# BUSINESS COURTS AND INTERSTATE COMPETITION

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ABSTRACT

*Over the past two decades, specialized trial courts that hear business disputes primarily or exclusively have been established in nineteen states. To explain the recent surge of interest in these courts, policymakers and scholars alike have cited the process of interstate competition. Specifically, these commentators have argued that business courts serve, among other purposes, to attract out-of-state companies to expand their business, reincorporate, or litigate disputes in the jurisdiction that created the business court.*

*This Article critically evaluates each of these theories. It argues first that business courts do not serve to attract companies from other states because business expansion decisions in the United States are rarely driven by the high quality of the courts in a particular jurisdiction. It next argues that business courts are unlikely to attract incorporation business because their core attributes are such that they are unlikely to compete successfully with the Delaware Court of Chancery. The Article goes on to argue that while the creation of a business court may in some cases serve to divert litigation business to local lawyers, the opportunities for diversion are relatively limited.*

*The Article then draws upon these insights to offer a number of suggestions as to how future business courts should be designed. It suggests that states seeking to attract technology companies should think twice before creating a business and technology court. It notes that major institutional reforms will be required if states wish to*

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*use business courts to attract incorporation business away from Delaware. It also identifies additional steps that states might take to more effectively attract litigation business. The Article concludes by evaluating the viability of several non-competition-based rationales for establishing business courts.*

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## INTRODUCTION

Over the past twenty years, specialized trial courts with dockets comprised primarily or exclusively of business cases—commonly known as business courts—have been established in nineteen states in the United States. In 1993, business courts were established in New York and Illinois.[1] In the years to follow, business courts were created in North Carolina (1995), New Jersey (1996), Pennsylvania (2000), Massachusetts (2000), Nevada (2000), Rhode Island (2001), Maryland (2003), Florida (2004), Georgia (2005), Oregon (2006), Colorado (2006), South Carolina (2007), Maine (2008), New Hampshire (2008), Alabama (2009), Ohio (2009), and Delaware (2010).[2] There are today in the United States more trial courts that hear business disputes primarily or exclusively than at any previous moment in the nation's history.

In seeking to explain the rise of the business court, policymakers and legal scholars alike have cited the process of interstate competition.[3] Some commentators have argued that a business court

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1. Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 481, 505 tbl.1 (2007).

2. *Id.* at 505-09 tbl.1 (Illinois, New York, North Carolina, New Jersey, Pennsylvania, Massachusetts, Nevada, Rhode Island, Maryland, Florida, Georgia, and Oregon); Memorandum from Gilbert A. Martinez, Chief Judge, Fourth Judicial Dist. of Co. (Nov. 21, 2006), *available at* http://www.gofourth.org/CJD%20Comm%20docketfourth_judicial_district.htm (Colorado); Lee Applebaum, *The Steady Growth of Business Courts*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/sitecore/content/microsites/future-trends/home/Specialized-Courts-Services/3-3-The-Steady-Growth-of-Business-Courts.aspx (last visited Mar. 28, 2012) (South Carolina, New Hampshire, Alabama, Ohio, and Delaware); Journal of Bus. & Tech. Law, *Overview of State Business, Technology and Complex Courts/Programs*, U. MD. FRANCIS KING CAREY SCH. L., http://www.law.umaryland.edu/academics/journals/jbtl/bus_tech_res.html (last visited Mar. 28, 2012) (Maine).

3. *See, e.g.*, Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 36-37 (1995) ("If states are ... choosing to establish specialized corporate and commercial courts as a means for attracting commerce, or in-state incorporations, or business for the bar, then the dynamics of the competition among states for these benefits will affect substance and procedure also."); Diane P. Wood, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, Generalist Judges in a Specialized World, Speech at the SMU School of Law Eighth Annual Judge Irving L. Goldberg Lecture Series (Feb. 11, 1997), *in* 50 S.M.U. L. REV. 1755, 1763 (1997) (invoking business courts as an example of "an interesting competition among court systems"). Other rationales have also been cited to justify the creation of these courts. These include the argument that business courts improve the quality of decisions in business cases and the claim that such

serves to attract out-of-state businesses to a state or, alternatively, to dissuade in-state businesses from moving elsewhere, thereby growing the state's economy.[4] Others have suggested that a business court attracts out-of-state corporations to incorporate, or to reincorporate, under the law of the state that creates it, thereby generating franchise fees for the state.[5] Still others have contended that a business court makes it more likely that out-of-state companies will choose to litigate their disputes before that court, thereby generating fees for local lawyers.[6] The common thread uniting each of these arguments is the notion that a business court is a product that serves to facilitate the diversion of economic resources *away* from other states *to* the state that creates the business court.

This Article critically evaluates each of these theories. First, with respect to the theory that business courts serve to attract or retain business to a particular state, this Article argues that decisions to relocate a business in the United States are rarely, if ever, driven by the high quality of the courts in a particular jurisdiction. Rather,

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courts enable court systems to operate more efficiently. Although this Article is concerned primarily with competition-based rationales, these other rationales are discussed in Part VII.

4. LAWRENCE BAUM, SPECIALIZING THE COURTS 192-93 (2011) ("The creation of business courts ... [is] motivated by the belief that these courts will appeal to businesses and thus attract them to a state."); Nees, *supra* note 1, at 491 (noting that the creation of a business court may serve to "attract[] corporations and businesses to the state"); Carrie A. O'Brien, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 367 (2002) ("State officials believe the Business Court will attract out-of-state businesses to the state by developing their understanding of North Carolina corporate law."); *see also infra* notes 71-88 and accompanying text.

5. *See, e.g.*, Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1837 (2008) ("In trying to attract incorporation business, states may create courts of specialized jurisdiction that appeal to business managers and investors."); Kimberly A. Ward, Comment, *Getting Down to Business—Pennsylvania Must Create a Business Court, or Face the Consequences*, 18 J.L. & COM. 415, 415 (1999) ("Many legislators and business leaders believe that the establishment in Pennsylvania of a court specializing in business disputes would help induce businesses to incorporate in Pennsylvania, by demonstrating to those businesses that Pennsylvania has a stable judicial environment.").

6. *See* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2092-95 (2009) (citing New York's creation of a business court as an attempt to attract litigation business and keep in-state business in New York); *see also* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 57 (2008) ("An obvious motivation for making local courts attractive to foreign litigants is to procure business for the local bar and for other purveyors of services in the host state, such as restaurants and hotels.").

they are driven by a variety of economic factors—including labor costs and proximity to markets—that have a direct and immediate impact on a company's bottom line. It is highly unlikely that any business, whether in-state or out-of-state, would make a location decision based on the absence or presence of a specialized business court. Nevertheless, officials in a sizable number of states have sought to rationalize the creation of business courts on the ground that these courts can attract and retain business for the state.

Second, with respect to the theory that business courts will attract corporate charters to the states that create them, this Article notes that corporations tend to incorporate in their home state or in Delaware, and that Delaware's success in attracting corporate charters is partly attributable to the high quality of its Court of Chancery.[7] If the purpose of the current crop of business courts is to attract incorporation business away from Delaware, one would expect to see these courts replicate some of the unique attributes of Delaware's Court of Chancery, such as that court's focus on corporate law or its practice of resolving all cases without juries. They do not.[8] Nevertheless, some commentators continue to argue that the creation of a business court by a state may help it to attract corporate chartering business away from Delaware.

Finally, with respect to the theory that business courts serve to attract litigation business to a particular state, this Article notes that such courts can accomplish this end in individual cases. The Article goes on to identify, however, a number of limitations on the ability of these courts to attract litigation business. In sum, this Article concludes that theories emphasizing competition for economic resources provide only tenuous support for establishing business courts.

This insight matters because it offers useful lessons in institutional design. Specifically, this Article suggests that states should rethink whether business and technology courts are likely to attract technology companies to a particular jurisdiction, that states wishing to attract corporate chartering business should rethink the

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7. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572 (2002) ("Firms essentially incorporate in one of only two places: their home state or Delaware.").

8. *See infra* Part VI.B.

design of their business courts, and that states attempting to attract litigation business should consider adopting a host of additional reforms designed to make it more likely that attorneys representing commercial actors will choose to litigate their disputes before the state's business court. These insights can inform the choices made by states that are planning to adopt business courts in the future and should also spur those states that have already established business courts to adjust their respective approaches.

This insight also matters because it highlights the importance of other rationales for establishing business courts. Confronted with the reality that the economic benefits to be derived from creating business courts will flow principally to local attorneys—a group not historically popular with voters—state officials may cease to invoke the claim that business courts may be used to compete for economic resources. Should this occur, then the case for establishing business courts would rise or fall based primarily on two alternative justifications: (1) that these courts improve the quality of dispute resolution in individual cases; and (2) that these courts enhance administrative efficiency within a court system. This Article suggests that there is some empirical support for the notion that business court judges render better-reasoned decisions in business disputes than do generalist courts. The Article also notes, however, the near absence of any statistical evidence as to whether business courts enhance administrative efficiency.

This Article proceeds as follows. Part I provides a brief history of business courts in the United States, describes the core attributes of such courts, and outlines the basic rationales in support of creating them. Part II summarizes the theories that seek to justify and explain the creation of these courts as part of a process of interstate competition. Part III explains why the establishment of business courts is unlikely to attract foreign companies to expand into a particular jurisdiction or, alternatively, to prevent local companies from moving away. Part IV details why the establishment of a business court, at least as such courts are currently designed, is unlikely to persuade companies to incorporate or reincorporate in a particular state. Part V shows that, while business courts may attract some litigation business to a state, there are limits on their capacity to achieve this end. Part VI outlines a number of recom-

mendations as to how to design the next generation of business courts if the ultimate goal is to divert economic resources from one jurisdiction to another. Finally, Part VII discusses the viability of two alternative justifications for creating business courts.

## I. THE CORE ATTRIBUTES OF A BUSINESS COURT

A business court is a specialized trial court that hears business disputes primarily or exclusively.[9] Until recently, such courts were quite rare in the United States. In 1839, New Orleans established a business court that heard only commercial cases, but the state legislature dissolved this court in 1846.[10] The Delaware Court of Chancery has played a prominent role in the development of the nation's corporate law since the 1930s.[11] These examples aside, there have been few public courts devoted exclusively to hearing business cases in United States history. The demand for specialized resolution of business disputes was satisfied, if at all, by private arbitrators.[12]

The modern business court movement traces its origins to New York in the early 1990s.[13] Litigants in business cases were

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9. The use of the term "business court" throughout this Article should not obscure the fact that, in many cases, business courts are not formally separate from other trial courts in a particular jurisdiction. The business court may be a program or a track within existing civil divisions or, in some cases, a separate division within a court. For the sake of simplicity, I use the term "business court" as a shorthand reference for all of these approaches except when the distinction is material.

10. 1839 La. Acts 42-50, *repealed by* 1846 La. Acts 32-34.

11. Although the Court of Chancery was founded in 1792, its role as an important corporate law jurisdiction only dates to the 1930s. *See* Richard J. Agnich & Steven F. Goldstone, *What Business Will Look for in Corporate Law in the Twenty-First Century*, 25 DE. J. CORP. L. 6, 29 (1999) ("[O]ur Court did not begin to surface as a corporate law court until the early 1930s—after the Depression and 150 years after its creation." (comments of Hon. Jack B. Jacobs, V.C., Del. Court of Chancery)); *see also* Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 71 (2009) ("The Delaware Supreme Court has served as the unofficial 'highest court' of corporate law."). Stevelman also notes that "[a]bout seventy-five percent of the Court of Chancery's docket is composed of corporate and other business-related cases." *Id.*

12. Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*,11 J.L. ECON. & ORG. 479, 481-82 (1995) (discussing commercial arbitration's long history in the United States).

13. *See* Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152 (2004). Although Illinois established its business courts at about the same time, New York's courts ultimately had

frustrated by backlog, expense, and inconsistent case management.[14] In response to these complaints, New York initiated a pilot project in Manhattan whereby each business case was assigned to a single judge throughout the litigation.[15] In determining which cases should be assigned to these judges, New York drew up a laundry list of cases that would qualify as "commercial."[16] These cases were then automatically assigned to judges in the newly-created Commercial Division as long as they satisfied certain jurisdictional requirements.[17]

As word began to trickle out that the reforms in New York had enabled the courts in that state to resolve business disputes more quickly,[18] other states started creating business courts of their own.[19] They were assisted in these efforts by the Business Law Section of the American Bar Association, which formed a subcommittee specifically devoted to advising states on the creation of business courts.[20] By 2011, business courts had been established in nineteen states across the United States.

These new business courts were, in most cases, created by the judiciary rather than the legislature.[21] The supreme court of a state

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more of an influence on the development of other states' decisions in this area. *Id.* at 159. Accordingly, the focus here is on New York's courts.

14. *See id.* at 152-53. In Illinois, litigators were particularly frustrated by the master calendar system, pursuant to which a different judge might handle different aspects of the same case. *See id.* at 160.

15. *Id.* at 152-53. This attribute would become the hallmark of business courts around the country.

16. *Id.* at 156-58. In New York, cases designated as "commercial" include certain contract claims, shareholder derivative suits, and commercial class actions, among others. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70(b) (2011).

17. Bach & Applebaum, *supra* note 13, at 156-57.

18. For instance, the time it took to resolve a contract dispute in New York dropped from 648 days in 1992 to 364 days in 2002. *Id.* at 154.

19. Business courts were subsequently established in Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, and South Carolina. *See supra* notes 1-2 and accompanying text. In some states, such as North Carolina, a business court operated statewide. *See* Nees, *supra* note 1, at 506 tbl.1. In other states, such as Massachusetts and Illinois, a business court operated in a single large metropolitan area. *Id.* at 505, 507 tbl.1. In still other states, such as Florida, business courts were established in several large metropolitan areas. *See id.* at 508 tbl.1.

20. *See* Bach & Applebaum, *supra* note 13, at 159-60.

21. *See, e.g.*, *id.* at 153-54 (noting that New York's Commercial Division was created through the office of the Chief Judge of the New York Court of Appeals); *id.* at 160 (noting that Illinois' Commercial Calendar was created by an administrative order issued by the

or, in some cases, the chief judge of a particular court would issue an order mandating that "business" cases be assigned to a particular trial judge whose docket would thereafter be comprised primarily or exclusively of such cases.[22] In some states, these judicial orders were preceded by the creation of a formal advisory committee or a task force charged with investigating whether a business court should be created.[23] In other states, no formal study was commissioned.

Although these new business courts resembled New York's in most respects, they took a variety of tacks in how they defined what constituted a "commercial" or "business" case eligible for assignment to the court. Some states followed New York's lead and drew up a laundry list of case types that would be assigned to the business court. This list might include, for example, shareholder derivative suits, claims arising out of securities transactions, and business torts.[24] Other states, such as North Carolina, stipulated that only business disputes that were adjudged to be "complex" would be assigned to the business court.[25] This meant that simple contract

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presiding judge); *id.* at 166 ("North Carolina's Supreme Court established the North Carolina Business Court.").

22. *See, e.g.*, *id.* at 160-62 (describing the individualized Commercial Calendars for judges in the Cook County Circuit Court); *id.* at 166-67 (noting that the North Carolina Supreme Court designated one judge to hear all complex business litigation matters).

23. *See, e.g.*, MD. BUS. & TECH. COURT TASK FORCE, MARYLAND BUSINESS AND TECHNOLOGY COURT TASK FORCE REPORT 1 (2000), *available at* http://www.courts.state.md.us/finalb&treport.pdf (stating that the General Assembly formed the Task Force for the purpose of "consider[ing] the feasibility of establishing a specialized court function ... to adjudicate business and technolgy disputes"); SPECIAL COMM. ON SUPERIOR COURT BUS./COMPLEX LITIG., REPORT AND RECOMMENDATIONS 1 (2009), *available at* http://www.delawarebusinesslitigation.com/uploads/file/Special%20Committee%20on%20Superior%20Court%20Business%20Complex%20Litigation%20Report.doc; Press Release, Me. Supreme Judicial Court, Formation of the Judicial Branch Business and Consumer Docket Advisory Committee, *available at* http://www.courts.state.me.us/maine_courts/committees/ANNOUNCEBCDAC8-06.pdf (announcing the Committee's role in developing the "Business and Consumer Docket of the Maine State Court System").

24. *See, e.g.*, OHIO CT. TEMP. SUPERINTENDENCE R. 1.03.

25. *See* N.C. GEN. STAT. § 7A-45.4(a) (2010) (creating mandatory jurisdiction in the state's business court for seven categories of complex cases); N.C. SUP. & DIST. CTS. GEN. PRACTICE R. 2.1 (listing factors to be considered in deciding whether a case qualifies as a "complex" business case); *see also* Memorandum from I. Beverly Lake, Jr., Chief Justice, N.C. Supreme Court, to Superior Court Judges, Guidelines for Assignment of Cases to the North Carolina Business Court (Mar. 7, 2001), *available at* http://www.ncbusinesscourt.net/New/links/CJ%20Guidelines%203%2007%2001.pdf (stating that cases arising under certain chapters of the General Statutes "will be assigned as complex business cases"). Other states—including

cases would still be heard by the regular trial courts, whereas complex contract cases would be assigned to the business court. Still other states, such as Maryland, sought to attract technology companies to the state by defining "complex" cases eligible to be heard by the business court to include those in which "business or technology issues predominate over other issues presented in the action."[26] Thus, while there was broad agreement across states that "business" disputes could be referred to a business court, there was some variation as to which disputes were qualified to be heard by which courts.

