

# The Coming Privatization of Corporate Law

*Delaware's recent stumbles may (serendipitously) pave the way for a future of private ordering in corporate governance.*

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**F**or more than a century, American corporate law has revolved around a simple competitive premise: State governments supply corporate law while companies choose their state of incorporation, and the market rewards the state offering the best corporate law product. Delaware's longstanding market dominance (especially for public companies) is often explained through the confluence of its unusually attractive institutional package: expert judges, extensive precedent, a specialized bar, an enabling statute, and a legislature that—at least traditionally—treats corporate law as something to be calibrated technocratically rather than politicized.

While that story is not wrong, it has grown prohibitively incomplete.

Its most familiar complication is the celebrated debate over what “the best corporate law product” really means (and for whom). One side—the “race to the bottom” thesis—posits that because managers influence where a firm incorporates, states have an incentive to cater to managerial interests over those of investors (Cary 1974). The retort—the “race to the top” thesis—counters that unabashed managerialism simply doesn't pay: Because firms must attract outside capital even to get out of the starting blocks, managers feel compelled to embrace legal rules that maximize firm value from investors' perspectives (Winter 1977). More recently, others have argued that whatever jurisdictional competition might have once existed, the appreciable network effects of Delaware's dominance have slackened the race to a leisurely trot, as entrepreneurs, lawyers,

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consultants, and financiers are overwhelmingly most familiar with Delaware legal doctrine and thus habitually favor Delaware for business structuring (Sanga 2020; Kahan & Kamar 2002; Klausner 1995).

Over time, however, even those competing accounts have proven to be too simplistic to explain contemporary regulatory dynamics. Conventional accounts assume, for example, that firms more or less want the same one-size-fits-all model for corporate law, and the governments supplying it obligingly produce it in a rational, consistent, and stable way. Both assumptions have become harder to defend in recent years. On the demand side, firms are now highly heterogeneous in their governance needs. And on the supply side, the production of corporate law has become visibly more vulnerable to clientelist politics, ideological pressures, cutthroat marketing, and dynamic instability than the classic literature admits.

In a forthcoming article in the *Journal of Corporation Law* (Lund & Talley 2026), we argue that a more realistic assessment of the state of play is that regulatory competition is far

more complex and nuanced than the conventional accounts concede. Recent forays by other states (namely Nevada and Texas) have demonstrated weaknesses in the view that states compete by going after a one-size-fits-all model; instead, these states have attempted to capture market share from Delaware by offering legal products that cater to a fringe of controller-dominated firms—that is, firms in which a single shareholder or small group can exert decisive control over corporate decisions. And the ensuing responses by Delaware represent an odd departure from predictions of how a market-leading state would react to such peripheral challenges. Curiously, Delaware has rushed to reshape its law to chase the same controller-dominated segment (a fraction of the overall market by nearly any measure), with pressure campaigns and interest groups catalyzing and impelling the effort. The resulting state of play imposes significant challenges for governmental actors to address the heterogeneous needs of firms and their investors in a nuanced manner. In short, Delaware (along with other state governments) has been caught up

in our current moment where politics infuses business regulation at nearly every level. Regardless of how the next election swings, the entanglement of politics and business seems unlikely to abate.

While this state of affairs sounds dreary for corporate law wonks, it does not (in our view) suggest that Delaware will be relegated to irrelevance, nor that public corporate law has outlived its usefulness for business planning. Quite the contrary. We think that Delaware still possesses an underappreciated (if serendipitous) strategic advantage. Recent statutory reforms unique to the state have made it possible for Delaware firms to deploy private contracts that substantially displace state-supplied corporate law, including dispute resolution in Delaware courts. This development represents a game changer for regulatory competition. It means that the key battleground for competition is no longer limited to Delaware versus sister jurisdictions, or even Delaware versus the federal government. Rather, the new entrant to the race for corporate law is privately provided corporate law via agreements to arbitrate claims in a specialized tribunal. Luckily for Delaware, the small state has put itself in a position to remain a juggernaut in the

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incorporation market, not by monopolizing public company governance, but by providing a flexible platform for private ordering.

