DELAWARE, LAWYERS, AND CONTRACTUAL CHOICE OF LAW

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There are strong policy and constitutional grounds for enforcing clauses in agreements that specify which state's law will be applied to a contract.¹ By facilitating competition among legal regimes, the enforcement of contractual choice of law has efficiency implications in the same way that the "internal affairs rule" in corporate law has generated interstate competition to provide corporate charters. However, in the absence of constitutional compulsion, courts may

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be unwilling to enforce choice-of-law clauses that evade mandatory rules and erode legislators' rents from enacting these laws. Moreover, even if courts enforce these clauses, states may not compete to supply non-corporate law when they have no corporate-type incentives such as franchise taxes and license fees.

These issues are brought into focus by a recently enacted Delaware statute which compels enforcement of choice-of-law clauses. This statute, as well as analogous but less ambitious statutes in other states, suggests that states do seek to compete to supply non-corporate law. Moreover, increased enforcement of choice-of-law clauses as a result of such statutes could lead to even greater competition.

This article explores the state competition to supply non-corporate law which may underlie these choice-of-law statutes. It argues

2. Id.
3. Section 2708 reads as follows:
§ 2708. Choice of Law.
   (a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

   (b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section.

   (c) This section shall not apply to any contract, agreement or other undertaking, (i) to the extent provided to the contrary in Section 1-105(2) of title 6 or, (ii) involving less than $100,000.

   (d) In the event that any provision hereof shall be held to be invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision hereof. Any provision hereof which is held to be invalid or unenforceable only in part or degree or under specific facts, shall remain in full force and effect to the extent, and with respect to facts in connection with which, it has not been held to be invalid or unenforceable.

   (e) This section shall not limit any jurisdiction otherwise existing in a court sitting in the State and shall not affect the validity of any other choice of law provisions in any contract, agreement or other undertaking.
4. See infra Part II(B) (comparing the Delaware statute with analogous choice-of-law statutes in California, New York, and Texas).
that lawyers are important both to the demand side and the supply side of the competition, and that there is a tension between lawyers' roles on each side of the market equation. The supply of competitive non-corporate law depends significantly on lawyers' interests in increasing the value of their litigation services and expertise concerning local law. Lawyers' incentives to supply competitive laws may offset demands by other interest groups for inefficient, wealth-redistributing laws. Therefore, lawyers may actually provoke a "race to the top" in non-corporate law. However, lawyers also have an incentive to demand legal rules that maximize the value of their services, sometimes at the expense of efficiency. The more a state's law is designed to produce rewards for its lawyers, the less reason contracting parties have to contract for application of its law.

Delaware-type choice-of-law statutes also are significant in aligning the general rule on contractual choice of law with the "internal affairs rule" for corporations. This appropriately reflects the underlying similarity between the two rules. At the same time, applying the new choice-of-law statute to corporations raises questions concerning the law applicable to firms that have adopted the Delaware choice-of-law statute while forming under the law of another state.

The article proceeds as follows. Part I places the Delaware statute in the general legal and theoretical context of contractual choice of law. Part II discusses the application and effect of the Delaware statute. The implications of the Delaware statute for a possible jurisdictional competition to supply non-corporate law are developed in Part III. Part IV discusses the legal rules regarding the extraterritorial application of Delaware law, which may be critical in promoting interstate competition of non-corporate legal rules. Part V discusses the relationship between the Delaware choice-of-law statute and the corporate internal affairs rule. Part VI offers concluding remarks.

I. THE LAW AND THEORY OF CHOICE-OF-LAW CLAUSES

There are strong efficiency-based reasons for enforcing choice-of-law clauses. Such reasons include facilitating exit from inefficient mandatory terms, promoting jurisdictional competition, furthering development of efficient standard form terms, resolving problems of multiple state regulation, and reducing uncertainty about which law applies.\(^5\) To be sure, it can be argued that allowing the use of choice-

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5. See Ribstein, supra note 1, at 247-55.
of-law clauses to evade mandatory rules is inconsistent with policies intended to protect contracting parties. However, the significant benefits of choice-of-law clauses justify enforcing these clauses absent strong competing arguments.

This analysis suggests that the current legal rules, which impose open-ended restrictions on enforcement of choice-of-law clauses, are flawed. The Restatement summarizes current law by stating that choice-of-law clauses are not enforced if:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

The Restatement offers little help in determining whether the parties' choice is "reasonable" and gives no apparent reason for enforcing only the law of a state that has a "substantial relationship" with the contract apart from the parties' stated preference. Nor is it clear what sort of "fundamental policy" would justify refusing to enforce specific clauses in otherwise enforceable contracts.

In fact, the gap between law and policy is best explained on interest group rather than public interest grounds. The enforcement of contractual choice of law can weaken the effect of state regulation by facilitating exit from undesirable state laws. This reduces the value of state legislators' services in enacting mandatory rules on behalf of interest groups. State judges have incentives to serve legislators' interests and lack countervailing personal motives to enforce choice-of-law clauses. This theory about the impact of interest groups is supported by the fact that federal judges, who have life

6. Id. at 255-56.
8. See Ribstein, supra note 1, at 262-64.
9. Id. at 264-66.
10. Id. at 273-87.
11. Id. at 274-77.
12. Ribstein, supra note 1, at 278-79.
tenure and no responsibility to state legislators, have been more willing than state judges to enforce choice-of-law clauses. The Constitution, through the Commerce Clause, could close the gap between law and policy. The choice-of-law issue inherently has a strong interstate flavor. More importantly, states that refuse to enforce contractual choice of law are probably helping local interest groups, such as franchisees, resist the power of national, out-of-state groups, such as national franchisers. Non-enforcing states thereby export regulatory costs to states that support the clauses. This problem is appropriately addressed by the Commerce Clause.

The states may, however, move toward enforcing contractual choice of law without Constitutional compulsion. Lawyers, a powerful interest group in many states, may want their jurisdictions to enforce contractual choice of law in order to attract legal business to their states. Delaware-type choice-of-law statutes provide some evidence on the feasibility of active jurisdictional competition to provide non-corporate law.

II. SCOPE AND APPLICATION OF THE DELAWARE STATUTE

Before analyzing the theoretical ramifications of the Delaware statute, it would be useful to determine the transactions to which the statute is intended to apply and the statute’s purported effect on choice-of-law clauses. Part II briefly summarizes the Delaware statute and compares it with analogous statutes in California, New York, and Texas.

