
Process Innovation in the Production of Corporate Law

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Corporate law is a product that is demanded by business managers and supplied by states. Because a business can incorporate in a state without having to operate in that state, businesses effectively choose the most attractive corporate law system to govern the relationships among managers, shareholders, and other corporate constituencies. Each state has an interest in providing an attractive corporate law system because a state collects fees from every business that chooses to incorporate there.

In competing to attract incorporation business, states may innovate the law itself or the manner in which the law is produced. Scholars have focused their attention on developments in the substance of corporate law (product innovation), but have paid less attention to developments in the process by which corporate law is produced (process innovation).

This Article identifies how states innovate their production of corporate law. While acknowledging that states engage in process innovation with respect to their corporate law systems, this Article explains that states, judges, and legislators inefficiently innovate their corporate law systems, challenging the prevailing premise of existing literature that states develop their corporate law systems to maximize profits. This Article also examines how efficient innovation in the production of corporate law might be achieved.

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INTRODUCTION

States govern corporate law.¹ Interestingly, a business can incorporate in one state — for example, Delaware — and avail itself of Delaware’s corporate law without having to operate in Delaware.² Consequently, businesses effectively choose the corporate law that will govern the relationships among managers, shareholders, and other corporate constituencies. Federalism allows states to serve as laboratories experimenting in corporate law, with businesses choosing to organize in the state that offers the most attractive corporate law system.³ Because a business entity pays a fee to the state in which it organizes as a corporation, and thereafter pays annual fees to that state, each state has an interest in providing a corporate law system that will attract business entities.⁴ Professor Roberta Romano describes corporate law as a product that is demanded by business managers and supplied by states.⁵ Delaware Supreme Court Justice Myron T. Steele seemingly would agree with the characterization of

¹ See *Cort v. Ash*, 422 U.S. 66, 84 (1975) (“Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 *FORDHAM L. REV.* 843, 843 (1993) (“In the United States, corporate law — which concerns the relation between a firm’s shareholders and managers — is largely a matter for the states.”).

² See DEL. CODE ANN. tit. 8, § 101 (2001) (“Any person, partnership, association or corporation, singly or jointly with others, and without regard to such person’s or entity’s residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter”); *id.* § 131(a) (2001) (“Every corporation shall have and maintain in this State a registered office which may, but need not be, the same as its place of business.”); see also MODEL BUS. CORP. ACT § 5.01(1) (2005) (“Each corporation must continuously maintain in this state . . . a registered office that may be the same as any of its places of business” (emphasis added)). See generally *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 761 (3d Cir. 1974) (“The pertinent law on the question of the defendant directors’ fiduciary duties . . . is that of New York, the state of AT&T’s incorporation.”).

³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments”).

⁴ See, e.g., DEL. CODE ANN. tit. 8, § 501 (2001) (requiring “every corporation now existing or hereafter to be incorporated under the laws of this State [to] pay an annual tax”).

⁵ See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *J.L. ECON. & ORG.* 225, 225-26 (1985).

the corporate law system as a product; he recognized that courts play an important role when he said, “We work together to encourage each court and every judge . . . to provide service to . . . litigants as if they were customers. We are at heart a customer-service organization.”⁶

As states compete to attract incorporation business, they innovate their corporate law systems, improving the product itself (product innovation) or the manner in which the product is produced (process innovation).⁷ Scholars have focused their attention on developments in the substance of corporate law (product innovation), but have paid less attention to the manner in which corporate law is produced and developments in its production (process innovation).⁸

This Article addresses process innovation in the production of corporate law. Part I describes judicial and legislative innovations. For example, when issuing opinions, Delaware judges, unlike judges in most jurisdictions, offer advice unnecessary to the resolution of the pending dispute for the benefit of legislators, managers (and their advisors), and shareholders. Part II challenges the prevailing premise that states develop their corporate law systems to maximize profits by explaining that states, judges, and legislators inefficiently innovate their corporate law systems.⁹ Part III briefly examines how efficient innovation in the production of corporate law might be achieved. Because Delaware is a leading producer and innovator of corporate law, this Article focuses on process innovation in Delaware, with references to other jurisdictions for purposes of comparison.¹⁰

⁶ Press Release, State of Delaware, Delaware’s Legal System Ranked #1 in Nation for Fourth Consecutive Year (Mar. 10, 2005), available at <http://governor.delaware.gov/news/2005/03march/index.shtml>.

⁷ See, e.g., Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006) (describing, among other things, diffusion of anti-takeover states).

⁸ See Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, 22 J.L. ECON. & ORG. 414, 416 (2006) (“Most of the attention has been focused on demand-side imperfections, namely agency problems between managers and shareholders.”).

⁹ See *id.* at 423 (“The central premise of the regulatory competition literature is that legislators (and other public actors) effectively behave like profit-maximizing firms . . .”).

¹⁰ Roughly one-half of the publicly traded companies, including those companies listed on the NYSE, are incorporated in Delaware. See JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 238 (6th ed. 2004). According to two recent studies, 90% of firms going public — specifically those that did not incorporate in the jurisdiction in which they would operate — incorporated in Delaware. See Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572 (2002); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice:*

I. PROCESS INNOVATION

It may be appropriate to briefly introduce the concept of process innovation. A firm may improve its production efficiency without altering the characteristics of the product itself. For example, a car manufacturer may invent a machine to replace assembly-line employees. Though the cost of inventing and operating the machine may be high, such a cost may be less than the cost of wages paid to the displaced assembly-line employees during the machine's usage. The cost of maintaining the machine may be less than the cost of maintaining the health of the assembly-line employees. Compared to employees, the machine may suffer little diminishment in the quality of product produced over an eight-hour period.

A firm's innovation in the process by which its product is produced advantages that firm relative to its competitors. A state may advantage itself by innovating the manner in which it produces corporate law. States generally produce corporate law through judges, who issue common law decisions, and legislators, who amend the state's corporate code.¹¹

A. Courts

When competing for incorporation business, states may innovate through their courts. First, Delaware may attract incorporation business because its judges are independent. Second, those judges may serve on courts of specialized jurisdiction. Finally, they may

Evidence on the "Race" Debate and Antitakeover Overreaching, 150 U. PA. L. REV. 1795, 1818 n.95 (2002). Delaware is also a leading innovator. See DALE A. OESTERLE, *THE LAW OF MERGERS AND ACQUISITIONS* 261 (3d ed. 2005) ("Delaware has taken the lead with an innovative approach."); Romano, *supra* note 7, at 209 (charting Delaware's high rank regarding recent innovations). Delaware raises a significant portion of its annual budget through fees paid by corporations that are attracted to its corporate law system. See Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 526 (2001) [hereinafter Daines, *Firm Value*] ("Delaware collects incorporation fees totaling roughly 20% of state revenues and is therefore dependent on producing corporate law that firms demand." (citation omitted)); Maureen Milford, *Delaware's Chancery: A Legal Gem*, NEWS J. (Wilmington, Del.), Sept. 29, 2006, at E4 ("Delaware's corporate and legal services industry brought more than \$1 billion in direct revenue to the state [in 2005] And that doesn't even count the taxes paid by lawyers and businesses that support the legal industry.").

¹¹ See, e.g., DEL CONST. art. II, § 1 ("The legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921) ("I take judge-made law as one of the existing realities of life.").

address issues unnecessary to the resolution of the cases before them to offer helpful advice to legislators, managers, and shareholders.

1. Judicial Independence

In trying to attract incorporation business, states may offer an independent judiciary.¹² States generally provide that judges are either appointed or elected. A judiciary elected by the populace may be overly deferential to the will of the majority or another outside influence, undermining judicial independence.¹³ A hefty majority of states provide that the populace elects judges.¹⁴ Delaware is among a minority of states in which judges are not directly accountable to the populace.¹⁵ Therefore, Delaware is among a minority of states that increases the independence of its judges through its selection process.

Independence correlates with lengthy judicial tenure.¹⁶ In theory, the shorter the term, the more likely a judge would seek to curry favor with a party appearing before it or appease a particular constituency at the expense of a party appearing before it.¹⁷ Life tenure lessens this impact on a judge's independence. Though federal judges enjoy life tenure,¹⁸ only one state has given its judges life tenure.¹⁹ In the

¹² Corporate managers and investors would presumably prefer a judiciary that favors them over third parties. Imposing externalities on third parties, however, may invite unwanted state or federal legislation which could impose costs on managers and investors greater than the benefits anticipated from a judiciary biased in their favor.

¹³ Cf. U.S. CONST. art. II, § 2 (stating federal judges are appointed by President); THE FEDERALIST NO. 78, at 495 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) ("if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity . . .").

¹⁴ In 38 states, judges are elected or must be elected to retain their offices after their appointed terms expire. See Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 133 (1998).

¹⁵ In Delaware, the Governor appoints judges. See DEL. CONST. art. IV, § 3 ("The Justices of the Supreme Court, the Chancellor and the Vice-Chancellor or Vice-Chancellors . . . shall be appointed by the Governor, by and with the consent of a majority of all the members elected to the Senate, for the term of 12 years each . . ."). In Delaware, for judicial officials to retain office, the governor must reappoint them. Hereafter, the text of the Article will not distinguish between a chancellor and a vice-chancellor.

¹⁶ See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 13, at 496 ("[A] temporary duration in office . . . would . . . throw the administration of justice into hands less able, and less well qualified . . .").

¹⁷ Cf. *id.* (suggesting that short tenure would force judge to contemplate their post-judicial career, with self-interest jeopardizing independence).

¹⁸ See U.S. CONST. art. III, § 1.

remaining states, judges serve for a term of years. In Delaware, Supreme Court Justices and chancellors serve twelve-year terms.²⁰ Those terms are among the longest in the country,²¹ and longer than the terms in jurisdictions whose judiciaries are perceived to be less impartial.²² While life tenure may enhance independence, it is not without costs. Although wisdom comes with age, at some point, age may cause one's cognitive abilities to suffer.²³ Additionally, an appointed tenure that is shorter than life may lessen the politicization of the judicial nomination and confirmation process.²⁴ Less

¹⁹ See Edward Fitzpatrick, *Bill Aims to Ban Life Tenure for Most Judges*, PROVIDENCE J. (R.I.), Jan. 25, 2005, at B1 ("Rhode Island is the only state that provides lifetime tenure to its judges . . .").

²⁰ See DEL. CONST. art. IV, § 3.

²¹ See Fitzpatrick, *supra* note 19 ("[I]n most states, judges serve terms ranging from 3 to 15 years before facing some sort of election or reappointment process.").

²²

State	Impartiality Ranking (1 is Most Impartial)	Term of Supreme Court Justice (Years)	Term of Appellate Court Judge (Years)	Term of Trial Court Judge/Chancellor (Years)
Delaware	1	12	N/A	12
Hawaii	46	10	10	10
Alabama	47	6	6	6
Mississippi	48	8	4	4
West Virginia	49	12	N/A	8
Louisiana	50	10	10	6

HUMPHREY TAYLOR ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, 2006 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY 33 tbl.17 (2006); see ALA. CONST. art. VI, § 154; DEL. CONST. art. IV, § 3; HAW. CONST. art. VI, § 3; LA. CONST. art. V, §§ 3, 8, 15; MISS. CONST. art. VI, §§ 149, 153; W. VA. CONST. art. VIII, §§ 2, 5.

²³ See Billy House & Jon Kamman, *Rehnquist's Hospital Stay Fuels Debate*, ARIZ. REPUBLIC, July 14, 2005, at A1 ("The high court has endured its share of justices who have outstayed their capacities.").

²⁴ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 15, 39-41 (Roger C. Cramton & Paul D. Carrington eds., 2006).

politicization may result in higher quality nominees and greater independence.

There may be less politicization in Delaware than other states. First, since 1978, each Delaware governor voluntarily has appointed a bipartisan judicial nominating commission to identify the best candidates for appointment.²⁵ Second, the Delaware Constitution prevents any particular political party from dominating the bench.²⁶ Five justices sit on the Delaware Supreme Court — three from one political party, and two from the “other major political party.”²⁷ Additionally, no more than a bare majority of Delaware’s justices, judges, and chancellors may be members of the same political party.²⁸ It should not come as a surprise, then, that the business community perceives the Delaware judiciary to be more impartial than the judiciary of any other state.²⁹

Independence may be enhanced if judges possess a wealth of knowledge regarding a particular subject matter. Specialized expertise may lessen wrongful or personal influences that could otherwise

²⁵ See Del. Exec. Order No. 4, 4 Del. Reg. Regs. 1310 (Feb. 1, 2001) (ordering continuation of Judicial Nominating Commission and appointing new members); E. Norman Veasey, *The Drama of Judicial Branch Change in this Century*, 17 DEL. LAW. 4, 4 (1999) (“[The] recent insistence by Delaware Governors on a bipartisan Judicial Nominating Commission . . . has helped to ensure merit selection.”); Delaware Governor Ruth Ann Minner, Letter to the Editor, N.Y. TIMES, June 22, 2001, at A20. Such nominating commissions are not without critics. See Editorial, *Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10.

²⁶ Cf. Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1428 (2006) (noting “President Franklin Roosevelt’s declared plan to pack the Supreme Court with justices sympathetic to his New Deal economic policies”).

²⁷ See DEL. CONST. art. IV, § 3; Veasey, *supra* note 25, at 4 (terming this provision “unique”).

²⁸ See DEL. CONST. art. IV, § 3 (“[A]t any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.”).

²⁹ See TAYLOR ET AL., *supra* note 22, at 33 tbl.17; see also D. Gordon Smith, *Chancellor Allen and the Fundamental Question*, 21 SEATTLE U. L. REV. 577, 581 n.22 (1998) (“[Because] the Delaware courts were viewed as suspiciously promanagement . . . , Chancellor Allen’s defense of traditional corporate norms . . . was not a strategic ploy designed to win him widespread praise.”).

impact judicial analysis. This may explain why some states have created specialized courts to resolve business disputes.

2. Specialized Jurisdiction

In trying to attract incorporation business, states may create courts of specialized jurisdiction that appeal to business managers and investors.³⁰ We see specialization in other professions, such as medicine and engineering. We also see specialization in the field of law by practitioners. And, at the federal level, we see specialization by courts.³¹ Some states have followed suit by narrowing the subject matter of disputes heard by particular judges. Thereby, those judges possess and further develop expertise in the specified subject matter. Because of their familiarity with the subject matter, those judges may render generally superior decisions and fewer anomalous decisions than would generalist judges.³² Such decisions enhance legal predictability. Predictability facilitates planning and may lessen litigation costs, which generally pleases business managers and investors. Additionally, judges possessing specialized expertise may require less time to educate themselves of the pertinent facts and law, allowing them to render decisions more quickly.³³ For most litigants, the quicker the resolution of the matter, the better.

³⁰ See Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340, 341 (2006) (“We also find significant but less robust evidence that firms are more likely to incorporate in states with higher quality judicial systems.”). See generally Stephen P. Ferris et al., *The Influence of State Legal Environments on Firm Incorporation Decisions and Values*, 2 J.L. ECON. & POL’Y 1, 11 (2006) (“[W]illingness to separate their . . . headquarters from the state of incorporation . . . [is] consistent with a rational assessment of the overall attractiveness of the state legal environment.”).

³¹ See Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 950 (1997) (discussing U.S. Bankruptcy Court, U.S. Claims Court, U.S. Court of International Trade, and U.S. Tax Court).

³² See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 165 (2004) (regarding Circuit Court of Cook County Commercial Calendar, “[t]he focus provided by serving on the Commercial Calendar leads to the development of such facility and knowledge, resulting in more expeditious and fair results.” (footnote omitted)); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 113 (1995) (noting specialist judges are “more frequently correct”).

³³ See Bach & Applebaum, *supra* note 32, at 153 (regarding Supreme Court of New York Commercial Division, “[t]he efficiencies attributed to judicial specialization permitted three specialized business judges to handle the work of more than four generalist judges using the same resources.” (footnote omitted)); Stempel, *supra* note 32, at 113 (“A trial judge with specialized expertise would have more of an intrinsic

Because of the perceived benefits, some states have sought to create specialized courts to resolve business disputes. But only a minority of jurisdictions have innovated their judicial systems by creating specialized courts to handle business matters.³⁴ For example, the Pennsylvania legislature contemplated creating specialized business courts.³⁵ The legislature, however, could not overcome opposition from rural attorneys who feared lost business or the increased costs of traveling to urban courts.³⁶

Most of these business courts address matters both internal and external to the operations of a corporation.³⁷ In selecting the jurisdiction in which to incorporate, a business manager may be most concerned with the law governing the internal operations of the corporation, because the entity may organize in one jurisdiction and operate in another. In Delaware, chancellors “almost exclusively”³⁸ address matters internal to the corporation.³⁹ As a result, Delaware chancellors are specialists in the law internal to the operation of

‘feel’ for performing these tasks correctly, and would need less fresh research and reflection than would a generalist. Consequently, a specialist judge might well preside over case processing that is faster, less costly[,] . . . and more frequently correct.”)

³⁴ See Bach & Applebaum, *supra* note 32, at 151 (noting 11 states that have done so). The business courts of some states may be limited to the courts of metropolitan areas. See, e.g., *id.* at 160, 180, 184 (noting Chicago (Cook County), Illinois; Boston (Suffolk County), Massachusetts; and Reno and Las Vegas (2d & 8th Judicial Districts), Nevada). Some states, such as California and Connecticut, offer specialized courts to handle complex matters that include, but are not limited to, business matters. *Id.* at 204-13. For more information about commercial courts, see University of Cincinnati College of Law, Commercial Court Project, http://www.law.uc.edu/academics/corporate_commercialct.shtml (last visited Apr. 14, 2008).

³⁵ See Ad Hoc Comm. on Bus. Courts, *supra* note 31, at 958.

³⁶ See Daines, *Firm Value*, *supra* note 10, at 540; cf. Bach & Applebaum, *supra* note 32, at 176-80, 269-71 (discussing business court in Philadelphia County).

³⁷ See, e.g., Business Calendar, Rhode Island Superior Court Administrative Order No. 2001-9 (Apr. 17, 2001), available at <http://www.courts.ri.gov/superior/pdfadministrativeorders/2001-9.pdf> (indicating matters appearing on Business Calendar include breach of fiduciary duty, breach of contract, business tort, UCC transactions, commercial real estate transactions, commercial bank transactions, and business insolvency).

³⁸ CHOPER ET AL., *supra* note 10, at 238.

