

Faculty Publications

---

2024

## Incorporating Unicorns: An Empirical Analysis

Anat Alon-Beck  
anat.beck@case.edu

Follow this and additional works at: [https://scholarlycommons.law.case.edu/faculty\\_publications](https://scholarlycommons.law.case.edu/faculty_publications)

 Part of the [Business Organizations Law Commons](#)

---

### Repository Citation

Alon-Beck, Anat, "Incorporating Unicorns: An Empirical Analysis" (2024). *Faculty Publications*. 2317.  
[https://scholarlycommons.law.case.edu/faculty\\_publications/2317](https://scholarlycommons.law.case.edu/faculty_publications/2317)

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

INCORPORATING UNICORNS:  
AN EMPIRICAL ANALYSIS

*Anat Alon-Beck\**  
*Associate Professor*

ABSTRACT

There is a growing concern among regulators and academics about how to regulate unicorns - entities large enough to have a public impact yet remaining in the private domain. An examination of corporate charters within a selected sample of unicorn firms reveals an important finding: 97% of these entities are incorporated in Delaware. This concentration provides Delaware with significant leverage to shape regulatory frameworks, especially concerning the protection of parties who may lack the ability to safeguard their interests through contractual means.

This groundbreaking discovery on the dominance of Delaware showcases a substantial deviation from incorporation trends in other business segments. While 79% of public firms and 67% of early-stage venture-backed private firms are incorporated in Delaware, only 2% of small private enterprises do so. The overwhelming preference for Delaware among unicorn firms is a distinct and unprecedented trend, raising intriguing questions about the specific factors driving this exceptional pattern. As unicorns evolve and continue to develop as market movers, Delaware's position as their incorporation venue of choice will only grow in importance and relevance, especially due to the recent debate over changes to Delaware law and the competition among states to attract businesses.

TABLE OF CONTENTS

<b>II. CORPORATE LAW FEDERALISM AND DELAWARE'S HISTORICAL DOMINANCE.....</b>	<b>8</b>
A. <i>THE ALLURE OF DELAWARE FOR PUBLIC COMPANIES</i> .....	9
1. <i>Decoding Delaware: Features that Make it a Corporate Haven</i> .....	10
2. <i>Debating Between a "Race to the Top" or a "Race to the Bottom" - Shareholder or Management Friendly?</i> .....	11
3. <i>Examining the Neglected Role of Privately-Held Entities in State Corporate Law Competition Discourse</i> .....	13
B. <i>PRIVATE BECOMES THE NEW PUBLIC: TRANSFORMATIVE SHIFT IN CORPORATE DYNAMICS</i> ..	14
1. <i>Public Market Decline: Changes to Corporate Ownership</i> .....	14
2. <i>Public Firm Focus: Evolving Dynamics of Corporate Strategies</i> .....	15
3. <i>A Comparative Analysis of Public and Private Firms</i> .....	17
<b>III. NAVIGATING HOME STATE INCORPORATION: UNDERSTANDING PREFERENCES AMONG PRIVATE FIRMS .....</b>	<b>19</b>
A. <i>UNDERSTANDING VARIATIONS AMONG PRIVATE FIRMS</i> .....	19
1. <i>Clearing the Terminological Landscape</i> .....	19

B.	<i>UNRAVELING PRECONCEPTIONS: SCRUTINIZING PREVIOUS DATA</i> .....	20
C.	<i>NEW UNICORN DATA</i> .....	24
1.	<i>Data Collection</i> .....	25
2.	<i>Methodology</i> .....	26
3.	<i>Key Insights &amp; Results</i> .....	27
4.	<i>Implications</i> .....	30
5.	<i>Challenges and Limitations</i> .....	31
6.	<i>Additional Data</i> .....	31
<b>IV.</b>	<b>DELAWARE'S SECRET SAUCE: WHY BILLION-DOLLAR UNICORNS FLOCK TO THE FIRST STATE</b> .....	<b>33</b>
A.	THE ATTRIBUTES OF DELAWARE'S LEGAL SYSTEM.....	33
1.	<i>The Role of Judicial Independence in Attracting Investment</i> .....	34
2.	<i>Contractual Framework and Enforcement</i> .....	35
3.	<i>Efficiency and Impartiality</i> .....	36
B.	NETWORKS OF REPEAT PLAYERS.....	36
1.	<i>Founders</i> .....	36
2.	<i>Investors</i> .....	37
3.	<i>Industry</i> .....	39
<b>V.</b>	<b>FROM SEED TO STARDOM: NAVIGATING THE DISTINCTIONS BETWEEN PRIVATE COMPANIES, STARTUPS, AND UNICORNS</b> .....	<b>43</b>
A.	WHAT'S THE DIFFERENCE?.....	43
B.	POLICY CONSIDERATIONS.....	44
1.	<i>Regulatory Frameworks</i> .....	44
2.	<i>Corporate Governance</i> .....	45
3.	<i>Market Dynamics and Innovation</i> .....	45
<b>VI.</b>	<b>CONCLUSION</b> .....	<b>45</b>

## I. Introduction

*“[C]lose corporations generally incorporate in the states in which their principal places of business are located, the state competition debate has naturally focused on publicly traded companies.”*

- Lucian Arye Bebchuk<sup>1</sup>

“The times, they are a-changin’.”<sup>2</sup> We live in a new era. One in which

---

\* I would like to convey my appreciation to Roberta Romano and Marcel Kahan for sparking my interest in the field of state competition in corporate law and for shaping my perspective on the subject. I would also like to express my gratitude to Reece Disney, John Livingstone and Sharon Miller for their invaluable assistance. For their helpful comments, I extend my gratitude to Ian Ayres, Michal Barzuza, Steve Bainbridge, Lucian Bebchuk, Brian Broughman, Eric Chaffee, Stephen Choi, Alma Cohen, Mirit Eyal-Cohen, Jesse Fried, Jonathan Adler, Yifat Aran, Matt Jennejohn, Marcel Kahan, Sharona Hoffman, Ehud Kamar, Charles Korsmo, Juliet Kostritzky, Edward Rock, Cassandra Robertson, Roberta Romano, Elizabeth Pollman, and the participants at NYU Law School and NYU Stern Law & Finance Workshop, BYU Law School Winter Deals, Oxford University Business Law Workshop, and Goethe University Law & Finance. This article was presented in my testimony to the Delaware Senate on this subject.

<sup>1</sup> Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442 (1992) (footnotes omitted).

<sup>2</sup> BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN’* (Columbia, 1964).

private firms now surpass public ones, challenging the conventional scholarly focus on public companies. This Article addresses this shift in our corporate landscape. Scholars, who once paid limited to no attention to privately-held firms, are now prompted to reconsider their focus.<sup>3</sup>

In the United States, businesses are established and regulated at the state level rather than the federal level.<sup>4</sup> Consequently, early on, entrepreneurs must make the critical decision of where to incorporate their business. Due to its business-friendly laws and strong corporate governance infrastructure, Delaware stands out as the preferred destination for public companies.<sup>5</sup> The state actively works to uphold its position as the foremost location in the United States and globally for business incorporation.<sup>6</sup>

While existing research has predominantly focused on public firms, a significant gap persists in understanding how this market for corporate law influences the organizational structure and governance of large private firms,

---

<sup>3</sup> In the corporate literature the terms “close” or “private” corporations will usually be applied to those firms imposing some restrictions on share tradability. They used to refer to these firms interchangeably prior to the rise in unicorns. In this overarching classification, two crucial differentiations are emphasized. Initially, a company with shares held by a small group of individuals, where interpersonal relationships are integral to management, will be termed “closely held.” This stands in contrast to the term “privately held,” indicating a company not listed on an exchange but widely held by numerous shareholders. Additionally, privately held firms might possess some tradability on secondary markets.

<sup>4</sup> Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) (“the very notion that states compete for incorporations is a myth. Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”). See also Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Re-considering the Competition over Corporate Charters*, 112 YALE L.J. 553, 563–64 (2002) (arguing that Delaware’s dominant position imposes insurmountable barriers to entry); Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1790 (2011) (“Some recent evidence, however, suggests that the basic premise of both stories (i.e., that states compete actively for corporate charters) is wrong.”); Mark J. Roe, *Delaware’s Shrinking Half-Life*, 62 STAN. L. REV. 125, 125 (2009) (“A revisionist consensus among corporate law academics has begun to coalesce that, after a century of academic thinking to the contrary, states do not compete head-to-head on an ongoing basis for chartering revenues, leaving Delaware alone in the ongoing interstate charter market.”); *id.* at 127 (quoting Ronald Gilson as saying that “Kahan and Kamar ha[ve] demonstrated [that] there is no[] competition for corporate charters in the U.S. [and] no competition among states for the revenue from incorporation . . .”).

<sup>5</sup> In this Article, we will broadly categorize companies as either “public” or “publicly held” to signify that their shares are traded freely on a stock exchange. It means that investors, shareholders, in these companies can easily trade their shares.

<sup>6</sup> See, e.g., Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Takeover Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995); Bebchuk, *supra* note 1, at 1446-70; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1512-13 (1989); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 256 (1977); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993). Kahan & Kamar, *supra* note 4.

colloquially referred to as “unicorns.”<sup>7</sup>

This Article seeks to address this gap by offering fresh insights through empirical analysis and data on unicorns’ incorporation and headquarter choices. A significant finding reveals that 97% of unicorn entities choose to incorporate in Delaware. This discovery is groundbreaking, as it diverges significantly from incorporation patterns seen in other sectors of the business world. By closely examining the competition for unicorn charters in the United States, this Article not only contributes depth and breadth to the scholarly understanding of the market for corporate law but also sheds light on the distinctive decision-making processes of some of the economy’s largest and most influential firms. This exploration aims to unravel the factors driving the exceptional pattern of Delaware incorporation among unicorn firms and its implications for the broader corporate landscape.

The prevailing wisdom in the literature on corporate chartering in the United States has long emphasized Delaware’s prominence, particularly within the realm of public firms.<sup>8</sup> However, a notable gap in this narrative pertains to the prevailing assumption that this dominance does not extend to private firms.<sup>9</sup> The conventional wisdom suggests that private entities typically favor incorporating in their respective home states where their primary place of business is located.<sup>10</sup> This Article seeks to challenge and reevaluate this established narrative, directing attention to a distinct and remarkable new category of unicorn companies.

Why unicorns? Unicorn firms are characterized by their extraordinary high and perhaps exaggerated valuations exceeding \$1 billion.<sup>11</sup> These new types of very

---

<sup>7</sup> “Unicorns” are elusive venture capital-backed behemoths that silently shape the economic landscape. The term “unicorn” was coined in 2013 by venture capitalist Aileen Lee. The term describes a phenomenon where a startup is capable of raising substantial capital without the necessity of going public initially. See Aileen Lee, *Welcome to the Unicorn Club: Learning from Billion-Dollar Startups*, TECHCRUNCH (Nov. 2, 2013), <https://techcrunch.com/2013/11/02/welcome-to-the-unicorn-club/> [<https://perma.cc/7WQP-NG6S>].

<sup>8</sup> Kahan & Kamar, *supra* note 4, at 684 (“the very notion that states compete for incorporations is a myth. Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”). See also Bebhuk & Hamdani, *supra* note 4, at 563–64 (arguing that Delaware’s dominant position imposes insurmountable barriers to entry); Bainbridge, *supra* note 4, at 1790 (“Some recent evidence, however, suggests that the basic premise of both stories (i.e., that states compete actively for corporate charters) is wrong.”); Roe, *supra* note 4, at 125 (“A revisionist consensus among corporate law academics has begun to coalesce that, after a century of academic thinking to the contrary, states do not compete head-to-head on an ongoing basis for chartering revenues, leaving Delaware alone in the ongoing interstate charter market.”); *id.* at 127 (quoting Ronald Gilson as saying that “Kahan and Kamar ha[ve] demonstrated [that] there is no[] competition for corporate charters in the U.S. [and] no competition among states for the revenue from incorporation . . .”).

<sup>9</sup> Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365 (1992).

<sup>10</sup> Kahan & Kamar, *supra* note 4; Bebhuk, *supra* note 1, at 1435–510; David A. Skeel, Jr., *Rethinking the Line between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994); Shannon Wells Stevenson, *The Venture Capital Solution to the Problem of Close Corporation Shareholder Fiduciary Duties*, 51 DUKE L. J. 1139 (2001); Ayres, *supra* note 9.

<sup>11</sup> It is important to acknowledge that achieving a \$1 billion valuation is considerably more challenging in the present economic climate than in the past. As an illustration, Aileen Lee, the co-founder of Cowboy Ventures, who initially coined the term “unicorn,” now refers to them as “ZIRPicorns.” This terminology shift reflects the growing difficulty faced by hundreds of startups in raising substantial capital due to the evolving economic landscape. See Kate Clark, *So Long Unicorns. Hello, ZIRPicorns?*,

large or gigantic privately-held venture-backed innovation-driven firms have emerged as a unique subset within the corporate landscape. However, the distinctiveness of unicorns extends beyond their impressive valuation. This Article adds another layer to their definition by characterizing unicorns as entities inclined to remain private for longer periods of time, displaying a resistance to traditional exit strategies, such as an initial public offering (“IPO”).<sup>12</sup>

Discussions surrounding corporate chartering have overlooked the preferences and considerations of such high-valuation private companies. By delving into the chartering choices of unicorn firms, this Article aims to offer a nuanced perspective that challenges the existing assumptions regarding the dominance of Delaware in the private sector. This investigation aims to empirically scrutinize whether unicorn firms deviate from the assumed pattern of privately held firms incorporating in their home states, choosing instead to emulate their public counterparts by selecting Delaware as their preferred jurisdiction. The exploration into these intricacies raises questions about whether Delaware’s distinctive allure for out-of-state incorporations for publicly held firms extends to large privately held firms such as unicorns.

When examining the corporate charters of a selected sample of unicorn firms, a notable remarkable finding surfaces: an overwhelming 97% of these entities choose Delaware as their state of incorporation.<sup>13</sup> This important groundbreaking finding not only signifies a substantial deviation from incorporation patterns observed in other segments of the business environment but also prompts essential inquiries into the specific factors shaping the decisions of unicorn firms in the realm of corporate governance.

The distinctive inclination of unicorns towards Delaware becomes particularly evident when contrasted with the incorporation rates observed among public firms. While only 68.2% of Fortune 500 members select Delaware as their state of incorporation, it’s noteworthy that around 79% of all U.S. initial public offerings in the calendar year 2022 were registered in the state.<sup>14</sup> So, 97% is much higher.

Further underscoring the uniqueness of unicorn firms, this stark contrast becomes even more pronounced when juxtaposed with earlier studies focusing on different categories of private entities. For instance, early-stage venture-backed private firms exhibit a 67% incorporation rate in Delaware,<sup>15</sup> while small private enterprises demonstrate a mere 2%.<sup>16</sup> It’s important to note that unicorns are private

---

INFO. (Jan 18, 2024), <https://www.theinformation.com/articles/so-long-unicorns-hello-zirpicorns>. Note that the “unicorn” moniker has been traced to a *TechCrunch* article by Aileen Lee in 2013. See Lee, *supra* note 7.

<sup>12</sup> See JAY RITTER, INITIAL PUBLIC OFFERINGS: UPDATED STATISTICS (Feb. 2, 2024), <https://site.warrington.ufl.edu/ritter/files/IPO-Statistics.pdf>; see Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445 (2017).

<sup>13</sup> See *infra* Section III.C, New Unicorn Data.

<sup>14</sup> DEL. DIV. OF CORPS., ANNUAL REPORT STATISTICS, <https://corp.delaware.gov/stats/> (last visited Feb. 14, 2024).

<sup>15</sup> Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 872 (2014).

<sup>16</sup> Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held*

firms, and the overwhelming favoritism towards Delaware among them emerges as an unprecedented trend, highlighting the distinctiveness of these entities in shaping their corporate destinies. This remarkable discrepancy not only underscores the importance of understanding the dynamics driving unicorn firms' incorporation choices but also prompts a detailed exploration into the contributing factors behind this unusually high rate of Delaware incorporation.

