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## Mutual Assent in the Corporate Contract: Forum Selection Bylaws

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# Mutual Assent in the Corporate Contract: Forum Selection Bylaws\*

Benjamin D. Landry

## Abstract

In recent years, frivolous and inefficient multijurisdictional stockholder litigation has become a costly burden on corporations in the United States. A popular solution among boards of directors has been to adopt bylaws with forum selection provisions (which require certain disputes to be litigated before one forum). Those who oppose this solution have challenged these provisions on the grounds that they were passed as bylaws—which are unilaterally adopted by boards without stockholder consent. These challengers argue that bylaws are like contracts, and, therefore, require the mutual assent of both stockholders and the corporation to be enforceable. This argument implicates a classic theory of corporate law—the contractarian theory—but vastly oversimplifies the relationship between a stockholder, her corporation and the board of directors. When the contractarian theory of corporate law is applied to the full legal and practical reality of that relationship, the mutual assent argument falls apart and the contractarian theory is shown to support the enforceability of bylaws.

**KEYWORDS:** Corporate Law, Contract Law, Forum Selection

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\*J.D., The University of Chicago Law School; B.A., Albion College. I would like to thank Isaac Gruber and Cameron Lewis. All remaining errors are, of course, my own.



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## ABSTRACT

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## TABLE OF CONTENTS

INTRODUCTION .....	890
I. THE FORUM SELECTION BYLAW .....	892
II. THE CORPORATE CONTRACT .....	894
A. THE CONTRACTARIAN THEORY OF CORPORATE LAW .....	894
1. <i>The Economic Theory</i> .....	894
2. <i>The Legal Theory</i> .....	896
B. MUTUAL ASSENT .....	897
C. ARE BYLAWS A PART OF THE CORPORATE CONTRACT? .....	898
1. <i>Delaware Statutory Law</i> .....	899

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2. <i>Contract Law: Federal Precedent</i> .....	902
3. <i>Contract Law: Analysis</i> .....	904
4. <i>Contract Law: Qualification on Retroactive Application</i> ..	909
CONCLUSION.....	910

### INTRODUCTION

On September 29, 2010, the board of directors of Chevron Corporation, a Delaware corporation headquartered in San Ramon, California, adopted and amended a bylaw establishing the Delaware Court of Chancery as the exclusive forum for certain intra-entity actions.<sup>1</sup> The bylaw reads:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and 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. 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 provisions of this [bylaw].<sup>2</sup>

In early 2012, lawsuits were filed in the Delaware Chancery Court against twelve major Delaware corporations that had passed forum selection bylaws like Chevron's.<sup>3</sup> The suits, filed by plaintiffs' lawyers on behalf of stockholders, challenged the validity of the bylaws on a

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1. See Verified Complaint at 22, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220 (Del. Ch. Feb. 6, 2012) [hereinafter *Chevron Complaint*].

2. *Id.* at 6–7.

3. Marc A. Alpert & Patrick J. Narvaez, *Continuing Challenges to Exclusive Forum Bylaw Provisions*, in CHADBOURNE & PARKE LLP, *CORPORATE PRACTICE NEWSWIRE 2* (Sept. 2012), available at [http://www.chadbourne.com/files/Publication/d9847614-a7b3-4164-9cf9-973e92ab2299/Presentation/PublicationAttachment/0baecf9c-db50-4f90-89bf-c6a17e3d215c/ContinuingChallengestoExclusiveForumBylawProvisions\\_Alpert\\_DealLawyers.pdf](http://www.chadbourne.com/files/Publication/d9847614-a7b3-4164-9cf9-973e92ab2299/Presentation/PublicationAttachment/0baecf9c-db50-4f90-89bf-c6a17e3d215c/ContinuingChallengestoExclusiveForumBylawProvisions_Alpert_DealLawyers.pdf).

number of grounds, including: (1) that they were overbroad, (2) that they conflicted with other provisions of Delaware Law, (3) that they conferred upon the Chancery Court exclusive jurisdiction over all stockholders regardless of personal or subject matter jurisdiction, (4) that they were neither reasonable nor equitable, and (5) that they were unenforceable under contract law because they were unilaterally adopted by the boards and thus lacked the requisite mutual consent of the stockholders.<sup>4</sup>

In response, ten of the companies repealed their forum selection bylaws, mooting their cases.<sup>5</sup> The two remaining companies, Chevron and FedEx, had their cases consolidated and are currently before Chancellor Leo Strine, Jr. of the Delaware Court of Chancery.<sup>6</sup> On June 25, 2013, Chancellor Strine issued an opinion granting the defendants' motion to dismiss on two counts of the plaintiffs' complaints: Count I, that the bylaws are statutorily invalid because they exceed the board's authority under Delaware statutory law and Count IV, that the bylaws are contractually invalid because they lack the mutual assent of the stockholders.<sup>7</sup> The decision is likely to be appealed.<sup>8</sup>

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4. Chevron Complaint, *supra* note 1, at 2–8.