In defining the scope of cases to be assigned to its business courts, it is noteworthy that no state has followed the lead of Delaware's Court of Chancery.[27] The Court of Chancery's prominence as a business court is based principally on its jurisprudence relating to *corporate* cases (i.e., equitable disputes between the shareholders, directors, and officers of a particular corporation).[28] This court only rarely hears *commercial* cases (i.e., claims for money damages arising out of a variety of other business disputes).[29] Partly in response to the limited jurisdictional reach of the Court of Chancery, the Delaware Superior Court recently created a separate business

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Arizona, California, and Connecticut—established complex civil litigation dockets. *See* Bach & Applebaum, *supra* note 13, at 206-09, 211-14. These courts hear exclusively complex cases, irrespective of whether the cases grow out of a *business* dispute. *See id.* In light of their lack of any specific connection to business law, these courts are not treated as business courts for purposes of this Article.

26. *See* MD. CT. R. 16-205(c) (stating that a judge may assign an action to a business court after determining that "the action presents commercial or technological issues of such a complex or novel nature that specialized treatment is likely to improve the administration of justice").

27. *See* Bach & Applebaum, *supra* note 13, at 223 n.637 ("The Delaware Court of Chancery ... provides [a] model, but it does not appear that other jurisdictions are looking to establish an equity court model for their business courts.").

28. *See* Nees, *supra* note 1, at 480-81. Corporate law is generally understood to "primarily govern the relationship between a company's managers and investors." Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 546-47 (1990).

29. *Cf.* Nees, *supra* note 1, at 480-81. Commercial law is generally understood to refer to "[t]he substantive law dealing with the sale and distribution of goods, the financing of credit transactions on the security of the goods sold, and negotiable instruments." BLACK'S LAW DICTIONARY 305 (9th ed. 2009). Most modern business courts hear a mixture of corporate and commercial cases, which are together frequently described as "business" cases. *See supra* text accompanying note 24. This Article refers to "corporate" and "commercial" law collectively as "business" law.

court, the Complex Commercial Litigation Division, which closely resembles the model pioneered by New York.[30] Thus, although the Court of Chancery has a long and illustrious history as a business court focused on corporate law, to the extent that modern business courts trace their basic structure back to a single progenitor, it is to the New York Commercial Division, not the Court of Chancery.[31]

A number of states have also excluded certain categories of cases from the business court's jurisdiction.[32] The rules of the Commerce Program of the First Judicial District of Pennsylvania, for example, specify that the business court is not permitted to hear actions relating to personal injury or individual products liability, among others.[33] In Ohio, the list of exclusions promulgated by the state Supreme Court includes wrongful death claims, noncommercial landlord-tenant disputes, and employment law cases.[34] These exclusions were in many cases driven by the need to win support for

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30. In the Complex Commercial Litigation Division, which was created in 2010, cases are assigned to a single superior court judge throughout the litigation. Cases are generally eligible for assignment to the division if the amount in controversy exceeds $1 million or if they involve an exclusive choice of court agreement. DEL. SUPER. CT., ADMINISTRATIVE DIRECTIVE OF THE PRESIDENT JUDGE NO. 2010-3, at 1-3 (May 1, 2010) [hereinafter COMMERCIAL LITIGATION ADMINISTRATIVE DIRECTIVE], *available at* http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2010-3.pdf. The Division may not hear "any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; [or] any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes or where the agreement relates to an individual or collective contract of employment." *Id.* at 1-2.

31. *See* Bach & Applebaum, *supra* note 13, at 153 n.20 (recognizing "New York's influence on creating business courts nationally"); *id.* at 177 (noting that Philadelphia's Commerce Case Management Program was "[p]atterned after New York's Commercial Division"); *id.* at 180 & n.273 (observing that the creation of the Business Litigation Section in the Superior Court of Massachusetts "was the result of a five year process that began in the wake of the New York Commercial Division's creation"); *id.* at 185 (reporting that Nevada's Chief Justice, the author of the rules creating business courts in Nevada, "thought that the New York model would be better within Nevada's court system"); *id.* at 195 (observing that the "new [Florida] Business Court Subdivision's jurisdiction is most similar to that found in New York and Philadelphia").

32. These lists of exclusions have a long history. The New Orleans Commercial Court, which was disbanded in 1846, was not permitted to hear cases relating to the ownership or possession of land, the ownership of slaves, domestic relations, tort suits, or eminent domain expropriations. *See* 1839 La. Acts 44.

33. *See* First Judicial Dist. of Pa., *Criteria for Assignment of Cases to Commerce Program*, PHILADELPHIA CTS., http://fjd.phila.gov/pdf/cpcvcomprg/criteria.pdf (last visited Mar. 28, 2012).

34. OHIO CT. TEMP. SUPERINTENDENCE R. 1.03(B).

the court among plaintiffs' lawyers, who had expressed concerns that business court judges might be biased in favor of business interests; these lawyers did not want to litigate personal injury suits, for example, before a business court.[35]

Against this backdrop, business court advocates have identified three principal rationales for creating these courts. First, such courts are said to result in a higher quality of decisions in individual cases and to generate more and better-reasoned decisions in the fields of corporate and commercial law.[36] Second, such courts are said to improve the administrative efficiency of a state court system.[37] Finally, business courts are said to facilitate the diversion of economic resources from one jurisdiction to another as part of a broader process of interjurisdictional competition.[38] The theoretical underpinnings for this third rationale, which is the primary concern of this Article, are examined at greater length in the next Part.

## II. THEORIES OF LEGAL INNOVATION AND COMPETITION

There is little doubt that the diffusion of legal and institutional innovations can occur through a process of economic competition.[39] Pursuant to this competition, states vie with one another to provide new and innovative legal rules and institutions that attract businesses, tax revenue, and jobs away from other jurisdictions.[40] States are thus incentivized to innovate and to adopt innovations pioneered by other states out of concern that they will wind up on the losing end of this ongoing competition for economic resources.[41] In order

35. *See* Nees, *supra* note 1, at 529 (noting that exceptions for these types of cases were made in response to "opposition from groups such as plaintiffs' bar"); Elaine R. Friedman, *New Business Courts Gain Acceptance but Plaintiffs' Lawyers Seek to Block State Legislation*, NAT'L L.J., Jan. 6, 1997, at B1.

36. *See infra* Part VII.A.

37. *See infra* Part VII.B.

38. *See infra* Part II.

39. *See* BAUM, *supra* note 4, at 193 ("Business courts ... reflect competition as a mechanism for the diffusion of innovations."); *see also* Frederick J. Boehmke & Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 POL. RES. Q. 39, 39 (2004).

40. *See* BAUM, *supra* note 4, at 193; *see also* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 217 (2009).

41. Economic competition thus simultaneously justifies the creation and explains the spread of a particular innovation.

for this competition to take place, of course, there must be some "product" for which there exists both supply and demand.[42] In the business court context, the product is a particular mode of dispute resolution.

The demand for this product comes from in-state and out-of-state companies that would prefer, all other things being equal, to litigate their disputes before an impartial tribunal that understands the relevant law and that will resolve the dispute quickly and fairly.[43] The product itself is supplied by the state, which may choose to create courts that possess these characteristics. States do not, however, have a monopoly on the supply of systems of dispute resolution. A thriving system of private arbitration may be said to compete with the public courts on the supply side.[44] The interplay

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42. *See* O'HARA & RIBSTEIN, *supra* note 40, at 3 ("Parties ... can shop for law, just as they do for other goods."); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 233, 261 (1985) (arguing that state laws act as "products" that corporations select when deciding where to incorporate). The most famous example of this phenomenon can be found in the literature relating to corporate chartering. When a company is deciding where to incorporate, it is choosing which state's corporate law shall govern its internal affairs. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 887 n.6 (1990). In theory, states may try to persuade out-of-state companies to reincorporate under their own law, thereby generating franchise fees for the state, by making changes to their corporate law. *See, e.g.*, *id.* at 891-92 & n.21.

43. *Cf.* Marc Galanter & Jayanth K. Krishnan, *Debased Informalism:* Lok Adalats *and Legal Rights in Modern India*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96, 126 (Erik G. Jensen & Thomas C. Heller eds., 2003) (recognizing this phenomenon playing out in the Indian court system, and noting that "[t]here is a market for courts that give prompt and enforceable judgments. Where the state fails to provide such courts, others who appreciate their potential ... will try to fill the vacuum.").

44. *See* R. Franklin Balotti & Roland E. Brandel, *Business Bench: Are Special Courts the Future?* BUS. L. TODAY, Jan.-Feb. 1995, at 25, 27 (noting that business courts represent a potentially viable alternative to arbitration); Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 491, 493 (2009) (discussing the "extent to which competition from business courts is likely to impact the future of arbitration"); Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as Well as Anyone?*, 13 TOURO L. REV. 191, 195-96 (1996) (observing that the task force asked to create New York's business courts was aware that "[b]usinesses which had a choice often preferred to litigate in federal court, in the courts of other states such as Delaware and in private dispute resolution forums provided by such entities as the American Arbitration Association"); Editorial, *Musical Benches*, N.J. L.J., Mar. 17, 1997, at 81 ("Increasing competition from alternative dispute resolution furnished the impetus for Essex County's experiment.... It is an amusing illustration of Adam Smith's invisible hand that the justice system has felt it necessary to improve efficiency in order to prevent consumers from flocking to the competition."); Thomas J. Stipanowich, *Punitive Damages and the*

between the business entities on the demand side and courts and arbitrators on the supply side has led some observers to label this a market for dispute resolution or, alternatively, a market for adjudication.[45]

Modern legal scholarship traces the general concept of a market for adjudication to a famous article by William Landes and Richard Posner in which the authors cite a number of historical examples of competitive markets for the provision of judicial services.[46] They also specifically note the possibility of competition between modern public court systems and consider whether such a system is likely to generate rules that are economically efficient.[47] In this context, they offer the following discussion in which they explicate the dynamics likely to underlie this competition:

> Imagine a system in which there are several courts, public or private, with overlapping jurisdictions, and the judges are paid out of litigant fees and therefore have a direct pecuniary interest in attracting business away from competing courts.... [I]t might seem that competition would lead to an optimal set of substantive rules and procedural safeguards. But this is incorrect. The competition would be for plaintiffs, since it is the plaintiff who determines the choice among courts having concurrent jurisdiction of his claim. The competing courts would offer not a set of rules designed to optimize dispute resolution but a set designed to favor plaintiffs regardless of efficiency.[48]

Setting to one side the question of whether the market for adjudication inevitably leads to the production of plaintiff-friendly rules,

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*Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 50 n.277 (1997) ("[Arbitration] may soon face increasing competition as an adjudicative alternative. The concept of a commercial court, long a fixture in many civil law jurisdictions, has recently spurred interest in the United States.").

45. *See, e.g.*, Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 85-93 (2005) (describing market for dispute resolution services).

46. *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 241, 243, 254, 257 (1979); *see also* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007) ("[I]mportant features of the common law, including the structure of contract law, can be explained as the result of competition among courts and the constraints on that competition.").

47. *See* Landes & Posner, *supra* note 46, at 253-54.

48. *Id.* at 254.

it is noteworthy that state court judges in the United States lack the pecuniary motives attributed to them by Landes and Posner.[49] These judges are not paid out of litigant fees; rather, they are salaried employees of the state or, in some cases, the city or county in which they sit.[50] All other things being equal, the judges have no monetary incentives to attract cases to their home jurisdictions because it will mean more work for them with no corresponding increase in compensation.[51] Accordingly, scholars who claim that a market for adjudication currently exists have been forced to identify other actors with incentives to promote innovation with respect to the court system. The most commonly cited actors are the state itself and local lawyers.

### *A. Supply Side: State Incentives*

Turning first to the state, it is important to note that although the conditions for a market for adjudication may exist—in that commercial actors demand certain laws or institutions and the state is able to supply them—it does not necessarily follow that states will compete in a market for adjudication. The state, after all, is not exclusively an economic actor. Many high-ranking state officials are subject to unique constraints—most notably the requirement that they stand for reelection at periodic intervals—and these constraints may limit their willingness to produce products for consumption in any market for adjudication.[52] If the state decides

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49. *See* Paul D. Carrington, *Adjudication as a Private Good: A Comment*, 8 J. LEGAL STUD. 303, 305 (1979) (noting incentives of public courts to send business to their competitors).

50. *See* Landes & Posner, *supra* note 46, at 249.

51. This does not mean, of course, that judges may not have other motives for wanting to see legal disputes resolved by litigation rather than by arbitration or for competing to attract cases to their home jurisdiction. They may, for example, be concerned that the legitimacy of the judicial system as a whole may suffer if litigants routinely decide to avoid the courts. Alternatively, judges who preside over cases involving large sums of money may derive prestige by virtue of their association with the case. *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 20 (2005). These potential benefits notwithstanding, modern state court judges generally do not derive any direct monetary benefit by attracting cases to their jurisdiction. *Id.* ("Attracting big cases changes neither the salary nor the pension [of judges].").

52. Indeed, states may choose *not* to compete in the market for dispute resolution services if private alternatives such as arbitration exist. The more parties that resolve their disputes via arbitration, the fewer the number of cases that are litigated in the state's courts, which reduces the cost to the state.

not to adopt a particular law or create a specialized court, then the preferences of out-of-state actors are simply not relevant. Absent supply, there can be no market.

Nevertheless, scholars have advanced a number of reasons why it may be in the state's economic interests to create a business court. First, they have argued that business courts help the state to attract or retain businesses.[53] This increased economic activity generates revenue for the state in the form of wage and sales taxes; that revenue in turn enables the state to provide more services to its populace or, alternatively, to lower the tax burden on state residents. Second, they have argued that business courts help the state to attract out-of-state companies to reincorporate under that state's law.[54] Since corporations incorporated under the law of a particular state must pay annual franchise fees to the state, attracting incorporations may enable the state to provide more services to its populace or reduce taxes.[55] Under either of these two theories, the state has a direct financial incentive to participate in the market for adjudication by creating business courts.

### *B. Supply Side: Lawyer Incentives*

Turning now to the lawyers, some scholars have noted that attorneys have strong incentives to lobby the state to supply legal innovations that can generate fees for local lawyers.[56] Jonathan Macey and Geoffrey Miller have argued that the Delaware bar heavily influences the legal rules supplied by that state.[57]

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53. *See supra* note 4 and accompanying text.

54. *See supra* note 5 and accompanying text.

55. *See, e.g.*, Faith Stevelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law*, 53 N.Y.L. SCH. L. REV. 817, 824 (2009) (noting that states' realization of significant revenues from incorporation fees led to their relaxing of local limits on companies' flexibility); *see also* Harwell Wells, *The Modernization of Corporate Law, 1920-40*, 11 U. PA. J. BUS. L. 573, 583-84 (2009) (noting how, during the beginning of the modern era of corporate law, New Jersey's corporate legal regime led to it being the "preferred state of incorporation," and the fees generated "allowed it to eliminate its state property tax").

56. *See, e.g.*, Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 367 (2003) (discussing lawyer incentives in promoting laws that would encourage parties to establish contacts with the state).

57. *See* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472-73 (1987); *see also* Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 684-85.

Specifically, they claim that corporate decision rules in Delaware are generated in a political process dominated by the state's bar, which is principally interested in maximizing the fees paid to Delaware lawyers on behalf of Delaware corporations.[58] By their account, Delaware lawyers are interested in attracting charters principally because these charters are likely to attract more business from out-of-state companies.[59] If there were some other legal innovation that would result in the lawyers obtaining even more business from these companies, such as a business court, then those lawyers would doubtless support that innovation as well.

There are other examples of legal innovations whose creation seems to have been driven, at least in part, by self-interested lobbying by lawyers.[60] Geoffrey Miller and Theodore Eisenberg discuss New York's efforts to encourage out-of-state companies to choose New York law to govern their high-value commercial agreements or, even better, to choose to litigate their high-value commercial disputes in New York courts.[61] Miller and Eisenberg also highlight decisions by New York legislators and attorneys to make arbitration agreements enforceable in New York.[62] The 1984 passage of sections

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58. Macey & Miller, *supra* note 57, at 503.

59. *Id.* at 503-04. If push came to shove, Miller and Macey argue that the bar would probably favor rules increasing the amount of litigation as opposed to the amount of advisory work because it is more difficult for out-of-state companies to compete for the former. *Id.* at 504-05.

60. *See* Miller & Eisenberg, *supra* note 6, at 2073-74 ("New York attracts contracts by offering a menu of substantive rules that are desired by the contracting parties and by providing prompt, efficient, and reliable procedures and institutions for resolving disputes. Attracting contracts serves the state's economic interests and increases demand for the services of New York attorneys.").

61. *See id.* at 2079-98. In 1984, the New York legislature enacted a statute directing New York courts to respect choice-of-law clauses selecting New York law in certain high-value contracts *regardless* of whether the contract or the parties had any other connection to the state. N.Y. GEN. OBLIG. LAW § 5-1401 (Consol. 2006). In that same year, the legislature also enacted a companion statute directing New York courts to hear cases that otherwise had no connection to the state if the case involved a high-value contract, the contract contained a choice-of-law clause selecting New York law, and the defendant agreed to submit to the jurisdiction of New York courts. *Id.* § 5-1402 (Consol. 2006); *see also* N.Y. C.P.L.R. 327(b) (Consol. 1999) (directing courts not to dismiss on inconvenient forum grounds when section 5-1402 applies). The combined effect of the two statutes is to make it easier for parties to high-dollar-value commercial agreements that otherwise lack a connection to New York to litigate disputes arising out of their agreement in that state, thereby generating more business for New York lawyers. *See* Miller & Eisenberg, *supra* note 6, at 2074.

62. *See* Miller & Eisenberg, *supra* note 6, at 2080-87.