### FLAWS IN THE CLASSIC DEBATE

The most popular accounts of jurisdictional competition essentially boil down to taking polar sides of a longstanding debate: that state competition for corporate charters either produces corporate laws that maximize firm value or, in the alternative, allows maximal managerial rent extraction to the detriment of investors. But the idea of convergence on a single set of rules is very much at odds with what we have come to see in the real world: a market-leading state like Delaware historically producing a set of rules, with rivals attempting to chip away at its market share by differentiating themselves at the margin. Our forthcoming article therefore offers a differentiated product framework for jurisdictional competition that better reflects the fact that the demand for corporate law is heterogeneous and that firms will want to customize their governance and legal frameworks across many different dimensions.

On the latter point, consider the following examples of heterogeneous demand for corporate law: An early-stage founder-led technology company may care intensely about insulating management from litigation noise and short-term shareholder pressure. A controlled company may want legal rules that allow a powerful insider to pursue an idiosyncratic long-term strategy without constant judicial second-guessing. A mature firm with dispersed ownership, by contrast, may face acute agency problems and therefore place greater value on judicial oversight, fiduciary accountability, and minority-investor protection. A company with repeated needs for outside capital may want especially credible governance commitments to reassure investors. Different firms, in other words, can rationally want different combinations of managerial freedom, investor protection, contractual flexibility, and adjudicative scrutiny.

With this complexity in mind, the conventional binary debate begins to break down. The choice is not simply whether state competition yields pro-manager or pro-investor law. Instead, one should expect a differentiated market in which states try to attract different segments of firms by offering specialized legal products. The right framework is not a race to a single finish line, but a differentiated-products model in which both demand and supply are heterogeneous. Rational firms should therefore sort themselves across governance regimes that offer different products that best fit their governance needs.

This perspective yields several practical implications that

we further develop in our forthcoming article. For example, in contrast to the classic debate, profit-maximizing jurisdictions should never want to copy each other, as copycat governance regimes make fee competition fiercest and thus reduce expected revenue. Moreover, while “fringe” states will have more of an incentive to experiment with radical rules than market-leading states, a dominant jurisdiction should generally be cautious about making dramatic moves in modifying their law to copy fringe competitors. It should instead seek to protect predictability, its moderate positioning, and institutional credibility.

### DELAWARE’S HISTORIC FORMULA FOR DOMINANCE

Viewed in the light of heterogeneous market demand, Delaware’s product is more than simply pro-management or pro-shareholder law. Rather, Delaware’s dominance is forged from other aspects of institutional quality. The first and most important element of its formula is judicial expertise. Delaware’s Court of Chancery has developed into a uniquely

## Delaware can remain a juggernaut in the incorporation market by providing a flexible platform for private ordering.

sophisticated tribunal for business disputes thanks to the following attributes: judges carefully selected from a deeply experienced corporate bar, an absence of juries, speedy dispute resolution, and the application of equitable standards rather than rigid rules. That combination lowers uncertainty for sophisticated parties because it makes outcomes more intelligible and more professionally legible, even when the law itself is formally open-ended.

Second, Delaware has accumulated a dense body of precedent. That body of case law has long been one of the state’s most valuable assets. It allows lawyers, boards, investors, and transaction planners to navigate by known markers. The practical result is not perfect certainty, but a level of predictability far superior to what most rival states can offer. Rival jurisdictions may copy Delaware’s statutory language, but they cannot instantly copy decades of adjudicative gloss, professional familiarity, and institutional memory.

Third, the state has traditionally paired judicial sophistication with statutory flexibility. The Delaware General Corporation Law (DGCL) is detailed, but it is traditionally enabling rather than mandatory. Firms can structure voting rules, board arrangements, capital structures, and numerous

governance features to suit their needs. Delaware's legislature, working through the Corporation Law Council process, historically updated its statute in a deliberate and relatively nonpartisan way.

Fourth, Delaware benefits from powerful network effects. Lawyers know Delaware law and pay close attention to legal developments. That professional familiarity compounds over time: It makes Delaware governance arrangements easier to price, negotiate, and litigate.

