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## Delaware's New Competition

William J. Moon

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## Articles

### DELAWARE'S NEW COMPETITION

*William J. Moon*

**ABSTRACT**—According to the standard account in American corporate law, states compete to supply corporate law to American corporations, with Delaware dominating the market. This “competition” metaphor in turn informs some of the most important policy debates in American corporate law.

This Article complicates the standard account, introducing foreign nations as emerging lawmakers that compete with American states in the increasingly globalized market for corporate law. In recent decades, entrepreneurial foreign nations in offshore islands have used permissive corporate governance rules and specialized business courts to attract publicly traded American corporations. Aided in part by a select group of private sector lawyers who draft legislation for these lawmakers, foreign nations enable American corporations to opt out of mandatory rules that are axiomatic features of American corporate law.

This Article documents an emerging international market for corporate law that has largely been undetected by legal scholars who presuppose an interstate market. While acknowledging the potential benefits offered by foreign nations competing to attract American corporations, this Article highlights a series of countervailing considerations that render any claims about gains from international jurisdictional competition premature at best.

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### INTRODUCTION

The United States seems cut off from the rest of the world when it comes to corporate law. Legal scholars take as virtual gospel that corporate law is a matter of state law,<sup>1</sup> and that states compete to sell their laws to corporations by supplying corporate charters.<sup>2</sup> Delaware is widely regarded

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<sup>1</sup> See, e.g., Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGULATION 26, 26 (2003) (“For over 200 years, corporate governance has been a matter for state law.”).

<sup>2</sup> See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1–3 (1993) [hereinafter ROMANO, GENIUS].

as the winner in this competition. Supplying corporate law to more than 66% of Fortune 500 companies,<sup>3</sup> Delaware remains the central focus of academic studies and a transactional lawyer's prized tool kit.<sup>4</sup> For nearly half a century, corporate law scholarship has been dominated by discussions about whether other states put competitive pressure on Delaware and whether this competition is normatively desirable.<sup>5</sup>

There is a missing piece to this important body of scholarship. Until now, legal scholars have neglected to consider foreign nations as jurisdictions that compete with Delaware to supply corporate law.<sup>6</sup> This is not particularly surprising. When theorists in economics and law laid the theoretical foundations of corporate law in the 1970s and 1980s,<sup>7</sup> there was little reason to consider the corporate law of foreign nations within the framework of *American* corporate law.<sup>8</sup> At that time, only a small fraction of

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<sup>3</sup> See *About the Division of Corporations*, DEL. DIVISION CORP., <https://corp.delaware.gov/aboutagency/> [<https://perma.cc/5RDG-TKQW>].

<sup>4</sup> See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1574 (2005) (noting that Delaware “has long been viewed as the de facto national corporate law”).

<sup>5</sup> Much of this discussion concerns whether a particular state law affords adequate protection for shareholders and whether that protection ought to be left to private choice. Compare Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256 (1977) [hereinafter Winter, *State Law*] (“States seeking corporate charters will thus try to provide legal systems which optimize the shareholder-corporation relationship.”), with Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1454 (1992) [hereinafter Bebchuk, *Desirable Limits*] (“[T]o the extent that we find that a state’s interest in attracting incorporations will be served by adopting undesirable rules, we can conclude that state competition is detrimental.”). In recent decades, Professor Mark Roe’s work has complicated this picture by introducing the federal government as the de facto second American corporate lawmaker. See, e.g., Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003) [hereinafter Roe, *Delaware’s Competition*].

<sup>6</sup> A brief word on terminology may be useful here. I use the term “foreign nations” loosely in this Article, referring to jurisdictions with internationally recognized lawmaking authority. My definition thus includes jurisdictions like the Cayman Islands and Bermuda that are technically not full sovereigns under international law, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 282–84 (2d ed. 2006), but whose corporate lawmaking authority has been unquestioned under domestic jurisprudence. See, e.g., *In re Kingate Mgmt. Ltd. Litig.*, No. 09-CV-5386 (DAB), 2016 WL 5339538, at \*15–16 (S.D.N.Y. Sept. 21, 2016) (“The fact that Madoff and his fraudulent scheme arose out of New York is not sufficient to override BVI’s interests in regulating the relationship between BVI corporations and their shareholders. Accordingly, the Court finds that BVI law applies to the issue of standing.”).

<sup>7</sup> Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1326 (2013).

<sup>8</sup> American corporate law was traditionally framed within the policy debate over federalism, with state corporate codes being conceptualized as products “whose producers are states and whose consumers are corporations.” ROMANO, GENIUS, *supra* note 2, at 6. The standard account implicitly limits the “suppliers” of American corporate law to the constituent states of the United States. See *id.*; see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 5

American companies were incorporated in foreign nations.<sup>9</sup> Moreover, leading scholars have long assumed that the internal affairs doctrine—a conflict of laws principle that corporations can opt into any state’s corporate law without regard to the location of their physical operations—only applies to states in the United States.<sup>10</sup> If federal and state courts do not honor the choices of corporations to incorporate abroad, foreign nations cannot seriously compete with Delaware. But as I document below, judges routinely extend the internal affairs doctrine for firms incorporated outside of the United States.<sup>11</sup> Texas-based consumer giant Helen of Troy, Los Angeles-based weight management company Herbalife, and Kentucky-based clothing company Fruit of the Loom are among hundreds of companies that are effectively governed by the corporate law of foreign nations.<sup>12</sup>

This Article develops a theoretical framework that accounts for the emerging international market for corporate law. It contends that a handful of foreign jurisdictions, including Bermuda, the British Virgin Islands, and the Cayman Islands, have become emerging “laboratories” of corporate law offering attractive corporate governance rules for publicly traded corporations that principally operate outside of those jurisdictions.<sup>13</sup> American corporations are not immune to their seduction. These jurisdictions—especially those I identify as “offshore corporate law havens”<sup>14</sup>—are already global market leaders for certain types of closely held

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(1991) (“Managers in the United States must select the place of incorporation. The fifty states offer different menus of devices (from voting by shareholders to fiduciary rules to derivative litigation) for the protection of investors.”).

<sup>9</sup> See *infra* Section II.A.

<sup>10</sup> See, e.g., Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 698 (2009) [hereinafter Easterbrook, *Race for the Bottom*] (“[T]his country does not recognize an internal-affairs doctrine in its dealings with other nations.” (emphasis omitted)).

<sup>11</sup> See *infra* Section I.B.

<sup>12</sup> See generally William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 12–15 (2019) [hereinafter Moon, *Regulating Offshore Finance*] (explaining how particular industries have established practices of setting up headquarters in offshore jurisdictions); Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649, 1748–51 (2015) (compiling corporate inversion transactions involving U.S. target companies between 1994 and 2014).

<sup>13</sup> Conceptualizing jurisdictions as laboratories was popularized by Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, explaining that a “[s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Professor Roberta Romano extended this concept to the corporate law ecosystem, referring to states as “fifty laboratories.” ROMANO, *GENIUS*, *supra* note 2, at 5.

<sup>14</sup> As I further elaborate in Part II, I use the term “offshore corporate law havens” in this Article principally to refer to three jurisdictions that have successfully attracted clients based in the United States: the Cayman Islands, Bermuda, and the British Virgin Islands. See E. EDWARD SIEMENS, *OFFSHORE COMPANY LAW* 9 (2009). While all three jurisdictions are self-governing British Overseas Territories (voluntarily), they each exercise almost full discretion when it comes to enacting legislation on corporate

business entities, including mutual funds, hedge funds, and trusts.<sup>15</sup> But these offshore jurisdictions are also starting to compete seriously for publicly traded corporations. Today, foreign nations are juridical homes to over 14% of large publicly traded corporations listed in American securities markets.<sup>16</sup>

There is virtually no literature on whether and to what extent foreign nations compete with American states to supply corporate law. While legal scholars and policymakers alike have been acutely aware of domestic corporations reincorporating in offshore “tax havens,”<sup>17</sup> they have diagnosed the phenomenon as a problem of tax.<sup>18</sup> While insightful, the foreign incorporation trend cannot be entirely attributed to tax incentives.

As this Article will show, offshore corporate law havens in recent decades have built sophisticated legal infrastructures that enable them to compete with Delaware. For one, they have attracted a select group of foreign lawyers who help lawmakers in these jurisdictions draft “cutting edge” corporate law statutes. These lawmakers also rely heavily on incorporation fees for government revenues,<sup>19</sup> allowing them to credibly commit to retaining laws that are attractive to the private sector.<sup>20</sup> Because the population of offshore corporate law havens tends to be a fraction of even sparsely populated states in the United States,<sup>21</sup> these jurisdictions can enact

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law. The focus of this Article on these three jurisdictions is aimed at defining the concept of an international market for corporate law and should not be taken to suggest that other foreign nations besides these offshore jurisdictions do not or cannot attract American corporations. Indeed, many foreign nations, including Ireland and the Marshall Islands, have had some success in drawing publicly traded companies listed in American securities markets.

<sup>15</sup> Moon, *Regulating Offshore Finance*, *supra* note 12, at 1, 3.

<sup>16</sup> See *infra* Section II.A.

<sup>17</sup> See, e.g., RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 8–9 (2010) (“[T]ax havens are places or countries (not all of them are sovereign states) that have sufficient autonomy to write their own tax, finance, and other laws and regulations . . . . Tax havens are used, as their name suggests, to avoid and evade taxes.”); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 276 (2010) (“In some circumstances, managers will opt to minimize taxes by choosing a tax haven or tax-friendly jurisdiction, even if that jurisdiction is suboptimal from the standpoint of corporate law.”).

<sup>18</sup> See, e.g., Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1230 (2008) (observing that offshore incorporation is “unabashedly all about tax reduction”).

<sup>19</sup> The British Virgin Islands, for instance, has derived approximately half of its government revenues from annual incorporation fees in recent years. See *infra* Section II.B.

<sup>20</sup> A benign, economic-centric view would assess that the additional suppliers of corporate law lower the transactional cost for creating standard templates of corporate governance rules. See *infra* Section III.B. A more cynical view would be that their lawmakers are easily “captured” by private interests and thereby prone to producing rules that may not be desirable from the society’s standpoint. See *infra* Section III.B.

<sup>21</sup> For instance, estimates show the population of the Cayman Islands is 61,944 compared to 961,939 in Delaware and 2,998,039 in Nevada. See *Central America: Cayman Islands*, CENT. INTELLIGENCE

legislation swiftly in response to private sector demand. They also 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.<sup>22</sup>

Skeptical readers may point to the “unique” legal system in Delaware that is said to make it near impossible for any other jurisdiction to mount a serious challenge to Wilmington’s corporate law empire. I do not seek to rehash the extensive and illuminating literature identifying Delaware’s judicial system—particularly the renowned Delaware Court of Chancery—as the predominant competitive advantage enjoyed by Delaware over other *states*.<sup>23</sup> Indeed, many foreign jurisdictions *do not* offer a Delaware-style legal system famous for producing an abundance of well-reasoned and fact-specific case law appearing on Westlaw and Lexis. Instead, many legal proceedings offshore take place in secret, and full-length opinions are frequently unpublished or available only to insiders.<sup>24</sup>

These jurisdictions compete not by carbon copying Delaware’s judiciary, but rather by offering dispute resolution fora functionally similar to modern commercial arbitration. Like arbitration,<sup>25</sup> courts in offshore

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AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html> [<https://perma.cc/TVX3-C95L>]; Delaware, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=Delaware&g=0400000US10&table=DP05&tid=ACSDPIY2018.DP05> [<https://perma.cc/6JUM-KRBL>]; Nevada, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=Nevada&g=0400000US32&table=DP05&tid=ACSDPIY2018.DP05> [<https://perma.cc/FN9W-V9NL>].

<sup>22</sup> Indeed, offshore corporate law havens have enacted laws specifically for “exempted” or “excepted” companies, which are designed for foreign business entities that do not (and in many instances legally cannot) conduct any business in their territories. See Moon, *Regulating Offshore Finance*, *supra* note 12, at 8–9. It is no coincidence that offshore incorporations havens are small in terms of population. As is the case for Delaware, the small size of a jurisdiction minimizes competing political lobbies and immunizes lawmakers from domestic factions that have interests in shaping corporate governance rules. See Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 918–19 (1990); Bebchuk, *Desirable Limits*, *supra* note 5, at 1452; John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 762–63 (1987).

<sup>23</sup> See, e.g., Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) [hereinafter Fisch, *Peculiar Role*] (attributing Delaware’s success in attracting corporate charters to “the unique lawmaking function of the Delaware courts”); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) [hereinafter Rock, *Saints and Sinners*] (asserting that the judgment of Delaware courts plays an important role in evolving nonlegal norms of conduct).

<sup>24</sup> See *infra* Section II.D.

<sup>25</sup> Arbitration is a consent-based dispute resolution mechanism touted for offering efficient and expert proceedings. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through*

corporate law havens resolve disputes without juries.<sup>26</sup> 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.<sup>27</sup>

This account complicates some of the fundamental theoretical building blocks underlying the study of American corporate law. Whereas several prominent academics have assessed that other *states* do not vigorously compete to give a run for Delaware's money, thus dubbing the interstate competition story a "myth,"<sup>28</sup> this Article suggests that a handful of foreign nation states are actively vying to gain a share of the American corporate law market. Thus, even if state-to-state competition is or will remain weak,<sup>29</sup> state-to-*nation state* competition may be alive and kicking, albeit not with the same set of consequences that the standard interstate framework would have us believe.

For example, offshore corporate law havens allow firms to opt out of a range of corporate governance rules—including the ability of shareholders to bring derivative suits for mismanagement—that are axiomatic features of American corporate law.<sup>30</sup> While Delaware corporate law is predominantly made up of "enabling" default rules that leave significant discretion to

*Arbitration*, 83 MINN. L. REV. 703, 723 n.90 (1999) (discussing the reduced cost and delay associated with arbitration).

<sup>26</sup> See *infra* Section II.D.

<sup>27</sup> See *infra* Section II.D.

<sup>28</sup> Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) [hereinafter Kahan & Kamar, *Myth*] ("[T]he very notion that states compete for incorporation is a myth. Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.").

<sup>29</sup> This premise is contested. For instance, Professor Romano maintains that "given Delaware's dominance, most other states engage in defensive competition, acting to retain domestic corporations, rather than seeking to lure corporations away from Delaware and unseat it as the market leader." Roberta Romano, *Market for Corporate Law Redux*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 358, 361–62 (Francesco Parisi ed., 2017) [hereinafter Romano, *Corporate Law Redux*]. Others have argued that at least Delaware and Nevada "are vigorously attempting to attract out-of-state incorporations." Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 994 (2012).

<sup>30</sup> Of course, the desirability of a liberal derivative suit regime is disputed (after all, defending frivolous suits is costly). See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 692 (1986); Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 86 (2008); Charles J. Goetz, *Verdict on Corporate Liability Rules and the Derivative Suit: Not Proven*, 71 CORNELL L. REV. 344 (1986) (evaluating the argument regarding the effect of derivative suits on stock prices). But the general availability of derivative suits is said to serve the dual purpose of compensating the injured shareholders and deterring managerial misconduct. See Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1345–46 (1993).



private choice,<sup>31</sup> it includes a number of “mandatory” rules ranging from fiduciary duty of loyalty to shareholder inspection rights.<sup>32</sup> These are rules that even the most sophisticated corporations cannot waive compliance of through contract. Viewed in this light, foreign jurisdictions enable corporations to opt out of certain mandatory rules that may not be possible in the pure domestic setting. This descriptive account thereby reorients the normative debate concerning the proper boundaries and function of corporate law.

By proposing an update to the interstate race framework underlying the study of “American” corporate law,<sup>33</sup> this Article also adds an important normative dimension critical to understanding a number of areas tertiary to corporate law. After all, the interstate corporate charter competition literature has been influential in a number of important areas of the law, including bankruptcy law, tax policy, conflict of laws, trust law, environmental law, and securities regulation.<sup>34</sup>

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<sup>31</sup> See EASTERBROOK & FISCHER, *supra* note 8, at 2 (“The corporate code in almost every state is an ‘enabling’ statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator.”); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (describing the Delaware corporate lawmaking process as driven in part by “enhancing flexibility to engage in private ordering”).

<sup>32</sup> See *infra* Section III.A.

<sup>33</sup> I use quotes around “American” because there has been little systematic reflection about what American corporate law even means. Scholars have long assumed it to mean corporate governance rules produced by American states, supplemented with federal laws setting minimum standards. That seems fair enough. But if we remove two shaky theoretical building blocks underlying that assumption—that firms operating within the United States only shop among the corporate law of American states and that the internal affairs doctrine only applies between states of the United States—it appears that we also ought to care about the corporate law of foreign nations chosen by corporations with substantial factual nexus to the United States. To put it bluntly with an extreme example, it helps very little to understand American corporate law by studying the law of American states if 60% of American corporations choose to incorporate in foreign nations. Even now, lawyers advising hedge fund managers based in the United States would practically be committing malpractice if they were unfamiliar with the laws of the Cayman Islands—the jurisdiction estimated to be home to upwards of 60% of the world’s hedge fund assets. See Jan Fichtner, *The Anatomy of the Cayman Islands Offshore Financial Center: Anglo-America, Japan, and the Role of Hedge Funds*, 23 REV. INT’L POL. ECON. 1034, 1051 (2016).

<sup>34</sup> See, e.g., Marcus Cole, “*Delaware Is Not a State*”: *Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1847 (2002) (“[T]he advantages most often postulated for Delaware’s dominance in corporate law do not carry over to corporate bankruptcy.”); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1247 (1992) (drawing on the corporate charter competition literature to challenge “race-to-the-bottom arguments in the environmental context”); Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 363 (2005) (discussing the nature of jurisdictional competition in the trust law context by engaging with the corporate charter competition literature). These areas of the law are heavily influenced by jurisdictional competition theories, recognizing that rules are

The remainder of this Article is organized in three Parts. Part I synthesizes existing accounts and proposes a revision to the standard interstate competition framework underlying the study of American corporate law. Specifically, it develops a theoretical framework accounting for the emerging international market for corporate law. Part II details the corporate lawmaking processes in offshore corporate law havens, which are severely understudied thus far.<sup>35</sup> This includes (1) data showing the extent to which lawmakers in these jurisdictions are “captured” by foreign corporations<sup>36</sup> by being heavily reliant on annual incorporation fees for government revenue; (2) the inner workings of offshore law firms and other local interest groups that facilitate efficient production of corporate law; and (3) the emergence of specialized business courts featuring credentialed business law jurists that resolve disputes swiftly (and in many cases, secretly). Part III surveys important features of offshore corporate law, highlighting how offshore corporate law havens enable corporations to opt out of corporate governance rules that are largely immutable under Delaware law. Part III also weighs the potential benefits offered by an emergence of international competition against important negative externalities—effects on third parties—present in the international setting. A short Conclusion follows.

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supplied in part through multiple lawmakers competing to supply their laws to private actors. *See, e.g.*, Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1182–83 (2007) (“Just as state revenue from incorporation fees may encourage states to mold corporate law to attract more corporations, this Article suggests that revenue from court fees encouraged English courts to mold the common law to attract more cases.”). Leading thinkers typically agree that the law is derived from or heavily influenced by jurisdictional competition, but vigorously disagree as to whether the competition is normatively desirable. *See* Kahan & Kamar, *Myth*, *supra* note 28, at 681–85.

<sup>35</sup> *See* Robert Briant, *Transactional Success Offshore? The Role of Corporate Lawyers*, BUS. BVI 62, 63 (2015) (anecdotally describing the corporate lawmaking processes in offshore jurisdictions but lamenting that “there are no studies or journal articles to cite as evidence of this practice”).

<sup>36</sup> I use the term “capture” to refer to special interest groups exerting significant influence over the local lawmaking process. *See, e.g.*, Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 203 (2006) (“According to the broad interpretation, regulatory capture is the process through which special interests affect state intervention in any of its forms, which can include areas as diverse as the setting of taxes, the choice of foreign or monetary policy, or the legislation affecting R&D.”). In their strongest form, interest groups can literally write legislation that “captured” lawmakers formally enact into law. For excellent discussions analyzing Delaware corporate law in the framework of a capture model, *see* William W. Bratton, *Delaware Law as Applied Public Choice Theory: Bill Cary and the Basic Course After Twenty-Five Years*, 34 GA. L. REV. 447, 453–61 (2000), and William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861 (1995).