Beyond this intriguing phenomenon, a broader context of concern revolves around the regulation of unicorns – entities significant enough to have a public impact while remaining within the private domain. The concentration of these influential firms in Delaware endows the state with substantial leverage to influence regulatory frameworks, particularly in terms of safeguarding the interests of common shareholders and stock-option holders, who may lack the means to protect themselves through contractual agreements.

Understanding the chartering preferences of unicorn firms is crucial as they represent a dynamic and influential segment of the business world. These companies, often at the forefront of innovation and disruption, may adopt distinctive strategies in their choice of jurisdiction for incorporation. Examining the factors influencing their decisions can provide valuable insights into the evolving dynamics of corporate governance, regulatory considerations, and the strategic advantages that specific jurisdictions may offer to such high-profile entities.

Moreover, considering the absolute majority of private or closely held firms becomes integral to the narrative. While Delaware's dominance in public firms is well-documented, exploring whether this trend persists among private or closely held firms adds another layer of complexity to the analysis. This Article aims to investigate whether the assumed preference for home state incorporation holds true not only for unicorn firms but also for the broader landscape of private companies.

By focusing on unicorn firms and extending the discussion to encompass the absolute majority of private or closely held firms, this Article aims to contribute to a more comprehensive and nuanced understanding of corporate chartering practices in the United States. It seeks to explore whether the assumed preference for home state incorporation holds true for this exceptional category of companies and whether similar patterns emerge in the broader private sector. Through empirical analysis and case studies, this research endeavors to shed light on the factors influencing the chartering decisions of private or closely held firms, adding depth to the scholarly conversation and providing insights into the intricate dynamics of corporate governance in the contemporary business environment.

This Article will focus on Delaware's responsibility to regulation of relationships between shareholders and management in private firms due to information asymmetry in private markets, specifically, on behalf of employees as common shareholders and stock-option holders, which can be viewed as a mechanism to protect employees, a demographic that may encounter challenges in adequately safeguarding their interests through contractual arrangements alone. This dynamic underscores the far-reaching implications of Delaware's dominance in corporate chartering for the broader landscape of corporate governance and regulation.

---

*Corporations*, 27 J.L., ECON., & ORG. 79 (2011).

Upon completion of the empirical analysis, several critical variables were identified as key factors attracting unicorns to incorporate in Delaware, distinguishing it from other states. One particular variable concerning the publication of a model charter by the National Venture Capital Association (“NVCA”) in 2003 emerges as influential in drawing unicorns to choose Delaware over alternative jurisdictions.<sup>17</sup>

The adoption of standardized documents, endorsed by industry experts, adds an extra layer of familiarity and consistency for both investors and companies during transactions. Furthermore, Delaware’s appeal may extend to its ability to attract out-of-state investors.<sup>18</sup> Unicorns, being high-profile entities with diverse investor bases, may find Delaware’s legal landscape conducive to accommodating investors from various geographical locations. This aligns with the theory that these companies leverage Delaware’s reputation and legal framework to attract a broader pool of investors, further solidifying its status as the preferred jurisdiction for unicorn incorporation.

Another significant variable is that these unicorn companies are often deeply integrated into networks involving repeat players in the venture capital and startup ecosystem. The prevalence of repeat players, such as serial entrepreneurs as founders, and other experienced repeat players, including venture capitalists, legal advisors, and corporate governance experts who are familiar with Delaware’s corporate laws, may influence this decision-making process. The established precedents and case law in Delaware provide a level of predictability and familiarity that benefits these repeat players. The variables are explained in greater detail below and contribute to the adoption of Delaware as the state of choice for unicorn firms.<sup>19</sup>

This Article analyzes these factors as they relate to high-valuation startups in the context of the renewed debate surrounding competitive federalism. In essence, Delaware’s corporate legal structure and the incorporation essentials it offers align seamlessly with the distinctive requirements of unicorns.

This article is structured as follows. Section II, “*Corporate Law Federalism and Delaware’s Historical Dominance*,” explores Delaware’s historical dominance as a preferred jurisdiction for public companies. It decodes the features that make Delaware a corporate haven for large publicly traded firms, delves into the debate surrounding a “race to the top” or “race to the bottom” theory, and highlights the often overlooked role of privately held entities in the discourse on state corporate law competition. It also analyzes the transformative shift in corporate dynamics,

---

<sup>17</sup> See also Robert P. Bartlett, *Standardization and Innovation in Venture Capital Contracting: Evidence from Startup Company Charters* (Rock Ctr. for Corp. Governance at Stan. Univ., Working Paper No. 253, 2023; STAN. L. & ECON. Olin Working Paper No. 585, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4568695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568695) (“Adoption of the Delaware-oriented charter has also been accompanied by the growing dominance of Delaware incorporation, with Delaware charters growing from 54% of sample charters in 2004 to 100% in 2022. High adoption rates among the six most active law firms servicing U.S. startups largely explain the success of the standardization project.”); (“[B]ecause the NVCA model charter assumes Delaware incorporation, the charter has been periodically updated to reflect Delaware judicial decisions relating to the interpretation of preferred stock rights and preferences.”).

<sup>18</sup> See network analysis theory discussed in Klausner, *supra* note 6.

<sup>19</sup> See *id.*



emphasizing the decline in public markets, the historical evolving focus on public firms, and a comparative analysis of public and private entities. It provides insights into the new changing strategies and ownership structures within the corporate landscape.

Contrary to the notion that private companies primarily incorporate in their home state, this is not true for unicorn firms.<sup>20</sup> This research challenges these conventional notions and examines motivations for choosing to incorporate in Delaware rather than home states. The Article further contributes to the broader debate on state charter competition, questioning whether it fosters a “race to the top” or “race to the bottom.”<sup>21</sup> It also addresses the longstanding question of whether states adopt corporate laws favoring managers over shareholders, offering new perspectives and groundbreaking insights into the dynamics of unicorn incorporation choices.<sup>22</sup>

Section III, “*Navigating Home State Incorporation: Understanding Preferences Among Private Firms*,” focuses on understanding variations among private firms, clearing the terminological landscape, and scrutinizing previous data on private firm incorporation. New unicorn data is presented, exploring data collection methodologies, key insights, implications, challenges, and additional contextual data.

It relies on a primary dataset consisting of 220 unicorn firms, with a focus on those based in the United States.<sup>23</sup> The data collection process entailed extracting relevant information to analyze variables influencing their incorporation decisions. This dataset serves as the foundation for understanding patterns and trends concerning the preferred jurisdictions for unicorn incorporation.

Section IV, “*Delaware’s Influence on Corporate Governance in Unicorn Firms*,” delves into Delaware’s influence on unicorn firms’ corporate governance. It examines Delaware’s dominance in the unicorn race, the role of employees as common shareholders and stock-option holders, the impact of securities law amendments, shifts in common shareholder dynamics, and Delaware’s role in safeguarding employee shareholder interests.

Section V concludes with a comprehensive understanding of the unique corporate governance landscape shaped by Delaware’s historical dominance and the distinctive characteristics of unicorn firms.

## II. Corporate Law Federalism and Delaware’s Historical Dominance

Corporate law federalism refers to the division of regulatory authority between state and federal governments concerning corporate governance. In this context, Delaware has historically played a predominant role in overseeing public companies. This dominance is rooted in Delaware’s business-friendly legal

---

<sup>20</sup> See *infra*, Section II.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

framework, which includes a specialized court system and well-established corporate statutes. These attributes have made Delaware an attractive jurisdiction for companies seeking incorporation.

The following is an explanation of the historical trend of why public companies favor Delaware.

### A. *The Allure of Delaware for Public Companies*

Delaware historically dominated the publicly held corporate-chartering market in the United States.<sup>24</sup> Currently, it stands as the only state drawing a significant number of out-of-state headquartered publicly held companies for incorporation. At the heart of an age-old debate in American corporate law literature lies the question of why public companies consistently choose Delaware as their preferred state of incorporation. This topic represents one of the most extensively discussed and debated subjects in the realm of corporate charter competition.<sup>25</sup> This body of literature is fueled, to a significant extent, by differing opinions regarding the normative desirability of companies having the ability to choose among various corporate laws.<sup>26</sup>

---

<sup>24</sup> See Anat Alon-Beck, *Delaware Beware* (draft on file with author).

<sup>25</sup> See WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS 1604-05 (3d ed. 1894 (noting that federalism in corporate law in the United States is driving some states to liberalize their corporate statutes); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 201-02 (1899) (same). Contemporary scholars claim that states still vie for incorporations today. See, e.g., Stephen J. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 VA. L. REV. 961, 961 (2001) (arguing that states compete for corporate charters); Jonathan R. Macey, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607, 625 (2002) (same). See Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001); Kahan & Kamar, *supra* note 4; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

See, e.g., Bebchuk & Ferrell, *supra* note 6; Klausner, *supra* note 6; Bebchuk, *supra* note 1, at 1461-70; EASTERBROOK & FISCHER, *supra* note 6; Eisenberg, *supra* note 6, at 1512-13; Romano, *supra* note 6; Fischel, *supra* note 6; Winter, Jr., *supra* note 6; Cary, *supra* note 6, at 666. ROMANO, *supra* note 6. Kahan & Kamar, *supra* note 4. See also William J. Moon, *Global Corporate Charter Competition*, in A RESEARCH AGENDA FOR CORPORATE LAW 231-50 (Christopher M. Bruner & Marc Moore eds., 2023); Marcel Kahan, *The State of State Competition for Incorporations Revisited* (NYU Sch. of L., Pub. L. Rsch. Paper, forthcoming; European Corp. Governance Inst. – L. Working Paper No. 724, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4495588](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4495588); Jens Dammann, *State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis*, 80 MD. L. REV. 214 (2021).

<sup>26</sup> See COOK, *supra* note 25, at 1604-05 (noting that federalism in corporate law in the United States is driving some states to liberalize their corporate statutes); Keasbey, *supra* note 25, at 201-02 (same). Contemporary scholars claim that states still vie for incorporations today. See, e.g., Choi & Guzman, *supra* note 25, at 961 (arguing that states compete for corporate charters); Macey, *supra* note 25, at 625 (same). See Kahan & Kamar, *supra* note 25; Kahan & Kamar, *supra* note 4; Kamar, *supra* note 25.

See, e.g., Bebchuk & Ferrell, *supra* note 6; Klausner, *supra* note 6; Bebchuk, *supra* note 1, at 1461-70; EASTERBROOK & FISCHER, *supra* note 6; Eisenberg, *supra* note 6, at 1512-13; Romano, *supra* note 6; Fischel, *supra* note 6; Winter, Jr., *supra* note 6; Cary, *supra* note 6, at 666. ROMANO, *supra* note 6. Kahan & Kamar, *supra* note 4. See also Moon, *supra* note 25; Kahan, *supra* note 25; Damman, *supra* note 25.

The tradition of horizontal corporate law federalism is deeply rooted in American history, whereby a firm located and headquartered in a particular state is generally permitted to incorporate in any other state and thereby have its internal affairs governed by that other state's corporate law.<sup>27</sup>

Consequently, the choices for incorporation follow a “bimodal” pattern,<sup>28</sup> where public and private firms commonly opt for either home-state or Delaware incorporation.<sup>29</sup> The majority of public firms and large private enterprises tend to choose Delaware.

### 1. Decoding Delaware: Features that Make it a Corporate Haven

In the United States, companies have the freedom to establish their corporate entities in any state within the federation, irrespective of their operational activities in that specific state. This creates a scenario of interstate competition as states actively compete to attract businesses for incorporation, leading to the generation of revenue through mechanisms such as franchise taxes and various fees. Termed “competitive federalism,” this approach places states at the center, empowering them to formulate and enforce their unique set of corporate laws and regulations.<sup>30</sup>

Corporate law federalism refers to the division of authority between the federal government and individual states in regulating corporate activities.<sup>31</sup> In the United States, the federal government and state governments share the power to regulate corporations.<sup>32</sup> While federal laws, such as securities laws, apply uniformly across the country, each state has the authority to enact its own corporate laws, particularly those related to the internal affairs of corporations.<sup>33</sup>

Delaware has historically been the preferred state for the incorporation of many public companies. The reasons behind Delaware's dominance can be

---

<sup>27</sup> See COOK, *supra* note 25, at 1604-05 (noting that federalism in corporate law in the United States is driving some states to liberalize their corporate statutes); Keasbey, *supra* note 25, at 201-02 (same). Contemporary scholars claim that states still vie for incorporations today. See, e.g., Choi & Guzman, *supra* note 25, at 961 (arguing that states compete for corporate charters); Macey, *supra* note 25, at 625 (same). See Kahan & Kamar, *supra* note 25; Kahan & Kamar, *supra* note 4; Kamar, *supra* note 25.

See, e.g., Bebchuk & Ferrell, *supra* note 6, Klausner, *supra* note 6; Bebchuk, *supra* note 1, at 1461-70; EASTERBROOK & FISCHER, *supra* note 6; Eisenberg, *supra* note 6, at 1512-13; Romano, *supra* note 6; Fischel, *supra* note 6; Winter, Jr., *supra* note 6; Cary, *supra* note 6, at 666. ROMANO, *supra* note 6. Kahan & Kamar, *supra* note 4. See also Moon, *supra* note 25; Kahan, *supra* note 25; Damman, *supra* note 25.

<sup>28</sup> Broughman, Fried & Ibrahim, *supra* note 15.

<sup>29</sup> Bebchuk & Hamdani, *supra* note 4; see Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002) [hereinafter Daines, *The Incorporation Choices of IPO Firms*]; Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 421 (2003); Damman & Schündeln, *supra* note 16; Broughman, Fried & Ibrahim, *supra* note 15.

<sup>30</sup> See Alon-Beck, *supra* note 24.

<sup>31</sup> See Alon-Beck, *supra* note 24.

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

<sup>33</sup> *Id.*

attributed to several factors. Most scholars concur on the following factors: First, Delaware offers a business-friendly legal environment with a well-established body of corporate law that provides clarity and predictability for businesses. The state has a specialized court, the Delaware Court of Chancery, which focuses exclusively on corporate matters and has experienced judges, contributing to the efficient resolution of corporate disputes.

Second, Delaware has a responsive and flexible legislative process that allows for quick updates to corporate laws to address emerging business needs. This adaptability attracts companies seeking a favorable regulatory environment.<sup>34</sup>

Third, Delaware's legal precedents and decisions have created a body of case law that provides further guidance and certainty for businesses operating under Delaware law. This has established Delaware as a jurisdiction of choice for corporate incorporation, with a significant majority of Fortune 500 companies choosing Delaware as their legal home. Fourth, antitakeover statutes.<sup>35</sup> Finally, the state also offers a variety of corporate structures and favorable tax treatment.<sup>36</sup>

However, there is a long debate on whether Delaware's corporate law is shareholder-friendly or management-friendly and provides strong protection for directors and officers, which is appealing to companies and their leadership.

The following is a short overview of this debate.

## 2. Debating Between a "Race to the Top" or a "Race to the Bottom" - Shareholder or Management Friendly?

Understanding why public companies choose Delaware over other states is important, as the dual role of corporate law serves as a crucial element in our economy. Viewing corporate law as a product involves recognizing that the legal frameworks and services provided to businesses as essential components contribute to the overall function of the business environment.<sup>37</sup> This dual role involves both rationalizing economic behavior and adapting to the ever-changing landscape of technological and innovation dynamics.<sup>38</sup> This dynamic nature reflects the evolving needs and challenges faced by corporations, underscoring the vital importance of corporate law in providing a framework that accommodates these changes and

---

<sup>34</sup> Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L., ECON., & ORG. 340, 363 (2006); Dammann & Schündeln, *supra* note 16.

<sup>35</sup> Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2002); Bebchuk & Cohen, *supra* note 29.

<sup>36</sup> Romano, *supra* note 6; Subramanian, *supra* note 35; Bebchuk & Cohen, *supra* note 29.

<sup>37</sup> Romano, *supra* note 6.

