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An Interest Group Response to The Legitimation of Shareholder Primacy

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Abstract:

This is an invited response to Professor Ann Lipton's (Colorado Law) article, The Legitimation of Shareholder Primacy, 51 J. Corp. L. 83 (2025).

Lipton's foundational thesis is that the exercise of corporate power requires social legitimacy. Shareholder primacy purports to provide the requisite legitimacy by constraining that power in politically neutral ways. Formal governance procedures make that constraint visible, but those procedures do not always align with shareholder value because they also serve social and symbolic purposes. When shareholder welfare conflicts with public welfare, corporate law must choose between them. The present highly polarized political environment has generated a series of controversies over issues such as the use of environmental, social, and governance (ESG) metrics in both management and investing, diversity initiatives, climate risk, Elon Musk's immense compensation package, and directors' oversight duties that have forced Delaware to make such choices. Delaware's choices in recent years revealed that shareholder primacy and Delaware law are political after all. In light of those developments, Delaware's traditional neutrality is now questioned, as its courts and legislature are accused of taking sides in national political disputes. That politicization helps drive the DExit phenomenon.

This article offers a complementary explanation. The phenomena Lipton identifies can be understood without treating them primarily as manifestations of shareholder primacy's internal contradictions. They can instead be explained through a public-choice model in which the three principal producers of Delaware corporate law—the Delaware bar, the Delaware legislature, and the Delaware judiciary—act rationally to advance their own institutional interests. What Lipton describes as a crisis in the legitimation of shareholder primacy may therefore also be understood as the destabilization of an interest-group equilibrium.

An Interest Group Response to *The Legitimation of Shareholder Primacy*

Stephen M. Bainbridge[*]

I. INTRODUCTION

In *The Legitimation of Shareholder Primacy*,[1] Ann Lipton argues that the contemporary politicization of corporate governance exposes a contradiction at the heart of shareholder primacy.[2] The adoption of shareholder primacy as the defining norm of corporate law was intended to remove decisions about contested social, political, and economic questions from corporate governance by limiting managerial discretion to promotion of shareholder value. In particular, making trade-offs between shareholder value and the interests of other corporate constituencies, such as employees, consumers, communities, and so on, was a task left to markets and public regulation. Shareholder primacy thus allows corporate governance and, accordingly, corporate law to be nonpartisan, because contested political choices fall outside their domain. In turn, as the premier state of incorporation and source of our de facto national corporate law, Delaware is able to position itself as offering "a distinctively nonpartisan, technocratic approach" to corporate law.[3]

Lipton argues that that model no longer holds true, if it ever did. Her foundational thesis is that the exercise of corporate power requires social legitimacy.[4] Shareholder primacy purports to provide the requisite legitimacy by constraining that power in politically neutral ways.[5] Formal governance procedures make that constraint visible, but those procedures do not always align with shareholder value because they also serve social and symbolic purposes.[6] When shareholder welfare conflicts with public welfare, corporate law must choose between them. The present highly polarized political environment has generated a series of controversies over issues such as the use of environmental, social, and governance (ESG) metrics in both management and investing, diversity initiatives, climate risk, Elon Musk's immense compensation package, and directors' oversight duties that have forced Delaware to make such choices. Delaware's choices in recent

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[1] Ann M. Lipton, The Legitimation of Shareholder Primacy, 51 J. Corp. L. 83 (2025).

[2] Lipton defines "shareholder primacy" for purposes of this article as "the principle that corporate governance should orient around encouraging managers to maximize profits for the equity holders." Id. at 86. In contrast, I define shareholder primacy as embracing "two distinct principles: (1) the shareholder wealth maximization norm, pursuant to which directors are obliged to make decisions based solely on the basis of long-term shareholder gain . . . and (2) the principle of ultimate shareholder control." Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U.L. Rev. 547, 573 (2003). In this Response, however, I adopt Lipton's terminology.

[3] Lipton, supra note 1, at 87 n.25 (quoting McRitchie v. Zuckerberg, 315 A.3d 518, 573 (Del. Ch. 2024)).

[4] See infra notes 9-10 and accompanying text (highlighting that argument).

[5] See Lipton, supra note 1, at 87 (summarizing that argument).

[6] See id. at 90 (discussing "provisions [that] are intended to legitimate the exercise of corporate power in the eyes of society").

years revealed that shareholder primacy and Delaware law are political after all.[7] In light of those developments, Delaware's traditional neutrality is now questioned, as its courts and legislature are accused of taking sides in national political disputes.[8]

There is a lot going on in Lipton's article, much of which is highly contestable. The claim that corporate power must be perceived by society as legitimate.[9] The claim that for corporate power to be regarded as legitimate that power must be deployed to "prosocial" ends.[10] The identification of prosocial ends with the progressive left conception of stakeholderism.[11] The assertion that shareholder primacy was invented to solve a political dilemma.[12] The related claims that shareholder primacy was never apolitical and that recent developments have brought that reality into the light of day.[13] The argument that corporate governance rules are at least partly symbolic, being intended to make corporate power appear professional, accountable, and socially

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[7] Id. at 84.

[8] Id. at 84-85.

[9] See id. at 85 n.13 ("It has frequently been recognized that the power wielded by corporate managers must be recognized as legitimate for businesses to function effectively.").

[10] See id. at 87 ("For that kind of power to be accepted as legitimate there must be the perception that his power is channeled in a prosocial direction . . ..").