## I. (NATION) STATES AS LABORATORIES OF CORPORATE LAW

This Part sketches the standard account underlying American corporate law scholarship and develops a theoretical framework for understanding the emerging international market for corporate law. Section A synthesizes the prevailing literature that identifies states as potential competitors in the race to supply corporate charters. Section B documents recent federal and state court jurisprudence that effectively enables firms to choose the corporate law of foreign nations without establishing any physical operations in the chosen jurisdiction. Section B also advances this Article's central thesis: that Delaware and other states compete with foreign nations in the increasingly globalized market for corporate law.

*A. The Standard Account: States as Laboratories of Corporate Law*

American corporate law is often characterized as a byproduct of a race: states compete to supply corporate law.<sup>37</sup> For the most part, corporate law is a collection of default rules governing the relations between the firm's shareholders (principals) and the managers (agents).<sup>38</sup> These rules serve to remedy the various agency problems that arise when a large group of individuals pool money and labor for business ventures. In the United States, corporate law has historically been the domain of state law, although the federal government sets minimum standards through statutes and administrative guidelines.<sup>39</sup>

The traditional view holds that states compete to supply corporate charters in order to attract annual fees from locally incorporated corporations. Enacting the first modern liberal corporate statute in 1896, New Jersey was the early market leader, principally drawing corporations physically headquartered in New York.<sup>40</sup> But when New Jersey enacted a series of restrictive amendments to its statutes deemed unfriendly for businesses in 1913, Delaware quickly took over New Jersey's throne.<sup>41</sup>

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<sup>37</sup> See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 226–27 (1985) [hereinafter Romano, *Law as a Product*].

<sup>38</sup> See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1416 (1989) [hereinafter Easterbrook & Fischel, *The Corporate Contract*] (explaining that corporate law “establishes minimum voting rules and restricts how managers can treat the firm and the investors”).

<sup>39</sup> See Bebchuk, *Desirable Limits*, *supra* note 5, at 1442.

<sup>40</sup> See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 81, 92–94 (2006).

<sup>41</sup> See Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 270–71 (1976).

Delaware has since maintained an almost monopolistic advantage over other states.<sup>42</sup>

The view that this competition produces socially undesirable results is most famously associated with former Securities and Exchange Commission (SEC) chair William Cary.<sup>43</sup> Professor Cary argued in a widely cited piece published in 1974 that competition between states to supply corporate charters induced states to “race for the bottom” by adopting laws that favor corporate insiders—namely directors and officers—over dispersed shareholders.<sup>44</sup>

Professor Cary’s thesis was attacked almost immediately, despite enjoying a brief period of scholarly consensus.<sup>45</sup> Judge Ralph Winter set the table for this takeover.<sup>46</sup> Judge Winter suggested that any competition between states would result in a race for the top, because the market would constrain managers from incorporating in a state that would be detrimental to the shareholders’ interest.<sup>47</sup> While managers could technically choose any state’s corporate law, if that choice was unfavorable to the shareholders’ interest, they would be outperformed, putting the managers’ employment in jeopardy. Building on Judge Winter’s thesis, Professor Roberta Romano’s wide-ranging theoretical and empirical studies have produced a generation of followers who maintain that the race is for the top.<sup>48</sup> In doing so, Judge

<sup>42</sup> See William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 U. ILL. L. REV. 1, 2; Omari Scott Simmons, *Branding the Small Wonder: Delaware’s Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1131 (2008); David A. Skeel, *Icarus and American Corporate Regulation*, 61 BUS. LAW. 155, 165 (2005) (calling Delaware “the most important corporate law regulator since 1913”).

<sup>43</sup> See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 474 (1987) (“The race-to-the-bottom theory was presented most forcefully in Professor William Cary’s famous article that gave rise to that phrase.”).

<sup>44</sup> See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974). This view built on Justice Brandeis’s concern that a competition between states to produce laws for corporations would induce state laws to capitulate to private corporate interests over public interests. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–65 (1933) (Brandeis, J., dissenting).

<sup>45</sup> See Ralph K. Winter, *Foreword to ROMANO, GENIUS*, *supra* note 2, at ix (1993) (“Twenty years ago, legal scholars were herdlike in regarding corporate law as a species of consumer protection in which the law’s role was to protect helpless investors by hogtying a predatory corporate management.”).

<sup>46</sup> Winter was a former Yale Law School professor and Senior Judge of the U.S. Court of Appeals for the Second Circuit. *Ralph K. Winter*, U.S. CT. APPEALS FOR SECOND CIR., <http://www.ca2.uscourts.gov/judges/bios/rkw.html> [<https://perma.cc/75NH-CGAK>].

<sup>47</sup> See Winter, *State Law*, *supra* note 5, at 256.

<sup>48</sup> Cf. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 770 (1995) [hereinafter Klausner, *Corporations*] (“[T]here is a broad consensus that the finish line of the race is closer to the top than the bottom.”). The “race for the top” account probably gained so much following in no small part because of the ascendance of economics in the study of the law during the 1970s and the 1980s. This movement, in corporate law, successfully took down the notion that corporate

Winter and Professor Romano successfully reshaped the dominant narrative in corporate law: competition between states leads to efficient production of corporate law while incentivizing socially beneficial corporate law innovations. This view is probably the mainstream view among modern corporate law circles, although the race for the bottom thesis continues to enjoy support, in various iterations.<sup>49</sup>

The idea that competition even exists between states has been subject to sweeping revisionist accounts within the past two decades.<sup>50</sup> Professors Marcel Kahan and Ehud Kamar, for instance, have argued that the competition metaphor is largely a “myth,” observing that “[o]ther than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”<sup>51</sup> Specifically, Professors Kahan and Kamar showed that no other state structures its corporate charter fees to attract publicly traded companies.<sup>52</sup>

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law was a sovereign-based law and replaced it with economic theories suggesting that corporate law constituted private contracts, amendable to private choice. Thus, corporate law today is predominantly conceptualized as a nexus of standard form contracts, rather than a set of rules imposed by the state. *See, e.g.,* Easterbrook & Fischel, *The Corporate Contract*, *supra* note 38, at 1426 (referring to a corporation as a “nexus of contracts”).

<sup>49</sup> *See, e.g.,* Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CALIF. L. REV. 1775 (2002) (finding that state competition over corporate charters provides undesirable incentives that substantially affect corporate managers’ private interests); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999) (discussing the incentives states have to produce rules that excessively protect incumbent managers and restrict hostile takeovers, often leading to rules that do not maximize shareholder value); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002) (finding that managers generally migrate to typical antitakeover statutes, which increase managerial agency costs and reduce shareholder wealth, consistent with the “race to the bottom” view).

<sup>50</sup> Most of this debate is framed around competition for publicly traded corporations. Professor Ian Ayres has observed that given the insignificance of close corporations for state revenues, there might not be a race in the interstate context. *See* Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365, 370 (1992). In a recent empirical study, Professors Bruce Kobayashi and Larry Ribstein argued that Delaware is also the market leader for close companies. *See* Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 91 (“[W]e find evidence that large LLCs, like large corporations, tend to form in Delaware, and that they do so for many of the same reasons—that is, for the quality of Delaware’s legal system.”).

<sup>51</sup> Kahan & Kamar, *Myth*, *supra* note 28, at 684.

<sup>52</sup> *Id.* at 687–88. Others, most notably Professors Lucian Bebchuk and Assaf Hamdani, have called the race a “leisurely walk,” observing that “other states have not been making any visible efforts to mount a serious challenge to Delaware’s dominance.” Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 556 (2002) [hereinafter Bebchuk & Hamdani, *Leisurely Walk*]. Professors Bebchuk and Hamdani attribute Delaware’s preeminence in corporate law, instead, to network externalities. *Id.* at 559. The concept of

Other challengers to the traditional state competition theory identify the federal government in Washington D.C. as Delaware's *real* competition. Professor Mark Roe developed this argument in a series of law review articles starting in 2003.<sup>53</sup> His argument is two-fold. First, Congress and the SEC already have important pieces of corporate governance rules on the books that displace certain segments of state corporate law.<sup>54</sup> Thus, for instance, the Securities and Exchange Act of 1934 sets the minimum standards for proxy rules,<sup>55</sup> and the Sarbanes-Oxley Act of 2002 mandates "internal managerial duties and allocates authority inside the firm."<sup>56</sup> Second, because federal authorities can always preempt state corporate law under modern interpretations of the Commerce Clause, Delaware's corporate governance rules reflect "corporate law that the federal players tolerate."<sup>57</sup> Many legal scholars now view the federal government as a significant

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network externalities refers to the benefits of incorporating in a jurisdiction where a large number of other firms have incorporated. See Klausner, *Corporations*, *supra* note 48, at 843–45. These benefits include (1) a robust body of case law enhancing the predictability of the law; and (2) a large group of lawyers who can efficiently provide legal services by the virtue of their extensive practice experience in one jurisdiction. Bebchuk & Hamdani, *Leisurely Walk*, *supra*, at 586–87. Network externalities help explain why Delaware has maintained a near monopolistic advantage in the corporate law world, even though other states could easily copy and paste Delaware's *substantive* law. Importantly, Delaware's corporate law statutes are typically written in open-ended language, all but guaranteeing a steady flow of cases. See *id.* at 601.

<sup>53</sup> See, e.g., Roe, *Delaware's Competition*, *supra* note 5; Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005); Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125 (2009).

<sup>54</sup> Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 10 (2009) [hereinafter Roe, *Delaware and Washington*] ("Washington makes corporate law . . . . It has made the main rules governing insider trading, stock buybacks, how institutional investors can interact in corporate governance, the structure of key board committees, board composition (how independent some board members must be), how far states could go in making merger law, how attentive institutional investors must be in voting their proxies, what business issues and transactional information public firms must disclose (which often affect the structure and duties of insiders and managers to shareholders in a myriad of transactions), the rules on dual class common stock recapitalizations, and duties and liabilities of gatekeepers like accountants and lawyers, and more.").

<sup>55</sup> See Bebchuk, *Desirable Limits*, *supra* note 5, at 1442 ("Federal law was totally silent on the internal governance of corporations until the enactment of the Securities Act of 1933.").

<sup>56</sup> Roe, *Delaware's Competition*, *supra* note 5, at 598; see also *id.* at 633–34 ("Sarbanes-Oxley mandates that the SEC make rules for audit committee independence. It controls executive compensation by requiring that a class of bonuses be forfeited back to the company. It requires that the board's audit committee, not management, control the hiring and firing of accountants, as well as the ancillary business that accountants do with the corporation. It mandates that audit partners rotate and pushes firms toward rotating their accountants. It orders the SEC to grab control of off-balance-sheet transactions and special purpose vehicles. It increases federal control over who may and may not sit on a corporate board. These matters were once for state law. Not anymore." (footnotes omitted)).

<sup>57</sup> *Id.* at 644.

contributor to American corporate law, principally by constraining Delaware.<sup>58</sup>

While these studies should be celebrated for complicating and refining the study of American corporate law, they too tell an incomplete story. This is because Delaware competes not just with its fellow states (and maybe the federal government), but increasingly faces competition from foreign nations. The absence of foreign nations in the prevailing account is particularly notable if the market for corporate law is segmented: that is, corporations might not only be looking to one leading jurisdiction producing the “best” corporate law, but may also have an appetite for differentiated corporate law “products.”<sup>59</sup> That is, even if Delaware continues to dominate the market, there may be a significant number of firms looking for corporate governance regimes that substantially deviate from that of Delaware. Thus, no systematic study of American corporate law can be complete without considering foreign nations that supply corporate law to “American” corporations. The next Section develops a theoretical framework conceptualizing foreign nations as Delaware’s emerging competition in the increasingly globalized market for corporate law.

### *B. Nations as Laboratories of Corporate Law*

Under the standard account of American corporate law, states alone compete to supply corporate charters. This Article complicates the literature by introducing foreign nations as emerging suppliers in the race.

To be clear, this is not the first time someone has written about competition between nations to supply corporate law. For instance, there is a growing body of literature acknowledging possible competition between European nations, in part enabled by recent jurisprudence from the European Court of Justice.<sup>60</sup>

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<sup>58</sup> See William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 958 (2003).

<sup>59</sup> Professor Michal Barzuza, drawing on Professor Michael Porter’s influential work on competitive strategy, argued that the corporate law market may be explained by jurisdictions “dividing the market to serve distinct consumer groups with similar demand preferences.” Barzuza, *supra* note 29, at 942 n.15 (citing MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* 196–200 (1980)). Judge Richard Posner and Professor Kenneth Scott advanced an earlier version of the “market segmentation” thesis in 1980, hypothesizing that states differentiate their corporate law products. See RICHARD A. POSNER & KENNETH E. SCOTT, *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* 111 (1980).

<sup>60</sup> See, e.g., Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT’L L. 477, 480–81 (2004) (arguing that the European Community should adopt free choice in corporate law); Martin Gelter, *Centros and Defensive Regulatory Competition: Some Thoughts and a Glimpse at the*

Legal scholars have also occasionally acknowledged the alarming rates at which American corporations are reincorporating in foreign “tax havens.”<sup>61</sup> But prior discussions have almost exclusively centered around the corporate inversion movement: American companies like Accenture Consulting or Chiquita Bananas reincorporating in notorious “tax havens” to reduce domestic tax liability. This line of scholarship tends to highlight the problematic aspects of U.S. tax rules being bundled with corporate governance rules, incentivizing domestic firms to choose “inferior” corporate governance rules in order to receive tax benefits in offshore havens.<sup>62</sup> For example, Professors Mitchell Kane and Ed Rock describe corporate inversions as “unabashedly all about tax reduction.”<sup>63</sup> Professors Kane and Rock warn that “tax-motivated corporate locational decisions can lead to an efficiency cost to the extent that corporations are steered into suboptimal legal regimes from a corporate law standpoint.”<sup>64</sup>

In a more recent piece, Professor Eric Talley argues that foreign incorporation introduces material legal risks, “since they move the locus of corporate internal affairs out of conventional jurisprudential terrain and into the domain of a foreign jurisdiction whose law is—by comparison—recondite and unfamiliar.”<sup>65</sup> Unsurprisingly, Professor Talley assesses that “a strong domestic corporate governance regime can provide a plausible buffer against a tax-induced incorporation exodus.”<sup>66</sup>

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*Data*, 20 EUR. BUS. ORG. L. REV. 467 (2019) (providing a partial theoretical and empirical analysis of defensive regulatory competition); Martin Gelter, *The Structure of Regulatory Competition in European Corporate Law*, 5 J. CORP. L. STUD. 247 (2005) (analyzing the structural conditions of competition on the supply and demand sides of the market for European corporate law); Andrea Zorzi, *A European Nevada? Bad Enforcement as an Edge in State Competition for Incorporations*, 18 EUR. BUS. ORG. L. REV. 251 (2017) (stating that the possibility of one European state competing for a segment of the market for incorporations cannot be ruled out). The European model of corporate law governance has also long been on the radar of American corporate law scholars from a comparative law standpoint. *See, e.g.*, ROMANO, GENIUS, *supra* note 2, at 128–40; Bebchuk, *Desirable Limits*, *supra* note 5, at 1439.

<sup>61</sup> *See, e.g.*, Omri Marian, *Home-Country Effects of Corporate Inversions*, 90 WASH. L. REV. 1, 7–8 (2015).

<sup>62</sup> *See* Fleischer, *supra* note 17, at 276 (“In some circumstances, managers will opt to minimize taxes by choosing a tax haven or tax-friendly jurisdiction, even if that jurisdiction is suboptimal from the standpoint of corporate law.”).

<sup>63</sup> Kane & Rock, *supra* note 18, at 1230.

<sup>64</sup> *Id.* at 1233.

<sup>65</sup> *See, e.g.*, Talley, *supra* note 12, at 1652.

<sup>66</sup> *Id.* In a similar vein, Professor Omari Scott Simmons observed in an excellent piece that Delaware’s preeminence is intertwined with America’s global strength, identifying “capital migration toward foreign markets, the growing appeal of foreign stock exchanges, multi-jurisdictional litigation, business firms eschewing courts for alternative dispute resolution, and corporate tax-inversion strategies” as potential global threats. Omari Scott Simmons, *Delaware’s Global Threat*, 41 J. CORP. L. 217, 217 (2015). On the other side of the spectrum, a few scholars have pointed to offshore jurisdictions as offering



Because the prevailing view considers tax to be the only driver of foreign incorporation, the existing literature is devoid of a serious inquiry into the substantive corporate governance laws of foreign nations. While appreciating insights from this current body of scholarship, this Article analyzes the viability of foreign nations competing with Delaware from a corporate governance perspective. This conversation is increasingly relevant as foreign nations continue to grow their market share of “American” corporations.

The following discussion documents recent domestic jurisprudence that sets the stage for an international market for the supply of corporate law.

### *1. The Internal Affairs Doctrine Goes International*

In the United States, a small state like Delaware can dominate the corporate law market because of the widespread acceptance of the internal affairs doctrine.<sup>67</sup> The internal affairs doctrine is a conflict of laws principle—a set of state law rules principally developed by judges in the nineteenth century.<sup>68</sup> The doctrine enables corporations to opt into any state’s corporate law simply by incorporating in that state.<sup>69</sup> Thus, the extent to which foreign corporate law can successfully govern the “internal affairs” of American companies—which in turn determines a range of issues including

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innovative financial instruments. See CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD 59–60 (2016) (highlighting Bermuda’s success in the insurance industry); Anna Manasco Dionne & Jonathan R. Macey, *Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving Toward Efficient?*, in OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION 8, 8–10 (Andrew P. Morriss ed., 2010). While this line of scholarship draws on the domestic corporate charter competition literature to make normative claims about the desirability of offshore financial products, it does not recognize offshore jurisdictions as competing with American states to supply corporate law for publicly traded corporations.

<sup>67</sup> Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 161 (1985) (“To many corporate lawyers, the ‘internal affairs’ doctrine . . . is irresistible if not logically inevitable.”).

<sup>68</sup> See Tung, *supra* note 40, at 57–58. According to the U.S. Supreme Court, the 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). To conflict of laws junkies, the internal affairs doctrine is an unusual doctrine, departing from the standard prescription that instructs courts to weigh multiple factors in order to determine the “correct” law applicable to a dispute involving more than one jurisdiction. See LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 114–17, 177–85 (2015); Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 144 (2004) (“I believe the internal affairs doctrine is open to serious challenge. I believe it is best seen as simply an exception to conflict-of-laws rules . . .”).

<sup>69</sup> See Tung, *supra* note 40, at 45–46.

derivative suits, fiduciary duties, and shareholder inspector rights<sup>70</sup>—relies not just on foreign nations offering desirable sets of corporate governance rules, or even companies choosing to incorporate in those jurisdictions. It relies on domestic law honoring those choices.

Today, the internal affairs doctrine has a near-impeccable pedigree among judges in the United States.<sup>71</sup> The Restatement (Second) of Conflict of Laws, which has been highly influential in federal and state courts,<sup>72</sup> prescribes the application of “local law of the state of incorporation” for issues related to the internal affairs of corporations, except in unusual cases.<sup>73</sup>

However, one cannot assume that the internal affairs doctrine automatically extends to corporations incorporated in foreign nations. First, the Restatement specifically crafts guidelines for American “states,”<sup>74</sup> remaining silent on what judges ought to do in inter-*national* cases. Second, the internal affairs doctrine is said to have a “quasi-constitutional” status,<sup>75</sup> operating under a few cryptic clues from the U.S. Supreme Court.<sup>76</sup> Given

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<sup>70</sup> See Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 339 (2018) (“The internal affairs doctrine is the sine qua non of modern corporate law.”). Of course, whether a particular matter falls under the domain of the “internal affairs” of a corporation is not entirely straightforward. See James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 131–32 (2017).

<sup>71</sup> This need not be the rule, as a considerable number of foreign nations subscribe to the “real seat” approach to corporate law, assigning corporate governance rules based on where the corporation principally conducts its business. See Werner F. Ebke, *The “Real Seat” Doctrine in the Conflict of Corporate Laws*, 36 INT’L LAW. 1015, 1016 (2002) (“[T]he real seat doctrine . . . gives effect to the law of the state that has the most significant relationship to a corporation.”).

