HAVENS FOR CORPORATE LAWBREAKING

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ABSTRACT

Whether corporations are obligated to maximize profits or if they ought to consider societal interests more broadly remains one of the most highly contested debates in corporate law. Yet even the fiercest defenders of the firm's profit motive concede that the corporation's profit-seeking function cannot justify breaking the law. As a matter of American corporate law, directors and officers are in breach of their fiduciary duties if they facilitate or engage in profit-maximizing illegal activities. Or so we thought.

This Essay reveals a troubling trend of jurisdictions undercutting the legal compliance obligations of directors and officers. The current legal architecture of American corporate law—which enables corporations to shop for applicable corporate law regardless of the location of their physical operations—encourages competition amongst jurisdictions to supply corporate charters. While often considered a strength of American corporate law, it can lead to perverse incentives. Notably, emerging jurisdictions supplying corporate law to American corporations, such as Nevada and the Cayman Islands, have broadly eliminated doctrines that enable shareholder suits against directors and officers who turn a blind eye to corporate lawbreaking. These jurisdictions have also erected a range of procedural barriers that preclude shareholders from holding directors and officers accountable when they actively participate in corporate lawbreaking.

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In documenting the rise of havens for corporate lawbreaking, this Essay offers two contributions to the literature. Descriptively, it shows how jurisdictional competition can strip away legal compliance obligations that have been widely understood as a "mandatory" feature of American corporate law. In doing so, it showcases that charter competition may not result in a singular version of corporate purpose, but rather may usher in different strands of corporate purpose as it relates to profit-maximizing illicit behavior. Normatively, it argues that public enforcement agencies apply heightened scrutiny to firms incorporated in lawbreaking havens to counteract the negative societal effects of unfettered choice for corporate charters while preserving the well-documented benefits of jurisdictional competition.

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INTRODUCTION

After experiencing a meteoric rise in corporate boardrooms and academic circles for the past decade, the movement demanding corporations to engage in socially responsible business practices appears to be in retreat. A growing list of high-profile firms, including Meta, McDonald's, and Walmart, have pulled the plug on diversity and racial equity initiatives launched just a few short years ago.[1] The six biggest banks in the United States, including Goldman Sachs and Bank of America, have also withdrawn from climate change initiatives.[2] These developments, which coincide with the new presidential administration in Washington D.C., appear to be driven by a renewed sense that corporations ought to abandon "woke" agendas to focus on maximizing profits.[3]

While the debate over profit maximization and social responsibility remains highly contentious, one area of consensus converges on the idea

1. *See* Kate Gibson & Emmet Lyons, *Meta Ends Diversity Programs, Joining McDonald's, Walmart and Other Major Companies to Back Off DEI*, CBS NEWS (Jan. 16, 2025, 2:56 PM), https://www.cbsnews.com/news/meta-dei-programs-mcdonalds-walmart-ford-diversity/ [https://perma.cc/Z3H2-FSJJ].

2. *See* Damien Gayle, *Six Big US Banks Quit Net Zero Alliance Before Trump Inauguration*, THE GUARDIAN (Jan. 8, 2025, 7:00 AM), https://www.theguardian.com/business/2025/jan/08/us-banks-quit-net-zero-alliance-before-trump-inauguration [https://perma.cc/HZ4X-CAKQ].

3. *See* Brooke Masters, *Vanguard Says Shareholders Can Vote for Profits over ESG Issues*, FIN. TIMES (Nov. 18, 2024), https://www.ft.com/content/f0516b4b-bdc3-4752-84f6-ee1dc9a7baff [https://perma.cc/ZBE9-F5J5].

that corporations cannot pursue profits by engaging in illicit activities.[4] With a few notable exceptions,[5] even the most loyal defenders of an academic theory known as shareholder primacy—conceptualizing the sole purpose of corporate directors and officers as maximizing shareholder profits[6]—adhere to the view that firms must operate within the boundaries of the law.[7]

This Essay reveals how competition among jurisdictions to supply corporate law can facilitate corporate lawbreaking, eroding the obligation of legal compliance previously presumed to be a mandatory feature of American corporate law.[8] The possible consequences are profound. Social media platform Twitter's re-incorporation from Delaware to Nevada in 2023, which came with its signature name change to X,[9] effectively constrains the company's shareholders from holding the directors accountable for failing to comply with data privacy laws.[10] California-based supplement company Herbalife's incorporation in the Cayman Islands effectively strips shareholders of a mechanism to hold the directors and officers accountable for bribing Chinese government officials in violation of the Foreign Corrupt Practices Act.[11] Brain implant company Neuralink's re-incorporation from Delaware to Nevada in 2024 means a lack of recourse by shareholders against the directors for facilitating a spectacle of legal

4. *See infra* Section I.B.

5. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("[M]anagers not only may but also should violate the rules when it is profitable to do so."). See *infra* Section II.B. for a full exposition.

6. Shareholder primacy is a loaded term in corporate law. The term is often used to refer to two different concepts: (1) the idea that corporations ought to be managed in the interest of shareholders, and (2) the idea that shareholders ought to have ultimate control over the corporation. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573 (2003). This Essay principally refers to shareholder primacy in the first sense.

7. *See, e.g.*, STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 14 (2023) ("Shareholder value maximization is thus fully consistent—indeed requires—playing fair within the rules of the game, engaging in open and free competition rather than pursuing monopoly status, eschewing deception and fraud, and obeying the law.").

8. *See infra* Section I.B.

9. *See* Alexa Corse, *Twitter Inc. Changes Its Name to X Corp. and Moves to Nevada*, WALL ST. J. (Apr. 12, 2023, 8:38 PM), https://www.wsj.com/articles/twitter-inc-changes-its-name-to-x-corp-and-moves-to-nevada-703ac892 [https://perma.cc/9VR7-Q64Y].

10. Press Release, U.S. Dep't of Just., Twitter Agrees with DOJ and FTC to Pay $150 Million Civil Penalty and to Implement Comprehensive Compliance Program to Resolve Alleged Data Privacy Violations (May 25, 2022), https://www.justice.gov/opa/pr/twitter-agrees-doj-and-ftc-pay-150-million-civil-penalty-and-implement-comprehensive [https://perma.cc/H3VS-M4F3].

11. Press Release, U.S. Dep't of Just., Herbalife Nutrition Ltd. Agrees to Pay over $122 Million to Resolve FCPA Case (Aug. 28, 2020), https://www.justice.gov/opa/pr/herbalife-nutrition-ltd-agrees-pay-over-122-million-resolve-fcpa-case [https://perma.cc/FLG4-5V3C].

violations, including U.S. Department of Transportation and U.S. Food and Drug Administration regulations.[12]

While a rich body of literature on "tax havens" documents how jurisdictional competition on a global scale enables corporate tax evasion,[13] there is virtually no scholarship on how corporations shopping for their place of incorporation can facilitate or deter corporate lawbreaking.[14] This is an unfortunate shortcoming given that many of the most shocking examples of corporate misbehavior—ranging from coal mine explosions and aircraft crashes to mass-scale Ponzi schemes—involve conduct that violates existing law.[15]

To a certain extent, this academic void is understandable. On the surface, the corporate codes of every state in the United States mandate that corporations can be only chartered for "lawful activities."[16] Well-known casebooks, treatises, and law review articles also understand the corporation's legal compliance obligation as a given.[17] Influential judicial opinions also maintain that directors and officers who steward business corporations "may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the

12. Marisa Taylor, *Exclusive: Musk Brain Implant Company Violated US Hazardous Material Transport Rules — Documents*, REUTERS (Jan. 26, 2024, 11:19 AM), https://www.reuters.com/technology/musk-brain-implant-company-violated-us-hazardous-material-transport-rules-2024-01-26/ [https://perma.cc/Y839-H5S9]; Dilara Irem Sancar, *Musk's Neuralink Brain Implant Company Cited by FDA over Animal Lab Issues*, CNBC (Feb. 29, 2024 12:57 PM), https://www.cnbc.com/2024/02/29/musks-neuralink-brain-implant-company-cited-by-fda-over-animal-lab-issues.html [https://perma.cc/P22D-L4L4].

13. *See, e.g.*, GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS (Teresa Lavender Fagan trans., Univ. of Chi. Press 2015) (2013); RONEN PALAN, RICHARD MURPHY & CHRISTIAN CHAVAGNEUX, TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 9–10 (2010); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1575, 1575 (2000); Noam Noked & Zachary Marcone, *Targeting Tax Avoidance Enablers*, 13 U.C. IRVINE L. REV. 1355 (2023); Omri Marian, *Home-Country Effects of Corporate Inversions*, 90 WASH. L. REV. 1, 3 (2015).

14. This stands in contrast to the robust body of scholarship debating the merits and perils of charter competition as a general matter. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 12 (1993); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101 (2018).

15. *See* ROBERT CHARLES CLARK, CORPORATE LAW 685 (1986); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 255 (2020).

16. *See infra* Section I.B. Correspondingly, "most corporate charters contain a generic statement that the purpose of the corporation is to engage in any lawful activity." Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1316 (2021).

17. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 419–29 (2002); CLARK, *supra* note 15, at 17–19, 677–81; MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(1) & cmt. g, § 4.01 (AM. L. INST. 2024).

entity."[18] Therefore, jurisdictional competition at first glance may appear to have little, if any, association with enabling or deterring corporate lawbreaking.

It is not that scholars are unaware of the market for corporate law in the United States. In the United States, a time-honored choice of law rule allows corporations to choose the corporate law governing their "internal affairs"—principally the legal relations between the firm's shareholders and managers—by freely choosing their place of incorporation.[19] Delaware has been the undisputed leader for the past century, supplying corporate law to roughly half of all publicly traded American corporations.[20] While generations of scholars have examined the merits and perils of corporate charter competition, legal compliance is widely understood as a mandatory rule largely immune to market forces.[21]

To be clear, legal compliance *is* a mandatory rule in America's leading corporate law jurisdiction. Delaware enshrines what can be conceptualized as a dual mandate for directors and officers tasked to steward modern corporations: the obligation to pursue profits while also putting in good faith efforts for the corporation to comply with the law.[22] When the two mandates conflict, the profit motive can take a backseat to the firm's legal compliance obligations.[23] In fact, the obligation to obey the law is one of the few sacrosanct obligations under Delaware corporate law that cannot be waived

18. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004).

19. Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 210 (2006). In recent decades, judges have extended the geographic scope of the internal affairs doctrine by allowing American corporations to incorporate in and be governed by the corporate law of foreign nations. *See* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1418–22 (2020) [hereinafter Moon, *Delaware's New Competition*] (synthesizing American conflict of laws jurisprudence extending the internal affairs doctrine to the international context).

20. Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 512 (2011) ("Roughly half of all publicly traded U.S. corporations are chartered in their headquarters state; nearly all the rest are incorporated in Delaware."); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003) ("Delaware has 'won' that race, as most large American firms incorporate there.").

21. *See infra* Section I.B.

22. Leo E. Strine, Jr., Response, *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 CORNELL L. REV. 1257, 1275 (2001) ("The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act.").

23. The recent wave of high-profile shareholder litigation in Delaware holding the directors of corporations accountable for legal violations is a paradigmatic example of the state's corporate law jurisprudence that does not endorse profit-seeking at all costs. *See infra* Section II.A.

through contracts.[24] Importantly, the muscularization of Delaware's legal compliance jurisprudence in recent decades has sent a powerful message to corporate America about their duties to detect and prevent corporate lawbreaking.[25]

In contrast, Delaware's emerging competitors—most prominently, Nevada and the Cayman Islands—have effectively eliminated oversight duties of directors and officers to monitor and prevent corporate lawbreaking.[26] These jurisdictions have also erected a number of powerful procedural barriers precluding shareholders from pleading viable suits even when directors and officers intentionally violate the law.[27] While maintaining a formalistic nod to legal compliance,[28] these jurisdictions have subtly yet significantly eroded the legal compliance obligations for any corporation willing to pay the requisite fees required to be chartered by their jurisdictions.[29] Perhaps, even more alarmingly, there is currently nothing that prevents a state or a foreign nation from offering a body of corporate law that completely eviscerates the legal compliance duties imposed on directors and officers of American corporations.