<sup>38</sup> *See generally* Christopher Grandy, *The Economics of Multiple Governments: New Jersey Corporate Chartermongering, 1875-1929* (1987) (Ph.D. dissertation, University of California, Berkeley),

<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=4ff463d5b93028b14e32f5ec22cd5fc02221f80c>; *see also* ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF AMERICAN INDUSTRIAL ENTERPRISE* (1962). (Chandler documented the large representation of New Jersey in incorporation of large industrial enterprises at the turn of the century, during the merger wave between 1895 and 1904.)

shapes organizational structures and governance models.<sup>39</sup>

The impact of chartering decisions on a company's norms and corporate governance structures cannot be overstated. The ongoing debate surrounding state charter competition focuses on whether states are adopting corporate laws that prioritize managers over shareholders, leading to extensive empirical research on publicly held corporations.<sup>40</sup> At the core of this debate is the question of whether state chartering competition aligns more with a "race to the bottom"<sup>41</sup> or a "race to the top"<sup>42</sup> theory of corporate law.

From the viewpoint of a "race-to-the-top," companies opt to incorporate in Delaware because its laws are believed to optimize firm value for shareholders.<sup>43</sup> In contrast, the "race-to-the-bottom" perspective proposes that companies choose Delaware due to its inclination toward favoring firm insiders at the detriment of others.<sup>44</sup>

Alternative perspectives on why a firm might choose Delaware shift away from the intrinsic quality of its laws, focusing instead on the number of other companies incorporated in Delaware.<sup>45</sup> Drawing from the network-effects literature, Klausner argues that some firms commit to Delaware as a long-term domicile, especially those planning future IPOs.<sup>46</sup> This decision may not necessarily stem from an evaluation of Delaware's corporate laws but rather anticipates a large number of other public firms being domiciled in Delaware in the

---

<sup>39</sup> See generally Grandy, *supra* note 38; see also CHANDLER, JR., *supra* note 38.

<sup>40</sup> For surveys of this work, see Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380 (2002); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001); Romano, *supra* note 6; Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1 (1989); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001); Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002). For a formal model demonstrating this point, see Oren Bar-Gill, Michal Barzuz & Lucian Bebchuk, *The Market for Corporate Law* (Harvard L. Sch., Discussion Paper No. 377, 2002), [www.papers.ssrn.com/abstractp275452](http://www.papers.ssrn.com/abstractp275452). This paper models a race-to-the-bottom equilibrium in which (1) states are induced to provide rules that give managers excessive private benefits and (2) incorporation in the dominant state is associated with a higher shareholder value because of the institutional advantages and network benefits offered by that state. See Bebchuk & Cohen, *supra* note 29; Robert Daines, *Does Delaware Law Improve Firm Value?* 12 n.5 (New York Univ., Ctr. for L. & Bus., Working Paper No. CLB-99-011; Columbia L. Sch., Ctr. for Stud. in L. & Econ., Paper No. 159, 1999) (noting that the majority of firms incorporate either in their home state or in Delaware). In contemporaneous work, Daines presents evidence that firms display home preference in their incorporation decisions when they first go public. The results of Daines's study, which is based on data on the dates of initial public offerings (IPOs), complement and reinforce these findings, which are based on Compustat data on the stock of all firms existing at the end of 1999. See Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002) [hereinafter Daines, *The Incorporation Choices of IPO Firms*].

<sup>41</sup> See sources cited *supra* note 40.

<sup>42</sup> See sources cited *supra* note 40.

<sup>43</sup> See Winter, *supra* note 6; Romano, *supra* note 6.

<sup>44</sup> Cary, *supra* note 6; Bebchuk, *supra* note 1; Oren Bar-Gill, Michal Barzuz & Lucian Bebchuk, *The Market for Corporate Law*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 134 (2006).

<sup>45</sup> Klausner, *supra* note 6.

<sup>46</sup> *Id.*

future.<sup>47</sup> The extensive and sustained network of Delaware firms ensures access to a richer body of case law and superior legal services compared to domiciling in their home state, where the firm network is relatively smaller.<sup>48</sup>

Furthermore, according to Kahan and Klausner, the persistence of contractual terms in loan agreements, charters, and similar documents may not solely be due to their inherent quality but rather because of the learning advantages derived from their widespread use.<sup>49</sup> These advantages encompass increased efficiency in drafting and a decrease in uncertainty.<sup>50</sup> Their analysis suggests that a firm might choose Delaware as its domicile not only for the state's attributes but also for the learning benefits generated by the historical choices of numerous other firms that have selected Delaware.<sup>51</sup>

Regardless, the prevailing discourse surrounding state competition in corporate law primarily focuses on publicly traded firms while overlooking privately held entities.<sup>52</sup> The fundamental argument posits that the decision-making processes of privately held firms differ significantly from those of their publicly traded counterparts, warranting a distinct analytical approach.<sup>53</sup>

The following addresses the gap in the literature and provides a fresh perspective, new insights and groundbreaking findings.

### 3. Examining the Neglected Role of Privately-Held Entities in State Corporate Law Competition Discourse

The prevailing discourse surrounding state competition in corporate law primarily focuses on publicly-traded firms while overlooking privately-held entities.<sup>54</sup>

A gap in the existing literature pertains to the limited understanding of how the market for corporate law influences the organizational structure and governance of large privately-held corporations. Notably, there is a lack of specific research on

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

<sup>50</sup> *Id.*

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

<sup>52</sup> There now exists a well-developed body of empirical research exploring the incorporation choices of publicly traded corporations in the United States. *See, e.g.*, Bebchuk & Cohen, *supra* note 29, at 421 (analyzing the incorporation choices of IPO firms and providing evidence that states adopting a greater number of antitakeover statutes tend to attract more corporations); Kahan, *supra* note 34 at 363 (analyzing the incorporation choices of IPO firms and finding that the flexibility of a state's corporate law regime is positively correlated with success in the charter market).

<sup>53</sup> Bebchuk & Ferrell, *supra* note 6; Klausner, *supra* note 6; Bebchuk, *supra* note 1, at 1461-70; EASTERBROOK & FISCHEL, *supra* note 6; Eisenberg, *supra* note 6, at 1512-13; Romano, *supra* note 6; Fischel, *supra* note 6; Winter, Jr., *supra* note 6; Cary, *supra* note 6, at 666.

<sup>54</sup> There now exists a well-developed body of empirical research exploring the incorporation choices of publicly traded corporations in the United States. *See, e.g.*, Bebchuk & Cohen, *supra* note 29, at 421 (analyzing the incorporation choices of IPO firms and providing evidence that states adopting a greater number of antitakeover statutes tend to attract more corporations); Kahan, *supra* note 34, at 363 (analyzing the incorporation choices of IPO firms and finding that the flexibility of a state's corporate law regime is positively correlated with success in the charter market).

the incorporation decisions of the most significant privately-held entities in our economy, commonly referred to as unicorns. Scholars typically refrained from exploring private firms, asserting that the decision-making processes of privately held entities diverge significantly from those of publicly traded counterparts. This distinction therefore necessitates a unique analytical approach to comprehensively address the dynamics within privately-held corporations.<sup>55</sup>

### *B. Private Becomes the New Public: Transformative Shift in Corporate Dynamics*

The inattention to privately held firms by scholars can be seen as somewhat expected, given that only in the last eleven years has there been a notable transformation in the market dynamics.<sup>56</sup>

#### 1. Public Market Decline: Changes to Corporate Ownership

Private firms have not only surpassed but have also outperformed their public counterparts. To illustrate, one might metaphorically depict public firms as a species currently facing extinction.<sup>57</sup> The number of public firms is dwindling, they are raising less capital from public markets, and dissolution is occurring at a faster rate than ever before.<sup>58</sup>

This trend, spanning several decades, elucidates a significant decline in the count of publicly traded U.S. companies. In 1996, the United States boasted a peak of 8,090 listed companies. Unfortunately, as of the first quarter of 2023, this number has sharply declined to 4,572, representing a staggering 43% decrease.<sup>59</sup>

Private companies, on the other hand, are experiencing significant growth, securing substantial capital from private markets and opting to remain private for extended durations.<sup>60</sup> Only in the past eleven years have we seen a growth in unicorn firms, which aim to prolong their status as privately held entities for as long as feasible. Unicorns, as a unique category of high-valuation startups, possess distinct characteristics that set them apart from other startups or close large privately held corporations or public ones.

---

<sup>55</sup> *See id.*

<sup>56</sup> *See* RITTER, *supra* note 12; *see de* Fontenay, *supra* note 12.

<sup>57</sup> Lynn Stout, *The Shareholder Value Myth*, YOUTUBE, <https://www.youtube.com/watch?v=ZzztBF9nprA> (last visited Feb. 14, 2024).

<sup>58</sup> RENÉ M. STULZ, NAT'L BUREAU OF ECON. RSCH., *THE SHRINKING UNIVERSE OF PUBLIC FIRMS: FACTS, CAUSES, AND CONSEQUENCES* (2018), <https://www.nber.org/reporter/2018number2/shrinking-universe-public-firms-facts-causes-and-consequences>.

<sup>59</sup> Ari Levy, *Tech IPO Drought Reaches 18 Months Despite Nasdaq's Sharp Rebound in First Half of 2023*, CNBC (June 30, 2023), <https://www.cnbc.com/2023/06/29/tech-ipo-drought-reaches-18-months-despite-nasdaq-first-half-rally.html>.

<sup>60</sup> *See* Anat Alon-Beck, *Unicorn Stock Options – Golden Goose or Trojan Horse?*, 2019 COLUM. BUS. L. REV. 107 (2019) [hereinafter Alon-Beck, *Unicorn Stock Options*]; Anat Alon-Beck, *Alternative Venture Capital: The New Unicorn Investors*, 88 TENN. L. REV. 983 (2020) [hereinafter Alon-Beck, *Alternative Venture Capital*]; Anat Alon-Beck, *Bargaining Inequality: Employee Golden Handcuffs and Asymmetric Information*, 81 MD. L. REV. 1165 (2022) [hereinafter Alon-Beck, *Bargaining Inequality*].

Originally coined to underscore the exceptional success and rarity of such companies in the competitive business landscape, the term “unicorn” highlights the scarcity of achieving such a high valuation of \$1 billion before going public or being acquired.<sup>61</sup> However, the once-rare occurrence of unicorn firms has become more prevalent. As of January 1, 2024, the global count of unicorn companies was 1,354, signaling a remarkable surge in these privately held startups.<sup>62</sup>

There is a notable shift within the technology sector, where certain tech giants, exemplified by figures like Elon Musk, no longer pursue public status. This new phenomenon is both intriguing and challenges our conventional understanding of how privately held firms operate. It specifically focuses on the operational dynamics of long-term privately-held venture-capital backed startup companies. The Article introduces the innovative concept of recognizing a new classification - the “long-term private giant” company,<sup>63</sup> citing examples such as Elon Musk’s corporations: X.AI, X Corp., X Holdings, Neuralink and more.<sup>64</sup> This idea initiates an interesting analysis of how different states compete to attract these companies, marking a departure from viewing unicorns merely as a transitional phase before going public. These entities now have a more enduring or long-term status, which is primarily tied to the changes listed below in our federal securities laws and their effect on our state corporate laws.

These market developments explain the void in literature regarding the effect of the corporate law market for charters on the organizational structure and governance of large privately-held corporations. Notably, there is a lack of research specifically exploring the incorporation decisions of unicorns.

## 2. Public Firm Focus: Evolving Dynamics of Corporate Strategies

Historically, public firms garnered more attention than private firms, driven by the belief in their significant impact on the economy. Many law schools in the

---

<sup>61</sup> See Lee, *supra* note 7.

<sup>62</sup> Jordan Rubio, *Unicorn Companies Tracker*, PITCHBOOK (Jan. 1, 2024), <https://pitchbook.com/news/articles/unicorn-startups-list-trends>.

<sup>63</sup> Most scholars refer to technology companies backed by venture capital as private entities that aspire to attain public status. The examples and quotations utilized in previous empirical works appear to pertain more to other different categories of private companies, which may not directly align with the technology sector under discussion in this piece.

<sup>64</sup> According to filings with the Nevada Secretary of State, Elon Musk is listed as a director for both X Holdings Corp. and X Corp. These companies are registered with a Carson City address. The third company, X.AI Corp., is registered with a Las Vegas address and has Jared Birchall listed as its secretary. The *Wall Street Journal* has reported that Jared Birchall is the individual who manages Musk’s family office. Sean Hemmersmeier, *Elon Musk Forms 3 Companies in Nevada, Filings Show*, LAS VEGAS REVIEW-JOURNAL (Apr. 17, 2023), <https://www.reviewjournal.com/business/entrepreneurs/elon-musk-forms-3-companies-in-nevada-filings-show-2763280/>. xAI is a benefit corporation. Becky Peterson, *Musk’s xAI Follows Anthropic with Benefit Corporation Structure*, INFORMATION (Dec. 26, 2023), <https://www.theinformation.com/briefings/musks-xai-follows-anthropic-with-benefit-corporation-structure>; Hayden Field, *Elon Musk’s AI Startup – X.AI – Files to Raise \$1 Billion in Fresh Capital*, CNBC (Dec. 6, 2023), <https://www.cnbc.com/2023/12/05/elon-musks-ai-startup-xai-files-to-raise-1-billion-.html>; X.AI Corp., Form D (Dec. 5, 2023), [https://www.sec.gov/Archives/edgar/data/2002695/000200269523000002/xslFormDX01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/2002695/000200269523000002/xslFormDX01/primary_doc.xml).



United States emphasize public firms in business association (corporate law) courses, assuming that law students will predominantly work for large law firms representing these entities post-graduation. Undoubtedly, public firms have been pivotal drivers of economic growth, shaping the social and environmental landscape. Their crucial role in mobilizing capital, job creation, fostering innovation, providing investment opportunities, and promoting transparency and accountability cannot be overstated.

The following are additional reasons why researchers often focus on public firms. First, information on public firms is generally more readily available compared to private firms. Due to the regulatory environment, publicly traded companies are required to disclose financial statements, governance practices, and other relevant information to regulatory bodies and the public. This transparency makes it easier for researchers to access comprehensive and standardized data.

Second, researchers studying public firms can gain insights into market dynamics, investor behavior, and the overall economy.<sup>65</sup> Third, corporate governance literature focuses on structures of public firms.<sup>66</sup> It explores the impact of board structures, executive compensation, and shareholder activism. Fourth, thanks to U.S. securities laws, public firms are required to communicate policy and actions with their shareholders and the broader market.<sup>67</sup> Finally, researchers can analyze stock market movement and reactions to significant events, such as news, earnings announcements, mergers and acquisitions, and other corporate events.<sup>68</sup>

While public companies often take center stage in the news, corporate governance and finance literature, or law school courses, it's crucial to recognize that the foundational principles of corporate law apply equally to both private and public firms.<sup>69</sup> Let's turn to private firms.

Privately-held companies, although sometimes overshadowed, wield considerable influence on our economy, business development, and entrepreneurship. The ongoing shift from public to private firms has heightened the importance of understanding the role of private entities in society. This transition carries substantial implications for corporate law and governance. Analyzing the decisions of large private firms becomes essential in comprehending the patterns of incorporation and the outcomes of regulatory competition in areas like information

---

<sup>65</sup> The disclosure of information by public firms is primarily driven by regulatory requirements. Publicly traded companies are subject to various regulations and reporting obligations imposed by securities regulators and stock exchanges. These regulations are designed to ensure transparency and provide investors with the information they need to make informed investment decisions.

<sup>66</sup> See sources cited *supra* note 6.

<sup>67</sup> See Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259, 260, 266 (1980). See, e.g., Stephen M. Bainbridge, *Fee Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 874-75 (2016) (discussing fee shifting bylaws); MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* (2018).

<sup>68</sup> See Alon-Beck, *Unicorn Stock Options*, *supra* note 60.

<sup>69</sup> There are some laws under corporate statutes that apply specifically to private or public firms. Public companies are also subject to extensive disclosure requirements mandated by other laws, such as our securities regulations. This includes regular financial reporting, disclosure of material events, and other information that may affect the company's stock price. Public firms often adhere to more stringent corporate governance standards. They typically have a board of directors with a majority of independent directors, and certain committees (e.g., audit, compensation, nominating) are required.

disclosure, corporate governance, and securities.

