe they count the vote accurately. The second requirement is distinct from and just as important as the first.

Cards on the table: I'm a Republican. Delaware is a deep blue state. I have zero concerns about political bias in the Delaware bench. None at

78. Elon Musk (@elonmusk), X (formerly Twitter) (Nov. 7, 2024, 11:50 AM), https://x.com/elonmusk/status/1854567200113533325 (last visited Nov. 28, 2024).

79. Jeff Bezos, *Trust in the Washington Post,* WASH. POST (Oct. 28, 2024), https://www.washingtonpost.com/opinions/2024/10/28/jeff-bezos-washington-post-trust/.

all. However, to project this for years since I started practice, we had a constitutional provision that said the Supreme Court and the Court of Chancery had to be split between Republicans and Democrats.[80] That was a way of providing confidence that this system had no political bias. There were a couple of lawsuits, one of which went up to the Supreme Court for a while, the U.S. Supreme Court,[81] from people who said, "Well, look! Why can't independents have a seat at this table?" And now, as a result of a settlement of one of these cases,[82] the rule is that you can't have more than a majority of the court belonging to any particular party.

So far, there's no difference in practice, but it opens up the possibility of something that concerns me because I used to live in D.C. The D.C. City Council has the same type of rule for its at-large members. You can have a majority of Democrats (or a majority of Republicans if, all of a sudden, everyone in D.C. starts voting differently). What you find on the D.C. City Council is that for the at-large members it's a majority plus one of Democrats, and the rest of it is pretty much made up of independents who were Democrats three weeks ago.[83] What concerns me is that, if our politics get more divided--I'm not going to say "as our politics gets more divided" because I'm going to hope it doesn't--are our governors and our politicians going to keep to the traditions that have kept this perception of bias out of Delaware? Or could that start breaking down to the D.C. government city council situation?

The other thing that I think may start having a little more salience is political donations. An article I saw during this election that I found very interesting was from an NPR Station in Oregon that mentioned that some of the largest donors to the Oregon Attorney General were out-of-state plaintiff's attorneys from Delaware and New York who don't have

80. *See* Stipulated Consent Judgment and Order, Adams v. The Hon. John Carney, C.A. No. 20-1680-MN ¶ 6 (D. Del. Sep. 23, 2022) (describing "major political party" restriction on judicial appointments).

81. *See* Carney v. Adams, 592 U.S. 53 (2020).

82. *Id.* at 5-6 (holding, as part of a consent judgment, that the "major political party" restriction on the judicial appointment power, limiting appointments to either the Democratic or Republican parties, is unconstitutional and unenforceable).

83. "Three weeks" is an exaggeration. *See* Martin Austermuhle, *Why are Two of the D.C. Council's At-Large Seats Off Limits for Democrats,* WAMU88.5 (Nov. 5, 2018), https://wamu.org/story/18/11/05/why-are-two-of-the-d-c-councils-at-large-seats-off-limits-for-democrats/.

offices in Oregon.[84] However, Oregon's Attorney General and Treasurer have influence over the public sector pension fund. And that public sector pension fund is a plaintiff in Delaware.[85] I wonder if, and this would be interesting to hear from the other States, if there isn't a thought in the other States that, "Hey, we'd like to get in on this game. This is a reason to have a business court and be part of this process that doesn't really play into the corporate law arena." Those are the two things that I am concerned about.

**BENJAMIN EDWARDS**: I think politics matter here, and for the state of Nevada, our state politics will determine whether we can effectively compete with Delaware. If we're going to compete in any meaningful way, we will have to think about how to offer some alternative to the Delaware Chancery Court. Right now, we've tried to do that as best we can, limited by the Nevada Constitution that requires our judges to be elected.[86]

It is just very hard to make that kind of change. So, for Nevada to do it, the politics would have to allow for a constitutional amendment. That's going to take, as I read our Constitution, passing the legislature repeatedly and winning a referendum.[87] So you have to win the same issue repeatedly over a period of years. The political process matters. Having politicians who understand the issue and see it as worthwhile for them matters. Historically, this hasn't been too much of a partisan issue in Nevada. But you know, we'll see what happens.

