

# OPENING REMARKS TO SYMPOSIUM: “THE TEXAS BUSINESS COURT AND THE FUTURE OF CORPORATE GOVERNANCE”

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Thank you, Dean Ahdieh, for the kind introduction and for your tremendous support of this symposium. The work Dean Ahdieh has done here at Texas A&M University School of Law is impressive and truly inspiring.

We kick off the symposium with the hope that it will become an annual event to explore corporate governance and the Texas Business Court. And we really could not have begun with a more impressive group of speakers. Today we're joined by two Texas Supreme Court justices, including the new Chief Justice, almost all of the Texas Business Court judges, a justice from the Fifteenth Court of Appeals, a former Chancellor of the Delaware Chancery Court, a former SEC Commissioner, the leading expert on ESG investing, several of the most prominent corporate governance professors in the country, several corporate directors, and several renowned corporate governance experts in litigation, counseling, and advising. Thank you all for joining us today.

Seeing the excitement in the room, the tremendous quality of the speakers on our agenda, and all the interest in the Texas Business Court confirms that the time is right for this symposium.

To begin the event, I want to answer three questions. Why are we doing this in Texas? What is the goal of the symposium? And why Texas A&M School of Law?

## 1. WHY TEXAS?

Why Texas is the easiest to answer. Texas is one of the great economic engines of the United States. If you look at the market capitalization of listed

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domestic companies in all OECD countries,<sup>1</sup> you'll find that there is \$61 trillion in value across these countries and that the United States comprises more than two-thirds of that.<sup>2</sup> So the United States holds the majority of the world's value in public and private companies. It's the world leader in financial markets and corporate value creation.

And Texas is one of the big drivers of the U.S. economy. Texas has over 31 million residents<sup>3</sup> who participate in a \$2.7 trillion economy as of 2024.<sup>4</sup> That's larger than every state other than California.<sup>5</sup> And, if Texas were its own nation, it would be the eighth-largest economy in the world.<sup>6</sup> Larger than Italy, Brazil, Canada, and Russia—and not far behind France.<sup>7</sup> Hundreds of publicly traded companies—including 54 Fortune 500 companies—are headquartered in Texas.<sup>8</sup> And there are 3.3 million small businesses in the state.<sup>9</sup> So it's sensible that we—and many others—are interested in the business climate in Texas and the rules and regulations that govern those businesses that call Texas home.

Texas has long been very attractive to business—what many have called the “Texas miracle” is not new and is well known.<sup>10</sup> But as a practicing

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<sup>1</sup> The OECD is the Organization for Economic Co-Operation and Development. OECD, <https://perma.cc/X7GW-CUST>.

<sup>2</sup> *Stocks Traded, Total Value (Current US\$) - OECD Members*, WORLD BANK GRP., <https://perma.cc/CQW4-TNM7>.

<sup>3</sup> *QuickFacts: Texas*, U.S. CENSUS BUREAU, <https://perma.cc/4PJG-F5C9>.

<sup>4</sup> BUREAU ECON. ANALYSIS, U.S. DEP'T OF COM., BEA 25-12, GROSS DOMESTIC PRODUCT BY STATE AND PERSONAL INCOME BY STATE, 4TH QUARTER 2024 AND PRELIMINARY 2024 (2025).

<sup>5</sup> *See id.*

<sup>6</sup> *Compare id.* (listing Texas's 2023 GDP as \$2,583,866), *with GDP (Current US\$)*, WORLD BANK GRP., <https://perma.cc/6ME6-8HAV> (listing only France, the United Kingdom, India, Japan, Germany, China, and the United States with 2023 GDPs above Texas's 2023 GDP).

<sup>7</sup> *Compare* BUREAU ECON. ANALYSIS, *supra* note 4 (listing Texas's 2023 GDP as \$2,583,866), *with GDP (Current US\$)*, *supra* note 6 (listing Italy's, Brazil's, Canada's, Russia's, and France's 2023 GDPs, respectively, as \$2,300,941.15, \$2,173,665.66, \$2,142,470.91, \$2,021,421.48, and \$3,051,831.61).

<sup>8</sup> *See Fortune 500 Ranking (2025)*, FORTUNE, <https://perma.cc/CWC5-29A7>.

<sup>9</sup> *Small Business Assistance*, TEX. ECON. DEV. & TOURISM OFF., <https://perma.cc/W2XM-URVD>.

