

Where Nonprofits Incorporate and Why It Matters

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ABSTRACT: Nonprofit corporations account for over a trillion dollars of American annual GDP, employ twelve million people, and include some of the most well-known organizations in the world. Yet despite their significance, many core corporate governance issues about nonprofits remain a black box. This Article, using newly available data, begins to remedy this gap in the literature. Using filing data from 300,000 charitable nonprofits, I examine the foundational issue of where nonprofits incorporate, a decision that determines both the law of nonprofit corporate governance affairs and public oversight apparatus for governance and compliance. Unlike publicly traded corporations, I find nonprofit incorporation choice is not a vigorously competitive race to the top or bottom, but instead is better characterized as a stroll. A nonprofit's headquarters jurisdiction is the most popular incorporation destination—far more common than for publicly traded corporations. However, among those nonprofits that incorporate out-of-jurisdiction, Delaware is the most popular destination, with the District of Columbia a surprising second. The findings are consistent with nonprofits' selecting weaker governance and oversight rules, suggesting a potential "stroll to the bottom" among nonprofits. Using these results, I offer evidence-based policy implications to improve governance of nonprofits, to reverse the potential stroll to the bottom, and to invigorate beneficial state competition for nonprofit incorporations.

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INTRODUCTION

In 2020, New York's Attorney General filed a lawsuit demanding the removal of Wayne LaPierre, CEO of the nonprofit National Rifle Association

(“NRA”), from his position.¹ The suit alleged the NRA had diverted millions of dollars from its charitable mission for personal use by NRA leaders.² In response, the NRA announced plans to change its state of incorporation from New York to Texas, seeking “to exit what it believes is a corrupt political and regulatory environment in New York.”³

In addition to political optics, one reason the NRA might reincorporate is because the incorporation jurisdiction determines essential organizational law features: the law that governs core governance issues, the forum in which lawsuits will be decided, and the state regulator that oversees the nonprofit’s operations. Nonprofits, just like traditional corporations, can choose to incorporate under the laws of any jurisdiction of the United States, not simply its headquarters jurisdiction. Therefore, the NRA, just like any nonprofit, could incorporate or reincorporate wherever it wished, including outside its headquarters. The NRA is not alone in incorporating outside its headquarters jurisdiction. Well-known nonprofits like the Nature Conservancy,⁴ the American Cancer Society,⁵ the Howard Hughes Medical Institute,⁶ and the PGA Tour⁷ do so as well.

Because incorporations bring annual filing fees to the incorporation jurisdiction, this ability to incorporate anywhere in the country gives jurisdictions financial incentives to attract incorporations. The resulting pressure among jurisdictions to attract companies and filing fees is one of the most intensely studied features of corporate law, with vigorous debate over whether this competition yields efficient or inefficient law⁸ and whether Delaware, which

1. Press Release, N.Y. State Att’y Gen., Attorney General James Files Lawsuit to Dissolve NRA (Aug. 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-files-lawsuit-dissolve-nra> [https://perma.cc/QqJZ-7JA4].

2. *Id.*

3. Jonathan Randles, *NRA’s Bankruptcy Tossed Out in Setback for Gun Group’s Planned Move to Texas*, WALL ST. J. (May 11, 2021, 6:59 PM), <https://www.wsj.com/articles/nras-bankruptcy-tossed-out-by-court-in-setback-to-gun-groups-planned-texas-move-11620762323> [https://perma.cc/7RR3-NWNA].

4. NATURE CONSERVANCY, FORM 990 (2018), <https://www.nature.org/content/dam/tnc/nature/en/documents/form-990-tax-return-fy19.pdf> [https://perma.cc/DgE2-HJEF] (headquarters in Virginia, incorporated in the District of Columbia).

5. AM. CANCER SOC’Y, INC., FORM 990 (2019), https://www.cancer.org/content/dam/cancer-org/online-documents/en/pdf/forms/american-cancer-society-inc_990_PIC_2019-final.pdf [https://perma.cc/P4EZ-5QCZ] (headquarters in Georgia, incorporated in New York).

6. HOWARD HUGHES MED. INST., FORM 990 (2020), https://projects.propublica.org/nonprofits/display_990/590735717/04_2021_prefixes_58-59%2F590735717-202008_990_2021041417946561 [https://perma.cc/P7N9-K69C] (headquarters in Maryland, incorporated in the District of Columbia).

7. PGA TOUR, INC., FORM 990 (2018), https://projects.propublica.org/nonprofits/display_990/520999206/06_2020_prefixes_51-57%2F520999206_201812_990O_2020061617191671 [https://perma.cc/E7BA-VS3E] (headquarters in Florida, incorporated in Maryland).

8. These positions were initially staked in William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974), and Ralph K. Winter, Jr., *State Law, Shareholder*

leads incorporations among publicly traded corporations, can ever be displaced as leader.⁹

Existing scholarship on incorporation decisions has largely ignored nonprofits. Most of the study of regulatory competition for incorporations has been confined to publicly traded corporations. Yet while publicly traded corporations are economically significant, they are not the exclusive or, in many contexts, even the most important means of conducting enterprise. For instance, publicly traded corporations account for less than one percent of all U.S. companies and less than one-third of non-farm U.S. employment¹⁰; the number of limited liability companies dwarfs corporations¹¹; and publicly traded companies are now organized as limited partnerships and LLCs with some frequency.¹²

Instead, the intense study of publicly traded corporations seems driven more by practical necessity than by a belief that they are the sole business type worthy of study. Publicly traded corporations have public filing requirements,¹³ generating data that enable studying foundational corporate issues like which jurisdiction's laws attract the most companies,¹⁴ or the effect of incorporation jurisdiction on company performance.¹⁵ Privately held companies, by contrast, generally have no public filing requirements, making systematic study of these entities much more difficult despite their economic significance.¹⁶

Protection, and the Theory of the Corporation, 6 J. LEGAL STUD. 251 (1977). Roberta Romano has applied credible commitment theory to advance the view that competition among jurisdictions culminates in an efficient corporate law. *See generally, e.g.*, Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

9. *See, e.g.*, A. Gilchrist Sparks III & Daniel D. Matthews, *Delaware's Continued Resilience: The Next Hundred Years*, in *CAN DELAWARE BE DETHRONED?* 238, 240–41 (Stephen M. Bainbridge, Iman Anabtawi, Sung Hui Kim & James Park eds., 2018).

10. Steven J. Davis, John Haltiwanger, Ron Jarmin & Javier Miranda, *Volatility and Dispersion in Business Growth Rates: Publicly Traded Versus Privately Held Firms* 11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12354, 2006), <https://www.nber.org/papers/w12354> [<https://perma.cc/8YMD-CVKC>].

11. Peter Molk, *Uncorporate Insider Trading*, 104 MINN. L. REV. 1693, 1694 (2020).

12. *See generally* Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555 (2012) (studying the universe of publicly traded Delaware non-corporate entities); *see also* Molk, *supra* note 11, at 1710–11 (listing examples).

13. These filings are collected and available from the SEC's EDGAR public filing database. *See EDGAR—Search and Access*, SEC, <http://www.sec.gov/edgar/search-and-access> [<https://perma.a.c.c/4UWA-8KSN>].

14. *See, e.g.*, WILMERHALE, 2020 IPO REPORT 8 (2020), <https://www.wilmerhale.com/en/in-sights/publications/2020-ipo-report> [<https://perma.cc/D6AL-4KHZ>] (finding that eighty-eight percent of initial public offering companies incorporated in Delaware from 2017 through 2019, while no other single jurisdiction had over three percent during this period).

15. *See generally* Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (studying the effect of incorporating in Delaware on company values).

16. *See, e.g.*, Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. 503, 516–17 (2017) (describing the difficulties in studying privately held companies).

Tax-exempt nonprofits are an exception. Although these companies are not publicly traded, they are nevertheless subject to public filing requirements. The Internal Revenue Service (“IRS”) requires companies with a section 501(c) tax exemption, like 501(c)(3) and (c)(4) organizations, to provide, to the public, information recently filed with the IRS on a document called Form 990.¹⁷ This information, used by the IRS and jurisdictions to assess compliance with tax and regulatory rules,¹⁸ also includes disclosures related to finances and governance matters that can be used to explore corporate governance issues. Recently, the IRS has begun publishing this information in a useable, aggregated format.¹⁹

Consequently, exempt nonprofit corporations, like traditional publicly traded corporations, now have the data to study foundational issues of corporate governance. And, as with publicly traded corporations, the economic stakes are enormous. Recent estimates put nonprofit revenue at eleven to twelve percent of GDP,²⁰ or over one trillion dollars.²¹ Nonprofits employ over twelve million people, or ten percent of the labor force,²² paying \$670 billion in wages.²³ Empirically understanding fundamental corporate governance issues in this vast sector could pay significant dividends for scholars, regulators, and policymakers.

A good place to start is with nonprofits’ incorporation decisions. Like with publicly traded corporations, the incorporation jurisdiction fundamentally affects a nonprofit’s operations. Incorporation choice dictates the statutory law that governs nonprofits’ internal affairs as well as the regulatory oversight to which nonprofits will be subjected, leading nonprofits to prefer some

17. *Public Disclosure and Availability of Exempt Organization Returns and Applications: Public Disclosure Overview*, IRS (June 16, 2022), <https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organization-returns-and-applications-public-disclosure-overview> [https://perma.cc/JA7Q-EMV3].

18. *Form 990 Resources and Tools*, IRS (July 27, 2022), <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools> [https://perma.cc/KVJ5-ZRJ9].

19. *IRS 990 Filing Data Now Available as an AWS Public Data Set*, AWS PUB. SECTOR BLOG (June 15, 2016), <https://aws.amazon.com/blogs/publicsector/irs-990-filing-data-now-available-as-an-aws-public-data-set> [https://perma.cc/5XYS-CZWE]. Members of the public can download the raw data at *Tax Exempt Organization Search Bulk Data Downloads*, IRS (Oct. 4, 2022), <https://www.irs.gov/charities-non-profits/tax-exempt-organization-search-bulk-data-downloads> [https://perma.cc/ZCX6-CS6L].

20. *Overview of the Tax-Exempt Sector: Hearing Before the H. Comm. on Ways & Means*, 109th Cong. 7 (2005) (statement of David M. Walker, Comptroller Gen., U.S. Gov’t Accountability Off.).

21. *The Nonprofit Sector in Brief*, NAT’L CTR. FOR CHARITABLE STAT. (June 18, 2020), <https://nccs.urban.org/project/nonprofit-sector-brief> [https://perma.cc/4TW7-W8B4].

22. *Nonprofits Account for 12.3 Million Jobs, 10.2 Percent of Private Sector Employment, in 2016*, U.S. BUREAU OF LAB. STAT. (Aug. 31, 2018), <https://www.bls.gov/opub/ted/2018/nonprofits-account-for-12-3-million-jobs-10-2-percent-of-private-sector-employment-in-2016.htm> [https://perma.cc/2943-KHBR].

23. *Business Employment Dynamics: Research Data on the Nonprofit Sector*, U.S. BUREAU OF LAB. STAT. (May 14, 2020), <https://www.bls.gov/bdm/nonprofits/nonprofits.htm> [https://perma.cc/HH6C-B4J9].

jurisdictions over others. Moreover, because nonprofits pay jurisdictions annual filing fees, jurisdictions should compete to attract nonprofit incorporations, just as is seen for publicly traded companies. But do these forces play out in practice?

I address this question in four parts. Part I provides background on the dynamics that drive jurisdiction competition for publicly traded corporation incorporations. The debate among academics has crystallized into two principal outcomes. Under one, company management incorporates where management can maximize its value extractions from the corporation at investors' expense. The result is a race to the bottom among jurisdictions to attract companies by offering laws that minimize investor protections. Under the other outcome, company management incorporates where efficient shareholder protections are offered, minimizing capital costs and maximizing management's performance and profits. The result is a race to the top among jurisdictions to attract companies, offering more robust investor protections that efficiently balance the costs and benefits of these protections.

Theoretically, analogous dynamics should also drive jurisdiction competition for nonprofit incorporations. Part II considers these dynamics. Nonprofit management, like management of publicly traded corporations, may want to maximize value extraction from the firm, resulting in an incorporation preference for "bottom" jurisdictions that minimize stakeholder protections. Or nonprofit management, like management of publicly traded corporations, may want to reduce capital costs and incorporate in a "top" jurisdiction that provides efficient stakeholder protections. In an effort to attract incorporations and filing fees, jurisdictions offer whichever set of laws nonprofit management prefers. Either scenario should yield a preference among nonprofits to incorporate in some jurisdictions, but not others, just as has been observed for publicly traded corporations.

Although theory supports a pooling of nonprofits in particular states, scholars disagree about whether and how the theory will play out in practice.²⁴ For instance, although some have asserted that "Delaware is the corporate home of a disproportionate number of nonstock, nonprofit corporations,"²⁵ others have claimed that "[w]ith respect to nonprofits . . . there simply seems to

24. The most comprehensive study on nonprofit formations was conducted by Garry Jenkins, who examined the incorporation choice at a single point in time of nonprofits included in the Philanthropy 400 (a list of the largest U.S. charitable nonprofits) and a random sample of one hundred nonprofits receiving a four-star rating from Charity Navigator. Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1144-46 (2007). He concludes "that states do not compete for incorporations of nonprofit corporations" and that "[w]ith respect to nonprofits . . . there simply seems to be no race at all." *Id.* at 1115.

25. Mary M. Johnston, *Nonstock, Nonprofit Corporations: A Dearth of Direction*, 8 DEL. LAW. 12, 12 (1990); see also Mary A. Jacobson, Comment, *Nonprofit Corporations: Conversion to For-Profit Corporate Status and Nonprofit Corporation Members' Rights—Farahpour v. DCX, Inc.*, 20 DEL. J. CORP. L. 635, 635 (1995) (noting "the large number of nonprofit corporations that choose to incorporate in [Delaware]").

be no race at all”²⁶ and “that no single state attracts large nonprofit incorporations to nearly the same degree that Delaware attracts for-profit entities.”²⁷

Part III tests the theory empirically, using a comprehensive dataset of charitable nonprofit filings from 2010 through 2019. I find that approximately five percent of nonprofits incorporate outside their headquarters jurisdiction, an appreciable number but one that pales in comparison to publicly traded corporations. Among nonprofits choosing to incorporate outside their headquarters jurisdiction, or “out-of-jurisdiction,”²⁸ Delaware is the preferred choice, but it has not achieved the same dominance for out-of-jurisdiction nonprofit incorporations as it has for publicly traded corporations.

Part III also seeks to understand why nonprofits incorporate out-of-jurisdiction. I find that factors consistent with managerial agency costs increase the likelihood that a nonprofit will incorporate out-of-jurisdiction. To determine whether the decision is made to minimize these agency costs, or instead to exacerbate them, I also analyze the consequences for existing nonprofits that change their jurisdictions of incorporation midstream. The reincorporation decision is associated with increases in multiple measures of managerial agency costs, suggesting that nonprofits do not incorporate to minimize agency costs, but instead perhaps to maximize them. Finally, I analyze a significant change in New York’s nonprofit law and draw a similar conclusion: Enhancements to New York’s nonprofit governance and oversight rules coincide with an increased likelihood that New York–headquartered nonprofits will incorporate out of state. These results are consistent with a preference for incorporation jurisdictions that exacerbate agency costs, rather than minimize them. But because the intensity of this preference seems weak—most nonprofits simply incorporate at home—the result may best be characterized as a potential “stroll” to the bottom, rather than a “race.”

Part IV addresses the implications from the preceding analysis. First, I analyze why the rate of out-of-jurisdiction nonprofit incorporations, while meaningful, is far smaller than for publicly traded incorporations. Next, I examine why nonprofits seem more likely to incorporate out-of-jurisdiction to exacerbate agency cost problems, rather than to minimize them. Finally, I provide concrete regulatory suggestions for optimizing nonprofit regulatory policy that could improve public policy outcomes both for nonprofits that remain incorporated in their headquarters jurisdiction and for nonprofits that tactically incorporate out-of-jurisdiction.

26. Jenkins, *supra* note 24, at 1115.

27. *Id.* at 1149.

28. I use the phrase “out-of-jurisdiction” instead of the more common “out-of-state” from corporate law literature because nonprofits can incorporate in non-state jurisdictions like Washington, D.C., which ends up being an important jurisdiction for nonprofit incorporations.

I. INCORPORATION SHOPPING FOR PUBLICLY TRADED CORPORATIONS

Academics have devoted significant attention to how jurisdictions compete for incorporations of for-profit corporations. I briefly review the theory to set the stage for how similar dynamics could unfold in the largely unstudied nonprofit corporation context. The factors driving competition can be divided into two groups: demand-side incentives from corporations to incorporate in particular jurisdictions and supply-side incentives from jurisdictions to attract incorporations.

A. DEMAND-SIDE INCENTIVES FROM CORPORATIONS TO CHOOSE AMONG JURISDICTIONS

Corporate law's internal affairs doctrine holds that "matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders" are to be decided by the law of the jurisdiction of incorporation,²⁹ even if the corporation has no ties to the jurisdiction beyond the formal act of incorporation.³⁰ Companies therefore have the ability to select the law that will govern fundamental governance issues related to the company's operations. Although the legal basis for the doctrine is sometimes questioned, it is now one of the foundational features of corporate law amounting to a choice-of-law rule for internal disputes.³¹

Key issues about board of director independence requirements, board composition requirements, standards of fiduciary conduct, and indemnification and exculpation provisions will all be determined by the law of the incorporation jurisdiction.³² Moreover, when disputes about these issues arise, they will often be heard in the courts of the incorporation jurisdiction under established conflict of laws rules.³³ The incorporation decision will therefore impact firm governance to the extent jurisdictions vary in their governance rules and the competence of their courts. Academic study suggests significant variation along

29. *McDermott Inc. v. Lewis*, 531 A.2d 206, 214–15 (Del. 1987). *See generally* *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (recognizing the internal affairs doctrine); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmts. b, g (AM. L. INST. 1971) (same).

30. *See, e.g.,* Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 136 (2004).

31. *See, e.g.,* Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 346 (2018).

32. Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 2 (Stan. Univ. Rock Ctr. for Corp. Governance Working Paper Series No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [<https://perm.a.cc/PN6L-PV3W>]; Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 264, 269–82 (2020).

33. Internal disputes are more likely to be decided by courts of the jurisdiction whose law is applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 (AM. L. INST. 1971).

both these dimensions,³⁴ which makes choosing an incorporation jurisdiction a decision of consequence.

Academics have fiercely debated for decades over whether corporations' jurisdiction-selection process will produce inefficient corporate law that maximizes agency costs—management pursuing its interest over shareholders' and the firm's—or efficient corporate law that minimizes agency costs. Both sides of the debate recognize management's incentive to maximize its income, but the sides differ in how this maximization will occur.