**GEORGE MOCSARY**: I'll share two stories, one of which I was involved with personally.

The Wyoming Legislative Committee, which does corporations and the business stuff, basically wanted to pass a benefit corporation statute in Wyoming. Those of you who are familiar with the area might know that the Model Act has a bunch of stuff in it that arguably opens the door

84. Dirk VanderHart, *Out-of-state law firms among top donors to Oregon attorney general candidate Dan Rayfield,* OPB (Aug. 27, 2024), https://www.opb.org/article/2024/08/27/out-of-state-law-firms-campaign-donors-oregon-attorney-general-candidate-dan-rayfield/.

85. *See* In re Fox Corp. Derivative Litig., 307 A.3d 979, 998 (Del. Ch. 2023) (appointing Oregon pension fund to co-leadership position with New York City funds in derivative action).

86. NEV. CONST. art. VI, § 2.

87. NEV. CONST. art. XVI §§ 1–2.

to some third party influencing the business operations.[88] Maybe there's a derivative suit possibility, and maybe there isn't. But arguably there, it's possible for outside entities to judge the public benefit.

Delaware's is much better, but it still has a line in there that arguably does the same thing. The bill was being debated in Wyoming. I worked with the committee to remove that. It basically copied Delaware's law, but I worked with it to remove that line or that provision that arguably could allow any outside entity to influence what the corporation does by lawsuit, by whatever means. The benefit corporation would have been impervious to outside influence. It would have been solely run by the board of directors.

Some legislators in Wyoming were afraid to pass the statute because the statute would have said that benefit corporations can consider environmental concerns, etc. Oil and gas are very important in Wyoming. Exceedingly important. If the oil and gas business suffers, fewer people eat in Wyoming. I understand their concern, but this wouldn't have allowed anyone other than the corporation's board to run its business.

The statute never passed, and whatever benefit corporation business Wyoming might have gotten, little bits along the edges, Wyoming didn't get because the statute didn't pass.

Compare this to S.B. 313.[89] The Delaware Legislature saw a threat to its business in a handful of cases. The commission that first proposes the laws in Delaware is called the Corporate Law Council. The Corporate Law Council immediately wrote up a provision, and the Delaware Court and the Delaware Legislature passed it. Delaware was able to respond pretty much immediately to a threat to its business that it saw was too big. That's a stark contrast in the two states, Nevada and Delaware. A well-functioning political system, political system I use sort of in the modern, almost negative term, but also in the original term —just making policy, the ability to make policy. A well-functioning political system is exceedingly important, I think, in this area.

**BAILEY SWARTZ**: Given that we only have a couple of minutes left, I'd like to hear from each of you about where you think corporate law is going in the long run.

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88. *See* George A. Mocsary, *Freedom of Corporate Purpose,* 2016 BYU L. REV. 1319, 1390-91 (2017).

89. S. B. 313, 152nd Gen. Assemb., Reg. Sess. (Del. 2024) (enacted).

**ANTHONY RICKEY**: I think I'll end where I started. I think there's a very small possibility that Delaware is not going to be dominant in the next 10 years. That being said, I will be a lot happier if we go back to the situation where we have one of these conferences and one of these panels about Delaware's dominance every 5 or 10 years of my career rather than every couple of months.

**ROBERT RAGAZZO**: In Texas, we actually have a Texas bar committee called the Delaware Law Subcommittee, whose job is to bring Texas law into conformity with Delaware law. Every year, we get closer and closer to Delaware, and I predict that trend will continue.

**BENJAMIN EDWARDS**: If I'm going to make a prediction, Delaware will remain dominant. There are probably areas for states to compete where Delaware doesn't want to do it. For example, there's a very large defense bar and a very large plaintiff's bar in Delaware. Both sides benefit from a significant degree of corporate governance litigation. Things that significantly reduce the overall volume of litigation are probably non-starters. That doesn't mean that Delaware is going to allow things to remain unchanged. If a significant number of companies start going somewhere else, I think Delaware will respond. Delaware has always been very responsive. No state can really compete with Delaware because if you do something different and better, you can't use intellectual property to protect your corporate law. Delaware can just change its statute. I think we'll see more competition. But I don't see Delaware losing its edge.

**GEORGE MOCSARY**: I agree with Ben here, and I would only add that I think competition is healthy. It's good to have different alternatives in the different states because that's value-creating. If there's a 6% discount for certain types of corporations staying in Delaware, it's value-creating. If those companies can go elsewhere and get back that 6%, that's valuable. So, I'd like to see more competition. But on the whole, I think Delaware will remain dominant, and it will continue to serve the large bulk of firms out there.