A. Overview of the Delaware Statute

The Delaware statute provides that the parties may agree in writing that Delaware law governs a “contract, agreement or other undertaking,” other than one “involving less than $100,000,” as

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13. Id. at 284-86.
14. U.S. Const. art. 1, § 8, cl. 3.
15. Ribstein, supra note 1, at 287-94.
16. Id. at 281.
17. Del. Code Ann. tit. 6, § 2708(a), (c) (1993). This could refer to the basic consideration in each contract containing the clause, the consideration in all connected transactions, or the potential or actual contract damages. Even the smallest product purchase can give rise to large personal injury damages, and even the most straightforward sale-of-goods case can involve substantial consequential or punitive damages. The amount limitation is best understood as an attempt to moot the potential objection that the statute contravenes the “fundamental policy” of state
long as the parties are subject to jurisdiction in Delaware and may be served with legal process. The statute requires any court to enforce a Delaware choice-of-law agreement even if the clause itself is the only connection the parties and transaction have with Delaware, and even if applying the chosen law would contravene the fundamental policy of a state with a materially greater interest than the chosen state. It also allows any action relating to an agreement which contains a Delaware choice-of-law clause to be maintained in Delaware. The language "[c]ontract, agreement or undertaking" is broad enough to include any consensual relationship, even if the underlying liability might be characterized as a tort for some purposes.

B. The California, New York, and Texas Statutes

The Delaware statute goes further than analogous statutes enacted in California, New York, and Texas. The California and statutes intended to protect certain contracting parties from oppressive use of superior bargaining power. See Ribstein, supra note 1, at 266. The limitation isolates a class of transactions that are large enough to justify the use of lawyers and so to involve an informed choice to contract for the application of Delaware law. This explanation suggests that "involving" is intended to refer to the basic consideration inherent in the contract at the time of bargaining.

It is not clear how the statute affects common law restrictions on choice-of-law clauses in contracts involving less than $100,000. On the one hand, the statute arguably represents a clear policy judgment concerning enforceability that the courts could apply to such contracts although the statute does not explicitly direct them to do so. On the other hand, the explicit exclusion of certain large contracts may hamper the liberalization of the constraints on choice-of-law clauses for those contracts.

18. The statute also does not apply "to the extent provided to the contrary in Section 1-105(2) this title," which refers to certain specific exclusions from the choice-of-law provision in the Uniform Commercial Code. Del. Code Ann. tit. 6, § 2708(c) (1993).

19. Id. § 2708(a).

20. The statute applies only to written Delaware choice-of-law clauses. See id. § 2708(a). Notably, only the choice-of-law clause, and not the underlying agreement, must be in writing. This lets the parties agree in writing that all of their agreements, including their oral agreements, are subject to Delaware law.

21. Id.

22. Section 1646.5 states, in pertinent part: [T]he parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars ($250,000), including a transaction otherwise covered by subdivision (1) of Section 1105 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. Cal. Civ. Code § 1646.5 (West Supp. 1994).
New York statutes both provide that, subject to certain exceptions, parties to contracts "covering" more than $250,000 "may agree" to application of California or New York law without regard to whether the contract "bears a reasonable relationship" to California or New York.

The Texas statute is more stringent and allows choice-of-law clauses only in contracts involving a consideration of at least $1 million. The statute qualifies enforcement of choice-of-law clauses by (1) only applying the law of a jurisdiction bearing a "reasonable relation" to the transaction regarding validity and enforcement; (2) excluding from coverage such matters as real property transfers,

23. Section 5-1404 states, in pertinent part:
1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.
2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

N.Y. GEN. OBLIG. LAW § 5-1401 et seq. (McKinney 1993).

24. TEX. BUS. & COM. CODE ANN. §§ 35.51-.52 (West 1994). The amount limitation in the Texas statute clearly applies to the bargained-for consideration. See id. § 35.51(2). This is consistent with the interpretation of the Delaware act discussed above. See supra note 17.

25. TEX. BUS. & COM. CODE ANN. § 35.51(b). A transaction bears a "reasonable relation" to a jurisdiction if:
(1) a party to the transaction is a resident of that jurisdiction;
(2) a party to the transaction has its place of business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;
(3) all or part of the subject matter of the transaction is located in that jurisdiction;
(4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or
(5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.

Id. § 35.51(d).
validity of a marriage or adoption, or rights under a will; and (3) providing that the clause is voidable by a party obligated to perform construction or repair under a contract primarily providing for construction or repair of real property.

The Delaware statute goes beyond the California and New York laws by stating clearly that the choice-of-law clause which is within the statute “shall be enforced.” Thus, while the California and New York statutes merely negate the requirement that the contract have some relationship with the state, the Delaware statute also eliminates the Restatement’s qualification concerning the “fundamental policy” of a state with a “materially greater interest.” Delaware also goes beyond the Texas statute by preserving the “reasonable relationship” test and including several exceptions.

These contrasts between the Delaware statute and those enacted in three other major commercial jurisdictions are significant because they provide some evidence concerning the influence of lawyers on state competition. Delaware, where lawyers are highly influential, broadly enforces choice-of-law clauses. In the much larger jurisdictions of California, New York, and Texas, where lawyers’ influence is tempered by that of other interest groups, choice-of-law clauses are not so favored.

C. Constitutionality of the Statutes

Some commentators argue that the Full Faith and Credit Clause of the Constitution invalidates statutes that enforce contractual

26. Id. § 35.51(f).
27. Id. § 35.52(a).
29. See Credit Francais Int’l, S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc. 2d 564, 569, 490 N.Y.S.2d 670, 675-76 (N.Y. Sup. Ct. 1985) (stating that “the enactment of the statute now puts beyond argument the policy question of whether New York courts should burden themselves with litigation involving non-residents where the only nexus is the contractual agreement to designate New York as a forum”).
30. See supra text accompanying note 7. Moreover, the Delaware statute ensures that contracts with Delaware choice-of-law clauses can be litigated in Delaware. See supra note 20 and accompanying text.
32. See infra text accompanying notes 36-37.
33. See discussion Part II(E) (discussing the role of interest groups other than lawyers in jurisdictional competition).
34. The Full Faith and Credit Clause states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every
choice of law over another state's significant interest. This article focuses on the broader implications of the statutes rather than their validity. However, it is worth noting that a forum state's decision either to apply its own law or to sacrifice its interests and apply the chosen state's law is unlikely to be deemed unconstitutional under the Supreme Court's liberal "full faith and credit" test articulated in Allstate Insurance Co. v. Hague. Moreover, it is not clear how holding choice-of-law clauses unconstitutional could be reconciled with the continuing validity of the "internal affairs" rule in corporations.

