London as Delaware?

Adam C. Pritchard

University of Michigan Law School, acplaw@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Business Organizations Law Commons, Comparative and Foreign Law Commons, Securities Law Commons, and the State and Local Government Law Commons

Recommended Citation

LONDON AS DELAWARE?

A.C. Pritchard*

I. INTRODUCTION

Jurisdictional competition in corporate law has long been a staple of academic—and sometimes, political—debate in the United States. State corporate law, by long-standing tradition in the United States, determines most questions of internal corporate governance—the role of boards of directors, the allocation of authority between directors, managers and shareholders, etc.—while federal law governs questions of disclosure to shareholders—annual reports, proxy statements, and periodic filings. Despite substantial incursions by Congress, most recently in the Sarbanes-Oxley Act of 2002,1 this dividing line between state and federal law persists, so state law arguably has the most immediate impact on corporate governance outcomes.

Companies have a good deal of discretion in choosing their state of incorporation. The allocation to the states of primary authority over corporate governance, when combined with the “internal affairs” doctrine (which holds that courts must apply the law of the state of incorporation to corporate law disputes), has created an “issuer choice” regime in state corporate law.2 Corporations are free to choose the law of the state that best suits the needs of their directors, managers, and shareholders, without regard to where the corporation principally does business. States can compete to attract firms by offering the most attractive menu of corporate law rules. Competition for corporate charters is not just about state pride: States that attract incorporations are rewarded with tangible benefits in the form of charter fees. Of equal importance, incorporations are also likely to produce work for lawyers in the state, who may be an influential lobbying force.3

Critics of issuer choice argue that states compete by pandering to corporate managers. These critics charge that states are caught in a

---

* Frances and George Skestos Professor of Law, University of Michigan.
"race to the bottom," catering to management by providing rules that promote management entrenchment at the expense of shareholders.\(^4\) According to this view, states prevail in this competition by leaving shareholders vulnerable to overreaching by corporate managers. These critics point to state antitakeover laws as evidence for their position.\(^5\) Advocates for state control over corporate governance respond that competition between states for corporate charters generates a "race to the top." According to this camp, competition in the capital markets compels managers to offer shareholders corporate law rules that effectively constrain the agency costs inherent in the separation of ownership and control.\(^6\)

Whether the race is to the top or the bottom, Delaware has prevailed in the competition for corporate charters. That state draws a substantial majority of the nation's largest public companies to incorporate under its corporate code, despite its relatively small population and share of the national economy.

Lately, the topic of jurisdictional competition has spread from corporate law to its close cousin, securities law. Historically, issuers listed their stock for trading on one of the exchanges in the country where they principally did business. Improvements in communication and related technologies, however, have made possible an international market for stock exchange listings that resembles, in many respects, the long-standing federal market for corporate charters in the United States. In an era when businesses are consolidating across national boundaries to create international conglomerates, the notion of a corporation having a "home" country seems increasingly archaic. Corporations, at least those of a certain size, are now citizens of the world, although they may identify with the jurisdiction where their headquarters are located. Today, corporations around the world realistically can choose the location, or locations, where they want to raise capital. They can also choose where they want their common shares to trade. Corporations are not limited to their "home" country in making these critical business decisions, and the capital-raising decision need not be linked to the listing decision.

Academics have offered their views on the normative desirability of

---

issuer choice in the worldwide market for listings for close to a decade. More recently, groups more intimately involved in live policy disputes have entered the fray. The last few years—not coincidentally following closely the enactment of the Sarbanes-Oxley Act—have seen a flurry of reports bemoaning the decline of American competitiveness in the market for international listings.

As of today, the primary contenders in that listing market are New York and London. These cities have long dominated the competition for international listings, with New York the historic leader. Not coincidentally, those two markets have also long been the deepest and most liquid—and liquidity attracts listings. The source of that liquidity is hotly contested, and the competition for listings between the United States and the United Kingdom raises important and interesting policy questions. In this essay, I want to put aside those normative topics. Instead, I want to focus on prediction—can we pick a winner in this market? Is London or New York likely to prevail in the battle for corporate listings?

This international question can be explored through the historical lens of domestic competition for corporate charters. In this essay, my central claim is that Delaware has prevailed in that competition by being highly attuned to demands by directors who choose the site of incorporation. That responsiveness is driven, in part, by its small population and relatively insignificant share of the U.S. economy. Delaware has very few public companies, which limits the number of managers and shareholders who might seek to influence the direction of its corporate law. Translating this insight to the market for exchange listings, London is the smaller, and therefore potentially more nimble, of the two primary international contenders. Should we expect the David of London to prevail over the Goliath of Gotham?

I proceed as follows. I begin in Part II by exploring how Delaware has prevailed in the U.S. market for corporate charters. Part III then looks at the development of the international market for corporate listings.

---


listings and compares the strengths and weaknesses of London and New York in that competition. In Part IV, I assess whether London shares Delaware’s advantages in jurisdictional competition. Is London likely to prevail in the market for listings? My answer, ultimately, is no. In the long term, New York is likely to lose in the market for listings, but so is London. I offer concluding speculations about the effect of democracy on the market for listings in Part V.

II. JURISDICTIONAL COMPETITION: THE DELAWARE ADVANTAGE

A. Statutes

Does Delaware corporate law differ from that of other states in a way that is likely to appeal to directors choosing a state of incorporation? Recent work suggests that the competition for corporate charters is largely bilateral: States compete with Delaware to retain corporate charters. Notably, Delaware does not compete on price. Delaware’s incorporation fees are generally higher than those charged by other states, and incorporating in Delaware does not produce any particular tax advantages. If we look at the substance of the law, what is on offer in Delaware? The differences between the Delaware General Corporation Law and its main competitor, the Model Business Corporation Act (adopted in more than forty states) are slight, so doctrinal analysis yields few obvious clues. Notably, egregious forms

9. Different corporate laws may be better or worse for different corporate constituencies. In particular, restrictions on payouts to shareholders may appeal to creditors, potentially decreasing a firm’s cost of debt. Wald and Long found that firms incorporated in states with tighter payout constraints, including California and New York, carry lower levels of debt than firms incorporated in Delaware, which does not impose a fixed payout constraint. Compare CAL. CORP. CODE § 500 (West 2009), and N.Y. BUS. CORP. LAW § 510 (McKinney 2009), with DEL. CODE ANN. tit. 8, § 170 (2010). See also John K. Wald & Michael S. Long, The Effect of State Laws on Capital Structure, 83 J. FIN. ECON. 297 (2007). Sattar A. Mansi, William F. Maxwell and John K. Wald find that firms from states that restrict payouts have better credit ratings and lower yield spreads. They also found antitakeover statutes reduce the cost of debt for investment-grade firms. Sattar A. Mansi et al., Do State Laws Matter for Bondholders? (Feb. 20, 2007), available at http://www.mbs.ac.uk/Research/accountingfinance/documents/Mansi-Maxwell-Wald.pdf.