In the language of a differentiated-products account, Delaware came to occupy the broad center of the market by offering a moderately positioned, highly predictable, easily adaptable legal product. Fringe jurisdictions, by contrast, have stronger incentives to compete by differentiation. Nevada, for instance, positioned itself as a liability-light jurisdiction more favorable to managerial autonomy. Texas has lately experimented with more statute-driven reforms and institutional innovation of its own. California, in different ways, pushes in a more investor- and stakeholder-protective direction. This pattern is exactly what a differentiated-products account would predict.

### THE POLITICIZED SB 21 SAGA

The real stress test for Delaware came in 2025. As we argue in our article, Senate Bill 21 represented the most sweeping set of changes to the DGCL in many decades. The reform was justified publicly as a response to a purported crisis: Delaware, it was said, faced a serious threat of "DExit," meaning the migration of major corporations to Texas, Nevada, or elsewhere. While the empirical case for DExit was (and still is) questionable, the political and rhetorical backdrop was impossible to ignore. High-profile complaints from founders and controllers—most notably after a Delaware court nullified Elon Musk's record-breaking pay package, leading him to admonish his X users to "never incorporate your company in the state of Delaware"—helped create an atmosphere of urgency, one that newly elected governor Matt Meyer seemed all too anxious to smother.

What followed was a markedly unconventional legislative process. The bill was drafted outside the normal path (where it would usually be developed by a bipartisan group of lawyers on the Corporation Law Council), moved rapidly through a fractious General Assembly, and provoked unusually heated opposition from plaintiff-side lawyers and investor groups. In our view, the process and product both suggest a substantial increase in the role of clientelist politics in Delaware corporate lawmaking.

But our larger point does not dwell on relitigating the multiple substantive disputes around SB 21. Reasonable observers can disagree about the proper treatment of controller conflicts and the degree of judicial scrutiny that such transactions should receive. One can, for example, believe Delaware had moved too far toward intrusive litigation and still worry about

the manner in which the state responded. Our claim is accordingly narrower and, in some ways, more structural. Delaware's response is hard to square with what one would expect from a dominant, revenue-maximizing jurisdiction seeking to protect its long-run competitive advantage.

Why? Because the moves embedded in SB 21 appear to have cut against three of Delaware's traditional pillars of strength.

The first is predictability. Proponents described the reform as increasing certainty through safe harbors and more rule-like guidance. There is something to that. But predictability is not just about writing more words into a statute. It is also about the stability of the surrounding legal environment. SB 21 added significant new statutory complexity, displaced or unsettled a large body of precedent, invited fresh interpretive questions, and did so through a process that itself suggested Delaware law might be more politically contingent than many market participants had assumed. That is not obviously a recipe for greater predictability, at least in the near term.

The second is contractarian flexibility. Delaware has long marketed itself as an enabling state. Yet SB 21 did not take an obviously contractarian path. It did not, for example, simply create an optional regime that firms could opt into or out of through their charters (as most other significant reforms have done). Rather, it imposed a new, retroactive, one-size-fits-all framework on all Delaware corporations, including the millions of firms that were formed in reliance on the prior statutory regime. That choice matters. A state that values a large and heterogeneous incorporation base should generally prefer greater flexibility for adaptation: Firms with different needs should be able to tailor around the default. A more mandatory approach, in contrast, strangles that flexibility.

The third is strategic. As we argue in our article, a dominant provider such as Delaware positioned in the middle of the market should be wary of mimicking fringe competitors because doing so can make it look less distinctive while also exposing it to losses on both flanks. If Delaware moves in a more management-protective direction, it might gain some appeal for firms who can still choose Nevada or Texas, but it almost certainly will alienate firms and investors that valued Delaware precisely because it was *not* Nevada or Texas.

However, the broader concern is not confined to SB 21, but rather what the episode suggests about governmental actors' continued capacity to produce public corporate law. Once Delaware's lawmaking process becomes more visibly politicized and clientelist—reacting to targeted pressure campaigns over technocratic innovation—the state's historic comparative advantage begins to founder. And such pressures are not confined to Delaware: They are plainly alive in rival state governments, too (witness the Texas legislature's theatrics surrounding its mid-decade gerrymandering). If public corporate law is becoming more unstable and politically vulnerable across the board, then the appeal of a private-ordering option grows.