### 3. A Comparative Analysis of Public and Private Firms

Recognizing the disparities between public and large venture capital-backed (VC-backed) private firms is essential when assessing incorporation preferences, as these distinctions profoundly influence the legal framework for each entity. Within the legal environment, privately held companies exhibit unique characteristics that necessitate careful consideration. Here are some primary distinctions:

First, private companies typically have fewer disclosure requirements compared to their public counterparts. They are not obligated to disclose financial information to the general public, enabling greater confidentiality in their operations.<sup>70</sup> Second, as elaborated in greater detail below, the governance structures of private firms can exhibit significant variation. While some may adopt governance practices akin to public companies, others—especially closely held or family-owned businesses—might embrace more flexible governance arrangements.

Third, private firms often rely on shareholder agreements to delineate the rights and responsibilities of shareholders, embracing a practice known as private ordering. In this context, private ordering allows companies to tailor their governance structures to the specific needs and preferences of the involved parties, providing flexibility and customization in defining the terms of shareholder relationships. This approach enables private firms to navigate their unique circumstances and align governance arrangements with the distinct characteristics and goals of the business. Fourth, private companies face more restricted access to capital sources, loans, and funding. Securing loans can be challenging due to the absence of tangible assets, primarily relying on intangible assets, which can limit the collateral options for lenders. This limitation contrasts with public companies, which often have more diverse financing avenues. In the startup arena, these companies commonly depend on private equity, venture capital, or other alternative funding sources to fulfill their capital requirements.<sup>71</sup>

Fifth, in recent times, however, there has been a notable surge in alternative financing mechanisms, accompanied by the emergence of new market trends, often in response to the challenges of securing venture capital investments.<sup>72</sup> Mutual funds and sovereign wealth funds, among other new market participants, are now injecting substantial capital into unicorn firms. These new market dynamics contribute to the prevailing trend of unicorn firms postponing their IPOs.<sup>73</sup>

---

<sup>70</sup> Alon-Beck, *Unicorn Stock Options*, *supra* note 60.

<sup>71</sup> Alon-Beck, *Alternative Venture Capital*, *supra* note 60.

<sup>72</sup> Alon-Beck, *Unicorn Stock Options*, *supra* note 60; Alon-Beck, *Alternative Venture Capital*, *supra* note 60.

<sup>73</sup> See Sungjoung Kwon, Michelle Lowry & Yiming Qian, *Mutual Fund Investments in Private Firms* 1 (Sept. 20, 2018) (unpublished manuscript), <https://ssrn.com/abstract=2941203> [perma.cc/B65L-4W4S]. Chernenko, Lerner and Zeng show that “[O]ver the 2010–2016 period, the number of distinct funds directly investing in unicorns has increased from less than 10 to more than 140. . . . The dollar value of aggregate holdings has also increased by an order of magnitude, from less than \$1 billion to more than \$8 billion. These results paint a consistent picture of unicorn investments becoming a more

The involvement of these new players and others alters the equilibrium, empowering founders to request more founder-friendly funding rounds.<sup>74</sup> Securing capital for a startup, even one situated in Silicon Valley with VC backing, remains an exceedingly risky and challenging undertaking.<sup>75</sup> These private investments enable the firm's founder to postpone the expenses linked to going public and evade the pressures associated with being a public company.<sup>76</sup> This is particularly crucial in avoiding the pressures to refrain from investing in innovation and instead focus on short-term results.<sup>77</sup>

To sum up, this analysis has broader implications for the current landscape of corporate law, the potential need for future federal intervention, and the overarching theories of regulatory competition.

Having underscored the significance of privately held firms in our

---

important part of the portfolios of open-end mutual funds.” Sergey Chernenko, Josh Lerner & Yao Zeng, *Mutual Funds as Venture Capitalists? Evidence from Unicorns* 25-26 (Harv. Bus. Sch., Working Paper No. 18-037, 2017), [https://www.hbs.edu/faculty/Publication%20Files/18-037\\_02aec6d2-1209-449e-84df-c3730b4d7b4b.pdf](https://www.hbs.edu/faculty/Publication%20Files/18-037_02aec6d2-1209-449e-84df-c3730b4d7b4b.pdf). See also William Gornall & Ilya A. Strebulaev, *Squaring Venture Capital Valuations with Reality 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23895, 2017) (“A number of the largest U.S. mutual fund providers, such as Fidelity Investments and T. Rowe Price, have begun investing their assets directly in unicorns.”). Kwon et al. further show that these large amounts of capital “should enable companies to stay private longer.” Kwon et al., *supra* at 21.

<sup>74</sup> Anat Alon-Beck, *Dual Fiduciaries: Unicorns, Corporate Law and the New Frontier*, in *A RESEARCH AGENDA FOR CORPORATE LAW* (C.M. Bruner & M.T. Moore eds., 2023); Ola Bengtsson & John R.M. Hand, *CEO Compensation in Venture Backed Firms*, 26 J. BUS. VENTURING 391, 410 (2011) (“Without multiple injections of new capital, a firm of the type backed by venture capital is likely to go bankrupt rather than realize its goal of going public or being acquired.”).

<sup>75</sup> See Zvi Griliches, *The Search for R&D Spillovers*, 94 SCANDINAVIAN J. ECON. 29, 32 (Supp. 1992). Kwon et al., *supra* note 73, at 27. On the regulatory costs of going public, see generally Anne Beyer, Daniel A. Cohen, Thomas Z. Lys & Beverly R. Walther, *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. ACCT. & ECON. 296 (2010).

<sup>76</sup> Alon-Beck, *Unicorn Stock Options*, *supra* note 60.

<sup>77</sup> Another plausible cause for the rise of the unicorn firms is that lucrative technology companies choose to stay private as long as possible in order to escape the pressures toward short-term strategies that stem from public ownership. See *The Endangered Public Company*, *ECONOMIST* (May 19, 2012), <https://www.economist.com/leaders/2012/05/19/the-endangeredpublic-company> [https://perma.cc/7HJS-6T5Z]; see also LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 7 (2012) (asserting the short term focus of investors and corporate boards is currently one of the key issues in the corporate governance debate); Thomas J. Chemmanur & Yawen Jiao, *Dual Class IPOs: A Theoretical Analysis*, 36 J. BANKING & FIN. 305, 316 (2012). For discussion on shareholder value, see COLIN MAYER, *FIRM COMMITMENT* (2013); see also Ira M. Millstein, *Re-Examining Board Priorities in an Era of Activism*, *N.Y. TIMES* (Mar. 8, 2013), [http://dealbook.nytimes.com/2013/03/08/re-examining-board-priorities-in-an-era-of-activism/?\\_r=0](http://dealbook.nytimes.com/2013/03/08/re-examining-board-priorities-in-an-era-of-activism/?_r=0) [https://perma.cc/T434-PFH8] (“[C]orporate boards around the country should re-examine their priorities and figure out to whom they owe their fiduciary duties.”); see also STOUT, *supra*, at 7. Stout also expresses this concern with regards to the innovation ability of large public companies. See Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 710–11 (2015); see also John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, in *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (3d ed. 2017); David Ciepley, *Beyond Public And Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 148–49 (2013); Bill Buxton, *The Price of Forgoing Basic Research*, *BLOOMBERG* (Dec. 17, 2008), <https://www.bloomberg.com/news/articles/2008-12-17/the-price-of-forgoingbasic-researchbusinessweek-business-news-stock-market-and-financialadvice> [perma.cc/7R96-JCK4]; *Out of the Dusty Labs*, *ECONOMIST* (Mar. 1, 2007), <http://www.economist.com/node/8769863> [https://perma.cc/M5S5-Q6DU].

economy, let's now redirect our attention to debunking another misconception, specifically, the notion that all privately held firms are identical, including the misconception that they share the same preferences when it comes to incorporation choices.

### III. NAVIGATING HOME STATE INCORPORATION: UNDERSTANDING PREFERENCES AMONG PRIVATE FIRMS

In the complex landscape of horizontal federal corporate chartering competition, private firms also grapple with critical decisions surrounding home state versus Delaware incorporation. Contrary to a common misconception, these privately held entities are far from uniform in their preferences and approaches.

As we delve into the nuanced realm of home state incorporation choices among private firms, it becomes evident that a diverse array of factors shapes their decisions. This exploration aims to shed light on the multifaceted factors influencing the incorporation choices of private firms, emphasizing the intricate interplay between home state options and the renowned allure of Delaware as a preferred jurisdiction.

Indeed, our exploration will reveal that unicorns exhibit distinct behaviors and considerations, setting them apart from other privately held firms.

#### A. *Understanding Variations Among Private Firms*

The diversity among private companies is undeniable, and a nuanced examination becomes crucial to understanding the broader landscape. While Delaware's dominance in public firms is well-established, investigating whether this trend extends to large private firms introduces additional layers of complexity to the analysis.

#### 1. Clearing the Terminological Landscape

This Article delves into the nuanced distinctions within private companies, aiming to discern the underlying reasons for the presumed inclination toward home state incorporation, particularly for small or closely held firms. The investigation seeks to explore whether this tendency extends across the broader spectrum of other private enterprises.

By concentrating on unicorn firms and comparing them to private or closely held entities, this Article contributes to a more thorough and nuanced comprehension of corporate chartering practices in the United States. It seeks to unravel why the perceived preference for home state incorporation does not hold true for this exceptional category of companies. Through empirical analysis and case studies, this research endeavors to illuminate the factors influencing the chartering decisions of unicorn firms, enriching scholarly discussions and providing valuable insights into the intricate dynamics of corporate governance in the contemporary business landscape.

Let's start with terminology. Traditional corporate literature often tends to

broadly categorize companies as either “public” or “close” corporations, oversimplifying distinctions that hinder clear policymaking. The term “close corporation” itself also embodies ambiguity, sometimes signifying a “closed corporation,” or other times a “closely-held corporation,” or occasionally both. It’s crucial to recognize that private companies vary significantly.

Some private companies may have freely tradable shares on secondary markets. Additionally, corporations with non-freely tradable shares may still have hundreds or thousands of shareholders, deviating notably from a typical “closely-held corporation,” which usually has only a few shareholders, often, but not limited to, from the same family.

As noted above, the terms “closed” or “private” corporations will usually be applied to those firms imposing some restrictions on share tradability. Within this broad categorization, two critical distinctions are considered. First, a company with shares held by a small group of individuals, where interpersonal relationships play a vital management role, will be characterized as “closely held,” contrasting with the term “privately held,” which implies a company not listed on an exchange but widely held by numerous shareholders. Again, privately-held firms may have some tradability on secondary markets.

Furthermore, a crucial distinction needs to be made for the purposes of this Article between venture-backed privately held firms and other types of privately held firms. This Article focuses exclusively on venture-backed firms, which are often involved in high-tech or knowledge-intensive industries such as technology, biotechnology, pharmaceuticals, and other sectors requiring advanced scientific or technological expertise. These firms play a pivotal role in job creation, technological innovation, and overall economic stimulation in the United States, contributing significantly to total output and employing a substantial number of skilled workers, thereby elevating wages across various job sectors.

Certainly, now that the terminology is established, let’s proceed to debunking previous data and research results. There is no significant data or research concerning the incorporation decisions made by the largest closely held U.S. corporations – unicorns.<sup>78</sup>

The subsequent overview delves into the limited research conducted with regards to privately held firms, the difference between unicorns and other types of private firms, this subject’s research and the findings derived from it.

## *B. Unraveling Preconceptions: Scrutinizing Previous Data*

Competition among states for the charters of privately-held firms was traditionally viewed as minimal by corporate law scholars. This perception stemmed from the tendency of these firms to operate within a single state, with the

---

<sup>78</sup> It should be noted that there is some literature on this in the context of the European Union. See research by Becht, Mayer and Wagner who find that there is legal migration to the U.K., which explained by country-specific incorporation costs and minimum capital requirements. However, there are huge discrepancies between U.S. and European jurisdictions. Marco Becht, Colin Mayer & Hannes F. Wagner, *Where Do Firms Incorporate? Deregulation and the Cost of Entry*, 14(3) J. CORP. FIN. 241 (2008). That is why this research paper will not compare to data found in the European Union. See also Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT’L L. 477 (2004).

associated costs of incorporating in other jurisdictions often cited as outweighing the potential benefits for such businesses.

Over the years, scholars simply claimed that a significant majority of privately or closely held corporations prefer to incorporate in their local jurisdiction. These scholars include Eisenberg,<sup>79</sup> Kahan and Kamar,<sup>80</sup> Bebchuk,<sup>81</sup> Skeel,<sup>82</sup> and Stevenson.<sup>83</sup> However, to my knowledge, these assertions were stated without substantial empirical investigation. There was no distinction between the different types of private firms. They primarily relied on the scholarship of Ayres.

In 1992, Ayres conducted the most extensive evaluation of how the charter market influenced closely held U.S. corporations.<sup>84</sup> Ayres argued that there is essentially no necessity for closely held corporations to incorporate in another state outside their primary place of business.<sup>85</sup> This is because state law typically offers sufficient flexibility, enabling privately held corporations to establish the structure they prefer.<sup>86</sup> Ayres further asserted that the legal framework for closely held corporations tend to be more flexible than the law governing public corporations.<sup>87</sup> This heightened flexibility, according to Ayres, could potentially obviate the necessity to incorporate out of state for privately held corporations.<sup>88</sup> Kades' work is also often mentioned, along with Ayres.<sup>89</sup> Kades built on Ayres' work, suggesting that private firms are opting for incorporation in the state where their primary place of business is located because it is preferable for closely held corporations.<sup>90</sup>

The initial focus on distinguishing between various types of privately held firms emerged in scholarly discussions around 2008. Scholars Rock and Kane became pioneers in incorporating startup firms into their research, marking a

---

<sup>79</sup> MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS* (9th ed. 2005).

<sup>80</sup> Kahan & Kamar, *supra* note 4.

<sup>81</sup> Bebchuk, *supra* note 1.

<sup>82</sup> Skeel, Jr., *supra* note 10.

<sup>83</sup> Stevenson, *supra* note 10.

<sup>84</sup> Ayres, *supra* note 9. Roberta Romano didn't agree with Ayres on some issues. See Roberta Romano, *State Competition For Close Corporation Charters: A Commentary*, 70 WASH. U. L.Q. 409, 409 (1992) ("He contends that state corporation codes and judicial decisions cannot both be efficient because sometimes the two disagree; courts ignore or overturn statutes, and legislatures override judicial decisions. I think that this packaging is unfortunate, for there is no basis for contending that these scholars' positions are inconsistent.").

<sup>85</sup> Ayres, *supra* note 9.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Eric Kades, *Freezing the Company Charter*, 79 N.C. L. REV. 111, 142 (2000) ("[S]pecial close corporation statutes offer a set of preferable rules, they are used by relatively few firms and hence offer fewer learning externalities in the short run and create a significant risk that they will offer fewer network externalities in the long run. Close corporations, then, may select general corporate law rules despite unanimous preference for tailor-made rules."). Citing Ayres, Kades states: "There is little if any state competition for the charters of small, privately-held firms, because they usually operate in only one state and the costs of incorporating elsewhere exceed the benefits.' Thus, there is less pressure on legislatures to enact efficient governance rules, and private firms have more to fear from legislative ineptitude." Kades, at 150 (footnote omitted).

<sup>90</sup> *Id.*

pivotal development in understanding the nuances within the realm of privately held entities.<sup>91</sup> Kane and Rock conducted a study examining startups operating in Silicon Valley, the prominent U.S. startup hub. Their findings revealed that these firms typically opted to incorporate in California during their initial stages.<sup>92</sup> However, a notable shift occurred when these companies transitioned to the stage of going public. Many of them chose to change their legal domicile to Delaware during this phase.<sup>93</sup> Rock and Kane's observation aligns with a broader trend identified three years later by Dammann and Schündeln in 2011.<sup>94</sup>

In 2011, Dammann and Schündeln undertook an extensive empirical study on privately held firms, a precursor to the widespread emergence of unicorns in subsequent years.<sup>95</sup> This study made significant contributions to the literature. Let's review their findings. It's important to note that their study was conducted before the widespread emergence of unicorn firms.