11. Romano found that firms are likely to reincorporate in Delaware before committing to a program of mergers and acquisitions. Roberta Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. ECON. & ORG. 225 (1985). Delaware, with its doctrine of “independent legal significance,” gives corporations flexibility in structuring transactions and will not import procedures applicable to one type of transaction into another type. See Heilbrunn v. Sun Chemical Corp., 150 A.2d 755 (Del. 1959) (rejecting “de facto merger” claim). This doctrine takes on practical importance in allowing acquiring corporations to avoid shareholder votes and appraisal rights in most circumstances. Delaware corporations can set up a holding company structure without a shareholder
of self-dealing, such as looting and tunneling, are proscribed by all states, although procedures for enforcing those proscriptions may vary. So U.S. corporate law is intolerant of kleptocracy that discourages outside investment in many developing nations.

With explicit self-dealing prohibited in all U.S. jurisdictions, some scholars have focused on managers' quest for self-preservation. Antitakeover provisions are thought to promote management entrenchment; perhaps these provisions drive the competition for charters? Do antitakeover provisions explain Delaware's dominance in the competition for corporate charters? Although Delaware's antitakeover statute is generally considered less protective of management than most states, these differences may have little practical effect. Delaware courts have validated the use of the poison pill to ward off takeovers, so managers of Delaware corporations are relatively immune to external threat. And firms at the initial public offering (IPO) stage can make this defense effectively invulnerable by adopting a staggered board, even in relatively takeover-friendly Delaware.

Despite managers' ability to construct their own antitakeover defenses, Guhan Subramanian found that firms are more likely to incorporate in the state where their headquarters are located if that state

vote, DEL. CODE ANN., tit. 8, § 251(g) (2010), which allows Delaware corporations to complete acquisitions through a triangular merger using a subsidiary without triggering a shareholder vote or appraisal.

12. Although intuitively plausible, the evidence for this proposition turns out to be rather thin. See Murali Jagannathan & A.C. Pritchard, Does Delaware Entrench Management? (Univ. of Mich., Working Paper No. 93, 2009) (finding that companies incorporated in states with stringent antitakeover protection do not have a lower rate of management turnover).

13. A substantial portion of the preference for antitakeover provisions found by Subramanian, see supra note 10, may be explained by the exodus from California. California does not provide any explicit antitakeover statutes, although its corporate code does make it very difficult to cash out minority shareholders, CAL. CORP. CODE § 1101(e) (West 2009), which may provide some secondary antitakeover effect. Unlike most antitakeover provisions, however, this provision is not subject to waiver by the target company's board. Avoiding this provision may push firms headquartered in California to incorporate in Delaware. California also stands out in that the validity of the poison pill has not yet been established there; the pill may run afoul of that state's provision precluding discrimination among shareholders. Id. § 203. In Delaware, by contrast, the validity of the pill is firmly established, although there are limits on the type of pill that can be adopted.

If the quest for antitakeover protection were the primary motivation for fleeing California, however, Delaware seems an unlikely destination: the neighboring state of Nevada not only has a statutory language validating poison pills, NEV. REV. STAT. §§ 78.195(5), 87.350(4), & 78.378(3) (2008), but also gives directors greater discretion in redeeming pills than Delaware. Id. § 78.139. Moreover, Nevada not only has a business combination statute, id. § 78.438, with fewer exceptions than Delaware's, DEL. CODE ANN., tit. 8, § 203 (2010), but unlike Delaware, it has a control share statute. NEV. REV. STAT. § 78.379. In addition to Nevada's relatively stringent antitakeover protections, it is also cheaper than Delaware, both in terms of franchise fees, and in terms of potential litigation costs. Taking all of these factors together, it seems unlikely that California firms choose Delaware incorporation for antitakeover reasons.
UNIVERSITY OF CINCINNATI LAW REVIEW

has adopted antitakeover statutes.14 Rob Daines, however, argues that Delaware’s relatively mild antitakeover statute may minimize management entrenchment. He showed that takeover activity is not lower in Delaware.15 These findings suggest that firms may sort themselves based on their willingness to be taken over. Particularly for firms incorporated in states with stringent antitakeover protection, incorporating in Delaware may be akin to putting a “For Sale” sign on the door of the company’s headquarters. This sorting hypothesis may be undermined, however, by Marcel Kahan, who, after controlling for other factors that might influence choice of incorporation, found no evidence that firms are likely to incorporate in states with antitakeover statutes.16

But these scholars may be looking under the wrong lamppost to explain Delaware’s advantage in the competition for charters. Delaware dominated the market for charters long before the advent of antitakeover provisions. Gordon Moodie showed that Delaware reincorporations surge after Delaware adopts liability protections for directors.17 To be sure, under the corporate law of virtually every state, the combination of the business judgment rule, stringent demand requirements, and broad statutory exculpation provisions means that directors face vanishingly small probabilities that they will be held personally liable for their acts as directors.18

Even if the probability of liability is low, however, directors may take a special interest in provisions protecting them from personal liability if the states’ corporate law does not differ much on other margins. Liability concerns are likely to be salient for outside directors, who have limited ability to control the firm’s litigation exposure because they do

18. See Bernard Black et al., Outside Director Liability, 58 STAN. L. REV. 1055 (2006). Delaware law does not differ significantly from the Model Business Corporation Act (M.B.C.A.) on the question of the standard of care or the protections of the business judgment rule. The M.B.C.A. also tracks Delaware law closely on the question of liability exculpation for breaches of the duty of care; if anything, the M.B.C.A. may be slightly more generous to directors. Compare MODEL BUS. CORP. ACT § 2.02(b) (2002), with DEL. CODE ANN., tit. 8, § 102(b)(7) (2010).
not make day-to-day business decisions. Among outside directors, directors who serve multiple firms are most likely to be concerned about the potential for personal liability because each additional board membership increases the threat of liability. 19 And directors, after all, make the decision where to incorporate. The lawyers who advise those directors are also likely to focus on liability concerns, and lawyers are the most common instigators of reincorporation decisions. 20 Consistent with this line of reasoning, Kahan found that states that have not adopted a liability limitation are significantly less likely to retain firms headquartered in their states. 21