5-1401 and 5-1402 of the New York General Obligations Law,[63] they note, was preceded by an aggressive lobbying effort by the New York Bar Association.[64] Viewed against this broader backdrop of legal innovations, the creation of business courts by states can be seen as yet another legal innovation designed to generate legal business for in-state attorneys.[65] Under this theory, one goal of these courts is the diversion of litigation and arbitration business away from courts and arbitrators in other states and to the business courts in the lawyers' home state; alternatively, this goal can be viewed as the retention of litigation and arbitration business that might otherwise have gone to a different state.[66]

Thus, even if state court judges lack financial incentives to innovate and create new business courts, these incentives may still exist on the part of the state itself (to increase tax revenue through economic development or through the corporate chartering business) or local lawyers (to maximize fees paid to in-state lawyers).

### *C. Demand Side: Company Incentives*

Turning now to the demand side, it is important to note that a viable market for adjudication may also fail to develop because out-of-state commercial actors exhibit too little demand for the product being supplied by the state.[67] If the fact that a state has supplied a particular legal innovation is irrelevant to the decision making of

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63. *See supra* note 61.

64. *See* Miller & Eisenberg, *supra* note 6, at 2091-92; *see also* N.Y.C. BAR ASS'N, COMM. ON FOREIGN & COMPARATIVE LAW, PROPOSAL FOR MANDATORY ENFORCEMENT OF GOVERNING-LAW CLAUSES AND RELATED CLAUSES IN SIGNIFICANT COMMERCIAL AGREEMENTS 537, 548-50 (1983) (suggesting that New York's "legal and business communities" would benefit "if significant agreements are governed by New York law and if significant commercial litigation is conducted in the state" and recommending passage of sections 5-1401 and 5-1402).

65. Miller and Eisenberg cite New York's creation of a business court as an additional innovation that seems likely to generate more business for New York lawyers. *See* Miller & Eisenberg, *supra* note 6, at 2092-95. Another legal innovation that may serve to attract litigation is a long statute of limitations. *See* Ferens v. John Deere Co., 494 U.S. 516, 528 (1990) (noting Mississippi's incentive to attract plaintiffs' personal injury suits through a long statute of limitations).

66. *See* Miller & Eisenberg, *supra* note 6, at 2095 (noting the observation of New York's chief judge that the introduction of the business court has helped retain commercial litigants within the state).

67. *See id.* at 2079 (noting that both supply and demand must exist in order for there to be a "market" for business litigation fora).

out-of-state actors, then states cannot be said to be in "competition" with each other in any meaningful sense because there is no external demand for their product. The validity of competition-based theories explaining the creation of business courts thus depends on whether the actors on the demand side of the equation are likely to respond to a particular legal innovation. Absent any meaningful response by out-of-state actors, it is a mistake to view the innovation in question as part of an attempt to "compete" with similar innovations produced in other states. There can be no real competition if there is no external demand.

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The next three Parts of this Article evaluate the most popular theories of economic competition that have been used to justify the creation of business courts: (1) creating business courts attracts and retains businesses,[68] (2) creating business courts attracts incorporation business,[69] and (3) creating business courts generates litigation business for local lawyers.[70]

## III. COMPETING FOR BUSINESS ACTIVITY

The first, and by far the most popular, theory of economic competition cites the business court as the product of competition among states to attract business activity.[71] This theory suggests that the creation of a business court serves both to attract out-of-state companies to the state and to keep in-state companies from moving their operations elsewhere.[72] Under this theory, states that compete

68. *See infra* Part III.

69. *See infra* Part IV.

70. *See infra* Part V.

71. *See, e.g.*, Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 954 (2008) ("Florida's stated purpose in establishing business courts is to provide economic stimulus in the community by drawing business to relocate to Florida."). The term "business activity" is broad enough to encompass a wide range of possible actions. This includes, among other things, opening new stores, creating new manufacturing centers, setting up new offices, starting a franchise, or creating new distribution centers.

72. *See, e.g.*, Ward, *supra* note 5, at 421 (noting that proponents of a Pennsylvania business court thought the idea "would provide a reason for a Pennsylvania business to remain in the commonwealth and for other businesses to locate in Pennsylvania"). For a variation on this theory, albeit one framed around the idea of competing for "investment," see

successfully by establishing business courts will enjoy faster economic development and job growth than states that do not.[73]

This theory appears in numerous states' official accounts of business court creation. For example, the official report calling for the establishment of the North Carolina Business Court stated that one of the goals of the court was to "attract[ ] new businesses to the State."[74] In Colorado, a report issued by the Governor's Task Force on Civil Justice Reform noted that "a business court could develop the expertise and specialized procedures needed to help Colorado attract and retain world-class employers and employees alike."[75] Additional statements along these lines have been made by local officials and commentators in Florida,[76] Maryland,[77] Maine,[78]

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Ehud Kamar, *Beyond Competition for Incorporations*, 94 GEO. L.J. 1725, 1743-50 (2006) (distinguishing between states that revise their corporate law to compete for incorporations and those that revise their corporate law to compete for investment).

73. *See, e.g.*, Bach & Applebaum, *supra* note 13, at 176 (discussing the Philadelphia Bar Association Chancellor's recognition that business courts can combat job and business losses); Ward, *supra* note 5, at 415, 421 (noting the labeling of business courts as an "economic development tool").

74. CHIEF JUSTICE'S COMM. ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION (2004), *available at* http://www.ncbusinesscourt.net/ref/Final%20 Commission%20Report.htm.

75. GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, EXECUTIVE SUMMARY, FINAL REPORT OF GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM 3 (Nov. 26, 2003), http://www.state.co.us/cjrtf/report/report.htm.

76. Fla. Cir. Ct., Ninth Jud. Cir., Amended Order Creating Specialized Business Court Sub-Division of the Civil Division of the Circuit Court, at 2 (Nov. 26, 2003) ("[T]he establishment of a Business court may become one more factor in helping our community to attract new businesses that are looking to re-locate."); *Complex Business Litigation Court*, NINTH JUD. CIRCUIT CT. FLA., http://www.ninthcircuit.org/about/divisions/civil/complex-business-litigation-court.shtml (last visited Mar. 28, 2012) ("The theory that a specialized Business Court will draw big businesses to Central Florida has proven true in the states where Business Courts have been established. Businesses are drawn to areas where courts understand the complexity of business litigation.").

77. *See* MD. STATE BAR ASS'N, *Issue: Business and Technology Court*, *in* 2003 STATE LEGISLATIVE PROGRAM 92 ("A business court would make Maryland a more attractive state for resident businesses to stay and for corporations in other states and countries to relocate.").

78. *See* Noel K. Gallagher, *Order in the Court for Business Disputes*, PORTLAND PRESS HERALD (Portland, Me.), Mar. 12, 2010, http://www.pressherald.com/archive/order-in-the-Court-for-business-disputes_2009-03-06.html (quoting a local Maine lawyer who stated that "we need (the business court) if we want to attract the kind of business that will keep us vibrant").

Michigan,[79] Minnesota,[80] Mississippi,[81] New Jersey,[82] Ohio,[83] Pennsylvania,[84] and West Virginia.[85]

This particular argument has also been forcefully articulated by professional organizations that have urged state legislatures to create more business courts. For example, the Business Law Section of the American Bar Association has stated that states should consider establishing business courts in order to "[b]e competitive from an economic development standpoint with other states/jurisdictions which have established business courts."[86] Perhaps the

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79. *See* Jacob A. Sommer, Note, *Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Businesses into Forum States?*, 56 VAND. L. REV. 561, 576 (2003) ("Michigan Governor John Engler outlined a series of initiatives designed to attract inventors, entrepreneurs, small-tech, and information technology firms to the state. One of the initiatives was the creation of a connected court that could satisfy the demands of high-tech business." (footnote omitted)); Robert Ankeny, *A Conversation with Diane Akers*, CRAIN'S DETROIT BUS., Mar. 14, 2005, at 11 (noting that the former chair of the business court committee of the State Bar of Michigan's business law section believed that "[i]f the Michigan economy wants to attract and retain business and create more favorable business conditions, a business court can help do that").

80. *See* Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 WM. MITCHELL L. REV. 315, 318 (1998) (noting business court supporters' claim that "[b]etter resolution of business matters is often a key factor in 'business climate' discussions and in attracting and retaining business" in Minnesota).

81. Delbert Hosemann, Miss. Sec'y of State, Remarks at the First Meeting of the Business Courts Study Group 1 (May 20, 1998), *available at* http://www.sos.ms.gov/links/pol_res/business_courts/meeting01_minutes.pdf (stating that he viewed the creation of a business court as part of a broader project to "make Mississippi the most business-friendly and competitive state").

82. *See* Stuart A. Hoberman, *Letter from the President of the New Jersey State Bar Association to the Readers of the Metropolitan Corporate Counsel*, METROPOLITAN CORP. COUNS., Jan. 2006, at 66 ("The creation of a business court and its attendant benefits are among those factors which might attract business to New Jersey. A number of jurisdictions ... have created business courts in order to attract business and improve their states' business climate.").

83. *See* Cleveland Metro. Bar Ass'n, Cuyahoga County Commercial Docket 27 (Jan. 16, 2009) (PowerPoint presentation on file with author) (observing that by creating a business court, the "Ohio judiciary will contribute to attracting and retaining business in Ohio").

84. Ward, *supra* note 5, at 421 ("[D]evelopment of a commerce court is vital to [Philadelphia's] ability to retain and attract business." (quoting the president of the Greater Philadelphia Chamber of Business)).

85. *See* Chris Dickerson, *Thompson Pleased Business Court Bill Signed into Law*, W. VA. REC. (May 20, 2010, 2:30 PM), http://www.wvrecord.com/news/226979-thompson-pleased-business-court-plan ("The biggest benefit [of a business court] would be attracting new businesses to the state.").

86. AM. BAR ASS'N, ESTABLISHING BUSINESS COURTS IN YOUR STATE 2008-2009, at 1, *available at* http://meetings.abanet.org/webupload/commupload/CL150011/sitesofinterest_Files/establishing-business-courts0809.pdf (observing that the creation of a business court will

clearest articulation of this theory comes from Lee Applebaum, an attorney who has written extensively in support of business courts:

> [C]ompetitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region, or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.[87]

The theory, therefore, is that business courts may attract out-of-state business to the jurisdiction that creates them or, alternatively, may prevent local businesses from relocating elsewhere, as part of a broader competition among the states for economic resources.

Although none of the advocates listed above have specified what sort of "business" they expect business courts to attract, they are probably referring to the decision by an out-of-state company to "locate" in the state by choosing to open a new store, build a new factory, or move its offices to the state. These location decisions can have a significant impact on the state's economy through the creation of jobs for state residents and the concomitant generation of tax dollars for state governments.[88] Accordingly, I assume for the sake of the following analysis that state efforts to "attract business"

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enable a jurisdiction to "[i]mprove overall infrastructure of [the] entire community by creating a forum that makes conducting business in that region more attractive, predictable and reliable"); *see also* Lee Applebaum, Letter, *The Business of Business Courts*, TRIAL, Sept. 2006, at 8, 8 ("[O]ne goal in creating business courts is to create a litigation environment that encourages businesses to stay in or locate to a region.").

87. Lee Applebaum, *The "New" Business Courts: Responding to Modern Business and Commercial Disputes*, BUS. L. TODAY, Mar.-Apr. 2008, at 13, 16. Applebaum also observes that business courts "have garnered respect ... for their expertise, efficacy, and internal efficiencies, as well as because of the belief that taking business and commercial cases off of the general docket allows other kinds of cases to move more efficiently" and that "[s]uch results have merited, and continue to merit, emulation and consideration by other states." *Id.*

88. *See, e.g.*, Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation?: Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1721 (2010) ("[I]ndividual states receive various potential benefits from attracting [company] incorporations, including increased tax revenue.").

by establishing a business court are, in fact, efforts to persuade out-of-state companies to locate, or re-locate, brick-and-mortar shops, factories, or offices in the state that created the business court.[89]

The notion of attracting businesses to a state, understood in this way, is intimately bound up with the idea of a state's "business climate." This term can refer either to *actual* factors that drive a company's decision as to where to do business or to the *perception* that a particular state is a desirable place to do business.[90] The creation of a business court, viewed through either lens, could thus be viewed as an effort to improve a state's business climate.[91]

The claim that the creation of a business court may be an actual factor driving a company's business decisions is facially plausible. Litigation can be expensive and time consuming. Judges may lack a basic understanding of economics—let alone the complexities of sophisticated business transactions—or have little interest in business law.[92] There may only be a few decisions published each year in a particular area of commercial law in a particular state, which makes it hard for businesses to know what the law is in

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89. Alternatively, they could simply be referring to an increase in sales by in-state companies to out-of-state companies or to an increase in the number of franchising or distributorship agreements between in-state companies and out-of-state companies. However, given the more attenuated benefits likely to accrue to in-state residents and the state itself from these alternatives, it seems most plausible that efforts to attract business are primarily efforts to drive location decisions.

90. *See* LIESL EATHINGTON, AARON L. TODD & DAVE SWENSON, WEATHERING THE STORM OF BUSINESS CLIMATE RANKINGS 5 (2005) (describing business climate as "a set of factors believed to contribute to regional economic growth" or, alternatively, as "an intangible asset in the form of a regional reputation for business friendliness").

91. An ever-growing number of organizations publish "business climate rankings" that purport to evaluate whether a state is taking steps to foster a business-friendly environment. Notwithstanding their widespread circulation, these rankings tend not to be particularly accurate predictors of economic performance. *See* PETER FISHER, GRADING PLACES: WHAT DO THE BUSINESS CLIMATE RANKINGS REALLY TELL US? 73 (2005). The five best-known ranking systems have such drastically different conclusions that thirty-four states can claim a spot in the top ten and "[t]he average state's best ranking is 26 positions above its worst." *Id.* at 71-72; *see also* Robert D. Atkinson, *Understanding Business Climate Studies: Their Use and Validity,* ECON. DEV. REV., Winter 1990, at 46, 47-48.

92. Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 758 (2000) ("[C]ourts have trouble understanding the simplest of business relationships. This is not surprising. Judges must be generalists, but they usually have narrow backgrounds in a particular field of the law."); *see also* Miller & Eisenberg, *supra* note 6, at 2093 (observing that New York trial judges are political selections including little consideration of candidates' background in business).

advance.[93] In choosing where to do business, a company would logically prefer to do business in a state where the costs of litigation are lower, where a specialized judge was tasked with resolving its business disputes, and where there was a robust body of case law relating to business matters.[94] To the extent that a business court satisfies each of these needs, it could serve as an effective tool for attracting businesses to a particular state.

With respect to the claim that a business court may attract business to a state by contributing to the *perception* that a state is business-friendly, this claim also has a certain surface appeal. If perception is all that matters, then the creation of a business court could signal receptivity to business that would be effective by itself, irrespective of any actual impact that the business court's operations may have on business incentives. In making location decisions, a company will likely balance the pros and cons of expansion in a particular region against one another in a methodical manner. When these factors are in equipoise, however, the ultimate decision may come down to the company executives' gut instincts. These gut decisions are, almost by definition, driven as much by emotion as by logic, and the outcomes of such decisions may be driven by subconscious positive associations about a particular state. To the extent that these associations are a direct result of a state's long-standing efforts to brand itself as a positive business environment, then perception may matter as much as reality.

In the following Sections, I explain why each of these two arguments—and hence the theory that posits that business courts should be created in order to attract business activity—is ultimately unpersuasive. I first examine the claim that business courts are likely to play a significant role in *actually* attracting foreign

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93. My research assistant identified and coded the published decisions in each state by searching the appropriate state corporate law databases in LexisNexis. Between 2000 and 2010 there were, excluding veil-piercing cases, only seventeen published decisions by all the appellate courts in the state of Kansas that addressed corporate law issues, a rate of just 1.7 cases per year. The rate in several other states over this timeframe is comparable: Arizona (0.6 cases per year); Michigan (0.6 cases per year); Maine (0.7 cases per year); Washington (1.5 cases per year); North Carolina (2.6 cases per year); and Texas (3.1 cases per year).

94. *See, e.g.*, Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 776-78 (2009) (attributing the high volume of corporate incorporations in Delaware to its sophisticated bench, efficient litigation process, and clear, numerous corporate precedents).

companies to a state.[95] I then examine the claim that the *perception* of receptivity to business generated by business courts is itself a useful economic development tool.

### *A. The Irrelevance of Dispute Resolution*

Let us first consider the claim that business courts are likely to play a meaningful role in shaping the actual incentives of out-of-state companies trying to decide whether to locate shops, factories, or offices in a particular state. In order for this claim to be true, it must be the case that out-of-state companies, in weighing the myriad factors that inform a decision to expand their operations into a particular jurisdiction, would view the presence of a business court in a particular jurisdiction as meaningful. In other words, there must be some demand for high-quality dispute resolution systems among out-of-state companies that are weighing whether to locate in a particular state. This inquiry thus necessitates a close examination of the various factors that companies consider when making their expansion decisions.

A comprehensive review of these factors reveals that the presence of high-quality courts in a jurisdiction ranks far down on the list of priorities of firms weighing the decision of where to expand, if it is even mentioned at all.[96] Instead, most studies suggest that business expansion decisions are driven largely by economic factors rather

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95. The discussion herein is primarily focused on the notion that the state is seeking to attract foreign businesses to the state. However, another possible take on this idea is that the business court is simply trying to keep in-state businesses from moving elsewhere. In other words, the competition is about *retaining* businesses rather than about *attracting* them. Given the arguments outlined in this Section highlighting the extremely weak effect that the creation of a business court has on company incentives, it is just as unlikely that a company will remain in a jurisdiction because it has created a business court as it is that an out-of-state company will move to a jurisdiction because it has created a business court. Accordingly, the focus here is on attracting out-of-state companies.