³⁹ See Veasey, *supra* note 25, at 5 (noting 75% of caseload addresses corporate matters, including “derivative, class actions, injunctions, internal corporate affairs”); cf. Milford, *supra* note 10 (noting 65% of chancery’s caseload involves business and corporate matters). The Delaware Supreme Court communicates the significance of business matters through the allocation of its time. Though appeals from the Court of Chancery may account for only five percent of its docket, the Delaware Supreme Court allocates 20% of its time to the resolution of those cases. See Veasey, *supra* note 25, at 5.

corporations organized in Delaware.⁴⁰ Such innovative specialization favors Delaware in the competition for charters. Despite a state's business court innovation,⁴¹ corporate managers may nonetheless view that jurisdiction's court system unfavorably as a whole because of other deficiencies, such as a poorly developed body of case law.⁴²

A well-developed body of case law enhances legal predictability. Further, a well-developed body of case law positively distinguishes Delaware from other jurisdictions.⁴³ Compared to Delaware's chancery courts, the business courts of other jurisdictions are still quite green.⁴⁴ For example, North Carolina established its business court in 1995.⁴⁵ In light of the short period of time during which these business courts have existed, relatively little case law has been developed.⁴⁶ Although there was a pre-existing body of case law in

⁴⁰ See CHOPER ET AL., *supra* note 10, at 238 (noting that Chancellors have "achieved a national reputation [as] expert[s]"); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State — Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (noting that Chancellors developed their expertise by "hand[ing] down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute"). See generally Smith, *supra* note 29, at 579 ("[T]he nation's guardians of corporate law [are] the Delaware judiciary."). In Delaware, the Superior Court generally addresses matters external to the operations of a corporation, that is, matters that would fall within the domain of other jurisdictions' business courts. See Bach & Applebaum, *supra* note 32, at 216-17.

⁴¹ See generally Tamara Loomis, *Commercial Division: High-Profile Case Casts Spotlight on Well-Regarded Court*, N.Y. L.J., June 20, 2002, at 5 (describing New York's Commercial Division as "a virtually unqualified success").

⁴² See Bach & Applebaum, *supra* note 32, app. A at 158 ("[B]usiness litigants once seemed to avoid New York's state trial courts . . ."). See generally Veasey, *supra* note 25, at 5 ("[O]ur success in business law cannot be taken for granted. . . . [T]hat success must be replicated in all that we do in the Judiciary.").

⁴³ See Rehnquist, *supra* note 40, at 354 ("[The Court of Chancery] handed down thousands of opinions interpreting virtually every provision of Delaware's corporate statute.").

⁴⁴ See *id.* at 351 (noting Delaware's Court of Chancery was established in 1792); Veasey, *supra* note 25, at 5 ("The Court of Chancery began handling serious corporate litigation in the decade from 1910 to 1920."). Delaware enacted a modern corporate code in 1899. See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 327 (2007).

⁴⁵ See Bach & Applebaum, *supra* note 32, at 166; see also *id.* at 152 (stating New York County's pilot program commenced in 1993); *id.* at 180 (stating Suffolk County's experiment commenced in 2000); *id.* at 184 (stating Nevada's rules creating its business courts became effective in 2000). Corporate managers generally view North Carolina's overall judicial system favorably. See *infra* app. A.

⁴⁶ The North Carolina Business Court issued 25 opinions in 2006, a high water mark since the court's formation. See North Carolina Business Court Opinions,

each of those jurisdictions that created business courts, those jurisdictions typically acknowledged that one of the reasons for their invention was to increase the predictability of business disputes.⁴⁷ Though predictability may be a goal, not every jurisdiction has taken the necessary steps to enhance predictability. In North Carolina, decisions of its business court, though persuasive, “have no value as precedent because neither the Supreme Court nor the General Assembly has enacted a rule or statute dealing with the issue.”⁴⁸

Arguably an innovation,⁴⁹ Delaware maintains the law-equity distinction in its courts and is one of the few states to do so.⁵⁰ The chancellors, not juries, serve as fact-finders.⁵¹ Fact-finding by judges, rather than ever-changing juries, increases legal predictability. Moreover, judges that engage in fact-finding contribute to the speed

<http://www.ncbusinesscourt.net/New/opinions> (last visited Apr. 14, 2008). In 2006, Maryland’s Business and Technology Court issued only 16 opinions. See Maryland Business and Technology Courts Case Management Program, <http://www.courts.state.md.us/businesstech/opinions.html> (last visited Apr. 14, 2008). That output is consistent with the court’s first three years. See Maryland Business and Technology Courts Case Management Program Archived Opinions, http://www.courts.state.md.us/businesstech/opinions_archive.html (last visited Apr. 14, 2008) (noting court wrote 11 opinions in 2003, 15 opinions in 2004, and 11 opinions in 2005).

⁴⁷ See, e.g., Amended Order Creating Specialized Business Court Sub-Division of the Civil Division of the Circuit Court, Administrative Order No. 2003-17-1, In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida (Nov. 26, 2003), available at <http://www.ninthcircuit.org/research/orders/downloads/administrativeorder.pdf> (stating “a business Court will provide consistency and predictability to litigants and counsel”).

⁴⁸ See REPORT ON ACTIVITIES OF THE NORTH CAROLINA BUSINESS COURT 2000 TO 2001, <http://www.ncbusinesscourt.net/ref/2001%20General%20Assembly.htm> (last visited Apr. 16, 2008) [hereinafter REPORT ON ACTIVITIES].

⁴⁹ See Rehnquist, *supra* note 40, at 351 (“[Delaware’s] decision to establish equity in a separate court of chancery was an unusual decision — a decision counter to the trend in other states . . .”); *id.* at 352 (“[E]quity in Delaware was a creature of colonial statute rather than royal prerogative . . .”). But see Ad Hoc Comm. on Bus. Courts, *supra* note 31, at 956 (“Its business specialization is not the result of a formal decision to specialize . . .”).

⁵⁰ See Milford, *supra* note 10.

⁵¹ DEL. CODE ANN. tit. 10, § 369 (1999) (“When matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may order such facts to trial by issues at the Bar of the Superior Court.” (emphasis added)); *Saunders v. Saunders*, 71 A.2d 258, 262 (Del. 1950) (“Once jurisdiction of the subject matter has been properly ascertained equity will proceed to determine all facts essential to a decree . . .”); *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 151 (Del. Ch. 1978) (“The old procedure of framing of issues by the Court of Chancery for jury trial is now probably outmoded and this Court is certainly not equipped to hold jury trials itself even if permissible.” (footnote omitted)).

with which Delaware resolves matters.⁵² Consequently, Delaware's chancery courts attract incorporation business. Other states are unlikely to reinstate the law-equity distinction.⁵³ Other states could allocate fact-finding to the courts in business disputes, but, other than some states' specialized business courts, there is no apparent movement to do so.⁵⁴

Delaware also innovated an avenue to eliminate the possibility of other jurisdictions' courts misinterpreting Delaware corporate law. Although Delaware cannot prevent other jurisdictions from interpreting Delaware corporate law, Delaware amended its constitution to allow its supreme court to accept certified questions from the highest courts of other states.⁵⁵ The high courts of most states accept certification only from federal courts, not other state courts.⁵⁶ This innovation allows Delaware to preserve its competitive advantage. Through its constitution, Delaware preserves the opportunity to develop its own law even if the case is being handled in another state's court.⁵⁷ Although the other state may never certify the

⁵² See CHOPER ET AL., *supra* note 10, at 238 (noting Delaware's chancellors "have achieved a national reputation for expert and expeditious rulings without juries"); Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 704 (1992).

⁵³ See *supra* note 30. Among states' judges, Delaware's judges are perceived to be the least partial and most competent. See TAYLOR ET AL., *supra* note 22, at 33 tbl.17, 34 tbl.18.

⁵⁴ Cf. 28 U.S.C. § 2402 (2000) (providing that "any action against the United States . . . shall be tried by the court without a jury").

⁵⁵ See DEL. CONST. art. IV, § 11(8) ("The Supreme Court shall have jurisdiction . . . [t]o hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, the United States Securities and Exchange Commission, or the highest appellate court of any other state, where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it." (emphasis added)). A more recent amendment to that section allowed the court to accept certified questions from the SEC, an amendment which Professor John Coffee described as "immensely creative." Maureen Milford, *New State Law Expands Del.'s Role in Corporate Governance*, NEWS J., May 19, 2007, at 1A; see S. 62, 144th Gen. Assem. (Del. 2007); Milford, *supra* ("Legal experts said the amendment has the potential to expand the power of the state Supreme Court in establishing nationally significant rules of corporate governance. . . . The amendment is designed to keep the SEC from having to guess at what the Delaware's highest court would rule on issues of corporate governance.").

⁵⁶ See Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 314-15 (1994).

⁵⁷ See generally *Farahpour v. DCX, Inc.*, 635 A.2d 894 (Del. 1994) (accepting certified questions from District of Columbia Court of Appeals regarding Delaware corporate law).

question to the Delaware Supreme Court, it may see little benefit to expending resources to develop law for Delaware.⁵⁸ Court decisions of other jurisdictions would not bind Delaware courts, but those decisions might muddy or otherwise negatively impact Delaware's body of common law.⁵⁹ Thus, by accepting certified questions from other states, Delaware creates an avenue to limit these negative possibilities.

3. Advisory Opinions

A state may attract incorporation business if its corporate law is both predictable and adaptable to the business communities' changing needs. Enhancing predictability and adaptability, Delaware judges innovate through their speeches, scholarship, and opinions that include dicta offering advice. Seemingly more than judges of other jurisdictions, Delaware judges share their thoughts in their presentations and scholarly writings.⁶⁰ Though judges commonly refrain from speaking to issues that may come before them,⁶¹ Delaware

⁵⁸ See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 496 (1987) (discussing dismissal on grounds of forum non conveniens).

⁵⁹ See *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 959 (Del. Ch. 2007) ("The important coherence-generating benefits created by our judiciary's handling of corporate disputes are endangered if . . . decisions are instead routinely made by a variety of state and federal judges who only deal episodically with our law."). See generally *Brandin v. Deason*, No. 2123-VCL, 2007 WL 4788444, at *3, 5 (Del. Ch. July 20, 2007) (denying motion to stay proceedings in Delaware court pending resolution of parallel proceeding in federal court because "Delaware courts have a sizable interest in resolving such novel issues to promote uniformity and clarity in the law that governs a great number of corporations" and because "stockholders of companies incorporated in [Delaware] would suffer a disservice if Delaware courts suddenly became a forum of last resort").

⁶⁰ See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1068-70 (1997) (describing Delaware judges' "extrajudicial utterances"); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189 *passim* (2007); see also Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, app. A at 1788 (2006) (listing 71 recent speaking engagements by Delaware judges at public fora); *infra* app. B (setting forth non-exhaustive list of recent publications by Delaware judges).

⁶¹ See *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) ("To engage in an effort to craft . . . a definitive and categorical definition of the universe of acts that would constitute bad faith would be unwise and is unnecessary to dispose of the issues presented on this appeal." (internal quotes and citation omitted)). See generally *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong.

judges voluntarily address issues divorced from facts being litigated before them, offering advice to the litigants and court watchers.⁶² In this section, I first explain some of the benefits of such judicial advice. Second, I describe cases in which Delaware courts have offered advice unnecessary to the resolution of the dispute. The courts direct their advice to legislators, corporate managers (and their advisors), and shareholders.⁶³ Third, I identify several objections to the issuance of advisory opinions — legitimacy, accuracy, and consistency — and explain why those objections may possess less force in Delaware than other jurisdictions.

a. Benefits of Advisory Opinions

Delaware judges issue opinions that include advice or guiding dicta to enhance the predictability of corporate law and adapt the corporate law in ways that may not have been otherwise predicted. Even though Delaware's corporate code⁶⁴ and case law⁶⁵ are well-developed, Delaware corporate law suffers from indeterminacy, though arguably no more than any other jurisdiction.⁶⁶ The classic rules-versus-standards dilemma explains much of the uncertainty. Because rules are both over-inclusive and under-inclusive, courts create exceptions on an ad hoc basis, resulting in uncertainty as to when such

142 (2005) (testimony of John G. Roberts, Jr.) (“Again, I think I should stay away from discussions of particular issues that are likely to come before the Court again.”); MODEL CODE OF JUDICIAL CONDUCT Canon 2.10(B) (2004) (“A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”); Helen Herschkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1838 (2001) (“Many state courts do conform the scope of their judicial function to the Article III model.”).

⁶² See *infra* Part I.A.3.b.

⁶³ In this Article, I refer to advice unsolicited by legislators. Cf. MICH. CONST. art. III, § 8 (“Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law . . .”).

⁶⁴ Delaware adopted its corporate code in 1899, see *supra* note 44, and it now amends that code virtually every year. See Hamermesh, *supra* note 60, at 1754.

⁶⁵ CHOPER ET AL., *supra* note 10, at 238.

⁶⁶ See Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 87 (1990); Rock, *supra* note 60, at 1101 (entitling section of article: “The Mushiness of Delaware Fiduciary Duty Case Law”); Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 CARDOZO L. REV. 497, 501 (1991) (describing courts’ treatment of certain corporate law concepts as “fuzzy”).

exceptions may be created in the future.⁶⁷ Standards give rise to uncertainty in their application.⁶⁸

Other reasons contribute to indeterminacy, including the following. First, a party may decide to not file a lawsuit, denying the court the opportunity to develop or adapt the law.⁶⁹ Second, many cases are dismissed on procedural grounds.⁷⁰ Dismissals deny the court the opportunity to develop or adapt the law. Judges dismiss cases in jurisdictions other than Delaware, but the resulting indeterminacy in Delaware could be more costly to it than other jurisdictions because of Delaware's reliance on proceeds from the incorporation business.⁷¹ Third, many cases settle.⁷² A court may resolve certain issues that

⁶⁷ See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949).

⁶⁸ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 352-53 (2001) (“[U]nder current doctrine the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable argument . . .”).

⁶⁹ See Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2418 (2006) (“Judges must wait until a plaintiff musters the initiative to file a lawsuit, and then they must further wait through the tedious processes of evidence-gathering, motions practice, and trial before they can formulate new policy . . .”); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 85 (1991) (“As few suits produce a legal rule . . . , this explanation of lawsuit efficacy turns on the need for a large number of lawsuits in order to obtain a ruling.”). Perhaps contrary to those that believe it is racing to the bottom, Delaware has taken certain steps to encourage litigation. See Macey & Miller, *supra* note 58, at 496-97. Unlike some states, Delaware does not require plaintiffs to post security. See, e.g., CAL. CORP. CODE § 800 (West 1990) (requiring plaintiff to furnish bond in certain circumstances); N.J. STAT. ANN. § 14A:3-6(3) (West 2003) (same). Further, Delaware requires directors (and officers) to consent to jurisdiction. See DEL. CODE ANN. tit. 10, § 3114(a) (1999 & Supp. 2006). And, Delaware courts regularly approve settlements and award generous attorney fees. See, e.g., *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 972 (Del. Ch. 1996) (approving settlement and awarding attorneys' fees of \$816,000); see also Macey & Miller, *supra* note 58, at 497; Carolyn Berger & Darla Pomeroy, *Settlement Fever*, BUS. LAW TODAY, Sept.-Oct. 1992, at 7 (detailing study that found Delaware Chancery courts had approved 96 of 98 proposed settlements).

⁷⁰ See, e.g., DEL. CH. CT. R. 23.1 (setting forth requirements for complaints in derivative causes of action); *Lewis v. Ward*, 852 A.2d 896, 901 (Del. 2004) (“When a merger eliminates a plaintiff's shareholder status in a company, it also eliminates her standing to pursue derivative claims on behalf of that company.”)

⁷¹ See Daines, *Firm Value*, *supra* note 10, at 526 (“Delaware collects incorporation fees totaling roughly 20% of state revenues and is therefore dependent on producing corporate law that firms demand.” (citation omitted)).

⁷² See John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789, 796 (1984) (“[C]ases are most often resolved by settlement. . . . [T]hus, judicial dicta about the scope of the duty has some real world effect.”). In other respects, however,

spur the settlement, increasing legal predictability to an extent; but the settlement denies a court the opportunity to reach other unresolved issues or to beneficially adapt the law. As with dismissals, case settlement may cause Delaware to suffer more from the lost opportunity to resolve a new issue or to adapt its existing law.⁷³ Fourth, because litigation takes time, nonlitigants — those who are similarly situated to litigants — are uncertain about how to plan their actions during the pendency of the suit.⁷⁴ To enhance predictability, Delaware judges fill these gaps with their speeches, articles, and most importantly, advisory opinions. Judges offer advice so that legislators can better legislate, managers can better plan transactions, and shareholders can more effectively monitor their fiduciaries.⁷⁵

Because managers change the manner with which they conduct business, corporate law must adapt to those changes. To a certain extent, however, adaptability is inconsistent with predictability.⁷⁶ A harsh consequence of the development of common law is that properly motivated actors may comply with the rule of the day, but learn, following litigation, that a new rule retroactively imposes liability on them. Courts utilize advice to cue the corporate community that change may be afoot. Because such advice is unnecessary to the resolution of the matter before the court, courts may minimize or eliminate the harsh effect of ex post legal review on

settlements are good. See *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (“[A] bad settlement is almost always better than a good trial.”).

⁷³ Of the North Carolina Business Court’s first 66 cases, “52 settled, five of which settled after Court Opinion; one settled during trial; and one settled after jury trial.” REPORT ON ACTIVITIES, *supra* note 48.

⁷⁴ See Ronald J. Gilson, *The Fine Art of Judging: William T. Allen*, 22 DEL. J. CORP. L. 914, 917-18 (1997) (“In the fast moving environment into which events thrust the Court of Chancery, traditional common law accretion of precedent was too slow to help.”).

⁷⁵ See *Siegman v. Tri-Star Pictures, Inc.*, Civ. A No. 9477, 1989 WL 48746, at *5 (Del. Ch. May 30, 1989) (rejecting ripeness argument, and stating: “Of importance also is the imperative that corporate fiduciaries be given clear notice of what conduct is and is not permitted”); Gilson, *supra* note 74, at 915 (“[A] large number of transactions [are] in the planning stage whenever a new opinion [is] issued. Planners promptly reflect[] a new opinion in pending transactions”); *id.* at 918 (“[The] use of dicta, directed explicitly at transaction planners, was a creative and elegant response to the problem of keeping the law moving at a pace at least close to that of the market.”).

