

PANEL THREE: SARBANES-OXLEY GOVERNANCE ISSUES

THE POLICY FOUNDATIONS OF DELAWARE CORPORATE LAW

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From a firsthand perspective, the author reviews the mechanisms by which Delaware creates its corporate law, and identifies various explanations for Delaware's prominence and its corporate lawmaking ("race" theories, Roe's identification of active or dormant federal power as a limiting influence, and Kahan and Rock's description of "symbiotic federalism"). Although finding support for all of these accounts, the author maintains that none fully expresses the considerations that are actually salient for Delaware corporate law policymakers. The author suggests, rather, that the following considerations are dominant: (1) enhancing flexibility to engage in private ordering; (2) deferring to case-by-case development of the law, and avoiding legislation that is prescriptive and proscriptive; (3) avoiding impairment of preexisting contractual relationships and expectations; and most importantly, (4) avoiding legislative change in the absence of clear and specific practical benefits. Because of the dominance of these considerations, the author suggests that Delaware is unlikely to expand materially the regulation of corporate actors by means of either statutory or common law change. While additional federal regulation of corporate governance will emerge sporadically in response to political crises, any effort by Delaware to anticipate or respond to such additional federal regulation will involve small steps that will not significantly alter the existing allocation of power and authority among corporate constituencies.

INTRODUCTION

It is well known that among the fifty states, Delaware occupies an outsized place in the formation of business entities, particularly publicly held corporations.¹ There are numerous academic explanations for this

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1. The website for Delaware's Division of Corporations recites that "[m]ore than half a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500." Del. Dep't of State, Div.

phenomenon, with varied accounts of why and how Delaware corporate law has been developed to achieve that position of prominence.² To someone from Delaware who has had firsthand involvement with that law-making process, these accounts—largely from observers whose involvement is to some degree more remote—resemble the pronouncements of space explorers on missions to describe life forms on an alien planet.³ While these pronouncements do engender some awkwardness over having been probed, they do not and should not strike us, the observed natives, as inherently offensive or flawed. To the contrary, the objectivity of these reports yields insights that might otherwise never have occurred to us.

In contrast to the extensive literature from outside observers, there are relatively few even partial accounts of the formation of Delaware corporate law from those who are essentially native to Delaware. This relative dearth is not necessarily regrettable: Just as outside assessments are not inherently flawed, such firsthand accounts are not necessarily superior to those of outside observers. A firsthand report can be flawed by a failure to see the reasons for one's own actions or inactions, or by a tendency toward self-congratulation or avoidance of self-criticism. Neverthe-

of Corps., *Why Choose Delaware as Your Corporate Home?*, at <http://www.state.de.us/corp/default.shtml> (last updated Sept. 8, 2006) (on file with the *Columbia Law Review*). Statistics from the International Association of Commercial Administrators show that of total new business entity formations during 2005, Delaware's share was 6.03%, behind only California and Florida. Int'l Ass'n of Commercial Adm'rs, *Annual Report of the Jurisdictions 6–282* (2006), available at http://www.iaca.org/downloads/AnnualReports/2006_IACA_AR.pdf (on file with the *Columbia Law Review*).

2. E.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 *Yale L.J.* 553 (2002); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *Yale L.J.* 663 (1974); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 *U. Cin. L. Rev.* 1061 (2000); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 *Nw. U. L. Rev.* 913 (1982); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 *J. Corp. L.* 625 (2004); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 *Vand. L. Rev.* 1573 (2005); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 *Colum. L. Rev.* 1908 (1998); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *Tex. L. Rev.* 469 (1987); Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 *J. Corp. L.* 99 (2004); Mark J. Roe, *Delaware's Competition*, 117 *Harv. L. Rev.* 588 (2003) [hereinafter *Roe, Delaware's Competition*]; Mark J. Roe, *Delaware's Politics*, 118 *Harv. L. Rev.* 2491 (2005) [hereinafter *Roe, Delaware's Politics*]; Roberta Romano, *The State Competition Debate in Corporate Law*, 8 *Cardozo L. Rev.* 709 (1987) [hereinafter *Romano, Competition Debate*]; Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251 (1977).

3. This characterization is inspired by Professor James Gordon's spectacularly creative assessment of *Reves v. Ernst & Young*, 494 U.S. 56 (1990), in which he describes a mission from planet Zerix to gather intelligence from Earth about the treatment of notes as securities. James D. Gordon III, *Interplanetary Intelligence About Promissory Notes as Securities*, 69 *Tex. L. Rev.* 383, 383–85 (1990).

less, a Delaware native's articulation of a subjective sense of why we in Delaware do what we do when it comes to matters of corporate law might enrich this Symposium's examination of the tensions in the development of state and federal roles in corporate law.

That articulation is the mission of this overtly firsthand account. Not being written by a judge, it necessarily can't report firsthand why Delaware corporate law judges do what they do,⁴ but it can offer a firsthand sense of Delaware corporate law policymaking from someone actively involved both as an advocate in corporate litigation and, in the last eleven years, in the formulation and ongoing amendment (and nonamendment) of the Delaware General Corporation Law.⁵

Part I describes the two principal policymaking agencies of Delaware corporate law: (1) the state legislature (the Delaware General Assembly) and its partner in corporate legislative lawmaking, the Delaware State Bar Association; and (2) the state courts (specifically, the Court of Chancery and its reviewing court, the Delaware Supreme Court).

Part II summarizes some of the outside accounts of the formation of Delaware corporate law. As this section goes on to explain, every one of these accounts has some support, both intuitive and factual. As will also be explained, however, none is entirely accurate or complete, at least

4. Increasingly in recent years, the judges themselves have published their own accounts on this topic. See Kahan & Rock, *supra* note 2, at 1603 n.117 (citing extensive publication by judges of Delaware Supreme Court and Court of Chancery).

5. This footnote bears the burden of disclosing the basis for the observations in this Essay. I practiced law from 1976 to 1994 with the Wilmington, Delaware law firm of Morris, Nichols, Arsht & Tunnell. That period coincided with the rapid development of Delaware's takeover jurisprudence and of the law of corporate fiduciary duty in general. See, e.g., *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45-48 (Del. 1994) (refining application of enhanced judicial scrutiny in mergers); *Paramount Commc'ns Inc. v. Time Inc. (In re Time Inc. S'holder Litig.)*, 571 A.2d 1140, 1152-53 (Del. 1990) (rejecting claim that cash tender offer for all shares could not constitute cognizable threat to shareholder interests); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182-84 (Del. 1985) (articulating directors' obligations in sale of company); *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1357 (Del. 1985) (upholding shareholder rights plans); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985) (articulating standards of review of board-adopted takeover defenses); *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (articulating directors' fiduciary duty of care in approving merger). My former law firm was directly involved as counsel in many of these cases, and I participated personally in a number of them. I have been a member of the Corporation Law Section of the Delaware State Bar Association for about thirty years. Since 1995, I have been a member of the Council of that section, which serves as the primary source of initiatives to revise the Delaware General Corporation Law. My experience with the Council is the basis for several observations concerning the Council's informal practices and certain of its substantive discussions of proposed legislation. With this recitation of background, however, comes the inevitable and appropriate qualification that the assessments and assertions in this paper are solely my own and do not represent the views of my former firm, the Bar Association, the Corporation Law Section, or the Council, each of which has been composed of many individuals, each with his or her own views about the content and motivation of his or her activities in the field of corporate law.

judged from the perspective of firsthand involvement with the formation of Delaware corporate law.

Part III attempts to distill—again, from a firsthand perspective—the policy considerations that underlie the development of Delaware corporate law. What emerges is a picture in which the policymakers are attentive to, and respond to, interstate competitive threats as well as potential federal expansion in the field of corporate law. Within those very broad limits, however, these policymakers act on conventional notions of (1) enhancing flexibility to engage in private ordering; (2) deferring to case-by-case development of the law, and avoiding legislation that is prescriptive and proscriptive; (3) avoiding impairment of preexisting contractual relationships and expectations; and (4) most importantly, avoiding legislative change in the absence of clear and specific practical benefits.⁶ Above all, Delaware corporate law is conservative.

This inherent conservatism will significantly affect the course of federal and state roles in regulating corporate governance. Delaware is unlikely to expand materially the regulation of corporate actors by means of either statutory or common law change. Additional federal regulation will emerge sporadically in response to political crises in which matters of corporate governance take on political salience beyond the management and shareholder groups that are ordinarily involved in such matters.⁷ Delaware can do and will do little if anything to stand in the way of such responses. Any effort by Delaware to head off such additional federal regulation of corporate governance will involve small steps that will not significantly alter the existing allocation of power and authority among corporate constituencies.

I. THE PARTICIPANTS IN DELAWARE CORPORATE LAWMAKING

A. *The Delaware General Assembly and the Delaware State Bar Association*

At the formal apex of the structure of Delaware corporate law is the Delaware General Corporation Law (DGCL), the basic organization and content of which have remained essentially unchanged for approximately forty years.⁸ Although the Delaware state constitution is formally supe-

6. These are not at all new conceptions of the bases for good corporate law. See, e.g., William Klein, *Criteria for Good Laws of Business Association*, 2 *Berkeley Bus. L.J.* 13, 18–24 (2005) (identifying list of possible criteria for evaluating business association laws). But see Stephen M. Bainbridge, *Competing Concepts of the Corporation (a.k.a. Criteria? Just Say No)*, 2 *Berkeley Bus. L.J.* 77, 79–81 (2005) (calling into question Klein’s project of defining criteria for evaluation of corporate association law absent overarching theory).

7. See Roe, *Delaware’s Politics*, *supra* note 2, at 2493 (“[W]hen media saliency puts the matter on the federal agenda or when Delaware’s primary players disagree or when the matter strikes Washington players as important to the American economy, Delaware loses its dominance.”).

8. Del. Code Ann. tit. 8, §§ 101–398 (2001). This statute was substantially revised in 1967 based on the work of a specially appointed commission comprised principally of Delaware corporate lawyers, and the statute has been modified only incrementally since

rior in authority to the DGCL, there is now only one constitutional provision of any continuing importance in Delaware corporate law.⁹ That provision, specifying that amendments to the DGCL require a two-thirds vote of both the state Senate and the House of Representatives,¹⁰ has been touted as a source of stability of the Delaware corporate law.¹¹ In truth, the supermajority legislative vote requirement is more symbolic than real, since voting on amendments to the DGCL is almost invariably unanimous.¹² Plainly, then, the Delaware General Assembly has not perceived the content of the DGCL as an appropriate subject for partisan controversy.¹³

Of course, lack of partisan controversy cannot be taken as evidence of lack of interest. Just as the disproportionate role of Delaware in corporate chartering is well known, so is the financial importance of that activity to the state's fiscal health.¹⁴ Revenue from the state corporate franchise tax alone has in recent years constituted over twenty percent of the state's budget, a fact of which Delaware legislators are intensely

then. David A. Drexler et al., *Delaware Corporation Law and Practice* § 1.01, at 1-4 to 1-5 (2005) (giving brief history of statute).

9. In 2004 the Delaware General Assembly eliminated the longstanding provision of the state constitution specifying the required form of consideration for the issuance of corporate stock. See Frederick H. Alexander & Jeffrey R. Wolters, *Analysis of the 2004 Amendments to the Delaware General Corporation Law* 1, 3-4 (Aspen Corp. Serv., vol. unavailable, Sept. 15, 2004) (on file with the *Columbia Law Review*). Delaware's state constitution is unusual, if not unique, in that it can be amended by the General Assembly itself, with no popular vote. Del. Const. art. XVI, § 1. Additionally, the General Assembly, by a two-thirds vote of both houses, can submit to the voters the question whether to convene a state constitutional convention. *Id.* art. XVI, § 2. The greater authority and dignity accorded to the state constitution derives from the fact that an amendment must be adopted by both houses of the General Assembly in successive legislative sessions, ostensibly to afford the electorate the opportunity, before the amendment can be approved in the second legislative session, to vote out incumbents who approve an amendment in the first session. See Del. State Bar Ass'n, *The Delaware Constitution of 1897: The First One Hundred Years* 211 (Randy J. Holland et al. eds., 1997) (describing amendment process).

10. Del. Const. art. IX, § 1.

11. See Romano, *Competition Debate*, supra note 2, at 722 (noting that constitutional two-thirds vote requirement "makes it difficult to renege on provisions already in the code and, correspondingly, on the overall policy of being responsive to firms"); Omri Yadlin, *Commentary on Sitkoff*, 69 *U. Chi. L. Rev.* 1167, 1185-86 (2002) (arguing that while Delaware's two-thirds majority requirement ensures stability, it only reduces extortion if preference for status quo and trustworthy judiciary are assumed).

12. Kahan & Rock, supra note 2, at 1600.

13. See *id.* (citing Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 *Del. J. Corp. L.* 885, 898 (1990)) (explaining that partisan politics plays no role in formulation of Delaware corporate law).

14. See, e.g., Del. Dep't of State, Div. of Corps., 2005 Annual Report 2 (2006), available at <http://www.state.de.us/corp/2005%20doc%20ar.pdf> (on file with the *Columbia Law Review*) ("Revenues collected by the Division [of Corporations] increased 2.2% from \$612.8 million in fiscal year 2004 to a new record of \$626.1 million in fiscal year 2005.").

aware.¹⁵ Incidental benefits from the prevalence of Delaware incorporation undoubtedly account for a substantial additional percentage of state revenues.¹⁶ It is therefore not surprising that when proposed amendments to the DGCL are presented for legislative consideration, as they are essentially every year, they are very promptly brought to a vote before the appropriate committee and the floor of both houses.¹⁷

The members of the Delaware General Assembly, however, have not taken on any significant role in initiating or drafting changes to the DGCL.¹⁸ Nor are those amendments the product of any legislative staff, or of any lobbyists engaged by individual businesses. Likewise, and in light of the large number of Delaware public corporations, the drafting of

15. *Id.* (“Incorporations revenue accounted for 22 percent of the State’s general fund in fiscal year 2005.”).

16. Revenues to the state that flow indirectly from incorporation in Delaware but stem from economic activity largely centered elsewhere include: fees for U.C.C. filings based on the borrower’s state of incorporation, see *id.* (noting dramatic growth in U.C.C. filing fees following July 2001 adoption of revisions to Article IX of Uniform Commercial Code); funds escheated based on Delaware incorporation, see, e.g., *Delaware v. New York*, 507 U.S. 490, 494 (1993) (holding that state of incorporation, often Delaware, has right to escheat funds of owners who cannot be identified or located); and state tax on income earned in Delaware by corporate service providers, lawyers, and related support service industries, where such income relates to interpretation and enforcement of Delaware’s corporation law or to bankruptcy litigation based on the debtor’s incorporation in Delaware; see 28 U.S.C. § 1408 (2000) (indicating that venue for corporate bankruptcy reorganization proceedings may include corporate domicile); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 *Del. L. Rev.* 1, 16–18 (1998) (describing history of Delaware’s rise to prominence in bankruptcy law).

