
CORPORATE RESILIENCY AND RELEVANCY IN THE PRIVATE ORDERING ERA

Megan Wischmeier Shaner*

Firm-specific private ordering has flourished in the twenty-first century. Public companies are seeing more and more governance contracting in traditional venues such as the bylaws and charter, as well as in less conventional places like shareholder agreements and dual-class-like contracts. Decisions legitimizing private ordering in the corporate setting contain strong contractarian language and rely heavily on contract—and not corporate—principles to justify their holdings. In addition, recent statutory amendments have chipped away at traditionally mandatory features of the corporation, thereby reinforcing the contractual view of the corporate form and fueling the private ordering movement. All told, the current trajectory of corporate law appears to privilege freedom of contract and the contractarian theory above other principles and theories of the firm.

Noticeably absent from recent corporate jurisprudence, however, is any meaningful discussion of the rationale for, and consequences of, intertwining contract and corporate law in such an intimate way. Engaging in this discussion is critical, as the expansion of corporate contractual freedom and the corresponding judicial embrace of contractarian principals have important implications for corporate law and the role of the corporation in the business entity ecosystem. This Article

*Arch B. & Jo Anne Gilbert Professor of Law, President's Associates Presidential Professor of Law, University of Oklahoma College of Law.

For helpful comments and discussions, sincere thanks go to Afra Afsharipour, Anat Alon-Beck, Eric Chaffee, Jessica Erickson, Jill Fisch, and Joan Heminway. I would also like to thank the participants in the National Business Law Scholars Conference and the Southeastern Association of Law Schools Annual Meeting whose thoughtful comments and questions contributed to the completion of this paper. All errors and omissions are my own.

discusses some of the impacts to the corporate form, corporate theory, and the corporation’s role in society resulting from the prioritization of contractual freedom.

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I. INTRODUCTION

“[T]he question of contractual freedom is one of the most important questions in corporate law.”¹ This assertion is arguably more apt today than it was when first made over three decades ago. Increasingly enabling corporate statutes, a shift in the composition of the public company’s shareholder base, and increased shareholder activism have ushered in an era in which private ordering has become the predominant means for shaping public company governance.² With

¹ Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1397 n.11 (1989).

² Consistent with prior scholarship addressing this topic, this Article uses the term “private ordering” to mean contractual in nature. See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638 (2016); D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 127 n.12 (2011).

increasing frequency and creativity, the certificate of incorporation and bylaws of public corporations are being used as tools for restructuring key aspects of corporate governance. Forum selection, fee-shifting, arbitration, corporate opportunity waivers, proxy access, and proxy reimbursement are some recent examples of the emerging role and use of organizational documents as a platform for ex ante corporate governance. Corporate contracting in public firms has also been discovered in less familiar forms and venues, with recent scholarship highlighting the significant role shareholders' agreements and dual-class-like contracting play in the governance of the corporation.³ Moreover, ex ante governance efforts are taking aim at altering bedrock principles of corporate law, commonly thought to be immutable, such as fiduciary duties, appraisal rights, and books and records inspection rights.⁴

The private ordering era raises important questions about the relationship between corporate law and contract law. Case law both in the public and private company contexts has drawn heavily on the contractarian view of the corporation in endorsing contractual freedom and upholding the private ordering of corporate governance.⁵ Commentaries surrounding statutory amendments that sanction firm-specific tailoring similarly cite to the contractarian view of the corporation and the accompanying freedom of contract to

³ See Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913 (2022) (discussing the role of shareholder agreements in altering corporate governance); Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. REG. 1124, 1127 (2021) (finding the general consensus that shareholder agreements play a trivial or nonexistent role in public companies to be false, and finding that such agreements contain governance private ordering); Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. REG. 1286, 1288 (2022) (discussing dual-class-like contractual governance arrangements).

⁴ See *infra* Sections III.B.–C.

⁵ See, e.g., *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020).

engage in firm-specific tailoring.⁶ So strong is the courts' contractarian language, that it appears that private ordering jurisprudence has taken the contract metaphor, originally used to illuminate the corporate structure and relationship of its participants, one step further and turned it into a propositional statement.⁷ As many scholars and commentators have observed, the Delaware courts—widely considered the leaders in corporate law—are irretrievably committed to the contractarian view of the corporation.⁸

While private ordering jurisprudence places the subject of contractual freedom and the contractarian account of the corporate form at the center of modern corporate discourse, the courts have, to date, refrained from any meaningful discussion of the rationale for, and consequences of, intertwining contract and corporate law in such an intimate way. Engaging in this discussion is important because how strongly one views the legitimacy of the contract metaphor and the capacity for contractual freedom in the corporation impacts the resolution of broader normative questions in corporate theory, as well as the validity of specific private

⁶ See, e.g., DEL. CODE ANN. tit. 8, §§ 112, 113 (2022); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 356 n.244 (Del. Ch. 2010) (explaining the statutory amendments regarding proxy access and proxy expense reimbursement “make plain that which had always been understood by most Delaware corporate lawyers, which is that the stockholders of Delaware corporations have the authority to adopt potent bylaws shaping a more competitive election process”), *aff'd* 15 A.3d 218 (Del. 2011) (mem.).

⁷ See Megan Wischmeier Shaner, *Interpreting Organizational “Contracts” and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 1010–11 (2019) (discussing cases that show the court treating corporate organizational documents as contracts themselves). See also Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 803 (2002) (“Metaphor theorists warn against mistaking metaphors for ‘propositional statements.’”).

⁸ See Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2157 (2018). See generally Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501 (2021) (discussing the Delaware Supreme Court’s elevation of contractarian theory in *Salzberg* and its confinement of the role of the state and internal affairs in corporate law).

ordering initiatives.⁹ Accordingly, the rise in private ordering, and the courts' corresponding embrace of contractarianism, have important implications for corporate law and the role of the corporation in business organizations more broadly.

There is a growing body of scholarship focusing on the private ordering of public company governance, ranging from narrow discussions of the legality of individual provisions to broader discussions of the legitimacy of the contract metaphor in corporate law, shareholder empowerment, and the concession theory-contractarian theory debate.¹⁰ This Article builds upon this research and looks at some of the externalities resulting from the dominance of contractarianism in modern corporate law. Specifically, this Article analyzes the effect contractarianism and contractual freedom have with respect to the relevancy of the corporate form in the business entity ecosystem and, relatedly, the resiliency of corporate doctrine. In addition, this Article discusses whether the proliferation of private ordering and the contractarian view of the corporation support or are at odds with the burgeoning view in American society that the public corporation is a vehicle for achieving social reform, fighting climate change, and promoting economic equality and diversity.

This Article proceeds as follows: Part II provides a brief history of the contractarian view of the corporation and the contract metaphor that has been frequently applied in recent judicial decisions. Part III describes the rise of private ordering and its role in bolstering the contractual view of the

⁹ Bebchuk, *supra* note 1, at 1408 (“The question of contractual freedom is a basic question in the theory of corporate law, and it is thus natural to expect it to be connected to other basic questions in the theory of the corporation and of corporate law.”).

¹⁰ See, e.g., Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 9–11 (2018); Fisch, *supra* note 2, at 1638; Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 550–51 (2019); Smith et al., *supra* note 2, at 127 n.12; Shaner, *supra* note 7, at 1010–11; Manesh, *supra* note 8, at 534; Rauterberg, *supra* note 3, at 1149; see generally Shobe & Shobe, *supra* note 3; Fisch, *supra* note 3.

corporation. Over the past two decades, management and shareholders have experimented with private ordering, pushing the boundaries of contractual freedom in their efforts to influence the governance of the corporation. In upholding these private ordering efforts, the Delaware courts have given a full-throated endorsement of the contractarian view of the corporation. During this same time, statutory amendments to corporate codes have largely enabled and expanded contractual freedom, perpetuating the contractual view of the corporate form and fueling private ordering. All told, the private ordering era has revealed the dominance of contractarianism in corporate law—a trend that seems unlikely to subside any time soon.

Part IV then discusses how private ordering raises important questions about the relationship between corporate law and contract law, the resolution of which has significant implications for corporate theory and principles. In particular, private ordering and the expansion of contractual freedom in the corporation raises concerns about the relevancy of the corporate form as a distinct business entity as well as the erosion and fracturing of corporate doctrine. First, the current contractual trajectory of corporate law is accelerating the convergence of business forms into a specialized form of long-term relational contract. Such a collapse of the corporate-uncorporate distinction among business entities comes at the expense of diversification, standardization, predictability, and transparency. Second, in adjudicating private ordering disputes, the courts are reshaping the foundation of the corporation to look more and more contractual. Allowing contract law to govern without consideration for the other regulatory regimes that apply to corporations (such as state corporate law, property law, and agency law), however, undermines the features of the corporate structure that legitimize the separation of ownership from control. Finally, as corporate doctrine shifts from an institutionalist view of the corporation to a contractual one, courts' decisions will be largely fact-specific and prevent strong generalizations across entities. Thus, corporate law will lose its historic ability to

speak to all corporations—public and private, large and small—with one voice.

Part V discusses whether the contractarian movement in corporate law complements or is in tension with the stakeholder movement and the prevailing view in American society that the public corporation has the role of social reformer. To that end, this Part discusses whether contractual freedom in the corporation (i) can create meritocratic competition and diversity within the corporate ecosystem, thereby providing stakeholders a new avenue for participation in the corporate endeavor, as well as to address socioeconomic inequalities in America; or (ii) will further solidify the power and wealth inequalities that currently exist. The Article concludes with Part VI, which briefly addresses the future of corporate law and the important role for state legislatures in cabining contractual freedom and preserving the corporation and corporate law.

II. THE CORPORATION AS CONTRACT

Historically, American law did not view the corporation through the strong contractarian lens it uses today.¹¹ Similar to the U.K. system upon which it was based, American corporate law originally viewed corporations as quasi-public bodies.¹² Early chartered business corporations were largely privately-owned public utilities.¹³ Accordingly, state corporate codes heavily regulated these corporations and left little room for individual tailoring of the entity.¹⁴ The expansion in the ability of entities to conduct interstate business and the resulting state competition for corporate

¹¹ See John C. Coffee, Jr., *No Exit?: Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 *BROOK. L. REV.* 919, 939 (1988) (“Historically, American corporate law has never regarded the corporation as simply a private contract.”).

¹² See Hill, *supra* note 10, at 541–43 (describing the origins of U.S. corporate law); Coffee, *supra* note 11, at 940.

¹³ See Hill, *supra* note 10, at 543.

¹⁴ See *id.* (“[E]arly American colonial corporations were essentially ‘chips off the block of sovereignty’ and, as a result, heavily restricted in their actions.”).

charters, however, changed this view.¹⁵ During the late nineteenth and early twentieth centuries, states engaged in a race for corporate charters, each trying to offer the most liberal incorporation laws.¹⁶ The result was that the special chartering system, which previously provided for strict regulation of corporations, gave way to an enabling statutory regime.¹⁷ Ultimately, Delaware emerged as the victor in the states' race for corporate charters. Amendments to Delaware's corporate code in 1901 delegated the right to determine the structure and distribution of power within the corporation to the entity's incorporators, thus "flipp[ing] U.S. corporate law history on its head, designating the corporation, rather than the state, as primary 'law-maker.'"¹⁸ This greater flexibility in structuring the contents of the corporate charter and bylaws afforded by enabling statutes such as Delaware's laid the groundwork for the contractual view of the corporation and the private ordering of corporate governance.

The law and economics movement is credited with relying on such corporate statutes to firmly cement the contract metaphor in our current conceptualization of the

¹⁵ See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 188–90 (1986) (discussing case law holding that there was no constitutional right for corporations to carry on business outside their chartering state); Hill, *supra* note 10, at 549–50.

¹⁶ See Hill, *supra* note 10, at 550–52.

¹⁷ See JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* 33–34 (2d ed. 2002) (describing the evolution of corporate law and stating that "today all states have broadly permissive enabling corporation statutes with very little evidence in any state statute of regulatory or paternalistic provisions"); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 70–71, 132–35 (1970); Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 998–1006 (2006); Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 501 (2002).

¹⁸ Hill, *supra* note 10, at 553; see also S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 9 (1976); Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 273 (1976).

corporation.¹⁹ As large public corporations came to dominate the United States, economists developed the “nexus-of-contracts” model to define and justify the “firm” as a means of production.²⁰ Legal scholars imported the nexus-of-contracts theory to explain the corporate form.²¹ Under this theory of the corporation, the relationship between directors, officers, and shareholders can be characterized as contractual in nature, with the charter and bylaws serving as a primary source of this contractual arrangement.²² Corporate statutes thus serve as a form of “off-the-rack” contract terms that the parties may alter.²³ Quickly, the “contractual theory of the

¹⁹ See Robert Anderson IV, *A Property Theory of Corporate Law*, 2020 COLUM. BUS. L. REV. 1, 11–21 (2020) (discussing the “intellectual lineage of the contractarian approach” in corporate law); Hill, *supra* note 10, at 552 n.358 (“The idea that corporate law was ‘enabling’ was an important feature of the nexus of contracts theory of the corporation.”).