⁷⁶ If a court is not bound by stare decisis, the law may change quickly. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 278-80 (1974).

properly motivated actors.⁷⁷ Advice signals the change so that the evolution of law is more predictable. The advice not only benefits transaction planners but also invites legislative consideration of statutory amendments. Although the fact-intensive nature of Delaware cases negatively impacts the predictability of that state's common law, it also enhances the adaptability.⁷⁸

b. Examples of Advisory Opinions

This section addresses advice offered by judges in their opinions. Judges may also offer advice in their speeches, writings, or other communications.⁷⁹

(1) Advising Legislators

In *Hollinger, Inc. v. Hollinger International, Inc.*, the chancery court unnecessarily addressed, but did not definitively resolve, a novel issue of statutory interpretation.⁸⁰ In so doing, the court identified

⁷⁷ In approving a settlement because there was a low probability of a breach of duty by directors, Chancellor Allen, in the *Caremark* decision, signaled that more may be expected of directors with regard to their obligation to monitor than the Delaware Supreme Court previously suggested. Compare *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 969-70 (Del. Ch. 1996) (“[T]hat a corporate board has no responsibility to assure that appropriate information and reporting systems are established by management — would not . . . be accepted by the Delaware Supreme Court in 1996, in my opinion.”), and *id.* at 970 (“[I]t would, in my opinion, be a mistake to conclude that our Supreme Court’s statement in *Graham* concerning ‘espionage’ means that corporate boards may satisfy their obligation . . . without assuring themselves that information and reporting systems . . . are reasonably designed to provide . . . timely, accurate information . . . concerning . . . the corporation’s compliance with law . . .”), with *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (1963) (“[A]bsent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists.”).

⁷⁸ See Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CINN. L. REV. 1061, 1088 (2000) (noting how Delaware can “fine-tune . . . initial rules”); *id.* (“Delaware courts can change doctrine . . . to respond to . . . a prior approach [that] was unworkable or reflected a poor policy judgment.”).

⁷⁹ See, e.g., Leo E. Strine, Jr., “Mediation-Only” Filings in the Delaware Court of Chancery: *Can New Value Be Added by One of America’s Business Courts?*, 53 DUKE L.J. 585, 585 (2003) (“The mediation-only device was conceived . . . by members of the Delaware judiciary . . . [T]his legislation is the first of its kind adopted in the United States.”); *infra* app. B (collecting recent articles written by Delaware judges and chancellors).

⁸⁰ See *Hollinger, Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 348 (Del. Ch. 2004) (deferring “decision on the interesting question presented”); see also *In re Digex, Inc. S’holders Litig.*, 789 A.2d 1176, 1198-1205 (Del. Ch. 2000) (articulating various

competing policy considerations, essentially inviting legislative clarification. Moreover, having identified a possible demarcation point, the court clued transaction planners in as to the court's probable interpretation if the issue arose in the future.⁸¹

Section 271 of the Delaware General Corporation Law requires that shareholders approve the sale of "all or substantially all" of the assets of the corporation in which those shareholders have a direct interest.⁸² The statute may have been unclear on whether the shareholders of a parent needed to approve the sale of "all or substantially all" of the assets by a subsidiary of the parent.⁸³ In *Hollinger*, the parties presented this issue to the court, but the court assumed that the parent sold the assets⁸⁴ before concluding that inadequate assets had been sold to meet the "all or substantially all" threshold.⁸⁵ Because the court assumed away the notable issue, there seemingly would be no reason to address it. Moreover, because plaintiff sought a preliminary injunction, the posture of the case counseled in favor of rapid resolution and against addressing any superfluous issues.⁸⁶ The court, however, seized the opportunity to identify competing policy concerns supporting contrary interpretations of the statute. And, although the

statutory interpretations and competing policy rationales supporting contrary conclusions before declining to resolve issue unnecessarily).

⁸¹ See Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1719 (1998) (describing demarcation as court's advice that identifies point beyond which relevant protections apply, without identifying closer points where those protections may also apply). According to the *Hollinger* court, the court, "without any appreciable stretch," can interpret the parent company as having sold its assets, even though title to those assets may lie with the subsidiary if (1) the parent company guarantees the subsidiary's performance, (2) the parent will be liable for any breach by the subsidiary, and (3) the parent is the beneficiary of the sale because the proceeds will flow upstream. *Hollinger*, 858 A.2d at 375; see also *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 721 (Del. 1971) (concluding that deferential business judgment rule applies to board's declaration of dividend and then demarking hypothetical situation in which greater scrutiny would be appropriate).

⁸² See DEL. CODE ANN. tit. 8, § 271 (2001 & Supp. 2006).

⁸³ Following the *Hollinger* decision, the Delaware legislature acted. 75 Del. Laws 24 (2005) (adding subsection (c) to section 271, which provides in part, "For purposes of this section only, the property and assets of the corporation include the property and assets of any subsidiary of the corporation").

⁸⁴ See *Hollinger*, 858 A.2d at 348 ("As to the § 271 claim, I choose not to decide whether [defendant's] technical statutory defense has merit. . . . Instead, I address the economic merits of [plaintiff's] § 271 claim and treat the [assets to be sold as if] directly owned by [the parent].").

⁸⁵ See *id.* at 386 (refusing to "supplant the plain language and intended meaning of the General Assembly with an 'approximately half test'").

⁸⁶ See *id.* at 346.

court did not “render[] any definitive pronouncement” on the issue, the court suggested one interpretation might be preferred in certain specified situations, if not generally.⁸⁷

The court identified some of the strengths of the position that shareholders of the parent should not be entitled to vote on the sale of assets by a subsidiary. First, because Delaware law commonly respects distinct corporate entities, sales of assets by a parent should not be conflated with sales of assets by a subsidiary.⁸⁸ Second, in other sections, the Delaware legislature expressly empowered parents’ shareholders with rights regarding subsidiaries; in section 271, however, the legislature did not similarly empower parent shareholders.⁸⁹ Arguably then, the court should not empower shareholders in this instance when the legislature did not do so, especially in light of the legislature’s willingness to do so elsewhere. Third, the court highlighted the value of bright-line rules, which provide clear guidance and limit litigation.⁹⁰ Finally, the court emphasized the director-centered nature of Delaware law.⁹¹ An interpretation that permitted the directors of the parent to sell a subsidiary’s assets without seeking approval from the shareholders of the parent would be consistent with such director primacy.⁹²

The *Hollinger* court then identified policy rationales supporting the right of parent shareholders to vote on the sale of assets by a subsidiary. First, the holding company structure is common; a parent company typically owns no operating assets, just the stock of other

⁸⁷ *Id.* at 375.

⁸⁸ Moreover, when interpreting the Delaware code, Delaware courts commonly emphasize form over substance. See *Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) (“[T]he sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.”).

⁸⁹ See DEL. CODE ANN. tit. 8, § 220(b) (2001 & Supp. 2006) (providing that, in specified situations, shareholders of parent company may inspect books and records of subsidiary); *id.* § 251(g)(7)(i)(A) (2001 & Supp. 2006) (providing that, in connection with specified transactions, provision in certificate of incorporation may require approval from shareholders of parent not otherwise required for transactions involving subsidiary).

⁹⁰ See *Hollinger*, 858 A.2d at 374.

⁹¹ See *id.*

⁹² For more on director primacy, see Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791 (2002); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006).

subsidiaries that directly own operating assets.⁹³ This common structure effectively disenfranchises shareholders of the parent with respect to sales of subsidiaries' assets, rendering the shareholder vote "largely hortatory" and "easily-sidestepped."⁹⁴ Consequently, a parent could liquidate all of its subsidiaries' assets without obtaining the approval of parent's shareholders; such a fundamental change generally requires shareholder approval.⁹⁵ The contrary interpretation would be a "stark, binary approach . . . [that would] not comport with the approach Delaware has taken in other areas of its corporate law[and would unnecessarily] create a Hobson's choice."⁹⁶ Elsewhere and perhaps on this issue, nuance may be more appropriate — recognizing the separate existence of parent and subsidiary for some issues, but not for every issue.⁹⁷ The court's rhetoric — "technical," "stark," "Hobson's choice" — suggested that it favored plaintiff's interpretation.⁹⁸ The Delaware legislature took the cue, responding within a year of the *Hollinger* decision by amending section 271 to include a new subsection which clarified that the assets of a corporation include the assets of wholly owned and controlled subsidiaries.⁹⁹

Delaware judges may feel emboldened to offer advice to legislators because they possess expertise regarding corporate law, while the legislators, who serve only part-time, likely lack comparable expertise. Because of their limited jurisdiction, chancellors continually are exposed to business transactions, providing familiarity with typical transaction behavior, attendant problems, and their public resolution, private resolution, or both. Courts likely possess valuable insight from which legislators may benefit.¹⁰⁰ Aside from relevant expertise, Delaware judges may be more impartial than their counterparts in other states because of the nonpoliticized selection process and their

⁹³ See *Hollinger*, 858 A.2d at 374.

⁹⁴ *Id.*

⁹⁵ See *id.*; cf. DEL. CODE ANN. tit. 8, § 275 (2001) (addressing dissolution).

⁹⁶ *Hollinger*, 858 A.2d at 375.

⁹⁷ *Id.* at 374-75.

⁹⁸ *Id.* at 348, 375.

⁹⁹ The court issued the *Hollinger* decision on July 29, 2004. See *id.* On May 17, 2005, the Delaware legislature amended section 271 consistent with the *Hollinger* court's suggestion. See 75 Del. Laws 24, 28 (2005).

¹⁰⁰ See also Katyal, *supra* note 81, at 1719 ("The advantage of prescription is that it permits relatively intellectual federal judges with life tenure to impart their nonbinding wisdom to politicians.").

relatively long tenure. Thus, Delaware courts may feel free to offer advice about policy for the consideration of legislators.¹⁰¹

Additionally, in the *Hollinger* case, the advice concerned a matter of statutory interpretation. Unlike an interpretation of a constitutional provision, which would be largely untouchable by the legislature, the legislature can reject or overrule a court's advice regarding the interpretation of a statute.¹⁰² In non-Delaware jurisdictions, judges might be unwilling to dispense advice, which, if wrong, could remain unaddressed by the legislature. In Delaware, however, the judges know that the legislature annually reviews its corporate code for possible amendment,¹⁰³ and that the legislature responds to court decisions.¹⁰⁴

Importantly, the court's adaptive statutory interpretation did not retroactively (nor adversely) impact any of the parties because the issue was not squarely presented. Further, the court signaled to managers and their advisors that, with respect to section 271, the court was contemplating an adaptation from its typical form-over-substance interpretation of the corporate code.¹⁰⁵ Similarly, such advice to transaction planners is not anomalous.

¹⁰¹ See *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176, 1198-1205 (Del. Ch. 2000) (articulating various statutory interpretations and competing policy rationales supporting contrary conclusions before declining to resolve issue unnecessarily).

¹⁰² See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding that court, not legislature, offers final word as to statute's constitutionality).

¹⁰³ See *Hamermesh*, *supra* note 60, at 1754.

¹⁰⁴ See 73 Del. Laws 786 (2002) (clarifying statutory ambiguity identified in *In re Digex*, 789 A.2d at 1176 by amending DEL. CODE ANN. tit. 8, § 203(c)(8) (Supp. 2006) to include following language: "Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock"); *Romano*, *supra* note 7, at 225-26 (noting that, at median, Delaware legislature took two years to reverse decision of Delaware courts whereas average time for Congress to reverse decision of U.S. Supreme Court was 12 years). The Delaware legislature responded to, among other things, the *Smith v. Van Gorkom* decision by enacting section 102(b)(7) of the Delaware General Corporation Law. Compare *Smith v. Van Gorkom*, 488 A.2d 858 (1985) (holding that directors breached duty of care and could be responsible for monetary damages), with DEL. CODE ANN. tit. 8, § 102(b)(7) (2001) (providing that certificate of incorporation may eliminate director liability to corporation or shareholders for monetary damages for breach of duty of care).

¹⁰⁵ For an example of the Delaware courts' typical form-over-substance statutory interpretation, see *Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) ("[T]he sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end.").

(2) Advising Corporate Managers and Their Counsel

Delaware judges commonly utilize dicta or advice to guide corporate managers and their counsel. The Delaware Supreme Court's resolution of *In re Walt Disney Co. Derivative Litigation* exemplifies this.¹⁰⁶ Following the death of its president, Disney courted Michael Ovitz.¹⁰⁷ Ovitz, who was once dubbed the most powerful man in Hollywood, headed a talent agency that represented an illustrious list of clients, including Martin Scorsese and Tom Cruise.¹⁰⁸ Because he was well-compensated and because his future was secure at the agency he founded, Ovitz required of Disney a generous compensation package that included contractual protection if, without cause, he were ousted by Disney's board of directors,¹⁰⁹ as the law empowered the board to do.¹¹⁰ Fifteen months after Ovitz was hired, the Disney board terminated him without cause, resulting in payments to Ovitz of approximately \$130 million.¹¹¹

In claiming that the board of directors should not benefit from the deferential business judgment rule, plaintiff-shareholders argued that the board failed to act in good faith when contracting with Ovitz on terms unfavorable to Disney and when terminating him without cause.¹¹² On appeal, plaintiffs contended that the chancery court erroneously defined bad faith.¹¹³ Although the court rejected plaintiffs' contention, it explained why it would unnecessarily address the issue presented:

[T]he error would not be reversible because the appellants cannot satisfy the very test they urge us to adopt.

¹⁰⁶ 906 A.2d 27, 62-67 (Del. 2006).

¹⁰⁷ See *id.* at 36.

¹⁰⁸ See John Greenwald, *An Economic Samurai*, TIME, Dec. 10, 1990, at 70.

¹⁰⁹ *In re Walt Disney*, 906 A.2d at 37, 57-58.

¹¹⁰ See DEL. CODE ANN. tit. 8, § 122(5) (2001) ("Appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation . . ."); *id.* § 142(b) (2001) ("Officers . . . shall hold their offices for such terms as . . . determined by the board of directors. . . . Each officer shall hold office . . . until such officer's . . . removal.").

¹¹¹ See *In re Walt Disney*, 906 A.2d at 35; *Brehm v. Eisner*, 746 A.2d 244, 249 (Del. 2000) ("By an agreement dated October 1, 1995, Disney hired Ovitz as its president."); *id.* at 252 ("On December 11, 1996, Eisner and Ovtiz agreed to arrange for Ovitz to leave Disney on the non-fault basis. . . . This decision was implemented by a December 27, 1996 letter to Ovitz from defendant Sanford M. Litvack, an officer and director of Disney.").

¹¹² See *In re Walt Disney*, 906 A.2d at 46.

¹¹³ See *id.* at 62.

For that reason, our analysis of the appellants' bad faith claim could end at this point. In other circumstances it would. This case, however, is one in which the duty to act in good faith has played a prominent role, yet to date is not a well-developed area of our corporate fiduciary law [T]he duty to act in good faith is, up to this point relatively uncharted. Because of the increased recognition of the importance of good faith, some conceptual guidance to the corporate community may be helpful. For that reason we proceed to address the merits of the appellants' . . . argument.¹¹⁴

The court then identified three categories of behavior that might constitute bad faith fiduciary conduct. The first category, subjective bad faith, includes conduct designed to harm and clearly evidences bad faith.¹¹⁵ The second category, gross negligence, fails to evidence bad faith.¹¹⁶ Recognizing philosophical difficulty but also the need to provide guidance, the court indicated that "in the pragmatic, conduct-regulating legal realm which calls for more precise conceptual line drawing," gross negligence does not breach the duty to act in good faith.¹¹⁷ The third category, which includes "intentional dereliction of duty [or] a conscious disregard for one's responsibilities," suffices to evidence bad faith.¹¹⁸ Even assuming that the court was required to address plaintiffs' claim, which it concedes it was not, the plaintiffs' factual allegations centered on the second category — gross negligence.¹¹⁹ This left the court's resolution of the more difficult third category — which falls between intent and gross negligence — even more unnecessary.¹²⁰

¹¹⁴ *Id.* at 63-64 (footnotes omitted).

¹¹⁵ *See id.* at 64.

¹¹⁶ *See id.* at 64-65 ("[T]o afford guidance we address the issue of whether gross negligence (including a failure to inform one's self of available material facts), without more, can also constitute bad faith. The answer is clearly no.").

¹¹⁷ *Id.* at 65.

¹¹⁸ *See id.* at 66 ("To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.").

¹¹⁹ *See id.* at 64 ("[A]ppellants assert claims of gross negligence to establish breaches . . . of the directors' duty to act in good faith.").

¹²⁰ Interestingly, after unnecessarily reaching these issues to offer advice, the court humbly stated: "To engage in an effort to craft . . . a definitive and categorical definition of the universe of acts that would constitute bad faith would be unwise and is unnecessary to dispose of the issues presented on this appeal." *Id.* at 67 (internal

(a) *Advising Litigators*

The explication regarding bad faith represents an important development in corporate law. As the court noted, the case law on the subject is relatively sparse. Such advice benefits litigators.¹²¹ After the fact, when litigators counsel managers subject to suit, the court's guidance on bad faith may prove beneficial and facilitate an efficient private resolution of the dispute. This aspect of the *In re Walt Disney* opinion, however, seemingly does not assist transaction planners. The fact that a director may be grossly negligent and not violate her duty of good faith is of little consequence because ex ante, no transaction planner would counsel the client to so act or advise board members to consciously disregard their duties.

(b) *Advising Transaction Planners*

The court identified information considered by the Compensation Committee (and the full board) in connection with Ovitz's retention and subsequent termination and concluded that the directors benefitted from the business judgment rule.¹²² After reviewing the process and holding that directors were not liable, the court need not have done more. The court, however, offered advice regarding information that might have been gathered and considered by the Compensation Committee as well as documenting such consideration. Had Disney acted according to the court's concept of best practices, the directors not only would have avoided liability, but the company may have avoided the time and expense of litigation.¹²³ The Delaware Supreme Court had the following to say:

quotes and footnote omitted).

¹²¹ In another matter, the chancery court recently signaled a change that may benefit litigators. It noted a disconnect between the "waste" standard articulated by the Delaware Supreme Court years ago and the high court's occasional references to "proportionality" when discussing that standard, before stating that "waste," not "proportionality," would be employed. See *Lewis v. Vogelstein*, 699 A.2d 327, 338 (Del. Ch. 1997) ("The [Delaware] Supreme Court has not expressly deviated from the 'proportionality' approach to waste of its earlier decision, although in recent decades it has had few occasions to address the subject."). Compare *id.* at 336 ("[I]n its earlier expressions, the waste standard used by the courts in fact was not a waste standard at all, but was a form of 'reasonableness' or proportionality review."), with *Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 656 (Del. 1952) (defining standard as "reasonable relationship between the value of the services . . . and the value of the options" (emphasis added)).