B. Judges

Beyond differences in exculpation and indemnification, Delaware may promise directors more subtle advantages. Kahan found that firms are more likely to incorporate in states with high-quality judicial systems and flexible corporate law rules—two characteristics for which Delaware is well known. 22 Commentators suggest Delaware’s experienced and expert judges who sit on its Court of Chancery may play an important role in protecting shareholder interests. 23 That role is necessarily muted, however, by the very low probability that a director will be held personally liable. The low probability of liability suggests that experienced and expert judges are not important because they are likely to intervene to protect shareholder interests, thereby inducing Delaware board members to act as faithful monitors. Instead, an alternative causal story would suggest quality judges are important because they are likely to give directors comfort that they will not face liability because the judges render litigation outcomes that predictably

---

19. Delaware law is particularly generous on indemnification. Delaware directors who prevail in a lawsuit against them have a statutory guarantee of indemnity from the corporation for the expense of their defense, which may be considerable. See DEL. CODE ANN., tit. 8, § 145(c)). States following the Model Business Corporations Act also provide for guaranteed indemnification, but that provision requires complete exoneration, MODEL BUS. CORP. ACT. § 8.52, whereas Delaware requires indemnification for partial success. See Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Super. Ct. 1974). Delaware may also be more generous in allowing companies to provide permissive indemnification. Compare DEL. CODE ANN., tit. 8, § 145(f), with MODEL BUS. CORP. ACT § 8.56. These differences are muted, however, by insurance policies, which are universal, and go beyond indemnification in the range of conduct that can be covered.

20. See Romano, supra note 11, at 273.
22. Id. at 363; see also Romano, supra note 11, at 280.
To be sure, Delaware law could afford directors total security by granting them complete immunity; Delaware has not gone down that path. Instead, it simply guarantees that when litigation is brought, the directors will not be held personally liable. The predictability of Delaware law is further bolstered by the large stock of precedent that guides its courts. Delaware’s combination of expert judges and relatively comprehensive precedent provides a predictable body of law, at least on the salient point of the potential for director liability.

Notwithstanding the slim chance that a director will be found liable, the experience and expertise of Delaware judges may allow them to play an important “shaming” role, publicly rebuking outside directors for inattention to their duties, even while excusing them from liability. The Delaware Supreme Court’s recent Disney decision is a prominent example of this style of decisionmaking. Delaware judges’ impact is likely to be amplified by the attention given to their decisions by the media and legal academics. Directors may be signaling their quality by pushing their firms to incorporate in Delaware, thereby announcing a willingness to have at least their reputation be held publicly accountable to shareholders through litigation. That willingness is undoubtedly bolstered, however, by the knowledge that they will not personally bear the consequences of suit. The company’s directors and officer’s insurance policy will cover the costs of suit, and that policy will pay any settlement. The directors will not pay out of pocket. Their houses and retirement funds are safe.

The Citigroup decision is a timely exemplar of the predictability of the Delaware judiciary. In that case, the plaintiff shareholders attempted to hold Citigroup directors liable in a derivative action for failure to monitor the bank’s risk taking in subprime mortgage market. Chancellor Chandler framed the theory of liability as a Caremark claim, i.e., a failure by the board to monitor management’s operation of the firm. The court placed an “extremely high burden” on the plaintiff to show that the directors had acted in “bad faith,” which it defined as

24. See Romano, supra note 11.
25. See Macey, supra note 3, at 1132.
27. See In re Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006).
30. Id. at 121–22 (citing In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).
“particularized facts that show that a director consciously disregarded an obligation to be reasonably informed about the business and its risks or consciously disregarded the duty to monitor and oversee the business.”

The rationale for this daunting standard was a familiar one: the need to preserve the board’s ability to exercise its discretion.

Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future. To impose liability on directors for making a “wrong” business decision would cripple their ability to earn returns for investors by taking business risks. Indeed, this kind of judicial second guessing is what the business judgment rule was designed to prevent, and even if a complaint is framed under a Caremark theory, this Court will not abandon such bedrock principles of Delaware fiduciary duty law.

In a nutshell, the “bedrock principle” is that Delaware courts will not second-guess directors. And so that principle was applied in Citigroup, with the Chancellor rejecting the plaintiffs’ claims.

C. The Legislature

The Delaware legislature does its part to reassure outside directors as well. Delaware’s constitution requires a two-thirds vote of the legislature to amend the corporate law. The legislature further enhances predictability with virtually complete reliance on the corporate bar to screen any amendments proposed for the corporate code. The combination of these structural features means that Delaware’s politicians have largely tied their hands when it comes to the corporate code. Partisan politics does not entangle corporate lawmaking. Consequently, interest groups and corporate “reformers”—who have their own agenda—face substantial barriers when seeking changes in Delaware’s corporate law.

More importantly, the state has bonded a good deal of its tax revenue
stream as a guarantee that it will not do anything reckless in the field of corporate governance. Some scholars suggest Delaware’s competitive advantage is tied, in part, to its small population, which ensures that franchise tax revenues will be a significant portion of its overall budget.\textsuperscript{37} That budget contribution amounted to 15% of revenues in 2007.\textsuperscript{38} The crisis du jour will inevitably be met with calls for populist retribution—e.g., Congress’s incursion into corporate governance with the Sarbanes-Oxley Act\textsuperscript{39}—but the constituents of Delaware legislators are unlikely to lead the call. Consequently, Delaware legislators are relatively insulated from the populist backlash that inevitably accompanies economic downturns. Insulating corporate lawmaking from the vagaries of democracy may be Delaware’s most important comparative advantage.

Not only does Delaware’s legislature protect directors from the tides of democracy, it also protects them from the unlikely event of judicial overreaching. Delaware’s reliance on charter fee revenues is a powerful incentive for legislative attentiveness to corporate law. Consequently, should Delaware’s judges slip and do the unpredictable, directors of Delaware firms can be confident that the Delaware legislature will step in to correct the problem. When the Delaware Supreme Court did the unthinkable in \textit{Smith v. Van Gorkom}\textsuperscript{40}—holding the directors of Trans Union personally liable for the careless sale of their company—the Delaware legislature quickly restored equilibrium by allowing corporations to amend their charters to eliminate money damages for duty of care violations.\textsuperscript{41} The Delaware legislature’s swift overturning of \textit{Smith v. Van Gorkom} actually accelerated Delaware reincorporations.\textsuperscript{42} Delaware created a shock to the system, and then benefited from the ensuing uncertainty in the directors’ and officers’ insurance market by fixing the problem more swiftly than its peer states.

