

# BEYOND CORPORATE CONTRACT: A RESPONSE TO HELEN HERSHKOFF & MARCEL KAHAN, *FORUM-SELECTION PROVISIONS IN CORPORATE “CONTRACTS”*

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*Abstract:* Corporate charters and bylaws sometimes limit where shareholders can sue. These forum terms are commonplace in sophisticated commercial contracts. Their migration into corporate documents, however, set off a fight about the balance between private ordering and public restraint in corporate law. This essay and the Article to which it responds propose alternative analyses of the corporate “contract” and the state’s role in defining it. Both also wrestle with how to translate these fundamental concepts into advice for the judges and litigants on the ground. This essay looks at the benefits of existing protections—fiduciary duties and reasonableness limits. It then broadens the lens to consider how a heightened consent mechanism might accommodate the nuances in this area. This approach takes concerns about consent seriously, but also takes into account the need to balance respect for private ordering with the state’s special role in organizing and governing corporations.

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## INTRODUCTION

TriQuint Semiconductor—a Delaware corporation with Oregon headquarters—merged with another company in the high-tech industry in 2015. Two days before merger plans were announced, the TriQuint directors adopted a corporate bylaw that made the Delaware Chancery Court the only place to bring state corporate law claims, including those challenging the merger.<sup>1</sup> Nonetheless, plaintiff shareholders brought five

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1. See *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 330 (Or. 2015); TriQuint Semiconductor, Inc., Amendment to Second Amended and Restated Bylaws of TriQuint Semiconductor, Inc., art. XI (Form 8-K) (Feb. 22, 2014), <https://www.sec.gov/Archives/edgar/data/913885/000119312514063841/d681010dex32.htm>

suits against the company and its directors, some in Oregon and some in Delaware.<sup>2</sup> They alleged that the board members underpriced the TriQuint stock in return for “lucrative board positions in the new corporation.”<sup>3</sup> They also fought over whether they could litigate in Oregon court, forcing the Oregon court to decide whether forum-selection bylaws like TriQuint’s were enforceable.<sup>4</sup>

Helen Hershkoff and Marcel Kahan’s Article, *Forum-Selection Provisions in Corporate “Contracts,”* addresses itself to that Oregon court. It sets itself two difficult goals: (1) to lay out a “properly conceived approach to corporate forum-terms” with detail about how the approach “would operate in practice” and (2) to use this detailed analysis “as a window into larger issues of state power and private ordering.”<sup>5</sup> The authors resist treating corporate charter terms and bylaws as contracts because underlying consent is limited and because the state has a special role in corporate formation and agreements. They then use these two features—limited consent and the state’s role—to develop guidance for courts that have to decide whether to enforce forum-selection bylaws and charter provisions.

The authors contrast themselves with commentators who call for fulsome use of dispute resolution terms in this context. And certainly some commentators have heralded these terms as a welcome stake in the heart of shareholder litigation.<sup>6</sup> But ultimately the authors’ answer to “Are these terms valid?” is “sometimes.”<sup>7</sup> Which leaves them in the

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[<https://perma.cc/LX2P-MBGT>] (designating the Delaware Chancery Court as the “sole and exclusive forum” for a list of claim categories that can be roughly summarized as state corporate law claims).

2. *Triquint*, 364 P.3d at 330.

3. *Id.*

4. Complaint at 5, *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328 (Feb. 28, 2014) (No. 1402-02441), 2014 WL 842387.

5. Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts,”* 93 WASH. L. REV. 265, 286, 267 (2018).

6. *See, e.g.*, Stephen Bainbridge, *The Case for Allowing Fee Shifting Bylaws as a Privately Ordered Solution to the Shareholder Litigation Epidemic* (Nov. 17, 2014), <http://www.professorbainbridge.com/professorbainbridge.com/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholderlitigat.html>

[<https://perma.cc/P957-D8SD>] (advocating the use of fee-shifting bylaws to address “a serious litigation crisis in American corporate law”).

7. Hershkoff & Kahan, *supra* note 5, at 270 (“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.”).

tricky position of having to get into the details and draw lines. (I write this with sympathy, since “sometimes” is also my answer.)<sup>8</sup>

In doing so, the authors run into difficult questions: What is a corporation? What is shareholder consent? What is an “ordinary contract” to which these corporate organizational documents should be compared? In other words, they run into all of the fundamental questions that make digging into this sometimes-seemingly-technical area of the law worthwhile.