¹²² See *In re Walt Disney*, 906 A.2d at 53-62, 70-73.

¹²³ The Ovitz hiring and firing spawned much litigation and generated a number of published opinions. See, e.g., *id.*; *Brehm v. Eisner*, 746 A.2d 244, 249 (Del. 2000); *In*

In our view, a helpful approach is to compare what actually happened here to what would have occurred had the committee followed a . . . “best case” . . . scenario, from a process standpoint. In a “best case” scenario, all committee members would have received, before or at the committee’s first meeting . . . , a spreadsheet . . . prepared by . . . a compensation expert. . . . Making different, alternative assumptions, the spreadsheet would disclose the amounts that Ovitz could receive under the OEA [Ovitz’s Employment Agreement] in each circumstance that might foreseeably arise. One variable in that matrix of possibilities would be the cost to Disney of a non-fault termination for each of the five years of the initial term of the OEA. The contents of the spreadsheet would be explained to the committee members, either by the expert who prepared it or by a fellow committee member similarly knowledgeable about the subject. That spreadsheet, which ultimately would become an exhibit to the minutes of the compensation committee meeting, would form the basis of the committee’s deliberations and decision.

Had that scenario been followed, there would be no dispute (and no basis for litigation) over what information was furnished to the committee members or when it was furnished. Regrettably, the committee’s informational and decisionmaking process used here was not so tidy. That is one reason why the Chancellor found that although the committee’s process did not fall below the level required for a proper exercise of due care, it did fall short of what best practices would have counseled.¹²⁴

The court generally advised Compensation Committees and boards regarding the information component of the business judgment rule. Compliance with the advice may benefit shareholders via a more informed directorate and may benefit directors by enabling them to more easily attain dismissals of suits challenging their judgment.

re Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005); *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003); *In re* Walt Disney Co. Derivative Litig., 731 A.2d 342 (Del. Ch. 1998).

¹²⁴ *In re* Walt Disney, 906 A.2d at 56; *see id.* at 57 (“On this question the documentation is far less than what best practices would have dictated. There is no exhibit to the minutes that discloses, in a single document, the estimated value of the accelerated options in the event of an NFT [Non-Fault Termination] termination after one year.”).

Disney is only one of the latest of a line of cases in which Delaware courts have offered transaction planning advice to corporate managers and their transaction planners.¹²⁵ *Smith v. Van Gorkom* is a classic example. In that case, the court determined that the directors would not benefit from the deferential business judgment rule, and then suggested alternative behavior — advice — that would have enabled the directors to benefit from the deferential business judgment rule.¹²⁶

In *Van Gorkom*, the Delaware Supreme Court addressed the plaintiffs' claim that the board of directors did not comply with its duty of care when it approved the sale of the corporation.¹²⁷ Directors must inform themselves of reasonably available information when exercising business judgment.¹²⁸ Directors will not benefit from the deferential business judgment rule if they are grossly negligent in informing themselves, and in *Van Gorkom*, the court concluded that the directors were grossly negligent.¹²⁹ In describing the failures of the board, the court offered advice — a blueprint for actions that could be taken by board members in future deliberations to produce an informed (and presumably better substantive) decision that would benefit shareholders and protect directors by shielding their decisions from shareholder challenge.¹³⁰

¹²⁵ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983) (“Although perfection is not possible, or expected, the result here could have been entirely different if [the controlled subsidiary] had appointed an independent negotiating committee of its outside directors to deal with [the parent company] at arm’s length. Since fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm’s length is strong evidence that the transaction meets the test of fairness.” (citations omitted)); *In re Fort Howard Corp. S’holders Litig.*, Civ. A No. 9991, 1988 WL 83147, at *12 (Del. Ch. Aug. 8, 1988) (“It cannot . . . be the best practice to have the interested CEO in effect handpick the members of the Special Committee Nor can it be the best procedure for him to, in effect, choose special counsel for the committee”).

¹²⁶ Professor Katyal terms such advice-giving as “exemplification.” See Katyal, *supra* note 81, at 1718 (“Exemplification refers to instances in which the Court uses judicial review to strike down an act . . . , but then provides . . . a . . . method to achieve the same end.”).

¹²⁷ See *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985).

¹²⁸ See *id.* at 872.

¹²⁹ See *id.* at 873. With regard to collective versus individual liability for directors, see Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=918119>.

¹³⁰ See R. Franklin Balotti et al., *Equity Ownership and the Duty of Care:*

The court criticized the board for approving the sale of the company at a single, two-hour meeting when the board lacked notice of the meeting's purpose and had not previously been contemplating a sale.¹³¹ Because of its focus on process, the court signaled its preference for more (not fewer) and longer (not shorter) meetings.¹³² The court also expressed its preference that directors be notified of a meeting's purpose,¹³³ even if not typically required.¹³⁴ Relatedly, the court signaled its preference that directors have documentation related to any proposal that they will be asked to approve.¹³⁵ Because the directors were uninformed as to the meeting's purpose, lacked relevant documentation, and were asked to approve an action not previously contemplated, the court criticized the board's passive reliance on relatively uninformed officers.¹³⁶ Lastly, the court noted its preference

Convergence, Revolution, or Evolution?, 55 BUS. LAW. 661, 664 (2000) (“[P]rocedural landmarks such as the information the board received, the number of meetings held, and the receipt of advice from attorneys, investment bankers, or other outside consultants . . .”); Charles M. Elson, *The Duty of Care, Compensation and Stock Ownership*, 63 U. CIN. L. REV. 649, 677 (1995) (describing how *Van Gorkom* “served to create a number of new and important guideposts to ‘informed’ decisionmaking”); Gilson, *supra* note 74, at 916 (entitling section of article: “Transaction Planning Guidance Via Dicta”).

¹³¹ See *Van Gorkom*, 488 A.2d at 865 (“The sale of [the company] was not among the alternatives.”); *id.* at 874 (finding board was “grossly negligent in approving the ‘sale’ of the Company upon two hours’ consideration, without prior notice, and without the exigency of a crisis or emergency”); *id.* at 875 (criticizing board for “hastily calling the meeting without prior notice of its subject matter”).

¹³² See Balotti et al., *supra* note 130, at 664 (noting importance of “procedural landmarks such as . . . the number of meetings held”).

¹³³ See *Van Gorkom*, 488 A.2d at 875 (remarking on board’s actions “without any prior consideration of [the sale of the company] or necessity therefor[e]”).

¹³⁴ See MODEL BUS. CORP. ACT § 8.22(a) (2005) (“Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the . . . purpose of the meeting.”); *id.* § 8.22(b) (“The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.”). Importantly, one’s compliance with statute is not conclusive as to compliance with one’s fiduciary duties. See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

¹³⁵ See *Van Gorkom*, 488 A.2d at 874 (emphasizing that directors lacked documents, and even summaries thereof, before authorizing sale of company); *id.* at 875 (noting “the total absence of any documentation whatsoever”).

¹³⁶ See *id.* at 874 (“[T]he Board had before it nothing more than Van Gorkom’s statement of his understanding of the substance of an agreement which he admittedly had never read . . .”); *id.* at 875 (“Van Gorkom was basically uninformed as to the essential provisions of the very document about which he was talking.”); *id.* (“[CFO] Romans’ statement was irrelevant to the issues before the Board since it did not purport to be a valuation study. . . . [T]he directors were duty bound to make reasonable inquiry of Van Gorkom and Romans, and if they had done so, the

that board members actively engage in the deliberative process and, when appropriate, seek the advice of experts.¹³⁷

Regardless of whether *Van Gorkom* was correctly decided,¹³⁸ corporate managers and their advisors have heeded the court's advice.¹³⁹ Because the courts emphasize process (not substance), compliance with the court's blueprint ensures counsel can assist board members to insulate their considered judgments from challenge by shareholders.

(3) Advising Shareholders

Acknowledging the limits of its authority, a Delaware court may offer advice regarding the proper authority to address what the court deems potentially troubling behavior.¹⁴⁰ Again, the *Disney* case exemplifies this concept. In detailing the nature of the plaintiff-shareholders' claims, the Delaware Supreme Court seemed sympathetic to their allegations. According to the court:

[I]t appear[ed] from the Complaint that: (a) the compensation and termination payout for Ovitz were exceedingly lucrative, if not luxurious, compared to Ovitz's value to the Company; and (b) the processes of the boards of directors in dealing with the approval and termination of the

inadequacy of that upon which they had now claim to have relied would have been apparent."); *id.* at 877 ("No director sought any further information from [CFO] Romans. . . . No director asked Romans for any details as to his study, the reason why it had been undertaken or its depth. No director asked to see the study; and no director asked Romans whether [the company's] finance department could do a fairness study within the remaining . . . period available under the [acquirer's] offer.").

¹³⁷ See *id.* at 876 ("[A]t no time did the Board call for a valuation study . . ."); *id.* at 877 (emphasizing repeatedly that no director asked crucial questions); Balotti et al., *supra* note 130, at 664 (noting preference for "procedural landmarks such as . . . the receipt of advice from attorneys, investment bankers, or other outside consultants").

¹³⁸ The case received much criticism. See, e.g., *Van Gorkom*, 488 A.2d at 893 (McNeilly, J., dissenting); Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437 (1985); Symposium, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002).

¹³⁹ See, e.g., Helen M. Bowers, *Fairness Opinions and the Business Judgment Rule: An Empirical Investigation of Target Firms' Use of Fairness Opinions*, 96 NW. U. L. REV. 567, 574 (2002) ("Immediately following the *Van Gorkom* decision, the frequency of use of fairness opinions increased.").

¹⁴⁰ See Katyal, *supra* note 81, at 1717 (terming concept "self-alienation").

Ovitz Employment Agreement were casual, if not sloppy and perfunctory.¹⁴¹

The court further stated, “One [could] understand why Disney stockholders would be upset with such an extraordinarily lucrative compensation agreement and termination payout awarded [to] a company president who served for only a little over a year and who underperformed to the extent alleged.”¹⁴² Consistent with that sympathy, the court noted certain desirable actions taken by well-functioning boards that were not taken by the Disney board.¹⁴³

Although critical of the board’s governance practices, the court clarified that ensuring compliance with ideal practices was not its mission.¹⁴⁴ Certainly, compliance with ideal practices would be consistent with directors’ fiduciary duties, but the failure to meet those ideal standards does not necessarily result in liability.¹⁴⁵ The court, though seemingly sympathetic to the shareholders’ plight, refused to overstep its limited role.¹⁴⁶ It highlighted that shareholders had the responsibility of communicating among themselves to alter management’s identity or behavior, exercising their voting rights to elect new management, or voting with their feet by selling their

¹⁴¹ *Brehm v. Eisner*, 746 A.2d 244, 249 (Del. 2000); *id.* (“[T]he sheer size of the payout to Ovitz . . . pushes the envelope of judicial respect for the business judgment of directors . . .”).

¹⁴² *Id.* at 267.

¹⁴³ *See id.* at 256 n.29 (noting that board should meet regularly in absence of officers and provide written assessment of chief executive officer performance consistent with practice of most large industrial companies). Such blueprint advice benefits managers and their transaction planners. *See supra* Part I.A.3.b.2.

¹⁴⁴ *Brehm*, 746 A.2d at 255-56 (“This case is not about the failure of the directors to establish and carry out ideal corporate governance practices.”); *see also* Harvey Gelb, *Corporate Governance Guidelines — A Delaware Response*, 1 WYO. L. REV. 523, 539 (2001) (discussing distinction between aspirational standards and standards of liability).

¹⁴⁵ *See Brehm*, 746 A.2d at 256 (“[T]he law of corporate fiduciary duties and remedies for violation of those duties are distinct from the aspirational goals of ideal corporate governance practices. Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.”).

¹⁴⁶ *See id.* at 255 (“This is a case about whether there should be personal liability of the directors of a Delaware corporation to the corporation for lack of due care in the decisionmaking process and for waste of corporate assets.”); *id.* at 266 (“[T]hese claims must be dismissed. To rule otherwise would invite courts to become super-directors, measuring matters of degree in business decisionmaking and executive compensation.” (footnote omitted)).

holdings in Disney.¹⁴⁷ The court would not provide a remedy *ex post* for the alleged wrongs. Instead, the court advised shareholders that they were tasked with holding directors accountable under the facts presented. Arguably, if shareholders know that they are so tasked, then shareholders will be more vigilant¹⁴⁸ or will protect themselves *ex ante* by paying less for their corporate interests.¹⁴⁹

c. Arguments Against Advisory Opinions

Arguments that advisory opinions will not be legitimate, consistent, or accurate counsel against their issuance, but these arguments possess less force in Delaware than other jurisdictions.

(1) Legitimacy

The governmental structure by which powers are separated among the branches generally counsels against the issuance of advisory opinions. Legislatures enact laws; courts resolve cases. Thus, courts should not tread on the legislature's domain.¹⁵⁰ As a court strays from the facts of the case presented by the parties, the court enters a more theoretical domain, addressing normative considerations and analyzing policy matters — arenas properly reserved to the legislature.

The process by which Delaware produces its corporate law, however, may be sufficiently different such that the separation of powers argument possesses less force. The Delaware legislature delegates more to its courts than do other states' legislatures.¹⁵¹ In the

¹⁴⁷ See *id.* at 256 (“The inquiry here is not whether we would disdain the composition, behavior and decisions of Disney’s . . . Board . . . if we were Disney stockholders. . . . [T]hat determination is not for the courts. That decision is for the stockholders to make in voting for directors, urging other stockholders to reform or oust the board, or in making individual buy-sell decisions involving Disney securities.” (footnote omitted)).

¹⁴⁸ Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 54-55 (1999) (noting that legislators may be less vigilant in ensuring that legislation complies with constitution *ex ante* because courts perform this task *ex post*).

¹⁴⁹ See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 280-83 (1991).

¹⁵⁰ See *In re Appraisal of Transkaryotic Therapies, Inc.*, No. 1554-CC, 2007 WL 1378345, at *5 (Del. Ch. May 2, 2007) (“The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.”).

¹⁵¹ Compare MODEL BUS. CORP. ACT § 8.30(a)-(b) (2005) (“Each member of the board . . . shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation . . . [and] shall discharge their duties with the care that a person in a like position would reasonably believe

federal system, Congress delegates to executive agencies consistent with the Constitution's separation of powers.¹⁵² Agencies possess relevant expertise that Congress lacks, and given the ever-changing realm of the knowledge within each agency's field, Congress may prefer to remain relatively uninformed.¹⁵³ Thus, Congress may adopt a general statute and delegate to an agency to fill in the gaps by promulgating rules. As knowledge evolves, as learning increases, and as circumstances change, an agency may adapt its rules. Congress stands ever-ready to alter those rules or reclaim its role as lawmaker in chief. Perhaps in Delaware, the courts, in certain respects, play the role of an administrative agency.¹⁵⁴ Because the Delaware legislature is part-time, most legislators lack the wealth of corporate knowledge possessed by the judiciary.¹⁵⁵ A part-time legislature is not designed to respond rapidly to evolving needs. And if the legislature responds, the resulting statute may be a relatively blunt instrument. Consequently, the legislature may enact a statute with general principles, entrusting the courts to fill in the gaps.

Even if Delaware courts are not analogous to federal agencies, the Delaware legislature may delegate the administration of corporate law to the Delaware courts, just as Congress delegates the administration of antitrust and admiralty law to the federal courts.¹⁵⁶ Non-Delaware

appropriate under similar circumstances.”), with DEL. CODE ANN. tit 8, § 141(a) (2001) (failing to provide specificity of Model Act), and *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (setting forth standards akin to those of Model Act).

¹⁵² See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 999 (2006) (“The Court has shown no indication that it intends to overthrow the administrative state, so it has sidestepped the agency challenge to the separation of powers . . .”).

¹⁵³ See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 171 (2005).

¹⁵⁴ See Fisch, *supra* note 78, at 1088 (“[Delaware] chancery courts . . . act something like administrative agencies.”). Certainly, there are differences between federal agencies and Delaware courts. For example, the President may remove federal administrators but the Delaware Governor may not remove Delaware judges. Nonetheless, there is *some* accountability to the executive because Delaware judges serve for a term of years and must be reappointed by the governor. There are other similarities. For example, both the Delaware judiciary and certain federal agencies require (near) political equality. See DEL. CONST. art. IV, § 3 (“[T]hree of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.”); 15 U.S.C. § 78d(a) (2000) (“There is hereby established a Securities and Exchange Commission . . . to be composed of five commissioners Not more than three of such commissioners shall be members of the same political party . . .”).

¹⁵⁵ See *supra* Part I.A.2; *infra* note 181.

¹⁵⁶ See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57

states similarly entrust their courts to fill legislative gaps, though non-Delaware courts generally have fewer and less significant disputes regarding their respective bodies of corporate law, meaning that the delegation is less significant.¹⁵⁷

Though courts generally resolve disputes *ex post*, Delaware courts offer advice so that, like legislatures, their advice has prospective effect. And because business conditions and managerial behavior may change quickly, courts can adapt their rules and offer incremental advice more easily than legislators can amend the statute to accommodate evolving needs.

The dual role played by the Delaware courts may not be so troubling because the Delaware legislature is attentive. The legislature periodically reviews the content of the Delaware code and judicial decisions.¹⁵⁸ Moreover, the Delaware legislature responds to cues by courts, stepping in with clarifying legislation or legislatively overturning cases when appropriate.¹⁵⁹ Because the Delaware legislature seemingly keeps a close tab on the Delaware courts, the argument that the Delaware courts' advisory opinions violate the state's separation of powers is relatively weak.

(2) Consistency

Another concern that counsels against the issuance of advisory opinions is conflicting advice. If a state high court, an intermediate appellate court, and each of the trial courts offer advice, then the advice offered by those courts may be contradictory, creating legal confusion, harming transaction planning, inviting litigation, and generally defeating the purpose of the advice in the first place. This concern possesses less force in Delaware than non-Delaware jurisdictions.

In Delaware, the Supreme Court routinely speaks unanimously, even on potentially divisive issues.¹⁶⁰ Fewer splintered opinions at the

OKLA. L. REV. 1, 6 (2004).

¹⁵⁷ See *supra* note 10 (suggesting that because Delaware attracts more corporations than non-Delaware states, corporate law disputes in Delaware are more meaningful).

¹⁵⁸ See Hamermesh, *supra* note 60, at 1754.

¹⁵⁹ See *supra* note 104.