[11] Lipton defines the "prosocial direction" in which she claims corporate power must be aimed as having "due regard for the multiple constituencies—shareholders, creditors, employees, consumers, and communities—who may be affected by corporate behavior." Id. at 87. Although stakeholderism has been embraced by some business leaders, it is mainly associated with progressive politicians and commentators. See, e.g., Amy K. Lehr, Fiduciary Duties for A Globalized World: Stakeholder Theory Reconceived, 27 Geo. Mason L. Rev. 81, 94 (2019) ("Stakeholder theory has gained new attention due to the rise of a progressive wing in the Democratic Party that has proposed significant changes to corporate law."); A. Caleb Pirc, Gambling on Another's Dime: How ESG Investing Violates the Fiduciary Duty, 36 Regent U.L. Rev. 375, 379 (2024) ("ESG scores have become popular as a method for advancing particular economic and social values, primarily promoting more politically progressive values and priorities."). In contrast, red states have opposed developments such as ESG, suggesting their politicians and voters have a different conception of what policies are prosocial. See Sharon Hannes, The Future of Corporate America, 50 Del. J. Corp. L. 499, '"). Indeed, Lipton herself acknowledges later in the article that "the very definitions of prosociality and antisociality are contested" in today's environment. Lipton, supra note 1, at 116.

[12] See Lipton, supra note 1, at 85 ("Shareholder primacy was conceived, in large part, as a compromise to keep politics out of business management; what today's controversies reveal is the futility of that effort.").

[13] See id. at 94 (arguing that the litigation over Elon Musk's compensation at Tesla "explode[d] the myth that the doctrine of shareholder primacy removes contested allocative choices from the law of corporate governance (and from the State of Delaware)"). Lipton offers two possible explanations for why corporate law creates provisions having a largely symbolic function. First, shareholder primacy may be economically efficient, but governance rituals are needed to make it publicly acceptable. See id. at 91 ("The "good governance" requirements civilize firms by cloaking their decisionmaking with a veneer of professionalism."). Second, shareholder primacy may favor a narrow group, while governance rituals disguise that distribution of power as socially beneficial. See id. at 125 (suggesting that "legitimacy-washing is a tool to maintain a system that benefits a few at the expense of the many").

legitimate.[14] And so on. Space does not permit me to address all of those debates in this Response, although I shall tackle some of them elsewhere.[15]

Instead, this Response focuses on Lipton's effort to link DExit to the polarized political environment.[16] As Lipton notes, the last several years have seen claims that Delaware's position as the leading state of incorporation is facing a series of challenges posing "perhaps the gravest threat" to its dominance in decades.[17] But what does that have to do with shareholder primacy and political polarization?

As I read it, Lipton's argument intersects with the DExit debate through the following causal chain: (1) Issues once treated as matters of apolitical corporate governance—e.g., ESG, DEI, climate change, and executive compensation—have become partisan political controversies that are being contested in a highly polarized environment.[18] (2) Shareholder primacy historically supplied the intellectual basis for treating corporate governance and, accordingly, corporate law as politically neutral.[19] (3) Delaware's legitimacy as the de facto national corporate lawmaker depends on pretending that shareholder primacy is technocratic and nonpartisan.[20] (4) But the politicization of corporate governance reveals that shareholder primacy in fact cannot insulate managers from having to make politically contested judgments about how to deploy corporate

[14] See id. at 90 (discussing corporate governance "provisions [that] are intended to legitimate the exercise of corporate power in the eyes of society as a whole").

[15] See Stephen M. Bainbridge, Response to Ann Lipton's "The Legitimation of Shareholder Primacy" (Part I): An Overview, BainbridgeOnCorporations (July 30, 2026), https://www.bainbridgeoncorporations.com/p/response-to-ann-liptons-the-legitimation. [NOTE: Add citations to other BainbridgeOnCorporations.com posts.]

[16] I elsewhere explained that "DExit is a portmanteau of Delaware and exit, in the same spirit as Brexit and Megxit, used as a shorthand for corporate reincorporation out of Delaware to another state." Stephen M. Bainbridge, DExit Drivers: Is Delaware's Dominance Threatened?, 50 J. Corp. L. 823, 825 n.4 (2025). I have been credited with having "coined the term in a 2024 article." Derek S. Hubbard, Under Pressure: Delaware, Corporate America, and Certified Questions, 60 U. Rich. L. Rev. 853, 855 n.4 (2026). In fact, however, I heard attorneys using the term as early as 2022 and, as such, make no claim to it.

[17] Lipton, supra note 1, at 88. As detailed in an earlier article in this Journal, I have serious reservations about the significance of the DExit phenomenon. In my view, the number of companies that have left Delaware is small and most of the high-profile leavers have been controlled companies whose controllers believed they faced significantly greater risk of liability in connection with conflicted transactions in light of a series of Delaware Chancery Court decisions predating the adoption of SB 21. See Bainbridge, supra note 16, at 889 (explaining that "multiple sources have identified controlling shareholder liability exposure as the key DExit" driver)

[18] See Lipton, supra note 1, at 84 (noting "controversies raging over 'environmental, social, governance,' (ESG) investing, diversity, equity, and inclusion initiatives, climate change as an investment concern, and even Elon Musk's takeover of Twitter and his pay package at Tesla").

[19] See id. at 87 ("Shareholder primacy . . . is championed as the better system because it is the only one that offers a meaningful, societally determined constraint on managerial behavior.").

[20] See id. ("Delaware's legitimacy to serve this inescapably political function rests, ironically, on its fierce commitment to keeping political concerns out of its law.").

power.[21] (5) At the same time, the polarized environment encouraged corporations and, in particular, corporate controllers dissatisfied with recent Delaware decisions to characterize those as politically biased, leading them to exit to jurisdictions offering a different political or governance bargain.[22] (6) As Delaware's image as a neutral supplier of universally acceptable corporate law erodes, states can begin to compete for corporate charters by differentiating themselves politically.[23] (7) Delaware's legislature responded to the challenge by making major changes in its laws, especially to those laws constraining controlling shareholders.[24] Accordingly, polarization becomes an alternative explanation for the breakdown of the Delaware Way and the conflict between the Delaware courts and its legislature.[25]

Lipton thus offers an interesting take on the dramatic developments that have preoccupied the minds of corporate lawyers and academics in recent years. In contrast to conventional legal scholarship on interstate competition for corporate charters, Lipton is not primarily arguing that companies leave because Delaware law has become economically inefficient. Instead, she is arguing that polarization exposes the political content concealed within shareholder primacy, which in turn destroys Delaware's ability to market its corporate law as politically neutral. Once that neutrality is lost, states can compete not merely on legal quality but on different normative visions of corporate governance, making DExit a structural threat to Delaware's traditional dominance.

