

## Leveraging Corporate Law: A Broader Account of Delaware's Competition

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**LEVERAGING CORPORATE LAW: A BROADER ACCOUNT OF  
DELAWARE’S COMPETITION**

CHRISTOPHER M. BRUNER\*

I. INTRODUCTION.....72

II. DELAWARE’S CORPORATE COMPETITION .....73

A. Prevailing Accounts .....73

B. International Competition in Corporate Law .....76

III. DELAWARE’S BROADER COMPETITIVE LANDSCAPE .....78

A. The Economic Development Imperative.....79

B. Leveraging Corporate Law .....81

1. Credit Cards .....81

2. Captive Insurance.....87

IV. CONCLUSION .....93

I. INTRODUCTION

Delaware inhabits a competitive landscape that includes, but is not limited to, corporate law. Like other small jurisdictions active in cross-border corporate and financial services, Delaware has become widely associated with a particular area of specialization, providing de facto U.S. corporate law for large, publicly traded companies. However, the economic development imperatives prompting this have also led Delaware to explore opportunities in related though distinct fields that build upon this platform, effectively leveraging their corporate law advantage to expand and diversify the state’s revenue streams. This Article assesses Delaware’s competitive position amidst this broader landscape.

Part II provides an overview of prevailing accounts of U.S. corporate charter competition, which generally conclude that Delaware faces quite limited competition from other states.<sup>1</sup> When the frame of reference is limited to domestic corporate charter competition, only federal preemption would appear to pose a substantial threat to Delaware’s dominance. In response to these prevailing accounts, this Part suggests that such a narrow view of the competitive landscape misses important dynamics that could

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1. See *infra* Part II.

affect Delaware's position moving forward. Minimally, these include the emergence of competitors abroad that challenge Delaware's corporate dominance on multiple fronts—both internationally and with respect to chartering of large companies based in the United States.

Part III pushes the analysis further by assessing Delaware's broader competitive landscape beyond corporate law.<sup>2</sup> This Part reframes the matter by reference to underlying economic development imperatives, which are particularly pressing for smaller, resource-constrained jurisdictions like Delaware. It then examines Delaware's efforts to leverage corporate law—that is, to build on Delaware's corporate law advantage by expanding into related though distinct fields that build upon that preexisting platform, including aspects of financial services and insurance where chartering and innovative entity structures loom large.

Part IV concludes, observing that this broader framing—including cross-border and extra-corporate dynamics—reveals a more complex competitive landscape than prevailing accounts can accommodate.<sup>3</sup> Overall, Delaware faces real competition from a range of domestic and foreign jurisdictions that have grappled with similar economic development challenges through similar strategies, producing global competitive dynamics that may substantially impact Delaware's long-term prospects.

## II. DELAWARE'S CORPORATE COMPETITION

Prevailing accounts of U.S. corporate charter competition generally describe Delaware's position as essentially unassailable, save only the (remote) possibility of substantial federal preemption. This Part provides a brief overview of such accounts and assesses them amidst a broader competitive landscape—notably, the rise of foreign competitors challenging Delaware in both international and domestic contexts.

### *A. Prevailing Accounts*

As a constitutional matter, corporate law in the United States has traditionally been left to the states themselves.<sup>4</sup> Potential for domestic charter competition, then, arises from the internal affairs doctrine, a choice-of-law

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2. See *infra* Part III.

3. See *infra* Part IV.

4. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). While James Madison proposed to the Constitutional Convention that Congress be given broad incorporation powers, his proposal was not adopted. See WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 79 n.6 (5th ed. 2016); Christopher M. Bruner, *What is the Domain of Corporate Law?* 29–30 (Univ. of Ga. Sch. of L. Rsch. Paper Series No. 2019-04, 2019), <https://ssrn.com/abstract=3308611>.

rule under which a corporation's internal affairs are generally governed by the law of the state of incorporation, regardless of where the corporation is headquartered or predominately operates.<sup>5</sup> In the corporate law literature, these dynamics have long been assessed by reference to whether the resulting competition to attract incorporations is likely to result in a race to the bottom, with states eliminating beneficial regulation to lower compliance costs, or a race to the top, with states favoring regulation that efficiently balances the interests of various corporate constituencies.<sup>6</sup>

Over time, these conflicting positions have only ossified through their association with conflicting views on the law-and-economics-inspired "nexus of contracts" conception of the corporation. Proponents of this conception generally assume a high level of market efficiency and minimal potential for harmful externalities, in which light charter competition appears inherently efficient because it reflects market preferences.<sup>7</sup> Opponents of the nexus conception, meanwhile, reject those assumptions and correlatively argue that charter competition promotes socially harmful outcomes because it enables corporations to opt into laws that favor corporate insiders at the expense of outsiders who do not participate in incorporation decisions, and whose interests will accordingly be disregarded by states competing for corporate charters.<sup>8</sup>

Whatever the merits of these competing policy positions may be,<sup>9</sup> empirical studies have concluded that Delaware faces little meaningful competition among U.S. states when it comes to attracting incorporations

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5. See REST. (SECOND) OF CONFLICT OF LAWS §§ 302(2), 304 (1971). See also *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 107–31 (2009).

6. Compare William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (characterizing Delaware as "contributing to the deterioration of corporation standards") with Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (arguing that state charter competition "should tend toward optimality so far as the shareholder's relationship to the corporation is concerned").

7. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 35–39, 212–18 (1991).

8. See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 114–19 (2006).

9. In prior work, I tend toward the latter view, rejecting highly shareholder-centric approaches to corporate law on both positive and normative grounds. See generally CHRISTOPHER M. BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER* (2013); see also Beate Sjøfjell & Christopher M. Bruner, *Corporations and Sustainability*, in *THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY* 3 (Beate Sjøfjell & Christopher M. Bruner eds., 2019); Christopher M. Bruner & Beate Sjøfjell, *Corporate Law, Corporate Governance and the Pursuit of Sustainability*, in *THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY*, *supra*, at 713.

from companies based elsewhere.<sup>10</sup> At the interstate level, Delaware at most faces competitive pressure to maintain rules appealing to institutional investors in large public companies,<sup>11</sup> and “defensive” competition from other states that aim to keep locally headquartered companies incorporated there.<sup>12</sup> Beyond this, Delaware’s only real domestic competition for corporate charters would appear to be the federal government, insofar as the Commerce Clause gives Congress authority to federalize corporate law for companies operating in interstate commerce.<sup>13</sup> To date, Congress has exercised this authority only sporadically and in response to crises, substantially leaving the core of corporate governance in public companies to Delaware.<sup>14</sup> Over 1 million business entities “have made Delaware their legal home,”<sup>15</sup> and this includes “more than two thirds of the Fortune 500 and 80 percent of all firms that go public.”<sup>16</sup>

While the early days of U.S. charter competition in the late nineteenth and early twentieth centuries do bear the hallmarks of a regulatory race to the bottom—with New Jersey attracting incorporations from New York through adoption of a permissive corporate statute, and Delaware taking over when New Jersey later cracked down under then-Governor Woodrow Wilson<sup>17</sup>—Delaware now has a more favorable story to tell about its attractions as a

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10. See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 578 (2002); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1570-74 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 687 (2002).

11. See Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12 AM. ECON. J.: MICROECONOMICS 60, 81–82 (2020) (finding that “although Delaware has substantial market power, if it adopted laws that signal to the market that it does not view takeovers favorably, it would lose significant market share”).