The initial view, advanced by William Cary, held that management will incorporate in the jurisdiction that facilitates management's extracting value at the expense of the corporation and its shareholders.³⁵ Jurisdictions therefore “race [to] the bottom,” eviscerating statutory shareholder protections to create a management-friendly environment that will attract incorporations to their borders, and, in his view, Delaware represented the winner of that race.³⁶ Ralph Winter later countered by arguing that incorporating in “bottom” jurisdictions will raise the firm's cost of capital, reducing firm performance and management compensation.³⁷ Instead, he theorized that a firm's management will incorporate in jurisdictions offering efficient, robust shareholder protections that minimize finance costs and maximize firm performance, resulting in a “race to the top” among jurisdictions, with Delaware emerging as the victor.³⁸ Others have since argued that firms now incorporate in Delaware not because of anything to do with the quality of Delaware law, but instead because of the network effects from incorporating in a jurisdiction with a comprehensive body of established legal precedent.³⁹ Both views, however, make the same assumption that management will make strategic incorporation choices, reflecting this demand-side incentive among corporations to choose carefully among incorporation jurisdictions.

But why would Delaware, or any other jurisdiction, care about emerging as the jurisdiction of choice for incorporations? I analyze this next.

34. See, e.g., Roberta Romano, *Market for Corporate Law Redux*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS 358, 365–66, 389 (Francesco Parisi ed. 2017) (referring to Delaware as a “market leader” for legislation, and describing significant investments by Delaware in enhancing the value of its judiciary); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 488–89 (1987) (arguing “that Delaware is likely to adopt desirable rules to handle complex and technical problems as they arise” and produce “statutes that serve the needs of corporate managers”).

35. Cary, *supra* note 8, at 679.

36. See *id.* at 664–66, 705.

37. Winter, *supra* note 8, at 256–57.

38. *Id.* at 254–58.

39. See, e.g., Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J.L. & ECON. 865, 866 (2014); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 843–44 (1995); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1923–24 (1998).

B. SUPPLY-SIDE INCENTIVES FROM JURISDICTIONS TO COMPETE
FOR CORPORATIONS

Delaware dominates the market for publicly traded corporations. Two-thirds of Fortune 500 companies are incorporated in Delaware,⁴⁰ and approximately eighty to ninety-five percent of publicly traded corporations choosing to incorporate outside their headquarters jurisdiction choose Delaware.⁴¹ Eighty-eight percent of companies undertaking recent initial public offerings incorporate in Delaware.⁴² The second-most popular jurisdiction for public company incorporations, Nevada, attracts only eight percent of corporations that choose to incorporate outside their headquarters jurisdiction.⁴³

Why would jurisdictions want to attract incorporations? Incorporations bring economic benefits. The direct fiscal benefit comes from the filing fees that corporations pay to be incorporated in that jurisdiction. In Delaware, these fees vary by the size of the corporation, reaching as high as \$250,000 per year for large publicly traded corporations.⁴⁴ Almost twenty percent of Delaware's general fund revenue comes from publicly traded corporation franchise fees, and when the filing fees of non-corporate entities like LLCs are included, the figure grows to twenty-eight percent.⁴⁵ The prospect of funding government programs through fees paid by out-of-jurisdiction corporations is attractive.

Incorporations bring other economic boons, too. When legal disputes are heard in the jurisdiction of incorporation, the local bar benefits.⁴⁶ Companies are more likely to hire lawyers from their incorporation jurisdiction to represent the company in those disputes, particularly when those suits are heard within the incorporation jurisdiction's borders.⁴⁷ This increased business translates

40. DEL. DIV. OF CORPS., 2019 ANNUAL REPORT STATISTICS (2019), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf> [<https://perma.cc/2ZM4-JWQ8>].

41. See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, Essay, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 579 (2002) (80.4 percent to 90.2 percent); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572–73 (2002) (94.8 percent).

42. WILMERHALE, *supra* note 14, at 8.

43. Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3594 (2014). When private corporations' incorporation decisions are analyzed, Nevada is still the second-most popular jurisdiction, although its share of incorporations increases. Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 675 (2018).

44. *Annual Report and Tax Instructions*, DEL. DIV. OF CORPS., <https://corp.delaware.gov/paytaxes> [<https://perma.cc/S5PY-HN4F>].

45. DEL. OFF. OF MGMT. & BUDGET, FINANCIAL SUMMARY: GOVERNOR'S RECOMMENDED BUDGET 6 ch. Sources of Funds, 7 (2021), <https://budget.delaware.gov/budget/fy2021/documents/operating/financial-summary.pdf> [<https://perma.cc/F3JX-CJQF>].

46. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 694 (2002).

47. *Id.*

into increased legal fees for the local bar.⁴⁸ Hospitality businesses that cater to out-of-jurisdiction participants also gain from the increased business within an incorporation jurisdiction.

Moreover, not all benefits need be economic. Delaware, as a leader for corporate law issues, has a level of prestige unmatched by other jurisdictions. This prestige inures to its judiciary,⁴⁹ its corporate bar,⁵⁰ and its legislative body,⁵¹ bringing non-economic reputational value to the jurisdiction. The interplay between these non-economic and economic factors results in jurisdictions having the incentive to attract incorporations.⁵²

Debate continues over why Delaware has sustained long-term success in attracting incorporations,⁵³ and whether Delaware now competes with the federal government⁵⁴ or foreign jurisdictions⁵⁵ instead of other jurisdictions, and if these supply-side incentives still push other jurisdictions to compete for incorporations. It is incontrovertible, however, that these supply-side incentives have incentivized Delaware to emerge as the jurisdiction of choice when it comes to publicly traded corporations.

What is less well understood is the extent to which these incentives encourage Delaware to attract companies beyond publicly traded corporations. Because most of these entities are privately held, they lack the disclosure obligations of publicly traded firms, making systematic empirical study of them

48. *Id.* at 694–98 (noting Delaware’s success in attracting incorporations brings more business for the bar, although concluding that this additional business is “equivalent to that of a single large non-New York law firm”).

49. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000); Macey & Miller, *supra* note 34, at 488–89.

50. *See* Macey & Miller, *supra* note 34, at 472 (noting the state bar’s resulting ability to extract economic value from this position).

51. S.J. Res. 12, 147th Gen. Assemb. (Del. 2014) (“[T]he legal system and the courts of this State are respected nationally for their efficiency, fairness and predictability and their leadership on issues of corporate law.”).

52. Jurisdictions may not be able to act meaningfully on this incentive, however, given Delaware’s existing lead. Kahan & Kamar, *supra* note 46, at 724–35. *But see CT Seeks to Challenge Delaware’s Business-Friendly Legal Environment*, HARTFORD BUS. J. (June 9, 2014), <https://www.hartfordbusiness.com/article/ct-seeks-to-challenge-delawares-business-friendly-legal-environment> [<https://perma.cc/QW5E-WCKA>] (recounting Connecticut’s recent endeavor to “challenge and eventually overtake Delaware as the leading state in the country for businesses and corporations to locate, incorporate and do business”).

53. *See generally* Peter Molk, *Delaware’s Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111 (2021) (summarizing recent scholarship on the issue and arguing that competition among jurisdictions for incorporations may still be robust, despite Delaware’s sustained success).

54. *See generally* Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003) (arguing Delaware’s chief competitor is the federal government, not other states).

55. *See generally* William J. Moon, *Delaware’s New Competition*, 114 NW. U. L. REV. 1403 (2020) (contending several international jurisdictions offer corporate governance rules that can compete with Delaware).

difficult.⁵⁶ Scholars have recently begun to study other entity types. They have found, for instance, that Delaware attracts an outsized portion of privately held LLCs⁵⁷ and publicly traded noncorporate entities⁵⁸ and, using a sample of nonprofits, that Delaware appears to be an unpopular choice for nonprofit incorporations.⁵⁹ Non-publicly traded entities, and the company-specific factors that might lead an entity to form in Delaware (or another jurisdiction) instead of its headquarters jurisdiction, and the attributes that make Delaware attractive to other entity types all have yet to be comprehensively examined.

I take up these issues in the remainder of the Article. I analyze nonprofits specifically, because of their economic significance; because of newly available comprehensive data on their incorporation decisions and company-specific attributes; and because they have been overlooked in the academic literature and stand to benefit from empirical insight.⁶⁰ In the next Part, I lay out the theoretical framework for why we might, or might not, expect similar competition among jurisdictions for nonprofit incorporations as we see among publicly traded corporation incorporations, before introducing empirical evidence on these incorporation decisions and the resulting implications.

II. INCORPORATION-SHOPPING FOR NONPROFITS?

Nonprofits, like publicly traded corporations, present a theoretical race for jurisdictions to compete for nonprofit formations and nonprofits to choose carefully among their incorporation options. This Part develops the theoretical argument. I divide the argument in two to track the argument for publicly traded corporations: demand-side incentives among nonprofits to incorporate in particular jurisdictions and supply-side incentives among jurisdictions to attract nonprofit incorporations.

A. DEMAND-SIDE INCENTIVES FROM NONPROFITS TO CHOOSE AMONG JURISDICTIONS

As with traditional corporations, the jurisdiction of incorporation affects fundamental features of a nonprofit's governance. For nonprofits, these fundamental features are two: the statutory law and courts that apply to nonprofits' internal affairs and oversight by state attorneys general. Nonprofits influence both factors through their jurisdiction of incorporation. Although

56. For a discussion of why other entity types have attracted less scholarly attention, see *supra* note 17 and accompanying text.

57. Molk, *supra* note 53, at 1156–68; Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 135.

58. Manesh, *supra* note 12, at 558–59.

59. Jenkins, *supra* note 24, at 1143–44.

60. Work by Garry Jenkins is a notable exception. See *supra* note 24.

the decision to incorporate out-of-jurisdiction involves some costs⁶¹—payment of an additional set of annual fees on the order of under one hundred dollars per year and retaining another registered agent with similar annual costs⁶²—the benefits from that decision might significantly outweigh those costs, generating strategic incorporation decisions.

1. Selecting Law and Courts

Just as with traditional corporations, the jurisdiction of incorporation can fundamentally affect nonprofit operations by determining the statutory law that governs nonprofits' internal disputes—assuming the internal affairs doctrine applies. Although the internal affairs doctrine is well established for traditional corporations,⁶³ its traction among nonprofits is historically less clear, as “[c]ourts may be particularly interested in applying local laws to a foreign nonprofit corporation when an important public policy is at issue, such as the protection of donors, members, or residents.”⁶⁴

To determine exactly how commonly the internal affairs doctrine applies to nonprofits, I undertook a review of statutes and cases in the fifty states and Washington, D.C. Of those fifty-one jurisdictions, thirty-seven expressly apply the internal affairs doctrine to nonprofits,⁶⁵ and another twelve implicitly do

61. See, e.g., Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365, 374–75 (1992) (arguing that these costs dampen interjurisdiction competition for closely held corporations).

62. See, e.g., Edward A. Haman, *How Much Does It Cost to Have a Registered Agent?*, LEGALZOOM (Nov. 10, 2022), <https://www.legalzoom.com/articles/how-much-does-it-cost-to-have-a-registered-agent> [<https://perma.cc/gL7W-DWAU>] (estimating registered agent fees to cost between one hundred fifty and three hundred dollars per year); Andrew K. Jennings, *Notice Risk and Registered Agency*, 46 J. CORP. L. 75, 81 n.37 (noting that “CT Corporation, a leading commercial provider of registered-agent services, advertises its basic services at \$279 per year”).

63. See *supra* notes 29–31 and accompanying text.

64. Michele Berger, *Foreign Corporations and the Application of California Nonprofit Laws*, NONPROFIT L. BLOG (Mar. 31, 2016), <https://nonprofitlawblog.com/foreign-corporations-and-the-application-of-california-nonprofit-laws> [<https://perma.cc/5MWY-VNAZ>]. For additional authority on the subject, see Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 981–84 (2004); and RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 5.04 cmt. (b)(1) (AM. L. INST. 2021).

65. The jurisdictions are: Alaska, ALASKA STAT. § 10.20.455 (2022); Arizona, ARIZ. REV. STAT. ANN. § 10-11505(C) (2022); Arkansas, ARK. CODE ANN. § 4-33-1505 (2022); Colorado, COLO. REV. STAT. §§ 7-135-101, 7-90-805 (2022); Connecticut, CONN. GEN. STAT. § 33-1214 (2022); Delaware, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (recognizing the internal affairs doctrine for corporations); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557–58 (Del. 2014) (applying internal affairs doctrine to Delaware-incorporated nonprofit); Florida, FLA. STAT. § 617.1505 (2022); Georgia, GA. CODE ANN. § 14-3-1505 (2022); Hawaii, HAW. REV. STAT. § 414D-275 (2022); Illinois, 805 ILL. COMP. STAT. 105/113.05 (2022); Indiana, IND. CODE §§ 23-17-1-5, 23-0.5-5-1 (2022); Iowa, IOWA CODE § 504.1505 (2022); Kansas, KAN. STAT. ANN. § 17-7930 (2022); Maryland, *NAACP v. Golding*, 679 A.2d 554, 559–63 (Md. 1996); Massachusetts, MASS. GEN. LAWS ch. 156D, § 15.23 (2022); Michigan, MICH. COMP. LAWS § 450.3002 (2002); Minnesota, MINN. STAT. § 317A.061 (2022);

so.⁶⁶ Only two states—New York and California—have professed not to apply the doctrine to nonprofits,⁶⁷ but even these two states may have moderated their stance.⁶⁸

Therefore, (potentially) as long as a nonprofit does not have significant ties to New York or California, its incorporation decision selects the law for its internal affairs and, under conflict of laws rules, the court that will decide internal disputes.⁶⁹ Matters like rules on nonprofit member standing to sue, the minimum

Mississippi, MISS. CODE ANN. § 79-11-371 (2022); Montana, MONT. CODE ANN. § 35-2-824 (2021); Nebraska, NEB. REV. STAT. § 21-19,150 (2022); North Dakota, N.D. CENT. CODE § 10-33-125 (2022); Oregon, OR. REV. STAT. § 65.714 (2021); Pennsylvania, 15 PA. CONS. STAT. § 6145(b) (2022); Rhode Island, R.I. GEN. LAWS § 7-6-70(a) (2022); South Carolina, S.C. CODE ANN. § 33-31-1505 (2022); South Dakota, S.D. CODIFIED LAWS § 47-27-5 (2022); Tennessee, TENN. CODE ANN. § 48-65-105 (2022); Texas, TEX. BUS. ORG. CODE ANN. § 1.102 (West 2022); Utah, UTAH CODE ANN. § 16-6a-1505 (West 2022); Vermont, VT. STAT. ANN. tit. 11B, § 15.05 (2022); Virginia, VA. CODE ANN. § 13.1-923 (2022); District of Columbia, *Boomer Dev., LLC v. Nat'l Ass'n of Home Builders of the U.S.*, 258 F. Supp. 3d 1, 8–9 (D.D.C. 2017); West Virginia, W. VA. CODE § 31E-14-1405 (2022); Wisconsin, WIS. STAT. § 181.1505 (2022); and Wyoming, WYO. STAT. ANN. § 17-19-1505 (2022).

66. Jurisdictions that expressly recognize the internal affairs doctrine for companies incorporated in their jurisdiction but are silent about respecting the doctrine for foreign companies are Nevada, NEV. REV. STAT. § 78.012; and New Jersey, N.J. STAT. ANN. § 14A:10A-2 (West 2022). Jurisdictions that exclude foreign nonprofits by definition from their nonprofit regulations are Kentucky, KY. REV. STAT. ANN. §§ 273.161(1), (3); and Maine, ME. STAT. tit. 13-B, §§ 102(4), (6) (2022). The following jurisdictions ascribe to the internal affairs doctrine for traditional corporations with no mention of limiting that doctrine in the context of nonprofits: Idaho, IDAHO CODE ANN. § 30-21-501 (West 2022); Louisiana, LA. STAT. ANN. § 12:1-747 (2022); New Hampshire, N.H. REV. STAT. ANN. § 293-A:15.05 (2022); New Mexico, N.M. STAT. ANN. § 53-8-64 (2022); North Carolina, *Bluebird Corp. v. Aubin*, 657 S.E.2d 55, 63 (N.C. Ct. App. 2008); Ohio, *Heine v. Streamline Foods, Inc.*, 805 F. Supp. 2d 383, 389 (N.D. Ohio 2011); Oklahoma, *Dunham v. Chem. Bank & Trust Co.*, 71 P.2d 468, 471 (Okla. 1937); and Washington, *Miesen v. Munding*, No. 2:18-cv-270, 2019 WL 1410899, at *5 (E.D. Wash. Mar. 28, 2019).

67. Brody, *supra* note 64, at 982; Am. Ctr. for Educ., Inc. v. Cavnar, 145 Cal. Rptr. 736, 742–43 (Cal. Ct. App. 1978); CAL. DEP'T OF JUST., ATTORNEY GENERAL'S GUIDE FOR CHARITIES 100, 102 (2021), <https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf> [https://perma.cc/5ELT-3SCA] (claiming “oversight over foreign entities involved in the nonprofit sector in California”); *Laws & Regulations, Nonprofit Integrity Act of 2004 FAQ*, CAL. DEP'T OF JUST., <https://www.oag.ca.gov/charities/laws> [https://perma.cc/KFW8-XLUG] (claiming California “law applies to all foreign charitable organizations . . . doing business or holding property in California for charitable purposes”); N.Y. NOT-FOR-PROFIT CORP. LAW § 1320 (McKinney 2022) (subjecting nonprofits incorporated in other states to rules on member derivative actions, indemnification provisions for directors and officers, and mergers or consolidations of nonprofits).

68. For instance, New York applies only its rules on member derivative actions, indemnification, and mergers to nonprofits; other rules, like those on inspection rights or membership voting rights, do not apply. N.Y. NOT-FOR-PROFIT CORP. LAW § 1320 (limiting the applicability of New York law for foreign corporations); *id.* § 613 (member voting provisions); *id.* § 621 (member inspection rights). And the California case refusing to abide by the internal affairs doctrine noted that “[t]his holding, however, is not of great consequence because the differences between California and [the incorporation jurisdiction’s] law in the relevant areas are not so significant as to dictate opposite results in this case,” making one wonder whether the result would be the same if the incorporation jurisdiction’s law made a difference. *Cavnar*, 145 Cal. Rptr. at 743.

69. See *supra* note 33 and accompanying text.

number of directors who will serve on the nonprofit board, the independence of those directors, the fiduciary duties that apply to those directors and officers, indemnification provisions for directors and officers, and the process for mergers or consolidations of nonprofits will all be affected by the incorporation decision.⁷⁰ And because jurisdiction laws, and the quality of jurisdiction courts interpreting those laws, vary on these issues, the incorporation decision could have real consequences.⁷¹

Through their incorporation choice, nonprofits could therefore select the law and courts they find attractive. One might suppose that most nonprofits would naturally choose to incorporate in the jurisdiction with the most permissive rules on internal governance and the weakest court enforcement of those rules to maximize management's flexibility and agency costs. Nonprofits might, for instance, incorporate in jurisdictions with weak oversight that allow them to inflate overhead and retained assets, prioritizing management comfort and financial security over stakeholders' interests.⁷² These nonprofits would be analogous to those corporations that drive a "race to the bottom" in corporate law by maximizing managerial agency costs.