²⁰ See R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 784–85 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 311 (1976); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288 (1980).

²¹ See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12, 163 (1991); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 *COLUM. L. REV.* 1416, 1430–33 (1989); see also William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 *CORNELL L. REV.* 407, 415–17 (1989) (describing the work of early scholars behind the “nexus of contracts” metaphor).

²² See COX & HAZEN, *supra* note 17, at 59 (“The essence of the contract is the corporation’s articles of incorporation and the laws of the state of incorporation. The relationships and their corresponding duties and rights that flow through these documents underscore the view, discussed earlier, that the corporation is a ‘nexus of contracts.’”). State corporate law also serves as an important source of the corporate “contract.” See Easterbrook & Fischel, *The Corporate Contract*, *supra* note 21, at 1417.

²³ See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 *J. L. & ECON.* 395, 401 (1983); Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 *BUS. LAW.* 1, 56 (2013) (“American corporate law statutes essentially operate as a specialized contract law governing the relations of the fiduciaries who manage a corporation and the corporation’s

firm . . . dominate[d] the thinking of most economists and most economically oriented corporate law scholars.”²⁴ The contractarian view of the corporation became especially influential in shaping the agenda of corporate scholarship such that the question of contractual freedom has been described as “a question with which every scholar of corporate law must wrestle.”²⁵

Judicial embrace of the contractarian view of the corporation lagged behind that of corporate scholarship. To be sure, the rhetoric of contract law was part of early corporate jurisprudence. In 1819, the United States Supreme Court in *Trustees of Dartmouth College v. Woodward* held that a corporate charter was “a contract made on a valuable consideration,” and a “contract for the security and disposition of property.”²⁶ Twenty years later, the Delaware Court of Chancery similarly declared that the “charter is the contract between the company and the State.”²⁷ Subsequent descriptions of a corporation’s organizational documents then extended the corporate contractual relationship to include

stockholders.”); see also Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 378–80 (2018).

²⁴ Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1705 (1989); see also EASTERBROOK & FISCHER, *supra* note 21, at 163; Easterbrook & Fischel, *The Corporate Contract*, *supra* note 21, at 1430–33; Bratton, *supra* note 21, at 415–17 (describing the work of early scholars behind the nexus-of-contracts metaphor).

²⁵ Bebchuk, *supra* note 1, at 1415 (“Within the law of corporations, the question of limits to contractual freedom is one of great theoretical and practical importance.”).

²⁶ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 644 (1819). In *Dartmouth College*, the Court was faced with the “political question of the degree of freedom that private corporations should have from legislative control.” JESSE H. CHOPER, JOHN C. COFFEE, JR., & RONALD J. GILSON, *CASES AND MATERIAL ON CORPORATIONS* 26 (8th ed. 2013). Specifically, the Court had to address whether a corporate charter was a contract in light of the constitutional limitation on a state’s ability to impair the obligations of a contract. *Id.* at 26. While *Dartmouth College* involved the charter of a college, it was understood to extend well beyond that limited context to corporations more generally. See *id.* at 25.

²⁷ *State v. Wilmington Bridge Co.*, 2 Del. Ch. 58, 60 (Del. Ch. 1838).

shareholders as well.²⁸ However, it was not until the past few decades that, in the context of the upsurge in private ordering efforts described in the next section, the Delaware courts have given a more full-throated endorsement and broader application of the contractarian view. Recent cases reveal the courts relying heavily on the contract metaphor and contract principles in theorizing the corporation and developing the principles that govern the role, enforcement, and interpretation of a corporation's organizational documents.²⁹

III. THE PRIVATE ORDERING ERA

Modern corporate statutes recognize freedom of contracting in the creation and enforcement of organizational documents.³⁰ Indeed, “[c]ontractual freedom is . . . the

²⁸ See *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. Ch. 1930) (“Ever since the decision in the *Dartmouth College* . . . it has been generally recognized in this country that the charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition.”); *Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 700 (Del. Ch. 1923) (finding that the corporate charter served as a contract between (i) the state and the corporation, (ii) the corporation and its stockholders, and (iii) “the stockholders inter sese”).

²⁹ See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020); *Airgas, Inc. v. Air Prods. & Chems., Inc.* 8 A.3d 1182, 1188 (Del. 2010); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014).

³⁰ See *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996) (“At its core, the Delaware General Corporation Law is a broad enabling act which leave latitude for substantial private ordering[s.]”); see also Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1260 (2001) (describing the DGCL as creating “a wide realm for private ordering”). Arguably, corporate statutes do this implicitly, while unincorporated entity statutes do so explicitly. See James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 282 (2015) (“For example, the Delaware Limited Liability Company Act provides: ‘It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company

overriding concept.”³¹ As explained by two renowned corporate jurists:

The Delaware General Corporation Law . . . , which has emerged as the market leader, is “broadly enabling” and designed to facilitate individual tailoring rather than “one-size-fits-all” solutions. . . . [T]he DGCL and its counterparts predominantly offer default rules that can be altered through private ordering via the corporation’s certificate of incorporation and bylaws.³²

This emphasis on private ordering reinforces and perpetuates the idea that the charter and bylaws are “contracts” that allow for parties to customize their provisions.³³

Of note, corporate statutes have not gone as far as unincorporated business entity statutes in allowing unfettered freedom of contract to tailor the structure and governance of the entity.³⁴ Corporate law maintains certain

agreements.’ General corporate statutes, even in Delaware, lack any parallel to this provision.” (footnotes omitted)).

³¹ WILLIAM T. ALLEN, REINIER H. KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 93 (3d ed. 2009).

³² Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCs, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11, 14 (Mark Lowenstein & Robert Hillman eds., 2014); see also COX & HAZEN, *supra* note 17, at 57 (“Under the corporation acts of most states, wide latitude is given to the organizers to include in the articles certain optional provisions and to make certain special variations on the ordinary rules prescribed by statute.”); Strine et al., *supra* note 23, at 56–57.

³³ Strine et al., *supra* note 23, at 56–57.

³⁴ See Cox, *supra* note 30, at 282–83 (“The juxtaposition of LLC statutes with general corporation statutes not only invites but also confirms the conclusion that a clear distinction exists between the two with respect to the embrace of private ordering. Whereas the LLC enjoys few private-ordering restrictions, corporate law provides a body of predictable mandatory rules and no open-ended invitation for their alteration. While less freedom for private ordering exists within the corporate statute, corporate statutes’ greater rigidity through more standardized terms has

mandatory, immutable features. These include structural aspects, like requiring a charter and bylaws and identifying the key participants in the corporation, as well as specifying their respective powers within the enterprise.³⁵ In addition, other rights and responsibilities within the corporation are mandatory, including fiduciary duties, holding annual shareholders' meetings, shareholder voting rights, and specific processes for approving charter amendments, mergers and acquisitions, and dissolution.³⁶ As a result, private ordering, especially in the public corporation context, was traditionally more limited, occurring in shareholders' agreements, preferred stock designations, debt instruments, and commercial and consumer contracts.³⁷

Described as the “new governance” of public corporations, corporate practice in the twenty-first century, however, has seen a dramatic rise in the use of private ordering to structure the governance of the corporation.³⁸ Early corporate contracting efforts took the form of majority voting provisions for the election of directors, elimination of staggered boards,

social significance by reducing information costs for market participants as well as reducing legal uncertainty.” (footnotes omitted)).

³⁵ See, e.g., DEL. CODE ANN. tit. 8, §§ 102, 109, 141, 151 (2022).

³⁶ See, e.g., *id.* §§ 211, 242, 251, 271. See also Cox, *supra* note 30, at 282 (“[C]orporate law provides a body of predictable mandatory rules and no open-ended invitation for their alternation.”); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1674–76 (1989).

³⁷ See Fisch, *supra* note 2, at 1637, 1642–43 (describing “old governance” devices); see also William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815, 1839, 1847 (2013) (describing the rights preferred stockholders can secure through the terms of preferred stock designations); Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 FORDHAM L. REV. 703, 707–09 (2008) (discussing the ability of debt instruments to be used as levers of control over corporate governance).

³⁸ See Fisch, *supra* note 2, at 1638 (“[F]or the most part the innovations take the form of private ordering—that is, the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law).”); Shaner, *supra* note 7, at 988.

special meeting bylaws, and advance notice bylaws.³⁹ Around this same timeframe, three different developments were occurring that further fueled the private ordering movement.

First, parties in publicly traded LLCs began testing the limits, if any, on “the expansive contractual freedom authorized by alternative entity statutes to grant managerial discretion” by eliminating bedrock protections, such as the duty of loyalty, in their organizational documents.⁴⁰ When challenged, the Delaware courts upheld such provisions as enforceable.⁴¹ This judicial validation of extreme alterations to the governance of an unincorporated business entity in its organizational documents, combined with the court’s reiteration of the contractual nature of organizational documents, encouraged similar experimentation in public corporations.⁴²

Second, in the context of consumer and commercial contracts, parties were testing the bounds of contract provisions governing litigation procedure, such as arbitration and forum selection provisions. When challenged, the courts

³⁹ See Fisch, *supra* note 3, at 921–24 (discussing private ordering efforts like majority voting); Geeyoung Min, *Shareholder Voice in Corporate Charter Amendments*, 43 J. CORP. L. 289, 313 (2018) (analyzing charter amendments regarding board declassification, majority voting, and calling a special meeting); Fisch, *supra* note 2, at 1638 (describing different private ordering efforts); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016) (discussing majority voting); Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117 (2014) (discussing majority voting and advance notice bylaws); RAJEEV KUMAR, GEORGESON, 2016 ANNUAL CORPORATE GOVERNANCE REVIEW 4 (2016).

⁴⁰ Strine & Laster, *supra* note 32, at 12. See also Brent J. Horton, *The Going-Private Freeze-Out: A Unique Danger for Investors in Delaware Non-Corporate Business Associations*, 38 DEL. J. CORP. L. 53, 57–58 (2013); Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 561–62 (2012).

⁴¹ See *Gerber v. Enter. Prods. Holdings, LLC*, No. 5989–VCN, 2012 WL 34442, at *12–13 (Del. Ch. Jan. 6, 2012).

⁴² See Shaner, *supra* note 7, at 1000.

were again willing to uphold such provisions.⁴³ Drawing on the contract metaphor, corporate actors began implementing parallel provisions in organizational documents.⁴⁴

Third, and most importantly, the past thirty years have seen a resurgence in shareholder power vis-à-vis management regarding the governance of the corporation. Traditionally, the power to sue has been viewed as shareholders' most effective tool in constraining management power.⁴⁵ Regulatory responses following events like the public outcry over excessive executive compensation, the financial fraud at large public companies in the early 2000s, and the 2008 financial crisis, however, have reinvigorated the shareholder franchise, providing shareholders with greater information rights, access to the company's proxy statement, and additional approval rights.⁴⁶ These reforms, coupled with the

⁴³ See Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 498–99 (2016).

⁴⁴ *Id.* (discussing the backdrop of contract procedure and how it contributed to the emergence of litigation provisions in corporate organizational documents). In a similar vein, Professor George Geis points out that, as Delaware courts reiterate and reinforce the idea that charters and bylaws are contracts, corporate actors become more confident that private ordering amendments will be upheld, triggering further developments and proposals to include ex ante corporate governance features in organizational documents. George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 644–45 (2016) (“One clear driver of these initiatives is a renewed emphasis on corporate bylaws as contracts. By conceptualizing the corporate relationship as an unfolding agreement between shareholders and firms, lawmakers can view bylaw modification efforts as the permissible product of flexible private ordering.”).

⁴⁵ See Eugene Rostow, *To Whom and for What End is Corporate Management Responsible?*, in *THE CORPORATION IN MODERN SOCIETY* 46, 48 (Edward S. Mason ed., 2d. ed. 1961) (describing derivative suits as “the most important procedure the law has yet developed to police the internal affairs of corporations”); Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1733 (1994) (“Shareholder suits are the primary mechanism for enforcing the fiduciary duties of corporate managers.”); Megan W. Shaner, *The (Un)Enforcement of Corporate Officers’ Duties*, 48 U.C. DAVIS L. REV. 271, 327–28.

⁴⁶ See Yaron Nili & Megan Wischmeier Shaner, *Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder*

rise of activist and institutional investor engagement, have resulted in shareholders expanding the tools available to them to influence corporate affairs and constrain management power. Large institutional investors now dominate the shareholder activist scene and are asserting their influence primarily through the right to vote.⁴⁷

A review of private ordering efforts exemplifies the surge in shareholder influence over corporate affairs. Initial private ordering in the public company context was predominantly instituted by boards, through their unilateral power to amend bylaws or create preferred stock. In response, shareholders, through voting and Rule 14a-8 proposals, have sought to reshape the balance of power in the corporation.⁴⁸ For example, shareholder-driven efforts have contributed to the widespread declassification of public company boards, as well as the adoption of majority voting bylaws.⁴⁹ As shareholders

Engagement, 63 B.C. L. REV. 123, 133–36 (2022) (describing the rise of the shareholder franchise movement and its impact on governance of the corporation).