17. In 2004, for example, proposed amendments to the DGCL (in the form of Senate Bill No. 272) were introduced on May 4, 2004; a similar bill was substituted and approved by the Senate Judiciary Committee on May 12, 2004 (S.S. 1 for S.B. 272); that bill was approved by the Senate on June 1, 2004; approved by the House Judiciary Committee on June 9, 2004; passed by the House on June 15, 2004; and signed by the Governor on July 6, 2004. State of Del., 142d General Assembly Bill Tracking for S.S. 1, at <http://www.legis.state.de.us/LIS/LIS142.NSF/04e8b79d21032ccd852568700053e5b5/8b1eea82b256ce9485256e8c00617af0?OpenDocument> (last visited Sept. 11, 2006) (on file with the *Columbia Law Review*). In 2006, proposed amendments to the DGCL (in the form of S.B. 322) were introduced on May 16, 2006; approved by the Senate Judiciary Committee on May 31, 2006; passed by the Senate on June 7, 2006; approved by the House Judiciary Committee on June 14, 2006; passed by the House on June 20, 2006; and signed by the Governor on June 27, 2006. State of Del., 143d General Assembly Bill Tracking for S.B. 322, at <http://www.legis.state.de.us/LIS/LIS143.nsf/vwLegislation/SB+322?Opendocument> (last visited Sept. 11, 2006) (on file with the *Columbia Law Review*).

18. It should not be inferred that the Delaware General Assembly is thoroughly passive and ignorant with respect to corporate law issues. The current chair of the House Judiciary Committee (the committee to which corporate legislation is referred) is an experienced practitioner of corporate law. See *Biography of Representative Robert J. Valihura, Jr.*, at <http://www.valihura.com/OTHER%20SECTIONS/biography.htm> (last visited Sept. 11, 2006) (on file with the *Columbia Law Review*). Moreover, members of the various houses and committees of the General Assembly invariably expect and receive oral presentations from the drafters of proposed amendments to the DGCL explaining the origins and purposes of such amendments.

the DGCL is not dominated by any one Delaware corporation.¹⁹ Rather, for decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed by the Corporation Law Section of the Delaware State Bar Association.²⁰ In particular, it is the governing body of the Corporation Law Section—its Council—that develops such initiatives.²¹

Because of the Council's central importance in the development of the Delaware General Corporation Law, then, its composition and processes deserve brief elaboration. The Council currently consists of twenty-one members, formally elected annually by the members of the Corporation Law Section.²² A number of informal traditions guide the selection of nominees to the Council. As a matter of practice, and in recognition of the size of their corporate practice groups, seven of the large commercial law firms in Wilmington have nominated two members each; the other members practice in smaller firms (or in my case, teach), all in Wilmington.²³ The members are about evenly distributed between those whose practices concentrate on litigation and those whose practices

19. See Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 679–80 (2005) [hereinafter *Strine, Delaware Way*] (“[I]t is vital that we remain the leader in corporation law. . . . For that reason, our state will not tilt its corporation law to favor a corporation that happens to have its headquarters here. . . . The cost to our integrity and our ability to preserve our advantage . . . would be too high.”).

20. The Delaware State Bar Association is a nonunified (voluntary) organization of members of the Delaware Bar. See generally Del. State Bar Ass’n, Profile (2006) at <http://www.dsba.org/GenInfo/profile.htm> (on file with the *Columbia Law Review*) (providing history and information about organization). Like the American Bar Association, many of its activities proceed under the auspices of significantly autonomous sections, including the Corporation Law Section, each with its own membership, bylaws, governing body, and officers. See Am. Bar Ass’n, Constitution and Bylaws 19–20, available at <http://www.abanet.org/policy/cb0304.pdf> (last visited Sept. 11, 2006) (on file with the *Columbia Law Review*); Del. State Bar Ass’n, Sections of the Delaware State Bar Association (2006), at <http://www.dsba.org/SecComm/sectionslist.htm> (on file with the *Columbia Law Review*).

21. Kahan & Rock, *supra* note 2, at 1599–1600.

22. Section of Corp. Law, Del. State Bar Ass’n, By-Laws § 6.1 (unpublished, on file with the *Columbia Law Review*). Representing the Division of Corporations of the Department of State, the Assistant Secretary of State participates in meetings of the Council on an ex officio basis. Richard Geisenberger, the current Assistant Secretary of State, has actively and productively fulfilled the role of communicating to the Council and having it address the administrative needs of the Division of Corporations that affect or may be affected by potential amendments to the DGCL.

23. Report from the Corporation Law Section to the Delaware State Bar Association Executive Committee 1, 2 (2006) (unpublished compendium of Bar Association Section reports, on file with the *Columbia Law Review*) (identifying Council members and Corporation Law Section officers). Firms represented on the Council (and the number of their respective representatives) are: Ashby & Geddes (1); Connolly Bove Lodge & Hutz (1); Grant & Eisenhofer (1); Morris, James, Hitchens & Williams (2); Morris, Nichols, Arsht & Tunnell (2); Potter Anderson & Corroon (2); Prickett Jones & Elliott (2); Proctor Heyman (1); Richards Layton & Finger (2); Rosenthal Monhait Gross & Goddess (1); Skadden Arps Slate Meagher & Flom (2); Smith Katzenstein & Furlow (1); and Young Conaway Stargatt & Taylor (2).

gravitate toward transactional counseling. Also as a matter of practice, the members of the Council include a number of lawyers—a small minority, to be sure—whose litigation practice is dominated by representation of shareholder plaintiffs.²⁴ In 2005, after one Wilmington firm had developed an ongoing client base of public institutional investors, the size of the Council was expanded to permit that firm to nominate a member. Notably absent from the Council, on the other hand, are any in-house lawyers (i.e., lawyers employed by and primarily representing a single business), any non-Delaware lawyers, and with one exception, any lawyers from firms not principally based in Delaware.²⁵

The Council's schedule is shaped by the schedule of the Delaware General Assembly, which convenes every January and generates legislation in a crescendo of activity culminating on June 30, when it adjourns its regular session.²⁶ In order to present legislation for action by the General Assembly, the Council conducts monthly meetings from August through March or April. Shortly before that cycle begins in late summer, Council members are invited to suggest potential amendments, and such suggestions are considered by the full Council to determine whether they merit further exploration. If so, the matter is ordinarily referred to a subcommittee of the Council for detailed review and drafting. It is common for subcommittee proposals to be reviewed by the Council and "remanded" for revision, sometimes twice or more. Upon approval by the full Council, however, the legislative proposal is submitted to the Corporation Law Section and the Bar Association's Executive Committee, as explained below, before submission to the General Assembly.²⁷

One aspect of the Council's processes deserves particular mention. For better or worse—and Council members would almost certainly say for better—the work of the 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. Thus, Council members do not submit to their current clients legislative proposals that might affect those clients, nor do they submit such proposals to corresponding counsel in other jurisdictions. This is not to say that "outsiders" have no input into the development of the DGCL: Council members not uncommonly receive suggestions for change from clients or co-counsel outside of Delaware, Council members also actively follow the development of the Model Business Cor-

24. These categories—litigators vs. transactional lawyers, plaintiffs' vs. defendants' lawyers—are oversimplified. Most of the Council members have had at least some involvement in all four of these quadrants.

25. That exception is Skadden Arps Slate Meagher & Flom LLP, which by Delaware standards has a large corporate practice based in Wilmington and has nominated two members of the Council.

26. Del. Const. art. II, § 4.

27. Del. State Bar Ass'n, Amended and Restated Delaware State Bar Association Bylaws § 10.2(e) (2006), available at <http://www.dsba.org/AssocPubs/PDFs/Bylaws.pdf> (on file with the *Columbia Law Review*).

poration Act,²⁸ and Council members' own suggestions are often prompted by problems or issues they have observed in their dealings with clients and co-counsel.²⁹ Regardless of the source of a proposal, however, Council members consider it important that further deliberation on the proposal proceed without further input from or influence by persons outside of their own law firms.³⁰

This limited form of insularity on the part of the Council also extends to relations with the Delaware courts. Delaware's judges, particularly of late, have publicly expressed their individual views—formed out of their extensive experience with the corporate cases presented to them—on potentially desirable changes to the DGCL.³¹ Similarly, and in view of the small size and close-knit character of the relations among Delaware's judges and corporate lawyers, private conversations among members of these two groups on the subject of potential changes to the DGCL have not been uncommon. Recognizing the importance of the separation of coequal branches of government, however, these communications are rare, informal, and, most importantly, preliminary. The Council does not invite the Delaware judges to its meetings, nor do the judges seek out an audience at such gatherings. And as is the case with lawyers outside of Delaware, the Council does not solicit comments from the Delaware judges with respect to the drafting of potential or proposed legislative initiatives that do not relate to matters of court jurisdiction or administration. There is, moreover, an equally strong corollary tradition: The Council, as a matter of longstanding policy, consciously tries to avoid

28. Until June 2006, two of the current Council members, as well as two former members (former Delaware Supreme Court Chief Justice E. Norman Veasey and current Justice Jack B. Jacobs) served on the Committee on Corporate Laws of the Section of Business Law of the American Bar Association, the committee responsible for the drafting of the Model Business Corporation Act. See Am. Bar Ass'n, Section of Business Law, at <http://www.abanet.org/buslaw/home.shtml> (last modified June 23, 2006) (on file with the *Columbia Law Review*) (providing mission of Section on Business Law).

29. Kahan & Rock, *supra* note 2, at 1600.

30. Aside from the adoption of DGCL section 203, see *infra* text accompanying note 70, I have observed only one exception to this approach: When a particularly complex amendment dealing with domestication or transfer of non-Delaware corporations was under consideration, Council members considering the amendment felt it necessary to confer with practitioners of international tax law whose expertise was both critical to the proper drafting of the legislation and beyond the knowledge of any of the lawyers in their firms. That contact, however, was initiated by Council members, not by the outside lawyers.

31. See, e.g., William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. Pa. L. Rev. 953, 999–1004 (2003) (discussing possible changes to Delaware laws controlling elections of corporate directors and holding key executives accountable); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759, 1777–79 (2006) [hereinafter Strine, *True Corporate Republic*] (outlining "initiative that would address the real issues that inspire Bebchuk's and others' calls for reform while responsibly taking into account the concerns of traditionalists").

proposing legislation that would directly or even indirectly affect the outcome of litigation pending in the Delaware courts.³²

Before concluding this description of the formation of Delaware's statutory corporate law, it is important to dispel any inference that the Council has an entirely free hand in developing the DGCL. At the most superficial level, the Council's recommendations must be approved by the full Corporation Law Section (consisting of over 300 members of the Delaware Bar) and by the Executive Committee of the Bar Association, following notice of proposed changes to the other sections of the Bar Association.³³ These approvals usually follow Council approval in a fairly routine way, but not always. In 2003, for example, the Council's proposal to amend DGCL section 220 was significantly revised in response to objections from the Corporate Counsel Section (which deals largely with issues pertinent to in-house corporate counsel).³⁴

Far more importantly, however, the Council has always been acutely aware that it must strive to maintain the trust and confidence of the General Assembly and to avoid legislation that would expose the General Assembly to criticism for favoring the parochial interests of one corporation or for favoring local businesses over Delaware corporations headquartered elsewhere. One senior Delaware corporate practitioner has explained as follows the symbiotic and trust-based relationship between the General Assembly and the Bar Association:

The Delaware General Corporation Law is the great beneficiary of an unwritten compact between the bar and the state legislature. In broad outline the terms of the compact recognize that the legislature will call upon the expertise of the Corporation Law Section of the Delaware Bar Association to recommend, review and draft almost all amendments to the statute. Similarly unspoken, but understood, is the obligation of the bar to leave parochial client interests behind when proposing corporate legislation, to present issues fairly and in an even handed fashion, and always to deal candidly and openly with the legislature on matters involving the corporation law.³⁵

This perceived "obligation . . . to leave parochial client interests behind when proposing corporate legislation" will undoubtedly be dismissed by some as self-serving, self-deluding, and illusory. There are at

32. The rationale for this form of abstention is discussed in Part III.C *infra*.

33. See Amended and Restated Delaware State Bar Association Bylaws, *supra* note 27, § 10.2(d)–(e) (setting rules for legislative recommendations based upon Executive Committee and Section actions).

34. See Corp. Law Section, Del. State Bar Ass'n, 2002–2003 Annual Report 1, 1 (2003) (unpublished, on file with the *Columbia Law Review*).

35. Lewis S. Black, Jr., *Why Corporations Choose Delaware* 4 (Corp. Serv. Co., Jan. 1999 ed.). This publication has been printed and distributed extensively by the Division of Corporations of the Delaware Department of State. Mr. Black, who served on the Council for many years, is a former partner and now of counsel with the Wilmington firm of Morris, Nichols, Arsht & Tunnell.

least two reasons, however, to take it seriously. First, the obligation has been recited by Council members quite regularly in and outside of formal meetings of the Council, enough to suspect that the members act on the obligation if only because they repeatedly remind themselves of it. Second, and as previously noted, most of the Council members have represented a wide range of corporate participants—inside directors, outside directors, officers, takeover bidders, dissenting stockholders—and thus have had clients who simply do not speak with one voice on any aspect of the corporate law. 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.

B. *The Delaware Court of Chancery and the Delaware Supreme Court*

In the previous section it was noted that the legislative drafting work of the Council proceeds largely out of public view.³⁶ The work of the Delaware Court of Chancery and Supreme Court, on the other hand, is presumptively entirely public.³⁷ Especially in recent years, Delaware's judges (including recently retired judges) have become prolific authors on corporate law matters.³⁸ The Delaware judges also participate in conferences throughout the world on the subject of corporate law as speakers, panelists, and audience members. They interact at these gatherings with lawyers (domestic and foreign, litigation and transactional, plaintiff

36. See *supra* notes 28–30 and accompanying text. Of course, the General Assembly itself meets in public, but the proceedings of its houses and of its committees are not published; there are no written committee reports; and the only elaboration on its amendments to the DGCL is in the form of written synopses (drafted by the Council) that appear at the end of bills.

37. See, e.g., *Stone v. Ritter*, No. 1570-N, 2005 Del. Ch. LEXIS 146, at *5 (Del. Ch. Sept. 26, 2005) (stating that court must find “good cause” to keep written proceedings under seal).

