

TEXAS AND “DEXITS”: CAN THE TEXAS BUSINESS COURTS DRIVE DELAWARE’S DOWNFALL?

“You may all go to hell, and I will go to Texas.”

-Davy Crockett

ABSTRACT

Texas’s freshly minted business courts offer significant and unique incentives for businesses to incorporate in the state. However, it remains to be seen whether Texas can compete with Delaware’s long-held incorporation dominance. Although the Texas Business Court system’s strict jurisdictional requirements, specialized appeals court, and proclivity for releasing written opinions are a boon for efficient corporate litigation and the development of clear Texas state corporate caselaw, Texas fails to match Delaware’s strengths. The Delaware Chancery Court’s partisan-balanced judges, lengthy judicial terms, lack of jury trials for cases in equity, and decades of caselaw bring unrivaled independence, stability, and efficiency to corporate litigation. Yet, Delaware is going through a struggle of its own. It has recently faced fears of mass “DExit,” as several major businesses have openly considered reincorporation away from the state. This Note argues that the way Delaware lawmakers respond to “DExit” is the real threat to Delaware’s downfall, not the comparative benefits of Texas’s corporate law regime, or that of any other state.

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INTRODUCTION

Miffed by an unfavorable decision in the Delaware Court of Chancery, Elon Musk took to social media in early 2024 to declare, “[n]ever incorporate your company in the state of Delaware.”¹ He subsequently polled his followers to ask if he should move Tesla’s state of incorporation

1. Elon Musk (@elonmusk), X, (Jan. 30, 2024, 4:14 PM), <https://x.com/elonmusk/status/1752455348106166598> [<https://perma.cc/TP9S-Q4HU>]; Shauneen Miranda, *Musk's Threat to Re-Incorporate Tesla Boosts Texas' Challenge to Delaware*, AXIOS (Feb. 1, 2024), <https://wwwaxios.com/2024/01/31/elon-musk-tesla-delaware-court-texas-law> [<https://perma.cc/ZC4A-EMEG>]. Musk issued the statement after the Chancery Court ruled that Musk had failed to show that his executive compensation package (valued at \$56 billion) was fair. To read the full opinion, see *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024). For more on this saga and Musk’s reaction, see *On the Merits, Elon Musk’s \$56 Billion Bad Year in Delaware Court*, BLOOMBERG INDUS. GRP. (Jan. 10, 2025), <https://megaphone.link/BL1643654649> [<https://perma.cc/64AP-Y4TF>].

to Texas: over 87% of respondents answered yes.² Pleased with the results, Texas Governor Greg Abbott replied to the poll to say, “Elon, it’s over. The election desk is declaring a landslide victory for Texas.”³

This particular reincorporation was a major win for Governor Abbott, who, in June of 2023, signed a new system of Texas state business courts into law with hopes of incentivizing businesses to incorporate within the state.⁴ The very public reincorporation of Tesla sparked commentary on whether other major corporations would soon follow Musk’s lead.⁵ The question was being raised: Is Tesla’s reincorporation the beginning of a wave of businesses fleeing the traditional choice of Delaware, or merely a one-off situation, heavily influenced by a Texas-based company’s risk-embracing and retaliatory CEO?⁶

Multiple high-profile corporations, including Meta and Walmart, have openly considered a move out of Delaware since the Tesla reincorporation, a phenomenon which journalists have dubbed a “DExit”.⁷ Whether or not these threats were actualized,⁸ the pressure appeared to make Delaware politicians sweat. In mid-February of 2025, a Delaware Senator introduced Senate Bill 21 (S.B. 21), which proposed several major legislative updates to the state’s corporate law, constituting “the most significant single-year revision of Delaware’s corporate code since at least 1967 . . .”⁹ The changes cater heavily to management, reflecting the state’s anxiety to keep firms

2. Miranda, *supra* note 1.

3. *Id.*

4. Benjamin Raymond Norman & Benjamin M. Burningham, *Recent Developments in Business Courts 2024*, ABA (Mar. 7, 2024), https://www.americanbar.org/groups/business_law/resources/business_law-today/2024-march/recent-developments-business-courts-2024/ [https://perma.cc/A69Z-CY4Q].

5. Theo Francis, *The Big Loser in Tesla’s Shareholder Vote Is Delaware*, WALL ST. J. (June 16, 2024, 5:30 AM), <https://www.wsj.com/business/tesla-texas-incorporation-delaware-edcbd0dd> [https://perma.cc/72A5-NC3A].

6. Tesla’s risk-taking nature was made explicit in its proxy filing: “Doing new things is part of Tesla’s DNA, and how it has become one of the most valuable companies in the world.” *Id.*

7. Mike Isaac & Eli Tan, *Meta Said to Explore Incorporating in a Different State*, N.Y. TIMES (Jan. 31, 2025), <https://www.nytimes.com/2025/01/31/technology/meta-incorporation-delaware.html> [https://perma.cc/9TAA-3FNY]; Lora Kolodny, *After Elon Musk’s Delaware Exit, State Lawmakers Weigh Bill to Overhaul Corporate Law*, CNBC (Mar. 15, 2025, 8:00 AM), <https://www.cnbc.com/2025/03/15/after-elon-musk-delaware-exit-state-weighs-overhaul-of-corporate-law.html> [https://perma.cc/2BJM-55NG]. Note that not all of these corporations contemplated Texas as their state of reincorporation.

8. For a discussion of whether these reincorporation threats did or will really materialize, see sources cited *infra* note 109.

9. Eric Talley, Sarath Sanga & Gabriel V. Rautenberg, *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/> [https://perma.cc/J3T8-3J86]. The reform is strongly supported by Delaware Governor Matt Meyer. Press Release, Office of the Delaware Governor, Governor Meyer Calls for Swift Passage of Senate Bill 21 (Mar. 12, 2025), <https://news.delaware.gov/2025/03/12/governor-meyer-calls-for-swift-passage-of-senate-bill-21/> [https://perma.cc/952F-4PLH].

incorporated in the state of Delaware.¹⁰ In late March of 2025, the bill passed and was signed into law by Delaware Governor Matt Meyer.¹¹ Clearly, a majority of the Delaware legislature is concerned that their incorporation dominance is not to be taken for granted.

So, will Texas, with its new business courts, be the downfall of Delaware? In this Note, I will explore how Texas and key features of its newly instated business courts compare to the longstanding state of choice for incorporations, Delaware and its Court of Chancery. I will contend that Texas, more so than many states that have attempted before, is positioning itself to be a seriously attractive state of incorporation. Yet, the drawbacks of certain features of Texas's new courts will make taking preeminence over the Delaware Court of Chancery difficult. I further argue that it is not the attraction of Texas's (or any other state's) corporate law regime that could spell Delaware's downfall, but rather how the state responds to mounting political and economic pressures.