12. See Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 214 (2006).

13. See U.S. CONST. art. I § 8, cl. 3 (giving Congress power to “regulate Commerce . . . among the several States”). For additional background, see Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003); Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1 (2009). Congress derives further incorporation powers from the Necessary and Proper clause. See U.S. CONST. art. I, § 8, cl. 18 (granting Congress power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–09, 422–25 (1819) (holding that the federal government could incorporate a national bank as “a convenient, a useful, and essential instrument in the prosecution of its fiscal operations”).

14. BRUNER, *supra* note 9, at 37–38, 276–77.

15. *Why Businesses Choose Delaware*, DELAWARE.GOV, <https://corplaw.delaware.gov/why-businesses-choose-delaware/> (last visited July 31, 2020).

16. *Annual Report Statistics*, DEL. DIV. OF CORPS. (2018), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2018-Annual-Report.pdf>.

17. See CHRISTOPHER M. BRUNER, *RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD* 179–81 (2016).

jurisdiction of incorporation for U.S. public companies. Today, Delaware fairly cites the benefits of “an enabling statute intended to permit corporations and their shareholders the maximum flexibility in ordering their affairs,” a legislature that “gives a high priority to corporation law matters,” expert judges producing considerable corporate case law, and a service-oriented and “user-friendly” Division of Corporations.<sup>18</sup> From a competitive perspective, a sparse statute and heavy reliance on case-by-case judicial application of abstract fiduciary concepts such as loyalty, care, and good faith generates a body of corporate law that is essentially “unique and not easily replicated” elsewhere.<sup>19</sup>

### *B. International Competition in Corporate Law*

The foregoing accounts generally suggest that Delaware now enjoys advantages in the market for corporate charters that would be difficult for domestic competitors to overcome to any meaningful degree. It is critical to observe, however, that these accounts focus solely on the domestic picture. These matters take on a different cast when one recalls that capital is increasingly mobile, fueling global regulatory competition in numerous areas of corporate and financial services.<sup>20</sup> This requires that some account be taken of where Delaware sits relative to competition from abroad.

As a threshold matter, Delaware officials themselves are well aware of these dynamics, and actively pursue international incorporations business. In a marketing piece aptly titled “Beyond the Borders,” the Delaware Division of Corporations argues that, for the same reasons they appeal to domestic entities, “Delaware’s business statutes are also attractive to foreign businesses seeking a home for their U.S. business ventures.”<sup>21</sup> At the same time, the attractions of Delaware business entities have not gone unnoticed internationally, and in this context Delaware faces considerable competition from a range of jurisdictions—notably various British Overseas Territories such as Bermuda, the British Virgin Islands, and the Cayman Islands, another

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18. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 2–10 (2007) (pamphlet printed and distributed by the Delaware Division of Corporations); see also WILLIAM W. BOYER & EDWARD C. RATLEDGE, DELAWARE POLITICS AND GOVERNMENT 18–20 (2009); BRUNER, *supra* note 17, at 181–83.

19. Omari Scott Simmons, *Delaware’s Global Threat*, 41 J. CORP. L. 217, 247 (2015). For discussion of the complex and idiosyncratic approaches to these concepts that have resulted, see generally Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131 (2006); Christopher M. Bruner, *Is the Corporate Director’s Duty of Care a “Fiduciary” Duty? Does It Matter?*, 48 WAKE FOREST L. REV. 1027 (2013).

20. See BRUNER, *supra* note 17, at 30–38.

21. *Beyond the Borders: Delaware’s Benefits for International Business*, DELAWARE.GOV, <https://corplaw.delaware.gov/delawares-benefits-international-business/> (last visited Aug. 2, 2020).

category of sub-sovereign jurisdictions active in global corporate and financial services.<sup>22</sup>

These market dynamics complicate the more benign account of Delaware's dominance cited above. Having itself pursued what (from the U.S. vantage point) amounts to "offshore" incorporations business, Delaware has exposed itself to accusations of purveying opaque shell companies susceptible to money laundering, tax evasion, and other criminal activities—a characterization fueled by Delaware's long-standing refusal to collect beneficial ownership information at the formation stage for corporations and limited liability companies,<sup>23</sup> although Delaware has recently voiced support for a federal-level regime and taken other steps to prevent abuses.<sup>24</sup>

At the same time, the assumption that other jurisdictions cannot effectively replicate the attractive features of Delaware's system for resolution of corporate disputes may be too simplistic. As Omari Simmons has observed, several jurisdictions around the world, "borrowing in part from Delaware's model, have invested in their corporate adjudicative capabilities to enhance their reputations for adjudicating business-related disputes."<sup>25</sup> He adds that, in terms of global competition, "the prospect of firms eschewing national courts for alternative dispute resolution is perhaps one of the greatest potential threats to Delaware's dominance," particularly to the degree that "international arbitration is favored among general counsels."<sup>26</sup> In this light, "international arbitration hubs, such as London and emerging venues like Singapore, are a potential long-term threat to Delaware's dominance."<sup>27</sup>

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22. The British Virgin Islands represents the main incorporations competitor internationally. See BRUNER, *supra* note 17, at 37, 234.

23. See BRUNER, *supra* note 17, at 184–87, 228–30; Joachim Bartels, *Discreet Delaware: Why Corporate Secrecy and Money Laundering Have Thrived in the US*, BUS. INFO. INDUS. ASS'N (Apr. 6, 2019), <https://www.biiia.com/discreet-delaware-why-corporate-secrecy-and-money-laundering-have-thrived-in-the-us>. For the little information required to form a Delaware corporation or limited liability company, see DEL. CODE ANN. tit. 8, § 102(a); DEL. CODE ANN. tit. 6, § 18-201(a) (neither requiring beneficial ownership information).

24. See, e.g., *Annual Report Statistics*, *supra* note 16 (citing efforts to "deny access to those who attempt to use Delaware entities for nefarious purposes," including adopting "Know Your Customer" regulations and advocating "federal action to make beneficial ownership information available to law enforcement"); *Facts and Myths*, DELAWARE.GOV, <https://corplaw.delaware.gov/facts-and-myths/> (last visited Aug. 2, 2020) (citing, in response to charges of providing "anonymity and secrecy," Delaware's ban on bearer shares). See also Delaware Coalition for Open Government, *Opinion: More Could Be Done in Delaware to Prevent Abuse of LLCs*, DEL. ONLINE, Mar. 7, 2019, <https://www.delawareonline.com/story/opinion/2019/03/07/delawares-corporate-law-needs-fresh-set-eyes-prevent-misuse/3093468002/>.

25. Simmons, *supra* note 19, at 244.

26. *Id.* at 255.

27. *Id.* at 256; see also William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403 (2020).

Hitting closer to home, foreign jurisdictions are even competing to provide charters—and accordingly, corporate law—for large U.S.-listed companies, Delaware’s bread and butter. Indeed, William Moon has found that “foreign nations are juridical homes to over 14% of large publicly traded corporations listed in American securities markets.”<sup>28</sup> As he observes, this could exert meaningful pressure on aspects of substantive corporate law regarded as mandatory in Delaware.<sup>29</sup> There is of course a double irony here: insofar as Delaware itself markets an “enabling” approach to corporate law, these jurisdictions might be said to have out-Delawared Delaware, and insofar as this phenomenon arises from U.S. courts’ application of the internal affairs doctrine to entities incorporated abroad, these jurisdictions might be said to have hoisted Delaware on its own petard.<sup>30</sup> Significantly, British Overseas Territories once again predominate in this space—notably, Bermuda, the British Virgin Islands, and the Cayman Islands—and these jurisdictions have actively sought “to differentiate their corporate law from that of Delaware” in order to compete more effectively for chartering business among U.S.-listed companies.<sup>31</sup>

### III. DELAWARE’S BROADER COMPETITIVE LANDSCAPE

The global dynamics discussed in Part II suggest that, even when the frame of reference is limited to corporate law, prevailing accounts of charter competition and Delaware’s dominance within that marketplace are oversimplified. This Part takes the analysis further by assessing the broader competitive landscape that Delaware encounters beyond corporate law, reframing the matter by reference to underlying economic development imperatives and examining Delaware’s efforts to leverage its corporate law advantage in other areas. These include aspects of financial services and insurance where corporate chartering and innovative entity structures loom large—the most consequential examples being credit card-issuing banks and captive insurance companies.<sup>32</sup> Each represents a distinct, though related, “law market,”<sup>33</sup> and understanding them is critical to a full understanding of Delaware’s competitive position.