This Response offers a complementary but competing explanation for the recent ferment in Delaware law. The phenomena Lipton identifies can be understood without treating them primarily as manifestations of shareholder primacy's internal contradictions. They can instead be

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[21] See id. at 85 ("What is unique about the current moment is that the trends toward politicization result from tensions inherent in shareholder primacy . . .."). Lipton contends that polarization enters corporate governance through what she calls the stewardship channel. Because shareholder primacy equates investor and societal interests, reformers blocked elsewhere are increasingly disguising social policy in investor-protection language. ESG thus has become the vehicle for prosocial corporate reforms. As a result, the shareholder primacy "conceit that profitability will ultimately align with prosociality invites politicians to treat antisociality as a problem of corporate governance", so that "corporate governance itself becomes the new political battlefield, with Delaware's role now squarely in the crosshairs." Id. at 116-17.

[22] See id. at 100-02 ("Critics accused Delaware of 'activist' and politicized decisionmaking . . ..").

[23] See id. at 85 ("Delaware's newly politicized approach threatens to splinter the corporate governance universe, driving corporations to other states that are more reliable (or that follow different corporations' preferred politics).").

[24] See id. at 102 ("Unwilling to risk any threat to its status as the dominant jurisdiction for corporate chartering, Delaware's legislature responded in dramatic fashion."). If Lipton is correct, we may see the development of a recursive loop triggering a death spiral for Delaware's dominance of corporate law: Delaware changes its law to retain incorporations → those changes themselves become politically controversial → critics accuse Delaware either of favoring plaintiffs/shareholders or capitulating to controllers/managers → Delaware looks still less neutral → jurisdictional choice becomes still more politicized → further DExit becomes conceivable → and Delaware changes its law again, starting the loop over.

[25] On the "growing divide between the Chancery Court and Delaware lawmakers," see Andrea Safran, Uncertainty in Business Judgment: How a Divide Between Delaware's Judiciary and Legislature Has Changed Corporate Law, 17 Wm. & Mary Bus. L. Rev. 755, 783 (2026).

explained through a public-choice model in which the three principal producers of Delaware corporate law—the Delaware bar, the Delaware legislature, and the Delaware judiciary—act rationally to advance their own institutional interests. The bar seeks to maximize the demand for specialized legal services. The legislature seeks to preserve franchise-tax revenue and the electoral benefits that revenue provides. The judiciary seeks to maximize reputation, influence, and the continuing importance of Delaware adjudication. These interests usually reinforce one another, but polarization changes the payoffs. High-profile disputes increase the reputational value of judicial intervention, the fiscal danger of corporate exit, and the demand for sophisticated legal advice. What Lipton describes as a crisis in the legitimation of shareholder primacy may therefore also be understood as the destabilization of an interest-group equilibrium.

Put another way, Lipton's legitimation-based thesis is underspecified at the level of mechanism. Lipton tells a story in which Delaware performs prosociality for society.[26] But Delaware is not a unitary actor. As such, her account cannot explain the central drama of her own Part I—i.e., the state tearing itself apart in 2024–25, with the legislature publicly rebuking the judiciary, bypassing the Delaware state bar's traditional role in formulating Delaware corporate statutes, and importing MBCA-like language and safe harbors into the DGCL. A performance needs performers, but the performers have divergent interests. Legitimation pressure may set the stage, but interest group competition explains who says which lines.

Part I develops a three-actor public-choice model of Delaware lawmaking. Part II applies that model to Lipton's case studies; i.e., the Tesla litigation, ESG and stewardship disputes, and the expansion of *Caremark*[27] oversight. Part III responds to potential objections, including that the model is overly cynical, cannot explain doctrinal principle, and understates the genuine ideological content of contemporary corporate-law conflict. The conclusion argues that Lipton and public choice illuminate different levels of the same phenomenon. Lipton explains the justificatory language of Delaware corporate law, while interest-group analysis explains why particular institutions deploy that language in predictable ways.

II. A Three-Actor Public-Choice Model

Delaware corporate law emerges principally from the interaction of three actors; namely, the legislature, the bar, and the judiciary.[28] Each has its own role and set of interests. Although

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[26] See Lipton, supra note 1, at 88 (arguing that shareholder primacy must not only channel behavior in prosocial ways but "be seen to do so" and, as such, "[c]orporate governance must . . . perform prosociality").

[27] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

[28] Rolin Bissell explains:

> The term "Delaware System" is used because Delaware's preeminence in corporate law reflects more than its Legislature's ability to enact sensible laws. It is built on an institutional framework for the interpretation, application, and modification of corporate law over time and has three main components: first, Delaware's corporate laws themselves, as periodically modified by its Legislature; second, Delaware's Court of Chancery, a specialized court which hears corporate disputes; and third, the corporate legal bar in Delaware which has developed and grown along with Delaware's Legislature and courts, and provides invaluable support to them.

those interests often align, they are not identical. Delaware law is therefore best understood as the product of both cooperation and conflict among them.