I. BACKGROUND

A. Why Are States Invested in Attracting Incorporations?

Corporations are free to incorporate in any state they wish, regardless of whether they have ties to the state that they ultimately choose.¹² Clear caselaw on corporate matters, judges with business litigation expertise, and efficiency of the legal system are all factors that attract businesses to incorporate in a particular state.¹³ The implementation of a court, or system of courts, that specializes in addressing business litigation can therefore be a major boon for states seeking to attract incorporations.¹⁴ But why do states seek to attract incorporations in the first place?

States benefit from business incorporations because they can generate considerable revenue from selling “incorporation products,” which “includ[e] franchise taxes, fees, and various registration services.”¹⁵ Exactly

10. See discussion *infra* Part III.

11. 85 Del. Laws ch. 6 (2025).

12. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1560 (2002).

13. Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 4 (Eur. Corp. Governance Inst., Working Paper No. 761, 2024), <https://doi.org/10.2139/ssrn.4746878> [<https://perma.cc/68JB-6EZP>].

14. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1937 n.87 (2012).

15. Anat Alon-Beck, *Delaware Beware*, 2025 U. ILL. L. REV. 363, 398.

how much money states gain in the sale of incorporation products varies by state, as taxes, fees, and services are matters of state law.¹⁶

The franchise tax is the key revenue booster among incorporation products.¹⁷ Franchise taxes are “a state tax levied on certain businesses for the right to exist as a legal entity and to do business within a particular jurisdiction.”¹⁸ Franchise tax calculations are different from state to state, and many states do not have them at all.¹⁹ Where in place, franchise taxes can really add up; in 2024, franchise taxes comprised 20.5% of Delaware’s state revenue.²⁰ Clearly, attracting big businesses can, itself, be big business (and, in Delaware’s case, economically essential business). Hence, states compete to attract incorporations, though Delaware has heavily dominated the competition in recent history.²¹

B. The Delaware Court of Chancery

While a well-functioning court dedicated especially to hearing corporate matters is not the only means by which states can compete for incorporations, it has been key to the top player’s success.²² Delaware’s Court of Chancery has been attractive to businesses choosing a state of incorporation for its efficiency and expertise in handling complex corporate lawsuits;²³ yet, the Chancery Court did not originate as a means to attract incorporations.

16. In many states, so little is to be gained by incorporations that they are unlikely to compete for them at all. *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 687 (2002). Of course, states can always amend their corporate law in order to extract more benefit. Nevada raised their maximum franchise tax for in-state incorporations from \$85 to \$11,100 in 2003 as they began their attempt to seriously compete with Delaware for incorporations. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 948 (2012).

17. Kahan & Kamar, *supra* note 16, at 688. But again, in many states, very little is gained by incorporation products at all. *Id.* at 687.

18. Adam Hayes, *Franchise Tax: Definition, Rates, Exemptions, and Example*, INVESTOPEDIA (Mar. 31, 2025), https://www.investopedia.com/terms/f/franchise_tax.asp [<https://perma.cc/B33G-QBL4>]. It should be noted that a franchise tax is not a form of income tax, and it applies to all businesses (not just an official “franchise”). *Id.*

19. *Id.*

20. DEL. DEP’T OF FIN., DELAWARE FISCAL NOTEBOOK § 2, at 32 (2024).

21. Conversely, some scholars disagree that this competition actually exists. *See generally* Kahan & Kamar, *supra* note 16; *see also* Daines, *supra* note 12, at 1600; Lucian Arye Bebchuk & Assaf Hamdani, *Essay, Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002) (arguing that Delaware has been so dominant that there has effectively been no meaningful competition for incorporations). Note that there have been many developments in the world of attempting to compete with Delaware that have happened *after* the publication of these dissenting scholar’s works. *See, e.g.*, Barzuza, *supra* note 16.

22. Another way to compete is to use legislation to create a corporate law regime favorable to management interests. *See* discussion *infra* Section I.D.3.

23. *See* Barzuza, *supra* note 13, at 18.

Delaware's Court of Chancery was established in 1792 specifically to have subject-matter jurisdiction over equitable, as opposed to legal, claims.²⁴ The court then came to specialize in complex business disputes, given the equitable nature of the claims being brought by businesses.²⁵ The Delaware Court of Chancery, thus, came to be regarded as the first state "business court."²⁶

It was not until the 1990s that other states began formulating their own versions of a business court system, with New York and Illinois leading the charge.²⁷ These state business courts varied in their structures, including "specialized dockets, tracks, or programs within an existing civil trial court system, separate divisions of a civil trial court system, or in some cases a separate court . . . within an overall court system."²⁸ Over time, more and more states have joined in. As of 2024, "nearly half of all states have enacted some form of specialized trial court for handling civil business and commercial disputes."²⁹

C. Delaware's Dominance in Incorporations

Despite the increasing number of states joining Delaware in designating specialized courts for processing business litigation, Delaware has remained remarkably dominant as the go-to state for business incorporations.³⁰ It is not just the Court of Chancery's comparatively long history that has made Delaware so preeminent; the court is also attractive for its impartially selected expert judges, promptness, well-defined caselaw, and national renown.³¹ With such established credentials, it has been incredibly difficult for other state business courts to make a breakthrough in attracting business

24. Lee Applebaum, Mitchell Bach, Eric Milby & Richard L. Renck, *Through the Decades: The Development of Business Courts in the United States of America*, 75 BUS. LAW. 2053, 2058 (2020).

25. *Id.* Examples of common business-related equitable claims include requests to enjoin mergers and claims for breach of fiduciary duties. *Id.*

26. *Id.*

27. *Id.* at 2058–60. For more detail on the early state business courts, see Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147 (2004).

28. Applebaum et al., *supra* note 24, at 2054.

29. Andrew Zeve & Stephen Shuchart, *Texas Business Courts: What You Need to Know*, WHITE & CASE (Sept. 9, 2024), <https://www.whitecase.com/insight-alert/texas-business-courts-what-you-need-to-know> [https://perma.cc/ZSV2-S4SM]. It should be noted that, because business courts are so varied in structure, naming an exact number of states that have them is somewhat difficult. Also note that, though a separate business court is helpful to the competition for incorporations, not every state that has one is necessarily competing for incorporations. Further, not every state that competes for incorporations has a business court.

30. Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 772 (2009).

