

WE DON'T LIVE THERE ANYMORE: UNILATERALLY ADOPTED FORUM SELECTION  
BYLAWS AND SHAREHOLDER CONSENT AFTER BOILERMAKERS V. CHEVRON

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*“This isn't your song*

*This isn't your music*

*How can they be wrong*

*When by committee they choose it all?”*<sup>1</sup>

INTRODUCTION

You are the board of a publically held Delaware corporation that wants to avoid the risk of being hauled into court by shareholders in more than one jurisdiction for the same litigation (perhaps you have been up to something naughty<sup>2</sup>). You seek to achieve this by limiting the ability of shareholders to select the forum for litigation by private ordering, but having each shareholder sign a contract would be impractical.<sup>3</sup> Shareholders are, however, on notice that the certificate of incorporation give you the power to adopt and amend corporate bylaws unilaterally.<sup>4</sup> Delaware law allows bylaws to regulate “the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders”.<sup>5</sup> Therefore you adopt a bylaw that states that all litigation by shareholders against the corporation

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<sup>1</sup> ANDREW BIRD, PLASTICITIES (Fat Possum, 2007).

<sup>2</sup> See Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) (involving a forum selection bylaw adopted after an alleged overbilling scheme but prior to action being filed by shareholders).

<sup>3</sup> See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1471 (1989) (“[B]argaining among the shareholders, or between managers and the shareholders as a body, is virtually impossible.”).

<sup>4</sup> DEL. CODE ANN. Tit. 8, § 109(a) (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .”).

<sup>5</sup> *Id.* at § 109(b).

must be brought in Delaware, thereby immediately solving your problem, without worrying about pesky shareholder approval. Fairly simple right? The Delaware Court of Chancery would say so, as it tracks the rationale of their decision in *Boilermakers v. Chevron*<sup>6</sup>. However, getting to that decision requires numerous assumptions about the nature of corporations and their relationship to shareholders. This note seeks to shed light on some of the complexity implicated by the unilateral adoption of forum selection bylaws by Delaware corporations.

Part I will begin with a brief history of forum selection bylaws including the risk of multi-forum litigation. Part II will cover several theories of the corporation and their significance on shareholder consent. Part III will examine the current state of forum selection bylaws after *Boilermakers v. Chevron* and recommend a reevaluation of upholding these bylaws when adopted without shareholder consent, and instead recommend that mandatory rules enforce the requirement of shareholder approval before divesting the plaintiff of her choice of forum.

## I. A BRIEF HISTORY OF FORUM SELECTION BYLAWS

### A. *The Risk of Multi-forum Litigation*

1. *The Rise of Multi-forum Litigation.* The plaintiff generally has the right to decide in what forum litigation will take place.<sup>7</sup> In cases involving representative litigation, the plaintiff shareholder does not sue in their individual capacity, but rather sues on behalf of a class of shareholders or, in the case of a derivative claim, the entire corporation.<sup>8</sup> The suit may be

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<sup>6</sup> *Boilermakers Local 154 Retirement Fun, et al., v. Chevron Corp.*, 2013 WL 3191981 (2013).

<sup>7</sup> See *RWI Acquisition LLC v. Todd*, 2012 WL 1955279 at \*6 (Del. Ch.) (“Delaware courts afford great weight to a plaintiff’s choice of forum. Only extraordinary circumstances can supersede a plaintiff’s right to select its choice of forum.” (internal quotations omitted)); Randall S Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1792 (2012) (“The fact that the rules of civil procedure allow the plaintiff to choose, among the multiple permissible forums, where to file a suit is one of the strongest arguments in favor of forum shopping.”).

<sup>8</sup> Thomas et al., *supra* note 7, at 1764 (2012).

brought in any forum that has jurisdiction over all of the necessary parties.<sup>9</sup> In the corporate context, this is usually at least the state of incorporation and the company's principle place of business.<sup>10</sup>

Since the 1990s, a greater percentage of cases brought by shareholders against the directors of Delaware corporations have been brought outside of Delaware courts.<sup>11</sup> A study by John Armour, Bernard Black, and Brian Cheffins found that the percentage of all written decisions involving suits against directors of Delaware public corporations that were issued by Delaware courts declined slowly from a high of 80% in 1995, to an average of 31% over 2005–2009.<sup>12</sup> That study also found that large mergers and acquisitions (“M&A”) litigation was filed in Delaware courts an average of 69% over 1994–2001, which dropped to 31% after 2001.<sup>13</sup> Another study by Matthew D. Cain and Steven M. Davidoff found that the percentage of contested M&A deals with value over \$100 million that had multi-state litigation increased from 8.6% in 2005 to 46.5% in 2010.<sup>14</sup> The amount of complaints per challenged transaction also rose from 2.2 to 4.7 during that same period.<sup>15</sup> Professor Jennifer Johnson found that in 2010, 58% of litigation involving M&A transactions the “plaintiffs sued both in Delaware and out of state.”<sup>16</sup> Armour, Black, and Cheffin also found that in leveraged buyout (“LBO”) cases involving public

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<sup>9</sup> Defendants' Opening Brief in Support of their Joint Motion for Judgment on the Pleadings at 6–7, *Boilermakers Local 154 Retirement Fund, et al., v. Chevron Corp.*, 2013 WL 3191981 (2013) (No. 7220-CS).

<sup>10</sup> *Id.*

<sup>11</sup> John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 *IND. L.J.* 1345, 1353 (2012).

<sup>12</sup> *Id.* at 1354.

<sup>13</sup> *Id.* at 1357.

<sup>14</sup> Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 13–14 (Feb. 2012) (unpublished manuscript), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1998482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998482).

<sup>15</sup> *Id.*

<sup>16</sup> Jennifer Johnson, *Securities Class Actions in state Court*, 80 *U. CIN. L. REV.* 349, 374 (2012).

Delaware corporations, 73% occurred in Delaware courts between 1997–2001, which fell to 45% between 2002–2009.<sup>17</sup>

2. *Explanations for the “Flight from Delaware”*. Many different explanations have been offered to elucidate this “flight from Delaware”<sup>18</sup>. Plaintiff’s have been accused of “forum shopping”.<sup>19</sup> The “internal affairs doctrine” provides that law of the state of incorporation will govern the suit and therefore the substantive law will be the same regardless of the forum.<sup>20</sup> There may be procedural differences that are more favorable to the plaintiff such as different discovery rules or demand requirements under derivative suits.<sup>21</sup> One theory is that the flight has resulted from the plaintiff’s bar perception of Delaware courts as becoming increasingly hostile towards plaintiff’s counsel fee awards.<sup>22</sup> The plaintiff’s bar may also see Delaware courts as “being too pro-management to provide a fair forum.”<sup>23</sup> Professors Randall S. Thomas and Robert B. Thompson reject these claims to primarily adopt a theory of “fee distribution litigation.”<sup>24</sup> They find that cases are filed in another forum after suits are filed in another jurisdiction in order

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<sup>17</sup> Armour, Black & Cheffins, *supra* note 11, at 1360.

<sup>18</sup> Robert M. Daines & Olga Koumrian, *Cornerstone Research: Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, March 2012 Update, 20130228A NYCBAR 74.

<sup>19</sup> See Defendant’s Brief, *supra* note 10, at 13. *But see* Thomas et al., *supra* note 7, at 1793 (“[S]everal other Supreme Court cases have accepted forum shopping between different state courts without comment and, in some cases, have even endorsed it.”).

