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## Forum-Selection Provisions in Corporate "Contracts"

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## FORUM-SELECTION PROVISIONS IN CORPORATE “CONTRACTS”

Helen Hershkoff & Marcel Kahan\*

*Abstract:* We consider the emergent practice of including clauses in corporate certificates of incorporation or bylaws that specify an exclusive judicial forum for lawsuits. According to their proponents and most courts that have considered the question, such forum-terms are, and should be, enforceable as contractual choice-of-forum provisions.

We argue that treating corporate charter and bylaw forum-terms as a matter of ordinary contract doctrine is neither logical nor justified. Because charters and bylaws involve the state in ways that are at odds with private-ordering principles and because they entail only a limited form of “consent,” an analysis of enforceability must account for the hybrid nature—public and private—of such terms. Specifically, the state’s role should render forum-terms invalid that oust federal courts of diversity jurisdiction. Likewise, because of a lack of any meaningful consent, a forum-term that applies to a claim that is neither derivative nor brought by a shareholder should not be enforced. In other situations, courts should consider, before enforcing a corporate forum-term, whether adjudicating the entire dispute in the designated forum would be efficient (e.g., whether the court has subject-matter jurisdiction over all claims) or fair (e.g., whether the procedural rules, including the limitations period, of the designated forum are substantially more advantageous to the parties who decided to adopt the forum-term than those of the state that supplies the substantive law). In some cases, efficiency and fairness factors will argue against the forum-term’s enforcement.

On the other hand, several factors in other corporate settings and, in particular, in merger-related representative suits, may tip the balance towards enforcement. First, the fact that “consent” by class members to these suits is also limited counter-balances concerns about the limited consent shareholders may have given to the forum-term. Second, a forum-term reduces the ability to avoid the crack-down on “disclosure-only” settlements—that provide broad releases, but entail minimal recovery—that Delaware courts have embarked on.

Finally, we consider the implications of corporate forum-terms to debates about interstate competition for incorporation and for corporate litigation. A state may adopt forum-term legislation to enhance its attractiveness as a corporate domicile or to protect shareholders in domestic corporations. However, legislation that discriminates against out-of-state courts and seeks to centralize corporate litigation in the state’s own courts for the benefit of its local bar may be vulnerable to non-enforcement in the courts of sister states.

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## INTRODUCTION

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “Whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>1</sup>

What is a corporation, and why does it matter? A century ago, the U.S. Supreme Court treated the corporation as a creature of the state, making it subject to any condition that a state chose to impose.<sup>2</sup> “The only rights” a corporation could claim, Justice Taney explained in *Bank of Augusta v. Earle*,<sup>3</sup> “are the rights which are given to it” in the corporation’s charter, and “not the rights which belong to its members as citizens of a state.”<sup>4</sup>

1. LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 205 (1934).

2. See Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 *BROOK. L. REV.* 767, 768 (1989) (describing the theory).

3. 38 U.S. (13 Pet.) 519 (1839).

4. *Id.* at 587.

The Court eventually retreated from this view, granting the corporation procedural rights against the federal and state governments under the Due Process Clause,<sup>5</sup> and later according it protection for speech otherwise within the scope of the First Amendment.<sup>6</sup> Despite this doctrinal shift, the Court saw no contradiction in rejecting a challenge under the Commerce Clause to anti-takeover legislation, relying upon the earlier conception of the corporation as a creature of the state.<sup>7</sup>

On a separate track, finance scholars cast the corporation as a contract or as a nexus of contracts.<sup>8</sup> Within the corporation-as-contract model, corporate law—and especially the corporate law of Delaware, as the state with the premier corporate law in the United States—is said to function as an enabler of corporate choice, free of public regulation.<sup>9</sup> Not surprisingly, the existing legal landscape has been criticized as incoherent and inconsistent.<sup>10</sup>

Nevertheless, what is clear is that how courts characterize the corporation significantly affects legal doctrines that impact not only the corporation, but also third parties such as shareholders, vendors, and political candidates. The characterization question is important even for the most technical sounding rules of corporate practice. In this Article, we consider an emergent practice—including a clause in a corporation’s charter or bylaws that specifies and so limits where lawsuits may be filed—as a window into larger issues of state power and private ordering.

So far, state courts and lower federal courts that have considered the question have applied a contractual approach to determining whether

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5. See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (noting that it is well-established that the corporation is entitled to equal protection under the Fourteenth Amendment); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (state’s exercise of personal jurisdiction over out-of-state corporation must comply with Due Process Clause of Fourteenth Amendment).

6. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (“The Court has recognized that First Amendment protection extends to corporations.”).

7. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987).

8. See Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). The nexus-of-contracts conception of the corporation has many critics. See, e.g., Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 819 n.2 (1999) (“The conception has never lacked critics.”).

9. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989) (referring to the “voluntary adventure” of corporate investing).

10. See Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 797 n.69 (“Supreme Court rulings have not adopted a consistent view of corporate personhood.”). But see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 100 (2014) (“The Court adopts a consistent approach, but the approach proceeds right-by-right, rather than by starting with a theory of organizations or corporations as constitutional actors.”).

corporate forum-terms are valid or enforceable.<sup>11</sup> It is old news that the parties to a contract are allowed to do things that the state cannot. Quite apart from specifying terms like price or quality, ordinary commercial contracts regularly include clauses saying where the parties to the contract can sue should a dispute arise.<sup>12</sup> The U.S. Supreme Court has upheld the validity of contractual forum-selection terms under contract principles, on the view that it is efficient and fair to let the parties decide where and how to litigate.<sup>13</sup> Under the corporation-as-contract conception, permitting a corporate charter or bylaw, the constitutive documents of a corporation, to specify where shareholders can sue the company would seem the logical next doctrinal step.<sup>14</sup> Indeed, a leading corporate lawyer has called the use of forum-terms in corporate charters and bylaws simply “another brick in the wall” of private ordering.<sup>15</sup>

We say: not so fast. Treating corporate charter and bylaw forum-terms as a matter of ordinary contract doctrine is neither logical nor justified. No doubt, there is a family resemblance between a corporate charter or bylaw and an ordinary contract.<sup>16</sup> But a corporation’s charter and bylaws are no ordinary contracts. Rather, they are hybrid legal structures that provide a mechanism for collective choice in the context of substantial state regulation and straddle the public-private divide in ways that make them quite dissimilar from ordinary contracts. Indeed, their unusual

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11. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011) (discussing the Court’s contractual approach to forum-selection terms).

12. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1511 (2009) (reporting evidence “that choice of law and choice of forum provisions are negotiated in the material contracts of public firms”).

13. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972) (upholding validity of forum-term if “it is freely bargained for and contravenes no important public policy of the forum”); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2089 (2009) (discussing the autonomy rationale for enforcement of forum-selection terms by New York courts).

14. See George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 611 (2016) (“By conceptualizing the corporation as a collection of negotiated agreements between the firm and individual shareholders, proponents of ex-ante governance defend unilateral bylaw initiatives as the permissible product of flexible private ordering.”); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 531 (2016) (urging “expansive use” of tailored procedure for corporate governance).

15. William Savitt, *Forum-Selection Bylaws—Another Brick in the Wall*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE & FIN. REG. (Apr. 10, 2016), <https://corp.gov.law.harvard.edu/2016/04/10/forum-selection-bylaws-another-brick-in-the-wall/> [<https://perma.cc/UAV7-Q8DJ>].

16. See Robert Borowski, *Combatting Multiforum Shareholder Litigation: A Federal Acceptance of Forum Selection Bylaws*, 44 SW. L. REV. 149, 150 (2014) (“[B]ylaws are generally treated as contracts between corporations and their shareholders.”); Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 323 (2015) (“[C]orporate bylaws are merely contractual agreements between the corporation, its directors, and the stockholders.”).

features make applying a contractual paradigm to corporate forum-terms vulnerable to two significant challenges.

First, corporate charters and bylaws involve a type of consent that often is only distantly related to contract principles. Even academic proponents of the corporation-as-contract model admit that terms added after the purchase of the stock or at some later point are contractually suspect.<sup>17</sup> These so-called mid-stream amendments do not bear a hallmark of consent equivalent to ordinary contracts. The absence of consent raises familiar questions about the fairness of compelling adherence to terms that do not reflect agreement or preference.

Second, corporate charters and bylaws involve the state in ways that are at odds with private-ordering principles. State judicial decisions routinely call the state a party to the corporate “contract” of a domestic corporation.<sup>18</sup> But the state reserves rights that typically are not a part of an ordinary contract—above all, the unilateral right to enact laws that retroactively modify or render invalid aspects of the corporate-governance structure. States, however, operate under legal constraints that do not apply to private actors. These constraints are particularly pronounced in the context of laws that restrict access to courts or disfavor the interests of other states. Thus, the Constitution generally does not permit a state to adopt a “forum-selection” statute that eliminates a party’s right to sue in the courts of a sister state or in federal court. Should the notionally private corporate “contract” be subject to these constraints imposed on the state because the state is considered to be a party to the contract?<sup>19</sup> Conversely, should the intermediary of the “corporate contract” permit the state to achieve indirectly goals that it could not achieve directly because of constitutional limits on government power?

These questions have current importance. Delaware, the state in the forefront of corporate law in the United States, amended its law in 2015 to authorize companies to adopt an exclusive forum for corporate litigation through a charter or bylaw provision, provided that Delaware is

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17. See, e.g., Easterbrook & Fischel, *supra* note 9, at 1442–44; Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1822 (1989) (arguing the contractual view of corporation offers strong reasons to limit mid-stream amendments).

18. *Infra* section II.A.

19. Cf. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549, 1576 (2014) (considering whether the fact that the poison pill is a private arrangement insulates it from a preemption challenge under the Williams Act, given the extent to which state-law rules enable the practice and “are critical to the extent to which the pill empowers incumbents to block tender offers”).

among the selected fora.<sup>20</sup> Corporations, in increasing numbers, have adopted such provisions.<sup>21</sup> The validity of such a term within Delaware, and its enforceability in other states, go to core matters of judicial federalism and corporate governance.

Moreover, even if corporate forum-terms can be justified, corporations have started to use the contractual paradigm to adopt provisions that have farther reaching effects on jurisdictional doctrine and so on the scope of due process protections. In particular, many Delaware corporations have begun to include shareholder deemed-consent provisions in their charters and bylaws that postulate that a shareholder who bought stock after the term was added shall be “deemed” to have “consented” to personal jurisdiction in Delaware to enforce the forum-selection term if that shareholder files an action in a different court.<sup>22</sup> In our view, a state could not mandate such a result, but it is a result that very quickly could become entrenched through the reflexive—and, in our view, inappropriate—application of the contractual approach.

Although the contractual paradigm is not a sufficient basis for the blanket enforcement of corporate forum-terms, we recognize that, in some situations, corporate forum-terms may be beneficial. Arguably, their emergence in corporate practice is part of a strategy to curb abuses in representative litigation, with the Delaware judiciary as chief designer of that strategy. Delaware judges have commenced a crack-down on settlements in corporate disputes that addresses the dual problem of settlements with high attorneys’ fees and minimal recovery, coupled with broad releases that may bar claims before they have been sufficiently investigated.<sup>23</sup> Centralizing intra-corporate disputes involving Delaware corporations—as is achieved through corporate forum-terms—may be necessary to assure that Delaware’s strategy is not undermined by other state courts. Viewed in this light, corporate forum-terms serve to limit the adverse effects of such litigation on both the parties and the public. These

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20. DEL. CODE ANN. tit. 8, § 115 (2017).

21. *Infra* note 44.

22. *See, e.g.*, ROCKWELL AUTOMATION INC., BY-LAWS OF ROCKWELL AUTOMATION, INC. (FORM 8-K, EX. 3.1), art. XI, at 35 (2016) (“If any action the subject matter of which is within the scope of the preceding sentence is filed in a court other than a court located within the State of Delaware (a “Foreign Action”) in the name of any shareowner, such shareowner will be deemed to have consented to (x) the personal jurisdiction of the state and federal courts located within the State of Delaware in connection with any action brought in any such court to enforce the preceding sentence and (y) having service of process made upon such shareowner in any such action by service upon such shareowner’s counsel in the Foreign Action as agent for such shareowner.”) [hereinafter ROCKWELL AUTOMATION].

23. *See infra* text accompanying notes 173–82.

benefits may be lost, or at the least obscured, if the validity and enforceability of corporate forum-terms turn exclusively on the touchstone of party consent within a contractual paradigm.

The Article is organized as follows. In Part I we briefly rehearse the emergent practice of director-initiated forum-selection provisions in a corporation's charter or bylaws. Specifically, we examine the case law and Delaware's 2015 amendment to its incorporation law that together regulate the validity of forum-selection terms in a corporate charter or bylaw in Delaware corporations.<sup>24</sup> So far, courts largely have accorded corporate forum-terms the same presumption of validity and enforceability given to forum-terms in ordinary contracts.

Part II examines two features of corporate forum-terms that distinguish them from the ordinary contractual provisions that have dominated the literature on customized procedure. These two distinguishing features are the state's participation in the contractual relation and the limited form of consent given by shareholders to the forum-term. Given the state's unusual role in corporate charters and bylaws, we do not view the quasi-assent supplied by the shareholders' voluntary decision to invest in a company as a sufficient ground for treating a charter or bylaw forum-term as valid. However, we do not see the absence of full shareholder consent as sufficient for treating the forum-term as unenforceable. Rather, we argue that the court's approach must account for the hybrid nature of such terms—public and private—when they appear in a corporation's constitutive documents.

In Part III, we explore the implications of our analysis for adjudicative practice, looking at questions that are important to the next stage of discussion about corporate forum-terms. First, we argue that given the state's role in the corporate "contract," certain forum-terms ought to be invalid and unenforceable. Second, we explain why consent ought not to be the touchstone of the validity of a corporate forum-term or of its enforceability. Third, we show how our approach to corporate forum-terms differs from current doctrine with respect to ordinary contractual forum-terms in the context of a motion to transfer or to dismiss on the ground of *forum non conveniens*.

The Conclusion moves beyond adjudicative practice and considers corporate forum-terms in relation to broader questions of corporate regulation, assessing their likely impact upon interstate competition for incorporation and for corporate litigation. We argue that to the extent a state's motivation for adopting forum-term legislation that discriminates

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24. DEL. CODE ANN. tit. 8, § 115.



against out-of-state courts was to benefit the local bar, the legislation presents grounds for sister states to refuse to enforce the forum-term.

## I. JUDICIAL AND LEGISLATIVE ENABLING OF BYLAW FORUM-TERMS

Until 2010, most charters and bylaws of publicly-traded corporations did not include any forum-terms.<sup>25</sup> Delaware, where most companies are incorporated, did not expressly authorize the adoption of forum-choice provisions in these documents and commentators disagreed whether such a provision, if adopted, would be valid.<sup>26</sup>

The use of corporate forum-terms started to gain popularity after Delaware's Vice-Chancellor Laster remarked, in a 2010 opinion,<sup>27</sup> that companies could use exclusive forum *charter* provisions as protection against multiforum litigation.<sup>28</sup> The suggestion coincided with an uptick in shareholder suits involving claims based on Delaware law being filed in courts outside of Delaware—dubbed the “Anywhere but Chancery” phenomenon<sup>29</sup>—and viewed in many quarters as a threat to the status of the Delaware Chancery Court as “the Mother Court of corporate law.”<sup>30</sup> Then, in 2013 and 2014, two separate Chancery Court opinions—*Boilermakers*<sup>31</sup> and *City of Providence*<sup>32</sup>—held that even *bylaw* provisions

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25. See Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 336 (2012) (reporting that prior to 2010, forum-terms appeared in the charters or bylaws of only sixteen publicly traded companies).