96. *See* EDWIN M. MCPHERSON, PLANT LOCATION SELECTION TECHNIQUES 11-18 (1995) (listing various factors driving location decisions and emphasizing economic factors); PHILIP S. ORSINO, SUCCESSFUL BUSINESS EXPANSION: PRACTICAL STRATEGIES FOR PLANNING PROFITABLE GROWTH 84-85 (1994) (same); ROGER W. SCHMENNER, MAKING BUSINESS LOCATION DECISIONS 33-36 (1982) (same); *see also* James N. Morgan & George Katona, *The Quantitative Study of Factors Determining Business Decisions*, 66 Q. J. ECON. 67, 72, 73 tbl.1 (1952) (noting the results of a survey conducted in Michigan showing that the primary factors driving location decisions were proximity to markets, labor factors, and proximity to materials).

than by legal or regulatory factors.[97] Specifically, these studies show that when businesses are expanding, they focus on issues such as market size, product demand, distribution channels, infrastructure quality, customer needs, the availability of capital, and the presence or absence of competitors, among others.[98] These factors—as opposed to legal or regulatory factors—are routinely identified as the primary drivers of business expansion decisions.[99]

To be sure, the legal or regulatory environment is frequently mentioned as an additional factor to consider in making location decisions.[100] In this context, however, the focus of attention is typically on local laws enacted by a state legislature or on regulations promulgated by a state administrative agency.[101] While the quality of the judicial system may operate as a disqualifying factor in extreme cases—for example, where the courts of a particular jurisdiction are perceived to be actively hostile to business, or where the courts of a particular jurisdiction are known to be biased,

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97. *See* MCPHERSON, *supra* note 96, at 11-18; ORSINO, *supra* note 96, at 84-85; SCHMENNER, *supra* note 96, at 33-36.

98. *See, e.g.*, ORSINO, *supra* note 96, at 84-85.

99. *See, e.g.*, JOHN P. BLAIR & MICHAEL C. CARROLL, LOCAL ECONOMIC DEVELOPMENT: ANALYSIS, PRACTICES, AND GLOBALIZATION 40 (2009) (summarizing surveys relating to location factors, and concluding that "the traditional location factors—(1) markets, (2) labor, (3) new materials, and (4) transportation—remain the most important location factors").

100. *See, e.g.*, ORSINO, *supra* note 96, at 84. The importance of these factors is, however, typically downplayed. In his book on business planning, for example, Wesley Truitt identifies five primary factors driving business planning decisions: (1) the physical environment, (2) the technological environment, (3) the legal/regulatory environment, (4) the economic environment, and (5) the sociocultural environment. WESLEY B. TRUITT, BUSINESS PLANNING: A COMPREHENSIVE FRAMEWORK AND PROCESS 80-123 (2002). In the context of the legal/regulatory environment, Truitt writes that "the system of laws, the *dispute resolution system*, the civil order and justice system, rights of redress of grievance, sanctity of contract, and law-making and law enforcement systems are all part of this [business planning] evaluation." *Id.* at 97-98 (emphasis added). At no point in his book, however, does Truitt cite an example when dispute resolution impacted business planning, and he devotes no attention to the issue other than this passing reference.

101. *See, e.g.*, SCHMENNER, *supra* note 96, at 35 (noting relevance of states' right-to-work laws); Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271, 336 n.178 (1997) ("This state activity [in passing environmental legislation] is likely to have increased the variation in environmental regulations and hence the sensitivity of business location decisions to state environment regulations."); David A. Strifling, *Environmental Federalism and Effective Regulation of Nanotechnology*, 2010 MICH. ST. L. REV. 1129, 1147 (noting one study that found that state taxes, availability of public services, and the state's labor unions were "substantially more significant" to business location decisions than the "stringency of environmental regulation").

corrupt, or unreliable—there is otherwise little in these studies to suggest that the availability of a high-quality judge to resolve business disputes matters enormously to businesses making expansion decisions.[102] As the Maryland task force chartered to consider the feasibility of establishing a state business and technology court noted in its report: "[N]ot one witness testified that the implementation of such a [court] will prove to be the deciding factor in whether a business chooses Maryland as its ... principal place of business."[103]

To highlight the relative importance of legal or regulatory factors vis-à-vis economic factors in location decisions, let us examine briefly the role played by tax policies. Many outside observers would likely believe that tax considerations, which directly impact a company's bottom line, would be among the most salient legal or regulatory factors facing a business considering expansion. Over the past thirty years, states have offered tax incentives collectively worth billions of dollars to entice out-of-state companies to expand or locate in their state.[104] Some researchers who have conducted econometric studies seeking to calculate economic benefits generated by these tax incentives, however, have taken a skeptical view of these incentives, concluding that "the proliferation of tax incentives has not produced the intended effect of expanding economic activity and employment in the competitor states."[105] Surveys of

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102. *See* source cited *supra* note 99. These studies do show, however, that in other contexts, the presence of negative factors—as opposed to the presence of positive factors, such as an expert judge—can function to drive away corporations. *See* MCPHERSON, *supra* note 96, at 199 ("On the community scale, local legislation seldom is a factor that attracts industry, although local legislation may repel industry."); SCHMENNER, *supra* note 96, at 46 ("In descriptive terms, high taxes are more apt to 'push' corporations away from potential sites than low taxes are likely to 'pull' corporations in from other sites.").

103. MD. BUS. & TECH. COURT TASK FORCE, *supra* note 23, at 19; *see also* BAUM, *supra* note 4, at 192 ("In contrast with personal injury law, the initiative for this [business court] movement has come primarily from state policy makers rather than from the business community."); *id.* at 194 ("As for hopes that a business court could improve a state's economic situation, it appears that judicial specialization in business cases can have a substantial effect only under unusual circumstances.").

104. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 388-89 (1996) (noting tax incentives designed to attract new plants worth $150 million in Tennessee, $294 million in Indiana, and $300 million in Alabama).

105. *See, e.g.*, *id.* at 397. Enrich found that state taxes have minimal significance in business decisions and concluded that "[r]elative to other costs of doing business, state taxes are simply too small to have a major influence on business decision making." *Id.* at 390-93 (citing numerous econometric studies). Instead, he attributed the reason for offering tax

corporate real estate executives, moreover, suggest that other economic factors dominate the decision-making process. As one executive has stated:

> The business reasons will *always* prevail in a site search.... I don't go looking for a site based on incentives. When we're doing a site search, incentives don't even enter in as one of the criteria for our original cost analysis.... There are just so many essential business factors that are so much more important than incentives.[106]

If tax incentives, which directly impact a corporation's bottom line, play, at best, a peripheral role in business location decisions, then the fact that a jurisdiction has specialized business courts would seem to border on the irrelevant.

This conclusion derives additional support from the fact that litigation is a contingent event; there is no guarantee that it will occur.[107] Consequently, issues relating to prospective litigation are of relatively low salience to business principals ex ante; it is easy to discount the possibility of litigation when there is a possibility that it will never occur at all.[108] This is the well-documented natural bias

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incentives to the political atmosphere of the states and the state officials' desire to keep their state competitive. *Id.* at 392-93.

106. Jack Lyne, *Incentives Are Important, Executives Say, but Business Concerns Drive the Location Process*, SITE SELECTION, Apr. 1992, at 1, 1-2, *available at* http://www.conway.com/geofacts/pdf/41150.pdf (quoting the director of administrative services for National Computer Systems) (internal quotation marks omitted); *see also* SCHMENNER, *supra* note 96, at 46 (stating that "taxes themselves are merely a minor consideration" that are "capable of altering the decision in favor of a particular site only if almost all other factors are equal").

107. Once a company reaches a particular size, one can assume that it anticipates being sued on a semi-regular basis by natural persons who are its customers—slip-and-fall or breach of warranty cases, perhaps—and by its employees for discrimination or wrongful termination. For small- and medium-sized companies, however, it is more difficult to predict when and where lawsuits will arise because they have fewer customers and employees.

108. *See, e.g.*, Eric A. Posner, *Probability Errors: Some Positive and Normative Implications for Tort and Contract Law*, 11 SUP. CT. ECON. REV. 125, 125 (2003) (finding that experimental and empirical evidence suggest that "people discount low probability events, treating them as though they occur with a probability of zero"); *see also* Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1182-84 (1997) (discussing the problem of "systematic overconfidence in risk judgments"). *See generally* Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POL'Y ANALYSIS & MGMT. 565 (1989) (discussing policy problems that arise when individuals underestimate risks with low probabilities).

of risk takers to focus on the upside potential as opposed to the possibility of conflict and loss.[109] This sensibility is evident in the striking number of business contracts that make no provision for dispute resolution; this absence suggests that the parties would rather focus their attention on the likely successes of the adventure than on how to resolve disputes that may or may not arise.[110] The willingness of individuals making decisions on behalf of companies to discount the likelihood of litigation, at least with respect to a subset of claims, further undermines the claim that the creation of business courts will attract out-of-state companies—and hence economic activity—to the state.

The presence of a business court is also likely to be of relatively low salience because business-to-business disputes are often resolved informally, without litigation.[111] Business law scholars describe a "dispute pyramid" with business contracts at the bottom.[112] In the words of Terence Dunworth and Joel Rogers:

> When a subset of [business] transactions is perceived as injurious by one or more of the parties, grievances result. Going up the pyramid, with successively fewer participants in each category, we have informal grievances, formal claims, ongoing disputes, disputes involving lawyers, and, at the apex of the

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109. *See* ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 751 (2d ed. 2010) (noting that business partners "frequently agree upon an allocation of profits but are silent about losses because they do not anticipate losing money"); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 53 (2010) (observing that "dispute resolution provisions tend to be accorded low priority in negotiations" because parties intent on sealing a deal are reluctant to dwell on the subject of relational conflict); *see also* Page v. Page, 359 P.2d 41, 43 (Cal. 1961) (quoting the defendant in a business lawsuit as saying, "We never figured on losing [profits], I guess").

110. *See* John Y. Gotanda, *Awarding Interest in International Arbitration,* 90 AM. J. INT'L L. 40, 50 (1996) (observing that international contracts "often contain no choice-of-law clause, and when they do, the provision is often ambiguous with respect to the applicable law, substantive or procedural, relating to the awarding of interest"); Stipanowich, *supra* note 109, at 53.

111. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know and Think We Know About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 18 (1983).

112. *Id.* at 11, 18 (describing the "dispute pyramid" in which general disputes, disagreements, and injuries occupy the lower levels—those outside of the grasp of lawyers and courts—and noting, as particularly applicable here, that "[m]ost of these disputes were settled bilaterally, without the invocation of any third party").

> pyramid, litigation consisting of case filings, settlements, trials, and appeals.[113]

As a practical matter, the overwhelming majority of business disputes are resolved without initiating formal legal proceedings. Indeed, Dunworth and Rogers state that it is "reasonable ... to assume that only a tiny fraction of contract disputes will generate a court filing."[114] To be sure, informal dispute resolution will occur "in the shadow of the law."[115] And tort claims, as contrasted to contract claims, may be less susceptible to informal resolution if the parties were strangers before the alleged tort occurred and will have no continuing relationship going forward.[116] Nevertheless, the fact remains that a significant portion of the disputes likely to arise in the course of a business will be resolved without recourse to courts of any type, business or otherwise. This in turn gives businesses further reason to discount the importance of business courts in making their expansion decisions.

In summary, there is little reason to believe that the creation of a business court is likely to have much of an impact on the incentives of those individuals tasked with charting the expansion of an out-of-state company's business. Those incentives are, in the first instance, likely to be shaped predominantly by economic considerations rather than those related to the legal or regulatory environment.[117] To the extent that legal considerations relating specifically to dispute resolution factor into these decisions at all, they are likely to be discounted because it is common at the outset of a business venture to underestimate the likelihood of a future dispute.[118] And even if the company takes seriously the possibility of future disputes, it will assume that, to the extent that these disputes arise

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113. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497, 504 (1996); *see also* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963) (discussing factors in business which contribute to personnel performing properly).

114. Dunworth & Rogers, *supra* note 113, at 505.

115. *See* Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228 (1982).

116. *See id.* ("At all levels of ... two business units personal relationships across the boundaries of the two organizations exert pressures for conformity to expectations.").

117. *See supra* notes 96-106 and accompanying text.

118. *See supra* notes 107-10 and accompanying text.

with individuals with whom the company has an ongoing relationship, they are likely to be resolved informally, without resort to formal litigation before any court, business or otherwise.[119] The cumulative effect of these arguments is to make the creation or noncreation of a business court largely irrelevant to out-of-state companies making expansion decisions.

### *B. Misalignment of Litigation Incentives*

Even if one were to accept that dispute resolution procedures generally play a more important role in location decisions than suggested by the previous Section, it is still far from clear that business courts are likely to influence the incentives of out-of-state companies in a meaningful way. The reasons why become apparent when one considers the dynamics that apply when an out-of-state company is named as a defendant, on the one hand, and when that same company files suit as a plaintiff, on the other.

Let us begin by considering the out-of-state company in its role as defendant. Large businesses are much more likely to defend against lawsuits than they are to initiate lawsuits against others.[120] One comprehensive study of litigation in federal court involving the two thousand largest U.S. corporations between 1971 and 1991 found that these companies appeared as a defendant in 74 percent of cases and as a plaintiff in only 26 percent of cases.[121] Given that the most common litigation posture for large corporations is in the role of defendant, one would think that the ability of a business court to attract business to a particular state will turn primarily on an assessment by an out-of-state company as to whether it is likely to receive a fair hearing if it is named as a defendant. This is, however, only partly correct. The threshold question in many instances is whether the business court will even be able to hear the case.

As discussed above, all states that have created business courts have imposed restrictions on the types of cases that they may hear.[122] The rules of the Birmingham Commercial Litigation Docket

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119. *See supra* notes 111-16 and accompanying text.

120. *See* Dunworth & Rogers, *supra* note 113, at 540 (finding that for nearly all categories of corporate cases, large companies were on the defendant's side of the lawsuit).

121. *Id.*

122. *See supra* notes 16-17, 24-35 and accompanying text.

in Alabama, for example, stipulate that the court may hear claims alleging breach of fiduciary duty, securities claims, intellectual property claims, and antitrust claims, among others.[123] That court is *not* authorized to hear product liability claims, whether brought by individuals or as a class action; personal injury claims; or individual employment-related claims.[124]

Using the numbers in the Dunworth and Rogers survey as a rough proxy for litigation patterns generally, let us consider what percentage of cases in which companies are named as defendants the Birmingham Commercial Litigation Docket would be able to hear.[125] It would not have jurisdiction over civil rights suits—just over 15 percent of the total—or product liability suits—almost 21 percent of the total. In other words, the business court would be unable to hear approximately 36 percent of the cases that the typical large corporation is likely to find itself defending as a *baseline*. Even if one assumes that fully 70 percent of the remaining tort and contract cases were eligible for resolution by the Alabama business court—a heroic assumption in light of the eligibility criteria outlined above—then the court will still be eligible to hear fewer than 50 percent of the cases in which large companies are typically named as defendants. One may fairly ask, therefore, how likely it is that an out-of-state company will decide to expand into a particular state on the basis of a dispute resolution body able to hear less than one-half of the cases in which that company can reasonably expect to be named as a defendant.[126]

Still another reason why a potential out-of-state defendant may discount the salience of the business court is the availability of alternative fora—specifically federal court and arbitration. Federal diversity jurisdiction ensures that businesses incorporated in an-

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123. J. Scott Vowell, *Creation of Commercial Litigation Docket in the Birmingham Division, Tenth Judicial Circuit*, ALA. LAW., Jan. 2010, at 56, 57.

124. *Id.*

125. The above-quoted survey found that large U.S. corporations were named as defendants in approximately 167,023 tort suits, 70,200 contract suits, and 52,223 civil rights suits between 1971 and 1991. Dunworth & Rogers, *supra* note 113, at 541 tbl.7. Within the broader category of tort suits, 72,035 were product liability suits. *Id.*

126. While these numbers may vary by industry, the aggregate data assembled by Dunworth and Rogers covers the largest companies in the United States, spans a number of industries, and therefore offers a useful overview of the incentives of businesses across the board. *See id.* at 582-92 (listing the firms included in the study).

other state are at least sometimes able to remove the action to federal court in the event of litigation initiated in the host state.[127] This forum is, significantly, able to hear both tort and contract suits.[128] And while federal courts are courts of general jurisdiction, their availability means that out-of-state litigants often have at least one alternative to litigating before a local trial judge who knows little about business law.[129]

Alternatively, out-of-state companies may also seek to resolve their disputes via arbitration. To the extent that a company fears that it will be forced to litigate claims brought by a party with which it has a preexisting relationship in a forum not of its choosing, the company can manage this risk by demanding that the other party agree ex ante to binding arbitration in any disputes arising out of their relationship. In so doing, the company can, in effect, create its own private business court headed by one or more expert decision makers to be jointly selected by the parties.[130] Although arbitration is, as a rule, less available in tort suits than in contract suits because tort plaintiffs are unlikely to consent to arbitration after the fact of an unforeseen injury,[131] the fact that arbitration exists as an alternative in contract cases means, again, that out-of-state businesses, in their capacity as defendants, already have some ability to

127. 28 U.S.C. § 1332 (2006) (providing federal district court jurisdiction for courts sitting in diversity); *id.* § 1441 (allowing for removal to federal district courts).

128. *See id.* § 1441 (covering "any civil action," a category in which both contract and tort actions undoubtedly fall).

129. There is also a perception among some members of the bar that federal courts are superior to state courts. *See* Daniel J. Meador, Essay, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 771 (1995). This may lead some lawyers to prefer to litigate in federal court.