<sup>20</sup> Thomas et al., *supra* note 7, at 1778–79, 1783.

<sup>21</sup> *Id.* at 1785.

<sup>22</sup> See John Armour, Bernard S. Black & Brian R. Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. (forthcoming 2012), available at <http://ssrn.com/abstract=1578404> (“Increased scrutiny of fee awards could foster a reduced propensity by plaintiffs’ lawyers to file suit in Delaware in cases involving Delaware targets.”).

<sup>23</sup> Thomas T. McClendon, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 WASH. & LEE L. REV. 2067, 2074 (2012) (citing Armour et al., *supra* note 11, at 1350).

<sup>24</sup> Thomas et al., *supra* note 7, at 1797–98.

to “give a second set of plaintiff’s law firms a seat at the settlement table and an opportunity to reallocate the pool of attorney’s fees that may be awarded.”<sup>25</sup>

3. *The Consequence of Multi-forum Litigation.* The result of multi-forum litigation is unclear. Opponents argue that it increases costs, places a strain on the judicial system, and creates the risk of inconsistent results.<sup>26</sup> Defendant’s can also engage in forum shopping of their own,<sup>27</sup> as well as engage in a “reverse auction” whereby they play the different plaintiffs’ counsel against each other so that they undercut each other on settlement amounts in order to secure a contingent fee.<sup>28</sup> Thomas and Thompson offer two kinds of benefits created by multijurisdictional litigation: “[f]irst, it preserves the traditional jurisdictional and venue rules for forum selection that apply in all other areas of the law . . . [and] [s]econd, this form of litigation preserves other states’ ability to influence the business and affairs of corporations headquartered in their states.”<sup>29</sup> With the dominance of Delaware as the state of incorporation for entities,<sup>30</sup> the “quasi-monopoly” of its corporate law could mean the interests of other states are not represented in the ubiquitous law of America’s corporations.<sup>31</sup> Thomas and Thompson also challenge the general assumption that multi-forum litigation drastically increases costs for

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<sup>25</sup> *Id.*

<sup>26</sup> See Defendant’s Brief, *supra* note 10, at 13

<sup>27</sup> Thomas et al., *supra* note 10, at 1791–92.

<sup>28</sup> See Defendant’s Brief, *supra* note 10, at 14–15 (citing *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL, 2011 WL 863887 (Del. Ch. Mar. 11, 2011) (discussing forum shopping and reverse auctions).

<sup>29</sup> Thomas et al., *supra* note 7, at 1799.

<sup>30</sup> McClendon, *supra* note 23, at 2087–88 (“over 50% of all publically traded companies are incorporated in Delaware . . .”).

<sup>31</sup> Thomas et al., *supra* note 7, at 1799–1800.

corporations, finding that “[a] substantial number of shareholder litigation cases are dismissed with no settlement and very little litigation activity.”<sup>32</sup>

4. *Solutions to the Multijurisdictional Threat.* There have been several proposals to deal with the threat of duplicative legislation including changing the rules for collateral attacks,<sup>33</sup> increased monitoring of attorney’s fees,<sup>34</sup> and providing a federal forum for representative litigation.<sup>35</sup> The two main proposals that will be discussed here are use of *forum non conveniens*<sup>36</sup> and judicial comity.<sup>37</sup>

A motion for *forum non conveniens* is seldom granted and “dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”<sup>38</sup> The defendant must prove that the balance of factors strongly weigh in favor of a change of venue.<sup>39</sup> Where the litigation attempting to be dismissed was filed in the corporation’s principle place of business, “prevailing on a *forum non conveniens* motion is nearly impossible.”<sup>40</sup> Because of the high standards applied to *forum non conveniens* motions and that

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<sup>32</sup> *Id.* at 1800–01 (“[N]or do [multijurisdictional litigation] appear to generate much in the way of additional costs.”).

<sup>33</sup> *Id.* at 1801–03.

<sup>34</sup> *Id.* at 1805–09.

<sup>35</sup> Thomas et al., *supra* note 7, at 1801–08.

<sup>36</sup> McClendon, *supra* note 23, at 2086.

<sup>37</sup> Thomas et al., *supra* note 7, at 1803–05.

<sup>38</sup> See Defendant’s Brief, *supra* note 10, at 17 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981)).

<sup>39</sup> Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). *Gulf Oil* listed nine factors including (1) the private interest of the litigant; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process and cost of attendance for witnesses; (4) possibility of view of premises if appropriate; (5) the pendency or nonpendency of a similar action in another jurisdiction; (6) the ability to exercise jurisdiction over all the individual defendants; (7) the relative advantages and obstacles to fair trial; (8) the enforceability of the judgment; and (9) any other practical considerations that make trial of a case easy expeditious, and inexpensive. *Id.*

<sup>40</sup> See Defendant’s Brief, *supra* note 10, at 17.

duplicative litigation will normally be filed where the defendant corporation's corporate headquarters or principle place of business is,<sup>41</sup> it would not be a practical solution to the multijurisdictional threat.

Thomas and Thompson suggest addressing the problem through judicial comity, where judges of the various courts would cooperate in finding where the optimal forum would be.<sup>42</sup> This is attractive in the sense that it would address the issue before the case is heavily litigated, would be easily reversed and flexible, and would not require any major changes to the existing judicial system.<sup>43</sup> Indeed it has already been used successfully.<sup>44</sup> This approach could be susceptible to error if the judges or attorneys do not wish to participate, the judges are influenced by improper considerations such as the profile of the case and press coverage, or the judges simply disagree.<sup>45</sup> Defendants may also become fearful of "potentially offending" the judge on the receiving end of the motion.<sup>46</sup> Some have responded to these fears by filing multi-captioned "one-forum" motions that do not take a position on the appropriate forum and merely seek for the judges to choose.<sup>47</sup> Although they have had some minor success, the Court of Chancery may be critical of their utility.<sup>48</sup>

#### B. *The Rise of Forum Selection Bylaws*

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<sup>41</sup> Thomas et al., *supra* note 7, at 1765.

<sup>42</sup> *Id.* at 1803–04.

<sup>43</sup> *Id.* at 1804–05.

<sup>44</sup> *See* Defendant's Brief, *supra* note 10, at 18 n.37; Thomas et al., *supra* note 7, at 1803–04. *But see* Defendant's Brief, *supra* note 10, at 18 n.38.

<sup>45</sup> Thomas et al., *supra* note 7, at 1804–05.

<sup>46</sup> Defendant's Brief, *supra* note 10, at 20.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 20–21.

1. *Forum Selection Clauses Generally*. Generally, a forum selection clause is a provision that designates a forum as the exclusive venue for certain actions.<sup>49</sup> Historically, forum selection clauses were disfavored by American courts.<sup>50</sup> They were often declined to be enforced as “contrary to public policy or that their effect was to oust the jurisdiction of the court.”<sup>51</sup> The Supreme Court in *M/S Bremen v. Zapata*<sup>52</sup> announced that the refusal to enforce these clauses reflected a “provincial attitude regarding the fairness of other tribunals” and “has little place in an era when all courts are overloaded and when businesses . . . now operate in world markets.”<sup>53</sup> The *Bremen* court held that when “unaffected by fraud, undue influence, or overweening bargaining power” courts should “give effect to the legitimate expectations of the parties manifested in their freely negotiated agreement, by specifically enforcing the forum clause.”<sup>54</sup> The court applied this presumption in favor of enforcing contractual forum selection clauses to a non-negotiated form contract between a cruise ship and a passenger in *Carnival Cruise Lines, Inc. v. Shute*.<sup>55</sup>

2. *Genesis of Use in the Corporate Charter and Bylaws*. Professor Joseph A. Grundfest identifies the earliest instance of an intra-corporate forum selection clause in the charter or bylaws of a publically traded corporation as being adopted in October of 1991.<sup>56</sup> Prior to March

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<sup>49</sup> Boilermakers, *supra* note ??? at \*4.