⁴⁷ See CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 213–15 (6th ed. 2010); Fisch, *supra* note 2, at 1644 (“[I]t is clear that, in the United States, shareholders are more active and effective in corporate governance than ever before.”); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 867–68 (2013) (describing the interplay of institutional and activist shareholders in influencing corporate governance); Smith et al., *supra* note 2, at 171–72.

⁴⁸ See Hill, *supra* note 10, at 524–25 (describing how, in the “wake of the SEC’s failure to issue mandatory federal rules,” institutional investors used their voting rights and Rule 14a–8 to achieve such corporate governance change through private ordering).

⁴⁹ See Geis, *supra* note 44, at 644 (“Shareholder–side initiatives, including board declassification campaigns and other activist proposals, have blossomed in recent years.”); Smith et al., *supra* note 2, at 171–72 (“In recent years, as institutional investors have shown an increased inclination toward participation in corporate governance, the monitoring role of shareholders has focused on director elections. In addition to proxy access, discussed above, shareholders have created various other means of making director elections more meaningful, including withhold-the-vote campaigns, majority voting, and the abolition of cumulative voting and classified boards.”); Stephen J. Choi et al., *Does Majority Voting Improve Board*

have flexed their muscles to increase participation in the governance of public firms, it has led to a push and pull with management over the balance of power in the corporation.⁵⁰ The following discussion outlines management's and shareholders' experimentation with private ordering and how it has been pushing the boundaries of the contractarian view of the corporation. Relying heavily on the contract metaphor and the enabling nature of corporate statutes for support, private ordering has placed the issue of contractual freedom and the influence of the contractarian account in corporate theory and jurisprudence at the center of modern corporate discourse.⁵¹

A. Shareholder Litigation Private Ordering

In response to the dramatic increase in multi-forum shareholder litigation, an array of corporate contract procedures emerged.⁵² This trend has involved boards

Accountability?, 83 U. CHI. L. REV. 1119, 1121 (2016) (reporting that, while in 2005, only nine of the S&P 100 companies had majority voting in place, by 2014, over 90% of the S&P 500 had some form of majority voting in place). See also Min, *supra* note 39, at 313, 316 (discussing “compromised implementation” of bylaw amendments where shareholders push directors to adopt change). Other shareholder-led governance reform efforts include poison pill redemption bylaws, increased board independence, increased ability for shareholders to call a special meeting, director qualifications and incentives, separation of the chairman of the board and CEO positions, and changes to executive compensation. See Fisch, *supra* note 2, at 1644–52 (describing shareholder efforts at corporate governance reform); see generally Smith et al., *supra* note 2 (describing shareholder private ordering efforts).

⁵⁰ See Shaner, *supra* note 7, at 998–99. Professor Jennifer G. Hill has described this back-and-forth between shareholders and management as “private ordering combat.” Hill, *supra* note 10, at 509.

⁵¹ See *infra* Section III.A. To be sure, the issue of contractual freedom has long been an important one in corporate theory and discourse. See, e.g., Bebchuk, *supra* note 1, at 1408; Coffee, *supra* note 11. However, the recent private ordering movement has placed renewed judicial and scholarly attention on the issue.

⁵² See Winship, *supra* note 43, at 501–03 (describing the development of forum selection clauses including the rise in multi-forum litigation); see also Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2011,

limiting shareholder litigation through forum-selection bylaws, fee-shifting bylaws, arbitration provisions, and minimum threshold requirements.⁵³ Adoption of forum selection provisions gained momentum following the Delaware Court of Chancery's endorsement of such a provision in a footnote in *In re Revlon Inc. Shareholders' Litigation*,⁵⁴ and peaked after the court expressly upheld the facial validity of an exclusive forum selection bylaw in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*⁵⁵ In

at 2 (Feb. 2, 2012) (unpublished manuscript), <http://ssrn.com/abstract=1998482> [<https://perma.cc/3GCK-9HJ4>] (documenting the rise in merger and acquisition litigation and multi-forum litigation); see generally Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013) (discussion of forum selection provisions); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31 (2017). Management-led private ordering efforts have largely focused on shareholders' right to sue, as the rights to vote and sell have been heavily guarded by the courts. See, e.g., *Hoschett v. TSI Int'l Software, Ltd.*, 683 A.2d 43, 44–45 (Del. Ch. 1996); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (referencing the “central importance of the [stockholder] franchise to the scheme of corporate governance” and applying heightened scrutiny to the directors' actions).

⁵³ See Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, in RESEARCH HANDBOOK ON REPRESENTATIVE STOCKHOLDER LITIGATION 5–9 (Sean Griffith et al. eds., forthcoming 2018) (summarizing developments in the private ordering of stockholder litigation); Winship, *supra* note 43, at 500–18 (documenting the development of corporate contract procedure).

⁵⁴ 990 A.2d 940, 960 n.8 (Del. Ch. 2010); see also *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013) (citing to the rise in public corporation adoption of forum selection bylaws leading up to the case); Romano & Sanga, *supra* note 52 (documenting the proliferation of forum selection provisions).

⁵⁵ *Boilermakers Loc.*, 73 A.3d at 956 (citing to the broad language of Section 109(b) and holding that the exclusive forum selection bylaws were facially valid even though they were unilaterally adopted by the board); see also CLAUDIA H. ALLEN, THE CONFERENCE BOARD GOVERNANCE CENTER: TRENDS IN EXCLUSIVE FORUM BYLAWS 3 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715

upholding the bylaw at issue, the *Boilermakers* court explicitly endorsed a contract theory for analyzing the bylaw amendment, stating that “the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and shareholders formed within the statutory framework of the DGCL. This contract is, by design, flexible and subject to change in the manner that the DGCL spells out.”⁵⁶ The *Boilermakers* language is one of the first in a line of private ordering cases evidencing a transformation in the judicial perception of organizational documents from being akin to contracts to becoming contracts themselves.⁵⁷

Litigation fee-shifting bylaws followed closely behind forum selection bylaws. Less than a year after *Boilermakers*, the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher*

[<https://perma.cc/5TF2F88N>] (stating that, following *Boilermakers* (June 2013 through October 2013), at least 112 Delaware corporations adopted or announced plans to adopt such bylaws). Today, forum selection provisions can be found with increasing frequency in public corporations’ organizational documents. See Joseph M. McLaughlin, Simpson Thacher & Bartlett LLP, *Corporate Litigation: Enforceability of Board-Adopted Forum Selection Bylaws*, N.Y. L.J. (Oct. 9, 2014), https://www.stblaw.com/docs/default-source/Publications/ny-law-journal_joe-mclaughlin_corporate-litigation-column_10_09_2014.pdf

[<https://perma.cc/4W2D-6AWD>] (reporting on exclusive forum bylaws at over one hundred public corporations); Romano & Sanga, *supra* note 52; SULLIVAN & CROMWELL LLP, EXCLUSIVE FORUM BYLAWS GAIN MOMENTUM 1 (2014),

http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Exclusive_Forum_Bylaws_Gain_Momentum.pdf [<https://perma.cc/74QX-GNBV>]

(reporting on the adoption of more than two dozen forum selection bylaws at large corporations in 2013 and 2014).

⁵⁶ *Boilermakers Loc.*, 73 A.3d at 939. See *id.* at 955 (“In an unbroken line of decisions dating back several generations, the Supreme Court of Delaware has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”). In his opinion, Chancellor Strine rejected a holding by the U.S. District Court for the Northern District of California, stating that the decision “rest[ed] on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders.” *Id.* at 956.

⁵⁷ See Shaner, *supra* note 7, at 1011; Cox, *supra* note 30, at 274; Geis, *supra* note 44, at 611–12.

Tennis Bund upheld fee-shifting bylaws as “valid and enforceable under Delaware law.”⁵⁸ Again, the court in its decision espoused strong contractarian views of the entity, stating that “[b]ecause corporate bylaws are ‘contracts among a corporation’s shareholders,’ a fee-shifting provision . . . would fall within the contractual exception to the American Rule [which permits the parties to alter by contract the ordinary rule that each party pays its own attorney’s fees]. Therefore, a fee-shifting bylaw would not be prohibited under Delaware common law.”⁵⁹ While the fee-shifting bylaw in *ATP Tour* occurred in the nonstock corporation context, the implications for stock corporations were clear.⁶⁰ Several public corporations adopted similar provisions in the wake of the court’s decision.⁶¹ The Delaware state legislature quickly amended the General Corporation Law to bar the use of fee-shifting provisions as applied to intracorporate disputes involving stock corporations, implicitly recognizing that legislative action would be necessary to limit private ordering in light of the courts’ contractarian views.⁶²

⁵⁸ 91 A.3d 554, 555 (Del. 2014). The case occurred in the context of a certified question of law from the United States District Court for the District of Delaware. *Id.*

⁵⁹ *Id.* at 558 (internal citation omitted).

⁶⁰ The statutes cited and interpreted as supporting fee-shifting bylaws for nonstock corporations should apply in the same manner to stock corporations. See Stephen Bainbridge, *The Case for Allowing Fee Shifting Bylaws as a Privately Ordered Solution to the Shareholder Litigation Epidemic*, PROFESSORBAINBRIDGE.COM (Nov. 17, 2014), <https://www.professorbainbridge.com/professorbainbridge.com/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html> [<https://perma.cc/533L-YKSS>] (“It is widely assumed that the legal basis for upholding such a bylaw in the context of a membership corporation will carry over to a stock corporation.”).

⁶¹ See Tom Hals, *US Companies Adopt Bylaws That Could Quash Some Investor Lawsuits*, REUTERS (July 7, 2014, 4:02 PM), <https://www.reuters.com/article/usa-litigation-companies/us-companies-adopt-bylaws-that-could-quash-some-investor-lawsuits-idUSL2NOPE1YZ20140707> [<https://perma.cc/2QGH-RG55>] (reporting on the first Delaware corporations to adopt fee-shifting bylaws).

⁶² See DEL. CODE ANN. tit. 8, § 102(f) (2018); 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS*

Boilermakers, *ATP*, and the resulting statutory amendments left open questions about just how far corporate contracting could go in regulating claims arising outside of state law, such as federal securities law claims.⁶³ That question was put squarely before the Delaware Supreme Court in *Salzberg v. Sciabacucchi*.⁶⁴ Building on the strong contractarian rhetoric in these prior cases, the *Salzberg* court elevated the contract framework above other corporate principles, such as the internal affairs doctrine, in upholding the validity of federal forum charter provisions.⁶⁵

In sum, this line of cases alone evidences a trajectory of corporate jurisprudence firmly wedded to contractarianism. As the rest of the examples of private ordering that follow illustrate, this trend is not unique to either shareholder litigation nor the judicial branch of corporate lawmaking.

B. Corporate Opportunity Waivers

In addition to judicial rhetoric, statutory amendments reflect a swing towards a strong contractarian view of the corporation. The fiduciary duty of loyalty has been characterized as a key component in mitigating agency costs and, accordingly, an immutable obligation of corporate management.⁶⁶ One instance where the duty of loyalty is implicated is where directors are confronted with business opportunities that may conflict with the corporation's interests.⁶⁷ Following the decision in *Siegman v. Tri-Star*

ORGANIZATIONS § 1.10 (John Zeberkiewicz & Blake Rohrbacher eds., 4th ed. 2022) (describing *ATP Tour* and the adoption of Section 102(f)). Other states outside of Delaware have, however, taken a opposite stance and statutorily allowed fee-shifting to continue. See, e.g., OKLA. STAT. tit. 12, § 12-696.4 (2021) (permitting fee-shifting provisions).

⁶³ See Manesh, *supra* note 8, at 516.

⁶⁴ 227 A.3d 102 (Del. 2020).

⁶⁵ See *id.* at 135–36; Manesh, *supra* note 8, at 532–34 (discussing how the decision confined the internal affairs doctrine through its contractarian analysis and holding).

⁶⁶ See Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 3 (1993).

⁶⁷ See BALOTTI & FINKELSTEIN, *supra* note 62, at § 4.16.

Pictures, there was uncertainty over a corporation's contractual freedom to renounce any interest or expectancy in a corporate opportunity.⁶⁸ This led the Delaware legislature to amend its corporate code in 2000 to expressly allow for corporations to waive the application of the corporate opportunity doctrine.⁶⁹ The amendment to Section 122 of Delaware's General Corporation Law reflects a strong contractarian view of the corporation, paving the way for a corporation to contract out of a portion of the otherwise immutable duty of loyalty.⁷⁰

Sixteen years after Section 122 was amended, Professors Gabriel Rauterberg and Eric Talley undertook a "broad empirical assessment of how public companies have responded to [this] statutory reform[]" and the ability to contract around the duty of loyalty.⁷¹ Their study found that "hundreds of public corporations in our sample – and well over one thousand in the population – have disclosed or executed [corporate opportunity] waivers," indicating that "[p]ublic companies have an enormous appetite for tailoring the duty of loyalty when freed to do so."⁷² Moreover, their study found that the exercise of private ordering in this regard was not received negatively among investors.⁷³ Overall, their study

⁶⁸ *Id.*

⁶⁹ See S. 363, 140th Gen. Assemb. ch. 343 § 3 (Del. 2000) (citing *Siegman v. Tri-Star Pictures, Inc.*, No. Civ. A. 9477, 1989 WL 48746 (Del. Ch. May 5, 1989)).