38. See Kahan & Rock, *supra* note 2, at 1603 n.117 (listing twenty-two such publications). Other and more recent articles include: Jack B. Jacobs, *Implementing Japan's New Anti-Takeover Defense Guidelines, Part I: Some Lessons from Delaware's Experience in Crafting “Fair” Takeover Rules*, 2 N.Y.U. J.L. & Bus. 323 (2006); Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 Del. L. Rev. 1 (2005) [hereinafter Jacobs, *Uneasy Truce*]; E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399 (2005). Delaware's judges also frequently contribute to academic literature through their comments on articles by law professors and other commentators. E.g., Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479 (2001); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 Stan. L. Rev. 679 (2002) [hereinafter Kahan & Kamar, *Myth of State Competition*]; Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 Cornell L. Rev. 1205 (2001); Fred S. McChesney, *“Proper Purpose,” Fiduciary Duties, and Shareholder-Raider Access to Corporate Information*, 68 U. Cin. L. Rev. 1199 (2000); John L. Reed & Matt Neiderman, *“Good Faith” and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty*, 29 Del. J. Corp. L. 111 (2004).

and defense), as well as other judges, investment bankers, institutional shareholder representatives, and of course, academics.³⁹ It is not surprising, therefore, that there has been much more academic analysis of the Delaware judiciary than of the Council.⁴⁰

The basic features of the Delaware corporate judicial system are thus well known. It relies on a specialized trial court (the Court of Chancery) that sits without a jury and bars punitive damages awards.⁴¹ Judges are appointed, rather than elected, through a largely nonpolitical process backed up by a requirement of bipartisan representation on the court.⁴² A sufficiently uncrowded docket permits urgent cases to be resolved expeditiously, sometimes amazingly so.⁴³ Finally, the judges have a deep appreciation of the value of both clear formal rules and the superficially contrary discretion to remedy inequitable conduct.⁴⁴

It is this last feature that has drawn the most academic attention. Some scholars have expressed frustration with a system in which foundational rules emerge (or later metamorphose) out of discrete, fact-bound rulings, rather than from a coherent deliberative process that values clarity and predictability over equity.⁴⁵ Some of these critics see a rent-seek-

39. Appendix A to this Essay sets forth an incomplete—but nonetheless imposing—list of such public engagements by some of the members of the Delaware Supreme Court and the Court of Chancery.

40. See, e.g., Fisch, *supra* note 2, at 1061 (analyzing what part Delaware courts play in state's competition for corporate charters); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 *Tex. L. Rev.* 865, 873 (1990) (arguing that Delaware judges are effectively “empowered to shape (or reshape) the entire corporate landscape”); Kahan & Rock, *supra* note 2, at 1602–04 (analyzing unique aspects of Delaware's judiciary).

41. See *Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (discussing “rationale [behind] . . . denying Chancery's power to award punitive damages”); see also Drexler et al., *supra* note 8, § 2.01, at 1-2; Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2-5 (2000).

42. See Veasey & Di Guglielmo, *supra* note 38, at 1402 (describing judicial selection by governor from list provided by bipartisan commission).

43. A notable example is the schedule on which the dispute over the Hewlett-Packard stockholder vote on the merger with Compaq was resolved. In its April 30, 2002 opinion resolving the dispute after trial, the court recited the following procedural history:

This action was filed just over a month ago, on March 28, 2002. HP moved to dismiss the complaint on April 1. After oral argument on April 7, that motion was denied on April 8. The parties conducted discovery on an expedited basis and a three-day trial was held from April 23 to April 25. Six witnesses testified at trial and several other witnesses gave deposition testimony. The parties submitted post-trial briefs on April 27. Having considered the testimony and reviewed these filings, together with more than 500 trial exhibits, I now set forth my findings of facts and conclusions of law.

Hewlett v. Hewlett-Packard Co., No. 19513-NC, 2002 Del. Ch. LEXIS 35, at *3 (Del. Ch. Apr. 30, 2002) (footnotes omitted). In short, in barely over a month, the court had disposed of both a motion to dismiss the complaint and a trial on the merits.

44. See, e.g., Jacobs, *Uneasy Truce*, *supra* note 38, at 15 (suggesting need for “bright line rule . . . [to] make the application of equity more predictable”).

45. Cf. Kamar, *supra* note 2, at 1912–23 (suggesting Delaware corporate law's “legal indeterminacy” helps create “suboptimal equilibrium”).

ing motivation, deliberate or not, in the prevailing judicial attitude and in the central role played by the courts in developing Delaware corporate law. They see a devotion to an indeterminacy that aggrandizes the courts' role and enriches those (especially the Delaware lawyers) who handle the necessary litigation, at the expense of corporations, stockholders, and customers who bear the costs of uncertainty and litigation.⁴⁶

This is a good story to the extent one believes that greater codification would substantially reduce uncertainty and its costs, and that those who eschew such codification and promote indeterminacy impose dead-weight costs upon society. Not all are convinced, however, that efforts aimed at codification would in fact be more efficient.⁴⁷ For present purposes, it is neither necessary nor possible to resolve that empirically elusive issue; rather, the question is how the natives perceive their own role and motivation. On this point, Delaware's judges appear sincere and unanimous. In the words of Vice Chancellor Leo Strine:

By its very nature, equitable review is situationally-specific and proceeds in the common law fashion. The case at hand is decided and the law is thereby evolved incrementally. Although that can lead to what some scholars like to call indeterminacy—i.e., some residual uncertainty—it also allows space for the judiciary to pull back in future cases if a prior decision turns out, in the wake of experience, to have been unwise.⁴⁸

Other Delaware judges likewise defend a regime in which indeterminacy is systemic,⁴⁹ even as they struggle to keep equitable discretion from overrunning statutory or contractual rules that have ostensibly predict-

46. See *id.* at 1939–40 (suggesting Delaware lawyers' interests, judges' preferences, and state's "legal culture" all reproduce "legal indeterminacy"); see also Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 *Vand. L. Rev.* 85, 112 (1990) ("An explanation for Delaware's surprisingly proshareholder output of decisions is that a not invisible hand operates to serve the special interest groups that make up the Delaware establishment, including the shareholder and plaintiffs' counsel side that this establishment must have."); William J. Carney, *The Production of Corporate Law*, 71 *S. Cal. L. Rev.* 715, 727 (1998) ("Delaware increases litigation costs through the adoption of open legal standards (rather than bright-line property rules)."); John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 *Cardozo L. Rev.* 759, 762–66 (1987) (arguing that interest group influence explains development of Delaware corporate law).

47. See Fisch, *supra* note 2, at 1083–85 ("[I]ndeterminacy [in corporate law] has benefits as well as . . . costs . . ."); see also Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 *Bus. Law.* 1, 2–3 (2005) (advocating state law flexibility as advantage over largely mandatory federal corporate lawmaking); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 *UCLA L. Rev.* 1009, 1017 (1997) (claiming that process leading to precise standards through narratives cannot be reduced to rules or algorithms); Veasey & Di Guglielmo, *supra* note 38, at 1412–13 (arguing that Delaware corporate law's "genius" lies in its "flexibil[ity]").

48. Strine, *Delaware Way*, *supra* note 19, at 683.

49. See Jacobs, *Uneasy Truce*, *supra* note 38, at 15 (expressing approval for Delaware Supreme Court's movement away from equity); Veasey & Di Guglielmo, *supra* note 38, at

able content.⁵⁰ In any event, the ongoing struggle to apply the law and concurrently do equity is what Delaware's corporate law judges do.

II. AN INVENTORY OF OUTSIDE EXPLANATIONS OF THE MAKING OF DELAWARE CORPORATE LAW

Not long after Delaware substantially revised its General Corporation Law in 1967, its role in establishing rules of corporate governance captured the attention of outside observers. This section reviews some of the more significant outside observations of Delaware's corporate lawmaking activity. The purpose of this review is not to pick a winner whose work appeals to a Delaware native as the most accurate assessment. Nor is the purpose of this section, or even this Essay, to espouse normative judgments about the quality of Delaware's corporate lawmaking. The goal for now is simply to set out a brief inventory of the outside assessments, lacing it with a little color commentary from time to time to note a few points of agreement, disagreement, or elaboration.

A. *The Earliest Explorer and the Race to the Bottom*

The first notable explorer of the Delaware incorporation phenomenon, Professor William Cary, took a dim view of the natives.⁵¹ His core assessment was that Delaware is "a pygmy among the 50 states [that] prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue."⁵² As an antidote to Delaware's leadership of a "race to the bottom,"⁵³ what Cary argued for was not federal incorporation (which he considered "politically unrealistic"⁵⁴), but the enactment of federal minimum standards of corporate conduct uniformly applicable to publicly held corporations.⁵⁵

Many of Cary's observations were accurate. He was certainly correct in describing full-fledged federal incorporation as politically unrealistic; there has never been any substantial political coalition of support for

1412–13 (describing advantages of Delaware corporate law versus other states' corporate law).

50. See, e.g., *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 434 (Del. Ch. 2002) ("[J]udges must supplement the broadly enabling features of statutory corporation law with equitable principles sufficient to protect against abuse and unfairness, but not so rigid as to stifle useful transactions that could increase the shareholder and societal wealth generated by the corporate form."); Jacobs, *Uneasy Truce*, supra note 38, at 10–15 (explaining that equitable discretion "should be reserved for those instances that threaten the fabric of the law, or which by an improper manipulation of the law, would deprive a person of a clear right" (quoting *Ala. By-Products v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991))).

51. See Cary, supra note 2, at 672–86.

52. *Id.* at 701.

53. *Id.* at 666.

54. *Id.* at 700.

55. *Id.* at 701–02.

such a measure. Cary also accurately describes modern corporation laws (largely patterned after the DGCL) as “‘enabling’ acts” rather than as regulatory systems.⁵⁶ He was correct in observing that the corporate franchise tax and the indirect benefits of incorporation command the attention of Delaware’s corporate lawmakers, who are therefore powerfully motivated to preserve those benefits.⁵⁷ And he was undoubtedly responsible in some immeasurable way for Delaware court opinions that emerged after his article was published and that could fairly be viewed as an attempt to refute his various theses.⁵⁸

Cary’s arguments, of course, have been roundly criticized, from the perspectives of both law and economics,⁵⁹ and there is little to be gained by taking even more shots at the work of a thoughtful scholar who can no longer defend his work. One wonders, in fact, whether Cary would tell the same story today in comparing Delaware corporate law with the law of other states.⁶⁰ It is a sufficient response to Cary at this point, in any event, to assert merely that today’s drafters of the DGCL do not devote an iota

56. *Id.* at 666.

57. See *id.* at 668–69 (explaining how Delaware corporate law created additional tax revenue and “favorable climate” to become state policy); Fischel, *supra* note 2, at 915–16.

58. For example, Cary claimed that Delaware courts did not impose any fiduciary duty upon directors or officers in buying stock from minority stockholders. Cary, *supra* note 2, at 672 (citing *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317, 320 (5th Cir. 1959)). It is not at all clear that this assertion was correct when made. See Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director’s Fiduciary Disclosure Duty*, 49 *Vand. L. Rev.* 1087, 1115–20 (1996) (arguing that Delaware cases reciting “no fiduciary duty” rule are factually limited and not inconsistent with rationale underlying fiduciary duty of disclosure). In any event, the Delaware Supreme Court, within just a few years after Cary’s article was published, resoundingly asserted the existence of a fiduciary duty of disclosure associated with purchases of stock from minority stockholders. *Id.* at 1120–21 (discussing *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977)).

Similarly, Cary’s critique of *Graham v. Allis-Chalmers Manufacturing Co.*, 182 A.2d 328 (Del. 1962), Cary, *supra* note 2, at 683–84, was embraced by Chancellor Allen in his well-known opinion *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959, 970–71 (Del. Ch. 1996), in which the Chancellor found a duty on the part of directors to install internal control systems to prevent violations of law—precisely the duty that Cary contended the *Graham* court should have imposed.

59. See, e.g., S. Samuel Arsht, *Reply to Professor Cary*, 31 *Bus. Law.* 1113, 1113–17 (1976) (questioning accuracy of Cary’s examination of Delaware case law); Fischel, *supra* note 2, at 920–21 (questioning economic premises of “race to the bottom” story).

60. It is well known that Delaware has resisted adopting legislation that is nearly as protective of management in takeovers as legislation adopted in other states. See, e.g., 15 *Pa. Cons. Stat. Ann.* § 1715 (West 1995) (permitting director consideration of interests of constituencies other than shareholders, providing that “the fiduciary duty of directors shall not be deemed to require them . . . to redeem any . . . rights plan,” and presuming validity of disinterested director action relating to or affecting acquisition or potential or proposed acquisition of control). Similarly, Delaware courts have not embraced doctrines as restrictive of minority stockholder rights in freeze-out mergers as those adopted in some other jurisdictions—for example, Ohio’s strong judicial articulation of appraisal exclusivity, announced in *Armstrong v. Marathon Oil Co.*, 513 N.E.2d 776, 798 (Ohio 1987), and applied to an Ohio corporation in *Abbey v. E.W. Scripps Co.*, No. 13397, 1995 *Del. Ch. LEXIS* 94, at *12–*13 (Del. Ch. Aug. 9, 1995).

of conscious effort to make that statute more friendly to management and less protective of stockholders. To the contrary, as explained below, we favor a much more conservative approach that seeks to maintain whatever balance currently exists, and we are distinctly uncomfortable with any change that alters that balance in either direction.⁶¹

B. *The Second Wave of Exploration: The Race to the Top*

The principal academic response to Cary came in the decade that followed publication of his "Reflections upon Delaware."⁶² In published remarks that almost certainly set the record for the highest ratio of influence to footnotes, Judge Ralph K. Winter argued that "[a]s long as we assume that there is real competition to make money through attracting corporate charters, Delaware will not tilt toward management."⁶³ To the contrary, Winter posited that to secure its happy place in the competition for corporate charters, Delaware would lead a "race to the top."⁶⁴ Extending Judge Winter's work, Professor Daniel Fischel published a more extensive articulation of the same basic point, noting, among other things, empirical evidence refuting the existence of the discount on Delaware stocks that one would predict if it were truly the leading purveyor of investor abuse.⁶⁵ Professor Roberta Romano, perhaps the most consistent and forceful advocate of the "race to the top" perspective, has added her own empirical analysis of reincorporations in support of this perspective.⁶⁶

None of these "race to the top" advocates, however, elaborated on precisely how Delaware's legislators, judges, and lawyers did or would actually decide how to carry out the leadership of the "race to the top." Moreover, their prediction of a "race to the top" in the development of corporate law from its inception presupposed "real competition." That presupposition, of course, has had its detractors,⁶⁷ but the existence of

61. See *infra* Part III.

62. Cary, *supra* note 2.

63. Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 *Harv. J.L. & Pub. Pol'y* 127, 128 (1982). The article contains four footnotes (including the one identifying the author), and cites just two articles, including the Cary article.

64. *Id.* at 128–29 ("As long as Delaware is competing . . . [t]here will be a race to establish the optimal corporation code . . .").

65. Fischel, *supra* note 2, at 920–21.

66. See, e.g., Roberta Romano, *The Genius of American Corporate Law* 19–24 (1993) (demonstrating empirically that Delaware statutes limiting directors' personal liability for damages in shareholder suits did not adversely affect stock prices); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *J.L. Econ. & Org.* 225, 265–73 (1985) (demonstrating empirically that Delaware reincorporation does not adversely affect stock price).