<sup>50</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

<sup>51</sup> *Id.* (internal quotations omitted).

<sup>52</sup> *Id.* at 9.

<sup>53</sup> *Id.* at 12. *See also* *Ignes Corp v. CA, Inc.*, 8 A.3d 1143, 1145–1146. (“we hold that where contracting parties have expressly agreed upon a legally enforceable forum selection cause, a court should honor the parties’ contract and enforce the clause.”).

<sup>54</sup> *Bremen*, 407 U.S. at 12.

<sup>55</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (holding the forum selection clause contained in ticket contract was enforceable despite the passengers lack of opportunity or power to bargain).

<sup>56</sup> Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 379 (2012).

16, 2010, only 16 publically traded entities (0.18% of all such entities) included forum selection clauses in their charter or bylaws.<sup>57</sup> On that date, the Court of Chancery of Delaware announced in dicta in *In re Revlon, Inc.*<sup>58</sup> that “if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolutions, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”<sup>59</sup> By June 30, 2011, 133 publically traded entities had forum selection clauses in their corporate documents, with another 62 entities adding them by December of that year.<sup>60</sup> The breaking of judicial silence on the issue in *Revlon* as well as the adoption of intra-corporate forum selection clauses in corporate bylaws by high profile Fortune 500 companies like Chevron Corporation and Berkshire Hathaway are credited with the rapid increase in their popularity.<sup>61</sup>

3. *Evolution of Intra-Corporate Forum Selection Clauses.* The first forum selection provision adopted in the corporate bylaws was extremely broad, stating “[a]ny action brought by any stockholder against the Corporation or against any officer, director, employee, agent or advisor of the Corporation, including without limitation any such action brought on behalf of the Corporation, shall be brought solely in a court of competent jurisdiction located in the State of Delaware.”<sup>62</sup> Forum selection clauses generally cover four overlapping categories of actions including (1) any derivative action or proceeding brought on behalf of the corporation, (2) any claim of breach of fiduciary duty owed by any director or officer to the corporation or its

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<sup>57</sup> *Id.* at 336.

<sup>58</sup> *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940 (De. Ch. 2010).

<sup>59</sup> *Id.* at 960.

<sup>60</sup> Grundfest, *supra* note 56, at 339–340.

<sup>61</sup> *Id.* at 340–41 (“Corporate boards seeking guidance from the actions of other large, well-respected entities could have drawn comfort from these high profile corporate actions.”).

<sup>62</sup> *Id.* at 379.

stockholders, (3) any claim arising pursuant to any provision of the Delaware General Corporate Law, and (4) any claim governed by the internal affairs doctrine.<sup>63</sup> Later forms of forum selection bylaws added further provisions. These include making the clauses “elective” by providing the flexibility to director’s to waive the clause if proceeding with litigation outside of Delaware is in the best interests of the shareholders and the corporation, acting as a “fiduciary out”.<sup>64</sup> Even if the provision is a mandatory one, without the “fiduciary out”, the court may interpret it as “elective if strict application of the provision would constitute a breach a director’s duty of loyalty or care.”<sup>65</sup> Grundfest has found that the recent trend is a “migration” from mandatory to elective provisions.<sup>66</sup> Elective provisions raise additional concerns that they may be used by the defendant directors or corporations to engage in forum selection of their own by agreeing to waive the provision in order to enter into a “collusive, sweetheart settlement”.<sup>67</sup> Some companies have further limited their clauses by providing an exception when the court of the chosen forum has determined that it does not have jurisdiction over an indispensable party, or disclaiming retroactive application of forum selection clause to incidents occurring prior to

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<sup>63</sup> McClendon, *supra* note 22 at 2110–11. For a selection of various forum selection clauses adopted by corporations, see *Id.* at 2106–09.

<sup>64</sup> Grundfest, *supra* note 56, at 383.

<sup>65</sup> *Id.* at 365.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 386–87. *See also* McClendon, *supra* note 23, at 2114 (“[The defense] may have an impossible task in convincing a judge who sees an elective forum selection clause as too advantageous to the corporation. The plaintiff will argue that an elective forum selection clause allows the corporation to forum shop while preventing the plaintiff-shareholder from doing the same.”).

adoption.<sup>68</sup> But some studies have shown that these limits may not have gained much traction thus far.<sup>69</sup>

4. *Charter or Bylaws?* The decision of whether to place the forum selection clause in the corporate charter or bylaw has significant procedural implications. DGCL section 102(b)(1) allows the charters of Delaware corporations to include “any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State . . . .”<sup>70</sup>

Once a provision is adopted in the corporate charter it is binding on all shareholders, regardless of whether they acquire their shares subsequent to the vote.<sup>71</sup> Inserting a provision into a corporation’s charter requires a board resolution amending the charter followed by a shareholder vote.<sup>72</sup> This shareholder approval is generally obtained as an agenda item at an annual shareholder’s meeting.<sup>73</sup> Often forum selection provisions are bundled with other shareholder proposals that may make it more attractive such as de-classifying the board or changing the state of incorporation.<sup>74</sup> Amending or removing the provision is accomplished through the same process. Shareholders cannot propose their own charter amendments, they require a board

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<sup>68</sup> McClendon, *supra* note 23, at 2111–13. The disclaimer is responding to concerns over the situation that occurred in *Galaviz*. *Id.*

<sup>69</sup> *Id.* (stating that currently only one company has adopted language similar to each of these provisions.)

<sup>70</sup> DEL. CODE ANN. Tit. 8, § 102(b)(1) (2011).

<sup>71</sup> McClendon, *supra* note 23, at 2117 (citing *Centaur Partners, Iv v. Nat’l Intergroup Inc.*, 582 A.2d 923, 928 (Del. 1990)).

<sup>72</sup> See DEL. CODE ANN. Tit. 8, § 242 (2011).

<sup>73</sup> Deborah A. DeMott & David F. Cavers, *SHAREHOLDER DERIV. ACTIONS L. & PRAC.* § 1:5 (2013).

<sup>74</sup> Grundfest, *supra* note 56, at 370–71.

resolution.<sup>75</sup> This process may be appealing from a legitimacy perspective, but brings risks of shareholder resistance.<sup>76</sup> Therefore, even though *Revlon* made no mention of using corporate bylaws,<sup>77</sup> they have been targeted as a method of adopting forum selection bylaws.

Delaware law allows the certificate of incorporation to grant the board the power to adopt and amend corporate bylaws unilaterally.<sup>78</sup> Customarily, the certificates of incorporation of Delaware entities do grant this power.<sup>79</sup> However, this cannot divest the shareholders of the power to adopt, amend or repeal bylaws.<sup>80</sup> This large grant of discretion to the board is to allow them to have the flexibility to respond to changing dynamics without having to go through the process of obtaining shareholder consent for every business decision.<sup>81</sup> Delaware law allows bylaws to regulate “the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders”.<sup>82</sup> The court of chancery has most recently interpreted the scope of that power to easily contain the power to adopt a forum selection clause.<sup>83</sup> Because the shareholders still retain the power to adopt or repeal bylaws, although the

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<sup>75</sup> Demott et al., *supra* note 73, at § 1:5.

