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ON TAKEOVER LAW AND REGULATORY COMPETITION

Lucian Bebchuk* and Allen Ferrell**

Abstract

This paper defends, and further develops, our earlier work on the effects of regulatory competition on takeover law. We have argued that competition for corporate charters provides incentives to states to protect incumbent managers from hostile takeovers, and that the empirical evidence is consistent with this account. To improve the performance of regulatory competition, we have put forward the possibility of choice-enhancing federal intervention; such intervention would expand shareholder choice, and encourage states to become more attentive to shareholder interests, without imposing any mandatory arrangements. Replying to Jonathan Macey's response to our work, we show that none of his claims weakens our analysis.

JEL classification: G30, G38, H70, K22.
Key words: Delaware, incorporations, corporate charters, regulatory competition, corporate governance, managers, shareholders, takeovers.

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** Assistant Professor of Law, Harvard Law School (fferrell@law.harvard.edu). We are grateful to Alma Cohen for many helpful conversations and for her collaboration with us in work on which we rely in this paper. We also wish to thank the John M. Olin Center for Law, Economics, and Business for its financial support.

I. Introduction

Takeover law and state competition over corporate charters are two subjects that have been long debated among scholars of corporate law. In a series of papers, we have examined the effects of state competition, as currently structured, over corporate charters on takeover law. Our analysis has concluded that state competition provides incentives to states to excessively protect incumbent managers from takeovers.[1] We have suggested that the evidence is consistent with this analysis of state competition.[2] Finally, in a recent paper, we have introduced the idea of federal intervention designed to improve the outcome of state competition both in the takeover area and in general.[3]

Jonathan Macey has offered a critical response to our analysis of the shortcomings of state competition as well as to our ideas for possible federal intervention.[4] Other responses to our work have been offered by Stephen Choi and Andrew Guzman,[5] Roberta Romano,[6] and Robert Sitkoff.[7] We have

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[1] See Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1486-88 (1992) (arguing that takeover law is an area of corporate law in which state competition does not perform well) [hereinafter Bebchuk, The Desirable Limits]; Lucian Arye Bebchuk & Allen Ferrell, Federalism and Corporate Law: The Race to Protect Managers from Takeovers, 99 Colum. L. Rev. 1168, 1172-77 (1999) (further developing the view that regulatory competition provides incentives to offer excessive antitakeover protections) [hereinafter Bebchuk& Ferrell, Race to Protect]; see generally Lucian Arye Bebchuk & Allen Ferrell, A New Approach to Takeover Law and Regulatory Competition, 87 Va. L. Rev. 111 (2001) (putting forward an approach to improve the performance of regulatory competition in the takeover area) [hereinafter Bebchuk & Ferrell, New Approach]; Oren Bar-Gil, Michal Barzuza, and Lucian Bebchuk, A Model of State Competition in Corporate Law, Working Paper (2002), available at http://papers.ssrn.com/abstract=275452 (developing a formal model showing how competition among states can provides adverse incentives in the takeover area).

[2] Lucian Bebchuk, Alma Cohen and Allen Ferrell, Does the Evidence Favor State Competition in Corporate Law? Harvard Olin Discussion Paper No. 352, forthcoming, 90 *California Law Review* _ (2002), available at http://papers.ssrn.com/abstract=303417; Lucian Bebchuk and Alma Cohen, Firms' Decisions Where to Incorporate, Harvard Olin Discussion Paper No. 351 (2002), available at http://papers.ssrn.com/abstract=296492.

[3] See Lucian Ayre Bebchuk & Allen Ferrell, A New Approach, supra note 1.

[4] See Jonathan Macey, Displacing Delaware: Can the Feds Do a Better Job Than the States in Regulating Takeovers?, 57 Business Lawyer ___ (2002).

[5] Stephen J. Choi & Andrew T. Guzman, Choice and Federal Intervention in Corporate Law, 87 Va. L. Rev. 961 (2001).

[6] Roberta Romano, The Need For Competition in International Securities Regulation, 2 Theo Inq L 387 (2001); Roberta Romano & Sanjai Bhagat, Event Studies and the Law: Part II-Empirical Studies of Corporate Law (2001) (Yale International Center for Finance Working Paper No. 00-33) available at http://papers.ssrn.com/abstract=268285.

[7] Robert Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, U. Chi. L. Rev. (forthcoming 2002), available at http://papers.ssrn.com/abstract=228300.

replied elsewhere to Choi and Guzman's response.[8] We reply in this piece to Macey's criticisms, defending and developing our earlier work. Because some of Macey's arguments substantially overlap with arguments made by Romano and Sitkoff, our reply addresses some of their work as well. We show that none of the arguments made in Macey's response weakens the analysis contained in our paper.

Section II defends and develops our view that state competition provides states with incentives to protect excessively incumbent managers from takeovers. Whereas Macey accepts the theoretical possibility that state competition might have such an effect, he believes that there is no basis for concluding that antitakeover protections in fact enable states to do better in the incorporations market. As we show, however, there is substantial evidence that this is the case. An examination of the patterns of incorporations clearly indicates that amassing antitakeover statutes make states more successful both in retaining in-state corporations (corporations with headquarters in the state) and in attracting out-of-state incorporations (corporations with headquarters outside the state).

Section III discusses the position of Delaware, the recognized leader of state competition. Macey completely misstates our views by asserting that we claim that Delaware has won its position by offering managers stronger protection from takeovers (or otherwise more favorable treatment) than other states. As will be explained, and as was stressed in our earlier paper, we do not at all view Delaware as being worse in this way. To the contrary, we believe that Delaware's legal regime is often better for shareholders than that of other states, in large part because of the expertise and skill of its judiciary. Our focus, rather, is on the incentives placed on *all* states by competition, as it is currently structured. Competition might have pushed all states, including Delaware, in the direction of providing stronger antitakeover protections. In understanding the constraints against which Delaware operates, we must recognize that, to the extent to which Delaware is influenced by competitive pressures, the pressure is for maintaining antitakeover protections. The evidence, we show, is consistent with this view.

Section IV discusses and defends the ideas we have put forward for improving (*not* replacing) regulatory competition in corporate law in general and takeover law in particular. We have suggested various ways in which federal intervention could improve regulatory competition without forgoing competition's important benefits or imposing substantive arrangements on shareholders against their wishes. The forms of intervention that we have introduced would not displace the critical role that states play in corporate law. Delaware would still be able to maintain the leading position it enjoys

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[8] Lucian Arye Bebchuk & Allen Ferrell, Federal Intervention to Enhance Shareholder Choice, 87 Va. L. Rev. 993 (2001).

due to the institutional and network advantages it now provides to Delaware corporations. The intervention would just improve the incentives that states face in developing corporate arrangements. In the course of our discussion on the merits of our approach, we reply to Macey's various objections.