Appreciating the emergence of these corporate lawbreaking havens takes on urgent practical importance in light of a recent wave of firms re-incorporating out of Delaware. Within minutes of a Delaware judge in 2024 striking down Elon Musk's compensation package at Tesla reportedly worth around $50 billion,[30] Musk declared on X (formerly known as Twitter) to "never incorporate your company in the state of Delaware."[31] The potential impact of Elon Musk's widely publicized grudge against the state of Delaware should not be underestimated. Corporate boardrooms and their legal counsel across the United States are now seriously debating the

24. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2025). Such a provision is a rarity in American corporate law that is mostly constituted of enabling rules that are amenable to private sector preferences. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 2 (1991); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (describing the Delaware corporate law as "enhancing flexibility to engage in private ordering").

25. Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1881 (2021).

26. *See infra* Part II.

27. *See infra* Part II.

28. *See, e.g.*, NEV. REV. STAT. ANN. § 78.030(1) (West 2025) ("A person shall not establish a corporation for any illegal purpose . . . .").

29. States generally charge franchise taxes annually to firms incorporated in their jurisdictions, which can be a significant source of state government revenue. Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1209 (2001).

30. Tornetta v. Musk, 310 A.3d 430, 445 (Del. Ch. 2024).

31. Elon Musk (@elonmusk), X (Jan. 30, 2024, 5:14 PM), https://x.com/elonmusk/status/1752455348106166598 [https://perma.cc/VJ4W-FTVT].

possibility of leaving Delaware.[32] Tripadvisor, U-Haul, The Trade Desk, TransPerfect, Neuralink, and X are only a few examples of firms that have joined Tesla in moving their legal residence out of Delaware in recent years.[33]

The stakes are high. While the corporate form is central to the modern economy as we know it,[34] its foundational features—including the doctrine of limited liability[35]—are widely acknowledged to fuel the excessive risk-taking tendencies of business corporations.[36] Some view the core features of the modern corporate form to be "simply unsustainable—environmentally, socially, and economically."[37] Yet, statutory proposals aimed at gutting or reforming limited liability, while enjoying luminary status in prestigious law reviews and generating a large scholarly following, have failed to gain traction in the real world.[38]

Legal compliance obligations embedded in modern corporate law play an important yet underappreciated role in taming the excessive risk-seeking tendencies of modern business corporations.[39] It is a modest yet realistic way to infuse societal interests embedded in external bodies of law without radically gutting axiomatic features of modern corporate law.[40] While prosecutors and regulators also enforce substantive laws prohibiting corporate misconduct, the current framework relies heavily on the

32. *See, e.g.*, Priya Cherian Huskins, *Weighing the Move from Delaware: Key Considerations for Company Reincorporation*, FORBES (Oct. 9, 2024, 11:55 AM), https://www.forbes.com/sites/priyacherianhuskins/2024/10/09/weighing-the-move-from-delaware-key-considerations-for-company-reincorporation/ [https://perma.cc/Y3AQ-TQKW]; Amy L. Simmerman et al., *Client Advisories: Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, WILSON SONSINI (Apr. 23, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html [https://perma.cc/SU28-BUKP].

33. *See, e.g.*, Alison Frankel, *In Good Omen for Tesla, Delaware Judge OKs Vote on Ad Company's Move to Nevada*, REUTERS (Nov. 7, 2024, 4:02 PM), https://www.reuters.com/legal/government/column-good-omen-tesla-delaware-judge-oks-vote-ad-companys-move-nevada-2024-11-07/ [https:// perma.cc/85JP-BH4T].

34. Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1204–05 (2019) (book review); David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1317 (2007).

35. Limited liability is a canonical corporate law doctrine instructing that the firm's shareholders risk no more than the money they invest into the business enterprise. *See S*TEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 13 (2016).

36. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1879 (1991); Luca Enriques, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 79, 93 (3d ed. 2017).

37. Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1227 (2022).

38. *Id.*

39. *See infra* Section III.A.

40. *See* William J. Moon, *Beyond Profit Motives*, 122 MICH. L. REV. 1059, 1078 (2024) (reviewing BAINBRIDGE, *supra* note 7).

corporation's internal compliance systems to detect, prevent, and deter corporate lawbreaking.[41] Corporate law powerfully shapes the behavior of the movers and shakers of modern corporations—the directors and officers—who devise such internal compliance systems.[42] When no longer assumed to be a mandatory feature of American corporate law, we are able to have a more productive discussion about the proper calibration of legal compliance duties that ought to be demanded from directors and officers who steward modern corporations.

This Essay proceeds in three Parts. Part I contextualizes the recent wave of corporate migration out of Delaware within the broader literature on corporate charter competition. After tracing the evolution of legal compliance duties mandated by corporate law, it presents a framework to conceptualize interests at stake in corporate charter competition beyond standard discussions about shareholder value. Part II takes a deep dive into the corporate laws of Nevada and the Cayman Islands in relation to Delaware to illustrate how jurisdictional competition can enable managers of American corporations to evade legal compliance obligations previously presumed to be mandatory. Part III draws lessons. It highlights both descriptive and normative questions ripe for scholarly scrutiny and discusses the broader policy implications of this analysis.

I. CHARTER COMPETITION AND CORPORATE LAWBREAKING

As a foundational debate in American corporate law, generations of legal academics have contributed to understanding the nature and effects of corporate charter competition. This literature, dubbed one of the most important debates in corporate law,[43] is animated by a longstanding disagreement over the normative desirability of leaving corporate law amenable to private sector preferences. The recent wave of corporate migration out of Delaware offers a fresh lens to re-examine some of the foundational intellectual building blocks underlying the study of American corporate law. Section I.A synthesizes this literature, which focuses predominantly on whether any given jurisdiction's corporate law enhances shareholder value. Section I.B focuses on how charter competition can

41. Miriam H. Baer, *Personhood, Procedure and the Endurance of Corporate Compliance*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 320, 341 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

42. Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 708–09; Lisa M. Fairfax, *Government Governance and the Need to Reconcile Government Regulation with Board Fiduciary Duties*, 95 MINN. L. REV. 1692, 1693 (2011).

43. Moon, *Delaware's New Competition*, *supra* note 19, at 1403.

erode the firm's legal compliance obligation—a feature that has yet to be detected in part because of the legacy of the debate that has (understandably) focused on enhancing shareholder value.

A. What's Good for Shareholders?

In the United States, corporate law is an unusual body of law that does not track the location of corporate activity.[44] Instead, a time-honored choice of law rule called the internal affairs doctrine instructs the application of corporate law of the firm's place of incorporation regardless of the location of corporate activity.[45] Firms are effectively free to choose the corporate law of any state—and in fact, any nation—by obtaining a charter from that jurisdiction.[46]

While competition between states to supply corporate charters took off in the late nineteenth century,[47] the modern academic debate over the subject is generally traced to the 1970s when Bill Cary published a scorching indictment of Delaware corporate law that would go on to become one of the most cited pieces ever to grace the pages of the *Yale Law Journal*.[48] Cary famously argued that competition between states to supply corporate charters induced states to "race for the bottom" by adopting laws that favor directors and officers over dispersed shareholders.[49] According to Cary, this enabled the "management to operate with minimum interference,"[50] as evidenced by the elimination of mandatory rules that "watered the rights of shareholders vis-à-vis management down to a thin gruel."[51]

Despite enjoying a period of scholarly consensus,[52] Cary's thesis would be quickly challenged by a forceful retort written by Ralph Winter. Winter revealed how Cary's account failed to consider the powerful disciplinary

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44. *See* LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 114–17, 177–85 (7th ed. 2015).

45. *See* Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 323 (2023).

46. Moon, *Delaware's New Competition*, *supra* note 19, at 1416–18.

47. Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AM. L. & ECON. REV. 369 (2022); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 81, 92–94 (2006).

48. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974); *see also* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (listing Cary's article as the fourth most cited article ever to be published by the *Yale Law Journal*).

49. Cary, *supra* note 48, at 705.

50. *Id.* at 666.

51. *Id.*

52. *See* Ralph K. Winter, *Foreword* to ROMANO, *supra* note 14, at ix.

role that markets play in restraining managerial misconduct.[53] To Winter, competition between states would result in a "race to the top" because states would be incentivized to offer laws that enhance firm value.[54] Winter's thesis would be endorsed by contemporary corporate law luminaries, who have offered wide-ranging studies on why the race was for the top and how Delaware maintains its advantage in the corporate law market. As Roberta Romano explains, Delaware's competitive advantage derives in large parts by not only a responsive legislative body that relies heavily on franchise taxes, but also "a comprehensive body of corporate case law and judicial expertise in administering corporate law, assisted by administrative expertise in expedited processing of corporate filings."[55]

While there is a general scholarly consensus that Delaware has won the race,[56] scholars ferociously disagree about whether competition between jurisdictions to supply corporate law is normatively desirable.[57] Proponents of the race to the bottom theory, owing their intellectual debt to Bill Cary, claim that competition harms shareholders by "driving states to adopt corporate law rules that are too lax with respect to managers."[58] Scholars subscribing to the race to the top account, on the other hand, assess that competition "benefits shareholders by driving states to adopt corporate law rules that enhance shareholder value."[59] To the extent that there is a degree of scholarly consensus, it is that "[b]oth theories view the socially desirable rule with respect to any given corporate law issue as the rule that maximizes shareholder value."[60]

The intellectual legacy of this debate powerfully shapes contemporary theory and practice. Today, the desirability of charter competition is largely

53. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256 (1977).

54. *Id.*

55. *See* Romano, *supra* note 19, at 213. Scholars have also identified Delaware's brand and network effects as additional sources of Delaware's competitive advantage. *See* Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1136 (2008); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 770 (1995).

56. Omari Scott Simmons, *The Federal Option: Delaware as a De Facto Agency*, 96 WASH. L. REV. 935, 950 (2021); David A. Skeel, Jr., *Icarus and American Corporate Regulation*, 61 BUS. LAW. 155, 165 (2005).

57. Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987).

58. Bebchuk, *supra* note 14, at 1444.

59. *Id.* at 1445.

60. *Id.*

reduced to asking a single question: does it enhance shareholder interests, measured in terms of firm value?[61]

In some respects, the highly publicized move by Tesla in 2024 to convince shareholders to vote in favor of its re-incorporation out of Delaware follows the script of this broader intellectual debate. In order to secure the blessing of its shareholders to leave Delaware, Tesla hired a renowned University of Chicago law professor, Tony Casey, to evaluate whether companies incorporated in Delaware command higher valuations.[62] The report concluded that "existing literature strongly suggests that such premium is non-existent or unknowable."[63] This finding, in turn, was "likely dispositive" to the Tesla board's decision to leave Delaware.[64]

In academic ivory towers, scholars warn that corporate governance rules offered by Delaware's leading competitors have the potential to transfer significant value from shareholders to managers by enabling managerial misconduct.[65] For instance, Michal Barzuza has noted Nevada's capacity to attract corporations by offering lax rules that would "impair shareholder litigation rights significantly and facilitate self-dealing transactions, poor corporate governance practices, and managerial misconduct."[66] Others offer more benign explanations. For instance, Ofer Eldar has offered empirical evidence that lax governance rules in Nevada actually increase—rather than decrease—shareholder value, particularly for small firms with low institutional shareholding.[67] If managerial-friendly laws can enhance firm value, then under the dominant conceptual framework there would be very little reason to be concerned about Delaware's emerging competitors offering a different menu of corporate law.

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61. *See, e.g.*, Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 538 (2001). *But see* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 1–4 (2012) (critiquing the shareholder value framework).

62. *Report of Professor Anthony J. Casey to the Special Committee of the Board of Directors of Tesla, Inc.*, *in* TESLA, INC., PROXY STATEMENT (SCHEDULE 14A) (2024), at Ex. D, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf [https://perma.cc/5M7G-GP3C].

63. *Id.* ¶ 127.

64. *Report of the Special Committee of the Board of Directors of Tesla, Inc.*, *in* PROXY STATEMENT, *supra* note 62, at E-1, E-12, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf [https://perma.cc/5M7G-GP3C].

65. *See, e.g.*, Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3593 (2014).

66. Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 6 (Eur. Corp. Governance Inst., Working Paper No. 677/2251, July 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878 [https://perma.cc/8U57-68K5].

67. *See* Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada*, 61 J.L. & ECON. 555, 597 (2018).