⁷⁰ See DEL. CODE ANN. tit. 8, § 122(17) (2022) ("Every corporation created under this chapter shall have the power to: . . . (17) Renounce, in its certificate of incorporation . . . any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders.").

⁷¹ Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1078 (2017).

⁷² *Id.* at 1079. The number of corporate opportunity waivers adopted is especially notable given that such waivers must be included in a corporation's charter, which, by statute, requires a vote of both the board and the stockholders. See DEL. CODE ANN. tit. 8, § 242 (2022).

⁷³ Rauterberg & Talley, *supra* note 71, at 1147.

provides important insight into private ordering behavior in the wake of legal developments that empower firm-specific tailoring. Given public companies' penchant for private ordering, careful consideration regarding the extent to which corporate law embraces the contractarian theory of the corporation and legislatively enables governance contracting is needed.

C. Proxy Access & Reimbursement

Despite a failed federal regulatory attempt to mandate proxy access for director nominations,⁷⁴ the private ordering of proxy access in corporations' bylaws by shareholders has been successful.⁷⁵ In 2009, the Delaware legislature amended the corporate code to allow a corporation to provide for both proxy access and reimbursement of proxy solicitation expenses in its bylaws.⁷⁶ These amendments specifically enable proxy access through private ordering in a corporation's organizational documents.⁷⁷ In explaining the statutory amendments, the Court of Chancery emphasized the contractual freedom afforded in structuring the corporation, stating that the amendments "make plain that which had always been understood by most Delaware corporate lawyers, which is that the stockholders of Delaware

⁷⁴ See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (invalidating federal proxy access rule, Rule 14a-11).

⁷⁵ See Fisch, *supra* note 2, at 1649; Nick Grabar & Leah LaPorte Malone, *Getting Ready for Proxy Access*, CLEARY GOTTLEIB (Oct. 20, 2015), <https://www.clearymawatch.com/2015/10/getting-ready-for-proxy-access/> [<http://perma.cc/D37Z-T8K2>] (stating that "[p]roxy access bylaws are proliferating"); *Boardroom Accountability Project*, N.Y.C. COMPTROLLER, <http://comptroller.nyc.gov/boardroom-accountability/> [<https://perma.cc/6TH9-ZSK4>]; see also Geis, *supra* note 44, at 614-17; David Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1, 4-7 (2017) (summarizing the history of proxy access bylaws); Smith et al., *supra* note 2, at 161-63.

⁷⁶ See DEL. CODE ANN. tit. 8, §§ 112, 113 (2009). These amendments overruled the Delaware Supreme Court's earlier decision in *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227 (Del. 2008) (invalidating a stockholder-proposed proxy access bylaw).

⁷⁷ See *id.* §§ 112, 113.

corporations have the authority to adopt potent bylaws shaping a more competitive election process.”⁷⁸ Thus, in a similar manner to the corporate opportunity waiver amendments, legislative reforms continue to perpetuate the contractual view of the corporate form and fuel private ordering.⁷⁹

D. Shareholder Agreements & Dual-class Stock

Most recently, scholarly attention has turned to the use of non-conventional tools, such as shareholder agreements and dual-class control in single-class stock, as a means for reshaping the balance of power in public companies.⁸⁰ Both of these examples illustrate how corporations are using indirect means to further inject contracts into the entity’s governance and stretch contractual freedom beyond traditional limits. Coined “stealth governance,” scholars have warned that the proliferation of private ordering of this nature threatens to sacrifice critical corporate law values.⁸¹

Private ordering through the use of shareholder agreements is not a new phenomenon, especially in the private company setting. As Professor Gabriel Rauterberg explains, “[s]hareholder agreements – contracts among the owners of a firm and sometimes the firm itself – are a central instrument of corporate law and at the core of private company governance.”⁸² Aggressive contracting efforts in this space have, however, moved beyond traditional matters, such as voting and board composition, to alter bedrock governance rights, such as appraisal, books and records inspection rights,

⁷⁸ *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 356 n.244 (Del. Ch. 2010), *aff’d*, 15 A.3d 218 (Del. 2011) (mem.).

⁷⁹ See Hill, *supra* note 10, at 525–28 (describing the dramatic rise in shareholder proposals relating to proxy access in the years following the statutory amendments).

⁸⁰ See Fisch, *supra* note 3; Rauterberg, *supra* note 3, at 1126; Shobe & Shobe, *supra* note 3.

⁸¹ See Fisch, *supra* note 3; see also Rauterberg, *supra* note 3, at 1126–27; Shobe & Shobe, *supra* note 3, at 1303–04.

⁸² Rauterberg, *supra* note 3, at 1126.

and fiduciary duties.⁸³ To date, courts have upheld these efforts based on principles of contract, not corporate, law.⁸⁴ This recent shareholder agreement jurisprudence and its contractual justifications has been described as “reconfigur[ing] Delaware’s longstanding defaults along each of exit, voice, and liability.”⁸⁵

For many years, the general consensus was that “shareholder agreements . . . play a trivial or nonexistent role” in public companies, and thus governance contracting and the courts’ prioritization of contract over corporate principles in analyzing such agreements was not of concern.⁸⁶ This view, Professor Rauterberg’s research reveals, is, in reality, incorrect. In fact, he found that a significant number—15% of the companies studied—continued to have shareholder agreements in effect after the company went public.⁸⁷ This means that public company governance is not, as was previously thought, immune from developments in the private company context; the strong contractarian principles governing private companies are weaving their way into the

⁸³ See Fisch, *supra* note 3, at 915–17 (describing the expanding scope of governance contracting in shareholder agreements); Rauterberg, *supra* note 3, at 1129–30.

⁸⁴ See, e.g., *Manti Holdings, LLC v. Authentix Acquisition Co.*, Civil Action No. 2017–0887–SG, 2018 Del. Ch. LEXIS 318, at *1 (Del. Ch. Sept. 28, 2018) (appraisal); *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 918–920 (Del. Ch. 2020) (books and records inspection rights); *Bonanno v. VTB Holdings, Inc.*, C.A. No. 10681–VCN, 2016 WL 614412, at *1 (Del. Ch. Feb. 8, 2016); *Kortum v. Webasto Sunroofs, Inc.*, 769 A2d 113, 125 (Del. Ch. 2000) (books and records inspection rights).

⁸⁵ Rauterberg, *supra* note 3, at 1136.

⁸⁶ *Id.* at 1129.

⁸⁷ *Id.* at 1149. In addition, given the increase in the number and size of private companies, in particular technology startups which have been employing such agreements, the use and impact of shareholder agreements cannot be ignored. Fisch, *supra* note 3, at 959 (“As the number and size of private companies continue to grow, stealth governance raises increasing concerns.”). Cf. Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 164 (2019) (“Unlike traditional closely held corporations, startups are aimed at eventually being acquired by another corporation or transforming to a public corporation—their existence in startup form is understood to be ephemeral like a caterpillar in its chrysalis.”).

public company setting as well. As the traditional lines between private and public corporations become further blurred, corporate law progresses farther down the contractarian path.

A similar unconventional governance contracting trend has been analyzed in the context of dual-class versus single-class stock. Traditionally, dual-class stock structures have been utilized to give certain shareholders disproportionately favorable governance rights, usually voting rights, after the company goes public in an initial public offering (IPO).⁸⁸ In their study of dual-class versus single-class stock structures, Professors Gladriel Shobe and Jarrod Shobe find that companies today are much more likely to maintain a single-class stock structure and then “grant insiders special rights through contract than through a dual-class structure.”⁸⁹ This type of private ordering is found in a combination of the corporation’s charter, bylaws, and/or separate contracts between the company and insiders.⁹⁰ The consequences of this type of corporate contracting are that insiders are able to obtain certain rights not available to the public, thus turning “what appears on the surface to be a single-class corporation into a de facto dual-class corporation.”⁹¹ As a result, Professors Shobe and Shobe explain, “[t]he line between single-class and dual-class public companies has surreptitiously become blurred, and many companies that are formally single class yet dual class in substance avoid much of the scrutiny that comes with being a dual-class corporation.”⁹² Thus, in a similar manner to shareholders’

⁸⁸ Shobe & Shobe, *supra* note 3, at 1288 (describing how dual-class stock structures have traditionally given company insiders control in public companies through disproportionate voting rights).

⁸⁹ *Id.* at 1288–89.

⁹⁰ *See id.* at 1302. Outside of the corporation’s organizational documents, “[t]hese contracts have a variety of names, like shareholder agreement, nomination agreement, director-designation agreement, voting agreement, master separation agreement, investment agreement, or investor-rights agreement.” *Id.* at 1289.

⁹¹ *Id.* at 1289.

⁹² *Id.* at 1289–90.

agreements, parties are departing from traditional norms in their use of contract tools to alter the governance of the corporation.

The above examples illustrate how quickly and broadly the private ordering of corporate governance is progressing. Case law and statutory amendments have either fueled or stymied private ordering initiatives and correspondingly the contractual nature of the corporation. Decisions like *Revlon* and *Boilermakers* applied a contractual framework and stimulated widespread adoption of forum selection bylaws at public companies.⁹³ Similarly, the adoption of Sections 112, 113, and 122(17) of the Delaware General Corporation Law encouraged private ordering with respect to proxy access, proxy reimbursement, and corporate opportunity waivers, respectively.⁹⁴ On the other hand, Delaware's statutory amendments after *ATP* prohibited fee-shifting and eliminated the ability to adopt exclusive forum clauses outside of Delaware or mandatory arbitration clauses.⁹⁵ As a result, while mandatory arbitration clauses had been predicted to be the next iteration of ex ante corporate contract procedure, the statute effectively foreclosed contractual freedom in that context.⁹⁶ In addition, as described above, close-corporation, contract-based private ordering is increasingly being imported into the public company setting.⁹⁷ All told, the private ordering era has revealed the dominance of

⁹³ See *supra* notes 54–57 and accompanying text.

⁹⁴ See *supra* notes 75–78, 71–73 and accompanying text.

⁹⁵ See DEL. CODE ANN. tit. 8, §§ 102(f), 115 (2018).

⁹⁶ See Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 809 (2015) (“[M]andatory arbitration bylaws are the latest attempts to address [the] problem [of too many lawsuits].”); Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181 (2008); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 68 (2013).

⁹⁷ See *supra* Section III.D; see also Robert W. Hillman, *The Bargain in the Firm: Partnership Law, Corporate Law, and Private Ordering Within Closely-Held Business Associations*, 2005 U. ILL. L. REV. 171, 172–174 (2005).

contractarianism in corporate law – statutory amendments endorse, and the courts have embraced, private ordering as consistent with the contract theory of the firm.

IV. THE COSTS OF CONTRACTUAL FREEDOM

The private ordering era raises important questions about the relationship between corporate law and contract law as well as the relevancy of the corporate form going forward. Commentary surrounding statutory amendments that sanction firm-specific tailoring reflect a contractarian view of the corporation.⁹⁸ Caselaw has similarly drawn heavily on the contractarian view of the corporation in endorsing and upholding private ordering of corporate governance.⁹⁹ In fact, in using such strong language to emphasize contractual freedom, private ordering jurisprudence appears to take the contract metaphor, originally used to illuminate the corporate structure and relationship of its participants, one step further and turn it into a propositional statement.¹⁰⁰ Interestingly, corporate jurisprudence fails to provide any meaningful discussion of the contract metaphor and explanation of the basis for its sweeping application of contract principles to decide corporate disputes.¹⁰¹ Engaging in this discussion is

⁹⁸ See, e.g., DEL. CODE ANN. tit. 8, §§ 112, 113 (2018); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 356 n.244 (Del. Ch. 2010) (explaining the statutory amendments on proxy access and proxy expense reimbursement “make plain that which had always been understood by most Delaware corporate lawyers, which is that the stockholders of Delaware corporations have the authority to adopt potent bylaws shaping a more competitive election process”), *aff’d* 15 A.3d 218 (Del. 2011) (mem.).

⁹⁹ See, e.g., Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010); Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); Salzberg v. Sciabacucchi, 227 A.3d 102, 116 (Del. 2020).

¹⁰⁰ See Shaner, *supra* note 7, at 1010–11 (discussing cases that show the court treating corporate organizational documents as contracts themselves). See also Joo, *supra* note 7, at 803 (“Metaphor theorists warn against mistaking metaphors for ‘propositional statements.’”).

¹⁰¹ While the Chancery Court and Delaware Supreme Court opinions in the *Sciabacucchi v. Salzberg* litigation address the limits of corporate contracting as it relates to the internal affairs doctrine, the Delaware

important as the basis for and scope of corporate contractual freedom impacts not only the validity of specific private ordering initiatives, but the resolution of broader normative questions in corporate theory.¹⁰²

The expansion of corporate contractual freedom resulting from the private ordering movement and the judicial embrace of contractarian principles has important implications for corporate law and the role of the corporation in business organizations more broadly. Within corporate doctrine, for example, the expansion of contractual freedom is blurring the traditional lines separating (i) public and private companies, and (ii) single-class and dual-class stock.¹⁰³ Such a result is concerning, as it allows parties to avoid scrutiny and potentially alter bedrock governance rights.¹⁰⁴ And within the broader business entity ecosystem, the integration of more and more contractual flexibility into the corporate form is eroding the distinguishing features of that entity from other organizational forms. As a result, the corporation, along with

Supreme Court's uses strong contractarian language without providing the basis for relying on contract law to resolve the issues in the case. See *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 WL 6719718, at *2 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102 (Del. 2020).