II. THE EFFECTS OF REGULATORY COMPETITION ON TAKEOVER LAW

A. DOES THE INCORPORATIONS MARKET REWARD PROTECTION FROM TAKEOVERS?

The scholarly debate on state competition for corporate charters focuses on what kind of incentives such competition creates. To be sure, participants in the debate do not assume that public officials are generally and deliberately shaping laws with a constant eye on how this affects incorporations. That is, there is no assumption that the incentives provided by the incorporations market are the decisive, or even primary, consideration in the formulation of state corporate law. In this respect, Macey misstates our work in portraying us as suggesting that specific decisions by state officials had a particular motivation. Rather, the standard assumption is that state competition creates an incentive structure and, thus, competition might thereby have an effect on corporate law. This assumption is made both by those who support and those who criticize state competition. The debate is on the nature of this effect.

Participants in the debate generally recognize that management plays an important role in where firms are incorporated. For one thing, reincorporations must be initiated by the board. Thus, managers' preferences will have substantial influence on where firms are incorporated and on how successful states will be in attracting and retaining incorporations. Of course, the fact that managers' preferences will have weight is not necessarily problematic. The relevant question is whether managers will have any reason to prefer rules other than those that would be best for shareholders.

One view that is highly supportive of state competition, as it is currently structured, holds that, because of the presence of market forces, managers would generally prefer to see in place whatever rules would be best for shareholders.[9] According to this view, competition produces, to use an over-used phrase, a "race to the top". Another, more skeptical view, to which we subscribe, holds that competitive pressure might push in undesirable directions with respect to *some* areas of corporate law.[10] In

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[9] See, e.g., Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977); Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 1-40 (1991); Roberta Romano, The Genius of American Corporate Law 1 (1993).

[10] Bebchuk, The Desirable Limits, supra note 1, at 1438-39; Bebchuk & Ferrell, Race to Protect, supra note 1, at 1193-97; cf. William Cary, Federalism and Corporate Law:

particular, the concern is that, with respect to issues that are likely to implicate in a significant way managers' private benefits of control, managers might prefer rules that would favor management more than would be optimal for shareholders. Takeover law is a prime example of an area where such concerns are present.

Macey does not question our theoretical analysis but argues that there is no evidence that states that offer more antitakeover protections are in fact rewarded with more incorporations.[11] In this respect he joins Roberta Romano and other scholars highly supportive of state competition who have taken the position that the evidence is inconsistent with our view.[12]

The problem that these scholars face is that most of them have long viewed state takeover law as an area that has likely produced excessive managerial protection from takeovers.[13] Such scholars tend to believe that the massive proliferation of state antitakeover statutes has been unfortunate. Scholars who believe that antitakeover statutes do not serve shareholders find support for their view in the empirical evidence on the effects of such statutes. The overwhelming majority of the numerous event studies done on the adoption of state antitakeover statutes finds either no price reactions or negative price reactions (sometimes substantial ones).[14] Furthermore, researchers have also found direct evidence that state antitakeover statutes have operated to increase agency costs.[15]

Supporters of state competition, however, have sought to reconcile their belief that state antitakeover statutes do not serve shareholders by arguing that state competition does not encourage, and is thus not responsible for, the adoption of antitakeover statutes.[16] On this view,

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Reflections upon Delaware, 83 Yale L.J. 663 (1974) (also advocating a skeptical, albeit somewhat different, view of state competition).

[11] See Macey, *supra* note 4, at pp.8-12.

[12] See Romano, supra note 6, at IV.A; Romano & Bhagat, supra note 6.

[13] See, e.g., Winter, supra note 9, at 288; Easterbrook & Fischel, supra note 9, at 221.

[14] See, e.g., Jonathan Karpoff & Paul Malatesta, The Wealth Effects of Second-Generation State Takeover Legislation, 25 J. Fin. Econ. 291 (1989) (stating that forty second-generation statutes adopted in twenty-six states had, on average, a -.294% impact on stock prices). For a survey of event studies on state antitakeover statutes, see Grant Gartman, State Antitakeover Laws (2001).

[15] See, e.g., Marianne Bertrand and Sendhil Mullinathan, Is there Discretion in Wage Setting? A Test Using Takeover Legislation, 30 Rand Journal of Economics 535 (1999) (finding that the adoption of antitakeover statutes weakened managers' incentives to minimize costs); Gerald T. Garvey and Gordon Hanka, Capital Structure and Corporate Control: The Effect of Antitakeover Statutes on Firm Leverage, 54 J. Fin. 519, 520 (1999) (concluding that antitakeover statutes "allow managers to pursue goals other than maximizing shareholder wealth"); Marianne Bertrand and Sendhil Mullinathan, Executive Compensation and Incentives: the Impact of Takeover Legislation, (NBER Working Paper No 6830 at 4) (1999) (finding that antitakeover statutes have adverse effects on managers' executive compensation schemes).

[16] See, e.g., Easterbrook & Fischel, supra note 9 at 221-222.

amassing strong antitakeover statutes is likely to decrease rather than increase the number of incorporations. Such statutes were still adopted even though they could have been expected to reduce the number of future incorporations, so the argument goes, because the adopting states could not resist the lobbying or political pressure of some managers concerned about the threat of a takeover. As Ralph Winter put it: "The problem [with antitakeover statutes] is not that states compete for charters but that too often they do not."[17] Thus, on this view, state competition has operated not to encourage the adoption of antitakeover statutes but rather to discourage and moderate this tendency.

This is a testable prediction. Does the provision of antitakeover protections in fact result in more or less incorporations for a state? Macey seeks to answer this question by comparing the state antitakeover statute adopted by Delaware with those of other states. This is also a comparison employed recently by Romano and by Sitkoff and, earlier, other writers supportive of state competition.[18] Delaware has only one antitakeover statute (and not an especially strong one),[19] whereas most states have more than one. Because Delaware is the most successful state, it is argued, this comparison indicates that competition does not reward the amassing of antitakeover protections but rather moderation in providing such protections.

To be sure, Delaware clearly offers fewer antitakeover protections compared with some states, such as Pennsylvania, and more protections compared with other states, such as California. But how does Delaware compare with most states or the "average" state? This comparison cannot be made, as Macey does, by merely noting that Delaware has only one antitakeover statute whereas most states have more than one. Unlike other states, Delaware has a very large and developed body of case law on takeovers, which makes the absence of some statutes practically irrelevant for Delaware's takeover regime. For example, because Delaware has a large body of judge-made law upholding the indefinite use of poison pills in a wide range of circumstances, the absence in Delaware of some state antitakeover statutes, such as a statute endorsing poison pills, is rendered irrelevant or of limited practical significance.