31. *Id.*

incorporations away from Delaware.³² In 2023, 67.6% of Fortune 500 companies were incorporated in Delaware, and “[a]pproximately 80% of all U.S. initial public offerings in 2023 were registered in Delaware.”³³ Overwhelmingly, businesses choose between incorporation in Delaware or incorporation in their home state.³⁴ The more sophisticated the company, the greater the likelihood of it being incorporated in Delaware.³⁵

D. Modern Inter-State Competition in Attracting Incorporations

While states besides Delaware began establishing their own business courts in the 1990s, it is perhaps more recent that certain states have begun to seriously compete with Delaware over incorporations.³⁶

1. North Dakota

North Dakota is one such state that has made an attempt to compete. In the late 2000s, it passed the Publicly Traded Corporations Act, offering a corporate law regime that differentiated itself from Delaware by being more shareholder friendly.³⁷ The effort was, for the most part, a failure. “Despite the legislative efforts, as of 2013 only two public companies incorporated in North Dakota (one owned by Carl Icahn), and twelve shareholder proposals sponsored by activist investors to reincorporate firms in North Dakota have failed to gain shareholder support.”³⁸ Perhaps it is unsurprising that a competitive strategy that relied on activist shareholders to trigger reincorporations would be unsuccessful, given the general costs and difficulties of shareholder engagement.³⁹

32. Daines, *supra* note 12, at 1600.

33. JEFFREY W. BULLOCK, DEL. SEC’Y OF STATE, DELAWARE DIVISION OF CORPORATIONS: 2023 ANNUAL REPORT (2023).

34. Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 674 (2018); *see also* Daines, *supra* note 12, at 1600.

35. Anderson, *supra* note 34, at 687. Anderson measured firm sophistication using markers including choice of law firm and location of headquarters. *Id.* at 677–82.

36. Barzua, *supra* note 13, at 3.

37. Joshua P. Fershee, *The North Dakota Publicly Traded Corporations Act: A Branding Initiative Without a (North Dakota) Brand*, 84 N.D. L. REV. 1085 (2008). One scholar argued that North Dakota was doomed from the start. Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043 (2008). Notably, the state did not establish a business court even as it attempted to compete. *See id.* at 1045.

38. Ofer Eldar & Gabriel Rautenberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 216.

39. *See* Alex Gorman, *Exit vs. Voice: A Comparison of Divestment and Shareholder Engagement*, 72 N.Y.U. ANN. SURV. AM. L. 113, 147 (2017).

2. Wyoming

Wyoming has been another prominent competitor.⁴⁰ Though they are the smallest state by population, they have sought to be on the cutting edge of corporate law for some time now. In 1977, Wyoming was the first state to introduce the limited liability company as a means of attracting business to the state.⁴¹ Today, the state focuses on attracting incorporations by being the most friendly for blockchain and cryptocurrency-based businesses.⁴² In order to do so, the state “passed avant-garde legislation to provide a safe harbor for digital asset companies” and passed a law to create its own chancery court in 2019.⁴³ Wyoming has been quite successful in attracting the incorporation of LLCs, though they do not have the same pull as Delaware when it comes to attracting major corporations.⁴⁴

3. Nevada

Nevada is the state that has been most successful in the competition to detract from Delaware’s dominance in incorporations thus far. According to data collected in 2016, Nevada is the state of incorporation for 22.3% of all public corporations.⁴⁵ The state has succeeded in attracting the reincorporation of several major companies, including X and Neuralink.⁴⁶ Nevada offers a relatively relaxed body of corporate law designed to attract management away from the traditional choice of Delaware.⁴⁷ Nevada corporate law is, by design, incredibly protective of management. The state makes exculpation for breaches of the duties of care, loyalty, and good faith the default for businesses that incorporate there.⁴⁸ Personal liability for breaches of fiduciary duties only happens in cases where there is “intentional misconduct, fraud or a knowing violation of law,” a standard that the Nevada courts have considered a very high bar to meet.⁴⁹ A

40. Pierluigi Matera, *Delaware’s Dominance, Wyoming’s Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73 (2022).

41. *Id.* at 124.

42. *Id.*

43. *Id.* at 79; *see also Chancery Court*, WYO. JUD. BRANCH, <https://www.courts.state.wy.us/chancery-court/about-the-chancery-court/> [https://perma.cc/3GV8-AZTR].

44. Wyoming even recently overtook Delaware in incorporations per capita. Ana Muñoz Padrós, *An Explosion of LLCs: The Wyoming Angle*, OPENCORPORATES (Dec. 11, 2024), <https://blog.open-corporates.com/2024/12/11/an-explosion-of-llcs-the-wyoming-angle/> [https://perma.cc/9JYH-AJUR].

45. Anderson, *supra* note 34, at 674.

46. Barzuza, *supra* note 13, at 1.

47. *Id.* at 4.

48. *Id.* at 23. Delaware does allow exculpation for the duty of care, however, the business must “opt-in” by adding an exculpation provision to their articles of incorporation as opposed to exculpation being the default. DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

49. Barzuza, *supra* note 13, at 23–24; NEV. REV. STAT. § 78.138(7)(b)(2) (2025).

downside of this management favoritism, however, is that these reincorporations can sometimes be a subject of shareholder contention. TripAdvisor is still undergoing shareholder litigation which accuses its Nevada reincorporation of being a self-dealing transaction on behalf of controlling shareholder Greg Maffei.⁵⁰

II. TEXAS VS. DELAWARE: COMPARING THE SCHEME OF THE TEXAS BUSINESS COURTS TO THE DELAWARE COURT OF CHANCERY

Now that Texas has entered the ring, it becomes important to assess how its offerings compare to Delaware and make a prediction on whether it will sink or swim. While many factors can be at play in assessing how competitive a state is for incorporation, the main focus of this Note is to address the scheme of the freshly established Texas Business Courts and compare Texas’s scheme to the Delaware Chancery Court.

The scheme of the new Texas Business Courts has multiple notable features that could hinder or help the state’s attempt to compete for incorporations. This Part identifies five of these significant features and how they compare to their analogs in the Delaware Court of Chancery.

A. System of Judge Selection and Judge Terms of Office

The initial business court judges are appointed by the Texas governor with the advice and consent of the state senate, and serve two-year terms.⁵¹ This initial selection is a temporary departure from how Texas typically chooses its judges, which is through partisan elections.⁵² In the coming election cycles, these business court seats will subsequently be up for election or re-election.⁵³ The Texas judges are, and are expected to remain,

50. Barzuza, *supra* note 13, at 12. For a recent update on this litigation, see Gail Weinstein, Philip Richter & Steven Epstein, *Delaware Supreme Court Overturns Tripadvisor Decision, Providing a Clearer Path for Reincorporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2025), <https://corpgov.law.harvard.edu/2025/02/27/delaware-supreme-court-overturns-tripadvisor-decision-providing-a-clearer-path-for-reincorporation/> [https://perma.cc/YS4M-H98M]. Given the Delaware Supreme Court’s decision that the business judgment rule applies to the transaction, TripAdvisor is highly likely to win its case, and future reincorporations by other similarly situated companies are less likely to be challenged. *Id.*

51. TEX. GOV’T CODE ANN. § 25A.009 (West 2025). Other requirements include having “10 or more years of experience” practicing complex civil business litigation, practicing business transaction law, or serving as a judge of a Texas court with civil jurisdiction. GOV’T § 25A.008(a)(4).

52. MARK P. JONES, POL. & ELECTIONS, THE SELECTION OF JUDGES IN TEXAS: ANALYSIS OF THE CURRENT SYSTEM AND OF THE PRINCIPAL REFORM OPTIONS (2017).