26. See CLAUDIA H. ALLEN, STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS 11 (2012), <http://ssrn.com/abstract=2463314> [<https://perma.cc/UNL3-V879>] (discussing “unsettled state of the law” and likelihood that bylaw provisions would be challenged as invalid).

27. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (Laster, V.C.) (postulating that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes”).

28. See generally Thomas T. McClendon, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 WASH. & LEE L. REV. 2067 (2012); Michael Van Gorder, *Boilermakers v. Chevron: Are Board Adopted Arbitration Bylaws Valid under the Delaware General Corporation Law?*, 39 DEL. J. CORP. L. 443, 444 (2014) (“Dicta within a 2010 opinion of the Delaware Court of Chancery. . . seemed to provide approval of forum selection clauses within a corporation’s governing documents.”).

29. See generally Sara Lewis, Note, *Transforming the “Anywhere but Chancery” Problem into the “Nowhere but Chancery” Solution*, 14 STAN. J.L. BUS. & FIN. 199 (2008).

30. John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1346 & n.3 (2012) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1343 (7th Cir. 1990)).

31. *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 954 (Del. Ch. 2013).

32. *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 240 (Del. Ch. 2014).

designating Delaware courts, or courts of another state, as exclusive fora were facially valid.<sup>33</sup>

To add a forum-term in a charter (a.k.a. certificate of incorporation), as Vice-Chancellor Laster suggested, a majority of shareholders would have to vote in favor of such a provision.<sup>34</sup> To add a forum-term to a bylaw, by contrast, shareholder approval generally is not required. Rather, in most companies, the board of directors can approve bylaw amendments.<sup>35</sup>

In 2015, the Delaware legislature stepped in and added a provision to the state's corporate code—Section 115—to make clear that either the charter or the bylaws of a Delaware corporation may include a forum-selection provision for “internal corporate claims,” defined to include claims “based upon a violation of a duty by a current or former director or officer or stockholder in such capacity” or as to which the Delaware General Corporation Law “confers jurisdiction upon the Court of Chancery.”<sup>36</sup> Such a term may designate “any or all of the courts in this State,” but it may not “prohibit bringing such claims in the courts” of Delaware.<sup>37</sup> In effect, Section 115 codified the 2013 decision permitting bylaw provisions to designate Delaware courts as the exclusive fora. But it overruled the 2014 decision permitting the provision to designate *another* state's court as an exclusive forum. Connecticut,<sup>38</sup> Indiana,<sup>39</sup> New

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33. *Boilermakers*, 73 A.3d at 954 (Strine, C.); *City of Providence*, 99 A.3d at 240 (Bouchard, C.) (“I do not discern an overarching public policy of this State that prevents boards of directors of Delaware corporations from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign jurisdiction.”); *see also* *Choupak v. Rivkin*, No. CV 7000-VCL, 2015 WL 1589610, at \*19 n.3 (Del. Ch. Apr. 6, 2015), *judgment entered* (Del. Ch. May 12, 2015), and *aff'd* 129 A.3d 232 (2015).

34. DEL. CODE ANN. tit. 8, § 242(b) (2017).

35. *Id.* § 109(a).

36. *Id.* § 115.

37. *Id.* (effectively overruling *City of Providence*, 99 A.3d at 229, except with respect to stockholders agreement or agreement signed by stockholder).

38. Act effective Oct. 1, 2017, Pub. Act. No. 17-108, 2017 Conn. Pub. Acts 108.

39. IND. CODE § 23-1-22-2(16) (2017) (permitting designation of Indiana state or federal courts as exclusive fora for certain disputes in company's charter or bylaws).

Jersey,<sup>40</sup> North Carolina,<sup>41</sup> Oklahoma,<sup>42</sup> Virginia,<sup>43</sup> and Washington<sup>44</sup> have adopted similar provisions.

In the wake of these developments, an increasing number of Delaware firms, as well as multiple non-Delaware firms, have adopted corporate forum-terms.<sup>45</sup> As of mid-2014, the most recent date for which data are available, the number of U.S. public corporations that had adopted such provisions stood at 746.<sup>46</sup> Since then, that number is likely to have grown substantially.

Forum-terms have two principal structural components. First, the terms designate a court as an exclusive forum, unless the corporation consents to a different forum. Delaware companies generally split in selecting just the Delaware Chancery Court as the exclusive forum or also including other Delaware state courts and the Delaware federal district court;<sup>47</sup> non-Delaware companies generally have designated both their local state court and the federal court in that state as fora.<sup>48</sup>

Second, the terms specify the claims that can be litigated only in the selected forum. Not surprisingly, the terms channel “internal affairs” to the selected forum. However, some terms arguably go beyond that category. For example, some terms include actions “asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation’s

40. Act of Jan. 16, 2018, ch. 356, 2017 N.J. Sess. Law Serv. (West).

41. N.C. GEN. STAT. ANN. § 55-7-50 (2017).

42. Act of May 22, 2017, ch. 323, § 3, 2017 Okla. Sess. Law Serv. (to be codified at OKLA. STAT. tit. 18, § 1014.2).

43. VA. CODE ANN. § 13.1-624 (2017) (permitting designation of Virginia courts or courts in state of company’s principal office as exclusive fora for certain disputes).

44. Act of Apr. 17, 2017, ch. 28, § 9, 2017 Wash. Legis. Serv. 96 (to be codified at WASH. REV. CODE § 23B.02).

45. CLAUDIA H. ALLEN, TRENDS IN EXCLUSIVE FORUM BYLAWS, DIR. NOTES, CONF. BOARD GOVERNANCE CTR. (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2411715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715) [<https://perma.cc/U62K-WRRA>] (listing companies); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation 2* (Nat’l Bureau of Econ. Research, Working Paper 21362, 2015), <http://www.nber.org/papers/w21362> [<https://perma.cc/56MQ-BKYV>].

46. Romano & Sanga, *supra* note 45, at 2.

47. ALLEN, *supra* note 45, at 4 (reporting that, post-*Boilermakers*, 43% of terms selected the Chancery Court as exclusive forum, 23% selected the state and federal courts in Delaware, and 34% selected the Delaware Chancery or state courts and the Delaware federal court only if the state court lacked subject-matter jurisdiction).

48. See, e.g., BYLAWS OF NORDSTROM, INC., art. II, § 14 (Amended and Restated as of June 7, 2017) (designating state and federal courts in King County, Washington as exclusive fora); BYLAWS OF SKYLINE CORP., art. VIII, § 2 (Amended and Restated as of June 1, 2017) (designating state and federal courts in Elkhart County, Indiana as exclusive fora).

shareowners,”<sup>49</sup> which would seem to embrace insider trading claims.<sup>50</sup> Other terms refer to any actions “based upon a violation of a duty by a current or former director or officer or stockholder in such capacity,”<sup>51</sup> which may include a host of non-internal affairs claims (for example, employment discrimination claims).

Beyond the forum selected and the claims covered, some terms set conditions on when the selected forum must be used. For example, some terms condition use of the selected forum on its having subject-matter jurisdiction and personal jurisdiction over indispensable parties. Other terms attempt to insulate the selected forum from challenge by deeming any shareholders who acquire stock after the provision was adopted to have consented to personal jurisdiction in the selected-forum court in a proceeding brought to enforce the exclusive forum-term.<sup>52</sup>

The Delaware courts that have considered challenges to corporate forum-terms have looked at the question in the context of bylaw forum-terms. These courts have reasoned that corporate bylaws are contracts. Thus, the Delaware Chancery Court’s 2013 decision in *Boilermakers* notes that the bylaw provision providing for Delaware as a forum for litigating internal affairs disputes is a “valid and enforceable *contractual* forum selection [provision]”;<sup>53</sup> that “bylaws . . . constitute part of a binding broader *contract*”;<sup>54</sup> and that forum-selection provisions in bylaws are “enforceable under Delaware law to the same extent as other *contractual* forum selection clauses.”<sup>55</sup> *City of Providence*—the 2014 Chancery decision which upheld a bylaw provision opting for North Carolina as the exclusive forum for intra-corporate disputes of a Delaware corporation—likewise contains extensive references to this contractual rationale.<sup>56</sup>

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49. ROCKWELL AUTOMATION, *supra* note 22, art. XI, at 35.

50. Chiarella v. U.S., 445 U.S. 222, 230 (1980) (premising insider trading liability on the breach of a fiduciary or similar duty).

51. See COLUCID PHARMACEUTICALS INC., FIFTH AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF COLUCID PHARMACEUTICALS, INC. (FORM 8-K, Ex. 3.1), art. 10.1 (2015).

52. See ROCKWELL AUTOMATION, *supra* note 22, art. XI, at 35; Allen, *supra* note 45, at 5.

53. *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (emphasis added).

54. *Id.* (emphasis added).

55. *Id.* at 940 (emphasis added). *Boilermakers* emphasized that under the U.S. Supreme Court’s approach to contractual forum-selection terms, which Delaware has adopted as a matter of state law, a forum-term is not valid if it is unreasonable. See also *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143 (Del. 2010) (relying on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1 (1972)).

56. See, e.g., *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 233 (Del. Ch. 2014) (“[B]ylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders.”) (citations omitted).

Delaware's view of the validity of a bylaw forum-term is important because the law of the state of incorporation will determine the validity of a corporate forum-term as a matter of corporate law. Because the content of a charter or bylaw is, in the first instance, an issue of the corporation's "internal affairs," the validity of a forum term under the corporate law of the company's state of incorporation is a prerequisite to its enforceability. Delaware now treats a corporate forum-term as a valid clause, subject to an as-applied challenge for breach of fiduciary duty or other unfairness.

However, whatever Delaware's view of the validity of a corporate forum-term of a Delaware corporation (or a sister state's view in a comparable circumstance), the decision to have litigation proceed in a forum not selected in the forum-term generally will be made by a court in a state that was not selected by that clause. The handful of courts that have considered the enforceability of a bylaw forum-term when suit has been filed in a non-selected forum have applied forum law, not Delaware law, to decide the question. For the most part, these courts have accepted the contractual rationale articulated by *Boilermakers*.<sup>57</sup> The only court so far to have refused to enforce a forum-term is the California federal district court in *Galaviz v. Berg*,<sup>58</sup> which held that a forum-term unilaterally adopted by the board mid-stream "after the majority of the purported wrongdoing is alleged to have occurred" was unenforceable because it lacked any showing "of mutual consent" to the choice of forum.<sup>59</sup>

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57. *E.g.*, *Billard v. Angrick*, 220 F. Supp. 3d 132 (D.D.C. 2016) (granting motion to dismiss suit on forum non conveniens grounds because bylaw designated the Delaware Chancery Court as exclusive forum); *In re CytRx Corp. Stockholder Derivative Litig.*, No. CV14-6414-GHK, 2015 WL 9871275 (C.D. Cal. Oct. 30, 2015) (same); *Butorin ex rel. KBR Inc. v. Blout*, 106 F. Supp. 3d 833 (S.D. Tex. 2015) (holding bylaw designating Delaware courts enforceable and transferring case to U.S. District Court for District of Delaware); *North v. McNamara*, 47 F. Supp. 3d 635, 642 (S.D. Ohio 2014) (citing *Melissa's Trust v. Seton*, No. 14 C 02068, 2014 WL 3811241, at \*7 (N.D. Ill. July 31, 2014)); *Groen v. Safeway, Inc.*, No. RG14716641, 2014 WL 3405752 (Cal. Super. May 14, 2014) (looking to *Boilermakers* as source for general contractual principles); Transcript of Oral Argument at 38–47, *Miller v. Beam, Inc.*, No. 2014-CH-00932, 2014 WL 8664334 (Ill. Cir. Ct. Mar. 5, 2014); *Katz v. Commonwealth REIT*, No. 24-C-13-001299, 2014 WL 9913855, slip op. at \*22–26 (Md. Cir. Ct. Feb. 19, 2014); *Genoud v. Edgen Grp., Inc.*, No. 625,244, 2014 WL 2782221, slip op. (La. Dist. Ct. Jan. 17, 2014); *HEMG Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, slip op. (N.Y. Sup. Ct. Nov. 4, 2013).

58. 763 F. Supp. 2d 1170 (N.D. Cal. 2011) (as matter of first impression, corporation could not dismiss action for lack of venue based on forum-term in bylaw).

59. *Id.* at 1173–74. A later federal court punted on the question, finding that the challenged forum-term had not yet become effective. *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013). An Oregon state court declined to enforce a Delaware bylaw term, adopted two days before a merger announcement, finding that it violated a state policy against enforcing contracts that lack "mutual assent." *Roberts v. TriQuint Semiconductors, Inc.*, No. 1402-02441, 2014 WL 4147465, at \*4 (Or. Cir. Aug. 14, 2014). But the Oregon Supreme Court, en banc, entered mandamus relief finding no such compelling policy under state law. *Roberts v. TriQuint*

## II. RESISTING THE CONTRACTUAL APPROACH TO CHARTER AND BYLAW FORUM-TERMS

In our view, the validity and enforceability of the corporate forum-term ought not to be treated as a matter of ordinary contract law. Corporate forum-terms differ significantly from ordinary contracts, and invoking the contract rationale obfuscates the underlying considerations that bear on terms of this sort.<sup>60</sup> In this Part, we explain our skepticism about applying ordinary contract principles in assessing the validity and enforceability of forum-terms in corporate charters and bylaws. First, we show why the state’s role as a party to the corporate “contract” cuts against having a court treat a charter or bylaw forum-term as an ordinary contract when the issue arises in litigation. Second, we take the contract argument on its own terms, discussing whether a charter and bylaw forum-term manifests the requisite degree of assent needed to validate a contact.

### A. *The State as Party to the Corporate “Contract”*

The contractual approach to corporate forum-terms treats the corporation’s constitutive documents—its charter and bylaws—as contracts. Contractual parties may agree to waive access to a federal forum, to designate venue in a particular state court, and to give up rights to damages or to jury trials. Under the contractual approach, these terms carry a presumption of respect—and are not subject to certain constitutional limitations—because they are the product of a private arrangement in which parties consented to modify their entitlements.

A corporation’s charter and bylaws, however, are no ordinary contracts. They are instead a hybrid between an ordinary contract and state law—they are highly regulated constitutive documents that order collective decision-making.<sup>61</sup> Both formally and functionally, corporate law conceives of the state as an integral party to the corporate “contract,”

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Semiconductors, Inc., 364 P.3d 328 (Or. 2015). See Eleanor J. Vincent, Note, *The Implications of Oregon’s TriQuint Decision for Enforcing Forum Selection Bylaws*, 94 OR. L. REV. 223, 225 (2015) (criticizing *TriQuint* and discussing “strong policy considerations” in favor of enforcing corporate forum-terms of “consistency, efficiency, and judicial expertise”).

60. See James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 259 (2015) (arguing that contract law principles do “not support the results reached in *Boilermakers*”); Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1953–56 (2013) (expressing skepticism about the enforceability of forum selection bylaws as contracts).

61. The literature is canonical and voluminous. See, e.g., Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

and assigns powers to the state that are not typical of parties to ordinary contracts.

Consider, first, the formal argument about state involvement in the corporate “contract.” Delaware courts routinely describe the corporation as a contract between the firm and the state,<sup>62</sup> a view that is shared by other state courts and federal courts.<sup>63</sup> Indeed, the Delaware Supreme Court has referred to the conception of the corporation as a “contract between the State and the corporation, and the corporation and its shareholders” as one of “many interacting principles of established law.”<sup>64</sup> A corollary is that every corporate charter and bylaw “impliedly” includes state law as a provision,<sup>65</sup> and that the state, as a party to the charter, reserves the right to change its terms by amending or repealing its laws.