67. See, e.g., Bebchuk & Hamdani, *supra* note 2, at 563–85 ("[T]he vigorous race among states . . . does not exist in fact."); Kahan & Kamar, *Myth of State Competition*, *supra* note 38, at 684 ("[T]he very notion that states compete for incorporations is a myth.").

genuine interstate competition—a “race,” in other words—was a critical factual premise for both Cary and his “race to the top” antagonists.

This Essay makes no attempt to address definitively or even in any detail the issue of whether and to what extent a meaningful interstate “race” has occurred or continues to occur. Nor does it stake out a position on whether a “race,” if one has been occurring, has been aimed at some “top” or “bottom.”⁶⁸ Viewed from the perspective of a Delaware native, however, two things can be said about the various “race”/non-“race” theories. First, even if some are willing to declare that Delaware has “won” the “race,” or has an ostensibly insurmountable lead,⁶⁹ no one in Delaware is willing to play hare while some other state tortoise gains ground. If some innovation in corporate law were to emerge in another jurisdiction and prove to be widely popular, there is no doubt that Delaware would carefully consider it. Whether Delaware would actually adopt it would depend on other considerations, but there is no question that Delaware’s policymakers would be strongly motivated to adopt it in order to maintain its competitive place. Thus, and to this extent anyway, the “race” remains alive and well.

Second, this “race” motivation of Delaware’s corporate lawmakers certainly does not lead inexorably only downhill. The classic illustration of both of these points is Delaware’s adoption of its current takeover statute in 1988.⁷⁰ As has already been observed,⁷¹ Delaware’s enactment of its business combination moratorium statute (DGCL section 203) occurred in a context with three powerfully salient circumstances: (1) The U.S. Supreme Court had recently revitalized the constitutional foundation for state regulation affecting takeovers;⁷² (2) numerous states had

68. Nor does this Essay address intrastate competition in corporate lawmaking, which was the subject of Macey and Miller’s well-known article. See generally Macey & Miller, *supra* note 2 (analyzing competing interests of Delaware corporate lawyers and Delaware taxpayers).

69. See Bebchuk & Hamdani, *supra* note 2, at 586 (“Delaware faces a very weak threat of a challenge by another state.”); Kamar, *supra* note 2, at 1954 (“Participants in the state competition controversy agree that, to date, Delaware is the undisputed winner.”); Roe, Delaware’s Competition, *supra* note 2, at 590 (“States . . . are said to use their corporate law to compete for corporate tax revenue . . . ; Delaware has ‘won’ that race . . .”). As Frank Balotti pointed out in commenting on this paper, interstate “racing” may be much more vibrant in niche areas (formation of real estate investment trusts or mutual funds, for example) than in the case of public companies in general. See Ellisa Opstbaum Habbart & James J. Hanks, Jr., *Crossing the Line, Real Estate Portfolio*, Jan.–Feb. 2002, available at <http://www.nareit.com/portfoliomag/02janfeb/policy.shtml> (on file with the *Columbia Law Review*) (featuring presentations by James J. Hanks, Jr. of Maryland and Ellisa Opstbaum Habbart of Delaware outlining advantages of Real Estate Investment Trust formation in their respective states).

70. Act of Feb. 2, 1988, ch. 204, sec. 1, § 203, 66 Del. Laws 422, 426.

71. See, e.g., Roe, Delaware’s Competition, *supra* note 2, at 630–31 (describing creation of Delaware’s antitakeover law).

72. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–93 (1987) (affirming states’ interest in establishing corporate governance rules despite potential impact on interstate transactions).

already adopted antitakeover statutes to take advantage of this recognition of state authority;⁷³ and (3) hostile takeover bids were approaching then-record levels.⁷⁴ Quite simply, Delaware was in no position not to respond to the legislation in other states—and grudgingly or not, the “race” was definitely on.⁷⁵

But as the Delaware takeover statute demonstrates, and contrary to what the Cary “race to the bottom” thesis would have predicted, “race” pressures from other states did not lead to the adoption of a statute that was an even more formidable deterrent to hostile takeovers than the versions that other states had adopted. To the contrary, the Delaware takeover statute is generally recognized as at worst mild, and perhaps even irrelevant, in its effect on hostile takeovers,⁷⁶ and has had a far greater negative impact on friendly deals, as the limited case law demonstrates.⁷⁷ One could explain the mildness of Delaware’s response as an act of enlightened self-interest aimed at winning a “race to the top.” Or, one could seek out some more mundane, even cynical, explanation—which brings us to the next major visitor’s exploration of the Delaware corporate lawmaking phenomenon.

73. Professor Romano has thoroughly documented the extraordinarily rapid spread of state antitakeover statutes and the political and economic conditions that fueled that phenomenon. See Roberta Romano, *The Political Economy of Takeover Statutes*, 73 *Va. L. Rev.* 111, 189 (1987) (“[In contrast to Delaware] the regulation of corporations at the state level is not an unmitigated good. States in which there are not many major corporations . . . are more susceptible to the pressure of a specific target firm and hence are more likely to pass takeover regulations . . .”).

74. See D. Gordon Smith & Cynthia A. Williams, *Business Organizations: Cases, Problems and Case Studies* 682 (2003) (describing 1988 as “the peak year for hostile takeovers in the 1980s”).

75. *Roe*, Delaware’s Competition, *supra* note 2, at 630–31.

76. See, e.g., *id.* at 625 (describing Delaware takeover statute as “mild”). For the proposition that DGCL section 203 is largely irrelevant in deterring hostile bids, one merely has to ponder the extent of its impact in a regime in which flip-in shareholder rights plans, or poison pills, are allowed. If for all practical purposes a hostile bid can be pursued only in conjunction with an effort to unseat the incumbent directors, that same effort would also enable the bidder to elect a board willing to approve the acquisition and thereby render section 203’s moratorium effect inapplicable. See *Del. Code Ann. tit. 8, § 203(a)(1)* (2001) (permitting “business combinations” with “interested stockholder” with prior board approval).

77. See *In re Digex Inc. S’holders Litig.*, 789 A.2d 1176, 1216 (Del. Ch. 2000) (requiring merger proponents to establish “entire fairness” of board’s waiver of section 203’s moratorium on business combinations with “interested stockholders”); *Siegman v. Columbia Pictures Entm’t, Inc.*, 576 A.2d 625, 635 (Del. Ch. 1989) (denying motion to enjoin Sony’s acquisition of Columbia Pictures based on claim of violation of section 203); see also *Omicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 925, 935–36 (Del. 2003) (noting that section 203 required target directors to approve controlling shareholders’ agreements to vote for merger, thereby requiring directors’ participation in adopting “preclusive and coercive” deal protections).

C. *The Pygmy in Fear of the Federal Giant*

Great scientific advances proceed from tension between prevailing theories and the facts.⁷⁸ Faced with evidence that the interstate competition for corporate chartering is relatively weak,⁷⁹ one could no longer confidently accept the Winter/Fischel/Romano theory that Delaware's corporate law was successful because it was the best product on the market. By the same token, however, one could not help but observe that Cary's fears of states outbidding each other to pander to corporate managers at the expense of investors were far from realized, and were contradicted by the apparent trajectory of Delaware corporate law.

Setting out upon this sea of academic tension, Mark Roe explored the Delaware phenomenon yet again. In his recent articles on the subject, he makes the pathbreaking observation—like all great scientific theories, inspiring in its simplicity yet exhaustive in its comprehension of the facts—that whatever interstate “racing” has occurred necessarily takes place within the powerful gravitational pull of actual and inchoate exercises of federal regulatory authority.⁸⁰ Simply put, if Delaware and the other states compete at all for corporate chartering business, they do so within the limits of what federal authorities will tolerate.

In telling this story, Roe becomes a worthy successor to Cary: While Roe does not advocate the congressional enactment of minimum corporate standards, let alone federal incorporation, he suggests in effect that such formal action is unnecessary, because the mere threat of it is enough to keep Delaware from unduly degrading corporate law at the expense of investors.⁸¹ As he suggests, and to paraphrase the well-known bumper sticker, minimum federal standards happen: They have happened through direct legislation,⁸² they have happened through SEC rulemaking,⁸³ they have happened through stock exchange corporate governance listing standards,⁸⁴ and they have happened through federal court application of disclosure rules that enforce what are in substance duties of

78. Thomas S. Kuhn, *The Structure of Scientific Revolutions* 52–53 (2d ed. 1970) (explaining how scientific paradigms shift).

79. See Kahan & Kamar, *Myth of State Competition*, *supra* note 38, at 684–86 (“Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”).

80. E.g., Roe, *Delaware's Competition*, *supra* note 2, at 591–93.

81. See *id.* at 590 (“Delaware players are conscious that the federal government, even if silent, could step in if roused.”).

82. See *id.* at 610–11 (noting that shareholder voting, “probably the single most important internal corporate affair,” is subject to extensive SEC regulation (citing Securities Exchange Act of 1934, ch. 394, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78mm (Supp. II 2003)))).

83. See *id.* at 615–17 (describing promulgation of SEC Rule 13e-3, 17 C.F.R. § 240.13e-3 (2003), regulating going private transactions).

84. See, e.g., NYSE, Inc., *Listed Company Manual* ¶¶ 303A.01–303A.10, available at http://www.nyse.com/lcm/lcm_section.html (last modified Nov. 3, 2004) (on file with the *Columbia Law Review*) [hereinafter NYSE Manual] (requiring, for instance, that listed companies have audit committees and majority of independent directors).

care.⁸⁵ Delaware lawmakers know all this, he says,⁸⁶ and moderation in Delaware corporate law is therefore simply the observed result of lawmakers being tugged in competing directions by the “race to the bottom” motivation and by a desire to avoid even further federal incursion into the domain of state corporate law.⁸⁷

As a participant in Delaware corporate lawmaking, and having enjoyed the approbation of those who see Delaware corporate law as the evolutionary survivor of the fittest in the corporate chartering competition, I would surely like to say that Roe has it all wrong. But he doesn't. At the most basic level, Roe is absolutely right: The federal government could, in a variety of ways, expand its role in establishing the rules of corporate law, and there is little if anything that we in Delaware could do about it. All we can do is hope that paroxysms of populist pressure for such federal intervention are few and far between, and try not to make law that will induce such paroxysms, so that the not unimportant role of Delaware's courts and legislature in the making of corporate law can continue to be played and so that our state can continue to enjoy the resulting benefits.

Without diminishing my admiration for Roe's insights, however, it must be noted that my agreement with them is not complete. More precisely, I see a gap in them: While they may accurately explain why Delaware refrains from lawmaking behavior that would push too many populist buttons, Roe's insights are incomplete in that they do not explain why Delaware does what it does within the considerable range of motion allotted to it. Likewise, they do not fully explain why Delaware has passed up the opportunity to make laws that might head off federalization threats.

Delaware's response to Sarbanes-Oxley is illustrative. In the wake of that statutory eruption from Washington, with the scent of corporate scandal still lingering and with many institutional investor representatives vigorously seeking further federal intervention in the form of control of the election of public company directors,⁸⁸ one would have thought that

85. See Roe, *Delaware's Competition*, supra note 2, at 615 (citing Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 *Vand. L. Rev.* 859, 861 (2003)).

86. *Id.* at 642.

87. See *id.* at 639–40 (contending that Delaware's “two main adversaries”—other states and federal authorities—“have differing motivations, which can lead [Delaware] to differing substantive results”).

88. Specifically, they sought to secure such control through the adoption of SEC rules that would require corporations to include, at the corporation's expense, director nominees submitted by stockholders. See, e.g., AFL-CIO, *Request for Rulemaking to Permit Shareholder-Nominated Director Candidates to Appear in Corporate Proxy Statements and Proxy Cards* (May 15, 2003), at <http://www.sec.gov/rules/petitions/petn4-491.htm> (on file with the *Columbia Law Review*) (petitioning SEC “to adopt comprehensive new rules that will give shareholders equal access to the proxy for their director nominees”). This “direct access” movement culminated in the proposal by the SEC in late 2003 of a new Rule 14a-11, which would have provided for such proxy statement inclusion of stockholder nominees in limited circumstances. *Security Holder Director Nominations*,

the federal gravitational pull on Delaware would be at its strongest, or nearly so, and that Delaware would respond preemptively by seeking to pursue legislative initiatives that might have blunted the federal momentum, with a minimum of risk of state competition cost. It did not, even though many possibilities were actively considered, including a proposal to require corporations to reimburse some or all of the solicitation expenses of dissident proxy contestants who achieve at least thirty-five percent of the vote in an election.⁸⁹ Instead, the Council labored and in 2003 brought forth two amendments that pale in significance relative to Sarbanes-Oxley: (1) a clarification of the circumstances in which stockholders would be entitled to inspect records held by corporate subsidiaries,⁹⁰ and (2) a provision extending personal jurisdiction to top corporate officers, where such jurisdiction had been limited to directors.⁹¹

Exchange Act Release No. 34-48626, 68 Fed. Reg. 60,783 (proposed Oct. 23, 2003). Barely over a year later, the proposal had come to be widely viewed as stillborn. See Stephen Labaton, S.E.C. Rebuffs Investors on Board Votes, N.Y. Times, Feb. 8, 2005, at C2 (reporting that SEC's proposed direct access rule appears "dead").

89. See Strine, True Corporate Republic, supra note 31, at 1778 (proposing triennial election regime where companies would reimburse "reasonable solicitation costs" of qualified contestant who won at least thirty-five percent of votes); Joann S. Lublin, Corporate Funding for Shareholder Activism?, Wall St. J., July 3, 2006, at B3 (discussing Strine's proposal).

90. Act of June 30, 2003, ch. 84, secs. 5-8, § 220(a)-(d), 2003-2 Del. Code Ann. Adv. Legis. Serv. 402, 403-05 (LexisNexis) (permitting inspection of subsidiary records if parent controls subsidiary and either possesses records itself or could obtain them through exercise of its control over subsidiary). In proposing this amendment, the drafters were sensitive to the fact that many of the accounting irregularities at Enron occurred at the level of direct or indirect subsidiaries. See Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. 36-39 (2002), available at <http://news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf> (on file with the *Columbia Law Review*) (emphasizing importance of special purpose entities used by Enron to preserve off-balance sheet treatment of financing). According to Kahan and Rock, the Delaware Supreme Court has applied new section 220 with "discomfort" or "even hostility." Kahan & Rock, supra note 2, at 1594-95 (citing *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 511 (Del. 2005)). I did not find the court's treatment of new section 220 so hostile: It simply emphasizes that the duty to produce subsidiary documents rests not just on potential control through share ownership, but on actual operational control—control that was found lacking in the case at hand due to the meaningful independence of the special committee of the subsidiary's board, to which the power over the matter had been delegated, and which rejected the parent's request for the records out of concern that divulgence of such information would cause the subsidiary to suffer from a competitive disadvantage. *Weinstein Enters.*, 870 A.2d at 505-06.