A. The Delaware Legislature

Delaware's dominance of the market for corporate charters generates enormous tax benefits for the state. Companies pay an annual franchise tax of up to $250,000 simply for the privilege of being incorporated in Delaware.[29] The state's total franchise tax collections represent "roughly a third" of the state's total tax revenue.[30] Losing that revenue stream or even a significant chunk of it would thus require significant reductions in services to Delaware's residents or a substantial increase in those residents' income taxes, giving the Delaware legislature a keen interest in maintaining Delaware's dominance of corporate law.[31] The legislature's chief concern is thus maximizing the number of companies that incorporate in Delaware.

In making Delaware corporate law, the legislature ordinarily defers to the judiciary and the state bar, assuming that those bodies also have a strong interest in maximizing the number of Delaware corporations.[32] As demonstrated by the swift passage of SB 313 in 2024 and SB 21 in 2025, however, the legislature will take the initiative if it perceives a threat to Delaware's dominance, especially if that threat originates from one of the other actors.[33] Indeed, even if actual emigration is limited, the mere risk of fiscal loss may trigger legislative intervention. The legislature need not conclude that the judiciary acted incorrectly as a matter of law; it need only conclude that the decision has increased the perceived cost of Delaware incorporation.

The legislature's incentives are asymmetrical. The benefits of aggressively constraining managerial discretion are diffuse, often national, and difficult for Delaware voters to observe. The costs of declining franchise revenue are concentrated within the state. Corporate managers, local lawyers, and business organizations are organized and able to communicate their concerns. The employees, consumers, or diversified shareholders who might benefit from stricter regulation are

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Rolin P. Bissell, "The Race to the Top" in State Corporate Law: The Delaware Model, 19 No. 13 Andrews Del. Corp. Litig. Rep. 13 (Jan. 2005), 2005 WL 14637, at *3.

[29] Del. Code Ann., tit. 8, § 503.

[30] Warren Sikolo, Trading Uncertainty for Order: S.B. 21 and the New Era of Fairness Review, 50 Del. J. Corp. L. 357, 370 (2026).

[31] See Joel Edan Friedlander, Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster, U. of Penn Inst. For L. & Econ. Rsch. Paper No. 24-24, at 6 (July 21, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901375 (arguing that "Delaware politicians are keen to preserve Delaware's dominance in the market for incorporations, which is a foundation of Delaware's tax base."); Lawrence A. Hamermesh, The Policy Foundations of Delaware Corporate Law, 106 Colum. L. Rev. 1749, 1753-54 (2006) (asserting that Delaware politicians are "intensely aware" of the significant percentage of the state's tax base consisting of franchise taxes).

[32] On the deference paid by the Delaware legislature to those other bodies, see Bainbridge, supra note 16, at 862-64.

[33] See Mohsen Manesh, A New Cardinal Precept in Corporate Law, 86 La. L. Rev. 1, 33 (2025) (noting that SB 313 was introduced "on May 23, exactly 90 days after *Moelis* was decided"); Safran, supra note 25, at 757 (noting that SB 21 was intended, *inter alia,* "to overturn the Delaware Supreme Court's decision in *In re Match Group, Inc. Derivative Litigation*").

generally not Delaware electoral constituencies. The legislature will therefore tend to intervene when judicial doctrine threatens the chartering franchise, even if intervention adversely affects either shareholders or stakeholders.[34]

B. The Delaware Bar

The process by which Delaware statutory corporate law is made is unique in that the state bar historically has possessed an unusual degree of influence over statutory lawmaking. Amendments to the Delaware General Corporation Law (DGCL) commonly originate in or pass through the bar's Corporation Law Council (CLC) before receiving legislative approval.[35] The CLC is comprised of both plaintiff's counsel and defense counsel, although the latter dominate. Half of the seats on the CLC are held by members of four large defense bar firms, giving those firms both a veto over CLC decisions and the ability to pass proposed legislation unless all other CLC members oppose them.[36] Proposed amendments to the DGCL put forward by the CLC are routinely rubberstamped by the state legislature.[37]

In general, like the state legislature, the Delaware bar will prefer to maximize the number of companies choosing to incorporate in Delaware as doing so increases the bar's earnings from advisory, transactional, and litigation services. Having said that, however, the bar's interests diverge from those of the legislature in two respects. First, the bar will be more concerned with maximizing the amount of work generated by Delaware corporations rather than the amount of franchise taxes those corporations pay.[38] Second, because the bar's interest is maximizing legal fees, a legal rule that marginally discourages companies from choosing Delaware incorporation may benefit the bar if the rule generates offsetting advisory or litigation work.[39]

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[34] The legislature's ability to adopt rules that disadvantage investors vis-à-vis managers is limited because investors will discount the price they are willing to pay for corporate shares if the company is incorporated in a state with laws investors disfavor, which raises management's cost of capital and thus incentivizes managers to push for laws that investors favor. See generally Stephen M. Bainbridge, Why the North Dakota Publicly Traded Corporations Act Will Fail, 84 N.D.L. Rev. 1043, 1043-44 (2008) (discussing the race to the top hypothesis).

[35] For a summary of the Corporation Law Council's role in the legislative process, see Greg Varallo, Andrew Blumberg, Ben Potts, Optimizing Delaware's Corporate Law Amendment Process: Ideas for the Next 20 Years, 50 Del. J. Corp. L. 251, 259-65 (2026). For discussion of the breakdown of that role in recent years, see id. at 265-67.

[36] Id. at 260.

[37] Hamermesh, supra note 31, at 1753 (observing that "voting on amendments to the DGCL is almost invariably unanimous").

[38] See Michal Barzuza, Price Considerations in the Market for Corporate Law, 26 Cardozo L. Rev. 127, 176 (2004) (noting that the bar "will arguably support rules that maximize the volume of incorporations rather than franchise tax revenues").

[39] As I have noted elsewhere, the bar is not monolithic. In assessing legal standards, for example, "transactional lawyers should favor indeterminate rules that can be modified by private ordering, while litigators should favor indeterminate rules that are nonwaivable." Stephen M. Bainbridge, Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study, in Can Delaware be Dethroned? Evaluating Delaware's Dominance of Corporate Law 120, 122 (Stephen M. Bainbridge et al.