The authors cabin these unwieldy questions with two main moves. First, their discussion is limited to forum-selection terms.<sup>9</sup> Forum terms are not the only charter provision or bylaw designed to shape intracorporate litigation, and many provisions raise similar questions about shareholder consent and the role of the state in the corporate “contract.” However, the authors focus on forum selection, ignoring the bestiary of other possible dispute resolution terms—mandatory arbitration, jury waivers, discovery limits, fee-shifting, no-pay provisions, etc. Also absent is the even greater catalog of bylaws and charter provisions that do not deal with litigation and disputes, but that are implicated by any discussion of whether corporate charters and bylaws count as contracts.

The authors’ second cabining move is to couch the Article as guidance for the judge of the forum that was *not* selected by the term: the Oregon court in the *TriQuint* example. For forum-selection clauses, this is where the real action takes place, when the court must decide whether to dismiss in favor of the selected forum.

This essay comments primarily on the authors’ critique of the contractual view and on their practical advice, inevitably leaving out many of the interesting complications that the authors raise. The essay begins in Part I by providing a brief history. Particularly when the focus is on intracorporate forum selection, it is difficult to divorce these terms from how they emerged. In fact, many of the reasons the authors give to enforce certain terms are rooted in the specific context in which they began to be adopted and tested.<sup>10</sup>

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8. See generally Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485 (2016) [hereinafter Winship, *Shareholder Litigation by Contract*] (proposing a framework that encourages tailoring of corporate litigation but also limits waiver).

9. Although forum-selection terms can be either exclusive or permissive (also called “consent to jurisdiction” clauses), the Article seems aimed primarily at terms that restrict litigation to a particular forum (i.e., exclusive forum terms).

10. Hershkoff & Kahan, *supra* note 5, at 310 (indicating that enforcement of some forum-selection terms promotes public policy in the context of ubiquitous M&A litigation and the Delaware courts’ crackdown on disclosure-only settlements).

Part II addresses the two main points of the Article: that charters and bylaws are not the same as “ordinary contracts” and that the state has a special involvement with corporate organization. It points to agreement on some of the fundamentals, acknowledging differences between certain contracts and corporate organizational documents, complications in the nature of shareholder consent, and the special role of the state in corporate law.

Part III outlines an alternative approach. Existing tests of fiduciary duties and fundamental fairness address many of the concerns about forum-selection terms that the authors raise. This is particularly true in the core situation of shareholder representative litigation channeled into courts in the state of incorporation. Because the Article is couched as advice to the judge, this essay also takes that approach. This essay suggests grounds for distinguishing among terms that do not require as much bold engagement with tough constitutional questions or as harsh a critique of the organizing state. It concludes by broadening the lens to consider the promise of heightened consent as a way to accommodate the nuances in this area.

## I. CORPORATE FORUM TERMS EMERGE

Why do corporations organize in Delaware? According to the state’s official website, businesses “take advantage of Delaware’s complete package of incorporation services, including modern and flexible corporate laws, our highly-respected Judiciary and legal community, a business-friendly government, and the customer-service-oriented staff of the Division of Corporations.”<sup>11</sup> Nevada similarly advertises the efficiency of the state’s Business Court, “[d]eveloped on the Delaware model,” as a reason to organize a business in Nevada.<sup>12</sup>

Although these states advertise both law and forum, these are not necessarily a package. Shareholder and other intracorporate plaintiffs have access to courts in the incorporating state, but can bring suits

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11. *Incorporate in Delaware*, DELAWARE.GOV, <https://delaware.gov/topics/incorporateindelaware.shtml> [<https://perma.cc/TU42-3EAC>]; see also LEWIS LS. BLACK, JR., DEL. DEP’T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), [https://corpfiles.delaware.gov/whycorporations\\_web.pdf](https://corpfiles.delaware.gov/whycorporations_web.pdf) [<https://perma.cc/K6LC-W5RV>] (stating that “the source of Delaware’s prestige” is not only its corporate statute, but also the Delaware courts, “and, in particular, Delaware’s highly respected corporations court, the Court of Chancery”).