III. THE DELAWARE STATUTE AND STATE COMPETITION TO SUPPLY LEGAL RULES

Part III evaluates the Delaware statute's implications for, and likely impact on, interstate competition to supply non-corporate commercial law. Section A discusses the forces that motivate a state to enact a choice-of-law statute, i.e., the supply side of the state competition; Section B examines the incentives of contracting parties to adopt Delaware's or any other state's law, i.e., the demand side. Section C discusses the critical role of lawyers in both the supply and demand sides of the equation. Section D discusses the interaction between lawyers and other interest groups.

A. A "Supply-Side" Explanation: The Role of Lawyers

The standard explanation of the state competition for corporate law is based on the states' incentives to earn franchise and related fees from incorporating firms. Thus, Delaware's dominance in cor-

other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.


37. See infra Part V (noting the close relationship between this rule and enforcing choice-of-law clauses).
porate law may be due to its reliance on corporate franchise fees.\textsuperscript{38} But it is not clear that dispersed Delaware taxpayers can motivate state legislators to draft state-of-the-art legislation solely in order to maximize state revenues, particularly given legislators’ political costs of producing this legislation.

Legislators incur several kinds of costs in competing to provide state law. First, they have to spend time mastering the complexities of commercial legislation. This takes time away from projects that may bring them larger payoffs in campaign contributions and constituent support. Second, because legislators can earn contributions and other support from affected parties by implementing changes in mandatory rules, they do not have strong incentives to lead the movement toward more enabling rules. Corporate law evolved from the sale of corporate charters by state legislators to enabling statutes and alternative forms of limited liability business forms because of the pressure of jurisdictional competition.\textsuperscript{39} It did not evolve because legislators independently wanted to promote change. Third, active legislators face more risks than rewards. Innovative politicians take a risk that the legislation will fail to accomplish its objectives or will alienate potential supporters, while their successes can easily be duplicated by other states.\textsuperscript{40}

The Delaware choice-of-law statute seems particularly puzzling from a supply-side perspective since it apparently does not yield any potential benefits for legislators. The statute seems neither to generate income for the state, nor to benefit firms and individuals residing or doing business in Delaware. Delaware residents do not need the statute to secure jurisdiction in Delaware or to establish a close enough relationship to justify enforcement of the choice-of-law clause


outside of Delaware. In fact, the statute aids only non-residents who may need statutory recognition of their ability to contract for Delaware jurisdiction and Delaware law.

Competition for non-corporate law, such as that suggested by the Delaware statute, must be explained by reasons other than benefits to Delaware residents. The most likely motivation is that the statute helps Delaware's influential legal services industry. Professors Jonathan Macey and Geoffrey Miller argue that lawyers may be the group that most influences Delaware corporate law. Delaware lawyers have all of the attributes of a politically powerful interest group: they are already organized into bar associations and maintain an advantage over other groups because they continually learn about the law as a consequence of their profession; they are centered in a single city (Wilmington), in a small state and, therefore, can communicate with each other at minimal costs; and they provide an important service for legislators in drafting legislation on complex commercial and corporate matters.

Delaware lawyers, in essence, are the Delaware legislature, at least insofar as corporate law is concerned. Delaware has one of the three smallest legislatures in the country. Its legislative committees are virtually inactive. Most striking, however, is that few of Dela-


42. For general discussions of interest group theory that stress the importance of organizational costs in analyzing the relative strength of interest groups, see Mancur Olson, Jr., The Logic of Collective Action (1965); Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q. J. Econ. 371, 377 (1983); George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Robert D. Tollison, Public Choice and Legislation, 74 Va. L. Rev. 339 (1988). The “byproduct” effect in determining the political power of interest groups was first identified in Olson, supra, at 132-67. The byproduct effect exists when an organization has the power to make membership compulsory and has a lobby that is a byproduct of whatever function the organization performs that permits a captive membership. Id. at 133.

43. This offsets the fact that the legal services industry is not particularly large in relation to the rest of Delaware's population. Although Delaware has a high lawyer-to-population ratio, see Macey & Miller, supra note 41, at 506 n.136, the industry produces approximately the same percentage of the Delaware economy, about two percent, as it does in the United States economy. See Bureau of the Census, U.S. Dept’ of Commerce, County Business Patterns 1989 Delaware: Employment and Payrolls, Number and Employment, Size of Establishments by Detailed Industry (1989) (grouping for United States, and for Delaware, respectively, by all categories in the Standard Industrial Classification).
ware's legislators are lawyers. Such legislators are likely to rely on lawyers to supply sophisticated commercial and business legislation. As a result, virtually all of Delaware corporate law is proposed by the Delaware bar, and the bar's proposals invariably pass through the legislature.

One important function of the Delaware statute may be to make Delaware law a standard for commercial contracts. If Delaware law is made such a standard, Delaware's commercial and corporate lawyers will reap the benefits. As with Delaware corporate law, wide use of Delaware commercial law would attract more litigation business to the state's courts and increase the value of advice on and expertise in Delaware law. Increased litigation in Delaware is the crucial potential benefit because lawyers everywhere in this country can advise their clients on, and indeed even gain an expertise in, Delaware law. However, lawyers have only a limited legal and cost-effective ability to represent clients in litigation in other states. Moreover, entry barriers such as bar qualification requirements, moving costs, and the difficulty of entering existing social and business