The recent trend of large publicly traded corporations migrating out of Delaware, however, presents a challenge to this traditional framing of the issue. Importantly, Delaware corporate law's capacity to produce value-enhancing bodies of law may not be enough to prevent firms from leaving Delaware. While the traditional analysis assumes the strength of Delaware based on its status as producing good corporate governance rules, the market may not necessarily reward good law.[68] As Jon Macey puts it, "the winner of the jurisdictional competition will be determined by which state's corporate law holds the greatest appeal to the relevant decision-makers, and those decision-makers may be concerned by factors other than the actual substantive content of a state's law and the technical mastery of the judges interpreting that law."[69]

In some respects, recent shifts in the corporate charter market demonstrate that superstar CEOs like Elon Musk and Mark Zuckerberg may have outsized voices in shaping the corporate law preferences of shareholders. The management literature has long noted the rise and implications of superstar CEOs.[70] Recent legal scholarship shows how "superstar CEOs have significant power over boards of Directors . . . based on the widespread belief that a CEO, and only this individual CEO, has what it takes to produce superior returns for shareholders."[71] But the influence of superstar CEOs does not stay confined within the boardroom. Delaware corporate law might be the gold standard.[72] But shareholders, who ultimately decide whether to approve corporate migration out of Delaware,[73] might give more credence to the opinion of superstar CEOs rather than the recommendations of corporate law counsel that have traditionally played a significant role in shaping the incorporation preferences of firms.[74]

On the supply side, there are lawmakers both domestically and internationally eager to supply corporate charters—a business that can

68. Jonathan R. Macey, Delaware Law Mid-Century: Far from Perfect but Probably Not Leaving for Las Vegas (Jan. 30, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5043887 [https://perma.cc/B7BJ-H2FX].

69. *Id.* at 6.

70. *See, e.g.*, Jay Lorsch & Jack Young, *Pawns or Potentates: The Reality of America's Corporate Boards*, 4 ACAD. MGMT. EXEC., Apr. 1990, at 85, 85–86.

71. *See, e.g.*, Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1353 (2023).

72. *See, e.g.*, William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1688 (2021) [hereinafter Moon, *Delaware's Global*].

73. *See* William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1441 (2022) (describing how shareholders may care about more than the quality of corporate governance rules when deciding on the place of incorporation).

74. *See* Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 662 (2018).

generate a reliable source of recurring revenue for cash-strapped state governments while boosting demands for local lawyers.[75] States like Nevada compete with Delaware by offering famously lax rules,[76] while Texas has publicly courted corporations by launching specialized business courts in 2024 tasked to adjudicate corporate and securities litigation.[77] Then there are foreign nations—most notably the Cayman Islands, Bermuda, and the British Virgin Islands—that have offered "cutting edge" corporate law in tandem with specialized business law courts staffed with renowned business law jurists.[78]

These new market realities demand a fresh update on the vast body of literature on charter competition that has preconditioned both scholars and practitioners to diagnose the desirability of any given jurisdiction's corporate law from the perspective of whether it enhances firm value. Under this approach, the divergence in corporate law between jurisdictions is predominantly understood as a tug-of-war between shareholder and managerial power.

While shareholder interest, measured in terms of firm value, is undoubtedly an important dimension in appreciating the modern corporate form, it is hardly the only value we ought to care about. As Mariana Pargendler observes, "[c]orporate governance arrangements often have consequences beyond agency costs . . . [and] exporting the solution to these problems to other areas of law may be difficult or impossible."[79] Unfortunately, the legacy of the charter competition debate constrains us from examining the more fundamental question of whether societal interest is advanced by corporate charter competition. The next Section aims to correct the course.

B. What's Good for Society?

Shareholder interests have been treated as the holy grail for a large number of scholars studying corporate law—and for good reason. A robust

75. *See* ROMANO, *supra* note 14, at 12; Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 474 (1987).

76. *See* Barzuza, *supra* note 66, at 2.

77. Act of May 21, 2023, S.B. 1045, 88th Leg., Reg. Sess. (Tex. 2023), https://capitol.texas.gov/tlodocs/88R/billtext/html/SB01045F.htm [https://perma.cc/H5X4-YBE4]; Press Release, Office of the Tex. Governor, Governor Abbott Appoints Inaugural Members to Fifteenth Court of Appeals (June 11, 2024), https://gov.texas.gov/news/post/governor-abbott-appoints-inaugural-members-to-fifteenth-court-of-appeals [https://perma.cc/R3JV-GY4T].

78. Martin W. Sybblis, *Corporate Law as Decolonization*, 71 UCLA L. REV. 798 (2024); Moon, *Delaware's New Competition*, *supra* note 19, at 1441.

79. Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 971 (2020).

protection of shareholder interests generates a market environment that enables the efficient allocation of capital in a way that rewards productive and innovative enterprises that in turn benefit society at large.[80] Moreover, corporate law's core function of reducing the agency cost between shareholders and managers may benefit society at large "by reducing the costs of contracting among the corporation's contractual constituencies."[81] Advancing shareholder interests, however, may not necessarily align with advancing societal interests.[82] This Section delves into the effects of charter competition from a broader societal perspective.

It is not that no one has discussed the societal effects of corporate charter competition. Most notably, in a series of classic *Harvard Law Review* articles, Lucien Bebchuk called for federal regulation over some areas of corporate law by identifying various issues with respect to which competition between states to supply corporate charters may produce externalities.[83] More specifically, Bebchuk advanced the novel argument at the time that "[i]n designing corporate law rules, states competing to attract incorporations will have an incentive to focus on the interests of managers and shareholders and to ignore the interests of third parties not involved in incorporation decisions."[84] Bebchuk, in turn, identified significant externalities present in "the regulation of takeover bids, proxy contests, and corporate disclosure and the protection accorded to creditors."[85] As a prime example, Bebchuk pointed to how state codes devoted to effectuating shareholder interests "will tend systematically to favor incumbents and discourage control challenges relative to the socially desirable rules."[86]

Bebchuk's intervention was critically important because it enabled scholars to conceptualize corporate law broader than a body of law whose sole task was reducing the agency problem between shareholders and managers. The presence of externalities has been acknowledged even by some of the fiercest defenders of charter competition, although race to the

80. BAINBRIDGE, *supra* note 7, at 132–33.

81. John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 36, at 1, 23.

82. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 638 (2006).

83. Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1825–51 (1989); Bebchuk, *supra* note 14, at 1441. These ideas are further defined and developed in Bebchuk's other well-known projects. *See, e.g.*, Lucian Arye Bebchuk, Foreword, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).

84. Bebchuk, *supra* note 14, at 1441.

85. *Id.*

86. *Id.* at 1488.

top proponents generally do not think that externalities are significant enough to warrant federal intervention.[87]

While insightful in many regards, Bebchuk's externalities framework does not explore a critically important societal interest at stake in jurisdiction shopping: the ability of corporations to evade governance rules requiring corporate directors and officers to obey external laws and put in good faith efforts to detect and prevent corporate lawbreaking.

To a certain extent, this academic void is understandable. The idea that corporations ought to obey external laws—ranging from environmental laws to antitrust laws—is widely thought to be a mandatory rule in American corporate law, meaning that they cannot be waived through private agreement.[88] Before the mid-nineteenth century, corporate charters required special legislative acts that authorized particular corporate activity, and "the provision of power was [logically] limited to the confines of state-imposed legal boundaries."[89] This tradition remained intact even when states adopted general incorporation statutes enabling corporations to secure corporate charters on demand.[90] Today, the corporate code of every state in the United States requires that corporations be chartered only for the purpose of engaging in "lawful activities."[91]

Derived from this duty imposed on the corporate entity, there has been over a century of jurisprudence imposing some duty on the human agents—

87. *See, e.g.*, Roberta Romano, *Market for Corporate Law Redux*, *in* 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 358, 360 (Francesco Parisi ed., 2017).

88. *See, e.g.*, Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010); Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y. L. SCH. L. REV. 421, 433 (2010).

89. Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2019 (2019).

90. *See* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1437 (2021).

91. In a notable work published more than two decades ago, Greenfield observed that "[f]orty-seven states and the District of Columbia have some kind of language in their incorporation statutes limiting corporations to lawful purposes and activities." *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1317 n.121 (2001) (collecting sources). In that work, Greenfield assessed that "[t]he only three states that do not have such language are Minnesota, North Dakota, and Vermont." *Id.* Those three states have joined the other forty-seven states in requiring business corporations to be formed only for lawful activities. N.D. CENT. CODE ANN. § 10-19.1-08 (West 2025) ("A corporation may be incorporated under this chapter for any lawful business purpose or purposes."); VT. STAT. ANN. tit. 11A, § 3.01(a) (West 2025) ("Every corporation incorporated under this title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."); MINN. STAT. ANN. § 302A.101 cmt. (West 2025) ("Minnesota Statutes, Section 301.03, permitted a corporation to have general business purposes; the new law presumes that it has such purposes. The modifier 'lawful' which appeared in Section 301.03 has been eliminated because the determination of what is or is not lawful belongs in Section 302A-757, which deals with dissolution by the attorney general.").

more specifically, the directors and officers—to steward the corporation to operate within the boundaries set by the law.[92] While the precise contours of their duties for legal compliance were historically unclear,[93] modern cases dating back a century have clarified that corporate fiduciaries have some duty to obey the law. For instance, a New York state court in 1909 in the case of *Roth v. Robertson* sustained recovery from a director who used corporate funds for bribes in violation of the state's Sunday closing laws.[94] More recently, Delaware courts have produced a wide array of canonical cases ruling that directors and officers cannot act loyally to shareholders when they enable or cause the corporation to violate positive law.[95]

It is therefore unsurprising that existing scholarship treats the legal compliance duties imposed on directors and officers as a mandatory feature of American corporate law.[96] Canonical writings generally study *Delaware* corporate law as a proxy for *American* corporate law.[97] Einer Elhauge, for instance, writes: "Under well-established law, not only do managers have no fiduciary duty to engage in illegal profit maximizing, but managers that do so would affirmatively violate a fiduciary duty not to act unlawfully."[98] Similarly, Jenn Arlen observes that "corporate law has never been structured purely to promote pursuit of corporate profit . . . . [and] expressly requires companies to pursue profits within the bounds of the law, regardless of whether allegiance to shareholder welfare would counsel otherwise."[99] More provocatively, Asaf Raz argues that American corporate law actually adheres to a form of legal primacy, as opposed to shareholder

92. Pollman, *supra* note 89, at 2020 ("As a doctrinal matter, over a century of case law provides that corporate directors and officers who engage in unlawful conduct on behalf of the corporation do not receive business judgment rule protection."); *see also* HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS § 62 (rev. ed. 1946) ("[D]irectors owe a threefold duty to the corporation. First, they must be obedient.").

93. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

94. Roth v. Robertson, 118 N.Y.S. 351, 354 (Sup. Ct. 1909).

95. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004); Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003). Importantly, legal compliance suits are not subject to indemnification and cannot be subject to exculpation under Delaware corporate law. DEL. CODE ANN. tit. 8, § 145(a) (West 2025) (corporation has no power to indemnify a director, officer, or agent in a criminal action or proceeding unless that person "had no reasonable cause to believe [their] conduct was unlawful"); *id.* § 102(b)(7) (charter may not insulate a director from liability to the corporation or its stockholders for breach of fiduciary duty involving knowing violations of law).

96. BAINBRIDGE, *supra* note 7, at 14.

97. *See, e.g.*, Strine et al., *supra* note 88, at 653 n.71; Baer, *supra* note 41, at 321.

98. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 757 (2005).

99. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under* Caremark*: Using Enhanced Information Acquisition Duties in the Public Interest*, *in* RESEARCH HANDBOOK ON CORPORATE LIABILITY 194, 200 (Martin Petrin & Christian Witting eds., 2023).

primacy.[100] According to Raz, corporate law's requirement for legal obedience is "enforced by corporate law courts, imposes fiduciary liability on corporate directors and officers, and places a hard limit on the rights of the archetypal corporate law actor—shareholders—who can only lawfully get what is left after the corporation meets (or as long as it can meet) all of its other obligations."[101]

While this line of work is critical to understand the complexity of duties demanded of modern corporate directors and officers of Delaware-incorporated firms, it does not consider the possibility of directors and officers evading such "mandatory" rule simply by leaving Delaware altogether.[102]

The variance in any given jurisdiction's stance on legal compliance obligations cannot necessarily be detected by measuring firm value, given that firm value can be enhanced when managers steward corporations to engage in profit-maximizing illicit conduct.[103] Indeed, as Judge Richard Posner observed in his classic law and economics treatise, "if the shareholders bear no responsibility for a manager's crime, they will have every incentive to hire managers willing to commit crimes on the corporation's behalf."[104]

While fiduciary duty suits predicated on corporate lawbreaking technically rely on shareholders, these suits arguably seek to accomplish a different goal than classic shareholder suits, which are designed to protect shareholder interests by constraining managerial misbehavior, such as engaging in sophisticated forms of looting through self-dealing transactions or usurping corporate opportunities.[105] Legal compliance suits rely on shareholders—and to some extent, the financial motive of the plaintiff's lawyers who represent shareholders—to effectuate societal interests embedded in the law.[106] As Elizabeth Pollman explains, Delaware's legal compliance jurisprudence "aims to protect a public realm to which corporate law must subscribe, rather than to protect shareholders from agency costs."[107]

100. Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933 (2022).