12. *The Nevada Advantage*, NEV. SEC’Y OF STATE, <https://www.nvsos.gov/sos/businesses/the-nevada-advantage> [<https://perma.cc/MC3Y-MJLA>] (advertising Nevada’s low taxes and fees as well as its Nevada Business Court that “minimizes the time, cost and risks of commercial litigation”).

elsewhere as well. The internal affairs doctrine provides that, no matter where intracorporate suits are brought, the law of the incorporating state defines the duties and the rights of the internal corporate actors—directors, shareholders, officers, and the corporation.<sup>13</sup> But the forum is not restricted.<sup>14</sup> Or, more precisely, it has only the usual jurisdictional restrictions that are not specific to corporate law, and that usually allow filing where the corporation is headquartered as well.<sup>15</sup>

Nonetheless, good, practical reasons drove this lumping of corporate law and forum. As a matter of practice, Delaware corporate law claims were filed in Delaware court (especially the Chancery Court). Illinois corporate law claims were filed in Illinois court. And so on.<sup>16</sup> This practice led commentators to consider forum and choice of law together, pointing to in-state courts as well as the content of the state's corporate law to explain Delaware's predominance in public company incorporations.<sup>17</sup>

In the early 2000s, the growth of a particular type of corporate litigation put pressure on this shorthand treatment of corporate law and forum as bundled. Shareholder plaintiffs challenged almost every merger or acquisition.<sup>18</sup> A key aspect of these suits was that they were filed in multiple jurisdictions. In *TriQuint*, for example, lawyers filed representative suits on behalf of shareholders in Delaware, the state of incorporation. Other lawyers challenged the same corporate deal on

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13. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. LAW INST. 1971).

14. This was not always so. The “internal affairs doctrine” designates the law of the incorporating state as the law governing internal corporate affairs. See *id.* But once upon a time, the internal affairs doctrine was jurisdictional as well, restricting Delaware intracorporate claims to Delaware courts. See *Wilkins v. Thorne*, 60 Md. 253, 258 (1883) (“[A]ll such [internal management] controversies must be determined by the courts of the state by which the corporation was created.”).

15. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (providing for general jurisdiction where “the corporation is fairly regarded as at home”); *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014) (identifying the principal place of business and incorporating state as “home” for corporations).

16. See generally John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012).

17. See generally Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1909 (1998).

18. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2012* (Feb. 2, 2012) (unpublished manuscript) (available at <http://ssrn.com/abstract=1998482>) (finding that 38.7% of completed takeovers were challenged in 2005 and 94.2% in 2011); Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015 2* (Jan. 14, 2016) (unpublished manuscript) (available at <https://ssrn.com/abstract=2715890>) (finding that 94.9% of completed takeovers were challenged in litigation in 2014 and 87.7% in 2015).

behalf of the same shareholders in Oregon, where the company was headquartered.<sup>19</sup>

These suits were brought in state courts, raising a problem peculiar to this aspect of U.S. federalism: the U.S. court system has no easy mechanism of consolidation and coordination from state court to state court.<sup>20</sup> The Delaware legislature could not simply write a statute restricting Delaware-law claims to Delaware courts.<sup>21</sup> The states were thus stuck with relying on *forum non conveniens*, principles of comity, informal coordination with other states' judges, or a more daunting project of state-to-state coordination through uniform laws. Another alternative was to have private parties insert forum-selection terms in corporate documents and then rely on other states' courts to enforce them.<sup>22</sup>

Eventually parties in these multijurisdictional deal suits settled on the last option: to include terms in corporate charters and bylaws that restricted suits to the state of incorporation—mostly Delaware. The possibility of using exclusive forum provisions had been percolating in the defense bar,<sup>23</sup> then invited (at least for charter provisions) by the Delaware Chancery Court,<sup>24</sup> then adopted by a few companies,<sup>25</sup> then tested and approved in court.<sup>26</sup>

Ultimately, these provisions were the subject of state-level legislative intervention. Part of the prompt for legislation was a development regarding another type of term that, like forum selection, sets the rules for intracorporate disputes. In 2014, the Delaware Supreme Court approved a particularly ferocious fee-shifting provision.<sup>27</sup> The provision seemed designed to chill shareholder litigation entirely because it

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19. *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 330 (Or. 2015).

20. See Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 88 (2012) [hereinafter Winship, *Bargaining for Exclusive State Court Jurisdiction*].

21. *Id.*

22. *Id.*

23. Ted Mirvis, *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A J. 17 (May 2007).

24. *In re Revlon Inc. Shareholders' Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (“[I]f 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.”).

25. See, e.g., Chevron Corp., Current Report (Form 8-K) (Sept. 30, 2010), <http://www.sec.gov/Archives/edgar/data/93410/000095012310090397/f56977e8vk.htm> [<https://perma.cc/TTM3-92MW>].

26. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938–39 (Del. Ch. 2013).

27. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014) (approving a fee-shifting bylaw in a Delaware nonstock corporation).

required shareholder plaintiffs to cover fees unless success was total and on the merits—a very unusual mix in this context.<sup>28</sup>

Delaware’s legislative response was to elaborate on the permissibility of including any of three types of clauses in the corporate charters and bylaws of Delaware corporations: exclusive forum, mandatory arbitration, and fee-shifting provisions. Of most relevance here, the legislation allowed exclusive forum-selection provisions to be included in a corporation’s charter or bylaws, provided that they did not exclude the courts of the incorporating state.<sup>29</sup>

The rise of these forum-selection charter provisions and bylaws—and the near-simultaneous rise and then fall of fee-shifting provisions and bylaws<sup>30</sup>—put pressure on courts, legislators, and commentators to define more carefully the nature of corporate organizational documents (especially their relation to contract), the documents’ scope, and the extent to which litigation should be considered a right of shareholders. Hershkoff and Kahan’s Article, *Forum-Selection Provisions in Corporate “Contracts,”* is part of the growing literature responding to this development.

## II. RESISTING “CONTRACT”

As to the Article’s first point, the quotation marks in the title say it all: *Forum-Selection Provisions in Corporate “Contracts.”* The authors resist “reflexive” enforcement of exclusive forum terms included in corporate charters and bylaws on the ground that they are contractual.<sup>31</sup> Corporate charters and bylaws, they argue, are not the same as what they refer to as “ordinary contracts.”<sup>32</sup> Why? Shareholder consent is lacking, and the state has a special role in corporate contracts—more than it does in every contract.

The authors are not alone in suggesting that corporate charters and bylaws are not the same as commercial contracts among sophisticated players. Even courts that use the contractual label talk about these

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28. *Id.*

29. See DEL. CODE ANN. tit. 8, § 115 (West 2018). The express statutory permission was limited to “internal corporate claims,” defined as “claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.” *Id.*

30. See *id.* §§ 102(f), 109(b) (prohibiting Delaware corporations from including certain fee-shifting provisions in charters and bylaws); *ATP Tour*, 91 A.3d at 555.

31. Hershkoff & Kahan, *supra* note 5, at 270.

32. *Id.* at 268–69, 271, 277–78, 280 (comparing corporate charters and bylaws to “ordinary contracts”).

organizational documents as “part of” a “flexible contract.”<sup>33</sup> Other courts acknowledge that shareholders do not literally sign off on every term, or they analogize organizational documents to contracts for particular purposes, such as to impose interpretive rules.<sup>34</sup> The rationale instead is consent to a governance structure that then gives rise to, among other things, the possibility of unilateral director amendment of bylaws.<sup>35</sup>

Shareholders of the same company vary in their relationship to the organizational documents with very few, if any, in the same position as a sophisticated player who reads, negotiates, and signs an agreement. How much shareholder consent resembles robust and idealized contractual consent depends in part on whether the term at issue was in a charter or bylaws and when the shareholder bought the shares.<sup>36</sup>

A few examples give a sense of the complexities. A charter provision that appears in the IPO documents gives notice, but is sticky as it can only be changed with a shareholder vote. Midstream amendment to the charter requires a shareholder vote, but a shareholder could vote against it and still be bound by the majority. Bylaws generally can be amended unilaterally by management, giving no notice of the specific term and raising concerns about conflicts when the directors are defendants.

The authors compare the organizational documents to “ordinary contracts,” but it is not entirely fair to contrast these corporate documents with idealized versions of consent and contract. The existence of relationship contracts, contracts of adhesion, and other variants put pressure on the notion of an “ordinary contract.”<sup>37</sup> For

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33. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (“[T]he bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders . . . .”); *id.* at 957 (calling the contract “inherently flexible”).

34. *Id.*; *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (calling bylaws “contracts among a corporation’s shareholders” as a prelude to applying principles of contract interpretation). See generally Verity Winship, *Litigation Rights and the Corporate Contract*, in *THE CORPORATE CONTRACT IN CHANGING TIMES* ch. 12 (William Savitt et al. eds., 2018); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 *GEO. L.J.* 583, 587–88 (2016).

35. *Boilermakers Local*, 73 A.3d at 938–39. Even the Delaware statute concerning forum selection terms is built on the presumption that charters and bylaws do not count as contracts for the Federal Arbitration Act, as its prohibition of arbitration clauses might otherwise impermissibly burden arbitration.

36. Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 *BUS. LAW.* 161, 166 (2014).