Initially, they found that, in general, the majority, 95.66%, of small privately held companies in their research established their legal status in the same state as their primary business headquarters, aligning with the assertions of earlier scholars mentioned above.<sup>96</sup> Only 2% of these companies incorporated in Delaware. However, a noteworthy shift emerged when they segmented the dataset by excluding large private corporations employing over 1,000 employees.<sup>97</sup>

In this subset, only half, 50%, of private companies with over 1,000 employees chose to incorporate in the state where their main business operations were located.<sup>98</sup> Among those opting for incorporation in a different state, more than half selected Delaware.<sup>99</sup> The study also revealed consistent evidence suggesting that private companies originating from states with an unfavorably perceived judiciary were more inclined to incorporate outside of their primary business location.<sup>100</sup> See chart below with the full explanation of their findings.

In 2014, Fried, Broughman and Ibrahim expanded the work of Dammann and Schündeln, focusing on startup firms.<sup>101</sup> It's important to note that their study was conducted before the widespread emergence of unicorn firms. Their sample included 1,998 firms, all U.S.-based startups that secured their initial round of venture capital investment between January 1, 2000 and December 31, 2002, and received a minimum of \$5 million in total VC financing across all investment rounds.<sup>102</sup>

The findings of Fried, Broughman and Ibrahim indicate that startup firms, like other firms, often face a binary decision, opting to incorporate either in their

---

<sup>91</sup> Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1282 (2008).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Dammann & Schündeln, *supra* note 16.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Broughman, Fried & Ibrahim, *supra* note 15, at 87.

<sup>102</sup> *Id.*

home state or in Delaware.<sup>103</sup> As depicted in Table 2 of their research paper, the majority of sample firms, specifically 67.8% of the same firms, chose Delaware as their initial state of incorporation.<sup>104</sup> Among the remaining firms, 32.2%, that did not choose Delaware, a significant portion, specifically 28.7%, incorporated in their respective home states. Only a minor fraction, 3.5%, of the sample firms opted to incorporate in a jurisdiction other than Delaware or their home state.<sup>105</sup>

If we compare to the previous research by Dammann and Schündeln, Fried, Broughman and Ibrahim’s research also highlights that larger firms exhibit a greater likelihood of incorporating in Delaware, consequently reducing the likelihood of incorporating in their home state.<sup>106</sup>

Let’s draw comparisons among the results obtained by Alon-Beck, Dammann, and Fried. Dammann and Fried’s databases, notably predating the era of unicorn firms, differ in their scopes. Dammann’s database lacks a clear distinction between small private firms and startups, grouping all firms into a singular database. While Dammann does differentiate between sizes within privately owned firms, Fried’s research specifically focuses on early-stage startups and does not encompass mature or large startups that have received early rounds of financing.

Dammann's findings emphasize the relevance of size for privately held firms. In general, the majority of privately held firms tend to incorporate in the state where they are headquartered. Furthermore, Dammann notes that size indeed matters, with large firms featuring a substantial number of employees showing a distinct trend. Specifically, 57% of large firms with about 1,000 to 4,999 employees and 41% of very large firms with over 5,000 employees choose to remain incorporated in their primary business state. For those incorporated outside their state, around 80% opt for Delaware, indicating a prevalent choice among larger entities. In contrast, Fried’s research reveals that 67% of startups in their early stages opt for incorporation in Delaware.

See chart below for comparison between the studies.

Aspect	Dammann and Schündeln	Fried, Broughman, and Ibrahim	Alon-Beck
<b>Focus</b>	Privately held companies, did not separate between SMEs and startups, but lumped all private firms together, with special emphasis on large corporations.	Startup firms.	Unicorn firms.
<b>Time Frame</b>	2005-2007 (predates the widespread emergence of unicorns).	2000-2002 (predates the widespread emergence of unicorns).	1995-2022.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



<b>Sample Size</b>	266,531 close company observations.	1,998 U.S.-based startups.	220 U.S.-based unicorns.
<b>Incorporation Trends</b>	Majority established legal status in the same state as primary business headquarters.	Binary decision: Home state or Delaware.	Delaware.
<b>Large Corporations (Excluded Subset)</b>	93% of corporations with 20 or more employees are incorporated locally. Of the remaining 7% incorporated elsewhere, 53% choose Delaware.	Not applicable; focuses on small and medium startups.	Not applicable.
<b>Very Large Corporations (<math>\geq</math> 1,000 employees)</b>	57% (1,000-4,999 employees) and 41% (more than 5,000 employees) are incorporated in their primary business state. Of those incorporated elsewhere (outside their state), about 80% choose Delaware.	Not applicable.	Not applicable.
<b>Delaware Incorporation (Among Chosen States)</b>	20-99 employees - 2.07% 100-1,000 employees – 9.16% 1,000-4,999 employees – 33.14% >5,000 employees - 49.75%	67.8% of startups chose Delaware.	97% of startups chose Delaware.
<b>Home State Incorporation (Among Chosen States)</b>	20-99 employees - 95.66% 100-1,000 employees - 85.40% 1,000-4,999 employees - 57.61% >5,000 employees - 41.34%	28.7% of startups incorporated in their home states.	...% of startups incorporated in their home states.
<b>Incorporation Outside Home State and Delaware</b>	20-99 employees – 42.21% 100-1,000 employees – 60.92% 1,000-4,999 employees – 76.71% >5,000 employees – 83.07%	3.5% of startups opted for a jurisdiction other than Delaware or their home state.	...% of startups opted for a jurisdiction other than Delaware or their home state.

Now, let's shift our focus to our exploration of unicorns.

### C. *New Unicorn Data*

Employing empirical analysis supported by hand-collected data on unicorns' incorporation and headquarter choices, the study below delves into private company charter competition in the United States. By doing so, it contributes to an enhanced scholarly understanding of the market for corporate

law.<sup>107</sup> Contrary to the prevailing perspective that privately held corporations typically choose to incorporate in the states where their primary business operations are situated, this Article challenges and refutes that notion.

To validate my hypothesis, suggesting that a heightened presence of out-of-state investors and the adoption of the National Venture Capital Association's ("NVCA") model charter documents by prominent law firms are associated with a greater probability of unicorns incorporating in Delaware, I examine data from a specifically chosen sample of unicorn companies. This section provides an overview of my dataset and offers summary statistics related to the incorporation status of unicorn firms within the sampled cohort.

## 1. Data Collection

In an effort to gain deeper insights into the global landscape of privately held innovation driven firms, particularly those decorated with the desirable "unicorn" status, I embarked on a comprehensive hand extraction of information from different platforms, including PitchBook and various Departments of State Divisions of Corporation. I collected information related to registered businesses, corporate entities, entity names and types, incorporation details and related filings. The primary focus of this research was to unveil the geographical distribution of these high-valued startups, shedding light on both their headquarters and the jurisdictions where they are officially incorporated or reincorporated. It's important to note that the accuracy and availability of specific data points may vary depending on the level of disclosure by the unicorn firm and the stage of development.

### a) Research Design

Data was obtained from PitchBook's Unicorn Tracker until the year 2021. PitchBook's unicorn tracker contains all new unicorn companies formed since the beginning of 2016. It provides a list of all unicorns that are created in a given year in that time period.<sup>108</sup>

The data is limited to U.S.-based unicorn companies. The research involves a cross-sectional examination of the unicorn firms' incorporation and headquarters locations. Subsequently, the date of incorporation and headquarters location information were extracted from public data sources for each firm. I retrieved information on the date of incorporation utilizing Delaware's Department of State, Division of Corporations, to ascertain the location of incorporation. I matched, verified and compared data on headquarters location using public data from Delaware's Department of State and other states department of state websites.

**Independent Variable:** Date of incorporation, value of corporation above \$1 billion

**Dependent Variables:** Location of incorporation, Location of headquarters

---

<sup>107</sup> *See id.*

<sup>108</sup> Rubio, *supra* note 62.

The data collection process involved extracting pertinent information from the following sources:

(1) Pitchbook

Pitchbook is a financial data and software company that specializes in collecting and providing information on private market transactions, including data on unicorn firms. PitchBook's extensive database is a source renowned for its thorough coverage of private market transactions. Specifically, the dataset encompassed details on unicorn startups, defined as privately held companies with valuations surpassing the \$1 billion threshold. Key variables included the startup's name, current valuation, funding history, executive leadership, and, crucially, its geographic locations for headquarters and incorporation.

(2) Departments of State Divisions of Corporation

Corporate law varies by state. I accessed data from Departments of State Divisions of Corporation, from the following states: Delaware, New York, California, Nevada, Wyoming, Maryland and North Carolina. The data collection on business incorporations involved navigating the respective government agencies responsible for overseeing corporate registrations. The common data points collected on business incorporations, included entity names, dates of formation and types of entity.

## 2. Methodology

The methodology employed was descriptive statistics to analyze the distribution of unicorns based on their date of incorporation, location of incorporation, and location of headquarters. It involved a systematic process of gathering, organizing, and analyzing information to address the specific research question – where unicorns are incorporated and headquartered?

For each company included in my sample, I gathered information on the initial state of incorporation. I compared it with research on both public firms by Daines (2002), Bebchuk and Cohen (2003) and private firms by Dammann and Schündeln (2011) and Fried, Broughman and Ibrahim (2014). My findings indicate that unicorn firms will face a binary decision, opting to incorporate either in their home state or in Delaware.

The following provides descriptive statistics for the 220 firms in my sample.

a) Pitchbook

By navigating through PitchBook's rich repository of private market data, I compiled a comprehensive list of unicorn startups, capturing key details on each entity, specifically, where the entity was founded and where is it headquartered.

The data extraction process involved cross-referencing multiple sources to ensure accuracy and completeness, mitigating the risk of overlooking critical information.

b) Departments of State Divisions of Corporation

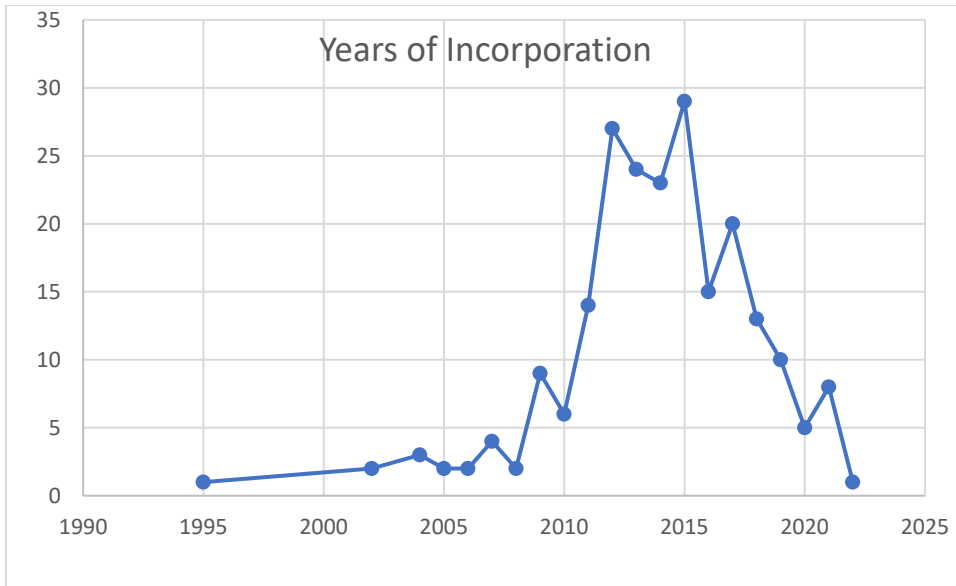
By navigating through the states' rich repository of divisions of corporation databases, I searched for entity names, dates of formation and types of entity. The data extraction process involved cross-referencing the results with other states' divisions of corporations and sources to ensure accuracy and completeness, mitigating the risk of overlooking critical information.

3. Key Insights & Results

The study aims to present a comprehensive overview of the distribution of American unicorn companies based on their date of incorporation, location of incorporation, and location of headquarters. The dataset used included 220 U.S.-based unicorns.

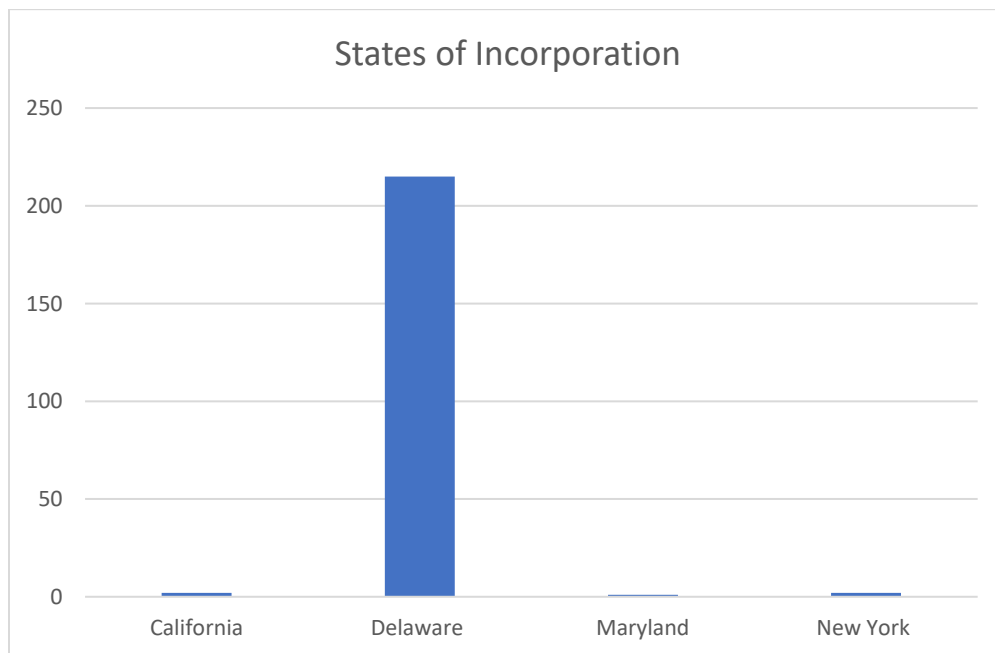
The chosen state of incorporation has remained extremely consistent, with only 5 out of the 220 unicorns in my data not incorporating in Delaware. Meanwhile, the headquarter locations, while less predictable based on the data, indicate a preference for California.

Table 1.



In table 1, I have data on the years of incorporation, the incorporation locations, and the headquarter locations for 220 of these companies. Based on a sample of 220 firms, the number of U.S. unicorns per year increased noticeably from 2010-2015 and has since begun dropping again.

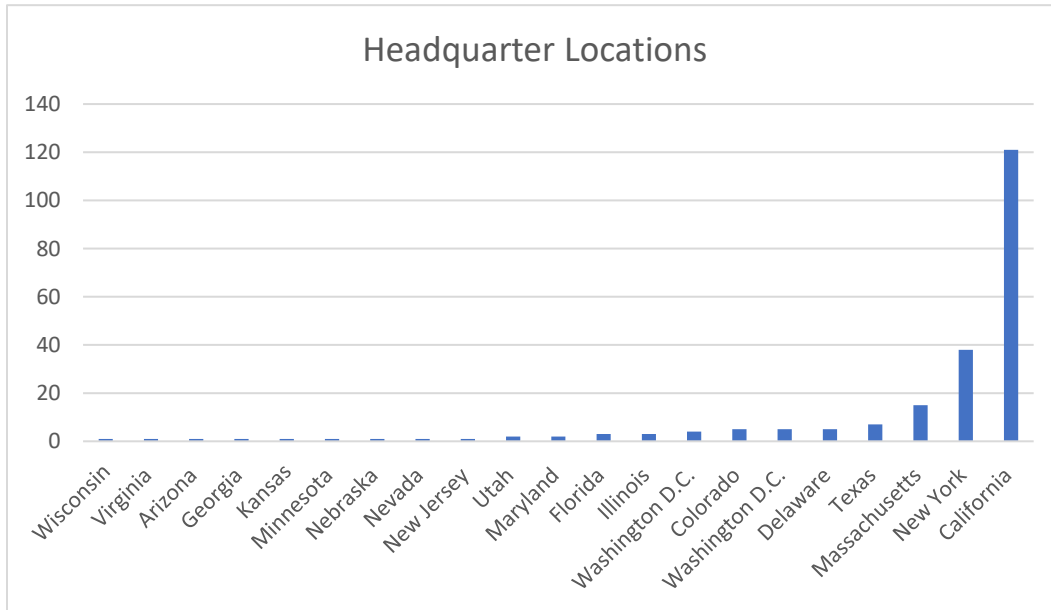
Table 2.