<sup>72</sup> Thus, for instance, in *NatTel, LLC v. SAC Capital Advisors LLC*, the Second Circuit referred to the Connecticut choice of law rule that “the state of incorporation normally determines issues relating to the internal affairs of a corporation,” while noting that the rule is “consistent with provisions in the Restatement (Second) of Conflict of Laws.” 370 F. App’x 132, 134 (2d Cir. 2006).

<sup>73</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (AM. LAW INST. 1971).

<sup>74</sup> See *id.* (referring to the “local law of the *state of incorporation*” (emphasis added)).

<sup>75</sup> Compare Richard M. Buxbaum, *Federalism and Company Law*, 82 MICH. L. REV. 1163, 1166 (1984) (questioning the internal affairs doctrine’s constitutional pedigree), with Paul N. Cox, *The Constitutional “Dynamics” of the Internal Affairs Rule—A Comment on CTS Corporation*, 13 J. CORP. L. 317, 349 (1988) (“[T]he internal affairs rule of choice of law may have a constitutional dimension.”).

<sup>76</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982) (“[I]n this case, MITE Corp., the tender offeror, is a Delaware corporation with principal offices in Connecticut. Chicago Rivet is a publicly held Illinois corporation with shareholders scattered around the country, 27% of whom live in Illinois. MITE’s offer to Chicago Rivet’s shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines . . . . It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect.”). The Delaware Supreme Court has taken a step further, pronouncing that the internal affairs doctrine may be constitutionally required “under due process, the commerce clause and the full faith and credit clause—so that the law of one state governs the relationships of a corporation to its stockholders, directors and officers in matters of internal corporate governance.” *McDermott, Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987).

that many of these constitutional doctrines have developed in a purely domestic context or are plainly inapplicable for the international setting,<sup>77</sup> it is unclear if constitutional law adds much guidance. It may be for this reason that Judge Frank Easterbrook, one of the preeminent authorities in American corporate law, pronounced in 2009 that “this country does *not* recognize an internal-affairs doctrine in its dealings with other nations.”<sup>78</sup>

Putting aside the question of whether courts *ought to* extend the internal affairs doctrine internationally, a survey of domestic jurisprudential trends reveals that courts across the United States have already extended the internal affairs doctrine for American business entities incorporated in foreign nations. Indeed, federal and state courts across jurisdictions, including California,<sup>79</sup> Connecticut,<sup>80</sup> Delaware,<sup>81</sup> Illinois,<sup>82</sup> Maryland,<sup>83</sup> Minnesota,<sup>84</sup> New York,<sup>85</sup> New Jersey,<sup>86</sup> Texas,<sup>87</sup> and the District of

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<sup>77</sup> For example, the Full Faith and Credit Clause addresses the duties that states have to respect the “public Acts, Records, and judicial Proceedings of every *other State*.” U.S. CONST. art. IV, § 1 (emphasis added).

<sup>78</sup> Easterbrook, *Race for the Bottom*, *supra* note 10, at 698.

<sup>79</sup> *See, e.g., Vaughn v. LJ Int’l, Inc.*, 94 Cal. Rptr. 3d 166, 168 (Ct. App. 2009) (applying British Virgin Islands law for “a fine jewelry company incorporated in the British Virgin Islands, [which] has no other connection to that jurisdiction”).

<sup>80</sup> *See, e.g., NatTel, LLC v. SAC Capital Advisors*, 370 Fed. App’x 132, 133 (2d Cir. 2006) (applying Bahamas law for shareholder’s lawsuit involving an entity formed in the Bahamas).

<sup>81</sup> *See, e.g., Kostolany v. Davis*, No. 13299, 1995 WL 662683, at \*2 (Del. Ch. Nov. 7, 1995) (applying Dutch law after reasoning that legal relations between “a corporation and its stockholders, directors, and officers are governed by the law of the state of incorporation”).

<sup>82</sup> *See, e.g., Pittway Corp. v. United States*, 88 F.3d 501, 503 (7th Cir. 1996) (“On this issue of internal corporate affairs, we look not to the law of any of the United States but to the law of France[,] a State in the international sense.”).

<sup>83</sup> *See, e.g., Tomran, Inc. v. Passano*, 891 A.2d 336, 342 (Md. 2006) (“[U]nder the internal affairs doctrine, an analysis of Irish law determines whether Tomran possesses a right to bring a derivative suit . . .”).

<sup>84</sup> *See, e.g., Varga v. U.S. Bank Nat’l Ass’n*, 952 F. Supp. 2d 850, 855 (D. Minn. 2013) (“The Palm Beach Funds were formed in the Cayman Islands and, hence, whatever duties they were owed must have arisen under Cayman Islands law.”), *aff’d*, 764 F.3d 833 (8th Cir. 2014).

<sup>85</sup> *See, e.g., In re Kingate Mgmt. Ltd. Litig.*, No. 09-CV-5386 (DAB), 2016 WL 5339538, at \*15 (S.D.N.Y. Sept. 21, 2016) (“The fact that Madoff and his fraudulent scheme arose out of New York is not sufficient to override BVI’s interests in regulating the relationship between BVI corporations and their shareholders.”).

<sup>86</sup> *See, e.g., Krys v. Aaron*, 106 F. Supp. 3d 472, 479 (D.N.J. 2015) (applying “Cayman law in accordance with the internal affairs doctrine”).

<sup>87</sup> *See, e.g., In re BP S’holder Derivative Litig.*, No. 10-md-2185, 2011 WL 4345209, at \*15 (S.D. Tex. Sept. 15, 2011) (“The primary concern of this derivative litigation is the internal affairs of an English corporation, and the suit seeks to recover damages for the benefit of BP only. Accordingly, England has a greater interest in the resolution of this dispute.” (emphasis omitted)).

Columbia,<sup>88</sup> have recently extended the internal affairs doctrine for business entities incorporated in foreign nations.<sup>89</sup>

Courts frequently apply precedent developed in the interstate context without distinguishing between states and foreign nations. For instance, in *Howe v. Bank of New York Mellon*, the Southern District of New York concluded that it “must apply Cayman Islands law to the question of derivative standing” given that the defendant “is an entity incorporated under the laws of the Cayman Islands.”<sup>90</sup> In other cases, courts have expressly held that the internal affairs doctrine applies outside of the United States. For instance, in *City of Harper Woods Employees' Retirement System v. Olver*, the D.C. Circuit applied English law to a company incorporated in England, holding that the “internal affairs doctrine applies to corporations incorporated outside of the United States.”<sup>91</sup>

To be sure, this is not a universal rule. A number of federal and state judges have declined to apply the internal affairs doctrine in international cases on the grounds that there was an insufficient nexus between the corporation's physical operations and the place of incorporation. For instance, in *UBS Securities LLC v. Highland Capital Management, L.P.*, a New York state trial court applied New York law in an internal affairs case involving a Cayman Islands corporation because “[o]ther than being incorporated in the Cayman Islands, [the corporation] has no obvious ties to that jurisdiction.”<sup>92</sup> In another case, Judge Scheindlin of the Southern District

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<sup>88</sup> See, e.g., *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 577 F. Supp. 2d 124, 129 (D.D.C. 2008) (“The internal affairs doctrine is not limited to the application of the laws of the States of the United States . . . . Based on the internal affairs doctrine, BAE plc, incorporated in the U.K., is subject to U.K. law.”), *aff'd*, 589 F.3d 1292 (D.C. Cir. 2009).

<sup>89</sup> Not all opinions automatically deduce applicable corporate law from the corporate entity's place of incorporation. In some cases, the place of incorporation is just one factor in a judge's choice of law analysis. For instance, noting that the internal affairs doctrine may be excused in “unusual cases,” a federal judge in New Jersey in *Krys v. Aaron* employed New Jersey's general choice of law analysis weighing “(1) the interests of interstate comity, (2) the interests of the parties, (3) the interests underlying the field of tort law, (4) the interests of judicial administration, and (5) the competing interests of the states.” 106 F. Supp. 3d at 485. Even so, the court concluded that the law of the place of incorporation (Cayman Islands law) controlled, in part because “the parties will necessarily benefit from the application of a single standard.” *Id.*

<sup>90</sup> 783 F. Supp. 2d 466, 475 (S.D.N.Y. 2011).

<sup>91</sup> 589 F.3d 1292, 1298 (D.C. Cir. 2009).

<sup>92</sup> 2011 WL 781481, at \*3 (N.Y. Sup. Ct. Mar. 1, 2011), *aff'd in part, modified in part*, 940 N.Y.S.2d 74 (App. Div. 2012). But given that New York as a state has not adopted that policy (other New York cases extend the doctrine internationally), this should be treated more like an exception. See, e.g., *NatTel, LLC v. SAC Capital Advisors, LLC*, 370 F. App'x 132, 133 (2d Cir. 2006) (affirming the district court finding that “the law of the Bahamas—where ODC was incorporated—governed [the] dispute because NatTel's claims involved matters of internal corporate governance”).

of New York refused to apply British Virgin Islands law for suits brought by investors against British Virgin Islands hedge funds, reasoning in part that the “allegedly tortious conduct . . . in relation to the management of the Funds had little more than a nominal connection to the BVI.”<sup>93</sup> This line of cases derives from the concept of “pseudo-foreign” corporations, or business entities that have no physical presence in the state of incorporation other than the fact of incorporation.<sup>94</sup>

For better or worse, the “pseudo-foreign” corporations exception surfaces from time to time in the domestic interstate context<sup>95</sup> without detracting from the apparent robustness of the interstate charter competition market. While judges may be more hesitant to extend the internal affairs doctrine to corporations incorporated in foreign nations,<sup>96</sup> the doctrine has been extended enough to enable foreign nations to effectively compete with Delaware for corporate charters.

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<sup>93</sup> Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 194 (S.D.N.Y. 2006); *see also* Tech. Dev. Co. v. Onischenko, No. 05-4282 (MLC), 2011 WL 6779552, at \*11 (D.N.J. Dec. 23, 2011) (“We further note that the section 6 factors may not favor application of Bermuda law, insofar as that jurisdiction has little connection to this claim with the exception of TTDC being incorporated there and TTDC having a bank account there.”).

<sup>94</sup> *See* Summer Kim, *Corporate Long Arms*, 50 ARIZ. ST. L.J. 1067, 1083–84 (2018) (“[The pseudo-foreign corporation] exception provides that if a corporation is chartered in one place but does *all* of its activities and business in another place (the host state), then the host state’s laws will apply to the internal affairs of the corporation.”); Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 144–45 (1955). Even the Restatement of Conflict of Laws recognizes that there may be unusual cases where the law of a state that is not the state of incorporation may govern, if that state has a more significant relationship to the corporation. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (AM. LAW INST. 1971) (“The local law of the state of incorporation will be applied to determine the existence and extent of a director’s or officer’s liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship . . .”); Kostolany v. Davis, 1995 WL 662683, at \*2 (Del. Ch. Nov. 7, 1995) (explaining that the law of the state of incorporation may not apply in an “extremely rare” situation where the “overriding interest of another state” requires a contrary result).

<sup>95</sup> Most notably, California has enacted a statutory exception to the internal affairs doctrine, mandating the application of California law for corporations that conduct the majority of their business in California, without regard to the corporations’ place of incorporation. *See* CAL. CORP. CODE § 2115 (West 2010); *see also* Matt Stevens, Note, *Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047, 1047 (2007) (“The Internal Affairs Doctrine (‘IAD’) has traditionally been a categorical rule mandating that in corporate conflict-of-laws scenarios, only the incorporating state has the right to regulate a corporation’s internal affairs. California has created a statutory exception to the IAD, however, that allows regulation of the internal affairs of out-of-state corporations in limited circumstances.”).

<sup>96</sup> *See, e.g.*, UBS Sec. LLC v. Highland Capital Mgmt., L.P., No. 650097/2009, 2011 WL 781481, at \*3 (N.Y. Sup. Ct. Mar. 1, 2011) (“Application of the law of New York is also mandated on the ground that SOHC has almost no ties to the Cayman Islands. . . . Other than being incorporated in the Cayman Islands, SOHC has no obvious ties to that jurisdiction.”), *aff’d in part, modified in part*, 940 N.Y.S.2d 74 (App. Div. 2012).

## II. EVIDENCE OF MORE PLAYERS IN THE RACE: THE MAKING OF OFFSHORE CORPORATE LAW HAVENS

This Part describes the extent to which foreign nations are starting to compete with Delaware to supply corporate charters. Because of their prominence in this general trend, this study primarily focuses on three foreign nations that it refers to as “offshore corporate law havens”: Bermuda, the British Virgin Islands, and the Cayman Islands.<sup>97</sup> The structure of this Part is as follows. Section A presents data on corporations listed in American securities markets that are increasingly opting to incorporate in foreign nations—in particular, offshore corporate law havens. Section B explores the structural design of offshore lawmaking processes. Unlike most American states, but similar to Delaware, offshore corporate law havens are small enough to make incorporation business a worthwhile venture for local lawmakers. Indeed, lawmakers in these jurisdictions rely heavily on incorporation fees, allowing them to credibly commit to maintaining favorable corporate governance rules.<sup>98</sup> Section C explains how “local” lawyers and other interest groups in key offshore jurisdictions benefit from generating litigation and transactional work arising out of American corporations incorporated locally. This Section also explains how private law firms work closely with local lawmakers to swiftly enact corporate law statutes. Section D documents the emergence of specialized business courts in offshore jurisdictions that supply the judicial infrastructure necessary to handle complex corporate law disputes.

### A. *The Rise of Offshore Corporate Law Havens*

Any analysis discussing trends on where “American” corporations choose to incorporate will inevitably confront definitional challenges regarding what type of corporations qualify as “American” corporations. The prevailing literature tends to use the term to describe corporations that are publicly traded in American securities markets *and* incorporated in one of

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<sup>97</sup> It is worth reemphasizing that I focus on these three jurisdictions only to concretize the concept of an international market for corporate law. This study should therefore not be taken to suggest that other foreign nations besides these offshore jurisdictions do not or cannot attract publicly traded American corporations. Indeed, the Marshall Islands and Ireland have also had some success attracting American corporations.

<sup>98</sup> This is because corporate charters are relational contracts. As Professor Romano explains, because a charter “binds the state and firm in a multi-period relationship in which performance under the contract is not simultaneous . . . a state needs a mechanism by which it can commit to firms that it will maintain its code and otherwise not undo existing rules to firms’ disadvantage.” Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 212 (2006) [hereinafter Romano, *States as a Laboratory*].

the constituent states of the United States.<sup>99</sup> This approach does not account for at least two types of corporations: (1) corporations that principally operate within the territory of the United States but nevertheless choose foreign nations as their place of incorporation; and (2) corporations that principally operate outside the territory of the United States but may consider shopping for U.S. corporate law when choosing to list in American securities markets like the New York Stock Exchange. The semantic debate over what should count as an “American” corporation falls outside the scope of this paper. Instead, this Article investigates whether corporations with a substantial American factual nexus—corporations that operate physically in the United States or corporations that raise capital by listing in American securities markets—shop for corporate law produced by foreign nations.

Specifically, I surveyed all publicly traded corporations listed in American securities markets, principally made up of corporations listed in the New York Stock Exchange and the NASDAQ.<sup>100</sup> Using Standard & Poor’s Compustat database, a compilation of public financial data for publicly traded corporations, I gathered more than thirty years of all publicly available data from 1985 to 2018.<sup>101</sup> As shown in Table 1, over 14% of firms trading on American securities markets are now incorporated in foreign nations. This represents a substantial growth from 1985, when only 2.7% of entities were incorporated in foreign nations. While Delaware continues to dominate the market, foreign nations now account for more than triple the number of companies incorporated in Nevada, which has been identified as

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<sup>99</sup> See, e.g., Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340, 348 (2006) (“Our initial sample consists of all public new issues of common stock between 1990 and 2002 by companies headquartered and incorporated in one of the 50 states or the District of Columbia contained in the SDC database.”); Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: “Unhealthy Competition” Versus Federal Regulation*, 53 J. BUS. 259, 261–62 (1980) (studying the proportion of firms incorporated in Delaware out of the total number of companies incorporated in the United States); *id.* at 263–64 (studying New York Stock Exchange-listed firms that reincorporated from one American state to another American state).

<sup>100</sup> Data are on file with author. NASDAQ and the New York Stock Exchange are the two biggest securities markets in the United States. Other securities markets included in the study are companies listed in the American Stock Exchange, OTC Bulletin Board, Boston Stock Exchange, Midwest Exchange, Pacific Exchange, and Philadelphia Exchange.

<sup>101</sup> A few details on the methodology of data collection are worth mentioning. I aggregated the data using Wharton Research Data Services’ Compustat. This aggregated dataset consisted of a large number of duplicate inputs. I filtered out the duplicates using the statistics software SPSS. Because Compustat includes firms listed in both Canadian and American securities markets, I used SPSS to filter out “Canadian” firms (for instance, firms that are only listed in the Toronto Stock Exchange are excluded). Because OTC includes both American and Canadian firms, I also excluded those firms listed in OTC that trade in Canadian currency. I also went through firms that did not have currency information manually to exclude Canadian firms. Using SPSS, I also disaggregated the data by jurisdiction of incorporation (coded “fic” for foreign nations and “loc” for constituent states of the United States).

the only other state besides Delaware actively vying to draw corporations that physically operate outside of its borders.<sup>102</sup>

TABLE 1: INCORPORATION DECISIONS OF PUBLICLY TRADED CORPORATIONS LISTED IN AMERICAN SECURITIES MARKETS

	1985	1990	1995	2000	2005	2010	2015	2016	2017	2018
<b>Delaware</b>	42.4%	47.4%	49.2%	48.1%	47.6%	47.1%	48.5%	48.7%	48.3%	49.2%
<b>Nevada</b>	2.5%	2.5%	2.5%	4.9%	5.3%	6.6%	5.8%	5.2%	4.8%	4.3%
<b>Foreign Nations</b>	2.7%	4.2%	6.6%	9.7%	11.7%	12.2%	13.6%	14.4%	15.1%	14.9%

Several caveats warrant attention. Most notably, a significant part of the increase in foreign incorporation may be attributable to the changing demographics of firms trading in American securities markets.<sup>103</sup> More specifically, it may be an indication of growth in the number of companies principally headquartered in foreign nations that are raising capital in American securities markets. For instance, Toyota Motors is a Japanese automobile manufacturer headquartered in Tokyo, but made its debut in the New York Stock Exchange in 1999.<sup>104</sup> There are certainly increases attributable to these types of firms. These corporations typically use the corporate law of their “home” nation, appearing not to shop for corporate law.<sup>105</sup>

<sup>102</sup> See Barzuza, *supra* note 29, at 940.

<sup>103</sup> It is worth noting here that it is difficult (if not impossible) to compute the percentage of firms incorporated in foreign nations that are physically headquartered in the United States merely by collecting data on the firms' stated headquarters reported to the SEC. This is because the SEC has not defined the “principal place of business,” and it is common for firms to abuse this shortcoming. See *Where Is Your Corporation's Principal Executive Office?*, CAL. CORP. & SEC. L. BLOG, <https://www.jdsupra.com/legalnews/where-is-your-corporation-s-principal-80235/> [<https://perma.cc/6HMW-G4JX>] (“The Securities and Exchange Commission, however, has not defined ‘principal executive offices’ for purposes of Form 10-K.”). It is also relatively easy to manipulate the firms' stated headquarters in certain industries. See Moon, *Regulating Offshore Finance*, *supra* note 12, at 12–15. Thus, this study relies on various indirect metrics to measure the growing market share captured by foreign nations.

<sup>104</sup> *Financial Information & Stock Price*, TOYOTA, <https://www.toyota.com/usa/investors/index.html> [<https://perma.cc/AH9Y-AFXL>].