37. Although not at the center of their analysis, the authors mention some of these examples. See, e.g., Hershkoff & Kahan, *supra* note 5, at 284 n.93.



example, it is not clear that shareholders give less consent than consumers when they click “I agree.”<sup>38</sup>

At root, though, the authors argue that “blanket enforcement” of the forum selection terms in charters and bylaws cannot be justified by a reference to the talisman of shareholder consent.<sup>39</sup> For now this discussion will borrow the authors’ working definition of corporate charters and bylaws as “hybrid legal structures that provide a mechanism for collective choice in the context of substantial state regulation and straddle the public-private divide,”<sup>40</sup> even if one could fight about how dissimilar they are from contracts (and which contracts provide the source of comparison).

Because corporate charters and bylaws are not contracts, the argument goes, courts are not bound by the rationales of the core U.S. Supreme Court cases that consider—and favor the enforcement of—contractual forum-selection clauses more generally. The courts are not bound by the U.S. Supreme Court’s directive in *The Bremen v. Zapata Offshore Co.*<sup>41</sup> that forum-selection clauses “should control absent a strong showing that they should be set aside.”<sup>42</sup> Nor are they bound by the Court’s enforcement of a forum-selection clause in small print on the back of a cruise ticket (sent to passengers after the sale) in *Carnival Cruise Lines, Inc. v. Shute*.<sup>43</sup> Courts are thus free to consider forum-selection terms in corporate charters and bylaws without a presumption that they are valid.

So, what *should* courts consider? The Article proposes ways in which the lack of robust consent and the state’s special role should shape the court’s analysis.

#### A. *The Limits of Consent*

Although consent is key to the authors’ critique of treating charters and bylaws as contracts, the Article provides little guidance as to how the lack of robust consent affects what courts *should* consider. The authors argue that when no consent at all is given (e.g., creditor plaintiffs), these terms should not be enforced regardless of whether

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38. *Cf. Boilermakers Local*, 73 A.3d at 957–58 (pointing out that shareholders have more recourse than consumers, who are unable to negotiate terms).

39. Hershkoff & Kahan, *supra* note 5, at 270.

40. *Id.* at 268.

41. 407 U.S. 1 (1972).

42. *Id.* at 15.

43. 499 U.S. 585, 593–95 (1991); *cf. Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 62 (2013) (directing courts to give forum selection clauses controlling weight in transfers among federal courts absent “extraordinary circumstances unrelated to the convenience of the parties”).

claims fall within Delaware's broad statutory language.<sup>44</sup> They later suggest that the non-selected court (e.g., the Oregon court in *TriQuint*) should consider "the extent of the shareholders' consent to the forum-term,"<sup>45</sup> but give little help in making that suggestion operational.

Frankly, this gap is understandable, particularly given the varied relationships of shareholders to the corporate organizational documents. One could deem all unilaterally adopted bylaws invalid. But the authors do not do that; they "do not see the absence of full shareholder consent as sufficient for treating the forum term as unenforceable."<sup>46</sup> Indeed, to consider all unilateral bylaws suspect could nullify the state statutes that permit corporate management to take these unilateral actions.<sup>47</sup>

Moreover, an underlying rationale exists for giving directors the ability to amend bylaws unilaterally. Picture a change to some innocuous housekeeping bylaw. And then picture one that is more problematic. Because they are both unilaterally adopted, a court needs something besides the concept of consent to distinguish between the two. Fiduciary duties and review for fundamental fairness may be more apt tools, as explored below.

Consent may also fail to provide much of a limiting factor for a potentially large category of provisions. Midstream adoption characterized the early examples. However, some evidence suggests that Delaware companies are moving towards including forum selection in the boilerplate of IPO charters.<sup>48</sup> More empirical work is needed, but if that is the case, consent will not provide a limit for this large category under the authors' framework: charter provisions have the "strongest case for consent," in part because shareholders are on notice.<sup>49</sup>

### B. *Can Delaware Really Do That?*

What about the state's special role in corporate organizational documents? How should that affect whether courts should enforce a forum-selection term? The authors raise an interesting question about

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44. Hershkoff & Kahan, *supra* note 5, at 293–94.

45. *Id.* at 299.

46. *Id.* at 271.

47. DEL. CODE ANN. tit. 8, § 109(a) (West 2018); MODEL BUS. CORP. ACT § 10.20(b) (AM. BAR ASS'N 2016).

48. A study of adoption by Delaware companies through 2014 identified a movement towards including forum selection in the boilerplate of IPO charters in Delaware public companies. See Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31 (2017).