However, just as with traditional corporations, choosing weak law is not necessarily the optimal choice for self-interested management. As Henry Hansmann originally argued, the hallmark legal feature of a nonprofit is its "nondistribution constraint," which prohibits nonprofits from distributing net earnings to private parties.⁷³ Because nonprofits lack owners or management

70. A merger or consolidation may still require the consent of the attorney general in jurisdictions in which the nonprofit's assets are based, if different from the incorporation jurisdiction, but other elements, such as provisions on membership votes, may be determined by the law of the incorporation jurisdiction. *See, e.g.*, Dana Brakman Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 BYU L. REV. 1181, 1192–99 (describing nonprofit change of control transactions); Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1114–21 (2001) (same); MODEL NONPROFIT CORP. ACT §§ 11.02(b), 12.02(g) (AM. BAR ASS'N 2021) (requiring attorney general approval for nonprofit mergers and dispositions of assets); Brody, *supra* note 64, at 981 (noting involvement by attorneys general of jurisdictions of operations).

71. For instance, nonprofit corporation standing rules vary significantly by jurisdiction. *See, e.g.*, *Tran v. Hoang*, 481 S.W.3d 313, 316–18 (Tex. App. 2015) (interpreting Texas statute as declining to give nonprofit members standing to sue derivatively); ARIZ. REV. STAT. ANN. § 10-3631 (authorizing derivative suits if brought by either fifty members or by members representing twenty-five percent of voting power, whichever is less); MINN. STAT. § 317A.467 (authorizing derivative suits if brought by either fifty members or by members representing ten percent of voting rights, whichever is less); N.Y. NOT-FOR-PROFIT CORP. LAW § 623 (authorizing derivative suits if brought by members representing five percent of any class of members); FLA. STAT. § 617.07401 (allowing derivative suits to be brought by a single member). The quality of courts also varies by jurisdiction, with Delaware often placed at the top. Molk, *supra* note 53, at 1123–35; Fisch, *supra* note 49, at 1061.

72. *See generally* Brian Galle, Essay, *The Quick (Spending) and the Dead: The Agency Costs of Forever Philanthropy*, 74 VAND. L. REV. 757 (2021) (finding donor-advised funds incur these agency costs soon after their principal monitor departs).

73. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

who can withdraw earnings from the organization, the nonprofit has no strong economic incentive to maximize profits at the expense of customers, suppliers, employees, and other stakeholders that traditional corporations have.⁷⁴ Therefore, compared to other organizations, nonprofits offer an enhanced commitment to trust and quality to their stakeholders, committing to higher quality goods and services, and solving agency problems that otherwise exist.⁷⁵ This commitment is particularly valuable when stakeholders are not able to protect themselves through alternative mechanisms, like regulation, contracting, reputation, or ownership.⁷⁶ Empirical evidence supports this theoretical assumption.⁷⁷

Importantly, the strength of the nondistribution constraint's credible commitment, and therefore nonprofits' market advantage, hinges on how robustly that constraint is enforced. More concretely, voluntarily subjecting itself to strict governance rules can help a nonprofit in several ways. Nonprofits that fundraise from donors could raise more funds if the nonprofit can credibly assure donors that those funds will be spent wisely, in accordance with donor-friendly standing rules and managerial fiduciary principles.⁷⁸ Or, a nonprofit's customers, suppliers, or employees may have more trust that the nonprofit will treat them fairly when the nonprofit is subject to governance constraints. Consider, for example, charitable intermediaries like the American Red Cross that transfer customer-donors' contributed funds to third-party beneficiaries. Donors must trust the intermediary to deliver contributions to the intended beneficiaries,⁷⁹ and that trust grows when the nonprofit voluntarily subjects itself to stricter internal governance regimes, ensuring donors that funds will not

74. See, e.g., HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 20–22 (1996).

75. Hansmann, *supra* note 73, at 854–59.

76. See, e.g., Edward L. Glaeser & Andrei Shleifer, *Not-for-Profit Entrepreneurs*, 81 J. PUB. ECON. 99, 100 (2001); Peter Molk, *The Puzzling Lack of Cooperatives*, 88 TUL. L. REV. 899, 905–10 (2014) (describing the role of ownership as a stakeholder protection mechanism).

77. The evidence is not uniformly positive, however. See, e.g., Glaeser & Shleifer, *supra* note 76, at 100 (noting market areas where nonprofits maintain a competitive advantage); Jill R. Horwitz, *Does Nonprofit Ownership Matter?*, 24 YALE J. ON REGUL. 139, 171–84 (2007); Pauline Vaillancourt Rosenau & Stephen H. Linder, *Two Decades of Research Comparing For-Profit and Nonprofit Health Provider Performance in the United States*, 84 SOC. SCI. Q. 219, 224 (2003); Peter Molk, *The Ownership of Health Insurers*, 2016 U. ILL. L. REV. 873, 925–26 (finding policyholders of nonprofit health insurer were more likely to minimize expenses than policyholders of for-profit insurer in an experimental context).

78. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 609 (1981) (“[I]t is clear that patrons will commonly feel a strong interest in seeing that the managers of nonprofits adhere to their fiduciary duties.”); Brian Galle, *Valuing the Right to Sue: An Empirical Examination of Nonprofit Agency Costs*, 60 J.L. & ECON. 413, 415 (2017) (finding that donors value certain protections like having the right to sue); Albert H. Choi, *Nonprofit Status and Relational Sanctions: Commitment to Quality Through Repeat Interactions and Organizational Choice*, 58 J.L. & ECON. 969, 970–72 (2015) (arguing for the importance of relational sanctions).

79. HANSMANN, *supra* note 74, at 229; Hansmann, *supra* note 73, at 846–48.

be diverted to personal use.⁸⁰ University students—a university’s customers—who invest considerable capital (financial and non-financial) in their school face a similar problem, trusting that those universities will maintain adequate levels of prestige to benefit those students after graduating.⁸¹ Again, that trust grows, and students may pay more, when the nonprofit voluntarily subjects itself to strict oversight that ensures funds are spent wisely, not tunneled from the firm through governance failures or violating the nondistribution constraint.

Nonprofits’ incorporation decisions therefore have the potential to strengthen or weaken the commitment they make to their stakeholders to minimize agency costs, because the incorporation jurisdiction affects those stakeholders’ legal rights and management’s duties. Nonprofits seeking to maximize the comparative advantage of the nonprofit form may therefore prefer to incorporate in jurisdictions with stakeholder-friendly law and courts, just as for-profits seeking to engender shareholder trust and minimize capital costs might incorporate in jurisdictions with shareholder-friendly law. On the other hand, nonprofits seeking to “race to the bottom” and extract value from their stakeholders might prefer to incorporate in jurisdictions with management-friendly law that provide weak protections for stakeholders, just as for-profits seeking to extract value from shareholders might incorporate in jurisdictions that provide few shareholder protections. But either way, nonprofits should have a preference for certain jurisdictions’ laws over other jurisdictions’.

2. Selecting State Attorney General Oversight

The other major regulatory area influenced by incorporation jurisdiction is the attorney general that will oversee nonprofits’ operations. Unlike traditional corporations, nonprofits have no shareholders and, therefore, no shareholder constituency to bring derivative suits on behalf of the nonprofit against managerial misdeeds.⁸² Although some jurisdictions provide standing to a nonprofit’s membership if the nonprofit has members,⁸³ and a nonprofit is free to expand standing to private parties if it wishes,⁸⁴ the general rule is

80. This may be especially true when the trust engendered by external oversight implies that donors must no longer monitor so vigorously on their own. See Choi, *supra* note 78, at 989–91.

81. Trust may be particularly important in this space, since the student will continue to draw on the relationship with the educational institution after graduating, when it is too late for the student to switch. See, e.g., Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3, 27 (1990) (“The student is making a substantial commitment by choosing a given university: she is investing in a relationship that will continue to bear fruit over the rest of her life.”).

82. Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1500 (2021).

83. See, e.g., ARIZ. REV. STAT. ANN. § 10-3631 (authorizing derivative suits by either fifty members or by members representing twenty-five percent of voting power, whichever is less); MODEL NONPROFIT CORP. ACT § 6.30 (AM. BAR ASS’N 2021) (authorizing derivative suits by either fifty members or by members representing five percent of voting power, whichever is less).

84. See, e.g., *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 82 (N.Y. 2005) (granting standing to certain members for purposes of challenging a proposed merger).

that private parties do not have standing to sue derivatively on a nonprofit's behalf.⁸⁵ Instead, it is the state attorney general that is the primary entity involved in charitable⁸⁶ nonprofit oversight.⁸⁷ The attorneys general of the nonprofit's incorporation jurisdiction⁸⁸ and the jurisdictions in which the nonprofit operates are all tasked with enforcing actions that would be brought derivatively by shareholders against traditional corporations.⁸⁹ Attorneys general are not always enthusiastic about exercising this power,⁹⁰ and this

85. See, e.g., Brody, *supra* note 64, at 957; Hansmann, *supra* note 78, at 606–07.

86. Many jurisdiction statutes are written so that the state attorney general's role is to protect the public's interest in nonprofits' assets. See, e.g., MASS. GEN. LAWS ch. 12, § 8 (“The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.”); *Nonprofit Organizations and Charities: Resources for Organizations and Donors*, MD. OFF. OF THE ATT’Y GEN., <http://www.marylandattorneygeneral.gov/Pages/Nonprofits/default.aspx> [<https://perma.cc/A3S3Q-PH62>] (“The Attorney General represents the public interest in the protection of charitable assets.”). See generally RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 5.01 cmt. b(1) (AM. L. INST. 2021) (“Under the common law, the role of the state attorney general is usually limited to bringing matters involving the protection of charitable assets to the attention of a court.”). Because it is unlikely that the public has a meaningful interest in non-exempt nonprofits' assets, attorney general oversight may not reach non-exempt nonprofits in those states.

87. The IRS also engages in oversight, although its focus is in ensuring that tax-exempt dollars are put to good use. This focus means the IRS's main goal is to ensure that charitable nonprofits' assets are not diverted to private uses. See, e.g., Molk & Sokol, *supra* note 82, at 1525–27. As a result, nonexempt nonprofits will not be subject to this oversight, nor will prototypical governance disputes that do not involve diverting charitable assets to private purposes. *Id.* at 1526.

88. See, e.g., Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 493 (2010); MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 309 (2004).

89. Mayer & Wilson, *supra* note 88, at 493–94; Peter Swords, *The Form 990 as an Accountability Tool for 501(c)(3) Nonprofits*, 51 TAX LAW. 571, 575–76 (1998).

90. For some, the lack of enforcement seemingly stems from a lack of interest. See, e.g., *Complaints*, CHARITIES NYS, https://www.charitiesnys.com/complaints_new.html [<https://perma.cc/K3GD-ZYNH>] (“The Charities Bureau generally does not become involved in governance disputes within nonprofit organizations.”); James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 555 (2010) [hereinafter Fishman, *Stealth Preemption*] (“Staffing problems, a multitude of other responsibilities, and sometimes a lack of interest in monitoring nonprofits has made attorney general oversight more theoretical than deterrent in most jurisdictions.”). For others, the lack of enforcement stems from a lack of resources. See, e.g., Jenkins, *supra* note 24, at 1129 (finding low levels of full-time equivalent state attorneys general office employees monitoring charities in most jurisdictions); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 262 (2003) (“Staffing problems and a relative lack of interest in monitoring nonprofits make attorney general oversight more theoretical than deterrent.”); Brian Galle, *Design and Implementation of a Charitable Regulation Regime*, in RESEARCH HANDBOOK ON NOT-FOR-PROFIT LAW 530, 545 (Matthew Harding ed., 2018) (“Due to resource constraints and political disinterest, enforcement by state or federal officials is typically modest given the size of the sector.”); Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231, 244 (2014) (highlighting resource constraints as explaining weak attorney general oversight).

power may not always be exercised in the public interest,⁹¹ but as a matter of legal doctrine, the state attorneys general are the primary overseers of a charitable nonprofit's operations.

Incorporation choice does not give nonprofits complete control over which attorneys general office will supervise them; attorneys general in any jurisdiction where a nonprofit operates can exercise jurisdictional authority.⁹² Moreover, nonprofits are typically required to register with attorneys general in jurisdictions where those nonprofits operate or solicit contributions, providing information of the type disclosed in a Form 990.⁹³ Nonprofits can, however, select one additional state attorney general office that will supervise them by choosing their jurisdiction of incorporation and thereby voluntarily subjecting themselves to that additional jurisdiction's attorney general oversight.⁹⁴

Of course, nonprofits can incorporate in their headquarters jurisdiction or a jurisdiction in which they already operate, in which case the incorporation decision does not increase the number of overseeing attorney general offices. Indeed, this is the approach a nonprofit should follow if it seeks to minimize its external oversight. But a nonprofit that seeks to *increase* its regulatory oversight, and voluntarily increase its commitment to good governance, can do so by incorporating in a jurisdiction where it does not operate, thereby subjecting itself to the supervision of an additional state attorney general. And given the heterogeneity in the vigor with which state attorneys general offices monitor, this decision can have meaningful consequences.⁹⁵ Nonprofits seeking to maximize their external oversight could, for instance, incorporate in a jurisdiction known for its robust enforcement like New York, California, or Massachusetts.⁹⁶ In doing so, the

91. See, e.g., Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 756–59, 759 n.47 (2008) (estimating that actions by Pennsylvania attorney general against Hershey Trust imposed approximately \$3.5 billion in economic costs). See Brody, *supra* note 64, at 985–1034 (summarizing multiple instances of apparently value-reducing attorney general interventions).

92. See *supra* note 89 and accompanying text.

93. See, e.g., Mayer & Wilson, *supra* note 88, at 493–94; Molk & Sokol, *supra* note 82, at 1522.

94. See *supra* note 88 and accompanying text.

95. For example, jurisdictions vary in the number of employees with which they staff their charitable oversight divisions. See Jenkins, *supra* note 24, at 1129.

96. See, e.g., Fishman, *Stealth Preemption*, *supra* note 90, at 556 (“Enforcement is often episodic, though some jurisdictions — California, New York and Massachusetts come to mind — have displayed renewed vigor”); Brody, *supra* note 64, at 951–52 (“New York state has one of the most comprehensive notice and oversight schemes.”); Mark Sidel, *The Nonprofit Sector and the New State Activism*, 100 MICH. L. REV. 1312, 1312 (2002) (“[S]tates — led by New York — have at times aggressively exercised their powers to monitor, oversee and regulate the nonprofit sector.”); NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR 127–38 (2001) (analyzing evolution of New York's oversight of nonprofits); Kathleen M. Boozang, *Does an Independent Board Improve Nonprofit Corporate Governance?*, 75 TENN. L. REV. 83, 115–16, 116 n.191

nonprofit maximizes the comparative advantage derived from its nondistribution constraint, just like a traditional corporation incorporating in a “top” jurisdiction with robust shareholder protection rules. So, while nonprofits lack the shareholders and all-important capital markets that drive publicly traded corporations’ incorporation decisions, these alternative mechanisms may provide sufficient incentives for a similar calculated incorporation decision.⁹⁷

Although nonprofits may prefer certain suites of jurisdiction laws, courts, and attorney general oversight to others, would jurisdictions be responsive to these preferences in an effort to attract nonprofit incorporations? I analyze this next.

B. SUPPLY-SIDE INCENTIVES FROM JURISDICTIONS TO COMPETE FOR NONPROFITS

As with the case for publicly traded corporations, the principal driver for jurisdictions to compete for nonprofit incorporations is financial.⁹⁸ Nonprofits pay fees to their incorporation jurisdiction for the privilege of incorporating in that jurisdiction.⁹⁹ Therefore, jurisdictions that grow their share of nonprofit incorporations also stand to grow capital inflows to buttress their budgets. If a jurisdiction became the preeminent location of choice for nonprofit incorporations, then it could exercise its market advantage to charge higher incorporation fees, maximizing the revenue gain from nonprofit incorporations. Many have argued that Delaware has followed this approach for publicly traded incorporations,¹⁰⁰ where companies are charged up to \$250,000 per year for incorporations.¹⁰¹

Yet to date, no jurisdiction has followed this trajectory for nonprofit corporations. Across the board, jurisdictions charge nonprofits—especially tax-exempt ones—only nominal incorporation fees.¹⁰² Initial formation fees range from a low of eight dollars in Kentucky¹⁰³ to a high of only \$125 in

(2007) (noting that although state “attorney general offices . . . do a rather poor job” of overseeing nonprofits, “[e]nforcement in New York is generally regarded as the exception”).

97. See Roberta Romano, *State Competition for Close Corporation Charters: A Commentary*, 70 WASH. U. L.Q. 409, 412–13 (1992) (noting that competition for closely held corporations can emerge despite thin capital markets).

98. See *supra* notes 44–45 and accompanying text.

99. For a recent survey, see Claire Shinn, *The Cost of Starting a Nonprofit in Every State*, NONPROFIT HUB (June 7, 2016), <https://nonprofitHub.org/the-cost-of-starting-a-nonprofit-in-every-state> [https://perma.cc/RCT8-KX3U].

100. See, e.g., Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1214–17 (2001); Macey & Miller, *supra* note 34, at 491–92; Romano, *supra* note 8, at 240–41.

101. See *supra* text accompanying note 44.

102. Shinn, *supra* note 99.

103. *Fees*, KY. SEC’Y OF STATE, <https://www.sos.ky.gov/bus/business-filings/Pages/Fees.aspx> [https://perma.cc/FAU9-YPJS].

Pennsylvania¹⁰⁴ and Vermont.¹⁰⁵ Ongoing expenses are similarly low. Delaware, for instance, charges exempt nonprofits twenty-five dollars per year¹⁰⁶ despite charging for-profit corporations up to \$250,000 per year. California charges nonprofits twenty dollars every two years¹⁰⁷ with up to \$300 per year in additional fees,¹⁰⁸ while charging for-profit corporations the greater of \$800 or 8.84 percent of their earnings each year.¹⁰⁹ New York charges exempt nonprofits at most \$1,500 per year;¹¹⁰ while the annual fees for traditional corporations can balloon above \$200,000.¹¹¹

Unquestionably, under current pricing schemes, it would not pay to corner the market for nonprofit incorporations; the incremental incorporation revenue would be a drop in the budgetary bucket.¹¹² However, a jurisdiction that corners the nonprofit incorporation market would not be bound to current fee schedules and could raise franchise fees once its dominance has been cemented. The absence of a current premium for nonprofit incorporations may therefore better reflect a lack of any dominant jurisdiction in the market for nonprofit incorporations than a lack of long-term financial incentives, even though nonprofits are not new and jurisdictions have had years to attract them. A jurisdiction with a long enough time horizon¹¹³ might still be motivated by the prospect of future high fees to attract nonprofits today, building its position as the jurisdiction of choice for nonprofit incorporations. By all accounts, a similar picture eventually helped spur Delaware to its current position in the publicly traded corporation marketplace, for which it outcompeted the original dominant jurisdiction,

104. *Fees & Payments*, PA. DEP'T OF STATE, <https://www.dos.pa.gov/BusinessCharities/Business/Resourses/Pages/Fees-and-Payments.aspx> [<https://perma.cc/X75U-G7HM>].

