

Why Charters?

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Charters have such strong pedigree in corporate law that is easy to take them for granted. But do we need them? If so, do they need to be publicly filed? And why are they so hard to access in Delaware? By examining these questions, an unappreciated function of charters emerges. While charters are poorly designed for broad public transparency, they still provide benefits by functioning like a recording system that reduces investigation costs and produces particularly reliable information. This sharper understanding of charters has important consequences for current doctrinal controversies and the broader debate over Delaware’s future in corporate law.

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Introduction

When today’s innovative startups begin corporate existence, they do so by filing an instrument with ancient origins: a charter.¹ Charters loom large in corporate scholarship, having been characterized as a corporation’s “constitution,”² a vehicle for corporate transparency,³ and a

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¹ Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1426 (2021) (“The legal and social technology of chartering has existed for over a millennium[.]”)

² See James Si Zeng, *The Calculus of Shareholders’ Consent: A Constitutional Economics Theory of Corporate Charter Amendment Rules*, 41 U. PA. J. INT’L L. 429, 429 (2019).

³ Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 947 (2021).

site of governance innovation.⁴ Charters are also central to today’s highest profile controversies in corporate law.⁵

While it is easy to take charters for granted given their pedigree, their peculiar design warrants attention. Most charter *content* consists of internal arrangements of corporate participants, such as financial and voting rights.⁶ But the most distinctive feature of charters—one that is not shared by any other corporate document—is a requirement to file the charter with the state and thereby make it publicly available.⁷ For startups not yet subject to disclosure requirements under federal securities law and accustomed to operating in stealth mode,⁸ the charter therefore provides a unique glimpse into the inner workings of the company. But why publicly file this document detailing internal rights?

Historically, the dual nature of charters (internal content; public filing) was inevitable because each charter took the form of separate legislation.⁹ Under this “special chartering” system, the charter could only have whatever internal arrangements were set for that corporation by the public act of the legislature, thereby melding the public and the private.¹⁰

But special chartering was discarded in the late nineteenth century in favor of a general incorporation system,¹¹ under which corporate promoters authored their own “certificate of incorporation” (referred to as a “charter” in corporate law parlance) and filed it with the state.¹² At the start of general incorporation, maybe it seemed natural to require filing of the charter because this public act brought the new system closer to its legislatively-based predecessor. But this approach was not inevitable. The public function of creating a nexus with the state could have been achieved

⁴ See Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1327–28 (2013) (summarizing the contractarian view as reflected in FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15 (1991)).

⁵ See *infra* Part V.A (discussing the legislative response to *W. Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 311 A.3d 809 (Del. Ch. 2024)).

⁶ See *infra* Part II (discussing the content of charters across the lifecycle of a corporation).

⁷ See DEL. CODE ANN. tit. 8, § 103 (2025).

⁸ See Alexander I. Platt, *Unicorniphobia*, 13 HARV. BUS. L. REV. 115, 155–56, 166–68 (2023) (discussing the benefits to startups of operating privately).

⁹ E.g., AN ACT TO INCORPORATE THE DELAWARE RAILROAD COMPANY (1836)(chartering the Delaware Railroad Company); see also JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 13–55 (1970); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 2–5 (1976).

¹⁰ See Pollman, *supra* note 1, at 1426.

¹¹ See Arsht, *supra* note 9, at 4–8.

¹² See *id.* at 4; Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 385 n.7 (2007).

through a simple registration process (like obtaining a taxpayer ID),¹³ and the private function of delineating internal rights could have been achieved through private record keeping (like the minute book maintained by every corporation).¹⁴

All this is not to say that charters, in their current form, play no beneficial role in corporate law. In this essay, I explore benefits of the charter system that scholars have already proposed—such as providing a venue for altering statutory defaults and providing transparency for investors and the broader public.¹⁵ While these ideas have merit, neither fully aligns with both the content and administration of contemporary charters. The focus on altering statutory defaults does little to explain the public filing requirement, and the assertion of transparency benefits, at least in its broadest form, is at odds with actual charter content.

I therefore explore a previously unacknowledged benefit of charters. Inspired by the historical requirement (now repealed) to file charters in real estate recording offices, I argue that charters improve transactional efficiency by providing especially definitive records of potentially conflicting shareholder rights, much in the way that real estate recording systems reduce investigation costs for property transfers.¹⁶ This argument is not only novel but also aligns with both charter content *and* filing practices.

Sharpening our understanding of charters has important implications. First, it may inform doctrinal controversies over charter content, such as determining which governance arrangements should be implemented exclusively in charters. The Delaware Chancery Court’s opinion in *Moelis*, and the legislature’s controversial decision to undermine that decision, is one example.¹⁷ Second, this essay’s less than flattering historical account of charter administration may serve as a cautionary tale for Delaware amidst a burgeoning movement by tech companies to reincorporate in other jurisdictions. One reading of the history is that Delaware got too comfortable after dominating the charter business and neglected technical and administrative improvements that today’s entrepreneurs might expect.¹⁸

¹³ See *Employer Identification Number*, IRS, <https://www.irs.gov/businesses/employer-identification-number#whoneedsanein> [<https://perma.cc/F89B-Y6ME>] (discussing requirements to obtain an employer identification number with the Internal Revenue Service).

¹⁴ See DEL. CODE ANN. tit. 8, § 224 (2025) (requiring a corporation to maintain a corporate minute book).

¹⁵ See *infra* Parts III.B & C.

¹⁶ See *infra* Part IV.D.

¹⁷ See *infra* Part V.A (discussing *W. Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, 311 A.3d 809 (Del. Ch. 2024) and the controversial legislative response).

¹⁸ See *infra* Part V.B (discussing the “DExit” movement led by Elon Musk’s reincorporation of Tesla in Texas).

I. Historical Background

In early statehood, Delaware relied on the legislature to form individual corporations through customized charters—a system known as special chartering or special incorporation.¹⁹ As use of corporations increased in the nineteenth century, this became a corrupting and unwieldy process.²⁰ Delaware, like other jurisdictions, therefore experimented with the concept of general incorporation, whereby promoters created their own corporations under a system guided by a statute.

Delaware's first general incorporation law, however, was a flop. The process required by that statute was, by today's standards, laughably cumbersome. Forming a corporation required three incorporators (two of whom had to be Delaware residents), publication of notice in a newspaper 30 days in advance, submission of a certificate of incorporation to a local judge (during a vacation of the court), review by the judge for compliance with statutory requirements and to confirm the corporation would not be "injurious" to the community, further publication of notice in the newspaper initiated by the judge, and filing of the approved certificate with the Secretary of State and the local county recording office.²¹ Under this unwieldy system, it was apparently easier to hire a lobbyist and secure a charter from the legislature.²² The general incorporation system languished.

Eventually opinion turned so sharply against special incorporation that the Delaware constitution prohibited the practice.²³ At this same time, a group of local boosters believed that Delaware could compete with other states for charter business.²⁴ These boosters included lawyers hoping to profit by forming their own enterprises (which I call "registered agent companies") to assist with incorporations and serve as registered agents for Delaware corporations.²⁵ The group secured passage of the 1899 General Corporation Law, which eliminated the most problematic

¹⁹ See RUSSELL C. LARCOM, *THE DELAWARE CORPORATION* 1–2 (1937); Pollman, *supra* note 1, at 1426–36; Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 331–335 (2007).

²⁰ See LARCOM, *supra* note 19, at 4–7 (describing the "abuses and evils" of special chartering and the burdens of special incorporation requests on the legislature); Arsht, *supra* note 20, at 1–4 (indicating 144 special incorporations, amendments, and renewals by the Delaware legislature in the single year of 1873).

²¹ See Arsht, *supra* note 20, at 4–5.