<sup>10</sup> Max Ehrenfreund, *The Facts About Rick Perry and the 'Texas Miracle'*, WASH. POST: ECON. POL'Y (June 8, 2015), <https://perma.cc/N4YN-2J95>.

lawyer, I'm most interested in the regulatory and legal environment that makes it so attractive. And it is the state's desire to be the premier place for business *relative to other states* that makes this most interesting.<sup>11</sup>

## 2. GOALS OF THE SYMPOSIUM

One of the principal goals of this symposium is to bring together a brilliant group of experts to discuss the state-to-state competition happening in corporate regulation and governance. The symposium provides a forum where those experts—judges, practitioners, academics, and others—can discuss and debate developments in the Texas corporate regulatory environment and how the creation of the Texas Business Court can further enhance the state's attractiveness to business and innovation.

As much as we hear about what is happening in Washington, under our system of federalism, state law is key to how companies are governed and how they interact with their owners and communities. One of the geniuses of the Founding Fathers was to create 50 separate states that serve as laboratories of democracy.<sup>12</sup> This allows states the freedom to have different laws and implement different regulatory regimes.<sup>13</sup> Over time, we will all find that some approaches work better than others.

Two ways to judge a state's success in creating an environment conducive to business and innovation are to look at where companies choose to locate their core operations and where they choose to incorporate. Over the past several years, Texas has seen tremendous growth in the number of

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<sup>11</sup> See Press Release, Greg Abbott, Off. of the Tex. Governor, Governor Abbott Releases 5-Year Econ. Dev. Strategic Plan (Mar. 4, 2025), <https://perma.cc/3YDV-5849> (“Texas is a national leader in population growth, job creation, technology and innovation, and overall economic expansion,” said Governor Abbott. “Entrepreneurs and businesses choose Texas because of our unmatched business friendly policies, low taxes, and highly skilled workforce. With this statewide economic development strategic plan, we will cement Texas as a global economic powerhouse.”).

<sup>12</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>13</sup> See *id.*

public companies moving their operations here. The NYSE<sup>14</sup> and Nasdaq<sup>15</sup> are opening offices in Texas, and serious Wall Street heft is behind the creation of a new Texas Stock Exchange.<sup>16</sup> Simply put, the Texas model has been a success in attracting business to the state.

But it's not the same when it comes to incorporation. As we sit here today, far more companies are incorporated in Delaware than any other state.<sup>17</sup> That's long been true, and it isn't likely to change any time soon.<sup>18</sup> Nearly 2.2 million entities are registered in Delaware, including two-thirds of all Fortune 500 companies.<sup>19</sup> Delaware has long been corporate America's leading legal jurisdiction because of its predictable corporate law and regulations, the expertise of its Supreme Court, and its specialized Court of Chancery.<sup>20</sup> And Delaware's prominence has meant that it often sets the baseline for corporate norms and practices for everyone else.<sup>21</sup> There's much to learn and admire about Delaware's corporate governance scheme.

But it hasn't always been that way.<sup>22</sup> New Jersey once dominated the landscape for business charters, but progressive regulatory changes by then-governor and future president Woodrow Wilson caused businesses—and

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<sup>14</sup> Russell Gold, *Y'all Street Is Open for Business*, TEX. MONTHLY (Mar. 31, 2025), <https://perma.cc/SZ2V-QF5Y>.

<sup>15</sup> Aislinn Murphy, *Nasdaq to Open Regional Headquarters in Texas*, FOX BUSINESS (Mar. 18, 2025, at 12:29 ET), <https://perma.cc/VQ5K-CVE5>.

<sup>16</sup> Nicole Goodkind, *Texas is Coming for Wall Street with a New BlackRock-Backed Stock Exchange*, CNN: BUSINESS (June 6, 2024, at 18:35 ET), <https://perma.cc/9FS8-2SCQ>.

<sup>17</sup> Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 553–54 (2002).

<sup>18</sup> *Id.* at 554, 556.

<sup>19</sup> JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS: 2023 ANNUAL REPORT 1 (2023), <https://perma.cc/CJ52-HZ4B>.

<sup>20</sup> See Bebchuk & Hamdani, *supra* note 17, at 557; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911, 1925 (1998).

<sup>21</sup> Rob Ward, *VIEWPOINT: Delaware Is a Unique Cornerstone in Global Business*, DEL. BUS. TIMES (Jan. 23, 2025), <https://perma.cc/H9R4-6X9C>.

<sup>22</sup> RALPH NADER ET AL., CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 42–54 (1976), as reprinted in *How Delaware Became No. 1*, N.Y. TIMES, May 9, 1976, at 14F, <https://perma.cc/JM3X-PNVR>.

corporate lawyers who advise them—to seek a new state of incorporation.<sup>23</sup> After enactment of these perceived anti-business regulations, change came to New Jersey “[g]radually, . . . then suddenly.”<sup>24</sup>

There’s now a serious debate about whether Delaware’s hold on corporate law is justified—or whether more competition among the states for corporate charters is warranted. After all, as former Attorney General Bill Barr and Jonathan Berry wrote at the end of 2023, “Like corporations, corporate law itself competes in a market.”<sup>25</sup>