Delaware law often is described in facilitative terms: the state’s corporate law merely “enable[s]” private parties to incorporate “on terms which they freely choose.”<sup>66</sup> But this statement is only half true. While corporate laws afford corporations significant choice in devising charter and bylaw terms, they also impose significant constraints.<sup>67</sup> Above all, charters and bylaws may contain provisions dealing only with a limited set of subjects—some specifically identified, such as whether directors

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62. *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. Ch. 1930); *see also* Garry D. Hartlieb, *Enforceability of Mandatory Arbitration Clauses for Shareholder-Corporation Disputes*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 131, 140 & n.54 (2014) (“a corporation’s governance documents are ‘a contract between the State and the corporation, and the corporation and its shareholders’”) (citing *Lawson*, 152 A. at 727).

63. *See, e.g.*, *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429 (1934); *Avondale Land Co. v. Shook*, 54 So. 268, 269 (Ala. 1911); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 852 (Fla. 1971); *S. W. R. Co. v. Benton*, 58 S.E.2d 905, 917 (Ga. 1950); *Pac. Intermountain Exp. Co. v. Best Truck Lines, Inc.*, 518 S.W.2d 469, 472 (Mo. Ct. App. 1974); *State ex rel. Swanson v. Perham*, 30 Wash. 2d 368, 374, 191 P.2d 689, 693 (1948); *see also* 18 C.J.S. *Corporations* § 64 (2017).

64. *STARR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. Ch. 1991). *See* *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338, 344 (Del. Ch. 1979) (“[T]he corporate charter, (1) is a contract between the state and the corporation; (2) is a contract between the corporation and its stockholders; and (3) is a contract between the stockholders inter se.” (citations omitted)).

65. DEL. CODE ANN. tit. 8, § 394 (2017) (“This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation.”). *See also* *Hartford Acc. & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 24 A.2d 315, 321 (Del. Ch. 1942) (“[T]here is impliedly written into every corporate charter as a constituent part thereof the pertinent provisions of the State Constitution and statutes.”).

66. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 252 (1977).

67. *See generally* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989); Cox, *supra* note 60, at 278–84 (arguing that restrictions on private ordering imposed by corporate law conflict with nexus-of-contracts paradigm).

can be removed without cause, and others generically identified, such as “any provision for the management of the business and for the conduct of the affairs of the corporation.”<sup>68</sup> Within the set of permissible subjects, the content of a charter or bylaw provision often is constrained—for example, in Delaware, a charter cannot provide that directors of a corporation with a non-classified board can be removed only for cause.<sup>69</sup> Likewise, state law highly regulates the mode by which charters and bylaws may be amended. Thus, any charter amendment in Delaware requires an affirmative recommendation by the board of directors and the approval by at least a majority of shares entitled to vote.<sup>70</sup>

Section 115 illustrates both the enabling elements and the presence of constraints. A corporation may choose whether to include a forum-term in its charter or bylaws. But the scope of permissible terms is limited: no forum-term may oust Delaware as a forum.<sup>71</sup>

Second, at the functional level, the *Boilermakers* court referred to the relationship between the directors and shareholders as a “flexible” contract.<sup>72</sup> This characterization is consistent with treating the state as a third party to a corporate “contract” in light of its role in revising, adding, and eliminating terms from the corporation’s charter and bylaws. Indeed, an influential characterization of the corporation as a long-term relational contract emphasizes the fact that the “contract” delegates authority to revise contractual terms on an on-going basis to one party—the state—which serves as a “third-party contracting agent for corporate investors and managers”<sup>73</sup> and can “[t]hrough statutory amendments or judicial decisions . . . in effect, alter the corporate charter when the need arises.”<sup>74</sup> Corporations are said to have an incentive to defer to terms that are provided by statute or decisional law because participating public

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68. DEL. CODE ANN. tit. 8, § 102(b)(1).

69. *Id.* § 141(k).

70. *Id.* § 251. A charter may not relax the shareholder voting requirements supplied by state law. *Id.* § 102(b)(4).

71. *Id.* § 115.

72. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (calling corporate bylaws “part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the [Delaware General Corporate Law]” and stating that the contract “is, by design, flexible and subject to change in the manner that the DGCL spells out”). For a criticism of validating forum-terms on the basis of a flexible contract that fails to manifest true shareholder consent, see Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269 (2015).

73. Henry Hansmann, *Corporation and Contract*, 8 AM. LAW & ECON. REV. 1, 14 (2006).

74. *Id.* at 9.



institutions—the legislature and the courts—are regarded as “relatively durable and trustworthy third parties.”<sup>75</sup>

Section 115 and the earlier court decisions validating corporate forum-terms conform to this identified pattern. They grant boards the power (perhaps new, perhaps always present but previously not recognized) to include a forum-selection clause in either the corporate charter or the bylaws. These powers presumably have become more desirable due to the growth of multi-forum litigation. Thus, the fact that state law has changed or clarified the board’s power, coupled with the board’s increased “private” decision to exercise such power, reflect the “flexible” nature of the corporate contract and the state’s involvement in it.

In sum, the state plays an unusual and large role in the “contractual” regime constituted by charters, bylaws, and state law. State law, in particular statutory law, extensively regulates the permitted content of charters and bylaws; state law continuously revises and adds terms—opt-in provisions, opt-out provisions, and, less commonly, mandatory provisions—to the charters and bylaws; state corporate law is conceived as implied provisions of the “corporate contract”; the state itself is conceived as a notional party to that contract; and, most tellingly, the state reserves the right to change charter and bylaw terms *ex post*—by adopting laws making such terms invalid—without running afoul of the Contracts Clause.<sup>76</sup> This degree of state involvement, and the state’s retention of the power to revise charter terms *ex post*, cannot be reconciled with the ordinary principles of contract law that have been applied to conventional forum-terms outside the context of charters and bylaws.

### *B. Corporate Bylaws, “Contracts,” and the Myth of Shareholder Consent*

So far we have argued that the state’s participation in the corporate “contract” argues against treating a corporate charter or bylaw as an ordinary contract when it regulates access to the courts. Now we consider the charter/bylaw-as-contract argument on its own terms. Contractual forum-terms arguably differ from legislative venue rules not simply because of the level of state involvement, but also because parties to a contract typically are assumed to have given consent to the term—thus

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75. *Id.* at 15.

76. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 589–91 (1819) (holding that corporate charter is a contract between the state and the person to whom the charter is granted within the meaning of the Contracts Clause). See Elmer W. Roller, *The Impairment of Contract Obligations and Vested Rights*, 6 MARQ. L. REV. 129, 132 (1922) (explaining that the state’s use of a “reserved power clause” avoids the effect of the *Dartmouth College* rule).

volitionally giving up important interests, including waiving the right to commence a suit other than in the selected forum or to transfer the suit from the designated forum.<sup>77</sup>

The general rule is that a court ought to enforce a contract because the parties have agreed to its terms.<sup>78</sup> Party consent is the touchstone of contractual validity, and respecting the parties' consent through contractual enforcement reinforces notions of autonomy, encourages innovation, and promotes efficiency. However, these standard principles suffer serious distortion when applied to corporate forum-terms.<sup>79</sup>

To start, who are the parties who have consented to the corporate “contract?” Delaware courts have waffled in their response to this question. *Boilermakers*, for example, stated that “the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework.”<sup>80</sup> Other cases and passages refer to these documents as contracts “among a corporation’s shareholders,”<sup>81</sup> as contracts “both between the corporation and the state and the corporation and its stockholders,”<sup>82</sup> as contracts “between the stockholders, the directors and officers, and the corporation” or as contracts “between corporations and stockholders.”<sup>83</sup>

Corporate forum-terms, however, encompass claims brought by persons who are not mentioned in *any* of these formulations—persons whom not even Delaware seems to regard as parties to the corporate “contract.” To take one example, creditors of insolvent corporations, including involuntary creditors such as tort victims, can assert claims of

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77. *E.g.*, Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 *BUS. LAW.* 161, 165–66 (2015) (defending validity of bylaw forum-term through a “doctrine of corporate consent”).

78. Omri Ben-Shachar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 *U. PA. L. REV.* 1829, 1829 (2004) (“One of the pillars of the law of contract formation is the principle of mutual assent.”).

79. Our argument that charters and bylaws lack the degree of consent found in ordinary contracts does not imply that these governance documents should not be treated as analogous to contracts in certain respects. Thus, it may make sense, as held by the Delaware Supreme Court, to apply principles of contract interpretation to the interpretation of ambiguous charter provisions. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). What is significant is determining when and why the contractual paradigm should dominate and when it should not.

80. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

81. *Airgas*, 8 A.3d at 1188. *See also* Patrick J. Rohl, *The Reassertion of the Primacy of Delaware and Forum Selection Bylaws*, 92 *DENV. U. L. REV. ONLINE* 143, 145, 145 n.19 (2015) (citing *Airgas* for the proposition that Delaware courts apply non-contractual principles to questions “that arise out of the role of shareholders in the governance process”).

82. *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. 1930).

83. *Boilermakers*, 73 A.3d at 940, 949.

breach of corporate fiduciary duties that are clearly within the scope of Section 115.<sup>84</sup> Similarly, various market participants, such as bondholders or option holders, have standing to assert claims arising under the federal securities laws.<sup>85</sup> Claims that the CEO engaged in insider trading or fraudulently certified a securities filing as accurate also appear to fall within the scope of forum-terms that encompass claims “based upon a violation of a duty by a current or former director or officer or stockholder in such capacity.”<sup>86</sup> Indeed, even claims that an officer engaged in employment discrimination arguably fall within the scope of Section 115.

What about shareholders—the core plaintiffs meant to be bound by corporate forum-terms and clearly parties to the charter/bylaw “contract?” The notion that the shareholders have consented to a forum-term often is no more than a fiction. The strongest case for consent arises when shareholders bought shares from the corporation, for example at an initial public offering (IPO), and the company’s charter or bylaw *at that time* already included a forum-term.<sup>87</sup> In this situation, the degree of the shareholder consent resembles that of a party who has “accepted” a term embedded in a non-negotiable contract: the shareholder will have had either actual knowledge of the forum-term or, at the least, an opportunity to have learned about its existence before making the investment decision.

However, this form of consent is lacking when the company adds the forum-term mid-stream, after the company has sold shares.<sup>88</sup> Indeed, any shareholder who did not vote in favor of the mid-stream amendment did not consent *at all* to the forum-selection provision. At most, such a shareholder consented to the *rules* for changing charter or bylaw terms (to the extent these rules were established when the company initially sold the shares).

The Delaware Chancery Court in *Boilermakers* relied upon this notion of consent—consent to the rules for making changes, albeit not to the

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84. *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) (creditors of insolvent corporations have standing to assert derivative breach of fiduciary duty claims).

85. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750–51 (1975).

86. DEL. CODE ANN. tit. 8, § 115 (2017).

87. *See, e.g., Bebcuk, supra* note 17, at 1825–29 (distinguishing between charter terms added mid-stream and terms present at the IPO).

88. *See Hameresh, supra* note 77, at 169. The relevant issue is when the company sold the shares to shareholders, not when a particular shareholder bought shares in the secondary market. A secondary market buyer stands in the shoes of the secondary market seller and should have the same rights. So, to the extent the secondary market seller “consented” to a forum-selection term, by voting in favor or by buying from the company with actual or presumed knowledge of the presence of the term, that consent can be imputed to the secondary market buyer. But if the provision was added mid-stream without the vote of the secondary market seller, and the secondary market seller hence did not “consent,” this lack of consent should also be imputed to the buyer, even if the buyer may have been aware of the provisions at the time of the investment decision.

changes themselves—to justify treating bylaws as contracts for purposes of assessing forum-terms. According to *Boilermakers*, the contract embodied in the bylaws

is, by design, flexible and subject to change in the manner that the [Delaware General Corporation Law] spells out and that investors know about when they purchase stock in a Delaware corporation. . . . Thus, when investors bought stock [in the companies that had adopted forum selection bylaws], they knew (i) that . . . the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally; (ii) that . . . bylaws [could] regulate the business of the corporation, the conduct of its affairs, and the rights or powers of its stockholders; and (iii) that board-adopted bylaws are binding on the stockholders. In other words, *an essential part of the contract stockholders assent to when they buy stock in Chevron and FedEx is one that presupposes the board’s authority to adopt binding bylaws . . .*<sup>89</sup>

But, for one, this rationale proves too much. When investors buy stock, they also know that the rules of corporate governance (including the rules on how the rules can be changed) can be changed *by legislation*. Thus, “an essential part of the [arrangement] that shareholders assent to when they buy stock”—to paraphrase *Boilermakers*—“presupposes” *the legislature’s* “authority to adopt binding” corporate laws.<sup>90</sup> Under the *Boilermakers* rationale, therefore, a Delaware statute that conferred exclusive jurisdiction over “internal corporate claims” should likewise be treated as a contract for purposes of assessing forum-terms. Such a statute, however, would almost certainly violate the recognized limits to the power of the state to regulate judicial access and be invalid. As a matter of logic, therefore, the rationale in *Boilermakers* is fallacious.

Moreover, consent to process is not the equivalent to consent to the substantive output of that process.<sup>91</sup> Whether and when to enforce a term consenting to process is a contested notion in procedural doctrine and democratic theory.<sup>92</sup> Simply put, having bought shares with knowledge of

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89. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939–40 (Del. Ch. 2013) (emphasis added).

90. *Id.* at 940.

91. See Ben Walther, *Bylaw Governance*, 20 FORDHAM J. CORP. & FIN. L. 399, 428 (2015) (distinguishing between changes to the “rules of the game” and decisions “that occur during the game itself”) (citing Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005)).

92. The best-known discussion in democratic theory, that consent to majoritarian decision-making is not the same as consent to the substantive outputs of majoritarian process in all cases, remains that

how the rules can be changed does not amount to having consented to the changes themselves and does not generate the same presumption of consent as having signed a contract that already contains the new rules.<sup>93</sup>

Though consent to process is never equivalent to consent to output, several factors bear on the degree of the gap. As mentioned, amendments to corporate charters generally require the approval of shareholders.<sup>94</sup> To the extent that the shareholders who approved an amendment adding a forum-term have the same interest as those who did not, majority approval provides a form of virtual consent by shareholders as a whole to that provision (and actual consent by the shareholders who voted for it). Especially in the case of representative actions brought on behalf of all shareholders as a class, the fact that a majority of shareholders (or their successors in interest) approved a charter amendment adding an exclusive forum provision provides a strong basis for enforcement.

Bylaw amendments adopted by the board without a shareholder vote, however, raise more severe concerns. While shareholders are the most likely plaintiffs in a suit subject to the forum-term, directors are the most likely defendants in such a suit. Any procedural device applicable to lawsuits by a shareholder against directors inherently raises potential conflicts of interest (potential because a shareholder-plaintiff may not represent the interest of shareholders as a whole). When the interests of shareholders and directors conflict, the board's approval of a bylaw does not amount even to virtual consent for there is no legitimate representative proxy.<sup>95</sup> Similarly, when the interests of shareholders conflict—for example, in a firm with a controlling shareholder—approval of a charter

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of JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981). On the “deeply problematic” nature of process-based constitutional theory, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1080 (1980). For a discussion of the serious concerns raised by contractarian theories of fair process, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 *B.U. L. REV.* 485 (2003). For an article supporting the broad use of contract procedure in corporate organizational documents, see Winship, *supra* note 14, at 531–32.

93. Consumer contracts increasingly have included terms allowing the seller or creditor a unilateral right to modify the contract. Frequently, but not always, these change-terms allow a modification of procedural rights that the consumer would have—for example, to file suit in court or to join in a class action. In some of these settings, the contract at the time of formation has granted one party the unilateral right to change a contract term. Unilateral modification rights in actual contracts raise issues of consent that are similar to those we address in this article.