### A DAWN OF PRIVATE ORDERING IN CORPORATE LAW?

While we are not the first to propose a thought experiment about privatizing corporate law and governance (e.g., Hadfield & Talley 2006), corporate statutes have historically been hostile to such attempts. Delaware even has a (seemingly) sweeping statute that requires *all* internal affairs disputes—including common-law fiduciary duties—to be channeled into Delaware courts (DGCL Section 115). Nevertheless, a notable escape hatch appeared almost by accident in 2024, when the Delaware General Assembly enacted Section 122(18) of the DGCL. The immediate motivation was a reaction to a Court of Chancery decision that had called into question the permissibility of certain stockholder agreements reallocating governance power in ways the corporate charter and bylaws had not. In response, the General Assembly amended the code to provide broad authority for corporations to enter into binding agreements with their shareholders (or prospective shareholders), even if such agreements destabilized traditional corporate governance rules under state law.

But the sweeping statutory language adopted in Section 122(18) goes far beyond rescuing a few bespoke governance arrangements. By our reading, it opens the door to a much broader project: corporations using stockholder agreements to structure governance rights and dispute resolution in ways that substantially bypass court-administered corporate law. Notably, the amendment explicitly exempts stockholder agreements from Delaware’s statutory forum requirement. In other words, a corporation can now evidently enter into a stockholders agreement specifying that it would eschew the Court of Chancery altogether in favor of a specified private arbitral tribunal.

This admittedly broad interpretation of Section 122(18) may have seemed adventurous when we first embarked upon this project. But a recent Delaware decision (*Masimo Corporation v. Kiani*) lends considerable support to our interpretation. The case grew out of a dispute over medical device maker Masimo’s then-CEO (and Masimo stockholder) Joseph Kiani and the terms of his employment agreement specifying “special payment” rights upon a control change in the company. After being ousted pursuant to an activist-led board takeover, Kiani sued in California under the agreement’s forum-selection clause. Masimo, in turn, filed a Delaware action asserting that Kiani’s claims primarily concerned fiduciary duties and internal affairs, and therefore they must be adjudicated (if at all) in a Delaware court. The key question was whether Delaware could retain the case notwithstanding the contract’s exclusive California forum provision.

Vice Chancellor Nathan A. Cook sided with Kiani, enforcing the California forum-selection clause and dismissing the Delaware action. But the opinion’s reasoning extends beyond a single contract dispute. The court held that Section 122(18) substantially upended Delaware’s prior doctrine that prohibited contractual outsourcing of internal corporate claims. The opinion reasoned that Section 122(18) authorizes corporations to contract with current or prospective stockholders in their capacity as such, and that the statute’s carveout for Section 115 means those agreements are indeed free to select non-Delaware fora, including fora that would otherwise be impermissible for internal affairs claims were they provided for

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in a charter or bylaw. In other words, Section 122(18) displaced an older jurisprudence and statutory framework that insisted that internal claims be heard in Delaware courts. Moreover, the court explicitly embraced the view that an older line of cases—which had held corporate fiduciary claims could not be modified by contract—were now effectively superseded by 122(18). At least for stockholder agreements, Vice Chancellor Cook held, the legislature had now authorized precisely that kind of private ordering.

That outcome—the first major Delaware opinion interpreting Section 122(18)’s breadth—is a big deal. It means that Delaware courts are themselves confirming the central claim we posit in our article: Parties now have much more power than at any time before to structure agreements that sideline Delaware adjudication of disputes that look and feel like classic internal affairs cases. The exact boundaries must still be litigated, of course, and *Masimo* is not the last word. But it is powerful evidence that private corporate law is no longer merely hypothetical: Such contracts are specifically recognized by Delaware statutory and case law as legitimate.

The official embrace of corporate governance by contract is also supported by federal law. Specifically, if state law recognizes a valid and enforceable contract, the Federal Arbitration Act kicks in to reinforce that status, making arbitration clauses sticky in a way that ordinary state-law governance provisions often are not. Once such an agreement is validly formed, federal law adds its own considerable heft to contractual designations of venue (including to arbitration), leaving little for a state court to do beyond compelling arbitration and enforcing the arbitrator’s judgment. And because Section

122(18) expressly authorizes broad stockholder agreements as validly formed contracts, the usual objection that such clauses are alien to Delaware law loses much of the steam it might have once enjoyed.