Some have expressed concerns that Delaware courts are exercising an approach more friendly to activists than to actual businesses.<sup>26</sup> For instance, in *In re Caremark International Inc. Derivative Litigation*, the Delaware Court of Chancery held that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”<sup>27</sup> But claims under *Caremark* were traditionally circumscribed: “only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability” under *Caremark*.<sup>28</sup> That meant claims under *Caremark* were “the most difficult theory in corporate law upon which a plaintiff might hope to win a judgment.”<sup>29</sup>

But according to former Attorney General Barr and Berry, these *Caremark* claims are “increasingly succeeding, and thus have proliferated” on the Chancery Court’s docket.<sup>30</sup> To illustrate: before 2019, no oversight duty

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<sup>23</sup> *Id.*; William P. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations*, WALL ST. J. (Nov. 24, 2023, at 15:12 ET), <https://perma.cc/9LW7-9XAZ>.

<sup>24</sup> ERNEST HEMINGWAY, *THE SUN ALSO RISES* 141 (paperback ed. 2006).

<sup>25</sup> Barr & Berry, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> 698 A.2d 959, 970 (Del. Ch. 1996).

<sup>28</sup> *Id.* at 971.

<sup>29</sup> *Id.* at 967.

<sup>30</sup> Barr & Berry, *supra* note 23.

lawsuit had culminated in a large settlement.<sup>31</sup> But by 2024, *Caremark* settlements occupied over half the list of largest derivative lawsuit settlements ever—including settlements for \$237 million, \$123 million, and \$60 million.<sup>32</sup>

What changed? The answer may be a 2019 opinion where the Delaware Supreme Court reversed dismissal of a *Caremark* claim brought against executives and the board of directors of Blue Bell related to a listeria outbreak in ice cream.<sup>33</sup> Other court decisions followed, all involving allegations that boards failed to exercise proper oversight in the face of known risks.<sup>34</sup> The extent of the change in the law is debatable, and many scholars and experts are indeed debating it;<sup>35</sup> but it's certain that large settlements have followed.<sup>36</sup> With these court decisions and large settlements, the perceived predictability and expertise of Delaware law began to be questioned.

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<sup>31</sup> Luca Enriques et al., *How the EU Sustainability Due Diligence Directive Could Reshape Corporate America*, 78 STAN. L. REV. (forthcoming 2026) (manuscript at 33).

<sup>32</sup> *Id.*

<sup>33</sup> *Marchand v. Barnhill*, 212 A.3d 805, 807 (Del. 2019).

<sup>34</sup> *See* Enriques et al., *supra* note 31, at 33.

<sup>35</sup> *See, e.g.,* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021); Kelly O'Brien, *Analyzing the Post-Marchand "Expansion" of Mission Critical Risks: Cybersecurity, Climate Change, and Caremark*, 57 U. RICH. L. REV. ONLINE 109, 111–12 (2023).

<sup>36</sup> *See, e.g.,* Enriques et al., *supra* note 31, at 33. A recent example of related concerns that some have raised about Delaware courts is found in the use of lodestar multiples, which is a method used by courts to determine plaintiff attorneys' fees in contingency fee cases. *See* George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 604 (2000). Generally, a court determines lodestar multipliers by multiplying the number of hours expended on this litigation by a "reasonable" hourly rate. *Id.* A recent study of lodestar multipliers in Delaware courts found that "[l]odestar multipliers exceeding seven or ten are far more frequent and extreme in Delaware court than in federal court." Joseph A. Grundfest & Gal Dor, *Lodestar Multipliers in Delaware and Federal Attorney Fee Awards* 6 (Stan. L. Sch. Rock Ctr. for Corp. Governance, Working Paper No. 263, 2025), <https://ssrn.com/abstract=5237545>. In fact, "Delaware has . . . generated almost as many septuples as the entire federal system (87.0%) and almost triple the number of decuples (280%)." *Id.* at 1. Finally, "[t]wo sitting members of Chancery have generated more than half of all Delaware septuples and decuples, and three quarters of all Delaware decuples awarded in the most recent five years. Much of Delaware's divergence from federal experience, measured in terms of septuples and decuples, arises in the last five years. *Id.* at 6.

Delaware courts also may just be second-guessing corporate decisions too often. A Bloomberg headline not too long ago announced: “Novel Corporate Rulings Fuel Charged Debate on Delaware’s Role.”<sup>37</sup> That article focused on several recent cases that had created uncertainty in Delaware law.<sup>38</sup> In one, *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, the Chancery Court invalidated most of an agreement between a company and its founder, creating uncertainty around shareholder agreements giving extensive veto rights to early investors.<sup>39</sup> In another, *Tornetta v. Musk*, the Chancery Court famously invalidated Elon Musk’s \$55 billion pay package.<sup>40</sup> The Bloomberg article concluded that these decisions had “arguably offered more questions than answers about the [Delaware Chancery] court’s approach to emerging issues with broad ramifications.”<sup>41</sup> That’s putting it mildly.