In contrast, the adoption of state antitakeover statutes often does have practical significance in other states. No state, other than Delaware, has a well- developed case law on the use of defensive tactics. Indeed, a Lexis

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[17] Ralph K. Winter, Preface in Roberta Romano, The Genius of American Corporate Law at xi (1993).

[18] See Sitkoff, supra note 7, at 31 n.149; Romano, supra note 6, at IV.D (2001); Bebchuk & Ferrell, Race to Protect Managers, supra note 1, at 1193-99 (responding to a similar argument made in prior writings by a number of commentators).

[19] DEL. CODE. ANN tit.8, SEC. 203 (2001)

search indicates that most states do not have even a single reported case on the use of poison pills. In these states, the adoption of poison pill endorsement statutes (and constituency statutes) provides managers with the confidence, notwithstanding the absence of precedents in these states, that use of the poison pill will be tolerated. In some states, such as New Jersey, the adoption of a poison pill endorsement statute served to override an earlier case questioning the validity of poison pills.[20] The adoption of antitakeover statutes by a state without a developed takeover jurisprudence can convey a message that the state's corporate law is committed to providing substantial protections from unwanted takeovers, a message which in Delaware is supplied in large part by established case law.

Furthermore, trying to infer the impact of antitakeover protection on incorporations from comparing the number of incorporations in Delaware relative to that of other states is extremely difficult because of non-takeover differences between Delaware and other states. In particular, Delaware provides unique benefits to shareholders that other states do not. Delaware offers companies a specialized, expert, and widely respected judiciary. Delaware has a valuable institutional infrastructure. Incorporation in Delaware offers some network benefits due to the large of number of its incorporations.

How then can one assess the impact of antitakeover protections on a state's ability to attract incorporations? A careful examination of the differences among the fifty corporate law jurisdictions (including the District of Columbia) other than Delaware can provide an answer. These jurisdictions are similar in not having a developed case law on defensive tactics and, thus, in antitakeover statutes being important in shaping their takeover law. These jurisdictions do not offer the institutional and network benefits uniquely provided by Delaware's legal regime. Thus, such an examination, which is provided below, can provide a good test of how antitakeover protections affect a state's success in the incorporations market. The variation among states both in terms of their laws and in terms of their success in the incorporations market provides a natural laboratory for examining which corporate rules make states more or less attractive.[21]

B. CROSS-STATE DIFFERENCES IN TAKEOVER PROTECTIONS AND INCORPORATIONS

The patterns we describe below account for all the nonfinancial publicly traded companies for which there was data in the Compustat

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[20] N.J. STAT. ANN. SEC. 14A:7-7 (Supp. 2002)

[21] We draw below from our forthcoming work. See Lucian Arye Bebchuk, Alma Cohen & Allen Ferrell, supra note 2; Bebchuk & Cohen, supra note 2. These works provide a fuller account of the empirical evidence on how antitakeover arrangements affect firms' incorporation decisions.

database at the end of 1999 and which have both their headquarters and their incorporation in the United States.[22] There are 6,530 such companies. Table 1 displays how the headquarters of these companies are distributed among states. By "states" we mean throughout the fifty-one jurisdictions consisting of the fifty states and the District of Columbia.

Not surprisingly, states that have large populations and big economies have more companies headquartered in them. California, with the largest population and economy, is home to 19.2% of all companies. Texas comes in second, with 8.97% of all companies, followed by New York with 8.82%.

Table 2 displays how the incorporations of these companies are distributed among the states. A comparison of Tables 1 and 2 reveals the considerable differences between the distributions of headquarters and incorporations. As is well known, Delaware has by far the largest stock of incorporations (57.75% of all companies).

Tables 3 displays how each state fares in the market for incorporations. The Table displays the following for each state: (i) how many of its in-state companies it retains, both in absolute numbers and as a percentage of all in-state companies; and (ii) how many out-of-state companies it attracts, again in absolute numbers and as a percentage of all out-of-state incorporations.

The Table indicates that there is a great deal of variance among non-Delaware states in terms of how they fare, both in retaining in-state companies and in attracting out-of-state companies. For example, whereas California retains only 21.77% of its in-state companies, Ohio and Washington retain more than 50%, and Minnesota and Indiana retain approximately 70%. As for out-of-state incorporations, while thirty-three states attract less than ten out-of-state incorporations each, there are four states with more than 5fifty each. The question on which we shall focus next is the extent to which this relative performance depends on the antitakeover statutes adopted by the various states.

Table 4 indicates, for each state, which standard antitakeover statutes are in place.[23] The vast majority of these statutes were adopted in the period 1985-1991. There are five "standard" types of antitakeover statutes: control share acquisition statutes; fair price statutes; business combination statutes – of which there is a three-year no-freezeout version and a five-year no-freezeout version; poison pill endorsement statutes; and constituency

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[22] In focusing on nonfinancial firms we follow the approach of Robert Daines in his article, Does Delaware Law Improve Firm Value?, 62 J. Fin. Econ. 525 (2001). When financial companies are included, the results (which are available upon request) are qualitatively the same.

[23] The table is based on Gartman, State Takeover Laws (2001).

statutes. Each of the standard antitakeover statutes has been adopted in a majority of the states.

In addition to the standard antitakeover statutes, unusual and more restrictive statutes were adopted by three states. Pennsylvania and Ohio adopted a statute that enables the "disgorgement" or "recapture" of all the short-term profits made by a hostile bidder.[24] Massachusetts adopted a statute that mandates a staggered board even for companies that did not elect to have a classified board in their charter, a requirement that has a powerful antitakeover effect.[25]

C. ANTITAKEOVER STATUTES HELP STATES RETAIN IN-STATE CORPORATIONS

One fact that is immediately apparent from looking at the distribution of incorporations from Table 3 is the presence of "home-state advantage." States generally are better able to attract incorporations from companies headquartered in them than from companies headquartered elsewhere.[26] Even states that hardly attract any out-of-state incorporations are commonly able to retain a significant fraction of their in-state companies. States do vary, however, greatly in the fraction of their in-state companies they retain.

Table 3 indicates that states without antitakeover statutes do rather poorly in terms of retaining their companies. Whereas the average fraction of in-state companies retained is 38%, most states with no antitakeover statutes retain a much lower fraction. For example, California retains only 21% of its in-state companies.

Conversely, Table 3 also indicates that states with all the standard antitakeover statutes generally retain a larger-than-average fraction of their in-state companies. For example, Indiana and Wisconsin, each of which offers a "royal flush" set of five standard antitakeover statutes; retain 69% and 72% respectively of its in-state companies.

Finally, observe that the average retention rate among Pennsylvania, Ohio and Massachusetts is higher than the average fraction in-state companies retained by states. Two of these states (Pennsylvania, with 39% and Ohio, with 54%) retain more than the average fraction, and one of these states retains a lower fraction (Massachusetts, with 30%).