<sup>105</sup> Thus, for instance, Toyota Motors is incorporated in Japan and governed by Japanese corporate law, despite being listed on the New York Stock Exchange. See Toyota Motor Corp., Annual Report



But a sizable portion of the expanded share is attributable to firms that principally operate in the United States. As shown in Table 2, about a quarter of firms incorporated in foreign nations are accounted for by three jurisdictions that this Article has identified as “offshore corporate law havens”: the Cayman Islands, Bermuda, and the British Virgin Islands. This figure is important because the vast majority of corporations formed in these jurisdictions, which are widely known to draw clients from the United States,<sup>106</sup> do not actually conduct their operations in those jurisdictions.<sup>107</sup> Typically, these corporations physically operate in “onshore” jurisdictions like the United States and have no connection to offshore jurisdictions other than the fact of incorporation—essentially glorified paperwork.<sup>108</sup> This is the case even when corporations claim to have their headquarters in offshore jurisdictions. Consider, for instance, Theravance Biopharma, a company incorporated in the Cayman Islands. The company declares a P.O. Box in George Town, Cayman Islands, as its headquarters in its SEC filings.<sup>109</sup> But even a cursory examination of the company’s disclosed real estate holdings in the same filings indicates that its physical headquarters are located in South San Francisco, California.<sup>110</sup>

While still a small portion of the overall market, there is a clear trend in terms of the increase of market share captured by offshore corporate law havens.

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(Form 20-F) 131–32 (June 25, 2018), <https://www.sec.gov/Archives/edgar/data/1094517/000119312518201591/d549954d20f.htm> [<https://perma.cc/33QF-ZSZD>].

<sup>106</sup> See, e.g., SIEMENS, *supra* note 14, at 9. To be clear, these jurisdictions do not exclusively cater to firms based in the United States. For instance, firms based in China that are listed in NASDAQ or the New York Stock Exchange are frequently incorporated in the Cayman Islands or the British Virgin Islands. See William J. Moon, Delaware’s Global Competitiveness 5, 16 (Oct. 30, 2019) (unpublished manuscript) (on file with author). Bermuda, however, appears to heavily cater to firms physically headquartered in the United States. According to my survey of SEC disclosures looking at real property ownership and revenue source data, for instance, approximately 40% to 50% of all publicly traded Bermuda companies listed in the United States today appear to be actually headquartered in the United States, notwithstanding the fact that the majority of these firms claim that they are headquartered in Bermuda. William J. Moon, Appendix 1: “Bermuda” Corporations Listed in American Securities Markets (on file with author).

<sup>107</sup> See Moon, *Regulating Offshore Finance*, *supra* note 12, at 9.

<sup>108</sup> See William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081, 1095 (2018) [hereinafter Moon, *Tax Havens*]. This shows that a sizable portion of the increase is attributable to firms that shop for the corporate law. See Barzuza, *supra* note 29, at 948 n.33.

<sup>109</sup> See, e.g., Theravance Biopharma, Inc., Annual Report (Form 10-K) (Dec. 31, 2017).

<sup>110</sup> See *id.* at 56 (“Our principal physical properties in the US consist of approximately 170,000 square feet of office and laboratory space leased in two buildings in South San Francisco, California. The lease was extended in November 2017 and expires in May 2030.”).

TABLE 2: FOREIGN CORPORATIONS INCORPORATED IN OFFSHORE CORPORATE LAW HAVENS

	1985	1990	1995	2000	2005	2010	2015	2016	2017	2018
<b>Bermuda</b>	5.1%	5.8%	8.2%	6.6%	7.5%	6.9%	6.3%	6.3%	5.8%	5.8%
<b>Cayman Islands</b>	2.3%	3.0%	2.5%	2.8%	7.9%	15.4%	13.9%	15.6%	18.5%	18.5%
<b>British Virgin Islands</b>	0.6%	1.8%	2.1%	2.6%	2.5%	4.1%	4.3%	4.8%	4.7%	4.5%
<b>Total</b>	8.0%	10.6%	12.8%	12.0%	17.9%	26.4%	24.5%	26.7%	29.0%	28.8%

To be sure, whether corporations incorporate in foreign nations for corporate law or for some other reason, like tax reduction, is difficult to test. But the prevailing account that attributes everything to tax incentives breaks down under deeper consideration.

For one, there are dozens of “tax havens” that offer 0% corporate and capital gains tax.<sup>111</sup> Yet, corporations traded on American securities markets like the New York Stock Exchange tend to cluster around only a handful of jurisdictions,<sup>112</sup> suggesting that there is something more than tax motivating their behavior. Second, far from offering archaic corporate governance rules, offshore corporate law havens frequently update their corporate law statutes—largely in response to private sector demand. For instance, the Cayman Islands has updated its Companies Law at least fifty-eight times since originally enacted in 1964.<sup>113</sup> Official government publications do not

<sup>111</sup> According to one notable study, there are “roughly 40 major tax havens in the world today.” Dhammika Dharmapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, 93 J. PUB. ECON. 1058, 1058 (2009).

<sup>112</sup> See *supra* Table 1 and Table 2.

<sup>113</sup> See CONYERS DILL & PEARMAN, CAYMAN ISLANDS COMPANIES LAW 1–2 (2018), [https://www.conyers.com/wp-content/uploads/2019/02/Cayman\\_Companies\\_Law\\_Conyers.pdf](https://www.conyers.com/wp-content/uploads/2019/02/Cayman_Companies_Law_Conyers.pdf) [<https://perma.cc/A8EW-37XN>]. The frequency of updates is not unusual for leading offshore jurisdictions. Bermuda, for instance, has amended or updated its corporate law at least forty-five times. See CONYERS, DILL & PEARMAN, BERMUDA COMPANIES ACT 1981 AND RELATED LEGISLATION 3–4 (2018), [https://www.conyers.com/wp-content/uploads/2018/08/Bermuda\\_Companies\\_Act\\_1981\\_Conyers.pdf](https://www.conyers.com/wp-content/uploads/2018/08/Bermuda_Companies_Act_1981_Conyers.pdf) [<https://perma.cc/6CAZ-J33W>].

shy away from pronouncing the factors motivating amendments to their corporate law statutes. For instance, the Cayman Islands government describes the purpose of legal updates as improving “the competitiveness and attractiveness of companies incorporated in the jurisdiction.”<sup>114</sup> Indeed, if offshore jurisdictions were just about tax reduction, they might simply try to copy and paste Delaware’s General Corporation Law. But, as elaborated in Part III, offshore corporate law havens have opted to differentiate their corporate law from that of Delaware. Third, even after several federal legislation and administrative orders in the United States aimed at curbing tax avoidance, many corporations have remained incorporated in foreign nations.<sup>115</sup> This may be due to path dependency, but it could also be driven by attractive corporate governance rules offered in foreign jurisdictions.

Incorporation decisions of American firms following the new federal tax bill provide a particularly important datapoint. The Tax Cuts and Jobs Act of 2017,<sup>116</sup> which includes a provision designed to reduce the incentive for transnational corporate tax arbitrage,<sup>117</sup> does not appear to have slowed down offshore incorporation. Connecticut-based Biohaven Pharmaceuticals, New Jersey-based Watford Holdings, Massachusetts-based Kiniksa Pharmaceuticals, New York-based Replay Acquisition Corporation, and New Jersey-based Hudson Group are a few recent examples of corporations listed on the New York Stock Exchange or NASDAQ that chose to incorporate offshore, instead of in Delaware, to go public.<sup>118</sup> Publicly available SEC filings indicate that the companies choosing to incorporate in

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<sup>114</sup> CAYMAN IS. GOV’T, PLAN AND ESTIMATES FOR THE 2018 FINANCIAL YEAR & FOR THE 2019 FINANCIAL YEAR 26 (2017), <http://www.gov.ky/portal/pls/portal/docs/1/12612394.PDF> [<https://perma.cc/VM67-ZKX3>] [hereinafter CAYMAN IS. GOV’T, PLAN & ESTIMATES].

<sup>115</sup> See, e.g., Talley, *supra* note 12, at 1748–51.

<sup>116</sup> Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>117</sup> See David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1488 (2019) (“[T]he old system of U.S. international tax rules, prior to the new tax legislation, was also the subject of considerable tax gaming and inefficiency. As measured against the baseline of old law, some of the new rules represent modest improvements.”); Susan C. Morse, *International Cooperation and the 2017 Tax Act*, 128 YALE L.J. F. 362, 380 (2018) (assessing that the new tax bill’s base erosion and anti-abuse tax “should function as an anti-tax haven measure”); Jonathan D. Rockoff & Nina Trentmann, *New Tax Law Haunts Companies That Did ‘Inversion’ Deals*, WALL STREET J. (Feb. 11, 2018, 7:00 AM), <https://www.wsj.com/articles/new-tax-law-haunts-companies-that-did-inversion-deals-1518350401> [<https://perma.cc/QC37-9832>].

<sup>118</sup> See Biohaven Pharm. Holding Co., Prospectus (Form 424B4) 10 (Dec. 12, 2018) (Virgin Is.); Watford Holdings, Ltd., Prospectus (Form 424B3) 236 (Mar. 26, 2019) (Berm.); Kiniksa Pharm., Ltd., Prospectus (Form 424B4) 7 (May 23, 2018) (Berm.); Replay Acquisition Corp., Prospectus (Form 424B4) 1 (Apr. 3, 2019) (Cayman Is.); Hudson Grp., Ltd., Prospectus (Form 424B1) 10 (Jan. 31, 2018) (Berm.).

foreign nations are well-counseled about the content of offshore corporate law—presumably indicating that they are making informed decisions.<sup>119</sup>

*B. “Captured” Lawmakers: Offshore Governments Rely Heavily on Incorporation Fees*

Of course, the proposition that offshore governments even produce laws accommodating private sector preferences cannot be taken for granted. At least in theory, the government revenue generated from firms incorporated offshore ought to be significant enough from the local lawmakers' point of view to make the venture worthwhile.<sup>120</sup> This Section thus examines the extent to which offshore lawmakers are reliant on incorporation-related revenue—namely, franchise tax and incorporation fees—as a rough metric of understanding legislative behavior.

Revenue data, assembled from official government publications of the British Virgin Islands, Bermuda, and the Cayman Islands, help to assess whether lawmakers in these jurisdictions are indeed reliant on fees from locally incorporated firms.<sup>121</sup> These data appear to back up anecdotal accounts that these lawmakers—lacking a source of significant revenue besides tourism—rely heavily on incorporation fees.<sup>122</sup> As shown in Tables 3 through 5, this reliance is not uniformly strong across these jurisdictions. In recent years, the British Virgin Islands, for example, has derived over half of its government revenue from incorporation-related fees. Bermuda, on the other hand, derived 6.3% to 7.1% of its revenues from annual incorporation fees. To put these numbers in perspective, Delaware's incorporation fee revenues, which are often heralded as the textbook case of legislative

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<sup>119</sup> See *infra* Section III.A.

<sup>120</sup> See Kahan & Kamar, *Myth*, *supra* note 28, at 687–88.

<sup>121</sup> Several notes on the limitation of the data presented here are worth mentioning. First, exact year-to-year comparison is not possible, because both Bermuda and the Cayman Islands report revenue figures from mid-year to mid-year. Second, these jurisdictions do not supply revenue data broken down by type of business entity. Therefore, the numbers include fees derived from both closely held and publicly traded business entities, although the data exclude fees from “funds” or “banking,” where possible. Even if a significant proportion of their revenues are derived from closely held business entities, the fact that offshore corporate law havens regularly update their corporate law statutes makes it likely that they derive a significant percentage of their revenue from publicly traded corporations.

<sup>122</sup> Ezra Fieser, *Indebted Caribbean Tax Havens Look to Tax Foreign Investors*, CHRISTIAN SCI. MONITOR (Nov. 26, 2012), <https://www.csmonitor.com/World/Americas/2012/1126/Indebted-Caribbean-tax-havens-look-to-tax-foreign-investors> [<https://perma.cc/2PNJ-MD49>] (“[I]ndustry analysts and tax specialists believe new fees and taxes will bring in needed money for government coffers while doing little harm to the business community.”).

dependence on corporate charter fees, averaged 17% of the state’s total tax revenue over the past several decades.<sup>123</sup>

TABLE 3: BERMUDA REVENUE SOURCE (IN BERMUDIAN DOLLARS)<sup>124</sup>

	“Fees, Permits & Licenses” from “International Companies”	Total Government Revenue	Percentage of Government Revenue
2014–2015	\$62.78 million	\$880.41 million	7.13%
2015–2016	\$60.82 million	\$935.43 million	6.50%
2016–2017	\$62.61 million	\$987.99 million	6.34%

TABLE 4: THE BRITISH VIRGIN ISLANDS REVENUE SOURCE (IN U.S. DOLLARS)<sup>125</sup>

	Taxes Related to “Registry of Corporate Affairs”	Total Government Revenue	Percentage of Government Revenue
2015	\$171.16 million	\$314.70 million	54.39%
2016	\$164.94 million	\$307.06 million	53.71%
2017	\$170.04 million	\$290.98 million	58.43%

<sup>123</sup> Romano, *States as a Laboratory*, *supra* note 98, at 212–13 (“This financial dependency on incorporation fees makes Delaware highly responsive to the requirements of corporations for an updated legal regime; it cannot afford to lose domestic corporations from being slow to update its code. Because it would lose a major revenue source if the number of domestic incorporations markedly declined, Delaware is a hostage to its own success, which makes credible a commitment to corporate law responsiveness.”).

<sup>124</sup> GOV’T OF BERM., 2016–2017 BUDGET STATEMENT 40 (2016), <https://www.gov.bm/sites/default/files/2016-2017-Budget-Statement.pdf> [<https://perma.cc/6H29-SY7S>] (2014–2015 revenue data and 2015–2016 revenue data); GOV’T OF BERM., 2018–2019 BUDGET STATEMENT 33 (2018), [https://www.gov.bm/sites/default/files/2018-Budget-Statement\\_Web.pdf](https://www.gov.bm/sites/default/files/2018-Budget-Statement_Web.pdf) [<https://perma.cc/UG5Y-ZQYV>] (2016–2017 revenue data).

<sup>125</sup> GOV’T OF THE VIRGIN IS., 2018 BUDGET ESTIMATES 7–9 (2018), <http://www.bvi.gov.vg/pub/2018%20Budget%20Estimates.pdf> [<https://perma.cc/7UQN-57HT>] (2016–2017 revenue data) [hereinafter BVI BUDGET 2018]; GOV’T OF THE VIRGIN IS., 2017 BUDGET ESTIMATES 8–10 (2017), <http://www.bvi.gov.vg/pub/2017%20Budget%20Estimates.pdf> [<https://perma.cc/9NF9-PXAQ>] (2015 revenue data).

TABLE 5: THE CAYMAN ISLANDS REVENUE SOURCE (IN CAYMAN ISLANDS DOLLARS)<sup>126</sup>

	<b>“Company Fees” from Exempt, Foreign, and Nonresident Companies</b>	<b>Total Government Revenue</b>	<b>Percentage of Government Revenue</b>
<b>2014–2015</b>	\$98.49 million	\$891.07 million	11.05%
<b>2015–2016</b>	\$99.86 million	\$712.42 million	14.02%
<b>2016–2017 (estimate)</b>	\$79.85 million	\$623.21 million	12.81%

These data are crucial for several reasons. Primarily, heavy reliance on incorporation fees makes offshore lawmakers highly sensitive to private sector preferences on corporate governance rules.<sup>127</sup> Relatedly, this reliance lends credibility to lawmakers’ responsiveness to private sector demand in the face of evolving market conditions.<sup>128</sup>

This analysis also helps demystify a degree of perplexity about the motivations driving offshore jurisdiction competition to attract foreign companies. Professor Talley, for instance, has observed that the objectives of offshore tax havens appear to “have little to do with tax earnings maximization,”<sup>129</sup> suggesting that these jurisdictions potentially “crave international fame and prominence that comes with a high market share of incorporations”<sup>130</sup> or share some sort of “commitments on taxes.”<sup>131</sup> Offshore corporate law havens, however, do not typically levy corporate taxes or taxes imposed on income derived from local activities for foreign corporations incorporated locally. These data instead suggest that the motives of offshore

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<sup>126</sup> CAYMAN IS. GOV’T, PLAN & ESTIMATES, *supra* note 114, at 332, 405 (2015–2016 revenue data and 2016–2017 data estimate); CAYMAN IS. GOV’T, PLAN & ESTIMATES FOR THE 18-MONTH PERIOD ENDING 31 DECEMBER 2017, at 365, 386 (2013), <http://www.gov.ky/portal/pls/portal/docs/1/12310534.PDF> [<https://perma.cc/ZY7C-SAMZ>] (2014–2015 revenue data).

<sup>127</sup> The governments in these jurisdictions are acutely aware of the competition from other foreign nations. *See, e.g.*, BVI BUDGET 2018, *supra* note 125, at ix (“There are jurisdictions competing to take on our market share in financial services . . . if and where we fall short.”).

<sup>128</sup> *See* ROMANO, GENIUS, *supra* note 2, at 38 (“[A] state with a large proportion of its budget financed by the franchise tax will be responsive to firms, since it has so much to lose.”).

<sup>129</sup> Talley, *supra* note 12, at 1716.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

corporate law havens are not too different than those of Delaware.<sup>132</sup> And, like Delaware, offshore corporate law havens rely on the profits from recurring franchise and incorporation fees received from locally registered business entities.<sup>133</sup> This reliance sets the stage for offshore lawmakers to be “captured” by the private sector in their production of corporate law.

### C. *The Role of Lawyers and Other “Local” Interest Groups*

To focus exclusively on government coffers to explain the behavior of legislators would neglect another pivotal aspect of corporate lawmaking process—the various interest groups, including lawyers, accountants, and other stakeholders who stand to benefit from attracting foreign corporations, that also drive the corporate lawmaking process in offshore corporate law havens, just as they do in the domestic context.<sup>134</sup> Accounting for these interest groups refines the crude theory of legislative behavior that presupposes revenue maximization as the objective of domestic and offshore governments.<sup>135</sup>

Studying Delaware, Professors Jonathan Macey and Geoffrey Miller laid the theoretical foundation for an interest group approach to studying

<sup>132</sup> See Moon, *Regulating Offshore Finance*, *supra* note 12, at 10–11. The lack of corporate tax thus accounts for Professor Talley’s assessment, as well as that of critics of “tax havens” who characterize these jurisdictions as parasitic entities that enable corporations to evade or avoid domestic tax. See also Moon, *Tax Havens*, *supra* note 108, at 1081–82.

<sup>133</sup> Consistent with others who have observed that market-dominant jurisdictions are able to command higher annual franchise tax, offshore corporate law havens appear to be able to charge high annual franchise fees. It is well-established that Delaware exploits its market-dominant position in the incorporation market to price discriminate. As Professors Marcel Kahan and Ehud Kamar explain, “Delaware uses its uniquely structured franchise tax to charge a higher incorporation price to public corporations than it does to nonpublic corporations, and that among public corporations, it charges a higher price to larger corporations than it does to smaller ones.” Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1209 (2001) [hereinafter Kahan & Kamar, *Price Discrimination*]. Similar traits are found in offshore corporate law havens. In Bermuda, for instance, annual fees start at \$2,095 and increase on a sliding scale up to \$32,676—calculated according to issued share capital. See WALKERS, CLIENT MEMO: GLOBAL – COMPARISON OF COMPANIES – CAYMAN ISLANDS, BRITISH VIRGIN ISLANDS, BERMUDA, JERSEY, GUERNSEY AND IRELAND 3 (2019), [https://www.walkersglobal.com/images/Publications/Memo/Global/Global\\_Comparison\\_of\\_Companies.pdf](https://www.walkersglobal.com/images/Publications/Memo/Global/Global_Comparison_of_Companies.pdf) [<https://perma.cc/5FPS-DH69>].

<sup>134</sup> Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1511 (1989) (“Not all states are motivated solely by the goal of maximizing franchise-tax revenues. Many states are at least weakly motivated by the goal of maximizing the revenues of the local corporate bar . . . . Furthermore, legislatures are not private sellers, but public actors. Attracting the business of principals by making side payments to agents is a morally dubious enterprise. For some legislators, public morality will be an important constraint on the willingness to engage in that enterprise. The extent of that willingness also undoubtedly varies from state to state.”).