<sup>76</sup> See McClendon, *supra* note 23, at 2116 (“[S]hareholders may be unwilling to affirmatively vote in favor of a charter forum selection provision . . . .”); Grundfest, *supra* note 56, at 371.

<sup>77</sup> *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940 (De. Ch. 2010).

<sup>78</sup> DEL. CODE ANN. Tit. 8, § 109(a) (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . . .”).

<sup>79</sup> Demott et al., *supra* note 73, at § 1:5.

<sup>80</sup> DEL. CODE ANN. Tit. 8, § 109(b) (2011); *see also* *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 232 (Del. 2008) (“[B]y its terms Section 109(a) vests in the shareholders a power to adopt, amend or repeal bylaws that is legally sacrosanct, i.e., the power cannot be non-consensually eliminated or limited by anyone other than the legislature itself.”).

<sup>81</sup> *See Boilermakers Local 154 Retirement Fun, et al., v. Chevron Corp.*, 2013 WL 3191981, \*12 (2013) (“[T]he boards of Delaware corporations have the flexibility to respond to changing dynamics that are authorized by our statutory law.”).

<sup>82</sup> DEL. CODE ANN. Tit. 8, § 109(a) (2011).

<sup>83</sup> *Boilermakers*, 2013 WL 3191981 at \*10 (“As a matter of easy linguistics, the forum selection bylaws address the ‘rights’ of the stockholders . . . . They also plainly relate to the conduct of the corporation . . . .”).

board may unilaterally adopt a forum selection bylaw, it may be subsequently removed by unilateral shareholder action.<sup>84</sup> If a board unilaterally re-adopted a bylaw that has been removed by shareholder action, the shareholders could re-remove it and may deem the action so extreme as to prompt shareholder removal of board members.<sup>85</sup> The first time it was challenged in court, a bylaw adopted in this way was struck down as lacking the requisite shareholder consent to be bound by its terms.<sup>86</sup>

5. *Benefits of Forum Selection Clauses.* If effective, an intra-corporate forum selection provision has several benefits beyond simply reducing the multi-forum litigation risks outlined above, including access to the expertise of the Delaware Court of Chancery, and avoids misapplications of Delaware law by non-Delaware courts.<sup>87</sup> Other claimed benefits include reducing dispute resolution costs, promoting efficient contracting, and enhancing functional specialization of the judiciary.<sup>88</sup> The expertise of the Court of Chancery of Delaware is well documented.<sup>89</sup> Delaware courts are more focused on corporate law, have judges with extensive

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<sup>84</sup> Demott et al., *supra* note 73, at § 1:5.

<sup>85</sup> *Id.* See also DEL. CODE ANN. Tit. 8, § 211 (2011) (“Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws.”).

<sup>86</sup> See Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) (involving a forum selection bylaw adopted after an alleged overbilling scheme but prior to action being filed by shareholders). The court left open the suggestion that the bylaw may have been upheld if it had received shareholder approval. See *id.* at 1175 (“Certainly were a majority of shareholders to approve such a charter amendment, the arguments for treating the venue provision like those in commercial contracts would be much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment.”). This case is discussed further *supra* Part II.D.

<sup>87</sup> Demott et al., *supra* note 73, at § 1:5.

<sup>88</sup> Grundfest, *supra* note 56, at 335. *But see* Thomas et al., *supra* note 7, at 1800–01 (“[N]or do [multijurisdictional litigation] appear to generate much in the way of additional costs.”).

<sup>89</sup> 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, 1480 (2009) (“[T]he Delaware Chancery Court enjoys a strong

corporate experience, and get a “steady diet of corporate law” on their dockets.<sup>90</sup> Having the same court apply its own law could lead to increased consistency of results and certainty of outcome.<sup>91</sup> One litigator described other state courts applying Delaware law as “like taking Gallatorie’s secret recipes and giving them to a Jack-In-The-Box short-order cook. It doesn’t always work so well.”<sup>92</sup> Although having the expertise and sophistication of the Delaware courts would clearly have benefits, there are the aforementioned concerns about preserving the “other states’ ability to influence the business and affairs of corporations headquartered in their states.”<sup>93</sup> Forum selection provisions have also been criticized as having potential management-protection purposes, harmful lock-in effects, and as basically privileging the forum shopping of the defendant over the plaintiff’s forum shopping.<sup>94</sup>

## II. SHAREHOLDER CONSENT

In arriving at the justification for enforcing a unilaterally adopted forum selection bylaw, the court in *Boilermaker’s* adopted a view of the relationship between corporations, shareholders, and the law that is merely one choice among many. This section will discuss several different theories of the corporation, and how they affect the relationship between the board, the shareholders, and the entity as a whole.

### A. *Top Down and Bottom Up Perspectives of the Corporation*

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reputation as an expert on the issues of fiduciary duty that are likely to play a role in corporate merger cases.”).

<sup>90</sup> Thomas et al., *supra* note 7, at 1771.

<sup>91</sup> Bonnie White, *Reevaluating Galaviz v. Berg: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws as Requirements Contract*, 160 U. PA. L. REV. PENNUMBRA 390, 398 (2012).

<sup>92</sup> Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions, M&A J., May 2007, at 17.

<sup>93</sup> Thomas et al., *supra* note 7, at 1799. *See supra* notes 25–28 and accompanying text.

<sup>94</sup> Thomas et al., *supra* note 7, at 1816–17.

1. *Perceptions Generally*. There has been a historical tension between the “top-down” and “bottom-up” perspectives of the corporation.<sup>95</sup> The “top-down” perspective sees the corporation as only existing by virtue of having its powers conferred on it by the government. This perspective was expressed by Chief Justice John Marshall in the *Dartmouth College* case: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>96</sup> The “bottom-up” approach is very different, seeing the corporation as the creation of the participants in the entity, with its rights and powers accruing derivatively through its participants.<sup>97</sup> In this view the state has a much smaller role, and simply supplies the overarching rules and structure within which the entity operates.<sup>98</sup> This view is more likely to be manifested in the recognition of a corporation as having distinct legal rights in the entity itself, such as the *Santa Clara County v. Southern Pacific Railroad*<sup>99</sup> which extended the constitutional right of equal protection to corporations as “legal persons”.<sup>100</sup>

2. *Perceptions and Legal Personhood*. There exist many theories offered to describe the legal personhood of corporations that implicate parts of both the top-down and bottom-up perspectives. This section will focus on three theories as highlighted and labeled by Professor Eric W. Orts: concession theory, participant theory, and institutional theory.<sup>101</sup> The concession theory represents the top-down perspective, that corporations only exist “by concession” of

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<sup>95</sup> ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 9 (2013).

<sup>96</sup> *Dartmouth College v. Woodward*, 17 U.S. 518, 639 (1819).

<sup>97</sup> Orts, *supra* note 95, at 10.

<sup>98</sup> *Id.*

<sup>99</sup> *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394 (1886).