Of course, these observations are just suggestive, and a more systematic testing is necessary before definite conclusions can be reached. One needs to control for other factors, besides state antitakeover statutes, that might be influencing the incorporation decisions of in-state companies.

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[24] 15 PA. CONS. STAT SEC. 2575 (2001): OHIO REV. CODE ANN. SEC. 3901.31 (Anderson 2001)

[25] See Lucian Bebchuk, John H. Coates & Guhan Subramanian, The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 Stan. L. Rev. (forthcoming 2002), available at http://papers.ssrn.com/abstract=304388.

[26] For an analysis of the home-state advantage and its possible sources, see Bebchuk and Cohen, Firms' Decisions Where to Incorporate, supra note 2, Section III, at 9-17.

We provide such an analysis in other work, which controls for various factors that could conceivably be important, including both characteristics of the incorporating company and characteristics of the state in which the company is headquartered (other than the state's antitakeover statutes).[27]

This testing indicates that having a larger antitakeover index – that is, a larger number of antitakeover statutes – makes a state more likely (at 99% confidence, the highest degree of confidence conventionally used in such testing) to retain its in-state companies.[28] Of the different antitakeover statutes, the ones most useful in attracting in-state companies are control share acquisition statutes, no-freezeout statutes with a moratorium period of more than three years, and poison pill endorsement statutes.[29]

Also consistent with the observations made above, the testing indicates that having a recapture antitakeover statute, as Pennsylvania and Ohio do, does not adversely affect a state's ability to retain its in-state companies.[30] With regard to the classified board statute of Massachusetts, the results are mixed, depending on the type of testing done, but does not overall support the prediction that enacting such a statute would hurt an adopting state in the incorporations marketplace.[31]

D. ANTITAKEOVER STATUTES HELP STATES ATTRACT OUT-OF-STATE CORPORATIONS

Even if antitakeover statutes help states retain in-state corporations, how do these statutes affect their competitive position in attracting out-of-state corporations? We will now turn to this second dimension of how states fare in the competition over incorporations.

Table 5 displays the distribution of out-of-state incorporations going to states other than Delaware, and it lists all the states attracting more than 6 out-of-state incorporations. Indeed, looking at the ten top states coming after

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[27] See id. at 18-31. Controlled-for characteristics of the company include the company's volume of sales, Tobin's Q, return on assets, number of employees, and age (when the company went public). Controlled-for characteristics of the state in which the company is headquartered include the state's population, number of located companies, per capita income, ideological leaning, geographic region, and whether the state has adopted the RMBCA (or its predecessor the MBCA).

Guhan Subramanian, The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the 'Race' debate and Antitakeover Overreaching, U. PA. L. REV. (forthcoming 2002), available at http://papers.ssrn.com/abstract=292679, also tests how the presence of standard antitakeover statutes affects states' ability to retain their headquartered companies, and his results are consistent with those obtained by the above analysis.

[28] Bebchuk & Cohen, supra note 2, at 4.

[29] Id. at 27.

[30] Id at 28.

[31] See id. at 30-31. Section IV. This study also explains why Subramanian, supra note 27, reports different findings on this issue. .

Delaware in their ability to attract out-of-state incorporations, *eight out of ten states have either four or five antitakeover statutes*.

Table 5 also indicates that the three "outlier" states, which have been blacklisted by corporate law scholars as extreme, have not been hurt in the market for out-of-state incorporations. Pennsylvania, Massachusetts and Ohio are comfortably among the top half of states in terms of the number of out-of-state incorporations they attract. Pennsylvania, in fact, holds a respectable eighth place.

Again, definite conclusions cannot be drawn without controlling for characteristics of states and firms. When such controls are used, the conclusions of the testing confirm what is suggested by the above observations.[32] The findings indicate that having a higher antitakeover index (i.e., more antitakeover statutes) makes a state more attractive -- again, at the high 99% confidence level -- for out-of-state incorporations. Of the different types of standard antitakeover statutes, the ones most helpful for attracting out-of-state incorporations are control share acquisition statutes and poison pill endorsement statutes.

The testing also provides clear results with respect to the two types of extreme antitakeover statutes. Neither a classified board statute nor a recapture statute have a statistically significant effect on the ability of a state to attract out-of-state incorporations. This finding provides further evidence against the claim that the incorporations marketplace penalizes states adopting extreme, shareholder value-reducing statutes.

III. DELAWARE AND REGULATORY COMPETITION

Macey portrays our position as being one that views Delaware as more protective of managers than other states, thereby "leading" a race to the bottom, and as owing its success to its doing so.[33] Romano similarly views us as claiming or implying that Delaware is worse in this way.[34] This is not our position at all. We state explicitly that we do not view Delaware as less hospitable to takeovers than other states.[35] Indeed, we stress that the incentives, created by regulatory competition, to offer excessive protections from takeovers is consistent even with Delaware being somewhat more hospitable to takeovers.[36]

Our concern is not one focused on Delaware but rather is a systemic one. As we state in the article Macey criticizes:

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[32] See Bebchuk & Cohen, supra note 2, at 29-31.
[33] Macey, supra note 4, at 10.
[34] Romano, supra note 6, at IV.A.
[35] Bebchuk and Ferrell, New Approach, supra note 1, at 138-140. See also Bebchuk and Ferrell, Race to Protect, supra note 1, and Bebchuk, Cohen & Ferrell, supra note 2, at 40.
[36] Bebchuk and Ferrell, New Approach, supra note 1, at 139.

> "[T]here is a difference between the relative performance of a victor in a competitive process and the performance of the process as a whole. Whether state competition overall creates a pressure to adopt good or bad regulation, we would expect Delaware, the victorious state, to offer shareholders a somewhat better deal."[37]

The important question, we stress, is not the nature of the impact of the limited differences between the takeover law of Delaware and other states but rather whether the body of state takeover law that the system has produced, taken as a whole, is desirable.[38] According to our analysis, states as a group are being pushed by the incentives produced state competition. Delaware does not do worse on this score than other states. The problem is with the body of state takeover law considered as a whole.[39]

Thus, we do not attribute Delaware's success, as Macey claims, to its being especially favorable to managers. Rather, we view Delaware's long-standing dominance of the incorporations market as the result of several advantages offered by Delaware and now widely recognized.[40] As already noted, Delaware has a specialized court, with highly skilled and respected judges, a well-developed body of case law, and an impressive professional and institutional infrastructure. Furthermore, incorporating in a jurisdiction where many other firms are already incorporated confers network benefits, which is another advantage of incorporating in the dominant state.[41] Indeed, it is these unique advantages of Delaware that have led us to focus on differences among states other than Delaware (which are similar in not offering these advantages) in our earlier empirical investigation of the effects of antitakeover statutes on incorporations.