<sup>135</sup> See Romano, *Law as a Product*, *supra* note 37, at 228.

American corporate law.<sup>136</sup> Their account revealed that attracting corporate charters not only benefits the state legislature that accrues franchise taxes annually, but also various interest groups that benefit from the spillover effects of drawing incorporation business.<sup>137</sup> Professors Macey and Miller concluded that Delaware's preeminent corporate law regime principally serves to benefit "Wilmington lawyers who practice corporate law in the state."<sup>138</sup>

In the international context, evaluating offshore corporate law havens within an interest group framework also reveals the inner workings of these jurisdictions. Generally, the ability of local lawmakers to raise a sizable portion of their budget from incorporation fees, principally from foreign sources, allows offshore corporate law havens to lower taxes on domestic constituents.<sup>139</sup> However, certain local constituencies, or special interest groups, tend to benefit more than others. Special beneficiaries include local residents that provide services to locally incorporated corporations, from registered agents to property owners leasing small offices or mailboxes, to foreign business entities.<sup>140</sup> A number of locals also explicitly benefit from laws that increase the value of their residency status. For instance, under Bermuda law, at least one director, secretary, or representative of a corporation must be a resident of Bermuda.<sup>141</sup> Local residents routinely serve

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<sup>136</sup> See Macey & Miller, *supra* note 43.

<sup>137</sup> Others have extended this framework, building an impressive catalog of law review articles devoted to studying Delaware using an interest group framework. See, e.g., Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990).

<sup>138</sup> Macey & Miller, *supra* note 43, at 472. This account has been highly influential, although scholars assign different persuasive value as to its explanatory power. See, e.g., ROMANO, GENIUS, *supra* note 2, at 30 ("Although I am skeptical of the strong form of Macey and Miller's claim that Delaware's corporation code favors lawyers over shareholders, Delaware's commanding position in the charter market may possibly enable the corporate bar to siphon a share of Delaware's monopoly rents by generating some laws that decrease firm value and increase attorney income.").

<sup>139</sup> This is strictly from the point of view of that jurisdiction. From the international community's standpoint, welfare effects are mixed at best. See Moon, *Tax Havens*, *supra* note 108, at 1094 ("When accounting for tax incentives, the fact that consumers of corporate law have not advocated a replacement of the current system, which is often taken as the best evidence of the welfare-enhancing effects of jurisdictional competition, cannot be assumed." (citation omitted)).

<sup>140</sup> To be sure, whether the distribution of benefits is completely lopsided within these jurisdictions depends on the level of public services that the governments in these jurisdictions provide to their citizens and how these are distributed. This is because presumably the level of local public service would be lower without franchise revenues. I am grateful to Professor Romano for this point.

<sup>141</sup> Bermuda Companies Act of 1981, § 130(1) (Berm.); Natalie Town & Jonathan Betts, *Corporate Governance and Directors' Duties in Bermuda: Overview*, THOMPSON REUTERS PRAC. L. (2015), <https://content.next.westlaw.com/Document/I2030ee541cb611e38578f7ccc38dcbee/View/FullText.htm>



as “dummy” directors for hundreds, if not thousands, of companies, playing little or no actual role in the entities’ operations.<sup>142</sup> Foreign corporations thus help create jobs in the local economy. Lawyers, unsurprisingly, benefit from the structure of offshore incorporations as well. In Delaware, the bulk of the financial gains go to corporate transactional lawyers and litigators, as evidenced by the fact that Delaware lawyers have the highest average income in the country.<sup>143</sup> The corporate lawyers that benefit offshore, fascinatingly, are not entirely “local.” They are principally made up of an elite cadre of lawyers who work in “offshore magic circle” law firms—a colloquial term given to law firms that have established physical offices in strategic offshore jurisdictions like Jersey, Bermuda, the British Virgin Islands, Hong Kong, and the Seychelles.<sup>144</sup> A significant fraction of the lawyers who practice law in these jurisdictions are foreign citizens who move offshore and are accredited to practice locally. In addition to warm weather and sandy beaches, these jurisdictions offer minimal income tax rates to attract foreign talent.<sup>145</sup> These offshore law firms typically work with larger international

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!?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1. [https://perma.cc/TFY7-JNCQ].

<sup>142</sup> The same is true for many closely held business entities. To form feeder funds in the Cayman Islands, managers must hire directors who are physically present in the territory of the Cayman Islands. These directors, who serve as directors in hundreds—if not thousands—of entities, typically play little or no role in the management of the fund—explaining why they typically do not exist in domestic hedge funds. See Moon, *Regulating Offshore Finance*, *supra* note 12, at 50. As Professor John Morley explains, the so-called “dummy directors” exist in offshore jurisdictions like the Cayman Islands “typically because quirks of law in offshore jurisdictions require it.” John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1253 (2014) [hereinafter Morley, *Investment Fund*].

<sup>143</sup> Kahan & Kamar, *Myth*, *supra* note 28, at 695. According to the influential public choice theory, lawyers in Delaware financially benefit from the steady stream of shareholder litigation (and related business law disputes) brought involving Delaware corporations. See Jonathan Macey, *Delaware: Home of the World’s Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1136–37 (2005) (“[T]he . . . sophisticated body of corporate law in Delaware comes with a heavy price, extracted by powerful interest groups within the state, particularly lawyers, who enjoy the dominant position within the culture that generates corporate law rules.”).

<sup>144</sup> An example of a successful “offshore magic circle” law firm is Appleby. The firm, which gained international notoriety in 2017 from massive document leaks that made international headlines as the Paradise Papers, has offices in Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Hong Kong, Isle of Man, Jersey, Mauritius, the Seychelles, and Shanghai. *About Us*, APPLEBY, <https://www.applebyglobal.com/about/> [https://perma.cc/FB7R-L8FQ].

<sup>145</sup> As a *Financial Times* spread explains, offshore law firms actively recruit foreign lawyers who are “drawn by the sun, low income tax rates and the prospect of becoming a partner faster.” Madison Marriage & Barney Thompson, *‘Offshore Magic Circle’ Law Firms Fear Paradise Papers Fallout*, FIN. TIMES (Nov. 9, 2017), <https://www.ft.com/content/8aff482c-c4a3-11e7-b2bb-322b2cb39656> [https://perma.cc/4AWF-SMJ4]. Unsurprisingly, specialized recruitment firms have emerged, recruiting lawyers from the United States by promising low tax rates, warm weather, and proximity to the United States. See HAMILTON RECRUITMENT, LIVING & WORKING OFFSHORE: A GUIDE FOR LAWYERS 2,

law firms to draw clients from the United States and the United Kingdom,<sup>146</sup> although some New York “Big Law” firms have recently entered alone to get a share of this booming business.<sup>147</sup>

Of course, there is nothing inherently pernicious about lawyers getting rich. Indeed, a crucial ingredient in Delaware’s corporate law regime is the legislature’s responsiveness to local interest groups.<sup>148</sup> In Delaware, there is an “unwritten compact between the bar and the state legislature,” wherein Delaware lawmakers regularly “call upon the expertise of the Corporation Law Section of the Delaware Bar Association to recommend, review and draft almost all amendments to the statute.”<sup>149</sup> The lawmaking process in offshore corporate law havens is not too different from Delaware, although fewer lawyers control the lawmaking process. In virtually all these incorporation havens, the process of proposing and drafting corporate legislation is controlled by as few as one or two firms.<sup>150</sup> This process is far from a secret. It is not unusual for law firms to advertise their close working

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[http://www.hamilton-recruitment.com/HR\\_Downloads/OffshoreGuideForLawyers.pdf](http://www.hamilton-recruitment.com/HR_Downloads/OffshoreGuideForLawyers.pdf) [<https://perma.cc/V7BB-HN9S>] (“Bermuda, the British Virgin Islands and the Cayman Islands share the characteristics of low tax, a common law legal system, the benefits of a Caribbean-style climate and proximity to the United States.”).

<sup>146</sup> See Marriage & Thompson, *supra* note 145 (“Large international law firms in New York and London, many of which work with offshore companies to help their clients structure their investments, have warned staff against discussing the Paradise Papers publicly. DLA Piper, which was itself hit by a cyber-attack this year, sent a memo to staff on Tuesday, seen by the *Financial Times*, warning them against publicly commenting on the documents, as several of its clients were affected by the leak.”).

<sup>147</sup> See, e.g., Press Release, Sidley, Sidley Advises on Successful US \$3.8 Billion Restructuring of Ocean Rig UDW (Sept. 22, 2017), <https://www.sidley.com/en/newslanding/newsannouncements/2017/09/sidley-advises-on-successful-us-3-8-billion-restructuring-of-ocean-rig-udw> [<https://perma.cc/R2QY-7A7G>] (“Sidley represented Simon Appell of AlixPartners and Eleanor Fisher of Kalo . . . . The restructuring was implemented through four separate and interconnected Cayman Islands-law governed schemes of arrangement . . . .”); see also Scott Flaherty, *What It Takes to Dominate in the Elite Game of International Litigation*, AM. LAW. (Sept. 28, 2017), <https://kobrekim.com/assets/Uploads/What-It-Takes-to-Dominate-in-the-Elite-Game-of-International-Litigation-The-American-Lawyer.pdf> [<https://perma.cc/U3R2-U8Y7>] (“Kobre & Kim has lawyers stationed in offshore jurisdictions like the British Virgin Islands and Cayman Islands—something that can come in handy if, say, a client needs a lawyer in Hong Kong but is going up against a BVI-registered company . . . .”).

<sup>148</sup> Romano, *Corporate Law Redux*, *supra* note 29, at 363 (calling Delaware’s corporate bar the “catalyst” when corporate codes are updated).

<sup>149</sup> LEWIS S. BLACK, JR., *WHY CORPORATIONS CHOOSE DELAWARE 4* (2007). This group consists of twenty-one transactional and litigation attorneys representing small and large law firms in Wilmington, Delaware. See Hamermesh, *supra* note 31, at 1755–56; see also Romano, *Corporate Law Redux*, *supra* note 29, at 364 (explaining that the powerful corporate bar “monitors and identifies needed legislative changes . . . and the Delaware legislature in turn responds to the bar’s pulling the fire alarm by enacting the proposed initiatives”).

<sup>150</sup> Briant, *supra* note 35, at 63.

relationships with offshore legislatures to their clients.<sup>151</sup> According to a report commissioned by the British Virgin Islands government, the country's financial services law is a byproduct of "regular meetings with the private sector," which includes the Bankers Association and the Financial Services Advisory Committee.<sup>152</sup> Indeed, the legendary legislation that gave birth to an offshore financial services market in the British Virgin Islands was introduced by a Shearman & Sterling lawyer from New York.<sup>153</sup> This process of public-private partnership ensures that the laws on the books stay up-to-date and reflect private sector preferences.<sup>154</sup> In the British Virgin Islands, for instance, a group of prominent private sector lawyers serving on the Financial Services Commission provide specific input relating to amendments on the British Virgin Islands' Companies Act (BVI's corporate law statute).<sup>155</sup> For example, as recently as June 2018, the Commission advised the cabinet of the British Virgin Islands to revise the Companies Act by lowering penalties for corporate noncompliance.<sup>156</sup>

Legislative committees in the Cayman Islands similarly illustrate how the private sector dictates the content of corporate law. The Cayman Islands Constitution formally recognizes the Attorney General as the chief legal

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<sup>151</sup> See John Christensen, *Do They Do Evil? The Moral Economy of Tax Professionals*, in NEOLIBERALISM AND THE MORAL ECONOMY OF FRAUD 72, 80 (David Whyte & Jörg Wiegatz eds., 2016) ("Appleby Partners have been members of the elected legislatures, and ministers in governments in a number of offshore financial centres." (footnote omitted)).

<sup>152</sup> LAWS CONSOL., INC., CONSULTANT'S REPORT FOR BRITISH VIRGIN ISLANDS: COMPUTERISATION AND THE ADMINISTRATION OF JUSTICE 3-4 (1998), <http://lawsconsolidated.com/cms3/phocadownload/Reports/British%20Virgin%20Islands%20Report.pdf> [<https://perma.cc/4FAM-GHRA>].

<sup>153</sup> See Colin Riegels, *British Virgin Islands: A Tough Act to Follow*, MONDAQ (July 20, 2014), <http://www.mondaq.com/x/327334/offshore+financial+centres/A+Tough+Act+To+Follow> [<https://perma.cc/GD7S-5YDU>] (describing how the International Business Companies Act in the British Virgin Islands was drafted by "a Wall Street lawyer named Paul Butler from renowned New York law firm Shearman & Sterling").

<sup>154</sup> See, e.g., *Government Boards and Committees*, GOV'T BERM., <https://www.gov.bm/government-boards-and-committees> [<https://perma.cc/GQS8-K9SD>].

<sup>155</sup> See THE VIRGIN IS. FIN. SERVS. COMM'N, ANNUAL REPORT 2014, at 43 (2014), [http://www.bvifsc.vg/sites/default/files/annual\\_report\\_2014.pdf](http://www.bvifsc.vg/sites/default/files/annual_report_2014.pdf) [<https://perma.cc/6LJM-NXB8>] (explaining how the commission helps draft bills, regulations, and other subsidiary legislation); see also *Governance*, VIRGIN IS. FIN. SERVS. COMMISSION, <http://www.bvifsc.vg/about-us/governance/board-of-commissioners> [<https://perma.cc/SAJ8-4ASY>] (providing the names and biographies of the Commission's membership). Michael Riegels, a founding partner of the offshore law firm Harneys and one of the original drafters of the BVI Companies Act, was selected as the first chairman of the board. See Press Release, Virgin Is. Fin. Servs. Comm'n, British Virgin Islands Financial Services Commission Board Appoints an Additional External Commissioner (June 12, 2012), <http://www.bvifsc.vg/news/british-virgin-islands-financial-services-commission-board-appoints-additional-external> [<https://perma.cc/Q57T-6WT3>]; Riegels, *supra* note 153.

<sup>156</sup> See Business Companies Act (Amendment of Schedule 1) (No. 2) Order, 2018 (Virgin Is.).

adviser to the Legislative Assembly.<sup>157</sup> The Attorney General delegates this authority to several subcommittees to allow leading offshore lawyers to draft actual legislation. The former managing partner of a prominent offshore law firm, Maples and Calder, described the process bluntly: “[T]he private sector [identifies] areas of particular need and tak[es] a first cut at drafting the legislation to meet it. The private sector will always be best placed to undertake that role because of its relations with onshore professionals who can pinpoint precisely what needs to be drafted to achieve the effect they seek.”<sup>158</sup>

The private sector not only helps draft laws, but also helps corporate clients navigate local administrative requirements. Local law firms typically bundle and sell corporate law “packages” that satisfy all local administrative requirements, ranging from appointing resident directors to maintaining corporate books in the territory of the incorporating jurisdiction.<sup>159</sup>

All in all, prominent private sector lawyers are instrumental in writing the content of corporate governance rules in leading offshore jurisdictions, exerting influence as de facto lawmakers.

#### *D. The Rise of Offshore Business Courts*

Despite their arguably favorable corporate governance regimes, offshore corporate law havens may still lack the judicial infrastructure necessary to compete with Delaware. While any given jurisdiction can copy and paste laws from Delaware, it is difficult to transplant Delaware’s renowned judicial system. This is the principal explanation offered to explain why other states like Maryland have not been successful at competing with Delaware. The advantages offered by Delaware include: (1) the Delaware Chancery Court, where judges who have corporate law expertise resolve

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<sup>157</sup> *Portfolio of Legal Affairs*, CAYMAN IS. GOV’T, <http://www.gov.ky/portal/page/portal/plghome/what-we-do> [<https://perma.cc/H9KR-YEZS>].

<sup>158</sup> Charles Jennings, *The Financial Services Legislative Committee*, CAYMAN FIN. REV. MAG. (Aug. 3, 2011), <https://www.caymanfinancialreview.com/2011/08/03/the-financial-services-legislative-committee/> [<https://perma.cc/F72F-K3QW>].

<sup>159</sup> One leading law firm in Bermuda, for instance, arranges for the following services under a standard agreement: “i) Bermuda resident directors (if required); ii) Company secretary (to maintain the corporate records of the client company); iii) Maintaining the minute book, share register and register of directors & officers; iv) Providing registered office facilities for the client company; v) Liaising with government departments with respect to annual filings and any changes to the constitutional documents of the company; vi) Liaising with banks and other service providers such as accountants and auditors.” ATTRIDE-STIRLING & WOLONIECKI, INCORPORATION OF AN EXEMPTED COMPANY IN BERMUDA 6–7 (2008), <http://www.aswlaw.com/wp-content/uploads/2011/03/Incorporation-of-an-Exempted-Company-in-Bermuda.pdf> [<https://perma.cc/UZ3X-BNC8>].

disputes without juries;<sup>160</sup> (2) the meritocratic nature of selecting Chancery Court judges;<sup>161</sup> and (3) the steady production of case law that reduces uncertainty in the application of substantive law.<sup>162</sup> These advantages amount to an unusually high barrier to entry that make it difficult for other *states* to compete.<sup>163</sup> Although other states are aware of Delaware's lucrative revenue stream,<sup>164</sup> few have attempted to give a run for Delaware's money, and even fewer have actually succeeded.<sup>165</sup>

That assumption does not hold true for small foreign nations. In the past decade or two, offshore corporate law havens have launched specialized business courts aimed at resolving complex commercial disputes: the Bermuda Commercial Court (2006), the Commercial Division of High Court in the British Virgin Islands (2009), and the Financial Services Division of the Cayman Islands Grand Court (2009).<sup>166</sup> These specialized business courts were built specifically to resolve disputes that arise from foreign firms incorporated locally, typically separated from the garden variety of local civil and criminal matters. For instance, in the Cayman Islands, all actions under Part XVII of the Companies Act (Cayman's corporate law statute) are required to be brought in the Financial Services Division.<sup>167</sup> Moreover, like

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<sup>160</sup> Kahan & Kamar, *Myth*, *supra* note 28, at 708; *see also* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 590 (1990) ("Delaware's governor, mindful of the value of corporate charters, often deliberately appoints judges with corporate expertise."); Mark J. Roe, *Juries and the Political Economy of Legal Origin*, 35 J. COMP. ECON. 294, 294 (2007) [hereinafter Roe, *Juries*] ("[T]he usual view in legal circles is that the jury's absence (and the resulting decision-making by expert judges, not juries), is a strength of the court, not a weakness.").

<sup>161</sup> Kahan & Kamar, *Myth*, *supra* note 28, at 708 (stating that a nominating commission chooses Chancery Court judges).

<sup>162</sup> *See id.* (explaining that Delaware's widely published case law provides guidance to practitioners).

<sup>163</sup> *See id.* ("One would expect states trying to attract incorporations to establish similar courts. But none has." (citation omitted)).

<sup>164</sup> In recent decades, Delaware has earned approximately "\$440 million per year in franchise taxes and related fees." Fisch, *Peculiar Role*, *supra* note 23, at 1061.

<sup>165</sup> *See* John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1920 (2012) (stating that other states have not replicated unique aspects of Delaware courts, including their focus on corporate law and lack of juries); Kahan & Kamar, *Myth*, *supra* note 28, at 724–36.

<sup>166</sup> TIM PRUDHOE & ALEXANDER W. HEYLIN, KOBRE & KIM, BRITISH VIRGIN ISLANDS (2018), <https://kobrekim.com/assets/Uploads/PDFs/Getting-the-Deal-Through-Asset-Recovery-2018-British-Virgin-Islands-2.PDF?url=/assets/Uploads/Getting-the-Deal-Through-Asset-Recovery-2018-British-Virgin-Islands-2.PDF> [https://perma.cc/B56P-P4MA]; *Bermuda's Commercial Court: The First Five Years*, ROYAL GAZETTE (Mar. 2, 2012, 8:12 AM), <http://www.royalgazette.com/article/20120302/BUSINESS/703029943> [https://perma.cc/2R27-ZAR4]; Alan Markoff, *Cayman's Judiciary Grows with the Times*, CAYMAN FIN. REV. (Jan. 5, 2011), <https://www.caymanfinancialreview.com/2011/01/05/caymans-judiciary-grows-with-the-times/> [https://perma.cc/N7GH-4RVH].