49. Hershkoff & Kahan, *supra* note 5, at 282.

Delaware's (and several other states') approach. By statute, since 2015, Delaware permits exclusive forum terms in charters and bylaws, but only if they do not exclude the incorporating state.<sup>50</sup> Several states have enacted similar statutes since.<sup>51</sup>

Based on these statutes, the authors ask whether “the intermediary of the ‘corporate contract’ permit[s] the state to achieve indirectly goals that it could not achieve directly because of constitutional limits on government power?”<sup>52</sup> A statute that simply declared that Delaware courts had exclusive jurisdiction over Delaware corporate law claims would run into constitutional limits.<sup>53</sup> Does the Delaware statute limiting private parties’ ability to select a forum have the same defects?

Rather than provide a definitive answer, the authors build these concerns into their advice for the considering court as reasons to invalidate a clause.<sup>54</sup> This intriguing question is not, however, entirely in harmony with the frame of advice-giving. Companies are not required to adopt an exclusive forum bylaw at all, so there seems to be an intervening actor and choice. It is also not clear why courts should punish litigants for the alleged overreaching of the incorporating state, particularly when they might have chosen the incorporating state even without the statutory restriction.

It may also be quite uninviting for a sister court to pass judgment on the ability of the Delaware or other state legislature to pass such a statute. Particularly if the approach forces the court to distinguish between permissible motives (“self-promotion when the challenged law is aimed at favoring the state itself or its subdivisions”) and impermissible ones (“promot[ion of] the private interest of the local bar”).<sup>55</sup> And it may be equally uninviting to consider the difficult questions (which the authors do not definitively answer either) about whether the constitutionality of the state legislation changes when couched as a limit on private ordering rather than a direct limit on where suits may be brought. In sum, whether Delaware can pass such a statute

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50. See DEL. CODE ANN. tit. 8, § 115.

51. See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 2-113(b)(2)(ii) (West 2018) (“The charter or bylaws of a corporation may not prohibit bringing an internal corporate claim in the courts of this State or a federal court sitting in this State.”).

52. Hershkoff & Kahan, *supra* note 5, at 269.

53. See Winship, *Bargaining for Exclusive State Court Jurisdiction*, *supra* note 20, at 88 (analyzing the constitutional limits on such a potential statute, prompted by early signs that corporate litigation was moving out of Delaware).

54. See Hershkoff & Kahan, *supra* note 5, section III.A.

55. *Id.* at 291.

is unanswered, and non-Delaware courts seem unlikely to step in and fill the gap.

### III. AN ALTERNATIVE APPROACH

Being a critic is easy; it is much more difficult to identify alternatives. Outlined below is an alternative route to the authors' desired result: that courts avoid simply deferring to forum-selection charter provisions and bylaws on the basis of consent. This Part develops the suggestion that existing doctrines may take care of many of the problems that the authors identify.

Because dispute resolution terms vary widely and some have dramatic effect on shareholder litigation, it is also worth considering more broadly applicable ways to identify permissible terms. This Part concludes by considering how heightened consent requirements might accommodate some of the nuances in this area.

#### A. *Back to Basics*

The authors note that they are least worried about representative suits by shareholders, particularly in the context of ubiquitous deal litigation. This is the circumstance of the *TriQuint* litigation, and the framework the authors propose does little to change the outcome there (unless the Oregon court should punish litigants for Delaware's legislation).

Existing doctrines address other problematic examples that the authors give, such as non-shareholder plaintiffs or suits brought in out-of-the-way courts. Courts can determine whether a term was adopted in violation of fiduciary duties; evaluate whether a forum-selection clause is fundamentally fair and consistent with public policy; or use both of these existing frameworks, as did the *TriQuint* court.<sup>56</sup>

If the degree of consent provides limited guidance and the state role is difficult to implement, what remains are the classic concerns about forum-selection clauses and the classic solutions, with an overlay of corporate law. Three main worries seem to motivate the authors here: an unfair process of adoption, unfair content, and third-party effects.

*The Process of Adoption Was Unfair.* Courts could say that these terms are always unfair if unilaterally adopted. But not every bylaw is suspect. As noted above, it is necessary to have some way of

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56. In *TriQuint*, the Oregon court eventually enforced the forum-selection term, and the litigation was resolved in Delaware courts. *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 338 (Or. 2015); *Granted Notice and [Proposed] Order of Voluntary Dismissal, In re TriQuint Semiconductor, Inc. Stockholders Litig.*, No. 9415-VCN (Del. Ch. Jan. 20, 2015).

distinguishing among terms on the spectrum from innocuous housekeeping to insidious self-dealing.