53. Meshach Y. Rhoades & Amber Rose Gonzales, *Texas Creates Two New Courts: State Supreme Court Upholds Legislature’s Right to Create Statewide Court of Appeals*, CROWELL (Aug. 30, 2024), <https://www.crowell.com/en/insights/client-alerts/texas-creates-two-new-courts-state-supreme-court-upholds-legislatures-right-to-create-statewide-court-of-appeals> [https://perma.cc/V5A7-XY3C].

highly partisan.⁵⁴ Notably, all three justices currently appointed to Texas's new statewide specialized business court of appeals, the Fifteenth Circuit, are Republicans, and it is anticipated that they will remain that way in the future.⁵⁵

1. Judicial Selection as Compared to Delaware

When it comes to the Delaware Court of Chancery, judges are nominated by the governor and confirmed by the state senate.⁵⁶ The governor is required to choose the nominee from a list provided by the state's bipartisan Judicial Nominating Commission.⁵⁷ The Commission focuses heavily on merit and political balance, as Delaware's Constitution has required that judges be evenly divided between the political parties since 1897.⁵⁸

Corporate law scholars Ofer Eldar and Gabriel Rautenberg suggest that strong partisanship (in both the legislature and judiciary) in either direction can be unattractive for incorporations as it tends to place greater power in the hands of management.⁵⁹ They write:

Although the form of such managerialist laws appears to differ based on whether the control is in the hands of Democrats or Republicans, both forms of partisan influence lead to a similar outcome in terms of the allocation of corporate authority between shareholders and management—to greater managerial discretion and a lower likelihood of questioning corporate decision-making through shareholder lawsuits.⁶⁰

While this management bias may appear to be a competitive advantage, it can be a turn-off for shareholders who worry that their rights and interests will be compromised for the sake of managerial power; therefore, “market-oriented firms are likely to resist incorporating in states where corporate law-making and adjudication are highly partisan.”⁶¹ A management team’s

54. *Id.*

55. *Id.* In Texas's other two statewide courts, “all 18 justices combined ran as Republicans. This indicates that the Fifteenth is all but guaranteed to remain a panel of three Republicans when the current justices’ initial term expires in 2026.” *Id.* For more about the Fifteenth Circuit Court of Appeals, see discussion *infra* Section II.D.

56. Holland, *supra* note 30, at 776.

57. *Id.* at 777.

58. *Id.*; DEL. CONST. art. IV, § 3.

59. Eldar & Rautenberg, *supra* note 38, at 214. They note from their research that “Democratic control is associated with anti-takeover and pro-stakeholder statutes, while Republican controlled legislatures seem to favor certain statutes that restrict the litigation liability of corporate managers.” *Id.* at 214 n.185.

60. *Id.* at 214.

61. *Id.* at 218.

decision to reincorporate in a state whose business courts are as partisan as Texas’s could make some shareholders uneasy. The long-standing and nonpartisan system of judicial selection found in Delaware, focused on merit and expertise, lends an air of neutrality to its judges that the Texas courts could be criticized as lacking.

2. Judicial Term Lengths as Compared to Delaware

Another major distinction between Texas Business Court judges and Delaware judges is that the latter serve twelve-year terms, as opposed to the two-year terms of the former.⁶² The significant length of judicial terms in Delaware adds the advantage of case stability that the comparatively shorter terms of the Texas judges do not offer.⁶³ While Texas judges can always be re-elected, their short-term tenures present a looming risk that a case would have to change hands (perhaps several times) while still in progress.⁶⁴ The potentially frequent shifting of judges during complex business litigation would frustrate the efficiency of the Texas system.

Ultimately, Delaware’s system of judicial selection and sizable term lengths is positioned to inspire a sense of impartiality and stability that Texas’s system is not currently equipped to match.⁶⁵

B. Jurisdictional Requirements

The Texas Business Courts have set in place substantial amount-in-controversy thresholds to establish jurisdiction.⁶⁶ There is a ten million dollar minimum threshold for commercial or contract disputes and

62. DEL. CODE ANN. tit. 10, § 906 (2025).

63. See Madlin Mekelburg & Ryan Autullo, *Elon Musk Moving Tesla HQ Boosts Texas Plan to Rival Delaware Business Courts*, BLOOMBERG L. (Aug. 28, 2024, 6:05 AM), www.bloomberg.com/product/blaw/bloombergterminalnews/bloomberg-terminal-news/SI423ET0G1KW?criteria_id=89aca7850ab268cad7a8f4f5f808862a [https://perma.cc/649S-FRDQ].

64. *Id.*

65. Another concern that has been expressed concerning the Texas Business Court judges is that their salaries may not be competitive enough to attract top talent to judicial appointments. Ryan Autullo, *Low Pay Plagues Judicial Recruitment in New Texas Business Court*, BLOOMBERG L. (Dec. 14, 2023, 5:00 AM), www.bloomberg.com/bloombergnews/litigation/X4SHCNVC000000 [https://perma.cc/45WN-SALR]. The compensation for Texas Business Court judges is set at a base of \$140,000, whereas in Delaware it is \$205,600. TEX. GOV’T CODE ANN. § 659.012 (West 2025); *Survey of Judicial Salaries*, NAT’L CTR. FOR STATE CTS. (July 1, 2025), www.ncsc.org/resources-courts/state-state-tracking-judicial-salaries [https://perma.cc/X3RB-XXYT]. Some amount of the salary gap might be accounted for in that Texas does not have individual income tax, and in that the cost of living in Texas is somewhat lower than the national average, whereas the cost of living in Delaware is slightly higher than average (this calculation does not account for variation by city within the states). See *Cost of Living Index by State 2025*, WORLD POPULATION REV. (2025), worldpopulationreview.com/state-rankings/cost-of-living-index-by-state [https://perma.cc/B2Z9-9AKH].

66. Norman & Burningham, *supra* note 4.

violations of the finance or business code, and a five million dollar threshold for governance and security disputes.⁶⁷ Unlike Texas's high bar to entry, Delaware's Court of Chancery has jurisdiction to hear all cases in equity.⁶⁸ Texas's narrowed focus may help it to maintain a high level of efficiency, though Delaware's Court of Chancery is already famously speedy in spite of its wide jurisdictional capture.⁶⁹

C. Jury Trials

The Texas Constitution is highly protective of the right to a jury trial; as such, the right to a jury trial in the Texas Business Courts is preserved where required by Texas constitutional law.⁷⁰ Article 5, Section 10 of the Texas Constitution states: "In the trial of all causes in the district courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury."⁷¹ This requires that, when the jury right is invoked, juries resolve issues of fact in both legal and equitable causes.⁷² The involvement of juries in complex business litigation, however, has long been disfavored by corporate higher-ups.⁷³ Allowing jurors a decisive role in complex corporate cases can lead to unpredictable results and significant punitive damages.⁷⁴ The inclusion of juries can also "introduce complexities that could potentially impact the efficiency and expeditious nature of corporate legal proceedings."⁷⁵

While there is a right to a jury trial for civil trials in Delaware as well, the right applies to cases in law and does not extend to cases in equity.⁷⁶

67. TEX. GOV'T CODE ANN. § 25A.004 (West 2025). If a party to the action is a publicly traded company, the five-million-dollar threshold will not be required for governance and security disputes. GOV'T § 25A.004(c).