<sup>167</sup> Sam Dawson & Peter Sherwood, *Litigation and Enforcement in the Cayman Islands: Overview*, THOMPSON REUTERS PRAC. L. (2019), <https://us.practicallaw.thomsonreuters.com/2-633-8594> (last

Delaware, offshore corporate law havens have uniformly eliminated jury trials for corporate law disputes,<sup>168</sup> allowing cases to be resolved relatively swiftly and predictably.

Reminiscent of judges on the Delaware Court of Chancery, offshore corporate law havens are staffed by judges with business law expertise who are commissioned on a merit-based system.<sup>169</sup> But there are important differences. Unlike Delaware's Chancery Court judges, who are required to be "Delaware citizens,"<sup>170</sup> offshore judges in many circumstances are foreign citizens. Consider the Financial Services Division of the Grand Court in the Cayman Islands. Of the six judges in the Financial Services Division, only one judge is a Cayman Islands citizen.<sup>171</sup> One of the Financial Division

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visited Apr. 12, 2020). The British Virgin Islands screens for these cases by requiring that "[t]he minimum value for a claim to be brought in the Commercial Court is US\$500,000, although most cases are considerably larger than that." See *Supreme Court (High Court)*, GOV'T VIRGIN IS., <http://www.bvi.gov.vg/supreme-court-high-court> [<https://perma.cc/VC57-HVB6>]. Finally, claims arising out of the Bermuda Companies Act are required to be resolved by the Bermuda Commercial Court. See RULES OF THE SUPREME COURT 1985, Order 72/1 (Berm.), <http://www.bermudalaws.bm/laws/Consolidated%20Laws/Rules%20of%20the%20Supreme%20Court%201985.pdf> [<https://perma.cc/SA58-P9YY>].

<sup>168</sup> APPLEBY, GUIDE TO THE LEGAL SYSTEM IN THE CAYMAN ISLANDS 4 (2015), <https://www.applebyglobal.com/wp-content/uploads/2019/04/guide-to-the-legal-system-of-the-cayman-islands.pdf> [<https://perma.cc/2JBV-J6T4>] ("Civil cases before the Grand Court, by contrast, are often heard by judge alone unless the matter is one which can be heard by judge and jury (e.g. in cases of defamation."); David Kessaram et al., *Bermuda*, in LITIGATION & DISPUTE RESOLUTION 24, 24 (Ted Greeno ed., 6th ed. 2017), <https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations> [<https://perma.cc/246H-35WB>] ("The judges in the Commercial Court are experienced in commercial matters and decide cases without a jury."); Roe, *Juries*, *supra* note 160, at 294 ("America's premier corporate court—the Delaware Chancery court—sits without a jury . . ."); Andrew Thorp et al., *British Virgin Islands*, in COMPLEX COMMERCIAL LITIGATION 19, 26 (Simon Bushnell & Daniel Spendlove eds., 2019) (available by subscription), <https://gettingthedealthrough.com/area/102/jurisdiction/128/complex-commercial-litigation-british-virgin-islands/> [<https://perma.cc/5T6Q-YEQ9>] ("Jury trials are not the norm and there is no provision for this mode of trial in the Commercial Court procedural rules. The BVI Commercial Court appoints single judges to perform the function of both tribunal of fact and law when determining the issues at trial.").

<sup>169</sup> See, e.g., Guy Manning et al., *Cayman Islands*, in DISPUTE RESOLUTION 2017, at 48 (Martin Davies & Kavan Bakhda eds., 2017) (available by subscription), <https://gettingthedealthrough.com/area/9/jurisdiction/59/dispute-resolution-cayman-islands/> [<https://perma.cc/2RDM-DKA6>] ("[T]he selection process takes the form of a significant application form, shortlisting and interview."). While commercial courts in offshore jurisdictions tend to be called "divisions" within courts that handle garden variety of criminal and civil cases, commercial cases are funneled into specialized divisions with judges with business law expertise, effectively constituting separate court systems.

<sup>170</sup> *Judicial Officers*, DEL. CTS., <https://courts.delaware.gov/chancery/judges.aspx> [<https://perma.cc/7YYS-A6D8>].

<sup>171</sup> *Judges*, CAYMAN IS. JUD. ADMIN., <https://www.judicial.ky/judicial-administration/judges> [<https://perma.cc/N8CF-KKFX>]; *Margaret Ramsay-Hale Gets Top Judge Job in TCI*, CAYMAN NEWS

judges in the Cayman Islands was also a partner in the London office of the renowned international law firm Freshfields Bruckhaus Deringer LLP (Freshfields) and is now a barrister at a barristers' chambers in London.<sup>172</sup> Another recently appointed judge in the same court is a former solicitor and partner at Freshfields and current associate at a barristers' chambers located in London.<sup>173</sup> In Bermuda, the Chief Justice has recently appointed nine "assistant justices," a group of experienced commercial lawyers, who sit on the commercial court on an as-needed basis.<sup>174</sup>

Although many court opinions are publicly available, and precedents do help contribute to filling gaps left in statutory language, offshore jurisdictions come nowhere close to the case law maintained by Delaware.<sup>175</sup> In contrast to Delaware's judicial system, these jurisdictions also do not have every opinion available to the public. Of the three offshore jurisdictions, the Cayman Islands is most secretive. According to a recent report, 55% of cases litigated at the Financial Services Division of the Cayman Islands were sealed over a sixty-eight-day period.<sup>176</sup> While unsealed opinions are published either in the Cayman Islands Law Reports or on the Cayman

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SERV. (June 20, 2014), <http://archive.caymannewsservice.com/2014/06/20/margaret-ramsay-hale-gets-top-judge-job-in-tci/> [<https://perma.cc/KXP4-P45M>].

<sup>172</sup> See *Nick Segal*, ERSKINE CHAMBERS, <https://www.erskinechambers.com/barrister/nick-segal/> [<https://perma.cc/8624-65KE>].

<sup>173</sup> *Raj Parker*, MATRIX CHAMBERS, <https://www.matrixlawinternational.com/wp-content/uploads/2016/11/Raj-Parker-CV.pdf> [<https://perma.cc/8G5N-JN89>]; *Raj Parker CV*, CT. INNOVATIVE ARB., [coia.org/CV-Raj-Parker.PDF](http://coia.org/CV-Raj-Parker.PDF) [<https://perma.cc/3XGE-7GVX>]. In the Cayman Islands, the judiciary also solicits applications for "part-time" judges for the Financial Division, who work an average of fifteen to twenty days per month. See *Application for Acting Grant Court Judges*, CAYMAN IS. GOV'T (2017), [http://www.judicialandlegalservicescommission.ky/upimages/ckeditor/AD\\_GCJ-FSD\\_January%202017.pdf](http://www.judicialandlegalservicescommission.ky/upimages/ckeditor/AD_GCJ-FSD_January%202017.pdf) [<https://perma.cc/3PN5-ECGS>].

<sup>174</sup> Most "assistant justices" are also fellows at the Chartered Institute of Arbitrators. GOV'T OF BERM., ASSISTANT JUSTICES' PANEL-CIVIL AND COMMERCIAL (Sept. 28, 2017), <https://www.gov.bm/sites/default/files/ASSISTANT%20JUSTICES%20PANEL.PDF> [<https://perma.cc/UL2A-TGUA>].

<sup>175</sup> It is worth emphasizing that the secrecy element is not completely different from Delaware. In Delaware, although opinions are public, important rulings or insights into future rulings are made from the bench during trial and motion practice. See Mohsen Manesh, *Dictum in Alternative Entity Jurisprudence and the Expansion of Judicial Power in Delaware*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 336, 350 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) ("Transcript opinions, like dictum and the bench's professional and scholarly engagement, have provided Delaware's judges with alternative means by which to mold and refine the law, beyond the holdings of their written opinions."). Although hearing transcripts are not public, law firms typically purchase them and use them as quasi-precedents. My thanks to Professor Romano for this point.

<sup>176</sup> David Marchant, *Cayman Court Secrecy on the Rise: 55% of Recent Financial Cases Are Sealed*, OFFSHORE ALERT (Aug. 6, 2018), <https://www.offshorealert.com/secrecy-at-financial-services-division-grand-court-of-cayman-islands.aspx> [<https://perma.cc/DE6X-U6AV>].

Islands Judicial Administration's website, full and unlimited access to the Cayman Islands Law Reports is available only to registered users who pay an annual fee.<sup>177</sup> In Bermuda, the official government website publishes judicial opinions of commercial disputes, but many cases are adjudicated confidentially and not subject to public disclosure.<sup>178</sup> Some British Virgin Islands opinions are available for a subscription fee,<sup>179</sup> but the general rule is that in the British Virgin Islands, restricted access to court documents other than public summaries is not unusual.<sup>180</sup>

The quasi-public nature of offshore judicial proceedings, which look a lot like modern commercial arbitration,<sup>181</sup> helps these jurisdictions compete in the global corporate law market. Consider commercial cases resolved by the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA), two of the leading arbitration houses in the world. These arbitration houses resolve high-stakes commercial disputes through the consent of litigants.<sup>182</sup> In 2017 alone, over one thousand cases were filed with the international division of the AAA.<sup>183</sup> While some of the cases resolved in

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<sup>177</sup> See *Cayman Islands Law Reports*, CAYMAN IS. JUD. ADMIN., <https://www.judicial.ky/judgments/cayman-islands-law-reports> [<https://perma.cc/93UL-SYCH>]. In the Cayman Islands, proceedings are generally held either in open court or in the judge's chambers. Most large commercial cases are held in open court, but some proceedings take place in the judge's chambers, which are "generally considered to be private to the parties to the proceedings." Dawson & Sherwood, *supra* note 167.

<sup>178</sup> See *Court Judgments*, GOV'T BERM., <https://www.gov.bm/court-judgments> [<https://perma.cc/C8ZZ-CQLZ>]; Karen Skiffington, *Finding the Law in Bermuda*, GLOBALEX (Oct. 2010), <http://www.nyulawglobal.org/globalex/Bermuda.html> [<https://perma.cc/9YLH-F852>].

<sup>179</sup> See *The Largest Collection of Caribbean Case Law*, JUSTIS, <https://www.justis.com/caribbean/> [<https://perma.cc/5CQD-R9AN>].

<sup>180</sup> As the U.S. Court of Appeals for the Second Circuit observed while adjudicating a claim that the "secret" nature of the British Virgin Islands proceedings is against U.S. public policy, "restricted access to court documents [other than public summaries] is not unusual in the BVI . . . because only certain limited records are typically available to non-parties." *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 140 (2d Cir. 2013).

<sup>181</sup> These features are not unique to offshore business courts. Professor Matthew Erie, for instance, documents the emergence of dispute resolution centers in Hong Kong, China, Singapore, Dubai, and Kazakhstan that are designed to "hook capital by attracting cross-border commercial disputes through a number of business models." See Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. (forthcoming 2020) (manuscript at 21) (on file with author).

<sup>182</sup> MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2 (3d ed. 2017) ("The parties' consent provides the underpinning for the power of the arbitrators to decide the dispute.").

<sup>183</sup> AM. ARBITRATION ASS'N, 2017 ANNUAL REPORT AND FINANCIAL STATEMENTS 20 (2018). Within these cases, the largest claimants stemmed from a diverse group of industries including "technology, commercial insurance, energy, aviation/aerospace/national security, pharmaceuticals, financial services and commercial construction." *Id.*



arbitration end up getting published, albeit with significant retractions,<sup>184</sup> many of the cases remain unpublished.<sup>185</sup> This feature helps, rather than impedes, arbitration houses compete with domestic courts as modern dispute resolution hubs.<sup>186</sup>

Moreover, Delaware's widely known advantages do not fully guard against competition from foreign nations because not every jurisdiction necessarily benefits from copying Delaware's judicial system. Recall that Delaware's corporate law "relies on open-ended standards applied by judges in ways that are highly case-specific."<sup>187</sup> This indeterminacy (1) enables Delaware to price discriminate annual incorporation fees;<sup>188</sup> (2) increases demand for litigation, thus benefiting local corporate lawyers;<sup>189</sup> and (3) deters potential competition from other states.<sup>190</sup>

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<sup>184</sup> See generally, e.g., 7 INT'L CHAMBER OF COMMERCE, COLLECTION OF ICC ARBITRAL AWARDS, 2012–2015 (Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher eds., 2018); AAA YEARBOOK ON ARBITRATION & THE LAW xxiii (Stephen K. Huber & Ben H. Sheppard, Jr. eds., 25th ed. 2013); Award Made in Case No. 1512 (ICC 1971), reprinted in COLLECTION OF ICC ARBITRAL AWARDS, 1974–1985, at 3 (Sigvard Jarvin & Yves Derains eds., 1990).

<sup>185</sup> *Arbitral Awards & Court Decisions*, GEO. L. LIBR., <http://guides.ll.georgetown.edu/c.php?g=363504&p=2455950> [<https://perma.cc/WR5V-S35K>] ("Locating a decision or award issued by an arbitral tribunal in an international commercial dispute is often an exercise in frustration. Many decisions and awards are not published . . . and some that are published have the names of the parties redacted.").

<sup>186</sup> See Ware, *supra* note 25, at 704–06 (discussing the extent to which the creation of law has been privatized through arbitration); Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS 1, 1 (2002), <https://object.cato.org/pubs/pas/pa433.pdf> [<https://perma.cc/U4GC-YN4G>] ("Arbitration is a private-sector alternative to the government court system. Compared with litigation, arbitration is typically quick, inexpensive, and confidential.").

<sup>187</sup> Bebchuk & Hamdani, *Leisurely Walk*, *supra* note 52, at 601; see also William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 900 (1997); Fisch, *Peculiar Role*, *supra* note 23, at 1074 ("Delaware corporate law relies on judicial lawmaking to a greater extent than other states."). As Professor Rock explains, "the fact-specific, narrative quality of Delaware [judicial] opinions, over time . . . yield reasonably determinative guidelines." Rock, *Saints and Sinners*, *supra* note 23, at 1017.

<sup>188</sup> See Kahan & Kamar, *Price Discrimination*, *supra* note 133, at 1208. This is because Delaware's vague corporate code induces the state to be a "litigation intensive" corporate law regime, generating a large body of case law. Firms and their shareholders are willing to pay more to opt into this legal regime. According to Professors Kahan and Kamar, "since Delaware offers by far the largest body of corporate law precedents, its law is more predictable than those of other states." *Id.* at 1235.

<sup>189</sup> See Macey & Miller, *supra* note 43, at 498 ("If the state were acting as a pure profit maximizer, it would attempt to minimize the indirect costs and maximize the direct costs of Delaware incorporation.").

<sup>190</sup> See Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 56 (2005) ("[J]udges may craft opinions to limit the risk of corporate migration . . . [A]lthough a few reincorporations out of state do not represent a serious threat to the authority of the Delaware judiciary, large scale corporate migration poses a direct threat to Delaware courts as national corporate lawmakers. The judiciary therefore has a direct incentive to avoid opinions that would unleash a flood of corporate migration."); Ehud Kamar, *A Regulatory Competition Theory of*

While Delaware counts on a large number of corporate litigants to reduce uncertainty associated with its vague statutory rules, foreign nations have enacted relatively clear-cut statutory laws.<sup>191</sup> Far from being a death knell for competing in the market for corporate law, relatively clear statutory language may be attractive for certain firms that do not benefit from building extensive case law in a particular jurisdiction. Furthermore, a lack of an American-style discovery system and procedure may be attractive, at least for certain segments of the market, for the same reason certain consumers of Delaware corporate law are looking to resolve disputes in private arbitration rather than going to the Delaware Court of Chancery.<sup>192</sup>

### III. INTERNATIONAL MARKET FOR CORPORATE LAW AND THE FUTURE OF AMERICAN CORPORATE LAW

This Part assesses the extent to which offshore corporate law havens offer differentiated corporate law “products” from American states and evaluates the normative desirability of the increasingly globalized market for corporate law. Section A documents offshore corporate law havens’ corporate governance rules that enable corporations to opt out of mandatory rules imposed by Delaware corporate law. Section B examines whether international corporate charter competition may be desirable from the perspective of society at large. While giving credence to the possibility that jurisdictional competition can benefit firms—and collectively, society at large—this Part identifies two countervailing considerations salient in the international context that render any claims about gains from jurisdictional competition premature at best.

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*Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911 (1998) (discussing the “competitive advantage” Delaware derives from network externalities).

<sup>191</sup> Several competing theories might help explain this phenomenon. One reason why Delaware has gotten away with vague statutory laws is that it faces weak competition from other states. See Kahan & Kamar, *Myth*, *supra* note 28. Another plausible explanation is that foreign nations, unlike Delaware, do not fear the federalization of American corporate law and are thus able to devise corporate law statutes without intervention from Washington, D.C. As Professors Bebchuk and Hamdani explain, “[T]he flexibility of the open-ended standards enables Delaware case law to develop in directions that are responsive to the fear of federal intervention without the visible change in course that would be involved in a legislative amendment.” Bebchuk & Hamdani, *Leisurely Walk*, *supra* note 52, at 603.

<sup>192</sup> See Lynn M. LoPucki, *Delaware's Fall: The Arbitration Bylaws Scenario*, in CAN DELAWARE BE DETHRONED? 35, 50 (Stephen Bainbridge et al. eds., 2018) (commenting on the potential emergence of arbitration in corporate charters that force shareholders to arbitration); Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L.J. F. 169, 170–71 (2018) (“The consequences of a shift to shareholder arbitration could be substantial . . . . A shift to arbitration likely would dramatically reduce the number of claims filed, in part because representative actions such as class actions or derivative suits probably would be unavailable. The future of shareholder rights may be at stake.” (footnote omitted)).

A. *Lax Laws Offshore?*

American corporate law is predominantly conceptualized as default rules that firms can opt out of through contract.<sup>193</sup> But there are a few mandatory rules under state corporate law that even sophisticated parties cannot waive through contract.<sup>194</sup> These rules principally govern the power structure between shareholders and managers of corporations.<sup>195</sup>

Importantly, a survey of key corporate governance rules offered by leading foreign jurisdictions reveals distinctive templates of corporate codes that allow corporations to opt out of rules that are mandatory in the pure domestic context.<sup>196</sup> These include (1) limitations on shareholder derivative lawsuits; (2) restrictions on shareholders inspecting books and records of corporations; and (3) lax fiduciary duty rules that allow corporations to opt out of rules that are mandatory in the United States.<sup>197</sup> These features are highlighted below.

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<sup>193</sup> See EASTERBROOK & FISCHER, *supra* note 8, at 2 (“The corporate code in almost every state is an ‘enabling’ statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator.”); Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 441, 441 (2014) (“Corporate law in the United States is largely enabling, whereas most other countries around the globe rely heavily on mandatory corporate law.”).

<sup>194</sup> See Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities*, in RESEARCH HANDBOOK ON FIDUCIARY LAW 285, 289 (D. Gordon Smith & Andrew S. Gold eds., 2018).

<sup>195</sup> See Jens Dammann, *Homogeneity Effects in Corporate Law*, 46 ARIZ. ST. L.J. 1103, 1134 (2014) (“[M]any of the norms that govern the distribution of power between shareholders and the board of a public corporation retain their mandatory character.”).

<sup>196</sup> I want to be clear here that not all offshore jurisdictions pursue the strategy of offering differentiated corporate governance rules. Corporate law of the Marshall Islands, for instance, is largely modeled after Delaware corporate law. The Marshall Islands Business Corporations Act specifically instructs that the law be “applied and construed to make the laws of the Republic . . . uniform with the laws of the State of Delaware.” 52 M.I.R.C., Part I, § 13 (2004) (Marsh. Is.).