130. *See, e.g.*, C. Edward Fletcher III, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-*McMahon *World*, 37 EMORY L.J. 99, 123 n.135 (1988) (observing that in arbitration before the American Arbitration Association, "[t]he arbitrators are generally selected by the parties and in many cases are required to be neutral"). Delaware even permits its chancellor and its vice chancellor to serve as arbitrators under some circumstances. *See Delaware Court of Chancery Adopts New Arbitration Rules*, POTTER ANDERSON & CORROON LLP (Mar. 15, 2010), http://www.potteranderson.com/news/delaware-court-of-chancery-adopts-new-arbitration-rules (last visited Mar. 28, 2012).

131. *See* Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS., Winter & Spring 2004, at 253, 255.

avoid inexpert judges and master calendar systems at the state level.[132]

Moreover, when the out-of-state company is litigating as a plaintiff, the presence of a business court in a particular jurisdiction should have *no* impact on any location decision. When an out-of-state company initiates litigation as a plaintiff, it generally has the power—subject to personal jurisdiction and venue constraints—to choose the forum in which it wishes to bring suit.[133] In these instances, the fact that a state has a business court may well make that state an attractive forum for the out-of-state company. The out-of-state company will, however, typically be permitted to file suit in that court regardless of whether it is doing business in the jurisdiction.[134] Accordingly, the presence or absence of a business court in a particular jurisdiction must be viewed, from the perspective of a potential plaintiff, as irrelevant to a decision to locate there.

In summary, a business court is unlikely to alter the actual incentives of out-of-state businesses' expansion decisions because these companies exhibit little demand for business courts in this decision-making context. The multitude of other business factors that typically dominate the expansion decision, combined with (1) the contingent nature of litigation generally; (2) the fact that most business disputes are resolved by means other than litigation; (3) the restrictions on the type of cases that can be heard by the typical business court; (4) the availability of federal court and arbitration as alternatives to state court adjudication; and (5) the fact that out-of-state companies may make use of the business court as plaintiffs regardless of whether they are actually doing business in the state, all suggest that the existence of the business court will play a negligible role in expansion decisions. Accordingly, the claim that the creation of a business court will encourage economic development by attracting out-of-state companies to expand into the

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132. While business courts are subsidized by the state, and therefore potentially less costly than arbitration, the prevailing wisdom is that arbitration is—notwithstanding its costs—less expensive than litigation. *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 27-28 (2d ed. 2006). *But see* Stipanowich, *supra* note 109, at 15 (suggesting that "arbitration may be no less costly or lengthy than litigation").

133. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (recognizing the "plaintiff's power to choose the forum" as a factor to be weighed in the personal jurisdiction analysis for bringing suits against a corporate defendant).

134. *See* sources cited *supra* notes 25-34.

jurisdiction is not persuasive. The structural incentives for the companies to respond to the newly supplied business courts—the demand for the system of adjudicative services—are simply not strong enough to alter their incentives in any meaningful way.

### *C. Business Courts as Branding Devices*

Alternatively, one could argue that business courts attract businesses to a particular jurisdiction not because they alter the *actual* incentives of out-of-state companies but because they operate to improve the business community's *perception* of a state's responsiveness to business concerns.[135] On this account, the actual impact of the business court on the actual incentives of businesses is irrelevant. What matters is that the state successfully brands itself as a place that is "business friendly;" so long as this branding effort is viewed as successful, the business court project will be deemed a success.[136] As Peter Enrich has noted, this line of argument offers two principal virtues from the perspective of the business advocate:

> First, business advocates are in an unimpeachable position when they say that a particular issue is critical to the business climate, because business climate is, by definition, what business perceives it to be. Second, unlike claims about the [actual] economic effects of determinate government actions, claims about the significance of business climate are essentially impervious to empirical verification or refutation, because business climate defies objective measurement.[137]

Notwithstanding the cogency of these observations, the perception argument fails to give enough credit to the fact that perception must have *some* basis in reality. It is unlikely, for example, that an innovation that had little or no impact on a company's actual incentives could produce a dramatic shift in perception. Even acknowledging that the creation of a business court could result in a shift in

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135. *See, e.g.*, MD. BUS. & TECH. COURT TASK FORCE, *supra* note 23, at 2 ("Maryland is still generally perceived by the business community as anti-business. Whether accurate or not, such perception is often viewed as reality.").

136. For an excellent discussion of the dynamics of why politicians are as interested in the symbolic content of their attempts to improve business climate as they are in its actual causes, see Enrich, *supra* note 104, at 394.

137. *Id.* at 394 n.83.

perception that is outsized relative to the shift in actual incentives, the impact on actual incentives in these cases is *so* minimal that the change in perception is unlikely to be substantially greater. If there is little or no demand for a product in a particular decision-making context, it should not matter how it is branded. In order for this argument to hold true, companies would have to take action based on the mere perception of an improved business climate, irrespective of any actual impact that the business court has on their incentives. Because it seems unlikely that most rational companies would act in this way when making major decisions about business expansion, the perception argument does little to salvage the claim that business courts will, in fact, succeed in attracting businesses from out-of-state.

## IV. COMPETING FOR CORPORATE CHARTERS

A second theory of economic competition relates to the competition among the states for corporate charters. For decades, corporate law scholars have argued that states in general, and Delaware in particular, seek to attract corporate chartering business from companies in other states to obtain the franchise fees paid to the state of incorporation.[138] The existing literature shows that companies tend to incorporate in their home state or in Delaware.[139] To the extent that a state business court is seeking to "compete" in this arena, therefore, it is effectively competing with Delaware.[140] Delaware's success in attracting corporate charters is frequently attributed to the fact that its Court of Chancery generates and draws upon a vast body of published case law, is staffed by judges

138. *See, e.g.*, Stevelman, *supra* note 11, at 59 (noting that in Delaware, "selling corporate charters can generate as much as $600 million or more," which accounts for "about one-fifth of the state's total annual tax revenue"); *see also* MD. BUS. & TECH. COURT TASK FORCE, *supra* note 23, at 21 (noting the Business Law Section of the Maryland Bar Association assertion that "the establishment of a [business court] ... could increase the number of business entities incorporated ... in Maryland which improves the state's overall economy").

139. *See* Daines, *supra* note 7, at 1572.

140. The fact that a majority of the largest public companies are incorporated in Delaware suggests that corporations do demand a stable system of corporate law rules to govern their internal affairs. *See* Stevelman, *supra* note 11, at 59-60; *see also* Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340, 341 (2006) ("We also find significant but less robust evidence that firms are more likely to incorporate in states with higher quality judicial systems.").

with considerable expertise in corporate law, and has a reputation for expeditious resolution of cases.[141] This court hears all cases in equity (i.e., without a jury) and hears primarily corporate, as opposed to commercial, cases.[142] Were other states to create similar courts, then there is a possibility that they could attract charters away from Delaware.[143] The question is whether these other states are willing and able to supply courts that are likely to compete successfully with the Court of Chancery.

Although the competition for corporate charters rationale is invoked less frequently than the attracting business rationale, a number of commentators have cited it as a rationale for creating business courts.[144] There is, moreover, some evidence that states create business courts in order to attract corporations.[145] The Nevada Secretary of State, for example, advertises that state's business court as a reason to incorporate in Nevada in that it "minimizes the time, costs and risks of commercial litigation."[146]

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141. *See, e.g.*, Holland, *supra* note 95, at 776-79.

142. *Id.* at 773; Nees, *supra* note 1, at 480-81 ("The Chancery Court retained the old English distinctions between law and equity.... [It] hears cases involving breach of fiduciary duties, ... class actions, [and] shareholder disputes [among others]."); *see also supra* notes 28-29.

143. There are, however, no guarantees. The Court of Chancery is only a part of a package of attributes deemed to make Delaware a desirable place to incorporate. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1-2 (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf (discussing the importance of the Court of Chancery).

144. *See, e.g.*, Cleveland, *supra* note 5, at 1837 ("In trying to attract incorporation business, states may create courts of specialized jurisdiction that appeal to business managers and investors."); Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 505 (2000) ("If non-Delaware attorneys wanted to compete with Delaware's dominance in the corporate chartering business, ... these attorneys should be lobbying their state legislatures to develop specialized business courts to compete with Delaware's."); Nees, *supra* note 1, at 491 ("Attracting business in the form of corporate registrations ... is a secondary purpose of creating specialized business courts."); *see also* MD. BUS. & TECH. COURT TASK FORCE, *supra* note 23, at 21 ("The Business Law Section further contends that the establishment of a Business and Technology Division within the State Circuit Court System could increase the number of business entities incorporated and headquartered in Maryland.").

145. *See, e.g.*, Jack Scism, *Greensboro Lawyer Gets New Business Judgeship*, GREENSBORO NEWS & REC. (Greensboro, N.C.), Jan. 16, 1996, at B5, *available at* 1996 WLNR 5834389 (quoting a state legislative commission study's finding that the "lack of a business court ... puts North Carolina at a disadvantage when corporations are considering states in which to incorporate to do business").

146. *The Nevada Advantage*, NEV. SEC'Y OF STATE, http://nvsos.gov/index.aspx?page=422 (last visited Mar. 28, 2012). In light of this stated goal, it is peculiar that Nevada does not require its business court to publish its decisions. *See* Jesse N. Panoff, *Why State Trial Court*

The best explanation for why the current crop of business courts is ill-equipped to compete successfully with the courts in Delaware is set forth in Marcel Kahan and Ehud Kamar's seminal article on the myth of state competition for corporate charters.[147] In this article, Kahan and Kamar argue that although the potential exists for states to compete with Delaware for chartering business, there is little evidence that these states are actually engaged in a process of competition.[148] In advancing this argument, they specifically consider—and reject—the claim that the creation of business courts by other states represents an attempt to compete with the Delaware Court of Chancery.[149] In so doing, they outline four arguments why this is so.

First, whereas the Court of Chancery hears primarily corporate cases involving disputes between shareholders, directors, and officers, business courts outside of Delaware are typically called upon to adjudicate cases covering the entire panoply of business law, including corporate law.[150] This expansive jurisdictional focus suggests that these courts were *not* designed primarily to attract incorporations.[151] If this was the goal, then one would expect these courts to have a jurisdictional ambit more narrowly targeted on corporate law—that is, the law that is most relevant to companies considering whether to reincorporate under the law of another state. They do not.[152]

Second, whereas the Court of Chancery sits in equity and hears all cases without a jury, business courts outside of Delaware retain

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*Judges Should Write Their Own Decisions: Transforming the Current System*, 51 S. TEX. L. REV. 307, 324 (2009) (discussing an unenacted legislative proposal that would "require business court judges [in Nevada] to write and publish their decisions"); Brian G. Anderson, *Nevada: (Not Yet) The Delaware of the West*, SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON (on file with the *William and Mary Law Review*) (observing that until the Nevada business court starts publishing its opinions, it is unlikely to mount a serious challenge to Delaware).

147. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708-15, 724-35 (2002).

148. *Id.* at 701-24.

149. *Id.* at 708-15.

150. *Id.* at 711 tbl.4, 712; *see supra* notes 28-29 (distinguishing "corporate" and "commercial" law).

151. *See* Kahan & Kamar, *supra* note 147, at 712 ("As in the case of New York, the purpose of these courts was to streamline the disposition of commercial cases, not to attract incorporations.").

152. *See supra* notes 24-31 and accompanying text.

juries to hear cases that would ordinarily be submitted to a jury in the absence of a business court.[153] Corporate litigants would, all things being equal, prefer to litigate intracorporate disputes before a judge instead of a jury; this is frequently mentioned as one of the reasons why businesses prefer to litigate in Delaware.[154] Because states that create business courts have chosen to retain juries, this choice suggests that these business courts are not being created with the goal of attracting incorporation business away from Delaware.[155]

Third, whereas all decisions by the Court of Chancery are duly published in the relevant reporters and in online databases, many business courts outside of Delaware did not, at least as of 2002, publish their opinions at all.[156] This failure to take active steps to generate and promulgate a coherent body of corporate case law further suggests that business courts were not primarily intended to attract incorporations.

Finally, many states that have established business courts have chosen not to enact statutes requiring that directors of corporations organized under that state's law consent to being sued in that state for breach of fiduciary duty, as Delaware does.[157] In the absence of such a statute, it is unclear whether a business court would be able to exercise personal jurisdiction over a director whose company was incorporated in the same state but headquartered elsewhere. If a court designed to attract incorporation business lacks personal jurisdiction over the individuals who are most frequently named as defendants in intracorporate litigation, then the existence of that court is unlikely to factor into incorporation decisions. The company

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153. Kahan & Kamar, *supra* note 147, at 711 tbl.4.

154. J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 DEL. L. REV. 71, 96 n.146 (2010) (noting that "corporate and director defendants generally prefer the Court of Chancery for the experience of its judges in corporate disputes, *lack of a jury*, and inability to award punitive damages" (emphasis added)).

155. These states may in some cases face state constitutional constraints on their ability to do away with jury trials. *See, e.g.*, MD. CONST. art. 23 (West, Westlaw through 2010 amendments) ("The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $15,000, shall be inviolably preserved.").

156. Kahan & Kamar, *supra* note 147, at 711 tbl.4.

157. DEL. CODE ANN. tit. 10, § 3114 (2002); *see, e.g.*, Kahan & Kamar, *supra* note 147, at 714 (noting that Nevada "does not require directors of domestic corporations to consent to being sued in the State for breaches of their fiduciary duties").

would simply assume that shareholder derivative lawsuits would be filed elsewhere, and could discount the importance of a particular state's business court.

In light of the foregoing analysis, Kahan and Kamar concluded that the primary purpose of the business courts was to streamline commercial litigation, not to compete with Delaware to attract corporate charters.[158] Although their article was published in 2002, little has changed over the past ten years that would affect their conclusions. The business courts created over the past decade, like those that came before them, are typically assigned to hear cases covering the entire panoply of business law and do not focus solely on corporate law.[159] These newly created courts will try cases to a jury, unless the litigants specifically waive this right.[160] States that have created business courts still do not require that nonresident directors consent to jurisdiction. In many respects, then, little has changed.

The one area in which Kahan and Kamar's analysis is somewhat outdated relates to opinion publication practices. As shown in Table 1, more business court opinions are published today in reporters such as Lexis or Westlaw than was the case in 2002.[161] Those cases that are not published on Lexis or Westlaw are often made available on court websites.[162] Notwithstanding the increased availability of business court decisions generally, the core critique leveled by Kahan and Kamar still stands. While these published opinions may offer useful insights into commercial law, and while they may provide valuable certainty as to the content of a particular state's commercial law, their focus is broadly targeted on business law rather than corporate law. In addition, making cases available on a

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158. Kahan & Kamar, *supra* note 147, at 715. Notwithstanding this conclusion, Kahan and Kamar make clear that the field is open to states that wish to compete in this market: "[I]t is entirely plausible that an enterprising governor will in the future revamp her state's corporate law, establish a specialized court, and go after a portion of Delaware's profits." *Id.* at 725.

159. *See supra* Part I; *see also* Kahan & Kamar, *supra* note 147, at 711 tbl.4.

160. *See supra* note 153 and accompanying text.

161. *See infra* Table I.

162. *See, e.g.*, First Judicial Dist. of Pa., *Commerce Program Index of Opinions*, PHILADELPHIA COURTS, http://www.courts.phila.gov/apps/opinions/courtsearch.asp?search=cptcvcom; *see also* Kali Wyrosdic, *Commerce Court, 10 Years Later*, PHILA. BUS. J., Dec. 17, 2010, http://www.bizjournals.com/philadelphia/print-edition/2010/12/17/commerce-court-10-years-later.html?page=all.

state website that is not searchable, which is currently the norm in a number of states,[163] is of little value to commercial actors or other counsel.[164] Accordingly, the availability of these opinions does little to bolster the claim that business courts are being created to compete with Delaware for corporate charters.

None of this is to say that business courts are incapable of attracting corporate charters to a jurisdiction. Rather, it is simply to note that as currently comprised, these courts are unlikely to do so. If states were to make changes to their business courts to make them more like the Court of Chancery, then there is a chance that they could attract incorporation business. To date, however, few states have made any serious moves to model their business courts along these lines.

163. *See infra* Table I.

164. When opinions are not published at all, the loss to the commercial community is obvious. When opinions are published seriatim on a state court website that is not searchable, then the loss is comparable. In today's world, an opinion that is not searchable does not exist for all practical purposes. In order for business courts to fulfill their core function of providing greater certainty about the content of the business law of a particular state, it is necessary not simply that they write opinions but also—as importantly—that the state invest the time and resources in making sure that these opinions circulate as widely as possible. This means investing a sufficient amount in information technology to guarantee that these decisions can be located, searched, and read by local attorneys.

Table 1: Publication Practices of Selected Business Courts

| | Year Created | Opinions Available on Lexis/ Westlaw (2011) | Opinions Available on Court Website | Searchable Court Website* | Approximate Number of Published Orders/ Opinions (Inception – Jan. 1, 2011) |
|---|---|---|---|---|---|
| New York Commercial Division | 1993 | Yes | Yes | Yes | 1579** |
| Circuit Court of Cook County Commercial Calendar (Illinois) | 1993 | No | No | No | 0 |
| North Carolina Business Court | 1996 | Yes | Yes | Yes | 202 |
| Philadelphia Commerce Case Management Program (Pennsylvania) | 2000 | Yes | Yes | Yes | 908 |
| Business Litigation Sessions of the Superior Court (Massachusetts) | 2000 | Yes | Yes*** | No | 1252 |
| Nevada Business Court | 2000 | No | No | No | 0 |
| Circuit Court Business and Technology Case Management Program (Maryland) | 2002 | Yes | Yes | No | 80 |
| Ninth Judicial Circuit's Complex Business Litigation Court (Florida) | 2004 | No | No | No | 0 |

* A court website is deemed "searchable" if it is possible to search for terms exclusively within the universe of business court orders or opinions.

** This is the number of "leading" decisions summarized in the Commercial Division Law Report, which began publication in 1998.