These decisions were once rare.<sup>42</sup> But they’re seemingly more common, and they’re changing corporate behavior.<sup>43</sup> Businesses incorporated in Delaware now need more legal and governance experts and risk updates for directors who don’t want to get caught flat-footed. They result in more committees, more work for committees, more compliance, and more process. And they cause a shift to more conservative legal advice, which comes in the form of an avalanche of law firm client memos and legal updates for boards of directors. Good for corporate governance lawyers, but is it good for business?

To be clear, that’s not to say any of these cases were wrongly decided. At least two chancery court justices have publicly disagreed with the criticism leveled against the Chancery Court.<sup>44</sup> But more regulation and

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<sup>37</sup> Mike Leonard, *Novel Corporate Rulings Fuel Charged Debate on Delaware’s Role*, BLOOMBERG L. (Mar. 28, 2024, at 04:00 CT), <https://perma.cc/P68K-MRQ4>.

<sup>38</sup> *Id.*

<sup>39</sup> 311 A.3d 809, 817, 820–21, 828–29, 881 (Del. Ch. 2024).

<sup>40</sup> 310 A.3d 430, 445, 546–48 (Del. Ch. 2024).

<sup>41</sup> Leonard, *supra* note 37.

<sup>42</sup> See Shapira, *supra* note 35, at 1858–63.

<sup>43</sup> *Id.* at 1857–60, 1880–94.

<sup>44</sup> See Travis Laster, *Delaware Vice Chancellor Travis Laster Says Bill Barr Could Use Some Help on Delaware Law*, CLS BLUESKY BLOG (Dec. 7, 2023), <https://perma.cc/4FZN-8QQJ>; Letter from Kathaleen St. Jude McCormick, Chancellor, to The Delaware State

oversight, more second-guessing by the Chancery Court of shareholder-approved transactions, and more risk of reputational harm to directors and officers is costly to businesses. And these developments are generating increasing uncertainty about the role of boards of directors under Delaware law while expanding the influence of social activists in corporate management.<sup>45</sup> Ultimately, they raise fundamental questions about who runs the corporation and how it should be run.

Perhaps because of these developments, there is now serious interest in reconsidering Delaware as the place of incorporation. Tesla changed its place of incorporation from Delaware to Texas.<sup>46</sup> Other companies are exploring moving from Delaware to Texas, or perhaps another state.<sup>47</sup> And one prominent investor has said he plans to reincorporate his management company in Nevada, or perhaps Texas.<sup>48</sup> There's even a website and social media campaign that tracks and encourages corporate movement out of Delaware.<sup>49</sup>

Delaware courts initially responded to this in a remarkable way. When one company sought to move its place of incorporation to Nevada, the Chancery Court suggested that it may be a breach of the board's fiduciary duty to reincorporate in a state that offers shareholders fewer protections than Delaware.<sup>50</sup> As the court put it:

If the business judgment rule applied in this setting, then a stockholder controller could reduce the rights investors enjoy by changing the corporation's domicile. That would create a gap in the protections offered by Delaware law. The gap

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Bar Association Executive Committee, Proposed DGCL Amends. (Apr. 12, 2024), <https://perma.cc/M268-868D>.

<sup>45</sup> Usha Rodrigues, *Delaware Puts Its Corporate Law Dominance at Risk*, DIRS. & BDS. (Aug. 26, 2024), <https://perma.cc/844S-WT3X>.

<sup>46</sup> Natasha Solo-Lyons, *Elon Musk Officially Shifts Tesla's Incorporation to Texas After Vote*, BLOOMBERG (June 14, 2024, at 15:56 CT), <https://perma.cc/G6VE-U4SX>.

<sup>47</sup> Emily Glazer, Berber Jin & Meghan Bobrowsky, *Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware*, WALL ST. J. (Jan. 31, 2025, at 17:18 ET), <https://perma.cc/8YJE-8YUM>.

<sup>48</sup> Mike Leonard & Jef Feeley, *As Musk and Ackman Snub Delaware, Governor Looks at Court (1)*, BLOOMBERG L. (Feb. 4, 2024, at 14:01 CT), <https://perma.cc/NRW2-EFSY>.

<sup>49</sup> LEAVE DELAWARE, <https://perma.cc/J3YJ-XFDP>.