²² See *id.* at 5–6; Yablon, *supra* note 19, at 359.

²³ See LARCOM, *supra* note 19, at 7.

²⁴ See *id.* at 9; Arsht, *supra* note 9, at 6.

²⁵ See LARCOM, *supra* note 19, at 9 (indicating that the Delaware promoters likely modeled their registered agent company on an example in New Jersey); Yablon, *supra* note 19, at 347–55.

features of the earlier general incorporation statutes and marked the true start of general incorporation in Delaware.²⁶

The statute was based on a New Jersey law that had successfully drawn charters to that state.²⁷ New Jersey, and then Delaware, were “chartermongering” (or more politely, “liberal”) jurisdictions that actively sought incorporation activity for tax revenues and to create demand for related services.²⁸ The effort was a success. By the early twentieth century, Delaware was competing effectively for the charters of the nation’s largest corporations²⁹ and featured a significant cottage industry of lawyers and service providers.³⁰

II. What’s in a Charter?

One way to understand the content of charters is to examine who is likely to make use of the information required, or customarily contained, in the document. This exercise reveals three serious candidates: the state, creditors of the corporation, and current and potential shareholders. Among these three constituencies, current and potential shareholders appear to be the primary focus of modern charter practice. Appreciating this point helps pinpoint the essential function of charters, as discussed further in Part IV.

A. Information for the State

The state needs basic information to administer a corporate law system. Several items required in the charter could serve this purpose. Examples include the corporate name and the identity of the corporation’s registered agent for receiving legal notices.³¹ Without obtaining this

²⁶ See Arsht, *supra* note 9, at 6–7. For statutory references from 1899 to 1967, I cite to Nate Emeritz’s extremely helpful *A Compilation of Legislation Regarding the Delaware General Corporation Law From 1899 to 1967* (2025) [hereinafter *DGCL Compilation*]. This document is available at the Delaware Corporation Law Resource Center maintained by University of Pennsylvania Carey Law School at <https://www.law.upenn.edu/delawarecorporatchistory/> [<https://perma.cc/G668-PW2Q>].

²⁷ See Arsht, *supra* note 9, at 7; Yablon, *supra* note 19, at 359.

²⁸ See HURST, *supra* note 9, at 70 (describing Delaware as a “liberal state”); Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573, 576, 584 n.62 (2009) (using the terms “liberal” and “chartermongering”).

²⁹ See LARCOM, *supra* note 19, at 175 (describing Delaware’s lead in chartering large companies from 1915–1929); Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AM. L. & ECON. REV. 369, 391–94 (2022) (indicating a sharp rise in Delaware corporations in the early twentieth century); Yablon, *supra* note 19, at 370 (indicating that Delaware became a “viable alternative” for large corporations by the early 1900s). But see Andrew Verstein, *The Corporate Census* (Feb. 25, 2025), <https://ssrn.com/abstract=5154952> [<https://perma.cc/9QCZ-X2QG>] (arguing, based on a large data set of incorporations, that Delaware’s success in attracting charters before 1986 has been overstated).

³⁰ See LARCOM, *supra* note 19, at 16 (describing the role of registered agent companies); Joel Seligman, *A Brief History of Delaware’s General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 271–72 (1976) (describing the formation of the Corporation Service Company in Delaware); Yablon, *supra* note 19, at 360 (describing early Delaware lawyers and registered agent companies).

³¹ See DEL. CODE ANN. tit. 8, § 102(a)(1) & (2) (2025).

basic identifying information, the state could not, for example, collect its franchise taxes (fees for being a Delaware corporation).

B. Information for Creditors

Initially, a significant portion of charter content was pitched at creditors of the corporation. Delaware's 1899 statute, for example, required that a charter include a description of the officers who would conduct corporate affairs, the value of property that the corporation could hold, the maximum indebtedness that the corporation could incur, and the extent to which private property of stockholders would be subject to corporate debts.³² All of this would presumably be of interest to a potential lender looking to verify that a potential extension of credit was properly authorized and that the loan would be backed by the expected assets.

These requirements, however, did not survive. The first three were promptly repealed when the 1899 statute underwent its first round of revisions in 1901.³³ The fourth requirement—to state whether stockholders would be personally responsible for corporate debts—survived a surprisingly long time given the slim chance that a corporation would voluntarily elect for shareholder liability. In 1967, when the Delaware corporate statute underwent a major update, this provision was finally flipped on its head to provide that liability would be limited to corporate assets *unless* the charter provided otherwise.³⁴

Other forms of creditor protection in the 1899 statute survive, but only in vestigial form. In the original statute, the concept of legal capital loomed large.³⁵ The concept was that each share of stock would have a designated “par value,” which was the minimum purchase price the corporation could charge for issuing a share. The aggregate par value of all shares sold to investors would be the company's legal capital. The corporation would not be permitted to pay dividends out of that legal capital, which would serve as a buffer for creditors. A corporation could not commence business until it had reached a designated level of legal capital through selling initial shares.³⁶

³² See *DGCL Compilation*, *supra* note 26, at 12–13 (reproducing 21 Del. Laws 273, § 7 (1899)).

³³ See *id.* at 12 (reproducing 22 Del. Laws 166, § 1 (1901)).

³⁴ See *id.* at 2 (reproducing 56 Del. Laws 50, § 102 (1967)).

³⁵ See *id.* at 12 (reproducing 21 Del. Laws 273, § 7 (1899)).

³⁶ See Wells, *supra* note 28, at 603–610 (providing an overview of legal capital and its declining significance in corporate law); see also John C. Coffee, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1633–35 (1989).

This system proved ineffective, and Delaware abandoned regulating legal capital in any meaningful sense.³⁷ By 1917, a Delaware corporation could sell stock without any par value.³⁸ By 1967, references to minimum levels of legal capital were deleted from the charter requirements.³⁹

C. Information for Shareholders (Investors)

Most of a contemporary charter is directed at shareholders and potential shareholders considering an investment in a company. Examples include financial rights of shareholders, voting rights of shares, the scope of the board's fiduciary duties to shareholders, and limits on shareholder litigation.

To add context, I describe these categories of information across the lifecycle of a corporation. Specifically, I focus on the subset of corporations that begin as “startups” seeking venture capital (“VC”) with a goal of growing into large publicly traded companies. This focus on VC-backed startups has advantages and disadvantages. On the one hand, one cannot assume this segment of the corporate environment is representative of all corporations. On the other hand, corporate planning is especially standardized for these startups, producing forms and templates that should reflect actual practice in this setting.⁴⁰

What this lifecycle approach ultimately shows is that the content of charters fluctuates, with a largely boilerplate document at incorporation, a considerably longer and more consequential document from first preferred stock financing to initial public offering, and a return to a more formulaic document in the public company phase. This ends up being another helpful insight for understanding the function of charters in Part IV because it highlights the relative importance of charters to a particular type of negotiated investment transaction (preferred stock financings).

³⁷ See HURST, *supra* note 9, at 53 (explaining that the device of legal capital left “scope for evasion”); Wells, *supra* note 28, at 603–10; Coffee, *supra* note 36, at 1633–35 (suggesting that legal capital was easy to evade).

³⁸ See *DGCL Compilation*, *supra* note 26, at 11 (reproducing 29 Del. Laws 113, §§ 4, 5 (1917)).

³⁹ See *id.* at 2 (reproducing 56 Del. Laws 50, § 102 (1967)).

⁴⁰ See Robert Bartlett, *Standardization and Innovation in Venture Capital Contracting: Evidence from Startup Company Charters*, Sept. 2023, at 5, <http://dx.doi.org/10.2139/ssrn.4568695> [<https://perma.cc/8XEP-MXTL>] (studying charters of VC-backed companies and finding that 85% are based on the National Venture Capital Association model legal documents).