44. As recently as the mid-1980s, no Delaware legislators were lawyers. See Curtis Alva, Delaware and the Market for Corporate Charters: History and Agency, 15 Del. J. Corp. L. 885, 896-98 (1990).
45. Id. at 900. In fact, no proposal by the corporate law section of the Delaware Bar Association has ever failed and such proposals are generally not amended or even debated. Id.
46. This was clearly a function of the analogous New York choice-of-law statute quoted in supra note 23. As the court said in Credit Francais Int'l, 128 Misc. 2d at 570, 490 N.Y.S.2d at 675-76:
   New York, as the center of international trade and finance, has expressly recognized, as a service to the business community, that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships. Just as the dollar has become the international standard for monetary transactions, so may parties agree that New York law is the standard for international disputes.
47. The benefits discussed in the text are those attributable to the success of Delaware law in general. Lawyers can, of course, earn extra reputational benefits by working on and becoming identified with particular laws.
48. See Macey & Miller, supra note 41, at 503-05.
49. See id. at 493-94 n.87 (citing authorities, including Model Code of Professional Responsibility EC 3-9 (1981), which protect clients from unreasonable limitations on a lawyer's ability to represent clients in other states). This contrasts with Canadian practice, which limits lawyers' ability to advise their clients on the law of a province in which they are not licensed to practice. See MacIntosh, supra note 40, at 44.
50. See Macey & Miller, supra note 41, at 503-04 (discussing Delaware lawyers' ability to capture benefits from corporate litigation in Delaware).
networks limit outsiders' ability to compete with Delaware lawyers.

The benefits to Delaware lawyers help explain why the Delaware statute is designed to increase litigation in Delaware, and not merely increase application of Delaware law, which may also benefit non-Delaware lawyers. The statute provides for enforcement of clauses over which Delaware has jurisdiction and makes clear that the contract itself can create jurisdiction in Delaware. Therefore, the statute ensures that either party can insist on litigating in Delaware.

Delaware's focus on litigation also is apparent in a recent initiative to attract large litigation to Delaware courts. Pursuant to a recommendation of the Commission on Major Litigation Reform, the Delaware General Assembly endorsed an "important public policy initiative" to create a special expedited procedure for commercial and business cases involving an amount in controversy of over $1 million in which a Delaware corporation, citizen, or entity is a party. Although the resolution was explained as a benefit to Delaware corporations and other firms based in Delaware, it was obviously also designed to bring more litigation to Delaware courts.

Finally, while benefit to lawyers is certainly a strong impetus for jurisdictional competition to supply non-corporate law, the role of franchise fees should not be completely discounted. Delaware's immediate reason for adopting the Delaware choice-of-law statute was its adoption of provisions for "registered limited liability partnerships" (LLP). Delaware charges LLPs an annual fee of $100

51. Similarly, Delaware corporate law maximizes corporate litigation in Delaware by, among other things, foregoing a security for costs requirement and generously awarding plaintiffs' attorneys' fees. See Macey & Miller, supra note 41, at 509-22.

52. See Del. Code Ann. tit. 6, § 2708(a) (1993). The limitation to clauses over which Delaware has jurisdiction probably is unnecessary to validate the statute. The parties' agreement to choose a state's law probably would be enough to satisfy minimal due process standards for application of the law under Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981), even if the state lacked jurisdiction. It might not be enough, however, to compel litigation in Delaware over a forum non conveniens objection. See Macey & Miller, supra note 41, at 496 n.97.

53. The Commission was created by Executive Order No. 7 (May 20, 1993).


55. The resolution and the synopsis thereof emphasize the need to reduce litigation cost and delay. Id.

56. The "registered limited liability partnerships" statute, S. 161, 137th Gen. Assembly, 69 Del. Laws 42 (1993), was passed contemporaneously with the choice-of-law statute. For a discussion of the link between LLPs and the choice-of-law statute, see infra Part III(E).
per partner per year, up to the maximum annual corporate franchise tax, which is currently $150,000 per firm.\textsuperscript{57}

B. The “Demand Side”: Contracting for Efficient Law

Apart from questioning why Delaware would enact a choice-of-law statute, is the further question of why contracting parties would agree to be governed by the statute. The most likely answer is that Delaware is attractive because it can build on its corporate law reputation by offering for all commercial contracts what it offers corporations: stable but flexible legal rules, expert judges and lawyers,\textsuperscript{58} and the absence of strong interest groups, such as labor or consumer groups, that might be able to obtain statutory rules that redistribute wealth created by contracts.

The principal question regarding the demand for Delaware non-corporate law concerns the importance of franchise taxes and organization fees to Delaware’s success in competing to provide corporate law. Roberta Romano has shown that Delaware has an edge in the corporate chartering competition because franchise taxes represent enough of Delaware’s revenues to guarantee the stability of Delaware law.\textsuperscript{59} Aside from the franchise tax bond, Delaware courts have an expertise in business-oriented cases that other states cannot easily match.\textsuperscript{60} Moreover, Delaware also has a sophisticated and influential bar that has a stake in shaping law so as not to reduce legal business.\textsuperscript{61}

Despite the other incentives contracting parties have for adopting Delaware law, the franchise tax bond remains potentially significant. Unless Delaware lawmakers are constrained by the potential loss of franchise tax revenues, they might be inclined to enact rules that favor lawyers and other interest groups.\textsuperscript{62} Accordingly, contracting parties may be less willing to adopt Delaware law in areas in which

\textsuperscript{57} See Del. Code Ann. tit. 6, § 1544(c) (1993).
\textsuperscript{58} See Romano, supra note 38, at 280-81.
\textsuperscript{59} Id. at 280.
\textsuperscript{60} See Bernard S. Black, Is Corporate Law Trivial?: A Political and Economic Analysis, 84 Nw. U. L. Rev. 542, 589-90 (1990). The importance of the Delaware courts in the business community was illustrated recently by the interest of institutional investors and others in the decision whether to renominate an influential Delaware Supreme Court justice. See Richard B. Schmitt, Reappointment Seems Unlikely for Moore, WALL St. J., May 18, 1994, at B7.
\textsuperscript{61} See Macey & Miller, supra note 41, at 488-89.
\textsuperscript{62} Id. at 491-98 (discussing the tradeoff in Delaware corporate law between maximizing legal fees and maximizing franchise tax revenues).
there is no franchise tax bond even if high-quality Delaware courts and lawyers are available in these areas.