¹⁶⁰ See David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 129 (1997) (noting Delaware Supreme Court "rarely issues separate opinions" and "[e]ven on deeply controversial issues, such as those that arose during the takeover wave of the 1980s, Delaware's justices almost invariably speak with a single voice"). Although the Delaware Supreme Court generally rules by panel, not en banc, perhaps increasing the likelihood of conflicting opinions, the court addresses

high court level result in a more coherent message to lower courts and court watchers, and thus reduces the likelihood of conflicting advice. In Delaware, there is no intermediate court, so an additional avenue of potential conflict that may afflict other jurisdictions falls by the wayside.¹⁶¹ Turning to the court of chancery, there are only five chancellors.¹⁶² The small number of chancellors decreases the likelihood of conflict that might arise if their number were greater. Moreover, four chancellors have offices in the same building, and the fifth chancellor's chambers is less than an hour's drive away.¹⁶³ Because geographically speaking, Delaware is a small state, conflicting regional concerns are less likely to arise than would be the case in a large state. In other words, judges are less likely to offer conflicting advice motivated by different regional concerns.¹⁶⁴ Perhaps most importantly, the Delaware chancellors commonly discuss matters that come before them.¹⁶⁵ Although a chancellor issues an opinion for himself, the discussion among chancellors — facilitated by close proximity — increases the likelihood that a chancellor's opinion (and any advice contained therein) meets with the approval of the other

significant corporate matters en banc. See DEL. SUP. CT. INT. OPER. P. art. VII; E. Norman Veasey, *Counseling Directors in the New Corporate Culture*, 59 BUS. LAW. 1447, 1448 (2004).

¹⁶¹ See *supra* note 22.

¹⁶² See Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 903 (1990).

¹⁶³ See Delaware State Courts, Personnel Directory, <http://courts.delaware.gov/Courts/Court%20of%20Chancery/?personnel.htm> (last visited Apr. 14, 2008).

¹⁶⁴ See generally Macey, *supra* note 69, at 2425-26 (noting impact of geography on behavior of agents).

¹⁶⁵ See John Gapper, *Capitalist Punishment*, FIN. TIMES (London), Jan. 29, 2005, at 16 (“[T]he Delaware bench has one thing on its side in shifting ground: its unusual degree of collegiality. The judges often read each other’s rulings before they are published and there are no obvious political divisions among them. . . . When three vice-chancellors — Strine, Lamb and Donald Parsons, the newest member of the bench — gather over lunch at a restaurant near the Wilmington courthouse, they talk seamlessly, with one often finishing a thought about Delaware law for another.”); *id.* (“If someone were to say to me: ‘Of the five members of the chancery court, who would be most likely to aggressively change the law?’ I would say Leo, but it is not done like that,” says [Chief Justice] Myron Steele. ‘I don’t think Leo would do it without talking to other members of the court. If it were done, it would be in a way that was consistent with a doctrinal change on which everyone agreed.’”); Sheri Qualters, *Strine Theory: Court of Chancery Exerts Large Pull on Big M&A Deals*, NAT’L L.J., July 30, 2007, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1185527209444> (“Court of Chancery Judges also ask for input on significant opinions and show each other drafts, Strine said. ‘We probably interact more about decisions with one of our names on it than most appellate courts about decisions that are panel decisions.’”).

chancellors, decreasing the likelihood of conflicting advice. Chancellors “strive to remain consistent within the Court.”¹⁶⁶

(3) Accuracy

When courts offer advice untethered to existing law and the facts of the case in question, courts will err more frequently. If courts go beyond the facts in dispute, courts more likely proceed without the benefit of the parties’ arguments, increasing the risk of erroneous advice.¹⁶⁷ Less so than a legislature, a court does not control the issues, witnesses, or evidence that come before it; the litigants do. Because the litigants may not advocate on behalf of third parties, courts may fail to adequately account for them. Though surely wise, judges may not see the whole picture when offering advice, possibly rendering the advice inaccurate. Inaccurate advice defeats the purpose of giving advice.

Again, this argument may be less forceful in Delaware than other jurisdictions. First, though the adversarial system is designed to expose the truth, the system furthers other goals as well.¹⁶⁸ As a result of these other goals, accuracy may get lost in the shuffle even if advice is not offered.¹⁶⁹ Second, the parties are not always adversaries because many cases settle. In Delaware, any settlement of a class action requires court approval, and shareholder suits commonly take the form of class actions because no individual shareholder has much to gain.¹⁷⁰ A court may offer advice when the parties no longer oppose one another because it fears that its approval of a settlement somehow legitimizes the originally disputed conduct.¹⁷¹ A court may seize the

¹⁶⁶ Smith, *supra* note 29, at 609 n.155.

¹⁶⁷ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring) (“Sound judicial decisionmaking requires both a vigorous prosecution and a vigorous defense of the issues in dispute and a . . . rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.” (internal quotes and citation omitted)).

¹⁶⁸ See, e.g., FED. R. EVID. 501 (addressing privileges); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (discussing attorney-client and attorney work product privileges).

¹⁶⁹ See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (“[O]ur adversary system [in which I have served as a judge] rates truth too low among the values that institutions of justice are meant to serve.”); R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 4 (1987) (“Seven years on the trial bench yield the conviction that our adversary method . . . at times . . . exalt[s] trickery and victory over ethics and truth.”).

¹⁷⁰ See DEL. CH. CT. R. 23.1.

¹⁷¹ See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch.

opportunity to comment on that conduct or, as in *In re Caremark International Inc. Derivative Litigation*, signal adaptation of the law.¹⁷² Third, a court's advice may be comfortably on the side of any legally ambiguous ground, reducing the likelihood that the advice is inaccurate. Delaware courts commonly advise litigants and court watchers that the parties could have achieved the same outcome through alternative, legally permissible means. If the court merely suggests a safe-harbor, then it may not be breaking legal ground without the benefit of the parties' argument and it likely will not have dispensed inaccurate advice. Fourth, in Delaware, the advice is just that — advice — so when legislators or other courts subsequently are confronted with the issue, they are free to disagree with the advice.¹⁷³

B. Legislators

Delaware innovates other than through its courts. The mechanics of legislative action seem consistent across states, suggesting that states do not compete in that regard. But Delaware has innovated by ensuring consistency of its corporate law, delegating the drafting function to facilitate rapid change and lessen special interest influence, and encouraging judicial innovation.

1. Encouraging Consistency

Consistency of law attracts incorporation business because it enhances predictability and facilitates business planning. Delaware innovated a commitment to consistency that other states lack. The legislators of non-Delaware states may unanimously amend the corporate code on Monday; and on Tuesday, a bare majority may amend the code to “undo” Monday's amendment.¹⁷⁴ This could not

1996) (“[T]he court is constrained by the absence of a truly adversarial process, since inevitably both sides support the settlement and legally assisted objectors are rare.”); *id.* (noting “low probability . . . that the directors . . . breached any duty to appropriately monitor and supervise the enterprise”).

¹⁷² See *supra* note 77.

¹⁷³ See Hamermesh, *supra* note 60, at 1754. Compare *Smith v. Van Gorkom*, 488 A.2d 858, 874-75 (Del. 1985) (holding that board was not informed following two-hour board meeting during which board lacked valuation information and had not previously contemplated selling company), with *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989) (holding that board was informed, despite acquirer's three-hour deadline for responding to offer, because board possessed valuation information and had previously contemplated selling company).

¹⁷⁴ Assume, throughout this discussion, that the executive branch provided any necessary approval.

happen in Delaware. Delaware's Constitution requires the approval of two-thirds of each legislative chamber to amend its corporate code.¹⁷⁵ Delaware's constitutional requirement signals a commitment to consistency with respect to its corporate code. Other states cannot easily mimic Delaware's innovative constitutional requirement because, by design, constitutional amendments face tremendous hurdles. Some states require approval by consecutive legislatures prior to submission to constituents.¹⁷⁶ Other states require supermajority approval in the legislature prior to submission to the electorate.¹⁷⁷ Moreover, unlike other states, Delaware does not empower its electorate to amend its constitution.¹⁷⁸

Absent a constitutional provision signaling consistency, a state may otherwise signal consistency if prior amendments to its corporate code were unanimous. Unanimity suggests consistency because change is less likely when the rule is set unanimously than when it is set by a bare majority. For example, yesterday's fifty-one percent may easily become today's forty-nine percent, thus undermining consistency. But even if this were the case, the signal of consistency sent by non-Delaware states would be weaker than the signal sent by Delaware because any non-Delaware state that unanimously amended its corporate code in the past would not be required to do so in the future. Theoretically, a non-Delaware state could try to bolster its image of consistency by enacting an entrenching corporate code that includes a supermajority requirement to amend. Conventional wisdom, however, suggests that a legislature cannot enact an entrenching statute.¹⁷⁹

2. Delegating Drafting Responsibilities

Delaware's legislature also innovates by delegating drafting responsibilities to the Council of the Corporate Law Section of the

¹⁷⁵ See DEL. CONST. art. IX, § 1. Professor Hamermesh reports that amendments to the Delaware corporate code invariably receive unanimous approval. See Hamermesh, *supra* note 60, at 1753.

¹⁷⁶ See, e.g., N.Y. CONST. art. XIX, § 1; PA. CONST. art. XI, § 1.

¹⁷⁷ See, e.g., CAL. CONST. art. XVIII, § 1.

¹⁷⁸ See, e.g., *id.* § 3.

¹⁷⁹ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90) (“[O]ne legislature may not bind the legislative authority of its successors.”). *But cf.* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (arguing against conventional wisdom).

Delaware Bar Association (the “Council”).¹⁸⁰ Like the legislators of some states, Delaware legislators work only part-time, making it impossible for legislators to enjoy encyclopedic knowledge of the vast array of subject matters, including corporate law, that require their attention.¹⁸¹ Accordingly, with regard to updating the corporate code, those state legislators may rely on others with relevant expertise, namely, local corporate attorneys. Reliance on experts other than legislators and their staff is not unique to Delaware; other states commonly introduce corporate legislation drafted by outsiders.¹⁸² A majority of states have adopted some variant of the Model Business Corporation Act (“Model Act”), which was drafted by a subcommittee of the ABA.¹⁸³ When a state deviates from the Model Act, however, those deviations may be spurred by a powerful corporation within that state’s borders.¹⁸⁴ Other corporations may prefer to avoid a jurisdiction where a single corporation wields tremendous power over the legislature; and even if other corporations found such circumstances attractive, investors may not. In Delaware, no corporation wields such authority over the legislature or the Council, and the Council represents varied interests.¹⁸⁵

¹⁸⁰ See Hamermesh, *supra* note 60, at 1755.

¹⁸¹ In Delaware, “[t]he legislature is a part-time legislature . . . [and] legislators are part-time positions.” Legislative Info for the State of Delaware, http://legis.delaware.gov/legislature.nsf/Lookup/Know_Your_Legislators (last visited Apr. 14, 2008).

¹⁸² Even Congress relies on outsiders. For example, Viet Dinh has been credited with drafting the USA PATRIOT Act while serving as Assistant Attorney General for the DOJ’s Office of Legal Policy. See Eric Lichtblau, *Administration Plans Defense of Terror Law*, N.Y. TIMES, Aug. 19, 2003, at A1.

¹⁸³ See MODEL BUS. CORP. ACT, at xix-xx (2005) (indicating that 29 states have adopted all or substantially all of Model Act, which is drafted and revised by Committee on Corporate Laws of Section of Business Law of ABA); E. Norman Veasey & Christine T. DiGuglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1417 (2005).

¹⁸⁴ See MODEL BUS. CORP. ACT, at xix n.1 (indicating that Washington and Massachusetts each has adopted all or substantially all of Model Act); OESTERLE, *supra* note 10, at 615 (“When rumors circulated about a takeover of Boeing Corporation . . . , the Washington legislature met in emergency session and approved a bill, signed immediately by the governor, that had been drafted by Boeing counsel. The governor of Massachusetts signed . . . [a] statute in the offices of Gillette, a takeover target at the time.”).

¹⁸⁵ See Hamermesh, *supra* note 60, at 1754-55; *id.* at 1755-56 (noting Council includes litigators, transaction counsel, plaintiffs’ attorneys, counsel to institutional investors, and *excludes* in-house counsel); *id.* at 1759 (“It is just not that hard to leave client interests at the door when those interests are so diverse that any particular initiative will be attractive to some clients but unattractive to others.”). Although no

Delaware's regime allows for relatively rapid statutory amendments to respond to corporations and their constituencies as well as the courts.¹⁸⁶ The regime of a non-Delaware state may respond slowly and rely on the same national organization as many other states.¹⁸⁷ Slow responses and universal mimicry generally are inimical to innovation.¹⁸⁸ Whereas many states' legislatures may respond only after dramatic events,¹⁸⁹ Delaware's regime allows for legislative amendment that improves the corporate law system even absent the occurrence of dramatic events.¹⁹⁰

3. Encouraging Judicial Innovation

Recognizing that its court system is itself innovative, the Delaware legislature, in certain respects, invites litigation to enable Delaware

outside special interests may influence the Council, the Council may pursue its own interests. See Macey & Miller, *supra* note 58, *passim*.

¹⁸⁶ See CHOPER ET AL., *supra* note 10, at 599-600 (discussing rapid amendment to Delaware code in response to chancery court decision); *supra* note 104. Compare Romano, *supra* note 7, at 225 & n.42 (noting that median time for Delaware legislature to reverse decision of Delaware courts is two years), with *id.* at 225-26 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991)) (noting that average time for Congress to reverse decision of U.S. Supreme Court is 12 years).

¹⁸⁷ Non-Delaware states may be slow to amend their corporate codes, even if they previously adopted the Model Act and the Model Act has been amended. See MODEL BUS. CORP. ACT, at xix (indicating that corporate codes of four states reflect 1969 version of Model Act even though Model Act repeatedly has been revised since 1969).

¹⁸⁸ See Romano, *supra* note 7, at 236 (asserting Model Act contributes to "diffusion" of innovations across states); *id.* at 237 (noting innovativeness of Model Act varies, with drafters sometimes copying innovations of Delaware or other states). Consider the members of the ABA committee responsible for drafting amendments to the Model Act. How do a member's marginal costs of innovation compare to the marginal benefits of innovation? How does a member capture those benefits? There could be reputational benefits, but if one is already a member of such a committee, then one's reputation will already be quite favorable.

¹⁸⁹ Cf. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 450-86 (3d ed. 2003) (describing crises that prompted rule-making by Securities and Exchange Commission); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523-24 (2005) (describing vivid corporate bankruptcies of formerly leading corporations that prompted congressional legislation).

¹⁹⁰ See Hamermesh, *supra* note 60, at 1754 ("[P]roposed amendments to the DGCL are presented for legislative consideration . . . essentially every year . . ."); *id.* at 1772 ("Many of the statutory changes have been technical, and very few have attracted any academic attention.").

courts to ply their craft.¹⁹¹ For suits proceeding in a Delaware court, plaintiffs need not be concerned with whether the court will have jurisdiction over officers or members of the board of directors of a Delaware corporation, because the legislature has ensured such is the case.¹⁹² Though the legislatures of some states require that plaintiff-shareholders post some form of security for expenses,¹⁹³ the Delaware legislature does not similarly inhibit shareholder suits.¹⁹⁴ Moreover, the fact-intensive nature of Delaware jurisprudence, in certain respects, equates with legal uncertainty, which could increase litigation.¹⁹⁵ To be sure, the Delaware legislature disfavors strike suits, but it recognizes that its well-developed body of common law could stagnate absent litigation.

II. INEFFICIENT INNOVATION

Our laws may favor the innovator to encourage innovation.¹⁹⁶ Innovation involves the creation of information. Thus, an innovator cannot capture all of the benefits that flow from her innovation, because an innovation may inspire a second person to think in ways not previously contemplated, and the inspired party may originate a second innovation without any violation of the original innovator's rights. Although the second innovation only occurred because of the first innovation, the first innovator cannot tap the second innovator for her share. Because the first innovator cannot capture all of the gains that flow from her innovation, she will be more reluctant to bear the costs of innovation, and as a result, she will innovate less than is socially optimal.¹⁹⁷

¹⁹¹ See *id.* at 1772-73, 1776-77 (noting indeterminacy of Delaware corporate law and Council's hesitancy to influence ongoing litigation).

¹⁹² See DEL. CODE ANN. tit. 10, § 3114 (1999 & Supp. 2006); Macey & Miller, *supra* note 58, at 496 & n.98.

¹⁹³ See CAL. CORP. CODE § 800(c)-(d) (West 1990); N.J. STAT. ANN. § 14A:3-6(3) (West 2003).

¹⁹⁴ See Macey & Miller, *supra* note 58, at 496.

¹⁹⁵ See *generally* Orman v. Cullman, 794 A.2d 5, 20-21 n.36 (Del. Ch. 2002) (noting that fact-intensive nature of fairness inquiry "normally will preclude dismissal" of complaint, may preclude summary judgment, and "likely . . . will require a full trial").

¹⁹⁶ See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

¹⁹⁷ See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616-17 (1962) ("[A]ny information obtained . . . should, from the

This conceptual framework can be applied to the incorporation market. Despite the presence of process innovation in the production of corporate law, such innovation occurs at socially suboptimal levels. In the following subsections, I examine states and the motivations of those that act on states' behalf to innovate — judges and legislators.¹⁹⁸

welfare point of view, be available free of charge. . . . This insures optimal utilization of the information but of course provides no incentive for investment in research.”); *id.* at 611-12 (“[A]ny unwillingness or inability to bear risks will give rise to a nonoptimal allocation of resources, in that there will be discrimination against risky enterprises as compared with the optimum.”).