C. The Delaware Judiciary

Some commentators have treated the Delaware judiciary as "an exogenous variable in the interest-group equilibrium."[40] In my view, however, the judiciary cannot be treated as an exogenous or purely passive actor. Delaware courts produce most of the state's corporate law through common-law adjudication.[41] Any account that models the bar and legislature while excluding judicial incentives therefore omits a central lawmaker.

I have elsewhere evaluated possible explanations for the interests of the Delaware judiciary, which include the possibility that the judges are simply trying to make sound legal and policy decisions, seeking to preserve or enhance Delaware's market share in the competition for corporate charters, or responding to pressures from the state bar.[42] Space does not permit me to recapitulate those analyses here. Suffice it to say that I concluded that the most plausible explanation for the behavior of Delaware judges is their incentive to maximize their reputation.[43] Delaware judges benefit professionally and institutionally from deciding nationally important disputes, writing influential opinions, demonstrating expertise, and maintaining the Delaware judiciary's status as the leading tribunal for corporate law.

The incentives driving Delaware judges need not be monetary, although the post-judicial career financial rewards of joining a major law firm likely are substantial. They may include prestige, influence, intellectual satisfaction, institutional authority, and professional recognition. This is likely to be especially true for members of the Court of Chancery. The Chancellor and Vice Chancellors "receive a level of media attention to which few other state court judges—especially trial court judges—can aspire."[44] Chancery Court members also "routinely get invited to headline high-profile academic and professional conferences to which other state court judges—especially at the trial court level—rarely receive."[45] It would be surprising if judges did not respond to such

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eds. 2018). The latter type of rules maximize "the likelihood of litigation and resulting legal fee," while the former maximize "planning and drafting fees." Id. at 147.

40 Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469, 502 (1987).

41 See Valian A. Afshar, Note, A Blended Approach to Reducing the Costs of Shareholder Litigation, 113 Mich. L. Rev. 315, 339 (2014) ("Delaware's 'highly developed body of case law,' rather than the DGCL, comprises the bulk of Delaware corporate law."); Marcel Kahan & Edward Rock, Symbiotic Federalism and the Structure of Corporate Law, 58 Vand. L. Rev. 1573, 1577 (2005) ("Delaware's corporate law may be the last vestige of the classical 19th century common law model in America: most important legal rules are promulgated by a nonpartisan, expert judiciary . . ..").

42 See Bainbridge, supra note 39, at 136-42 (evaluating those explanations). In particular, it is worth emphasizing that the judiciary—unlike the legislature—is not likely to be driven mainly by concerns about the number of Delaware corporations. If the judiciary favored only maximum incorporations, it should consistently support rules offering managers and corporations greater certainty and private-ordering freedom. Yet Delaware courts often retain indeterminate, nonwaivable fiduciary standards even where clearer alternatives exist. The incentive to maximize their opportunities to enhance their reputation helps explain that choice. Id.

43 See id. at 142-43 (developing the reputational argument).

44 Id. at 142.

45 Id.

powerful psychic incentives. The result is that Delaware judges should prefer legal rules that generate a steady stream of high-profile cases in which complex legal issues allow them to demonstrate their expertise before a national audience.

III. REINTERPRETING LIPTON'S EXAMPLES

A. Tesla and the Institutional Value of Procedure

In 2018, Tesla's board of directors and shareholders approved a compensation package worth more than $50 billion for Tesla CEO Elon Musk.[46] Richard Tornetta—who owned a whopping "nine of Tesla's 168,867,016 outstanding shares (roughly 0.00000005%)"—subsequently brought a derivative suit on Tesla's behalf against Musk and Tesla's board.[47] In a 2024 opinion describing Musk's package as "unfathomable," Delaware Chancellor Kathaleen McCormick found that the defendants had the burden of proving the fairness of the package and they had failed to do so, as a consequence of which she ordered rescission of the contract and awarded Tornetta's lawyers attorney fees of $345 million.[48] Although the Delaware Supreme Court later reversed McCormick's decision, Tesla shareholders had already approved reincorporating the company in Texas.[49] If we insist on pinpointing the triggering event for DExit, that decision is an excellent candidate.

1. The *Tesla* Trap

Lipton treats the Musk litigation as a "trap" for shareholder primacy, arguing that it created "a fundamental problem for the Delaware court."[50] The process by which Musk's compensation package was approved was defective, but Musk had delivered extraordinary shareholder gains.[51] The court's decision to rescind the compensation package therefore privileged procedural integrity over the apparent preferences and experience of Tesla shareholders.

Viewing Delaware lawmaking through an interest-group lens adds an institutional explanation for the *Tesla* decision and the subsequent adoption of SB 21. The litigation was precisely the kind of case the model predicts Delaware jurists should prize. It presented a high-profile setting and complex factual and doctrinal questions that were sure to generate substantial attention.

The result is also consistent with the model. Delaware's judiciary has invested substantial reputational capital in doctrines of independence, disclosure, conflicted-controller review, and entire fairness. If shareholder approval and market success were sufficient to validate an

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[46] See Tornetta v. Musk, 250 A.3d 793, 797 (Del. Ch. 2019) (stating that the package allowed "Musk the potential to earn stock options with a value upwards of $55.8 billion").

[47] Alex Polidan, Performance-Based Compensation: The Case to Imitate Elon Musk's Historic Payday, 55 Stetson L. Rev. 391, 391 (2025).

[48] Tornetta v. Musk, 326 A.3d 1203 (Del. Ch. 2024), rev'd sub nom. In re Tesla, Inc. Derivative Litig., 351 A.3d 1005 (Del. 2025).