101. *Id.* at 937.

102. Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 556 (1990).

103. Even when a shareholder or groups of shareholders are willing to bring a shareholder suit to hold directors accountable, shareholders collectively may benefit from a pure firm value standpoint when managers break the law. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 313 (2000).

104. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 398 (3d ed. 1986).

105. Arlen, *supra* note 99, at 200.

106. William J. Moon, *Transnational Corporate Law Litigation*, 74 DUKE L.J. 901, 959 (2025) [hereinafter Moon, *Transnational*].

107. Pollman, *supra* note 89, at 2027.

Charter competition, however, has enabled corporations to opt for corporate law regimes that undercut the firm's legal compliance obligations.

II. THE EMERGENCE OF LAWBREAKING HAVENS

Charter competition can and has impacted the corporation's appetite for lawbreaking. This can be seen by comparing Delaware corporate law to the corporate laws of two leading jurisdictions that have attracted a significant fraction of American corporations: Nevada and the Cayman Islands. Section II.A synthesizes up-to-date Delaware corporate law governing legal compliance obligations imposed on directors and officers. Section II.B documents how Nevada and the Cayman Islands have largely eliminated legal compliance duties demanded of directors and officers. These two jurisdictions, while not alone in offering "lax" legal compliance rules,[108] are illustrative for the purposes of advancing a proof of concept that charter competition can give rise to corporate lawbreaking havens.[109] The goal of comparing these jurisdictions to Delaware is not to put Delaware corporate law on a pedestal and view any deviation from Delaware as a sign of defective corporate law. Rather, the goal is to better appreciate that legal compliance duties mandated by corporate law have been undercut by charter competition.

A. Shareholder Profit Maximization Within Legal Boundaries

In large part due to its longstanding dominance of the corporate charter market, Delaware is by far the most studied corporate law jurisdiction in the United States.[110] Both scholars and practitioners reflexively scrutinize Delaware judicial opinions with a fine-tooth comb to gain insight into the development of American corporate law.

Delaware's corporate law jurisprudence is often referred to as a "shareholder primacy" jurisdiction.[111] While prominent academics have offered several scholarly accounts arguing that Delaware corporate law does

108. *See* Moon, *Delaware's New Competition*, *supra* note 19, at 1441 (describing the British Virgin Islands and Bermuda as offering similar lax rules as the Cayman Islands).

109. Importantly, undercutting legal compliance rules does not necessarily indicate that any given jurisdiction's corporate law is lax in general. *See, e.g.*, William J. Moon, *Global Corporate Charter Competition*, *in* A RESEARCH AGENDA FOR CORPORATE LAW 231, 238 (Christopher M. Bruner & Marc Moore eds., 2023) ("Cayman law may offer better protection for shareholders than Delaware law when it comes to appraisal rights.").

110. *See* Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 527 (2005).

111. Edward B. Rock, *Business Purpose and the Objective of the Corporation*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 41, at 27, 32–33.

not actually require directors and officers to maximize shareholder profits,[112] Delaware courts in recent years have "dealt several blows to these interpretations."[113] For instance, in *In re Trados Inc. Shareholder Litigation*, the Delaware Court of Chancery reiterated that directors must "promote the value of the corporation for the benefit of its stockholders."[114] Structurally, Delaware's corporate law also reflects the reality that corporate codes are principally written for shareholders. Under Delaware General Corporation Law, absent a contrary provision in the certificate of incorporation, "shareholders, and only shareholders, vote on bylaws (§ 109), in director elections (§ 212), on charter amendments (§ 242), on mergers (§ 251), in the sale of all or substantially all of the assets (§ 271), and for dissolution (§ 275)."[115] As former Delaware Supreme Court Justice Leo Strine put it, "stockholders are the only corporate constituency with power under our prevailing system of corporate governance."[116]

While structurally privileging shareholder rights, Delaware historically has not embraced a jurisprudence encouraging ruthless profit maximization to the point of violating the law in the name of advancing shareholder interests. Instead, directors of Delaware corporations have some obligation to put in efforts for legal compliance, regardless of whether that compliance is profitable. To be clear, the precise contours of duty imposed on directors and officers had not been well-defined. But now, we benefit from more than half a century of jurisprudence recognizing the duty for legal compliance.[117] If canonical cases in Delaware teach us anything, it is that Delaware

112. STOUT, *supra* note 61, at 8 ("Contrary to what many believe, U.S. corporate law does not impose any enforceable legal duty on corporate directors or executives to maximize profits or share price.").

113. Dorothy S. Lund & Elizabeth Pollman, Essay, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2580 (2021).

114. *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013) ("[T]he standard of conduct requires that directors seek 'to promote the value of the corporation for the benefit of its stockholders.'" (citation omitted)). This is not to say that managers may not consider non-shareholder interests. The business judgment rule allows directors to consider other stakeholders in rendering decisions, so long as their decisions can be justified as advancing shareholder interests. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303 (1999); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

115. Rock, *supra* note 111, at 33; Lund & Pollman, *supra* note 113, at 2580–81.

116. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 179 (2017).

117. Delaware's modern legal compliance jurisprudence is often traced to the famous Delaware Supreme Court case of *Graham v. Allis-Chalmers Manufacturing Co*., 188 A.2d 125 (Del. 1963). While the court in *Graham* rejected the claim that directors had breached their fiduciary duties by failing to prevent the violation of federal antitrust laws, the court nevertheless established the principle that directors could be liable for losses arising from corporate illegality if they ignored clear signs of wrongdoing. *Id.*

corporate law today is a version of shareholder primacy that infuses a serious commitment to legal compliance.[118]

Doctrinally, Delaware's legal compliance jurisprudence can be conceptualized in two broad categories: obedience and oversight.[119] The duty of obedience prohibits directors and officers "from acting with the intention of violating the law."[120] While bestowing almost unlimited discretion to directors when it comes to making business decisions under the business judgment rule,[121] Delaware courts have drawn a strict line when it comes to directors or officers actively partaking in illicit activities.[122] For instance, in a 2004 case, the Delaware Court of Chancery clarified that "a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."[123]

Complementing the duty of obedience, the duty of oversight concerns "the monitoring function of the board of directors to ensure the legal compliance of actors within the corporation."[124] This jurisprudence, which corporate law practitioners and scholars in the United States refer to as *Caremark* jurisprudence after the landmark case decided in 1996,[125] enables shareholders to sue directors or officers for failing to implement a system of monitoring in good faith to prevent lawbreaking.[126] *Caremark* articulated the principle that directors—and as established by recent cases, officers[127]—could be held personally liable for a sustained or systematic failure to implement adequate reporting or information systems, which constitutes a breach of their fiduciary duties under Delaware law.[128]

Consider the famous case of *In re Massey Energy Co.*, involving a coal mining corporation whose board knew and sanctioned the violation of important safety regulations that led to a massive explosion in West Virginia

118. *See* Strine et al., *supra* note 88, at 649–50 (describing Delaware's legal compliance duty as an "essential bottom-line requirement").

119. Pollman, *supra* note 89, at 2018.

120. *Id.*

121. *See In re* Walt Disney Co. Derivative Litig., 731 A.2d 342, 351 (Del. Ch. 1998).

122. The business judgment rule, indeed, does not apply to "directors' and officers' knowing violation of the law." Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 721 (2019).

123. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004). As Professor Carliss Chatman explains, "If complying with laws of general application is contrary to the wishes of shareholders, the legal duties supersede the shareholder whims." Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 816, 837 (2018).

124. Pollman, *supra* note 89, at 2018.

125. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

126. South v. Baker, 62 A.3d 1, 14 (Del. Ch. 2012).

127. Segway Inc. v. Cai, C.A. No. 2022-1110, 2023 WL 8643017, at *3–4 (Del. Ch. Dec. 14, 2023).

128. *See* Carliss Chatman & Tammi S. Etheridge, *Federalizing* Caremark, 70 UCLA L. REV. 908, 945–46 (2023).

killing 29 miners.[129] Then-Vice Chancellor Leo Strine famously reminded corporate America that "Delaware law does not charter law breakers."[130] In doing so, the court scolded academics making "straw man arguments" that fiduciaries of Delaware corporations can act "loyally" while consciously causing the corporation to engage in illegal activities.[131] *Massey* is part of a long line of canonical Delaware cases that impose duties on directors and managers to put in good faith effort to prevent corporate lawbreaking.

Delaware courts in recent years have doubled down on their commitment to legal compliance.[132] Within the past decade or so, Delaware courts have increasingly showcased a willingness to entertain oversight suits against directors predicated on legal violations. Violations of federal anti-money laundering regulations, the Federal Aviation Administration regulations, and Federal Drug Administration regulations have all given rise to important shareholder claims in recent years surviving a motion to dismiss.[133] This approach, which has been described as a "new *Caremark* era",[134] constitutes a powerful legal mandate for directors and officers to put in good faith efforts to detect and prevent corporate lawbreaking.[135]

A critical ingredient in shareholders' enhanced ability to hold directors and officers accountable for legal compliance failures is the state's jurisprudence on inspection rights. Under Delaware corporate law, shareholders are granted the right to inspect a corporation's books and records provided they can demonstrate a "proper purpose."[136] Common "proper purpose" examples include shareholders investigating potential corporate mismanagement, breaches of fiduciary duty, waste of corporate assets, and wrongdoing.[137] This statutory right, which "cannot be limited or eliminated even by corporate charter," [138] is particularly critical when shareholders are considering or pursuing legal compliance suits, since they must establish that directors or officers actively participated in lawbreaking or failed to implement adequate internal controls or monitor the

129. *In re* Massey Energy Co., C.A. No. 5430, 2011 WL 2176479, at *1 (Del. Ch. May 31, 2011).
130. *Id.* at *20.
131. *Id.* at *20 & n.143.
132. Roy Shapira, *Conceptualizing* Caremark, 100 IND. L.J. 467 (2025).
133. Carliss Chatman & Tammi S. Etheridge, *Federalizing* Caremark, 70 UCLA L. REV. 908, 945 (2023).
134. Shapira, *supra* note 25, at 1881.
135. *See* Moon, *Transnational*, *supra* note 106, at 920–21 ("Doctrinally, directors' and officers' obligation to obey the law is built on the idea of good faith. A claim of oversight failure, most prominently, provides a path for shareholders to hold directors and officers liable for failing to implement a system of monitoring in good faith to prevent lawbreaking." (internal notes omitted)).
136. DEL. CODE ANN. tit. 8, § 220 (West 2025).
137. KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 751 (Del. 2019).
138. Geeyoung Min & Alexander M. Krischik, *Realigning Stockholder Inspection Rights*, 27 STAN. J.L. BUS. & FIN. 225, 229–30 (2022).

corporation's compliance with applicable laws.[139] In such cases, access to corporate records is essential for gathering evidence to support allegations that can survive a motion to dismiss.[140] As Roy Shapira assesses, the broadening of inspection rights in Delaware in recent years has permitted shareholders to review not only formal corporate documents, but also more insular communications between directors, allowing shareholders to garner enough "particularized facts" to overcome the pleading obstacle.[141]

Delaware's legal obedience jurisprudence is powerful in influencing the decision-making process of directors and officers because these breeds of shareholder suits are outside the protection of exculpation, indemnification, and most directors and officers (D&O) insurance.[142] Practically, this means that shareholders would be able to recover through settlement, once they have adduced sufficient evidence to survive a motion to dismiss.[143] While the practical likelihood of directors paying out of pocket for fiduciary duty violations remains low, shareholder suits powerfully shape the behavior of directors and officers by imposing reputational damages to corporate fiduciaries complicit in corporate lawbreaking.[144]

Delaware's commitment to legal compliance in corporate law, to be clear, does not always conflict with the idea that the modern corporate form is principally designed to facilitate the pursuit of profits. For instance, the expectation of legal compliance may compel managers to run the firm with long-term interests as opposed to succumbing to short-term profit pressures.[145] But such a scenario cannot ignore the inherent tension between profits and lawbreaking.[146] This is in part because lawbreaking can be profitable, even in the long run.[147] To that end, Delaware case law makes clear that shareholder wealth maximization is not a viable defense when directors and officers engage in or facilitate lawbreaking. In other words,

139. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

140. AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund, 243 A.3d 417, 435–36 (Del. 2020).

141. Shapira, *supra* note 25, at 1862.

142. Arlen, *supra* note 99, at 203.

143. *Id.*

144. Moon, *Transnational*, *supra* note 106, at 909.

145. Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1887 (2021).