¹⁰² See Bebhuk, *supra* note 1, at 1408 (explaining how the question of contractual freedom is connected to other basic questions in the theory of the corporation such as “(1) the nature of the corporation; (2) the boundaries of the corporation; (3) the content of corporate rules; and (4) the selection of the institutions making corporate law”).

¹⁰³ See Fisch, *supra* note 3, at 918 (pointing out that today corporate America exists “in an era in which the line between public and private corporations has become increasingly blurred”); Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 384 (2013) (“[B]oundary issues along the public-private divide are under theorized and, up until recently, left to resolution by reference to regulatory legacies from a time far different from today’s trading markets.”); Shobe & Shobe, *supra* note 3, at 1289 (asserting that “the line between single-class and dual-class public companies has surreptitiously become blurred”).

¹⁰⁴ See Fisch, *supra* note 3, at 915–17 (describing the expanding scope of governance contracting in shareholder agreements); Rauterberg, *supra* note 3, at 1129–30; Shobe & Shobe, *supra* note 3 (describing how provisions implemented in single-class companies avoid the transparency to which dual-class structures are subject).

other business entities, appear to be converging into essentially a form of long-term relational contracting. The following sections address these and other questions raised by the expansion of contractual freedom.

A. Corporate Relevancy & the Convergence of Business Entities

In theory, there exists a diverse ecosystem of entity types from which an individual can choose to structure their business: general partnerships, limited partnerships (LPs), limited liability partnerships (LLPs), corporations, close corporations, and limited liability companies (LLCs). At each entity's statutory inception, it was created and viewed as distinct from the other existing business entities based on certain substantive characteristics.¹⁰⁵ Such characteristics include formation procedures, liability exposure, taxable status, management structure, transferability of ownership interests, default provisions versus mandatory requirements, etc. Notably, these distinct characteristics are largely a product of state entity law, with federal securities regulation, tax laws, and bankruptcy law contributing in a lesser way.¹⁰⁶

In reality, however, there has been a slow and steady convergence of business entities toward a contract-based legal structure with little to no mandatory regulation under state law.¹⁰⁷ Over time, the development of the law, both in terms

¹⁰⁵ See *Twin Bridges Ltd. P'ship v. Draper*, No. Civ.A. 2351-VCP, 2007 WL 2744609, at *19 (Del. Ch. Sept. 14, 2007) ("Because the conceptual underpinnings of the corporation law and Delaware's limited partnership law are different, courts should be wary of uncritically importing requirements from the DGCL into the limited partnership context."); see also ROBERT R. KEATINGE & ANN E. CONAWAY, *KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY: SELECTING FORM AND STRUCTURE FOR A CLOSELY HELD BUSINESS* § 1.1 (2022 ed.).

¹⁰⁶ See CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS* 15 (8th ed. 2017) (discussing the role of state law in business associations); LARRY A. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* 184–85, 250 (2010).

¹⁰⁷ See *infra* notes 110–114 and accompanying text; see also Matthew G. Dore, *Deja Vu All Over Again? The Internal Affairs Rule and Entity Law*

of state and federal statutory amendments as well as cases, has blurred the distinguishing features of the different business entities. The ultimate convergence point, some scholars assert, will be one of maximum freedom of contract and zero mandatory regulation (i.e., the LLC).¹⁰⁸ All entities, they conclude, will be simply a variety of long-term, relational contracts through which individuals finance and govern their entities.¹⁰⁹

Evidence of the convergence trend can be seen across the different business entities. Examples include recognition of general partnerships as entities (like LPs, LLCs, corporations, and LLPs) and not aggregations of participants,¹¹⁰ the elimination of the control rule in limited partnership statutes,¹¹¹ changes in check-the-box regulation for

Convergence Patterns in Europe and the United States, 8 BROOK. J. CORP. FIN. & COM. L. 317 (2014).

¹⁰⁸ See Lynn M. LoPucki & Andrew Verstein, *The Systems Approach to Teaching Business Associations*, 2020 MICH. ST. L. REV. 703, 711 (2020); Lynn LoPucki, Oral Presentation on the Convergence of Entity Types (2021) (slides on file with author). Indeed, with the broad contractual freedom provided for in LLC statutes, an organizer could structure that entity to resemble any other type of entity—a partnership, corporation, or LP. See *Of LLCs, ESGs, Diversity, and Virtual Annual Meetings*, MARQUETTE LAW. 60, 64 (2021) (interview with Vice Chancellor Laster), <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2021-summer/2021-summer-p60.pdf> [https://perma.cc/R2ZY-KHCC] (interview with Vice Chancellor Laster, in which he called LLCs the “moldable clay of entity law” and stated that “[y]ou can make them into whatever you want . . . [y]ou can create an LLC that looks like a corporation . . . a limited partnership . . . [or] a flat partnership”); see, e.g., *Obeid v. Hogan*, C.A. No. 11900–VCL, 2016 WL 3356851, at *6 (Del. Ch. 2016), (citing several other cases, and confirming that the manner in which an LLC is organized may bespeak a desire to adopt the rules applicable to another form of entity, there a corporation), *judgment entered*, 2016 WL 4703059 (Del. Ch. 2016).

¹⁰⁹ See LoPucki, *supra* note 108.

¹¹⁰ See REVISED UNIF. P'SHIP ACT § 201(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2001) (providing that a partnership is an entity).

¹¹¹ See UNIF. LTD. P'SHIP ACT § 303 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2001) (eliminating the control rule). One of the reasons cited for eliminating the control rule was that in other entity forms, specifically the corporation and LLC, a participant could exercise management authority

unincorporated entities,¹¹² the Model Business Corporation Act's harmonization with some of the Uniform Law Commission laws,¹¹³ amendments to allow for limited liability protection in LPs and general partnerships,¹¹⁴ enabling amendments to corporate codes,¹¹⁵ and case law upholding and endorsing private ordering in corporations.¹¹⁶ The result of these developments is that the legal characteristics that traditionally distinguished the different types of entity forms are being whittled away. No longer does state law serve as the principal differentiator among the business entity forms; rather, non-business entity laws such as tax law, securities laws, and bankruptcy law are having to do that work.¹¹⁷

The rise of private ordering and corresponding judicial and legislative recognition of broad contractual freedom in the corporate context is accelerating the convergence of business forms. An important distinguishing feature between the corporation, on the one hand, and unincorporated business entities such as the LLC, on the other, is the flexibility of the

and still enjoy limited liability. Thus, this change in the law was intended to move LPs closer to enjoying the same status and benefits as the corporation and LLC.

¹¹² See 26 C.F.R. §§ 301.7701–1 to 301.7701–8; ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* 174 (3d ed. 2020).

¹¹³ See MODEL BUS. CORP. ACT ANNOTATED, Foreword at xvi–xvii (5th ed. 2020) (discussing the amendments made that related to the Uniform Business Organizations Code).

¹¹⁴ See ROBERT A. RAGAZZO, *CLOSELY HELD BUSINESS ORGANIZATIONS* 928–929 (3d ed. 2020) (describing how some states have amended their statutes to allow (i) limited partnerships to register as limited liability limited partnership (LLLLP), and (ii) general partnerships to register as limited liability partnerships (LLP); in each case providing additional limited liability protection to the participants); see also UNIF. LIMITED PARTNERSHIP ACT (2001) § 201(a)(4).

¹¹⁵ See, e.g., DEL. CODE ANN. tit. 8, §§ 112, 113, 122(17) (2018).

¹¹⁶ See, e.g., *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013); *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

¹¹⁷ See LoPucki, *supra* note 108. See also KEATINGE & CONAWAY, *supra* note 105, § 1.1 (pointing out that “[a]s the organizational statutes governing corporations and limited partnerships have become more flexible and with the advent and acceptance of the limited liability company (‘LLC’), the choice of form and structure has become more subtle”).

latter to tailor the governance of the entity.¹¹⁸ As state corporate law has taken an increasingly contractarian approach, the set of corporate norms that can be privately altered has expanded.¹¹⁹ This, coupled with the blurring of the private-public line in corporate law, has resulted in bedrock governance rights, once thought to be mandatory and a distinguishing feature of the corporate form, being subject to private ordering.¹²⁰ In fact, the proliferation of corporate contracting and the courts' endorsement of such efforts has led two prominent Delaware jurists to label the proclaimed contractual freedom distinction in choosing between LLCs and corporations a "canard."¹²¹ The current contractarian trajectory of corporate law calls into question the corporate-uncorporate equilibrium and the future relevancy of the corporate form, as compared to other business entities like the LLC, as a distinct business entity.¹²²

¹¹⁸ See RIBSTEIN, *supra* note 106, at 249 (discussing the two important distinguishing features of unincorporations, with one being that "unincorporations provide more flexibility than the hardwired corporate form").

¹¹⁹ See *supra* Part III.

¹²⁰ See Fisch, *supra* note 3, at 915–16 (describing the expanding scope of governance contracting in shareholder agreements); Rauterberg, *supra* note 3, at 1129–30.

¹²¹ See Strine & Laster, *supra* note 32, at 17 (calling the contractual flexibility motivation cited for preferring alternative entities to the corporate form a "canard"). *But see* Cox, *supra* note 30, at 282–83 (asserting that the difference in statutory language makes a clear distinction between the two entities with respect to the ability to privately order). Professor Larry Ribstein identified another risk of entity convergence going the opposite way of that described in this article. He cautioned that the expansion of unincorporated entities such as the LLC (and the rise of the public LLC) could lead to greater regulation of unincorporated entities, making them as inflexible as the publicly held corporation and thereby undermining the corporate-uncorporate distinction in business associations. RIBSTEIN, *supra* note 106, at 14 (cautioning that the expansion of unincorporated entities such as the LLC "might be accompanied by regulation of the unincorporation and convergence of the corporate and unincorporate forms that would undermine firms' ability to choose among these contracting options.").

¹²² See RIBSTEIN, *supra* note 106, at 250 (discussing the need for a clear separation between corporate and unincorporate features and forms).

While the convergence of the corporation and business entities into a single type of contract-based entity has the appeal of simplicity and flexibility, convergence comes at a price. There is value in having business entities with a diverse array of legal structures, with their own corresponding advantages and disadvantages, from which participants can choose.¹²³ Diversity in the market of organizational forms benefits investors, issuers, and society.¹²⁴ As Professor Kelli Alces Williams puts it, “[a] diverse menu of legal regimes can help companies find the right governance or regulatory fit for their capital needs.”¹²⁵ Such optionality is not only important for those organizing new businesses, but also for the ability of existing firms to move between entity forms as their circumstances and corresponding legal needs change.

The choice among different business entity forms also serves an important signaling function to courts, regulators, investors, and markets. As Professor Larry Ribstein explains, “[a] firm’s choice of form . . . signals courts and regulators on how to apply regulatory statutes” such as securities laws or employment discrimination statutes.¹²⁶ Entity choice also signals to courts how to engage in gap filling and interpretation of the entity’s structure and participants’ rights and obligations when deciding governance disputes.¹²⁷ In addition, entity choice signals to investors and capital markets the kind of investment the firm represents, including information about the types and degrees of agency costs to which one’s investment is exposed.¹²⁸ As a result, entity

¹²³ See *id.* at 26–27 (discussing the benefits of having multiple distinct business entities forms from which entrepreneurs can choose); Fisch, *supra* note 23, at 403 (discussing the value to business participants to select from a range of structural options made available through alternative business forms).

¹²⁴ See Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1977, 1980–83, 1991 (2013); RIBSTEIN, *supra* note 106, at 26–27.

¹²⁵ Alces, *supra* note 124, at 1981.

¹²⁶ RIBSTEIN, *supra* note 106, at 27.

¹²⁷ *Id.*

¹²⁸ See Alces, *supra* note 124, at 1981–83 (“Firms subject to different legal rules pose different kinds and degrees of agency costs even if they are otherwise very similar.”).

diversity can be an important investment strategy. As Professor Alces Williams explains:

A portfolio would be legally diversified if it contained securities issued by privately held limited liability companies (LLCs), public corporations, emerging growth companies (EGCs), and various derivatives. By holding a diversified portfolio of investments in firms and securities governed by different legal regimes and regulations, investors can realize the benefits of the best each regime has to offer while enjoying protection from its weaknesses.¹²⁹

Such entity diversity also mitigates systemic risk to financial markets caused by homogeneity in issuers' entity form and a subsequent failure of that form's regulatory regime.¹³⁰

Finally, a collapse of the corporate-uncorporate distinction and proliferation of unbounded contractual freedom comes at the expense of standardization, predictability, and transparency, as well as higher transaction costs (both in formation and in litigation).¹³¹ The availability of multiple distinct business entity forms decreases planning and drafting costs for entrepreneurs by providing them with alternative sets of default rules to govern their firm. In addition, "[f]irms not only have lower initial contracting costs than they would with a small set of forms, but also can expect lower litigation and regulatory costs and greater certainty through the life of the firm," as Professor Ribstein explains.¹³²

¹²⁹ *Id.* at 1980.