5. Alpert & Narvaez, *supra* note 3, at 3.

6. Chevron amended its bylaws to moot the subject matter and personal jurisdiction allegations. In its amended form, the bylaw reads in relevant part, “the sole and exclusive forum . . . shall be a state or federal court located within the state of Delaware, in all cases *subject to the court’s having personal jurisdiction over the indispensable parties named as defendants.*” Chevron Corp., Bylaws of Chevron Corporation (Mar. 27, 2013), available at <http://www.chevron.com/documents/pdf/chevronbylaws.pdf> (emphasis added). Fed Ex’s Bylaw remains unchanged. FedEx Corp., FedEx Corporation: Amended and Restated Bylaws (Sept. 26, 2011), available at <http://investors.fedex.com/phoenix.zhtml?c=73289&p=irol-govbylaws>. See also Tom Hals, *Shareholders Attack Sue-in-Delaware Bylaws*, THOMSON REUTERS NEWS & INSIGHT, Apr. 11, 2013, [http://newsandinsight.thomsonreuters.com/Securities/News/2013/04\\_-\\_April/Shareholders\\_attack\\_sue-in-Delaware\\_bylaws/](http://newsandinsight.thomsonreuters.com/Securities/News/2013/04_-_April/Shareholders_attack_sue-in-Delaware_bylaws/). In his recent opinion, Chancellor Strine noted that “[b]ecause the two bylaws are similar, present common legal issues, and are the target of near-identical complaints, the court decided to address them together.” See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 2013 WL 3191981, at \*1 (Del. Ch. June 25, 2013).

7. See generally *Chevron*, 2013 WL 3191981, *supra* note 6.

8. *Delaware Court of Chancery Upholds Validity of Board-Adopted Forum Selection Bylaws*, WSGR ALERT, (Wilson Sonsini Goodrich & Rosati), June 25, 2013, available at <http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-forum-selection-bylaws.htm>.

The Chevron plaintiffs' argument that the bylaws were unenforceable under contract law is an outgrowth of a legal and economic theory of corporate law that classifies the relationship between the stockholder, the board of directors, and the corporation as contractual.<sup>9</sup> This legal classification and the suggestion that mutual assent is necessary to enforce the "corporate contract" are the subjects of my interest, and the topic of this paper. I will proceed in three parts. First, I will discuss the current controversy surrounding the forum selection bylaw; second, I will explore the contractarian theory of corporate law; and third, I will analyze the mutual assent arguments made in the Chevron litigation in light of this theory, Delaware state law, federal law, and relevant academic commentary. My conclusion is that, subject to the caveat that they not be applied retroactively, validly adopted forum selection bylaws are an enforceable part of the corporate contract.

### I. THE FORUM SELECTION BYLAW

The impetus for the adoption of the forum selection bylaw provision was a comment made in dicta by Vice Chancellor Laster in *In re Revlon, Inc. Shareholders Litigation*, 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>10</sup> The attempt by boards of directors to use bylaws as opposed to charter provisions to enact exclusive forum selection provisions has given rise to a lively dispute among practitioners and scholars over the last few years.

The debate is particularly contentious because the costs of defending duplicative and frivolous multijurisdictional stockholder lawsuits have, in recent years, become increasingly high.<sup>11</sup> For example, a recent study found that in the six-year period from 2005 to 2011, the

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9. See generally Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

10. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010)

11. Alison Frankel, *El Paso Shapes Up as Latest M&A Shareholder Venue Fight*, THOMSON REUTERS NEWS & INSIGHT, Oct. 21, 2011, [http://newsandinsight.thomsonreuters.com/Legal/News/2011/10\\_-\\_October/El\\_Paso\\_case\\_shapes\\_up\\_as\\_latest\\_M\\_A\\_shareholder\\_venue\\_fight/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/El_Paso_case_shapes_up_as_latest_M_A_shareholder_venue_fight/).

percentage of mergers and acquisitions-related lawsuits brought in multiple jurisdictions increased by 44.7% (from 8.3% to 53%).<sup>12</sup> The problem is that engaging corporations in numerous multijurisdictional lawsuits, in transaction-related litigation, for example, rarely results in increased value (in terms of price-per-share) for stockholders, but rather, results directly in increased fees for plaintiffs' attorneys.<sup>13</sup> The use of exclusive forum selection provisions, whether by charter or bylaw, is a means to cut down on these costs.