There is a body of empirical work, as Macey points out, that suggests that incorporation in Delaware has positive effects on share value.[42] Macey relies on such findings and views them as inconsistent with our view that state competition provides undesirable incentives with respect to takeover

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[37] Id. at 138.
[38] Id at 139.
[39] Romano, supra note 6, at 495, states that "Delaware . . . is often cast as the villain in the race-to-the-bottom explanation of competition." As we stressed in our earlier work, and reiterate here, Delaware is not the villain in the account we have put forward.
[40] See Bebchuk & Ferrell, A New Approach, supra note 1, at 135–140. For an analysis of how these advantages have helped Delaware maintain its dominance over time, see Lucian Arye Bebchuk and Assaf Hamdani, Vigorous race or Leisurely walk: Reconsidering the debate on State Competition in Corporate Law, Yale L.J. (forthcoming).
[41] The importance of network benefits in this market was first stressed by Michael Klausner, Corporations, Corporate Law, and Networks of Contracts, 81 Va. L. Rev. 757 (1995), and has been widely accepted since then.
[42] For a survey of this work, see Bebchuk, Cohen & Ferrell, supra note 2, at 7-22.

law.[43] Romano similarly asserts that, if Delaware incorporation increases shareholder wealth, then it is not possible to contend that competition has such adverse effects.[44] Sitkoff also relies on this evidence and also suggests that benefits to investors from Delaware incorporation are "inconsistent with regulatory competition pushing 'the states in a negative direction."[45]

The exiting empirical studies on the wealth effects of Delaware incorporation suffer from certain methodological problems that make it difficult to infer from their results that these effects are positive.[46] Our theoretical analysis, however, leads us to believe that such a positive effect is likely to exist. As we explain in detail, but Macey and our other critics ignore, our account of state competition, and its effects of takeover law, is completely consistent with a positive value to Delaware incorporation under the current regime.[47] In our view, in the current situation, competition produces incentives that push all states in an undesirable direction in certain areas. Nevertheless, because of Delaware's unique advantages, Delaware incorporation provides some benefits to shareholders and thus has a positive effect on shareholder wealth.[48]

Macey spends a great deal of time criticizing us for being hostile to the *Moran* decision of the Delaware Supreme Court,[49] which upheld the validity of the poison pill, and for suggesting that the decision was "pandering to management."[50] He engages in extensive doctrinal analysis of the case and argues that the court had no choice but "was simply, and reluctantly, applying the relevant statute to the facts with which it was presented."[51] According to Macey, we ignored the relevant statutory provisions that compelled the court's decision in that case. This attack by Macey is surprising to us both because our brief discussion of *Moran* did not engage in any doctrinal analysis of the case and, more importantly, because it did not view the decision negatively. Indeed, we viewed it as an opinion that was moderate and signaled a willingness to place some constraints on the indefinite use of poison pills.[52]

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[43] Macey emphasizes Robert Daines's finding that Delaware incorporation is associated with a higher Tobin's Q. See generally Daines, supra note 22.

[44] Romano, supra note 6, at IV.A.

[45] Sitkoff, supra note 7, at 59 (quoting Bebchuk and Ferrell, A New Approach, supra note 1, 138-39).

[46] Bebchuk, Cohen & Ferrell, supra note 2, at 17-22.

[47] Id at 22-25.

[48] For an analysis of this problem using a formal model of state competition see Bargil, Barzuza, and Bebchuk, A Model of State Competition in Corporate Law, supra note 1.

[49] Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

[50] Macey, *supra* note 4, at 7.

[51] Id. at 9.

[52] See Bebchuk and Ferrell, A New Approach, supra note 1, at 119. In two recent works, one of us indeed discusses how Moran and Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), can be used as a basis for an approach to defensive tactics that he favors, see Bebchuk,

In fact, a more fitting target for Macey's criticism of the position that the *Moran* decision was aimed at protecting managers could be found in his own writings. In an earlier article, written jointly with Geoffrey Miller, Macey summarized his view on *Moran* as follows:

> "At the time of the Moran decision, however, [Delaware] was confronted with the possibility that poison pills would become so desirable that managers would be willing to move the firm's domicile to a more friendly location if the device were held illegal under Delaware law. The poison pill was highly publicized mechanism that already had been adopted by corporation around the country. In this particular context, *the danger of losing chartering business was probably a major consideration influencing the court*."[53]

Whichever position Macey ultimately picks on the *Moran*, we do not have a negative view of the case. What we view unfavorably is the subsequent move in *Paramount Communication, Inc. v. Time, Inc.*[54] and *Unitrin, Inc. v. American General Corp.*[55] toward allowing incumbents to maintain pills indefinitely. Again, however, the broad power of incumbents to maintain pills is a legal feature that, if problematic, is equally a problem for the many states that have a poison pill endorsement statute.

When discussing the pressures on Delaware during the late 80's, it has become customary to refer to the now legendary memorandum of Martin Lipton circulated after *City Capital Associates Ltd. Partnership v. Interco Inc.*[56] and before the overruling of *Interco* by *Time*.[57] Lipton was quite concerned about *Interco* and its not providing sufficient room for the use of takeover defenses:

> "If [Interco] is not reversed by the Delaware Supreme Court, it will be a dagger aimed at the hearts of all Delaware corporations and a further fueling of the takeover frenzy. The *Interco* case and the failure of Delaware to enact an effective takeover statute, raise a very serious question as to Delaware

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Coates, and Subramanian, supra note 26, at 66-68; Lucian Bebchuk, The Case Against Voting Power in Corporate Takeovers, forthcoming U. Chi. L. Rev. at 56 (forthcoming)

[53] See Jonathan Macey & Geoffrey Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Texas Law Review 469, 521-522 (1987) (emphasis added) (citation omitted).

[54] 571 A. 2d. 1140 (Del. 1989).

[55] 651 A.2d. 1361 (Del. 1995).

[56] 551 A.2d. 787 (Del. Ch. 1988)

[57] See Jeffrey Gordon, Corporations, Markets, and the Courts, 91 Colum. L. Rev. 1931, 1958-1959 (1991) (quoting and discussing this memorandum).

> incorporation. New Jersey, Ohio and Pennsylvania, among others, are far more desirable states for incorporation than Delaware in this takeover era. Perhaps it is time to migrate out of Delaware."[58]

Notwithstanding the wide attention given to Lipton's memo, it is far from clear to us that it had any influence on the Supreme Court's subsequent decision in *Time* to overrule *Interco*. The important point for our purposes, however, is that this memo illustrates the direction in which competitive incentives were working during the mid- and late '80s when states' takeover laws were developing and decisions on the adoption of antitakeover statutes were being made. We are unaware of any memo in that period or subsequently that suggested that firms consider migrating out of states that permitted maintaining pills as long as incumbents are in office. And the empirical evidence described above suggests that states that amassed antitakeover statutes were in fact better able to retain the incorporation of firms located in them.