[49] In re Tesla, Inc. Derivative Litig., 351 A.3d 1005 (Del. 2025).

[50] Lipton, supra note 1, at 88, 93.

[51] Id. at 93.

extraordinary conflicted-interest transaction, the importance of those doctrines—and of judicial review—would diminish. In turn, the importance of the Delaware Chancery Court would diminish.

McCormick's insistence on process protected the judiciary's institutional role. Independence inquiries, disclosure disputes, fairness review, and controller determinations are fact-intensive and resist reduction to bright-line rules. They require the specialized application of equitable principles for which the Court of Chancery is renowned. Granted, Tesla might decamp in response to an adverse decision, but the legal rules that generate the steady flow of cases before the Delaware courts would be preserved.[52] So long as DExit remained a trickle rather than a flood, striking down Musk's pay package was the right call from an incentive perspective.[53]

The legislature faced different incentives. Once Musk and others portrayed Delaware as hostile to founders or controlling stockholders, the prospect of reincorporation became salient. Texas and Nevada could offer not simply alternative doctrinal approaches but an ideologically resonant critique of Delaware. The legislature therefore had reason to reassure corporations by reducing uncertainty or limiting the consequences of *Musk* and the other Chancery Court decisions that had annoyed corporate controllers.

The bar's incentives were divided. Litigators likely benefited from the doctrinal uncertainty and extraordinary stakes of the case. Transactional lawyers and other corporate advisers likely benefited from clients demanding advice on better deal planning. What appeared publicly as a partisan fight over Musk thus reflected an underlying institutional conflict over the relative value of adjudicative discretion, transactional predictability, and franchise preservation.

2. The Timing Question

Lipton's explanation for the question "[w]hy are we now seeing a rebellion" against Delaware's use of formalities to protect stakeholder interests is that the historical discipline imposed by the threat of federal preemption has receded amid congressional gridlock and a deregulatory judiciary and administration, freeing Delaware lawmakers and managers to make

[52] Lipton interprets the court's criticism of Musk's "TechnoKing" title as a defense of corporate governance's symbolic seriousness. See Lipton, supra note 1, at 95. My account makes the point more specific. Musk's mockery of formal structure challenged the authority of the institutional system administered by Delaware judges. Reasserting the importance of titles, responsibility, independence, and process protected not only the social legitimacy of the corporate form but also of judicial relevance.

[53] To be sure, the decision's impact on McCormick's reputation was mixed, at least in the short term. On the one hand, Musk basically declared war on the Delaware judiciary in general and McCormick in particular. See Bainbridge, supra note 16, at 885-86 (describing Musk's critique). Musk's social media fanboys directed considerable invective at McCormick. See Jef Feeley & Dana Hull, Delaware Judge Who Rejected Musk's Payday Faces Backlash, Bloomberg Law (Dec. 3, 2024), https://news.bloomberglaw.com/litigation/delaware-judge-who-rejected-musks-payday-faces-backlash (describing the "social media blowback" McCormick received). On the other hand, serious commentators have praised McCormick and the Chancery court for being "'fearless' in holding iconic corporate founders and executives accountable to their shareholders" and for "applying really heavy scrutiny to actions taken by companies with controlling shareholders." Jennifer Kay, Elite Delaware Court Stands Up to 'Big Money-Powered People,' Bloomberg L. (Feb. 28, 2024), https://news.bloomberglaw.com/esg/elite-delaware-court-stands-up-to-big-money-powered-people (quoting University of Iowa Law Professor Robert Miller and University of Pennsylvania law professor Jill Fisch, respectively). In my model, Delaware judges are likely to care more about the latter than the former.

concessions they previously would have resisted.[54] But that account describes a slow-moving background condition rather than a trigger. It does not explain why the crisis erupted in 2024–25 rather than, say, 2021–22, when federal regulatory ambition (and gridlock) were arguably comparable.

The three-actor model developed here supplies the missing mechanism. It was the near-simultaneous arrival of two adverse, high-salience decisions— *Tornetta* in late January 2024 and *Moelis* in February 2024—combined with Musk's conversion of the abstract possibility of DExit into a credible, observed exit event through Tesla's June 2024 reincorporation vote that converted the legislature's ordinarily latent fiscal and electoral incentives into a binding constraint. In other words, although receding federal preemption risk may have lowered the cost of legislative accommodation, it was the sudden credibility of DExit—not the diminished threat of intervention by Washington—that explains why Delaware moved when it did.

B. ESG and the Value of Legal Complexity

ESG directly intersects with DExit. Delaware case law comes down on the side of shareholder value maximization, albeit with the important qualifier that the business judgment rule typically precludes judicial review of decisions that allegedly depart from that norm.[55] In contrast, Nevada corporate law includes a non-shareholder constituency statute allowing directors to consider a wide range of interests other than value maximization for the company's shareholders.[56] Despite Texas' open hostility to ESG,[57] its corporations code expressly allows directors to take actions having "a social, charitable, or environmental purpose."[58] In urging its shareholders to approve reincorporating in Texas, Tesla's board of directors pointed to that freedom as a plus factor.[59]

In addition to its role as an express consideration for companies pondering DExit, Lipton argues that ESG disputes reveal the impossibility of separating financial judgment from politics

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[54] Lipton, supra note 1, at 107–08.

[55] See, e.g., eBay Dom. Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (holding that "the fiduciary duties and standards that accompany" the corporate form "include acting to promote the value of the corporation for the benefit of its stockholders"); see generally Stephen M. Bainbridge, Why We Should Keep Teaching *Dodge v. Ford Motor Co.,* 48 J. Corp. L. 77, 101-11 (2022) (discussing Delaware law and explaining that, outside *Revlon*-land and the so-called confessional cases, the business judgment rule typically will preclude judicial review of actions allegedly breaching that duty).