### HOW WOULD PRIVATE ORDERING WORK?

The phrase *private corporate law* can sound more exotic than it is. We are not imagining that each corporation drafts an entirely bespoke constitution from the ground up and adjudicates disputes in a smoke-filled back room. In practice, the likely path is more institutionalized and modular, and the firm will have to remain mindful of many of the attributes that previously made Delaware a central venue for incorporation.

In our forthcoming article, we propose the creation of a Delaware Arbitration Board (DAB) as one model. The DAB would be more than just a set of arbitrators who sweep in after a dispute arises. It would be a carefully curated group of corporate law experts (including former Delaware judges). Under our proposed model, a corporation would remain incorporated in Delaware, but it would enter into a stockholder agreement under Section 122(18) specifying that a broad set of internal disputes would be resolved through the DAB rather than ordinary Delaware litigation. In doing so, the parties would be required to pay a subscription fee (akin to a private franchise fee) to the DAB. In turn, the DAB would have already adopted its own set of baseline arbitral default rules (modeled after the DGCL), permitting selected customizations through the contract. Moreover, unlike standard arbitration, the DAB would generate a published body of caselaw precedent, and it would amend or alter its background rules through competition, reputation, and demand rather than by election cycles, public lobbying frenzies, or ideological signaling.

The mechanics obviously matter, and many of them are described at greater length in our article. The attraction of such a system is not maximal novelty, but rather controlled modularity. The DAB could, for example, select as its baseline set of background rules Delaware law (and legal precedents) as of a particular moment in time, with its own arbitral caselaw and amendments forking into an independent evolutionary path. In turn, the parties could then opt into or out of the default provisions of the DAB's arbitral law, preserving familiar fiduciary concepts (as background rules) while altering substantive, procedural, or remedial prescriptions. None of this eliminates every complexity, of course, but the main point is that the ability to customize corporate law via private ordering dramatically expands the menu of governance choices available to firms.

### WHY PRIVATE CORPORATE LAW'S TIME MAY HAVE ARRIVED

Given our current freighted state of governmental politics,

the advantages of privatized corporate law are potentially significant and multipronged.

The first advantage is tailoring. If firms are genuinely heterogeneous in their governance needs, then a governance regime that allows them to select different bundles of law, procedure, and adjudication should often dominate a one-size-fits-all public-law system. Some firms may want something close to classic Delaware fiduciary law. Others may prefer more insulation for controllers or boards. Still others may care most about speed, confidentiality, or arbitral expertise. A system of private ordering can accommodate those differences more readily than a public-law monopoly can. And while Delaware has long advertised itself as having an enabling statute, its recent significant amendments (as argued above) do quite the opposite.

A second advantage is stability. Ironically, once corporate lawmaking becomes politicized in state governments, contract becomes a substantially more stable alternative. A stockholder agreement governed by arbitral law can lock in expectations more credibly than a public regime that has become increasingly unpredictable and susceptible to the next pressure campaign. That is one reason private ordering may appeal to firms on all sides of the substantive debate. Those who think Delaware had become too hostile to controllers before SB 21 can use contract to escape older doctrine. Those who think SB 21 went too far can use contract to preserve something closer to the former regime. Private ordering, in that sense, is not ideologically one-sided. It is a mechanism for opting out of instability that state legislatures simply cannot escape.

The third advantage is institutional discipline. We envision the DAB would not have a monopoly over private governance. Rather, private providers of corporate law would compete. They would have reputational incentives to produce coherent doctrine and credible dispute resolution. They would differentiate their offerings in a manner that is responsive to heterogeneous market needs. And they would be substantially more impervious to being commandeered by political posturing and clientelism than state legislatures. In the steady state, a private provider of corporate law would survive and thrive by attracting subscribing firms and investors, giving it a more direct feedback loop. If the provider produces bad law, it loses subscriptions, fees, and operating revenues.