\textbf{D. Summing up Delaware’s Comparative Advantage}

Predictability for directors is the theme that unites these points.\textsuperscript{43}

\textsuperscript{37} See Romano, \textit{supra} note 11, at 241.
\textsuperscript{39} See \textit{infra} text accompanying notes 60–68.
\textsuperscript{40} 488 A.2d 858 (Del. 1985).
\textsuperscript{41} \textit{DEL. CODE. ANN.}, tit. 8, § 102(b)(7) (2010).
\textsuperscript{42} See Moodie, \textit{supra} note 17, at 41–42.
\textsuperscript{43} Hamermesh, \textit{supra} note 34, at 1774 (“In predicting the trajectory of future struggle between federal and state governments over the establishment of corporate governance rules, count on Delaware to look for ways to make changes, if at all, that most nearly preserve intact the substance and balance
Delaware provides a relatively certain body of law that gives confidence to lawyers called on to advise their clients. Delaware’s predictability gives comfort to outside directors, who can sleep well at night if they serve on the board of Delaware corporations, regardless of the diligence of their monitoring. Corporate governance failures will inevitably be met with calls for draconian reform, and most worrisomely, imposing liability on the directors who were supposed to be minding the store. Directors of Delaware firms can be confident that those calls will be ignored. As Citigroup demonstrates, even amidst one of the worst financial crises of the century, Delaware directors can rest easy knowing that they will not be held personally liable for the fallout.

III. LONDON AND NEW YORK

London was the preeminent center of finance in the nineteenth century, leveraging its longtime status as a trading center. The historical advantage from international contacts was bolstered by the new wealth created in Great Britain by the early rise of the Industrial Revolution there. The combinations of these factors meant that London enjoyed global ties and a deep source of capital, which it used to finance development around the world. Most conspicuously, London capital markets largely funded the expansion of the U.S. industrial economy. Despite this head start, the cumulative impact of two world wars and the burden imposed by the rapidly disintegrating British Empire wiped away London’s lead. By the end of the second of those two wars, New York emerged as the world’s preeminent financial center.

A. New York’s Ascendance

It was not until the 1990s, however, that the world became small enough to allow New York to translate its status as a financial center into the ability to draw stock exchange listings from outside the United States. During that decade, the New York Stock Exchange and the Nasdaq established themselves as trading venues not only for U.S. companies, but foreign companies as well. Drawn by the unmatched depth and liquidity of the U.S. markets, foreign companies came to the

reflected in the existing law.”).

United States to add to the investment pool available in their home jurisdiction. The U.S. exchanges, of course, had every incentive to be accommodating; more listings meant more fees for the exchanges and more commissions for their broker-dealers.

New York’s status as the world’s leading financial center made it the preferred destination for companies choosing to cross-list on a stock exchange away from their home jurisdiction. New York led this competition through the 1990s, attracting 861 listings by foreign companies during that decade. London trailed badly, garnering only 156 foreign listings during the same period. In 2000, nine of the ten largest IPOs in the world took place in the United States; nearly half of the money raised by non-U.S. companies in IPOs came from listing on a U.S. exchange. New York was riding high.

What did New York have to offer that London (and other jurisdictions) lacked? Listing in New York offered a certain prestige, making clear that a company was “world class.” More tangibly, New York offered liquidity—New York boasted a deeper pool of investment capital than London at that time. Listing in the United States also provided valuable acquisition currency: common stock that could be freely traded in the United States. For growing companies with international aspirations looking to acquire publicly held U.S. companies, having stock that could be used as merger consideration offered considerable appeal. The alternative was cash—an international currency that travels everywhere—but this would have required taking on more debt or offering stock in their home jurisdiction.

A more controversial claim for the New York advantage is that New York provided bonding; foreign companies could signal their integrity by exposing themselves to the rigors of the U.S. disclosure and enforcement regime. That regime permitted foreign companies to credibly precommit to limit self-dealing transactions. The mechanism for precommitment was not a ban on such transaction, but disclosure requirements under exacting U.S. standards, backed by the threat of SEC scrutiny. The U.S. exchanges’ computerized surveillance systems also promised real teeth for enforcing insider trading rules and other prohibitions against market manipulation. Other countries have

48. Id.
followed the U.S. lead in prohibiting insider trading, but enforcement of those prohibitions is either spotty or nonexistent. Of equal significance for companies listing in the United States, misstatements about a company’s fortunes would be subject to the sting of SEC enforcement, generally regarded as step above other jurisdictions, both in the probability and size of sanctions.\textsuperscript{51}

In response to lobbying by the exchanges, the SEC did its part to encourage foreign companies to list in the United States by relaxing a number of potentially expensive requirements for listing in the United States. Most notably, the agency (1) allowed foreign issuers to reconcile their accounts with U.S. generally accepted accounting principles, rather than requiring a new set of financial statements prepared in accordance with U.S. standards;\textsuperscript{52} (2) relaxed certain reporting requirements;\textsuperscript{53} and (3) exempted foreign companies from the short-swing insider trading rule of Section 16 and the proxy requirements.\textsuperscript{54} Conspicuously, however, the SEC did not go so far as to allow foreign companies to merely comply with the disclosure requirements of their home jurisdictions (a “mutual recognition” regime). From the SEC’s perspective, U.S. standards were superior; they could be tinkered with around the edges, but wholesale waiver was not an option. Although the SEC was anxious to bring foreign companies to U.S. exchanges, it recognized that it bore a “significant political risk” from financial scandals involving foreign firms if American retail investors incurred substantial losses.\textsuperscript{55} Stock market losses due to financial scandal make the SEC unpopular; losses from fraud by foreigners are completely unacceptable.

Perhaps this explains why the SEC did not exempt foreign companies from the antifraud rules. Those antifraud rules carried the potential for SEC enforcement. More unpredictably, selling securities in the United States also exposed foreign issuers to Sections 11 and 12 of the


\textsuperscript{52} \textit{See} SEC Form F-1.

\textsuperscript{53} 17 C.F.R. § 240.13a-13(b)(2) (2009) (exempting foreign issuers from quarterly reporting requirements); \textit{Id.} § 243.101(b) (exempting foreign issuers from Regulation FD’s equal access to disclosure requirements).

\textsuperscript{54} 17 C.F.R. § 240.3a12-3.

Securities Act, which carry liability for misstatements made in connection with public offerings, and Rule 10b-5 of the Exchange Act, which makes companies potentially liable for misstatements, even when they have not sold securities. That liability risk, so frequently bemoaned by U.S. companies as increasing their cost of raising capital, made many foreign companies wary of dipping their toes into the U.S. waters. Indeed, the risk of private litigation—unheard of in other jurisdictions until very recently—was frequently cited by executives of foreign companies as the most compelling reason for not listing in the United States. Companies willing to face this risk by listing in the United States sent a strong signal of honesty and integrity (or more cynically, expected lack of volatility in their stock returns).