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28. Moon, *supra* note 27, at 1407.

29. *See id.* at 1445–1453 (discussing how other jurisdictions have placed limitations on derivative suits and inspection of books and records, while permitting greater capacity to reduce fiduciary duty constraints).

30. *Cf. id.* at 1420–21, 1444.

31. *See id.* at 1423–29.

32. Blockchain-based businesses may prove to be another area where Delaware seeks to leverage the preexisting corporate law advantage. *See* Christopher M. Bruner, *Distributed Ledgers, Artificial Intelligence and the Purpose of the Corporation*, 79 CAMBRIDGE L.J. (forthcoming 2020) (discussing the Delaware Blockchain Initiative).

33. On this concept, see O’HARA & RIBSTEIN, *supra* note 5, at 3.

*A. The Economic Development Imperative*

Small, resource-constrained jurisdictions face unique economic development challenges that render the development of high-value-added services particularly attractive. Those, like Delaware, that have been particularly successful in cross-border corporate and financial services tend to have similar characteristics and pursue similar strategies. I have elsewhere termed them “market-dominant small jurisdictions” (“MDSJs”), and developed an ideal type to summarize their consequential features. MDSJs (1) “are small and poorly endowed with natural resources, limiting their economic-development options”; (2) “possess legislative autonomy” (though not necessarily full sovereignty); (3) “are culturally proximate to multiple economic powers, and favorably situated geographically vis-à-vis those powers”; (4) “heavily invest in human capital, professional networks, and related institutional structures”; and (5) “consciously balance close collaboration with and robust oversight of the financial professional community, seeking at once to convey flexibility, stability, and credibility.”<sup>34</sup>

A number of significant players in cross-border corporate and financial services broadly reflect these characteristics and strategies, Delaware included.<sup>35</sup> Briefly, Delaware (1) is among the very smallest U.S. states in both land area and population; (2) possesses substantial legislative autonomy (even as a sub-sovereign) in corporate law and, as we will see, in lucrative related fields; (3) is favorably positioned between, and connected with, the finance capital (New York) and the political capital (Washington, D.C.); (4) has heavily invested in various forms of corporate and financial services, in addition to development of robust professional networks (for example, the Corporation Law Section of the Delaware Bar Association) and related institutional structures—activities facilitated by Delaware’s small size and the relative proximity of relevant public and private actors; and (5) has consciously cultivated balanced regulation in an effort to satisfy various relevant constituencies—including the principal corporate governance actors (management and shareholders), the main political parties (Delaware being famously centrist), and external regulatory actors who could disrupt Delaware’s market if substantial problems were to arise (i.e. Congress).<sup>36</sup>

The upshot of Delaware’s approach to economic development has been its extraordinary reliance on servicing large corporations. While this might be measured in various ways, there is no gainsaying the significance of business entity registration for Delaware from an economic development

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34. BRUNER, *supra* note 17, at 41–49 (emphasis removed).

35. *See id.* chs. 4–9 (providing case studies through this lens including Bermuda, Dubai, Singapore, Hong Kong, Switzerland, and Delaware).

36. *See id.* at 175–87; *see also* BOYER & RATLEDGE, *supra* note 18, at 26–28.

perspective. The Division of Corporations reports that its collections have accounted for approximately one-quarter of Delaware general fund revenues over recent years,<sup>37</sup> and the trend in total collections slopes upward.<sup>38</sup> Even this, however, understates Delaware's dependence on incorporation-related revenue sources. While personal income taxes were the largest single revenue source for Delaware in 2014 (\$1.14 billion), corporate franchise taxes (\$776.7 million) and abandoned property (\$566.5 million) together exceeded the state's personal income tax revenues.<sup>39</sup> This is significant because, as an additional "financial benefit of Delaware's corporate franchise, abandoned property includes the unredeemed value of gift cards, uncashed corporate checks, business-to-business credits, and dormant stock accounts. If the company is incorporated in Delaware, the money comes here."<sup>40</sup> Taking into account corporate income taxes as well, these direct sources of corporation-related revenues accounted for almost 40% of Delaware's general fund revenues in 2014.<sup>41</sup> As the Delaware Business Roundtable summed it up in an analysis of Delaware's budget, "the state has been successful in 'exporting' its revenue burden through the large franchise fee and abandoned property collections, from mostly out-of-state businesses."<sup>42</sup>

To be sure, this reflects adoption of a "uniquely aggressive abandoned property program" to shore up the budget in the wake of the financial crisis, generating abnormal revenues that could not be sustained indefinitely.<sup>43</sup> It also bears emphasizing, however, that the corporate chartering business made this short-term opportunity uniquely available to Delaware in the first place, and that the foregoing figures do not account for further state revenues that are indirectly attributable to incorporations—for example, income taxes paid by professionals employed to service Delaware corporations in various capacities.<sup>44</sup>

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37. See BRUNER, *supra* note 17, at 176–77.

38. See *Annual Report Statistics*, *supra* note 16.

39. See Jonathan Starkey, *Delaware Taxes: Top 5 Sources of State Revenue*, DEL. ONLINE (May 19, 2014), <http://delonline.us/1ne9ba0>.

40. *Id.*

41. See Delaware Business Roundtable, *Delaware's Structural Budget Problem: Causes, Potential Solutions, and Policy Tradeoffs* (2015), <https://www.dbrt.org/state-finances-study> (reporting that the franchise tax accounted for 23%, abandoned property for 13%, and the corporate income tax for 3%).

42. *Id.* See also BOYER & RATLEDGE, *supra* note 18, at 138–39 (similarly calculating that "32.3 percent of all 2007 revenue of Delaware's state government came from businesses that for the most part were not doing business in Delaware").

43. See Delaware Business Roundtable, *supra* note 41 (describing retroactive collections and forecasting a drop in such revenues moving forward).

44. *Cf.* BOYER & RATLEDGE, *supra* note 18, at 112 (observing that, in addition to corporate franchise taxes, Delaware's economy benefits from "the scale and productivity of the entire legal industry in Delaware – the employment generated, wages paid, and services consumed"); Starkey,

The foregoing data underscore both how successful Delaware has been at cultivating incorporation-related revenue sources and how extraordinarily dependent Delaware has become on revenues that trace back to that single source. In this light, it is hardly surprising that Delaware would be keen to diversify—including by expanding into new areas where the preexisting corporate law foundation might give Delaware a leg up. Delaware’s “Comprehensive Economic Development Strategy” recognizes that “Delaware has long been noted for its pro-business climate” but that “competition is now global,”<sup>45</sup> and sets out a goal to “expand long-term economic growth through focused recruitment of businesses complementary to Delaware’s core business sectors,” including “financial services.”<sup>46</sup>

### *B. Leveraging Corporate Law*

The economic development imperatives described above have led Delaware to aggressively pursue opportunities to leverage its corporate law advantage in other areas. These include aspects of financial services and insurance where corporate chartering and innovative entity structures loom large—notably, credit card-issuing banks and captive insurance companies. In these contexts, however, Delaware has typically found itself following the lead of other jurisdictions that had earlier ventured into such areas in order to stake out fields of cross-border corporate and financial specialization of their own, for largely similar reasons.