*** Opinions available through the Social Law Library, a public institution which requires a subscription.

| | Year Created | Opinions Available on Lexis/ Westlaw (2011) | Opinions Available on Court Website | Searchable Court Website | Approximate Number of Published Orders/ Opinions (Inception – Jan. 1, 2011) |
|---|---|---|---|---|---|
| Fulton County Superior Court Business Court (Georgia) | 2005 | No | Yes | Yes | 162 |
| Fourth Judicial District Commercial Docket (Colorado) | 2006 | No | No | No | 0 |
| Commercial Court Program of the Second Judicial District (Oregon) | 2006 | No | Yes | No | 10 |
| Business Court Pilot Program (South Carolina) | 2007 | No | Yes | No | 12 |
| Consumer and Business Docket (Maine) | 2008 | No | Yes | No | 33 |
| Business and Commercial Dispute Docket (New Hampshire) | 2008 | No | Yes | No | 16 |
| Ohio Commercial Docket | 2009 | No | Yes | Yes | 137 |
| Commercial Litigation Docket in the Circuit Court, Tenth Judicial Circuit of Alabama, Birmingham Division | 2009 | No | No | No | 0 |
| Complex Commercial Litigation Division (Delaware) | 2010 | Yes | Yes | Yes | 1 |

## V. COMPETING FOR LITIGATION BUSINESS

A third theory is that business courts represent an attempt by states to compete for litigation business.[165] On this account, local lawyers seek to persuade state officials to make their home jurisdiction a more attractive place to litigate disputes by establishing business courts. To the extent that litigants have a choice between litigating in one forum over another, those litigants will prefer the forum that has a business court to one that does not. The intended effect is to divert legal business away from states without business courts and to states with them, which in turn generates business for local lawyers.[166]

The notion of attracting, or retaining, litigation business to (or within) a particular jurisdiction is separate and distinct from the notion of attracting or retaining regular business. As outlined above, a state successfully attracts or retains regular business when it adopts policies that affect location decisions.[167] If these policies succeed in persuading businesses to locate stores, factories, or offices in a particular state, then they have succeeded in attracting or retaining regular business. By comparison, a state successfully attracts or retains litigation business by adopting policies that make it more likely that businesses will litigate their disputes in that state's courts.[168]

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165. Other scholars have described this competition for legal business as a "market for contracts" in which states "actively compete[ ] in an interstate market for corporate contracts." Miller & Eisenberg, *supra* note 6, at 2073. Miller and Eisenberg acknowledge, however, that "[a]ttracting contracts ... increases demand for the services of [local] attorneys," *id.* at 2074, that lawyers in New York lobbied for laws that would enforce arbitration clauses in commercial contracts because they "perceived a potentially valuable source of future business," *id.* at 2087, and that states "compete for litigation ... by offering upgraded judicial services to major commercial parties," *id.* at 2092. The market for contracts can thus be viewed as a competition among lawyers in different states to compete for litigation and other legal business.

166. *See* Haig, *supra* note 44, at 192 n.4 (referring to "the competition among states for business litigation").

167. *See supra* Part III.

168. In some cases, out-of-state companies may need to obtain a certificate of authority to file suit. *See* N.C. GEN. STAT. § 55-15-02(a) (2010) ("No foreign corporation transacting business in this State without permission obtained through a certificate of authority ... shall be permitted to maintain any action or proceeding in any court of this State.").

In many quarters, the suggestion that a particular innovation will bring more litigation business to a particular jurisdiction is viewed as distasteful.[169] To be sure, there are some exceptions. The capacity of a business court to generate business for in-state lawyers was openly acknowledged as a reason to create and maintain the Commercial Division in New York. An official body tasked with evaluating the performance of that business court noted approvingly that it had "helped to stem the flight of commercial litigants from New York's courts."[170] One occasionally sees isolated statements to this effect in other states as well.[171] On the whole, however, this particular competition-based rationale is only rarely invoked as a reason to create a business court.

This Part first observes that business courts do, in fact, have the capacity to divert litigation business from one state to another. In this respect, they can play a role in interstate competition for economic resources. This Part describes a well-publicized example of such business being diverted to the North Carolina Business Court. It goes on to argue, however, that the scope for diversion is limited by a number of factors that impose meaningful constraints on the ability of a business court to attract out-of-state litigation business.

### *A. The Diversion of Legal Business Occurs*

A classic example of how a business court can divert litigation business away from another jurisdiction is the dispute arising out of the merger between Wachovia and First Union in North Carolina.[172] On April 16, 2001, Wachovia and First Union, both

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169. *See, e.g.*, James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 365 (2008) (suggesting that "[c]ompetition among states to attract litigation business may not be ... healthy"); Editorial, *The 'Judicial Hellhole,'* CHI. TRIB., Mar. 11, 2004, at C22 ("In a perverse way, Madison County attracts business—legal business. Class-action lawyers flock there to file lawsuits.").

170. N.Y.C. BAR ASS'N, COUNCIL ON JUDICIAL ADMIN., THE CHIEF JUDGE'S COURT RESTRUCTURING PLAN, WITH CERTAIN MODIFICATIONS, SHOULD BE ADOPTED (1997), *available at* http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46.

171. *See infra* notes 187-89 and accompanying text.

172. *See* David Boraks, *In Battle for Wachovia, Many Suits, Many Goals*, AM. BANKER, June 4, 2001, at 11. For a detailed discussion of the background behind this merger, see Lijun K. Yang, Note, First Union v. SunTrust Banks*: The Fight for Wachovia and Its Impact on North*

North Carolina banks, announced plans for a friendly merger.[173] One month later, SunTrust, a Georgia bank, launched a hostile bid to acquire Wachovia.[174] A flurry of lawsuits followed. On May 22, First Union filed a lawsuit against SunTrust in North Carolina Superior Court.[175] On that same day, SunTrust filed a lawsuit against First Union and Wachovia in federal district court in Georgia.[176] On May 23, SunTrust filed a lawsuit against First Union and Wachovia in Georgia Superior Court.[177] Faced with the prospect of litigating their disputes in three different courts across two states, the principals agreed on June 1 to transfer all pending litigation between them—including the two cases SunTrust brought in Georgia—to the North Carolina Business Court.[178]

Why did the parties agree to transfer the entirety of the pending litigation to this particular court? One of the North Carolina lawyers who represented First Union subsequently offered a partial explanation:

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*Carolina Corporate Law*, 6 N.C. BANKING INST. 335 (2002).

173. Riva D. Atlas, *SunTrust Makes Bid for Wachovia, Criticizing First Union's Offer*, N.Y. TIMES, May 15, 2001, http://www.nytimes.com/2001/05/15/business/suntrust-makes-bid-for-wachovia-criticizing-first-union-s-offer.html.

174. *Id.*

175. First Union Corp. v. SunTrust Banks, Inc., No. 01-CVS-10075, 2001 WL 1885686, at *30 (N.C. Super. Ct. Aug. 10, 2001). This suit alleged unfair trade practices and tortious interference with prospective economic advantage and sought a declaratory judgment that certain stock option agreements were valid and enforceable. *Id.* Wachovia subsequently joined the lawsuit on the side of First Union. *Id.* On May 25, 2001, SunTrust effected removal of the North Carolina state action to the federal court in North Carolina. First Union Corp., Pre-Effective Amendment to Registration of Securities Issued in a Business-Combination Transaction (Form S-4/A), at 171 (June 27, 2001) [hereinafter First Union Corp. Form S-4/A]. Six days later, on May 31, the federal court remanded the action to the North Carolina courts, citing a lack of diversity jurisdiction. *Id.*

176. First Union Corp. Form S-4/A, *supra* note 175, at 171. SunTrust's federal suit alleged that First Union and Wachovia filed a joint preliminary proxy statement containing "materially false and misleading statement in violation of the federal securities laws." *Id.* This suit alleged "that the stock option agreements between First Union and Wachovia contained certain excessive provisions, particularly in relation to the cap on the total profit that may be obtained upon exercise of [an] option" to receive common stock. *First Union Corp.*, 2001 WL 1885686, at *30. In addition, this suit alleged that Wachovia's directors had breached their fiduciary duties and that First Union had aided and abetted these breaches. First Union Corp. Form S-4/A, *supra* note 175, at 172. The suit also asserted a claim for restraint of trade. *Id.*

177. *First Union Corp.*, 2001 WL 1885686, at *30.

178. First Union Corp. Form S-4/A, *supra* note 175, at 171.

> [W]hen we agreed to go into Business Court, that put the litigation in a court with a judge who understood the issues and could deal with them expeditiously, and according to a procedure that accommodated the very short time frame within which it played out.... If it had gone into [regular] state court here [in North Carolina], they would not have been set up properly for the complicated legal issues of merger and acquisitions that had to be decided on a very tight schedule. And in a regular court system, you would have had a different judge for each phase of the litigation.[179]

There was, in short, demand for quick and expert dispute resolution services on the part of both the in-state and out-of-state parties involved in the litigation.[180] The North Carolina Business Court satisfied that demand, and—significantly—Georgia lacked a business court at the time.[181]

In the litigation before the North Carolina Business Court, SunTrust was represented by two North Carolina-based law firms, four North Carolina-based lawyers, one New York-based law firm, four New York-based attorneys, and one Delaware-based attorney.[182] First Union and Wachovia were collectively represented by three North Carolina-based law firms, eleven North Carolina-based lawyers, two New York-based law firms, seven New York-based lawyers, and two California-based lawyers.[183] Notwithstanding the fact that SunTrust was incorporated in Georgia,[184] was headquartered in Georgia, and had filed two suits in Georgia against

179. Michael Dayton, *Trend: Speciality Business Courts on the Rise*, N.C. LAW. WKLY., Mar. 22, 2004 (quoting corporate lawyer Russell M. Robinson II).

180. *See id.* (noting that Robinson believed "the merger [likely] would not have taken place" without resort to the business court).

181. *See id.* (reporting that the general counsel for SunTrust working in Atlanta stated that he "came back from North Carolina with the conviction that Georgia should have a business court").

182. *See First Union Corp.*, 2001 WL 1885686, at *39 (refusing to enforce a nontermination provision in a merger agreement); First Union Corp. v. SunTrust Banks, Inc., No. 01-CVS-10075, 2001 WL 1885687, at *3 (N.C. Super. Ct. June 26, 2001) (resolving the remaining state law claims).

183. *See* sources cited *supra* note 182.

184. SUNTRUST BANKS, INC., ARTICLES OF RESTATEMENT OF THE ARTICLES OF INCORPORATION 1 (2009), *available at* http://www.suntrust.com (follow "Site Map"; then follow "About Us"; then follow "Corporate Governance" to "Corporate Governance Documents" to "Articles of Incorporation").

First Union and Wachovia,[185] there were no Georgia lawyers among those attorneys listed in the North Carolina Business Court's final opinion. The litigation business arising out of the dispute, in other words, went to non-Georgia lawyers.

This did not go unnoticed in Georgia legal circles. As a past president of the Georgia bar put it: "We flat out lost a significant amount of legal business to a neighboring state.... There would have been a lot of lawyers involved here [in Georgia] if the litigation had stayed here."[186] In the years that followed, the Georgia bar began lobbying state officials to create a business court in Georgia.[187] These lawyers cited the impressive performance of the North Carolina Business Court in the course of the Wachovia litigation as a rationale for establishing such a court in Georgia, as well as the argument that such a court would result in more efficient resolution of complex business cases.[188] In October 2005, Georgia established the Fulton County Superior Court Business Court.[189] In the years since, there have been no published reports of Georgia losing litigation business arising out of complex business disputes to other states.

### *B. But There Are Limits on Its Scope*

The above example serves to highlight the fact that business courts can divert legal business away from other states. However, it also illustrates some of the limits of the potential diversion. First, in order for litigation business to be diverted, one of the parties to the dispute must be from out of state. If the parties both reside in

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185. *See* First Union Corp. Form S-4/A, *supra* note 175, at 171-72.

186. Rachel Tobin Ramos, *Business Court May Start Here as Pilot Project*, ATLANTA BUS. CHRON., Oct. 8, 2004, at A3 (quoting Bill Barwick, Partner, Sutherland, Asbill & Brennan LLP).

187. *See* Kirsten Tagami, *Open for Business: New Fast Track Fulton Court Tries to Fill a Niche*, ATLANTA J.-CONST., Jan. 12, 2006, at 1F. This drive was clearly based in part on genuine admiration for how the North Carolina Business Court operated. *See id.*; *see also* Dayton, *supra* note 179.

188. *See* Tom Barry, *Court's Business Division Gives Cases Needed TLC*, ATLANTA BUS. CHRON., May 18, 2007, at C14 (noting that the business court had the support of SunTrust's general counsel, who was impressed by the North Carolina Business Court during the Wachovia litigation).

189. *Id.*

the same jurisdiction, it is highly unlikely that they would want to litigate their dispute in a different jurisdiction. Second, there must be multiple fora where personal jurisdiction can be obtained over the defendant. If a business court lacks personal jurisdiction over a particular defendant, diversion to that business court cannot occur.

Third, the parties must either agree by contract, ex ante or ex post, to transfer all pending litigation to the business court, or the party that wants to litigate before the business court must win the race to the courthouse.[190] If the out-of-state party loses the race to the courthouse, or if the opposing party refuses to agree to transfer the case, then diversion cannot occur. Fourth, the competitor state must lack a business court. As more states establish business courts, the opportunities for diversion attributable to the creation of a business court should decline. Fifth, the case must qualify as a "business" dispute within the rules of the relevant business court.[191] Corporate disputes like the one between First Union, Wachovia, and SunTrust are thus capable of being diverted. Claims for personal injury and products liability, by comparison, are not.[192] Finally, the suit must comply with any local rules relating to venue.[193]

Although disputes that satisfy all six of these criteria—an out-of-state party, multiple fora with personal jurisdiction over the defendant, mutual agreement as to the forum or a successful race to the courthouse, a lack of a business court in the other state, a claim eligible to be heard by a business court, and proper venue—are not unheard of, such a combination is likely not the norm. Given the atypical character of such cases, it is open to question whether the size and scale of litigation business capable of being diverted from one state court to another is significant.

These limitations notwithstanding, it is ironic that the most plausible of the three competition-based arguments in support of establishing business courts—that these courts will generate business for local lawyers[194]—is also the argument that is least likely to

190. If one is defending a suit, it is obviously much more difficult to control the choice of forum, though one can remove to federal court, *see* 28 U.S.C. § 1441 (2006), or invoke an arbitration or forum selection clause in the contract.

191. *See supra* notes 16-17, 24-31 and accompanying text.

192. *See supra* notes 32-35 and accompanying text.

193. *See, e.g.*, 28 U.S.C. § 1391.

194. *See supra* Part II.B.

generate political support for these courts.[195] Nevertheless, the analysis in the preceding three Parts suggests that business courts are unlikely to attract business to a jurisdiction under any circumstances and are unlikely, as currently comprised, to attract incorporation business. The analysis also suggests that while these courts have attracted litigation business to the jurisdictions that create them, there are limits on the potential scope of such diversion. All of these conclusions bear directly on the question of how future business courts should be designed, a topic that is addressed in the next Part.

### *C. A Response to a Possible Counterargument*

As a prelude to considering the design issue it is necessary to briefly consider a counterargument to the claim that competition-based arguments are of only limited utility when it comes to justifying the creation of a business court. This is the argument that the very fact that business courts have been widely adopted is evidence that the process of economic competition must be driving their creation. It is widely accepted, after all, that such competition can play an important role in ensuring that a particular innovation becomes widely diffused across the states.[196] Indeed, some scholars have argued that precisely this process explains the spread of the business court.[197] If this is so, then how can this be reconciled with the arguments set forth in the previous three Parts, which express considerable skepticism as to the plausibility of at least two of the three possible competition-based rationales?

To be clear, I am not arguing that notions of interjurisdictional competition played no role in driving the creation of business courts. The claim that a business court will enable a state to compete more effectively with other states carries considerable rhetorical weight and, consequently, influenced state officials, lobbyists, and power brokers across the United States deciding whether to establish a business court, as evidenced by their contemporaneous state-

195. *See supra* note 169 and accompanying text.

196. *See* Boehmke & Witmer, *supra* note 39, at 39-40.

197. BAUM, *supra* note 4, at 193 ("Business courts ... reflect competition as a mechanism for the diffusion of innovations.").

ments.[198] The fact that an argument is rhetorically effective, however, does not mean that the underlying merits of the argument are sound.[199] It is perfectly consistent to argue that competition-based arguments played a role in driving the creation of business courts while simultaneously arguing that that the logic underlying these arguments is flawed.

While it is well beyond the scope of this Article to offer a comprehensive alternative account of the rise of the business court, it is worth noting there are plausible, non-competition-based explanations for this phenomenon. Indeed, there exists an entire branch of sociological institutional theory[200] premised on the notion that the diffusion of legal and institutional innovations can take place through a process other than one of competition for economic resources.[201] This theory—which some sociologists have labeled "institutional isomorphism"—posits that organizations may adopt institutional innovations previously adopted by other organizations for a number of reasons.[202] These reasons include outside pressure,

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198. *See supra* notes 74-87 and accompanying text.

199. This is not to suggest that business court advocates are being disingenuous; there is little question that these arguments were advanced in good faith. Rather, it is simply to note that even justifications that have a great deal of surface appeal may not always be sound.

200. Institutional theory is that branch of sociology that "examines the processes and mechanisms by which structures, schemas, rules, and routines become established as authoritative guidelines for social behavior." W. Richard Scott, *Institutional Theory*, *in* 1 ENCYCLOPEDIA OF SOCIAL THEORY 408, 408 (George Ritzer ed., 2005); *see also* Boehmke & Witmer, *supra* note 39, at 39 (discussing the expansion of policy within a state).