<sup>50</sup> *Palkon v. Maffei*, 311 A.3d 255, 263 (Del. Ch. 2024).

would have knock on effects, and investors would demand greater returns *ex ante* to compensate for the increased risk. The cost of capital for Delaware corporations would go up.<sup>51</sup>

So, incorporating in Delaware would be like the Hotel California: you can try to check out any time you like, but “you can never leave”<sup>52</sup>—at least without paying a potentially hefty penalty. Not surprisingly, the Delaware Supreme Court quickly reversed this ruling, as I’m sure some of our panelists will discuss today.<sup>53</sup> But, again, none of this is to quibble with the Chancery Court’s decision. It all just creates unwelcome uncertainty and risk for corporations and those who run them.

Lest you think all this talk of competition with Delaware is bluster, Delaware’s new governor, Matt Meyer, said in response to questions about the Musk compensation decision: “It’s really important we get it right for Elon Musk or whoever the litigants are in Delaware courts . . . . We’re cognizant that there may be some things that need to change. We’re going to work on them.”<sup>54</sup> And the Delaware legislature and Governor did just that—controversially and quickly enacting changes to the Delaware General Corporation Law in an effort to stem the tide of businesses considering leaving Delaware.<sup>55</sup> This was the second set of significant changes to Delaware corporate law in a year.<sup>56</sup> While these changes to Delaware law were debated, the speed with which they were enacted and the responsiveness to the concerns demonstrate that Delaware felt its hold on state charters was under threat.<sup>57</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> THE EAGLES, *Hotel California*, on HOTEL CALIFORNIA (Vinyl Record, Asylum Recs. Dec. 8, 1976).

<sup>53</sup> Maffei v. Palkon, 339 A.3d 705, 744 (Del. 2025).

<sup>54</sup> Katie Balevic, *Delaware Governor Tells BI Things May ‘Need to Change’ as Companies Threaten to Leave the State*, BUS. INSIDER (Feb. 2, 2025, at 16:32 CT), <https://perma.cc/PJ62-HKN5>.

<sup>55</sup> Xerxes Wilson, *Controversial Corporate Law Changes Passed by House, Signed by Delaware Governor*, DEL. NEWS J. (Mar. 26, 2025), <https://perma.cc/V24R-RBU5>.

<sup>56</sup> *2024 Amendments to the General Corporation Law of the State of Delaware Go Into Effect*, MORRIS JAMES LLP (Aug. 1, 2024), <https://perma.cc/38YM-AC7B>.

<sup>57</sup> As Justice Kathaleen McCormick noted in her letter on the 2024 amendments to the Delaware General Corporation Law (DGCL) designed to counteract several specific Chancery Court decisions, “legislative intervention in response to judicial or social developments has occurred relatively infrequently since the modern era of the DGCL,”

What has all this got to do with Texas? It returns us to one of the other purposes of this conference—creating a forum where judges, practitioners, and academics can discuss and debate the opportunities and challenges ahead for the Texas Business Court. After many years of consideration, the creation of the Business Court will fill a missing piece in the regulatory and legal infrastructure in Texas and could make the state an even more attractive place to do business, as Texas and other states compete with Delaware.

This is not designed to create a regulatory race to the bottom. Texas has no goal to create an uneven playing field for any side in the governance debates. Nor is Texas likely to supplant Delaware as the place to incorporate any time soon. After all, Delaware has shown it will quickly change its laws to be responsive to corporations and the corporate law bar, in large part because corporate franchises mean so much more to Delaware’s budgetary bottom line.<sup>58</sup> But the Texas Business Court will enhance Texas’s reputation as an attractive place to do business—providing an alternative forum to Delaware that offers expertise and predictability. And the Texas Legislature itself is considering several changes to the Texas Business Organizations Code that will bring more clarity and predictability to Texas law.<sup>59</sup> Over time, these efforts should attract new businesses to incorporate in the state.

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and “rarely has the Council taken action in response to a judicial decision.” Letter from Kathaleen St. Jude McCormick, *supra* note 44, at 4.

<sup>58</sup> Mike Leonard, *Delaware Corporate Overhaul Signed into Law by Governor (1)*, BLOOMBERG L. (Mar. 25, 2025, at 21:56 CT), <https://perma.cc/9CPS-929J> (noting that Delaware “gets more than \$2 billion a year—roughly 25% of its budget—from corporate franchise fees”); Paul Kiefer, *US Supreme Court Rules Against Delaware in Unclaimed Property Case*, DEL. PUB. MEDIA (Mar. 4, 2023, at 17:34 ET), <https://perma.cc/QMG7-P44Z> (“Tuesday’s US Supreme Court’s ruling addresses Delaware’s collection of unclaimed checks issued by the cash-transfer company MoneyGram. Delaware collected checks on the grounds that the company is incorporated here, but the [C]ourt sided with thirty other states, including Pennsylvania and Wisconsin, by determining the checks fall under a decades-old federal law that returns unclaimed money orders to the states where they were purchased.”).