1. Formation Stage

At formation, the only parties are the startup's founders ("promoters" in an earlier age).⁴¹ The goal at this stage is to produce a minimally viable charter. Often, a page or two is adequate.⁴²

Beyond basic identifying information, the statute requires that a charter designate how many shares the corporation is "authorized" to issue.⁴³ This number is an outer limit to how much dilution a shareholder might experience without the procedural trappings of a charter amendment. At this point, the authorized shares will likely be the number of shares initially issued to the founders plus a cushion for contemplated stock options.⁴⁴

Superficially, the statute requires the charter to declare a corporate purpose.⁴⁵ This is a holdover from the special incorporation era during which the declaration of purpose did real work in defining the lawful scope of the entity's activities.⁴⁶ But early in the general incorporation era, lawyers and corporate promoters pushed boundaries and declared open-ended purposes.⁴⁷ In 1967, the legislature conceded to this practice by specifically allowing it.⁴⁸

Beyond this required information, the statute offers mechanisms for limiting shareholder litigation, and founders routinely take up the offer. Startups likely include in their charters:

- A provision permitting or committing the corporation to indemnify officers and directors to the full extent permitted by the Delaware statute;⁴⁹
- An "exculpation clause" providing that directors and officers will not be liable for money damages for certain breaches of the duty of care;⁵⁰ and
- A clause requiring that shareholders file corporate law claims, such as breaches of fiduciary duty, exclusively in Delaware courts.⁵¹

⁴¹ Larcom, *supra* note 19, at 14-16.

⁴² For example, the law firm Orrick Herrington & Sutcliffe LLP provides a form of initial charter in its Orrick Tech Studio. See *Forms*, ORRICK, <https://www.orrick.com/en/tech-studio/resources/forms> [<https://perma.cc/BH35-9AUP>] (on file with author) [hereinafter ORRICK CHARTER]. The document is approximately two pages and 700 words.

⁴³ See DEL. CODE ANN. tit. 8, § 102(a)(4) (2024).

⁴⁴ See *Frequently Asked Questions*, ORRICK, <https://www.orrick.com/en/tech-studio/resources/faq/what-type-of-stock-should-my-corporation-have-how-much-stock-should-my-corporation-have#:~:text=The%20number%20and%20types%20of,or%20%20voting%20stock> [<https://perma.cc/AY3M-LP5M>].

⁴⁵ See DEL. CODE ANN. tit. 8, § 102(a)(3) (2024).

⁴⁶ Pollman, *supra* note 1, at 1426-36.

⁴⁷ JAMES B. DILL, THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE COMPANIES UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY 20 (1898) ("It is often sought to broaden the powers by inserting such words as, 'to do any other business which the company from time to time determine.'").

⁴⁸ See *DGCL Compilation*, *supra* note 26, at 2 (reproducing 56 Del. Laws 50, § 102 (1967)).

⁴⁹ See DEL. CODE ANN. tit. 8, § 145 (2024); ORRICK CHARTER, *supra* note 42, at Article VI.

⁵⁰ See DEL. CODE ANN. tit. 8, § 102(b)(7) (2024); ORRICK CHARTER, *supra* note 42, at Article VI.

⁵¹ See DEL. CODE ANN. tit. 8, § 115 (2024); ORRICK CHARTER, *supra* note 42, at Article VII.

It is also common for charters to alter at least two statutory defaults concerning voting. Charters might permit voice votes and extend the power to amend bylaws to the board of directors.⁵²

Altogether, the goal is an unobjectionable starting point for future negotiations with investors. That is not to say the document is inconsequential. The provisions limiting shareholder litigation, for example, have material effect if the company eventually faces litigation. But even these provisions are so ubiquitous that founders and their legal teams can safely include them without scaring off future investors.⁵³

2. Venture Capital Financings

If the company attracts interest from VCs, the nature and length of the charter changes significantly. In business terms, this is because VCs negotiate for financial, governance, and information rights. Specifically, they almost always negotiate for preferred stock containing enhanced financial and control rights compared to the common stock held by founders. These terms appear in the charter, rather than private agreements among the company and the investors, because the Delaware statute has, since 1927, required that special rights (preferences) of any class of stock be designated in the charter.⁵⁴

By word count, preferred stock terms are the primary focus of a modern startup's charter. Under the statute, simply labeling stock as “preferred” would have no concrete meaning. Instead, all economic and control features of preferred stock must be spelled out in detail. Examples include:

- A “liquidation preference,” meaning a right to receive a payout before common shareholders receive a payout if the company is acquired;⁵⁵
- The rate at which preferred shares convert into common shares, which usually includes a mathematical formula that adjusts for underpriced share issuances to other investors;⁵⁶

⁵² See DEL. CODE ANN. tit. 8, § 109 (2024) (providing a default rule that only shareholders can amend bylaws); *id.* at § 211(e) (providing a default rule of vote by written ballot); ORRICK CHARTER, *supra* note 42, at Article V (providing for voice votes and permitting the board to amend bylaws).

⁵³ See, e.g., Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1, 37 (2021) (finding that 96% of publicly traded Delaware corporations include director exculpation clauses in their charters).

⁵⁴ See *DGCL Compilation*, *supra* note 26, at 9 (reproducing 35 Del. Laws 85, § 4 (1927)).

⁵⁵ See NAT'L VENTURE CAPITAL ASS'N, NVCA MODEL LEGAL DOCUMENTS, CERTIFICATE OF INCORPORATION, 7–13 (2024) [hereinafter NVCA CHARTER].

⁵⁶ See *id.* at 19–35.

- The right to elect at least one member of the company's board;⁵⁷ and
- A right to veto major transactions, such as a sale or dissolution of the company.⁵⁸

Beyond these preferred stock terms, the charter may narrow the directors' duty of loyalty to accommodate VC representatives on the board. Since 2000, the Delaware statute has allowed companies to narrow directors' duty of loyalty by disclaiming specific business opportunities in the charter, and many charters do so.⁵⁹

After negotiating terms with VC investors, the charter reaches its high-water mark. Though word count is not a perfect proxy for legal significance, it is revealing that the document swells to over 17,000 words based on the widely adopted model from the National Venture Capital Association ("NVCA").⁶⁰

It is worth noting, however, that the charter is not the only documentation for a VC financing. Even at this point, when the charter swells in size, a good deal of a VC financing involves contracting around the charter. Examples include a voting agreement, registration rights agreement, investor rights agreement, and others.⁶¹ Why spread the deal across these other documents?

One possible reason is privacy. Consider, for example, the VC's right to elect a director. Because the voting rights of preferred stock must be delineated in the charter,⁶² it is not surprising that a section of the charter establishes an exclusive right of the preferred shareholders to control election of one or more board positions.⁶³ What is surprising is that these same rights are also spelled out, with additional detail, in a separate voting agreement signed by the company, the founders (as the holders of common stock), and the VC investor.⁶⁴ In this additional agreement, particular holders of the preferred stock (for example, a specific VC fund) may have special rights to control the nomination process for an entire series of preferred stock, and the initial designee may be identified by name.⁶⁵ Why would corporate planners waste time and risk inconsistencies by documenting the right in overlapping documents? Why not spell out the board rights once and for all in the charter?

⁵⁷ See *id.* at 15–16.

⁵⁸ See *id.* at 16–19.

⁵⁹ See Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1079, 1126 (2017) (finding corporate opportunities waivers in public company charters); NVCA CHARTER, *supra* note 55, at 41.

⁶⁰ This is the word count excluding explanatory footnotes and appendices.