<sup>197</sup> These rules are illustrative and not exhaustive. For instance, offshore corporate law also enables domestic corporations to opt out of shareholder appraisal rights, which is guaranteed in every state in the United States. Albert H. Choi & Eric Talley, *Appraising the “Merger Price” Appraisal Rule*, 34 J.L. ECON. & ORG. 543, 543 (2018) (“In mergers and acquisitions law, shareholders of a target company often enjoy a statutory right to reject the terms of an approved sale in favor of a judicial determination of ‘fair value’ for their shares. All states provide dissenters with some form of appraisal right . . .”). Some offshore companies are upfront about the lack of minority shareholder protection. Houston-based Vantage Drilling Company, for instance, discloses in its SEC filing the effect of its status as a Cayman Islands company: If “a takeover offer . . . is approved, any dissenting shareholder would have no rights comparable to appraisal rights, which would otherwise ordinarily be available to dissenting shareholders of United States corporations, providing rights to receive payment in cash for the judicially determined value of the shares.” Vantage Drilling Company, Registration of Certain Classes of Securities (Form 8-A/A) 6 (Jan. 14, 2010).

### 1. Derivative Suits

Derivative suits, which date back to the early nineteenth century in the United States,<sup>198</sup> are typically shareholder claims against corporate insiders for mismanagement.<sup>199</sup> These claims have long been available under every American state's corporate law.<sup>200</sup> Under Delaware law, a shareholder is eligible to bring a derivative action if she demands the board of directors to assert the claims or offers particular reasons why making such a demand would be futile.<sup>201</sup> Successful derivative suits are paid to the corporation, theoretically enhancing the value of the stock and assets of the corporation for all current shareholders.<sup>202</sup> While the desirability of a liberal derivative suit regime is disputed—after all, defending frivolous suits is costly<sup>203</sup>—the general availability of derivative suits purportedly serves to compensate injured shareholders while deterring managerial misconduct.<sup>204</sup>

Offshore corporate law havens have vastly restricted the possibility of derivative suits.<sup>205</sup> In the British Virgin Islands, shareholders must first seek permission from the court prior to bringing a derivative suit.<sup>206</sup> Even if the court grants their request,<sup>207</sup> the remedy may require the company to acquire the shareholders' shares.<sup>208</sup> In the Cayman Islands, derivative suits similarly require permission from the court to proceed, and the practical success rate is slim. As practitioners from one prominent law firm explain, “[n]ot only is

<sup>198</sup> The earliest shareholder suit in the United States was brought in 1832. See DEBORAH A. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE* 11 (2018) (citing *Robinson v. Smith*, 3 Paige Ch. 222 (N.Y. Ch. 1832)).

<sup>199</sup> See George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 268 (2014).

<sup>200</sup> See Erickson, *supra* note 30, at 122.

<sup>201</sup> See Dennis J. Block, Stephen A. Radin & Michael J. Maimone, *Derivative Litigation: Current Law Versus the American Law Institute*, 48 BUS. LAW. 1443, 1451 (1992); John H. Matheson, *Restoring the Promise of the Shareholder Derivative Suit*, 50 GA. L. REV. 327, 359–60 (2016).

<sup>202</sup> See Geis, *supra* note 199, at 268–71.

<sup>203</sup> See Erickson, *supra* note 30, at 86; Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, 5–6 (1999).

<sup>204</sup> Swanson, *supra* note 30, at 1345–46.

<sup>205</sup> Of course, only time will tell if these jurisdictions will continue to maintain rules that are hostile to derivative suits.

<sup>206</sup> Statutory provisions on derivative actions have been enacted in the BVI Business Companies Act, 2004, §§ 184C–184F (Virgin Is.).

<sup>207</sup> The British Virgin Islands law enumerates the list of factors judges must consider in deciding whether to grant a leave: “(a) whether the member is acting in good faith; (b) whether the derivative action is in the interests of the company taking account of the views of the company’s directors on commercial matters; (c) whether the proceedings are likely to succeed; (d) the costs of the proceedings in relation to the relief likely to be obtained; and (e) whether an alternative remedy to the derivative claim is available.” BVI Business Companies Act, 2004, § 184C (Virgin Is.).

<sup>208</sup> *Id.* § 184I.

the threshold for such claims quite high (including the requirement to prove self-dealing or wrongful benefit), but the likely remedies available may be limited[.] [F]or example there is no ability to recover damages for mere negligence, or to claw back preferential or fraudulently undervalued transfers.”<sup>209</sup> While Bermuda did not previously have a statutory framework on derivative suits, it amended its rules in 2018 to require derivative suits to seek leave from the court, thereby bringing its rules close to those of the Cayman Islands and the British Virgin Islands.<sup>210</sup>

Some corporations are upfront about the content of offshore corporate laws in their public disclosures. For example, New York fashion house Michael Kors, which incorporated in the British Virgin Islands before listing in the New York Stock Exchange in 2011, disclosed in its annual reports: “The laws of the British Virgin Islands provide limited protection for minority shareholders, so minority shareholders will have limited or no recourse if they are dissatisfied with the conduct of our affairs.”<sup>211</sup> Likewise, the public disclosures of Herbalife, which is headquartered in Los Angeles and incorporated in the Cayman Islands, explain: “Our Cayman Islands counsel, Maples and Calder, is not aware of any reported decisions in relation to a derivative action brought in a Cayman Islands court.”<sup>212</sup> Incorporation choices of these “offshore” companies have serious consequences for American investors. In several cases, federal and state judges have dismissed multibillion-dollar suits brought by domestic shareholders of American firms incorporated in offshore jurisdictions, despite plaintiffs bringing the cases in the United States.<sup>213</sup>

## 2. *Inspection of Corporate Books and Records*

Derived from common law, all fifty states and the District of Columbia currently require corporations to provide shareholders qualified access to corporate books and records by statute.<sup>214</sup> This right, which is one of the few

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<sup>209</sup> MOURANT, BREACH OF DUTY BY DIRECTOR OF A CAYMAN FUND – THE PATH TO INVESTOR RELIEF IN THE CAYMAN ISLANDS VS NEW YORK 4 (2017), <https://www.mourant.com/file-library/media-2016/2016-guides/breach-of-duty-by-director-of-a-cayman-fund.pdf> [<https://perma.cc/7VUY-22MM>].

<sup>210</sup> *Bermuda RSC Amended to Require Leave to Bring Derivative Actions*, APPLEBY (Sept. 20, 2018), <https://www.applebyglobal.com/publications/bermuda-rsc-amended-to-require-leave-to-bring-derivative-actions/> [<https://perma.cc/ESM7-QAD6>].

<sup>211</sup> Michael Kors Holdings Ltd., Registration Statement (Form F-3) 8 (Feb. 19, 2013).

<sup>212</sup> Herbalife Ltd., Annual Report (Form 10-K) 41–42 (Feb. 19, 2013).

<sup>213</sup> *See, e.g., Winn v. Schafer*, 499 F. Supp. 2d 390, 392 (S.D.N.Y. 2007) (dismissing a derivative suit brought by a shareholder of a reinsurance company incorporated in the Cayman Islands).

<sup>214</sup> Browning Jeffries, *Shareholder Access to Corporate Books and Records: The Abrogation Debate*, 59 DRAKE L. REV. 1087, 1088 (2011).

rights bestowed on individual shareholders,<sup>215</sup> is deemed critical because of the basic agency problem that arises in large corporations: managers who run the corporations have better information than dispersed shareholders who technically own the corporations.<sup>216</sup> Under Delaware law, shareholder requests for inspections are granted when there is a “proper purpose.”<sup>217</sup> Delaware courts have zealously guarded this right.<sup>218</sup> Thus, for instance, in a recent case, the Delaware Court of Chancery held that a proper purpose for inspection may include “possible derivative litigation” or even seeking “an audience with the board to discuss reforms or, failing in that, they may prepare a stockholder resolution for the next annual meeting, or mount a proxy fight to elect new directors.”<sup>219</sup>

Books and records inspections are uniformly forbidden under the laws of offshore corporate law havens. An SEC disclosure of a multinational solar power producer incorporated in the Cayman Islands best captures the state of Cayman Islands law:

Shareholders of Cayman Islands exempted companies such as ourselves have no general rights under Cayman Islands law to inspect corporate records and accounts or to obtain copies of lists of shareholders of these companies . . . . This may make it more difficult for you to obtain the information needed to establish any facts necessary for a shareholder motion or to solicit proxies from other shareholders in connection with a proxy contest.<sup>220</sup>

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<sup>215</sup> See Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 72 N.Y.U. L. REV. 1040, 1042 & n.6 (2002).

<sup>216</sup> Books and records inspections can thus aid potential investigations for corporate wrongdoing, help mount a proxy fight, or assist in preparing a stockholder resolution. See Samuel L. Moultrie & Andrea Schoch Brooks, *Delaware Insider: Defining a Proper Purpose for Books and Records Actions in Delaware*, 2015 BUS. L. TODAY 1 (2015); F. Hodge O’Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 139 (1987).

<sup>217</sup> See, e.g., *Se. Pa. Transp. Auth. v. Abbvie Inc.*, 2015 WL 1753033, at \*11 (Del. Ch. Apr. 15, 2015).

<sup>218</sup> Thus, according to a recent Delaware Chancery Court opinion, “[i]t is well established that investigation of potential corporate wrongdoing is a proper purpose for a Section 220 books and records inspection.” *Id.*

<sup>219</sup> *Graulich v. Dell Inc.*, 2011 WL 1843813, at \*5 (Del. Ch. May 16, 2011).

<sup>220</sup> *Sky Solar Holdings, Ltd.*, Annual Report (Form 20-F) 34 (May 2, 2016); see also *Vantage Drilling Co.*, Registration of Certain Classes of Securities (Form 8-A/A) 7 (Jan. 14, 2010) (“Holders of the Ordinary Shares will have no general right under Cayman Islands law to inspect or obtain copies of the Company’s list of shareholders or its corporate records (other than the Amended and Restated Memorandum and Articles of Association).”).

The British Virgin Islands and Bermuda similarly allow corporations to forbid their shareholders to inspect books and records, either outright or through various procedural hurdles.<sup>221</sup>

### 3. *Fiduciary Duties of Directors and Officers*

Among the most canonical mandatory rules in American corporate law include the fiduciary duty owed by directors and officers (agents) to shareholders (principal). These duties are unsurprising, given that dispersed shareholders need a mechanism to ensure that people who operate their companies do not abuse their powers. Fiduciary duties can be largely divided into two duties: the duty of care and the duty of loyalty. The duty of care imposes liability if directors exercise business judgment without first being adequately informed, while the duty of loyalty prohibits directors from improperly benefiting through conflicts of interest.<sup>222</sup> Despite loosening monetary exposures on duty of care personal liability of directors,<sup>223</sup> Delaware mandates this duty upon officers—like chief executive officers—who operate the corporation on a daily basis. Furthermore, a Delaware corporation cannot waive “any breach of the director’s duty of loyalty to the corporation or its stockholders” for “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law” or “any transaction from which the director derived an improper personal benefit.”<sup>224</sup>

By incorporating in one of the leading offshore jurisdictions, domestic corporations can opt out of fiduciary duties that have long been considered axiomatic features of American corporate law. Here, we see diverging approaches among offshore jurisdictions. Whereas the Cayman Islands and

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<sup>221</sup> Joshua Mangeot, *British Virgin Islands: Shareholder Activism – Considerations for BVI Companies*, MONDAQ (July 31, 2017), <http://www.mondaq.com/x/615488/Shareholders/Shareholder+Activism+Considerations+For+BVI+Companies> [<https://perma.cc/98XT-DUJA>] (“[S]ubject to the company’s M&As, the directors [of a BVI corporation] may refuse or limit access if they are satisfied that inspection would be contrary to the company’s interests. While it is possible to apply to court to seek access in such cases, this is a relatively costly process and the court may be reluctant to make an order permitting inspection provided the directors can evidence bona fide commercial justifications for restricting access.”); Everest Re Grp., Ltd., Annual Report (Form 10-K) 36 (2017) (“Bermuda law does not provide a general right for shareholders to inspect or obtain copies of any other corporate records.”).

<sup>222</sup> Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1084–85 (2017).

<sup>223</sup> See Randy J. Holland, *Delaware Directors’ Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 696 (2009) (explaining that under Delaware law, firms can contractually “exculpate their directors from monetary damage liability for a breach of the duty of care”); see also DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2019) (specifying that corporations incorporated in Delaware may include a provision “eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages” for duty of care violations).

<sup>224</sup> DEL. CODE ANN. tit. 8, § 102(b)(7).

the British Virgin Islands appear to have adopted similar mandatory rules as Delaware,<sup>225</sup> Bermuda stands unique in allowing corporations to waive *all* fiduciary duty claims against directors *and* officers except in events of fraud or dishonesty.<sup>226</sup> Indeed, as an SEC disclosure form of a biopharmaceutical company incorporated in Bermuda makes clear: “as permitted by Bermuda law, each shareholder has waived any claim or right of action against our directors or officers for any action taken by directors or officers in the performance of their duties, except for actions involving fraud or dishonesty.”<sup>227</sup>

These waivers would not be enforceable under Delaware law. While Delaware has recently enacted a revision to its statute that has narrowed the scope of its fiduciary duty laws,<sup>228</sup> the duty of loyalty still affords several ways shareholders can bring fiduciary suits to hold officers and directors accountable. As explained in the famous Delaware Supreme Court decision *In re Walt Disney Co. Derivative Litigation*, these suits are available

where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.<sup>229</sup>

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Taken together, restrictions on shareholder derivative suits, prohibitions on shareholders’ books and records inspections, and loosened fiduciary duties may be an indication that managers are attempting to draw

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<sup>225</sup> See APPLEBY, GUIDE TO DIRECTORS’ DUTIES IN THE CAYMAN ISLANDS 5–6 (2015) [hereinafter APPLEBY, GUIDE]; WALKERS, BRITISH VIRGIN ISLANDS – DUTIES AND LIABILITIES OF DIRECTORS OF BVI COMPANIES 3–4 (2016).

<sup>226</sup> Bermuda Companies Act of 1981, § 98(1)–(2) (Berm.) (“[A] company may in its [bylaws] or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempt such officer or person from, or indemnify him in respect of, any loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof . . . Any provision . . . exempting such officer or person from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company shall be void . . .”).

<sup>227</sup> Axovant Scis. Ltd., Quarterly Report (Form 10-Q) 44 (June 30, 2015).

<sup>228</sup> Rauterberg & Talley, *supra* note 222, at 1077–78 (describing Delaware corporate law allowing the waiver of rules that forbid “corporate fiduciaries from appropriating new business prospects for themselves without first offering them to the company”).

<sup>229</sup> 906 A.2d 27, 67 (Del. 2006).



rent at the expense of shareholders. This is the traditional race for the bottom story. But tax rules are not inconsistent with a race for the top story. A benevolent explanation may be that the lack of mandatory rules benefits both managers and shareholders by deterring frivolous lawsuits. After all, modern shareholders of publicly traded corporations include sophisticated institutional investors like BlackRock or The Vanguard Group<sup>230</sup> that presumably would choose not to invest in firms incorporated in foreign nations if they could not sufficiently protect their self-interest. The next Section fleshes out the normative dimensions of this new descriptive reality.

*B. Implications: Reassessing the Market for Corporate Law*

The foregoing analysis yields several new insights that make the international market for corporate law an area for future research.<sup>231</sup> My goal in this Section is to resist the temptation to draw sweeping normative conclusions and instead to offer some preliminary assessments that may prescribe a research agenda for the next several decades. Thus, I will highlight areas where the globalizing market for corporate law forces us to rethink prevailing assumptions and methods.

To begin, the emergence of an international market for corporate law may improve the robustness of competition between jurisdictions to supply

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<sup>230</sup> See DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* 84 (2018); Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227, 241–42 (2018) (“[T]he nature of corporate investment has been transformed by the rise of institutional investors. Retirement savings have shifted to the equity markets, and from direct investment to investment intermediated by institutional investors. The great majority of U.S. corporations now have most of their outstanding shares held by institutional investors.” (citations omitted)); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991) (documenting and analyzing the rise of institutional ownership of publicly traded American corporations).

<sup>231</sup> One area ripe for future research is to model the type of domestic companies that are incorporating in foreign nations. Following Professor Barzuza’s important work documenting the rise of Nevada as a “liability-free” jurisdiction, scholars have produced empirical evidence that Nevada principally attracts small firms. In an important study, Professors Ofer Eldar and Lorenzo Magnolfi found that Delaware attracts large firms with sizeable institutional investor holdings compared to Nevada, lending support to the idea most firms “dislike protectionist laws, such as anti-takeover statutes and liability protections for officers, and that Nevada’s rise is due to the preferences of small firms.” Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 11 AM. ECON. J.: MICROECONOMICS (forthcoming 2020) (manuscript at 1), <https://papers.ssrn.com/a=2685969> [<https://perma.cc/58WJ-JHBF>]. A similar line of empirical research is needed for understanding why domestic corporations are opting into the corporate law of foreign nations despite Delaware’s longstanding dominance. Another topic that may be worth investigating is whether and to what extent legal representation influences incorporation decisions of firms choosing between popular offshore jurisdictions. In the domestic context, the choice of legal representation has been found to be an important variable in incorporation decisions. See Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 662 (2018) (finding that the identity of a company’s law firm, then the legal needs of a company, may drive jurisdictional choice).

corporate law. Recall an important work by Professors Kahan and Kamar that calls the very notion that American states compete for corporate charters a “myth.”<sup>232</sup> According to their account, no state besides Delaware is actively attempting to attract incorporations of public companies.<sup>233</sup> Their study sent shockwaves through the legal academy at the time of its publication because competition between suppliers of corporate law is a precondition to drawing some of the most important normative conclusions in corporate law.<sup>234</sup> This study reorients this literature. Even if we were to believe that the interstate competition is a “myth,”<sup>235</sup> there are still jurisdictions—namely a handful of entrepreneurial foreign nations—that are actively competing to gain a share of Delaware’s lucrative corporate law empire.

At least in theory, the additional players in the corporate charter race promise welfare gains by enabling optimal private choice. As in any market, consumers (here, corporations) gain access to a higher number of sellers (here, jurisdictions) and promise efficient, welfare-enhancing transactions.<sup>236</sup> This is particularly true if one adopts a nexus of contracts approach to corporate law—viewing corporate law as standard form default rules that happen to be produced by sovereign entities.<sup>237</sup> More “laboratories” producing corporate law will, in some cases, also lead to the diffusion of beneficial corporate law innovations across jurisdictions.<sup>238</sup>

The emerging international corporate law market is thus reason for celebration to those committed to the “race for the top” view.<sup>239</sup> A few decades ago, Judge Winter of the Second Circuit lamented that the corporate charter competition may be more of a “leisurely walk” than a “race” because Delaware “is the only state devoted exclusively to maximizing franchise taxes and may need only to offer a code marginally more efficient than other

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<sup>232</sup> Kahan & Kamar, *Myth*, *supra* note 28, at 679.

<sup>233</sup> *Id.* at 684.

<sup>234</sup> *Id.* at 681.

<sup>235</sup> *Id.* at 679.

<sup>236</sup> A simple analogy may be useful to illustrate this point. Imagine that I am an avid consumer of fast food. Instead of being limited to purchasing the Big Mac at McDonald’s, if I can choose the Junior Bacon Cheeseburger at Wendy’s or the Whopper at Burger King, my happiness (or in economics terminology, welfare) is enhanced. This is particularly true when competition encourages suppliers to offer better (or innovative) products.

<sup>237</sup> See Easterbrook & Fischel, *The Corporate Contract*, *supra* note 38, at 1426.

<sup>238</sup> The diffusion of LLCs across the United States that started with Wyoming is one example. William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 857–59 (1995).

<sup>239</sup> This includes Judge Easterbrook and Professor Fischel, who assessed in their influential book that fifty states are “perhaps too few to offer the complete menu of terms needed for the thousands of different corporate ventures.” EASTERBROOK & FISCHEL, *supra* note 8, at 216.

states.”<sup>240</sup> It is for this reason Judge Winter concluded that what may be needed to improve American corporate law is “a second Delaware that pursues franchise taxes and nothing else.”<sup>241</sup> Instead of the second state that Judge Winter may have wished for, it appears that there are other *nations* emerging as Delaware’s competition.