¹³⁰ *See id.* at 1983, 2022; *see also* Roberta Romano, *For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture* 5–8 (Yale Law & Econ. Research Paper No. 452, 2013), <http://ssrn.com/abstract=2127749/> [<https://perma.cc/S6C8-9HTL>].

¹³¹ *See* Fisch, *supra* note 3, at 946–48; Megan Wischmeier Shaner, *Privately Ordered Fiduciaries*, 28 *GEO. MASON L. REV.* 345, 372, 380–81 (2020) (discussing the high transactional costs arising from drafting and litigating tailored provisions); *see also* KEATINGE & CONAWAY, *supra* note 105, at § 1.1. (“This broad freedom to select an organizational form and structure creates a need to understand the objectives of the business clearly and realistically.”).

¹³² *See* RIBSTEIN, *supra* note 106, at 26–27.

This is important because transactional law places a premium on stability and predictability in the relevant legal constructs that will be applied. Corporate management, investors, regulators, banks, capital markets, and other groups are sensitive to corporate governance practices and the courts' enforcement and interpretation of, and general commentary on, those practices.¹³³ A public corporation's organizational documents (a hot spot for private ordering) are especially sensitive to the need for stability and predictability, given factors such as the intended longevity of the documents; the micro- and macroeffects on individual firms and capital markets, respectively, when there are shifts in drafters' expectations regarding interpretation and enforcement; and the difficulties in adapting charters to post-adoption changes in the law.¹³⁴ Before allowing corporate law to become, in essence, a specialized branch of contract law, careful analysis of the externalities produced by corporate contracting should be undertaken by courts and regulators.¹³⁵

B. The Erosion of Corporate Law

The American legal system generally operates through a system of categories and consequences.¹³⁶ Contract law and corporate law are, in this way, the same; however, the features that lead to the categorization of a relationship as a contract

¹³³ See Smith et al., *supra* note 2, at 170.

¹³⁴ See Strine et al., *supra* note 23, at 57 ("More broadly, there is a widely held conception of the corporation as a 'nexus of contracts' . . . On this view of the corporation, the same importance ascribed to consistent contract enforcement and clear judicial guidance to market actors applies equally to the handling of disputes involving internal corporate affairs.").

¹³⁵ To date, it has not been apparent from their opinions that the courts are engaging in an assessment of externalities produced by applying a contract framework and/or upholding the private ordering efforts confronting them. See Bebhuk, *supra* note 1, at 1405–06 (calling for more analysis of the externalities caused by specific default corporate rules that allow for opting out).

¹³⁶ Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1158–59 (2010) ("Laws attach consequences to particular categories of behavior.").

or a corporation are different.¹³⁷ Each relationship—a contract and a corporation—has certain legitimating features that justify the legal duties, rights, and liabilities that flow from them. Corporate law, for example provides for a system of checks-and-balances, which include fiduciary principles, not similarly found in contract law. These protections create expectations in corporate participants that are fundamentally distinct from those of parties to a contract.¹³⁸ Additionally, the concept of consent—a foundational feature of contract law—functions differently for contracts and corporations, with the former necessitating an explicit manifestation of mutual assent and the latter operating under the principle of implied consent for participants to be bound.¹³⁹ Further, unlike contracting between private individuals, the corporate form is defined and limited by state law.¹⁴⁰ Corporate state law both restricts and expands rights in ways that a contract does not allow for. Corporate law specifies key features of the corporate

¹³⁷ See Fisch, *supra* note 3, at 941–944 (discussing the differences between contracts and corporations); Cox, *supra* note 30, at 269 (“Contracts and corporate law are not mirror images[.]”).

¹³⁸ Shaner, *supra* note 7, at 1015. See also Cox, *supra* note 30, at 268–69.

¹³⁹ See Winship, *supra* note 43, at 497–98 (“Unlike in other contracting contexts, the rationale is not that shareholders have consented to the terms, but rather that they have consented to the corporate governance structure that gave rise to them.”); Fisch, *supra* note 3, at 944 (describing the implicit consent given by shareholders to amendments to the charter and bylaws); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 603–16 (2016) (discussing how the corporate form is not like a contract); see also Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 616 (2017) (“The concept of consent lies at the heart of contract law.”).

¹⁴⁰ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (stating that corporations are “entities whose very existence and attributes are a product of state law”). Indeed, a corporation cannot exist without permission from the state (usually through requisite filings, fees, and taxes given to the secretary of state’s office). See Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011). See also Bratton, *supra* note 21, at 445 (“If the corporation really ‘is’ contract, as the new economic theory tells us, then the last doctrinal vestiges of state interference should have withered away by now . . . But the sovereign presence persists.”).

form and its participants and, unlike contract law, limits the parties' freedom to alter some of these features.¹⁴¹ On the other hand, corporate law also confers rights and entitlements that would be difficult, if not impossible, to achieve through contracting. These include limited liability for shareholders and the internal affairs doctrine as a choice-of-law rule.¹⁴² Thus, while the contract metaphor is an apt tool in analyzing the corporation, these fundamental differences militate against collapsing the corporate law and contract law paradigms.

Private ordering case law, however, reveals contract law considerations superseding corporate law considerations in courts' resolution of those disputes.¹⁴³ The result is an erosion of longstanding principles and legitimating features of the corporation and corporate law. Concepts such as fiduciary duties, the internal affairs doctrine, appraisal, and books and records inspection rights have all been cited as examples of this phenomenon.¹⁴⁴ Stated another way, contract law's dominance in corporate doctrine is narrowing the application of bedrock corporate principles in a manner that had traditionally been reserved for legislative action. As the foundation of the corporation is being reshaped to look more and more contractual, this undermines the features of the corporate structure that legitimize the separation of ownership from control.

A different way of looking at how the private ordering doctrine is reshaping corporate law is to analyze the balance of the regulations that govern all corporations. At a basic level, regulation of the corporate form can be described as a combination of the following: (i) the state (i.e., the state

¹⁴¹ See Fisch, *supra* note 3, at 941.

¹⁴² See Lipton, *supra* note 139, at 602.

¹⁴³ See, e.g., Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).

¹⁴⁴ See Manesh, *supra* note 8, at 529; Fisch, *supra* note 3 (discussing books and records inspection rights and appraisal); Juul Labs, Inc. v. Grove, 238 A.3d 904, 919–20 (Del. Ch. 2020). See also Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 855–60 (2008) (describing mandatory features of Delaware corporate law).

corporate statute and case law), (ii) contract law, (iii) property law, and (iv) agency law.¹⁴⁵ Each of these areas, alone, fails to explain all aspects and features of the corporation.¹⁴⁶ Collectively, however, these legal rules work together to demarcate and differentiate the corporate form as a distinct legal entity and the roles and responsibilities of the actors within that entity.¹⁴⁷ The relative proportions among these different sources of the law that will govern will vary depending on the particular issue before the court. For example, in resolving preferred stock designation issues, the court has emphasized the contractual nature of the preferred shareholders' rights.¹⁴⁸ On the other hand, property law

¹⁴⁵ See Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016) (advocating for a collaboration theory); Anderson, *supra* note 19, at 102 (asserting that “the corporation is not exclusively contractual but instead a mix of contract and property”); Deborah DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269 (2015); Deborah DeMott, *Corporate Officers as Agents*, 14 WASH. & LEE L. REV. 847 (2017); Jensen & Meckling, *supra* note 20, at 310.

¹⁴⁶ See Anderson, *supra* note 19, at 7 (arguing that contract law “fails to explain even the most fundamental and important aspects of shareholders’ relationship to the corporation”); Bratton, *supra* note 21, at 438–46 (arguing that the contractarian approach fails to appreciate the “sovereign presence” of the state in the corporation, including its mandatory rules).

¹⁴⁷ Emphasizing different aspects and regulation of the corporation form, several theories have been proffered over the years to explain the corporation. These theories can be grouped into three essentialist theories—aggregate theory (of which the nexus-of-contracts is part), concession theory, and real entity theory—with each focusing on different aspects of the corporate form. See Chaffee, *supra* note 145, at 1749–50 (“The artificial entity theory celebrates the role of the government in the creation of the corporation; the real entity theory celebrates the identity of corporation itself; and the aggregate theory celebrates the role of individuals in organizing and operating the corporation.”). As an alternative to these theories, Professor Eric Chaffee, in describing charitable tax-exempt nonprofit corporations, has advocated for the use of collaboration theory to describe the entity—“a common effort between or among multiple entities to accomplish a task or project.” *Id.* at 1754–55.

¹⁴⁸ See Anderson, *supra* note 19, at 8–9; see also Bratton & Wachter, *supra* note 37, at 1820.

provides a justification for proprietary features of the corporation such as the transferable nature of common stock, limited liability, perpetual existence, fiduciary duties, and voting.¹⁴⁹ Further, when dealing with issues surrounding fiduciary duties as well as the authority to bind the corporation itself, in contract or tort, agency law principles play a role. And the state's role can be seen across many of the same and different issues such as fiduciary duties, limited liability, corporate personhood, and perpetual existence.¹⁵⁰

The current trajectory of corporate doctrine, especially that arising in the context of private ordering, is moving toward contract principles eclipsing the other areas of the law that regulate the corporation. Recent cases have been tunnel-focused on contract law to resolve issues of private ordering without consideration for the broader context in which such contracting exists, thereby further undermining the structure and legitimating features of the corporation.¹⁵¹ For example, enforcing board-initiated private ordering in corporate bylaws based solely on a contract rationale fails to appreciate the broader corporate context in which bylaw amendments exist, specifically the disparity in board versus shareholder power vis-à-vis unilaterally amending the bylaws.¹⁵² In addition, the law's identical contractual treatment of initial and midstream private ordering in the charter overlooks the conceptual

¹⁴⁹ Anderson, *supra* note 19, at 8–9.

¹⁵⁰ See *Sciabacucchi v. Salzberg*, C.A. No. 2017–0931–JTL, 2018 WL 6719718, at *2 (Del. Ch. Dec. 19, 2018), *rev'd*, C.A. No. 2017–0931, 2020 WL 1280785 (Del. Mar. 18, 2020); Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2431 (2020); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1015 (2013).

¹⁵¹ See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020); Manesh, *supra* note 8, at 533–34 (discussing the Delaware Supreme Court's elevation of contractarian theory in *Salzberg* and its confinement of the role of the state and internal affairs in corporate law).

¹⁵² See Fisch, *supra* note 23, at 383–87 (discussing the implications of the *AFSCME* decision in limiting the ability of shareholder-adopted bylaws to dictate how the board exercises its management responsibilities).

distinctiveness in corporate law of each type of amendment.¹⁵³ Similarly, the courts' heavy reliance on contract principles in analyzing shareholder agreements, while failing to account for the formal governance tools corporate law provides to facilitate private ordering, comes at the expense of key governance values such as oversight and transparency.¹⁵⁴ Allowing contract law to govern the resolution of private ordering without consideration for the other regulatory regimes that apply to corporations means that there "is not much for corporate law to do other than interpret, validate, and occasionally invalidate contracts, subject to the rules of contract law."¹⁵⁵ This is problematic, however, as contract law fails to provide guidance on even the most basic theoretical and doctrinal questions in corporate law.¹⁵⁶

C. The Fracturing of Corporate Law

The emphasis and overreliance on contract law to resolve private ordering disputes also undermines corporate law by resulting in a fracturing of corporate jurisprudence. The rise in private ordering of public company governance has led to contract law and contract interpretation issues shaping the development of modern corporate jurisprudence. Courts are having to draw fine-grained distinctions between the different variants of governance in a corporation's governing documents that are the result of creative lawyering. As a result, these decisions are largely fact-specific and driven by the particular contractual variations before the court, with little applicability to future disputes. This fracturing of corporate law by private ordering cases runs contrary to the

¹⁵³ See Bebhuk, *supra* note 1, at 1400–01 (arguing that, "[u]nlike initial charters, charter amendments cannot be viewed as contracts; consequently, one cannot rely on the presence of a contracting mechanism as the basis for upholding opt-out charter amendments").

¹⁵⁴ See Fisch, *supra* note 3, at 950 (discussing how using shareholder agreements as a venue for private ordering sacrifices transparency, standardization, and oversight).

¹⁵⁵ Anderson, *supra* note 19, at 6.