States cannot compete successfully for choice-of-law business simply by offering terms that systematically favor one set of contracting parties (such as franchisees) over another (such as franchisers). Contracting parties do not necessarily prefer rules that let them avoid onerous contract terms if the other party can insist on being compensated for bearing the increased risk and unpredictability imposed by these rules. For example, franchisees would no more want to pay for mandatory rules that excessively favor their interests than they would want to pay for contract terms that accomplish the same purpose. Contracting parties would favor mandatory rules only to the extent that they can retroactively obtain protection that they did not have to pay for at the time of contracting. As demonstrated by the evolution of enabling corporate rules, as long as Delaware or some other state offers rules favoring enforcement of contract terms, a state cannot win the competition for legal business by offering rules that only appeal to one set of contracting parties. Consequently, competition for legal business could cause the law to generally move towards enabling rules and away from mandatory rules.

The success of Delaware’s choice-of-law statute depends partly on the extent to which out-of-state lawyers advise their clients to include Delaware choice-of-law clauses in their contracts. Because, however, lawyers in this country can advise on the law of states other than those in which they are licensed, they can advise clients to utilize Delaware choice-of-law clauses without necessarily losing the client. Because contracts that adopt Delaware law give either

63. Delaware law may favor particular parties. For example, like many other states, Delaware has a franchise law that protects franchisees from bad faith terminations. See Del. Code Ann. tit. 6, § 2552 (1993). However, it follows from the theory of choice-of-law clause statutes discussed in this article that Delaware would not enact strong mandatory rules protecting franchisees, that Delaware courts would not interpret the statute as imposing stringent duties on franchisors, and that the Delaware legislature would answer any “surprise” new interpretation of the Delaware statute just as it answered Smith v. Van Gorkom, 488 A. 2d 858 (Del. 1985), which imposed stringent new duties on corporate directors. See Del. Code Ann. tit. 8, § 102(b)(7) (1991) (authorizing charter provisions limiting liability for breach of the duty of care).

64. See Ribstein, supra note 1, at 275.

65. Cf. Macey & Miller, supra note 41, at 486; Romano, supra note 38, at 273 (noting importance of legal advice in Delaware’s competition to supply corporate law).

66. See supra note 49 and accompanying text.
party the right to litigate in Delaware, lawyers might prefer to advise clients to agree to apply local law so as not to risk losing their clients' litigation business. What advice lawyers choose to give to their clients is affected by competition from lawyers who give unfettered advice as well as by the impediments to litigating in Delaware.

C. Lawyers' Interrelating Roles in Supply and Demand

Part III of this article has thus far shown that Delaware lawyers' interests in attracting litigation business to Delaware gives Delaware a strong incentive to compete to supply commercial law. At the same time, Part III also has shown that the contracting parties will only demand Delaware law to the extent that the rules in Delaware law are mutually advantageous for the contracting parties. This section shows the interrelationship between the effects of lawyers on the supply of and demand for competitive rules.

The supply of Delaware law, in the sense of Delaware's willingness to compete for commercial law business, depends on pressure from the Delaware bar, particularly in the absence of any franchise tax incentive. Without such pressure, the Delaware legislature may make its law less advantageous to contracting parties by adopting rules that favor particular interest groups.

But just as the Delaware bar can increase the supply of competitive rules, it also can reduce the demand if these rules are perceived to favor lawyers. Indeed, Delaware corporate law favors lawyers in several ways, particularly by adopting rules that encourage litigation. Similarly, Delaware may shape its non-corporate law to suit lawyers. For example, Delaware could offer open-ended default

67. See supra note 3.

68. It is not clear whether the lawyer market is sufficiently competitive that lawyers who attempt to serve their own interests will lose clients. Regulatory restrictions on the supply of lawyers, ethical rules limiting lawyer competition, and the high costs of clients' selecting or switching among lawyers probably limit competition to supply this self-serving advice. For contrasting conclusions on whether lawyer competition can resolve the choice-of-law problem, compare Ronald J. Daniels, Should Provinces Compete? The Case for a Competitive Corporate Law Market, 36 McGill L.J. 130, 184 (1991) (arguing that competition does constrain lawyers to properly advise clients on choice of law) with MacIntosh, supra note 40 (arguing to the contrary).

69. See Macey & Miller, supra note 41, at 494 (discussing non-Delaware lawyers' ability to litigate cases in Delaware).

70. See generally Macey & Miller, supra note 41.
rules that discourage settlement and increase the need for legal advice.\textsuperscript{71} Lawyers would support rules that reduce demand for Delaware law up to the point that the reduction in demand exceeds the rules’ benefit to Delaware lawyers. This point depends on the elasticity of demand for Delaware law which, in turn, depends largely on other states’ willingness to provide substitutes for Delaware law.\textsuperscript{72}

There is, moreover, a tension between lawyers’ dual roles in creating both the supply of and the demand for competitive law. This tension inherently limits state competition to supply non-corporate law, irrespective of whether other states choose to compete. The supply of competitive rules depends to some extent on the rules’ benefit to Delaware lawyers. Without a franchise tax incentive, state lawmakers will participate in an interstate competition to supply efficient commercial law rules only if pressured to do so by a strong bar. Contracting parties’ demand for a state’s law depends on that state’s having a sophisticated bar that has an interest in the form of a large income stream that would be lost if contracting parties defected.\textsuperscript{73} At the same time, lawyers’ incentives to press for competitive commercial law rules, their willingness to devote human capital to developing a state-specific expertise, and the size of their bond all depend on their being able to reap a benefit from their state’s winning the competition. Benefits to Delaware lawyers include increasing costly litigation and barring outside lawyers from sharing in litigation by linking Delaware choice of law with use of the Delaware forum.\textsuperscript{74}

Whether states compete to supply laws may depend on how much the states must rely on their lawyers to encourage the competition. If the states can impose franchise taxes, as states do for incorporation business, taxpayers in small states where such taxes can have an impact may support legislators’ efforts to compete for incorporation business. In most cases, however, lawyers probably

\textsuperscript{71} See George Priest & Benjamin Klein, \textit{The Selection of Disputes for Litigation}, 13 J. LEG. STUD. 1, 13-17 (1984) (illustrating how the settlement negotiations of potential litigants select disputes for litigation).

\textsuperscript{72} See infra Part III(D).

\textsuperscript{73} See Benjamin Klein & Keith Leffler, \textit{The Role of Market Forces in Assuring Contractual Performance}, 89 J. POL. ECON. 615 (1981).