So, what can be done if the answer is that forum-selection terms are *sometimes* unfair? This is where existing fiduciary duty analyses can do some work. To determine whether directors adopted the clause in violation of their fiduciary duties, timing matters, as do conflicts of interest. The Delaware Supreme Court established such a fiduciary review in a case where it invalidated bylaws that advanced the shareholder meeting date and moved the meeting to a remote location.<sup>57</sup> Although the directors had the power to adopt such bylaws unilaterally under corporate law, the bylaws were invalid because directors adopted them to perpetuate themselves in office.<sup>58</sup> Similarly, courts could invalidate forum-terms adopted for inequitable purposes. The fiduciary duty solution is imperfect, but may be able to address some of the excesses that the authors depict.

*The Content of the Clause Gives Its Adopter an Unfair Advantage.* The authors also point to worries that the selected forum is far away, putting pressure on the prospective plaintiff, or that procedures in the selected forum disfavor the plaintiff. Forum-selection terms might also cause suits to be split between different courts or force them to take place without important players.

Again, existing doctrines may be enough to address many of these concerns. The *Carnival Cruise Lines* Court called for “judicial scrutiny for fundamental fairness.”<sup>59</sup> A non-chosen court could consider whether a forum-selection term was “reasonable” by treating the organizational documents as contractual for this purpose and applying the “reasonableness” requirement (arguably in a more robust form than some courts have engaged).<sup>60</sup> Or courts could reason by analogy, without conceding the bigger point that charter and bylaws are “ordinary contracts.” As the authors point out, their argument allows for treating governance documents “as analogous to contracts in certain respects.”<sup>61</sup>

This reasonableness analysis may be attractive to the non-chosen court because it does not require difficult questions about consent and

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57. *Schnell v. Chris Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

58. *Id.*

59. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

60. *See id.*

61. Hershkoff & Kahan, *supra* note 5, at 281 n.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 . . . . What is significant is determining when and why the contractual paradigm should dominate and when it should not.”).

other states' motives. It may also be attractive for choice-of-law reasons. Courts often apply the incorporating state's law to the question of whether these organizational documents are contracts, but may apply their own law to questions about reasonableness and public policy,<sup>62</sup> leaving more space for interpretation and legal development.

*The Term Affects Third Parties.* The Article argues that the Delaware legislation defining permissible forum-selection terms could cover claims by creditors or others for whom no argument about consent, even the most attenuated, is plausible.<sup>63</sup> The authors interpret the statutory language to permit terms to reach fiduciary duty, federal securities law, and even employment discrimination claims.<sup>64</sup> They identify creditors as an example of non-consenting third parties who might have claims in these categories.

But a discussion of *which* claims are covered cannot ignore *whose* claims are covered. It seems unlikely that the statute means that anyone with a fiduciary duty, securities law claim, or employment discrimination claim against the company and its directors is bound by the term. Cases considering forum-selection clauses in other contexts routinely consider who is bound by the agreement containing the clause.<sup>65</sup> While the Delaware corporate legislation focuses on defining the types of claims, the underlying assumption is likely that the claims must be of the parties to the corporate charter and bylaws, which are variously listed as shareholders, the company, or the state—not, notably, creditors.<sup>66</sup>

The comparable question becomes: When are non-signatories bound by a forum-selection clause? The general rule in Delaware, for example, is that “only the formal parties to a contract are bound by its terms,” including forum-selection terms.<sup>67</sup> Exceptions exist, however. Non-signatories may be bound if the forum-selection clause is valid, the defendants are “third-party beneficiaries, or closely related to, the

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62. William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 17 (2006); see *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 330 (Or. 2015).

63. Hershkoff & Kahan, *supra* note 5, at 294; see DEL. CODE ANN. tit. 8, § 115 (West 2018).

64. Hershkoff & Kahan, *supra* note 5, at 294.

65. See, e.g., *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383–84 (2d Cir. 2007) (listing four factors for courts to consider when deciding whether to enforce a forum selection clause, including “whether the claims *and parties* involved in the suit are subject to the forum selection clause” (emphasis added)).

66. Hershkoff & Kahan, *supra* note 5, at 281.

67. *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 760 (Del. Ch. 2009).

contract,”<sup>68</sup> and “the agreement containing the forum selection clause [is] the agreement that gives rise to the substantive claims brought by or against a non-signatory.”<sup>69</sup> “Closely related” requires something more than the relationship between shareholders and creditors of the same company; the party must receive a direct benefit or foreseeably be bound by the agreement. These limits on applying forum-selection clauses to non-signatories developed outside the corporate context might very well be used to limit third-party effects here, contract or not.