[56] Nev. Rev. Stat. § 78.138(4)-(5) (2026).

[57] See Tawia Ansah, Materiality Beyond Metrics: Corporations, Climate Litigation, and Accountability For Distributed Harm, 41 J. Envtl. L. & Litig. 53, 55 (2026) (noting the "anti-ESG political backlash culminating in legislation in several red states including Texas and Florida").

[58] Tex. Bus. Orgs. Code Ann. § 21.401(e) (2026).

[59] See Christine Hurt, Texas, Delaware, and the New Controller Primacy, 67 Ariz. L. Rev. 693, 738 (2025) ("Tesla's proxy materials made several references to the fact that Texas, like many states, has a 'stakeholder statute'". . ..).

and the consequent inability of Delaware lawmakers to avoid making political choices.[60] An interest-group-based perspective does not necessarily deny that claim, but instead focuses on the actors who benefit from the resulting ambiguity. For the bar, ESG polarization generates advisory demand. Boards and investors must determine whether climate transition, workforce practices, diversity, supply-chain risks, political spending, and public controversy are financially material. They must comply with shifting federal requirements, inconsistent state policies, investor mandates, and fiduciary standards. Because the legality and materiality of ESG considerations depend heavily on context, firms require specialized counsel. For the judiciary, ESG disputes expand the potential domain of fiduciary law. Questions framed as social policy can be converted into questions about board process, disclosure, good faith, oversight, and corporate purpose. Open-ended standards allow courts to address new controversies without an explicit statutory mandate. For the legislature, ESG presents a more difficult calculation. Delaware must preserve its reputation among corporations with divergent political and governance preferences. A decisive statutory commitment to either side could drive some firms away. Legislative restraint, ambiguity, or selective intervention may therefore be rational strategies.

Polarization intensifies these incentives. The more contested ESG becomes, the more valuable legal advice and judicial interpretation become. At the same time, polarization increases the risk that corporate-law choices will be interpreted as partisan, threatening Delaware's chartering franchise. The resulting instability is not simply philosophical. It arises because the actors who produce Delaware law face different payoffs from clarity, ambiguity, and intervention.

C. Caremark and the Expansion of Judicial Domain

Lipton's *Caremark* analysis emphasizes the difficulty of claiming that shareholders are victimized when corporate illegality is profitable.[61] Instead, *Caremark* liability arising out of regulatory violations mostly appears to protect nonshareholder constituencies.[62] This is an important insight that puts *Caremark* in a new light.

Again, an interest-group analysis helps explain why the scope of *Caremark* liability continues to expand. *Caremark* transforms compliance failures into questions of board-level fiduciary obligation. Matters otherwise handled by federal agencies, state regulators, criminal authorities, or tort law thereby enter Delaware's judicial domain. As Lipton puts it, *Caremark* "turns state corporate courts—and Delaware courts in particular—into a secondary regulator for the United States (and, potentially, the world, to the extent violations of foreign law are alleged)."[63]

The doctrine's demanding and fact-specific character potentially enhances its value to all relevant interest groups. Courts must determine whether a risk was "mission critical," whether an

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[60] See, e.g., Lipton, supra note 1, at 115 (arguing that "the whole [ESG] mess has landed in Delaware's lap, via accusations over whether corporations do—or do not—violate fiduciary duties to shareholders when they adopt diversity programs and other political stances").

[61] See Lipton, supra note 1, at 118 (arguing that "corporate lawbreaking" can be "wealth-maximizing from an ex ante perspective"; emphasis removed).

[62] See id. at 121 ("*Caremark* claims are at least as much about protecting society as protecting shareholders . . ..").

[63] Id. at 124.

information system existed, whether red flags were ignored, and whether directors acted in bad faith.[64] These inquiries generate substantial advisory work, litigation, and judicial discretion.

The bar benefits from constructing compliance systems, reporting protocols, committee mandates, board minutes, and litigation defenses. The judiciary benefits from extending fiduciary law into operational and regulatory domains. The legislature benefits so long as the doctrine enhances Delaware's reputation for accountability without making incorporation materially less attractive. The equilibrium—a largely toothless-but-pleadable regime—is precisely the rent-maximizing configuration. It generates lots of filings without materially increasing liability, DGCL § 220 demands, books-and-records litigation, and long expert opinions.

But the equilibrium is fragile. If *Caremark* expands far enough to impose significant costs on managers or controllers, the legislature may intervene to protect the chartering franchise. If it remains too weak, federal policymakers or national commentators may accuse Delaware of tolerating misconduct, threatening the state's reputation and inviting preemption. What Lipton describes as Delaware's ambivalent role as regulator can thus be understood as an equilibrium strategy. The judiciary preserves enough oversight to maintain reputational legitimacy and institutional reach; the legislature preserves enough flexibility to prevent exit; and the bar benefits from the complexity generated by the unresolved boundary.

IV. Objections and Responses

A. The Model Is Excessively Cynical

Interest-group analyses can reduce legal actors to fee maximizers, tax collectors, and status seekers. In fact, of course, Delaware judges may genuinely seek fairness. Legislators may sincerely believe they are protecting an important state institution. Lawyers may value doctrinal quality and client welfare.

But this objection rests on a false dichotomy. First, self-interest need not explain every doctrinal detail to help explain why certain forms of lawmaking recur. Second, public-choice analysis does not require conscious corruption or exclusive self-interest. Institutional incentives can shape behavior pursued in good faith.[65] Judges may sincerely believe that indeterminate fiduciary standards are equitable while also benefiting from the prestige those standards generate. Legislators may honestly regard franchise preservation as good public policy while responding to concentrated fiscal incentives. Lawyers may believe that legal complexity protects clients while benefiting economically from the demand it creates. The relevant claim is comparative, not totalizing.