¹⁹⁸ This Article focuses on suppliers of a corporate law system. One should also consider those who demand a corporate law system. One should consider the motivations of corporate managers, those advising corporate managers (attorneys and investment bankers), and those to whom corporate managers are accountable (investors). One might conclude that the suppliers will be disciplined to provide an efficient corporate law system by those making the demand. Each of the parties involved in making the demand, however, are agents. Thus, the standard agency problem suggests that such discipline may be suboptimal. Corporate managers may not pursue the best interests of the corporation. *See, e.g.,* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 87-90 (1936) (discussing agency problem); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 *AM. BUS. L.J.* 417, 438-39 (2003) (same). Attorneys may not pursue the best interests of their corporate clients. *See, e.g.,* Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 *S. CAL. INTERDISC. L.J.* 375, 375-76 (1996) (discussing agency problem); Ted Schneyer, *Commentary, Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 *VA. L. REV.* 1777 (1998) (same). Investment bankers may not pursue the best interests of their corporate clients. *See, e.g.,* Janet Cooper Alexander, *The Lawsuit Avoidance Theory of Why Initial Public Offerings Are Underpriced*, 41 *UCLA L. REV.* 17 (1993) (discussing agency problem); Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 *DUKE L.J.* 27, 44 (same); Steven J. Cleveland, *An Economic and Behavioral Analysis of Investment Bankers When Delivering Fairness Opinions*, 58 *ALA. L. REV.* 299 (2006) (same); Charles M. Elson et al., *Fairness Opinions — Can They Be Made Useful?*, 35 *Sec. Reg. & L. Rep. (BNA)* 1984 (2003) (same). Investors' strategy may not result in efficient corporate behavior. *See, e.g.,* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 *MICH. L. REV.* 520 (1990) (noting that passive shareholders do not discipline disloyal corporate managers); Daniel Kahneman & Mark W. Riepe, *Aspects of Investor Psychology*, 24 *J. PORTFOLIO MGMT.* 52, *passim* (1998) (listing potential biases of financial advisors and investors, possibly resulting in failure to discipline disloyal corporate managers); Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 *NW. U. L. REV.* 135 (2002) (same). The effective implementation of any innovation may require complementary knowledge across multiple professions — corporate managers, attorneys, investment bankers, investors. *See* John Seely Brown & Paul Duguid, *Knowledge and Organization: A Social-Practice Perspective*, 12 *ORG. SCI.* 198, 207-09 (2001); Gert-Jan Hospers, *From Schumpeter to the Economics of Innovation*, 56 *BRIEFING NOTES IN ECON.* 1, 4 (2003) (“[F]irms are almost never able to innovate in isolation, they need various other organizations for a successful development and diffusion of

A. States

States may innovate their corporate law systems in a less than ideal manner. Delaware dominates the incorporation market, with most states enjoying only a small market share.¹⁹⁹ One might expect competition, with states innovating to increase their market shares, but most states do not compete.²⁰⁰ There may be little upside for newly innovative states. If the newly innovative state has a large annual budget, the fees attracted by an innovation may be relatively meaningless.²⁰¹ If the newly innovative state has a small annual budget, the fees attracted by an innovation may be meaningful, but the state may be unable to bear the additional costs necessary to attract those fees.²⁰² Many pieces of the corporate law system must be in place — statutes, common law, judges, attorneys, other corporate

innovations.”). Knowledge may not flow efficiently across professions. See Ewan Ferlie et al., *The Nonspread of Innovations: The Mediating Role of Professionals*, 48 ACAD. MGMT. J. 117, 129 (2005) (“First, professional communities of practice are often unidisciplinary, with great effort needed to create a functioning multidisciplinary community of practice. Secondly, they typically seal themselves off. . . . Thirdly, these communities of practice are highly institutionalized.”).

¹⁹⁹ See *supra* note 10; *infra* note 200.

²⁰⁰ See Henry N. Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters*, 1988 WIS. L. REV. 365, 378 (“[P]ossibly the most troubling aspect of the market for corporate charters is that many of the producers of charters are not competing in the market in any meaningful or productive sense. Most states simply do not care about the size of their market share.”); Ferris et al., *supra* note 30, at 8 (noting “most states ceding the market to a few states that vigorously compete”). Note, however, that the existence of only a few competitors does not necessarily mean little competition. See Partha Dasgupta & Joseph Stiglitz, *Industrial Structure and the Nature of Innovative Activity*, 90 ECON. J. 266, 277 (1980) (“[T]he number of firms in an industry is no measure of the extent of . . . effective competition.”).

²⁰¹ See Hadfield & Talley, *supra* note 8, at 437 (noting “low salience”); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 728 (2002).

²⁰² See Hadfield & Talley, *supra* note 8, at 437 (“[S]tates with . . . smaller state budgets . . . may be able to effectively underprice competitor legislators from large states.”); Romano, *supra* note 5, at 231. Interestingly, North Dakota recently innovated by establishing an opt-in shareholder-friendly corporate governance regime. See N.D. CENT. CODE § 10-3-5 (2007). Others, however, doubt that state’s ability to attract incorporation business. See Posting of Professor Lawrence A. Hamermesh to Harvard Law School Corporate Governance Blog, *The North Dakota Experiment: Bundle Up!*, <http://blogs.law.harvard.edu/corpgov/2007/04/26/the-north-dakota-experiment-bundle-up/> (Apr. 26, 2007, 16:44); Posting of Professor Larry Ribstein to Harvard Law School Corporate Governance Blog, *The North Dakota Experiment*, <http://blogs.law.harvard.edu/corpgov/2007/04/23/the-north-dakota-experiment/> (Apr. 23, 2007, 23:48).

service providers; and an attractive innovation in one area need not result in corporate migration from Delaware.²⁰³

States may also be deterred from investing in innovation because those investments almost certainly will be duplicative of other states (and thus be potentially wasted) absent coordination among those states.²⁰⁴ Coordination with other states, however, may be inconsistent with a state's desire to benefit from being the first-mover. And in the incorporation market, even first-movers may not benefit if other states can mimic the innovation.²⁰⁵ Certain innovations (e.g., statutory amendment) may be mimicked more easily than other innovations (e.g., talented, independent judiciary sitting in a court of specialized jurisdiction, armed with well-developed case law).²⁰⁶

We should not be surprised that a market leader, like Delaware, innovates disproportionately more than a state with a smaller market share.²⁰⁷ Delaware benefits from financing and scale advantages. As a market leader, Delaware collects a higher fee than other states from those firms that choose to incorporate there.²⁰⁸ Those profits enable risky investments which may or may not yield innovation. Less profitable states may lack resources to make investments that could yield nothing.²⁰⁹ And because of its heavy reliance on the incorporation business, Delaware continually monitors and tweaks its

²⁰³ "As the market matures . . . and barriers [to entry] begin to emerge, innovators will find that a more potent innovation is required to capture market share" Paula Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2369 (1994).

²⁰⁴ See Partha Dasgupta & Joseph Stiglitz, *Uncertainty, Industrial Structure, and the Speed of R&D*, 11 BELL J. ECON. 1, 27 (1980) (noting "systematic bias in favor of too little risk").

²⁰⁵ See Romano, *supra* note 7, at 230 ("States were consciously learning, copying, and refining each other's statutes."). See generally Partha Dasgupta, *The Theory of Technological Competition*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 519, 525 (Joseph E. Stiglitz & G. Frank Mathewson eds., 1986) ("Research activity appears to be strongest . . . where . . . rapid imitation is not possible . . .").

²⁰⁶ See Daines, *Firm Value*, *supra* note 10, at 540 ("[W]hile other states might (and sometimes do) imitate Delaware statutes, it is unlikely that they can duplicate the expertise of Delaware's unique courts or its store of precedent." (citation omitted)).

²⁰⁷ See Oliver E. Williamson, *Innovation and Market Structure*, 73 J. POL. ECON. 67, 67 (1965); see also F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 652 (3d ed. 1990); F.M. Scherer, *Concentration, R&D, and Productivity Change*, 50 S. ECON. J. 221, 222 (1983) ("And the larger a seller's market share is, the larger will be the share of cost savings from process innovations . . .").

²⁰⁸ See Macey & Miller, *supra* note 58, at 492 & n.86. The rates charged by Delaware's lawyers also include a premium. See Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1246 (2001).

²⁰⁹ See Dasgupta & Stiglitz, *supra* note 204, at 27.

corporate law system.²¹⁰ Such continuous review generates expertise which facilitates innovation. States that do not continuously review their corporate law system must bear the costs of “ramping up.” Moreover, Delaware, with its dominant market share, can spread the costs of innovation over its large customer base more easily than could a state that enjoys only a small market share.

Given Delaware’s dominant market share,²¹¹ and those states with small market shares investing less in innovation,²¹² one would suspect that there is less incentive for Delaware to innovate.²¹³ If, however, Delaware does not innovate, those states with small market shares could benefit from their own innovations. In such circumstances, the dominant firm may adopt a mixed strategy, innovating just enough to deter smaller firms from innovating but innovating in a manner that is less than socially optimal.²¹⁴

²¹⁰ See Hamermesh, *supra* note 60, at 1755-59 (describing standing committee that annually reviews Delaware’s corporate law system).

²¹¹ See Kahan & Kamar, *supra* note 208, at 1210-11.

²¹² See Jan Boone, *Competitive Pressure: The Effects on Investments in Product and Process Innovation*, 31 RAND J. ECON. 549, 559 (2000) (“For complacent or faint firms, however, competitive pressure . . . reduc[es] their incentives to improve efficiency.”); cf. F.M. Scherer, *Market Structure and the Employment of Scientists and Engineers*, 57 AM. ECON. REV. 524, 529-30 (1967) (discussing investment in innovation in relation to market concentration).

²¹³ See Arrow, *supra* note 197, at 619 (“[T]he incentive to invent is less under monopolistic than under competitive conditions”); Joseph E. Stiglitz, *Introduction to NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE*, *supra* note 205, at vii, xvii (“[S]imply threatening potential entrants that if they do attempt to engage in R&D, the [dominant] firm will respond”); Williamson, *supra* note 207, at 68 (“[I]nnovative performance of the largest firms may decline as monopoly power increases.”); cf. David Encaoua et al., *Strategic Competition and the Persistence of Dominant Firms: A Survey*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE, *supra* note 205, at 55, 73-74 (“[W]hen first-mover advantages are present, strong tendencies towards dominance based on strategic pre-emption exist.”).

²¹⁴ See Richard J. Gilbert, *Pre-emptive Competition*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE, *supra* note 205, at 90, 112 (“Faced with the prospect of throwing away profits to prevent entry, an established firm would do better to gamble and to choose investment dates that pre-empted rivals with some probability less than one.”).

“[P]re-emptive investment is not likely . . . to be a credible threat to market performance unless: (i) scale economies are sufficient to allow the existence of only a few firms in an efficient market structure; or (ii) an established firm can convince potential competitors that it would compete aggressively against even relatively small entrants.”

Id. at 120. Both criteria may be met in the incorporation market. First, few states compete. See *supra* note 200. Second, Delaware competes aggressively. See Romano,

Delaware seemingly has adopted a mixed strategy. Delaware innovates, but other states commonly innovate as well; yet Delaware maintains its advantage by mimicking efficient innovations first implemented by other states.²¹⁵ Perhaps the mixed strategy is particularly suited to the market for incorporation because a newly innovative state does not capture all of the benefits of its innovation. A dominant state, like Delaware, can simply mimic the innovation and preserve its advantage.²¹⁶

Conservatism slows innovation, and states suffer from a status quo bias.²¹⁷ Innovation involves “creative destruction.”²¹⁸ In the long-run, innovation may be for the best, but in the short-run, the costs may seem overly burdensome. Because the innovation may leave obsolete one’s existing knowledge, innovation may be deterred.²¹⁹ For example, a statutory amendment may render common law interpreting the statutory predecessor irrelevant.²²⁰ Because a large body of common law is valuable, states may be slow to amend a statute unless perceived benefits significantly exceed perceived costs, including the possibility of rendering common law irrelevant. Network externalities slow innovation, but may affect product innovation more than process

supra note 7, at 218 (charting Delaware’s statutory innovations and rapidity with which Delaware adopts others’ innovations).

²¹⁵ See Romano, *supra* note 5, at 240 (“We can comfortably conclude that if Delaware has not always been the leader in corporate law innovation, it is, with extraordinary consistency, the most sensitive to new ideas.”); Romano, *supra* note 7, at 218 (charting Delaware’s statutory innovations and rapidity with which Delaware adopts others’ innovations).

²¹⁶ See Romano, *supra* note 7, at 217 (“Delaware would appear, on occasion, to behave as if it waited until another state acted, in order to calibrate more precisely the preferred response to changing business conditions.”).

²¹⁷ Even if all states favored a slight improvement in the law which could be implemented, no state may act first because the benefit to that state would be slight. See Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70, 72 (1985). If there were a first-mover, others would follow. See *id.*

²¹⁸ See Joseph A. Schumpeter, *Capitalism and the Process of Creative Destruction*, in MONOPOLY POWER AND ECONOMIC PERFORMANCE 19, 26-31 (Edwin Mansfield ed., 1978).

²¹⁹ See Paul R. Carlile, *A Pragmatic View of Knowledge and Boundaries: Boundary Objects in New Product Development*, 13 ORG. SCI. 442, 445 (2002) (“[T]he knowledge that people accumulate and use is often ‘at stake.’ . . . [So there is a] reluctan[ce] to change their hard-won outcomes because it is costly to change their knowledge and skills.”); Farrell & Saloner, *supra* note 217, at 71 (discussing reluctance to abandon QWERTY keyboard despite its suboptimal design).

²²⁰ See, e.g., *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 237-38 (Del. 1982) (“[C]ases construing . . . [the] former statutes are not dispositive of the scope and effect of the present [section] which has created [a] new . . . remedy . . .”).

innovation.²²¹ Delaware is conservative with regard to altering its corporate code, exhibiting “a reluctance to make any change without clear evidence that significant benefits . . . will result.”²²²

If Delaware inefficiently innovates, then it either has yet to implement advantageous innovations or has erroneously implemented innovations.²²³ For example, despite calls to reform corporate governance with respect to executive compensation, proxy access, and majority voting,²²⁴ Delaware will be an “inactive bystander,” largely deferring to the constituencies’ resolutions on such issues.²²⁵ Delaware innovated by expanding the jurisdiction of the chancery court to address technology disputes through mediation.²²⁶ This innovation ultimately may prove efficient, but there is cause to be suspicious. As the jurisdiction of the chancery court expands, the chancellors dilute their expertise, which could, for example, result in lengthier decision time and a greater number of erroneous decisions.

B. Judges

Common law may evolve to yield an efficient outcome over time,²²⁷ but judges innovate inefficiently.²²⁸ Sometimes judges innovate too

²²¹ See Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 352-53 (1996); see also Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 929 (2004); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 729-36 (1997).

²²² Hamermesh, *supra* note 60, at 1787. See generally Robert J. Shiller, *Behavioral Economics and Institutional Innovation* 5 (Cowles Foundation, Discussion Paper No. 1499, 2005), available at <http://cowles.econ.yale.edu/P/cd/d14b/d1499.pdf> (“One reason that innovation seems so episodic is that it tends to be spurred by major economic crises, and can take place only in the rare times when the public perceives an urgent need for change.”).

²²³ See Daines, *Firm Value*, *supra* note 10, at 539 (“Delaware law might not be optimal, but it appears to improve value relative to other jurisdictions.”).

²²⁴ See, e.g., LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

²²⁵ Hamermesh, *supra* note 60, at 1787.

²²⁶ See DEL. CODE ANN. tit. 10, §§ 346-347 (Supp. 2006).

²²⁷ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 249-53 (6th ed. 2003).

²²⁸ See John F. Duffy, *Inventing Innovation: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 5 (2007) (“[T]he incentives of those developing law to produce efficient doctrine are terribly weak and subject to corruption.”); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 584-85 (1992) (discussing, among other explanations for inefficient judicial innovation, biased sample of cases that come

much.²²⁹ A sampling of criticisms — legitimacy, consistency, and accuracy — was addressed above. For example, in *In re Digex, Inc. Shareholders Litigation*, the chancellor offered advice regarding the interpretation of statutory ambiguity, commenting on competing policy positions.²³⁰ Though the court did not resolve the ambiguity,²³¹ the court suggested that it favored one position.²³² Despite the court's articulation of its favored position, the legislature favored the alternative position and amended the statute to resolve the ambiguity contrary to the court's suggestion.²³³ Because judges enjoy tremendous power,²³⁴ they may use that power to innovate in a suboptimal fashion.²³⁵

Just as judges may innovate too much, judges may innovate too little. Prudence may prevent a judge from innovating at a socially optimal level.²³⁶ Stare decisis, which plays a critical role in a court's

before judges).

²²⁹ See *supra* Part I.A.3.c.

²³⁰ 789 A.2d 1176, 1198-1205 (Del. Ch. 2000).

²³¹ See *id.* at 1205 (noting “close question of Delaware law” where “the Court has not been convinced that this defense is legally ripe”).

²³² See *id.* at 1198-99 (discounting argument based on definition included in different statutory section because term is defined in section under examination); *id.* at 1201 (suggesting that Corporation Law Section of Delaware State Bar Association favored interpreting ambiguity to refer to shares, not votes); *id.* at 1202-03 (“The comments and interpretations of those involved in the public debate . . . imply that these individuals believed that the [statutory language] referred to the percentage of equity[,] . . . not of the voting power . . . [of] those shares.”).

²³³ See 73 Del. Laws 786 (2002) (codified at DEL. CODE ANN. tit. 8, § 203(c)(8) (Supp. 2006)) (“Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock.”); *id.* at Synopsis (“The amendments . . . clarify that references to ‘voting stock’ . . . [in Section 203] are intended to adopt the voting power concept reflected in Section 212(a).”). Compare *Systematics, Inc. v. Mitchell*, 491 S.W.2d 40 (Ark. 1973) (refusing to enforce restriction on transferability of shares arguably permitted by statute), with Act 409, §§ 1-2, 1973 Ark. Acts 1134, 1134-35 (amending Arkansas Business Corporation Act to reverse *Systematics, Inc.* decision), and James A. Carmody, Note, *Corporations — Stock Transfer Restrictions: Systematics, Inc. v. Mitchell and Act 409 of 1973*, 27 ARK. L. REV. 554 (1973) (discussing case and amendment).

²³⁴ See Macey, *supra* note 69, at 2423 (describing judges as possessing “significant power” when common law is primary source of law).

²³⁵ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* *passim* (1991); see also OESTERLE, *supra* note 10, at 427 & n.3 (suggesting that Delaware judges empower themselves by rejecting negligence standard which would call for judicial acceptance of custom and practice in industry).

²³⁶ See Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002) (“Prudence . . . is likely to rein in the most aggressive assertions of judicial power.”).

resolution of a legal dispute, counsels more in favor of the status quo than innovation.²³⁷ Outside of Delaware, judges may be unwilling to advise legislators, corporate managers, their counsel, or investors; and judges may offer advice too infrequently. Judges' failure to offer advice may be troubling because, outside of Delaware, legislatures may be slow to address developing problems.²³⁸ Additionally, because state judges are aware of the potential for federal intervention into corporate matters, state judges may decide cases in noninnovative ways so as to stave off federal intrusion.²³⁹

C. Legislators

State legislators seemingly serve their best interests by serving their state's best interests.²⁴⁰ Perhaps enacting socially optimal amendments to the corporate code would serve both a legislator's and a state's best interest. Thus, one might think that state legislators are motivated to innovate. If a state's innovations produce corporate law more efficiently (better, quicker, cheaper), businesses from every state may choose to incorporate there and pay fees to the state for the privilege. State legislators should find appealing the opportunity to increase state revenue by imposing fees that fall heavily on nonresidents. Legislators, however, may be uncertain that their innovations will attract incorporation business. Moreover, the revenue from such incorporation business may never come unless legislators bear related costs. The certainty of innovation costs necessary to attract

²³⁷ See Duffy, *supra* note 228, at 5 (noting "extraordinarily weak and sluggish mechanism for progress in law"); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 89-90 (1999).