In table 2, the collected data revealed that roughly 97% of the unicorns in the dataset are incorporated in Delaware. Out of the 220 unicorns in the sample, a

significant majority—215 firms—chose Delaware. Only 5 firms made a different choice, with 2 selecting California, and 2 opting for New York, and surprisingly, 1 choosing Maryland.<sup>109</sup> This data underscores Delaware’s predominant status as the preferred incorporation destination for unicorn firms within the U.S. startup ecosystem.

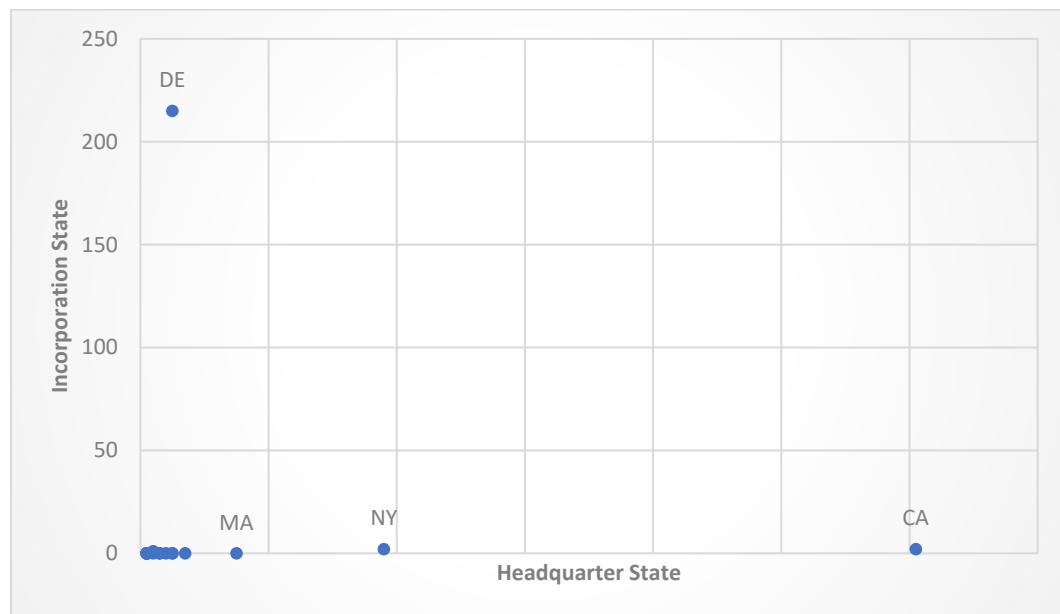
Table 3.



In table 3, the collected data revealed a nuanced picture of the national distribution of unicorn startups. Geographical patterns emerged, showcasing concentrations of these high-value entities in particular regions in the United States.

<sup>109</sup> It should be noted that the Maryland unicorns is not a REIT. REITs are companies that own and often operate income-producing real estate or related assets, including office buildings, shopping malls, apartments, hotels, resorts, self-storage facilities, warehouses, and mortgage loans. They do not develop property for sale, but instead buy and develop primarily to operate them as part of an investment portfolio. Real Estate Investment Trusts (REITs), INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investingbasics/investment-products/real-estate-investment-trusts-reits>. Eighty percent of the public-traded variation of REITs are based in Maryland. See Note, Spencer C. Ebach, *A Reputation to Uphold: Maryland Courts and the Continued Development of REIT Law*, 80 Md. L. Rev. Online 73 (2021) (describing Maryland’s success in attracting real estate investment trusts).

Table 4.



A scatter plot illustrates the relationship between the state of incorporation and the headquarters location with the prominent outliers labeled.

By juxtaposing the headquarters and incorporation locations, it became possible to discern strategic decisions made by these startups, their investors and lawyers in selecting their operational and legal bases.

#### 4. Implications

The findings of this research hold implications for various stakeholders, including investors, policymakers, and industry analysts. Understanding the geographical preferences of unicorn startups may provide a valuable framework for investment strategies, regulatory considerations, and regional economic assessments.

Despite these general trends, there may be a suggestion that unicorn firms are distinguished from typical startups, and therefore may exhibit different behavior in their choice of incorporation state.

## 5. Challenges and Limitations

While the data collection process was thorough, there are always potential challenges and limitations. Some startups may operate in stealth mode or disclose limited information, which impacts the comprehensiveness of the dataset. Additionally, data may be subject to change due to dynamic business environments, funding events, or corporate restructuring.

Limitations include the reliance on publicly available data and potential discrepancies between official records and the information available on PitchBook. Due to ethical considerations, the data involved is publicly available. No identifiable personal information is utilized, and the study adheres to privacy regulations.

## 6. Additional Data

### a) Extended Time to Exit

Unicorns are staying private for longer periods as noted above. Their strategy aligns with a broader trend in the startup ecosystem. Unicorns are different from other startup firms because they deliberately choose to delay IPOs (or other exits) and remain private to navigate business challenges, maintain control, and optimize their growth strategies without the immediate pressures of public markets.<sup>110</sup>

To illustrate these claims, I'm building on Strebulaev's research. Strebulaev conducted a study on 1,110 U.S.-based VC-backed unicorns. His study focused on their exit strategies,<sup>111</sup> where the definition of an exit event encompasses public listing, acquisition, bankruptcy, or liquidation. He found that unicorns are delaying their exits and are staying private longer. As of March 1, 2023, 601 companies, constituting 54% of the total, had exited the market.<sup>112</sup>

The most common exit route for unicorns was through an IPO, with 311 companies, or 52%, opting for this method. Another notable trend was going public via a Special Purpose Acquisition Company ("SPAC"). Eighty-six unicorns, accounting for 14%, chose this method, with examples such as Offerpad, Heliogen, and BARKBOX, INC.<sup>113</sup> A smaller subset of six unicorns, equivalent to 1%, chose

---

<sup>110</sup> See Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 560 (2016) ("[E]ntrepreneurs value corporate control because it allows them to pursue their vision (i.e., any business strategy that the entrepreneur genuinely believes will produce an above-market rate of return) in the manner they see fit."). See also Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 COLUM. L. REV. 941, 941 (2020) ("[R]eallocation of control rights raises an inevitable tradeoff between investors' protection from agency costs and the controller's ability to pursue its idiosyncratic vision, making the value of different allocations of control rights both firm-specific and individual-specific. It is thus inherently impossible to create objective valuation models for reallocation of control rights.").

<sup>111</sup> See Ilya Strebulaev, LINKEDIN (2023), [https://ve.linkedin.com/posts/ilyavcandpe\\_stanford-stanfordgsb-venturecapital-activity-7054093580126076928-W16H](https://ve.linkedin.com/posts/ilyavcandpe_stanford-stanfordgsb-venturecapital-activity-7054093580126076928-W16H) (last visited Jan. 25, 2024).

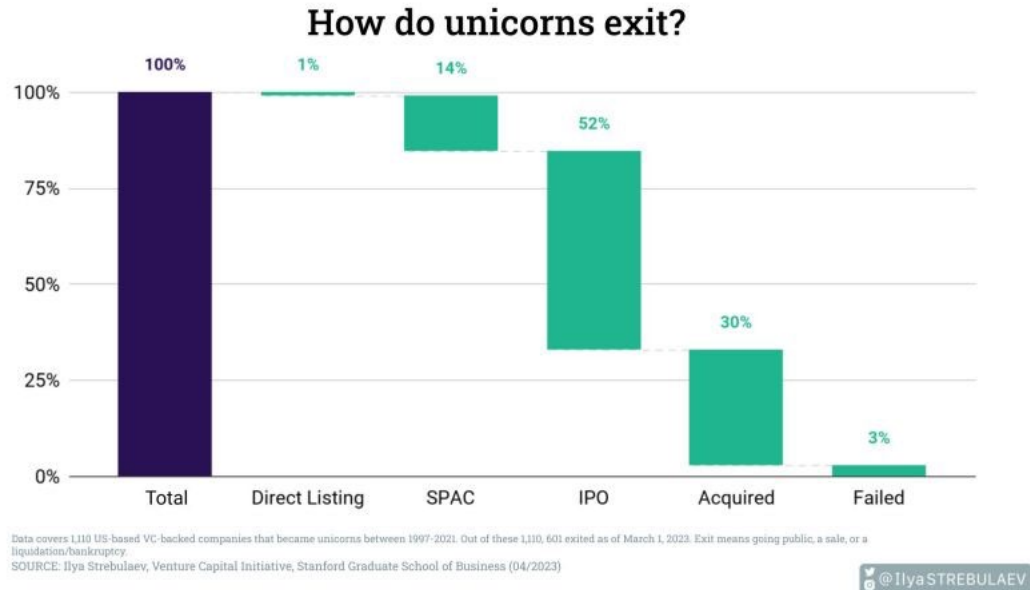
<sup>112</sup> *Id.*

<sup>113</sup> See Anat Alon-Beck, Moran Ophir, Miriam Schwartz-Ziv & John Livingstone, *SPAC Directors:*



a direct public listing for their exit strategy. Examples of companies employing this method include Asana, Squarespace, and Roblox.<sup>114</sup>

Approximately 30% of unicorns, totaling 180 companies, opted for acquisition by other entities, including other companies and private equity funds. Examples of such acquisitions include Salesloft, Indeed, and Headspace.<sup>115</sup> Finally, 18 companies, or 3% of all exited unicorns, faced outright failure through bankruptcy or closure. Examples of these cases include BlockFi and Celsius Network, emphasizing that startups may also encounter challenges in ways beyond traditional exit strategies, such as being acquired at a lower valuation.<sup>116</sup>



## b) Time to Get to Unicorn Status

How long does it take for a privately held firm to achieve unicorn status? In Strebulaev’s examination of the time it takes for companies to achieve unicorn status, he found that the median unicorn in his sample of 1,123 companies took seven years from founding to attain a valuation of \$1 billion or more.<sup>117</sup> Notable companies such as Tesla, SentinelOne, and Affinivax Inc. align with this profile.<sup>118</sup>

Interestingly, the most recent unicorns, entering the sample in 2020 and 2021, took, on average, a comparable number of years to achieve unicorn status as those that became unicorns prior to 2020.<sup>119</sup> This indicates a consistent trend across different time periods. However, there is substantial variability among unicorns,

*Big Tech’s New Approach to Skirting Antitrust*, U. PA. J. BUS. L. (forthcoming 2024).

<sup>114</sup> See Strebulaev, *supra* note 111.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

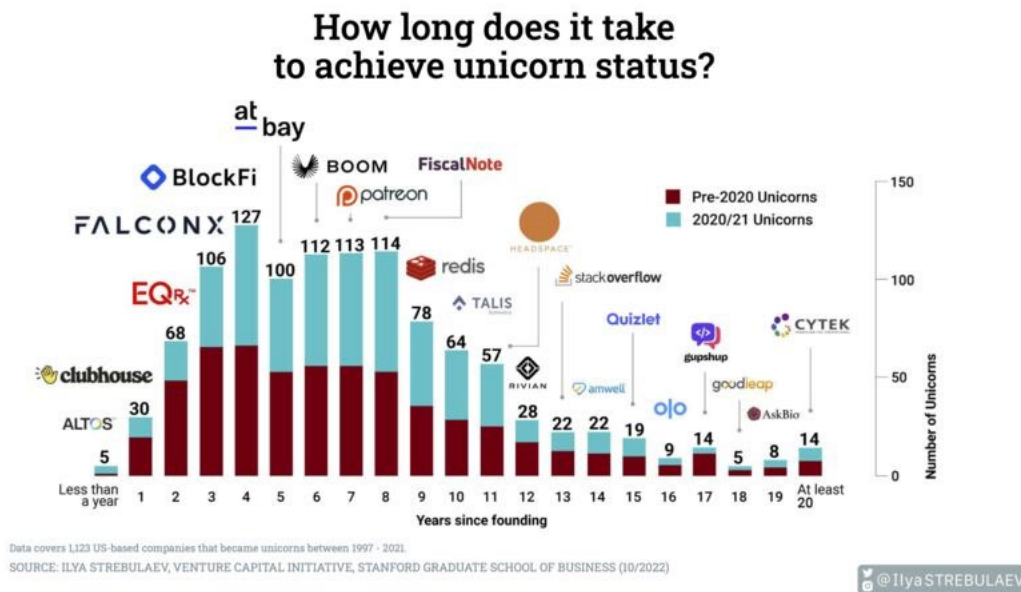
<sup>117</sup> See Strebulaev, *supra* note 111.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

with three out of four companies achieving unicorn status within nine years of their founding.<sup>120</sup>

Some companies achieved unicorn status very rapidly—Altos Labs in about a year, and EQRx in about two years.<sup>121</sup> In contrast, others took significantly longer, such as Quizlet, which took 15 years, and Cytek Biosciences, which took 28 years.<sup>122</sup> These results suggest that the growth trajectory is highly company-specific. Unlike Strebulaev, I feel that the influence of market conditions is also an important factor to consider in determining the time it takes for a company to achieve unicorn status.



#### IV. DELAWARE'S SECRET SAUCE: WHY BILLION-DOLLAR UNICORNS FLOCK TO THE FIRST STATE

Unicorns overwhelmingly choose Delaware for incorporation, with 97% of these U.S. firms opting for it. This article explores the reasons behind this choice, using network theory to highlight the roles of standardization, learning, and path dependence in shaping corporate governance practices and financial markets.

##### A. The Attributes of Delaware's Legal System

Sophisticated investors—those who are large, well-informed, and experienced—prefer to invest in companies that incorporate in Delaware with its stable and predictable legal frameworks. By ensuring fair and efficient legal processes, Delaware's legal system fosters greater investor confidence. The

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

following provides compelling evidence of these advantages, highlighting why Delaware continues to attract unicorns.

## 1. The Role of Judicial Independence in Attracting Investment

Investors typically seek legal environments where their rights and investments are protected, and where the legal framework is predictable and fair. The work of Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer underscores the critical role that judicial independence plays in achieving these goals, particularly within common law systems such as Delaware's.<sup>123</sup>

Judicial independence allows courts to make decisions free from external pressures, whether political or economic. This impartiality is crucial for investors, who feel more secure when legal decisions are made fairly and without bias, enhancing their willingness to invest.<sup>124</sup>

The Delaware judicial system has lower formalism, which means that legal processes are less rigid and more adaptable, leading to quicker and more efficient dispute resolution. This flexibility is advantageous for investors seeking timely and predictable legal outcomes.<sup>125</sup>

Judicial independence and lower formalism in Delaware contribute to better contract enforcement and enhanced property rights security.<sup>126</sup> Effective contract enforcement ensures that agreements are upheld, and any breaches are addressed swiftly and fairly. Enhanced property rights security means investors' assets are protected against unlawful infringement, further boosting their confidence.<sup>127</sup>

Recently, Delaware courts have faced scrutiny and legislative bypassing due to decisions in cases like *Moelis, Tornetta, Crispo v. Musk*, and *In re: Activision*.<sup>128</sup> The Corporation Law Council of the Delaware State Bar Association responded by drafting amendments to the Delaware General Corporation Law (DGCL), including Section 122(18). Submitted on May 23, 2024, and adopted on June 20, 2024, the proposal, signed into law by Governor John Carney, met near-universal opposition from academics, the plaintiffs' bar, and several judiciary members. This issue is outside the scope of this article.

---

<sup>123</sup> Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Delaware is a common law system, with its roots in appellate decisions and precedents, which offers strong protections for property rights. The common law system, characterized by adversarial dispute resolution and judicial independence from the executive and legislative branches, was historically developed to safeguard property and contract rights, limiting interference from the crown. For more on the history of the common law system see Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

<sup>127</sup> *Id.*

<sup>128</sup> *Moelis: Moelis & Co. v. Wilmington Savings Fund Society*, FSB, 2019 WL 1570082 (Del. Ch. Apr. 11, 2019); *Tornetta: Tornetta v. Musk*, 2019 WL 4566943 (Del. Ch. Sept. 20, 2019); *Crispo v. Musk: Crispo v. Musk*, C.A. No. 2022-0666-KSJM, 2022 WL 6693660 (Del. Ch. Oct. 5, 2022); *In re: Activision: In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025 (Del. Ch. 2015).