⁶¹ *Model Legal Documents*, NVCA, <https://nvca.org/model-legal-documents/> [<https://perma.cc/YR6M-9Q9C>].

⁶² See also DEL. CODE ANN. tit. 8, § 141 (2024).

⁶³ See NVCA CHARTER, *supra* note 55, at 15–16.

⁶⁴ See NAT'L VENTURE CAPITAL ASS'N, NVCA MODEL LEGAL DOCUMENTS, VOTING AGREEMENT 3–6 (2024).

⁶⁵ See *id.*

Although some sources suggest that the charter cannot grant special rights to particular holders because of the traditional principle that all shares within a series must have identical rights,⁶⁶ this is not a meaningful constraint in Delaware, where the voting rights of shares can vary based on shareholder identity.⁶⁷ Doctrinally, a Delaware charter could name names.

Doing so, however, would put more information into the public record because the charter is filed.⁶⁸ Admittedly, this information—basically, the name of a particular fund and VC partner—may not have obvious proprietary value. After all, VC funds often tout their portfolio companies openly, and VC partners sometimes openly discuss their affiliations with those companies.⁶⁹ But we should not dismiss the reflexive instinct of some investors to remain private. A VC could have concerns that are as pedestrian as uninvited solicitations from eager entrepreneurs who cull charters for a funding target list. Or the privacy instinct could be a matter of ego—some VCs not wanting other VCs to know that they are *not* the specific fund that controls the nomination process. In any event, absent any doctrinal reason to move this information out of the charter, privacy seems like a plausible explanation.

3. Public Companies

Counterintuitively, a more established company with publicly traded stock ordinarily reverts to a slimmer charter. That is because preferred stock ordinarily converts to common stock once the company has an initial public offering (“IPO”) and becomes listed on a stock exchange.⁷⁰

There are, however, new features that emerge in the charters of mature companies. These features respond to an important contextual change—open trading on stock markets that may introduce adversarial investors. Accordingly, founders may insulate themselves from certain forms of shareholder pressure.

For example, an increasing number of companies adopt a “dual-class” voting structure immediately prior to an IPO.⁷¹ Under these provisions, founders hold a class of common shares

⁶⁶ THERESE H. MAYNARD, DANA M. WARREN & SHANNON TREVINO, *BUSINESS PLANNING: FINANCING THE START-UP BUSINESS AND VENTURE CAPITAL FINANCING* 520 (3d ed. 2018) (citing Model Business Corporation Act and California statutory requirements).

⁶⁷ See *Colon v. Bumble, Inc.*, 305 A.3d 352 (Del. Ch. 2023) (permitting “identity-based voting”).

⁶⁸ See *id.*

⁶⁹ For example, the VC firm Andreessen Horowitz lists its portfolio at <https://a16z.com/portfolio/> [<https://perma.cc/T9ST-PXXE>].

⁷⁰ See NVCA CHARTER, *supra* note 55, at 31–32 (providing for conversion upon IPO).

⁷¹ See Ofer Eldar, *Dual-Class IPOs: A Solution to Unicorn Governance Failure*, (Rsch. Handbook on the Structure of Private Equity & Venture Capital, Working Paper, Paper No. 741, 2023) (indicating that almost 30% of IPOs in 2017–2019

with super voting rights. More traditionally, public companies often adopted staggered boards.⁷² When board members serve staggered terms (i.e., they are not all up for election each year), it takes longer for a hostile acquirer to replace the board with more sympathetic directors.⁷³

While dual-class voting and staggered boards are legally important, what is most striking about public company charters is how generic they are on balance. The Delaware statute gives expansive license to include in a charter “any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State.”⁷⁴ Yet, compared to the intricate preferred stock rights in the pre-IPO phase, the menu of provisions discussed above (dual-class stock, staggered boards, and limits on shareholder litigation) form a relatively set pattern. For example, in a 2013 essay, Michael Klausner reviewed a sample of over 300 IPO charters in search of idiosyncratic arrangements that would vindicate the dominate contractarian view of corporate law. What he found were almost entirely “plain vanilla” documents, containing staggered boards but not much else.⁷⁵ Resorting again to the imperfect metric of word count, Amazon, with a market capitalization of almost \$2.5 trillion, operates with a charter of just over 1,000 words.

To be clear, it is not that innovation has been lacking in corporate *governance*. Recent decades have seen many meaningful trends such as increasing independence of directors, requirements that directors be elected by a majority vote (not just a plurality), and increased access to the company’s proxy materials.⁷⁶ But these innovations have mostly been enacted outside of the charter, through bylaw amendment (which can be achieved unilaterally by shareholders), pressure from proxy advisors, or regulatory action.⁷⁷

featured dual-class stock); Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REG. 1286, 1294–1300 (2022) (discussing the history of dual-class stock).

⁷² See Klausner, *supra* note 4, at 1333 (summarizing empirical studies indicating that most IPO charters in the late 90s and early 2000s featured staggered boards).

⁷³ See *id.* at 1352–55.

⁷⁴ See DEL. CODE ANN. tit. 8, § 102(b)(1) (2024).

⁷⁵ See Klausner, *supra* note 4, at 1337–39.

⁷⁶ See *id.* at 1359–62 (citing director independence and majority voting as examples); Megan Wischmeier Shaner, *Interpreting Organizational “Contracts” and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 1004 (2019) (discussing majority voting and proxy access).

⁷⁷ Klausner, *supra* note 4 at 1359 (discussing regulatory changes, shareholder proposals, and activist campaigns); Shaner, *supra* note 76, at 992–1005 (stating that “[t]he predominant venue for ex ante corporate governance in organizational documents has been the bylaws”).

III. What Does Delaware Do with Charters?

To fully understand charters, it is necessary to look beyond their contents and examine the filing requirements that distinguish charters from all other corporate governance documents. Doing so reveals that Delaware, despite its reputation for attentiveness to corporate interests, maintains a surprisingly archaic system of charter administration.

To illustrate the point, it is helpful to begin with an historical anecdote. Despite streamlining the incorporation process in 1899,⁷⁸ one inconvenient feature of the early incorporation statutes persisted for almost the entire twentieth century. Until 1996, incorporators were still required to file a charter twice: once with the Secretary of State and again with a county recorder office.⁷⁹

One can imagine why legislatures turned to county recorder offices at the outset of general incorporation. Administering what they hoped would be a brisk business in charters required state capacity. Creditors, shareholders, and potential investors would presumably want access to reliably authentic copies of charters. But going after New Jersey's incorporation business was a bold gambit, so better to lean on existing institutions than risk a large outlay in building something new. A natural candidate for the task would be county recording offices with experience indexing real estate deeds.

What *is* surprising is how long it took for Delaware to even partially modernize. By 1967, Delaware undertook a far-reaching effort to update the statute to reflect emerging best practices. The state commissioned an influential report by a corporate law professor named Ernest Folk; in that report, Folk noted that the dual filing requirement was inefficient and presented a potential trap for incorporation mistakes.⁸⁰ His recommendation was for the Secretary of State, which must have had considerable capacity by then, to be the sole recipient of corporate filings.⁸¹ Folk, however, sensed that the recommendation would be sensitive. Noting that “local recordation may have to be continued for reasons not related to the advantage and convenience of corporations,” Folk recommended both an option for eliminating the recording requirement and, in the alternative, a less ambitious option for streamlining the dual recording requirement.⁸²

⁷⁸ See *supra* Part I.

⁷⁹ See *DGCL Compilation*, *supra* note 26, at 2 (reproducing 56 Del. Laws 50, § 102 (1967)) (providing an example of the recording requirements as of the 1967 revisions to the statute).