105. *Fees*, VT. SEC'Y OF STATE, <https://sos.vermont.gov/corporations/fees> [<https://perma.cc/J6V8-23E6>].

106. *Annual Report and Tax Instructions*, *supra* note 44.

107. CAL. SEC'Y OF STATE, FORM SI-100 (2022), https://bpd.cdn.sos.ca.gov/corp/pdf/so/co rp_so100.pdf [<https://perma.cc/6Z42-C8FJ>].

108. These fees apply if the nonprofit has a tax exemption. CAL. DEP'T OF JUST., ANNUAL REGISTRATION RENEWAL FEE REPORT TO ATTORNEY GENERAL OF CALIFORNIA (2020), https://oag.ca.gov/system/files/media/rff1_form.pdf [<https://perma.cc/49CQ-JREP>].

109. *C Corporations*, CAL. FRANCHISE TAX BD. (Dec. 30, 2021), <https://www.ftb.ca.gov/file/business/types/corporations/c-corporations.html> [<https://perma.cc/GGV8-2H3G>].

110. The highest fees apply to exempt nonprofits with minimum \$50 million in net worth. N.Y. STATE OFF. OF THE ATT'Y GEN., CHAR500 FORM (2021), https://www.charitiesnys.com/pdfs/CHAR500_2021.pdf [<https://perma.cc/ECZ4-JPJH>].

111. *Definitions for Article 9-A Corporations*, N.Y. STATE DEP'T OF TAX'N & FIN. (Nov. 30, 2021), https://www.tax.ny.gov/bus/ct/def_art9a.htm [<https://perma.cc/5X5L-KP34>].

112. *See, e.g., Jenkins*, *supra* note 24, at 1163.

113. This long-time horizon is not always compatible with elected officials' time horizons, which may be considerably shorter. *See, e.g., Kahan & Kamar*, *supra* note 46, at 728–35.

New Jersey¹¹⁴; these incentives continue to drive other jurisdictions in their current efforts to wrest market share away from Delaware.¹¹⁵

Moreover, as with publicly traded corporations, non-economic factors may spur jurisdictions to attract nonprofits. As more nonprofits incorporate in a jurisdiction, that jurisdiction's attorney general's influence grows as well, which may buttress that attorney general's political ambitions.¹¹⁶ Becoming the go-to jurisdiction for nonprofits may bolster the reputation of the jurisdiction's judiciary, business bar, and legislative body, just as it does for publicly traded corporations.¹¹⁷ Local attorneys can earn fees by acting as local counsel,¹¹⁸ although if nonprofit suits are comparatively rare, so too will be these additional fees.¹¹⁹ Or perhaps spillover from the "warm glow" generated by charitable nonprofits may also boost jurisdictions' desire to attract nonprofit incorporations.¹²⁰

To summarize, just as powerful incentives can push for-profit corporations to prefer particular jurisdictions and push jurisdictions to court those corporations, analogous incentives can induce nonprofits to prefer particular jurisdictions and for jurisdictions to compete for nonprofit incorporations. Does this happen? I now turn to the empirical evidence.

III. EMPIRICAL STUDY OF NONPROFIT INCORPORATIONS

This Part presents empirical evidence on nonprofit incorporation decisions. I begin by describing the data, and then I turn to analysis of the data.

A. DATA

Nonprofit organizations that are exempt under the federal tax code section 501(c) are required to file annual disclosures about their organizations and their operations over the prior year. These disclosures fall into three

114. CHRISTOPHER GRANDY, *NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW* 3–17 (1993).

115. Molk, *supra* note 53, at 1113–14 (describing Connecticut's recent efforts).

116. See, e.g., Brody, *supra* note 64, at 947.

117. See *supra* text accompanying notes 49–51. But see Jenkins, *supra* note 24, at 1162 (arguing that "nonprofits do not bring comparable indirect revenues . . . because charitable organizations do not have the resources to pay and, more important, they are rarely involved in lucrative change-of-control transactions and other high-stakes deals and litigation").

118. Kobayashi & Ribstein, *supra* note 57, at 99.

119. See Molk & Sokol, *supra* note 82, at 1499–502; Jenkins, *supra* note 24, at 1163. For additional discussion of this issue, see *infra* notes 169–71 and accompanying text.

120. See, e.g., Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1259 (2011); Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1222 (2010); see also Peter Molk, *Reforming Nonprofit Exemption Requirements*, 17 FORDHAM J. CORP. & FIN. L. 475, 535 (2012) (discussing the related "halo" effect and its impact on behavior in the nonprofit space).

groups: Form 990-EZ (for smaller exempt organizations); Form 990 (for other exempt organizations); and Form 990-PF (for private foundations).¹²¹

These disclosures are required to be “publicly available,” which until recently meant that annual disclosures from the last few years needed to be either available to the public upon request or filed with a third-party website like GuideStar.¹²² Beginning in 2016, the IRS began making these disclosures publicly available in a machine-readable format,¹²³ which Jesse Lecy has collected into aggregated databases.¹²⁴ These filings form the backbone for this Article.

The principal data consist of every annual Form 990 filed with the IRS for years 2010 through 2019.¹²⁵ Consequently, the project examines only a subset of the nonprofit universe—nonprofits that file a Form 990. This excludes four main types of nonprofits from analysis. The first group is nonprofits that do not have a federal tax exemption and therefore do not have public filing requirements. For instance, the American Automobile Association, or AAA, is a non-exempt nonprofit organization and therefore does not file a Form 990.¹²⁶ The second group is religious organizations. The IRS does not require religious organizations to file a Form 990 even when they are tax-exempt.¹²⁷ The third group is small tax-exempt organizations. The Form 990 filing requirement applies to exempt nonprofits with annual gross receipts of at least \$200,000 or total assets of at least \$500,000.¹²⁸ Organizations below both these thresholds instead file a Form 990-EZ, which does not include the incorporation jurisdiction and lacks internal governance

121. For examples of the forms and associated guidance, see *Form 990 Resources and Tools*, *supra* note 18.

122. See *supra* note 17 and accompanying text.

123. *IRS Makes Electronically Filed Form 990 Data Available in New Format*, IRS (June 16, 2016), <https://www.irs.gov/newsroom/irs-makes-electronically-filed-form-990-data-available-in-new-format> [<https://perma.cc/7UDY-WH5R>].

124. Jesse D. Lecy, *Projects*, <http://www.lecy.info/projects> [<https://perma.cc/7F4G-BECF>]; Nonprofit Open Data Collective: Resources, DATA.WORLD, <https://data.world/npdata?entryTypeLabel=dataset&tab=resources> [<https://perma.cc/UB36-4TSQ>].

125. Forms 990 are required to be filed annually, but the nonprofit can choose whether the filed form corresponds to either the corresponding calendar year or to the nonprofit’s corresponding fiscal year. In the analysis that follows, I treat calendar year and fiscal year filings from the same year as being filed for the same period. In addition, some nonprofits file multiple Forms 990 for the same year, such as when information from an earlier filing needs to be restated. In those instances, I keep only the latest-filed restated form.

126. *Am. Auto. Ass’n v. Comm’r*, 19 T.C. 1146, 1162 (1953). See generally LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 28 (3d ed. 2012) (estimating twenty-five percent of nonprofits are not tax exempt).

127. *Annual Exempt Organization Return: Who Must File*, IRS (June 17, 2022), <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file> [<https://perma.cc/CJ9W-Y9RG>].

128. *Form 990 Series Which Forms Do Exempt Organizations File Filing Phase In*, IRS (July 27, 2022), <https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in> [<https://perma.cc/AJ7Q-P97G>].

disclosures.¹²⁹ The fourth group is private foundations, or exempt organizations that are not public charities.¹³⁰ These are typically organizations, like the \$50 billion Bill & Melinda Gates Foundation, whose principal role is to provide grants to other tax-exempt organizations.¹³¹ Private foundations file Form 990-PF,¹³² which does not include the foundation's incorporation jurisdiction.¹³³

I also exclude the 6.3 percent of Form 990 filings that are missing either the incorporation or the headquarters jurisdiction,¹³⁴ as well as the 0.10 percent of filings from companies headquartered or incorporated outside of the fifty states or the District of Columbia.

The resulting data provide comprehensive information on nonprofit incorporation choices, financials, and internal governance characteristics for a significant swath of today's nonprofit organizations. In all, 310,000 nonprofits filed usable returns during this period, resulting in 1.6 million nonprofit-year datapoints. To these data, I add a series of jurisdiction- and year-specific economic and noneconomic factors, which I detail later in the Article.

Using these data, I analyze three research questions. First, I look at the incorporation decisions of nonprofits. Second, I look at the reincorporation decisions of nonprofits that change their jurisdiction of incorporation without changing their headquarters. Finally, I look at the effects of New York's Nonprofit Revitalization Act, which took effect in 2014, on nonprofits' likelihood of incorporating in New York.

B. INCORPORATION DECISIONS

I first examine nonprofits' incorporation decisions. To begin, I present data on jurisdiction shares of nonprofit incorporations. Table 1 shows the raw incorporation share, and the share adjusted for the jurisdiction's relative U.S.

129. For the current version of Form 990-EZ, see IRS, FORM 990-EZ (2022), <https://www.irs.gov/pub/irs-pdf/f990ez.pdf> [<https://perma.cc/E3JY-ZESE>]. Organizations with annual gross receipts below \$50,000 file Form 990-N, which the IRS does not make available in machine-readable format. *IRS Makes Electronically Filed Form 990 Data Available in New Format*, *supra* note 123. It also does not include information on incorporation jurisdiction. *Annual Electronic Notice (Form 990-N) for Small Organizations FAQs: What to Report*, IRS (Mar. 18, 2022), <https://www.irs.gov/charities-non-profits/annual-electronic-notice-form-990-n-for-small-organizations-what-to-report> [<https://perma.cc/VH5F-B9Q9>].

130. I.R.C. § 501(c)(3).

131. *How We Work*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/about/how-we-work> [<https://perma.cc/F775-XFZE>]; *Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/about/foundation-fact-sheet> [<https://perma.cc/QL4Q-V5KB>].

132. *IRS Makes Electronically Filed Form 990 Data Available in New Format*, *supra* note 123.

133. For the current version of Form 990-PF, see IRS, FORM 990-PF (2022), <https://www.irs.gov/pub/irs-pdf/f990pf.pdf> [<https://perma.cc/XR6U-TPXY>].

134. Form 990 refers to the jurisdiction of incorporation as the "domicile." *Instructions for Form 990 Return of Organization Exempt from Income Tax (2022)*, IRS (Dec. 14, 2022), <https://www.irs.gov/instructions/i990> [<https://perma.cc/VP7B-7YQJ>].

population to capture that nonprofits may more likely form, and incorporate, in jurisdictions with large populations.

Table 1
Jurisdiction Share of Nonprofit Incorporations

Jurisdiction	Inc. Share	Adj. Inc. Share	Jurisdiction	Inc. Share	Adj. Inc. Share
Alabama	1.2%	-0.3%	Montana	0.6%	0.3%
Alaska	0.4%	0.2%	Nebraska	0.8%	0.3%
Arizona	1.2%	-0.9%	Nevada	0.5%	-0.4%
Arkansas	0.8%	-0.1%	New Hampshire	0.6%	0.1%
California	9.6%	-2.2%	New Jersey	2.6%	-0.1%
Colorado	2.1%	0.4%	New Mexico	0.6%	0.0%
Connecticut	1.6%	0.5%	New York	8.4%	2.4%
D.C.	1.8%	1.6%	North Carolina	2.5%	-0.6%
Delaware	1.2%	0.9%	North Dakota	0.4%	0.2%
Florida	4.3%	-2.1%	Ohio	4.1%	0.5%
Georgia	2.2%	-1.0%	Oklahoma	0.9%	-0.3%
Hawaii	0.5%	0.1%	Oregon	1.4%	0.1%
Idaho	0.4%	-0.1%	Pennsylvania	5.2%	1.3%
Illinois	3.7%	-0.1%	Rhode Island	0.5%	0.2%
Indiana	2.0%	0.0%	South Carolina	1.2%	-0.4%
Iowa	1.3%	0.4%	South Dakota	0.4%	0.2%
Kansas	1.1%	0.2%	Tennessee	1.7%	-0.4%
Kentucky	1.1%	-0.3%	Texas	5.7%	-3.0%
Louisiana	1.2%	-0.2%	Utah	0.6%	-0.4%
Maine	0.7%	0.3%	Vermont	0.5%	0.3%
Maryland	2.0%	0.2%	Virginia	2.7%	-0.1%
Massachusetts	3.4%	1.3%	Washington	2.3%	0.0%
Michigan	3.0%	0.0%	West Virginia	0.6%	0.1%
Minnesota	2.7%	1.0%	Wisconsin	2.3%	0.5%
Mississippi	0.7%	-0.2%	Wyoming	0.3%	0.2%
Missouri	2.1%	0.3%			

Note: Adjusted incorporation share is equal to the jurisdiction's incorporation share minus its share of the U.S. population.

California and New York lead for overall nonprofit incorporations. However, after adjusting for jurisdiction size, the picture is rather different, with D.C., Delaware, Massachusetts, and Pennsylvania joining New York as leaders.

The fact that incorporations closely track jurisdiction populations suggests that most nonprofits may simply be incorporating in their home jurisdiction. Consequently, I calculate and present nonprofits' rates of out-of-jurisdiction incorporation in Table 2.¹³⁵ Across the sample, I find this rate to be five percent.¹³⁶ This number is similar to out-of-jurisdiction incorporation rates

135. Form 990 requires nonprofits to disclose their address, which I reference as its "headquarters" or "home" jurisdiction to differentiate from the incorporation jurisdiction, which is the jurisdiction under whose laws the nonprofit incorporates.

136. Nonprofits incorporated out-of-jurisdiction in 80,579 firm-year observations, relative to 1,592,063 total firm-year observations.

for other types of privately held firms, which range from two percent to 7.5 percent,¹³⁷ and as shown in Table 2, it appears to have been increasing in recent years. Still, the number pales in comparison to publicly traded corporations, where roughly sixty percent of companies incorporate outside their home jurisdiction, most of them choosing Delaware.¹³⁸

Table 2
Percent of Foreign-Incorporated Nonprofits

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	All
Ratio	4.88%	5.33%	4.63%	4.69%	4.87%	5.05%	5.28%	5.21%	5.41%	5.85%	5.06%

To assess which jurisdictions attract out-of-jurisdiction nonprofit incorporations, I next restrict the analysis to those nonprofits that incorporate outside their headquarters jurisdiction. As discussed above, choosing to incorporate outside one's headquarters jurisdiction is a deliberate decision with meaningful ramifications for governance and regulatory oversight.¹³⁹ By limiting the sample to those nonprofits that incorporate out-of-jurisdiction, we can examine jurisdictions' attractiveness for nonprofit incorporations.

Table 3 provides two ways to address this issue. First, I provide each jurisdiction's share of out-of-jurisdiction incorporations, or the number of foreign nonprofits incorporated in the jurisdiction divided by the total number of sample-wide nonprofits that incorporate out-of-jurisdiction. Another way to assess jurisdictions' attractiveness for out-of-jurisdiction formations is to calculate the ratio of out-of-jurisdiction incorporations in that jurisdiction to nonprofits headquartered in that jurisdiction that incorporate elsewhere. Ratios above 1.0 would indicate the jurisdiction attracts more out-of-jurisdiction incorporations than it loses to foreign destinations, suggesting that jurisdiction is comparatively attractive to nonprofit organizers and management. Ratios with jurisdictions that have fewer than one thousand attracted or departing nonprofits over the ten-year period include an asterisk, to signify that these ratios may overstate their minor importance in the overall market for nonprofit incorporations.¹⁴⁰

137. See Jens Dammann & Matthias Schündeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis*, 55 J.L. & ECON. 741, 743, 746 (2012) (finding 7.42 percent of a sample of privately held LLCs with at least twenty employees formed out-of-jurisdiction); Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 81, 84 (2011) (finding 6.72 percent of a sample of privately held corporations with at least twenty employees formed out-of-jurisdiction); Kobayashi & Ribstein, *supra* note 57, at 114–15 tbl.1 (finding two percent of a sample of privately held LLCs formed out-of-jurisdiction).

138. Daines, *supra* note 41, at 1573.

139. See *supra* Section II.A.

140. See *supra* Table 3. Alaska, for instance, has the second-highest ratio of all nonprofits (6.30), but it attracts only 208 nonprofit-year incorporations over the ten-year period, and loses thirty-three, giving it minor significance in the nonprofit incorporations market. *Id.*

Table 3
Jurisdiction Shares of Out-of-Jurisdiction Incorporations

Jurisdiction	Share	Ratio	Jurisdiction	Share	Ratio
Alabama	0.64%	0.82*	Montana	0.42%	2.00*
Alaska	0.26%	6.30*	Nebraska	0.46%	1.22*
Arizona	0.96%	0.90*	Nevada	1.00%	1.92*
Arkansas	0.44%	1.62*	New Hampshire	0.49%	0.95*
California	6.64%	0.9	New Jersey	2.02%	0.64
Colorado	2.20%	0.67	New Mexico	0.42%	0.89*
Connecticut	1.11%	0.82	New York	7.58%	0.91
Delaware	16.98%	54.08	North Carolina	1.24%	0.5
District of Columbia	9.35%	1.15	North Dakota	0.22%	1.77*
Florida	3.06%	0.83	Ohio	2.28%	0.83
Georgia	1.97%	0.84	Oklahoma	0.69%	1.77*
Hawaii	0.17%	0.96*	Oregon	0.95%	0.82*
Idaho	0.35%	1.52*	Pennsylvania	2.49%	0.64
Illinois	5.64%	1.22	Rhode Island	0.24%	0.48*
Indiana	1.51%	0.89	South Carolina	0.76%	1.12*
Iowa	0.76%	1.48*	South Dakota	0.20%	0.70*
Kansas	0.80%	0.63	Tennessee	1.22%	0.66
Kentucky	0.83%	0.79*	Texas	3.08%	0.87
Louisiana	0.77%	1.93*	Utah	0.37%	0.83*
Maine	0.48%	1.44*	Vermont	0.39%	1.12*
Maryland	3.00%	0.6	Virginia	3.19%	0.31
Massachusetts	2.64%	0.95	Washington	1.56%	0.88
Michigan	1.47%	0.81	West Virginia	0.44%	2.32*
Minnesota	1.35%	0.56	Wisconsin	1.61%	0.72
Mississippi	0.40%	1.07*	Wyoming	0.27%	2.58*
Missouri	2.50%	1.33			

Note: "Share" is equal to the number of firm-years with incorporation in the jurisdiction but headquarters in another jurisdiction, divided by the total number of firm-year incorporations in non-headquarters jurisdictions (80,579). "Ratio" is the ratio, for each jurisdiction, of the number of firm-year foreign incorporations in that jurisdiction to the number of firm-year incorporations in other jurisdictions with headquarters in that jurisdiction. Asterisks signify jurisdictions with fewer than 1,000 attracted and departing nonprofits over the entire period.