## 2. Contractual Framework and Enforcement

The principle of freedom of contract, enabling sophisticated parties to freely negotiate their agreements' terms and depend on their enforceability, is and always has been, a cornerstone of Delaware law.<sup>129</sup> Delaware is known for its robust respect for contract law and its tendency not to interfere in agreements between sophisticated parties. This hands-off approach fosters trust and predictability in business dealings, encouraging investors and startups alike to choose Delaware as their jurisdiction of incorporation.

Both Jensen and Meckling's framework and the residual control rights framework of Grossman, Hart, and Moore emphasize the role of the legal system in protecting investor rights.<sup>130</sup> The quality of the judiciary affects the kinds and extent of contracts executed.<sup>131</sup> Effective enforcement by Delaware courts is crucial for maintaining corporate governance and finance. When investor rights are well-protected and enforced, investors are more willing to finance firms, whereas inadequate protection leads to poor corporate governance and finance. Network effects lead to greater efficiency in this legal market by reducing complexity and fostering predictable outcomes.

It should be noted that recently there was some controversy over several decision by the Delaware Court of Chancery, as noted above. Specifically, the *Moelis* decision has raised significant concern among lawyers representing the VC industry. On February 23, 2024, the Delaware Court of Chancery's decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company* invalidated a stockholder agreement between Moelis and its controlling shareholder, Ken Moelis. This decision drew immediate criticism from the venture capital industry and members of the Delaware bar, who described it as having "shaken up the existing state of governance and management of Delaware corporations."

This ruling has prompted critiques that it undermines the enforceability of shareholder rights provisions, introduces uncertainty, shifts the balance of power, and complicates the drafting of agreements—issues critical for venture-backed startups. As a result, it was reported that the VC industry is reconsidering its reliance on Delaware for incorporation and is adopting new strategies to safeguard its interests. In response to the backlash, the governor signed a new bill to counteract the effects of this decision. While a full discussion of this issue is outside the scope of this paper, I do not believe that this decision will result in a mass exodus from Delaware or change the current unicorn incorporation practices.

---

<sup>129</sup> See *Abry P'rs V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032, 1061–62 (Del. Ch. 2006) ("sophisticated parties" can "make their own judgments about the risk they should bear"); see also *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch.), aff'd in part, rev'd in part on other grounds, 892 A.2d 1068 (Del. 2006) ("Delaware law is strongly inclined to respect" negotiated agreements and "will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract"); John A. Kupiec & Mark E. McDonald, *Chancery Court Highlights Tension Between Freedom of Contract and Corporate Fiduciary Duties*, HARV. CORP. GOV. BLOG (June 6, 2023), <https://corpgov.law.harvard.edu/>.

<sup>130</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>131</sup> *Id.*

### 3. Efficiency and Impartiality

Delaware's legal system exemplifies the advantages of a well-functioning common law system. Despite attempts by other states and countries to replicate Delaware's court structure and legal practices, there are three aspects that are uniquely Delawarean.

First, Delaware's bench and bar are renowned for their experience and efficiency. The Chancery Court, in particular, benefits from the Delaware legal ecosystem, which is comprised of expert decision-makers and a cadre of government-supervised enforcement attorneys.<sup>132</sup>

Second, as noted in more detail above, Delaware maintains a non-partisan judiciary, a feature difficult to replicate and crucial for ensuring impartiality in legal decisions. Third, as observed by Chief Justice William Rehnquist, the expertise of Delaware's Court of Chancery, demonstrated through thousands of opinions interpreting corporate law statutes, sets it apart from other state courts. The high volume of corporate litigation in Delaware has refined its laws, while allowing business planners to try to mitigate the cost of litigation or avoid litigation.<sup>133</sup>

Finally, Delaware's reputation for high-quality legal decisions has fostered global trust, contributing to its dominance in the business world. All these factors enhance the state's legal attractiveness to the following repeat players.

#### B. Networks of Repeat Players

Repeat players in unicorn firms, such as seasoned investors, founders, and legal advisors, significantly influence the choice of incorporation location. Being a repeat player means having extensive experience and multiple engagements in the startup ecosystem, often forming part of a broader network of professionals who share insights and best practices. Their familiarity with Delaware's legal environment creates a strong precedent, encouraging new unicorns to follow suit and incorporate there to benefit from the same advantages.

##### 1. Founders

Unicorn founders are typically repeat players in the entrepreneurial landscape, often with significant prior experience, either from starting successful companies before or from established relationships with influential lawyers and investors. As serial entrepreneurs, founders generally repeatedly initiate and

---

<sup>132</sup> William Savitt, *How Does Delaware Do It? Judges Alone Don't Explain Chancery's Speed*, COLUM. L. SCH. BLUE SKY BLOG (July 28, 2022), <https://clsbluesky.law.columbia.edu/2022/07/28/how-does-delaware-do-it-judges-alone-dont-explain-chancerys-speed/>.

<sup>133</sup> Stephen Choi, Mitu Gulati & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* (Univ. of Chicago L. & Econ., Olin Working Paper No. 405, Univ. of Chicago Pub. L. Working Paper No. 217, Duke L. Sch. Pub. L. & Legal Theory Paper No. 236 (May 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1130358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130358)).

develop multiple businesses over their careers and possess deep industry knowledge.<sup>134</sup> To illustrate, note that the research discussed above by Strebulaev reveals the prevalence of serial entrepreneurship among unicorn founders.<sup>135</sup>

These findings underscore the strategic advantage of serial entrepreneurship (and VC backing) in navigating the complexities of scaling high-growth companies. Serial entrepreneurs bring valuable insights and resilience from past ventures, enhancing their ability to innovate and attract investment. They will tend to choose Delaware law for their startups, because they are leveraging Delaware's well-established legal framework and business-friendly court system, which offer robust protections for investors and predictability in corporate governance. Their familiarity with Delaware's legal environment and their network's collective endorsement create a strong precedent, encouraging new unicorns to follow suit and incorporate there to benefit from the same advantages.

## 2. Investors

In the dimension of capital-raising, the structure of financial contracts between recipients and providers of venture capital (VC) is pivotal. Delaware, being a preferred jurisdiction for incorporation, provides a flexible and well-established legal framework that governs these contracts. Investors typically negotiate terms that include equity ownership, board representation, and control rights, ensuring their interests are protected. There are several groups of investors.

### a) Venture Capitalists

The venture capital industry plays a crucial role in the unicorn ecosystem. Unicorns are typically backed from the early stages by VC investors. VCs bring unique contracts and organizational capabilities that mitigate challenges like uncertainty, risk, information asymmetry, agency problems, “lemons,” and adverse selection.<sup>136</sup> Their extensive experience in funding and scaling high-growth startups equips them to navigate complex business environments adeptly, thereby enhancing the strategic decision-making of unicorns and promoting growth and stability in their operations.<sup>137</sup>

Venture capitalist are active investors and as such might favor Delaware's legal system for its stability and predictability, which simplifies the due diligence

---

<sup>134</sup> Recent studies indicate that having previous experience as a founder significantly influences future entrepreneurial success. D. Cumming, U. Walz, & J.C. Werth, *Entrepreneurial Spawning: Experience, Education, and Exit*, 51 FIN. REV. 507 (2016). Moreover, founders who have previously succeeded are more likely to attract venture capital investment. D. Hsu, *Experienced Entrepreneurial Founders, Organizational Capital, and Venture Capital Funding*, 36 RES. POL'Y 722 (2007). Serial entrepreneurs achieve success in their subsequent ventures. P. Gompers, A. Kovner, J. Lerner & D. Scharfstein, *Performance Persistence in Entrepreneurship*, 96 J. FIN. ECON. 18 (2010).

<sup>135</sup> Strebulaev, *supra* note 111.

<sup>136</sup> See Alon-Beck, *Alternative Venture Capital*, *supra* note 60.

<sup>137</sup> C. Casamatta, *Financing and Advising: Optimal Financial Contracts with Venture Capitalists*, 58 J. FIN. 2059 (2003); O. Bengtsson, *Relational Venture Capital Financing of Serial Founders*, 22 J. FIN. INTERMEDIATION 308 (2013).

process and streamlines investment decisions for startups seeking funding.<sup>138</sup> The standardization offered by Delaware-incorporated entities further facilitates investor familiarity and expedites legal processes, reinforcing Delaware's attractiveness as a jurisdiction for unicorn incorporation.<sup>139</sup>

Vcs use sophisticated contracts to protect their investments and align incentives between founders and investors. These contracts often include provisions for control rights, liquidation preferences, anti-dilution protections, and board composition.<sup>140</sup> Delaware's legal framework supports these complex arrangements, providing a conducive environment for the intricate terms and conditions typical in VC financing. The state's legal infrastructure ensures that these contractual agreements are enforceable and effective, which is crucial for maintaining the delicate balance of interests between various stakeholders in high-value startups.<sup>141</sup>

## b) Alternative Venture Capitalists

Alternative venture capitalists are groups of sophisticated investors, including hedge funds, private equity firms, sovereign wealth funds, family offices,

---

<sup>138</sup> Many have written on VCs' influence on startups and the creation of public companies. See, e.g., Christopher Barry et al., *The Role of Venture Capital in the Creation of Public Companies: Evidence from the Going Public Process*, 27 J. FIN. ECON. 447 (1990); Paul A. Gompers, *Grandstanding in the Venture Capital Industry*, 42 J. FIN. ECON. 133 (1996); Peggy M. Lee & Sunil Wahal, *Grandstanding, Certification, and the Underpricing of Venture Capital Backed IPOs*, 73 J. FIN. ECON. 375 (2004); William L. Megginson & Kathleen A. Weiss, *Venture Capital Certification in Initial Public Offerings*, 46 J. FIN. ECON. 879 (1991).

<sup>139</sup> See Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 771–72 (2009); see also William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992); Christina M. Sautter, *Delaware as Deal Arbiter*, 77 WASH. & LEE L. REV. 1269 (2020).

<sup>140</sup> For analysis on VC contracts, see generally Steven N. Kaplan, Frederic Martel & Per Strömberg, *How Do Legal Differences and Experience Affect Financial Contracts?*, 16 J. FIN. INTERMEDIATION 273 (2007); Steven N. Kaplan, Berk A. Sensoy & Per Strömberg, *Should Investors Bet on the Jockey or the Horse? Evidence from the Evolution of Firms from Early Business Plans to Public Companies*, 64 J. FIN. 75 (2009); Steven N. Kaplan & Per Strömberg, *Venture Capitalists as Principals: Contracting, Screening, and Monitoring*, 91 AM. ECON. REV. 426 (2001); Steven N. Kaplan & Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, 70 REV. ECON. STUD. 281 (2003); Steven N. Kaplan & Per Strömberg, *Characteristics, Contracts and Actions: Evidence from Venture Capitalist Analyses*, 59 J. FIN. 2177 (2004).

<sup>141</sup> Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (asserting that Delaware courts attract corporate charters and have developed a distinctive corporate lawmaking structure and process); Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 771–72 (2009) (asserting that Delaware courts set norms through its jurisprudence that create “predictability and expediency in adjudication”); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) (arguing that Delaware establishes standards through its national dominance in corporate law); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997); Joseph R. Slight III & Elizabeth A. Powers, *Delaware Courts Continue to Excel in Business Litigation with the Success of the Complex Commercial Litigation Division of the Superior Court*, 70 BUS. LAW. 1039, 1039 (2015) (examining Delaware's prominent position in resolving corporate disputes).

and corporate venture capital arms. They use different strategies to invest in unicorns like late-stage investments, large check sizes, and secondary market purchases.<sup>142</sup> They often co-invest with traditional VCs, form strategic partnerships, and provide substantial resources and operational support.

Alternative venture capital investors also rely on Delaware's legal framework which can be tailored to the needs of experienced and knowledgeable investment entities.<sup>143</sup> They use common deal structures and clauses, which became benchmarks, aiding in smoother deal-making processes. These specific terms and structures became standardized due to network effects. All the groups, including investors and entrepreneurs, rely on these established norms, which streamline negotiations and enhance mutual understanding. As more unicorn companies adopt Delaware specific provisions, while continuing to incorporate in Delaware, their perceived effectiveness increases, encouraging others to follow suit.

### 3. Industry

Delaware courts influence more than just dispute resolution. Judicial opinions shape negotiation conduct and the behavior of dealmakers, as well as the contractual terms they agree upon. Delaware thus serves as both a dispute resolver and a norm-setter in deal-making. Practitioners and other industry groups, in turn, pioneer new deal structures while adapting to Delaware's evolving legal precedents.

#### a) Practitioners

Lawyers representing startups and unicorns often fall into two distinct groups: deal lawyers and litigators. Deal lawyers specialize in corporate transactions such as mergers, acquisitions, and venture capital financing, while litigators handle disputes that may arise post-transaction. Though there is some synergy between these groups, they are very different.

Deal lawyers and firms focus on intricate corporate transactions, where litigation is perceived as a cost of doing business. They depend on the flexibility of Delaware's legal framework, which is crucial for negotiating and drafting complex agreements. These practitioners innovate new deal structures while responding to and evolving with Delaware's legal precedents. Deal lawyers can live anywhere but are generally located in clusters of high-tech ecosystems.

Litigators, on the other hand, benefit from the consistency of Delaware's legal framework, which provides a rich repository of precedents and predictable outcomes. These lawyers are often more centrally located in Delaware to litigate under the state's *pro hac vice* rules, which require an active participant in the

---

<sup>142</sup> See Alon-Beck, *Alternative Venture Capital*, *supra* note 60.

<sup>143</sup> See Yael V. Hochberg et al., *Networking as a Barrier to Entry and the Competitive Supply of Venture Capital*, 65 J. FIN. 829 (2009); Laura Lindsey, *Blurring Firm Boundaries: The Role of Venture Capital in Strategic Alliances*, 63 J. FIN. 1137 (2008); Darian M. Ibrahim, *Financing the Next Silicon Valley*, 87 WASH. U. L. REV. 717, 720 (2010).



management of the case in compliance with Delaware court rules.

The Delaware Court of Chancery does not accept the notion of “local counsel” and does not allow a more limited role for Delaware attorneys, even when non-Delaware counsel are leading the litigation or managing most of the work.<sup>144</sup> In fact, the Court emphasizes that a Delaware attorney of record bears full responsibility for every aspect of their client's case, including the content of pleadings and adherence to discovery obligations.<sup>145</sup> This allows Delaware litigators to navigate complex legal challenges with confidence, leveraging Delaware's well-established legal principles to advocate effectively for their clients in court.

There is concentration among Delaware law firms. The five prominent Delaware law firms include: Potter Anderson, Richard Layton and Finger, Morris Nichols, Young Conaway and Prickett Jones. While Skadden and, to a lesser extent, Wilson Sonsini also operate in Delaware, they are typically considered outliers as national firms. The five firms listed above are truly the key players in Delaware's legal landscape.

Deal lawyers rely on the litigators. While both deal lawyers and litigators find Delaware law attractive for its clarity, flexibility, and precedent-driven approach, making it a preferred jurisdiction for representing startups and unicorns across various legal matters.<sup>146</sup>

## b) Judges

The prominence of repeat players such as venture capitalists, investors, lawyers and founders is largely due to their reliance on seasoned professionals in Delaware, especially the judges. Many judicial officers have previously worked for prominent Delaware law firms.

---

<sup>144</sup> As illustrated in cases like *Wood v. U.S. Bank Nat'l Ass'n*, 2021 Del. Ch. LEXIS 21, at 19 (Del. Ch. Feb. 4, 2021), the Court of Chancery does not acknowledge the role of purely local counsel, regardless of the involvement of *pro hac vice* admitted counsel or who takes the primary role in the case. See also *James v. National Finance, LLC*, 2014 Del. Ch. LEXIS 254, at 12 (Del. Ch. Dec. 5, 2014) and *State Line Ventures, LLC v. RBS Citizens, N.A.*, 2009 Del. Ch. LEXIS 233, at 1 (Del. Ch. Dec. 2, 2009).