201. A sub-branch of institutional theory known as neo-institutional theory posits that "the adoption and diffusion of changes occur in organizations for reasons beyond the invisible hand of market efficiency." Bruce M. Price, *A Butterfly Flaps Its Wings in Menlo Park: An Organizational Analysis of Increases in Associate Salaries*, 2005 WIS. L. REV. 713, 716.

202. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150-54 (1983) (rejecting the idea that organizational change is driven exclusively by economic competition and arguing instead that such change can occur, for example, as a result of a desire to obtain institutional legitimacy). This concept has been used to explain the spread of drug courts across the United States, *see* Roger E. Hartley & James W. Douglas, Isomorphism and Policy Diffusion in Local Jurisdictions: Explaining the Spread of Drug Courts Across Four States 32-33 (Oct. 6, 2007) (unpublished manuscript), *available at* http://www.pmranet.org/conferences/AZU2007/ArizonaPapers/Hartley_&_Douglas_2007.pdf, the structure of national security courts, *see* Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 970-86 (2009), and the reasons why large corporations tend to adopt the same institutional arrangements following the passage of antidiscrimination laws, *see* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531 (1992). *See generally*

a desire to obtain formal legitimacy, and the influence of formal education and professional networks in disseminating ideas.[203] On a more intuitive level, it seems clear that while legal and institutional innovations can arise out of a competitive process between states, it does not follow automatically that widely copied innovations result from such a process.[204] Forty-nine of the fifty states have a bicameral legislature,[205] but nobody would seriously argue that this outcome is the product of economic competition between the states.

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D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1 (2009) (discussing insights to be drawn from institutional theory).

203. *See* Dimaggio & Powell, *supra* note 202, at 150-53. Institutional isomorphic change can occur through three distinct mechanisms. The first, "coercive isomorphism," results from "formal and informal pressures exerted on organizations by other organizations upon which they are dependent." *Id.* at 150. The second, "mimetic isomorphism," is the result of institutional change undertaken in the face of uncertainty. *Id.* at 151. The third, "normative isomorphism," results from contacts and connections arising out of formal education and professional networks. *Id.* at 152. Over the past two decades, the framework outlined above has been used to explain the similarities in organizational structure in nonprofit organizations (art museums) and for-profit organizations (law firms). *See* Peter Frumkin & Joseph Galaskiewicz, *Institutional Isomorphism and Public Sector Organizations*, 14 J. PUB. ADMIN. RES. & THEORY 283, 283-84 (2004). Legitimacy in this context refers to "the degree of cultural support for an organization." John W. Meyer & W. Richard Scott, *Centralization and the Legitimacy Problems of Local Government*, *in* ORGANIZATIONAL ENVIRONMENTS: RATIONAL AND RATIONALITY 199, 201 (John W. Meyer & W. Richard Scott eds., 2d ed. 1992); *see also* Cathryn Johnson et al., *Legitimacy as a Social Process*, 32 ANN. REV. SOC. 53, 55-57 (2006) (discussing definitions of legitimacy in institutional theory); Mark S. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995) (defining legitimacy to mean "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions").

204. One must also be cautious before attributing to public sector officials the same motivations and decision-making processes that are frequently attributed to private sector actors. *See, e.g.*, Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 AM. POL. RES. 221, 221-22 (2001) (observing that state officials "typically do not engage in rational, comprehensive decision making," but rather "take cues from innovative states that have successfully addressed the problem"); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 889 (1969) (observing that when it comes to the adoption of institutional innovations, state officials "make most of their decisions by analogy"); *see also* Frumkin & Galaskiewicz, *supra* note 203, at 283 (observing that "new institutionalism" has "moved research away from overly rationalistic explanations of organizational behavior").

205. Nebraska is the only state with a unicameral legislature. *See* Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895, 896 (2005).

There are, in short, other plausible, non-competition-based theories that may explain the spread of the business courts that are unrelated to theories of economic competition.[206] Hence, the mere fact that business courts have been so widely adopted does not by itself undermine the claims that business courts are unlikely to attract business to a jurisdiction and are unlikely to attract incorporation business. Nor does it require us to reconsider the claim that while these courts can attract, and have attracted, litigation business to the jurisdiction that creates them, there are limits on the potential scope of such diversion. With these insights in mind, let us now turn to the question of institutional design.

## VI. LESSONS FOR INSTITUTIONAL DESIGN

The foregoing analysis has a number of implications for state officials considering how best to design a business court. First, the goal of attracting and retaining business is irrelevant to the question of business court design. To the extent that any particular design element is intended specifically to attract or retain business, it should be omitted unless there is an alternative justification for its inclusion. Second, unless the basic institutional structure of the business court is substantially revised, then such courts are exceedingly unlikely to attract incorporation business away from Delaware. Third, if such courts are to be used to attract litigation business, states should consider adopting a number of additional innovations in order to maximize the success of this endeavor. At the same time, however, states should question whether the cost of adopting these innovations is worth the benefits that the state can

206. In this context, it is instructive that at least two scholars have argued that the proliferation of another type of specialized court at the state level—drug courts—has been driven primarily by isomorphic forces rather than by economic competition. *See* Hartley & Douglas, *supra* note 202, at 32-33 (arguing that a combination of state mandates, opportunities to observe other drug courts in operation, and exposure to the idea at professional conferences led to widespread institutional reforms within the state court systems relating to the treatment of drug-related offenses). For other examples of this phenomenon in action, see Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 493 (2006); Edelman, *supra* note 202, at 1531-32; Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC'Y REV. 893, 903 (2005).

expect to derive from them. Fourth, and finally, should states choose to design future business courts without regard to competition-based arguments, they should focus their attention on the need to design institutions that improve the quality of decision making and maximize administrative efficiency. These general conclusions give rise to a number of specific recommendations.

### *A. Rethinking Technology Courts*

Several states have considered creating business courts that have a special focus on technology issues. Maryland has actually created such a court—the Business and Technology Case Management Program—and Michigan has seriously considered the idea.[207] These courts can be distinguished from other business courts in that the case assignment criteria make specific reference to technology cases and the judges are given special training in resolving technology disputes.[208] Significantly, this expertise is in addition to, rather than in place of, their expertise in business law generally.[209]

While virtually every business court is said to attract business to a specific state, this particular rationale has increased salience in the context of business and technology courts. Advocates for these courts contend that they will attract not just any business but a particular type of business—technology companies—to the state that creates them.[210] If the notion is insupportable—and the analysis set forth above suggests that it is—then the case for creating business and technology courts must be reconsidered. Although such courts may be effective at attracting litigation business from technology companies, a possibility discussed at greater length below,[211] it is highly unlikely that these courts will induce such companies to locate in a particular jurisdiction.[212] Thus, to the extent that

207. *See* Sommer, *supra* note 79, at 575, 580.

208. *See, e.g.*, *id.* at 577-78.

209. *See id.* at 577.

210. *See* MD. BUS. & TECH. COURT TASK FORCE, *supra* note 23, at 2 (noting that the proposal to create a business and technology court was part of an "overall plan to encourage technology companies to locate in the State"); Sommer, *supra* note 79, at 603-09 (discussing efforts by Maryland and Michigan to attract high tech businesses to their states by creating business courts).

211. *See infra* Part VI.C.

212. *See supra* Part III.A.

technology court advocates have suggested that these courts may attract high tech companies to their home states, their arguments are based on a faulty premise.

With respect to attracting corporate charters, the likelihood that creating a business and technology court will enable the state that creates it to compete more effectively with Delaware dropped precipitously in 2003. This was the year when Delaware, in direct response to the creation of the Business and Technology Case Management Program in Maryland, altered its rules to allow the Court of Chancery to adjudicate technology disputes.[213] In light of the myriad other advantages currently enjoyed by Delaware with respect to the market for corporate charters,[214] it seems highly unlikely today that a state that simply created a business and technology court would succeed in attracting incorporation business away from Delaware.

### *B. Breaking Delaware's Dominance*

If a state's goal is to use a business court to attract incorporation business, as is the case in Nevada,[215] then it must completely revamp the structure of the modern business court. To date, such courts have been assigned cases across the entire panoply of corporate and commercial law, retained jury trials, published their opinions primarily on state court websites, and declined to enact statutes requiring that directors of corporations organized under that state's law consent to being sued in that state.[216] If such courts are to compete with the Court of Chancery, then state officials creating them would be well advised to assign them corporate law cases primarily or exclusively, allow for more bench trials, publish more of their opinions in online repositories like Lexis and Westlaw, and enact statutes requiring that directors of corporations organized under that state's law consent to being sued in that state. Until

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213. *See* Holland, *supra* note 94, at 773 ("In 2003, the jurisdiction of the Court of Chancery was expanded by statute to include adjudication of technology disputes that arise out of agreements involving at least one Delaware business entity, even if they concern solely claims for [money] damages." (internal quotation marks omitted)).

214. *See supra* notes 141-42 and accompanying text.

215. *See* Kahan & Kamar, *supra* note 147, at 712.

216. *See supra* notes 147-57; *see also* Sommer, *supra* note 79, at 571.

these basic design elements are changed, it is highly unlikely that the court will succeed in attracting incorporation business to a particular jurisdiction.

Even if an enterprising state were to adopt these design elements, however, it is still not clear that it would make a difference. Delaware's success is attributable not just to its Court of Chancery, but to an entire package of attributes that includes steady and robust support for the project of attracting corporate charters across all branches of state government, a reputation developed over decades, and a vast body of corporate case law that provides certainty to corporate actors and their attorneys.[217] Other states will be hard pressed to match these advantages, even assuming that another state chose to make a run at Delaware by remaking its business court to resemble the Court of Chancery. And if another state were to pioneer an institutional innovation with any potential to attract incorporation business away from Delaware, one can be confident that Delaware will quickly copy that innovation. As noted previously, Delaware changed its rules in 2003 to allow the Court of Chancery to hear certain technology cases in response to innovations in Maryland.[218] In 2010, the Delaware Superior Court created a separate business court, the Complex Commercial Litigation Division, in response to the spread of business courts in neighboring states.[219] The possibility that Delaware will copy any particular innovation in this area is thus likely to dampen any other state's enthusiasm for institutional reforms designed to attract incorporation business.

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217. *See* Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy,* 52 B.C. L. REV. 189, 210-11 (2011) (discussing various attributes that make Delaware an attractive place to incorporate); *see also* DEL. DIV. OF CORPS., ANNUAL REPORT 1 (2009) (noting that "[b]usinesses choose Delaware not for one single reason, but because we provide a complete package of incorporation services" including the expert Chancery Court and "prompt, friendly, and professional [administrative] service[s]").

218. *See* Holland, *supra* note 94, at 773.

219. *See* COMMERCIAL LITIGATION ADMINISTRATIVE DIRECTIVE, *supra* note 30, at 1.

### *C. Innovating to Attract Litigation Business*

There is some evidence that business courts, as currently comprised, have the capacity to attract litigation business.[220] There are a number of institutional innovations that, if adopted by a particular state, could increase the likelihood that a particular court will be successful in attracting such business. A number of these policy options are listed below, arranged in order from least to most costly.

First, states could adopt laws guaranteeing that forum selection clauses selecting the business court will be enforced.[221] In most states, forum selection clauses will be enforced in commercial disputes,[222] but a state could dispel any lingering uncertainty by enacting a statute that explicitly guarantees that the business court would enforce such clauses. A number of states—including New York, Illinois, California, and Texas—have already enacted statutes to this effect for high-value commercial disputes.[223] States with business courts that are interested in attracting litigation business should follow their lead.

Second, states could create business courts with a nonexclusive focus on a particular industry, such as technology, or a particular area of law, such as sales. It is important that this focus be nonexclusive because courts that are too narrowly tailored are likely to exclude more litigation business than they attract. This strategy could be pursued in coordination with the "superstar" strategy outlined below in that a state might specifically seek to recruit individuals who are known experts in the business court's particular area of specialty. The fact that such a court exists may well induce

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220. *See supra* Part V.A.

221. Delaware has already done this in its Complex Commercial Litigation Division. *See, e.g.*, Ingress Corp. v. CA, Inc., 8 A.3d 1143, 1146 (Del. 2010) ("Forum selection ... clauses are presumptively valid and should be specifically enforced unless the resisting party ... clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching." (internal quotation marks omitted)).

222. Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 370 (1993) ("State courts reversed years of hostility to forum selection clauses in purely commercial contracts, relying on [Supreme Court precedent]. So complete is this evolution that today nearly every state court that has considered the issue since 1972 has held that purely domestic forum selection clauses are prima facie valid and enforceable.").

223. *See* Miller & Eisenberg, *supra* note 6, at 2092; *supra* note 61 and accompanying text.

parties in a particular industry, or parties negotiating a particular type of contract, to litigate their disputes in that specific court rather than elsewhere. Indeed, the existence of such a court may prompt parties to write forum selection clauses into their contracts, choosing ex ante to resolve their disputes before that particular court.

Third, states could seek to hire "superstar" commercial arbitrators—that is, those individuals with a reputation for fairness and expertise in the field of commercial law—as their business court judges.[224] When one files a lawsuit in most jurisdictions in the United States, the case is randomly assigned to a particular judge.[225] Until this assignment is made, it is impossible to know which judge will hear a particular case. To the extent that the judges in a particular courthouse vary considerably in their levels of business expertise, one is in effect rolling the dice that the case will be assigned to a business-savvy judge. By comparison, if there are only three judges on a particular business court, and if each of them is renowned for his or her expertise in business law, then one can be sure that any case filed in that court will be heard by an expert. In effect, a litigant is getting many of the benefits of arbitration at considerably less cost because the proceedings are being subsidized by the state. If the three judges who sit on a particular state's business court are renowned commercial arbitrators, then it is plausible that litigants would be more likely to file their suit there to the exclusion of other jurisdictions.

Fourth, states could take steps to make jury trials optional in certain business disputes.[226] The approach here would be, in effect,

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224. In states where the judges are elected, it may be difficult for the state to simply "hire" a particular person to be a judge. This innovation is therefore more likely to be implemented in states where judges are appointed. Even in these states, however, there is no guarantee that the salary paid to a business court judge would be sufficient to persuade a well-known commercial arbitrator to take the position.

225. *See, e.g.*, Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 46 (2009) (noting that the Louisiana Supreme Court recommended randomization of case assignments as a *requirement* of state constitutional law to combat perceived "judge-shopping" by state prosecutors).

226. Some states have experimented with requiring bench trials in commercial disputes. In 1996, the Milwaukee Circuit Court created a voluntary business track in an attempt to bring about quick resolution to business disputes. Bach & Applebaum, *supra* note 13, at 275. The court limited pleadings, provided for expedited discovery, forbade appeals, and—most notably—required judges, rather than juries, to issue opinions. *Id.* In 2004, New Jersey

to flip the default from a jury trial to a bench trial for the types of cases eligible to be heard by a business court. To the extent that businesses would more often prefer to litigate complex commercial matters to a judge rather than a jury, this may attract litigants to the state while still preserving the ability of the litigants to have a jury trial if both parties agree. While this proposal would present problems under virtually every state constitution, which generally track the language of the Seventh Amendment guaranteeing jury trials in civil proceedings,[227] the difficulty of changing the rule may well result in a windfall to the first state to make the change.

One may fairly ask, however, why states would be interested in pursuing any of the above innovations or, indeed, in competing for litigation business at all. The direct beneficiary of successful competition in this area is not the state, but rather the attorneys who reside in that state. While states may tax the additional income earned by the local bar, it is an open question whether these indirect benefits would be sufficient to offset the costs of pursuing the innovations discussed above. Moreover, the state court judges who have been the primary movers when it comes to creating business courts may be less enthusiastic about their competitive benefits if they know that the primary winners of the competition are likely to be local lawyers rather than the state as a whole.

In light of the foregoing discussion, a possible—indeed, a logical—reaction to the conclusions outlined above would be to disregard the potential impact of competition altogether when establishing business courts. In other words, business court advocates may cease to argue that these courts should be created in order to attract regular business, corporate charters, or litigation business to their

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adopted a similar program in its chancery courts with the goal of resolving disputes more quickly. *Id.* at 174-75. To participate in the program, the parties had to agree to waive a jury trial, use complementary dispute resolution techniques, and agree to expedited discovery. *Id.* While neither of these projects was successful, this does not necessarily mean that commercial litigants prefer jury trials. In Milwaukee, for example, the fact that no appeal was permitted from the judgment, among other factors, may have dissuaded parties from using the business track.

227. Margaret L. Moses, *Privatized "Justice,"* 36 LOY. U. CHI. L.J. 535, 544 n.47 (2005) ("The right to a civil jury is protected in federal courts by the Seventh Amendment to the U.S. Constitution, and in almost all state courts by state constitutions, with two exceptions, Louisiana and Colorado.").

states. The possible implications of such a move are discussed in the next Part.

## VII. ALTERNATIVE JUSTIFICATIONS

In the event that states turn away from the notion that competitive goals should influence the decision of whether to create a business court, then the case for establishing such courts will rest primarily on two alternative rationales: (1) that business courts improve the quality of decisions in business cases, and (2) that business courts enable a court system to operate more efficiently.[228] While a comprehensive evaluation of the merits of each of these rationales is well beyond the scope of this Article, each is discussed briefly below.

### *A. Improved Quality of Decisions*

One alternative argument in support of business courts is that, irrespective of their competitive impact, they render higher-quality decisions in business cases than do generalist courts.[229] The idea is that a specialized judge who hears only business cases is in a better position to resolve such disputes quickly and correctly than a generalist judge who may be unfamiliar with business concepts or, alternatively, may lack an interest in business law. To the extent that business court judges publish their decisions, the publication of more and better-reasoned opinions by these judges also has the potential to generate greater certainty and predictability in the fields of corporate and commercial law.[230]

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228. *See* Dreyfuss, *supra* note 3, at 11 (arguing that business courts should be evaluated based, among other factors, on (1) the quality of their decision making, and (2) their efficiency in managing their dockets); *cf.* Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 250 (2010) ("The current central arguments for specialization concern systematic efficiency and uniformity.").