While there is a clear logic in Delaware’s effort to build upon its preexisting corporate law foundation in each of these areas, Delaware’s competition in these distinct fields complicates the prevailing accounts described above in multiple respects. These additional fields of competition reflect a concerted effort to branch out beyond corporate law; they place Delaware in the less familiar, and perhaps uncomfortable, posture of being a follower rather than a market leader; and they reveal a larger and more complex competitive landscape for cross-border corporate and financial services where Delaware does indeed face meaningful competition, both domestically and abroad.

#### *1. Credit Cards*

In addition to its corporate franchise—and, in fact, as an extension of it—Delaware has achieved substantial successes as a jurisdiction of

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*supra* note 39 (observing that “personal income taxes remain the single largest source of state tax revenue” in Delaware).

45. DEL. ECON. DEV. OFF., COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 22 (Dec. 20, 2014), [https://business.delaware.gov/wp-content/uploads/sites/118/2017/09/CEDS\\_Final\\_Revised12-20-2014.pdf](https://business.delaware.gov/wp-content/uploads/sites/118/2017/09/CEDS_Final_Revised12-20-2014.pdf).

46. *Id.* at 3, 30 (emphasis removed).

incorporation for credit card-issuing banks. Indeed, “half of the nation’s credit cards originate in Delaware, and about 48,000 state residents are employed in the financial services industry, roughly one-tenth of the entire workforce.”<sup>47</sup> As in the corporate franchise context generally, the geographic imbalance is apparent, as Delaware credit card issuers “represent about half of the U.S. credit card market” yet “Delaware residents account for only 0.3% of the U.S. population.”<sup>48</sup> From an economic development perspective, both the general incorporation business and the specific effort to attract credit card-issuing banks reflect the same underlying drivers and capitalize on the same sorts of features discussed above.<sup>49</sup> The results have been similarly impressive for Delaware. William Boyer and Edward Ratledge, a political scientist and an economist, respectively, conclude that Delaware’s efforts to cultivate credit card business have proven “as important historically for Delaware’s economy as Delaware’s Chancery Court, the general incorporation laws, and even the influence of the DuPont Company itself,” notably due to the employment impacts of credit card operations.<sup>50</sup> Perhaps inevitably, credit card-issuing banks have become a correlatively significant force in Delaware politics.<sup>51</sup>

One might imagine all of this arising as a straightforward and direct extension of Delaware’s general dominance in the market for corporate charters. As we will see, the two domains are closely related. Yet, the story is in fact more complicated and involves significant, ongoing competition with other states. Indeed, in a manner not unlike the early experience with incorporations, where Delaware took a leaf from New Jersey’s statute book, the relevant history for credit cards begins elsewhere—in this instance, South Dakota. South Dakota pioneered a new form of charter competition fundamentally akin to that for corporations generally—only here, the core competitive drivers have been the perceived attractiveness of banking regulations related to credit card issuance.

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47. David Dayen, *Tom Carper’s 40-Year Record of Defending Banks Is Being Challenged by Kerri Harris in a Democratic Primary*, THE INTERCEPT, Aug. 22, 2018, <https://theintercept.com/2018/08/22/tom-carper-delaware-primary-banks/>.

48. Claire Tsosie, *Why So Many Credit Cards Are From Delaware*, FORBES, Apr. 14, 2017, <https://www.forbes.com/sites/clairetsosie/2017/04/14/why-so-many-credit-cards-are-from-delaware/#ee4a1b01119b>.

49. See Delaware Business Roundtable, *supra* note 41, at 19 (analogizing between Delaware’s approach to corporate law and its approach to financial services, and “credit card operations” specifically).

50. BOYER & RATLEDGE, *supra* note 18, at 21–22; see also DEL. ECON. DEV. OFF., *supra* note 45, at 10–11, 14, 43.

51. See BOYER & RATLEDGE, *supra* note 18, at 64–65; Dayen, *supra* note 47; Tim Murphy, *House of Cards: How Joe Biden Helped Build a Financial System That’s Great for Delaware Banks and Terrible for the Rest of Us*, MOTHER JONES, Nov./Dec. 2019, <https://www.motherjones.com/politics/2019/11/biden-bankruptcy-president/>.

Under Section 85 of the National Bank Act, a national bank may charge “interest at the rate allowed by the laws of the State . . . where the bank is located.”<sup>52</sup> This places great weight on how the location of a bank is legally determined. In 1978, the U.S. Supreme Court decided in *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*<sup>53</sup> that, for purposes of Section 85, a bank is located “in the State named in its organization certificate.”<sup>54</sup> Consequently, as the Court candidly acknowledged, when a bank issues a credit card across state lines, “the interest rates of one State are ‘exported’ into another.”<sup>55</sup> The Court well understood that this might “significantly impair the ability of States to enact effective usury laws,” and invited those unhappy with this outcome to express their views to Congress.<sup>56</sup> The Court’s broad interpretation of Section 85’s other critical term, “interest,” would subsequently expand the reach of a bank’s capacity to “export” favorable laws from one state to another to include various bank-imposed fees as well.<sup>57</sup>

The potential for bank chartering competition created by the Supreme Court’s *Marquette* holding was amplified, as a practical matter, by the inherent “mobility of credit cards.”<sup>58</sup> This opened a potential national banking market at a time when New Deal-era regulations otherwise fragmented the banking industry along state lines,<sup>59</sup> and when market conditions were otherwise creating substantial financial challenges for banks. Rampant inflation in the 1970s had driven banks’ cost of funds—i.e. the interest paid to depositors—above what the banks could in turn charge for loans under state usury laws.<sup>60</sup> New York’s limits were particularly

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52. 12 U.S.C. § 85.

53. 439 U.S. 299 (1978).

54. *Id.* at 310.

55. *Id.* at 314. For additional background, see Alex Cramer, *Delaware, South Dakota and Utah: Home Is Where the Card Is?*, FINAL, Apr. 18, 2017, <https://getfinal.com/company-news/2017/04/18/issuing-states/>; Dayen, *supra* note 47; Tsosie, *supra* note 48; Sean H. Vanatta, *Citibank, Credit Cards, and the Local Politics of National Consumer Finance, 1968-1991*, 90 BUS. HIST. REV. 57, 72–73 (2016).

56. *Marquette*, 439 U.S. 299 at 318–19.

57. See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (interpreting the term “interest” to include various bank fees).

58. Vanatta, *supra* note 55, at 58; see also O’HARA & RIBSTEIN, *supra* note 5, at 146 (characterizing the resulting federal regime as a “choice-of-law rule” that “sparked jurisdictional competition to attract banks and their assets”).

59. See Vanatta, *supra* note 55, at 59–60; see also MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 54–59 (1994).