94. See *supra* notes 34–35.

95. The contractual analogue of permitting the board to change the bylaws unilaterally has been dubbed “empty promises” by one influential commentary. Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 *S. CAL. L. REV.* 1, 5 (2010) (“The public outrage is justified. Empty promises are prone to abuse and should not be offered in the guise of real promises.”).

amendment through a majority vote reflects no meaningful consent to output by dissenting minority shareholders.

We recognize that shareholders are not necessarily helpless even when a bylaw forum-term can be adopted without shareholder approval. Shareholders in publicly traded corporations who oppose such a forum-term could file a precatory shareholder proposal under Rule 14a-8 requesting that the board repeal the bylaw.<sup>96</sup> Although such a resolution is not binding, boards increasingly have implemented resolutions that have obtained majority support.<sup>97</sup> They also could show their displeasure by casting “withhold” votes in the election of directors (depending on the applicable voting rule and number of withhold votes, the effect of such votes ranges from embarrassment to non-election of a nominee to the board).<sup>98</sup> To the extent that shareholders have the realistic opportunity to take these steps and fail to do so,<sup>99</sup> they could be viewed as having at least passively acquiesced in the board’s action.

A final potentially ameliorating factor is that, at least in Delaware, fiduciary duties limit the ability of the board to amend bylaws.<sup>100</sup> Delaware courts have held that, even though the board had the formal power to amend the bylaws, bylaw amendments that advanced the date of a shareholder meeting thereby inhibiting the ability of dissidents to mount a challenge or that expanded the board size and filled the vacancy thereby preempting a shareholder attempt to expand the board size and fill vacancies with shareholder nominees were not valid.<sup>101</sup> Fiduciary duties thus may impose some loosely-defined constraint on the bylaw amendments that are adverse to the interest of shareholders and beneficial

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96. 17 C.F.R. § 240.14a-8 (2017).

97. Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1011–13 (2010) (implementation rate increased from 12% in 2001 to 50% in 2008).

98. Stephen Choi, Jill Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 888–901 (analyzing factors that contribute to withhold votes). Shareholders could also seek to repeal a bylaw provision by a binding shareholder vote. See DEL. CODE ANN. tit. 8, § 109(a) (2017); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 954 (Del. Ch. 2013) (distinguishing forum-terms from poison pills). Binding shareholder bylaw amendments, however, are extremely rare. See Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2018–21 (2014).

99. Whether the opportunity is realistic depends on factors such as timing of the adoption of the bylaw in relation to the lawsuit, the vote required for shareholders to repeal a bylaw, and the shareholder profile.

100. See *Boilermakers*, 73 A.3d at 954 (“[T]he real-world application of a forum selection bylaw can be challenged as an inequitable breach of fiduciary duty.”) (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)).

101. *Schnell*, 285 A.2d at 439 (date of shareholder meeting); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (board expansion).

to the personal interests of the directors. Indeed, the Delaware cases upholding forum-selection clauses, as well as the legislative history to Section 115, make clear that, while such clauses are not facially invalid, they will not necessarily survive an as-applied challenge: a board may in some circumstances breach its duty either by adopting such a clause or by failing to waive it.<sup>102</sup>

### III. REFRAMING THE DOCTRINE: JUDICIAL REVIEW OF CORPORATE FORUM-TERMS

The U.S. Supreme Court has favored applying a contractual approach to forum-terms—but it has done so in cases in which the forum-term actually is a part of a contract.<sup>103</sup> A charter or bylaw is not an ordinary contract. Our argument has emphasized the state's unusual role as a party to the "contract" with revisionary and authorizing power that is not typically granted in the ordinary contractual setting. The observation is not the general one of legal realism that the state is implicated in all private deals;<sup>104</sup> the state's role in corporate charters and bylaws is of a different order. Moreover, even if we were to accept charters and bylaws as a form of private ordering, the usual contractual rules about consent are difficult to apply to forum-terms. In particular, in the common situation of a mid-stream addition of a forum-term to the bylaws, shareholder consent is at most consent to the process of amending bylaws coupled with tacit acquiescence in the amendment approved by the board. The Supreme Court has not yet endorsed forum-terms as valid where there is no showing of consent to the provision.

In this Part, we consider how the state's role in the corporate contract ought to affect the kinds of forum-terms that permissibly may be included in a charter or bylaw. We then take up the question of consent and show how a properly conceived approach to corporate forum-terms would operate in practice. Through a series of examples, we sketch out the factors that ought to inform a court's assessment, and the differing weights that may be required given the facts and circumstances. Our approach diverges from the Supreme Court's treatment of ordinary forum-term provisions, but the two methodologies—notwithstanding criticisms of

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102. See *Schnell*, 285 A.2d at 439; *Blasius*, 564 A.2d at 663.

103. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 568, 583 (2013); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–10 (1972).

104. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

current doctrine<sup>105</sup>—can cohabit without disruption of current jurisdiction and venue rules.

*A. Mandatory Restraints on Corporate Forum-Terms*

States that authorize corporations to adopt forum-terms in their charters and bylaws do not mandate their inclusion; state law simply permits the firm to adopt the provision if it so chooses. At the same time, state law often constrains the firm's choices by regulating the content of a permissible forum-term; for example, if a Delaware company desires an exclusive forum for intra-corporate disputes, that forum may not exclude Delaware.

A key implication of our analysis is that the state's role in the corporate "contract" ought to bar its authorizing certain kinds of forum-terms in the firm's charter or bylaws. The federal Constitution prevents states from restricting judicial access in a number of important ways<sup>106</sup>: in our view, states ought not to be able to achieve an arguably impermissible result through the intermediary of private ordering, and particularly in a context that not only lacks a showing of strong party consent, but also potentially generates negative third party effects. The problem is the inverse of the usual private-governance problem when private parties wield quasi-public power yet escape public forms of regulation. Rather, the danger is that a public entity will be allowed to reach decisions that affect public life, free from public limits because filtered through the intermediary of "contract."<sup>107</sup>

Given the state's role in the corporate "contract," what kinds of forum-terms ought to be off the table or, at a minimum, subject to close scrutiny?

First, the Supreme Court repeatedly has held that a state may not oust a federal court of diversity jurisdiction to hear a state cause of action, and a corporate charter or bylaw likewise ought not to be able to oust a federal court of diversity jurisdiction.<sup>108</sup> *Railway Co. v. Whitton's*

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105. See Davis & Hershkoff, *supra* note 11, at 541–65 (criticizing the Court's contractual paradigm for ordinary forum terms).

106. See Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 67–77 (2012) (discussing various constitutional limits on state authority to restrict judicial access).

107. See Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 289 (2013) (discussing "state action cases in which the complaint is only with the private party's own conduct, as to which there is some reason to think public Constitutional Law is the appropriate governing regime").

108. See *Recent Cases, Federal Courts—Authority of State Law—Power of a State to Preclude Federal Diversity Jurisdiction*, 75 HARV. L. REV. 1433, 1434 (1962) ("The Supreme Court has consistently struck down attempts to oust federal jurisdiction of general causes of action created by a state and cognizable in its courts of general jurisdiction.").



*Administrator*,<sup>109</sup> a chestnut of federal jurisdiction, held that a state cannot bar the removal of an action from state to federal court by purporting to confer exclusive state jurisdiction over the claim:

Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such a case, is not subject to State limitation.<sup>110</sup>

The reason for this restriction draws from the constitutional concerns that motivate the inclusion of diversity jurisdiction in Article III of the Federal Constitution: fear of legislative capture by in-state factions and of judicial bias against non-state citizens.<sup>111</sup> For similar reasons, a state may not bar a litigant from filing or prosecuting an in personam action in a federal court within the grant of arising-under jurisdiction under 28 U.S.C. § 1331.<sup>112</sup> These concerns do not dissipate when the ouster is done through private mechanisms that privilege in-state parties.

Second, as a matter of Full Faith and Credit,<sup>113</sup> a state generally cannot discriminate in favor of its own courts to the detriment of the courts of sister states.<sup>114</sup> A limited exception for public policy is recognized, but rarely found in practice.<sup>115</sup> Thus, a state could not simply refuse to enforce

109. 80 U.S. (13 Wall.) 270 (1872).

110. *Id.* at 286.

111. See Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 124 (2014) (“Diversity jurisdiction allows a litigant to escape the potential unfair bias in state court by bringing his or her claim in federal court.”). See generally Lea Brilmayer, Carolene, *Conflicts, and the Fate of the “Inside-Outsider,”* 134 U. PA. L. REV. 1291 (1986).

112. *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 16 (1977) (“[T]he right to litigate in federal court is granted by Congress and, consequently, ‘cannot be taken away by the state.’”) (quoting *Donovan v. Dallas*, 377 U.S. 408, 413 (1964)). Of course, the state can define state causes of action, and in that way significantly affect whether a claim will fall within the jurisdictional grant of 28 U.S.C. § 1331.

113. U.S. CONST. art. IV, § 1.

114. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 320–21 (1992) (arguing that although the Full Faith and Credit Clause creates “the need for a single applicable law, identifiable in advance,” “[a] case can be decided by any court that acquires jurisdiction over the defendant . . .”). A limited exception to this principle relates to matrimonial and certain in rem claims. See, e.g., *Fall v. Eastin*, 215 U.S. 1, 11–12 (1909) (“[W]here the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated.” (citations omitted)).

115. See, e.g., *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547–48 (1935) (“One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows

the judgment of another state court.<sup>116</sup> Similarly, state statutes generally cannot vest exclusive jurisdiction in the courts of a state and deprive sister states of jurisdiction.<sup>117</sup> As the Supreme Court has explained:

[A] state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action.<sup>118</sup>

Under this analysis, the discriminatory feature of most forum-term laws—which permit the designation of the state of incorporation's courts as exclusive fora, but not of courts of any other state—at the least raises

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that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.”). An exception is provided for judgments rendered by courts without subject-matter jurisdiction, but a judgment is entitled to a presumption of facial validity. *See* *V.L. v. E.L.*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1017, 1020 (2016) (“A State is not required . . . to afford full faith and credit to a judgment rendered by a court that ‘did not have jurisdiction over the subject matter or the relevant parties.’” (citing *Underwriters Nat. Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Assn.*, 455 U.S. 691, 705 (1982))).

116. *Fauntleroy v. Lum*, 210 U.S. 230, 235–36, 238 (1908) (Mississippi could not deny respect to Missouri judgment based on gambling transaction on ground that gambling contracts are not to be enforced “by any court”); *see also* *Kenney v. Supreme Lodge of the World, Loyal Order of Moose*, 252 U.S. 411, 415 (1920) (holding that Illinois statute prohibiting prosecution of wrongful death where death had occurred in another state did not prevent enforcement of Alabama ruling, and explaining, “[w]hether the Illinois statute should be construed as the Mississippi Act was construed in *Fauntleroy v. Lum* was for the Supreme Court of the State to decide, but read as that Court read it, it attempted to achieve a result that the Constitution of the United States forbade”).

117. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 91 (AM. LAW INST. 1971) (claim-localizing statutes do not deprive sister states of power to hear claim).

118. *Tenn. Coal, Iron, & R.R. v. George*, 233 U.S. 354, 360 (1914); *see* Note, *Protection for Shareholder Interests in Recapitalizations of Publicly Held Corporations*, 58 COLUM. L. REV. 1030, 1039 n.64 (1958) (“The various legislatures, in specifying which courts are appropriate within their own states, probably are not concerned with and do not intend to affect the bringing of suits in other states. Further, even if the statutes are intended to foreclose suit in other states, they may be ineffective to do so.”) (citing *Tenn. Coal*, 233 U.S. at 354). The *Tennessee Coal* principle was subject to limits set out by the decision itself: where “the right and the remedy” are “so inseparably united as to make the right dependent upon its being enforced in a particular tribunal,” a forum-state’s jurisdiction may be restricted. *Tenn. Coal*, 233 U.S. at 359. However, in subsequent cases, this aspect of *Tennessee Coal* has been “eroded,” so that “the State of the forum may ‘supplement’ or ‘displace’ the remedy of the other State, consistently with constitutional requirements.” *Crider v. Zurich Ins.*, 380 U.S. 39, 42–43 (1965) (quoting *Carroll v. Lanza*, 349 U.S. 408, 414 (1955)) (citing *Alaska Packers*, 294 U.S. at 544). We do not need to identify the precise limits of this principle to make our point: that when it comes to jurisdiction and judicial access, states function under different constraints than private parties and the use of the corporate form does not dilute or mitigate the concern driving the constraint.

constitutional concerns that are not present when private parties agree to jurisdiction-limiting terms in a contract.

Third, a state may not create a property interest and then attach procedural limitations to that interest which effectively eliminate legal protection.<sup>119</sup> Although the principle has unclear boundaries, common sense suggests that a forum provision vesting jurisdiction over a claim exclusively in a court that either lacked subject-matter jurisdiction or lacked personal jurisdiction over an indispensable party—and hence would not be able to offer any relief—may amount to an unconstitutional denial of due process.

Fourth, the Dormant Commerce Clause limits a state's power to legislate in ways that discriminate against out-of-state interests, and its central target is state protectionist legislation. A state law that facially violates this rule is subject to a "virtually *per se* rule of invalidity"<sup>120</sup>—as described by the Court, "the strictest scrutiny of any purported local purpose and of the absence of nondiscriminatory alternatives."<sup>121</sup> In addition, even laws that do not facially discriminate may run afoul of the Commerce Clause if they burden or interfere with interstate commerce. In *Pike v. Bruce Church, Inc.*,<sup>122</sup> the Court expressed this bar in terms of a balancing test: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>123</sup>

The statutes adopted by Delaware and several other states authorizing the use of corporate charter/bylaw forum-terms on their face create an asymmetry in favor of the state's own courts and against the courts of other states; they permit a domestic corporation to designate an exclusive forum, but only if that forum is located in the state of incorporation. No other state's court may be selected. Arguably, such statutes run afoul of the *per se* rule of invalidity as a form of facial discrimination against out-of-state interests.

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119. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436–37 (1982) (holding that due process was violated when the state dismissed an administrative claim as untimely when the agency had failed to schedule a conference within the allowable time period).

120. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To overcome this presumption, a state would generally have to show that it has no other means to advance a legitimate local purpose. *E.g.*, *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (upholding fish import ban because it protected native fisheries from risk of parasitic infection and adulteration that could not be served as well by available nondiscriminatory means) (citing *City of Philadelphia*, 437 U.S. at 627).

121. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

122. 397 U.S. 137 (1970).

123. *Id.* at 142.

To be sure, the rule of per se invalidity is subject to an important exception: a state may engage in self-promotion when the challenged law is aimed at favoring the state itself or its subdivisions, as distinct from private entities within the state.<sup>124</sup> Delaware has an interest in maintaining its corporate-law brand—a composite of attractive law, efficient administration, and specialized courts with expertise and experience.<sup>125</sup> By bundling law and judicial decision-making together through the device of a law that privileges its own courts, as Section 115 does, Delaware engages in permissible discrimination if the law’s intent and effect are to aid the state by attracting corporate charters and generating franchise tax revenue.<sup>126</sup> Other states, however, are not actively competing for incorporations and would not earn increased franchise taxes. These states have a substantially weaker self-interest in localizing disputes in their own courts.<sup>127</sup>

The constitutional analysis changes considerably if discrimination were designed to promote the private interest of the local bar rather than the public interest of the state.<sup>128</sup> From that perspective, forum-term statutes that discriminate in favor of the state’s own courts would be seen not as a state revenue-raising device, but rather as a rent-seeking

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124. Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 342–43 (2008); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–44 (2007).

125. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 276–77 (1985).