The fourth advantage is specific to Delaware, which faces the purported threat of DExit. In allowing broad ability to privatize governance, Delaware's Section 122(18) can induce its large existing population of entities to remain in state. Specifically, Delaware can continue to serve as the formal legal domicile while allowing firms to purchase a more customized governance package. In that sense, private ordering may be a strategic response to the very pressures that have recently made Delaware corporate law less secure. Instead of forcing

firms to choose between Wilmington and Austin, it allows Delaware to keep the firm while relinquishing some of its adjudicative monopoly.

### POSSIBLE OBJECTIONS

There are, to be sure, many risks and uncertainties associated with the private production of corporate law. One is that private arbitral systems may themselves be captured, especially by powerful insiders or repeat-player law firms. That risk—while real—is not unique to private ordering. The recent Delaware experience is a reminder that state-produced corporate law can also be shaped in highly visible ways by organized interests and conjured political urgency. The relevant comparison, then, is not between private imperfection and public ideality. It is between different institutional environments, each with its own challenges. By situating the DAB (and other private providers) within a competitive environment, our proposal builds in a strong disincentive for excessive capture by a single client's interest.

A second potential objection is fragmentation. One of Delaware's great strengths has been the shared body of precedent that supports practitioner networks and reduces uncertainty. If every firm customizes too much, that shared stock of knowledge may deteriorate. We take that concern seriously. But it also has a market solution. Firms will often value sticking relatively close to familiar templates whenever network benefits are substantial, *especially* when arbitral precedents are transparent and evolve like case law. A private market in corporate law is therefore unlikely to generate infinite diversity. It is more likely to produce a set of recognizable governance packages and adjudicative forums, with some room for bespoke variation at the margins.

A third objection concerns legitimacy. Corporate law has public consequences. It affects not only managers and investors, but employees, creditors, consumers, and the economy more broadly. Why should disputes about fiduciary duties and corporate control be removed from public courts? While this is a fair question, the status quo already delegates enormous power to private ordering, sophisticated counsel, and market actors. If anything, the recent embrace of stockholder agreements extends that delegation further. The relevant issue, then, is not whether corporate law should be public in some abstract sense. Rather, it is whether, in a world where states increasingly struggle to supply a stable and broadly attractive public-law product, a greater role for private ordering would improve the mix. We think it can.

A final objection is enforcement power. Even with the enhanced power of contract, corporations (and their limited liability protections) remain dependent on recognition under governmental law. Moreover, arbitral bodies do not grant themselves adjudicative authority and they do not execute judgments by themselves. Such activities require some

minimal public-law backstop. Even so, we think it is possible—and prudent—to emancipate contractual choice while preserving a far leaner public legal infrastructure. It is not, in contrast, a persuasive ground to insist that all corporate governance disputes must be litigated through traditional public channels from start to finish. Indeed, we have operated under such a system for some time, and its flaws have become glaringly apparent: Once governmental lawmaking becomes more visibly crisis-driven and more responsive to clientelism, the public product becomes less reliable and less legitimate. And when that happens, contract can shoulder a much more expansive role.

That is why the future of corporate law may lie less in interstate rivalry alone than in a new competition among and between public and private governance regimes. Delaware's genius may no longer consist simply in having the best public judges and the best public code. It may consist in having built (possibly by accident) the most hospitable legal platform for firms that want to buy something different. This irony is striking. In trying to defend its public-law franchise through hurried reform, Delaware may have helped undermine confidence in the stability of that very franchise. Yet through Section 122(18), and now through cases like *Masimo*, it has also given corporate entities a practical mechanism to protect themselves from that instability without leaving the state. That makes private corporate law not a rejection of Delaware, but potentially its competitive salvation.

The storied debate about whether corporate regulatory competition creates a race to the top or the bottom is unlikely to die out anytime soon. And the option to privatize corporate law will not change that, as much as simply becoming a part of it. After all, such providers ultimately add to the number of options that incorporated entities have for governance. And in a world where firms have heterogeneous governance needs and state legislatures have grown historically unpredictable, the case for admitting private providers into the corporate governance dance-off becomes compelling. R

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