146. Elhauge, *supra* note 98, at 758 (assessing that if profits were the pure goal of fiduciary purpose, there would be no need to "impose special penalties on corporate managers with a fiduciary duty that makes managers liable to their corporation for engaging in illegal activities that were actually profitable for that corporation").

147. Indeed, scholars have long noted that directors might rationally choose to engage in lawbreaking in order to maximize profits. *See, e.g.*, David Rosenberg, *Delaware's "Expanding Duty of Loyalty" and Illegal Conduct: A Step Towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81, 85 (2012).

Delaware jurisprudence does not perform a cost-benefit analysis to determine whether the lawbreaking ultimately benefited the firm financially.[148] Even the most robust evidence demonstrating that the lawbreaking benefited the firm is not a good defense for corporate officers and directors accused of facilitating lawbreaking.[149]

It is for this reason Delaware corporate law cannot be understood as shareholder primacy in its purest intellectual form. This is not to say that Delaware has taken legal compliance obligations to the maxim.[150] The jurisprudence of "bad faith" required to establish oversight failures, for instance, inevitably places a heavy burden on shareholders to establish that the directors facilitated lawbreaking.[151] Despite the sizable number of cases surviving a motion to dismiss in recent years, Delaware courts have reiterated the difficulty of bringing these claims.[152]

While the precise contours of Delaware's legal compliance jurisprudence remain in flux, there is no question that Delaware has embraced a version of shareholder primacy but one that infuses a healthy dose of doctrines mandating fidelity to the rule of law. As elaborated in the next Section, this is a feature not shared by Nevada and the Caymans.

B. Unrestrained Shareholder Profit Maximization

In a famous article published in the *Michigan Law Review* more than four decades ago, corporate law luminaries Judge Frank Easterbrook and Dan Fischel proposed that corporate "managers not only may but also should violate the rules when it is profitable to do so."[153] When Easterbrook and Fischel wrote the piece, there were no serious challengers to Delaware's

148. The American Law Institute (ALI) takes a similar approach, assessing that "[w]ith few exceptions, dollar liability is not a 'price' that can properly be paid for the privilege of engaging in legally wrongful conduct . . . [and a] cost-benefit analysis whether to obey the rule is out of place." PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(B)(1) cmt. G (AM. L. INST. 1992); *see also* Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729, 730–31 (1996) (assessing that the ALI "rejects any cost-benefit justification for lawbreaking").

149. More conceptually, there is an inherent difficulty for directors and officers to ascertain whether illegal activities would be profitable in the long run. *See* Greenfield, *supra* note 91, at 1284.

150. Pollman, *supra* note 89, at 2045.

151. *Id.* at 2017.

152. Gail Weinstein, Philip Richter & Steven Epstein, *2024* Caremark *Developments: Has the Court's Approach Shifted?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 20, 2024), https://corpgov.law.harvard.edu/2024/05/20/2024-caremark-developments-has-the-courts-approach-shifted/ [https://perma.cc/Q33J-D9XH].

153. Easterbrook & Fischel, *supra* note 5, at 1177 n.57.

corporate law empire.[154] Thus, their viewpoint was largely academic in nature.[155]

But today, emerging suppliers in the market for corporate charters offer a set of corporate governance rules closer to what Easterbrook and Fischel envisioned—a framework that can be conceptualized as *unrestrained shareholder profit maximization*. Under this version of shareholder primacy, legal obedience takes a backseat to the firm's profit motives in the name of shareholder interests.[156]

This brand of corporate law, importantly, need not be effectuated by blatantly burning down legal compliance duties to the ground. Indeed, Delaware's emerging competitors retain formalistic acknowledgments that corporations chartered in those jurisdictions can only engage in lawful activities.[157]

Upon a deeper dive, there is a significant divergence in legal compliance obligations of Delaware-incorporated corporations compared to those corporations incorporated in Nevada and the Cayman Islands. For one, Nevada and the Cayman Islands do not recognize shareholder suits against directors and officers for oversight failures predicated on corporate lawbreaking. As such, directors of a corporation incorporated in the Cayman Islands or Nevada can turn a blind eye to lawbreaking to predictably boost profits. Powerful procedural barriers also constrain the ability of shareholders to bring claims even when directors and officers actively participate in lawbreaking.

1. Nevada

While historically sharing some features of corporate law with Delaware,[158] Nevada in recent decades has deliberately strategized to differentiate itself by offering laws that favor corporate directors and officers.[159] Nevada's strategy has paid handsome dividends. Nevada has managed to gain a non-trivial share in the market for out-of-state

154. At that time, the dominant choice for large public companies was to incorporate in Delaware or their home state. *Cf.* Ralph K. Winter, Response, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1529 (1989).

155. For academic support of this view, see Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1271 (1982).

156. Easterbrook & Fischel, *supra* note 5, at 1177.

157. NEV. REV. STAT. ANN. § 78.030 (West 2025) ("A person shall not establish a corporation for any illegal purpose.").

158. JLL Consultants, Inc. v. Gothner (*In re* AgFeed USA, LLC), 558 B.R. 116, 124 n.3 (Bankr. D. Del. 2016) (explaining that Nevada corporate law is, indeed, "modeled largely after Delaware's corporate law").

159. Barzuza, *supra* note 66, at 4.

corporations, boosting its government revenue and generating work for private-sector lawyers.[160]

Nevada's efforts have not gone unnoticed. In an important article published in the *Virginia Law Review*, Michal Barzuza offered the first comprehensive account of Nevada's rise in the corporate law ecosystem by offering "a shockingly lax corporate law."[161] Building on this work, other scholars have expressed similar concerns about the potential negative impacts of Nevada corporate law facilitating managerial misbehavior.[162] But this story is incomplete.

The existing accounts focus on whether Nevada offers lax rules for managers at the expense of shareholders, as opposed to the state's undercutting of legal compliance duties. To the extent discussed, the elimination of legal compliance duties is conceptualized as enabling a conflict of interest between management and shareholders.[163] While related, simply viewing differentiated law from the standpoint of shareholder value is insufficient to understand the broader societal interests embedded in external laws. Below, this Section elaborates on how Nevada has undercut legal compliance duties by (1) removing oversight duties; (2) narrowly construing the knowledge requirement for liability for knowingly violating the law; and (3) creating various procedural barriers to shareholders bringing suits.

Notably, Nevada's current statutory approach precludes the judicial recognition of oversight duties that would be functionally equivalent to Delaware's *Caremark*.[164] While Nevada law imposes a duty for directors and officers to exercise their powers "in good faith . . . and with a view to the interests of the corporation,"[165] they are presumed to satisfy that requirement.[166] That presumption, manifesting in an ironclad version of the business judgment rule, creates a significant barrier for shareholders seeking to hold directors and officers liable. Specifically, Nevada's business judgment rule protects directors and officers of Nevada corporations unless

160. Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 940 (2012) ("Nevada has identified an opportunity. Additional profits could be realized by targeting a poorly served market segment.").

161. *Id.* at 935.

162. *See, e.g.*, Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. 145 (2025).

163. Barzuza, *supra* note 66, at 6.

164. Keith Paul Bishop, *Should Boeing Fly to Nevada?*, NAT'L L. REV. (Nov. 8, 2021), https://natlawreview.com/article/should-boeing-fly-to-nevada [https://perma.cc/9NJM-TUGB].

165. NEV. REV. STAT. § 78.138(1) (West 2025).

166. Although they must "exercise their respective powers in good faith," NEV. REV. STAT. § 78.138(3) acts as a safety net, codifying expressly that "in deciding upon matters of business," officers and directors "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." *Id.*

shareholders are able to demonstrate clear evidence of "intentional misconduct, fraud, or a knowing violation of the law."[167] While Nevada's highest court has yet to precisely define the meaning of "a knowing violation of law," the Nevada Supreme Court has opined in a recent case that "the claimant must establish that the director or officer had knowledge that the alleged conduct was wrongful."[168] Given that *Caremark* claims concern oversight failures in preventing lawbreaking—deduced from utter failure to implement or monitor reporting systems[169]—as opposed to intentional participation in lawbreaking, Nevada law would not police director or officer conduct, even if their "utter failure" caused the corporation to violate positive law.

To be clear, a prohibition of "a knowing violation of law" remains a mandatory rule in Nevada.[170] Yet, both "intentional" and "knowing" requirements "have been interpreted by courts in the state to confer an extremely high degree of protection."[171] Moreover, because "knowing violation of the law" under Nevada law must also constitute a breach of fiduciary duty that can rebut the business judgment rule protection,[172] the breed of cases that would qualify as a viable shareholder suit would be substantively narrower than disobedience suits cognizable under Delaware law. Thus, for instance, a whole spectrum of possible claims involving the corporation violating the law that do not meet the standards of self-enrichment—presumably, lawbreaking that takes on a flavor of self-dealing—would not qualify.[173] Given the general ethos of lax rules for managers, it also remains unclear if Nevada courts would give directors and officers a pass for intentional lawbreaking if they could credibly establish that the lawbreaking at hand benefited the corporation financially—a doctrinal move that would essentially water down disobedience jurisprudence to a thin gruel.

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167. *Id.* § 78.138(7) (emphasis added). As affirmed by the Nevada Supreme Court, NEV. REV. STAT. § 78.138(7) "provides the sole avenue to hold directors and officers individually liable for damages arising from official conduct." Chur v. Eighth Jud. Dist. Ct., 458 P.3d 336, 340 (Nev. 2020).

168. *Id.* at 342 (emphasis added).

169. Pollman, *supra* note 89, at 2015.

170. NEV. REV. STAT. § 78.138(7) (West 2025); Barzuza, *supra* note 160, at 952 ("Nevada retains mandatory liability only for intentional misconduct and knowing violations of law."). This rule, at least from a pure substantive standpoint, is consistent with Delaware and states that follow the Model Business Corporation Act. Jens Dammann, Response, *How Lax Is Nevada Corporate Law? A Response to Professor Barzuza*, 99 VA. L. REV. BRIEF 1, 8 (2013).

171. Barzuza, *supra* note 66, at 23.

172. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1626 (2018).

173. *Id.*

Even if doctrinally viable, a number of procedural roadblocks curtail the practical feasibility of bringing such a suit against directors and officers of Nevada-incorporated firms.

For one, Nevada's stance on shareholder inspection rights constrain the ability of shareholders to detect factual conditions relevant to pleading legal compliance suits when directors or officers intentionally violate the law.[174] Whereas shareholders in Delaware need only to show a "credible basis" for a court to infer wrongdoing[175]—a standard that the Delaware Supreme Court has called the "lowest possible burden of proof"[176]—Nevada is far less accommodating.[177]

In Nevada, the right to inspect a private corporation is generally granted only to shareholders who own at least 15 percent of the corporation.[178] In addition to procedural roadblocks,[179] shareholders are disincentivized from bringing any inspection suits given that they must pay "costs and reasonable attorney's fees" if they do not prevail.[180] There is even a simpler restriction for shareholders of publicly traded corporations. Under Nevada law, publicly traded corporations can categorically foreclose inspection rights altogether.[181] As observed by Michal Barzuza, "so long as the firm furnishes its shareholders with the bare minimum required by federal law . . . firms [can] withhold trove of vital information—board minutes and communication—from stockholders, even when there may be suspected wrongdoing."[182]

These challenges practically make it extremely difficult for shareholders to build a viable case for legal compliance violations.[183] As a point of

174. Barzuza, *supra* note 66, at 6.

175. Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 130 (Del. 2006).

176. AmerisourceBergen Corp. v. Lebanon Cnty. Empls.' Ret. Fund, 243 A.3d 417, 426 (Del. 2020) (quoting *Seinfeld*, 909 A.2d at 123)).

177. Barzuza, *supra* note 66, at 27.

178. NEV. REV. STAT. § 78.257(7) (West 2025).

179. Specifically, shareholders who meet the 15 percent threshold must submit a written demand for inspection, produce an affidavit, and (if required by the board) execute a confidentiality agreement. *See id.* § 78.257(2).

180. *Id.* § 78.257(6).

181. *Id.* § 78.257(7).