126. A statute that comes within the self-promotion exception is subject to a balancing test that considers the burdens imposed on commerce “in relation to the putative local benefits.” *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)). To the extent Delaware law functions as “de facto ‘national’ U.S. corporate law,” see Armour et al., *supra* note 30, at 1398, other states arguably have an interest in participating in the elaboration of corporate law and of sharing in the economic benefits that accrue from charters and litigation. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (citing *Pike*, 397 U.S. at 142); see also *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). But see Paul N. Cox, *The Constitutional “Dynamics” of the Internal Affairs Rule—a Comment on CTS Corporation*, 13 J. CORP. L. 317, 318–19 (1988) (questioning whether the Court’s commerce clause analysis “is substantially narrower than the balancing test rhetoric that the Court often employs”).

127. See generally Marcel Kahan, *The State of State Competition for Incorporations*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2015) (discussing extent to which states compete for incorporations).

128. In proposing Section 115, the Delaware bar clearly understood that the statute could be cast as self-interested and protectionist. See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1673–74 (2016) (concluding that, although the interest of the bar played a role in passage of the legislation, viewing the legislation as a product of lawyers’ self-interest is incomplete); Maria Slobodchikova, Comment, *Forum Selection Bylaws in Delaware*, 34 REV. BANKING & FIN. L. 466, 474–76 (2015); Alison Frankel, *Forum Selection Clauses Are Killing Multiforum M&A Litigation*, REUTERS (June 24, 2014), <http://blogs.reuters.com/alison-frankel/2014/06/24/forum-selection-clauses-are-killing-multiforum-ma-litigation/> [https://perma.cc/UZ4N-KRRZ].

mechanism by an elite subset of the local bar, consistent with the interest-group theory of corporate law.<sup>129</sup> We need not resolve the issue whether any discriminatory statutes violate the Commerce Clause,<sup>130</sup> for our point is more modest. Discrimination of the sort entailed by forum-term statutes at the least raises constitutional concerns that other courts may take into account in ruling on the enforceability of a forum-term. In this sense, this discrimination constrains the kinds of forum-terms that may be included in a charter or bylaw.<sup>131</sup>

*B. Consent and the Validity or Enforceability of Corporate Forum-Terms*

A second implication of our analysis affects the weight that ought to be given to party consent when a court assesses the validity and enforceability of a corporate forum-term. The contractual approach to forum-terms makes party consent the touchstone of validity. Enforceability is another matter. Disputes about forum-terms typically come into play when a lawsuit is filed in a court not designated in the corporate charter or bylaw. If the action is filed in state court, state law will govern whether the party seeking to enforce the forum-term should move to dismiss on the merits, for improper venue, or on grounds of forum

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129. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987). As others have noted, Delaware has in effect assigned legislative agenda-setting for corporate law amendments to a private group—a committee of the corporate bar. See Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 70 (2009) (describing the practice of having the corporate bar responsible for adapting and revising the Delaware code, subject to ratification by the General Assembly).

130. We have identified no successful Commerce Clause challenge to a state restriction on jurisdiction of the sort implicated in forum-terms. The most analogous rulings are to tolling statutes that have been invalidated, insofar as they bar non-state corporations from the protections of statutes of limitations unless they submit to personal jurisdiction within the state. *E.g.*, *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 892 (1988) (“To gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts.”); *cf.* *Cox*, *supra* note 126, at 344–45 (discussing the market participant exception to discriminatory state laws, and asking but not answering whether the Dormant Commerce Clause bars a state from “authorizing private conduct for the purpose of encouraging retention of corporate assets within the state,” and recognizing that corporations, because their “existence and attributes are state determined,” may be “characterized legitimately as instruments of state policy”).

131. See Jeff C. Dodd & James Edward Maloney, *Keeping Current: Delaware Passes Legislation Prohibiting Fee-Shifting Bylaws and Validating Exclusive Forum Selection Bylaws for Stock Corporations*, BUS. L. TODAY (A.B.A. Bus. L. Sec., Chicago, Ill.), Aug. 2015, [https://www.americanbar.org/publications/blt/2015/08/keeping\\_current.html](https://www.americanbar.org/publications/blt/2015/08/keeping_current.html) [<https://perma.cc/98K3-3D2M>] (questioning whether exclusive forum-term giving differential treatment to Delaware and foreign courts as exclusive “will draw a constitutional attack”).

non conveniens.<sup>132</sup> If the action is filed in federal court, the party seeking to enforce the forum-term would move to transfer to another federal district court under 28 U.S.C. § 1404 or to dismiss on grounds of forum non conveniens if the forum-term lists a state court or a non-federal court, such as the court of a foreign country.<sup>133</sup> When the parties to a contract have specified a forum for disputes arising from their contract, the U.S. Supreme Court has held that courts should enforce the clause “[i]n all but the most unusual cases,”<sup>134</sup> directing that the district court is to accord no weight to the plaintiff’s private interests and to consider only public factors bearing on the decision to transfer or dismiss.<sup>135</sup> The Court’s approach does not bind state courts,<sup>136</sup> but it is influential.<sup>137</sup>

In our view, private factors ought not automatically drop out of the enforceability calculus for charter or bylaw forum-terms. Rather, given the attenuated nature of party consent to some corporate forum-terms, private factors deserve consideration, at least in some litigation contexts; likewise, consent ought not automatically ensure a term’s validity or enforcement if public factors tilt in favor of an alternative forum.<sup>138</sup>

### 1. *The Absence of Any Consent*

Forum-terms should not be enforced in circumstances when the plaintiffs have given no consent at all—not even meaningful consent to the process for amending charters and bylaws—to the provision. Such consent is generally lacking for any claim that is not either a derivative

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132. See generally J. Zak Ritchie, Note, *A Tie That Binds: Forum Selection Clause Enforceability in West Virginia*, 113 W. VA. L. REV. 95 (2010).

133. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 568, 576 (2013). The Supreme Court left open whether a motion to dismiss under FED. R. CIV. P 12(b)(6) would also be appropriate. *Id.* at 580 n.4.

134. *Id.* at 583.

135. *Id.* at 581–82.

136. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991) (“federal law governs the enforceability of the forum-selection clause” in a cruise-passenger ticket in an admiralty suit); *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 28–32 (1988) (law of *lex fori* applied in diversity action).

137. See Kevin M. Clermont, *Governing Law of Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 672–73 (2015).

138. The Third Circuit Court of Appeals addressed a variant of the problem in the context of an ordinary contractual forum-term resisted by persons who were not parties to the contract. Given the complete absence of consent, the appeals court found error in the district court’s failure to consider private factors, explaining, “where the *Atlantic Marine* framework would wholly deprive non-contracting parties of their right to seek transfer on the basis of their private interests, the customary § 1404(a) analysis guarantees them that right.” *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 403 (3d Cir. 2017).

claim asserted on behalf of the corporation or a claim asserted by a shareholder.

As we have discussed, some forum-terms encompass claims “based upon a violation of a duty by a current or former director or officer or stockholder in such capacity.”<sup>139</sup> This broad phrasing would include claims by security holders other than shareholders under the federal securities laws or even more mundane claims, such as a claim for employment discrimination. In addition, many jurisdictions, including Delaware, treat veil-piercing claims by creditors as claims governed by the internal affairs doctrine.<sup>140</sup> Because forum-terms generally include “any action asserting a claim governed by the internal affairs doctrine,” such claims would also be swept into the scope of forum terms. Either of these claims, for example, also would fall within the scope of Section 115 of Delaware law.<sup>141</sup>

But as to claims that are neither claims by stockholders nor derivative claims,<sup>142</sup> the plaintiffs cannot fairly be said to have consented either to the substance of a forum-term or to the process by which such a term may be inserted into a charter or bylaw. Some of the plaintiffs who may have such claims (such as tort creditors seeking veil piercing) may not have voluntarily engaged in any transaction with the company. Others, such as non-shareholder security holders, employees, or contract creditors, may have taken a voluntary action with regard to the company, such as entering into a contract or buying securities. But, unlike a shareholder, they neither have any power over the content of a charter or a bylaw nor any reason to believe that the terms of a charter or bylaw could reduce their contractual rights or any rights arising under non-corporate laws.<sup>143</sup>

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139. DEL. CODE ANN. tit. 8, § 115 (2017).

140. See Gregory Scott Crispi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 90 (2008).

141. The former would be claims based on a violation of a duty by a director or officer in such capacity; the latter would be claims as to which the Chancery Court has jurisdiction as well as, arguably, claims based upon a violation of a duty by a stockholder in such capacity. See *L.B. Labs, Inc. v. Lance Indus., Inc.*, No. CIV. A 5253, 1981 WL 318274, at \*1 (Del. Ch. May 22, 1981) (Chancery Court has exclusive jurisdiction over veil piercing claims).

142. Creditors of insolvent corporations have standing to pursue derivative claims, such as claims for self-dealing by corporate fiduciaries that normally are pursued by shareholders. *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007). Creditors in these cases are residual claimants that stand in the position normally occupied by shareholders (who lack incentives to pursue these claims if the company is insolvent).

143. The Supreme Court in *Carnival Cruise* upheld the validity of forum-selection term in a consumer contract that was merely a form provision and not subject to negotiation. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585 (1991). However, the Court emphasized in its decision that the party against whom the term applied conceded having had notice of the term. The Court left

## 2. *Corporate Forum-Terms and the Problem of Ineffective Relief*

Forum-terms become problematic when the selected forum is not an efficient or effective forum to adjudicate the entire dispute. This problem can arise when the selected forum lacks subject-matter jurisdiction over some of the claims or personal jurisdiction over some of the defendants.

These defects could weigh against the enforcement of a forum-term even if the suit involves, for example, an intra-corporate dispute of a Delaware corporation and the forum-term selects Delaware as a forum, and even if consent is manifest. Almost half of the forum-terms adopted by Delaware corporations after 2012 specify Delaware's Chancery Court as the exclusive forum.<sup>144</sup> As a state court, the Chancery Court lacks subject-matter jurisdiction over claims under the Securities Exchange Act.<sup>145</sup> However claims that a company violated Section 14(a) of the Securities Exchange Act by making misleading disclosures to shareholders in a proxy statement<sup>146</sup> often are intertwined with claims for breach of fiduciary duty. This is so for two reasons. First, a misleading

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open how an absence of notice would affect the validity of a forum-term and further emphasized that forum-terms contained in form contracts are subject to review for reasonableness. *Id.* at 595. Whether the ability to learn about the existence of a forum-term before making an investment decision ought to constitute the requisite consent for validity is unclear.

We acknowledge that small shareholders do not always find it worthwhile to examine all charter and bylaws provisions in detail before they make their investment decisions. *Cf.* G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J.L. ECON. & POL'Y 413, 438–39, 455 (2015) (stressing importance of reading non-price terms when markets are not competitive). However, institutional aspects of publicly traded corporations may ameliorate concerns about a lack of notice that otherwise are present in the consumer contracts setting. According to the efficient-market hypothesis, the stock price of securities traded in thick, public markets reflects all publicly available information. *See* Mark H. Van De Voorde, *The Fraud on the Market Theory and the Efficient Markets Hypothesis: Applying a Consistent Standard*, 14 J. CORP. L. 443, 464 & n.168 (1989) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 243–244 & n.22 (1988)). While the extent to which stock prices are “efficient” is disputed, information on charter and bylaw provisions is relatively easy to obtain and evaluation of these terms is aided by the fact that they tend to be standardized and common. *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 761 (1995). Unlike consumers who, when faced with a multi-page agreement in legalese, rationally decide not to read it, larger institutional investors in stocks may find it worthwhile to check for and evaluate provisions in charters and bylaws that are arguably material; even smaller investors, who do not find it worthwhile, may be protected by the information obtained, and the corresponding investment and pricing decisions, of the larger investors. On the other hand, it is recognized that procedural terms are difficult to price and often are undervalued. *See* Cox, *supra* note 67, at 262.

144. Allen, *supra* note 45, at 4 (“Of the 112 post-*Boilermakers* bylaws, only 43 percent provide that the Delaware Court of Chancery is the exclusive forum . . .”).

145. *See* Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (2012); Securities Act of 1933, § 22, 15 U.S.C. § 77v(a) (2012).

146. 15 U.S.C. § 78n.



disclosure is itself a violation of state corporate law.<sup>147</sup> Second, because a fully informed shareholder vote cleanses many actions that would otherwise amount to a breach of fiduciary duty (for example, an unfair self-dealing transaction), many suits involve an alleged breach of fiduciary duty as well as alleged deficiencies in disclosures made to shareholders.<sup>148</sup> A federal court has power and could exercise discretion to dispose both the federal claim and the state claim; the latter would be within the federal court's supplemental jurisdiction.<sup>149</sup> The Delaware court, by contrast, could dispose only the state claims.

A state court also might lack personal jurisdiction over some key defendants. The company is subject to general jurisdiction in the forum state if that is the state in which the company is incorporated or has its principal place of business; as such, it is amenable to suit on any claim.<sup>150</sup> Moreover, in our view, if the company has adopted a forum-term in its charter or bylaw in a state other than the state of incorporation, then specific jurisdiction over the company would be appropriate as to any claim within that clause. Furthermore, under Delaware law,<sup>151</sup> any director or officer of a Delaware corporation by accepting that position is deemed to have consented to jurisdiction in the courts of that state for any claim concerning breach of fiduciary duty.<sup>152</sup>

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147. See *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (citing *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992)) (fiduciary duties require that directors disclose to shareholders all material information bearing upon a vote).

148. See, e.g., *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313–14 (Del. 2015) (business judgment rule is the appropriate standard of review in post-closing damages suits involving mergers that are not subject to the entire fairness standard and that have been approved by a fully informed, uncoerced majority of the disinterested stockholders); *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) (business judgment rule applies in self-dealing transactions with controlling shareholder if transaction is approved by properly functioning independent committee and by fully informed, uncoerced majority of the disinterested stockholders).

149. See 28 U.S.C. § 1367 (2012).

150. *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 749 (2014) (citing *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)) (a corporation is subject to general jurisdiction in its state of incorporation and its principal place of business).

151. Delaware is alone in having a director deemed-consent statute. *Winship*, *infra* note 152, at 1183 (stating that “no other states’ director consent statutes have survived”). But some states include breach of a director’s duties among the acts covered by a long-arm statute. *Id.* at tbl.2 (listing sixteen states, including Delaware). Despite the claim that the charter or bylaws constitute a contract “between the stockholders, the directors and officers, and the corporation” (see *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013)), we are doubtful that a bylaw forum-term on its own would confer personal jurisdiction in the designated forum over the directors, officers, or controlling shareholders of the respective company.

152. DEL. CODE ANN. tit. 10, § 3114 (2017). The statute has covered corporate officers since 2003. Act of June 30, 2003, 74 Del. Laws, ch. 83 (2004) (codified as DEL. CODE ANN. tit. 10, § 3114(b)). The constitutionality of the statute was upheld in *Armstrong v. Pomerance*, 423 A.2d 174, 180 (Del.

However, a lawsuit involving a corporation's internal affairs may involve additional defendants. Controlling shareholders and investment banks often are crucial parties to a suit involving breach of fiduciary duty.<sup>153</sup> Controlling shareholders independently owe fiduciary duties under Delaware law;<sup>154</sup> investment banks are sometimes sued as aiders and abettors of breaches by directors.<sup>155</sup> Indeed, controlling shareholders are generally alleged to be the principal beneficiary of a director's breach, and usually have the greatest ability to pay damages; and investment banks as "aiders and abettors" may be the only party that is liable under Delaware law for certain kinds of breach.<sup>156</sup> If these defendants did not engage in in-state conduct,<sup>157</sup> they could be found to lack the requisite contacts to support the Delaware court's exercise of specific personal jurisdiction over them.<sup>158</sup>

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1980). However, subsequent developments in the law of personal jurisdiction have led to a rethinking about the constitutionality of the implied-consent statute as applied to directors. *See* Eric A. Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. 783, 785 (2013) (arguing that Delaware relies upon an "unconstitutional amenability statute . . . to secure in personam jurisdiction over nonresident directors and officers of Delaware corporations"). Questions also have been raised about the constitutionality of the provision with respect to officers. *See* Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1188–95.