<sup>145</sup> As noted in *James*, 2014 Del. Ch. LEXIS 254, at 38, the Delaware lawyer who appears in court remains accountable for the case and its presentation, irrespective of who drafted documents or handled specific tasks. See also the Principles of Professionalism for Delaware Lawyers. See Delaware Court of Chancery, Guidelines to Help Lawyers Practicing in the Court of Chancery (2012), <http://courts.state.de.us/Chancery/docs/CompleteGuidelines.pdf>.

<sup>146</sup> For more on the role of lawyers, see generally Ofer Eldar and Lorenzo Magnolfi highlighting the critical role of lawyers, finding that large firms are less likely to incorporate in their home state compared to small firms, a trend they attribute to the guidance provided by law firms. Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12(2) AM. ECON. J.: MICROECON. 60, 81 (2020). Survey data collected by William J. Carney, George B. Shepherd and Joanna Shepherd Bailey further underscores the importance of legal advice in choosing a state of incorporation, showing that issuer counsel plays a predominant role when companies go public. William J. Carney, George B. Shepherd & Joanna Shepherd Bailey, *Lawyers, Ignorance, and the Dominance of Delaware Corporate Law*, 2 HARV. BUS. L. REV. 123, 138 (2012). Their analysis of IPO data supports this finding, indicating that while both the issuer's and the underwriter's lawyers influence the choice, the issuer's lawyer has a greater impact. See *id.* at 148. Additionally, Robert Anderson IV provides empirical data confirming that lawyers play a key role in the decision of where to incorporate. Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 710 (2018).

To illustrate, for example, note that the following judges at the Court of Chancery worked for these firms. Chancellor McCormick worked for Young Conaway, VC Laster worked for Richard, Layton and Finger, VC Glasscock for Prickett Jones, VC Fioravanti worked for Prickett Jones, VC Will worked for Wilson Sonsiti and Skadden, and VC Molina for Richard, Layton and Finger. If we look at the Complex Commercial Litigation Division (“CCLD”), we will find that Eric Davis worked for Skadden, Vivivan L. Medinilla worked for Young Conaway, Sheldon Rennie worked for Prickett Jones, and Megahn A. Adams worked for Morris James (another prominent Delawarean firm).

The Delaware legal cluster is structured around this close knit social structure of the Chancery’s ecosystem, which contributes to knowledge spillovers. This cluster formation promotes innovation in litigation, corporate governance and knowledge spillover for the following five reasons.<sup>147</sup> First, clusters can foster competition thereby encouraging the court to continue to innovate and expedite litigation process.<sup>148</sup> Second, clusters can form many networks and linkages that can speed knowledge spillovers and innovation relevant to their industry.<sup>149</sup> Third, clusters can provide information (such as market research and supply chain analysis).<sup>150</sup> Fourth, clusters create environments that help entrepreneurial firms and encourage new firm formation.<sup>151</sup> Fifth and finally, by relying on their social capital, clusters offer another forum for the trade of intellectual property (including other intangible assets).<sup>152</sup>

---

<sup>147</sup> See MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (1990) (approximately twenty years ago, Michael Porter, a Harvard Business School professor, introduced and popularized the concept of “clusters”); PAUL R. KRUGMAN, *GEOGRAPHY AND TRADE* (1991) (Economist Paul Krugman also brought attention to the significance of geographical economics.). It should be noted that economists also refer to underlying concept as agglomeration economies (which explain the benefits that firms gain by locating close to each other), which dates back to the work of Alfred Marshall in 1890. Regional clusters are defined as “geographic concentrations of inter-connected companies and institutions in a particular field,” which include “governmental and other institutions.” See also Harald Bathelt, Anders Malmberg & Peter Maskall, *Clusters and Knowledge: Local Buzz, Global Pipelines and the Process of Knowledge Creation*, 28 *PROGRESS IN HUMAN GEOGRAPHY* 31-56 (2004) (Innovation is the process of commercializing new ideas, including the traditional notion of science- and technology-based breakthroughs, which can lead to new products, services, and production processes, as well as new ways of organizing activities, structuring organizations, and finding new supply sources for raw materials.); See Savitt, *supra* note 131.

<sup>148</sup> See Bathelt, Malmberg & Maskall, *supra* note 147 (which strongly encourages and pressures companies to innovate both to stay competitive and to increase profitability).

<sup>149</sup> *Id.* (because cluster entities share an industrial focus, they tend to be in an excellent position to make use of knowledge and innovation relevant to an industry).

<sup>150</sup> *Id.* (that individual companies would lack without access to the cluster’s resources and/or expertise).

<sup>151</sup> *Id.* (These small and young firms are often more open to—and more in need of—new ideas. These new ideas also tend to have a greater chance of making their way into practice due to the greater flexibility and more direct exchange of ideas among the various levels of the managerial hierarchy in smaller firms).

<sup>152</sup> *Id.* (as opposed to businesses relying on the market place and its potentially costly and lengthy enforcement of intellectual property rights).

### c) Trade Associations

Trade groups play a crucial role in supporting startups by advocating for favorable policies, providing access to resources, and fostering a supportive community for entrepreneurs.<sup>153</sup>

These trade groups, specifically, the National Venture Capital Association (“NVCA”), actively engages with legal professionals, both deal and litigation practitioners, to develop these documents. The NVCA’s deal documents are often tailored to Delaware law, making it easier for startups to adopt them if they incorporate in Delaware.

Representing the U.S. venture capital industry, the NVCA creates standardized legal documents for venture capital transactions, thereby streamlining the investment process. These widely accepted documents serve as benchmarks, minimizing obstacles and expediting startup funding. They recommend Delaware as a venue in its deal documents because of the state's favorable legal environment and predictable corporate laws.

To illustrate, see the example of the Certificate of Incorporation (“COI”), a crucial document defining stock rights. In 2015, the NVCA designated Delaware as the preferred forum in model COIs, establishing it as the industry norm.<sup>154</sup> This standardization aims to enhance efficiency and transparency in deal making and negotiations, benefiting both investors and entrepreneurs.<sup>155</sup>

The NVCA’s adoption of Delaware in its model deal documents is also a

---

<sup>153</sup> The following are examples of trade groups: The National Venture Capital Association (NVCA) represents the U.S. venture capital community, fostering a favorable environment for startups and investors through advocacy, networking, and education; TechNet is a bipartisan network of technology CEOs and senior executives promoting the innovation economy through policy advocacy and providing a platform for startups to connect with industry leaders; The National Small Business Association (NSBA) represents small businesses, including startups, at the national level, offering advocacy, resources, and networking opportunities; Engine Advocacy supports startups through policy advocacy, research, and community engagement, focusing on issues like patent reform and net neutrality; The Small Business & Entrepreneurship Council (SBE Council) provides resources, education, and advocacy to help startups thrive in a competitive market; National Association of Women Business Owners (NAWBO) advocates for women entrepreneurs, offering networking and educational opportunities to support the growth of women-owned startups; The Indus Entrepreneurs (TiE) is a global network providing mentoring, networking, and education to connect startups with experienced entrepreneurs and resources; Lastly, the Association for Corporate Growth (ACG), while primarily focused on middle-market companies, offers resources and networking opportunities for startups aiming to scale and grow, helping them connect with investors and industry experts.

<sup>154</sup> See Amended and Restated Certificate of Incorporation, NVCA (2020), [https://www.google.com/search?q=nvcas+amended+and+restated+certificate+ofincorporation+2020&oq=nvcas+amended+and+restated+certificate+ofincorporation+2020&gs\\_lcrp=EgZjaHJvbWUyBggAEEUYOTIKCAEQABiABBiiBDIKCAIQABiABBiiBDIKCAMQABiABBiiBDIKCAQABiABBiiBNIBCTExMTM2ajBqNKgCALACAA&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=nvcas+amended+and+restated+certificate+ofincorporation+2020&oq=nvcas+amended+and+restated+certificate+ofincorporation+2020&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIKCAEQABiABBiiBDIKCAIQABiABBiiBDIKCAMQABiABBiiBDIKCAQABiABBiiBNIBCTExMTM2ajBqNKgCALACAA&sourceid=chrome&ie=UTF-8).

<sup>155</sup> NVCA Financing Documents, COOLEY GO, <https://www.cooleygo.com/documents/nvca-financing-documents/> (last visited Jan. 25, 2024); see Scott R. Bieier & Jonathan D. Gworek, *The Evolution of the NVCA Documents*, MORSE (Dec. 29, 2015), <https://www.morse.law/news/evolution-of-nvca-documents/>.

strategic choice that underscores the recognition of Delaware’s regulatory regime, known for offering superior corporate governance and reliability, as particularly well-suited for the distinctive needs and complexities of privately-held firms. Delaware’s reputation is reinforced by industry standards and recommendations from organizations like the NVCA, creating a path-dependent preference for Delaware incorporation.

Many NVCA-affiliated lawyers represent investors and choose Delaware law for its strong shareholder protections and predictability. This choice aligns with their fiduciary duties, ensuring a stable investment environment and reinforcing trust among institutional investors.

In summary, the NVCA’s standardized practices and investor preferences drive the trend of firms incorporating in Delaware. The NVCA’s influence reinforces Delaware as the norm, creating a self-perpetuating effect where more unicorns choose Delaware to align with industry standards and attract venture capital.

## V. FROM SEED TO STARDOM: NAVIGATING THE DISTINCTIONS BETWEEN PRIVATE COMPANIES, STARTUPS, AND UNICORNS

In the evolving landscape of corporate law, the distinction between private and public companies has traditionally guided policymaking and scholarly analysis. However, the rise of large venture capital (VC)-backed unicorns—private companies valued at over \$1 billion—complicates this binary classification. These unicorns, which may remain private for extended periods, represent a distinct category that amalgamates features and policy concerns of both private and public corporations. Consequently, policymakers and scholars should exercise caution before generalizing all “private companies” or all “startups” as homogenous groups.

### A. What’s the difference?

In corporate literature, the terms “close” or “private” corporations have traditionally been used to describe firms that impose restrictions on the tradability of their shares. Historically, these terms were used interchangeably to refer to companies that were not publicly traded. However, the emergence of startup and unicorns has prompted a reevaluation of these classifications.

Within this broader framework, there are two key distinctions to consider. The term “closely held” is used to describe companies where shares are owned by a limited number of individuals. In these firms, interpersonal relationships are often central to management and decision-making. The close-knit nature of ownership typically means that the company’s shares are not widely traded and that ownership is concentrated among a few shareholders.

While the term “privately held” refers to companies that are not listed on public stock exchanges, they may have a larger and more diverse shareholder base compared to closely held firms. Privately held companies can include a broad range

of investors and may allow for some degree of share tradability on secondary markets, even though they are not subject to the same level of public scrutiny as publicly traded companies. This distinction highlights the varied nature of private companies, which can range from closely controlled entities to more broadly held organizations with some liquidity options for their shares.

Private companies typically operate without the regulatory scrutiny imposed on public companies. Their governance and transparency requirements are managed within a more limited scope. These companies benefit from less stringent reporting requirements and public disclosure norms compared to their publicly traded counterparts, allowing for more flexibility in operational decisions and strategic planning. However, the rise of unicorns—private companies valued over \$1 billion—has further complicated these traditional classifications.

Unicorns often blend characteristics of both closely held and privately held companies. They may have a broad shareholder base and significant investor involvement but remain private to retain flexibility and confidentiality. This evolution underscores the need for more nuanced classifications that account for the unique operational dynamics and market roles of modern private companies.

It is important to recognize that unicorns differ significantly from early-stage startup firms. Startups are characterized by their early-stage status and focus on innovation and rapid growth. Often funded by angel investors, seed funding, or early-stage venture capital, startups operate in a high-risk, high-reward environment. Startups typically aim to scale quickly and hope to eventually transition to public markets as part of their growth trajectory.

VC-backed unicorns represent a distinct category of large private companies with substantial market valuations and extensive venture capital backing. These entities often remain private for extended periods, defying traditional startup trajectories that lead to public offerings.

## B. Policy Considerations

Unicorns navigate a hybrid regulatory environment, blending private and public market expectations. They face challenges with investor protections, governance standards, and disclosures typically associated with public companies, despite remaining private. This creates difficulties for policymakers and regulators in applying frameworks meant for either private or public entities.

### 1. Regulatory Frameworks

The rise of unicorns calls for customized regulatory approaches that acknowledge their unique operational dynamics. Regulators may need to develop hybrid frameworks that strike a balance between fostering innovation and maintaining market integrity. These frameworks could entail tailored rules on transparency and disclosure to mitigate risks associated with information asymmetry while accommodating the confidentiality needs crucial to unicorn operations. By enhancing transparency requirements, policymakers can address concerns about market impact and investor protection without stifling the

innovative potential that distinguishes unicorns from more traditional corporate entities.

Policy concerns for unicorns blend elements from both private and public sectors. They face pressures for robust governance and transparency akin to public companies due to their high valuations and the significant number of stakeholders, including employees with stock options and secondary market investors. Moreover, the presence of large institutional investors necessitates investor protections similar to those in public markets, contributing to market stability considerations. Unicorns, by virtue of their size and market influence, also pose systemic risks that can impact markets, innovation ecosystems, and economic stability, necessitating careful regulatory and policy oversight.

## 2. Corporate Governance

Unicorns demand governance models that draw from both private company practices and those applicable to public corporations. Effective governance for unicorns includes robust board composition, clear fiduciary duties, and mechanisms designed to safeguard minority shareholders and other stakeholders. Given their substantial market valuations and diverse investor bases—including secondary market participants—unicorns must adopt sophisticated investor relations strategies to manage expectations and sustain stakeholder trust over the long term.

## 3. Market Dynamics and Innovation

Unicorns play a pivotal role in driving innovation and economic growth. Policymakers should recognize their contribution to the innovation ecosystem and craft regulatory interventions that support rather than hinder their ability to innovate and scale. This approach involves monitoring market dynamics closely to anticipate and address any systemic risks that unicorns, due to their size and influence, might pose. By fostering an environment conducive to innovation while ensuring regulatory preparedness for potential market disruptions, policymakers can effectively balance the benefits of unicorn-driven innovation with the need for market stability and investor confidence.

In summary, this evolving landscape also presents fertile ground for scholarly inquiry into the intersection of corporate governance, regulatory policy, and the economic impact of emerging high-growth private enterprises.

## VI. CONCLUSION

This Article unveils a significant shift in the historical landscape of privately-held corporations, challenging the conventional wisdom that favored states of incorporation align with the location of headquarters or primary business operations. Contrary to past trends, the empirical findings reveal a substantial evolution in private markets, particularly among unicorn firms. Notably, 97% of

these high-profile entities opt for Delaware incorporation, deviating from the traditional practice and establishing a new norm aligned with the preferences observed in public firms.

The Article explores the transformation of the market for privately-held corporations, emphasizing the evolution of unicorn firms and their impact on corporate law and governance in the United States. Delaware's historical dominance as a preferred jurisdiction for public companies, coupled with its allure for privately-held entities, underscores its significance in shaping corporate governance practices. The debate surrounding a "race to the top" or "race to the bottom" in corporate law highlights the complex interplay between shareholder and management interests. Unfortunately, this debate can't really accurately be framed as this - it's a combination of both of these theories and all of the underlying subfactors for each category.

Delaware is often positioned as a management-friendly jurisdiction. There is no question that it is management friendly, but, in my view, Delaware is also shareholder protective. This is an important distinction that is often missing in the analysis in other corporate law scholarship. In Delaware management is given deference to a point, albeit for a pretty long time, but once a certain line is crossed, the shareholders still have protections and recourse.

The transformative shift in corporate dynamics, where private firms assume characteristics traditionally associated with public entities, necessitates a nuanced understanding of incorporation preferences and governance structures. Insights gleaned from unicorn data collection and analysis reveal the pivotal role of Delaware in facilitating corporate governance among these high-growth entities.

Highlighting the influence of standardized documents, particularly those offered by the NVCA, the Article emphasizes Delaware's preferred status for venture-backed startups. The NVCA's inclusion of Delaware as the preferred forum selection further solidifies its position, citing reasons such as the modern DGCL, well-established case law, the prestigious Court of Chancery, and an efficient Secretary of State's office.

In conclusion, this Article contributes novel insights into the dynamics of private company charter competition, bridging the gap in understanding the market for corporate law. It sheds light on the strategic considerations of unicorn firms, shaping the trajectory of incorporation choices and regulatory landscapes in the United States.