<sup>59</sup> *Texas Legislature Proposes Amendments to Texas Business Organizations Code*, HUNTON (Mar. 24, 2025), <https://perma.cc/CEV2-F5A2>. These changes were ultimately signed into law. Gerry Spedale et al., *Client Alert: Texas Overhauls Business Organization Code*

More to the point, the Texas Business Court, in the larger context of the Texas approach to business and regulation, will give companies who want to be headquartered in the state no reason not to incorporate here as well. The judges appointed to the Business Court are by every measure outstanding, experienced jurists.<sup>60</sup> The Business Court judges are appointed, which gives the Texas governor the ability to ensure the judges are following the law as laid out by the Texas legislature.<sup>61</sup> This creates a robust system where companies can have certainty around the laws that apply to business and the confidence that those laws will be construed by judges who are experts on business disputes. The very things that Delaware strives to provide.

Many companies that have, or are considering, relocating their business headquarters to Texas stand to benefit. To take one example, when Tesla sought investor approval to change its place of incorporation to Texas, it explained to its shareholders the “value inherent in home-state incorporation” and that many public companies have chosen to incorporate in their home states.<sup>62</sup> The regulatory environment, educated workforce, and critical mass of diverse industries are already reason enough for companies to relocate in Texas.<sup>63</sup> The Texas Business Court now provides added certainty, predictability, and expertise that makes incorporating here an easier decision.

These developments beg for a forum where practitioners can hear from the Business Court and the Court can hear from governance and securities experts. The role of the Business Court judges is obvious—they will be addressing real-world corporate problems and developing a body of precedent that will guide future business decisions.<sup>64</sup> The role of practitioners—litigators but more importantly, corporate and transactional counsel—is often overlooked but cannot be overstated. Legal counsel are key players in corporate decisions on where to incorporate. There is some support for the

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*with SB 29: Key Changes for Entity Governance, Entity Administration and Shareholder Rights*, GIBSON DUNN (May 16, 2025), <https://perma.cc/PMK8-DWS4>.

<sup>60</sup> Ray Panneton, *Texas Governor Announced Judges for New Statewide Business Courts*, HENDERSHOT COWART P.C. (June 21, 2024), <https://perma.cc/AWA6-5RN3>.

<sup>61</sup> *Id.*

<sup>62</sup> Tesla, Inc. Proxy Statement 2024, at 27 (Form DEF 14A) (2024).

<sup>63</sup> *See Business Climate*, TEX. ECON. DEV. & TOURISM OFF., <https://perma.cc/2KBK-GVW7>; *Workforce*, TEXAS ECON. DEV. & TOURISM OFF., <https://perma.cc/2BZJ-YAYV>.

<sup>64</sup> *About the Texas Business Court*, TEX. JUD. BRANCH, <https://perma.cc/M8G9-XSA2>.

idea that they may be the most important factor, even beyond the laws of the state or other factors.<sup>65</sup> And one reason legal counsel are more likely to recommend Delaware is because they know Delaware law and aren't as certain about the laws in other states.<sup>66</sup>

We hope this symposium—and future versions of it—will be one more way to begin providing corporate lawyers confidence in Texas law and in the Business Court. We begin today with a panel called The Texas Business Court: Opportunity and Risks. And we'll conclude the symposium with a meet and greet with the Texas Business Court judges. There will be much more to follow on this topic in future symposia.

Another goal of this symposium is to create a forum where we can discuss corporate governance and the role of the board of directors in that governance. Corporate governance presents an intersection of practice and theory.<sup>67</sup> It's an area of law where practitioners and jurists actually read academic papers and academics actually care about what practitioners and businesses are doing.

That's why one of our panels today will discuss Director Decision Making in an Uncertain World. What happens—or ought to happen—in the boardroom has generated a rich academic literature.<sup>68</sup> Boardroom

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<sup>65</sup> Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 694–97 (2018) (“The most straightforward interpretation of the results is that more sophisticated lawyers choose Delaware incorporation for their clients and less sophisticated lawyers choose local (home state) incorporation for their clients.”); *id.* at 696 (citing William J. Carney et al., *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 147 (2012) (“In choosing the state of incorporation, lawyers matter. The lawyers and their locations were central to the choice of the state of incorporation.”)).

<sup>66</sup> *Id.*

<sup>67</sup> See generally STEPHEN BLOOMFIELD, *THEORY AND PRACTICE OF CORPORATE GOVERNANCE: AN INTEGRATED APPROACH* (2d ed. 2013) (discussing both the overlap and the gap between corporate governance theory and practice).