91. Act of June 30, 2003, ch. 83, sec. 3, § 3114, 74 Del. Laws 400, 400-01. Described as a "response to failures in corporate governance that received widespread publicity in recent years," this extension of personal jurisdiction over senior corporate officers was also motivated in part by the fact that such officers' service as directors (thereby subjecting them to service of process in Delaware under the preexisting statute) was becoming increasingly less common as board composition increasingly tilted toward outside director majorities. Lewis S. Black, Jr. & Frederick H. Alexander, Analysis of the 2003 Amendments to the Delaware General Corporation Law 1, 7 (Aspen Corp. Serv., vol. unavailable, Aug. 15, 2003) (on file with the *Columbia Law Review*); see also Del. Dep't of State, Div. of Corps., General Assembly Approves 2003 Amendments to Corporate Laws (June 30, 2003), at

Roe would direct our attention, however, to the judicial front, rather than the legislative front in evaluating Delaware's moves in response to Sarbanes-Oxley: He suggests that the Delaware courts' response was a series of cases attacking executive compensation and otherwise favoring shareholder plaintiffs.⁹² I suspect that he would contend that this judicial response was just enough of a push on the tiller to avert the need for a more aggressive legislative change of course. With that contention, however, Roe would be entering into the realm of speculating that the motives of Delaware's judges are evidenced only by the results they reach, and not by the analysis in their opinions that attempts to supply a coherent body of developing precedent through a common law approach to lawmaking.⁹³

I resist entering this realm in which the natives' moves are all explained as calculatingly self-protective. Before attempting to supply an alternative frame of reference, I turn to one more wave of exploration.

D. *The Latest Explorers: Symbiotic Federalism*

Marcel Kahan and Ed Rock are the latest explorers of the Delaware lawmaking scene. Like Roe, they exhibit a knowledge of and sensitivity to the natives that comes in no small part from their efforts to communicate directly with the participants in the Delaware lawmaking process. Kahan and Rock transcend Roe and the earlier explorers, however, in attempting to focus on the jurisprudential outlook of Delaware's corporate lawmakers.

Specifically, Kahan and Rock suggest that Delaware adheres to a "classical or 19th century common law model of lawmaking."⁹⁴ They describe a system that is apolitical, technocratic, and incremental, in which

<http://www.state.de.us/corp/2003amends.shtml> (on file with the *Columbia Law Review*) ("Because of enhanced requirements for independent director representation . . . it is likely that fewer senior officers will also serve as directors. Therefore, had section 3114 not been amended, the ability to obtain personal jurisdiction in Delaware over some of the most significant participants in corporate governance would have been impaired.").

92. Roe, *Delaware's Competition*, supra note 2, at 643 n.211 (citing *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003)). However, Roe does acknowledge that: The court's change in direction may indicate no more than that the shareholders' complaint was better drafted the second time around. Or the change could parallel Delaware's Singer shift after federal action: after Delaware had dismissed the first Disney complaint, Congress passed Sarbanes-Oxley, in the summer of 2002. The difficulty here is to sort out not so much whether Delaware shifted, but whether its abrupt shift was due primarily to the federal gravitational pull, to the dynamics of the litigation, or to the state's direct perception of the underlying corporate problems.

Id.

93. It should be noted, as Roe did, *id.*, that the Delaware Supreme Court's opinion remanding the *Disney/Ovitz* derivative litigation for further proceedings was issued in 2000, well before Enron, WorldCom, and Sarbanes-Oxley focused public attention on corporate misconduct. See *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

94. Kahan & Rock, supra note 2, at 1576.

judge-made law, made case by case, predominates over legislative control.⁹⁵ The result, they say, is a symbiotic relationship between Delaware and the federal regulators: Federal intervention allows Delaware to avoid the burdens of embracing a regulatory scheme that would require enforcement resources that Delaware simply cannot command, and leaves Delaware free from having to make controversial political decisions that its small size would not permit it to make with any broad national stamp of legitimacy.⁹⁶

The Kahan/Rock assessment nicely explains some things that Roe and others do not, particularly the otherwise puzzling lack of response to Sarbanes-Oxley and to the pressures that prompted that political event. Delaware is slow, they say, because Delaware embraces a “traditional, reactive model of judge-centered lawmaking.”⁹⁷ The Kahan/Rock assessment also appeals to me as a Delaware native because it begins to acknowledge that the Delaware participants have some guiding jurisprudential conceptions rather than simply jerking to the tugs of competing external political pressures.⁹⁸ That acknowledgement, in fact, is the springboard for the balance of this Essay.

III. THE POLICY MOTIVATIONS OF DELAWARE CORPORATE LAW

The core thesis of this Essay is that interstate competition and fending off federal incursion are only significant at the margins in Delaware corporate lawmaking, and that they rarely have salience for the participants in the lawmaking process, either in evaluating potential amendments to the DGCL or in deciding individual cases. A full account of that process can only be complete if it includes an inventory of the considerations that do have salience, day in and day out, as Delaware corporate law is made. To have salience in this sense means that a consideration is invoked or recognized in the lawmaking process, and that its invocation or recognition influences the shaping of the law. With that standard in mind, I turn in this section to an inventory of the considerations that I have found to be most visible and influential in shaping Delaware corporate lawmaking. I conclude with the suggestion that these considerations will continue to affect that lawmaking process and will guide and limit

95. *Id.* at 1611–15.

96. *Id.* at 1620–21.

97. *Id.* at 1618.

98. If I have any quarrel with Kahan and Rock, it is with their effort to paint a picture of judicial superiority in the lawmaking process. It is certainly true, as they say, that Delaware corporate law is “noteworthy” in the prominence accorded to judge-made law relative to legislation. *Id.* at 1591. As I suggest below, however, I believe that Kahan and Rock underestimate the extent to which the Council and the General Assembly seek to limit or undo judicial decisions. More importantly, the prominent place accorded to judicial determinations in the making of Delaware corporate law is not merely the judges’ choice; simply by virtue of the way the DGCL is drafted, and by virtue of what that statute does not contain, the critical role of the judiciary frequently results from a legislative preference for common law development. See *infra* text accompanying notes 119–121.

Delaware's collective behavior regardless of what Congress or other states do.

A. *The Principle of Conservatism*

Looking back over the forty years since the landmark 1967 general revision of the Delaware General Corporation Law, one of course observes many statutory changes. What appears on further reflection, however, is just how few of those changes have involved any dramatic effect on the governance of publicly held corporations. Many of the statutory changes have been technical, and very few have attracted any academic attention.⁹⁹

Delaware lawyers and judges consistently and consciously articulate reasons for this high degree of stability. Most prominent is a pervasive belief that the system of corporate law supplied by Delaware has worked pretty well, and that change should not be made unless it is apparent that there will be a significant benefit from it without any countervailing disruption.¹⁰⁰ In all of the Council meetings I have attended, this caution is the heuristic that is far and away the most commonly invoked in considering potential changes to the corporation law.

Many plausible legislative initiatives have been aborted, or never even explored in the first place, as a result of this "first do no harm" conservatism. The treatment of the substantive scope of bylaws provides a good illustration of this conservatism. It has been widely known for at least ten years that DGCL section 109(b) does a poor job of defining the extent to which a bylaw may limit the authority of the board of directors as expressed in section 141(a).¹⁰¹ There is a widely divergent range of views on this question.¹⁰² Puzzled by the anomaly of such uncertainty in a body of law widely admired for its depth, students have asked me why the Delaware statute has not been amended to clarify the substantive scope of bylaws. The fact that such legislation has not been developed

99. Kahan and Rock, as well as Carney and Shepherd, remark on this dearth of "interesting" or "significant" legislation. Kahan & Rock, *supra* note 2, at 1600-01; William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Success* 43 (Aug. 9, 2006) (unpublished manuscript, on file with the *Columbia Law Review*) (explaining that amendments to DGCL from 1992 to 2006 "are quite modest, and have not led to radical changes in corporate practice"). Nonetheless, and like most people, I suspect, I tend to overestimate the importance of what I do, so I see some considerable degree of practical significance in all of the DGCL amendments the Council has approved. Indeed, as I am about to explain, I find it unlikely that the DGCL would be amended in the absence of some strong practical reason to do so.

100. See, e.g., *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996) ("[C]ertainty and predictability are values to be promoted in our corporation law.").

101. See, e.g., Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 Tul. L. Rev. 409, 428 n.86 (1998).

102. See *id.* (outlining competing viewpoints on role of bylaws in managing power between shareholders and board of directors); see also Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 Berkeley Bus. L.J. 205, 207 (2005) (resolving validity of shareholder bylaws "has generated much scholarly debate").

has obviously not been unintentional. Any attempt to provide such clarification would be devilishly difficult and could easily cause even more confusion than it might cure. In this instance, then, the Delaware legislative process has followed a common law approach, waiting to see how specific cases develop, particularly in the Delaware courts, before determining what (if any) legislative solution would be useful. One should not expect to see a legislative response on this issue until the Delaware courts decide at least one case squarely presenting it, and even then, the legislative preference may well be to let the courts continue to refine the subject.¹⁰³

Consider also how, as previously discussed, the Delaware corporate statute responded—or more accurately, failed to respond—to recent pressures to enhance the role of contested elections of directors.¹⁰⁴ Perhaps, as was suggested earlier, contemporaneous judicial decisions blunted the need for a statutory response. Or, in declining to develop a direct proxy access approach, Delaware was perhaps prescient in foreseeing that the SEC's direct access proposal would ultimately founder and cease, at least for a time, to represent a further threat of federal intervention in corporate governance. No such prediction, however, appears to have been made. In this instance, then, Delaware appears to have passed up a clear opportunity to steal federal thunder while the storm was still on the horizon. The more powerful explanation for this reticence is not that Delaware policymakers were confident that the storm would dissipate; rather, the suggested approaches were simply so radically inconsistent with existing Delaware law that they were unacceptable.

More recently, and in the face of the apparent demise of the SEC direct proxy access rule proposals, those seeking a broader role for stockholders in director elections have rallied around the concept that the state law plurality vote default rule is significantly responsible for claimed lack of director accountability to stockholders. These individuals have actively urged that the plurality vote default rule be changed to one requiring some kind of majority vote, so that an “against” vote would be-

103. *General Datacomm Industries, Inc. v. State of Wisconsin Investment Board*, 731 A.2d 818, 818–19 (Del. Ch. 1999), raised but did not decide the question. The judicial reticence reflected in that opinion has not gone unnoticed: Professor Jill Fisch perceptively identified the *General Datacomm* opinion as reflecting a more general reluctance on the part of the Delaware courts to make legal pronouncements relating to matters of technical conformity with the DGCL and therefore having unforeseeably broad legal effects. Jill Fisch, Fordham Univ. Sch. of Law, Distinguished Scholar Lecture at the Ruby R. Vale Interschool Moot Court Competition, Widener University School of Law (Mar. 18, 2004). For a more recent example of such reluctance, see *Bebchuk v. CA, Inc.*, No. 2145-N, 2006 Del. Ch. LEXIS 118, at *1 (Del. Ch. June 22, 2006) (denying claim for declaratory judgment based on proposed bylaw governing board action because claim was unripe).

104. See *supra* text accompanying notes 88–92.

come meaningful and would transform corporate voting from the “symbolic to the democratic.”¹⁰⁵

In this environment, and notably despite the apparent disappearance of any imminent threat of federal occupation of the particular field, Delaware *has* adopted legislation, at least in a limited way, but in a manner consistent with its basic conservative tendency and with other Delaware corporate law policies. The relevant backdrop of the existing statute is its allowance for private ordering of the director vote requirement, unilaterally by either the directors or the stockholders, through the adoption of a bylaw.¹⁰⁶ In its 2006 amendments to the DGCL, however, the General Assembly expanded the scope of such private ordering. First, DGCL section 216 has been amended so as to deny the board of directors any power to repeal a director vote requirement bylaw adopted by the stockholders.¹⁰⁷ Second, recognizing that many Delaware corporations have already effectively embraced majority voting through adoption of policies requiring directors to offer their resignations when they fail to receive more “for” votes than “against” votes for their election,¹⁰⁸ DGCL section 141 has been amended to clarify that such a resignation can be supplied in advance and can be made irrevocable and thereby enforceable by the corporation.¹⁰⁹ These amendments are quintessentially conservative; they simply reinforce the existing statutory powers that stockholders and directors can use to define the vote required for the election of directors. No significant shift of power is contemplated.

The thesis? In predicting the trajectory of future struggle between federal and state governments over the establishment of corporate governance rules, count on Delaware to look for ways to make changes, if at all, that most nearly preserve intact the substance and balance reflected in the existing law.

B. *Avoidance of Disruption of Preexisting Commercial Relationships*

Closely related (at least in consequence) to Delaware’s general proclivity to avoid change is the Coasean notion that private commercial relationships are structured around existing laws, and that altering the rule

105. Institutional S’holder Servs. Inst. for Corporate Governance, *Majority Voting in Director Elections: From the Symbolic to the Democratic 2* (2005), available at <http://www.issproxy.com/pdf/MVwhitepaper.pdf> (on file with the *Columbia Law Review*) (advocating adoption of majority voting requirement for election of directors in lieu of prevailing plurality vote default rule).

106. Del. Code Ann. tit. 8, § 216(3) (2001).

107. S. 322 § 5, 143d Gen. Assem., Reg. Sess. (Del. 2006), available at [http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/SB+322/\\$file/legis.html?open](http://www.legis.state.de.us/LIS/lis143.nsf/vwLegislation/SB+322/$file/legis.html?open) (on file with the *Columbia Law Review*) (amending Del. Code Ann. tit. 8, § 216(4)).

108. See, e.g., Claudia H. Allen, Neal, Gerber & Eisenberg LLP, *Survey of Majority Voting in Director Elections* (2006), available at http://www.ngelaw.com/files/upload/study_callen_031506.pdf (on file with the *Columbia Law Review*) (surveying Delaware corporations that adopted majority vote bylaws or policies).

109. S. 322 § 3 (amending Del. Code Ann. tit. 8, § 141(b)).

structure midstream disrupts settled relationships. A legal regime prone to such alteration enhances risk and therefore drives up the cost of capital.¹¹⁰ This concern has been expressed in Delaware lawmaking in several ways.