182. Barzuza, *supra* note 66, at 27–28.

183. While shareholders can also detect wrongdoing through publicly available sources, the current trend of enforcement agencies entering into non-prosecution agreements for corporate misconduct—which are generally not made publicly available—further reduces the possibility of shareholders gaining access to relevant information. *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 355–58 (2017); Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-Prosecution of Corporations: Toward a Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 872 (2018) ("[W]ith a NPA, there are no formal charges and there is no court filing of the settlement. There is no obvious channel through which third parties would obtain a copy of the agreement. Whether the agreement becomes public depends on the prosecutor and the company[.]").

comparison, consider the landmark claim brought by shareholders in Delaware against Boeing directors in the aftermath of the widely-publicized Boeing 737 MAX airplane crashes.[184] Plaintiffs, who predicated the suit on Boeing's numerous safety violations imposed by the FAA, had access to 660,000 pages of internal company documents prior to filing the action.[185] These internal documents are critical ingredients to bringing successful legal compliance suits. As explained by Roy Shapira, internal documents render it "much more likely to find smoking-gun indications of what the insiders knew and when they knew it."[186]

These powerful procedural barriers render suits predicated on legal violations sufficiently difficult enough to dissuade plaintiff's lawyers from bringing cases on behalf of shareholders.[187] Directors and officers of Nevada corporations can rest easy knowing that the practical chances of shareholders detecting and bringing viable legal compliance suits are slim.

2. The Cayman Islands

Although a tiny quasi-sovereign nation,[188] the Cayman Islands is no small fry when it comes to the world of global finance. Nestled in the sun-drenched Caribbean Sea, the Cayman Islands serves as the juridical home to thousands of hedge funds and business corporations.[189] In part by offering what has been described as "cutting edge" corporate law, favorable tax rules, and a specialized business court adjudicating corporate law cases, the Cayman Islands has also managed to attract a significant number of corporations physically headquartered in the United States.[190] Apollomics (headquartered in California),[191] Global Foundries (headquartered in New

184. *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

185. *Id.* at *1 n.1 ("Prior to filing this action, Plaintiffs pursued and received books and records pursuant to 8 Del. C. § 220. Plaintiffs received over 44,100 documents totaling over 630,000 pages.").

186. Shapira, *Conceptualizing* Caremark, *supra* note 132, at 487.

187. Pollman, *supra* note 122, at 756.

188. While maintaining close legal and political ties with the United Kingdom, the Cayman Islands exercises "almost full discretion when it comes to enacting legislation on corporate law." Moon, *Delaware's New Competition*, *supra* note 19, at 1406–07 n.14.

189. CHRISTOPHER BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD 59 (2016); William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 3–4 (2019).

190. Moon, *Delaware's New Competition*, *supra* note 19, at 1406–07.

191. *See* APOLLOMICS INC., ANNUAL REPORT (FORM 20-F), at 1 (2024), https://ir.apollomics inc.com/static-files/7d5a5b88-4805-481f-9939-4452694ccd60 [https://perma.cc/2XNQ-AP4Q].

York),[192] Shark Ninja (headquartered in Massachusetts),[193] and Herbalife (headquartered in California)[194] are just a few of American corporations that maintain their headquarters in the United States but are effectively governed by the corporate law of the Cayman Islands.[195]

While Cayman law has begun to attract scholarly scrutiny from American legal academics, existing accounts principally focus on the ability of managers to extract wealth from dispersed shareholders, as opposed to the barriers faced by shareholders to bring legal compliance suits.[196]

Although both lawmakers and judges in the Cayman Islands pay close attention to Delaware,[197] the Cayman Islands has deliberately chosen to differentiate its corporate law from that of Delaware.[198] While directors and officers of Cayman Islands-incorporated corporations are required to act in good faith in what they consider to be in the best interests of the company,[199] they have no specific obligations to exercise oversight over corporate lawbreaking.[200]

Even if they did, such suits are matters that can largely be exculpated, rendering these claims dead on arrival. Cayman Islands law has no statutory limitations regarding indemnification or limitation of liability for directors and officers.[201] Rather, the limits have been imposed by common law, which allows corporations to exculpate all types of liability of a director and officer

192. *See* GLOBALFOUNDRIES INC., ANNUAL REPORT (FORM 20-F), at 1 (2024), https://investors.gf.com/static-files/3b93d28a-1eef-44f9-9c38-d34e8c2b5842 [https://perma.cc/2VTU-ADKU].

193. *See* SHARKNINJA, INC., ANNUAL REPORT (FORM 20-F), at 6 (2024), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001957132/f786c541-23c0-425a-b34f-a83af4d7a591.pdf [https://perma.cc/UEA5-D675].

194. *See* HERBALIFE LTD., ANNUAL REPORT (FORM 10-K), at 43 (2024), https://ir.herbalife.com/sec-filings/annual-reports/content/0000950170-24-015266/0000950170-24-015266.pdf [https://perma.cc/5T8K-KTVF].

195. Moon, *Delaware's New Competition*, *supra* note 19, at 1424–28 (offering data indicating that a significant number of firms listed in American securities markets are incorporated in the Cayman Islands).

196. *See* Jesse M. Fried & Tamar Groswald Ozery, *The Holding Foreign Companies Accountable (HFCA) Act: A Critique*, 14 HARV. BUS. L. REV. 257 (2024); Jesse M. Fried & Ehud Kamar, *China and the Rise of Law-Proof Insiders*, 48 J. CORP. L. 215 (2023); Jesse M. Fried & Ehud Kamar, *Alibaba: A Case Study of Synthetic Control*, 11 HARV. BUS. L. REV. 279 (2021); Moon, *Delaware's Global*, *supra* note 72, at 1703; Moon, *Delaware's New Competition*, *supra* note 19, at 1444.

197. Moon, *Delaware's New Competition*, *supra* note 19, at 1438–39.

198. Moon, *Delaware's Global*, *supra* note 72, at 1707.

199. *See* Bryan Hunter, *Guide to Directors' Duties in the Cayman Islands*, MONDAQ (Sept. 16, 2011), https://www.mondaq.com/caymanislands/offshore-company-formation/145462/guide-to-directors-duties-in-the-cayman-islands [https://perma.cc/X3X8-DZFN].

200. *Id.*

201. Oliver Payne, Jennifer Fox & Rachael Reynolds, Weavering *Litigation – Cayman Hedge Fund Directors' Duties and Indemnity/Exculpation Clauses Back in the Spotlight*, OGIER (June 1, 2015), https://www.ogier.com/news-and-insights/insights/weavering-litigation-cayman-hedge-fund-directors-duties-and-indemnityexculpation-clauses [https://perma.cc/7Q7L-G97C].

"except willful default or neglect, or fraud."[202] As a result, directors and officers are exculpable from liability arising from "all but the narrowest of circumstances."[203]

To be clear, Cayman law ostensibly prohibits directors and officers from intentionally engaging in illegal activities. Although there is scant case law, one could make the argument that intentionally violating the law would constitute *ultra vires* activities—meaning that it is beyond the legal authority of the corporation—that constitute one of the narrow exceptions that allow shareholders to bring suits against directors and officers.[204] Judicial opinions in the United States applying Cayman law suggest, however, that circumstances are rare. Consider the case of *Winn v. Schafer*.[205] In that case, a shareholder of Scottish Re, an insurance company incorporated in the Cayman Islands, brought a suit in New York against the company's officers and directors.[206] The court was tasked to ascertain whether officers and directors of the company who ordered Scottish Re to issue press releases and financial reports in violation of U.S. securities laws amounted to fiduciary duty violations under Cayman law.[207] Even though plaintiffs alleged participation in illegal activities, the court found that a fiduciary duty suit against directors and officers was not viable as a matter of Cayman law because such illegal activities must also invoke factual circumstances functionally equivalent to self-dealing.[208] This requirement precludes shareholder litigation over a whole host of illegal activities that may predictably boost corporate profits without crossing the line of engaging in self-dealing arrangements.

Even assuming that Cayman law recognized suits alleging intentional lawbreaking, a number of powerful procedural barriers undermine the practical feasibility of viable shareholder suits.

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202. *Id.*; *see also* Moon, *Delaware's New Competition*, *supra* note 19, at 1452 n.245 (citing Hunter, *supra* note 199).

203. *See* Payne et al., *supra* note 201.

204. Stephen Blake, Adam Goldberg & Bo Bryan Jin, *Renren Settlement Highlights Increased Risk of U.S. Derivative Litigation Concerning Foreign Private Issuers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 14, 2021), https://corpgov.law.harvard.edu/2021/11/14/renren-settlement-highlights-increased-risk-of-u-s-derivative-litigation-concerning-foreign-private-issuers/ [https://perma.cc/63UV-U5NH]. Cayman law severely restricts the possibility of shareholder derivative suits. Under Cayman law, a derivative claim "can only be brought in certain circumstances and amounts to an exception to the rule that a company, as a separate legal person, should sue and be sued in its own name." *Derivative Claims in the Cayman Islands*, LOEB SMITH (July 20, 2023), https://www.loebsmith.com/legal/derivative-claims-in-the-cayman-islands/373 [https://perma.cc/LY8A-JYUR]. These exceptions are extremely narrow. *Id.*

205. 499 F. Supp. 2d 390, 398 (S.D.N.Y. 2007).

206. *Id.* at 392.

207. *Id.* at 393.

208. *Id.* at 398.

For one, firms incorporated in the Cayman Islands can categorically prohibit shareholder inspection requests,[209] which effectively makes it unlikely that shareholders will have sufficient evidence concerning the director or officer's intent to violate positive law. While firms can contractually provide for inspection rights, firms incorporated in the Cayman Islands largely choose not to do so.[210] American firms incorporated in the Cayman Islands make that explicit in their mandatory disclosures. As California-based Herbalife explains, "shareholders of Cayman Islands exempted companies such as Herbalife Ltd. have no general rights under Cayman Islands law to inspect corporate records and accounts or to obtain copies of lists of shareholders."[211] Given the critical role of books and records requests for gaining access to information that can support legal compliance claims, it is difficult if not impossible for a large swath of shareholders to hold directors and officers accountable for legal violations.

Finally, derivative suit are vastly more difficult to bring under Cayman Islands law compared to Delaware law. Simply put, derivative suits in the Cayman Islands "require permission from the court to proceed, and the practical success rate is slim."[212]

* * *

Absent a course correction, the laws of Nevada and the Cayman Islands preclude shareholder suits for oversight failures predicated on corporate lawbreaking. While both jurisdictions formalistically "prohibit" directors and officers from engaging in intentional violation of the law, powerful procedural barriers limit the practical possibility of shareholders bringing such suits. Perhaps more importantly, the current legal architecture of American corporate law does not preclude these jurisdictions (or other jurisdictions) from amending their statutes to eliminate legal compliance obligations altogether.

III. THE FUTURE OF CHARTER COMPETITION AND CORPORATE PURPOSE

Legal compliance obligations are no longer a "mandatory" rule governing directors and officers of American corporations. This insight

209. Moon, *Delaware's New Competition*, *supra* note 19, at 1447.

210. Moon, *Delaware's Global*, *supra* note 72, at 1713.

211. *See* HERBALIFE LTD., *supra* note 194, at 38.

212. Moon, *Delaware's New Competition*, *supra* note 19, at 1445. Relatedly, while American shareholders of Cayman firms could try to bring a suit in the United States, they must overcome the forceful argument that the Cayman Islands is a more appropriate forum. Fried & Kamar, *supra* note 196, at 244.

complicates the longstanding scholarly understanding that corporate charter competition leads corporations to behave in a way that enshrines shareholder primacy as the purpose of modern business corporations.[213] In reality, charter competition may continue to usher in different versions of corporate purpose as it relates to profit-maximizing illicit behavior.

The remainder of this Essay turns normative and analyzes potential policy responses. Section III.A weighs the competing arguments for and against embedding legal compliance mandates as a matter of corporate law. It concludes that at least some minimal level of mandate is desirable from the standpoint of neutralizing the modern business corporation's excessive risk-taking tendencies. Section III.B recommends that public enforcement agencies take into account the firm's place of incorporation as a factor in their investigative and enforcement actions in order to counteract the negative societal effects of unfettered choice.