68. Applebaum et al., *supra* note 24, at 2058. For a history of how equity jurisdiction was defined in Delaware throughout the years, see William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery – 1792-1992*, 18 DEL. J. CORP. L. 819 (1993).

69. Holland, *supra* note 30, at 777–78.

70. TEX. GOV'T CODE ANN. § 25A.015(a) (West 2025). The right to a jury trial is particularly sacred under Texas constitutional law: "The framers of [the] present Texas Constitution considered this right so important that they used sweeping and emphatic language to guarantee it not once, but twice." *In re Troy S. Poe Tr.*, 646 S.W.3d 771, 781 (Tex. 2022) (Busby, J., concurring); *see* TEX. CONST. art. 1, § 15; *id.* art. 5, § 10.

71. *Id.* art. 5, § 10.

72. *In re Troy S. Poe Tr.*, 646 S.W.3d at 778.

73. *See generally* Gene Schaerr & Jed Brinton, *Business and Jury Trials: The Framers' Vision Versus Modern Reality*, 71 OHIO ST. L.J. 1055 (2010); VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000).

74. Schaerr & Brinton, *supra* note 73, at 1069.

75. Alon-Beck, *supra* note 15, at 43–44.

76. The right to a jury trial in civil cases in Delaware is less clear from the Delaware Constitution. The state's 1897 Bill of Rights vaguely declares that "[t]rial by jury shall be as heretofore." DEL. CONST.

Because the Delaware Court of Chancery is strictly a court of equity, it does not oversee any jury trials, providing the benefit of increased efficiency and predictability in proceedings.⁷⁷ A litigant seeking a jury trial in Delaware would have to bring a case in law (as opposed to equity) and go through the Superior Court, Delaware’s court of general jurisdiction.

Texas’s more expansive right to trial by jury could be viewed as a substantial drawback of Texas relative to Delaware incorporation, given the risks and inefficiencies presented by jury trials. However, for the high-stakes cases that will end up in the Texas Business Court system, parties in privity with one another are highly likely to have already enacted contractual provisions waiving the right to a trial by jury; such waivers are upheld under Texas law.⁷⁸ Still, if litigation is brought on a matter where the two parties were not in privity or otherwise did not waive their right to a jury, the invocation of the right could add significant unpredictability to case outcomes and provide plaintiffs the opportunity to try to “game” the jury system.⁷⁹

D. System of Appeals

The Texas Business Courts will come alongside the addition of a Fifteenth Circuit Court of Appeals. This court will have statewide intermediate appellate jurisdiction, including exclusive appellate jurisdiction over claims arising from the Texas Business Courts.⁸⁰ This

art. I, § 4 (incorporating the 1897 Delaware Bill of Rights in Article I of the Delaware Constitution). However, the Supreme Court of Delaware has affirmed that there is a right to “trial by jury in civil actions at law with regard to issues of fact.” *Baird v. Owczarek*, 93 A.3d 1222, 1227 (Del. 2014) (emphasis omitted); *see also* *Park Oil, Inc. v. Getty Refin. & Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979) (“The right to a jury trial, however, applies to an action at law; it does not apply in an equity suit.”).

77. Alon-Beck, *supra* note 15, at 20, 26.

78. See Philip Silberman, *Waiving Trial by Jury in a Contract: What You Need to Know in Texas*, SILBERMAN L. FIRM, PLLC (June 28, 2024), <https://silblawfirm.com/litigation/waiving-trial-by-jury-in-a-contract-what-you-need-to-know-in-texas> [https://perma.cc/E3RQ-FQ9W].

79. A federal Texas district court had already attracted patent plaintiffs seeking to “game” the jury system, in part owing to the locale’s “property rights-favoring jury pool” and a judge who believed “patentees are entitled to a jury trial on validity in most cases.” J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 438, 460 (2021). Because this particular judge was the only one serving the Waco division of the Western District of Texas, plaintiffs were guaranteed to have their case before him when they filed in the Waco division. *Id.* at 424. This “gaming” ended with a judicial order to distribute these cases to other judges in the district. Debra Cassens Weiss, *Federal Judge Sitting atop Mound of Patent Litigation Loses Perch with Equitable-Distribution Order*, ABAJOURNAL (July 27, 2022, 12:26 PM), <https://www.abajournal.com/news/article/federal-judge-sitting-atop-mound-of-patent-litigation-loses-perch-with-equitable-distribution-order> [https://perma.cc/DX22-YGWG].

80. TEX. GOV’T CODE ANN. § 22.201 (West 2025); *Fifteenth Court of Appeals*, TEX. JUD. BRANCH, <https://www.txcourts.gov/15thcoa/> [https://perma.cc/6HSU-45QS]. The Fifteenth Circuit also explicitly has appellate jurisdiction over matters involving the state. *Id.*

scheme for business court appeals is the first of its kind—no other state business court schemes have a designated business appellate court.⁸¹ Having a dedicated court of appeals for business matters could help the state efficiently handle corporate litigation and quickly develop state caselaw. Yet, the Fifteenth Circuit Court has already faced litigation challenging the constitutionality of its statewide jurisdiction. Still, the Texas Supreme Court found the scheme constitutional.⁸²

In Delaware, “[a]ppeals from the Court of Chancery . . . go directly to the Delaware Supreme Court”; there is no intermediate appellate court.⁸³ Additionally, “parties have an absolute right of appeal” for judgments issued by the Chancery Court.⁸⁴ The Delaware Supreme Court has a norm of issuing unanimous decisions, making the final determinations on corporate law relatively clear, compared to states in which the highest courts frequently issue multiple concurrences and dissents to accompany their decisions.⁸⁵

Texas’s novel Fifteenth Circuit Court of Appeals may help the state to rapidly develop a more robust and decisive corporate caselaw. Still, Delaware’s system of appeals to the state Supreme Court has unique benefits, given the Court’s track record for unanimity.