229. *See* Benjamin F. Tennille, Lee Applebaum & Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35, 43 (2010) (citing improved decision making and case management in individual cases as a core rationale for creating business courts).

230. The availability of these opinions means that companies will have a better understanding of the law ex ante, which may inform how they choose to structure their business

While it is always difficult to determine whether one court renders better decisions than another court in particular cases, there is some empirical support for the notion that business courts do render more satisfying decisions in business cases.[231] Surveys of attorneys who have appeared before a particular business court tend to show high levels of satisfaction with these courts.[232] In Philadelphia, for example, a 2005 survey of attorneys who had been involved with the business court there found that 97 percent would choose for a case to be heard by that court if they had a "choice of venue," and 90 percent of respondents were "very satisfied" with the treatment they had received from that court.[233] In Massachusetts, a 2003 survey of attorneys who had appeared before that state's business court found that 88 percent of respondents were "extremely satisfied" or "very satisfied" with their experience, and 83 percent believed that the business court had enabled them to provide better legal service to their clients.[234] In that same Massachusetts survey, however, only 60 percent of the respondents stated that they were more likely to recommend that their clients use the business court to resolve disputes instead of using private dispute resolution

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dealings, and will be able to predict more accurately whether they are likely to prevail in a lawsuit ex post, which may promote settlement. *See id.* at 41-42 (discussing the value of predictability in business law and noting that the publication of well-reasoned opinions contributes to increased predictability); *cf.* Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1117 (2006) (observing with respect to contract boilerplate that "an interpreted clause is a valuable, predictable clause").

231. Rochelle Dreyfuss has defined "quality" of decision making in this context to encompass three concepts: accuracy (correctness), precision (reproducibility of results), and coherence. Dreyfuss, *supra* note 3, at 12-13.

232. *See, e.g.*, COMM. OF SEVENTY, STUDY AND ANALYSIS OF THE PHILADELPHIA COMMERCE PROGRAM 25, 27 (2005) [hereinafter PHILADELPHIA REPORT], *available at* http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/Committeeof70.pdf. To be sure, surveys reporting that attorneys were pleased with the relative performance of a business court do not provide direct support for the notion that such courts render better decisions; it may be that these courts render decisions more likely to favor a particular attorney's client. To the extent that most disputes that make their way before a business court are business-to-business disputes, however, most of the attorneys surveyed were probably representing business interests. As such, the likelihood that their positive responses indicate pro-business bias, as opposed to quality, is low.

233. *Id.*

234. BUS. LITIG. SESSION RES. COMM., THE BUSINESS LITIGATION SESSION IN MASSACHUSETTS SUPERIOR COURT: A STATUS REPORT 2 (2003) [hereinafter MASSACHUSETTS REPORT], *available at* http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/2003MassachusettsReport.pdf (reporting positive survey results).

services such as arbitration or mediation.[235] This suggests that arbitration will continue to play an important role in resolving commercial disputes in Massachusetts, the business court notwithstanding.

There is also some anecdotal evidence suggesting that business courts are better than their generalist counterparts at resolving business disputes. The Association of Corporate Counsel, a trade group for in-house lawyers, has taken the position that the use of business courts results in an "improvement in the quality of dispositions" in business litigation.[236] And individual attorneys who have litigated before business courts have stated that such courts render higher quality decisions in business cases and that business court judges manage business cases more effectively than do their generalist counterparts.[237]

While the above evidence is not conclusive, it does suggest that business courts have the capacity to render high quality decisions in business cases and that the business courts in Massachusetts and Philadelphia have, in fact, rendered a number of high quality decisions. However, two caveats are in order. First, the fact that a particular business court is well respected among attorneys that have appeared before it does not mean that all business courts enjoy similar levels of support. A survey of South Carolina attorneys who had appeared before that state's business court found that only 51 percent of respondents had a "positive" business court experience, while 48 percent had a "neutral" or "negative" experience.[238] The perceived performance of these courts will, inevitably, depend on the quality of the individuals selected to preside over them and on the

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235. *Id.*

236. Press Release, Ass'n of Corporate Counsel, Statement on Business Courts (Oct. 18, 2009), *available at* http://www.acc.com/advocacy/upload/ACC-Statement-on-Business-Courts 101809.pdf.

237. *See* Bach & Applebaum, *supra* note 13, at 165 n.129 (citing interview with Chicago litigator for proposition that the business court in Illinois generates "more expeditious and fair results"); Tennille, Applebaum & Nees, *supra* note 229, at 43 (citing improved case management in individual cases as a core rationale for creating business courts).

238. PILOT PROGRAM EVALUATION COMM., REPORT ON SOUTH CAROLINA'S BUSINESS COURT PILOT PROGRAM 7 (2009) [hereinafter SOUTH CAROLINA REPORT], *available at* http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/SouthCarolinaBusinessCourtReport2009.pdf.

level of resources devoted to facilitating their success.[239] The survey results above suggest only that business courts have the capacity to render high-quality decisions, not that they will necessarily do so.

The second caveat relates to the source of a business court's comparative advantage. It is often said that "specialization" accounts for the ability of a business court to render quality decisions in business cases.[240] The use of this term implies that all business court judges are experts in corporate and commercial law, but this is not always the case. Business court judges are typically drawn from an existing pool of trial court judges in a particular state.[241] Although a judge who volunteers to serve on a business court is likely to have had more experience in the field of commercial litigation than one who does not, the degree of expertise that a given judge has in the fields of corporate and commercial law will vary widely.[242]

A business court judge is, however, unquestionably a specialist in the facts and prior history of a particular case. One of the core attributes of a business court is that each case is assigned to a single judge from start to finish.[243] To the extent that a judge who is familiar with the prior facts and proceedings in a complex

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239. *See* John J. Gibbons, *The Quality of the Judges Is What Counts in the End*, 61 BROOK. L. REV. 45, 47 (1995) ("[C]ourts are successful because the judges in those courts are selected and appointed by a process that selects high-quality jurists more often than not.").

240. *See, e.g.*, Dreyfuss, *supra* note 3, at 2, 16. One must be careful not to associate greater specialization with higher quality. A number of scholars have argued, for example, that giving the Federal Circuit exclusive jurisdiction over patent appeals has actually reduced the overall quality of the decisions in this area. *See, e.g.*, Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle,* 101 NW. U. L. REV. 1619, 1620-22 (2007). Similarly, Richard Posner has stated a number of reasons why generalist judges are to be preferred to specialists. *See* Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 779-88 (1983).

241. *See, e.g.*, MASSACHUSETTS REPORT, *supra* note 234, at 4, 8 (describing the use of current judges in both New York and Massachusetts).

242. As judges hear more and more business cases, they will doubtless develop subject matter expertise. *See* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1538 (2010) ("Whether or not judges on a specialized court have prior experience in the field of their court's work, they become specialists once they begin their judicial service."). And, as noted previously, some states provide additional training to business court judges to deepen their knowledge of business law. *See supra* note 208. At the outset of their tenure, however, it cannot be said that *all* business court judges are experts in the fields of corporate and commercial law.

243. *See supra* notes 15-17 and accompanying text.

business dispute is a specialist in that case, this comparative advantage may enable the judge to render a better decision than one who was unfamiliar with these matters, irrespective of that judge's substantive knowledge of corporate or commercial law. In the Massachusetts survey, attorneys cited the "assignment of one judge throughout the case" as one of the keys to the business court enabling them to provide better service to their clients.[244] This conclusion was echoed by attorneys in a similar survey conducted in South Carolina.[245] Thus, to the extent that business courts are perceived to be rendering better decisions than generalist courts, it may be that this improvement in quality derives from specialization in the facts of their particular case rather than specialization in any particular subject matter.

### *B. Enhanced Administrative Efficiency*

The second alternative argument in support of business courts relates to administrative efficiency.[246] On this account, the assignment of one or more existing trial judges to a specialized business docket will result in the more efficient resolution of business cases and nonbusiness cases alike.[247] Business cases will be resolved expeditiously by a specialist judge with an active interest in business law.[248] Nonbusiness cases, in turn, will be resolved more quickly because they will no longer be forced to compete for docket space with business cases.[249] Some commentators have even argued

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244. MASSACHUSETTS REPORT, *supra* note 234, at 2.

245. SOUTH CAROLINA REPORT, *supra* note 238, at 7 tbl.D.

246. While it is difficult to precisely measure the "efficiency" of a particular court or court system, factors that should inform this undertaking include (1) the speed with which cases are decided, (2) the number of judge-hours required to handle the docket, and (3) the number of cases and issues generated by the judicial system itself. *See* Dreyfuss, *supra* note 3, at 14.

247. *See* Applebaum, *supra* note 87, at 16 (observing that business courts "have garnered respect ... for their ... internal efficiencies, as well as because of the belief that taking business and commercial cases off of the general docket allows other kinds of cases to move more efficiently as well").

248. *See* Balotti & Brandel, *supra* note 44, at 26 (noting the efficiency gains derived from having a single expert judge "handle every aspect of cases from motion practice, to settlement conferences, to responding to in-court requests of counsel, to making the ultimate decision").

249. *See id.* ("The more efficient handling of disputes by judges who understand the complex economics and legal principles that apply to commerce will free up judicial resources for other litigants."); Robert L. Haig, *New York Creates Business Courts*, BUS. L. TODAY, Sept.-

that the strategic reassignment of generalist judges to specialist roles could have an effect equivalent to hiring a new full-time judge.[250]

Let us first consider the claim that business courts make it possible to resolve business cases more efficiently. There is statistical support for this claim, but it derives almost exclusively from the experiences of a single state: New York. In that state, the creation of a business court apparently led to significant improvements in the average disposition rate in contract cases.[251] Outside of New York, however, there is virtually no published statistical evidence—or any definitive statements by state officials with access to internal court data—that the creation of business courts results in the more efficient resolution of business cases. This proposition, whenever it is made, is supported by reference to New York statistics or, alternatively, to anecdotal evidence from practicing attorneys.[252] To date, no other state has published any sort of report citing to state-specific data to show that the creation of a particular business court led to more efficient resolution of business cases.[253] Significantly, although at least four states have conducted a formal review of their respective business court's performance after a period of years, none of these reviews cited any statistics to support

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Oct. 1996, at 33, 35 ("The Commercial Division would ease pressure on an overcrowded court system. Removing complex commercial cases from other parts of the state supreme court would allow those parts to function more efficiently and would reduce the possibility that a few complicated commercial cases would displace the time and attention that many other pending cases should receive.").

250. ABA Ad Hoc Comm. on Bus. Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. L. 947, 952 (1997) ("[W]ith the same resources, the work of more than four generalist judges can be accomplished by three specialized business judges."); Balotti & Brandel, *supra* note 44, at 26 ("Four specialized judges assigned as members of a business court division, for example, who can handle the work of five nonspecialized judges hearing similar cases, have for all practical purposes added the equivalent of a new full-time judge to an otherwise beleaguered system.").

251. *See* Bach & Applebaum, *supra* note 13, at 154.

252. In Philadelphia, the survey respondents believed that the business court resulted in faster and more efficient resolution of cases, but the survey cited no statistics from the court to confirm that this belief was correct. *See* PHILADELPHIA REPORT, *supra* note 232, at 1 ("96% of the [survey] respondents believed that the [business court] had improved the time to dispose of commercial cases and 84% thought that the [business court] handled cases efficiently.").

253. This near absence of data means that it is impossible to evaluate the efficiency of business courts under any of the criteria discussed in note 247.

the claim that the creation of these courts led to speedier disposition of business cases.[254]

Let us turn next to the claim that business courts make it possible to resolve nonbusiness cases more efficiently. There is, to date, no statistical support for this claim.[255] As of the time of this writing, no state has published any report that purports to evaluate the system-wide impact of a business court on the functioning of the state's overall judicial system.[256] Surveys showing high levels of satisfaction among attorneys who appear before a business court or statistics showing improvements in the average disposition rates for business cases in the New York Commercial Division tell us nothing about what is happening to other nonbusiness cases in the state's court system.[257] If these other cases are being processed more slowly because of the diversion of judicial resources to the business court, then these costs must be weighed against the benefits generated by that court. As Anne Tucker Nees has written, "The question that critics raise is whether specialized courts for complex civil cases

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254. *See* CHIEF JUSTICE'S COMM. ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION 21 (2004) [hereinafter NORTH CAROLINA REPORT], *available at* http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/NorthCarolinaReport(2004).pdf; MASSACHUSETTS REPORT, *supra* note 234, at 27; PHILADELPHIA REPORT, *supra* note 232, at 46; SOUTH CAROLINA REPORT, *supra* note 238, at 30 fig.2.

255. This claim is routinely made without citing to statistics. *See, e.g.*, Bach & Applebaum, *supra* note 13, at 182 (noting the unsupported claim by the Co-Chair of the Massachusetts Business Litigation Resource Committee that "[t]he case load that other [Superior Court] sessions would have had has been significantly reduced because the cases that go to the Business Litigation Session [in Massachusetts] do not go to the other regular sessions of the court").

256. *See* MASSACHUSETTS REPORT, *supra* note 234, at 5-6 (responding to concerns about inequitable distribution of judicial resources by citing competitive pressures from arbitration, need for business case law, efficiency gains in the abstract, and the existence of other specialized courts, but citing no statistics); NORTH CAROLINA REPORT, *supra* note 254, at 21 (citing anecdotal evidence that the transfer of two superior court judges to the business court will improve administrative efficiency, but providing no numbers in support of this claim); PHILADELPHIA REPORT, *supra* note 232, at 46 (noting anecdotal survey responses to conclude that business court had made the broader court system more efficient, but without citing any statistics).

257. All of the data from New York, moreover, dates to 1997. *See* Bach & Applebaum, *supra* note 13, at 154. As of 2011, New York did not possess a comprehensive list of all of the opinions published by the ten commercial divisions statewide in a given year, although summaries of "leading" opinions from the Commercial Division are published in the *Commercial Division Law Report*. *See Commercial Division Law Report*, N.Y. ST. SUP. CT. COMM. DIV., http://www.nycourts.gov/courts/comdiv/lawreport.shtml (last visited Mar. 28, 2012).

create two justice systems: one with the best judges, expeditious resolution, expert attention, and other resources and the other with general judges, longer resolution time, less resources, and a greater risk of inconsistent results."[258] In order to fully validate the claim that these courts enhance administrative efficiency, in other words, it is necessary to show that cases across the entire judicial system —not just cases that come before the business court—are being resolved at least as efficiently as they were before the judges were reassigned to hear business cases.[259] To date, this proposition is still untested.

Accordingly, states would be well advised to publish any statistics tending to show that business courts result in more efficient disposition of business or nonbusiness cases. If a particular business court has successfully brought about significant improvements in judicial efficiency, then this finding should be widely publicized. In addition, states should adopt reforms that would allow them to evaluate case loads and disposition rates by case type before a business court is established to facilitate the evaluation of whether, in fact, the court is successful in improving these metrics after it comes into being. This information is essential if one is to determine whether business courts do, in fact, bring about gains in administrative efficiency, regardless of case type.

The lack of published data to date does not mean that business courts do not enable court systems to resolve business and nonbusiness cases more quickly and efficiently. It does mean, however, that there is currently a mismatch between the confident assertions by business court advocates that these innovations enhance judicial efficiency and the lack of any statistical data outside of New York

258. Nees, *supra* note 1, at 493. Nonbusiness cases could be processed more slowly for any number of reasons, ranging from inefficiencies in the master calendar system to the assignment of the most efficient judges to the business court.

259. To be sure, the absence of evidence relating to efficiency gains in those states that have established business courts does not show that such gains have not occurred. And there can be no question that measuring such gains across an institution as complex as a state's court system is difficult. *See* PHILADELPHIA REPORT, *supra* note 232, at 46 (identifying challenges in measuring efficiency of court system); Arie Y. Lewin, Richard C. Morey & Thomas J. Cook, *Evaluating the Administrative Efficiencies of Court*, 10 OMEGA 401, 405 tbl.1 (1982) (listing twelve factors to be considered in evaluating the efficiency of a court system). Still, it is noteworthy that this particular claim is supported almost exclusively by anecdotal evidence almost two decades into the business court project.

suggesting that this is so. Until more and better data is made available, it is difficult—if not impossible—to determine the actual impact of a business court on the administrative efficiency of any particular court system.

## CONCLUSION

As states have moved to establish business courts over the past two decades, advocates for these courts have advanced a number of rationales justifying their creation. This Article examined one particular set of rationales—those relating to the claim that business courts will enable states to compete more successfully for economic resources—and found them to be generally unpersuasive. It argued that business courts are unlikely to attract business to a jurisdiction under any circumstances and are unlikely, as currently comprised, to attract incorporation business. It also suggested that while these courts can attract—and have attracted—litigation business to the jurisdiction that creates them, there are limits on the potential scope of such diversion.

The Article then applied these insights to two related issues. The first is institutional design. In light of the above conclusions, states should (1) avoid creating business and technology courts with the goal of attracting business; (2) fundamentally rethink the way business courts are designed if the goal is to compete for corporate charters; and (3) undertake a number of additional reforms if the goal is to attract litigation business. The second issue is the viability of alternative rationales. If the above conclusions lead states to disregard competition-based rationales for creating business courts, then it becomes even more important to find robust support for the notion, first, that business courts result in higher quality decisions and, second, that business courts enhance administrative efficiency within a court system. While there is some evidence for the proposition that business courts render better decisions in business cases, there is a lack of published statistical evidence to support the proposition that such courts enhance the overall administrative efficiency of court systems.