For example, it accounts for two very curious and unwieldy statutes. The more recent example is DGCL section 141(c), which contains two distinct recitations of the framework for action by board committees.¹¹¹ Subpart (1) of section 141(c), which was the version of section 141(c) in force as of 1996, does not generally permit the board to delegate to a committee the power to set the terms of and issue capital stock. Subsection 2, however, permits such a delegation by the board. In adding subsection 2, it was recognized that particularly in closely held firms, planners may have relied on the limitation in section 141(c) that would preclude a board, by vote of a mere majority of a quorum of directors, from creating a committee that would have the power to issue stock and thereby alter the corporation's capital and control structure.¹¹² In order to protect those commercial expectations, section 141(c) was amended so that only newly incorporated corporations would be automatically subject to the provision expanding board power to delegate authority to a committee.¹¹³ Pre-1996 corporations would remain subject to the old rule unless a majority of the *full* board (as opposed to a majority of a quorum) agreed to adopt the new rule. The textually cumbersome result is that section 141(c) has two different operative provisions, expressly divided chronologically. This is terribly ugly drafting, of course, but was viewed as a necessary accommodation to protect preexisting expectations.¹¹⁴

There is a similarly unwieldy provision in DGCL section 102(b)(3), which eliminates preemptive rights as a default rule going forward, but preserves those rights to the extent that they existed as of July 3, 1967,

110. To be sure, there is no longer any general belief that such preexisting expectations and rights are constitutionally protected against legislative alteration. Cf. Del. Code Ann. tit. 8, § 394 (providing that DGCL may be amended). The lack of constitutional protection, however, does not mean that legislative policy should not strive to provide similar protection.

111. Compare *id.* § 141(c)(1) (“[U]nless the resolution, bylaws or certificate of incorporation expressly so provides, no such committee shall have the power or authority to . . . authorize the issuance of stock . . .”), with *id.* § 141(c)(2) (containing no such limitation).

112. See Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 1995 Amendments to the Delaware General Corporation Law* 311, 312–13 (Aspen Corp. Serv., vol. unavailable, Oct. 2, 1995) (on file with the *Columbia Law Review*) (noting that amendment could “alter[] the balance of power”).

113. Act of July 1, 1996, ch. 349, 70 Del. Laws 609, 611.

114. Black & Alexander, *supra* note 112, at 313 (stating that amendments are made prospective because they “could have the effect of altering the balance of power, particularly in closely-held corporations with carefully negotiated corporate governance provisions”).

when the new provision was adopted.¹¹⁵ One wonders just how long this chronological anomaly will remain in the Delaware statute, but if it does remain there, the only explanation is the concern that some persons acquired shares before 1967, and they or their successors are still relying on the existence of preemptive rights they enjoyed, by default, before the statute was changed.

The broader point to be drawn from these examples is the second most commonly invoked heuristic I have heard in Council meetings: namely, that we should take care in amending the statute to avoid altering preexisting commercial arrangements, even by negative implication. Thus, when amendments are made, the legislative synopses accompanying those amendments often describe them as clarifications rather than as changes in the law.¹¹⁶ That characterization, while undoubtedly over-used, reflects an abiding desire to avoid a judicial inference that adopting a new statutory articulation necessarily casts doubt on or changes the meaning of the old statute.

C. Deference to Common Law Development/Resistance to Regulatory Prescription

The desire to avoid interference with preexisting commercial relationships also emerges in the previously mentioned unwritten but long-standing corollary rule of the Council: namely, that the Council will not put forward legislative recommendations relating to a matter that is in

115. Del. Code Ann. tit. 8, § 102(b)(3) (“All such [preemptive] rights in existence on July 3, 1967, shall remain in existence unaffected by this paragraph unless and until changed or terminated by appropriate action which expressly provides for the change or termination . . .”).

116. The legislative synopsis of the 2004 amendments to the DGCL characterizes six of the eight amendments as clarifications of existing law. Act of July 6, 2004, ch. 326, 74 Del. Laws 422, 425 (2004). The synopsis also states that another amendment was drafted to negate any inference of invalidity that might have been drawn (by a form of *expressio unius* reasoning) from the allowance of reference to outside facts in merger agreements but not explicitly in other filed corporate documents such as certificates of incorporation. *Id.* The temptation, of course, is to dismiss these changes as technical noodling. That would be a mistake. One of these changes clarified the power of a board committee to nominate directors, despite the argument that such nomination by a committee would require full board action because it involves recommending a matter for stockholder action. Trivial? Not at all, considering that stock exchange listing standard changes had begun to suggest that nominating committees composed exclusively of independent directors exercise sole authority to nominate directors. See NYSE Manual, *supra* note 84, ¶ 303A.04(b)(1) (stating nominating/corporate governance committee’s responsibility “to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders”). It was certainly important to avoid any suggestion that hundreds of nominating committees had lacked corporate power to fulfill their assigned function. See Alexander & Wolters, *supra* note 9, at 3 (“[P]ractitioners had raised a concern that a literal reading of the prohibition against committees approving matters that also require a stockholder vote might preclude the use of nominating committees The 2004 amendments clarify that this is not the intent of the statute.”).

active litigation.¹¹⁷ The only apparent exception to this rule is in the situation where the matter is almost constantly or continually in litigation, and a legislative solution would be precluded by rigid adherence to the general rule.¹¹⁸

This deference to the judicial branch rests on broader principles than a desire to avoid legislative intrusion into a current case or controversy. Kahan and Rock correctly describe these principles when they characterize Delaware corporate law as a “throwback” and “determinedly old-fashioned.”¹¹⁹ Like Fisch before them, they correctly note a decided preference for “incremental legislation” and for broad statutory rules, or no statutory rules at all, as is largely the case with respect to fiduciary duty issues, and a corresponding preference that the details of corporate law should be sketched in through the judicial process.¹²⁰ Thus, Delaware corporate lawmakers embrace the idea that legal issues that depend for their resolution on complex facts cannot and should not be reduced to black letter codification.

The most important illustration of this idea involves the definition of fiduciary obligations. By their nature equitable and fact-bound, fiduciary duties resist, and may even suffer from, codification. Valiant attempts have been made, for example, to create a bright-line framework for judicial assessment of transactions in which directors have a conflict of interest. The Model Business Corporation Act has included such an attempt since 1988 by adopting subchapter F,¹²¹ and that attempt was extensively revised in 2004.¹²² Delaware lawmakers are hardly unaware of this attempt.¹²³ Whatever admiration there may be for the precision and intellectual effort reflected in the attempt, however, the Council has manifested no interest in importing the bright-line Model Act approach into the Delaware General Corporation Law.

The legislative choices reflected in the 2005 amendment to DGCL section 271 reflect similar values. For many years section 271 had left unclear whether the sale of a subsidiary’s assets, where they accounted for all or substantially all of the assets of the parent corporation on its consol-

117. See *supra* text accompanying notes 32–33.

118. For example, the 2003 amendments to DGCL section 220 almost inevitably had some bearing on pending or incipient litigation, since books and records inspection cases are brought frequently. Waiting to make those changes until “the coast was clear” would have meant never making them at all.

119. Kahan & Rock, *supra* note 2, at 1610.

120. *Id.* at 1611; see also Fisch, *supra* note 2, at 1098–99.

121. Comm. on Corporate Laws, Changes in the Model Business Corporation Act—Amendments Pertaining to Directors’ Conflicting Interest Transactions, 44 *Bus. Law.* 1307, 1307 (1989).

122. See Comm. on Corporate Laws, Changes in the Model Business Corporation Act—Proposed Amendments Relating to Chapter 1 and Chapter 8 (Including Subchapters F and G and Duties of Directors and Officers), 59 *Bus. Law.* 569 (2004).

123. Indeed, Delaware Supreme Court Justice Jack Jacobs co-chaired the task force responsible for revising subchapter F.

idated balance sheet, should be deemed to trigger the stockholder vote requirement of section 271.¹²⁴ Soon after the *Hollinger* decision in 2004, the Council took up the question of how to clarify the subject of sales of subsidiary assets, reflecting its consistent desire to avoid unnecessary uncertainty over the operation of technical rules, such as when a stockholder vote is required. What emerged the following year was an amendment that attempted such a clarification, to the extent of establishing that sales out of a wholly owned and controlled subsidiary are deemed to constitute sales of the parent's own assets.¹²⁵ That amendment did not, however, resolve the treatment of asset transfers to or by subsidiaries that are less than "wholly owned," nor did it attempt to define the terms "owned" or "controlled." It was of course recognized that cases could arise that would present these unresolved issues. On balance, however, it was felt that a clear resolution of the most common problem—transfers to or by wholly owned subsidiaries—would contribute much in the way of clarity, and that attempting to do more would prove unwieldy and confusing. Most important for present purposes, Council members felt that the Delaware courts would be best suited to supply interpretations of the underlying statute to the extent that it remained unclear in its application.

The exception that most vividly proves the rule asserted in this section—that Delaware prefers broad legislative rules and their development through specific judicial application—is Delaware's takeover statute, DGCL section 203.¹²⁶ That statute has the same look and feel as an SEC regulation: It contains an extensive definitional section, numerically specific hurdles that define its operation, and most notably, it contains a regulatory prohibition against "business combinations," as defined in the statute.¹²⁷ In its length, complexity, and proscriptive quality, section 203 is unique in the DGCL. Likewise, section 203 is unique in its adoption: It was intentionally exposed for public comment, received plenty, and was the subject of extensive legislative hearings, with testimony from a variety of academics and regulators, and not just Delaware lawyers.¹²⁸ Thus, section 203 represents Delaware corporate lawmaking at the margin, not at the core. It is an aberration, and must be and has been explained not as

124. The history of this issue is reviewed in detail in *Hollinger Inc. v. Hollinger International, Inc.*, 858 A.2d 342, 373–75 (Del. Ch. 2004).

125. Act of May 17, 2005, ch. 30, sec. 28, § 271, 75 Del. Laws 52, 58. In accordance with that determination, transfers of assets from a parent corporation to a wholly owned and controlled subsidiary would not be deemed a sale of assets by the parent.

126. Del. Code Ann. tit. 8, § 203 (2001).

127. *Id.*

128. See Drexler et al., *supra* note 8, § 23.01, at 23-4 to 23-5 (describing how adoption of section 203 followed "a fervid campaign, which included full-page ads, mass mailings, radio commercials, national and local, editorials pro and con, and two full days of public legislative hearings at which all aspects were thoroughly aired"). See generally Practising Law Inst., *The New Delaware Takeover Statute* (1988) (compiling collection of legislative hearing transcripts and letters from government regulators on proposed takeover statutes); Craig B. Smith & Clark W. Furlow, *Guide to the Takeover Law of Delaware* (1988) (providing corporate practitioner guidance for understanding DGCL section 203).

an outcome of ordinary Delaware lawmaking, but as an aberrational response to an unusual confluence of competitive pressures.¹²⁹ That section 203 stands out as it does highlights the ordinary preference for general, nonprescriptive, and nonproscriptive rules.

The preference for common law development, however, should not be taken as legislative indifference or impotence. While admiring their attention to the life of Delaware corporate law, I disagree in this regard with Kahan and Rock to the extent that they suggest that the Delaware General Assembly is extraordinarily reluctant to reject decisions by the Delaware courts and has done so in only one significant case.¹³⁰ While Delaware has no great interest in emphasizing internal disharmony over matters of corporate law,¹³¹ I would consider the following to be instances of legislative rejection of, or at least response to, judicial action on significant corporate law issues:

(1) In 1997 the General Assembly amended DGCL section 211 to make clear that stockholder action to elect directors by written consent could obviate the need for an annual meeting of stockholders for that purpose.¹³² The previous year the Court of Chancery had ruled to the contrary,¹³³ despite the view that “most practitioners believed, at least in the case of corporations whose shares are not publicly traded, that it was indeed permissible to obtain stockholder consent in lieu of holding an annual meeting.”¹³⁴ In an extended footnote, Kahan and Rock briefly describe this action but dismiss the subject as “narrow” and not “significant.”¹³⁵ That characterization is questionable, however, in light of the torrent of criticism from institutional investors elicited by a subsequent amendment that similarly permitted the corporation to avoid conducting stockholder meetings in person.¹³⁶

129. See *supra* text accompanying notes 72–77.

130. According to Kahan and Rock, the General Assembly has overruled only one significant corporate law decision. Kahan & Rock, *supra* note 2, at 1596 (noting that with exception of director liability aspect of *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), “we are not aware of any significant corporate law decision in Delaware that has been legislatively overruled”).

131. See Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, 5 Del. L. Rev. 115, 118 (2002) (describing Delaware Supreme Court’s practice of issuing unanimous opinions as “unanimity norm”); David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. 127, 129 (1997) (noting that Delaware Supreme Court rarely issues separate opinions, opting for “single voice”).

132. Act of June 30, 1997, ch. 120, sec. 7, § 145(e), 71 Del. Laws 232, 233.

133. *Hoschett v. TSI Int’l Software, Ltd.*, 683 A.2d 43, 46 (Del. Ch. 1996).

134. Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 1997 Amendments to the Delaware General Corporation Law 311, 313* (Aspen Corp. Serv., vol. unavailable, Aug. 1, 1997) (on file with the *Columbia Law Review*) (acknowledging that before *TSI* was decided “it was an open question whether the right of stockholders to act by written consent . . . could serve as a substitute for the annual meeting”).

135. Kahan & Rock, *supra* note 2, at 1596 n.90.

136. In 2000, the DGCL was amended to provide for the convening of “virtual annual meetings.” Act of June 30, 2000, ch. 343, sec. 8, § 211(e), 72 Del. Laws 619, 620. That change was criticized as permitting boards to avoid face-to-face confrontation with

(2) Kahan and Rock correctly describe as significant, on the other hand, a 1998 amendment permitting merger agreements to “require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring its advisability that the agreement is no longer advisable and recommends that the stockholders reject it.”¹³⁷ Although belated, this 1998 amendment was a direct response to and reversal of the Delaware Supreme Court’s insistence in *Smith v. Van Gorkom* that the board of directors could not, consistent with the governing statute, commit to submitting a merger to a stockholder vote if it could no longer recommend that the stockholders approve it.¹³⁸

(3) As Kahan and Rock point out in their extended footnote on the subject, DGCL section 231(d), added in 1990, reversed a 1989 ruling that invalidated the practice under which election inspectors could contact brokers to clear up broker “over-votes.”¹³⁹ They correctly note that the Court of Chancery’s ruling was consistent with longstanding precedent, and there is no suggestion here that the court made a mistake.¹⁴⁰ What this event does show, rather, is the willingness and ability of the Council and the General Assembly to overturn judicial rulings when necessary or desirable when changed practices call for changed legal rules.¹⁴¹

(4) In 2000, DGCL section 122 was amended to add a subsection 17 conferring power upon the corporation to renounce, in advance, its interest or expectancy in “specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders.”¹⁴²

investors. See, e.g., Olga Kharif, Let’s Take an E-Meeting, *Bus. Wk.*, July 31, 2000, at 8 (quoting Nell Minow’s suggestion that with adoption of “virtual meeting” provisions of DGCL section 211, managers can “‘incorporate in Delaware and never have to look [the] shareholders in the eye again’”).

137. Kahan & Rock, *supra* note 2, at 1602 n.109 (quoting Act of Apr. 8, 1998, ch. 339, sec. 44, § 251(c), 71 Del. Laws 870, 872–73 (1998) (codified at Del. Code Ann. tit. 8, § 251(c) (2001))). In 2003, this provision was broadened to apply to other matters submitted to a stockholder vote, and was placed in a new section 146. See Act of Aug. 1, 2003, ch. 84, § 21, 74 Del. Laws 214, 214.