<sup>100</sup> *Id.*

<sup>101</sup> Orts, *supra* note 95, at 12.

government, and are therefore subject to strict government oversight and regulation.<sup>102</sup> This theory is much more likely to see corporate law as “public law”.<sup>103</sup> The participant theory tracks the bottom-up perspective, and that after setting the basic rules through granting the corporate charter, there is a “shift in legal emphasis” from the government to the individuals through their investment in capital, labor, and expertise.<sup>104</sup> This theory sees corporate law as primarily private law.<sup>105</sup> The institutional theory seeks middle ground between the top-down and bottom-up perspectives, and the concession and participant theories.<sup>106</sup> This theory sees firms as “socially established entities that are *both* authorized and recognized by governments *and* organized and managed by individual participants.”<sup>107</sup> Institutional theory begins with the government setting the initial “rules of the game” but sees a more important ongoing role for the government than participant theory.<sup>108</sup> The rules may be changed and adapted to suit the changing policy issues surrounding corporations, and is also used as the framework for the self-governance arranged among the participants of the entity.<sup>109</sup> This theory also recognizes the legal personhood of corporations and their attendant rights.<sup>110</sup> Adopting a purely extreme participant or concession theory would lead to libertarian anarchy, or government authoritarianism, respectfully.<sup>111</sup> The key is understanding that there is a need to balance recognizing the importance of government involvement while also allowing for sufficient flexibility and freedom from government

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<sup>102</sup> *Id.* at 12–13.

<sup>103</sup> Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 *Geo. Wash. L. Rev.* 582, 588 (1984).

<sup>104</sup> Orts, *supra* note 95 at 13.

<sup>105</sup> Eisenberg, *supra* note 103, at 588.

<sup>106</sup> Orts, *supra* note 95 at 14.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 15.

<sup>109</sup> *Id.* at 15

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 21–22.

intrusion to allow the participants in an entity create rules of self-organization within the broader legal framework. This will become important as these theories are built on below. Corporate law is primarily private law, but the public has an interest such as the desirability of facilitating commerce, protecting fair and reasonable expectations, and in maximizing our national economy.<sup>112</sup>

*B. Agency and the Corporation*

Agency law provides “an essential foundation for the legal structure of the modern firm.”<sup>113</sup> Unlike contractual relationships, which only requires two parties, agency relationships require three parties, the principal, the agent that acts on behalf of the principal, and the third party affected by the relationship.<sup>114</sup> Corporations require numerous agency relationships, but the one that will be primarily focused on here is the relationship between the board and the corporation. Corporations have been described as “a nexus of agency relationships” with the nexus being composed of recognition of the entity itself as a person. Shareholders are not considered to be principals of corporations.<sup>115</sup> Instead, the directors of the corporation owe a fiduciary duty, an agency relationship of trust and loyalty, to the corporation as a whole.<sup>116</sup> Agency relationships impose agency costs in the difficulty of the principal to control the agent.<sup>117</sup> The ability of shareholders to sue on behalf of the corporation to enforce the fiduciary obligations of officers and directors is an important tool in managerial agency-cost-reduction.<sup>118</sup>

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<sup>112</sup> Eisenberg, *supra* note 103, at 588.

<sup>113</sup> Orts, *supra* note 95 at 54.

<sup>114</sup> *Id.* at 56.

<sup>115</sup> *Id.* at 60. *See also* Restatement (Third) Of Agency Intro. (2006) (“[T]he defining characteristics of ‘true agency’ are not present in the relationship between a corporation’s shareholders and its directors . . .”).

<sup>116</sup> Orts, *supra* note 95, at 82.

<sup>117</sup> Eisenberg, *supra* note 3, at 1471.

<sup>118</sup> Thomas et al., *supra* note 7, at 1761.

This is what has led some to assert that “agents whose interests may materially diverge from the interests of their principals should not have the power to unilaterally determine or materially vary the rules that govern those divergencies of interest.”<sup>119</sup>

*C. Enabling, Default, and Mandatory Rules*

Before laying out the contractarian theory of the corporation, it is important to understand the different types of rules that act upon the internal governance of the entity. These are enabling, default, and mandatory rules.<sup>120</sup> Enabling rules serve as the framework for allowing participants in the corporation to construct and adopt their own organizational rules.<sup>121</sup> These rules include those that allow for the creation of the entity, and confer on it powers such as the ability to hold property and have legal standing.<sup>122</sup> Default rules supply common terms that form the base rules for business organizations based on what reasonable parties would have agreed to.<sup>123</sup> These rules can then be “contracted around” by “opting in” or “opting out” of them through private agreement and the adoption of internal organizational rules that diverge from them.<sup>124</sup> Mandatory rules are those that regulate the business relationship but cannot be “contracted around” or waived.<sup>125</sup> These terms include prohibitions against insider trading.<sup>126</sup>

*D. Contractarian Theories*

The contract theory of the corporation is that the corporate structure is a set of contracts which the participants, including managers and shareholders, exercise a great deal of discretion

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<sup>119</sup> Eisenberg, *supra* note 3, at 1474.

<sup>120</sup> Orts, *supra* note 95, at 68.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

and are influenced by market forces, but are largely free from government intervention.<sup>127</sup> This theory focuses on the “voluntary adventure” of the corporation, where the parties have all freely agreed to participate, and deemphasize the importance of corporate law or the status of the corporation as a distinct entity.<sup>128</sup> This theory is heavily focused on a bottoms-up view of the corporation, as the corporation is contracted from the ground level by contractual relationships between the participants.<sup>129</sup> Deemphasize on the role of the state lead proponents of this theory to stress relying on enabling and default rules only and seek a dismantling of mandatory rules, which has led some critics to suggest it is partially based in anti-regulatory ideologies.<sup>130</sup> Here, managerial agency problems are solved through the “invisible hand” of market forces that will generally align their interests with the corporation.<sup>131</sup> Contractarian theories of the firm adopt a “relatively extreme version of the participant theory of the firm.”<sup>132</sup> The logical conclusion of that extreme perspective is that there is no entity, but just a series of contracts making the idea of ownership “irrelevant.”<sup>133</sup> Eisenberg finds this view unpersuasive as shareholders seem to have most of the standard incidents of ownership, except control, which they exercise indirectly through the right to elect and remove directors or sell to another bidder.<sup>134</sup> It is argued that the contracts comprising the corporation are actually “implicit contracts” not marked by a real

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<sup>127</sup> See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989).

<sup>128</sup> *Id.* at 1426.

<sup>129</sup> Orts, *supra* note 95, at 69

<sup>130</sup> *Id.* at 70.

<sup>131</sup> See Easterbrook et al., *supra* note 127, at 1419 (“[T]hey find that the dynamics of the market drive them to act as if they had investor’ interests at heart.”).

<sup>132</sup> Orts, *supra* note 95, at 25. Participant theory is discussed *supra* Part IIa.

<sup>133</sup> Orts, *supra* note 95, at 27.