To recapitulate, we do not view Delaware incorporation as worse for shareholders, but rather as probably mildly better, than incorporation elsewhere. Our concern is with the systemic incentives provided by competition (as currently structured) to states in general, Delaware included. To the extent that Delaware is influenced by competitive incentives, these incentives are operating in the direction of adopting takeover protections. Given that firms are more likely to incorporate in-state, and less likely to incorporate in Delaware, when their home state provides substantial antitakeover protections, Delaware's incorporations might well decline if it were to move substantially in the direction of less protection from takeovers. Of course, attracting incorporations might not be the primary factor guiding any given decision. But the debate is on whether the incentives provided by competition, whatever their influence on particular decisions, encourage or discourage antitakeover protections. And the discussion above indicates that the former is the case.

Finally, it is worth stressing that the choice-enhancing approach put forward in our paper is not one that would necessarily, or even probably, undermine Delaware's dominant position. As noted, Delaware has certain established advantages, such as its judiciary. Choice-enhancing intervention is aimed at giving shareholder interests more weight in incorporation decisions. As a result, competitive incentives would push solely in the direction of serving shareholders. This again would have systemic effects that would apply to all states, Delaware included. While state law as a general matter would be influenced in a positive way, Delaware might well

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[58] Memorandum from Wachtell, Lipton, Rosen & Katz to clients, The Interco Case (Nov. 3, 1988).

remain the dominant domicile due to its long-standing institutional advantages.

IV. IMPROVING REGULATORY COMPETITION

A. IMPROVING COMPETITION, NOT REPLACING IT

In our paper, we argued that competition *as currently structured* has shortcomings in particular areas, most notably takeover regulation. Based on this analysis, we suggest how competition can be structured so as to ensure that the considerable benefits competition generates accrue to shareholders. This is the entire thrust of the paper.

Macey's response ignores all this. He somehow views us ones who do not believe in the benefits of competition and are different from "market-oriented scholars".[59] Macey then proceeds to build a (largely polemical) case against big government advocates. Despite Macey's characterization, our proposal seeks to improve and invigorate competition. Indeed, Macey himself has praised the merits of a legal rule, very much along the lines we suggest in the paper, which would render shareholder-initiated bylaws binding on the corporation.

Regardless of how strongly one is in favor of "competition", there is always the logically anterior question of how that competition should be structured. Should incumbent managers have a veto power over reincorporations or should shareholders' wishes be binding on the corporation? Should shareholders have the opportunity to select a regime substantially less favorable to incumbent managers in the takeover arena? These are the questions that our paper focuses on.

More concretely, our paper introduces what we have called "choice-enhancing federal intervention." It has two basic components. The first component of choice-enhancing intervention consists of a federal process rule, preempting contrary state law, which would grant to shareholders the right to opt into (or out of) an optional body of federal takeover regulation, regardless of incumbent managers' preferences. The second component is an optional body of federal takeover law substantially less favorable to incumbent managers who wish to block unwanted takeovers than the law of any other state.

Alternatively, choice-enhancing federal intervention could also be accomplished through a federal law requiring each state to provide shareholders with the power to initiate and approve, even against the wishes of incumbent managers, opting out of the antitakeover protection provided by state law.

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[59] Macey at supra note 4, at 4.

We will first discuss the federal process rule contemplated by choice-enhancing federal intervention and will then turn to the merits of having an optional body of takeover regulation.

B. FEDERAL REGULATION OF THE SWITCHING PROCESS

The mandatory process rule is aimed at addressing distortions that occur in the decision-making process governing whether corporations reincorporate to another state and are thereby subject to a different state's corporate law. The problem, which we identified and analyzed in earlier work,[60] is that under state law the board generally must initiate, and thus has an effective veto power over, a proposal to reincorporate. If managers' and shareholders' interests substantially diverge, which they sometimes will in the context of takeover regulation (among other contexts), then a distortion in the decision making process arises. The mandatory federal process rule that we have put forward, which ensures that shareholders have the ultimate power over whether reincorporation occurs, is an effective and straightforward means of removing this distortion.

There are different ways to implement such a process rule. One approach would be a rule that would allow shareholders to control reincorporation to other states. Another option would be to include, in the menu of choices, a federal body of law. Or, one could consider allowing shareholders to switch a corporation's legal regime with respect only to takeover regulation, which again can be accomplished in different ways. The key idea, however, is to let the process of choice be driven by shareholder interests. This would make competition work better. As a result of such a process rule, states would have stronger incentives to offer arrangements that benefit shareholders.

Macey criticizes us for being inconsistent. He argues that we fail to explain why shareholder voting would be valuable under our proposal but fails to work under current reincorporation procedures. He explains that the process is basically the same in both cases.[61] This criticism is easy to address. The process is not the same in both cases. The whole point of the process rule is to remove the managerial veto that is currently a prominent feature of the reincorporation process. It is this veto that creates distortions in the reincorporation process.

Macy has a second criticism. He disputes the value of a process rule by claiming that we ignore the "fundamental truth that shareholders are

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[60] See Bebchuk & Ferrell, Race to Protect, supra note 1, at 1173 n.15; Bebchuk, The Desirable Limits, supra note 1, at 1458 n.85.

[61] See Macey, supra note 4, at 7.

likely to follow the advice of management" about whether to switch.[62] But as we have said in print before, we readily accept the contention that shareholders display some deference to management. Indeed, the ability of managers to get shareholders to vote in favor of management positions was used by one of us in earlier work, years ago, as the basis for arguing for the importance of various midstream problems in corporate decision-making.[63]

But the tendency of shareholders to defer to managers too much at most suggests that shareholders will not always vote to reincorporate even when this would be beneficial. This in no way implies, however, that we should deny shareholders the power to initiate and approve reincorporations. If a majority of shareholders have in fact voted in favor of reincorporation (overcoming collective action and rational apathy problems) there is no reason to ignore their decision. To the contrary, if shareholders vote in favor of reincorporation, despite the problems that depress voting against management (or voting at all), such a vote suggests that a reincorporation really would be in the interests of shareholders.

C. OPTIONAL BODY OF TAKEOVER REGULATION

As we stressed in our work, adopting a process rule without anything more, would go a long way towards satisfying our concerns with the current structure of state competition.[64] We also suggested, however, that it might be desirable for the federal government to offer an optional regime into which firms could opt. There are, once again, a number of possibilities. One could, for instance, offer (but not mandate) a federal incorporation option. Under such a regime, firms could incorporate not only in a state but also federally. If one focuses only on takeover law, as we did in our piece, one could offer an optional federal takeover regime which shareholders could vote to opt in (and out) of.