The twin burdens of SEC disclosure requirements and exposure to securities class actions made listing in the United States a costly proposition for foreign companies, notwithstanding the SEC’s efforts at accommodation. The fact that a significant number of companies were willing to pay this price allowed the SEC to tell a happy story of a race to the top in the competition for international listings. The best companies sought to list in the United States because it had the best regulation, the story went. Left unsaid was the inference that companies that chose not to list in the United States had something to hide. Evidence of a listing premium for companies selling shares in the United States strongly supported the SEC’s account.

B. The (British) Empire Strikes Back

This happy equilibrium for U.S competitiveness did not last. London has overtaken—and by some measures, surpassed—New York. The switch can be traced to 2001–2002, a period marked by two signal developments for the U.S. financial markets. First, the tech bubble collapsed, with the overheated Nasdaq market taking a precipitous dive. The United States’ thirst for “the next Microsoft” had seemingly abated overnight, perhaps quenched by the collapse of Enron and WorldCom. Second, and more tangibly, Congress reacted to the accounting scandals at those companies by enacting a host of new regulatory requirements in the Sarbanes-Oxley Act. Collecting a hodge-podge of reforms,

57. 17 C.F.R. § 240.10b-5.
58. BLOOMBERG & SCHUMER, supra note 8, at 16.
Congress (1) federalized a portion of corporate governance;\(^\text{61}\) (2) took over the regulation of accounting firms from the private sector;\(^\text{62}\) (3) imposed expensive internal controls and certification requirements;\(^\text{63}\) and (4) adopted an array of new sanctions.\(^\text{64}\) The most expensive of these requirements were standards relating to internal accounting controls, requiring both review and certifications of those controls by the chief executive officer (CEO) and chief financial officer.\(^\text{65}\) Foreign company executives proved less than enthusiastic about the spotlight afforded by those certifications. More importantly for the bottom line, especially of smaller (i.e., growth) companies, Sarbanes-Oxley required not only certification of those internal controls, but also auditor attestation of their adequacy.\(^\text{66}\) Auditors proved unwilling to sign off on internal controls that they had not reviewed—thoroughly—and audit costs skyrocketed.\(^\text{67}\) Public companies were in no position to object to the demands of their auditors; terminating an auditor had become tantamount to an admission of fraud, so auditors now held the whip hand in their relations with their client companies. And the language of Sarbanes-Oxley offered no suggestion that the SEC was empowered to exempt foreign issuers.\(^\text{68}\)

The flow of foreign companies stopped, and more worryingly, reversed. After the SEC relaxed standards for foreign companies wanting to delist,\(^\text{69}\) a flood of companies headed for the doors.\(^\text{70}\) London seized the opportunity; fourteen of the top twenty IPOs listed on the London Stock Exchange (LSE) came from outside the United Kingdom in 2005 to 2008. By contrast, only four of the top twenty IPOs

\(^\text{63.}\) Id. § 302, 15 U.S.C. § 7241.
\(^\text{64.}\) E.g., id. § 906, 18 U.S.C. § 1350.
\(^\text{65.}\) Id. § 404(a), 15 U.S.C. § 7262(a).
\(^\text{66.}\) Id. § 404(b), 15 U.S.C. § 7262(b).
\(^\text{69.}\) Termination of a Foreign Private Issuer’s Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Exchange Act Release No. 34-55540, 90 SEC Docket 860 (Mar. 27, 2007).
\(^\text{70.}\) COMM. ON CAPITAL MKTS. REGULATION, SUMMARY OF COMPETITIVENESS MEASURES (2009) (noting that 16% of foreign firms listed on the NYSE delisted in 2007); see also Craig Doidge et al., Why Do Foreign Firms Leave U.S. Equity Markets? (Nat’l Bureau of Econ. Research, Working Paper No. 14245, 2009) (finding that departing firms had lower growth prospects and capital requirements).
in New York came from outside the United States. At the same time, London's pool of liquidity was growing deeper, as it developed its own community of hedge funds and private equity.

Still more ominously for New York, for the first time a small number of U.S. companies chose to list their shares in London, instead of New York. To be sure, most of the companies were not eligible for listing on the Nasdaq, much less the NYSE. A quarter of the U.S. firms, however, could have signed on to the Nasdaq, but instead opted for the London AIM market. London, long known for its "light touch" regulation based on principles, took the next step with the AIM market. The AIM market stood out for its minimal listing standards, essentially requiring only a sponsoring institution—a NOMAD—to vouch for the company. Even listing on the LSE was less burdensome than New York; the LSE only required foreign issuers to comply with the disclosure requirements of their home jurisdiction. London was providing an unencumbered source of liquidity, instead of the bonding opportunity provided in New York. London was winning the race, but the contest suddenly looked like a race to the bottom.

These developments suggested that in the competition for international listings, the United States may have repeated New Jersey's misstep in the competition for corporate listings. Delaware did not start out with the lead in the market for corporate charters. That honor belonged to New Jersey, which was the first state to attract significant numbers of corporate charters from companies located out of state. New Jersey stole a march on New York, the more obvious location for incorporation in the late nineteenth century, by adopting an "enabling" model of corporate law that emphasized contractual freedom.
Jersey’s reputation as a haven for incorporation eviscerated overnight, however, by new laws pushed by Governor Woodrow Wilson in an effort to crack down on business trusts. Corporations quickly fled south to Delaware, which had copied New Jersey’s enabling approach, but did not follow when New Jersey took a more restrictive turn. Delaware grabbed the lead and never looked back. In the market for corporate listings, the United States yielded its lead with the Sarbanes-Oxley Act. Can the United Kingdom dominate the listing market the way Delaware has dominated the charter market?

IV. IS LONDON DELAWARE?

Can London sustain its new momentum? The United Kingdom has a number of characteristics that seem to mirror the factors responsible for Delaware’s comparative advantage. Certainly the financial services industry is critical to the United Kingdom, growing from 5.3% of the economy in 2001 to 9.4% in 2006, and employing half a million people in London alone. From a regulatory perspective, the United Kingdom’s credible and responsive Financial Services Authority (FSA) might be viewed as the securities law analogue to the Delaware Chancery Court’s role in corporate adjudication. The FSA’s “light touch” approach to regulation gives London a predictability edge over New York, which is subject to the SEC’s more intrusive (and expensive) scrutiny. London’s unitary financial services regulator also reduces compliance costs in the United Kingdom relative to those imposed by the splintered regulatory structure in the United States, with its alphabet soup of federal and state agencies regulating broker-dealers, banks and insurers.