<sup>134</sup> 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, 825 (1999).

bargain, but by tacit understanding/expectation, like marriage or friendship.<sup>135</sup> In the case of those intimate relationships, we don't require explicit bargaining for clear policy reasons.<sup>136</sup> The key though is that implicit contracts are not legally enforceable promises, and therefore this theory of the corporation does not bring the legally enforceable realm of true contract law to bear onto corporate relationships.<sup>137</sup>

The idea that corporations are “generally free” to vary the rules of corporation law as a starting point ignores the important role of rules such as those dealing with “unfair self-dealing, insider trading, proxy voting, and disclosure which are largely mandatory.”<sup>138</sup> Parties “contract in the shadow of the law”, relying on the court to interpret the contract in terms of unforeseen circumstances which may require diverging from the text of the contract as written.<sup>139</sup> The idea that the corporation is a “nexus of contracts” ignores the fact that contract only supplies some of the rules, with law determining others, and most being determined by unilateral action by corporate officials.<sup>140</sup>

According to some proponents of this theory, the corporation, as a long term entrepreneurial relationship, is essentially a relational contract whose terms will be modified over its duration.<sup>141</sup> Therefore the missing terms need to be interpreted by the courts in light of their view of the corporate relationship. One approach, offered primarily by anticontractarians, is to interpret the missing terms in the context of a fiduciary duty between the shareholders and the

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<sup>135</sup> Eisenberg, *supra* note 3, at 1487–88.

<sup>136</sup> *Id.* at 1488.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1487.

<sup>139</sup> John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621–1622 (1989).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1659.

directors.<sup>142</sup> Critics see this is seen as freezing the corporate mold and not practical in a modern business world.<sup>143</sup> This view, although recognizing an original contractual relationship, starts to approach the more authoritarian concession theory. Another approach would be to use the hypothetical bargaining theory, to view new provisions in the context of what the parties would have wanted.<sup>144</sup> This essentially imports ‘reasonableness’ as a contractual requirement.

Eisenberg argues for a more balanced approach to contract theory that does not take as much of an extreme participant theory view, in that it does not have to ignore the proper role of mandatory rules.<sup>145</sup> Mandatory rules govern contract law such as the rules regarding consideration, unconscionability and good faith.<sup>146</sup> If the nexus view is accepted, it is hard for some to see how a director can owe authentic loyalty to a group of contracts.<sup>147</sup>

#### *D. Vested Rights Doctrine*

The first case to deal with a unilaterally adopted forum selection bylaw was *Galaviz v. Berg*.<sup>148</sup> The bylaw was struck down as lacking the requisite shareholder consent to be bound by its terms.<sup>149</sup> The court differentiated unilateral director action from the contractual paradigm as even parties subject to a contract of adhesion can be said to have consented, where as in this case, the shareholders could not.<sup>150</sup> This case involved a forum selection bylaw that was adopted after an alleged overbilling scheme had been ongoing, but before the actions were filed.<sup>151</sup> The

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<sup>142</sup> *Id.* at 1625.

<sup>143</sup> *Id.* at 1625.

<sup>144</sup> *Id.* at 1653.

<sup>145</sup> Eisenberg, *supra* note 134, at 823–24 (“[I]nsofar as the nexus of contracts is a positive conception, it has no implications for the proper role of mandatory legal rules.”).

<sup>146</sup> *Id.* at 823.

<sup>147</sup> *Id.* at 835.

<sup>148</sup> *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

<sup>149</sup> *Id.* at 1174.

<sup>150</sup> *Id.* at 1171.

<sup>151</sup> *Id.* at 1172.

court declined to apply the *Bremen* test and rejected the pure contractual view of the corporation, finding that “[t]o whatever degree bylaws may be generally be contractual in nature . . . [the defendant] here seeks to rely on principles of *corporate* law with respect to how its bylaws could be amended.”<sup>152</sup> The court accused the corporation of trying to achieve in corporate law, what it could not in contract law, failing to produce an example of a forum selection provision introduced into a commercial contract by unilateral amendment that was upheld.<sup>153</sup> The court did, however, leave open the possibility that the provision would have been upheld if it had received shareholder approval as a charter amendment.<sup>154</sup> This decision appears to reject the purely contractarian, participant theory of the corporation, to one that saw a greater role of the state or mandatory rules in enforcing at least a minimum level of consent.<sup>155</sup>

One interpretation of this decision, is that the court was borrowing principles from the so-called “vested rights theory.”<sup>156</sup> The vested rights doctrine holds that some rights of the shareholder are so fundamental that they cannot be taken away by subsequent corporate action.<sup>157</sup> It posits “that boards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent shareholder consent.”<sup>158</sup> They are said to be “vested” in their property rights as shareholders.<sup>159</sup> This system therefore places large emphasis on mandatory rules to protect these rights.<sup>160</sup> In the context of forum selection provisions, it

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<sup>152</sup> *Id.* at 1174.

<sup>153</sup> *Id.*

<sup>154</sup> *See supra* note 86 and accompanying text.

<sup>155</sup> *See Galaviz* 763 F. Supp. at 1174 (discussing the use of non-contract principles in the adoption of bylaws).

<sup>156</sup> Coffee, *supra* note 139, at 1633–34.

<sup>157</sup> *Id.*

<sup>158</sup> Joseph A. Grundfest & Kristen A. Savelle, *The Brohaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. L. 325, 330 (2013).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

would view the ability of the plaintiff shareholder to select the forum of any potential suit against the corporation or its directors to have vested in that shareholder, and therefore could not be stripped by the unilateral action of the directors. A very moderate version of this theory could explain the preference for forum selection provisions in corporate charters over unilaterally adopted bylaws, as at least the shareholder could be said to at least minimally consented to waiving their vested rights. More onerous views of this theory would say that not even a super majority could strip a shareholder of a vested right.<sup>161</sup> The vested rights doctrine, although useful as an example of a conceptual tool for describing the corporation, is generally considered to be substantively dead in Delaware.<sup>162</sup>

#### *E. Shareholder Consent*

1. *Price Theory*. One theory of shareholder consent, rooted in fairness, is that the market accurately prices the internal constitutive rules of the corporation, and therefore the “shareholder has gotten what he paid for.”<sup>163</sup> With respect to the contract theory of the Corporation, we enforce “take them or leave them” contracts such as rental contracts and warranties because the value of the terms has been reflected in the price.<sup>164</sup> This argument has no application in the context of a shareholder who owned stock *prior* to the adoption of the undesirable rule.<sup>165</sup> Any argument that the market would have priced in the *potential* that they could be adopted makes

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<sup>161</sup> *Id.*

<sup>162</sup> *See Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) (“[W]here a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.”); JAMES D. COX AND THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 25:4 (3d ed. 2011) (“In Delaware, the vested-rights doctrine is generally recognized as a dead letter, and no contemporary decision is likely to be resolved on this basis.”).

<sup>163</sup> *Id.* at 1514.

<sup>164</sup> Easterbrook et al., *supra* note 127, at 1429.

<sup>165</sup> Eisenberg, *supra* note 3, at 1515.

little sense especially in the context of novel provisions in corporate law like forum selection clauses. The price of any adopted provision would also be extremely difficult for investors to determine as the effect on value depends on assessing the probabilities that it would be used, and discounting those values by the time value of money.<sup>166</sup> It is possible that the law could at some point impose higher requirements for passing corporate terms post going public, such as requiring a supermajority.<sup>167</sup> Eisenberg argues that even if the terms could be fairly priced in, under modern contract law, a contract term that is unfairly surprising is unenforceable even if the term is impounded into the contract price.<sup>168</sup> Using an analogy to insurance contracts that weren't enforced due to unclear or inconspicuous terms, he argues that investors in an IPO are no more likely to know of variations in intra-corporate constitutive rules than a person buying insurance would know about fine print in their policy.<sup>169</sup> Share purchasers are unlikely to have knowledge of variations, nor understand their implications.<sup>170</sup> Judge Frank H. Easterbrook and Professor Daniel R. Fischel do not think it is problematic that individual investors will have little knowledge or understanding of the corporate structure as the price will be established by professionals.<sup>171</sup> This idea seems to be moving in a direction that would divorce the pricing theory from any semblance of actual consent and be focused exclusively on fairness.