E. Issuing Opinions

Litigants in Delaware courts benefit from years of precedent and the Chancery Court’s tradition of issuing written opinions.⁸⁶ The court’s

81. Norman & Burningham, *supra* note 4.

82. *In re Dallas Cnty.*, 697 S.W.3d 142 (Tex. 2024). In a controversial move, the Fifteenth Circuit issued two letters suggesting that they have appellate jurisdiction over civil cases of *any* kind, a conclusion that could invite forum shopping by litigants seeking the Circuit’s entirely Republican panel of judges. Ryan Autullo, *Texas Court’s Wider Authority Invites Shopping, Deluge (Correct)*, BLOOMBERG L. (Feb. 14, 2025, 6:19 PM), <https://news.bloomberglaw.com/litigation/texas-courts-unexpected-jurisdiction-invites-shopping-deluge> [https://perma.cc/K3PY-XGZA]. However, the Texas Supreme Court has already rejected this sweeping view of the appellate court’s jurisdiction, ruling that the Fifteenth Circuit is “limited to resolving only cases involving the state and complex business disputes.” Ryan Autullo, *Texas Justices Limit Statewide Court to Hearing Certain Appeals*, BLOOMBERG L. (Mar. 14, 2025, 11:45 AM), <https://www.bloomberglaw.com/bloombergnews/litigation/XAC84MC000000> [https://perma.cc/X89A-M357]; *Kelley v. Homminga*, 706 S.W.3d 829 (Tex. 2025).

83. Holland, *supra* note 30, at 775.

84. *Id.*

85. *Id.* at 776. In 2020, 97.9% of the Delaware Supreme Court’s four hundred twenty-six decisions were decided unanimously. *Delaware Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Delaware_Supreme_Court [https://perma.cc/4AJD-KF6X].

86. See *Litigation in the Delaware Court of Chancery and the Delaware Supreme Court*, DELAWARE.GOV, <https://corplaw.delaware.gov/delaware-court-chancery-supreme-court/> [https://perma.cc/XQ8T-X3L6]; see also DEL. CODE ANN. tit. 10, § 1961 (2025) (pertaining to publication of Delaware Supreme Court, Chancery Court, and Superior Court opinions).

precedent gives businesses predictability as to how corporate issues will shake out in litigation.⁸⁷ This predictability helps to guide corporate decision-making by making executives and directors aware of the litigation risks associated with their actions. Acknowledging the power of precedent, the Texas Business Courts are making intentional efforts to build up their caselaw through written opinions.

In a departure from most trial courts in Texas, the trial-level business courts are issuing opinions as a means of developing their body of corporate law.⁸⁸ In aiding these efforts, the business court judges are enabled by statute to hire staff attorneys to help them issue these opinions (another departure from Texas trial courts).⁸⁹ These opinions are publicly available on the Texas Judicial Branch website and are easily citable.⁹⁰

The Texas legislature has also recently passed a bill that allows the Texas Business Courts to issue advisory opinions.⁹¹ Specifically, the bill allows:

[C]orporations who are trying to establish committees of independent and disinterested directors to petition a court “to hold an evidentiary hearing to determine whether the directors appointed to the committee are independent and disinterested with respect to any transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer.”⁹²

Allowing corporations to establish a dispositive determination of director “independence” in potentially conflicted transactions (outside of the context of post-facto litigation) would be a major benefit for litigants in Texas. It could give Texas corporations an advantage over ones in Delaware, where the “test for determining whether a director is independent” has been accused of growing “vague and subjective” (at least up until the passage of S.B. 21).⁹³

87. See discussion *supra* Section I.C.

88. See TEX. R. CIV. P. 360(a)–(b). Rule 360 lays out when written opinions in Texas Business Court actions must or may be issued: “(a) *When Required*. A business court judge must issue a written opinion: (1) in connection with a dispositive ruling, on the request of a party; and (2) on an issue important to the jurisprudence of the state, regardless of request. (b) *When Permitted*. A business court judge may issue a written opinion in connection with any order.” As of July 2025, thirty-six opinions have been issued. *Business Court - Opinions*, TEX. JUD. BRANCH (Aug. 11, 2025), <https://www.txcourts.gov/businesscourt/opinions/> [<https://perma.cc/W33N-U4NX>].

89. TEX. GOV’T CODE ANN. § 25A.017(i) (West 2025).

90. *Business Court - Opinions*, *supra* note 88. The opinions are also available on Westlaw, published under their own specific reporter name: “Tex. Bus.”

91. S.B. 29, 9th Leg., Reg. Sess. (Tex. 2025); 2025 Tex. Gen. Laws ch. 21; *see also* Jonathan Macey & Roberta Romano, *Texas Is Disrupting Delaware’s Dominance Through Innovation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 7, 2025), <https://corpgov.law.harvard.edu/2025/03/07/texas-is-disrupting-delawares-dominance-through-innovation/> [<https://perma.cc/N265-YDC4>].

92. Macey & Romano, *supra* note 91 (quoting S.B. 29, 89th Leg., Reg. Sess. (Tex. 2025)).

93. *Id.* For more discussion on S.B. 21, see discussion *infra* Part III.

For businesses taking a wait-and-see approach to reincorporation in Texas, the accessibility and abundance of written opinions could help corporations assess whether to ultimately make the move.

F. Considering Texas vs. Delaware Corporate Law

When it comes to the actual substance of the states' corporate law, Texas and Delaware do not actually (currently) differ greatly.⁹⁴ As a key example, like Delaware (and unlike Nevada), Texas does not allow for the waiver of the duties of loyalty and good faith.⁹⁵ On the plus side for management, reincorporation in Texas is less likely to be viewed as a self-interested transaction than a reincorporation in Nevada.⁹⁶ On the downside, there is less of a "value-add" in terms of increasing managerial power when compared to the option of reincorporating in Nevada.

Before the passage of S.B. 21, scholars critiqued the Delaware courts' recent decisions on controller-conflicted transactions for being too vague and too tough on management.⁹⁷ While Texas has its own rules for self-dealing transactions,⁹⁸ a move to the state could be a means of avoiding the more complicated Delaware precedent that was in place before S.B. 21. In fact, many of the high-profile "DExit" threats come from corporations with controlling shareholders.⁹⁹ Now that S.B. 21 has addressed these issues, entities will be far less motivated to reincorporate in Texas.

Ultimately, as Tesla's reincorporation demonstrates, a business's decision to reincorporate in Texas might be more motivated by the desire to

94. Barzuza, *supra* note 13, at 37; Francis, *supra* note 5.

95. TEX. BUS. ORGS. CODE ANN. § 7.001(c) (West 2025).

96. Barzuza, *supra* note 13, at 37.

97. See Macey & Romano, *supra* note 91; Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 544 (2025). In the state, an "entire fairness" standard is triggered when a corporation has a controlling stockholder who engages in a conflicted transaction. *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012). For an argument that the recent controlling-shareholder decisions are actually a "conservative and common-sense application of longstanding equitable principles," see Ben Potts, Andrew Blumberg & Tom James, *Delaware Corporate Law Myth-Busting: The "Expanding Definition" of Controlling Stockholder*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 21, 2025), <https://corpgov.law.harvard.edu/2025/02/21/delaware-corporate-law-myth-busting-the-expanding-definition-of-controlling-stockholder/> [https://perma.cc/LYG9-ACP4].