Key to Delaware’s ability to maintain and extend its lead in corporate

77. Id. at 326–27.
80. Id. at 14, exhibit 5.
charters has been the Delaware legislature’s restraint. That body was conspicuous in failing to succumb to the quest for populist retribution in the wake of Enron and WorldCom. (To be sure, the demand for revenge may have been mitigated by the fact that neither company was incorporated in Delaware.) Less restraint was shown at the federal level in the United States. By adopting the Sarbanes-Oxley Act, the U.S. Congress demonstrated that it could not be trusted (at least in the eyes of foreign executives and directors). As noted above, the flow of foreign companies to New York largely dried up. By contrast, the British Parliament largely stayed on the sidelines at that time. For its part, the FSA pushed a set of “best practices” for corporate governance, backed only by a disclosure requirement for firms that chose not to follow the best practices directive.\(^3\) That episode suggested that London would follow the Delaware example, affording it a comparative advantage over New York on the predictability front.

More recent events, however, suggest that the regulatory forces in London cannot be so reliably constrained. Consequently, its recently gained allure for listings may be more tenuous. Unlike Delaware, which has a small population and few public companies’ headquarters, the United Kingdom, while benefiting from the financial services industry,\(^4\) cannot completely insulate that industry from the political pressures (pathologies?) typical of modern democracies. Britain has many public companies headquartered there, and of greater current relevance, a substantial representation of the world’s largest banks. The response to the near failure of a number of those banks in the wake of recent credit crisis revealed that the British democratic process was not immune to the inevitable quest for a scapegoat.

The British real estate market was infected by a bubble that paralleled the one that fueled the U.S. economy from 2002 to 2007, and the bubbles popped simultaneously.\(^5\) Unlike 2002, when the British response to the collapse of Enron and WorldCom was restrained, the British response to the financial meltdown was conspicuously un-Delaware-like. Indeed, the United Kingdom’s actions closely paralleled the populist backlash against the moneyed classes that emanated from Washington.\(^6\)

\[^3\] See Cearns & Ferran, supra note 75, at 55–60 (discussing UK Combined Code on Corporate Governance); Afshar & Rose, supra note 67, at 461–63 (discussing “comply or explain” approach of the United Kingdom and listing countries adopting that approach).

\[^4\] See Alistair MacDonald & Cassell Bryan-Low, Turmoil Batters London’s Status as Financial Center, WALL ST. J., Oct. 22, 2008, at A10 (citing government statistics that one in five jobs in the United Kingdom were in financial services).

\[^5\] See id.

\[^6\] See Adam Nagourney, Bracing for a Bailout Backlash, N.Y. TIMES, Mar. 16, 2009, at A14.
The initial British response was just as muddled as the U.S. response. As the markets declined in 2008, the FSA responded by banning short selling for a long list of financial institutions. This strategy of killing the canary in the coal mine, lest it die from the poisonous gases, was also pursued by the SEC, which also limited short selling in an effort to keep the markets propped up. The message for hedge funds and other liquidity providers was clear: Regulators and politicians in both Washington and London believed in the free play of market forces . . . until it became politically inexpedient. When the markets started to go south, policymakers on both sides of the Atlantic retreated to the old time faith in government control, whether or not it was likely to be effective. (For the record, it was not; the markets continued to plunge.)

As the credit crisis deepened, London, like was Washington, was also forced to step in and bail out a number of leading financial institutions. The messy insolvency of Northern Rock pressured the government into adopting new legislation to ensure the orderly resolution of failing banks. And like Washington, London quickly followed government control with populist retribution. Constituents were angry, and limits on executive pay were imposed on executives of financial institutions receiving bailouts on both sides of the Atlantic. To be sure, no British

---

politician sunk to the level of Senator Charles Grassley, who recommended ritual suicide for AIG derivatives traders who received performance bonuses after the government bailed out the insurance company. 94 (Never mind that the traders receiving the bonuses were not the ones responsible for the losses. 95) But British bankers did come in for vandalism of their homes and cars, not to mention bullying of their children at school. 96 To its credit, the British government stood placidly by while the U.S. Congress proposed a 90% tax rate on bonuses at financial institutions receiving government assistance. But the bureaucrats now in charge of the British banks cracked down in myriad irksome ways, such as limiting the use of car services and requiring employees to pay for their own meals on business trips. 97 Trivial matters perhaps, but for productive employees with alternative options, it was another factor pushing them out the door.

The message on both sides of the Atlantic was clear. Regulators told the public that their top priority was to free up lending markets. But they sent a very different message to the bankers making the decisions about whether to make loans: If you make risky loans that turn out badly, we are going to slash your pay. And if you accept bailout money to ameliorate the consequences of your risky lending, we may change the rules of the game retroactively. 98 Not surprisingly, bankers who

---


95. See Dear A.I.G., I Quit!, N.Y. TIMES, Mar. 25, 2009, at A29. Shockingly, the political backlash pushed a number of the AIG managers out the door, increasing the cost of unwinding the losing positions. Liam Pleven & Randall Smith, Action on AIG Unit May Cost Taxpayers, WALL ST. J., Apr. 13, 2009, at C1.


were subject to the restrictions responded that they would repay the
governments' bailout funds ASAP. Banks that had not accepted
money from the government loudly proclaimed that they would not be
lining up at the trough, and that they would sell even strategically
important assets to avoid that fate. Credit markets tightened in
response, despite government efforts to jump-start them.
The governments' message to the small group of bankers that were
actually generating profits for the bailed-out banks was that they should
start looking for greener pastures at the healthier banks or at unregulated
entities. In a situation in which the United Kingdom might have
distinguished itself by parting ways with the United States, it succumbed
to the populist backlash. The CEO of the FSA warned that the
bankers to blame for the crisis should be “very frightened” of the FSA,
and more ominously, declared that “a principles-based approach does
not work with individuals who have no principles.”

Notably, a number of institutions in the United States had to be bullied into taking the bailout money in the first place. Mark Landler & Eric Dash, Drama Behind a Banking Deal, N.Y. TIMES, Oct. 15, 2008, at A1 (“It was a take it or take it offer.”).


See David Enrich et al., Bank Lending Keeps Dropping, WALL ST. J., Apr. 20, 2009, at A1 (reporting reduced lending by banks receiving bailout funds); Liz Rappaport & Jon Milsenrath, Consumer-Loan Plan Is Off to Slow Start, WALL ST. J., Mar. 19, 2009, at A2 (“Some investors are concerned that they too could be exposed to a political storm should they make too much money from the taxpayer-funded program.”).


See, e.g., Sara Schaefer Muñoz, Under Fire, a Top U.K. Watchdog Quits Post, WALL ST. J., Feb. 12, 2009, at C3 (quoting John McCall, chairman of Parliamentary committee examining the banking crisis, asking bank executives: “Why do you think you are hated so much by the public?”).