The fact that lawmakers in small foreign nations are easily “captured” by the private sector, in certain respects, merely indicates lowered transactional costs of producing desirable “off-the-rack” templates of corporate law.<sup>242</sup> Thus, unlike domestic jurisdictions, where the large and dispersed nature of constituents make it prohibitively expensive to produce certain types of laws, “captured” lawmakers can swiftly enact legislative reforms that reflect private sector preferences almost in real time.<sup>243</sup>

Indeed, one benevolent explanation for the emergence of offshore corporate law havens is that they cater to corporations that want to hedge against frivolous lawsuits. There is some evidence of this practice. For instance, the rules in the Cayman Islands considerably limiting the possibility of shareholder derivative suits have been described as aiming to protect corporations from “vexatious or unfounded litigation.”<sup>244</sup> Moreover, the Cayman Islands and the British Virgin Islands, unlike Bermuda, have adopted fiduciary duty rules similar to Delaware’s instead of enacting rules that eviscerate fiduciary duties altogether.<sup>245</sup> This suggests that even pure private ordering does not necessarily result in the kind of managerial-interests-gone-wild scenario predicted by early “race for the bottom” theorists.<sup>246</sup>

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<sup>240</sup> Ralph K. Winter, *The “Race for the Top” Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1529 (1989).

<sup>241</sup> *Id.*

<sup>242</sup> See William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993).

<sup>243</sup> As Professor Henry Hansmann explains, publicly traded firms rely on legislatures to adjust the parties’ contract over time as circumstances demand. See Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 8–10 (2006).

<sup>244</sup> *Renova Res. Private Equity Ltd. v. Gilbertson* [2009] CILR 268, 283.

<sup>245</sup> See APPLEBY, GUIDE, *supra* note 225, at 9 (stating that Cayman law allows for indemnification of both a company’s directors and officers against personal liability stemming from actions that involve the company’s business while still maintaining the “irreducible core” of a fiduciary’s obligations).

<sup>246</sup> See Cary, *supra* note 44, at 705 (“The absurdity of this race for the bottom, with Delaware in the lead—tolerated and indeed fostered by corporate counsel—should arrest the conscience of the American bar when its current reputation is in low estate.” (footnote omitted)). Indeed, not all restrictions on traditional shareholder rights can necessarily be explained away as a race for the bottom phenomenon. For instance, there is early empirical evidence that lax governance rules in Nevada (a jurisdiction that is said to have adopted a “bottom feeder” strategy to attract corporations) actually increases—rather than decreases—shareholder value. See Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value?*

It does not seem like shareholders are actively hostile to lax rules offered in foreign nations, either.<sup>247</sup> In 2011, for instance, New York fashion house Michael Kors went public on the New York Stock Exchange choosing British Virgin Islands corporate law and raised nearly four billion dollars.<sup>248</sup> Opting out of American courts also means avoiding certain American discovery procedures that can be unduly expensive.<sup>249</sup> This account seems to be supported in part by the arbitration-like dispute resolution mechanism offered by specialized business courts offshore.<sup>250</sup>

But if one takes a broader conception of corporate governance rules—a view that may accommodate concerns that corporate law may impact third parties or society at large—the emergence of additional players in the corporate charter race may have a range of consequences that may be undesirable from a societal standpoint.<sup>251</sup> In the international context, there are several unique reasons why we cannot take an expanded selection of corporate law as necessarily promising socially desirable outcomes. First is

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*Evidence from Nevada*, 61 J.L. & ECON. 555, 597 (2018) (presenting empirical evidence that Nevada corporate law does not harm shareholder value—and may enhance the value—particularly for small firms with low institutional shareholding and high insider ownership).

<sup>247</sup> It bears noting that institutional owners hold a significant percentage of shares for many of these firms. As of March 7, 2020, for instance, institutional owners held over 95% of Helen of Troy (a consumer products company headquartered in El Paso, Texas, and incorporated in Bermuda), with BlackRock, FMR, Vanguard, and Capital Research Global Investors holding the highest number of shares. *Helen of Troy Limited Common Stock (HELE) Institutional Holdings*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/hele/institutional-holdings> [<https://perma.cc/6V37-WQYU>].

<sup>248</sup> See Steven Davidoff Solomon, *The Benefits of Incorporating Abroad in an Age of Globalization*, N.Y. TIMES (Dec. 20, 2011, 3:53 PM), <https://dealbook.nytimes.com/2011/12/20/the-benefits-of-incorporating-abroad-in-an-age-of-globalization/> [<https://perma.cc/6754-GZGX>].

<sup>249</sup> See Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law”*, 63 EMORY L.J. 1383, 1482 (2014) (observing that discovery in American shareholder lawsuits is “not merely expensive; it subjects the actions of the directors and officers, as well as the behavior of all company employees, to a level of scrutiny that is virtually nonexistent in any other country”); see also Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1339 (2019) (“The perception that excessive document discovery [in the United States] commonly leads to expensive and lengthy litigation processes is widespread . . .”).

<sup>250</sup> These features are not unique to offshore business law courts. Professor Pam Bookman, for instance, observed that emerging international commercial courts around the world are becoming more “arbitrationalized,” borrowing some of arbitration’s most attractive features, including expert adjudicators and confidentiality. See Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. (forthcoming 2020).

<sup>251</sup> Of course, not everyone will agree that corporate law creates externalities. See, e.g., Easterbrook & Fischel, *The Corporate Contract*, *supra* note 38, at 1429–30 (“The corporation’s choice of governance mechanisms does not create substantial third-party effects—that is, does not injure persons who are not voluntary participants in the venture.”); see also Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 131 (2016) (observing the “divergence of opinion as to whether the corporation ought to be viewed as purely private or, alternatively, as a social institution”).

the ubiquity of tax. While incorporation decisions cannot purely be explained as a problem of tax arbitrage,<sup>252</sup> current tax laws *do* allow corporations to reduce tax liability by incorporating outside of the United States.<sup>253</sup> Incorporation decisions in the pure domestic context generally do not implicate a substantial altering of effective tax liability because actual territorial operations—as opposed to the place of incorporation—determine state income taxes.<sup>254</sup> Consider, for instance, an automobile manufacturer headquartered in Michigan. The company’s decision to incorporate in Nevada or Delaware will have no bearing on state income taxes, for Michigan, like other states, imposes taxes based on whether sufficient activity occurs within its borders. It will also not affect federal taxes because firms operating within the United States must pay federal taxes. The company deciding to incorporate in the Cayman Islands, on the other hand, will have dramatic federal tax implications.<sup>255</sup> This is because “under the Internal Revenue Code (IRC) corporate tax-residence is determined based on the place of incorporation.”<sup>256</sup> For instance, Houston-headquartered Cooper Industries, Inc. moved its place of incorporation from Ohio to Bermuda, touting that it would “reduce its effective tax rate from about 35% to 18–23%.”<sup>257</sup> To the extent that firms can continue to alter their effective tax liability by incorporating in foreign jurisdictions, U.S. taxpayers are the big third parties negatively affected by incorporation decisions of private corporations.

To be sure, overall welfare effects of transnational corporate tax arbitrage can be disputed. This is because corporations, as entities of legal fiction, do not actually pay taxes—any tax on a corporate entity is passed through to its shareholders, employees, customers, and suppliers.<sup>258</sup> The

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<sup>252</sup> See *supra* Section II.A; see also Darren Rosenblum, *The Futility of Walls: How Traveling Corporations Threaten State Sovereignty*, 93 TUL. L. REV. 645, 645 (2019) (“Inversions—mergers in which one firm merges with another abroad to avoid taxes in its home country—have spread as globalization has reduced many of the transactional costs associated with relocating.”).

<sup>253</sup> See Marian, *supra* note 61, at 2–3.

<sup>254</sup> Moon, *Tax Havens*, *supra* note 108, at 1093–94.

<sup>255</sup> See *id.*

<sup>256</sup> Marian, *supra* note 61, at 3.

<sup>257</sup> Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 827 (2015) (citing Cooper Indus., Ltd., Registration Statement (Form S-4) 13–14 (June 11, 2001)).

<sup>258</sup> See Kimberly A. Clausing, *The Future of the Corporate Tax*, 66 TAX L. REV. 419, 419–23 (2013); Michael P. Donohoe et al., *Who Benefits from the Tax Advantages of Organizational Form Choice?*, 68 NAT’L TAX J. 975, 976 (2015) (investigating “whether and to what extent four parties—customers, suppliers, employees, and owners—benefit from the relative tax advantages of organizational form choice”).

incidence of the corporate tax has been extensively studied by economists, who are inconclusive about where it falls.<sup>259</sup> But we do know with a reasonable degree of certainty that it does not fall solely on shareholders.<sup>260</sup> Thus, lower corporate taxes from a corporation headquartered in the United States reincorporating abroad might in fact benefit the corporation's employees and customers by reducing how much of that tax they bear in lower salaries and higher prices.<sup>261</sup> I am skeptical, though, whether this form of tax savings can legitimately replace the function of tax revenues that are the lifeblood of democratic governments.<sup>262</sup>

Second, foreign jurisdictions may enable domestic corporations to opt out of desirable mandatory rules that benefit society in general. The fact that firms can opt out of mandatory rules using "captured" foreign lawmakers should warrant further scholarly scrutiny, for "the mandatory nature of a law is an indicator, and is perhaps the best evidence, that the law addresses externalities in the private sector."<sup>263</sup> In a classic piece widely considered to be the most serious challenge to the "race for the top" account, Professor Lucian Bebchuk argued that even if shareholders' interests perfectly align with those of managers,<sup>264</sup> we cannot assume that state charter competition leads to socially desirable results.<sup>265</sup> This is because of the presence of externalities, or impact on third parties. Therefore, the rules that maximize

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<sup>259</sup> See Arnold C. Harberger, *Corporate Tax Incidence: Reflections on What Is Known, Unknown, and Unknowable*, in *FUNDAMENTAL TAX REFORM: ISSUES, CHOICES, AND IMPLICATIONS* 283, 283 (John W. Diamond & George R. Zodrow eds., 2008).

<sup>260</sup> See Alan J. Auerbach, *Who Bears the Corporate Tax? A Review of What We Know*, 20 *TAX POL'Y & ECON.* 1, 1–4 (2006).

<sup>261</sup> I am grateful to Professor Romano for her insights on this point.

<sup>262</sup> See John Christensen & Richard Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the Bottom Line*, 47 *DEVELOPMENT* 37 (2004).

<sup>263</sup> Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 *VA. J. INT'L L.* 1, 6 (2001) (emphasis omitted); see also William W. Bratton & Joseph A. McCathery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *GEO. L.J.* 201, 205, 231–32 (1997) (critiquing the idea that jurisdictional competition and the "devolution of regulatory authority to the state and local level leads to competitive efficiency").

<sup>264</sup> Of course, it is important to note that the rise of institutional investors does not necessarily solve the age-old agency problem endemic in corporate law. Professors Lucian Bebchuk and Scott Hirst explain that index funds like BlackRock—which own an increasingly large proportion of American publicly traded companies—tend to underinvest in corporate stewardship. See Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 *COLUM. L. REV.* 2029, 2030 (2019) ("Our agency-costs analysis shows that index fund managers have strong incentives to (i) underinvest in stewardship and (ii) defer excessively to the preferences and positions of corporate managers.").

<sup>265</sup> Bebchuk, *Desirable Limits*, *supra* note 5, at 1485.

shareholder value may not be the most socially desirable.<sup>266</sup> Corporate law issues that have been identified to involve significant externalities range from the regulation of takeover bids and proxy contests, the protection of creditors, the regulation of corporate disclosure, and the protection of constituencies other than providers of capital.<sup>267</sup>

While legal regime shopping enabled by entrepreneurial foreign nations can strip away undesirable, and perhaps parochial, restraints on private contracting, they can also undermine mandatory domestic rules designed to effectuate important social policy. According to Professor Jeffrey Gordon, for instance, “remedial devices such as the shareholder derivative suit could be regarded as regulatory efforts to force the corporation to internalize the cost of law compliance.”<sup>268</sup> Less tangibly but no less importantly, mandatory rules may also shape corporate culture.<sup>269</sup> To the extent that these mandatory rules are designed in part to remedy negative externalities, welfare gains from international jurisdictional competition cannot be taken for granted.

To be clear, I *do not* contend that mandatory corporate governance rules imposed by Delaware (and other American states) serve to protect the general public in the same manner as public laws that mandate minimum levels of drinking water quality or prohibit the sale of certain hallucinogenic drugs. In corporate law, rules are designed principally to govern the relationship between shareholders and managers.<sup>270</sup> But they necessarily impact how the people who run corporations (managers) deal with other

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<sup>266</sup> *Id.*; see also Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 KAN. L. REV. 541, 544 (1995) (theorizing the possibility of “market failure in the supply of corporate charters”).

<sup>267</sup> Bebchuk, *Desirable Limits*, *supra* note 5, at 1485–94.

<sup>268</sup> Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1551–52 (1989). Other scholars argue that mandatory rules in corporate law serve to facilitate coordination problems that can arise between relevant parties. Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1459 (1989) (“[A] mandatory term may facilitate the coordination of the multiple contracts that constitute the corporation.”).

<sup>269</sup> Thus, for instance, Professor Bernard Black observes that “[l]egal rules, such as the duty of loyalty owed by managers to shareholders, can affect corporate norms.” Black, *supra* note 160, at 573; see also Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582, 590 (1984) (“The function of corporate law . . . is not to forcibly redirect evil human nature onto the path of good, but to reinforce and give greater precision to the general inclination to do right . . . .”); Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 777 (2007) (drawing on social psychology literature showing that the “more often someone makes a commitment, the more likely she is to engage in corresponding behavior”).

<sup>270</sup> See Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 843 (1993).

stakeholders, which could have vast societal consequences.<sup>271</sup> For instance, a stricter duty to monitor the corporation imposed on directors and officers at least in theory could help combat longstanding cultures of sexual harassment that appear to be endemic in all too many corporations today.<sup>272</sup>

This has important policy implications. If international competition chips away at desirable mandatory rules that may not be feasible in the pure domestic setting, it requires a renewed discussion as to the proper role of the federal government in American corporate law. This is an area of intense disagreement among leading scholars in the field, generally split between the “race for the top” and “race for the bottom” schools.<sup>273</sup> Whereas this debate has been thoroughly hashed out in the interstate context, there are simply too many unanswered questions in the international context for legal scholars to sit on the sidelines and celebrate every time mandatory rules are stripped away in the name of efficiency and private choice.

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<sup>271</sup> For an excellent discussion of Delaware’s jurisprudence on board oversight, see Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2016 (2019) (“Shareholders cannot be counted on to police corporate illegality, and oversight failures may rarely rise to the level of conscious disregard. The fiduciary duty of good faith is neither irrelevant nor toothless, however—it embeds a safety valve for public policy in the obligations of fiduciaries that cannot be eliminated.”). Examples abound documenting the socially undesirable outcomes produced by managers who are presumably accountable to shareholders. See Danielle K. Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. (forthcoming 2020) (reviewing NICK DRNASO, SABRINA (2018)) (“Right now, it is cheap and easy to wreak havoc online and for that havoc to go viral. Platforms act rationally—some might say responsibly to their shareholders—when they tolerate abuse that earns them advertising revenue and costs them nothing in legal liability.”); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 166–67 (2019) (arguing that mandatory disclosure to investors is an important tool of environmental governance); Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1582 (2019) (“One of the theoretical reasons why monitoring may be necessary beyond strong ex post deterrence is that people operate in a boundedly rational manner that makes them underestimate the likelihood of a bad event happening to them (and to the business they run), such as an oil spill or a bank failure.”).

<sup>272</sup> For a background on the link between sexual harassment and corporate law, see Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018).

<sup>273</sup> Compare Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1821 (2011) (arguing that Dodd-Frank and SOX “erode[] the system of competitive federalism that is the unique genius of American corporate law by displacing state regulation with federal law”), Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 731 (2013) (criticizing the “congressional usurpation of Delaware’s traditional role in regulating corporate governance”), and Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529 (2005) (“The best path to ameliorating the misguided congressional promulgation of substantive governance mandates through SOX is to conform them to the states’ enabling approach to corporate law.”), with Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1793 (2006) (“[T]he recurring need for federal officials to rectify state law failures in order to provide investors with adequate protection indicates that federal lawmaking should be proactive rather than reactive.”).



Perhaps most importantly, it is unclear if mandatory rules in Delaware, and other American states, are byproducts of federal government oversight or simply reflect the wishes of shareholders and managers.<sup>274</sup> In the pure domestic context, the federal government at least theoretically disciplines Delaware from enacting laws that are undesirable from society's standpoint—without actually federalizing corporate law. This is because the federal government can usurp state power by federalizing corporate law.<sup>275</sup> Foreign nations do not face such constraints because they are not subject to federal oversight. Thus, foreign nations constitute a unique breed of lawmakers that may need to be analyzed differently from other states like Nevada. The international market *at least in theory* may be used by domestic corporations to bypass mandatory rules found in state corporate law that reflect, in part, latent federal oversight.<sup>276</sup>

While robust empirical evidence should be a precondition to any major reshaping of the federal government's role in corporate law,<sup>277</sup> federal intervention may be warranted if international competition is found to erode state law-based mandatory rules designed to force private actors to internalize negative externalities.<sup>278</sup> To the extent that foreign nations allow

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<sup>274</sup> An alternative (and persuasive) explanation may be that mandatory rules reflect the wishes of powerful local interest groups—namely the Delaware corporate lawyers that benefit from bringing and defending shareholder lawsuits brought pursuant to these mandatory rules. See Macey & Miller, *supra* note 43, at 472. Because Delaware faces negligible competition from other states, local lawyers can take a sizable financial bite out of Delaware's corporate law regime, even as proponents of competition argue Delaware maintains "the best" corporate governance rules in the United States. See Kahan & Kamar, *Myth*, *supra* note 28, at 742.

<sup>275</sup> See Roe, *Delaware's Competition*, *supra* note 5; see also Bebchuk, *Desirable Limits*, *supra* note 5, at 1454 (assessing that Delaware may avoid certain risks in legislating corporate law because "adopting such rules might trigger federal intervention"); Chris Brummer, *Corporate Law Preemption in an Age of Global Capital Markets*, 81 S. CAL. L. REV. 1067, 1089 (2008) ("Delaware provides law in the shadow of the threat of federal intervention, and from this vantage point preemption serves as the primary discipline and motivation for efficient laws. Yet even here, the federal government cannot and does not monitor all of Delaware's lawmaking." (footnote omitted)).

<sup>276</sup> See Roe, *Delaware and Washington*, *supra* note 54, at 9–10 (attributing at least some parts of Delaware corporate law as byproducts of latent federal government oversight).

<sup>277</sup> After all, in some cases, institutional shareholders have been shown to play a significant role in demanding governance frameworks that may be socially desirable. Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. (forthcoming 2020).

<sup>278</sup> It is worth noting that there may be too little incentive for foreign nations to produce rules with a broader societal interest in mind. Cf. Bebchuk, *Desirable Limits*, *supra* note 5, at 1485 ("Note the difference in this regard between federal and state law. If a rule is designed at the federal level, it is possible that officials shaping this rule will take into account the interests of parties other than shareholders. But if the rule is designed by the states, then the competition among them will lead state law officials to exclude consideration of such interests."). To be clear, I am not suggesting that the federal government is immune to interest groups or has been particularly good at making sound corporate governance rules.

corporations to opt out of “immutable” rules in place under state law, these may be the exact types of areas where leaving rules in the hands of “captured” foreign lawmakers risks a lot more than what proponents of jurisdictional competition may initially envision.

#### CONCLUSION

A new revolution is quietly emerging in corporate law. In recent decades, a handful of small foreign nations have built sophisticated legal infrastructures to commercialize their lawmaking authority into a staple revenue stream. Aided in part by an elite cadre of foreign lawyers who stand to benefit from the development of offshore corporate law havens, entrepreneurial foreign nations in offshore islands are emerging suppliers of “cutting-edge” corporate law. These jurisdictions, unlike New York or California, offer some of the most unadulterated forms of corporate governance rules reflecting private sector preferences, setting the stage for a globalizing market for corporate law.

The emergence of an international corporate charter market has been largely undetected by domestic corporate law scholars who have for decades presupposed an interstate market for corporate law. In addition to complicating and refining the race metaphor, this Article highlights the need to scrutinize whether unadulterated private ordering built around efficiency goals is the only game in town. Until we are comfortable leaving corporate governance rules to “captured” lawmakers in small foreign nations, policy prescription presupposing interstate corporate charter competition ought to be interrogated from the ground up.