B. The Analysis Cannot Explain Legal Principle

A second objection is that reputational or fiscal incentives cannot explain why courts adopt one doctrine rather than another. Delaware opinions contain reasoned analysis, precedent, and

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[64] See id. at 119-21 (discussing standards of liability under *Caremark*).

[65] As the late Delaware Chancellor William Allen aptly noted, "human nature may incline even one acting in subjective good faith to rationalize as right that which is merely personally beneficial." City Capital Assn. Ltd. Partn. v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988) (emphasis omitted).

equitable principle. Interest-group models may explain institutional behavior but not legal outcomes.

The answer is that the model explains the selection of legal forms more readily than the content of every rule. It predicts a preference for standards over rules, judicially administered procedure over complete private ordering, and legislative intervention when exit threats become credible. It does not predict the precise language of every opinion.

Doctrinal reasoning remains important, but it operates within institutional constraints. Courts can sincerely reason from precedent while favoring doctrinal forms that preserve judicial discretion. Legislatures can choose among plausible statutory responses while privileging those that protect franchise revenue.

C. The Analysis Cannot Explain Facts on the Ground

Some may object that my theory does not generate testable hypotheses (although the same could be said of Lipton's). In fact, however, an interest group approach has both explanatory and predictive payoffs. A number of past events make sense from an interest-group approach, including the legislature's decision to bypass the state bar in passing SB 21 and the different outcomes in 2015 versus 2025. As to the former, the bar's interest in mandatory indeterminacy would have led it to oppose bright-line safe harbors. The legislature's interest in preserving Delaware's competitive advantage meant that this was an unacceptable outcome. In 2015, by way pf contrast, when the risk of DExit was much lower than it was in 2025, the legislature was willing to accept the bar's interest in opposing fee-shifting bylaws.[66]

As for its predictive value, our frameworks diverge on what happens next. Lipton's legitimation logic suggests Delaware must eventually re-perform prosociality or lose its social license. In contrast, mine predicts that if SB 21's safe harbors reduce litigation volume, we can expect judicial interpretations that result in the sort of indeterminacy that generates work for both courts and the bar. Early Chancery readings of the new § 144 will be my natural evidence, which provides a testable claim her account does not generate.

D. Delaware's Long-Term Interest Requires High-Quality Law

A fourth objection is that all three actors have a shared interest in Delaware's continued success. Excessive uncertainty, rent extraction, or judicial self-aggrandizement would eventually drive corporations away. Competition should therefore discipline institutional self-interest.

This objection is powerful but incomplete. The actors need not maximize short-term gains without regard to Delaware's future. They need only disagree about the optimal balance. The bar may believe that some uncertainty increases demand for expertise without materially threatening incorporations. The judiciary may believe that equitable flexibility enhances Delaware's reputation rather than undermining it. The legislature may tolerate those practices until exit threats become salient, at which point it intervenes.

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[66] See Stephen M. Bainbridge, Fee Shifting: Delaware's Self-Inflicted Wound, 40 Del. J. Corp. L. 851 (2016) (arguing that the Delaware legislature undermined its own interest by catering to the Delaware bar, which would have suffered from a reduction in the volume of corporate litigation and, as a result, advisory work if fee shifting were allowed).

The result is not unbounded rent seeking but a constrained equilibrium. Each actor seeks private or institutional benefits while preserving the system that makes those benefits possible. Conflict arises over how much indeterminacy, litigation, and managerial accountability the system can sustain.

E. Polarization Is Real, Not Merely Instrumental

A final objection is that the model understates genuine political disagreement. ESG, DEI, climate policy, wealth concentration, and Musk's political influence are substantively contested. These disputes cannot be reduced to institutional rent seeking.

That is correct. Public choice does not establish that polarization is artificial or that actors lack ideological commitments. It explains why political conflict is processed through particular Delaware institutions and why those institutions respond differently.

The two explanations can coexist. Lipton's account operates at the level of political theory: shareholder primacy cannot eliminate contested judgments about social welfare. The interest-group account operates at the level of institutional behavior: once those disputes arise, identifiable actors have incentives to translate them into legal complexity, statutory intervention, or judicial doctrine.

V. CONCLUSION

Lipton persuasively argues that contemporary polarization exposes the inability of shareholder primacy to remove politics from corporate governance. Corporate decisions allocate wealth, risk, and power, and Delaware cannot enforce shareholder-centered law without confronting the social consequences of those allocations.

But the politicization she describes also has an institutional political economy. Delaware corporate law is produced by actors with distinct incentives. The bar benefits from complexity and the demand for specialized legal services. The legislature benefits from preserving franchise-tax revenue and the electoral advantages it provides. The judiciary benefits from maintaining its reputation, influence, and authority over nationally significant disputes.

In ordinary periods, those interests form a stable bargain. Delaware attracts corporations; the legislature receives revenue; lawyers receive fees; and judges receive important cases. Polarization destabilizes the bargain. High-profile decisions become politically salient, exit threats become more credible, and disputes over corporate purpose generate both new legal work and new risks to Delaware's franchise.

Granted, the resulting conflict can be framed in the language Lipton chooses; i.e., procedural legitimacy, shareholder democracy, social responsibility, technocratic neutrality, and corporate freedom. But beneath that language lies a competition among rational institutions defending different forms of capital. The bar protects economic capital, the legislature protects fiscal and electoral capital, and the judiciary protects reputational capital.

Lipton's legitimation theory and interest-group analysis therefore need not be viewed as mutually exclusive. Lipton explains why Delaware must justify its authority in terms that appear socially and politically acceptable. Public choice explains why the actors who construct those justifications select different doctrines and intervene at different moments. Together, the two accounts suggest that Delaware's current crisis is neither solely ideological nor solely economic.

It is the product of political disagreement filtered through institutions whose claims of neutrality coexist with powerful incentives of their own.