2. *Limits on Shareholder Consent.* Shareholders do not have the time or incentive to all proposed corporate changes, nor is the information that they would require for an informed

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<sup>166</sup> *Id.* at 1517.

<sup>167</sup> Easterbrook et al., *supra* note 127, at 1443.

<sup>168</sup> Eisenberg, *supra* note 3, at 1519. *Compare with* Easterbrook et al., *supra* ?? at 1446 (“The one thing on which a contractual framework focuses attention is surprise . . . [i]t is a complaint for breach of contract, not for derogation from some ethereal ideal of corporate governance.”).

<sup>169</sup> Eisenberg, *supra* note 3, at 1521.

<sup>170</sup> *Id.* at 1522.

<sup>171</sup> Easterbrook et al., *supra* note 127, at 1431.

choice readily available, therefore they are rationally disinterested in voting.<sup>172</sup> Professor Melvin Aron Eisenberg identified several types of defective shareholder consent.<sup>173</sup> These are consent that is nominal, tainted by a conflict of interest, coerced, or impoverished.<sup>174</sup> Nominal consent addresses the difficulty that due to having dispersed holdings in a large amount of company's many shareholders will simply deem it not worthwhile to read every proposal and simply assume that the managers are proposing value increasing options and allow their votes to be cast by management as a proxy.<sup>175</sup> This can also result when non-shareholders with power to vote, like brokers who hold stock in street name, give approval.<sup>176</sup> Consent that is tainted by conflicts of interest refer to the fact that as more and more stock in publically held companies is owned by institutional investors, their commercial contracts and ties to management may inhibit voting against a proposal.<sup>177</sup> Coerced consent refers to consent obtained by the use of sweeteners or ties-ins of more favorable proposals or dividends for shareholders in order to gain support for less favorable proposals.<sup>178</sup> Impoverished consent refers to the problem that many shareholders have weak, incomplete, or nonexistent understandings of the proposals they are voting for.<sup>179</sup> Shareholders only receive management's side of the proposals, and cannot present the other side of the argument in the proxy.<sup>180</sup> Shareholders also face steep collective action problems.<sup>181</sup>

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<sup>172</sup> *Id.* at 1443.

<sup>173</sup> Eisenberg, *supra* note 3, at 1474.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1475.

<sup>176</sup> Eisenberg, *supra* 134, at 824.

<sup>177</sup> Eisenberg, *supra* note 3, at 1476.

<sup>178</sup> *See id.* at 1477 (“[M]anagement may tie a proposal that shareholders might vote down if it stood alone to a proposal that shareholders will clearly favor.”).

<sup>179</sup> *Id.* at 1478.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* 1478–79 (“Even if a group is successfully formed, shareholders who do not join the group will free-ride on its efforts and will therefore have an incentive not to join.”).

### III. FORUM SELECTION BYLAWS POST BOILERMAKERS V. CHEVRON

#### A. *Boilermakers v. Chevron*

The case of *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*<sup>182</sup> involved two corporations that unilaterally adopted forum selection bylaws.<sup>183</sup> Complaints were originally filed by shareholders against twelve corporations who adopted bylaws, but ten of those suits were dropped when the company's subsequently repealed them.<sup>184</sup> The shareholders alleged that the forum selection bylaws were invalid and constituted a violation of the director's fiduciary duty to the corporation.<sup>185</sup> The bylaw adopted by Chevron, after being amended, provided:

Unless the corporation consents in writing to the selection of an alternative forum, the sole exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action 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 stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personable jurisdiction over the indispensable parties named as defendants. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provision of this [bylaw].<sup>186</sup>

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<sup>182</sup> *Boilermakers Local 154 Retirement Fun, et al., v. Chevron Corp.*, 2013 WL 3191981 (2013).

<sup>183</sup> *Id.* at \*4.

<sup>184</sup> *Id.* at \*7.

<sup>185</sup> *Id.* at \*8–9.

<sup>186</sup> *Id.* at \*5.

This provision contains all of the previously discussed common features of an elective forum selection clause, as well as containing added limitations to get around the problem of the court not having personal jurisdiction over an indispensable party, or potential problems with federal jurisdiction.<sup>187</sup> The court held that the bylaws were assented to by the shareholders and were therefore enforceable.<sup>188</sup> The certificates of incorporation of Chevron and Fedex gave their board and directors the power to adopt and amend corporate bylaws unilaterally, which is permissible under Delaware law.<sup>189</sup> Delaware law also allows bylaws to regulate “the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders”.<sup>190</sup> The court interpreted the scope of that power to easily contain the power to adopt a forum selection clause.<sup>191</sup> The bylaws were therefore, a valid exercise of the board’s power and enforceable without express shareholder approval.<sup>192</sup> The plaintiff’s argued that forum selection bylaws attempt to regulate a matter “external” to the corporation and therefore outside of 8 Del C. § 109(b).<sup>193</sup> This argument was rejected by the court which saw the bylaws as purely internal process-oriented regulations because they regulate where stockholders file suit, not whether they can file suit.<sup>194</sup>

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<sup>187</sup> See *supra* Part I(B)(2) discussing the form of forum selection provisions.

<sup>188</sup> *Boilermakers*, 2013 WL 3191981 at \*2.

<sup>189</sup> DEL. CODE ANN. Tit. 8, § 109(a) (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .”).

<sup>190</sup> *Id.* at § 109(b).

<sup>191</sup> *Boilermakers Local 154 Retirement Fun, et al., v. Chevron Corp.*, 2013 WL 3191981, \*10 (2013) (“As a matter of easy linguistics, the forum selection bylaws address the ‘rights’ of the stockholders . . . . They also plainly relate to the conduct of the corporation . . .”).

<sup>192</sup> *Id.* at \*2.

<sup>193</sup> *Id.* at \*11.

<sup>194</sup> *Id.*

The court identified several limits on the use of forum selection bylaws including (1) waiver, (2) fiduciary duty, (3) Repeal, and (4) *Bremen* analysis.<sup>195</sup> First, because the forum selection provision is elective, the board may waive the corporation's rights under the bylaw in order to meet their obligations to act in the best interests of the corporation.<sup>196</sup> Second, the shareholders could also sue to challenge the application of the provision by the board as an inequitable breach of fiduciary duty.<sup>197</sup> Third, as the grant of the power to adopt bylaws does not divest the shareholders of the power to adopt or repeal bylaws themselves, they can simply repeal them.<sup>198</sup> They can also use their annual power to change the composition of the board and vote to replace boards who fail to recognize repeal of the provision by shareholders and continues to adopt similar provisions.<sup>199</sup> Last, the bylaws would be subject to the test established by the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, which was adopted by the Delaware Supreme Court in *Ingres Corp. v. CA, Inc.*<sup>200</sup> for evaluating the validity of contractual forum selection clauses.<sup>201</sup> In *Bremen*, the court held that contractual forum selection clauses are only valid if "unaffected by fraud, undue influence, or overweening bargaining power" and should not be enforced if unreasonable.<sup>202</sup> The *Bremen* analysis would only be used after a plaintiff sued in their forum of choice and the corporation raises the provision as a jurisdictional offence, therefore the plaintiff shareholder may be liable for breaching the bylaws themselves if

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<sup>195</sup> *Id.* at 13.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* See *supra* Part I(B)(4) discussing the bylaw power.