153. At least one court has construed a standard exclusive forum bylaw as not covering claims against controlling shareholders. *See* *Anderson v. GTCR, LLC*, No. 16-10-LPS, 2016 WL 5723657, at \*5 (D. Del. Sept. 29, 2016), *appeal docketed*, No. 1-16-CV-03870 (3d Cir. Oct. 16, 2016).

154. *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994).

155. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 875 (Del. 2015) (upholding liability of financial adviser).

156. In most states, companies can adopt charter provisions exculpating directors from personal liability for certain breaches of fiduciary duties. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7). Under Delaware law, an outside party who aided and abetted these breaches would remain personally liable even if the directors who committed these breaches avoid liability as a result of such an exculpatory clause. *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts.*, 129 A.3d at 875.

157. *See Bristol-Myers Squibb Co. v. Super. Ct. of Calif.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1773, 1781 (2017) ("In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" (alteration in original) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 54 U.S. 915, 919 (2011))).

158. *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1229 (Del. Ch. 2001) (finding jurisdiction over majority shareholder based on acts taken in Delaware in furtherance of a conspiracy), *rev'd on other grounds*, 817 A.2d 249 (Del. 2002); *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, No. CIV. A. 12036, 1992 WL 171420, at \*5–6 (Del. Ch. July 17, 1992) (ownership of Delaware corporation is itself not sufficient to subject parent corporation to Delaware jurisdiction except in double derivative suit where parent is indispensable party and would not be exposed to pay any judgment). Whether a court has personal jurisdiction is determined as of the date of the suit's filing. *Shatas v. Snyder*, No. 73716-3-I, 2016 WL 6084113, at \*5–6 (Wash. Ct. App. Oct.

When the selected forum court lacks subject-matter jurisdiction over all claims or personal jurisdiction over an indispensable party,<sup>159</sup> an exclusive forum provision would presumably be invalid under Section 115 of Delaware law and such terms ought not to be valid or enforceable if authorized by the laws of other states. Alternatively, a court should hold in such a case that fiduciary duties require the corporation to waive the provision.

Different considerations come into play when the selected forum court has subject-matter jurisdiction over some but not all claims or lacks personal jurisdiction over some defendants (none of whom are indispensable in the doctrinal sense).<sup>160</sup> Enforcement of the forum-term would mean that, to provide full relief, the lawsuit would have to be divided among the courts of different states or between the federal and state systems. Such a bifurcation in related lawsuits would result in additional costs to the plaintiffs, the corporation, potential witnesses, and the court system. Although principles of *res judicata* typically will lower the costs of litigation by avoiding the problem of duplicative fact finding, the federal system may have an interest in avoiding state fact finding that will affect questions of federal law.

In this situation, consent ought to be only one of several factors considered by the court when the validity or enforceability of the term is at issue. If a lawsuit asserting all related claims is brought in a non-

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17, 2016) (reversing trial court's dismissal as subsequent consent to jurisdiction was insufficient to establish jurisdiction as of the date of filing).

159. Whether a party is indispensable under Delaware law is governed by Del. Ch. Ct. R. 19(a), which compels joinder:

[W]here complete relief cannot be accorded among the parties in the person's absence, or where the person claims an interest and cannot protect that interest in their absence or that interest leaves any party subject to a substantial risk of inconsistent obligations. A necessary party should have not only an interest in some part of the controversy but the interest must be such that a final decree cannot be made which will neither touch upon that party's interest nor leave the controversy in such a state that the final determination would be inconsistent with equity and good conscience.

Tuscan Constr. Inc. v. Capaldi, No. CV 10861-MZ, 2016 WL 3212491, at \*2 & n.9 (Del. Ch. May 24, 2016) (citing *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1125 (Del. Ch. 1985)). In some cases, the lack of jurisdiction over an indispensable party has been treated as grounds for dismissing the entire lawsuit as against all parties. *See, e.g., Weinberger v. Lorenzo*, No. CV 10692, 1990 WL 156529, at \*4 (Del. Ch. Oct. 12, 1990) (class action by Lorenzo alleging corporate mismanagement at Eastern Air Lines dismissed for failure to join Eastern Air Lines).

160. For example, a controlling shareholder or an outside aider and abettor to a breach of duty would generally not be an indispensable party in a lawsuit against board members. *See, e.g., Terrydale Liquidating Tr. v. Gramlich*, 549 F. Supp. 529, 531 (S.D.N.Y. 1982) (no statutory basis for personal jurisdiction under New York law against aider and abettor of federal securities law violations where cause of action did not arise out of transaction in New York), *aff'd sub nom. Terrydale Liquidating Tr. v. Barness*, 846 F.2d 845 (2d Cir. 1988).

selected forum that has jurisdiction over all of the claims and parties, the non-selected forum court should independently consider private and public factors that bear upon party convenience and the interests of justice, taking account of the public interest in reducing judicial costs and ensuring effective redress. Such an analysis should include not only the extent of the shareholders' consent to the forum-term, but also the significance of the claims that could not be adjudicated in the selected forum, as well as the expertise of the selected forum in resolving those claims that it does have power to hear.

### 3. *Terms that Burden Plaintiff or Promote Self-Interested Forum Shopping*

Corporate forum-terms also carry the potential for abuse both to private interests and to public interests in such matters as law enforcement and efficient dispute resolution. In particular, the adoption of a forum-term may be motivated by a desire to steer litigation to a forum that is highly inconvenient for the anticipated plaintiffs or that has procedural rules that are unusual or prejudicial to obtaining relief for meritorious claims. We consider the case when the company is not publicly-traded and the selected forum is *not* the state of incorporation.<sup>161</sup>

In the context of a non-public corporation, the plaintiff in a lawsuit against the company often will be a minority shareholder. Although the stakes of the lawsuit may be significant relative to the resources of the parties, they typically will be much smaller than the stakes in suits involving publicly traded corporations. Having to litigate in a remote forum could impose a significant burden on plaintiffs. The private factor of convenience thus carries different weight, and a weight that cannot fairly be dismissed by resorting to fictional consent given by such plaintiff-shareholders. The public factors also will be significant. For example, resolution of the dispute is likely to depend on witness testimony, and not simply documentary evidence. An inconveniently located forum thus may pose additional burdens in terms of having to obtain discovery from non-parties outside the jurisdiction of the forum or to secure testimony from these non-parties at trial. These costs need to be considered when assessing whether a forum-term should be enforced.

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161. This situation could arise even in Delaware. Although Section 115 of the Delaware Code does not permit a Delaware company to include a forum-term that excludes Delaware as a forum, it permits a clause that selects *both* Delaware courts *and* the courts of another state as exclusive fora. To the extent that the Delaware courts lack personal or subject-matter jurisdiction, such a clause would effectively force plaintiffs to bring a case in the courts of a state other than the state of incorporation.

Another consideration is the ability of a forum-term to steer litigation into a forum with procedures that may cause prejudice to plaintiffs. This concern is heightened if the directors have adopted a forum-term for causes of action that arose before adoption of the term or in anticipation of a transaction likely to generate a dispute. Under basic conflicts rules, a court is permitted to apply its own procedures to the resolution of a dispute that involves foreign law.<sup>162</sup> A firm's selection of a forum other than the state of incorporation might be a strategic maneuver to benefit from the substantive law of the state of incorporation, coupled with the procedural law of the state of the selected forum. To the extent that a forum-term channels an internal corporate dispute into a forum other than the state of incorporation, concerns about procedural fairness are potentially present, particularly if the procedures undermine the plaintiff's interest in an effective remedy. Red flags ought to be raised if the selected forum has, relative to the state of incorporation, a statute of limitations for corporate disputes that may bar an asserted claim,<sup>163</sup> a requirement for higher bonds as a precondition for suits (or interim relief or appeals),<sup>164</sup> more restrictive notice rules for derivative lawsuits or class actions,<sup>165</sup> or a "loser-pays" rule that may be unfavorable to plaintiffs.<sup>166</sup> If a forum-term designates a forum that has procedural provisions that are materially adverse to the plaintiff, as compared to the procedural rules of the state of incorporation, then a forum that was adopted midstream should not be enforced unless

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162. RESTATEMENT (FIRST) OF THE CONFLICT OF LAWS § 585 (AM. LAW INST. 1934) ("All matters of procedure are governed by the law of the forum."); *see also* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

163. *Compare In re* Tyson Foods, Inc., 919 A.2d 563, 584 (2007) (citing 10 DEL. CODE ANN. § 8615 (2017)) (three-year period for breach of fiduciary duty claims), *with* Maxson v. Travis Cty. Rent Account, 21 S.W.3d 311, 319 (Tex. App. 1999) (two-year period).

164. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 686 (1974) (noting differences in state law requirements for positing of security for expenses).

165. *Compare In re* UnitedHealth Grp. Inc., 754 N.W.2d 544, 555 (Minn. 2008) (under Minnesota law, court is required to apply business judgment rule and defer to decision by a Special Litigation Committee to approve settlement of derivative action as long as members were sufficiently independent and pursued investigation in good faith), *with* Zapata Corp. v. Maldonado, 430 A.2d 779, 789 (Del. 1981) (even if Special Litigation Committee was independent and acted in good faith, court may use its own business judgment to determine whether motion by committee should be granted).

166. *See, e.g.*, Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1864 (1998) (noting that "a 'loser pays' rule impacts disproportionately on plaintiffs' access to the courts").

the plaintiff (or her predecessor in interest) actually voted in favor of that term.<sup>167</sup>

Similar concerns can arise in two additional circumstances. First, for claims that are not governed by the substantive law of the state of incorporation, even a term that designates the courts of the state of incorporation as exclusive fora may be problematic. This could be the case when the procedural law of the selected forum state is, relative to the state supplying the substantive law, adverse to plaintiffs. Second, forum-terms deserve scrutiny where states differ in their conflict of laws rules and the rules of the selected forum state point to a substantive law that is materially more adverse to a plaintiff than the substantive law designated by the rules of the state where the plaintiff brought a lawsuit. In all these cases, courts should presumptively give no weight to a forum-term in a charter or bylaw that was adopted midstream unless the plaintiff (or her predecessor in interest) actually voted in favor of that term.

#### 4. *Forum-Terms and Limiting Parallel Suits*

We next consider how party consent to a forum-term ought to affect the analysis when courts are faced with the problem of parallel derivative and class action lawsuits. Corporate forum-terms do not explicitly deal with such suits. But by channeling suits into a single forum (or two fora if the clause permits suit in both federal and state court), they greatly reduce the potential for parallel litigation.<sup>168</sup>

We note at the outset that applying forum-terms to derivative and class action shareholder lawsuits raises somewhat different concerns than applying forum-terms to non-representative suits. While shareholders may not actually have consented to the inclusion of the forum-term in the corporate charter or bylaw, they also will not actually have consented to the initiation of lawsuits on their behalf in a particular forum. In other words, forum-terms in representative litigation generally entail two

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167. The inquiry would be analogous to that of an enforcing court when determining whether offensive collateral estoppel may be asserted against a non-party to the judgment. In this situation, the Supreme Court has looked to whether the party to be bound had a “full and fair” opportunity to litigate in the prior action. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979).

168. *See, e.g.,* Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 41–46 (2012) (defending forum clauses that specify the state of incorporation as the efficient solution to the problem of multi-jurisdictional litigation). Whether multijurisdictional litigation is a problem, or a problem of broad scope, is questioned. *See* Brian J.M. Quinn, *Arbitration and the Future of Delaware’s Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 874 (2013) (“[T]here is not much evidence to support the contention that parties are presently seeking to bring merger disputes or shareholder disputes to forums other than Delaware.”).

agency relationships—the named plaintiff and her lawyer as “agent” of the shareholder class and the board that adopted the forum-term as agent of the shareholders—where the agents may pursue their own interest at the expense of the interests of shareholders. The possibility that institution of the lawsuit in a non-selected forum may not be in the best interest of shareholders even from an ex post perspective is thus uniquely present in representative litigation.

In our view, the balance of factors may tip in favor of enforcing the selected forum when representative suits are at issue. Courts and commentators have argued that a significant subset of shareholder derivative and class action lawsuits—in particular, shareholder suits filed after a merger has been announced—lack merit.<sup>169</sup> These lawsuits usually allege that the board breached its fiduciary duty in approving the merger.<sup>170</sup> The argument that many of these suits lack merit is based on the observation that a high percentage of mergers attract lawsuits, often filed right after the transaction is announced;<sup>171</sup> that many of these suits are settled with minimal investigation of the merits;<sup>172</sup> and that settlements often entail no monetary recovery for the shareholder plaintiffs, but

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169. See *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Tr.*, 834 F.2d 677, 681–82 (7th Cir. 1987) (Posner, J.) (“Ordinarily the named plaintiffs are nominees, indeed pawns, of the lawyer, and ordinarily the unnamed class members have individually too little stake to spend time monitoring the lawyer—and their only coordination is through him. . . . The danger of collusive settlements . . . makes it imperative that the district judge conduct a careful inquiry into the fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of class members who do not opt out of the settlement.” (citations omitted)); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686–91 (1986) (arguing that class counsel has incentive to settle early and quickly under both the percentage of recovery and lodestar methods for determining attorneys' fees); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985); Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 232; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000) (“[C]lass counsel generally face immense pressure to settle and even to collude with the defendant to settle the class claims cheaply in exchange for a generous fee.”).

170. Depending on the type of transaction, the breach may be reflected in agreeing to an unfair transaction with a controlling shareholder or insider who is acquiring the company in the merger; including deal protection measures in the merger agreement (such as termination fees or no-shop provisions) that make it harder for a competing bidder to emerge; not following a proper process to assure that the company is sold for the highest price; or making false or misleading disclosures to shareholders in soliciting their votes on approving the merger.

171. See, e.g., Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1827–29 (2004).

172. See Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 487–92 (2015).

significant attorney's fees. Critics refer to these fees as a transaction tax that is imposed on the shareholders.<sup>173</sup>

Parallel litigation forces a defendant to bear the duplicative cost of defending suits in several courts. These costs are ultimately borne by shareholders, either because they continue to hold equity in the corporation or because an acquirer, anticipating these costs, will offer a lower amount to acquire their shares. This being said, the literature on the topic may exaggerate these costs: lawsuits filed after a merger announcement and settled quickly do not generate high litigation costs because they do not generate substantial litigation activity such as discovery or trial.

Application of the forum-term may be beneficial to the defendant-corporation and shareholders for reasons that go beyond litigation costs. In many merger-related lawsuits, the most important procedural move happens early in the lawsuit when plaintiffs move for a preliminary injunction to stop the transaction from going forward during the pendency of the lawsuit. If granted, the injunction leaves the target company in limbo until the acquisition is consummated. During this period of limbo, management generally is oriented towards preserving the status quo, rather than maximizing company value. Moreover, delay increases the risk that the transaction will never be consummated. Many merger agreements permit the parties to a merger to walk away from the deal if the merger is not consummated by a certain date.<sup>174</sup> In addition, most merger agreements include so-called "materially adverse change" clauses which permit an acquirer to terminate the merger agreement if there are significant changes in the business of the target that reduce its value.<sup>175</sup> The longer the period between the signing of the agreement and its consummation, the more likely it is that such changes have occurred. Because publicly-traded companies involved in merger transactions often have a value in the tens of billions of dollars, even a decline in value resulting from status quo oriented management or the risk of non-

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173. See, e.g., Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 108 (2014) (observing that in 2012, 90% of public company mergers and acquisitions valued at over \$100 million were subject to litigation by objecting shareholders, and concluding that "'plaintiffs' attorneys have successfully attached what amounts to a transaction tax to an overwhelming majority of large public company deals"); Rodney Yap et al., *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, BLOOMBERG (Feb. 16, 2012, 1:59 PM), <http://www.bloomberg.com/news/articles/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals> [<https://perma.cc/HCV7-JGHQ>].