A. The Promise and Perils of Legal Compliance Mandates

The obligation imposed on corporations to obey the law is not a monolithic concept. At one end of the spectrum, corporate law doctrines mandating fidelity to the rule of law can impose severe punishment on directors and officers whenever the corporation violates the law—to the point of unduly chilling the entrepreneurial risk-taking function of business corporations.[214] On the other end of the extreme, corporate law can broadly eliminate the fiduciary duty to avoid illegal activities and immunize directors and officers who turn a blind eye to corporate lawbreaking for the purpose of boosting profits.[215]

To some scholars, the emergence of lawbreaking havens may be an indication that corporate law need not be in the business of deterring lawbreaking, despite its historic pedigree. Indeed, a dominant way to understand the function of corporate law is to treat it purely as a body of rules aimed at enhancing firm value. Under this approach, external laws—

213. *See, e.g.*, Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1552 (1989) ("In light of the competition among states for incorporations, however, private wealth maximization is likely to be the shaping force of corporate law. If shareholders and managers perceive that a state's corporate law does not operate in their joint interest, they can simply move elsewhere."); Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) (arguing that the "triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured").

214. Arlen, *supra* note 99, at 196.

215. *See, e.g.*, Elhauge, *supra* note 98, at 757 ("More importantly, an obvious alternative would be to have no applicable fiduciary duty, which would leave the corporation facing the same legal and economic sanctions as any noncorporate businesses, and thus should cause corporate managers acting on behalf of shareholders to make the same tradeoffs between those sanctions and expected business profits that sole proprietors would make.").

such as labor laws, antitrust laws, and environmental laws—alone ought to deal with corporate lawbreaking.[216] In an ideal world, "properly structured corporate criminal liability should suffice to deter by inducing companies to prevent, detect, investigate, and self-report misconduct, and share their information with enforcement authorities to increase the threat of individual liability."[217]

Viewed from this perspective, legal compliance mandates can be understood as no more than archaic rules that ought to be stripped away by jurisdictional competition. To be sure, it is entirely plausible that, at least for certain types of firms, lax rules on legal compliance can enhance shareholder value by facilitating managers to engage in profit-maximizing illicit activities.

But that theoretical possibility should not be the end of the inquiry. Even strictly from a firm value standpoint, the lack of legal compliance mandates may enable managers to design policies designed to maximize short-term value, as opposed to enhancing firm value by focusing on the long-term. After all, managers of public companies today face immense pressure from capital markets to deliver short-term results.[218] In that sense, enabling shareholder suits for egregious legal compliance failures has the capacity to reduce agency costs by disciplining managerial misconduct aligning managerial interest with the long-term value of the firm.[219]

While public enforcement agencies also enforce existing laws, external laws imposed on the corporate entity itself are insufficient to deter corporate lawbreaking to socially desired levels for a number of reasons. First, lawmakers in the United States rely heavily on private litigants to effectuate statutory goals.[220] As Jack Coffee explains in his classic article on class and derivative suits, "American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to

216. EASTERBROOK & FISCHEL, *supra* note 24, at 35–39.

217. Arlen, *supra* note 99, at 203.

218. *See* James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 438 (2022). Moreover, as Claire Hill and Brett McDonnell assess, "the directors' willingness to tolerate or engage in illegal conduct may be a proxy for their willingness to engage in conduct that more directly diverges with the shareholders' interests." Claire A. Hill & Brett H. McDonnell, Essay, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1784 (2007).

219. *See* Claire Hill, *The Rhetoric and Reality of Shareholder Profit Maximization*, 99 CHI.-KENT L. REV. 39, 59 (2024) ("[A]ny real-world conception of profit maximization will give law, which concerns others' interests, a special privileged status, and will also take others' interests into consideration by factoring in the possibility that some corporate conduct that caused harm would elicit regulation, regulatory scrutiny, lawsuits, recruitment and retention costs, reputational damage, and other ancillary costs."); *see also* Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *The Meme Stock Frenzy: Origins and Implications*, 96 S. CAL. L. REV. 1387, 1406 (2024) (discussing the "disciplinary effect of litigation risk in curbing managerial misconduct").

220. William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. 323, 325 (2018).

the discretion of public enforcement agencies."[221] Second, by virtue of their role within the firm, directors and officers are at an informational advantage relative to public enforcement agencies in their ability to detect and prevent corporate lawbreaking. As Maria Glover explains, "the best sources of information about private wrongs are often the parties themselves, because they tend to have superior knowledge regarding the costs and benefits of given activities, the costs of reducing risks of harm, and the probability or severity of risk."[222] Finally, directors and officers often benefit from lawbreaking that boosts profits, meaning that shareholder and manager interests aligning may not necessarily result in socially desirable outcomes.[223]

This is particularly true because it is difficult to deter corporate lawbreaking without adequate internal structures in place. Indeed, even the most celebrated theories on legal compliance—deterrence and expressive functions of the law—only have limited import for understanding legal compliance in complex organizational settings like corporations.

The deterrence effect of the law—the idea that the threat of punishment will deter people from violating the law[224]—only has partial applicability to corporations because financial penalties imposed at the corporate entity level have limits on influencing the behavior of the movers and shakers of the entity.[225] Studies show, for instance, that costly financial penalties and fines imposed on American corporations for human rights violations abroad have had limited impact in constraining the behavior of corporate leadership.[226] More broadly, imposing liability on the corporate entity through corporate criminal laws has not been able to reliably deter corporate lawbreaking because "employees contemplating misconduct usually face such a small likelihood of being detected and punished that it is not material."[227]

Expressive powers of the law—the idea that the law influences human behavior through shaping viewpoints of condemned acts—also only have

221. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986).

222. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1154 (2012).

223. Arlen, *supra* note 99, at 203.

224. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169–217 (1968).

225. *See* Moon, *Transnational*, *supra* note 106, at 908.

226. *See* Shayak Sarkar, Essays on Development, Finance, and International Law 32–33 (Apr. 2018) (Ph.D. dissertation, Harvard University) (on file with author).

227. Jennifer Arlen, *The Compliance Function* (NYU L. & Econ. Working Paper No. 23-38, Pub. L. & Legal Theory Working Paper No. 23-54, 2023), https://ssrn.com/abstract=4502973 [https://perma.cc/6NJL-3FXF].

limited impact when it comes to corporations.[228] While corporations are often caricatured as anthropomorphized versions of humans, the process through which societal norms are absorbed in organizational settings is both complex and dynamic. As Jenn Arlen and Lewis Kornhauser explain, the nature of organizational misconduct "often eliminates an essential prerequisite to deterrence through expressive law: employees' perceived responsibility for the misconduct."[229] Organizational settings reduce the perceived responsibility, which is a prerequisite to deterrence through expressive law.[230]

Corporate law can powerfully influence the lawbreaking tendencies of business corporations, for it holds the keys to ensuring that the firm detects and prevents misconduct.[231] At stake is not just an obligatory nod to law and legal systems, but jurisprudence that significantly shapes the behavior of some of the most powerful people that run modern corporations.

Importantly, corporate law's legal compliance obligations play an important—yet underappreciated—role in tackling a well-known problem underlying the modern corporate form. Foundational corporate law doctrines including limited liability encourage socially beneficial entrepreneurial risk-taking by assuring that the firm's "co-owners"—shareholders—do not risk more than their capital investment. The corporate form, which emerged in the seventeenth century,[232] has been celebrated as an important legal innovation fueling economic growth and enabling human collaboration on a previously unimaginable scale.[233]

Yet, it is widely acknowledged that the structural features of the modern corporate form facilitate corporate lawbreaking on a more frequent basis and on larger scales.[234] According to Kate Raworth, "economic effects that were treated as 'externalities' in twentieth-century theory have turned into defining social and ecological crises in the twenty-first century."[235]

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228. RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

229. Arlen & Kornhauser, *supra* note 42, at 705.

230. *Id.* at 705.

231. Arlen, *supra* note 227, at 24.

232. *See* Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193, 225 (2017).

233. *See* Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 248–49 (2017).

234. Arguably, the modern corporate form that reduce "directors' exposure—including the business-judgment rule, exculpation, indemnification, and directors and officers (D&O) insurance—make management more comfortable taking the risks that shareholders rationally prefer." Bruner, *supra* note 37, at 1244.

235. KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST CENTURY ECONOMIST 123 (2017).

While features like limited liability help investors overcome risk aversion and facilitate the pooling of capital, "limited liability is generally believed to contribute to excessive risk-taking and externalization of losses to the public."[236] Statutory proposals aimed at gutting or reforming limited liability, while enjoying luminary status in prestigious law reviews and generating widespread scholarly following,[237] have failed to gain traction as a matter of legal reform.[238] Veil piercing—a well-known and longstanding exception to the general rule of limited liability—has also largely failed as a viable tool. Today's leading scholars have described veil-piercing jurisprudence as constituted of cases that "make no sense and do not promote any sensible policy goals such as limiting opportunistic risktaking."[239]

Legal compliance duties demanded of corporate fiduciaries tame the corporation's excessive risk-taking tendency not through the gutting of the doctrine of limited liability or through mandating amorphous conceptions of corporate social responsibility. Rather, it does so by narrowing the zone of managerial decisions protected by the business judgment rule by drawing a hard line at lawbreaking.[240]

This form of social responsibility imposed on corporations, so to speak, is distinct from the decades of scholarship on corporate social responsibility that have been in and out of vogue over the past seven decades. Under the theoretical banners of stakeholder capitalism, corporate social responsibility, and most recently environmental, social, and governance (ESG), generations of scholars in law and social science have argued that corporations ought to infuse the public interest in their private decision-making.[241] Existing calls for corporate social responsibility tend to rely on a form of deontological reasoning.[242] Although enjoying dominance in

236. *See* Michael Simkovic, *Limited Liability and the Known Unknown*, 68 DUKE L.J. 275, 278 (2018); *see* Michael Simkovic, *Natural-Person Shareholder Voting*, 109 CORNELL L. REV. 1525, 1536 (2024).

237. *See* Hansmann & Kraakman, *supra* note 36, at 1883; Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1205–07 (2002).

238. Bruner, *supra* note 37, at 1227.

239. Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 106 (2014).

240. The business judgment rule is a presumption that the judgment of the directors of corporations enjoys the benefit of a presumption that it was formed in good faith and was designed to promote the best interests of the corporation. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 9 (2005). For fiduciary claims covered by the business judgment rule, the presumption typically results in jurisprudence where "the board wins, the shareholder loses, and the court stays out of it." *Id.* at 11.

241. The term "corporate social responsibility" was developed in the 1950s by economist Howard Bowen. HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953).

242. *See, e.g.*, Daryl Koehn, *A Role for Virtue Ethics in the Analysis of Business Practice*, 5 BUS. ETHICS Q. 533, 536 (1995).

today's business school curriculum and gaining a significant following among corporate law scholars in recent decades, this approach also suffers from a series of conceptual challenges.[243] Critically, there is no consensus on what social responsibility entails.[244] With critics piling on, movements demanding stakeholder capitalism today are vulnerable to being absorbed as "enlightened" versions of shareholder primacy,[245] or cheap talk in the force of capital markets that steer managers toward profit maximization goals.[246] At worst, they can be leveraged by corporate managers to evade accountability.[247]

While sharing some normative commitments of the corporate social responsibility movement, legal compliance doctrines embedded in corporate law do not rely on the same deontological foundations of stakeholder capitalism. This is because legal compliance mandates advance societal interests by promoting a more robust compliance of laws already on the books.[248] Importantly, external sources of law—including antitrust laws, environmental laws, and labor laws—follow the corporation wherever it operates, regardless of where it is incorporated.[249] Thus, legal compliance can accommodate more concrete notions of societal interests embedded in applicable positive law that may vary significantly based on where the corporation operates.[250] Legal compliance duties, in that sense, constitute a modest infusion of corporate social responsibility that does not require a wholesale re-writing of modern corporate codes.

This is not to say that there is no upside to corporate law produced by lawbreaking havens. For one, lawbreaking has the potential to provide social value. In an important work, Elizabeth Pollman documented how corporate lawbreaking in some cases may benefit society by pushing for

243. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2020).

244. Indeed, Max Schanzenbach and Robert Sitkoff caution that "evidence in support of risk-return ESG . . . is far from uniform, is often contextual, and in all events is subject to change, especially as markets adjust to the growing use of ESG factors." Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 454 (2020).

245. Bebchuk & Tallarita, *supra* note 243, at 164.

246. Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1176–77 (2022); Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 282 (2014).

247. *See* Jonathan R. Macey, *ESG Investing*: Why Here? Why Now?, 19 BERKELEY BUS. L.J. 258, 264 (2022).

248. *See* Moon, *supra* note 40, at 1079.

249. Greenfield, *supra* note 91, at 1282–83 ("A Delaware corporation, for example, is required under its charter to act 'lawfully' wherever it does business.").