60. Interview: Bill Janklow, FRONTLINE, Aug. 24, 2004, <https://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/janklow.html> (interview with former Governor of South Dakota).

restrictive, imposing interest rate ceilings while at the same time prohibiting banks from charging fees to offset costs of credit card administration.<sup>61</sup>

Large banks with global operations already understood from the international context that capital mobility permits regulatory arbitrage,<sup>62</sup> and the *Marquette* decision led them to reconsider their domestic operations through this lens—Citibank being the first mover. New York had refused to raise its usury limit, so in early 1980 Citibank decided to move its credit card operations to a more accommodating jurisdiction. Citibank developed a shortlist of states with high usury limits, no major competitors already there, and legislatures in session—criteria that yielded two possibilities: Missouri and South Dakota.<sup>63</sup> Under the Bank Holding Company Act, Citibank required an affirmative invitation from a would-be host state, and Missouri balked due to opposition from local bankers who feared such a large potential competitor.<sup>64</sup> South Dakota, on the other hand—a state in such dire economic straits that they had already decided to scrap usury limits to promote the flow of credit—proved more accommodating and extended an invitation to Citibank in exchange for a jobs guarantee.<sup>65</sup>

By any measure, this proved to be a phenomenally successful economic development initiative for South Dakota. The initial 1980 deal with Citibank envisioned 400 jobs,<sup>66</sup> yet Citibank would ultimately become one of the state’s most significant private employers.<sup>67</sup> As of 2017, there were “20,000 jobs in financial services in Sioux Falls, South Dakota,”<sup>68</sup> and it is critical to bear in mind the outsized impact such job figures have there. Like Delaware, South Dakota is one of the least populous states in the country, meaning that this number of jobs has far greater impact, from an economic development perspective, than the same number of jobs would have in a much larger jurisdiction like New York.<sup>69</sup> According to the South Dakota Governor’s Office of Economic Development, financial services was “the No. 1 industry in South Dakota, accounting for more than 15% of our economy” in 2015, and the state had “one of the highest concentrations of GDP attributable to

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61. See Vanatta, *supra* note 55, at 62–65, 70.

62. *Id.* at 61, 75–76, 79–80.

63. *Id.* at 73.

64. *Id.*; Interview: Bill Janklow, *supra* note 60.

65. See Interview: Bill Janklow, *supra* note 60; Tsosie, *supra* note 48; Vanatta, *supra* note 55, at 74–76. Local South Dakota bankers were protected by limits placed on Citibank’s capacity to engage in deposit-taking in South Dakota. See Vanatta, *supra* note 55, at 75.

66. See Interview: Bill Janklow, *supra* note 60.

67. See South Dakota Governor’s Office of Economic Development, *Major Employers*, <https://sdreadytowork.com/build-your-business/major-employers/> (last visited Jan. 24, 2020).

68. Cramer, *supra* note 55.

69. See Interview: Bill Janklow, *supra* note 60; see also BOYER & RATLEDGE, *supra* note 18, at 1 (observing that South Dakota is one of the few states with a smaller population than Delaware).

the finance industry in the nation, surpassed only by Delaware” (15.5% versus 29.2%).<sup>70</sup> South Dakota also ranked first in bank assets in 2015, with holdings of \$2.83 trillion.<sup>71</sup> Naturally, this all suggests that big banks have substantial political and economic clout in South Dakota, and the State clearly aims to maintain a competitive business and tax climate relative to other states in order to attract and retain financial services providers.<sup>72</sup>

It is hardly surprising that Delaware, observing South Dakota’s success in a closely related field, would perceive an opportunity for itself. Indeed, Delaware was clued into the foregoing developments quite early because, as it happened, Delaware was effectively in the room when South Dakota and Citibank struck their initial deal in 1980. As South Dakota’s then-Governor Bill Janklow would later recall in a 2004 interview:

... On Citibank’s board of directors were all these corporate titans, and one of them was Irving Shapiro. Irving Shapiro was the CEO of DuPont Company, headquartered in Delaware. And Shapiro, when we were doing our Citibank deal, went back to Delaware and said to Pete du Pont, who was then the governor of Delaware: “Pete, this is crazy. Delaware has got this long history of being kind of the corporate locus for America. This financial services industry, it’s all going to go to South Dakota. Let’s get the law changed in Delaware.” And so Delaware actually changed their law in the following year.<sup>73</sup>

That Delaware could effectively leverage its preexisting corporate platform to expand and diversify through this related form of bank charter competition was lost on no one, and other banks similarly seeking a new home for their credit card operations were quick to move. Then-Governor du Pont, “scion to another major state industry, heard from Chase Manhattan executives that if he combined Delaware’s existing business-friendly incorporation rules with loosened financial regulations, banks would swarm into the state.”<sup>74</sup> Essentially, Chase Manhattan requested and received from

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70. South Dakota Governor’s Office of Economic Development, *South Dakota Financial Services Industry Quick Stats*, <https://sreadytowork.com/wp-content/uploads/2018/10/Financial-Services-QuickStats-2015.pdf> (updated Mar. 2015).

71. *Id.*

72. See, e.g., South Dakota Governor’s Office of Economic Development, *50 State Comparison*, <https://sreadytowork.com/tools-resources/50-state-comparison/> (last visited Jan. 24, 2020); South Dakota Governor’s Office of Economic Development, *Financial Services*, <https://sreadytowork.com/key-industries/financial-services/> (last visited Jan. 24, 2020); South Dakota Governor’s Office of Economic Development, *Rankings*, <https://sreadytowork.com/media-center/rankings/> (last visited Jan. 24, 2020).

73. Interview: Bill Janklow, *supra* note 60; see also Vanatta, *supra* note 55, at 77–78 (observing that Delaware “passed legislation virtually identical to that of South Dakota,” and that “forty-four states had either loosened or lifted their usury laws by 1983”).

74. Dayen, *supra* note 47.

Delaware the same deal that Citibank had received in South Dakota.<sup>75</sup> Reasoning that “Delaware was much closer to New York compared with South Dakota,” and that “several major banks were already incorporated there because of the state’s Chancery Court,”<sup>76</sup> Delaware developed an ambitious plan, building directly on the corporate platform to become, in then-Governor du Pont’s words, “the Luxembourg of the United States.”<sup>77</sup> It would not take long to generate results, as a “dozen companies . . . opened offices in Delaware in the first year alone.”<sup>78</sup> By the late 1990s, “four of the five largest credit card firms in the country had set up in Wilmington, and the industry employed at least 35,000 people.”<sup>79</sup> MBNA, in particular, would come to represent a major force in Delaware’s economy and politics,<sup>80</sup> ultimately becoming Delaware’s largest private employer and a major source of campaign contributions prior to its acquisition by Bank of America in 2006.<sup>81</sup>

The Financial Center Development Act of 1981, which largely “deregulated Delaware laws governing bank-issued credit cards,”<sup>82</sup> permitted banks to set up credit card operations in Delaware if they undertook to employ at least 100 people.<sup>83</sup> Today, while Delaware has a general usury limit of 5% above the Federal Reserve discount rate,<sup>84</sup> this limit expressly does not apply to credit cards issued by Delaware banks<sup>85</sup>—for which there is no limit on interest rates or fees.<sup>86</sup> Meanwhile, Delaware’s position remains strong. As of 2018, about 48,000 Delaware residents were employed in financial services,<sup>87</sup> and the preexisting corporate platform remains a significant element of the larger financial services strategy. “Even after

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75. See Tsosie, *supra* note 48.

76. *Id.* (ascribing this reasoning to former Delaware Secretary of State Glenn Kenton). Delaware remains a dominant jurisdiction of incorporation for major bank holding companies. See Christopher M. Bruner, *Corporate Governance Reform in Post-Crisis Financial Firms: Two Fundamental Tensions*, 60 ARIZ. L. REV. 959, 963 (2018).

77. Murphy, *supra* note 51 (quoting du Pont).

78. *Id.*

79. *Id.*

80. See Dayen, *supra* note 47.

81. See BOYER & RATLEDGE, *supra* note 18, at 64–65.

82. *Id.* at 21.