<sup>199</sup> *Boilermakers*, 2013 WL 3191981 at \*14.

<sup>200</sup> *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143,1146 (Del. 2010).

<sup>201</sup> *Boilermakers*, 2013 WL 3191981 at \*15.

<sup>202</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

the application of the clause is deemed reasonable and the case is dismissed.<sup>203</sup> The courts decision may also be limited to cases where the structure and content of challenged forum selection bylaws contain some of the extra elements present in the provisions at issue in this case. The validity of clauses potentially may only be upheld where the bylaws are elective, contain an exception when personal jurisdiction cannot be gained over an indispensable party, and only apply to claims that arise from derivative suits, fiduciary-duty claims, claims arising under Delaware General Corporate Law, and other claims governed by the internal-affairs doctrine.<sup>204</sup>

*B. Consent*

The court in *Boilermakers* took a contractarian view of the corporate relationship. It announced that “[i]n an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”<sup>205</sup> The court argued that the plaintiffs view was based in the long rejected “vested rights” doctrine, which is no longer viable in Delaware.<sup>206</sup> Whereas the *Galaviz* court focused on the lack of consent, the court here focused on the concept of notice. Because stockholders are on notice that the board has the power to unilaterally enact bylaws and those bylaws may pertain to those subjects under 8 Del. C. § 109(b), than the shareholders have assented to those bylaws. The shareholders can be said to have given assent to

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<sup>203</sup> See *Boilermakers*, 2013 WL 3191981 at \*13–16 (“if a potential plaintiff does not have confidence in the strength of her argument under *Bremen* that the forum selection clause does not reasonably apply to the case she seeks to bring, she can always choose to file the case in the forum designated in the bylaws.”).

<sup>204</sup> See *id.* at \*4 (discussing the structure of the bylaw at issue in the case).

<sup>205</sup> *Boilermakers*, 2013 WL 3191981 at \*14.

<sup>206</sup> *Id.*

the “contractual framework” provided by Delaware corporate law.<sup>207</sup> The shareholders “assent to not having to assent to board-adopted bylaws.”<sup>208</sup>

This view seems unnecessarily extreme. As discussed above, there are many other variations of corporate theories that fall short of either the disfavored “vested rights” doctrine or a pure contractarian participant theory.<sup>209</sup> Although there are numerous problems with shareholder consent in publically traded corporations as previously discussed, the idea that notice of the contractual framework alone should be sufficient seems extraordinary. Especially in the case of bylaw provisions that have only become recently popular.<sup>210</sup> If you accept the premise that multiform litigation has been a growing problem since the early 90s, it does not make sense that only 0.18% of companies would choose adopt this solution, unless it was not as much of an obvious leap as the court claims.<sup>211</sup> If the framework placed all participants on notice that these bylaws were potentially going to be adopted, than we must believe that 99.82% of publically traded companies identified the adoption of a forum selection bylaw as an option but declined to do so. This does not explain the significance of the *Revlon* decision in spurring the rapid rate of their adoption. Of course there was no actual notice, the court is just reusing to hold the subject matter inappropriate for bylaws simply because its novel.<sup>212</sup> This does however completely debunks the claim that these shares could have been priced accordingly.<sup>213</sup>

Because of the aforementioned complexity of the corporation, the agency problems, the defects in shareholder consent, and the importance in respecting the plaintiff’s right to select her

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *See supra* Part II.

<sup>210</sup> *See supra* Part I.

<sup>211</sup> *Id.* at 336.

<sup>212</sup> *See Boilermakers*, 2013 WL 3191981 at 13.

<sup>213</sup> *See supra* Part II.E.1.

forum of choice, this area of corporate governance should be treated as more than purely contractual. I argue that this is the proper place for the interjection of mandatory rules, a glimmer of the top-down approach peeking through increasingly contractarian skies. At the very least, these forum selection provisions should follow the dicta in *Galaviz* and require at least some form of shareholder consent. This could be through a requirement that the provision must be instituted as a charter amendment, which would then have to be approved, or simply a rule that the bylaw cannot be adopted unilaterally. The fact that this solution to the growing specter of multiforum litigation has only become vogue twenty years after the problem started increasing suggests that the rationale of allowing the board to do away with shareholder approval in this instance is not pressing. Even if a contract view of the corporation is adopted, then actual assent should be required. The assent of the shareholders to the bylaw would most likely be filled with numerous of the previously mentioned defects, but, much like click-wrap agreements and contracts of adhesion, there would still be something resembling a contractual consent to be bound to these terms. There is no reason that notice of the framework of statutes and agreements that cumulated in granting the directors the power to unilaterally adopt bylaws should suffice in the place of assent. They are trying to do with corporate law what they could not in contract, and claiming a contractual perspective that allows them to do it.<sup>214</sup>

C. *The Future of Forum Selection Bylaws Post Boilermakers*

We don't yet have statistics on the affect this decision has had on the adoption of forum selection clauses, given the fact that their popularity still grew after the negative treatment they received in *Galaviz* it is fairly certain that their adoption will continue to drastically accelerate.<sup>215</sup>

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<sup>214</sup> See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1774 (N.D. Cal. 2011).

<sup>215</sup> Grundfest, *supra* note 56, at 342.

It is highly likely that a larger and larger percentage of these provisions will be adopted unilaterally as bylaws without shareholder consent due to the ease of adoption of this method and the collective action problems faced in their opposition.<sup>216</sup> A drastic but looming problem accompanying wholesale adoption of a contractarian view of the corporation, is how the idea of a unilaterally adopted mandatory arbitration bylaw will be dealt with.<sup>217</sup> The litany of problems raised by that thought is beyond the scope of this note, but an interesting concept to consider in assessing the significance of the theory of the corporation that gets used to interpret our laws. If we adopt a theory where the state is supposed to take a hands off approach to the inter-relations of the participants in the corporation, and mandatory rules don't have a place, are off-the-wall ideas like that suddenly so impossible to imagine?

#### CONCLUSION

Viewed in the context of the many moving parts and perspectives that inform our theories of the corporation, the idea that forum selection bylaws can or more importantly should be unilaterally adopted becomes less clear than the confident belief in the portability of exclusively contract principles into corporate law presented in *Boilermakers v. Chevron*. Due to this complexity, including the presence of agency costs, fiduciary obligations, collective action

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<sup>216</sup> *Id.* (identifying responding to *Galaviz* as a possible reason companies have sought shareholder consent for the adoption of forum selection bylaws).

<sup>217</sup> Although problematic for a number of reasons, it is not clear if this possibility was left open by the court in *Boilermakers*. The fact that the forum selection provision was only determining where a suit was brought, and not whether the suit was brought, was used as rationale in construing the provision as subject matter “internal” to the corporation and therefore within the scope of 8 Del C. § 109(b). *Boilermakers*, 2013 WL 3191981 at 11. For further discussion see Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 B.Y.U. L. REV. 65 (2013) (arguing that Corporations should be allowed to insert mandatory arbitration clauses into their corporate charter and bylaws).

problems, and flawed consent, mandatory rules should mandate a requirement of shareholder approval for forum selection clauses in corporate documents to be enforceable.