### B. *Heightened Consent*

Most of this essay has responded to the Article’s first goal: to develop an operational framework for judicial review of corporate forum terms. This last section addresses the Article’s second and broader goal: to use this analysis as “a window into larger issues of state power and private ordering.”<sup>70</sup>

The authors suggest a suite of private and public concerns that are specific to one particular type of dispute resolution term. Guidance for the other categories, especially mandatory arbitration, is beyond the Article’s scope. Nonetheless, it is worth pausing to think about what a broader approach might look like, particularly because forum-selection terms may not cause the biggest fight. Mid-stream adoption may be a transitional problem; this is an empirical question. But more importantly, with the limits above—a reasonable forum, consistent with fiduciary duties, and fundamentally fair—these forum-selection clauses preserve shareholder litigation and access to court, while addressing some of shareholder litigation’s defects.

What would a broader approach require? As in the specific example of forum-selection terms, it needs two things: a way to distinguish between permissible and impermissible terms, and a way to balance private ordering with the public aspects of corporations.

One basis for identifying permissible terms is to consider dispute resolution terms in corporate charters and bylaws most acceptable where

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68. *Weygandt v. Weco, LLC*, No. 4056-VCS, 2009 WL 1351808, at \*4 (Del. Ch. May 14, 2009).

69. *Id.* at \*4 n.15; *see also In re Optimal U.S. Litig.*, 813 F. Supp. 2d 383, 388 (S.D.N.Y. 2011) (“In order to bind a non-party [to the contract] to a forum selection clause, the party must be closely related to the dispute such that it becomes foreseeable that it will be bound. A non-party is closely related to a dispute if its interests are completely derivative of and directly related to, if not predicated upon the signatory party’s interests or conduct.”); *Pegasus Strategic Partners v. Stroden*, No. 653523/2015, 2016 WL 3386980, at \*7 (N.Y. Sup. Ct. June 20, 2016) (citing *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32, 38–39 (N.Y. App. Div. 2008)).

70. *Hershkoff & Kahan, supra* note 5, at 267.

they alter default rules in corporate law, and least acceptable where they effectively waive substantive requirements.<sup>71</sup> This approach roots the limits on procedural private ordering in the substantive law. It thus allows for variation in the treatment of different legal areas governing corporations, especially distinguishing between state corporate law and federal securities law.

Regardless of the basis for distinguishing between permissible and impermissible terms, these limitations can interact with concerns about consent. Worries about a particular bylaw, charter provision, or category of provisions could trigger a requirement of heightened consent. No longer would it be sufficient to deem shareholders to consent to a governance structure that eventually gives rise to a particular term. Instead, a shareholder vote could be required. (Though this consent is still not equivalent to an “ordinary contract,” because shareholders would be bound by a majority vote.) Or, as the authors mention, the shareholder must have voted for a particular amendment. Or a court or legislature could require a signed agreement.

Use of heightened consent has precedents, even in the area of intracorporate dispute resolution. For example, Delaware’s fee-shifting legislation is explicit about the role of heightened consent. Although it bars fee-shifting provisions in charters and bylaws, its legislative history affirmatively contemplates fee-shifting clauses in agreements signed by the shareholder against whom the terms are enforced.<sup>72</sup> Another example comes from shareholder arbitration, where at least one court required explicit consent to an arbitration bylaw.<sup>73</sup>

A heightened consent approach takes concerns about consent seriously, but also takes into account the need to balance respect for private ordering with the state’s special role in corporations.

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71. The points in this section are elaborated in Winship, *Shareholder Litigation by Contract*, *supra* note 8, at 524–28.

72. S.B. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015) (enacted) (amending DEL. CODE ANN. tit. 8, §§ 102, 109(b)) (West 2018); *id.* at Synopsis §§ 2–5 (noting that the amendment “is not intended . . . to prevent the application of such [fee-shifting] provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced”).

73. *See* Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 158, 162–63 (3d Cir. 2009) (holding that a shareholder could not be “compelled to arbitrate her civil rights claims pursuant to corporate bylaws to which she has not explicitly assented”).



## CONCLUSION

The above is a friendly critique. Corporate organizational documents and the shareholder's relationship to them differ in many ways from other settings that involve contract and consent. And the state clearly has a historical and current role in defining the rights and duties of corporate actors. Turning these general observations into operational directions is more challenging, and this essay introduces some alternative approaches. But *Forum-Selection Provisions in Corporate "Contracts"* provides a nuanced account, intriguing observations, and welcome participation in the broader debate over the balance between private ordering and public restraint in corporate law.