83. See Dayen, *supra* note 47; Tsosie, *supra* note 48.

84. See DEL. CODE ANN. tit. 6, §§ 2301(a), 2304(a).

85. See DEL. CODE ANN. tit. 5, § 953 (“Any other law of this State limiting the rate or amount of interest, discount, points, finance charges, service charges or other charges which may be charged, taken, collected, received or reserved shall not apply to extensions of credit under a revolving credit plan operated in accordance with this subchapter.”). See also *id.* § 956 (providing that a credit card issued by a Delaware-incorporated bank “shall be governed by the laws of this State”).

86. See DEL. CODE ANN. tit. 5, §§ 941(4), 943–45, 950.

87. See Dayen, *supra* note 47.

federal laws restricting interstate banking were repealed in 1994, Delaware remained a credit card industry stronghold because of its low tax rate for banks and [its] Chancery Court,”<sup>88</sup> suggesting that the same suite of characteristics and strategies that positioned Delaware to thrive in financial services has also tended to cement its status in this related field as national regulatory conditions have evolved. Other competitors with accommodating banking regimes do, however, remain strong as well—including South Dakota,<sup>89</sup> which, as discussed above, has worked hard to preserve and build upon its first-mover advantage.

## 2. *Captive Insurance*

In much the same way that Delaware followed the lead of South Dakota to build upon its preexisting strengths in the related field of financial services, Delaware followed the lead of another state to leverage corporate law in the related field of insurance—in this case, Vermont. Delaware’s competition to attract captive insurance business represents another extension of Delaware’s fundamental advantage in corporate law. In this marketplace, however, Delaware faces more substantial competition from both domestic and foreign jurisdictions.

Captive insurance is essentially a sophisticated form of self-insurance accomplished through a subsidiary formally organized as an insurance entity.<sup>90</sup> A range of structures are available to self-insure individual entities or groups.<sup>91</sup> Although tax abuses remain a constant concern (stemming from rules permitting deduction of premium payments), captive insurance is nevertheless widely regarded as a critical risk management tool—particularly in areas such as healthcare, where insurance markets remain underdeveloped, rendering coverage expensive or impossible to obtain.<sup>92</sup>

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88. Tsosie, *supra* note 48.

89. See Cramer, *supra* note 55 (describing Delaware, South Dakota, and Utah as competitors); Vanatta, *supra* note 55, at 78 (describing Delaware, Nevada, and South Dakota as competitors).

90. See BRUNER, *supra* note 17, at 59–61; *History of Captives*, CAPTIVE EXPERTS LLC, [www.captiveexperts.com/History\\_of\\_Captives.html](http://www.captiveexperts.com/History_of_Captives.html) (last visited Jan. 15, 2020); Sandy Bigglestone, Dir. of Captive Insurance, Dep’t of Fin. Regulation, Ian Davis, Dir. of Fin. Servs., Dep’t of Econ. Dev., & David Provost, Deputy Comm’r of Captive Insurance, Dep’t of Fin. Regulation, Captive Insurance 101: Presentation to Vermont Legislature (Jan. 22, 2019) <https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20Commerce/Captive%20Insurance/W~David%20Provost~Captives%20101~1-22-2019.pdf> [hereinafter Presentation to Vermont Legislature].

91. See, e.g., DEL. CODE ANN. tit. 18, § 6902(12); Presentation to Vermont Legislature, *supra* note 90.

92. See BRUNER, *supra* note 17, at 61–62; *History of Captives*, *supra* note 90; *Why Vermont?*, VERMONT CAPTIVE INS., <https://www.vermontcaptive.com/why-vermont/> (last visited Jan. 15, 2020). The Internal Revenue Service ultimately acknowledged the business case for captive insurance in 2002. See *History of Captives*, *supra* note 90.

Relative to the market for credit card-issuing bank charters, the market for captive insurance domiciling differs in two critical respects: first, it is global in nature, and second, it is more competitive. The perennial leaders in the captive insurance market are (in order) Bermuda, the Cayman Islands, and Vermont—two British Overseas Territories and a U.S. state.<sup>93</sup> These three jurisdictions remain at the top of the table of the largest captive insurance domiciles, followed by Utah, Delaware, Guernsey, Barbados, Anguilla, Hawaii, and North Carolina.<sup>94</sup> As this list conveys, sub-sovereign jurisdictions predominate both globally and within the United States.<sup>95</sup> It also makes clear that Delaware—although certainly among the top domiciles—does not remotely dominate the field, either internationally or domestically.

Here, again, Delaware followed earlier movers. Bermuda entered the field first in the 1960s, followed by the Cayman Islands in the 1970s, and Vermont—the first U.S. domicile—in the 1980s.<sup>96</sup> As it was for Delaware and South Dakota, pursuit of cross-border corporate and financial services business was, for Vermont, an economic development imperative. Indeed, Vermont reflects many of the characteristics and strategies associated with MDSJs above.<sup>97</sup> Being a small state with limited economic development options,<sup>98</sup> Vermont nevertheless benefits from the ease of coordination that a limited number of more proximate public and private actors provides—facilitating “a nimble regulatory environment” and ensuring better “[a]ccess to government officials” in service-based industries including captive insurance.<sup>99</sup> In these and other ways, Vermont has actively developed and promoted a “strong business environment.”<sup>100</sup>

When Vermont struck upon captive insurance as a potential field of specialization, “the Vermont legislature responded with laws that provided predictability and a fair regulatory environment,” as their “Comprehensive Economic Development Strategy” recounts.<sup>101</sup> Over time, “expertise for

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93. See BRUNER, *supra* note 17, at 60–61.

94. *Largest Captive Domiciles*, BUS. INS. (Jan. 1, 2020), <https://www.businessinsurance.com/article/20190103/news06/912325933/business-insurance-2018-data-rankings-largest-captive-domiciles>. See also AGENCY OF COMMERCE AND CMTY. DEV. ET AL., VERMONT 2020: COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 67, 92–93, <https://accd.vermont.gov/sites/accdnew/files/documents/DED/CEDS/CEDS2020FullReport.pdf> (updated Feb. 2016); Presentation to Vermont Legislature, *supra* note 90.

95. Of these, only Barbados is a full sovereign. See *Barbados*, CENTRAL INTELLIGENCE AGENCY WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bb.html> (updated Oct. 21, 2020).

96. See *History of Captives*, *supra* note 90; *Why Vermont?*, *supra* note 92.

97. See BRUNER, *supra* note 17, at 41–49.

98. See AGENCY OF COMMERCE AND CMTY. DEV. ET AL., *supra* note 94, at 7, 11, 13.

99. *Id.* at 65–66.

100. *Id.* at 19–20, 65–66.