The picture begins to resemble that of publicly traded corporations, with Delaware attracting the greatest share by a comfortable margin. Still, Delaware's position at the top is by no means dominant compared to other jurisdictions. Eighty-three percent of nonprofits forming out-of-jurisdiction incorporate in a place other than Delaware.

Washington, D.C., is the second-most popular location for out-of-jurisdiction incorporations, with just over half as many as Delaware. This outcome appears unique to the nonprofit space, as Washington, D.C., is usually not discussed as a meaningful choice for formations of other entity

types, like traditional corporations.¹⁴¹ I return to this interesting finding in Part IV.

Also of note are New York's and California's positions, ranking number three and number four in popularity, respectively. New York and California are often flagged by attorneys who advise nonprofits as states to avoid when incorporating, as they impose frustrating bureaucratic delays and regulatory requirements beyond those of most other jurisdictions.¹⁴² But despite that conventional wisdom, both states attract meaningful shares of out-of-jurisdiction nonprofit incorporations, suggesting a more complicated story that I return to in Part IV.

Turning to the ratio of attracted to departing nonprofits adds to the picture. While many jurisdictions attract large shares of out-of-jurisdiction nonprofit incorporations, only four—Delaware, Missouri, Illinois, and Washington, D.C.—attract more than they lose. Combining the ratios with the number of foreign nonprofit incorporations, Delaware and Washington, D.C., are the big players in this market. New York and California also attract large shares but lose even more.

Thus far the data suggest a market for foreign nonprofit incorporations, with a sizable share of nonprofits intentionally choosing to incorporate outside their home jurisdiction. Yet many more nonprofits choose to remain incorporated in their home jurisdiction. What explains the decision to incorporate out-of-jurisdiction? Intuitively, we might expect that comparatively small, local nonprofits have little to gain by incorporating elsewhere, but what more can be said? To answer this question, I conduct a series of regressions, which quantitatively assesses how different underlying nonprofit factors affect the likelihood that the firm will incorporate outside its headquarters jurisdiction in a particular year. Table 4 contains the results. Positive estimates signify that the factor increases the likelihood a nonprofit with that characteristic will incorporate outside its home jurisdiction.

141. See, e.g., Kobayashi & Ribstein, *supra* note 57, at 116 (finding 0.53 percent of LLCs that form out-of-jurisdiction form in Washington, D.C.).

142. See, e.g., *Why Delaware – The Most Popular State for New Businesses and New Nonprofits*, PERLMAN & PERLMAN (May 2, 2017), <https://www.perlmanandperlman.com/why-delaware-the-most-popular-state-for-new-businesses-is-also-the-state-we-recommend-for-new-nonprofits> [https://perma.cc/MC8V-DY5V] (noting that “New York’s, California’s, and Massachusetts’s most complex and onerous regulations” do not apply to nonprofits that incorporate elsewhere, an argument for incorporating in Delaware instead); J.J. Harwayne Leitner & Leanne C. McGrory, *The “Delaware Advantage” Applies to Nonprofits, Too*, BUS. L. TODAY, Nov. 2016, at 1–2 (“Most New York nonprofit practitioners vastly prefer forming corporations in Delaware over New York.”).

Table 4
Nonprofit Out-of-Jurisdiction Incorporation Likelihood Regressions

	(1)	(2)	(3)	(4)
Donations and Grants	-0.027*** (0.002)	-0.026*** (0.002)	-0.030*** (0.002)	-0.026*** (0.002)
Net Assets	0.106*** (0.004)	0.104*** (0.004)	0.073*** (0.005)	0.079*** (0.005)
Age	-0.561*** (0.014)	-0.555*** (0.015)	-0.521*** (0.015)	-0.468*** (0.015)
Number Voting Directors		-0.001 (0.000)	-0.001 (0.000)	-0.001 (0.000)
Board Independence (Percent)		-0.001 (0.001)	-0.004 (0.004)	-0.003 (0.003)
Net Unrelated Business Income			0.039*** (0.004)	0.052*** (0.004)
Total Revenue			0.066*** (0.007)	0.085*** (0.008)
Total Expenses			0.018*** (0.007)	0.021*** (0.008)
Total Salaries			-0.040*** (0.002)	0.006*** (0.002)
Bonds Issued			-0.035*** (0.005)	-0.012** (0.005)
(Lobby expenses)*(Engaged in Lobbying)			0.313*** (0.025)	0.357*** (0.026)
Employees (number)				-0.266*** (0.008)
Volunteers (number)				-0.025*** (0.005)
<i>Obs.</i>	1,482,640	1,462,664	1,399,591	1,399,591

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table 4 presents results for the sample as a whole, but as suggested by the theory in Part II, different types of nonprofits may prefer to incorporate in some jurisdictions more than others. Tables A1 through A4 in the Appendix therefore provide disaggregated results for the popular jurisdictions of Delaware, Washington, D.C., New York, and California. Those tables show results very similar to those of Table 4.

Given the number of observations, it is unsurprising that most coefficient estimates are statistically significant. The results show the strongest relationship appears to be based on size, with larger nonprofits—as determined by a variety of (but not all) measures—more likely to incorporate out-of-jurisdiction than smaller ones. Larger organizations with more assets, revenue, and expenses, more unrelated business income, and more lobbying expenses (assuming it is

an organization engaged in lobbying) incorporate outside their headquarters jurisdiction with greater likelihood.

However, some measures of firm size—donor contributions, the number of voting directors, bond issuance, the number of employees, and the number of volunteers—all reduce the likelihood that an organization incorporates outside its headquarters jurisdiction.

These results are broadly consistent with the theory of agency costs driving the incorporation decision that I described above.¹⁴³ A nonprofit's incorporation choice can affect its managerial agency costs by determining the law that governs internal governance, the courts that will apply the law, and the attorneys general who will monitor the nonprofit. Table 4 suggests that nonprofits with indicators of more severe agency costs are more likely to incorporate out-of-jurisdiction. The measures that reduce the likelihood a nonprofit incorporates elsewhere are all consistent with more monitoring by a nonprofit's stakeholders and hence lower agency costs. More donations and grants mean more donors with interest in overseeing the nonprofit to ensure donations are spent wisely. More voting directors on a nonprofit's board increases the likelihood of any one director identifying and correcting governance problems. More bond issuance implies more creditors who will monitor the nonprofit's financial condition. More employees and volunteers imply more people intimately familiar with the nonprofit's inner workings and therefore a greater likelihood of exposing problems with the firm.

On the other hand, the measures suggesting an increase in out-of-jurisdiction incorporation likelihood are consistent with a larger firm without concomitant greater oversight, suggesting a greater potential for nonprofit agency costs.¹⁴⁴ Nonprofits with more revenue, assets, income, and expenses are larger firms that are more difficult to monitor and that present greater returns to management that pursues its self-interest above the firm's interest.

These results cannot, however, determine *why* nonprofits with indicators of more severe agency costs are more likely to incorporate out-of-jurisdiction while nonprofits with less severe agency costs do not. If nonprofits with more severe agency cost indicators are more likely to incorporate out-of-jurisdiction, they may do so to choose “bottom” law to maximize personal gains at stakeholders' expense, exacerbating the agency cost issue. Or, nonprofits with greater agency cost indicators may incorporate out-of-jurisdiction to choose “top” law, attempting to mitigate agency cost concerns by opting into a legal regime that protects stakeholders. The next two Subparts disentangle this issue.

143. See *supra* Part II.

144. For discussion of agency costs in the nonprofit context, see Molk & Sokol, *supra* note 82, at 1513–14.

C. REINCORPORATION DECISIONS

Analysis of nonprofits' incorporation decisions suggests that an appreciable number of nonprofits are making calculated decisions to incorporate outside their headquarters jurisdiction. Delaware is the popular choice for out-of-jurisdiction incorporations, and nonprofits with greater agency costs seem more likely to incorporate out-of-jurisdiction. But, is Delaware's attraction, and the decision to incorporate out-of-jurisdiction, driven by a desire by management to abuse this agency cost problem, or to correct for it? Analyzing nonprofits' reincorporation decisions can help address both these related questions by identifying popular reincorporation destinations and the effects of reincorporation on nonprofits' operations.

Established nonprofits, just like traditional corporations, can reincorporate, changing their incorporation jurisdiction and therefore affecting the mix of law, courts, and attorney general oversight that will govern their internal affairs.¹⁴⁵ The NRA, for instance, recently announced plans to reincorporate so it could exit New York's regulatory environment.¹⁴⁶ To identify nonprofits that reincorporate for strategic reasons, I identify those nonprofits that change only their jurisdiction of legal incorporation, excluding nonprofits that change their headquarters jurisdiction alongside their incorporation jurisdiction. In total, 1,946 nonprofits meet these criteria. Table 5 presents the fifteen most popular reincorporation jurisdictions, as well as the jurisdictions from which nonprofits most commonly depart to reincorporate.

145. Some jurisdictions require nonprofits to receive permission from the attorney general or jurisdiction court of both the former and the new incorporating jurisdictions before allowing a merger like this. *See, e.g.*, Brody, *supra* note 64, at 952–54; Jenkins, *supra* note 70, at 1114–17. The IRS clarified in 2014 and 2018 that reincorporations did not require filing for a new federal tax exemption, which may have increased the appetite for reincorporations during the sample period. I.R.S. Priv. Ltr. Rul. 201446025 (Nov. 14, 2014); Rev. Proc. 2018-15, 2018-9 C.B. 379. However, because the guidance applied to all nonprofits in all jurisdictions, it should not have contributed to the principal results that follow involving the jurisdictions from which nonprofits reincorporate or the attributes of those nonprofits that choose to reincorporate.

146. *See supra* notes 1–3 and accompanying text.

Table 5
Nonprofit Reincorporation Choices

Jurisdictions Reincorporated To			Jurisdictions Reincorporated From		
Rank	Jurisdiction	Share	Rank	Jurisdiction	Share
1	District of Columbia	10.9%	1	New York	9.8%
2	Delaware	10.6%	2	District of Columbia	9.5%
3	New York	5.8%	3	Virginia	6.9%
4	Virginia	5.6%	4	Delaware	6.2%
5	California	5.5%	5	California	6.0%
6	Florida	5.1%	6	Illinois	4.3%
7	New Jersey	4.1%	7	Maryland	4.1%
8	Maryland	3.8%	8	Florida	4.1%
9	Texas	3.8%	9	Texas	3.9%
10	Illinois	3.5%	10	Pennsylvania	3.4%
11	Ohio	2.6%	11	Colorado	3.3%
12	Colorado	2.5%	12	Georgia	2.9%
13	Missouri	2.2%	13	Massachusetts	2.8%
14	Pennsylvania	2.2%	14	New Jersey	2.2%
15	Massachusetts	2.1%	15	Ohio	1.9%

Most jurisdictions have similar shares of reincorporation outflows and inflows. Delaware is the principal exception. In all, 10.6 percent of reincorporating nonprofits choose to incorporate in Delaware, while about half that amount change their incorporation jurisdiction from Delaware to another jurisdiction.

What explains the decision to reincorporate? Theory from Parts I and II, and the empirical results so far in Part III, suggest it may be an attempt by nonprofits either to minimize or to exacerbate agency costs. To assess which of these is more likely, I conduct an analysis on reincorporating nonprofits, quantifying the effects of the decision to reincorporate. I do so through the use of different fixed effects models, controlling for unobserved factors that remain constant over a period of time.

In corporate law, the variable of interest is typically a measurement of firm value, like return on assets or Tobin's *Q*.¹⁴⁷ Among nonprofits, however, choosing a single variable of interest is more difficult, because nonprofits have no profit maximization norm and therefore no single metric that captures either the severity of agency costs or the value of the firm. Therefore, following the nonprofit literature, I analyze multiple plausible measures of agency costs and firm value.¹⁴⁸ I examine four variables of interest: the

147. See, e.g., Peter Molk & Frank Partnoy, *The Long-Term Effects of Short Selling and Negative Activism*, 2022 ILL. L. REV. 1, 27–30. In corporate law, these measures are often chosen because agency costs in traditional corporations are conceptualized as affecting firm value, which is what agent-shareholders want maximized. See, e.g., Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 2014–15 (2018).

148. See, e.g., Ilona Babenko, Benjamin Bennett & Rik Sen, *Regulating CEO Pay: Evidence from the Nonprofit Revitalization Act* 6–7 (May 4, 2022), <https://papers.ssrn.com/sol3/papers.cfm?abstr>

administrative expense ratio,¹⁴⁹ which is the ratio of management and general expenses to total expenses; the log of occupancy plus office expenses; the log of salaries per employee; and loans to officers and directors. Each of these variables is directionally consistent with reincorporations either minimizing or exacerbating agency costs. If the reincorporation decision is tied to reducing agency costs, then we would expect reincorporations to be associated with a decrease in salaries and in loans to executives (agency costs of executives' setting employee salaries, including their own, or loaning funds from the nonprofit will decrease); or a decrease in administrative expense ratios and office and occupancy expenses. If, on the other hand, reincorporations increase agency costs, then we would expect the opposite association with some or all of these variables of interest. Or finally, if the reincorporation decision is made independent of agency cost considerations, then we would expect no relationship between these variables of interest and reincorporations.

These variables will not be perfect agency cost indicators in every instance. For example, a reincorporation decision may coincide with hiring more professional management and an increase in salaries independent of agency costs. However, for the sample as a whole, the variables can be useful indicators of agency costs.

Table 6 reports coefficient estimates for fixed effects regressions where the dependent variable is one of these four measures of nonprofit agency costs. For convenience, I report coefficient estimates only for "reincorporation," which capture the effect of reincorporation on the variable of interest.¹⁵⁰ Full regression results are in Appendix Tables A5 and A6. I estimate each variable of interest twice: once controlling simply for firm assets and age¹⁵¹; and once also controlling for the comprehensive set of variables of model (4) from Table 4. All regressions include firm- and year-fixed effects.

Panel A reports results for the full set of reincorporations, regardless of the jurisdiction to which the nonprofit reincorporates, while Panel B repeats the analysis for firms that reincorporate only to Delaware, the most popular jurisdiction for net reincorporations. Because the models include firm-level

act_id=3777576 [https://perma.cc/FL8M-NDGB] (using government grants and donor contributions, number of volunteers, administrative efficiency, and revenue per employee); Steven Balsam & Erica E. Harris, *The Impact of CEO Compensation on Nonprofit Donations*, 89 ACCT. REV. 425, 426 (2014) (donor contributions); Rajesh Aggarwal, Mark E. Evans & Dhananjay Nanda, *Nonprofit Boards: Size, Performance and Managerial Incentives*, 53 J. ACCT. & ECON. 466, 466–68 (2012) (number of programs, revenue, and spending on mission-related programs).

149. Administrative expense ratios are commonly used as a key component for charity ratings agencies. See, e.g., *How We Assess Charities' Transparency and Fiscal Responsibility*, CHARITY NAVIGATOR, https://www.charitynavigator.org/about-us/our-methodology/ratings/accountability-finance/? [https://perma.cc/35YS-6Q2K].

150. Specifically, "reincorporation" is a dummy variable taking a value of one for any years in which the nonprofit reincorporates or has already reincorporated and zero otherwise.

151. More specifically, I control for the log of these two variables.

fixed effects, estimates reveal reincorporation's effect on firm operations taking individual firm-specific characteristics into account.

Panel A of Table 6 shows that reincorporations are correlated with increases in office and occupancy expenses compared with those expenses before reincorporation. These increases are not driven by the costs of firms' moving their headquarters out-of-jurisdiction contemporaneously with their reincorporation, because I do not include firms that change headquarters within the reincorporation sample.

Table 6
Reincorporation and Agency Cost Measures

Panel A: Reincorporations to Any State								
	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
<i>Reinc.</i>	-0.032	0.084	0.124*	0.074	0.023	0.054**	-0.049	-0.055*
	(0.116)	(0.073)	(0.068)	(0.063)	(0.024)	(0.024)	(0.038)	(0.033)
Observations	1,471,222	1,390,162	1,481,356	1,398,364	926,958	872,413	1,481,600	1,398,592
Firm FE	Y	Y	Y	Y	Y	Y	Y	Y
Year FE	Y	Y	Y	Y	Y	Y	Y	Y
Add'l Controls	--	Y	--	Y	--	Y	--	Y
Panel B: Reincorporations to Delaware								
	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
<i>Reinc.</i>	-0.075	0.325	0.356***	0.227*	0.004	0.047	-0.025	-0.060
	(0.107)	(0.311)	(0.130)	(0.121)	(0.043)	(0.046)	(0.093)	(0.085)
Observations	1,471,222	1,390,162	1,481,356	1,398,364	926,958	872,413	1,481,600	1,398,592
Firm FE	Y	Y	Y	Y	Y	Y	Y	Y
Year FE	Y	Y	Y	Y	Y	Y	Y	Y
Add'l Controls	--	Y	--	Y	--	Y	--	Y

This Table reports the results from regressions where the dependent variables are different measures consistent with the presence of agency costs. Independent variables are the same as those included in Table 5 regressions. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table 6 reveals a mixed picture for the sample as a whole. Reincorporation is significantly associated with increases in two agency cost measures and decreases in one. But because jurisdictions vary in their strength of agency cost oversight, the estimates for the whole reincorporation sample might include firms reincorporating to "top" jurisdictions to minimize agency costs, and other firms reincorporating to "bottom" jurisdictions to maximize those costs, resulting in noisy estimates that sacrifice statistical significance. Noise is compounded by the fact that even if firms reincorporate to affect agency costs, they may not all reincorporate to affect the same agency costs.

The results from reincorporations to single jurisdictions may be more illuminating, as it is unlikely a single jurisdiction will attract both "top"-

and “bottom”-seeking reincorporations. One of the four agency cost measures—office and occupancy expenses—is significantly correlated with reincorporation to Delaware, while the other measures lack statistical significance. Reincorporating to Delaware appears more strongly correlated with increases in agency cost measures than reincorporation in general, suggesting nonprofits reincorporate to Delaware more often to increase agency costs than to reduce them, compared to the typical reincorporating firm.