\textsuperscript{74} This may be a situation in which creating a barrier to entry may be efficient because it encourages production of a high quality good, in this case, Delaware law. See Harold Demsetz, \textit{Barriers to Entry}, 72 AM. ECON. REV. 47 (1982); C.C. von Weizsacker, \textit{A Welfare Analysis of Barriers to Entry}, 11 BELL J. ECON. 399 (1980).
are necessary to create incentives to compete for choice-of-law business. In these situations, competition for law business must be tempered by offering enough benefits to lawyers that they will have the incentive to promote the competition.

D. Lawyers and Interest Groups in State Competition

The extent to which states compete to supply non-corporate law depends significantly on whether interest groups in those states can protect their benefits from mandatory rules from erosion by state competition. States can successfully compete only by making their underlying legal rules generally attractive to both contracting parties. Thus, a state would not win a competition to attract franchise law business simply by adopting a pro-franchisee law. However, the state might be able to help franchisees by imposing retroactive burdens in existing franchise contracts. Groups helped by such laws might oppose vigorous choice-of-law competition.

States' incentives to compete, therefore, depend on how well organized the groups that favor mandatory rules are, the costs and benefits to competing groups of applying contract-friendly enabling rules rather than protective mandatory rules, and the benefits to lawyers from competing for law business. Lawyers gain if their state prevails in the interstate competition to provide contract rules. This motivates them to help make law more efficient.

Delaware is in a good position to compete to supply law because it has a highly organized commercial bar but no well-organized competing groups. This proposition is supported by the observation that Delaware, where lawyers are the only interest group that really matters, has won the competition to supply corporate law over states that were willing to forfeit competitive position by, for example,

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75. For discussions of the role of interest groups in non-enforcement of contractual choice of law, see Ribstein, supra note 1, at 279-81. The success of these groups also depends partly on the Constitutional and choice-of-law rules discussed in Part IV.

76. See supra note 63 and accompanying text.

77. Of course, lawyers also can gain from inefficient rules that either increase litigation or favor particular sets of clients. Lawyers may prefer less interstate competition if this reduced competition would produce more rules that favor lawyers' interests. This, in fact, may help explain lawyers' strong advocacy of the uniform lawmaking process. For a discussion of how that process can coordinate movement toward inefficient laws, see Larry E. Ribstein & Bruce H. Kobayashi, A Theory of Uniform Laws 21 (Sept. 30, 1993) (unpublished manuscript, on file with The Delaware Journal of Corporate Law).
adopting strong anti-takeover statutes. Delaware lawyers' influence also helps explain differences between the Delaware choice-of-law statute and the one recently adopted in Texas. The Texas act apparently was enacted in order to help creditors and borrowers avoid Texas' restrictive usury statute, rather than generally to compete for choice-of-law business. Having accomplished that limited purpose, the legislators were willing to compromise Texas' ability to attract litigation and other choice-of-law business by making the statute inapplicable to certain types of contracts.

States' incentives to compete for legal business may change over time because of changes in interest groups and benefits derived by lawyers. As the rules in some states on enforcing contractual choice of law move toward fostering competition, other states that are on the fence have incentives to become more competitive. As a result of increased competition, local commercial lawyers may begin to lose clients to lawyers in states with more attractive commercial law. At the same time, local interest groups, who may already be losing business to neighboring states that are adopting efficient rules, can reduce these losses if their state joins the competition.

E. Activating the Competition: A History of the Delaware Law

The dynamics discussed above, including the roles of the bar and of other interest groups, have been in place in every state for some time. This raises the question of why Delaware waited until now to abandon the long-standing limitations on enforcement of contractual choice of law.

78. For discussions of lobbying, for anti-takeover statutes, primarily by management of locally powerful target firms, see Roberta Romano, The Genius of American Corporate Law 57-60 (1993) (ascribing Delaware's resistance to strong anti-takeover statutes in part to the role of the bar in approving Delaware corporate law); Roberta Romano, The Political Economy of Takeover Statutes, 73 VA. L. REV. 1 (1987).
79. See supra text accompanying notes 24-27.
81. See supra text accompanying note 27 (discussing the exceptions to the statute).
82. For an analogous test of the interest group factors moving states toward a more enabling corporate law regime, see Shughart & Tollison, supra note 39.
83. The most recent Restatement codification of these limitations, discussed and quoted supra at text accompanying note 7, is over 20 years old, and is based on law that is considerably older than that. See Ribstein, supra note 1, at 261-66 (discussing Restatement rules and supporting cases).
The answer may be that Delaware lawyers only recently acquired a strong incentive to enforce choice-of-law clauses. The Delaware legislature enacted the choice-of-law statute in the same session as they enacted legislation permitting Delaware general partnerships to obtain a restricted form of limited liability by becoming "registered limited liability partnerships" (LLPs). According to Jonathan R. Le option, LLP legislation is valuable for lawyers and other professionals because it offers a simple way for them to insulate themselves from personal liability for malpractice by their co-partners, while remaining a partnership. Accordingly, there is some evidence that the choice-of-law legislation was enacted to ensure limited liability for Delaware LLPs operating outside of Delaware.

Delaware’s entry into the competition for non-corporate choice-of-law business was, therefore, at least partly an accidental byproduct of lawyers’ and other professionals’ search for limited liability. If so, other states also may pass analogous laws as their professionals also seek a safe harbor from malpractice liability. However, Delaware differs from other states, including Texas, in that once Delaware lawyers decided to lobby for a choice-of-law-clause statute, they had an incentive to make the statute as broad as possible, rather than to protect groups who might lose by enforcement of the clauses.

In general, lawyers’ incentives to compete with Delaware for law business probably do not completely explain state competition to supply non-corporate law. The history summarized above suggests that lawyers might not have moved as a group to push for the choice-of-law statute unless they had also been motivated to seek interstate enforcement of limited liability. At the same time, as discussed above, the statute offered revenue-conscious legislators the lure of substantial franchise fees.