⁸⁰ ERNEST L. FOLK, III, REVIEW OF THE DELAWARE CORPORATION LAW 1–2 (1967), <https://libguides.law.widener.edu/c.php?g=772882&p=5544590> [<https://perma.cc/L4LD-GLAZ>].

⁸¹ See *id.* at 6–7.

⁸² See *id.* at 1–2.

Sure enough, the committee tasked with evaluating the proposals quickly rejected Folk's preferred approach.⁸³ Although there is sparse explanation in the committee's minutes, a contemporaneous commentary provided a cynical account: "[T]o eliminate the Recorders would mean putting people out of jobs and the legislature might not have accepted that."⁸⁴ Moreover, the committee member who moved to retain the recording system was a representative of a registered agent company,⁸⁵ which might have benefitted from a fragmented system that required professional assistance to navigate.

The recording requirement persisted for almost three more decades, until finally eliminated in 1996. At that point, the process was simplified from the incorporator's perspective. The Secretary of State became the sole recipient of filings and entered information into a computer system referred to as the Delaware Corporation Information System.⁸⁶ Even then, however, the statute showed continuing signs of parochial interests. To this day, the Secretary of State collects fees on behalf of the county recording offices and remits them to the county recorders. In 1996, these fees were described within the statute as compensation for the expense of transitioning to the new system. By 2022, this rationale was apparently hard to maintain and the legislature deleted the rationale from the statutory language (but nonetheless increased the amount of the fees to the county recorders).⁸⁷

Turning to the present, Delaware still lags its competitors in making charters and other filings accessible to the public. In California, for example, any interested party can go to a public website, type in the name of a California corporation, and download copies of filings for free.⁸⁸ In Delaware, all that is available online for free is the most basic information: name, incorporation date,

⁸³ *Minutes of the Delaware Corporation Law Study Committee (July 14, 1964)*, WIDENER UNIVERSITY, <https://delawarelaw.widener.edu/about/library/research/delaware-corporation-law-documents/> [https://perma.cc/VLX4-X328].

⁸⁴ Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 869 (1969).

⁸⁵ See *id.* at 865 (identifying committee member David H. Jackman as President of the United States Corporation Company of New York).

⁸⁶ See 70 Del. Laws 349, § 1 (1996); 70 Del. Laws 587, §§ 2-6 (1996).

⁸⁷ See 83 Del. Laws 77, § 2 (2022).

⁸⁸ See *Business Search*, CALIFORNIA SECRETARY OF STATE, <https://bizfileonline.sos.ca.gov/search/business> [https://perma.cc/48PD-TKRR] (indicating that California provides free access to over 17 million business entity filings). California may be an outlier in the degree to which it provides free access to electronic images of filings. Another Delaware competitor, Nevada, appears to employ processes and charge fees that are similar to Delaware. See *Commercial Recordings Copies and Certificate Services Fee Schedule*, NEVADA SECRETARY OF STATE, <https://www.nvsos.gov/sos/home/showpublisheddocument/1043/638345248868870000> [https://perma.cc/BEE4-WRPA]. Another competitor, Texas, lies somewhere in between by charging modest fees (compared to Delaware) for electronic copies. See *Instructions for Ordering Copies and Certificates Using SOSDirect*, TEXAS SECRETARY OF STATE, <https://www.sos.state.tx.us/corp/instructions-for-copies.shtml> [https://perma.cc/N3BC-4PUE].

and address of the registered agent (almost certainly a registered agent company).⁸⁹ For an extra \$10, one can find out if the company is up to date on its franchise taxes.⁹⁰ For an additional \$10, the investor can see an index of corporate filings, but not the actual content.⁹¹ To see the content of any filing, the investor would need to submit an order and provide a check or payment information for potentially significant fees. For a certified copy, those fees will start at \$50 plus \$2 extra per page (with some charters spanning more than 50 pages).⁹² An expedited request, to be completed in an hour, will set the investor back an extra \$1,000.⁹³ This process will spit out a paper copy, with extra charges for expedited delivery.⁹⁴ To an extent, commercial service providers make things easier. One can pay a registered agent company to make a document request and retrieve the paper copy at the Secretary of State offices. In addition, there are commercial data providers who assemble copies of some charters and provide access for a fee.⁹⁵ But the help provided by these vendors comes at a cost and does not change the basic reality that charters are relatively expensive and burdensome to obtain in Delaware.

To some, this clunky system may come as a surprise. The level of service provided by the Delaware Secretary of State is sometimes cited as a strength of the Delaware system.⁹⁶ But this is true only for a particular class of corporation for whom \$1,000 expedite fees are trivial. In other words, for all its efforts to liberalize incorporation procedures, Delaware is still catering to high-end clientele.⁹⁷ Since 1899, when the legislature eliminated the requirement to post notice of

⁸⁹ This information is available through the business entity search feature of the Delaware Division of Corporations website located at <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² Delaware Division of Corporations, *Fee Schedule* DEL. DEP'T OF STATE (Revised Aug. 1, 2024), <https://corpfiles.delaware.gov/AugustFee2024.pdf> [<https://perma.cc/ZXS7-RK5A>].

⁹³ Delaware Division of Corporations, *Certification Memo* DEL. DEP'T OF STATE, https://corpfiles.delaware.gov/Cover_Memo/updatedcertmemoandinstructionsSept24.pdf [<https://perma.cc/UK3M-SPJD>].

⁹⁴ *See id.*

⁹⁵ *See* Bartlett, *supra* note 40, at 19 (describing a subscription service named VC Experts that provides access to charters of venture-backed companies); Evan Epstein, *157 Tom Callahan, CEO of NPM: Unlocking Liquidity in Private Markets*, BOARDROOM GOVERNANCE WITH EVAN EPSTEIN (Dec. 16, 2024), <https://boardroom-governance.com/episodes/tom-callahan> [<https://perma.cc/WUZ2-AKHS>] (discussing how Nasdaq Private Markets provides institutional investors with access to charters of private companies).

⁹⁶ Amy Simmerman, William B. Chaldler & David Berger., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOV. (May 8, 2024), <https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/> [<https://perma.cc/AD4Z-6FZU>] (discussing the ability to obtain pre-clearance of corporate filings).

⁹⁷ Delaware corporate law has been characterized as catering to large corporations more generally. *See* Jonathan R. Macey & Geoffrey P. Miller, *Towards an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 478 (1987) (discussing R. POSNER & J. SCOTT, *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* (1980)).

incorporation in a newspaper,⁹⁸ broad and frictionless dissemination of information has not been a priority.

IV. What Do Charters Do Best?

This Part considers what useful functions are performed by the current charter system. After considering candidates already suggested in legal scholarship, I zero in on an unappreciated benefit of charters. Like the real estate recording system to which charters were originally linked, charters enhance transactional efficiency by providing a particularly definitive record of matters within the charter.

A. Contract With the State

A charter has long been described as both a contract among corporate participants and a contract with the state.⁹⁹ Symbolically, filing the charter announces to Delaware that an entity has been created under its laws and subject to its jurisdiction. More practically, at least some information in the charter (corporate name, name of incorporators, registered agent office) is in fact useful or necessary for the state of Delaware to administer its corporate law.¹⁰⁰

This is not, however, a complete answer to why corporate charters take their current form. Only a small portion of the charter conveys the type of information the state uses, and that information could easily be collected in the annual report corporations are required to file with the state. In theory, the state could review the whole charter for compliance with Delaware corporate law. But early experiments with that kind of compliance check failed,¹⁰¹ and it does not appear that the Delaware Secretary of State now reviews most filings in any substantive way.¹⁰²

B. A Sticky Altering Rule

When corporate law scholars discuss the role of charters, they mostly focus on charters as a vehicle for opting out of statutory defaults.¹⁰³ In the Delaware statute, a rule is frequently preceded

⁹⁸ See DGCL Compilation, *supra* note 6, at 12 (reproducing 21 DEL. LAWS 273, § 7 (1899)).