Peter Thal Larsen & Jennifer Hughes, FSA to ‘frighten’ with tough stance, FIN. TIMES (FT.COM), Mar. 12, 2009, http://www.ft.com/cms/s/0/dbf2b7e-0ef8-11de-ba10-0000779f2ac.html; see also Donald C. Langevoort, The SEC, Retail Investors, and the Institutionalization of the Securities Markets, 95 VA. L. REV. 1032–33 (2000) (predicting that FSA enforcement will become more stringent
The contours of that frightening regulation came into sharper focus with the FSA’s publication of *The Turner Review*. The Chancellor of the Exchequer commissioned Lord Adair Turner, Chairman of the FSA, to review the events that led to the financial crisis and to recommend reforms. Most of the proposed reforms, such as increased capital requirements, in particular for trading books, were predictable. More importantly, major banks were in no position to resist, given their dependence on the promise of a government backstop.

But the focus on the need for capital requirements to be countercyclical will be more difficult to implement simply as a technical matter. More controversial will be the proposal to limit pay structures thought to create undue risk. As a political matter, the proposal to expand regulation to cover entities deemed part of the shadow banking system will face the challenge of those entities fleeing offshore. Underlying all of these proposals is a newfound skepticism of the efficiency of capital markets generally, and a distrust of the process of securitization specifically. Although understandable in light of the dire circumstances that called for the review, does this new skepticism augur a considerably more interventionist attitude going forward? At a minimum, the report suggests that the United Kingdom will now be more sympathetic to attempts to suppress regulatory competition if it promises to limit risk taking.

If the United States and United Kingdom both responded to the credit crisis in a heavy-handed way, is it a wash from a regulatory competition perspective? Perhaps, in the short term, but the response does not bode well for London’s long-term future. This crackdown on financial institutions creates the potential for bifurcating the financial sector into two spheres. The first, populated by the type of institutions that have populated the headlines during the ongoing credit crisis, consists of

---


108. See FIN. SERVS. AUTH., supra note 106, at 53–60.


110. See id. at 79–81.

111. Id. at 74 (“Tighter effective controls in offshore centers will, however, become more important over time as regulation is improved in the major onshore locations and as the incentives for regulatory arbitrage through movement offshore therefore increase.”).

112. Id. at 39–42.

financial institutions that the government has deemed "too big to fail" because their insolvency would threaten the functioning of the financial system. Going forward, these institutions are likely to require the backing of a lender of last resort to have credibility with counterparties. If counterparties lose confidence in the ability of these financial institutions to perform, these massive entities can evaporate virtually overnight, as demonstrated by Lehman Brothers' demise.\textsuperscript{114} The registration of Goldman Sachs and Morgan Stanley as commercial banks reflected their recognition of that market reality.\textsuperscript{115} As the \textit{Turner Review} suggests, these large institutions are likely to face an array of regulation, including considerably more stringent capital requirements.\textsuperscript{116}

The flip side of capital requirements, however, is the lower profits implied by constraints on leverage. Leverage fueled the proprietary trading that drove bank profits during the boom years.\textsuperscript{117} Smaller bets will mean smaller paychecks.\textsuperscript{118} Not satisfied with limiting leverage, regulators may seek to limit pay directly for regulated institutions.\textsuperscript{119} Financial institutions are likely to tolerate this only if their business model requires a very deep pocket as a backstop. And London's pocket is unlikely to be deeper than New York's. Consequently, London's policies are unlikely to be more lax than Washington's—indeed, they may well be dictated by Washington.\textsuperscript{120} If anything, London's regulatory crackdown may be more draconian than the United States', driven by new directives from the European Union.\textsuperscript{121}

\textsuperscript{114} See Jon Hilsenrath et al., \textit{Paulson, Bernanke Strained for Consensus in Bailout}, \textit{WALL ST. J.}, Nov. 10, 2008, at A1 (chronicling the government's decision not to intervene to save Lehman Brothers).


More regulation is likely the best case scenario for these large institutions. The alternative is to simply break them up. Maya Jackson Randall, \textit{Economists Seek Breakup Of Big Banks}, \textit{WALL ST. J.}, Apr. 22, 2009, at A2 (quoting Joseph Stiglitz: "We have little to lose, and much to gain, by breaking up these behemoths, which are not just too big to fail, but also too big to save and too big to manage.").


\textsuperscript{119} Landon Thomas, Jr., \textit{Regulators Worldwide Scrutinize Bakers' Pay}, \textit{N.Y. TIMES}, Mar. 20, 2009, B4 (discussing plan for regulators to control pay at financial institutions to limit risk taking).

\textsuperscript{120} Joe Nocera, \textit{Twins in Finance and Folly}, \textit{N.Y. TIMES}, May 9, 2009, at B1 (arguing that "Britain can't regulate unilaterally anymore—it is simply too dependent on American institutions. Its regulatory response will be to mimic whatever the Obama administration decides to do.").

\textsuperscript{121} See \textit{REVIEW OF THE COMPETITIVENESS OF LONDON'S FINANCIAL CENTRE},
How do these developments in the financial services industry affect the competition for listings? Strong banks—commercial and investment—are one source of liquidity, but they do not dominate trading in the financial markets as they once did. Moreover, as capital requirements for such entities are ramped up, they will become even less important as sources of liquidity because they will need to rein in their proprietary trading. Traders have headed for the door rather than have their pay restricted. Where have they gone? To institutions that have not yet felt the backlash of political retribution. Institutional investors, such as pension funds, mutual funds, and increasingly, hedge funds, have become the predominant sources of investment capital and trading orders. London has become a leading center for such entities, rivaling New York. But is the status of those two finance capitals as centers for institutional investors secure?

Tightened limits on leverage for institutions deemed "too big to fail" create opportunities for smaller institutions, whose business models do not require the backing of a lender of last resort. These entities will be harder to regulate. Governments are keen to do so in the wake of the financial crisis; politicians on both sides of the Atlantic put forward proposals to crack down on hedge funds and other sources of capital that have mushroomed in the last decade. Among the more draconian ideas, the FSA has proposed requiring the disclosure of short positions. The FSA already requires disclosing positions greater than 3%, no matter the ownership form. The SEC responded with a proposal to restore its largely ineffective "uptick" rule. The Turner

supra note 71, at 17.


123. BLOOMBERG & SCHUMER, supra note 8, at 72 (noting 63% growth rate of hedge fund assets in the United Kingdom from 2003–2005).


125. Cassell Bryan-Low, U.K. Plan for Bears: Disclose All Bets, WALL ST. J., Feb. 9, 2009, at C2 (discussing proposal to disclose all short positions of more than 0.5% of a company's shares).