¹⁵⁶ See *id.* at 7.

broader expressive function that has been a hallmark of corporate case law.¹⁵⁷

This fracturing effect can be seen in the LLC context, where there exists a maximum freedom to contractually structure the entity. Case law in this area provides a good illustration of how cohesiveness is lost when judicial decisions are fact-specific inquiries. In Delaware, the number of newly formed LLCs surpasses the number of newly formed corporations, at a rate of nearly three to one.¹⁵⁸ Further, the Delaware Court of Chancery adjudicates many cases involving LLCs each year. Nevertheless, each year, the most notable decisions coming out of the court relate to corporations. As Vice Chancellor Laster of the Delaware Chancery Court acknowledged in a recent interview, the number of notable LLC cases are very few.¹⁵⁹ This trend, he posits, is likely because LLCs are “shape-shifting entit[ies] where individual cases tend to deal with individual LLC agreements.”¹⁶⁰ Professor Larry Ribstein has expressed similar views, citing to the LLC’s “flexibility and chameleon-like nature.”¹⁶¹ As he explains, “[t]he overriding importance of the operating agreement also prevents strong generalizations within the categories. Add to that the variation among LLC statutes as to a large swath of terms that apply between members and we get something close to an all-purpose form with few clear guideposts.”¹⁶² As a result, decisions in the LLC context are largely fact-specific and do not provide broader principles to the business community in the way corporate doctrine has traditionally functioned.

¹⁵⁷ See Shaner, *supra* note 7, at 990.

¹⁵⁸ See Del. Div. of Corp., *2020 Annual Report Statistics*, DEL. DEP’T OF STATE (2020), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf>. [<https://perma.cc/EFX6-LQ3S>] (reporting that 180,376 new LLCs were formed in 2020, while only 51,747 new corporations were formed in that same year).

¹⁵⁹ See *Of LLCs, ESGs, Diversity, and Virtual Annual Meetings*, *supra* note 108, at 64.

¹⁶⁰ *Id.*

¹⁶¹ RIBSTEIN, *supra* note 106, at 248.

¹⁶² *Id.*

In sum, as corporate doctrine shifts from an institutionalist view of the corporation underlying its analysis to a contractual one, corporate law begins to lose its ability to speak to all corporations—public and private, large and small—with one voice. As Professor Jill Fisch asserts, “[t]here is public value having a single version of corporate law apply to all corporations.”¹⁶³

V. PRIVATE ORDERING AND THE SOCIAL PURPOSE OF THE CORPORATION

The private ordering era and proliferation of the contractarian view elicit broader questions surrounding the role of the corporation in modern society. First, is the courts’ contractual view of the corporate form at odds with the burgeoning view in American society that the public corporation’s role is that of social reformer?¹⁶⁴ Second, and relatedly, given calls for greater economic equality and diversity, does the contractarian view and its enabling of private ordering help render competition more meritocratic and address socioeconomic inequality within the corporate ecosystem or, conversely, entrench the power and wealth inequalities as they currently exist in corporate America? This section considers these broader questions.

The modern public corporation is one of the (if not the sole) dominant economic, political, and social institutions in the United States.¹⁶⁵ Massive amounts of wealth are vested in public corporations. As of September 30, 2022, the total market capitalization of the U.S. stock market was

¹⁶³ Fisch, *supra* note 3, at 953.

¹⁶⁴ See Stavros Gadinis & Chris Havasy, *The Quest for Legitimacy in Corporate Law* (May 6, 2022) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081543/ [<https://perma.cc/4JBT-TUMC>]; Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1537–39 (2018).

¹⁶⁵ Nili & Shaner, *supra* note 46, at 185 (“Public corporations are widely considered the most powerful institutions in setting the social, economic, and political agenda for the country.”).

\$46,460,463.2 million.¹⁶⁶ Moreover, these institutions have influence over vast amounts of resources not personally owned by the entity, including managing the country's infrastructure and organizing production in nearly every sector of the U.S. economy.¹⁶⁷ Indeed, "[m]any of today's corporations rival nation-states in weight, influence, and reach."¹⁶⁸

Leveraging their economic power and status, public corporations can exert significant influence and effect real change in political and social arenas. Recent years have seen public corporations take the lead on issues like climate change, minimum wage, healthcare, gun regulation, parental leave, immigration, and education,¹⁶⁹ taking on a role that had traditionally been filled by the government.¹⁷⁰ Even more subtly, given their size and visibility, how public corporations

¹⁶⁶ *Total Market Value of U.S. Stock Market*, SIBLIS RESEARCH LTD. <https://siblisresearch.com/data/us-stock-market-value/#:~:text=The%20total%20market%20capitalization%20of,about%20OTC%20markets%20from%20here> [<https://perma.cc/GP6G-C8XE>] (last visited Feb. 14, 2023).

¹⁶⁷ See Gadinis & Havasy, *supra* note 164, at 10; Lin, *supra* note 164, at 1559–60 (describing the ways contemporary corporations exert their influence on traditional, public government functions like schools, prisons, utilities, and military forces).

¹⁶⁸ Lynn Stout & Sergio Gramitto, *Corporate Governance As Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 552 (2018). See also TOM C.W. LIN, THE CAPITALIST AND THE ACTIVIST 21–23 (2022) (“[T]oday’s trillion-dollar tech giants like Apple, Amazon, Alphabet (Google), and Microsoft are each worth more than the gross domestic products (GDPs) of countries like Saudi Arabia, Switzerland, Belgium, and Thailand.”)

¹⁶⁹ See LIN, *supra* note 168, at 21–23 (describing the social activity of public corporations). See, e.g., *Power Forward 4.0: A Progress Report of the Fortune 500’s Transition to a Net-Zero Economy*, WORLD WILDLIFE FUND (June 2, 2021), <https://www.worldwildlife.org/publications/power-forward-4-0-a-progress-report-of-the-fortune-500-s-transition-to-a-net-zero-economy> [<https://perma.cc/J5TX-DXDB>].

¹⁷⁰ See Gabriel Rauterberg, *The Corporation’s Place in Society*, 114 MICH. L. REV. 913, 913 (2016) (“The vast majority of economic activity is now organized through corporations. The public corporation is usurping the state’s role as the most important institution of wealthy capitalist societies.”); see also Shaner, *supra* note 131, at 346 (discussing the power and role of the modern corporate officer in “setting the economic, social, and moral agendas of corporations, markets, and society more broadly”).

structure their relationships with workers, customers, suppliers, creditors, and the communities in which they operate can set the tone for industry-wide practices and establish expectations for how these stakeholders are to be treated.¹⁷¹ Indeed, public corporations have been labeled the “new powerful player” in modern social activism.¹⁷²

The COVID-19 pandemic and recent social movements have brought corporations’ roles in improving societal wellbeing to the forefront of investor, labor, academic, political, and public discussions.¹⁷³ Already, we see the focus of corporate governance shifting in significant and lasting ways, including by questioning whether current corporate governance systems are working well for *all* stakeholders.¹⁷⁴ For example, COVID-19 and social movements have broadened environmental, social, and governance (ESG)¹⁷⁵

¹⁷¹ See Gadinis & Havasy, *supra* note 164, at 10 (“Consumers, employees, investors, creditors, and suppliers can find their fortunes, rights, and life prospects directly shaped by corporate policies. But as key economic actors, corporations also impact the prosperity of the communities in which they exist, the environment in which they set up production, and the cultural space their products and activities dominate.”); Stout & Gramitto, *supra* note 166, at 552.

¹⁷² Lin, *supra* note 164, at 1537.

¹⁷³ See Maitane Sardon, *Sustainability Investors Shift Their Focus to Social Issues*, WALL ST. J. (Oct. 10, 2020, 11:00 AM), <https://www.wsj.com/articles/sustainability-investors-shift-their-focus-to-social-issues-11602342000> [<https://perma.cc/NQG6-S3L9>] (“The global pandemic and social movements are accelerating change in the way investors, workers and the public view the role of companies in society.”).

¹⁷⁴ See Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885, 1886 (2021) (“The profound human and economic harm caused by the COVID-19 pandemic, and its harmful effects on ordinary workers, will only sharpen the societal focus about whether our corporate governance system is working well for the many or instead subordinating the interests of employees and society to please the stock market.”).

¹⁷⁵ ESG is generally described as “a taxonomy that divides this universe of factors into environmental, social, and governance factors”; however, many scholars point out that ESG concerns are constantly evolving and expanding such that it is difficult to articulate a consistent definition. E. Christopher Johnson, Jr., John H. Stout & Ashley C. Walter,

efforts to include previously overlooked issues such as human resource policies (such as sick leave and parental leave), workplace health and safety, supply chain management, continuity and emergency planning, and diversity and inclusion training.¹⁷⁶

While the initial proponents of ESG and corporate social responsibility (CSR) were smaller, environmentally-conscious or socially-minded investors or interest groups, today, large influential investors are putting pressure on corporate management to address social and environmental issues.¹⁷⁷ The rise of activist and institutional investor engagement,

Profound Change: The Evolution of ESG, 75 BUS. LAW. 2567, 2568 (2020). See Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1414–15 (2020) (describing the constantly evolving definition of ESG); see also Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* 8 (Univ. Pa. Inst. for L. & Econ. Rsch., Paper No. 19–39, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924 [<https://perma.cc/VL69-TGXQ>] (asserting that the phenomenon should be “EESG,” with an extra ‘E’ for employees,” a crucial but frequently missing component in the ESG discussion).

¹⁷⁶ See Johnson et al., *supra* note 175, at 2570 (“Clearly, the pandemic is placing a spotlight on corners of the sustainability room that have, up to this point, not received much attention . . . The result will be an increased focus on ESG, sustainability, and related concepts and their meaning for commerce and society generally.”); Sardon, *supra* note 173; David A. Katz & Laura A. McIntosh, *Corporate Governance Update: EESG and the COVID–19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2020), <https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis/> [<https://perma.cc/T2D8-GFQR>] (explaining the shifting priorities of EESG advocates after the start of the COVID–19 pandemic).

¹⁷⁷ See *Business Roundtable Redefines the Purpose of the Corporation to Promote “An Economy That Serves All Americans”*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans#:~:text=Americans%20deserve%20an%20economy%20that,and%20economic%20opportunity%20for%20all.> [perma.cc/765J-PW3J].

coupled with the concentrated voting power of institutional investors, is believed to be at least partly responsible for effecting meaningful corporate change with respect to ESG efforts.¹⁷⁸ The challenge for the modern public corporation is how to balance the potentially competing financial considerations and social expectations in running the firm.

As Professors James Cox and Randall Thomas put it, “[i]n law, the compelling story repeatedly told is the observable comovement of law on the one hand, and economic, social, and political changes on the other hand.”¹⁷⁹ At times, these comovements coincide and are complementary; at other times, the legal and social developments are in tension with one another.¹⁸⁰ Over the past two decades, Delaware’s jurisprudence has firmly embraced the contractarian theory of the corporation, furthering a private law view of corporate

¹⁷⁸ See Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHIC. L. REV. ONLINE (Apr. 15, 2020), <https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/> [<https://perma.cc/H5N9-VXEW>] (finding that shareholders are responsible for the adoption of ESG corporate policies, not management); Ann M. Lipton, *ESG Investing, or, if You Can’t Beat ‘Em, Join ‘Em*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 130, 131 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (positing that because investor-driven ESG “leans into, rather than resist[s], shareholder power,” this explains the success of ESG efforts where prior corporate social responsibility interventions failed); Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1139–72 (2016) (providing data on shareholder engagement in the voting process and its increasing impact); see also Kosmas Papadopoulos, *The Long View: US Proxy Voting Trends on E&S Issues from 2000 to 2018*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 31, 2019), <https://corpgov.law.harvard.edu/2019/01/31/the-long-view-us-proxy-voting-trends-on-es-issues-from-2000-to-2018/> [<https://perma.cc/3EPE-5LCD>] (noting changes to proxy voting policies as investors begin to emphasize factors such as diversity, shareholder rights, and environmental and social issues).

¹⁷⁹ James D. Cox & Randall S. Thomas, *A Revised Monitoring Model Confronts Today’s Movement Toward Managerialism*, 99 TEXAS L. REV. 1275, 1275 (2021).

¹⁸⁰ See *id.*

governance structures.¹⁸¹ At the same time, public opinion regards the corporation as a vehicle for achieving social reform, fighting climate change, and promoting economic equality and diversity.¹⁸² The question this raises is whether courts' contractarian view and endorsement of private ordering supports or frustrates the current calls for broader corporate stakeholderism.¹⁸³ The answer is complicated. Indeed, the contractarian approach has been cited by advocates as justifying both the shareholder primacy model and the stakeholder model in corporate law.¹⁸⁴

One way to evaluate the societal implications of the contractarian theory of the corporation is by analyzing how private ordering in public companies impacts efforts to

¹⁸¹ See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020); Manesh, *supra* note 8, at 509 (discussing the Delaware courts' "judicial rhetoric wedded to contractarianism").

¹⁸² See Manesh, *supra* note 8; Cox & Thomas, *supra* note 179, at 1301–02 ("The New Paradigm of corporate governance urges public corporations to focus on broader stakeholder interests rather than exclusively focusing on shareholder interests and investment returns."); Gadinis & Havasy, *supra* note 164, at 10. A recent example of this view is when companies were called upon to take a stance on voting rights legislation in certain states. See David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/business/ceos-corporate-america-voting-rights.html> [perma.cc/BV98-7RS5]. The shareholder-stakeholder debate and questions surrounding corporate purpose are not new. Today we see a resurgence in this debate in the context of calls for corporations to consider broader social issues in managing their businesses. See Anderson, *supra* note 19, at 98–99.