²³⁸ See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66-67 (3d ed. 2002) (discussing "vetogates" to legislative enactments); *supra* note 185 (noting that self-interest may taint legislative process, against which judicial innovation may be appropriate); *infra* Part II.C (same).

²³⁹ See Gapper, *supra* note 165, at 16 ("The [Delaware] court has little choice but to fall in line with federal law, as defined by the Sarbanes-Oxley Act, but the [Delaware] judges regard its dirigiste nature with disquiet."); *id.* ("[Chancellor Chandler] wants Sarbanes-Oxley to be tested before Washington considers further interventions.").

²⁴⁰ Although Delaware legislators may not initiate or draft amendments to the corporate code, "[i]t should not be inferred that the Delaware General Assembly is thoroughly passive and ignorant with respect to corporate law issues." Hamermesh, *supra* note 60, at 1754 n.18. "Even if corporate lawyers write a state's corporate code, the decision to implement that code is ultimately governed by the incentives and behavior of public state actors." Hadfield & Talley, *supra* note 8, at 417.

incorporation business and the uncertainty of attracting that business seemingly deter most states from vigorously competing in the corporate charter arena.²⁴¹

Although innovation may not come easily for legislative bodies as a whole, individual legislators may have incentive to innovate to secure re-election or post-legislative opportunities.²⁴² If an innovation benefits the state, then the innovation should benefit a legislator who participated in the innovation's enactment. The marginal benefits and costs to the state, however, will not mirror those of the individual legislator.²⁴³ Given that passage of the innovative legislation necessitates broad-based support, the individual legislator may be unable to claim credibly that she spurred the law's passage.²⁴⁴ In many states, including Delaware, nonlegislators draft amendments to the corporate code, leaving hollow any legislator's claim of authorship or meaningful contribution.²⁴⁵ Though the state may benefit from the passage of an innovative statute, the individual legislator may not.²⁴⁶

²⁴¹ See Butler, *supra* note 200, at 378 (“[P]ossibly the most troubling aspect of the market for corporate charters is that many of the producers of charters are not competing in the market in any meaningful or productive sense.”); Duffy, *supra* note 228, at 6 (discussing weak incentives for legislators to innovate); *id.* at 5 (“The success . . . of an experiment in law cannot be measured immediately, and it may never be subject to rigorous empirical proof.”).

²⁴² See generally Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 29-30 (2002) (“[I]ndividuals may . . . be better at devising a brilliant plan [G]roups are superior at evaluative tasks.”); Jared Sandberg, *Brainstorming Works Best If People Scramble For Ideas on Their Own*, WALL ST. J., June 13, 2006, at B1 (“I can’t remember a single instance where a group produced a really creative idea” (quoting John Clark, former university dean of engineering)).

²⁴³ See Hadfield & Talley, *supra* note 8, at 434 (“Public providers . . . do not face an incentive to learn”). See generally Macey, *supra* note 69, at 2425-26 (“Politicians are merely agents, operating at a vast distance from their principals — geographically as well as psychologically.”).

²⁴⁴ See Hadfield & Talley, *supra* note 8, at 424 (noting it is “costly for legislators to convert state revenues into private benefits”); *id.* at 426 (noting “limited capacity of the legislator to devote effort to personally convey[] information to voters” and “the cost of communicating with a group that is . . . distrustful”).

²⁴⁵ 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, 455 n.32 (2000) (“The legislature rubber stamps the bar’s recommendations” (citation omitted)); Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 276 (1976) (“[A]mendments forwarded by . . . attorneys were rushed through House and Senate committees in ‘five minutes’ and enacted by the full General Assembly within days” (footnote omitted)).

²⁴⁶ See EASTERBROOK & FISCHER, *supra* note 149, at 216 (“No legislator can capture the benefits to the state of increased revenue”).

While the benefits to the individual legislator seeking to innovate may be unclear, the costs are not.

Innovating the corporate code to attract incorporation business may require drafting legislation. In Delaware and other states, outsiders draft legislation that historically has been enacted without legislative revision, but legislators could have revised those drafts.²⁴⁷ Whether they do so could turn on their perception of the attendant benefits and costs.²⁴⁸ Such costs seem high. Legislative drafting has proven to be enormously difficult, especially for part-time legislators or legislators that lack corporate expertise.²⁴⁹ Tackling a difficult task becomes more difficult if one lacks critical resources. And relative to their federal counterparts, state legislators commonly lack the staff necessary to draft legislation.²⁵⁰ Resources expended on drafting innovative legislation may mean fewer resources are available to raise campaign funds or serve individual constituents. Fundraising and constituency service may be (or, at least, perceived by legislators to be) more valuable in ensuring re-election or post-legislative benefits than passing innovative legislation.²⁵¹

²⁴⁷ See *supra* note 245.

²⁴⁸ See *supra* note 240.

²⁴⁹ See ESKRIDGE ET AL., *supra* note 238, at 409 (stating legislative drafting is “one of the most difficult legal writing skills”). See *generally id.* (“Corrections Day in the House is a procedure to allow Congress a regular opportunity to fix statutory mistakes.”).

²⁵⁰ See *id.* at 27 (“State legislators are often even more dependent upon the offices of state attorneys general and private groups to draft legislation than members of Congress because they do not have the staff support of federal lawmakers.”).

²⁵¹ See *generally* Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1333 (1993) (“[L]egislators view constituency service as more effective than legislation in impressing voters”); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036-37 (2006) (“[P]oliticians’ desire to . . . create new opportunities for constituency service” (footnote omitted)); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 481 (1987) (“Studies of congressional behavior . . . suggest that legislators may fail to achieve appropriate national solutions because they spend so much of their time and interest on constituency service.”); *Strom Thurmond: On and On*, ECONOMIST, Dec. 15, 1990, at 28 (“His constituent service is legendary. Indeed, it is difficult to locate someone in the state whom Strom Thurmond has not helped. His competent staff can secure you a passport in a few days, clear up maddening glitches at the Social Security office, and cut through bureaucratic red tape with ease. Every high school graduate in the state receives a letter of congratulations from the senator”).

Finding the proper balance — between shareholders and managers, for example — may prove difficult.²⁵² With any attempt to alter the existing balance, legislators risk offending some constituency.²⁵³ Rational legislators may be purposefully timid to avoid offending any constituency because such an offense could prove politically costly. Thus, taking no (or only limited) action proves the favored course for many jurisdictions' legislators.²⁵⁴

Attracting incorporation business may require legislators to expend resources beyond those necessary to affect the innovative statutory amendment. A talented judiciary must be in place to interpret the innovative code and, when appropriate, innovate as well.²⁵⁵ Attracting talented judges may be expensive because talented practitioners commonly earn higher salaries than talented judges.²⁵⁶ But the

²⁵² Compare *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990) (empowering target's board to effect long-term plan and fend off hostile acquirer, contrary to shareholder preferences), with *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (preventing target's board from effecting long-term plan and from fending off hostile acquirer, consistent with shareholder preferences). See generally Hamermesh, *supra* note 60, at 1752 (“[Delaware would take] small steps that [would] not significantly alter the existing allocation of power and authority among corporate constituencies.”).

²⁵³ See Stephenson, *supra* note 251, at 1036-37 (noting “politicians’ desire to duck blame for unpopular choices” (footnote omitted)). Given the possibility of competing constituencies, legislators may even intend to enact ambiguous statutes. See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002).

²⁵⁴ See Butler, *supra* note 200, at 378 (“Most states simply do not care about the size of their market share.”); Hamermesh, *supra* note 60, at 1787 (noting that legislators have “an abiding conservatism, in the sense of a reluctance to make any change without clear evidence that significant benefits (primarily in the form of convenience or clarity) will result”); Romano, *supra* note 7, at 218 (charting innovations and indicating that widespread adoption of innovation takes time and rapidly adopted innovations are not widespread).

²⁵⁵ A talented judiciary is required to interpret legislators’ words, which commonly bear more than one meaning. Cf. *Muscarello v. United States*, 524 U.S. 125 (1998) (interpreting phrase “carries a firearm”); *id.* at 144 n.6 (Ginsburg, J., dissenting) (“And in the television series ‘M*A*S*H,’ Hawkeye Pierce (played by Alan Alda) presciently proclaims: ‘I will not carry a gun . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even “hari-kari” if you show me how, but I will not carry a gun!’” (citation omitted)).

²⁵⁶ Cf. Neil A. Lewis, *Judge Leaves Appeals Court for Boeing*, N.Y. TIMES, May 11, 2006, at A31 (reporting that Judge Luttig resigned his seat on U.S. Court of Appeals for Fourth Circuit to become Boeing’s general counsel and indicating that federal appellate judges earn \$175,100 annually); Jerry Markon, *Appeals Court Judge Leaves Life Appointment for Boeing*, WASH. POST, May 11, 2006, at A11 (suggesting that Luttig’s annual earnings at Boeing would be comparable to annual earnings of general

prestige that accompanies a judicial position and the theoretical opportunities that follow a judgeship may suffice to attract talent even if the salaries are lacking. Nonetheless, newly innovative jurisdictions initially may lack the requisite prestige to attract the requisite talent. In addition to quality, quantity matters. A newly innovative jurisdiction may not simply retain the bare minimum number of judges because the resolution of cases by those judges may be slow relative to other jurisdictions, like Delaware, that already dominate the incorporation business.²⁵⁷

Moreover, to attract incorporation business, other components of an effective corporate law system — well-developed case law, talented attorneys, and other corporate service providers — must be in place and may not come cheaply.²⁵⁸ Even if a jurisdiction provides quality rules, judges, case law, attorneys, and other corporate service providers, it may take time before that jurisdiction attracts a critical mass of incorporations.²⁵⁹ The passage of time may decrease the likelihood that legislators implement the innovation. Because their terms are often short, legislators commonly focus on the short-term.²⁶⁰ For this reason, legislators may be unwilling to bear the costs of

counsel at Lockheed Martin, who earned more than \$1.5 million in 2005).

²⁵⁷ See *CHOPER, ET AL.*, *supra* note 10, at 238 (noting Delaware's "judges have achieved a national reputation for . . . expeditious rulings"). Rapid resolution minimizes the time period of uncertainty, which generally appeals to managers and shareholders. See generally *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

²⁵⁸ See *Romano*, *supra* note 5, at 226 ("[T]he structure of the corporate charter market makes it particularly difficult for a state with a relatively small volume of incorporations to make inroads against a state with an already substantial market share. . . . [Certain characteristics, such as] the corporate legal system . . . make it costly for a newcomer to break into the business . . ."). At first blush, case law seems to come cheaply because the judges or legislature of the newly innovative jurisdiction may adopt the case law of another jurisdiction. Such adoption, however, merely postpones the problem of legal uncertainty, which could deter organization in the newly innovative jurisdiction. Moreover, regarding the judiciary, more than simple knowledge of a rule is required. See *Brown & Duguid*, *supra* note 198, at 203-04 (distinguishing between "know-how" and "know that").

²⁵⁹ See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 843-44 (1995); *id.* at 844 ("[A]s the number of firms incorporated in a state increases, the value of its charter increases.").

²⁶⁰ See Kahan & Kamar, *supra* note 201, at 729-30; Richard A. Posner, Editorial, *The Probability of Catastrophe . . .*, WALL ST. J., Jan. 4, 2005, at A12 ("Politicians [have] limited terms of office and thus foreshortened political horizons . . ."). See generally *Duffy*, *supra* note 228, at 5 ("The success . . . of an experiment in law cannot be measured immediately . . .").

innovation because those innovations may only produce benefits beyond their anticipated terms of service.

Rational legislators compare not only the benefits and costs of innovation, but also their likelihood of occurrence. Legislators will be unwilling to bear the high costs of innovating their corporate code if those innovations are unlikely to attract incorporation business. Innovation does not necessarily result in corporate migration to the innovative jurisdiction. An innovation by one jurisdiction may be implemented in every other jurisdiction. A corporation may be slow to migrate (and bear the attendant costs of migration) to the innovative jurisdiction, particularly if the legislature or courts of its current jurisdiction will soon implement the innovation.²⁶¹ Because mimicry abounds in corporate law,²⁶² corporations may be slow to migrate.²⁶³

III. ENHANCING PROCESS INNOVATION

Innovations in the production of corporate law might be enhanced through federalization or privatization. Both topics are discussed briefly.

²⁶¹ Such costs include obtaining shareholder approval, see EASTERBROOK & FISCHEL, *supra* note 149, at 66 (“Because voting is expensive, the participants in the venture will arrange to conserve on its use.”), identifying and establishing relationships with experts in the law of the new jurisdiction, see Langevoort & Rasmussen, *supra* note 198, at 386, as well as establishing relationships with the legislators of the new jurisdiction. See generally Butler, *supra* note 200, at 381 (discussing corporate investments in political process). For additional costs, see Romano, *supra* note 5, at 246-49, and *id.* at 249 (“[C]hanging domicile is not frictionless . . . nor so prohibitive as to enable states to disregard the possibility of migration.”). Some suggest that reincorporation is relatively inexpensive. See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 559 (1990). If so, retention of corporations may prove difficult.

²⁶² See CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE *passim* (Jeffrey N. Gordon & Mark J. Roe eds., 2004) (collecting articles that address convergence of corporate law across jurisdictions); Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 784 (2006) (noting “no significant diversity . . . in the corporate law rules that firms adopt via their incorporation choices”).

²⁶³ See Kahan, *supra* note 30, at 342 (noting original jurisdictional choice may prove “sticky”); Romano, *supra* note 5, at 278.

A. Federalization

The federal government could occupy the field of corporate law or, at least, a larger portion of that field to enhance process innovation.²⁶⁴ Alternatively, the federal government could, through intellectual property laws, protect a process innovation of one state from mimicry by another state to incentivize innovation.

1. Occupation of the Field

The federal government, rather than states, could regulate corporations. Because, however, federal law regarding corporate law is commonly mandatory whereas state corporate law is commonly enabling, federalization of corporate law could decrease innovation.²⁶⁵ Although federalization may deter potential races to the bottom by requiring states to meet certain minimum standards (generally or with respect to particular issues),²⁶⁶ federalization generally eliminates competition among states, and a decrease in competition has the potential for decreased innovation.²⁶⁷ Currently, at least some states compete. If a state fails to innovate, an entity may incorporate elsewhere, because the cost of incorporating elsewhere within the United States may be relatively low.²⁶⁸ If corporate law were federalized, competition provided by other countries would take on increased significance.²⁶⁹ Incorporation abroad, however, may be relatively expensive.²⁷⁰

²⁶⁴ See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 700-05 (1974) (proposing greater role for federal government).

²⁶⁵ See Romano, *supra* note 7, at 212.

²⁶⁶ See, e.g., Subramanian, *supra* note 10, at 1873 (suggesting as favorable federal rule that would permit shareholders to select unilaterally jurisdiction of incorporation).

²⁶⁷ See Arrow, *supra* note 197, at 619 (“[T]he incentive to invent is less under monopolistic than under competitive conditions . . .”).

²⁶⁸ See Black, *supra* note 261, at 558-59.

²⁶⁹ Some have suggested that the demands of U.S. federal securities regulation are excessive relative to the systems of other countries, resulting in the delisting of securities previously traded in the United States. See Silvia Ascarelli, *Citing Sarbanes, Foreign Companies Flee U.S. Exchanges*, WALL ST. J., Sept. 20, 2004, at C1 (“Many European companies are disenchanted by the cost of listing shares in the U.S. . . . [A]s a result of the 2002 [Sarbanes-Oxley] law . . . [German e-commerce software firm Intershop] was faced with an extra . . . \$600,000[] annually in extra accounting and lawyers’ fees. To escape, Intershop announced plans . . . not just to withdraw share trading in the U.S. but to . . . deregister[] with the U.S. Securities and Exchange Commission . . .”). Thus, competition from foreign countries may be meaningful.

If corporate law were federalized, why would federal legislators, administrators, and judges have any more incentive to innovate than their state counterparts?²⁷¹ Just as state actors, federal actors also may be captured by special interests.²⁷² Federal actors may be slow to address problems or changes in circumstances. Federal legislative and judicial responses may be slow relative to their state counterparts; an absence of urgency is likely to generate fewer innovations.²⁷³ If the federal government simply set a floor and prevented competition in one or a few areas of corporate law rather than completely federalizing it, then competitor states might concentrate their innovative efforts in other areas of corporate law, which may ultimately improve the corporate law system. It is unclear, however, in what areas federalization would spur process innovation in the production of corporate law.²⁷⁴

Some suggest that simply pruning back federal regulation of securities may not be enough. See EASTERBROOK & FISCHER, *supra* note 149, at 276-314. Aside from their regulation of securities, countries may also compete through other regulatory regimes. See Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition* (U. Penn. Inst. L. & Econ., Research Paper No. 07-16, 2007), available at <http://ssrn.com/abstract=1004607>.

²⁷⁰ For example, access to U.S. financial and trading markets may come more easily for firms organized in the United States than for firms organized elsewhere. See Ascarelli, *supra* note 269.

²⁷¹ See Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?* 7 (Yale L. & Econ., Research Paper No. 307, 2005), available at <http://ssrn.com/abstract=693484> (“[Federal] legislators . . . are not, in general, highly informed about financial market regulation . . .”).

²⁷² See Butler, *supra* note 200, at 383 (“While special interest politics in the states created the problem, it is doubtful that special interest politics in Washington will lead to a better solution.”).

²⁷³ See Hamermesh, *supra* note 60, at 1754 (“[P]roposed amendments to the DGCL are presented for legislative consideration . . . essentially every year . . .”); Romano, *supra* note 271, at 11 (“Congress’s attentiveness is rare and episodic, enacting amendments to the federal securities laws only approximately once every decade or two.”); *id.* at 10 (describing that SEC does not engage in “periodic, systematic reassessment or updating” of its rules); Romano, *supra* note 7, at 225-26 (contrasting relatively rapid legislative response to judicial opinion in Delaware with relatively slow response in Congress).