Adding a federal option to the menu would add a valuable competitor. One reason for this is that the competition between states for corporate charters is imperfect. The market for corporate law is one in which the dominant supplier, Delaware, has some built-in advantages. As a result, states might not have adequate incentives to develop and offer a competing takeover regime. A state considering competing with Delaware might worry that Delaware would match any successful corporate innovations and

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62 Id. at 7. Choi and Guzman raise a similar point in their reposnse to our work. See Choi & Guzman, supra note 5, at 962.

63 See Lucian Arye Bebchuk, Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments, 102 Harv. L. Rev. 1820 (1989).

64 Bebchuk & Ferrell, A New Approach, supra note 1, at 156-157.

thereby continue to retain its existing incorporations.[65] Moreover, a federal option could add a valuable choice for shareholders not currently offered by any state. For instance, this option could consist of a regime that prohibits the use of defensive tactics. No state's corporate law contains such a prohibition.

It is worth pointing out that the federal option could take a limited form and still provide shareholders with a meaningful option. For example, as we discuss in our paper, choice-enhancing federal intervention could require states to allow shareholders, in the absence of explicit charter provisions to the contrary, to adopt bylaws that prohibit or limit poison pills.[66] Such a federal requirement would enable shareholders, if they so choose, to opt into an arrangement that makes takeovers relatively easy. Interestingly, Macey expresses support for such shareholder bylaws.[67] On the same note, Romano has written, "had Bebchuk and Ferrell truly wanted to enhance shareholder choice through federal intervention . . . they would have recommended instead a federal procedural requirement that shareholders have initiation rights to create and remove takeover defenses . . ."[68] Surprisingly, these two critics of our work ignore our explicit and detailed discussion, and endorsement, of such a federal requirement as a plausible version of a choice-enhancing intervention.

D. GENERIC OBJECTIONS TO ANY FEDERAL ROLE

Finally, Macey raises some objections that could be raised with respect to any proposal for change in the law. First, he raises the objection that "A glaring defect in Professors Bebchuk's and Ferrell's analysis is that they fail to consider why, if their idea has merit, the federal government has not already acted."[69] But such argument can be made of any proposal for legal change (whether the change is for regulation or deregulation or change of any kind). Under Macey's reasoning, there is never any point in making a proposal because if it is not already there to begin with, it has no merit. We do not find this type of argument persuasive. We expect that readers will not find it persuasive either.

Macey also raises another generic objection that has to do not with the merit of the idea but with special interest politics. He says that "powerful interest groups are content with the status quo" and they would rise up in

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[65] Canada has an option for federal incorporation. It has been suggested by observers that it has provided a healthy competitive push to the provinces. We believe it could do so in the US as well.
[66] Bebchuk & Ferrell, A New Approach, supra note 1, at 156-157.
[67] Macey, *supra* note 4, at 21.
[68] See Romano, supra note 6, at 531 n.386.
[69] Macey, supra note 4, at 3.

unison to "smash into oblivion" our proposal.[70] It is interesting to notice that this argument is rather inconsistent with his first objection, since this argument assumes that an idea that is meritorious might in fact not be adopted due to the power of interest groups. In any event, Macey's second objection – that there is no point in raising ideas that would be smashed into oblivion by the reality of special interests groups – is similar to objections raised by Sitkoff and Romano. Both criticized us on grounds that it is unrealistic to expect the federal government to take actions that would facilitate takeovers.[71]

Perhaps. But perhaps not. In fact, recognizing that lawmakers would not necessarily adopt ideas that are meritorious, we discussed in our work why elements of our proposal might be politically feasible.[72] But this is really beside the point, given the purpose of the paper. As we took pains to emphasize in our piece, we believe that our proposal is worth putting on the table and thinking about. Our goal was to propose an alternative regime that would improve regulatory competition, even if elements of that alternative regime are, at present, politically difficult or even unlikely. We do not believe, for instance, that Roberta Romano's recent proposal for letting issuers choose the securities laws that will govern them is likely to be adopted in the near future, but we believe that it is an idea that is worth examining on the merits. Legal rules and approaches do change over time, as attitude, politics, and the balance of power among interest groups evolve. Ideas and the additional understanding gained by analysis can matter in such a process.

What we have done in our work is to identify an intermediate and appealing choice available to political actors and public officials. Students of corporate law have long believed that a choice must be made between state competition as currently structured and mandatory federal rules. We have shown that an additional alternative is possible – a federal role that does not involve the imposition of mandatory substantive arrangements but rather improves the way in which competition performs. Such an alternative can have appeal for a wider set of observers than mandatory federal rules. We believe that putting this idea on the table is useful in thinking about state competition and its optimal structure.

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[70] Id. at 22.

[71] See Sitkoff, supra note 7, at 62 ("An astonishing assumption of Bebchuk and Ferrell's analysis is that the relevant individual federal lawmakers . . . will have no agenda in their lawmaking other than the public interest."); Romano, The Need for Competition, supra note 6, at IV.D.

[72] Bebchuk & Ferrell, A New Approach, supra note 1, at 157-59.

V. CONCLUSION

We have sought in our work to add to and somewhat change the terms of the debate on the subject of state competition. Those opposed to any federal role have long believed that the proliferation of antitakeover statutes should not be attributed to state competition. The evidence we have put forward makes it difficult to hold this view. The evidence indicates that state competition rewards the provision of antitakeover protections.

Furthermore, students of corporate law have long believed that a choice must be made between state competition as currently structured and mandatory federal rules. We have shown that an additional alternative is possible – a federal role that does not involve the imposition of mandatory substantive arrangements but rather improves the way in which competition performs. Such a federal role can appeal to a wider set of observers than federal intervention in the form of mandatory substantive arrangements. We hope that our work will contribute to understanding the shortcomings of the current structure and the possible ways of improving it.