127. DealBook, SEC Looks At More Short-Selling Measures, N.Y. TIMES, Mar. 12, 2009,
Review suggests more intrusive measures will be forthcoming, and the EU is likely to push strongly in that direction.128

That impulse to regulate hedge funds and private equity, however, comes squarely up against the ever-increasing mobility of such institutions. These institutions can do business in Greenwich or London, but Bermuda, the Cayman Islands, Dubai, Ireland, Luxembourg, and Singapore, just to name a few, are also potential venues.129 Smaller countries, much like Delaware in the U.S. charter competition, are better able to precommit to predictable regulatory structures because their economies tend to be underdiversified.130 It is a safe bet that a number of these jurisdictions will be happy to commit to a “principles-based” regulatory approach now that the United Kingdom has announced a turn toward a “frightening” regulatory approach.131

Regulators are in the business of regulating; naturally they want to regulate as wide a domain as possible. The bifurcation between financial institutions that are too big to fail, and therefore require a government backstop, and those whose business models’ allow greater mobility, poses new challenges to regulators’ domains. The end result may be that regulators in the United States and United Kingdom wield overarching authority over financial institutions that are dependent on government bailouts (or may need such bailouts in the future). These regulators wield such authority, however, at the risk that the regulatory burden imposed will tend to shrink the sector being regulated. The banks (and similar institutions) that are too big to fail will be closely monitored; smaller financial institutions are likely to flee to more permissive jurisdictions. Of course, the regulator’s impulse will be to suppress regulatory competition through international agreement on


129. See Antony Currie & John Foley, Market Points to Banks in Need, N.Y. TIMES, May 7, 2009, at B2 (“Greenwich and Mayfair, the hedge fund capitals of the United States and Britain, may be shrinking. But a new hedge fund center is sprouting in Hong Kong. More funds opened than closed in the territory last year, according to the Alternative Investment Management Association.”); see also REVIEW OF THE COMPETITIVENESS OF LONDON’S FINANCIAL CENTRE, supra note 71, at 21 (identifying jurisdictions that pose particular threats to London).


regulatory standards. That goal, however, faces immense collective action problems, with many countries not inclined to follow the lead of the United States and United Kingdom.

The flight of liquidity providers is one very real threat to London's newfound ascendance in the market for listings. The other threat is trading technology improvement; stock exchanges around the world now offer similar speed in executing orders. Increasingly, securities trading has been reduced to the status of commodity. The best trading systems are no longer the monopoly of the exchanges, which are hemorrhaging market share to proprietary trading systems and dark pools. Commodification of trading technology—along with greater access to information about companies in other jurisdictions—has greatly reduced the liquidity advantages formerly enjoyed by the LSE and NYSE, which have cut fees in response. The value of the exchanges has plummeted.

Of equal importance to the question of liquidity, companies no longer need to bring their shares in physical proximity to investors. Institutional investors, at least, can access virtually any market in the world. As a result, ADRs have fallen out of favor, as investors invest directly abroad. Moreover, Rule 144A allows issuers to access capital in the United States without a U.S. listing. Why should a


135. Jacob Bunge, NYSE Adjusts Charges In Bid to Draw Traders, WALL ST. J., Feb. 4, 2009, at C5 ("Incumbent stock exchanges are grappling with lower year-on-year trading volumes and tougher competition from newer entrants like BATS Exchange and Direct Edge in the U.S., and a host of trading platforms in Europe.").

136. See Greg Keller, NYSE Euronext swings to massive net loss in 4th quarter on $1.6B writedown of merger goodwill, ASSOCIATED PRESS NEWSWIRES, Feb. 9, 2009 ("NYSE's matched volume of NYSE-listed stocks fell to 43 percent during the fourth quarter, from 54.3 percent during the year-ago period.").


138. See Pan, supra note 49, at 8–11.

139. 17 C.F.R. § 230.144A (2009). On the importance of Rule 144A in undermining the incentive
company pay for an expensive listing in London or New York if a listing in their home country allows them easy access to capital from around the world?\textsuperscript{140} For regulators, this means that listing requirements are likely to offer little leverage as a regulatory tool.\textsuperscript{141}

In sum, I argue that the international market for listings parallels the structure of the domestic market for corporate charters, but Delaware's sustained ability to dominate that domestic market is not likely to be replicated in the market for listings. Companies face a largely bilateral choice between their home jurisdiction and the market leader. In corporate law, Delaware has been that market leader since it surpassed New Jersey; in listings, New York has been that market leader, but its dominance was undermined when Congress and the SEC had their "New Jersey moment" with the Sarbanes-Oxley Act. New York's status is now challenged, and perhaps, surpassed by London. But neither New York nor London is likely to provide any important listing advantage over a company's home jurisdiction in the long run. Both jurisdictions' actions during the credit crisis revealed that they are willing to impose regulatory burdens in the face of political pressure. In their home jurisdiction, companies can at least bring political pressure to bear as a counter to political retribution.\textsuperscript{142} In the United States and United Kingdom, foreign companies are essentially powerless in political circles. London has not succumbed to the "burn the witches" mentality seen in Washington of late, but it nonetheless lacks the credibility to insulate companies from political influences in the way that Delaware does.

V. CONCLUSION

Delaware has long enjoyed an overwhelming lead in the domestic market for corporate charters, which invites the question of whether a similar leader might emerge in the market for corporate listings. Applying the insights derived from the market for corporate charters to
the market for listings, this Article has assessed the prospects of the two leading contenders in the latter market, New York and London.

For London to dominate in the market for listings as Delaware has done in the market for charters, it needs to offer a product that companies' home jurisdictions cannot easily duplicate. The notion that the world has become smaller is a cliché, of course, but it is nonetheless an important insight for the market for corporate listings. The world of investment capital shrinks every day, as institutional investors become more willing to look beyond their home jurisdictions in search of profitable investment opportunities. The lure of New York and London, and the pools of liquidity that they offer, have diminished greatly in the last decade, as trading has increasingly become a commodity. London must look elsewhere to find a comparative advantage.

London bears at least superficial resemblance to Delaware—the smaller, less populous competitor, heavily dependent on the financial services industry—but its recent track record shows that it is susceptible to political retribution in the same way that New York is. Democracy has its virtues, but it also has its costs. Delaware's primary product is predictability, which it has promoted by insulating its corporate law from the ebb and flow of politics. London may dominate New York with respect to predictability, but it does not appear to offer substantially more certainty than companies can get in their home jurisdiction. The answer to the cryptic question of my title, "London as Delaware?" is "No."