⁹⁹ DILL, *supra* note 48, at 18 (describing the charter as a contract between the corporation and the state, the individual stockholders and the corporation, and the stockholders themselves).

¹⁰⁰ See *supra* Part II.A.

¹⁰¹ See *supra* text accompanying notes 21 & 22.

¹⁰² See Simmerman, *supra* note 97 (“Unlike certain other states, Delaware reviews most filings only for the form of the filing and does not conduct substantive review, which allows filings to be processed quickly.”).

¹⁰³ See Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1553 (1989); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 402 (2007) (discussing charter

by “unless otherwise provided in the certificate of incorporation.”¹⁰⁴ Or the Delaware statute suggests that a charter may include a provision that displaces a default rule.¹⁰⁵ The charter is not the only place where corporate actors can depart from statutory defaults, but it is often the legislature’s preferred location because amending a charter requires the approval of both the board and shareholders, whereas other governance instruments are easier to enact or alter.¹⁰⁶ Against this backdrop, requiring that a particular default rule be changed only by charter amendment is tantamount to saying it should be hard to change. In more conceptual terms, the charter is legislative shorthand for a demanding “altering rule” that makes the associated default rule “sticky.”¹⁰⁷

It is hard to argue with this characterization, so far as it goes. A straightforward reading of the statute reveals that the legislature can and does invoke the charter as a hurdle to altering some statutory defaults.¹⁰⁸

So why doesn’t this fully answer the question of why charters have persisted in corporate law? Recall that this essay is concerned with the combination of charter content and administration. The puzzle it seeks to answer is why a general incorporation system should be centered on a publicly filed document memorializing the internal arrangements of corporate actors. The altering rule literature only provides an explanation of charter content. It does not seem to address why charters are filed and made public.

Put differently, if we only think of charters as shorthand for a particular altering rule, then charters are not independently very important. The Delaware legislature could replace “except to the extent the certificate of incorporation otherwise provides” with some slightly clunkier language such as “except as approved in a resolution of the board of directors and at a shareholder meeting called in accordance with this act.”¹⁰⁹ As Gabriel Rauterberg and Sarath Sanga state in a recent

amendment in terms of triggering a particular “altering rule” for opting out of a statutory default); Gabriel Rauterberg & Sarath Sanga, *Altering Rules: The New Frontier for Corporate Governance*, 42 YALE J. REG. 291 (discussing a variety of altering rules in corporate law).

¹⁰⁴ See Gordon, *supra* note 103, at 1553.

¹⁰⁵ See e.g., DEL. CODE ANN. tit. 8 § 102(b)(7) (2024) (permitting a corporation to adopt a provision exculpating directors or officers for breaches of the traditional duty of care).

¹⁰⁶ Bylaws can be changed unilaterally by shareholders or, in most corporations, the board. See DEL. CODE ANN., *supra* note 51. Other major corporate decisions are made by simple board resolution. See Rauterberg & Sanga, *supra* note 103, at 308.

¹⁰⁷ See McDonnell, *supra* note 103, at 402 (“[A]n altering rule that allows opting out of a default through either the charter or the bylaws is significantly less sticky than one that allows opting out only through the charter.”).

¹⁰⁸ See *id.* at 439 (identifying 36 matters that can only be altered in the charter); Gordon, *supra* note 103, at 1533.

¹⁰⁹ See e.g., DEL. CODE ANN. tit. 8 § 271(c) (2024) (allowing for sale of substantially all the corporation’s assets after approval by board and shareholders).

piece, what is important in this literature on altering rules is the approval process and not “the charter *per se*.”¹¹⁰

C. Transparency

Some commentators suggest a broad public interest in viewing corporate charters.¹¹¹ These commentators point to scandals at high-profile startups that produced public harm or violation of public law.¹¹² They note that these companies fall below thresholds for SEC disclosure requirements and that their corporate charters are the only information available about their governance.¹¹³ The implication is that heightened public knowledge of defective governance structures through charters could discourage future incidents.

This line of reasoning is appealing. It would help explain the unique filing and public availability of charters in a way that the literature on altering rules does not. It aligns with corporate scholarship asserting broad public benefits to disclosure.¹¹⁴ It even has some historical pedigree – charters once served a broader audience than just shareholders.¹¹⁵

Yet, the mechanism for advancing broad public interest through charter disclosure is murky if charters take anything like their current form. Assume, for example, that an aggressive corporate planner took every inch that current law allows in drafting the charter for a rogue startup: dual class stock that gave the founder outsized influence over the board, indemnification and exculpation provisions that desensitized the board to fiduciary liability, and provisions allowing board members to take specified corporate opportunities for themselves. What then? Would consumers boycott? Would health and safety regulators launch preemptive interventions based on this information? In fact, the hypothetical charter features just listed are common,¹¹⁶ sitting in thousands of corporate charters with copies on offer by the Delaware Secretary of State for those willing to go to the trouble. The problem is that the kinds of information contained in charters is not actionable in the way this argument implies.

¹¹⁰ See Rauterberg & Sanga, *supra* note 103, at 326–27.

¹¹¹ See Fisch, *supra* note 3, at 947.

¹¹² See *id.* at 948.

¹¹³ See *id.* at 946.

¹¹⁴ See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499 (2020).

¹¹⁵ See *supra* Part II.B.

¹¹⁶ See *supra* Part II.C.

One can, however, make a somewhat narrower transparency argument by focusing on employee investors rather than the broader public.¹¹⁷ One prominent feature of Silicon Valley is the use of stock options and other forms of stock-based compensation to attract, motivate, and retain employees.¹¹⁸ As unicorn startups grow to have headcounts in the thousands, these employees are not exactly the general public but nor are they true insiders or sophisticated investors like VCs.¹¹⁹ In theory, these employee investors benefit from public access to charters, which set the fundamental stock rights that determine how gains from an acquisition or other exit will be divided among shareholders.

But even those who advocate for greater access to charters on these grounds concede that the language of charters is impenetrable to most employees.¹²⁰ An emerging literature on pre-IPO equity compensation suggests that most employees already fail to investigate or understand even the terms of their individual stock option agreements.¹²¹ While some atypical employees may be more motivated to investigate,¹²² even they would likely struggle to use the information in the charter because it is written as a detailed legal document rather than a disclosure tool and it lacks many of the inputs required to effectively value stock.¹²³ In academic studies, economists armed with PhDs have sometimes been able to infer common stock values from charter provisions, but this is heady stuff that earns placement in top-tier finance journals.¹²⁴ If there is a need for the average employee to better understand his or her equity compensation, the appropriate vehicle is likely a new form of disclosure under federal securities law tailored to the capabilities and time constraints of employees.¹²⁵

In short, we *could* have a charter system that prizes transparency for a wide audience, but it is not the charter system we have. Ultimately, the transparency rationale does not align with charter content.

¹¹⁷ See Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C L. REV. 583, 609 (2016) (arguing that unicorn startups should be required to post their certificates of incorporation on public websites and provide plain English summaries for employees).

¹¹⁸ Yifat Aran, *Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1261–67 (2018) (discussing the role of equity compensation in Silicon Valley).

¹¹⁹ See Abraham J.B. Cable, *Fools Gold? Equity Compensation & the Mature Startup*, 11 VA. L. & BUS. REV. 615, 636–41 (2017).

¹²⁰ Fan, *supra* note 117, at 609.

¹²¹ Yifat Aran & Raviv Murciano-Goroff, *Equity Illusions*, J. OF LAW & ECON. & ORG. 196 (2021).