98. TEX. BUS. ORGS. CODE ANN. § 21.418 (West 2025). Texas's caselaw on controller-conflicted transactions remains relatively undeveloped in comparison to Delaware.

99. See Michael Maugans, *DExit Pits Chancery Against Controlling Stockholders*, BLOOMBERG L. (Feb. 20, 2025, 5:00 AM), <https://www.bloomberg.com/bloombergnews/bloomberg-law-analysis/XAQUSGKK000000> [https://perma.cc/LCV5-Z62U]; see also Bainbridge, *supra* note 97, at 534.

vent frustrations about Delaware than about any substantive legal benefits of the Texas Business Courts.¹⁰⁰

III. NEW LEGISLATION AND FUTURE CONCERNS

Delaware’s Chancery Court still seems to hold several powerful advantages over the Texas Business Courts, including its even partisanship, efficiency, lack of jury trials for cases in equity, and years of precedent. Yet, for businesses seeking to break away from Delaware, Texas’s arms are open wide and offering unique benefits of their own. Either way, the newly intensified competition for incorporations could have concerning effects.

A. Is S.B. 21 Beginning a Race to the Bottom?

Scholars have long recognized and debated the fear that competition for incorporations will become a “race to the bottom.”¹⁰¹ In his 1974 work, *Federalism and Corporate Law: Reflections upon Delaware*, corporate law authority William Cary expressed concerns that Delaware’s “creation of a ‘favorable climate’ for new incorporations” was encouraging a legal system that attracted and benefited management much to the downfall of shareholders.¹⁰² What is worse, Cary noted, is that Delaware’s success in creating a favorable place of incorporation that “watered the rights of shareholders vis-à-vis management down to a thin gruel” could motivate other states to similarly destroy shareholder protections.¹⁰³

100. Musk is not the only person to make a public ado about feeling “wronged” by the Delaware courts. TransPerfect CEO Phil Shawe launched a smear campaign against Delaware’s judiciary and Chancery Judge McCormick, leading the Delaware Bar Association to release a statement defending the courts. *See* Press Release, Delaware State Bar Association’s Response to Public Comment Committee, The Delaware Bar Stands with Chancellor McCormick (Aug. 29, 2024), <https://www.dsba.org/news-events/> [<https://perma.cc/D8BF-43Y5>]; *see also* Mary F. Dugan, Richard D. Kirk & Steve A. Spence, *Reminder: This Is What Delawareans Need to Know About the TransPerfect Case*, DEL. STATE BAR ASS’N (Jan. 26, 2024), <https://www.dsba.org/tp/> [<https://perma.cc/L8WR-QR69>]. Judge McCormick also presided over the aforementioned Elon Musk case, for which she was berated by Musk and his supporters. *See* Katie Tabeling, *Pushed by Legal Community, Delaware Bar Defends Chancery Court*, DEL. BUS. TIMES (Dec. 16, 2024), <https://delawarebusinesstimes.com/news/delaware-bar-defends/> [<https://perma.cc/6E2P-DYRG>]; Jef Feeley & Dana Hull, *Delaware Judge Who Rejected Musk’s Payday Faces Backlash*, BLOOMBERG L. (Dec. 3, 2024, 5:57 PM), <https://news.bloomberglaw.com/litigation/delaware-judge-who-rejected-musks-payday-faces-backlash> [<https://perma.cc/MU79-VXWN>]; *see also* Potts et al., *supra* note 97.

101. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974).

102. *Id.* at 672. “The view is widely held that Delaware corporate decisions lean toward the status quo and adhere to minimal standards of director responsibility both to the corporation and its shareholders.” *Id.*

103. *Id.* at 666.

Cary's fears were not unfounded. Musk's vocal exit from Delaware and the threat of exit by other major companies led to the introduction and passage of S.B. 21, which offers amendments to the Delaware General Corporation Law (DGCL) that gut shareholder rights even farther, as well as shrink the Chancery Court's field of discretion in its decision making.¹⁰⁴ In a brow-raising move, this legislation cut past the traditional process of working with the Delaware Bar's Corporation Law Council to formulate DGCL amendments.¹⁰⁵ Key changes involve major cutbacks on shareholder access to records in discovery, including imposing a three-year lookback period and limiting scrutiny for controller transactions.¹⁰⁶ Another amendment creates a bright-line rule that a stockholder, no matter how much influence he or she exercises, "is a controller only if the stockholder owns a majority or holds at least one-third plus managerial authority equivalent to a majority owner."¹⁰⁷ This particular rule would have precluded Elon Musk from controller status in *Tornetta* and prevented the application of controller scrutiny.¹⁰⁸

Amid the Delaware legislature's scramble to stop a worrisome trend of "DExiting," some corporate scholars are skeptical that the threat of an "exodus" from Delaware is (or was) actually materializing in the first

104. See Talley et al., *supra* note 9; S.B. 21, 153d Gen. Assemb., 1st Sess. (Del. 2025); 85 Del. Laws ch. 6 (2025).

105. Talley et al., *supra* note 9. The traditional process for amendments is described as follows:

Amendments often begin with the "customers" of the corporate franchise themselves – the corporations who use the franchise, investors in those corporations, and their respective counsel and advisers. Those customers will report to local Delaware counsel their experience in using the corporate franchise and provide feedback with respect to ways to improve that experience. Local Delaware counsel, in turn, may suggest consideration of amendments reflecting the feedback of the various stakeholders to the Council. The Council, comprised of diverse representation of twenty-six plaintiff- and defense-side lawyers . . . as well as a representative of the Secretary of State's office, will consider such amendments, often through the assistance of focused committees comprising an even broader cross-section of the Delaware bar. Any such proposed amendments are presented to the General Assembly only if they are approved by the Corporation Law Section and the executive committee of the DSBA.

Eric S. Klinger-Wilensky, William M. Lafferty & John P. DiTomo, *Thirty Years Later – Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on Proposed Amendment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 20, 2025), <https://corpgov.law.harvard.edu/2025/02/20/thirty-years-later-why-corporations-continue-to-choose-delaware-general-perspectives-and-thoughts-on-proposed-amendment/> [https://perma.cc/4KWG-8B2M].

106. Talley et al., *supra* note 9; 85 Del. Laws ch. 6 (2025).

107. Talley et al., *supra* note 9.

108. *Id.*; see *supra* note 1.

place.¹⁰⁹ Other scholars worry about the magnitude and rush of these changes, in addition to their effects on shareholder rights.¹¹⁰

On the other hand, many commentators are calling S.B. 21 a step in the right direction toward more “balance” and “clarity” in Delaware corporate law.¹¹¹ Still, several supporters *and* skeptics called for the middle-ground solution of making the S.B. 21 changes optional.¹¹² Rather than mandate the new S.B. 21 provisions, this would have allowed “corporations to adopt these provisions voluntarily, through an explicit election in their corporate charters.”¹¹³

B. Considering Legitimacy

Regardless of whether S.B. 21 represents a step forward or backward for Delaware law, the process, timing, and context in which the bill was introduced is worth further scrutiny.