138. 488 A.2d 858, 887–88 (Del. 1985).

139. Kahan & Rock, *supra* note 2, at 1596 n.90 (citing *Concord Fin. Group v. Tri-State Motor Transit Co. of Del.*, 567 A.2d 1, 6 (Del. Ch. 1989)).

140. The case was decided by Justice Randy Holland sitting by designation as a Chancellor, and relied on the Delaware Supreme Court’s 1971 opinion in *Williams v. Sterling Oil of Oklahoma, Inc.*, 273 A.2d 264, 265 (Del. 1971).

141. See Lewis S. Black, Jr. & A. Gilchrist Sparks III, *Analysis of the 1990 Amendments to the Delaware General Corporation Law* 311, 315–16 (Prentice Hall Corp. Serv., vol. unavailable, Nov. 30, 1990) (on file with the *Columbia Law Review*) (noting that old rule against election inspector consideration of matters beyond proxies and corporation’s own records “had the potential to disenfranchise large numbers of stockholders,” given evolved phenomenon of broker overvotes (i.e., “when a broker . . . which holds shares for various accounts in ‘street’ name votes more shares than the corporation’s stockholder list reflects that it holds”)).

142. Act of June 23, 2000, ch. 343, sec. 3, § 122, 72 Del. Laws 619, 619.

This change was brought about largely in an effort to dispel uncertainty arising from a Chancery decision that had called into question the formal power of a corporation to adopt charter provisions that would accomplish such a renunciation of any corporate interest in defined business opportunities.¹⁴³

This list of instances of legislative rejection of judicial rulings tells less than half the pertinent story, however. If the story is of a legislature that is attentive to changes in the business environment and is active in responding to such changes, it is just as important to note that the Council and the Delaware General Assembly are often responsive when the courts themselves report matters that merit legislative attention. For example, in 2002 the Court of Chancery was confronted with litigation in which a critical fact issue was the time of filing of a corporate instrument.¹⁴⁴ Noting an informal and usually benign practice of the Delaware Division of Corporations to allow backdated filings on a limited basis, the Court of Chancery fired the proverbial shot across the bow, predicting that with the advent of modern technology filing time can be readily and definitively established, and that the unfortunate events of the case at hand “doubtless will set in motion revised practices to effect this result.”¹⁴⁵ Not content to let a matter so critical to the operation of the corporate system await resolution for even six months, when the usual round of DGCL amendments could be expected to become effective, the General Assembly adopted amendments to DGCL section 103 establishing a firm antibackdating rule.¹⁴⁶

Another example—not quite a judicial plea for legislative action, nor quite a legislative reversal of a judicial ruling—comes from the *Digex*¹⁴⁷

143. See *Siegman v. Tri-Star Pictures, Inc.*, No. 9477, 1989 Del. Ch. LEXIS 56, at *23–*27 (Del. Ch. May 30, 1989). The legislative synopsis accompanying the adoption of section 122(17) describes its purpose as to “eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance.” Act of June 23, 2000, ch. 343, sec. 3, § 122(17), 72 Del. Laws at 619. That uncertainty stemmed directly from the *Siegman* case. See Lewis S. Black, Jr. & Frederick H. Alexander, Analysis of the 2000 Amendments to the Delaware General Corporation Law 1, 2 (Aspen Corp. Serv., vol. unavailable, Aug. 1, 2000) (on file with the *Columbia Law Review*). The pressure to address that uncertainty stemmed from the certainty enjoyed by noncorporate entities whose governing instruments renounced in advance what might otherwise be enterprise opportunities. See, e.g., *U.S. Cellular Inv. Co. of Allentown v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 504 (Del. 1996) (noting provisions of limited partnership agreement permitting partners to provide service in competition with limited partnership and applying section 17-1101(d) of Delaware Revised Uniform Limited Partnership Act to affirm dismissal of fiduciary duty claims asserting usurpation of limited partnership opportunities).

144. *Liebermann v. Frangiosa*, 844 A.2d 992, 1007–08 (Del. Ch. 2002) (rejecting claim that backdated certificate of designation of rights and preferences authorized issuance of preferred stock that preceded and thereby thwarted common stockholder written consent to remove directors).

145. *Id.* at 1008 n.49.

146. See Act of Feb. 21, 2003, ch. 9, sec. 3, § 103(c)(3), 74 Del. Laws 14, 14.

147. *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176 (Del. Ch. 2000).

opinion from 2000. In that case, the Court of Chancery found some merit—without ruling definitively, to be sure—in the assertion that the acquisition of shares constituting fifty-two percent in number but ninety-four percent in voting power would not be sufficient to satisfy section 203's requirement that to avoid the statutory moratorium on business combinations, an acquirer needs to obtain over eighty-five percent of the "voting stock" in the transaction in which it first acquires fifteen percent or more of the outstanding stock.¹⁴⁸ In response to the *Digex* opinion, DGCL section 203 was promptly amended to establish the opposite result, making clear that in applying the percentages specified in that statute, the term "voting stock" refers to the percentage of voting power associated with that stock.¹⁴⁹

The point is not to demonstrate the attentiveness of Delaware's corporate lawmakers; rather, it is to suggest that even though the Council and the General Assembly are not passive participants in the lawmaking process in Delaware, they do—despite their attentiveness and willingness to act—overwhelmingly prefer to let corporate lawmaking occur without detailed regulatory prescription. And they prefer that the courts be the first responders to controversies in applying Delaware corporate law, at least in those matters that defy clarification through simple legislation or codification.

D. *Flexibility and the Facilitation of Private Ordering*

Delaware's corporate laws are by no means a blank check for private ordering.¹⁵⁰ On the other hand, and like the Model Business Corporation Act and most other state statutes, the DGCL establishes de-

148. *Id.* at 1199 ("The statute . . . seems to place the emphasis in the term 'voting stock' on the term 'stock' and not the term 'voting.'").

149. Act of Aug. 1, 2002, ch. 298, sec. 6, § 203(c)(8), 73 Del. Laws 786, 786 ("Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock.").

150. By and large, the fiduciary duties of directors are nonwaivable, mandatory terms of the corporate contract. See *Siegman v. Tri-Star Pictures, Inc.*, No. 9477, 1989 Del. Ch. LEXIS 56, at *26 (Del. Ch. May 30, 1989) (holding that provision of corporate contract limiting liability of directors for breach of fiduciary duty is proscribed by DGCL), *aff'd* in part and *rev'd* on other grounds, *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319 (Del. 1993). The limited exceptions—DGCL sections 102(b)(7) (permitting charter elimination of monetary liability of directors for breach of fiduciary duty except in specified circumstances) and 122(17) (permitting advance renunciation of corporate opportunities)—reflect the generally mandatory character of director fiduciary duties. Where appraisal rights exist, they may not be eliminated by the corporate contract. Cf. *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 976–77 (Del. Ch. 1997) (describing appraisal rights as "mandatory," but holding that preferred stock terms can prescribe consideration to be received by preferred stock in mergers to exclusion of appraisal remedy). Stockholder inspection rights are yet another mandatory feature of the DGCL. In contrast, Delaware's noncorporate entity laws, with their explicit policy of maximizing freedom of contract among business participants, allow the governing participants' agreement to modify all of these organizational rules. See, e.g., Del. Code Ann. tit. 6, § 18-210 (2005) (allowing contractual appraisal rights); *id.* § 18-1101(e)

fault rules on central matters, such as economic rights and voting rights of stock, which can be changed by private agreement almost without limit.¹⁵¹ There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering. In contrast to the prevailing reluctance to alter substantive corporate law rules,¹⁵² proposals to enhance private ordering in ways that do not alter fundamental aspects of the system, such as judicial enforcement of fiduciary duties or the allocation of control as between directors and stockholders, are almost presumptively approved.

Before 2004, the DGCL permitted merger agreements to include provisions whose actual operation would depend on facts ascertainable from information not in the agreement itself.¹⁵³ The DGCL also permitted charter provisions to define in this fashion the rights of shares of stock.¹⁵⁴ Until 2004, however, the DGCL did not permit other charter provisions to be made dependent on outside facts. This limitation was at least a mild practical drawback: It might be useful, for instance, to define matters relating to corporate duration, board composition, or indemnification by reference to economic or operating conditions that evolve outside of the four corners of the certificate of incorporation. Accordingly, DGCL section 102(d) was adopted to expand the range of permitted uses of the “facts ascertainable” technique.¹⁵⁵ And as with the preexisting provisions relating to merger and stock terms, the new section 102(d) even allowed ascertainable “facts” to include determinations by the corporation itself.¹⁵⁶

This flexibility-enhancing proposal was obviously well received, but its potential for abuse did not go unnoticed. If a proposed section 102(d) provision, for example, permitted a board to determine unilaterally, as a “fact,” that the size of the board (otherwise fixed by charter) must be expanded, couldn’t the board invoke that provision and thereby eliminate an otherwise bargained-for element of control on the part of one or more stockholders? Proponents of the statutory change had to

(permitting elimination of fiduciary duties); *id.* § 18-305(a) (permitting reasonable limitations on inspection rights).

151. See, e.g., Del. Code Ann. tit. 8, § 151(c) (explaining that certificate of incorporation may provide for special or preferential dividend rights); *id.* § 212(a) (explaining that one share/one vote default rule can be overridden by provision of certificate of incorporation).

152. See *supra* Part III.A.

153. Del. Code Ann. tit. 8, § 251(b) (providing that “[a]ny . . . terms . . . may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation” and that “[t]he term ‘facts,’ as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation”).

154. See *id.* § 151(a) (providing that various rights attached to stock may be made dependent upon facts “ascertainable outside the certificate of incorporation”).

155. See Act of Aug. 23, 2004, ch. 422, sec. 1, § 1189, 74 Del. Laws 119, 119.

156. Alexander & Wolters, *supra* note 9, at 2.

acknowledge that such an abuse was at least technically and theoretically possible. Their responses to that potential abuse prevailed, however, and are instructive with respect to the policies underlying Delaware corporate law. First, they said, one should start with the assumption that unusual governance provisions taking advantage of the new flexibility will occur primarily in privately negotiated arrangements in which the governing terms—even ones with potential for abuse—are understood, appropriately priced, and voluntarily embraced. Second, and conversely, it is unlikely that corporations would go public with charters containing such open-ended provisions. And finally—and this is the most telling in terms of statutory policy—it was urged, successfully, that if corporate directors were to abuse an open-ended charter term authorized by new section 102(d), the Delaware courts are well armed with doctrines and remedial powers sufficient to address such abuse.¹⁵⁷

Thus, the legislative preference for flexibility and private ordering is ultimately dependent on what we believe to be a well-founded view that the courts will police overly opportunistic behavior on the part of those in control.¹⁵⁸ As long as the courts more or less sensibly call the balls and strikes—that is, remedy managerial behavior that unduly defeats reasonable expectations while blessing behavior that does not—the Council and

157. To the extent that the questioned conduct could be said to be addressed by application of the contractual term of the certificate of incorporation, it may be that this conduct would be evaluated only to determine whether it breached the contractual implied covenant of good faith and fair dealing; otherwise, the directors' conduct might be reviewed under fiduciary duty principles. See *HB Korenvaes Invs., L.P. v. Marriott Corp.*, No. 12922, 1993 Del. Ch. LEXIS 90, at *10 (Del. Ch. June 9, 1993) (holding that directors of corporation owed no duty of loyalty to holders of preferred stock).

158. Perhaps the most striking Delaware court opinions are those which invalidate managerial behavior that literally and technically complies with the governing statutes, but which is deemed to operate inequitably. *Schnell v. Chris-Craft Industries*, 285 A.2d 437, 439 (Del. 1971) (“[I]nequitable action does not become permissible simply because it is legally possible.”), is the landmark case of this sort. See also *Adlerstein v. Wertheimer*, No. 19101, 2002 Del. Ch. LEXIS 13, at *36 (Del. Ch. Jan. 25, 2002) (holding against board of directors despite evidence that its actions might have been legal because actions involved “trickery or deceit”); *Hubbard v. Hollywood Park Realty Enters., Inc.*, No. 11779, 1991 Del. Ch. LEXIS 9, at *22 (Del. Ch. Jan. 14, 1991) (“[W]here directors take action that, while legally permissible, is done for an inequitable purpose, such action is a breach of fiduciary duty that may be remedied by equity.”); *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 658 (Del. Ch. 1988) (stating that board's self-expansion would have been breach of duty if done for selfish reasons); *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1207–08 (Del. Ch. 1987) (finding that board of directors acted selfishly in postponing annual meeting); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 913–14 (Del. Ch. 1980) (same). See generally Leo E. Strine, Jr., *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) (discussing how Delaware judges have shaped common law of corporations using equity principles).

the General Assembly can comfortably expand the realm of private flexibility in the DGCL.¹⁵⁹

From time to time, exogenous changes—notably technological developments—open up opportunities and render old legal rules obsolete and unintentionally restrictive. In such situations, the DGCL must respond, if only to permit private ordering and commercial practices, to avoid being hamstrung by existing statutory restraints. The so-called “technology amendments” of 2000 again illustrate how Delaware lawmakers go about designing statutes to increase their flexibility (and thereby utility) for the users of corporate law.¹⁶⁰ Because so much of corporate law involves communication—including notices, meetings, proxies, votes, and information access—the technological revolution in information transmission that occurred at the end of the twentieth century required a serious overhaul of corporate laws that still prescribed “mailing” of notices, “written” signatures, and the like.¹⁶¹

The core of the 2000 technology amendments was a definition of “electronic transmission” that would be applicable throughout the DGCL,¹⁶² a term that was then used to augment permissible means of communicating corporate matters such as director resignations and consents, submission of a stockholder ballot, and waivers of notice.¹⁶³

The details of the 2000 technology amendments, however, are not the focus of this discussion. They are referred to here because the committee of the Council undertook to draft them in a manner that was un-

159. Vice Chancellor Strine ably articulated this symbiotic relationship between the General Assembly and the Delaware judiciary in *Hollinger International, Inc. v. Black*, 844 A.2d 1022, 1078 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005):

The DGCL is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation. That capacious grant of power is policed in large part by the common law of equity, in the form of fiduciary duty principles. The judiciary deploys its equitable powers cautiously to avoid intruding on the legitimate scope of action the DGCL leaves to directors and officers acting in good faith. The business judgment rule embodies that commitment to proper judicial restraint. At the same time, Delaware’s public policy interest in vindicating the legitimate expectations stockholders have of their corporate fiduciaries requires its courts to act when statutory flexibility is exploited for inequitable ends.

160. See James L. Holzman & Thomas A. Mullen, *A New Technology Frontier for Delaware Corporations*, 4 Del. L. Rev. 55 *passim* (2001) (describing background and content of year 2000 technology amendments).