¹²² See Abraham J.B. Cable, *Stock Options of Adhesion*, 50 J. CORP. L. (forthcoming 2025).

¹²³ See Fan, *supra* note 117, at 609.

¹²⁴ See Will Gornall & Ilya A. Strebulaev, *Squaring Venture Capital Valuation with Reality*, 135 J. FIN. ECON. 120 (2020).

¹²⁵ See e.g., See Yifat Aran, *Making Disclosure Work for Start-Up Employees*, 2019 COLUM. BUS. L. REV. 867, 952–55 (2019) (recommending that employees receive liquidation scenarios).

D. An Unappreciated Role: Transactional Efficiency

A different function of charters emerges by returning to the system's historical connection to real estate recording because the two systems (charter filing and real estate recording) are more similar than one might expect. A real estate recording system is a species of registration system that encourages property transfers by lowering transaction costs between buyer and seller.¹²⁶ Some real estate transfers would still occur without the recording system because sellers could sometimes satisfy themselves that there are no competing ownership claims. But that would be an expensive process without some official record of previous transfers. By allowing for the recording of real estate transfers and encouraging use of the system by providing legal advantages for recorded instruments,¹²⁷ transaction costs decline and beneficial property transfers increase.¹²⁸

One can think of charters as providing a similar kind of benefit, though the mechanics differ. In theory, all corporate rights could be defined by private agreements between the corporation and individual investors. In such a system, a new investor could use a variety of tools to satisfy itself that newly offered rights do not conflict with existing rights: due diligence investigations,¹²⁹ representations and warranties,¹³⁰ and certifications from corporate officers.¹³¹ This job, however, is made easier when certain topics must be addressed in the charter, such as financial rights of preferred stock, voting rights, and litigation procedure. By requiring these rights to be

¹²⁶ See Steven Shavell, *Economic Analysis of Property Law*, ch. 9 p. 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9695) www.nber.org/system/files/working_papers/w9695/w9695.pdf ("An advantage of registration systems is that they may ease sale and resale of things by assuring buyers of the validity of sellers' claims of ownership."). To be precise, the U.S. recording system is distinguished from a pure real-estate registration system. See Shavell, *supra* note 65.

¹²⁷ In the property recording system, the legal advantage of recording is that a good faith purchaser for value can prevail over a competing transfer that was not recorded. See *id.* For an overview of the recording acts that produce this result, see THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, *PROPERTY: PRINCIPLES AND POLICIES* 891–932 (4th ed. 2022).

¹²⁸ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 89 (5th ed. 1998) ("Problems in the transfer of property rights are part of a larger problem, that of deciding who owns what property. A system of recorded titles is a great help."). The filing system under Article 9 of the Uniform Commercial Code can be described in a similar fashion. See Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53, 58 (1983). I focus primarily the real estate recording system, rather than Article 9's filing requirement for perfecting a security interest in other forms of property, because the latter is a "notice filing system" with limited information in the actual filing, which complicates any analogy to corporate charters.

¹²⁹ See e.g., *Sample VC Due Diligence Request List*, COOLEY GO, <https://www.cooleygo.com/documents/sample-vc-due-diligence-request-list/> [https://perma.cc/NHZ9-UD4J].

¹³⁰ See e.g., *NVCA Model Legal Documents, Stock Purchase Agreement*, NAT'L VENTURE CAPITAL ASS'N, <https://nvca.org/document/stock-purchase-agreement-updated-october-2024/> [https://perma.cc/BB9F-S87B] [hereinafter NVCA SPA] (representing that corporate documents have been provided to the purchaser).

¹³¹ See e.g., *id.* at §14.13 (requiring delivery of a document certifying authenticity of corporate records).

delineated in a single charter, giving the charter precedence over other forums,¹³² and requiring the charter to be filed with the state, investors can place special confidence in this information. From this perspective, the essential role of the charter is not broad-based dissemination of information but instead the production of particularly definitive information for those already committed to a thorough investigation of fundamental corporate matters.¹³³

Note that terms required to be included in the charter are not only more conspicuous; they may also be more coherent due to being compiled in this single document. The charter serves a “forcing function” that surfaces and avoids potential mistakes as capital structure and governance grow more complicated.¹³⁴ Today’s unicorn startups can have many rounds of financing, starting with the sale of “Series A” preferred stock and eventually reaching Series B, C, D, and so on.¹³⁵ Sometimes a senior series of stock has complicated interactions with prior series.¹³⁶ Defining these interrelated rights within the four corners of a single document forces the drafters to squarely address potential conflicts and produces a more integrated structure than what might result from a series of individual agreements with individual investors.

In a sense, the transactional efficiency argument presented in this Part might feel like only a slight variation on the transparency rationale described earlier. Both ascribe an informational role to the charter. But note that transactional efficiency of the type described here is sometimes in tension with broader public transparency goals. As described above, pre-IPO investors have a revealed preference for keeping investment terms private. This is a likely explanation for why corporate planners push terms into side contracts.¹³⁷ In theory, making charters *more private* might best promote transactional efficiency. One could imagine a system in which charters were filed with the state, but companies then controlled access to the document.¹³⁸ Such a system might reduce

¹³² See DEL. CODE. ANN. tit. 8 § 109(b) (2024) (establishing that a charter has precedence over bylaws by stating that bylaws may contain any provision “not inconsistent with law or with the certificate of incorporation”).

¹³³ *C.f.*, Baird, *supra* note 128, at 55 (arguing that Article 9 financing statements are not intended to broadly disseminate information to unsecured creditors but instead assist secured creditors with investigating potentially conflicting security interests).

¹³⁴ See *Forcing Functions*, INTERACTION DESIGN FOUNDATION, <https://www.interaction-design.org/literature/book/the-glossary-of-human-computer-interaction/forcing-functions> [https://perma.cc/72SM-3Q99] (“A forcing function is an aspect of a design that prevents the user from taking an action without *consciously* considering information relevant to that action.”).

¹³⁵ See Abraham J.B. Cable, *Time Enough for Counting: A Unicorn Retrospective*, 39 YALE J. REG. BULL. 23, 34–35 (2021) (describing the complex capital structure of Square); Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 200–16 (2019) (discussing complexity in the capital structure and governance of startups).

¹³⁶ See Cable, *supra* note 135, at 34–35 (discussing an IPO ratchet in Square’s senior preferred stock that caused dilution to junior stock).

¹³⁷ See *supra* text accompanying note 68.

¹³⁸ For example, the company could control a password for charter access.

incentives to move content out of the charter and into side agreements, thereby increasing the informational value of the charter. Currently, there is no groundswell of support for making startups *less* transparent.¹³⁹ But highlighting this tension has explanatory power. The fact that charters currently sit behind paywalls and bureaucracy might even be a feature and not a bug because a system of mass dissemination might cut against transactional efficiency.

To be clear, there is no evidence that this kind of transactional efficiency was on the minds of legislators when they designed the system. The original reliance on recording offices was inherited from New Jersey and was likely a practical necessity. Its persistence for almost a century was understood as a political capitulation.¹⁴⁰ Nonetheless, this theory of the current charter system fits the facts on the ground better than any of the alternatives because it aligns with both charter content and administration.

V. Implications

This final Part considers how a better understanding of charters matters for corporate law and broader debates about the future of Delaware as the dominant corporate jurisdiction. Specifically, it considers implications for legal doctrine that determines charter content and potential improvements to the system of charter administration.