As another independent method of assessing the reason for nonprofits’ out-of-jurisdiction incorporation decisions, the next subpart examines effects from a major change to New York nonprofit law.

D. APPETITE FOR LAW: THE CASE OF NEW YORK

The state of New York offers a final approach for analyzing nonprofits’ incorporation decisions. New York significantly changed its nonprofit corporation law in the Non-Profit Revitalization Act of 2013 (the “Act”), affecting internal governance matters while leaving attorney general oversight unchanged.¹⁵² This change allows for studying nonprofits’ responsiveness to internal governance rules by determining whether, after the Act, nonprofits’ likelihood of incorporating in New York changed relative to the pre-Act likelihood.

Prior to New York’s rules change, many had decried the state’s “administrative red tape that [was] needlessly confusing and burdensome to nonprofits and that often prompt[ed] New York-based charities to incorporate in another state having favorable laws, such as Delaware.”¹⁵³ Some of the Act addressed these shortfalls, attempting to streamline the formation and regulatory oversight progress.¹⁵⁴ But much of the Act accomplished an unrelated goal of strengthening nonprofits’ internal governance and oversight. The Act required all nonprofits to adopt a conflict of interest policy and, for

152. See Non-Profit Revitalization Act of 2013, 2013 N.Y. Sess. Laws ch. 549 (McKinney).

153. *The Non-Profit Revitalization Act of 2013 Overhauls New York Nonprofit Corporation Law*, MCGUIREWOODS, (Oct. 3, 2013), <https://www.mcguirewoods.com/client-resources/Alerts/2013/10/NY-Non-Profit-Revitalization-Act-2013> [https://perma.cc/BRR5-UWJM].

154. Among other things, the Act eliminated New York’s antiquated purpose classification system; streamlined review of mergers, dispositions of substantially all assets, and corporate purpose changes; modernized board and member meeting procedures by allowing meeting notices to be made electronically and for meetings to occur via videoconference; raised thresholds for financial reporting to the state; and eliminated additional levels of review for education-related nonprofits. See *id.*; SULLIVAN & CROMWELL LLP, *THE NEW YORK NONPROFIT REVITALIZATION ACT OF 2013 2–5* (2013), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_The_New_York_Nonprofit_Revitalization.pdf [https://perma.cc/PFE4-JEHK]; Jerald A. Jacobs & Dawn Crowell Murphy, *Proposed Reform of New York’s Charities and Nonprofits Laws Would Ease Burdens*, PILLSBURY (June 4, 2013), <https://www.pillsburylaw.com/en/news-and-insights/proposed-reform-of-new-york-charities-and-nonprofits-laws.html> [https://perma.cc/RQJ6-DVQR]; Lisa M. Hix, Susan E. Golden, Kristalyn J. Loson & Jeffrey S. Tenenbaum, *New York Nonprofit Revitalization Act Modernizes the State’s Laws, Enhances Governance and Oversight*, J. MULTISTATE TAX’N & INCENTIVES Mar.–Apr. 2014, at 7, 8.

nonprofits of a minimum size, a whistleblower protection policy.¹⁵⁵ It also enacted oversight requirements for large nonprofits' accounting and financial reporting processes,¹⁵⁶ imposed stringent standards for satisfying independent director requirements,¹⁵⁷ and banned related party transactions unless the board determined that the transaction was "fair, reasonable, and in the [nonprofit's] best interest."¹⁵⁸ Finally, the Act required that deliberations on compensation could not be attended, or voted on, by the beneficiary of those deliberations, to preserve the independence of executive compensation-setting meetings.¹⁵⁹ The Act was unanimously passed by New York's legislature in June 2013 and signed into law by the governor on December 18, 2013, with provisions taking effect starting July 1, 2014.¹⁶⁰

The Act provides the opportunity to study nonprofits' responsiveness to major changes in the law governing their internal affairs and to assess the impact of New York's strengthening its nonprofit law on its population of incorporated nonprofits. Most of the Act's enhanced governance requirements could be avoided simply by incorporating in another jurisdiction.¹⁶¹ If nonprofits account for statutory law when selecting their incorporation jurisdiction, then there should be a change in the tendency of New York-headquartered nonprofits to be incorporated in New York following the Act's passage. If the Act made it more desirable for nonprofits to incorporate in New York—nonprofits valued the increase in credible commitment to stakeholders that the law provided—then the Act should decrease the tendency of New York-headquartered nonprofits to incorporate elsewhere. On the other hand, if the Act were unattractive to nonprofits—nonprofits

155. SULLIVAN & CROMWELL, *supra* note 154, at 6–7.

156. *Id.*

157. Among other things, the director could not receive more than \$10,000 in compensation in any of the prior three years. *Id.*

158. *Id.* at 7.

159. *Id.* at 7–8.

160. Hix et al., *supra* note 154, at 8.

161. New York's statute implies that nonprofits incorporated in other jurisdictions will be subjected only to rules on member derivative actions, indemnification provisions for directors and officers, and mergers or consolidations of nonprofits. N.Y. NOT-FOR-PROFIT CORP. LAW § 1320 (McKinney 2021) (noting that foreign nonprofits will be subject to these sections, in addition to portions of the Act dealing with definitions, certificates, and corporate name and service of process); Leitner & McGrory, *supra* note 142, at 2 (“[F]oreign corporations are not subject to most of the New York Not-for-Profit Corporation Law provisions that are so burdensome to New York charities, such as the detailed and specific rules regarding conflict of interest policies, whistleblower policies, and investment policies.”). The statute, however, does not expressly say that foreign nonprofits will be subject *only* to these sections, making the ultimate conclusion tentative. *See, e.g.*, JULIE FLOCH & CANDICE METH, THE NONPROFIT REVITALIZATION ACT OF 2013, 11 (2014), <https://www.eisneramper.com/globalassets/industries/nonprofit-organizations/nonprofit-revitalization-act.pdf> [<https://perma.cc/3H6M-M4R7>] (noting that “[t]he Act is not explicit regarding its applicability to ‘foreign corporations’”).

prefer not to be subjected to enhanced governance controls—then effects in the opposite direction should be seen.

The methodological approach for studying this issue is a difference-in-differences analysis that compares New York–headquartered firms’ tendency to incorporate out of state (and choose non–New York law) pre- and post-Act to non-New York–headquartered firms’ tendency at the same time.¹⁶² Difference-in-differences analysis offers a valuable way to isolate the effects of a legal change on a variable of interest and is regularly used in empirical corporate law scholarship.¹⁶³ Table 7 reports coefficient estimates for “*Impact*,” the difference-in-differences indicator variable that captures the impact of New York’s law change on New York–headquartered firms’ tendency to incorporate elsewhere. Positive estimates signify an increased likelihood of incorporating elsewhere after the Act. I provide multiple estimates for each variable of interest, controlling for varying sets of relevant factors for the incorporation decision. The controls are the same as the specifications included in Table 4. For presentation purposes, I report only the difference-in-differences estimates for the variable of interest for each model. Full results are in Appendix Table A7.

Table 7
Impact of New York Law Change on New York–Headquartered
Nonprofits’ Out-of-Jurisdiction Incorporation

	(1)	(2)	(3)	(4)
<i>Impact</i>	0.277***	0.282***	0.258***	0.258***
	(0.033)	(0.033)	(0.034)	(0.034)
<i>Obs.</i>	1,482,640	1,462,664	1,399,591	1,399,591
<small>This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. <i>Impact</i> is a dummy variable equal to 1 for firms headquartered in New York in years 2014 and later, and 0 otherwise. Models add increasing sets of control variables, which are the same as corresponding models of Table 5. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.</small>				

Table 7 shows that New York’s changes to its nonprofit incorporation statute are strongly associated with a greater tendency of New York–headquartered firms to incorporate out-of-jurisdiction—either through reincorporation by existing firms, or initial out-of-jurisdiction formation for new firms. Incorporating elsewhere avoids much of the governance-related changes of New York’s Act,¹⁶⁴ suggesting that firms preferred not having to comply with the Act’s enhanced internal governance requirements.

162. For more on this technique, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* 236–42 (2009).

163. See generally, e.g., Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1 (2020) (analyzing impacts from court decisions on incorporation decisions).

164. See *supra* note 161 and accompanying text.

Other than the legal change, New York's nonprofit regulatory oversight body remained relatively uniform over the sample period. For example, the same state attorney general, Eric Schneiderman, began service three years before the Act took effect and continued for more than four years after.¹⁶⁵ Most of the Act-related incorporation changes should therefore be attributable to the Act's internal governance rule changes, rather than a different, yet contemporaneous, change in regulatory oversight.

Which New York nonprofits were most likely to incorporate elsewhere following the Act? One could imagine nonprofits favoring weak law might be more inclined to do so. However, so too might nonprofits favoring strong law. The Act's enhanced internal governance requirements do not come without cost. For instance, nonprofits with directors who did not meet the new standard for independence were required to find new directors,¹⁶⁶ and nonprofits without formal conflict of interest or whistleblower protection policies were required to adopt them.¹⁶⁷ Because of those costs, it might make sense for already well-governed nonprofits to reincorporate elsewhere, because New York's Act threatened to increase their operational costs without a concomitant benefit. I therefore calculate the impact of the reincorporation decision on the four agency cost factors from Table 6. I examine New York-headquartered firms that reincorporated outside New York after the Act, relative to firms remaining headquartered and incorporated in New York through the entire period, using the same difference-in-differences technique described before.

Over the data period, 103 New York-headquartered firms reincorporated from New York to another jurisdiction without changing their headquarters state, resulting in 592 firm-year observations for those firms. Table 8 assesses how agency costs measures vary between these New York firms that reincorporate, and New York firms that do not, presenting for convenience estimates only for "reincorporation," which captures the effect of reincorporation on the variable of interest. Full results are in Appendix Table A8. Firms that reincorporate outside New York post-Act have higher salaries per employee and office and occupancy expenses, indicating higher agency costs. Collectively, the results suggest that firms with the strongest agency cost controls were not the firms reincorporating following New York's law change; in fact, the opposite is more consistent with the data.

165. Deanna Paul & Corinne Ramey, *Eric Schneiderman Loses Law License for One Year*, WALL ST. J. (Apr. 27, 2021, 9:24 PM), <https://www.wsj.com/articles/eric-schneiderman-loses-law-licens-e-for-one-year-11619573054> [<https://perma.cc/6AFQ-PGVQ>].

166. See *supra* note 157 and accompanying text.

167. See *supra* note 155 and accompanying text.

Table 8
Reincorporation and Agency Cost Measures New York Firms

	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
<i>Reinc.</i>	0.117 (0.099)	0.270 (0.287)	0.566 (0.371)	0.393* (0.230)	0.714*** (0.127)	0.511*** (0.110)	-0.049 (0.123)	-0.040 (0.127)
Observations	114,302	108,391	115,359	109,296	71,166	67,546	115,378	109,31
Add'l Controls	--	Y	--	Y	--	Y	--	Y

This Table reports the results from regressions where the dependent variables are different measures consistent with the presence of agency costs. Add'l Controls are specified in Model (4) of Table 5. All models include year fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

In sum, the reincorporation results show (at least for New York's Act passage) not only that nonprofits are responsive to governance-related statutory law changes, but also that nonprofits prefer incrementally weaker governance requirements, rather than stricter ones. As with the earlier results on reincorporations, the results are consistent with a nonprofit preference for weaker oversight, and potentially greater agency costs, rather than stronger oversight and reduced agency costs.

IV. IMPLICATIONS

This Part develops implications from the preceding theoretical and empirical analyses. I break the implications into three groups. First, I investigate why out-of-jurisdiction incorporation is not more common among nonprofits. Then, I examine potentially troubling practices from those nonprofits that incorporate out-of-jurisdiction, which, although comparatively rare, still account for five percent of incorporations. Finally, I analyze how to improve nonprofit regulatory policy in light of existing incorporation practices.

A. WHY ISN'T THERE MORE INCORPORATION-SHOPPING?

The empirical analysis shows an appreciable number of nonprofits—five percent—incorporate outside their home jurisdiction, but this number is much less than the prevalence among publicly traded corporations, which is about sixty percent.¹⁶⁸ Why is the nonprofit number so comparatively small? I divide the answer into the same two groups of factors used to support the theory for out-of-jurisdiction incorporations: demand-side and supply-side incentives.

1. Demand-Side Breakdown

One way to explain comparatively low rates of out-of-jurisdiction nonprofit incorporation is that the theoretical advantages of incorporating in particular jurisdictions do not translate to practical benefits for nonprofit

168. See *supra* note 138 and accompanying text.

operations. Recall that the incorporation decision gives nonprofits the ability to commit strongly to their nondistribution constraint, maximizing the comparative advantage of the nonprofit organizational form, or weakly, maximizing management's value-extraction potential.¹⁶⁹ This signaling ability comes from the variation in jurisdiction law, courts, and state attorney general oversight that nonprofits can select through their incorporation decision.

At least three reasons may explain why nonprofits may care little about the signal sent by their incorporation decision. One reason is if selecting into a robust commitment offers little comparative market advantage to nonprofits. Why might this be? For one thing, stakeholder understanding of the nonprofit form's essential legal characteristic—its nondistribution constraint—is low.¹⁷⁰ So too is stakeholder awareness of whether a firm is incorporated as a nonprofit as opposed to another organizational form.¹⁷¹ If a nonprofit's stakeholders, unlike shareholders of publicly traded corporations, do not appreciate the signal sent by a costly incorporation in a high-commitment jurisdiction, then out-of-jurisdiction incorporation promises to impose costs with few benefits.

It could also be that even if stakeholders appreciate the value of incorporating in a strong commitment jurisdiction, incorporation still offers little marginal value to most nonprofits. The nonprofit legal regime is just one way of committing to higher-quality goods and services, and substitute mechanisms may offer similar commitments at lower cost. As Daniel Sokol and I have argued elsewhere, nonprofits can achieve similar advantages to a robustly enforced nondistribution constraint by instead accumulating a track record of honest dealing.¹⁷² Nonprofits that have already acquired firm-specific reputations through years of successful operations might therefore be unlikely to incorporate out-of-jurisdiction; doing so imposes more costs than benefits. Indeed, as Table 4 shows, older nonprofits—which have had time to develop firm-specific reputations—are significantly less likely to incorporate out-of-jurisdiction, consistent with this hypothesis.

These first two explanations might inform why nonprofits do not incorporate strategically to maximize their commitment to strong governance and oversight. They do not, however, explain why nonprofits fail to incorporate strategically to *minimize* their commitment, allowing management to extract value from the firm. Yet most nonprofits do not. Why? It could be that some nonprofit management teams are uninterested in a strategic race to the bottom and are instead driven by nonpecuniary motives that deter them from seeking jurisdictions with weak rules, like a commitment to a public

169. See *supra* Section II.A.

170. See, e.g., Steven E. Permut, Comment, *Consumer Perceptions of Nonprofit Enterprise: A Comment on Hansmann*, 90 YALE L.J. 1623, 1626–28 (1981).

171. *Id.*; Anup Malani & Guy David, *Does Nonprofit Status Signal Quality?*, 37 J. LEGAL STUD. 551, 555 (2008).

172. Molk & Sokol, *supra* note 82, at 1529–30.

purpose.¹⁷³ For others, out-of-jurisdiction incorporation may provide little benefit because nonprofits are not usually the targets of lawsuits involving allegations of internal governance failures, making lax rules supplied by the incorporation choice of minor importance. Nonprofit lawsuits are comparatively rare because nonprofits lack traditional owners—the class of actors typically relied upon to police internal governance.¹⁷⁴ Although the membership base may act as a substitute, members still lack the financial interest¹⁷⁵ and, in some jurisdictions, the legal basis to sue or even to exercise rights to examine corporate books and records that might generate a derivative suit.¹⁷⁶ And although attorneys general have the authority to sue, they rarely do.¹⁷⁷ If nonprofits are insulated from legal action, then neither jurisdiction law on governance requirements, nor the courts that will decide the law, will matter much to management. In that case, instead of incorporating out-of-jurisdiction, nonprofits might as well remain in their headquarters jurisdiction, saving on filing fees and remaining where, depending on their size and political clout, they may have comparatively more impact on court proceedings or legal developments.¹⁷⁸

Putting these explanations together, we would therefore expect to see some movement, principally driven by newer firms seeking to maximize their commitment through strong law and oversight; established firms with adequate commitments through substitute means seeking to minimize their oversight burdens; and other firms seeking to minimize oversight burdens to maximize agency costs. The preceding empirical results provide some support, with Table 3 showing comparatively high formation ratios in states offering relatively strong commitments, but reincorporation decisions and New York's regime change showing an appetite for minimal oversight.¹⁷⁹

173. Glaeser & Shleifer, *supra* note 76, at 102 (“[M]ost founders of non-profits . . . appear to have a strong altruistic interest in their causes.”).

174. Molk & Sokol, *supra* note 82, at 1499–1502.

175. *See id.* at 1500, 1505–06.

176. For more extended treatment of this issue, see Peter Molk, *Alternative Entity Inspection Rights*, in RESEARCH HANDBOOK ON SHAREHOLDER INSPECTION RIGHTS: A COMPARATIVE PERSPECTIVE 258, 266–68 (Randall S. Thomas, Paolo Giudici & Umakanth Varottil eds., 2023).

177. *See* Mayer & Wilson, *supra* note 88, at 494. Nevertheless, the prospect of an attorney general lawsuit is a key factor that makes incorporation choice relevant even if the statutory law does not. Therefore, we would expect relatively more out-of-jurisdiction incorporations for nonprofits than for privately held traditional corporations, which, like some nonprofits, may have contracted for individualized governance terms that make default statutory law less relevant and are not subject to external oversight based on the incorporation jurisdiction. Romano, *supra* note 97, at 413.

178. Jenkins, *supra* note 24, at 1169–72; Ayres, *supra* note 61, at 374–75.

179. *See supra* Table 3. The Table shows comparatively high out-of-jurisdiction formations in California, Massachusetts, and New York, which are reputed to have relatively robust attorney general monitoring. *See supra* note 96.