IV. The Statute’s Extraterritorial Effect

Whether other states choose to compete with Delaware to supply non-corporate law depends not only on whether groups in the state gain or lose from the competition, but also on whether state courts

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86. See supra text accompanying note 80 (discussing the Texas statute as an attempt to avoid restrictive usury statutes).
87. See supra text accompanying note 57.
can stall the competition by not enforcing Delaware law. In states where supporters of mandatory law are strong, the Delaware statute may have little impact if the party who favors enforcement of Delaware law cannot win the race to the courthouse by suing in Delaware. Part IV discusses the extraterritorial effect of the Delaware statute from two perspectives: (1) the common law of contractual choice of law and (2) a forum’s constitutional duty to enforce another state’s law.

A. Common Law

The Delaware statute purports to require all states to enforce Delaware choice-of-law clauses by providing that the Delaware choice-of-law agreement “shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.”

Since non-Delaware courts ultimately will decide whether to enforce the Delaware statute in their jurisdictions, the important question is how the Delaware statute is likely to affect these decisions. In particular, does it matter that the Delaware statute purports to make the parties’ choice to litigate in Delaware enough to create a “substantial relationship” with Delaware? If non-Delaware courts decide that the “substantial relationship” test is based on “surprise”—i.e., forcing contracting parties to bear the costs of determining what law applies—they may conclude that the statute is relevant only in drawing contracting parties’ attention to the potential of litigation in Delaware.

The Delaware statute may have more impact outside of Delaware if non-Delaware courts instead decide that the function of the “substantial relationship” test is to ensure that transactions are regulated only by states that have real legislative interests and, therefore, appropriate incentives to legislate efficiently. The state’s interest ought to be less important than the contracting parties’ incentives to choose the law appropriate to the contract. To the extent the state’s interest does matter, it ought to be enough that states have an interest in competing for law business. Choice-of-law statutes demonstrate that

89. See Ribstein, supra note 1, at 263.
90. Id. at 263-64. “[T]he ‘state interest’ argument ignores reasons contracting parties would agree to apply the law of a particular jurisdiction, including the value of certainty and of avoiding inefficient mandatory rules.” Id.
the enacting states do have an interest in contractually selected law.\textsuperscript{91} The common law test also provides that the chosen law is not applied if its application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."\textsuperscript{92} The Delaware choice-of-law statute attempts to stay within these bounds because its amount limitation singles out contracts that are most likely to involve informed choice of law,\textsuperscript{93} thereby minimizing the applicability of non-Delaware law that purports to protect contracting parties. Also, by clarifying Delaware's "interest" in competing to provide the chosen law, the statute may be relevant, in close cases, to the determination of whether another state has a "materially greater interest."

\textbf{B. Constitutional Law}

The Commerce Clause of the Constitution arguably requires states to enforce contractual choice of law in some circumstances.\textsuperscript{94} This argument is based on the theory that statutes that override contractual choice of law are likely to impose costs on groups outside the state who cannot influence the enacting legislators. The Delaware statute brings the cost-externalization issue into focus by showing that Delaware is interested in exporting its law, and therefore the services of Delaware lawyers.\textsuperscript{95} This export business would be hurt if other states bar application of Delaware law in order to benefit their own lawyers. If a state enacts a Delaware-type choice-of-law statute and enforces its own statute while refusing to apply Delaware law or allow transfer to Delaware, the non-enforcing state arguably is preventing Delaware lawyers from selling their product, expertise in Delaware law, outside of Delaware. Thus, the state would be protecting its own law and local lawyer industry at the expense of Delaware's law industry.

This situation also may invoke protection under Commerce Clause doctrine which protects interstate commerce from discrimi-

\textsuperscript{91} See supra Part III(A).
\textsuperscript{92} Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).
\textsuperscript{93} See supra note 17.
\textsuperscript{94} See Ribstein, supra note 1, at 291-94. Part II(C), supra, discusses the converse question of whether states are constitutionally permitted under the Full Faith and Credit clause to enforce contractual choice of law pursuant to a choice-of-law-clause statute.
\textsuperscript{95} See supra Part III(A).
natory laws.96 A state’s legislative decision to enforce choice-of-law clauses selecting local law, but not clauses selecting the law of another state, is arguably discriminatory against a product being sold in interstate commerce. To be sure, selective enforcement of choice-of-law clauses differs from completely barring importation of foreign law. However, the discrimination cases have required only facial favoritism of a local over a foreign product. For example, in Wyoming v. Oklahoma,97 the Court invalidated a statute that required generating plants to use a portion of in-state coal although the law did not actually bar out-of-state coal. Moreover, a state may be unable to defend a decision to enforce all local law under choice-of-law clauses but only some foreign law, since such a decision does not weigh the policies of particular local and foreign laws on the same subject.

Therefore, Delaware’s decision to enforce choice-of-law clauses selecting Delaware law may constitutionally constrain Delaware courts from discriminating in favor of its own law by refusing to enforce choice-of-law and forum-selection clauses choosing other than Delaware’s law and fora outside Delaware.

C. Contracting for Delaware Forum and Jurisdiction

Parties can help ensure that Delaware law will be applied to their transaction by contracting for adjudication in Delaware and, of course, by bringing the case in Delaware. This may encourage parties who will gain ex post from the application of Delaware law to bring a preemptive declaratory judgment or injunction action. It may also reduce the prospects of negotiated solutions. Parties favored by the clause may be unwilling to delay litigation if this means a risk of losing the advantage of adjudication in Delaware, and parties

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96. See Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) (holding that Oklahoma legislation which requires Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma burn mixture of coal containing at least 10% Oklahoma-mined coal violated Commerce Clause); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (holding Florida statutes which prohibited out-of-state banks and holding companies from owning or controlling Florida businesses furnishing investment or advisory services and barring out-of-state corporations from exercising various trust powers and duties in Florida unconstitutional under Commerce Clause); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding New Jersey statute prohibiting the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of the State” violated the Commerce Clause); Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986).

disfavored by the clause similarly have an incentive to launch pre-emptive strikes in non-Delaware courts.

Because strategic litigation is costly and not always feasible, the ultimate impact of the Delaware statute may depend on whether the parties can force transfer of the litigation from other states pursuant to the choice-of-law clause. In light of the Supreme Court's recent enforcement of choice-of-forum98 and consent-to-jurisdiction99 clauses, it may be difficult for non-Delaware courts to justify refusing to enforce such clauses.