101. *Id.* at 92.

forming and managing captives became centered in Vermont and the state maintains its competitive advantage with responsive legislation, clear regulation and a knowledge base to keep new captives locating in the state.<sup>102</sup> Accordingly, the “mission” of Vermont’s Captive Insurance Division “is to maintain a regulatory system that attracts quality business to Vermont, promotes our reputation in the industry, and ensures the solvency of captive insurers while recognizing the special purpose for which they were created,”<sup>103</sup> a formulation that reflects Vermont’s pursuit of economic development through simultaneous regulation of and appeal to a mobile marketplace. Along these lines, the Division pursues its mission by “[a]ttracting and licensing quality programs”; undertaking surveillance, examinations, and enforcement; and developing policies and procedures that are at once “effective and reasonable,” toward the goal of “[a]dvancing the growth of Vermont’s captive industry.”<sup>104</sup>

These efforts have, to date, been quite successful. The state touts “the largest network of experienced and knowledgeable regulators, management professionals, in-house examiners, and service providers of any domicile,” with “unparalleled legislative support,” in addition to an “extensive network of captive management firms and service providers” and “the world’s largest captive insurance trade association, the Vermont Captive Insurance Association.”<sup>105</sup> As of year-end 2019, Vermont had 1,159 licensed captives with \$194 billion in assets under management.<sup>106</sup> The State collects over \$25 million annually in taxes and fees, and captives support over 400 direct jobs, in addition to providing indirect benefits—including “increased tourism spend from board meetings” and, more generally, “improved visibility and reputation in the business world.”<sup>107</sup> Along these lines, the State’s economic development strategy includes not only capitalizing on growth in this market, but building on these strengths to expand into financial services as well.<sup>108</sup> Overall, Vermont seeks to become “the ‘Delaware’ of insurance,” at least in the market for captive insurance domiciling,<sup>109</sup> where parties are free to opt into the legal system they prefer in much the same way that the markets for corporate charters and credit card-issuing bank charters permit.

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102. *Id.*

103. Presentation to Vermont Legislature, *supra* note 90.

104. *Id.*

105. *Why Vermont?*, *supra* note 92.

106. *See id.*

107. Presentation to Vermont Legislature, *supra* note 90.

108. *See* AGENCY OF COMMERCE AND CMTY. DEV. ET AL., *supra* note 94, at 93.

109. *See* O’HARA & RIBSTEIN, *supra* note 5, at 151–52 (arguing for a broader “federal choice-of-law statute” for insurance contracts and observing that “[m]any risk retention groups have elected to charter in Vermont, apparently because Vermont has more flexible regulations and reduced capitalization requirements”).

Naturally, Delaware would prefer to be the Delaware of insurance. So, it is unsurprising that Delaware, once again, followed another state's lead and expanded into this new field by building upon its preexisting advantage in corporate law and business organizations generally. In this area, Delaware was a relative latecomer, having begun to pursue captive insurance business only in 2005 when the General Assembly "moderniz[ed] Delaware law regarding the formation of these companies" with the aim of "positioning Delaware to become a home to the growing number of captive insurance companies being created by companies worldwide."<sup>110</sup> The legislative policy could not have been clearer, as the statute itself expressly states that "It is determined and declared as a matter of legislative finding that captive insurance companies can serve a valuable risk management function, and that their responsible utilization and the growth of the captive insurance industry in the State of Delaware are in the best interests of this State."<sup>111</sup> The provision adds that "the purpose and policy of this chapter" includes regulation of captive insurance entities, "provid[ing] flexibility and opportunity" to the market, and "foster[ing] economic development in this State through the growth of the captive insurance industry."<sup>112</sup>

In marketing their offerings, the Delaware Department of Insurance ("DDI") expressly roots their value proposition as a captive insurance domicile in their "sophisticated corporate laws, judiciary and financial infrastructure"—in other words, the preexisting corporate law platform discussed above, making Delaware "the preeminent jurisdiction for business" generally—and emphasizes that "[t]hese benefits are extended to [captive insurance] companies through the Delaware Captive Insurance Program."<sup>113</sup> The Delaware Captive Insurance Association ("DCIA") likewise touts what they call the "Delaware Advantage," reflecting the same strategy.<sup>114</sup> "Delaware has traditionally been the preeminent and innovative domicile for U.S. businesses to incorporate," they explain.<sup>115</sup> "The Delaware Advantage is a collection of the many benefits the state of Delaware offers to traditional businesses. The advantages of domiciling a captive in Delaware build on these advantages, creating the ideal domicile for captive business."<sup>116</sup> As to

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110. Captive Insurance Program, *Welcome to Captive Insurance*, DELAWARE.GOV, <https://captive.delaware.gov/captive-welcome/> (last visited Jan. 16, 2020).

111. DEL. CODE ANN. tit. 18, § 6901(a).

112. *Id.* § 6901(b). *See also id.* §§ 6903(d), 6914 (detailing applicable fees and taxes).

113. Captive Insurance Program, *supra* note 110.

114. *The Delaware Advantage*, DELAWARE CAPTIVE INSURANCE ASSOCIATION, <https://www.delawarecaptive.org/i4a/pages/index.cfm?pageid=3278> (last visited Jan. 15, 2020) [hereinafter *The Delaware Advantage*].

115. *Id.*

116. *Id.* *See also* Ned Holmes, *Advantage, Delaware*, CAPTIVE INS. TIMES 36 (Jan. 23, 2019), [https://www.captiveinsurancetimes.com/specialistfeatures/specialistfeature.php?specialist\\_id=266](https://www.captiveinsurancetimes.com/specialistfeatures/specialistfeature.php?specialist_id=266)

their insurance-specific capacities, the DDI has “34 people working on Delaware’s Captive team,” of which “15 are financial analysts,” representing “the first-line regulator who communicates with the captive manager or owner.”<sup>117</sup> They are also careful to convey that, while regulation remains robust, they contemplate a partnership with the industry. As Steve Kinion, Director of the Captive Insurance Program, has expressed it, the “DCIA serves as the eyes and ears for the regulators because it provides valuable information about what is occurring in the industry. We want to hear what the industry has to say.”<sup>118</sup>

Overall, Delaware’s pursuit of captive insurance business has been successful. DDI reports that “Delaware is third largest domicile for captives in the country and the fifth largest in the world.”<sup>119</sup> As noted above, this places Delaware in the unfamiliar, and presumably uncomfortable, position of lagging multiple competitors both domestically (Vermont and Utah) and internationally (Bermuda and the Cayman Islands).<sup>120</sup> Nevertheless, cultivating captive insurance business has had real impact in Delaware; one study found that the industry “directly and indirectly supports 2,537 Delaware jobs, creates almost \$109 million in additional income, and generates over \$5 million for the state in tax revenue.”<sup>121</sup>

Beyond generic marketing references to the business climate and associated track record, Delaware’s captive insurance regime builds on the corporate law platform in more direct and substantive ways. Delaware’s regulatory system for captives is a licensing regime that works with preexisting entity forms, meaning that virtually any type of entity can be used to form a Delaware captive.<sup>122</sup> Indeed, the DCIA claims that “Delaware provides more flexibility than any other onshore jurisdiction with respect to the legal form of organization that a captive insurance company may take.”<sup>123</sup> As is generally the case with Delaware entities, only a minimal nexus with

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&navigationaction=features&page=7&newssection=features; *Why Is Delaware Fertile Ground for Captives?*, DEL. BUS. TIMES (Oct. 20, 2015), <https://www.delawarebusinesstimes.com/why-is-delaware-fertile-ground-for-captives/>.

117. Captive Insurance Program, *About Captive*, DELAWARE.GOV, <https://captive.delaware.gov/about/> (last visited Jan. 16, 2020).

118. Holmes, *supra* note 116 (quoting Kinion).

119. KAREN WELDIN STEWART, COMM’R OF DEL. DEP’T OF INS., *THE ECONOMIC CONTRIBUTIONS OF THE CAPTIVE INSURANCE INDUSTRY TO THE DELAWARE ECONOMY: AN ANALYSIS BY THE UNIVERSITY OF DELAWARE’S CENTER FOR APPLIED BUSINESS & ECONOMIC RESEARCH (CABER)*, (Aug. 2016), <https://captive.delaware.gov/wp-content/uploads/sites/18/2016/12/caber-narrative-updated-by-jerry-201610.pdf>.