2. Supply-Side Breakdown

The supply-side story also suffers from problems. On the one hand, jurisdictions already vary in the quality of substantive nonprofit law and the quality of courts that apply that law,¹⁸⁰ both of which are key features determined by the incorporation jurisdiction. This variation is occurring even though, under current pricing systems, jurisdictions derive little revenue from attracting nonprofit incorporations.¹⁸¹

On the other hand, the supply-side story suffers in the rigor of attorney general oversight. The intensity with which attorneys general monitor nonprofits varies by jurisdiction,¹⁸² so theoretically state attorney general oversight can enhance or weaken a nonprofit's commitment to stakeholders. Yet in practice, attorneys general seem to be unpredictable monitors, more often driven by political ambitions rather than by the desire to ensure good nonprofit governance.¹⁸³ Jurisdictions could, of course, address the problem by removing nonprofit oversight from the purview of attorneys general offices, housing it within an independent body instead. Overwhelmingly, however, they have not.¹⁸⁴

It is puzzling that jurisdictions have not yet gone this route. Some of the explanation likely lies in the meager rewards to a jurisdiction that followed this path. Because of jurisdictions' low nonprofit incorporation fees, there is little short-term financial incentive to make a costly change like this one, even if the move could pay off in the long term. Some of the explanation could also be that most nonprofits are unconcerned with attorney general oversight, given the rarity with which attorney general power is currently wielded against nonprofits, giving jurisdictions little incentive to supply another approach.¹⁸⁵

It is worth observing how the failure to provide reliable attorney general oversight can feed into the lack of demand for out-of-jurisdiction incorporations. If jurisdictions wield their attorney general oversight to the disservice of nonprofits and their stakeholders, then nonprofits would be incentivized to minimize attorney general oversight, rather than to maximize it. In that case, nonprofits would be expected to incorporate more often in their headquarters jurisdiction rather than elsewhere. Incorporating in one's headquarters

180. See *supra* text accompanying note 71.

181. See *supra* notes 99–112 and accompanying text.

182. See *supra* notes 95–96 and accompanying text.

183. Brody, *supra* note 64, at 947–48.

184. *Attorneys General*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/attorneys-general> [<https://perma.cc/STP3-RNXD>] (attorneys general are elected in forty-three jurisdictions).

185. See, e.g., CINDY M. LOTT ET AL., CTR. ON NONPROFITS & PHILANTHROPY, STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 20 (2016), <https://www.urban.org/sites/default/files/publication/84161/2000925-State-Regulation-and-Enforcement-in-the-Charitable-Sector.pdf> [<https://perma.cc/K2RE-G7PN>] (finding thirty-six percent of surveyed attorneys general offices report nonprofit governance concerns as an area of attorney general enforcement).

jurisdiction¹⁸⁶ minimizes the number of monitoring attorneys general, minimizing regulatory oversight, and selects an attorney general who may be more subject to influence by a domestic nonprofit.¹⁸⁷ Incorporating in another jurisdiction adds another monitoring attorney general,¹⁸⁸ increasing the potential for unpredictable results.

B. WHAT TO MAKE OF THE EXISTING STROLL

Although most nonprofits incorporate in their headquarters jurisdiction, a sizable number (in both percent and in raw number) incorporate out-of-jurisdiction. What conclusions can be drawn from this fact? The incorporation decision fundamentally impacts the strength of a nonprofit's commitment to its nondistribution constraint by affecting the strength of regulatory and stakeholder oversight. It is therefore reasonable to assume that many of the nonprofits that incorporate out-of-jurisdiction do so intentionally to affect this level of oversight. But do nonprofits incorporate out-of-jurisdiction to increase or to decrease oversight? I explore both possibilities below.

1. A Stroll to the Bottom?

Nonprofits might incorporate out-of-jurisdiction to select weak attorney general oversight and weak law on internal governance, providing management the means to exacerbate agency costs and extract value from the firm. This outcome would be analogous to the feared "race to the bottom" of corporate law, although given the lower rate of nonprofit out-of-jurisdiction incorporations, the pace might be characterized as a "stroll" rather than a "race."

Some of the empirical results are consistent with a stroll to the bottom. The results show that nonprofits with indicators of greater agency costs are more likely to incorporate out-of-jurisdiction; that reincorporating nonprofits may have, in general, higher agency costs after reincorporation (although most of those measures are either weakly significant or not significant); and that New York's statutory increase in governance requirements coincided with a decreased probability of nonprofits' forming in New York.

The results also show that Delaware is the most popular destination for out-of-jurisdiction incorporations, and although Delaware incorporation brings the respected Delaware courts to decide legal disputes,¹⁸⁹ it also brings comparatively light regulatory oversight. Delaware has adopted a hands-off approach to nonprofit oversight. Unlike many other jurisdictions, Delaware

186. More precisely, we would not expect nonprofits to incorporate in a jurisdiction where they are not already subject to attorney general oversight. Because attorneys general, in every jurisdiction a nonprofit operates, have oversight authority, nonprofits could incorporate in a non-headquarters jurisdiction in which they nevertheless operate without increasing their regulatory burden.

187. Jenkins, *supra* note 24, at 1169.

188. Again, assuming the nonprofit incorporates in a jurisdiction in which it is not already subject to oversight because of conducting operations in that jurisdiction.

189. See Kahan & Kamar, *supra* note 46, at 694–95 n.50.

requires no approval by any state agency or the attorney general for charter amendments, mergers, or dissolutions.¹⁹⁰ Delaware does not require charities to register with any state office or provide any financial or other reports.¹⁹¹ And Delaware oversees charities through the generic Consumer Protection office of its Attorney General office, rather than through a branch dedicated to nonprofit oversight as with many other jurisdictions, generating the perception that Delaware engages in little meaningful nonprofit oversight.¹⁹²

Delaware therefore offers close to a blank slate upon which a nonprofit might craft efficient governance provisions unencumbered by mandatory rules or oversight, which may be desirable if monitoring in other states is, at best, ineffective and, at worst, destructive.¹⁹³ The problem is that the same system could—and, suggested by the data, *does*—instead provide the ideal means for less savory nonprofits to maximize agency costs. To the extent that nonprofits disproportionately incorporate in Delaware to maximize agency costs, then the resulting “stroll to the bottom” is a troubling outcome to which I return later in this Part.

2. A Stroll to the Top? Washington, D.C.’s Success

Undoubtedly, some nonprofits also incorporate out-of-jurisdiction to maximize efficiency rather than to maximize agency costs. Nonprofits might incorporate in a non-headquarters jurisdiction that offers strong law and regulatory oversight, because incorporating in that jurisdiction decreases the nonprofit’s cost of capital and increases its competitive advantage among stakeholders. But do any jurisdictions offer this type of attractive package to nonprofits? Is there any evidence of a stroll to the top in nonprofit governance?

The District of Columbia may provide an example. Recall that D.C. is strangely popular among out-of-jurisdiction nonprofit incorporations. It is one of the few major jurisdictions that attracts more out-of-jurisdiction nonprofits than it loses to other jurisdictions,¹⁹⁴ and it is the most popular location (by a slim margin over Delaware) for nonprofit reincorporations.¹⁹⁵ It turns out that D.C. bears many of the hallmarks of a jurisdiction that offers optimal nonprofit law, setting itself up as a “top” state.

First, D.C. has a relatively easy to understand body of nonprofit law. Unlike Delaware, D.C. breaks its nonprofit corporation law into a separate

190. Leitner & McGrory, *supra* note 142, at 1.

191. *Id.*

192. *Id.* at 2 (“Delaware does not have an attorney general with an active charity oversight function.”). Despite housing nonprofit oversight in the broad consumer protection unit, Delaware reported having one full-time equivalent attorney dedicated to monitoring charities. Jenkins, *supra* note 24, at 1129.

193. See *supra* text accompanying note 91.

194. See *supra* Table 3.

195. See *supra* Table 5.

statutory chapter, making it comparatively easy to navigate the legal provisions that apply to nonprofits as opposed to other types of corporations.¹⁹⁶ And unlike some states with a smaller nonprofit presence, D.C. has a relatively large number of nonprofits—1.8 percent of all incorporation-years in the sample period¹⁹⁷—which leads to relatively well-developed law that is relatively well-understood by lawyers.

Second, D.C., like Delaware, is a small jurisdiction without a major domestic business interest that might cause suboptimal development of its law.¹⁹⁸ Although D.C. law is formally approved by Congress, which raises the potential for a political influence on those laws, D.C. laws are first approved by both a local committee and the D.C. Council, blunting the potential national political influence.¹⁹⁹ Moreover, laws proposed by the D.C. Council automatically become law unless Congress affirmatively disapproves it, a power that Congress has exercised only rarely.²⁰⁰ D.C., like Delaware, is therefore relatively insulated from domestic business interests like “unions, environmental groups, local communities, or other special interests associated with [a company’s] physical plant or assets” that might impose undesirable influences on the jurisdiction’s nonprofit law.²⁰¹

Finally, D.C. is unique in having few higher political offices to which a monitoring attorney general might aspire, which mutes incentives to bring politically motivated nonprofit enforcement actions. Some have claimed “that A.G. stands not for attorney general but for aspiring governor,”²⁰² a sentiment that captures the greater political ambitions of many attorneys general. Yet D.C. has no governor, U.S. representatives, or U.S. senators to which an attorney general might aspire; indeed, its highest political office is mayor.²⁰³

196. Jerald A. Jacobs, Alvin Dunn, Julia E. Judish & Dawn Crowell Murphy, *The New DC Nonprofit Corporation Act*, PILLSBURY (Oct. 24, 2011), <https://www.pillsburylaw.com/en/news-and-insights/the-new-dc-nonprofit-corporation-act.html> [<https://perma.cc/6C63-7CDB>]; Leitner & McGrory, *supra* note 142, at 2–3.

197. See *supra* Table 1. Also, if we think that nonprofits incorporated out-of-jurisdiction are relatively more likely to generate litigation that clarifies the jurisdiction’s law, then D.C.’s larger share of out-of-jurisdiction incorporations becomes more important.

198. See, e.g., *The Top DC Area Employers*, GOODHART GRP. (Mar. 25, 2019), <https://www.thego.odhartgroup.com/top-dc-area-employers> [<https://perma.cc/DT48-5BQF>].

199. *Law 101*, D.C. OFF. CODE, <http://dcode.elaws.us/Home/Law101#Statutes> [<https://perma.cc/G5WS-ZT9Y>].

200. See, e.g., Aaron C. Davis, *House Committee Votes to Upend First D.C. Law in 23 Years*, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/local/dc-politics/house-committee-votes-to-upend-first-dc-law-in-23-years/2015/04/22/3a59c722-e877-11e4-9767-6276fc9boada_story.html [<https://perma.cc/7U85-G2WV>]. Of course, it could be that the threat of congressional override influences the laws that are passed by the Council, but since congressional override does not include any sort of sanction, this influence should be weak.

201. Macey & Miller, *supra* note 34, at 490.

202. Brody, *supra* note 64, at 946 (internal quotation marks omitted).

203. *District of Columbia*, GOVTRACK, <https://www.govtrack.us/congress/members/DC> [<https://perma.cc/PZ2R-TYME>].

Moreover, until 2015, D.C.'s attorney general was not publicly elected but instead was appointed by the mayor.²⁰⁴ D.C.'s attorney general is therefore comparatively better insulated from political pressures and ambitions than are attorneys general of other states. This insulation increases the likelihood that the attorney general will adopt a principled oversight of nonprofit governance, which might attract among nonprofits seeking to maximize their credible commitment to effective governance.

C. IMPROVING NONPROFIT REGULATORY POLICY

Finally, I turn to suggestions for how to improve nonprofit regulatory policy in light of the preceding empirical results and analysis. I divide these suggestions into two groups: those targeting nonprofits that incorporate out-of-jurisdiction and those targeting nonprofits that incorporate in their headquarters jurisdiction.

1. Nonprofits that Incorporate Out-of-Jurisdiction

Some nonprofits undoubtedly incorporate out-of-jurisdiction to select “top” law, but this number could certainly be higher. I therefore begin by considering how to encourage a more vigorous stroll to the top of nonprofit law.

One way to increase it would be for a jurisdiction to offer the type of credible commitment to good governance that could provide nonprofits an attractive market advantage, leading to more out-of-jurisdiction incorporations in that jurisdiction. The requisite features are a principled attorney general with active oversight of governance issues, a good set of nonprofit laws, and a trusted judiciary to handle governance disputes that proceed to litigation.

As just discussed, D.C. is an intriguing option, but in principle most any jurisdiction could achieve a dominant position given enough investment and time. No jurisdiction has yet emerged as the incorporation destination of choice, so the ensuing network effects that accrue to a dominant position and that make challenge difficult have not yet arisen.²⁰⁵

Delaware is another natural candidate for offering optimal nonprofit law. Delaware's general corporate law applies to nonprofits with few alterations,²⁰⁶ and although its law might benefit from a few more statutory distinctions between nonprofit and traditional corporations,²⁰⁷ essential pieces of good law are already present. Importantly, Delaware has a well-developed set of rules for managerial loyalty obligations that require putting the corporation's

204. See Martin Austermuhle, *Exit Interview: Karl Racine Reflects on His Eight Years as D.C. Attorney General*, DCIST (Dec. 29, 2022, 9:16 AM), <https://dcist.com/story/22/12/29/exit-interview-karl-racine-dc-attorney-general> [<https://perma.cc/4MHF-CHHT>].

205. See, e.g., Klausner, *supra* note 39, at 843–44; Kamar, *supra* note 39, at 1923.

206. See Leitner & McGrory, *supra* note 142, at 1–2.

207. See, e.g., Molk, *supra* note 176, at 266–68 (discussing how the optimal law for nonprofit inspection rights might differ from traditional corporations).

interest before management's.²⁰⁸ Because of the heightened potential for self-dealing transactions with nonprofit management, a well-developed fiduciary duty of loyalty is particularly helpful for optimal nonprofit law.

Delaware is also comparatively unique in having a highly regarded judiciary that decides corporate law disputes.²⁰⁹ This reputation for a commitment to quality is difficult to acquire, but it is a way to assure firms that governance disputes will be appropriately decided not only at the time of incorporation, but also into the future.²¹⁰ Other jurisdictions' efforts to mimic Delaware's success have been abandoned because of, among other factors, difficulty in replicating Delaware courts' reputation for handling corporate disputes.²¹¹ Delaware's existing reputation therefore reduces some of the difficulty in otherwise becoming an attractive home for nonprofits. And while it is true that Delaware's reputation has been built on publicly traded corporations, rather than nonprofits, this reputation spills over to other organizational forms given the similar agency cost and governance problems these firms confront.²¹²

Where Delaware is most lacking is in attorney general oversight, which currently is minimal. This problem can be relatively easily remedied by devoting resources to the attorney general's office to deal exclusively with nonprofit oversight. Although it would take an upfront investment of resources to accomplish this change, the costs could ultimately be paid back through increased nonprofit incorporation revenue, derived from an increasing number of nonprofits that incorporate in Delaware and an enhanced commitment to stakeholders, combined with the opportunity to increase the state's nonprofit franchise fee once Delaware achieves a market advantage in incorporations.²¹³

Jurisdictions could also facilitate out-of-jurisdiction incorporations by reducing regulatory barriers to incorporating out-of-jurisdiction. Some jurisdictions, like New York, simply do not allow companies to change their incorporation jurisdiction, necessitating a cumbersome process of forming a new nonprofit in the desired incorporation jurisdiction and merging the

208. See, e.g., Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 683-90 (2009).

209. See *supra* text accompanying note 49.

210. Molk, *supra* note 53, at 1123-25.

211. See, e.g., COMM'N ON CONN.'S LEADERSHIP IN CORP. & BUS. L., A REPORT TO THE CONNECTICUT GENERAL ASSEMBLY 8-9 (2015), <https://www.cga.ct.gov/ba/CTL/CBL/docs/Commission%20Final%20Report.pdf> [<https://perma.cc/LKH6-LD48>] (citing differences in Connecticut and Delaware courts' reputations for predictability and stability in their rulings among reasons to abandon Connecticut's efforts to supplant Delaware as the leader for corporate formations).

212. Molk, *supra* note 53, at 1173-74.

213. Delaware's nonprofit franchise fee currently is \$25 per year. See *Annual Report and Tax Instructions*, *supra* note 44. See generally Christopher M. Bruner, *Leveraging Corporate Law: A Broader Account of Delaware's Competition*, 80 MD. L. REV. 72, 81 (2021) (arguing that Delaware has an interest in diversifying its incorporation revenue stream "by expanding into new areas where the preexisting corporate law foundation might give Delaware a leg up").

original nonprofit into the new one.²¹⁴ While jurisdictions have an interest in ensuring the integrity of nonprofits operating in their jurisdiction, their oversight authority applies regardless of where the nonprofit is incorporated,²¹⁵ making incorporation restrictions difficult to justify. Some other jurisdictions, by contrast, make the process of reincorporation simpler and allow nonprofits to change their incorporation jurisdiction without justification.²¹⁶

In addition, some jurisdictions—namely California and New York—have taken the position that they do not recognize the internal affairs doctrine for nonprofits, instead applying California and New York law to foreign-incorporated nonprofits' internal affairs.²¹⁷ If a nonprofit's headquarters jurisdiction refuses to recognize the doctrine, then the benefits from incorporating elsewhere decrease significantly, as nonprofits lose choice-of-law benefits from the decision.²¹⁸ Facilitating out-of-jurisdiction incorporation would require abandoning this position.

One challenge with encouraging out-of-jurisdiction incorporations is to ensure nonprofits do not increasingly incorporate out-of-jurisdiction to maximize agency costs. Wise policy would not seek to increase the rate of any stroll to the bottom. I offer three ways to address this concern.

The simplest would be for state attorneys general to pay particularly close attention to the governance of nonprofits that incorporate out-of-jurisdiction in weak jurisdictions. Because nonprofits are subject to attorney general oversight of each jurisdiction in which they operate, this solution means nonprofits in multiple jurisdictions could not exacerbate agency costs by incorporating strategically, making "bottom" jurisdictions less attractive. State attorneys general already have access to nonprofits' incorporation jurisdiction through Forms 990, so flagging potentially problematic incorporations should be fairly easy to implement.

Another effective, implementable solution relies on existing nonprofit ratings companies, like GuideStar or Charity Navigator. Incorporating in jurisdictions with weak governance oversight is attractive to management only if stakeholders do not appreciate the significance of that incorporation decision and raise nonprofits' cost of doing business. If nonprofit ratings agencies

214. See, e.g., Leitner & McGrory, *supra* note 142, at 2 (noting that New York does not allow reincorporations of New York-incorporated nonprofits, although mergers are allowed after review by the New York Charities Bureau).

215. See *supra* notes 88–89 and accompanying text.

216. See, e.g., Leitner & McGrory, *supra* note 142, at 2 (contrasting New York's and Delaware's approach). See generally *Redomestication Matrix*, EMINUTES ATT'YS, <https://eminutes.com/redomestication> [<https://perma.cc/L4ZQ-2MBD>] (summarizing reincorporation options for various states and entity types).

217. See *supra* notes 67–71 and accompanying text.

218. Indeed, California's and New York's stance on the internal affairs doctrine may help explain why comparatively few nonprofits headquartered in these states choose to incorporate out-of-jurisdiction, given the disrepute with which many hold the nonprofit regimes of these states. See *supra* note 142.

factored “bottom” incorporation jurisdictions into their ratings decision, then stakeholders could easily take the incorporation decision into account. Although ratings produced by these agencies are imperfect,²¹⁹ they have been heavily influential, and explicit recognition of the incorporation jurisdiction by these agencies could prove an effective way of deterring undesirable incorporations.