There is also a question whether a party can somehow avoid litigating in Delaware despite the provision in the Delaware statute permitting any party to a Delaware choice-of-law clause to maintain the underlying action in Delaware.100 A recent Delaware decision allowed the plaintiff to remove a corporate case despite the defendant's concern that the court to which the case was removed (in California) would not apply Delaware law. In that case, the court held that the California courts were bound to apply the law of the state of incorporation, and defendant had not shown the California courts would refuse to do so.101 This case antedated the Delaware choice-of-law statute, and the parties had not contracted for jurisdiction.

V. THE INTERNAL AFFAIRS RULE AND THE PLATYPUS FIRM

Courts have long enforced the corporate law of the incorporating state, under the "internal affairs" rule.102 However, there is no justification for distinguishing in this respect between business associations and non-firms. Both are essentially contractual relationships,103 and enforcing contractual choice of law involves comparable

98. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (finding, absent a showing of bad faith, a reasonable forum clause in a form contract may well be permissible).
99. See National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) (asserting that due process is not offended by the enforcement of a consent to jurisdiction provision that is obtained through free negotiations and is not unreasonable or unjust).
102. See Ribstein, supra note 1, at 266-69.
costs and benefits in both situations. The Delaware statute rightly brings the rules regarding these comparable situations closer together. By integrating contractual choice of law with the internal affairs rule, the Delaware statute may, however, have surprising implications for corporate law. For example, in *Rosenmiller v. Borden*, the court applied Delaware law to a Delaware corporation with a shareholders' agreement that selected New Jersey law. Had the *Rosenmiller* situation been reversed and the parties to a New Jersey corporation had contracted to apply Delaware law to their shareholder agreement, the Delaware choice-of-law statute would compel application of Delaware law. Perhaps states' long acceptance and parties' general awareness of the internal affairs rule creates a contract to apply incorporating state law to all internal affairs and overrides agreements for application of other law. However, there is no such contract if the parties have made clear that they intended to apply a law other than that of the incorporating state.

Taking the analysis a step further, suppose that a shareholders' agreement for a New Jersey corporation includes a clause applying Delaware law to all corporate affairs. By doing so, the parties would have created a sort of "platypus" corporation. Although anyone who wants Delaware law to apply could choose to incorporate or reincorporate in Delaware, some corporations might choose the "platypus" approach to obtain the benefits of Delaware case law and adjudication without incurring higher Delaware franchise fees and foreign corporation fees in their home state. In this case, the parties' incorporation in New Jersey strongly implies the selection of New Jersey law. Yet the explicit agreement to apply Delaware law is inconsistent with that interpretation.

The argument for applying the law selected by the parties in the choice-of-law clause rather than that of the formation state may be stronger for non-corporate business associations. Under the Restatement, general contract choice-of-law rules, rather than the internal affairs rule, apply to partnerships.

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104. See Ribstein, supra note 1, at 269-73.
106. Just as a platypus is part mammal and part reptile, the hypothesized platypus corporation is part New Jersey corporation and part Delaware corporation.
107. See Restatement (Second) of Conflicts § 294 (1971). Moreover, the court need not apply the organization state's characterization of the firm as a corporation, but rather may make an independent characterization based on the firm's attributes. See id. § 298.
partnerships,\textsuperscript{108} and other business associations even if the parties explicitly agreed to the application of particular law,\textsuperscript{109} except under state statutes that explicitly recognize foreign firms.\textsuperscript{110} Moreover, the Revised Uniform Partnership Act provides that, in the absence of contrary agreement, partnerships are governed by the law of the state in which their chief executive office is located, rather than by the law of the state of organization the parties have selected.\textsuperscript{111} Without a well-recognized internal affairs rule to create strong expectations about which law applies, the courts may be more willing to let private agreements concerning choice of law override the general choice-of-law rule. Indeed, it can be argued that Delaware enacted its choice-of-law statute partly to ensure extraterritorial application of its "registered limited liability partnership" statute.\textsuperscript{112}

Although the foregoing discussion of choice of law for "platypus" firms emphasizes interpretation of the contract, the relevant business association statute could be interpreted to mandate application of the statute to any firm that chooses to form under it. This interpretation of the statute makes sense on both efficiency and Constitutional grounds. States should be able to choose to bundle their lawmaker and adjudication services and to charge parties franchise and other fees to use this service. Fees and taxes may or may not give the states sufficient incentive to compete to provide law, depending on what role, if any, lawyers play in promoting this competition.\textsuperscript{113} Letting states charge fees gives them a property right in their laws. Alternatively, lawyers could prevail on legislators to make the state's

\textsuperscript{108} Id. § 295(3) (referring to general rule stated in § 294). Note, however, that comment d to § 295 states that a limited partner should be compared to a corporate shareholder, indicating that a court should apply the same choice-of-law rule despite the difference in black letter. Id. § 295 cmt. d.


\textsuperscript{111} See REV. UNIF. PARTNERSHIP ACT § 106 (1994).

\textsuperscript{112} See supra Part II(E).

\textsuperscript{113} See supra Part III(A).
law freely available in order to increase use of the law and of the lawyers' services. There is no reason why states that let the parties use their statutes without charge should not be able to compete with fee-charging states.

In general, therefore, the Delaware statute has important implications for choice of law and business associations. The Delaware law may help to more firmly establish the contractual nature of the firm by emphasizing the fundamental link between contractual choice of law and the internal affairs rule. It also could lead to a reformulation of the basis of the internal affairs rule as a way of providing the states with incentives to participate in jurisdictional competition.

VI. Conclusion

Choice-of-law statutes like the one recently enacted in Delaware have potentially wide-ranging implications. First, such laws suggest that the states do, in fact, compete to provide non-corporate law. The statutes may, therefore, help to establish the central role of jurisdictional competition in theories explaining the evolution of legal rules. Second, the existence of such competition focuses attention on the role of lawyers in influencing both the supply of, and demand for, competing laws. Third, the Delaware statute bears on the need for federal and uniform state law. Uniform laws may not be justified by the need to clarify what law applies and to eliminate multiple state regulation, if contracting parties are allowed freely to choose their own law.\textsuperscript{114} Finally, the Delaware statute may lead to either the demise or a radical revision of the special internal affairs choice-of-law rule for corporations. This, in turn, could ultimately lead to a recognition of the essentially contractual nature of the corporation.

\textsuperscript{114} See Ribstein & Kobayashi, supra note 77.