174. See, e.g., HELIOS & MATHESON ANALYTICS INC., AGREEMENT AND PLAN OF MERGER BY AND AMONG HELIOS AND MATHESON ANALYTICS INC., ZONE ACQUISITION, INC., AND ZONE TECHNOLOGIES, INC., DATED AS OF JULY 7, 2016 (FORM 8-K, EX. 2.1) (2017), § 6.1(b)(i), at 54.

175. *Id.* §§ 2.3, 3.3, at 8–9, 22.



consummation that is small in percentage terms can be high in absolute dollar terms.

A preliminary injunction of a merger thus has the effect of imposing potentially significant costs on the defendants. At the same time, the preliminary injunction may be significantly and legitimately beneficial to plaintiffs. In particular, the preliminary injunction may enable the correction of materially deficient disclosures to the shareholders. Our point is not that preliminary injunctions are never or rarely justified in the merger context. Rather, our point is that preliminary injunctions impose burdens on defendants even in circumstances when they are not justified and generate no benefits to plaintiffs. The threat of obtaining a preliminary injunction is thus fertile ground for strike suits—a situation in which the costs to defendants so exceed the benefits to plaintiffs that the motion for interim relief holds settlement value to the plaintiffs even though the recovery for a litigated case was low or non-existing.

Two additional features contribute to the strike-suit potential of injunctions. It is well recognized that preliminary injunctions carry a greater risk than other remedies that a court might enter. For this reason, interlocutory review is permitted on appeal in the federal system despite the strong rule of finality that otherwise governs the appealability of judgments; an interlocutory judgment may be reconsidered and modified prior to final judgment.<sup>176</sup> Although the granting of a preliminary injunction is accompanied by an evidentiary hearing, the court's review of the evidence by definition is limited and provisional and so entails a greater risk of error than fully litigated cases. Hence, injunctions may be granted when, with a full record, they would have been denied. Moreover, a principal cost imposed by a preliminary injunction is delay if a merger is not permitted to go forward on the expected timetable; thus, the cost of an improperly granted preliminary injunction would persist even if the relief ultimately is modified after a full hearing or is overturned on appeal. The potential for legal error in the grant of interim relief, coupled with the costs that even a properly granted interim relief may impose, tends to induce strike-suits aimed at obtaining such interim relief and then settling the litigation prior to a final disposition.

Second, strategies that may ordinarily deter strike suits (such as a defendant's calling plaintiff's bluff by refusing to settle and compelling plaintiff to bear the costs of litigating a low-recovery case or developing a reputation for not settling) may not work well in a preliminary injunction context. Once the motion for a preliminary injunction is granted, the costs of any delay produced by not settling may be so highly asymmetric that

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176. See FED. R. CIV. P. 54(b).

defendants are under severe pressure to settle. And both because of the high asymmetry in costs and because defendants in these cases are not repeat players, developing a reputation for not settling these cases is difficult. And if plaintiffs believe that they can settle the case once an injunction is granted, they can credibly threaten to bear the limited expense of obtaining an injunction in the first place.

Parallel litigation enhances the potential for strike suits grounded in the threat of preliminary injunctions. Although one court may decline to issue interim relief, another set of lawyers with a different client may seek preliminary relief in a second court. Of course, the granting of a preliminary injunction is a matter of equity, and as a matter of comity the second court may not be receptive to ordering interim relief where forum shopping is manifest. But judges differ in the degree of comity they feel towards their sister courts. Moreover, there may be good policy reasons for a second court to treat an earlier denial of a preliminary injunction by a different court as not preclusive. For example, the case may have been filed first in the second court; the plaintiffs in that court hold more meaningful stakes and hence are better representatives; or the plaintiffs' lawyers have engaged in more investigation. An enforceable corporate forum-term in this context reduces the risk of strike suits based on the threat of obtaining interim relief by limiting such suits to a single forum.

The second potential benefit of a corporate forum-term flows from particularities of Delaware law and clauses that select Delaware as the forum. A key danger to lawyer-driven suits is the risk of a court-sanctioned resolution that provides the defendant with a broadly-worded release encompassing claims that could have substantial merit but have not yet been sufficiently investigated. From the defendant's perspective, the value of such a settlement may far off-set any perceived transaction tax—indeed, the settlement is sometimes characterized as an insurance policy against future claims where the attorney's fees paid to plaintiff's lawyer are the insurance premium.<sup>177</sup> To the shareholder, such settlements are a triple whammy: like other forms of insurance, they undermine incentives to comply with the law; unlike other forms of insurance, the potential shareholder-victims do not receive any insurance payout; and the attorney's fees/insurance premium is priced into the deal term and thus comes at the expense of shareholders.

Corporate forum-terms that locate litigation in Delaware indirectly deal with the problem of settlements of this sort. The reason stems from the

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177. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1057–58 (2013).

approach of the Delaware Chancery Court to settlements, set out in Chancellor Bouchard's decision in *In re Trulia*.<sup>178</sup> *In re Trulia* concerned a proposed settlement of a shareholder class action challenging a merger. Shortly after the transaction was announced, several groups of shareholders brought separate lawsuits; after limited discovery, the suits settled within four months of filing. The settlement was "disclosure-only:" Trulia agreed to provide shareholders with supplementary disclosure about the merger, but shareholders received no other recovery. In return, plaintiffs dropped their motion for a preliminary injunction and agreed to provide a broad release including any claims "relating in any conceivable way" to the merger. In addition, defendants agreed not to oppose payment of attorney's fees of \$375,000.<sup>179</sup>

Although no shareholder objected to the proposed settlement,<sup>180</sup> the Chancery Court rejected it—finding that the additional disclosures were neither material nor "even helpful" to Trulia's shareholders.<sup>181</sup> The court noted the problems with merger-related suits that we discussed above: almost every merger involving a public corporation engenders a "flurry of class action lawsuits," many of which lack merit,<sup>182</sup> these suits nevertheless result in fees for plaintiffs' lawyers who settle quickly on terms that offer no monetary benefit to the stockholders they represent, usually involving supplemental disclosures of questionable value;<sup>183</sup> defendants readily agree to provide such disclosures and advocate the

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178. 129 A.3d 884 (Del. Ch. 2016).

179. *Id.* at 889.

180. At a hearing on the fairness of the settlement, the court asked the parties for supplemental briefing on the benefits of disclosure and the rationale for the scope of the release. In response, an amicus curiae brief was filed by Professor Sean Griffith and the scope of the release was narrowed. See Brief of Sean J. Griffith as Amicus Curiae, *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. Oct. 16, 2015) (No. 10020-CB), 2015 WL 6391945.

181. *In re Trulia*, 129 A.3d at 908–09.

182. *Id.* at 891, 894 (citing MATTHEW D. CAIN & STEVEN DAVIDOFF SOLOMON, TAKEOVER LITIGATION IN 2015, at 2 (2016), <http://ssrn.com/abstract=2715890> [<https://perma.cc/6XW9-5RK3>]) (in 2014, 94.4% and in 2015, 87.7% of transactions involving more than \$100 million triggered litigation and in 2012, 76.0% of such litigation in Delaware was settled for solely supplemental disclosures); Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (contending that litigation challenging mergers is ubiquitous, results in no meaningful recovery, but mostly benefits lawyers who earn fees); Mark Lebovitch & Jeroen van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491, 534 (2016) (arguing that a settlement that provides only immaterial supplemental disclosures is a good proxy for a weak claim).

183. See Cain & Solomon, *supra* note 172, at 478 (showing that 316 of 411 non-dismissed cases involved a settlement for disclosures only and that meant fee award in these cases was \$749,000, whereas only 28 cases involved increased consideration).

approval of the settlement which also includes broad releases and attorney's fees.<sup>184</sup>

To deal with these problems, the court alerted practitioners to expect in future cases:

that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently. In using the term “plainly material,” I mean that it should not be a close call that the supplemental information is material as that term is defined under Delaware law. Where the supplemental information is not plainly material, it may be appropriate for the Court to appoint an *amicus curiae* to assist the Court in its evaluation of the alleged benefits of the supplemental disclosures, given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing.

Finally, some have expressed concern that enhanced judicial scrutiny of disclosure settlements could lead plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value. It is within the power of a Delaware corporation to enact a forum selection bylaw to address this concern.<sup>185</sup>

*In re Trulia* represents the culmination of several earlier Delaware decisions expressing increasing concern about settlement of merger litigation. During 2015, three other members of the five-judge Chancery Court had criticized these settlements and subjected to increasing scrutiny of the “give” (the value of the disclosures) and the “get” (broad releases including potential claims without investigation) in assessing their

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184. *In re Trulia*, 129 A.3d at 895 (citing Joel Edan Friedlander, *How Rural/Metro Exposes the Systemic Problem of Disclosure Settlements* (U. Pa. L. Sch. Inst. for L. and Econ. Res. Paper No. 15-40, Draft Dec. 17, 2015), <http://ssrn.com/abstract=2689877> [<https://perma.cc/3L63-A7ET>]) (noting that in the recent *Rural Metro* litigation, the court “initially considered it a ‘very close call’” to reject a disclosure settlement that would have released claims that, after a new counsel took over, yielded a damage award of more than \$100 million (Transcript at 134, *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) (No. 6350-VCL)).

185. *In re Trulia*, 129 A.3d at 898–99.

fairness.<sup>186</sup> While seeking to control merger litigation resulting in broad releases, disclosure-only remedies, and attorney's fees, the Chancery Court nevertheless remains an attractive forum for suits that generate large monetary recoveries for shareholders—and correspondingly high fees for plaintiffs' attorneys.<sup>187</sup>

As Chancellor Bouchard noted, charter and bylaw forum-terms play an important function in the enforcement of this judicial “policy” against strike suits and overbroad releases.<sup>188</sup> To the extent that courts in other states continue to approve disclosure-only settlements, award attorney's fees, and approve broad releases, Delaware's approach will be undermined. There are thus strong reasons for localizing deal-litigation in Delaware courts to enable the state to regulate merger activity of Delaware companies; to avoid the imposition of a transaction tax on shareholders; and to withhold “deal insurance” that insulate Delaware companies from liability for wrongdoing that the court would redress. In this situation, enforcement of a corporate forum-term by a non-selected forum in favor of Delaware serves the private interests of the shareholders.

Enforcement of the forum-term thus would serve at least three important public interests. First, by centralizing the litigation in Delaware, use of the forum-term arguably encourages sound corporate governance. Second, it encourages the effective use of judicial resources by obviating or reducing the likelihood of competing lawsuits and the costs that accompany strike suits. Third, it promotes law development by permitting Delaware to interpret its corporate law in the context of the state's broader regulatory regime.

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186. See Transcript of Settlement Hr'g and Req. for Att'ys' Fees and the Ct.'s Rulings at 74, *Acevedo v. Aeroflex Holding Corp.*, No. 9730-VCL, 2015 WL 4127547 (Del. Ch. Jul. 8, 2015) (Laster, V.C.) (refusing to approve settlement); Telephonic Bench Ruling on Settlement Hr'g at 17–18, *In re Intermune, Inc. Stockholder Litig.*, No. 10086-VCN (Del. Ch. Dec. 29, 2015) (Noble, V.C.); Mem. Op. at 11–15, *In re Riverbed Tech., Inc. S'holders Litig.*, No. 10484-VCG, 2015 WL 5458041 (Del. Ch. Sept. 17, 2015) (Glasscock, V.C.). According to some reports, even these pre-*Trulia* decisions resulted in a significant decline in merger litigation. See Daniel W. Halston & Alexandra C. Boudreau, *After In re Trulia: Increased Scrutiny for the Give and the Get in Disclosure Settlements*, WILMERHALE: PUBLICATIONS AND NEWS (Feb. 29, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179880878> [<https://perma.cc/A7LL-TEFG>].

187. See, e.g., *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 819 (Del. Ch. 2011) (\$300 million fee award); Gina Chon & Joe Palazzolo, *An Early Christmas for These Lawyers: \$300 Million in Fees for Shareholder Case Sets Off Debate*, WALL ST. J. (Dec. 28, 2011), <https://www.wsj.com/articles/SB10001424052970204296804577124772580624142>. See generally David Marcus, *Delaware's Chancery Grapples with Multijurisdictional Litigation*, DAILY DEAL, Dec. 9, 2011, 2011 WLNR 26934635; Cain & Solomon, *supra* note 172, at 469 (finding that Delaware awards higher attorney's fees but dismisses a greater proportion of cases than other states).

188. *In re Trulia*, 129 A.3d at 898 (noting that companies can adopt charter or bylaw forum terms to address concern of suits filed in jurisdictions “more hospitable to signing off on settlements of no genuine value”).

### 5. *The Special Problem of Waiver and Representative Litigation*

We consider one additional question that generally presents no issues in the context of ordinary contractual forum-selection provisions: whether the corporation should be permitted to waive the clause in favor of a non-selected forum. In our discussion of “*Trulia*”-forum-terms, we assumed that the corporation would seek to enforce the provision. However, most actual provisions permit the company to waive the clause and the company may want to do so.

In our view, waivers may in some circumstances be beneficial. This may occur, for example, when the selected forum cannot efficiently dispose of the litigation because of a lack of jurisdiction. However, a corporate board sometimes may elect to waive a forum-term for self-interested reasons, rather than for convenience or interests of justice, necessitating close scrutiny of a waiver.

Although parallel litigation often is described as a costly scourge for defendants, defendants may benefit strategically—in ways that are not beneficial to shareholders—when parallel representative suits are filed. This structural problem stems from the requirements of Full Faith and Credit: the first case to come to judgment will have preclusive effect on any subsequent claims. As a result, the plaintiffs’ law firm that concludes the first lawsuit is the firm most likely to receive legal fees as part of the judgment. The ensuing competition among plaintiffs’ law firms can motivate a “race to settle” that may be won by the firm willing to settle on the cheapest terms.<sup>189</sup> The need for speed also reduces incentives to investigate claims to determine their actual strength, to the detriment of the shareholders.<sup>190</sup>

The ability of the corporation to waive charter or bylaw forum-terms provides no protection for shareholders from these competitive dynamics. Knowing that a forum-term can be waived incentivizes plaintiffs’ counsel

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189. Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 24 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 910 (1987) (noting that “separate actions induce a rush to judgment”); Wasserman, *supra* note 169, at 462.

190. Thomas, *supra* note 57, at 1946–47; Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 505–07. See *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir. 1995) (“With early settlement, both parties have less information on the merits. . . . Without the benefit of more extensive discovery, both sides may underestimate the strength of the plaintiffs’ claims.”); Wasserman, *supra* note 169, at 474–75 (noting that pressure to settle results in plaintiffs’ lawyers commencing settlement negotiations before they have undertaken substantial discovery).

to file suit in a non-selected forum that is less than robust in its scrutiny of settlements and to offer terms that are attractive to the company by giving it an insurance policy against future claims, but that are not beneficial to the shareholders.<sup>191</sup>

Whether a waiver is proper thus depends on the particular circumstances. Assume a situation in which multiple suits are pending, including a suit in the selected forum. If defendant seeks to waive the selected forum, and plaintiffs object, one might suspect that the waiver is the product of a “race to settle.” But even if only a single suit is filed, or if the plaintiff who filed a parallel suit in the selected forum does not object to the waiver, a waiver can undermine Delaware’s judicial policy against disclosure-only settlements and low-recovery settlements with broad releases.