A third, more ambitious solution would require significant changes to the way attorney general nonprofit oversight currently works but promises the greatest potential gains. As I have argued elsewhere with Daniel Sokol in detail, a system of unitary oversight, where the attorney general of only the incorporation jurisdiction monitors a nonprofit’s governance, could offer significant advantages.²²⁰ A unitary oversight system would maximize the governance effects of incorporation choice, in turn maximizing the gains from incorporating out-of-jurisdiction. A unitary oversight system also, however, maximizes the potential for a race to the bottom of nonprofit governance law. Fortunately, jurisdiction coordination (jurisdictions do not defer to oversight of incorporation jurisdictions below minimum standards) and market forces (large, sophisticated nonprofit stakeholders do not deal with nonprofits incorporated in weak jurisdictions) provide meaningful checks that may obviate the need for additional regulation.²²¹

2. Nonprofits that Incorporate In-Jurisdiction

A large percentage of nonprofits incorporate in their headquarters jurisdiction, and even if proposals are adopted to increase out-of-jurisdiction incorporations, in-jurisdiction incorporations will dominate for some time. How to improve regulatory policy for nonprofits that do not engage in strategic incorporation choices? One could, of course, try to improve regulatory policy in every jurisdiction, but that hope faces significant practical difficulties.

Instead, encouraging the popular nonprofit ratings companies such as GuideStar and Charity Navigator to include incorporation jurisdiction in their ratings may be the most practical way to achieve meaningful change. These companies, like ratings agencies in other industries, perform the valuable service of distilling complicated factors of a nonprofit’s operations into an easy to understand rating for the general public.²²² Given the importance that incorporation jurisdiction has on nonprofit oversight and stakeholder statutory

219. See, e.g., William MacAskill, *What Charity Navigator Gets Wrong About Effective Altruism*, STAN. SOC. INNOVATION REV. (Dec. 3, 2013), https://ssir.org/articles/entry/what_charity_navigator_gets_wrong_about_effective_altruism [<https://perma.cc/PDX7-9PZG>]; David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 257 (2009).

220. Molk & Sokol, *supra* note 82, at 1541–50.

221. *Id.* at 1548–50. The interested reader can find more comprehensive development of this proposal in the work with Daniel Sokol.

222. See, e.g., Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619, 620–21 (1999).

rights, incorporation jurisdiction could naturally feed into the ratings provided by these agencies.

Accounting for the incorporation jurisdiction in this way would have two beneficial follow-on effects. First, it would encourage established nonprofits to reincorporate from jurisdictions with weak laws and weak oversight, and it would steer new nonprofits away from incorporating in weak jurisdictions. If the ratings agency's score impacts stakeholders' willingness to patronize a nonprofit, then nonprofits have the incentive to incorporate in stronger jurisdictions, and the resulting incorporation shift will increase the average intensity monitoring intensity. Second, it would encourage nonprofits that do not change their incorporation from weak jurisdictions nevertheless to agitate for improved governance oversight within their headquarters jurisdiction, so that their incorporation choice does not negatively impact their rating. This exercise of nonprofit voice would increase the quality of nonprofit governance oversight in those jurisdictions that would most benefit from improvement.²²³

CONCLUSION

Most nonprofits incorporate in their headquarters jurisdiction, but a significant portion incorporates elsewhere, especially Delaware and D.C. The evidence suggests that nonprofits more often incorporate out-of-jurisdiction to exacerbate agency costs, rather than to minimize them. Fortunately, the changes to nonprofit regulatory policy suggested in this Article can improve nonprofit governance irrespective of where nonprofits ultimately decide to incorporate, generating superior policy outcomes for this one trillion-dollar sector.

223. These efforts, however, may suffer from the classic commons problem since individual nonprofits have the incentive to free ride on others' efforts to make regulatory improvements. Achieving coordination, perhaps through an industry or trade group, could help solve those problems. See Molk & Sokol, *supra* note 82, at 1528–29 (discussing how a similar problem likely impedes nonprofits' attempts at self-regulation).

APPENDIX

Table A1

Nonprofit Out-of-Jurisdiction Incorporation Likelihood Regressions:
Delaware

	(1)	(2)	(3)	(4)
Donations and Grants	-0.010*** (0.004)	-0.009** (0.004)	-0.018*** (0.004)	-0.016*** (0.004)
Net Assets	0.192*** (0.010)	0.189*** (0.010)	0.134*** (0.013)	0.136*** (0.014)
Age	-1.412*** (0.032)	-1.398*** (0.033)	-1.410*** (0.035)	-1.394*** (0.035)
Number Voting Directors		-0.002* (0.001)	-0.002* (0.001)	-0.002 (0.001)
Board Independence (Percent)		-0.004 (0.006)	-0.003 (0.004)	-0.003 (0.003)
Net Unrelated Business Income			0.027*** (0.008)	0.031*** (0.008)
Total Revenue			0.086*** (0.015)	0.090*** (0.016)
Total Expenses			-0.002 (0.013)	-0.002 (0.013)
Total Salaries			-0.019*** (0.004)	-0.008 (0.005)
Bonds Issued			-0.013 (0.012)	-0.006 (0.012)
(Lobby expenses)*(Engaged in Lobbying)			0.284*** (0.058)	0.298*** (0.059)
Employees (number)				-0.065*** (0.018)
Volunteers (number)				-0.023** (0.011)
<i>Obs.</i>	1,472,363	1,452,527	1,389,862	1,389,862

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A2
 Nonprofit Out-of-Jurisdiction Incorporation Likelihood Regressions:
 Washington, D.C.

	(1)	(2)	(3)	(4)
Donations and Grants	0.024*** (0.006)	0.024*** (0.006)	0.012* (0.006)	0.014** (0.006)
Net Assets	0.129*** (0.015)	0.127*** (0.015)	0.050** (0.020)	0.050** (0.020)
Age	-0.178*** (0.047)	-0.170*** (0.047)	-0.166*** (0.049)	-0.109** (0.051)
Number Voting Directors		-0.001* (0.000)	-0.001 (0.001)	-0.001 (0.001)
Board Independence (Percent)		-0.000 (0.000)	-0.000 (0.002)	-0.000 (0.002)
Net Unrelated Business Income			0.049*** (0.010)	0.054*** (0.010)
Total Revenue			0.082 (0.051)	0.121** (0.062)
Total Expenses			0.072 (0.049)	0.090 (0.060)
Total Salaries			-0.036*** (0.006)	0.001 (0.007)
Bonds Issued			-0.047*** (0.013)	-0.033*** (0.013)
(Lobby expenses)*(Engaged in Lobbying)			0.543*** (0.057)	0.562*** (0.057)
Employees (number)				-0.217*** (0.024)
Volunteers (number)				-0.008 (0.014)
<i>Obs.</i>	1,442,975	1,423,217	1,362,065	1,362,065

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A3
 Nonprofit Out-of-Jurisdiction Incorporation Likelihood Regressions:
 New York

	(1)	(2)	(3)	(4)
Donations and Grants	-0.019*** (0.006)	-0.016*** (0.006)	-0.016*** (0.006)	-0.011* (0.006)
Net Assets	0.069*** (0.014)	0.070*** (0.015)	0.041** (0.017)	0.046** (0.018)
Age	0.173*** (0.055)	0.191*** (0.055)	0.211*** (0.056)	0.286*** (0.057)
Number Voting Directors		-0.003** (0.001)	-0.003** (0.001)	-0.003** (0.001)
Board Independence (Percent)		0.000 (0.000)	-0.001 (0.003)	-0.001 (0.003)
Net Unrelated Business Income			0.061*** (0.012)	0.071*** (0.012)
Total Revenue			0.044 (0.028)	0.079** (0.036)
Total Expenses			0.042 (0.026)	0.057* (0.032)
Total Salaries			-0.033*** (0.006)	0.019** (0.008)
Bonds Issued			-0.084*** (0.020)	-0.061*** (0.020)
(Lobby expenses)*(Engaged in Lobbying)			0.268*** (0.078)	0.300*** (0.078)
Employees (number)				-0.299*** (0.029)
Volunteers (number)				-0.022 (0.016)
<i>Obs.</i>	1,336,961	1,319,339	1,261,495	1,261,495

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A4
 Nonprofit Out-of-Jurisdiction Incorporation Likelihood Regressions:
 California

	(1)	(2)	(3)	(4)
Donations and Grants	-0.014** (0.007)	-0.010 (0.007)	-0.013* (0.007)	-0.009 (0.007)
Net Assets	0.109*** (0.013)	0.111*** (0.013)	0.093*** (0.016)	0.096*** (0.017)
Age	-0.442*** (0.045)	-0.416*** (0.046)	-0.352*** (0.047)	-0.284*** (0.048)
Number Voting Directors		-0.001 (0.003)	-0.001 (0.002)	-0.001 (0.002)
Board Independence (Percent)		-0.472*** (0.165)	-0.462*** (0.165)	-0.379** (0.165)
Net Unrelated Business Income			0.011 (0.014)	0.025* (0.014)
Total Revenue			0.045 (0.031)	0.076** (0.038)
Total Expenses			0.062* (0.033)	0.076* (0.040)
Total Salaries			-0.049*** (0.006)	0.007 (0.007)
Bonds Issued			-0.101*** (0.032)	-0.075** (0.032)
(Lobby expenses)*(Engaged in Lobbying)			0.196** (0.091)	0.245*** (0.091)
Employees (number)				-0.345*** (0.029)
Volunteers (number)				-0.011 (0.018)
<i>Obs.</i>	1,333,596	1,308,127	1,251,023	1,251,023

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A5
Reincorporation and Agency Cost Measures
Full Sample

	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Reinc.	-0.032 (0.116)	0.084 (0.073)	0.124* (0.068)	0.074 (0.063)	0.023 (0.024)	0.054** (0.024)	-0.049 (0.038)	-0.055* (0.033)
Donations and Grants	0.026 (0.017)	0.187 (0.169)	0.070*** (0.002)	0.085*** (0.001)	0.018*** (0.001)	0.018*** (0.001)	0.002*** (0.001)	0.002*** (0.000)
Net Assets	-0.051* (0.030)	-0.286 (0.262)	0.114*** (0.002)	0.074*** (0.002)	0.032*** (0.002)	0.038*** (0.002)	-0.007*** (0.001)	-0.014*** (0.001)
Age	0.057 (0.058)	0.533 (0.566)	0.080 (0.054)	0.463*** (0.010)	-0.047* (0.027)	-0.123*** (0.005)	-0.006 (0.019)	-0.079*** (0.004)
Num. Voting Directors		-0.443 (0.648)		0.292*** (0.008)		0.032*** (0.005)		-0.040*** (0.003)
Bd. Independ.		-0.000 (0.000)		0.000*** (0.000)		-0.000*** (0.000)		-0.000 (0.000)
Net Unrelated Bus. Income		0.044 (0.034)		0.020*** (0.001)		0.004*** (0.001)		0.001 (0.001)
Total Revenue		-1.347 (1.371)		-0.004 (0.003)		-0.009** (0.004)		0.003** (0.001)
Total Expenses		1.642 (1.650)		-0.008** (0.003)		-0.111*** (0.005)		0.001 (0.001)
Total Salaries		-0.137 (0.138)		0.166*** (0.001)		0.154*** (0.003)		0.006*** (0.000)
Bonds Issued (Lobby Exp.)*		0.021 (0.021)		0.034*** (0.002)		0.012*** (0.001)		-0.002 (0.001)
Employees (number)		0.000 (0.000)		0.003*** (0.000)		-0.001*** (0.000)		0.000 (0.000)
Volunteers (number)		0.000 (0.000)		0.000*** (0.000)		0.000*** (0.000)		-0.000 (0.000)
Obs.	925,679	925,679	925,679	925,679	925,679	925,679	925,679	925,679

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A6
Reincorporation and Agency Cost Measures:
Delaware

	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Reinc.	-0.075 (0.107)	0.325 (0.311)	0.356*** (0.130)	0.227* (0.121)	0.004 (0.043)	0.047 (0.046)	-0.025 (0.093)	-0.060 (0.085)
Donations and Grants	0.026 (0.017)	0.187 (0.169)	0.070*** (0.002)	0.085*** (0.001)	0.018*** (0.001)	0.018*** (0.001)	0.002*** (0.001)	0.002*** (0.000)
Net Assets	-0.051* (0.030)	-0.286 (0.262)	0.114*** (0.002)	0.074*** (0.002)	0.032*** (0.002)	0.038*** (0.002)	-0.007*** (0.001)	-0.014*** (0.001)
Age	0.058 (0.058)	0.533 (0.566)	0.079 (0.054)	0.463*** (0.010)	-0.047* (0.027)	-0.123*** (0.005)	-0.006 (0.019)	-0.079*** (0.004)
Num. Voting Directors		-0.443 (0.648)		0.292*** (0.008)		0.032*** (0.005)		-0.040*** (0.003)
Bd. Independ.		-0.000 (0.000)		0.000*** (0.000)		-0.000*** (0.000)		-0.000 (0.000)
Net Unrelated Bus. Income		0.044 (0.034)		0.020*** (0.001)		0.004*** (0.001)		0.001 (0.001)
Total Revenue		-1.347 (1.371)		-0.004 (0.003)		-0.009** (0.004)		0.003** (0.001)
Total Expenses		1.642 (1.650)		-0.008** (0.003)		-0.111*** (0.005)		0.001 (0.001)
Total Salaries		-0.137 (0.138)		0.166*** (0.001)		0.154*** (0.003)		0.006*** (0.000)
Bonds Issued (Lobby Exp.)*		0.021 (0.021)		0.034*** (0.002)		0.012*** (0.001)		-0.002 (0.001)
Employees (number)		0.000 (0.000)		0.003*** (0.000)		-0.001*** (0.000)		0.000 (0.000)
Volunteers (number)		0.000 (0.000)		0.000*** (0.000)		0.000*** (0.000)		-0.000 (0.000)
Obs.	925,679	925,679	925,679	925,679	925,679	925,679	925,679	925,679

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A7
Impact of New York Law Change on New York–Headquartered Nonprofits’
Out-of-Jurisdiction Incorporation

	(1)	(2)	(3)	(4)
<i>Impact</i>	0.277*** (0.033)	0.282*** (0.033)	0.258*** (0.034)	0.258*** (0.034)
Donations and Grants	-0.027*** (0.002)	-0.026*** (0.002)	-0.030*** (0.002)	-0.026*** (0.002)
Net Assets	0.106*** (0.004)	0.104*** (0.004)	0.073*** (0.005)	0.079*** (0.005)
Age	-0.561*** (0.014)	-0.555*** (0.015)	-0.520*** (0.015)	-0.468*** (0.015)
Number Voting Directors		-0.001 (0.000)	-0.001 (0.000)	-0.001 (0.000)
Board Independence (Percent)		-0.001 (0.001)	-0.004 (0.004)	-0.003 (0.003)
Net Unrelated Business Income			0.039*** (0.004)	0.052*** (0.004)
Total Revenue			0.066*** (0.007)	0.085*** (0.008)
Total Expenses			0.018*** (0.007)	0.021*** (0.008)
Total Salaries			-0.040*** (0.002)	0.006*** (0.002)
Bonds Issued			-0.035*** (0.005)	-0.012** (0.005)
(Lobby expenses)*(Engaged in Lobbying)			0.313*** (0.025)	0.357*** (0.026)
Employees (number)				-0.266*** (0.008)
Volunteers (number)				-0.026*** (0.005)
<i>Obs.</i>	1,482,640	1,462,664	1,399,591	1,399,591

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. *Impact* is a dummy variable equal to 1 for firms headquartered in New York in years 2014 and later, and 0 otherwise. Models add increasing sets of control variables, which are the same as corresponding models of Table 5. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.

Table A8
 Reincorporation and Agency Cost Measures:
 New York Firms

	Expense Ratio		Off. + Occ. Expenses		Salary Per Employee		Loans to Execs.	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Reinc.	0.117 (0.099)	0.270 (0.287)	0.566 (0.371)	0.393* (0.230)	0.714*** (0.127)	0.511*** (0.110)	-0.049 (0.123)	-0.040 (0.127)
Donations and Grants	-0.023*** (0.005)	-0.027 (0.023)	0.180*** (0.005)	0.070*** (0.005)	0.021*** (0.003)	0.006** (0.002)	0.014*** (0.001)	0.011*** (0.001)
Net Assets	-0.022 (0.021)	-0.041 (0.043)	0.380*** (0.011)	0.021** (0.011)	0.102*** (0.007)	0.044*** (0.007)	-0.010*** (0.003)	-0.013*** (0.003)
Age	0.096*** (0.023)	0.051 (0.043)	0.771*** (0.038)	0.145*** (0.033)	-0.175*** (0.019)	-0.267*** (0.015)	-0.101*** (0.013)	-0.082*** (0.014)
Num. Voting Directors		0.025 (0.024)		0.269*** (0.036)		-0.001 (0.017)		-0.072*** (0.013)
Bd. Independ.		-0.000 (0.001)		-0.004 (0.007)		-0.004* (0.002)		-0.001 (0.001)
Net Unrelated Bus. Income		0.025 (0.022)		0.049*** (0.009)		0.021*** (0.003)		0.003 (0.004)
Total Revenue		0.006 (0.016)		0.039** (0.018)		0.010 (0.030)		-0.002 (0.007)
Total Expenses		-0.033 (0.042)		0.128*** (0.018)		-0.192*** (0.034)		-0.002 (0.006)
Total Salaries		0.037 (0.034)		0.302*** (0.005)		0.368*** (0.017)		0.012*** (0.002)
Bonds Issued		0.002 (0.003)		0.030*** (0.008)		0.020*** (0.002)		-0.003 (0.004)
(Lobby Exp.)*		-0.006 (0.006)		0.273*** (0.038)		0.162*** (0.015)		0.020 (0.051)
Employees (number)		-0.000* (0.000)		0.002*** (0.000)		-0.001*** (0.000)		-0.000 (0.000)
Volunteers (number)		0.000 (0.000)		0.000*** (0.000)		-0.000* (0.000)		-0.000*** (0.000)
Obs.	71,081	71,081	71,081	71,081	71,081	71,081	71,081	71,081

This Table reports the results from logit regressions where the dependent variable is an indicator variable taking a value of 1 when the firm is incorporated outside its headquarters jurisdiction, and 0 otherwise. All financial independent variables are the natural log of the dollar amount, and "age" is the natural log of the firm's age in years. Employees and volunteers are winsorized at the 99% level to correct for outlier observations. Exempt organization types are relative to 501(c)(3) organizations. All specifications include jurisdiction, fiscal year, and 501(c) exemption type fixed effects. * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors in parentheses, clustered at the firm level.