A. Determining Charter Content

Courts and legislators are periodically called upon to determine the required and permitted content of charters. For example, in its *Moelis* decision, the Delaware Chancery Court declared portions of a shareholder agreement between a publicly traded corporation and its controlling shareholder invalid because the court viewed those provisions as granting governance rights to the controlling shareholder that would normally be possessed by the board.¹⁴¹ Because the Delaware statute provides that management of a corporation must be vested in its board *except as provided otherwise in the certificate of incorporation*, the court determined that the provisions in question could only be implemented in the charter.¹⁴² To bring the point home, the court colorfully explained that everything the controlling shareholder sought to accomplish could have been embodied in a “golden

¹³⁹ *But see* Platt, *supra* note 8, at 155–56, 166–68.

¹⁴⁰ *See supra* Part III (discussing the history of the charter recording requirement).

¹⁴¹ *See W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809 (Del. Ch. 2024). For example, the court invalidated provisions requiring the board to place the controlling shareholder's representatives on board committees. *See id.* at 818, 825.

¹⁴² *See id.* at 822–23.

share” created under the charter but was inappropriate for a mere contract between the controlling shareholder and the corporation.¹⁴³

Practitioners had a negative reaction to the opinion, stating that it would call into question forms of agreements already in use.¹⁴⁴ The legislature responded by undercutting the court and amending the statute to allow the agreements in question outside of the charter.¹⁴⁵

The legislative response drew criticism from corporate scholars. Many scholars focused on the legislative process, expressing concern that Delaware had capitulated too quickly and outside of its usual process.¹⁴⁶ Others defended the substance of the court’s position, with at least one scholar focusing on the public transparency benefits of including pre-IPO governance arrangements in the publicly available charter.¹⁴⁷

The transactional efficiency arguments advanced in this essay are another reason to support the court’s original position. When VCs invest in a startup, they need to understand existing governance arrangements. VCs can and do verify this information through due diligence and representations and warranties.¹⁴⁸ But the process would be marginally easier if backed by the legal requirement to include atypical board restrictions within the four corners of the charter. By backtracking on the court’s ruling, the legislature whittled away at these informational benefits.¹⁴⁹

¹⁴³ See *id.* at 822.

¹⁴⁴ *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCH. F. ON CORP. GOV. (June 7, 2024), <https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/> [https://perma.cc/6SWP-WJ94] (summarizing arguments by proponents of the legislative action) [hereinafter *Letter in Opposition*].

¹⁴⁵ DEL. CODE ANN. tit. 8 § 122(18) (2024).

¹⁴⁶ See *Letter in Opposition*, *supra* note 144 (criticizing the legislative process).

¹⁴⁷ See Fisch, *supra* note 3, at 947–48.

¹⁴⁸ See *Sample Due Diligence Request List*, *supra* note 129; NVCA SPA, *supra* note 130 (providing examples of how VCs verify facts in VC financings).

¹⁴⁹ Admittedly, the benefits of the court’s rule might be modest. But the cost of complying with the rule would also be modest judging by the reaction of the NVCA legal forms group to *Moelis*. See NVCA CHARTER, *supra* note 4, at Article VIII, n. 81 (relocating provisions to the charter in response to *Moelis*).

B. Improving Charter Administration

Though charter competition has long been a favorite topic of legal scholars,¹⁵⁰ Delaware has faced very little actual competition for decades. A considerable majority of publicly traded companies, and high-growth startups seeking to obtain that status, choose the state.¹⁵¹

The way Delaware administers charters seems to reflect this comfortable position. The system caters to the top of the market by offering concierge-style service. While the baseline product is technologically primitive and slow compared to other jurisdictions,¹⁵² a company with a significant legal budget can speed up the process through paying expedite fees and hiring registered agent companies to file and retrieve documents.¹⁵³ The costs of these extra services may represent inefficient rents to parochial interests,¹⁵⁴ but they seem to be tolerated due to other advantages of Delaware. In short, a clunky filing and retrieval system seems to be a luxury that Delaware has been able to afford.

But what if we enter a new phase of jurisdictional competition? What if the current “Dexit” trend, led by prominent tech CEOs, is real?¹⁵⁵ Perhaps it is time for Delaware to think more creatively about how it can attract the *next* Musk or Zuckerberg. In other words, perhaps Delaware should start paying more attention to the top of the charter funnel – the thousands of new entrepreneurs currently choosing Delaware at incorporation.

In this regard, Delaware might adopt the mindset of the specialized lawyers to these startups. So-called startup lawyers have been recognized as engaging in a distinctive style of legal practice that has grown up right alongside the startup and venture capital system.¹⁵⁶ These lawyers play the long game by showing a willingness to standardize work product at the expense of current billable

¹⁵⁰ See LARCOM, *supra* note 19, at v–vi (providing an early description of competing perspectives on the effects of charter competition); Yablon, *supra* note 19, at 371–76 (summarizing competing views of charter competition by scholars such as Lucian Bebchuck, William Carey, Jonathan Macey, Roberta Romano, and Geoffrey Miller).

¹⁵¹ Bartlett, *supra* note 40, at 27; Klausner, *supra* note 4, at 1329 (“Delaware is the only state in the race, and it dominates the market.”); Verstein, *supra* note 29, at 13–16 (finding that a majority of publicly traded companies incorporated in Delaware by 1986).

¹⁵² See *supra* text accompanying notes 89–95.

¹⁵³ See *supra* text accompanying notes 93–98.

¹⁵⁴ As discussed in Part III, the specific interests are registered agent companies and (historically) county recording offices. See *supra* Part III. For a comprehensive analysis of how special interests within Delaware affect the corporate law system, see Macey & Miller, *supra* note 97, at 498–510.

¹⁵⁵ See Stephen Bainbridge, *DEXIT News: Will Meta Follow Tesla to Texas?*, PROFESSORBAINBRIDGE.COM (Jan. 31, 2025, 12:58 PM), <https://www.professorbainbridge.com/professorbainbridge.com/2025/01/dexit-news-will-meta-follow-tesla-to-texas.html> [https://perma.cc/6V8H-PFV8].

¹⁵⁶ The seminal account of startup lawyers is Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996).

hours.¹⁵⁷ They also fight the legal profession's stodgy reputation by adopting the technologies their clients develop, sending a signal that they share an innovative mindset.¹⁵⁸

Similarly, Delaware might re-evaluate charter administration, even if its approach was sufficient historically. Such an effort would include investment in improved technological interfaces and reducing fees for basic administrative functions like document retrieval.¹⁵⁹ The filing system, after all, might be the most salient feature of Delaware law to a new entrepreneur. Delaware statutory and case law lurks in the background throughout a startup's lifecycle, but interactions with the filing system are conspicuous. Each incorporation, preferred stock financing, and document retrieval is a chance for the state to make a favorable or unfavorable impression. Currently, Delaware may be sending the wrong message.

Conclusion

Charters are not fully explained by current scholarship. This essay tried to fill that gap by identifying a new function grounded in minimizing investigation costs and enhancing transactional efficiency. Hopefully this new perspective helps policy makers refine both charter content and administration.

¹⁵⁷ See Bartlett, *supra* note 40, at 2–3; Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163, 167–78 (2014) (citing the work of Lawrence Friedman, Robert Gordon, Linda Bernstein, Richard Painter, and others).

¹⁵⁸ See e.g., *Gunderson Dettmer Launches ChatGD, a Homegrown Generative AI Chat App, to its Lawyers*, GUNDERSON DETTMER (Aug. 9, 2023), <https://www.gunder.com/en/news-insights/firm-news/gunderson-dettmer-launches-chatgd-a-homegrown-generative-ai-chat-app-to-its-lawyers> [https://perma.cc/7AFL-XELV].

¹⁵⁹ These improvements are warranted even if one thinks that it is beneficial for companies to control access to their filings. See *supra* text accompanying note 138. A properly designed system could provide both privacy (through a company-controlled password) and efficiency (through lower filing fees and faster access for the company and its permitted viewers).