<sup>68</sup> See, e.g., Amy Simmerman et al., *A Guidebook to Boardroom Governance Issues*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 8, 2019), <https://perma.cc/7U6A-H5NJ> (discussing stakeholders' roles, a corporation's purpose, board deliberations, director decision-making, board committee formation, conflicts of interest, oversight, director compensation, and succession planning); see also Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 493–502 (1999) (describing a model of board processes to understand the complexity of board dynamics); Seoyoung

discussions include things like: the purpose of the corporation; how the corporation should react to perceived societal changes; the role the company plays in shaping politics; how the corporation should interact with various stakeholders; and the role the corporation should play, if any, in the important environmental, social, and governance (ESG)<sup>69</sup> issues.<sup>70</sup>

These are some of the most exhaustively debated topics in governance and securities law among academics and experts.<sup>71</sup> But boards of directors make decisions related to these topics every day—when deciding what products to sell, how and where to sell them, where to do business, and how to engage with employees, customers, and vendors. The practical impact of these governance decisions makes them topics most in need of rigorous thinking. We hope to supply that with this and future symposia.

Take just one foundational question for the board: Should corporations govern themselves under a shareholder theory or a stakeholder theory? This isn't some ivory tower debate, though again, it is certainly debated there; the answer has real-world consequences for how corporate directors spend their time overseeing the management of the corporation.

Under a traditional shareholder theory of corporate governance, corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders, who are its owners.<sup>72</sup> This theory of corporate

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Kim, *Directors' Decision-Making Involvement on Corporate Boards*, 12 INT'L J. ECON. & FIN. 72, 88 (2020) (analyzing the impact of the extent of director involvement on firm value and operating importance); Neal Newman & Lawrence J. Trautman, *Securities Law: Overview and Contemporary Issues*, 16 OHIO ST. BUS. L.J. 149, 204–06, 205 n.234 (2021) (collecting articles describing the duties and responsibilities of corporate directors).

<sup>69</sup> For an excellent discussion on the history of ESG, see generally Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024).

<sup>70</sup> See Simmerman et al., *supra* note 68; Forbes & Milliken, *supra* note 68; Kim, *supra* note 68; Newman & Trautman, *supra* note 68; Pollman, *supra* note 69, at 417–18.

<sup>71</sup> Martin Lipton et al., *Thoughts for Boards: Key Issues in Corporate Governance for 2025*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 31, 2025), <https://perma.cc/7WRX-962R>.

<sup>72</sup> See, e.g., John H. Matheson & Brent A. Olson, *Corporate Law and the Longterm Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1326 (1992) (explaining that “the fundamental goal of corporate law is so theoretically and historically obvious that it need not be explicated: the goal is to maximize corporate—and thus shareholder—welfare”); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); *Dodge v. Ford Motor*, 170 N.W. 668, 684 (Mich. 1919)

governance held sway for many years.<sup>73</sup> And it has deep roots in Delaware law.<sup>74</sup> As former Delaware Chief Justice, Leo E. Strine wrote, the understanding in Delaware . . . could not have been more clear that directors of a for-profit corporation must at all times pursue the best interests of the corporation's stockholders, and that the [*Revlon*] decision highlighted the instrumental nature of other constituencies and interests. Non-stockholder constituencies and interests can be considered, but only instrumentally, in other words, when giving consideration to them can be justified as benefiting the stockholders.<sup>75</sup>

But it has also been pronounced dead many times over the last few years as new theories of corporate governance have emerged—or regained prominence.<sup>76</sup>

Many respected academics and experts now propose a stakeholder model of governance.<sup>77</sup> Today, a leading forum on corporate governance is

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(explaining that “[a] business corporation is organized and carried on primarily for the profit of the stockholders”).

<sup>73</sup> Matheson & Olson, *supra* note 72, at 1323–27.

<sup>74</sup> *E.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986).

<sup>75</sup> Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 771 (2015); *see also* Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 32, 34–36 (2023) (discussing *Revlon*).

<sup>76</sup> *E.g.*, Martin Lipton, *Stakeholder Governance and the Eclipse of Shareholder Primacy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 7, 2024), <https://perma.cc/A9B3-MCE9>; Mark DesJardine & Wei Shi, *Managing Shareholders in the Age of Stakeholder Capitalism*, HARV. BUS. REV. (Aug. 29, 2022), <https://perma.cc/7SVK-W5TG>.

<sup>77</sup> *See generally, e.g.*, R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 124–26 (2020); WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS (2022) (examining the history of corporations and the role they play in societies and arguing that the purpose of the corporation has been to promote the interest of the common good).

filled with articles promoting the stakeholder model.<sup>78</sup> According to Martin Lipton, this model “conceives of corporate governance as a collaboration among corporations, shareholders and other stakeholders working together to achieve long-term value.”<sup>79</sup> So “[e]very director should represent the interests of all shareholders and stakeholders.”<sup>80</sup>

What does that mean to some of stakeholder capitalism’s key proponents? Here’s one example of what it might mean for corporations and governance:

[I]f corporate law is to be a force for good, and not fuel irreversible harm, then it must address the big issues and stop pretending that those issues are for others to grapple with. . . . The momentous impact of corporate conduct from generations ago is affecting our planet in dangerous ways, and so is the unfairness and divisiveness that comes with growing inequality. The impact of more and more of us now, acting on each other and the planet through corporate power, will be even more substantial. If we don’t take commensurate action to address the use of that power and to channel it in a fair and sustainable direction, all of our descendants will be the residual claimants of our excesses and inequities.