120. *See supra* notes 93–95 and accompanying text.

121. STEWART, *supra* note 119 (reporting results from a study conducted by the University of Delaware’s Center for Applied Business & Economic Research).

122. *See* DEL. CODE ANN. tit. 18, §§ 6903(a), 6906.

123. *The Delaware Advantage*, *supra* note 114.

the state of Delaware is required. While a captive must generally maintain “its principal place of business” and have a registered office and agent for service of process in Delaware, and hold in the state “at least 1 meeting each year” of its board or governing body, of which at least one member must be a Delaware resident (or have the member’s principal place of business in Delaware),<sup>124</sup> there “is no requirement to retain a Delaware based captive manager.”<sup>125</sup> Additionally, the statute authorizes the Insurance Commissioner to issue “conditional” licenses under certain circumstances, permitting captives to begin conducting business immediately, based on a “statement of compliance signed by the owner . . . stating that to the best of the owner’s belief the business plan and other documents filed . . . comply with” stated requirements<sup>126</sup>—a same-day convenience that apparently only Delaware offers.<sup>127</sup> The Insurance Commissioner has additional authority, meanwhile, to “exempt a special purpose captive insurance company” from otherwise-applicable statutory requirements and regulations.<sup>128</sup>

At the same time, Delaware government officials and industry representatives strongly emphasize innovations at the level of entity organization that purportedly offer distinctive advantages in the captive insurance context—a direct and substantive link with Delaware’s preexisting corporate platform. In particular, the DCIA explains that only a few states “allow series limited liability companies [series LLCs], which are set up to allow one core company to segregate its risks” internally, and that Delaware “has taken the regulation a step further to allow series captives.”<sup>129</sup> Significantly, the series LLC is an innovation that arises in the first instance under entity laws that fall within the purview of the Division of Corporations, not the Department of Insurance.<sup>130</sup> Delaware’s captive insurance statute expressly provides that an individual series of an LLC can, itself, be granted a captive license.<sup>131</sup>

The nature of this structure is somewhat abstract, and the differences from competing structures are subtle, but the resulting advantages are

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124. DEL. CODE ANN. tit. 18, §§ 6903(b)(2)–(4), 6906(f). More lenient rules may apply in certain contexts, notably for “branch” captives organized elsewhere and licensed to conduct insurance business in Delaware. *See id.*

125. *FAQ*, DELAWARE CAPTIVE INSURANCE ASSOCIATION, <https://www.delawarecaptive.org/i4a/pages/index.cfm?pageid=3280> (last visited Jan. 15, 2020).

126. *See* DEL. CODE ANN. tit. 18, § 6903(g)(1)(c).

127. *See* Holmes, *supra* note 116.

128. *See* DEL. CODE ANN. tit. 18, §§ 6915, 6915A.

129. *The Delaware Advantage*, *supra* note 114. *See also* Holmes, *supra* note 116; Jeffrey Simpson & Andrew Rennick, *The Series LLC and Captives – A Brief History*, CAPTIVE REV., Mar. 2017, at 38, 38–39.

130. *See Annual Report Statistics*, *supra* note 16 (citing series LLC provisions as “new tools that allow businesses greater flexibility in formation and organization”).

131. *See* DEL. CODE ANN. tit. 18, §§ 6902(32)–(33), 6903(a)(9), 6906(a).

potentially significant. Relative to the individual cells of so-called protected cell companies (“PCCs”), first developed in Guernsey, the individual series of so-called series LLCs, first developed in Delaware, possess attributes more closely akin to distinct legal entities in their own right.<sup>132</sup> Notably, a cell cannot contract, sue, or be sued in its own name, whereas a series can.<sup>133</sup> Delaware’s LLC Act expressly provides that a series of a Delaware LLC can have its own assets and liabilities, enter contracts, and sue and be sued;<sup>134</sup> have its own distinct governance structure;<sup>135</sup> and be independently terminated and wound up.<sup>136</sup> Advantages of this structure include tax, governance, and administrative efficiencies,<sup>137</sup> and the entity-like features that series exhibit are thought to increase the likelihood that the desired segregation of assets and liabilities will be respected by courts.<sup>138</sup> Accordingly, “while Delaware also permitted the use of PCCs, it did not take long before Series LLCs became the favored ‘serial’ structure in Delaware.”<sup>139</sup> Since the first series LLC license was granted in 2010, “dozens of Series LLC structures, with hundreds of individual series, have been formed in Delaware.”<sup>140</sup> While, as discussed above, Delaware is not the market leader in captive insurance (internationally or domestically), other states “have taken note of the success of the Delaware Series LLC” and adapted accordingly.<sup>141</sup> This underscores that Delaware’s preexisting corporate platform and the capacities it reflects do in fact provide substantive competitive benefits in this related field—even if work remains to be done for Delaware to catch up with the overall market leaders.

#### IV. CONCLUSION

In assessing Delaware’s competitive position vis-à-vis other jurisdictions, much turns on the frame of reference. As the foregoing discussion demonstrates, while Delaware’s historical achievements and contemporary advantages in the domestic competition for corporate charters

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132. Simpson & Rennick, *supra* note 129, at 38–39. As Simpson and Rennick explain, these structures are themselves modeled upon series investment trusts, which have long “allowed the segregation of various investment portfolios” in the mutual fund industry. *Id.* at 38.

133. *See id.* at 38–39.

134. *See* DEL. CODE ANN. tit. 6, § 18-215(b)(1).

135. *See id.* §§ 18-215(b)(3)–(5).

136. *See id.* §§ 18-215(b)(9)–(11).

137. *See The Delaware Advantage, supra* note 114; Simpson & Rennick, *supra* note 129, at 38.

138. *See* Simpson & Rennick, *supra* note 129, at 39. On the confusion that courts have exhibited in this regard, see Ofer Eldar & Andrew Verstein, *The Enduring Distinction between Business Entities and Security Interests*, 92 S. CAL. L. REV. 213, 255–65 (2019).

139. Simpson & Rennick, *supra* note 129, at 39.

140. *Id.*

141. *Id.*

are indeed impressive—and while it remains difficult to imagine a credible domestic threat in this context (short of outright federal preemption with respect to public companies, which remains unlikely)—Delaware’s position differs when one looks beyond corporate charters, and beyond domestic competitors.

Driven largely by economic development imperatives that are well familiar to smaller jurisdictions around the world, and with the prudent aim of diversifying state revenues, Delaware has endeavored to leverage its preexisting corporate law platform in distinct though related fields where businesses similarly have choices to make about the governing law, and where chartering dynamics and entity structures similarly loom large.

This broader framing complicates prevailing accounts of Delaware’s competitive landscape and future prospects. Even when the inquiry remains focused on corporate chartering, prevailing accounts fail to address global competition, which threatens to erode Delaware’s position both domestically and abroad. At the same time, expanding the frame of reference to include additional fields of competition opens a new perspective on Delaware’s motivations and competitive position in multiple respects. Notably, it reflects an underlying economic development imperative to branch out beyond corporate law; it reveals that, in certain markets, Delaware occupies the less familiar, and perhaps uncomfortable, posture of being a follower rather than a market leader; and it illuminates a larger and more complex competitive landscape for cross-border corporate and financial services where Delaware does indeed face meaningful competition, both from other states and from foreign jurisdictions.

Delaware’s long-term prospects may substantially turn on how effectively the state navigates this broader competitive landscape. This, in turn, requires a reconceptualization of the relevant marketplace—one that is more embracing and multi-faceted than prevailing accounts contemplate.