To address this potential for abuse, in our view, judges in the non-selected forum have a special duty to monitor their role in any proposed settlements. Because the company has adopted a forum-term and has a plausible argument for dismissal of the lawsuit in the non-selected forum, the company’s decision to pursue settlement with a lawyer in the non-selected forum raises at least a yellow flag. The judge presiding over a suit in a non-selected forum generally ought to give particular attention to objections to a proposed settlement when it is accompanied by waiver of a forum-term and a competing action is pending in the selected forum. In such a situation, the waiver may serve as a signal for an unfair settlement or, at the least, that the claims have not been sufficiently investigated to justify preclusion.

Judges in the selected forum also can monitor decisions to waive a forum-term. When multiple actions are pending, objectors who have filed suit in the selected forum may seek an injunction against the company-defendant from waiving the forum-term or agreeing to a settlement in a case pending in a non-selected forum.<sup>192</sup> Generally, principles of

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191. See Sean J. Griffith, *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't* 11 (Fordham U. Sch. of Law, Legal Stud. Res. Paper No. 2855950, 2016), <https://ssrn.com/abstract=2855950> [<https://perma.cc/V52D-J3N3>], to be included in THE CORPORATE CONTRACT IN CHANGING TIMES (Steven Davidoff Solomon & Randall S. Thomas, eds., forthcoming 2018) (arguing that corporate defendants often do not want to invoke exclusive forum-terms in order to pursue disclosure-only settlements that would not be approved in Delaware under *Trulia*).

192. See Wasserman, *supra* note 169, at 511 (“A court entertaining a class action may, in some circumstances, enjoin the parties from initiating additional suits or prosecuting dueling actions previously filed.”). To be sure, an injunction may not be able to bind absent class members and the alternate forum court may not enforce it and proceed with the litigation. See Henry Paul Monaghan, *Antitrust Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Wasserman, *supra* note 169, at 511–12, 518. But the selected forum court’s ability to

federalism and comity have made courts reluctant to enjoin proceedings in other courts,<sup>193</sup> and a state court lacks authority to enjoin a federal proceeding.<sup>194</sup> So far, Delaware courts have not had occasion to enforce forum-terms aggressively in this manner. But litigation subject to corporate forum-terms is still in its infancy, and—as we have argued—the factors for and against their enforcement differ from the run-of-the-mine contractual forum-selection provision. Even if a court in the selected forum would be reluctant to issue an injunction, the court could make a strong appeal to the court in the alternate forum state requesting that that court not approve any settlement. Although there is no formal mechanism for coordinating inter-state judicial relations, informal mechanisms have developed in other contexts in which Delaware has participated.<sup>195</sup>

In addition, the corporation’s decision to waive a forum-term could be monitored as a breach of fiduciary duty by the board members who have approved the waiver. To be sure, such a claim would generally require a showing that a majority of the directors had a material conflict of interest

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hold the defendant in contempt provides significant incentives to the defendant to comply. *See* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 791 (1998) (noting that, unlike individual defendants, multi-state corporations cannot simply absent themselves from the forum that issued the injunction and thereby render enforcement difficult).

193. *See* State *ex rel.* Gen. Dynamics Corp. v. Luten, 566 S.W.2d 452, 458 (Mo. 1978) (stating that “the power of one State’s court of equity to restrain persons within control of its process from the prosecution of suits in another State is clear, but on comity considerations, it should be employed with great caution”).

194. 21 C.J.S. COURTS § 227 (1990) (stating that “[A] court which has acquired jurisdiction of the parties has power . . . to enjoin them from proceeding with an action in a court of another state . . . with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court. This power of a court should be exercised sparingly.”) (footnotes omitted); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 523 (1996) (explaining that courts are usually sensitive to interstate comity and usually require a convincing reason for an injunction); Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. REV. 925, 927–28 (noting the “comity barriers” to interstate injunctions); Wasserman, *supra* note 169, at 512. On the lack of state authority to enjoin a federal proceeding, see, e.g., *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n.24 (1983) (explaining that the Court does not suggest that a state court’s injunction could have prevented the petitioner from instituting the federal action); *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12 (1977) (holding that “it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts”); *id.* at 17 (stating that “the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective”); *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (stating that “state courts are completely without power to restrain federal court proceedings in *in personam* actions”).

195. *See* Randall S. Thomas, *19th Annual Institute for Law and Economic Policy Conference: The Economics of Aggregate Litigation: What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1928 (2013) (discussing the need for “greater coordination among judges in different courts”).



in granting the waiver or lacked independence.<sup>196</sup> But in a proper case, such a showing could be made. In particular, because the Delaware judiciary has identified certain forms of settlements as raising serious concerns, it may view skeptically a board decision to waive Delaware as a selected forum in order to join such a settlement.

Finally, a lawyer advising a Delaware company would likely tell the board to think twice before waiving a forum-term that selects Delaware in order to enter into a settlement of the sort condemned in *Trulia*—low recovery, high fee, broad release, and minimal pre-filing investigation. A company that has not adopted a forum-term favoring Delaware could plausibly argue that such a settlement benefits the shareholders by disposing of litigation that otherwise would consume corporate resources and threaten a proposed merger—thus justifying expedition and attorney’s fees despite a low recovery for the shareholders. Paradoxically, a company in this position could plausibly argue further that a broad release will facilitate consummation of the acquisition, which otherwise might be stalled by sequential suits by the same or a different set of plaintiffs’ lawyers.

But these arguments are not available to a Delaware company that has adopted a forum-term in favor of Delaware. Such a company, when sued, could expect dismissal without payment of attorneys’ fees—that is the point of the Delaware court’s approach in *Trulia*. Thus, a defendant does not need to take any additional steps to avoid delaying consummation of the deal. If, however, that company seeks to settle in an alternative forum and to waive the forum-term, one may suspect that the defendant’s desire for a broad release may stem from concerns that a more diligent investigation by a different set of lawyers will uncover more serious claims. Even if the Delaware courts are not receptive to enjoining the waiver or the settlement, or to seeing the waiver as a breach of fiduciary duty, defendant’s counsel, as officers of the court, may be reluctant to injure their reputational interests by taking a course that runs counter to Delaware’s *Trulia* policy. Thus, as long as the Delaware courts are willing to monitor waivers, the forum-term for a Delaware company may be difficult to waive in a context involving parallel lawsuits.

## CONCLUSION

So far we have considered the import of corporate forum-terms for adjudicative practice and argued that the justification for their use cannot rest only upon litigant consent. We conclude by considering the

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196. See *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002).

implications of exclusive corporate forum-terms for state competition for attracting incorporations—a question completely obscured by the contractual approach.

The literature about state competition for incorporation inevitably points to the quality of the Delaware judiciary as a magnet for a company's decision to locate in that state.<sup>197</sup> This preference is distinct from the benefit of having Delaware law govern in a dispute involving the corporation. From this perspective, a policy authorizing a corporation to adopt a forum-term designating Delaware courts as exclusive fora through a charter or bylaw provision makes it more likely that companies that incorporate in Delaware will get the benefit that they seek—claims involving the firm will be adjudicated in Delaware.<sup>198</sup> As such, it increases Delaware's competitive edge by bolstering its attraction as a state of incorporation.<sup>199</sup> Similarly, to the extent that the Delaware court's "*Trulia*" approach to settlement is seen as value enhancing, then an exclusive forum-term that locks in that approach for a Delaware corporation likewise bolsters Delaware as a site of incorporation.

Maintaining a steady flow of corporation cases into Delaware benefits the state in another way, too. In addition to the quality of its judiciary, incorporation decisions also take account of Delaware's extensive decisional law on corporate matters. By having disputes adjudicated in its own courts, Delaware can more easily control doctrinal development by resolving legal ambiguity and increasing the body of precedent than it

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197. See, e.g., Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5–8 (1995) (noting the quality of Delaware courts); Klausner, *supra* note 143, at 845 (same); Romano, *Law as a Product*, *supra* note 125, at 277 (same).

198. See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 589–90 (1990) (arguing that quality of state courts is one reason why corporations incorporate in Delaware); Romano, *supra* note 125, at 276–77 (same).

199. In some cases, a certification process can facilitate a court's correct application of another state's law (a presumable goal of an exclusive forum provision selecting the state of incorporation's courts). Indeed, Delaware makes certification available in a number of unusual contexts, such as certification of questions by federal agencies and by bankruptcy courts. See Verity Winship, *Delaware Invites Certified Questions from Bankruptcy Courts*, 39 DEL. J. CORP. L. 427 (2014); Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181 (2010). But certification has several shortcomings. A court from another forum hearing an intra-corporate dispute of a Delaware firm is not required to seek guidance from the Delaware high court; the answering of a certified question differs from deciding a case on a full factual record as a certified question typically is framed as a question of law, and not as the application of law to facts; and a principal attraction is Delaware's trial court, which would not be involved in any certification.

could be sharing interpretative authority with other state courts.<sup>200</sup> Exclusive forum-terms in the charter and bylaws of Delaware corporations selecting the Delaware Chancery Court as forum thus enhance Delaware's position in the market for incorporations, and Delaware case and statutory law validating such provisions could be seen as state actions designed to make Delaware more attractive as domicile.

Any measure that enhances the attractiveness of Delaware as a domicile makes it harder for other states to compete with Delaware. Delaware could not directly oust other states of hearing disputes concerning Delaware corporations and decided under Delaware law. With respect to forum-terms, the state can achieve this goal indirectly through the mechanism of private ordering.<sup>201</sup>

In addition to competition for incorporations, forum-terms affect competition for corporate litigation. Because lawsuits can be filed in states other than the state of incorporation, competition for corporate litigation is distinct from competition for incorporations. Indeed, attracting incorporations and attracting litigation benefits different constituents. In the case of Delaware, the principal direct beneficiary of attracting incorporations is the fisc: Delaware obtains hundreds of millions of dollars, amounting to one-third of its total revenues, from corporate franchise taxes. Most other states, by contrast, would obtain only trivial additional revenues by attracting incorporations.<sup>202</sup>

The principal direct beneficiary of attracting corporate litigation, for any state, is the local bar, whose members are likely to represent the plaintiffs and defendants in such suits. States would benefit only indirectly

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200. *In re The Topps Co. S'holders Litig.*, 924 A.2d 951, 959 (Del. Ch. 2007) (emphasizing the "coherence-generating benefits created" when a state court enforces its own laws and calling this a "compelling public policy interest in deciding these disputes"). *See also* Klausner, *supra* note 143, at 775–79 (noting externalities created by large body of corporate law precedents). Moreover, the Delaware judiciary arguably can retain expertise by resolving a steady stream of corporate disputes. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1925–27 (1998).

201. Moreover, exclusive forum-terms may hamper other states in a particular way that goes beyond merely making Delaware more attractive. Because only a small number of publicly traded companies choose to incorporate in any state other than Delaware, any state that wants to enhance its market position by developing judicial expertise must find a source of corporate disputes for its courts to decide. Attracting disputes involving corporations incorporated in other states would ameliorate this difficulty. A corporate forum-term selecting Delaware as an exclusive forum reduces this potential. Exclusive forum-terms favoring Delaware thus not only make Delaware more attractive, but also make it harder for other states to compete with Delaware.

202. Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1219–25 (2001).

from taxing the income of local lawyers and may incur costs in providing adjudicatory services.<sup>203</sup>

Several states, including Delaware, have adopted legislation that permits firms incorporated in the state to adopt forum-terms designating local courts as exclusive fora for certain disputes, but invalidates forum-terms that designate the courts of another state as exclusive fora. According to a member of the Council of the Corporation Law Section of the Delaware State Bar Association involved in the drafting of Delaware’s forum-term legislation,<sup>204</sup> one motivation for this legislation was to prevent companies, especially those with a controlling shareholder, to select an exclusive forum with controller-friendly procedural rules.<sup>205</sup> But by adopting legislation that bars corporations from selecting the courts of, say, its headquarter state or of the state where most production facilities are located as exclusive fora (unless they are also incorporated in the state), legislatures departed from the enabling approach of its corporate law—an approach that provides the conceptual foundation for a corporation’s adoption of a forum-term and its enforceability by sister courts.<sup>206</sup>

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203. See Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1586 (2002) (arguing that the self-interest of lawyers outside of Delaware in maintaining litigation business induces them to advise clients to incorporate in their headquarter state).

204. See Stephen M. Bainbridge, *Fee-Shifting: Delaware’s Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 858 n.47 (2016) (citing Francis G.X. Pileggi, *Delaware Proposes New Fee-Shifting and Forum Selection Legislation*, DEL. CORP. & COMMERCIAL LITIG. BLOG (Mar. 6, 2015), <https://www.eckertseamans.com/app/uploads/Pileggi-Westlaw-Journal-Delaware-Corporate-03.20.15.pdf> [<https://perma.cc/TP2C-8YJ3>]) (describing 2015 changes proposed by Delaware Bar’s Corporate Law Council prior to enactment of Section 115). See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1147 (2002) (noting a “strong legislative norm in Delaware in favor of deference to the Corporate Law Section of the Bar Association”).

205. Cf. *City of Providence v. First Citizens Bancshares*, 99 A.3d 229, 230–31 (Del. Ch. 2014) (decided shortly before the legislation was adopted, upholding the ability to select the courts of other states as exclusive fora in a case where the controlling shareholder of a North Carolina headquartered company selected courts in North Carolina). North Carolina permits an award of attorneys’ fees to class action lawyers only under the “common fund” doctrine, where the litigation results in a monetary award to the class members, or if they are paid pursuant to a settlement agreement. See Mark Hiller, *NC Court of Appeals Approves Payments of Attorneys’ Fees in Class Action Settlements*, ROBINSON BRADSHAW: CAROLINAS CLASS ACTION (Sept. 16, 2015), <https://www.carolinaclassaction.com/index.php/2015/09/nc-court-of-appeals-approves-payments-of-attorneys-fees-in-class-action-settlements/> [<https://perma.cc/N4T5-N47Y>].

206. While recognizing that the proposal came at the cost of litigant autonomy, and that it deviated from the enabling model of Delaware law, the Council nevertheless defended the bill as essential to maintain Delaware as the forum for corporate-law disputes:

The Council believes that stockholders of Delaware corporations should not be denied access to the protection of the Delaware courts. Thus, the broadly enabling nature of the DGCL would be trimmed back to address this issue. In particular, the Council believes that the value of Delaware as a favored jurisdiction of incorporation is dependent on a consistent development of a balance

We are not in a position to determine the reasons that led various states to adopt such forum-term legislation. Delaware's main goal may have been protecting minority shareholders or enhancing its attractiveness as domicile to obtain higher franchise tax revenues and perhaps other states may have just copied Delaware's approach. But given the self-interest of the local lawyers who often play a major role in the drafting of such legislation, it is plausible that some states sought to further the interest of the local bar in attracting litigation to local courts. Promoting private interests in this way cuts deeply into principles of judicial federalism, raising concerns under the Commerce Clause and the norm of state equality. To that extent, the adoption of legislation that on its face discriminates in favor of in-state courts may provide grounds for sister states to refuse to enforce forum-terms that were adopted after such legislation was enacted.

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of corporate law, and that the Delaware courts are best situated to continue to oversee that development.

Q&A Accompanying Draft Legislation Banning Fee-Shifting Bylaws 4, Prepared by the Corporation Law Council, Delaware State Bar Association, 2015, <http://www.law.du.edu/documents/corporate-governance/legislation/delaware-stat-revisions/Council-Second-Proposal-FAQs-3-6-15.pdf> [<https://perma.cc/HUE8-VGKK>].