²⁷⁴ *But cf.* Jens C. Dammann, *Adjudicative Jurisdiction and the Market for Corporate Charters* (Nov. 2003) (unpublished manuscript), available at <http://ssrn.com/abstract=466760> (addressing efficiency of federal rules governing allocation of adjudicative jurisdiction against backdrop of corporate charter competition).

2. Intellectual Property

Perhaps process innovations in corporate law — whether within the judicial or legislative branch — could enjoy federal intellectual property (“IP”) protection. The current state of patent law may provide protection that would incentivize a state to innovate, but otherwise federal IP law does not seem to provide the necessary protection.²⁷⁵

a. Patent

In theory, the United States Patent and Trademark Office could grant a patent to a state for an innovation in its common law or code. One who invents or discovers a new and useful process may obtain a patent.²⁷⁶ Although abstract ideas or principles may not be patented, means of applying ideas or principles fall within the patentable class of processes.²⁷⁷ A judge who innovates a new means of analyzing a legal problem may have invented or discovered a new and useful process.

²⁷⁵ It may be the case that federal law should be amended to provide such protection. Resolving that issue, however, exceeds the scope of this Article. This Article operates under the assumption that the federal government could protect one state’s intellectual property from infringement by another state. See U.S. CONST. art. I, § 8 (vesting Congress with authority “to regulate commerce . . . among the several states” and “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”); *id.* art. III, § 2 (“The judicial power shall extend to . . . controversies between two or more states . . .”). This assumption is not free from doubt. Compare *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (“We have decided that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment.”), with *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (“Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”). Nevertheless, this assumption may be valid because the Eleventh Amendment expressly prohibits suits pursued by citizens of one state against another state but makes no reference to suits pursued by other states. See U.S. CONST. amend. XI. “[Nonetheless,] the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). One can imagine, however, reasons that a court might give greater credence to suits brought by states than suits brought by private citizens, such that the rationale underlying the Supreme Court’s recent sovereign immunity cases might not bar enforcement of federally protected intellectual property rights by one state against another state. Although the issue of sovereign immunity merits greater attention, such attention is left to others better equipped than I.

²⁷⁶ See 35 U.S.C. § 101 (2000).

²⁷⁷ See 1 ERNEST BAINBRIDGE LIPSCOMB III, WALKER ON PATENTS § 2:14, at 158 (3d ed. 1984).

Such a process, however, may not enjoy patent protection because mental processes cannot be patented.²⁷⁸ Moreover, innovations dedicated to the public do not enjoy patent protection,²⁷⁹ and some view common law as a public good.²⁸⁰ For this reason, a legislative enactment seems less likely to enjoy patent protection. Additionally, form contracts have not received patents in the past,²⁸¹ and a state's corporate code has been analogized to a contract — an agreement between managers and investors.²⁸²

b. Copyright

Copyright law protects original writings, but not the underlying idea, process, or concept.²⁸³ By failing to protect the underlying idea, process, or concept, copyright seemingly fails to provide the incentive to innovate the process by which corporate law is produced. Moreover, certain government works are exempt from copyright protection.²⁸⁴ Though the federal statute does not expressly exempt state works from copyright protection, courts have long held that there is no copyright protection for state court opinions or state statutes.²⁸⁵

²⁷⁸ See *In re Abrams*, 188 F.2d 165, 168 (C.C.P.A. 1951).

²⁷⁹ See *Johnson & Johnston Assocs. v. R.E. Serv. Co.*, 285 F.3d 1046, 1051 (Fed. Cir. 2002) (en banc) (per curiam); Duffy, *supra* note 228, at 20 n.66 (“Of course, patents have generally not been granted for legal innovations — at least not yet!” (citations omitted)).

²⁸⁰ See Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1728 (1982).

²⁸¹ See 1 LIPSCOMB, *supra* note 277, § 2:17, at 171; see also *In re Moeser*, 27 App. D.C. 307, 310 (D.C. Cir. 1906).

²⁸² See EASTERBROOK & FISCHER, *supra* note 149, at 1-39 (discussing “[t]he Corporate Contract”).

²⁸³ See 17 U.S.C. § 102(a) (2000) (protecting “original works of authorship”); *id.* § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . .”).

²⁸⁴ See *id.* § 105 (2000) (“Copyright protection under this title is not available for any work of the United States Government . . .”).

²⁸⁵ See *Banks v. Manchester*, 128 U.S. 244, 254 (1888); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.12[A], at 5-91 (2006); see *id.* § 5.14, at 5-106; see also *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (en banc) (stating local ordinance cannot be copyrighted).

c. *Trade Secret*

Trade secret law “protect[s] any process or information that is both private and useful,”²⁸⁶ and designed to encourage innovation and facilitate usage thereof.²⁸⁷ Judicial opinions and state statutes, however, are not secret, and information generally known falls outside the protection of trade secret law.²⁸⁸ Although the Council in Delaware may proceed privately, any output by the Council that is subsequently enacted by the legislature would not remain secret.²⁸⁹

d. *Trademark*

Federal law protects trademarks, service marks, and trade names, but an innovative statute or judicial opinion seemingly falls outside of the scope of coverage.²⁹⁰ The Lanham Act protects names (7-Up), symbols (the Nike Swoosh), shapes (the Coca-Cola bottle), slogans (Allstate’s “You’re in good hands”), and even smells or sounds (NBC’s chimes).²⁹¹ A producer — a state that produces corporate law — seeks to reduce consumer — manager and investor — confusion among products and reduce their search costs; and federal protection of marks help achieve this goal.²⁹² Only the mark, however, is protected. A state that seeks to protect its innovation from emulation by other states seeks more than protection of its mark; it seeks protection of judicial and legislative innovations, which the Lanham Act does not seem to provide.

Though federalization of corporate law does not seem likely to facilitate states’ process innovations, federal intellectual property protection may incentivize such innovations. But existing IP law does

²⁸⁶ JAMES H.A. POOLEY, TRADE SECRETS § 1.01, at 1-1 (2006).

²⁸⁷ See *id.* § 1.02[3]-[4], at 1-10 to -12.

²⁸⁸ See *id.* § 1.01, at 1-6. See generally Michael Barbaro & Julie Creswell, *With a Trademark in Its Pocket, Levi’s Turns to Suing Its Rivals*, N.Y. TIMES, Jan. 29, 2007, at A1 (“[The] clothing makers’ trade secrets are hung on store racks for all to see”); *id.* (“The denim manufacturers . . . openly conceded that Levi’s has served as an inspiration, if not template, for their products.”).

²⁸⁹ See Hamermesh, *supra* note 60, at 1756 (“[T]he Council proceeds in private. There is a strongly held tradition that preliminary or potential legislative proposals are not to be discussed with or disseminated to persons outside the firms represented on the Council.”).

²⁹⁰ See 15 U.S.C. § 1127 (2000) (defining trade name, trademark, and service mark).

²⁹¹ See SIEGRUN D. KANE, TRADEMARK LAW: A PRACTITIONER’S GUIDE §§ 1:1.1-1.3, at 1-2 to -4 (4th ed. 2006).

²⁹² See *id.* §§ 1:2-:3, 1-9 to -16.

not clearly offer such protection. An absence of clear protection likely slows innovation.

B. Privatization

Although federalization may not lead to efficient process innovation, privatization may do so. Rather than balancing the state's marginal benefits against its marginal costs to the state, judges and legislators may instead balance their individual marginal benefits against their individual marginal costs. Professors Gillian Hadfield and Eric Talley provocatively suggest that a private regime offering privately generated rights and obligations may produce more efficient corporate law than public providers, in part, because of superior alignment of the private entity's benefits and costs with those of its actors.²⁹³

For example, if the state provides corporate law, then its rules apply to all businesses incorporated in that state. Thus, in the United States, there would be a limited number of options.²⁹⁴ Conversely, options need not be capped if private actors — for example, through contractual agreements — provided corporate law. If corporate law were optimally provided, then heterogeneous firms could choose from heterogeneous regimes of corporate law.²⁹⁵ Instead, convergence of corporate law regimes seems the order of the day. Although convergence may evidence a trend toward the ideal mode of corporate law, convergence may also evidence “exactly the opposite — an artifact of excess emulation among states.”²⁹⁶ But a state does not overcome the limits of its homogenous production of corporate law by enabling managers and investors to tailor around any undesirable default rules, because any such tailoring would increase the costs to those incorporating in that jurisdiction. Such costs to deviate from default rules, however, may be avoided if private actors offered a wide array of options.²⁹⁷

²⁹³ See Hadfield & Talley, *supra* note 8, at 417.

²⁹⁴ See EASTERBROOK & FISCHER, *supra* note 149, at 216 (“There are only fifty states, perhaps too few to offer the complete menu of terms needed for the thousands of different corporate ventures.”). *But see* DEL. CODE ANN. tit. 8, §§ 341-356 (2001) (providing subset of rules applicable to close corporations not generally available to other corporations organized in state).

²⁹⁵ See Hadfield & Talley, *supra* note 8, at 419. Heterogeneity in firms suggests that optimal corporate law should be heterogeneous. *See id.*

²⁹⁶ *Id.* at 436.

²⁹⁷ *See id.* at 418.

Although private regimes may provide more efficient corporate law than could public regimes, this is not necessarily the case.²⁹⁸ The agency problem applies not only to public actors, but to private actors as well. Private actors also suffer from innovative inefficiencies.

“[I]t is costly for . . . any private supplier of rules . . . to ponder unusual situations and dicker for the adoption of terms. . . . This may all be wasted effort if the problem does not occur. Because change is the one constant of corporate life, waste is a certainty.”²⁹⁹

Seeking to avoid waste, private providers may seek to free-ride on others' efforts and insufficiently innovate absent intellectual property protection.³⁰⁰

Even if corporate law is privatized, certain aspects of public law would continue to apply. For example, private parties to the corporate agreement cannot create limited liability with respect to third parties absent governmental involvement.³⁰¹ Moreover, the government still could serve as a backdrop with regard to enforcement. Parties that agree to be bound by private rules *ex ante* may seek public enforcement *ex post*. The powers of private enforcement may be lacking. For example, the New York Stock Exchange is a private organization that privately enforces its own rules, but this enforcement may be inadequate.³⁰² And if not actually lacking, a party may perceive private enforcement as inadequate and seek public enforcement.³⁰³ Even Hadfield and Talley assume that state regulatory regimes, such as state protection against securities

²⁹⁸ Even if this is true, efficiency need not be the only goal of a corporate law regime.

²⁹⁹ Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1445 (1989) (internal parentheses omitted); see Hadfield & Talley, *supra* note 8, at 439 (discussing problem of contracts addressing standardized and complex transactions).

³⁰⁰ See Hadfield & Talley, *supra* note 8, at 439.

³⁰¹ See *id.* at 418 (noting that state must also provide that corporation is legal entity).

³⁰² See SELIGMAN, *supra* note 189, at 464 (“Exchange regulators . . . [may] be reluctant to take steps that would put member firms out of business or would generally reduce member firms' income.”); Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 1, 38-42 (2005).

³⁰³ See, e.g., *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441 (Del. 1947) (analyzing claim despite contract providing for private enforcement via arbitration).

fraud, would remain in place as a supplement to the private regime or a backstop against its inadequacies.³⁰⁴

If privatization were possible, would private actors enter the field? Just as it is difficult for states to challenge Delaware's existing dominant position, it also seems difficult for private parties to do so. Delaware may respond to private challenges just as it responds to challenges from other jurisdictions.³⁰⁵ Even though Delaware's response may be less perfect than that potentially generated by private competitors, business entities may not seek perfection. The costs or perceived costs for a corporation may outweigh the benefits of availing itself of privately provided corporate law. Corporations may be reluctant to commit to private providers of corporate law because they may fail, whereas states (at least those in the United States) do not.³⁰⁶ A private company must expend time, effort, and money before it can rival a state, and at some point, it may become sufficiently well-established to credibly commit to long-term performance in the production of corporate law. But as the costs of effectively entering the field of corporate law production increase, the likelihood of private law providers doing so decreases.

CONCLUSION

States innovate in the process by which they produce corporate law. Each state innovates to attract incorporation business or, at least, to retain those corporations already organized there. In part, because of its dependence on incorporation fees, Delaware is a leading innovator of corporate law. Delaware innovates through its courts and legislature. Even Delaware, however, innovates less than the ideal. Perhaps federal protection of a state's innovation or privately provided corporate law will enhance innovation in the production of corporate law.

³⁰⁴ See Hadfield & Talley, *supra* note 8, at 418.

³⁰⁵ *Cf. id.* at 439 (discussing incentives of and responses by providers of corporate law).

³⁰⁶ *See id.*

APPENDIX A

<i>States with Business Courts</i> ³⁰⁷	<i>Ranking of State Liability Systems</i> ³⁰⁸ (1 is best, 50 is worst)
California	44
Delaware	1
Illinois	45
Maryland	20
Massachusetts	32
Michigan	22
Nevada	37
New Jersey	25
New York	21
North Carolina	10
Pennsylvania	31
Oklahoma	32
Wisconsin	23

³⁰⁷ See Bach & Applebaum, *supra* note 32, at 147; see also *supra* note 34.

³⁰⁸ TAYLOR ET AL., *supra* note 22, at 15 tbl.3A; *id.* at 6 (“All interviews for [the study] were conducted by telephone among a nationally representative sample of senior attorneys at companies with annual revenues of at least \$100 million.”); *id.* (studying interviewees’ perceptions about following matters: having and enforcing meaningful venue requirements, tort and contract litigation, treatment of class action suits and mass consolidation suits, punitive damages, timeliness of summary judgment/dismissal, discovery, scientific and technical evidence, noneconomic damages, judges’ impartiality and competence, juries’ predictability and fairness).

APPENDIX B

This non-exhaustive list of recent publications by Delaware Supreme Court Justices and Chancellors includes published versions of oral presentations, but excludes publications prior to or following judicial service.

William T. Allen

Chancellor, Delaware Court of Chancery, 1985-1997

- *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW. 1383 (2005) (with Leo E. Strine, Jr.)
- *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002) (with Jack B. Jacobs & Leo E. Strine, Jr.)
- *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002) (with Jack B. Jacobs & Leo E. Strine, Jr.)
- *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859 (2001) (with Jack B. Jacobs & Leo E. Strine, Jr.)
- *Commentary on the Limits of Compensation and Deterrence in Legal Remedies*, 60 LAW & CONTEMP. PROBS. 67 (1997)
- *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395 (1993)
- *A Bicentennial Toast to the Delaware Court of Chancery 1792-1992*, 48 BUS. LAW. 363 (1992)
- *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992)
- *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055 (1990)

William B. Chandler, III
Chancellor, Delaware Court of Chancery, 1997-present
Vice Chancellor, Delaware Court of Chancery, 1989-1997

- *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 COLUM. BUS. L. REV. 45 (2004)
- *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003) (with Leo E. Strine, Jr.)
- *On the Instructiveness of Insiders, Independents, and Institutional Investors*, 67 U. CIN. L. REV. 1083 (1999)

Randy J. Holland
Justice, Delaware Supreme Court, 1986-present

- *Conclusion to The Next Century of Corporate Law*, 25 DEL. J. CORP. L. 183 (2000)

Jack B. Jacobs
Justice, Delaware Supreme Court, 2003-present
Vice Chancellor, Delaware Court of Chancery, 1985-2003

- *Some Lessons from Delaware's Experience in Crafting "Fair" Takeover Rules*, 2 N.Y.U. J.L. & BUS. 323 (2006)
- *Entity Rationalization: A Judge's Perspective*, 58 BUS. LAW. 1043 (2003)
- *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002) (with William T. Allen & Leo E. Strine, Jr.)
- *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002) (with William T. Allen & Leo E. Strine, Jr.)
- *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859 (2001) (with William T. Allen & Leo E. Strine, Jr.)
- *Comments on Contestability*, 54 U. MIAMI L. REV. 847 (2000)

Myron T. Steele
Chief Justice, Delaware Supreme Court, 2004-present
Justice, Delaware Supreme Court, 2000-2004
Vice Chancellor, Delaware Court of Chancery, 1994-2000

- *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1 (2005) (with Sean J. Griffith)

Leo E. Strine, Jr.
Vice Chancellor, Delaware Court of Chancery, 1998-present

- *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2006)
- *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673 (2005)
- *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877 (2005)
- *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW. 1383 (2005) (with William T. Allen)
- "Mediation-Only" Filings in the Delaware Court of Chancery: *Can New Value Be Added by One of America's Business Courts?*, 53 DUKE L.J. 585 (2003)
- *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003) (with William B. Chandler, III)
- *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371 (2002)
- *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002) (with William T. Allen & Jack B. Jacobs)
- *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499 (2002)

- *The Professional Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question*, 55 STAN. L. REV. 863 (2002)
- *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002) (with William T. Allen & Jack B. Jacobs)
- *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any “There” There?*, 75 S. CAL. L. REV. 1169 (2002)
- *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919 (2001)
- *Delaware’s Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar’s Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257 (2001)
- *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859 (2001) (with William T. Allen & Jack B. Jacobs)

E. Norman Veasey

Chief Justice, Delaware Supreme Court, 1992-2004

- *The Judiciary’s Contribution to the Reform of Corporate Governance*, 4 J. CORP. L. STUD. 225 (2004)
- *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. CIN. L. REV. 731 (2003)
- *Corporate Governance and Ethics in the Post-Enron Worldcom Environment*, 38 WAKE FOREST L. REV. 839 (2003)
- *Musings on the Dynamics of Corporate Governance Issues, Director Liability Concerns, Corporate Control Transactions, Ethics, and Federalism*, 152 U. PA. L. REV. 1007 (2003)
- *Policy and Legal Overview of Best Corporate Governance Principles*, 56 SMU L. REV. 2135 (2003)

- *Reflections on Key Issues of the Professional Responsibilities of Corporate Lawyers in the Twenty-First Century*, 12 WASH. U. J.L. & POL'Y 1 (2003)
- *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441 (2003)
- *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. 1 (2002)
- *The Many Facets of Judicial Independence Diamond*, 20 QUINNIPIAC L. REV. 779 (2001)
- *The Roles of the Delaware Courts in Merger and Acquisition Litigation*, 26 DEL. J. CORP. L. 849 (2001)
- *Should Corporation Law Inform Aspirations for Good Corporate Practices — Or Vice Versa?*, 149 U. PA. L. REV. 2179 (2001)
- *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. LAW. 681 (1998)
- *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393 (1997)
- *The Emergence of Corporate Governance as a New Legal Discipline*, 48 BUS. LAW. 1267 (1993)