And if you think we believe that what it takes to reshape a public consensus supportive of stakeholder governance is a U.S. commitment to forging a global New Deal, well you understand us . . . and Berle himself.<sup>81</sup>

This is quite a tall order for corporations and their directors and executives. Still, the natural inclination to support such a theory is perhaps

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<sup>78</sup> E.g., Martin Lipton, *Stakeholder Capitalism and ESG as Tools for Sustainable Long-Term Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2022), <https://perma.cc/5Y33-9TTJ>; Frederick Alexander et al., *From Shareholder Primacy to Stakeholder Capitalism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 26, 2020), <https://perma.cc/PCF8-9JW4>.

<sup>79</sup> Martin Lipton, *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 11, 2017), <https://perma.cc/YQC8-CV3M>.

<sup>80</sup>

*Id.*

<sup>81</sup> Michael P. Klain & Leo E. Strine Jr., *Stakeholder Capitalism’s Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2023), <https://perma.cc/3YQK-3P5E>.

understandable—it’s lofty and noble and grand. And after all, who wants to be against workers? Or the environment? Or the current hot social issue of the day, whatever that may be? And who doesn’t want to reshape corporate America and mold it into a force for good?

But at the same time, the stakeholder model of the corporation is fraught with problems. Perhaps the principal one is how this all works in practice—or more precisely, does it work in practice. As Milton Friedman explained 55 years ago, “[t]he discussions of the ‘social responsibility of business’ are notable for their analytical looseness and lack of rigor.”<sup>82</sup>

How corporate boards and executives—or business court judges—can apply these lofty principles in practice raises many questions.<sup>83</sup> Who are the stakeholders boards should look to? How does the board know what they want? Do those stakeholders all want the same thing? How are conflicts among stakeholders who want different things resolved? Are some stakeholders more important than others? And how should the board decide these questions, or even equip itself to do so? How does a corporation focus on these lofty ideals while ensuring that the underlying business succeeds? Clear answers to these questions can be hard to come by.

At bottom, the stakeholder model, while undoubtedly attractive on the surface, provides little aid to a board that must decide how to exercise its oversight authority.<sup>84</sup> But these are all issues that deserve a full and rigorous debate, and this symposium will provide a forum for that debate. We can look forward to hearing from experts on this topic in our Shareholder Primacy v. Stakeholder Capitalism panel today.

### 3. WHY TEXAS A&M SCHOOL OF LAW?

That takes us to the last question I posed: why Texas A&M School of Law? The answer is easy: holding the symposium here allows us to take advantage of Texas’s economic miracle, but also of the miracle of Texas A&M

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<sup>82</sup> Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sep. 13, 1970), <https://perma.cc/G2NB-KERA>.

<sup>83</sup> See Robert Miller, *How Would Directors Make Business Decisions Under Stakeholder Model?*, 77 THE BUS. LAWYER 773 (2022), for an outstanding discussion of the practical implications and limitations of the stakeholder theory.

<sup>84</sup> David Woodcock, *ESG and the Board: Avoiding Risky Business*, THE CORP. BD., Sep.–Oct. 2023, at 19.

School of Law's astronomical rise in prestige. Though the University didn't have a law school until 2013, it has, over the last twelve years, become one of the country's leading law schools. It was unranked in 2015 and ranked 149th in 2016 according to the U.S. News & World Report's law school rankings.<sup>85</sup> But in the most recent rankings, released in 2025, Texas A&M School of Law was tied for 22nd.<sup>86</sup> It is unlikely that any law school has risen so quickly.

The law school's rise can be attributed to many things. An amazing Dean, outstanding and engaged faculty, and impressive applicants and students who are rigorously trained not just in law but in the Aggie way. All these things have worked together to create an outstanding law school—and the perfect place to host this symposium. With that, let the symposium begin.

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<sup>85</sup> Evan Jones, *The 2015 US News Law School Rankings Are Out!*, LAW SCHOOLI (Dec. 21, 2020), <https://perma.cc/3XDT-T9UN>; M. Hope Echales, *The 2016 US News Law School Rankings Are Here*, BLUEPRINT (Mar. 11, 2015), <https://perma.cc/8Y3J-TTQ3>.

<sup>86</sup> *2025 Best Law Schools*, U.S. NEWS, <https://perma.cc/93ES-L4H4>.