As noted throughout, this legislation arrived in a time of stress for Delaware as it navigates the threats of “DExit”—whether such threats are credible or not. It also comes during a time of harsh criticism of the Delaware judiciary by increasingly powerful persons.¹¹⁴ Further, S.B. 21 is strongly supported by Delaware Governor Matt Meyer, who took office in early 2025, and whose candidacy was backed by an extremely outspoken critic of the Delaware judiciary, TransPerfect CEO Philip Shawe.¹¹⁵

When news came out in late January that Meta was considering reincorporation outside of Delaware, Meyer called a virtual meeting with attorneys who had represented Meta and Tesla, among others, for a

109. See Stephen M. Bainbridge, *DExit Drivers: Is Delaware’s Dominance Threatened?*, 50 J. CORP. L. 823, 891 (2025); see also Jens Frankenreiter, *What the Past Can Teach Us About SB 21 and the Threat of Corporate Exodus*, CLS BLUE SKY BLOG (Mar. 12, 2025), <https://clsbluesky.law.columbia.edu/2025/03/12/what-the-past-can-teach-us-about-sb-21-and-the-threat-of-corporate-exodus/> [https://perma.cc/GGP3-TBAX].

110. See Talley et al., *supra* note 9; Lucian Bebchuk, *Delaware: The Empire Strikes Back*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2025), <https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/> [https://perma.cc/C867-FM9T].

111. Klinger-Wilensky et al., *supra* note 105; see also Bainbridge, *supra* note 97, at 80.

112. Eric Talley, Jeffrey N. Gordon & Stephen M. Bainbridge, *A Proposed Opt-In Feature for Delaware Senate Bill 21*, CLS BLUE SKY BLOG (Mar. 19, 2025), <https://clsbluesky.law.columbia.edu/2025/03/19/a-proposed-opt-in-feature-for-delaware-senate-bill-21/> [https://perma.cc/8T8C-9DPA].

113. Letter from John Armour et al., to the General Assembly of the State of Delaware (Mar. 18, 2025), <https://clsbluesky.law.columbia.edu/wp-content/uploads/sites/2/2025/03/here.pdf> [https://perma.cc/P64C-8639].

114. See *supra* notes 1, 100; see also *infra* note 115.

115. See Office of the Delaware Governor, *supra* note 9; Kolodny, *supra* note 7. Shawe has spent millions attempting to influence Delaware politics, including one million dollars on a PAC to support Meyer’s campaign. See Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES (Feb. 8, 2025), <https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html> [https://perma.cc/PTL8-7CKR]; see also *supra* note 100 and accompanying text.

“Discussion re: Corporate Franchise”; two weeks later, S.B. 21 was introduced.¹¹⁶ And, as previously stated, the legislature bypassed the traditional process, proposing amendments to the DGCL without working through the Delaware Bar’s Corporation Law Council.¹¹⁷

This suggests that the context in which S.B. 21 arose seems to be in contrast with the Delaware brand of “neutrality and balance.”¹¹⁸ This brand is perhaps more critical to Delaware’s primacy than has been acknowledged by Delaware’s executive and legislative branches. The University of Delaware’s Corporate Governance Chair, Charles Elson, noted that:

A final significant challenge to Delaware’s supremacy comes from within the state itself. . . . [S]hould the judiciary become politicized or the corporate regulatory process become subject to outside political manipulation, it will lose its critical reputation for neutrality and balance. This could pose the ultimate threat to its dominant position.”¹¹⁹

These same sentiments were echoed recently by skeptics of S.B. 21:

Delaware’s entire franchise relies on trust—that minority investors won’t be trampled and that controversies will be resolved with sophisticated equity-based jurisprudence. If these reforms are seen as a step too far in curtailing minority or derivative suits, it could fracture that trust and open the door to alternative states (or even foreign jurisdictions) offering a more balanced environment. The result could be the very exodus the legislature had hoped to avoid.¹²⁰

Delaware lawmakers must tread carefully when responding to any remaining or future fears of a mass “DExit.” While responding to legitimate concerns of management is, of course, quite important, it is dangerous to appear overly malleable to managerial pressure. Bypassing traditional procedures, failing to balance managerial interests with those of shareholders, and operating in ways that undermine the independence and

116. Lora Kolodny, *Meta’s Potential Exit from Delaware Had Governor Worried Enough to Call Special Weekend Meetings*, CNBC (Mar. 19, 2025, 1:10 PM), <https://www.cnbc.com/2025/03/19/meta-billions-of-dollars-at-stake-in-overhaul-delaware-corporate-law.html> [https://perma.cc/QGY8-AWKK] ; Xerxes Wilson, *Corporate Law Changes that Captured National Attention, Scrutiny Headed for House Vote*, DEL. ONLINE (Mar. 20, 2025, 8:50 PM), <https://www.delawareonline.com/story/news/politics/2025/03/20/controversial-changes-to-delaware-corporate-law-set-for-house-debate/82522911007/> [https://perma.cc/325Q-HAFQ].

117. See *supra* note 105 and accompanying text.

118. Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not, in CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE’S DOMINANCE OF CORPORATE LAW* 225, 237 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim & James Park eds., 2018).

119. *Id.*

120. Talley et al., *supra* note 9.

reputation of their judiciary could, in a twist of dramatic irony, be the actual downfall of Delaware’s dominance.

CONCLUSION

Texas’s scheme for its new business courts will provide significant incentives for businesses to incorporate in Texas, unique from other states that have attempted to compete with Delaware. However, the state will still struggle to compete with Delaware’s long-held dominance. While Texas’s high bars to jurisdiction, specialized appeals court, and proclivity for releasing written opinions will be a boon for efficiency in corporate litigation and the development of clear Texas state corporate caselaw, Texas fails to offer the strengths that help keep Delaware so dominant. The Delaware Chancery Court’s partisan-balanced judges, lengthy judicial terms, lack of jury trials in equitable cases, and decades of caselaw bring a sense of independence, stability, and efficiency to corporate litigation. For businesses that are unwilling to take the risks that come alongside a hyper-partisan judiciary, a potentially high judicial turnover rate, and expensive jury trial rights, reincorporation is unlikely. But for businesses that embrace risks and have a bone to pick with Delaware, à la Elon Musk and other controlling shareholders, perhaps Texas is the way to go.

Whether or not Texas, Nevada, or any other state is capable of overtaking Delaware’s primacy, many Delaware politicians are clearly sensitive to threats of a mass “DExit.” These lawmakers must be cautious in their reactions. Continuing down a path that undercuts the Delaware courts’ discretion and shareholder rights risks hampering the benefits that attract incorporations—neutrality and balance. As Delaware’s leaders continue to defend the state’s status as the go-to state of incorporation, they must remember to equally retain its reputation for neutral and balanced adjudications.

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