250. *Cf.* Pollman, *supra* note 122, at 2028–29 ("Corporations produce a continual flow of externalities; embedding a duty of obedience to laws and regulations that constrain these externalities for the good of society helps to legitimize corporate law.").

innovation and legal reform.[251] As illustrated by instances of Uber violating restrictive taxi regulations and cannabis companies that violate federal marijuana laws, "there is a wide array of lawbreaking, ranging from truly repugnant activity that has no redeeming social value to innovative entrepreneurship that arguably falls into a legal gray area or transgresses laws made in a different technological or social age."[252] Michael Kang has offered a public law account of how "strategic lawbreaking can be generative in presenting opportunities for democratic feedback and dynamism."[253]

To that end, the lesson here is not to move toward the strictest form of punishment for directors and officers anytime a corporation violates the law. Such a regime would make directors excessively risk-averse. After all, directors and officers at the top of command cannot prevent lawbreaking committed by employees gone rogue.[254] Yet, at least some minimal duties ought to be demanded of directors and officers as a matter of corporate law. Importantly, the requirement of corporations to be engaged in lawful conduct can be understood as a "function of the basic fact that it is only through government-granted charters that corporations exist."[255] At least historically speaking, large corporations have depended on the law and the administrative capacity of modern states for their very existence.[256] From that perspective, infusing minimal commitment to the rule of law is a tacit acknowledgment that law and legal institutions are required for "corporate equity holders to obtain the benefit of their bargains."[257] As Leo Strine and his colleagues observe, society's "willingness to generally charter for-profit corporations has been subject to an essential bottom-line requirement: corporations may only engage in lawful business."[258]

B. Time to Call the Feds?

At first blush, corporate lawbreaking arising from jurisdictions like Nevada offering lax rules may suggest federal intervention as a natural solution. While federal law was silent on matters of corporate law until

251. Pollman, *supra* note 122, at 715.
252. *Id.* at 716; *see* Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).
253. Michael S. Kang, *Lawbreaking as Lawmaking*, 3 U. CHI. BUS. L. REV. 443, 444–445 (2024).
254. Arlen, *supra* note 99, at 196.
255. Pollman, *supra* note 122, at 719.
256. Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970, 1970 (2023).
257. Moon, *supra* note 40, at 1074.
258. Strine et al., *supra* note 88, at 649–50.

Congress enacted the Securities Act of 1933,[259] certain segments of corporate law have since been federalized through legislation.[260] Moreover, as a general matter, the federal government unquestionably has the authority to make federal corporate law from the standpoint of constitutional law.[261]

Unsurprisingly, subscribers to the race to the bottom thesis have a long history of calling for federal intervention in corporate law.[262] These intellectual movements from time to time manifest in Washington D.C. in the form of draft bills.[263] In one of the most recent iterations, Elizabeth Warren has floated the Accountable Capitalism Act that would federalize much of American corporate law.[264] Following the 2024 election and his widely-publicized dissatisfaction with Delaware corporate law, even Elon Musk has also raised the possibility of federalizing corporate law.[265]

Sensible reforms should not start with the usurpation of corporate lawmaking authority by the federal government. In many respects, corporate law is a microcosm of the federalism debate, and jurisdictional competition in corporate law in the United States has generally proven to generate desirable governance rules for business enterprises.[266] While the jury is still out, at least the more outrageous claims about charter competition enabling managers to siphon money at the expense of shareholders appear not to track with reality.[267]

Notably, the federal government has a poor track record of producing corporate law. Roberta Romano's influential work critiquing the Sarbanes-Oxley Act illustrates the federal government's capacity to generate "quack"

259. Bebchuk, *supra* note 14, at 1442.

260. *Id.*

261. Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 101, 104 (2014) ("Congress could have federalized the law governing public corporations by exercising the power afforded to it by the Commerce Clause[.]"); Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 80 (2008) ("Congress, after all, could preempt state corporate law with federal rules.").

262. The more moderate accounts, including those of Bebchuk, call for at least some federal interventions where there are externalities associated with charter competition. *See* Bebchuk, *supra* note 14, at 1442.

263. Roe, *supra* note 20, at 588.

264. Accountable Capitalism Act, S. 3348, 115th Cong. (as introduced in the Senate, Aug. 15, 2018).

265. Mike Leonard, *Musk's Threat to Exact Delaware Revenge Runs Risk of Backfiring*, BLOOMBERG (Nov. 19, 2024, 4:00 AM), https://news.bloomberglaw.com/esg/musks-threat-to-exact-delaware-revenge-runs-risk-of-backfiring [https://perma.cc/T333-Q6JZ] (explaining Musk's flirtation with federalizing corporate law).

266. Romano, *supra* note 87, at 361–62.

267. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 279 (1985).

corporate and securities laws.[268] It is also worth remembering that corporate law—which must adopt to rapidly changing business environments—is likely ill-suited for federal law. As Bernie Black observes, "[s]tate laws are easy to change if they become obsolete or prove to be misguided, but the laws won't matter much. Federal laws can be nontrivial, but will be hard to change even if misguided or obsolete."[269] Today, it seems far-fetched to think that Congress can write sensible laws, at least ones that can stand the test of time and adapt to rapidly changing market dynamics.[270]

Solutions, therefore, might lie not in the usurpation of corporate lawmaking authority by the federal government, but rather in a modest adjustment by public enforcement authorities—at both the federal and state levels—that deploy limited resources when investigating and prosecuting corporations for violating external laws.[271] After all, when it comes to corporate lawbreaking, both external enforcement by government authorities and internal compliance structures within corporations influence the tendency of corporations to violate the law.[272] With the latter structure amenable to private sector preferences through the corporate charter market, government authorities can adjust their policy to curb illicit behavior.

Currently, public enforcement agencies are largely agnostic as to the firm's place of incorporation.[273] But the firm's place of incorporation—which dictates applicable corporate law—can vastly influence the compliance tendencies of any given corporation to take on risk for corporate lawbreaking.[274] While not categorically treating the place of incorporation as outcome-determinative, government authorities can apply heightened scrutiny to firms incorporated in well-known lawbreaking havens by

268. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) (criticizing the Sarbanes-Oxley Act and the effectiveness of its substantive corporate governance mandates).

269. Black, *supra* note 102, at 545.

270. *Id.*

271. While this Section focuses on formalized enforcement guidelines in the Department of Justice, such recommendation would apply to State Attorney General offices that play a pivotal role in enforcing both state and federal laws within their jurisdictions. *See What Attorneys General Do*, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/attorneys-general/what-attorneys-general-do/ [https://perma.cc/2SET-8LH7]; *see also* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 755–57 (2016) (documenting the pivotal role played by state attorneys general in privacy law). Importantly, "[f]ederal agencies do not work alone but in fact exercise power via networks, in tandem with other federal and state agencies as well as foreign powers." Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274, 276 (2020).

272. Baer, *supra* note 41, at 321.

273. *See, e.g.*, U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (Sept. 2024), https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl [https://perma.cc/3HUF-NKQK] [hereinafter DOJ COMPLIANCE GUIDELINE].

274. *See supra* Section II.B.

viewing the place of incorporation as a prima facia evidence of the firm's internal compliance culture.

Consider how such a proposal would be implemented by the Department of Justice.[275] The Department of Justice first published its Evaluation of Corporate Compliance Programs (ECCP) in 2017, identifying factors prosecutors should consider when assessing the adequacy of corporate compliance programs during criminal enforcement actions.[276] By formalizing the process, the Department of Justice aimed to offer guidance that assisted both businesses and legal professionals to better understand how compliance programs would be assessed during investigations.[277] Foremost, the ECCP recognizes that effective corporate compliance is not only about detecting violations but also about proactively preventing misconduct.[278] Since its inception, the ECCP has undergone significant revisions but has remained intact even with presidential power shifts in the White House.[279]

The current factors identified by the ECCP include risk assessment, program design, resource allocation, leadership commitment, third-party due diligence, employee training, monitoring and auditing, enforcement and discipline, and continuous improvement during periods of investigation and prosecution.[280] Under the guideline, the Department of Justice places great importance on the involvement of directors and officers in ensuring that compliance is a core element of the company's operations.[281] Ultimately, the ECCP underscores its broader goal of incentivizing robust and effective corporate compliance.[282] As a result, companies that invest in and maintain

275. While different numbers of government agencies can investigate, "the DOJ has the sole authority to prosecute offenders under federal criminal law." Alexander & Lee, *supra* note 183, at 864.

276. Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 969 (2018).

277. *See* DOJ COMPLIANCE GUIDELINE, *supra* note 273.

278. *Id.*

279. Aisling O'Shea, Nicolas Bourtin & Anthony Lewis, *DOJ Updates Guidance on the Evaluation of Corporate Compliance Programs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 20, 2020), https://corpgov.law.harvard.edu/2020/06/20/doj-updates-guidance-on-the-evaluation-of-corporate-compliance-programs/ [https://perma.cc/9GXR-C9NA]. While it remains to be seen what the precise contours of enforcement would look like under the new presidential administration that took office in 2025, the ECCP's initial launch during the first Trump administration suggests that at least some version of enforcement will likely remain in force. *See* Michael Peregrine, *Boards Face a Corporate Compliance Conundrum Under Trump 2.0*, FORBES (Jan. 13, 2025, 1:50 PM), https://www.forbes.com/sites/michaelperegrine/2025/01/13/the-boards-corporate-compliance-conundrum-in-a-new-administration/ [https://perma.cc/XZ8G-PPR3].

280. DOJ COMPLIANCE GUIDELINE, *supra* note 273.

281. John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191, 1207 (2020).

282. Peter Eyre et al., *Putting the "AI" in Compliance—DOJ Updates Its Corporate Compliance Program Guidance to Address Emerging AI Risks and Leveraging Data*, CROWELL & MORING LLP

comprehensive compliance programs are more likely to avoid significant legal penalties and gain favor in any potential prosecution or settlement negotiations.

Incorporation-based evaluations enable prosecutors to contextualize a corporation's compliance risks within the firm's jurisdictional environment. By expressly identifying applicable corporate law as a quasi-nested element, prosecutors can deploy limited resources appropriately armed with knowledge that any given firm's place of incorporation powerfully impacts whether non-governmental actors— shareholders—have sufficient control and information rights to credibly discipline errant managers.[283] Tying compliance program evaluations to the place of incorporation could encourage firms to adopt stricter compliance measures, regardless of their state's legal framework. Firms may be incentivized to implement more rigorous compliance programs through bylaws, going above the legal minimum enforced by applicable state corporate law.[284] It could also mitigate the jurisdictional tendencies of offering lax rules for legal compliance.[285]

Thoughtfully implemented, this approach could help preserve some of the well-documented virtues of corporate charter competition while serving as a guardrail against jurisdictions offering a body of corporate law that completely eliminates legal compliance mandates.

CONCLUSION

American corporate law is famously constituted principally of default rules.[286] Those who pool capital for business ventures can largely write their tickets as they see fit, constrained only by a handful of mandatory rules.[287] The duty imposed on the corporation and its fiduciaries to operate within legal boundaries is one of those rules widely understood as a mandatory

(Sept. 25, 2024), https://www.crowell.com/en/insights/client-alerts/putting-the-ai-in-compliancedoj-updates-its-corporate-compliance-program-guidance-to-address-emerging-ai-risks-and-leveraging-data [https://perma.cc/ZN6V-YTXN].

283. *See* Ann M. Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, 2020 WIS. L. REV. 657, 667.

284. Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 373 (2018). Firms incorporated in lax corporate law jurisdictions, for instance, can contractually specify higher levels of legal compliance mandates through corporate bylaws or corporate charters. Moon, *Delaware's Global*, *supra* note 72, at 1689.

285. James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200 (1999).

286. *See* Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1077 (2017) ("[M]uch of corporate law consists of 'default rules' that parties may freely alter . . . .").

287. *See* EASTERBROOK & FISCHEL, *supra* note 24, at 2.

feature of American corporate law. Consistent with this ethos, legal scholars rarely take the normative position that corporations ought to break the law to maximize profits.[288]

The emergence of corporate lawbreaking havens demonstrates how jurisdictional competition has undercut the legal compliance obligations demanded of modern business corporations. While legal compliance remains an important mandatory rule in Delaware, corporations today can effectively opt out of these obligations by incorporating elsewhere. The rise of lawbreaking havens has the potential to provide some redeeming social value but comes at the cost of encouraging unrestrained risk-taking with potentially catastrophic societal consequences. The proper calibration of the duty for legal compliance remains undertheorized and ought to be a central question with which more scholars and lawyers should tackle head-on in the coming decades.

288. *See* Elhauge, *supra* note 98, at 756–57 ("[M]ost advocates of a duty to profit-maximize concede it should have an exception for illegal conduct.").