161. The DGCL had already addressed issues like this before 2000. See, e.g., Act of July 17, 1990, ch. 376, sec. 4, § 151(b), 67 Del. Laws 809, 809 (validating datagram proxies and confirming result in *Parshalle v. Roy*, 567 A.2d 19 (Del. Ch. 1989)). The amendments in 2000, however, were a comprehensive effort to address these issues. See Holzman & Mullen, *supra* note 160, at 55–56.

162. Holzman & Mullen, *supra* note 160, at 56 (describing Del. Code Ann. tit. 8, § 232(c) (2001)).

163. Act of June 27, 2006, ch. 306, sec. 3, § 141(b), 75 Del. Laws 228, 229; see also Del. Code Ann. tit. 8, § 141(f) (addressing director resignations and consents); *id.* § 211(e) (addressing submission of stockholder ballots); *id.* § 229 (addressing waivers of notice).

usually explicit about the policy parameters of the task.¹⁶⁴ In defining those parameters, the committee proceeded from the following articulation of the basic policies of Delaware corporate law:

[T]he drafters sought to continue the hallmarks of the General Corporation Law: predictability and flexibility. Accordingly, the amendments were framed to: (1) be enabling and not mandatory, (2) operate fairly and maintain the current balance of powers and responsibilities among the corporation and its constituencies, (3) anticipate further advances in technology, (4) be flexible in application, and (5) offer economic efficiency and cost savings.¹⁶⁵

Here, in a carefully crafted nutshell, is a clear expression of at least what the Delaware lawmakers think they are doing. Clearly, these amendments were also promoted with an awareness that they might enhance Delaware's reputation and desirability as a choice of corporate domicile.¹⁶⁶ One can always dismiss any attempt at promoting efficiency as an effort to bolster a state's competitive position. What is notable, however, is how Delaware's policymakers conceived, and continue to conceive, of the considerations that guide them in developing the corporate law.

IV. CONCLUSION AND PREDICTIONS

Two principal agencies—the Delaware judiciary and the Delaware General Assembly, guided by the Council of the Corporation Law Section of the Delaware State Bar Association—develop Delaware corporate law. These two agencies act symbiotically: The legislature crafts the broad, largely flexible framework for private ordering of corporate affairs in the knowledge that the judiciary will protect such flexibility while applying equitable principles of fiduciary duty to rein in particularly opportunistic behavior that defeats the legitimate expectations of other corporate participants.

Over the years, commentators have described Delaware corporate lawmaking in a variety of ways, suggesting that the course and content of Delaware corporate law are dictated by a desire to “race to the bottom,” or to “race to the top.” More recently, however, closer observers have recognized that federal authorities exert a powerful influence, through the adoption or potential adoption of corporate law rules, which limits the extent to which Delaware can “race” with other states in the development of corporate law.

164. The committee's report is not publicly available, but its chair subsequently published a description of the amendments that goes into great depth in explaining the committee's work and rationale. Holzman & Mullen, *supra* note 160, at 56.

165. *Id.*

166. See *id.* (“The enactment of the legislation not only keeps Delaware in the forefront of corporation law, but also makes it, appropriately, the ‘First State’ broadly to embrace modern communication technology as an effective corporate governance tool.”).

With the exception of Kahan and Rock, however, none of these observers attend much to the heuristics that Delaware's corporate law policymakers routinely invoke as they shape the development of Delaware corporate law. Those heuristics are: (1) 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; (2) a related desire to protect commercial relationships and expectations that have been built up in reference to preexisting legal rules; (3) a preference that the details of corporate law be shaped in a common law fashion, with courts as first responders to tensions within the corporate law, at least in areas that are not susceptible to simple statutory clarification; and (4) a preference for enhancement of private ordering opportunities, so long as the basic scheme of fiduciary duty principles and the allocation of authority among directors, officers, and stockholders remains essentially unchanged.

These policy foundations will not shift easily, and they will significantly shape the future path of the federal and state roles in establishing the ground rules of public company governance. Specifically, as efforts emerge seeking reform on a range of corporate governance subjects—executive compensation, proxy access, majority voting, audit, compensation, and governance committees of the board, for example—Delaware can be expected to seek to afford corporate participants a wide range of privately determined resolutions. Do not expect the Delaware courts or the Delaware legislature, however, to either create detailed regulatory schemes that address these subjects or to alter the existing body of corporate law rules in ways that significantly affect these aspects of corporate governance. If and to the extent that political pressures in Washington result in regulatory responses in these areas—as occurs from time to time—Delaware will most likely be an interested but largely inactive bystander. There will always be debate about whether such federal regulatory initiatives are useful or counterproductive;¹⁶⁷ but again, Delaware will largely be on the sidelines, implicitly supporting the conservative view that more regulation is not necessarily better and calling upon those who advocate regulatory change to refrain from a too-ready assumption that such change is the answer to problems real or perceived.

167. Compare Chandler & Strine, *supra* note 31, at 957 (expressing cautious optimism at Sarbanes-Oxley corporate regulations), and Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 *Conn. L. Rev.* 915, 919 (2003) (arguing in favor of regulations), with Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 *J. Corp. L.* 1, 3 (2002) (arguing against regulations), and Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *Yale L.J.* 1521, 1602 (2005) (same).

APPENDIX A

Appearances by Delaware Judges at Public Forums on Corporate Law, 2003–2006¹⁶⁸

Judge	Date/Location	Role	Event
Steele ¹⁶⁹	Jan. 16, 2004, New York, NY	Speaker	Directors' Roundtable, Dialogue on Corporate Governance with Leadership of the SEC and the Delaware Supreme Court
"	Feb. 7, 2004, University of Iowa Law School	Keynote Speaker	Journal of Corporation Law Annual Banquet
"	Aug. 5, 2004, American Bar Association Annual Meeting, Atlanta, GA	Panelist	ABA Judicial Division Program on Business Valuations and Corporate and Commercial Litigation
"	Oct. 20, 2004, University of Delaware Center for Corporate Governance	Speaker	Executive Compensation Conference
"	Oct. 22, 2004, Wilmington, DE	Keynote Speaker	International Corporate Governance Network Conference
"	Oct. 29, 2004, SMU Law School	Keynote Speaker	Twelfth Annual SMU Corporate Counsel Symposium
"	Jan. 19–21, 2005, San Diego, CA	Panelist	Thirty-Second Annual Securities Regulation Institute
"	Feb. 16, 2005, New York, NY	Panelist and Lunch Speaker	Hostile Deals and Takeover Defense
"	Feb. 16–18, 2005, Coconut Grove, FL	Speaker	Twenty-Third Annual Institute on Federal Securities

168. This inventory of public appearances by members of the Delaware judiciary is certainly not complete, if for no other reason than that it is limited to appearances recorded during the period since 2003, and it is limited to current judges, and then only some of them. These judges also regularly attend programs sponsored by Widener University School of Law (such as the annual Francis X. Pileggi Lecture). Similarly, many judges regularly attend the Institute of Law and Economics of the University of Pennsylvania's events, such as its Roundtable discussions of corporate law issues. This inventory also does not recite the various judges' law school teaching engagements (such as Justice Jacobs's teaching at Widener Law School and New York University School of Law, Chancellor Chandler's teaching at Widener and Moritz College of Law at Ohio State University, Vice Chancellor Lamb's teaching at New York University School of Law, and Vice Chancellor Strine's teaching at the University of Pennsylvania Law School and Harvard Law School).

169. Myron T. Steele, Jr., Chief Justice, Delaware Supreme Court.

“	Mar. 3, 2005, University of Pennsylvania	Speaker	Distinguished Jurist Lecture
“	June 9, 2005, New York, NY	Keynote Speaker	Fourth International Mergers and Acquisitions Conference
“	July 7, 2005, London, England	Presenter	International Corporate Governance Network Global Summit on Corporate Governance
“	Oct. 26–28, 2005, University of Delaware	Speaker	Directors’ College
“	Oct. 27, 2005, NYU Journal of Law and Liberty	Participant	Online Symposium on Sarbanes-Oxley
“	Oct. 27–28, 2005, UCLA Law School	Speaker	Second Annual Institute on Corporate, Securities, and Related Aspects of Mergers and Acquisitions
“	Nov. 8, 2005, New York, NY	Keynote Speaker	Conference Board Directors’ Institute
“	Feb. 10, 2006, Dallas, TX	Panelist	Twenty-Eighth Annual Securities Regulation and Business Law
“	May 19, 2006, NYU Law School	Keynote Speaker	2006 NYU Directors’ Institute
Jacobs ¹⁷⁰	Apr. 11, 2003, Widener Law School	Panelist	Symposium on Duties in Unincorporated Associations ¹⁷¹
“	Oct. 16, 2003, Hong Kong, China	Presenter	Asian Corporate Governance Association Conference
“	Nov. 20, 2003, New York, NY	Lecturer	Fordham University Murphy Conference
“	Nov. 29, 2003, Hamburg, Germany	Keynote Speaker	Bucerius Law School
“	Jan. 19, 2004, San Francisco, CA	Presenter	Conference Board Directors’ Institute
“	Feb. 26, 2004, UCLA Law School	Speaker	Mergers and Acquisitions Institute
“	Mar. 3, 2004, Tulane Law School	Panelist	Corporate Law Institute
“	Mar. 25, 2004, Vanderbilt Law School	Keynote Speaker	Fourth Annual Law and Business Conference
“	Apr. 16, 2004, University of Virginia Law School	Lecturer	Colloquium on Corporate Law

170. Jack B. Jacobs, Justice, Delaware Supreme Court.

171. The Convergence of Fiduciary Duties in Unincorporated and Incorporated Entities: The Issue, Its Implications, Its Limitations: A Live Symposium, April 11, 2003, Panel IV: “Questions to Symposium Participants,” 28 Del. J. Corp. L. 999 (2003).

“	Apr. 19, 2004, Fordham Law School	Panelist	Roundtable—The Evolving Duty of Good Faith
“	May 24, 2004, New York, NY	Panelist and Keynote Speaker	Tenth Annual Merger and Acquisitions Lawyer Institute
“	June 15, 2004, New York, NY	Keynote Speaker	Conference Board Directors’ Institute
“	Oct. 22, 2004, Wilmington, DE	Panelist	International Corporate Governance Network
“	Nov. 1, 2004, Seoul, Korea	Presenter	Korean Development Institute
“	Jan. 25, 2005, UCLA Law School	Lecturer	Michael T. Masin Lecture
“	Apr. 12, 2005, Washington, DC	Speaker	Council of Institutional Investors Spring Conference
“	Apr. 14–15, 2005, Northwestern Law School	Participant	Twenty-Fifth Annual Ray Garrett Jr. Corporate and Securities Law Institute
“	May 4, 2005, London, England	Panelist	European Mergers and Acquisitions Roundtable
“	Sept. 30, 2005, Washington University Law School	Commentator	The New Corporate Governance Conference
“	Nov. 12, 2005, University of Tokyo	Lecturer	International Center for Corporate Law and Politics
“	Mar. 20, 2006, Stockholm, Sweden	Presenter	Organisation for Economic Co-operation and Development Conference—Resolution of Corporate Governance Related Disputes
“	Apr. 17, 2006, Amsterdam, Netherlands	Presenter	Ministry of Economic Affairs and Amsterdam Center for Corporate Finance Conference
“	May 4, 2006, Boston, MA	Commentator	American Law Institute-American Bar Association Conference, Takeovers: Litigation Developments in Contested Deals and Proxy Battles
Holland ¹⁷²	Nov. 18, 2003, University of Delaware	Speaker	Shareholder Access to the Company Proxy

172. Randy J. Holland, Justice, Delaware Supreme Court.

“	Sept. 24, 2004, Vanderbilt Law School	Participant	Directors' College
“	Oct. 22, 2004, Wilmington, DE	Panelist	International Corporate Governance Network
“	Sept. 2, 2005, University of Iowa Law School	Participant	Journal of Corporation Law Symposium
Chandler ¹⁷³	June 13, 2003, Tokyo, Japan	Speaker	Conference on Hostile Mergers and Acquisitions, Sponsored by Columbia Law School
“	June 17, 2004, London, England	Commentator	Third International Mergers and Acquisitions Conference
“	Aug. 5, 2004, ABA Annual Meeting, Atlanta, GA	Panelist	ABA Judicial Division Program on Business Valuations and Corporate and Commercial Litigation
“	Oct. 22, 2004, Wilmington, DE	Panelist	International Corporate Governance Network
“	June 1, 2005, New York, NY	Speaker	International Bar Association Fourth Annual Mergers and Acquisitions Conference
“	Oct. 6, 2005, Vanderbilt Law School	Panelist	Directors' College
“	Oct. 25, 2005, Washington, DC	Keynote Speaker	National Association of Corporate Directors 2005 Conference
“	Feb. 28, 2006, University of Pennsylvania Law School	Panelist	Program on Technicolor
“	Apr. 21, 2006, Yale Law School	Speaker	Colloquium on Contemporary Issues in Law and Business
Lamb ¹⁷⁴	Oct. 20, 2003, Washington, DC	Panelist	National Association of Corporate Directors 2003 Corporate Governance Conference
“	Nov. 18, 2003, University of Delaware	Panelist	Panel, Shareholder Access to the Proxy
“	Feb. 25–27, 2004, UCLA Law School	Speaker	First Annual Institute on Corporate, Securities and Related Aspects of Mergers and Acquisitions

173. William B. Chandler III, Chancellor, Delaware Court of Chancery.

174. Stephen P. Lamb, Vice Chancellor, Delaware Court of Chancery.

“	Mar. 18, 2004, USC Law School	Panelist	2004 Institute for Corporate Control
“	Oct. 22, 2004, Wilmington, DE	Panelist	International Corporate Governance Network
“	Oct. 22, 2004, Philadelphia, PA	Panelist	Business Lawyers’ Institute
“	Oct. 24, 2004, University of Delaware	Speaker	Executive Compensation Conference
“	Oct. 31, 2005, Chicago, IL	Speaker (by Video)	Second Annual Executive Compensation Conference
“	Mar. 24, 2006, Washington and Lee Law School	Participant	Symposium, Understanding Corporate Law Through History
Strine ¹⁷⁵	Oct. 3, 2003, Harvard Law School	Speaker	Program on Corporate Governance
“	Nov. 20, 2003, University of Delaware	Panelist	Program on SEC Proposals on Shareholder Empowerment
“	Sept. 13, 2004, New York, NY	Speaker and Panelist	Practising Law Institute Securities Litigation and Enforcement Institute
“	Oct. 22, 2004, Wilmington, DE	Panelist	International Corporate Governance Network
“	Dec. 10, 2004, University of Pennsylvania Law School	Panelist	Institute for Law and Economics Roundtable
“	Mar. 17–18, 2005, Duke Law School	Keynote Speaker and Panelist	Director’s Education Institute
“	Jan. 18, 2006, San Diego, CA	Panelist	Thirty-Third Annual Securities Regulation Institute
“	Mar. 16, 2006, Duke Law School	Keynote Speaker	Directors’ Education Institute

175. Leo E. Strine, Jr., Vice Chancellor, Delaware Court of Chancery.