TABLE 1

The Distribution of Firm Locations among States

State	Number of firms located in state	Percentage
CA	1,254	19.20%
TX	586	8.97%
NY	576	8.82%
MA	360	5.51%
FL	328	5.02%
NJ	311	4.76%
PA	248	3.80%
IL	241	3.69%
MN	212	3.25%
CO	201	3.08%
OH	192	2.94%
GA	178	2.73%
VA	154	2.36%
CT	147	2.25%
WA	131	2.01%
MI	104	1.59%
MD	101	1.55%
MO	101	1.55%
NC	98	1.50%
AZ	91	1.39%
TN	81	1.24%
WI	72	1.10%
OR	70	1.07%
UT	70	1.07%
NV	63	0.96%
Other	560	8.58%
Total	6,530	100%

TABLE 2

The Distribution of Incorporations among States

State	Number of firms incorporate in state	Percentage
DE	3,771	57.75%
CA	283	4.33%
NY	226	3.46%
NV	217	3.32%
MN	178	2.73%
FL	165	2.53%
TX	147	2.25%
CO	132	2.02%
PA	124	1.90%
MA	118	1.81%
OH	112	1.72%
NJ	111	1.70%
GA	83	1.27%
WA	79	1.21%
VA	74	1.13%
MI	60	0.92%
WI	57	0.87%
MD	54	0.83%
OR	54	0.83%
UT	52	0.80%
IN	50	0.77%
NC	46	0.70%
TN	39	0.60%
MO	36	0.55%
IL	32	0.49%
Other	230	3.52%
Total	6,530	100%

TABLE 3
Migration and Emigration in the "Market for Corporate Law:"

State	Number of firms located in state	Number of firms located and incorporate in state	As percentage of all firms located in this state	Number of firms located elsewhere but incorporate in state	As percentage of all out-of state incorporate
AK	2	1	50.00%	2	0.03%
AL	29	3	10.34%	2	0.03%
AR	20	3	15.00%	0	0.00%
AZ	91	21	23.08%	0	0.00%
CA	1,254	273	21.77%	10	0.19%
CO	201	74	36.82%	58	0.92%
CT	147	17	11.56%	3	0.05%
DC	25	2	8.00%	0	0.00%
DE	27	27	100.00%	3,744	57.57%
FL	328	137	41.77%	28	0.45%
GA	178	71	39.89%	12	0.19%
HI	13	6	46.15%	2	0.03%
IA	25	10	40.00%	4	0.06%
ID	15	2	13.33%	1	0.02%
IL	241	27	11.20%	5	0.08%
IN	56	39	69.64%	11	0.17%
KS	35	11	31.43%	8	0.12%
KY	29	7	24.14%	2	0.03%
LA	45	18	40.00%	4	0.06%
MA	360	108	30.00%	10	0.16%
MD	101	25	24.75%	29	0.45%
ME	10	4	40.00%	0	0.00%
MI	104	58	55.77%	2	0.03%
MN	212	158	74.53%	20	0.32%
MO	101	26	25.74%	10	0.16%
MS	14	4	28.57%	8	0.12%
MT	6	6	100.00%	0	0.00%
NC	98	38	38.78%	0	0.00%
ND	4	0	0.00%	0	0.00%
NE	18	4	22.22%	3	0.05%
NH	28	3	10.71%	0	0.00%
NJ	311	80	25.72%	31	0.50%
NM	9	4	44.44%	3	0.05%
NV	63	45	71.43%	172	2.66%
NY	576	141	24.48%	85	1.43%
OH	192	105	54.69%	7	0.11%
OK	61	22	36.07%	5	0.08%
OR	70	50	71.43%	4	0.06%
PA	248	98	39.52%	26	0.41%
RI	24	6	25.00%	1	0.02%
SC	30	9	30.00%	1	0.02%
SD	7	4	57.14%	0	0.00%
TN	81	33	40.74%	6	0.09%
TX	586	139	23.72%	8	0.13%
UT	70	32	45.71%	20	0.31%
VA	154	56	36.36%	18	0.28%
VT	11	4	36.36%	0	0.00%
WA	131	68	51.91%	11	0.17%
WI	72	52	72.22%	5	0.08%
WV	8	3	37.50%	0	0.00%
WY	9	3	33.33%	12	0.18%
Total	6530	2137		4393	
Average			38.10%		1.33%

TABLE 4
Standard Antitakeover Statutes

State	Number of Statutes	Control Share	Fair Price	No Freezeouts (years prohibited)	Poison Pill Endorsement	Constituencies
Alaska	0	0	0	0	0	0
Alabama	0	0	0	0	0	0
Arkansas	0	0	0	0	0	0
Arizona	4	1	1	3	0	1
California	0	0	0	0	0	0
Colorado	1	0	0	0	1	0
Connecticut	3	0	1	5	0	1
DC	0	0	0	0	0	0
Delaware	1	0	0	3	0	0
Florida	4	1	1	0	1	1
Georgia	4	0	1	5	1	1
Hawaii	3	1	0	0	1	1
Iowa	3	0	0	3	1	1
Idaho	5	1	1	3	1	1
Illinois	4	0	1	3	1	1
Indiana	5	1	1	5	1	1
Kansas	2	1	0	3	0	0
Kentucky	4	0	1	5	1	1
Louisiana	3	1	1	0	0	1
Massachusetts	4	1	0	5	1	1
Maryland	5	1	1	5	1	1
Maine	1	0	0	0	0	1
Michigan	3	1	1	5	0	0
Minnesota	4	1	1	4	0	1
Missouri	4	1	1	5	0	1
Mississippi	3	1	1	0	0	1
Montana	0	0	0	0	0	0
North Carolina	3	1	1	0	1	0
North Dakota	1	0	0	0	0	1
Nebraska	2	1	0	5	0	0
New Hampshire	0	0	0	0	0	0
New Jersey	4	0	1	5	1	1
New Mexico	1	0	0	0	0	1
Nevada	5	1	1	3	1	1
New York	4	0	1	5	1	1
Ohio	5	1	1	3	1	1
Oklahoma	2	1	0	3	0	0
Oregon	4	1	0	3	1	1
Pennsylvania	5	1	1	5	1	1
Rohde Island	4	0	1	5	1	1
South Carolina	3	1	1	2	0	0
South Dakota	5	1	1	4	1	1
Tennessee	5	1	1	5	1	1
Texas	1	0	0	3	0	0
Utah	2	1	0	0	1	0
Virginia	4	1	1	3	1	0
Vermont	1	0	0	0	0	1
Washington	3	0	1	5	1	0
Wisconsin	5	1	1	3	1	1
West Virginia	0	0	0	0	0	0
Wyoming	3	1	0	3	0	1
Average/total	2.7	27	27	33	25	31

TABLE 5
The Division of the Market for Out-of-State Incorporations

State	Number of firms incorporate in state	Percentage
DE	3,744	85.23%
NV	172	3.92%
NY	85	1.93%
CO	58	1.32%
NJ	31	0.71%
MD	29	0.66%
FL	28	0.64%
PA	26	0.59%
MN	20	0.46%
UT	20	0.46%
VA	18	0.41%
GA	12	0.27%
WY	12	0.27%
IN	11	0.25%
WA	11	0.25%
CA	10	0.23%
MA	10	0.23%
MO	10	0.23%
KS	8	0.18%
NC	8	0.18%
TX	8	0.18%
OH	7	0.16%
TN	6	0.14%
Other	49	1.12%
Total	4,393	100%