¹⁸³ See Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts"*, 93 WASH. L. REV. 265, 267 (2018) (pointing out that "how courts characterize the corporation significantly affects legal doctrines that impact not only the corporation, but also third parties such as shareholders, vendors, and political candidates"); Stout & Gramitto, *supra* note 168, at 551 (advocating for "how our society can use corporate governance shifts to address, if not entirely resolve, a number of currently pressing social and economic problems").

¹⁸⁴ See David K. Millon, *New Directions in Corporate Law Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377–78, 1380–81 (1993); Anderson, *supra* note 19, at 98–100.

address the wealth gap and systemic inequalities in the United States. It is a well-accepted fact that economic inequality in the U.S. has increased dramatically in recent decades, both over time and in comparison to other advanced economies.¹⁸⁵ Traditionally, addressing the growing economic inequality has been viewed as a task for policymakers, not corporations.¹⁸⁶ However, researchers have observed growing evidence that economic inequality imposes challenges for running corporations.¹⁸⁷ Moreover, scholars have found that corporate governance devices impact economic inequality and can result in the transfer of wealth from labor to capital, thus contributing to the continuing economic inequality occurring in advanced economies.¹⁸⁸ As a result, the prevailing legal characterization of the corporation as a nexus of contracts and its facilitation of private ordering has important implications for the corporation's role in either (i) increasing diversity and addressing wealth inequality or (ii) sustaining the systems of privilege and inequality that currently exist.

To date, corporate private ordering is largely the product of efforts by management and a select segment of the public shareholder base. To the extent the private ordering movement and contractarianism are empowering management's efforts to further entrench and empower themselves, this raises obvious concerns regarding lack of competition and maintaining the status quo of systemic

¹⁸⁵ See Alexander Styhre & Ola Bergström, *The Benefit of Market-Based Governance Devices: Reflections on the Issue of Growing Economic Inequality as a Corporate Concern*, 37 *EURO. MGMT. J.* 413, 414 (2019). See also Stout & Gramitto, *supra* note 168, at 551 (listing rising income inequality, demographic disparities in wealth and equity ownership, and increasing poverty and income security among the current pressing economic problems in the U.S.).

¹⁸⁶ See Styhre & Bergström, *supra* note 185, at 414.

¹⁸⁷ See Jirs Meuris & Carrie Leana, *The Price of Financial Precarity: Organizational Costs of Employees' Financial Concerns*, 29 *ORG. SCI.*, 398, 408 (2018) (finding that economic insecurity among coworkers may have a "debilitating influence on employees' ability to perform their jobs").

¹⁸⁸ See Styhre & Bergström, *supra* note 185, at 413.

inequality, and a lack of diversity in corporate America.¹⁸⁹ Examples of management-based private ordering that raise this concern include forum selection and fee-shifting bylaws adopted to limit shareholder litigation, as well as the adoption of advance notice bylaws which impose procedural requirements on shareholder proposal rights.¹⁹⁰

As for shareholder-side initiatives, the concentrated ownership of public company stock in large, institutional shareholders has resulted in these large shareholders wielding more power than ever before through individual actions and private engagement.¹⁹¹ This power is evident in private ordering efforts. For example, the skew in favor of large, sophisticated investors can be easily seen in the context of shareholder agreements and dual-class-like contracting. As Professor Rauterberg describes in his study of shareholder agreements, these agreements tend to involve “highly sophisticated” and “significant” investors.¹⁹² While arguments in favor of shareholder agreements have highlighted that the private ordering of governance can allow smaller stakeholders to coordinate in a way to exert influence that would not be economically feasible through pure, individual stock ownership, Professor Rauterberg finds that most of the participants in shareholder agreements are sophisticated financial actors such as Silver Lake Partners,

¹⁸⁹ See Shaner, *supra* note 7, at 992, 998 (describing how boards of directors have used private ordering to push back against stockholder efforts to become more active participants in corporate affairs); see also Anat Alon-Beck, Darren Rosenblum & Michael Agmon-Gonnen, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 101, 103–05 (2021) (describing the gender diversity problem on corporate boards); Afra Afsharipour & Darren Rosenblum, *Power and Pay in the C-Suite*, INEQUALITY INQUIRY 2–7 (2021) (discussing inequalities in the C-suite).

¹⁹⁰ See *supra* Section III.A; see also Geis, *supra* note 44, at 644–45 (describing different current and potential future shareholder-side and management-side initiatives).

¹⁹¹ See Nili & Shaner, *supra* note 46, at, 146–47 (discussing the rise of large institutional shareholders' influence in the context of voting and the annual meeting).

¹⁹² Rauterberg, *supra* note 3, at 1152, 1159.

Kohlberg Kravis Roberts & Co. (KKR), and the like.¹⁹³ Similarly, in their research on dual-class stock, Professors Shobe and Shobe found that the primary beneficiaries of this corporate contracting were founders and pre-IPO investors (who are typically venture capitalists and private equity companies).¹⁹⁴ Further, it is activist investors and large institutional investors who are credited with the success of other private ordering efforts like proxy access.¹⁹⁵

What these examples make clear is that, on the shareholder side, the participants who are able to use private ordering in a successful and likely advantageous way are those that are already embedded in the corporate ecosystem with significant influence and power. Institutional investors can use private ordering as a “self-help” mechanism to gain stronger participatory rights. Shareholder activism and the resulting private ordering of corporate governance thus results in merely bolstering the power status quo as opposed to creating governance strategies that act as a counterweight to management power.¹⁹⁶ Vesting further power in large, institutional shareholders, however, raises concerns where the objective is to address diversity and systemic economic inequality. First, the interests of the public shareholder base are not homogeneous, nor do the interest of the capital owners of public corporations reflect or align with those of the general public.¹⁹⁷ Second, and perhaps more importantly, equity ownership in public corporations follow the same racial,

¹⁹³ *Id.* at 1136, 1145, 1152.

¹⁹⁴ *See* Shobe & Shobe, *supra* note 3, at 1288–89.

¹⁹⁵ *See* Hill, *supra* note 10, at 525–27.

¹⁹⁶ *Id.* at 510–11 (arguing that shareholder empowerment via governance strategies will be “irrelevant, or even counterproductive, as an accountability device” in concentrated ownership settings, “rather than providing a check and balance on another locus of power, governance strategies of this kind will merely bolster the power status quo”).

¹⁹⁷ *See* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 15 (2017) (“[B]ut there are reasons to believe that retail investor voting preferences differ systemically from those of institutional investors. . . . These differences matter.”); Styhre & Bergström, *supra* note 185, at 413 (discussing the transfer of wealth from labor to capital owners).

gender, and generational patterns of inequalities as wealth and income.¹⁹⁸ This means that, “to the extent individual shareholders participate in corporate governance, it is older, whiter (and of course wealthier) citizens who exercise the most influence over companies.”¹⁹⁹ Because small retail shareholders or outside stakeholders such as customers, workers, or the public more generally cannot use the private ordering regime to influence corporate America, the ability of private ordering to address social concerns and wealth inequality is thus precariously dependent on the buy-in of those already engrained within, and profiting from, the corporate ecosystem.

VI. THE FUTURE OF CORPORATE LAW

Corporate law is largely regulated at the state level. In Delaware, corporate lawmaking involves three highly-respected and knowledgeable institutions – the Corporate Law Council of the Delaware Bar Association, the Delaware state legislature, and the Delaware judiciary (primarily the Court of Chancery and the Supreme Court when discussing corporate law disputes).²⁰⁰ As Professor Jill Fisch describes, this multi-faceted system of law-making offers a beneficial “series of checks and balances” on the creation of corporate law.²⁰¹ Throughout history, the Delaware legislature has stepped in to amend the corporate code so as to either codify or reverse the direction of the courts’ decisions. One of the most notable examples of this back-and-forth between the courts and legislature is the adoption of Section 102(b)(7) and amendments to Section 145 following the Delaware Supreme Court’s decision in *Smith v. Van Gorkom*.²⁰²

¹⁹⁸ Stout & Gramitto, *supra* note 168, at 560–62.

¹⁹⁹ *Id.* at 561.

²⁰⁰ See Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 740–41 (2013) (describing the process by which Delaware law is produced).

²⁰¹ See *id.* at 740–41; ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 39–41 (1993).

²⁰² 488 A.2d 858 (Del.1985). See 65 DEL. LAWS, ch. 289, §§ 1–2 (1986) (describing the background and rationale for the amendments to Section

To date, the Delaware courts appear “irretrievably committed” to the contractarian view of the corporation, resulting in the enforcement of almost all private ordering efforts.²⁰³ As a result, the tough decision of what (if any) limits should be placed on the expansive and widespread use of private ordering is being left to the legislative process. The Delaware legislature has taken some limited action in this space. For example, Section 115 of the Delaware General Corporation Law was added to confirm the result in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, that a corporation’s charter or bylaws may contain a forum selection provision.²⁰⁴ On the other hand, the legislature added a new Section 102(f) following the decision in *ATP Tour, Inc. v. Deutscher Tennis Bund* to invalidate the use of similar fee-shifting provisions in the organizational documents of stock corporations.²⁰⁵ Nevertheless, a growing number of scholars are advocating for increased legislative attention and intervention.²⁰⁶ These scholars point out that the courts’ overreliance on the contract law paradigm is

145). See also ROBERT S. SAUNDERS, ET AL., 2 FOLK ON THE DELAWARE GENERAL CORPORATION LAW 7–14 (7th ed. 2022) (describing the amendment to Section 211(b) with respect to the use of stockholder written consent following *Hoschett v. TSI International Software, Ltd.*); S. 363, 140th Gen. Assemb. ch. 343 § 3 (Del. 2000) (explaining the amendment to Section 122(17) as a clarifying response to *Siegman v. Tri-Star Pictures, Inc.*). Cf. DEL. CODE ANN. tit. 6, § 17–1001(2022) (amending the statute to permit elimination of fiduciary duties by agreement following *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.* decision); DEL. CODE ANN. tit. 6, §§ 18–109(d), 18–101(7) (2022) (amending the statute in response to the decision in *Elf Atochem North America, Inc. v. Jaffari* decision).

²⁰³ See LoPucki, *supra* note 8, at 2157 (“The Delaware courts are irretrievably committed to the view that charters and bylaws are contracts between the corporation and its shareholders, leaving Delaware little room to insist that arbitration bylaws are not arbitration contracts protected by [the FAA].”).

²⁰⁴ See 80 DEL. LAWS, ch. 40, § 5 (2015).

²⁰⁵ See *id.* §§ 2–5.

²⁰⁶ See Fisch, *supra* note 3, at 957 (asserting that legislatures are better suited than courts to evaluate the potential costs and benefits of private ordering and, relatedly, “the policy rationale for taking a mandatory versus enabling approach”).

allowing corporate participants to evade existing limits on private ordering, as well as to expand the scope of corporate contracting to impact bedrock principles such as inspection rights, appraisal, and fiduciary duties.²⁰⁷ This broad freedom to contractually structure corporate governance, they argue, comes at the expense of core corporate values such as transparency, oversight, and standardization.²⁰⁸

Moving forward, legislatures should take advantage of their ability to look through a broader lens in setting policy, and evaluate the toll contractual freedom has on the relevancy of the corporation as an entity and the legitimacy of the corporate enterprise. Of course, the issue of how to address private ordering is a delicate one for Delaware, which must also balance its interests in maintaining its place as a leader in corporate and business entity law. Outside of Delaware, other states with a large corporate presence such as New York and California will also have to tackle how to legislate private ordering. Additionally, as smaller states who are seeking to become leaders in corporate law, like Nevada, North Dakota, and Wyoming, consider what corporate developments they should make to entice corporations to reincorporate in their jurisdictions, they, too, will need to evaluate the impact of contractual freedom on corporate relevancy and resiliency in the broader business entity ecosystem.

VII. CONCLUSION

Firm-specific private ordering has flourished in the twenty-first century. Public companies are seeing more and more governance contracting in traditional venues such as bylaws and charters, as well as in less conventional venues like shareholder agreements and contractually structured dual-class control rights in single-class companies. Decisions

²⁰⁷ See Fisch, *supra* note 3, at 959–960; Rauterberg, *supra* note 3; Shobe & Shobe, *supra* note 3.

²⁰⁸ See Fisch, *supra* note 3, at 946; Shobe & Shobe, *supra* note 3, at 1289–90 (asserting that, by using contract to obtain dual-class-like control in a formally single-class company, participants are able to “avoid much of the scrutiny [and regulation] that comes with being a dual-class corporation”).

legitimizing corporate contracting efforts contain strong contractarian language and rely heavily on contract, not corporate, principles to justify their conclusions. Thus, the current trajectory of corporate doctrine appears to privilege freedom of contract and the contractarian theory above other theories of the firm. This Article outlines some of the costs to the corporate form, corporate theory, and the corporation's role in society that result from this prioritization of contractual freedom.