It is also important, however, to subject corporations to the review that comes from litigation (or, the threat of litigation). And this is the normative argument made by opponents of forum selection clauses—that the vulnerability to suit in multiple jurisdictions subjects corporations to an important check. But again, the problem is the enormous agency costs created by the plaintiffs' attorneys' incentive to file as many suits as possible; the costs of the lawsuits are born by stockholders, but the benefits—at the least the benefits of filing and then consolidating a multitude of suits—go to the plaintiffs' attorneys.<sup>14</sup> And for plaintiffs' attorneys, Delaware is not an appealing state to litigate in. As two practitioners note:

Plaintiffs' attorneys are particularly motivated to file outside of Delaware on the belief that courts in other jurisdictions are less likely to dismiss weaker claims and limit attorneys fee awards. Companies may also be more inclined to settle suits filed outside of Delaware due to the likelihood that Delaware law will be misapplied in other, less corporate-savvy jurisdictions.<sup>15</sup>

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12. Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 13–14, 35 (Jan. 13, 2013) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1984758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758).

13. Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 165 (2011).

14. *Id.*

15. Frank J. Aquila & Anna M. Kripitz, *Designating Delaware: The Rise of Exclusive Forum Selection Provisions*, PRACTICAL L.J., Oct. 2012, at 3–4, available at <http://us.practicallaw.com/0-521-5321>. The fervent anti-Delaware position taken by plaintiffs' attorneys is also attributable to a belief “that Delaware judges don't give shareholders and their lawyers a fighting chance.” See Alison Frankel, *Strine to M&A Bar: Don't Stop Believing . . . in Delaware*, THOMSON REUTERS NEWS & INSIGHT (Nov. 14, 2011), [http://newsandinsight.thomsonreuters.com/Legal/News/2011/11\\_-\\_November/Strine\\_to\\_M\\_A\\_bar\\_Don\\_t\\_stop\\_believing\\_\\_\\_\\_\\_in\\_Delaware/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_-_November/Strine_to_M_A_bar_Don_t_stop_believing_____in_Delaware/).



The exclusive forum selection provision, whether implemented by bylaw or charter, appears to be a middle ground solution. As Brian Quinn suggests: “[b]y limiting litigation to a single forum, firms and shareholders can still subject themselves to review, but in the case of Delaware, also benefit from the court’s interest in policing litigation agency costs.”<sup>16</sup>

Regardless of the underlying motivations or whether corporations *should* adopt exclusive forum selection clauses, let us take a look at the economic and legal theory behind the contractual classification of the corporate relationship.

## II. THE CORPORATE CONTRACT

This section will proceed in three parts. First, it will explore the economic and legal aspects of the contractarian theory of corporate law. Second, it will review the doctrine of mutual assent under general contract law. And third, it will analyze whether bylaws are an enforceable part of the corporate contract under Delaware state law and federal contract law, using the forum selection bylaw cases as an example.

### A. THE CONTRACTARIAN THEORY OF CORPORATE LAW

#### 1. *The Economic Theory*

The courts and the academic community have, for many years, broadly conceptualized the relationship between the stockholders, the board of directors, and the corporation as contractual in nature.<sup>17</sup> Incorporators draft certain promises in the charter, which stockholders then assent to at a certain price (determined by the market’s perception of the corporation’s value).<sup>18</sup> As discussed in detail below, the voluntary choice of entering into a contractual relationship with the corporation, by purchasing shares subject to the charter, represents a

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16. Quinn, *supra* note 13, at 165.

17. See, e.g., *Ellingwood v. Wolf’s Head Oil Ref. Co.*, 38 A.2d 743, 747 (Del. 1944) (finding that stockholder rights are contract rights); see generally Easterbrook & Fischel, *supra* note 9.

18. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 17–22 (Harvard Univ. Press 1996) (1991).

contract.<sup>19</sup> The underlying economic theory is based on this idea that a corporation will enter into and adapt a complex series of voluntary relationships with third parties to optimize its efficiency.<sup>20</sup> That is:

To say that a complex relation among many voluntary participants is adaptive is to say that it is contractual. Thus [the] reference to the corporation as a set of contracts. Voluntary arrangements are contracts. Some may be negotiated over a bargaining table. Some may be a set of terms that are dictated (by managers or investors) and accepted or not; only the price is negotiated. Some may be fixed and must be accepted at the going price (as when people buy investments traded in the market) . . . . The result of all of these voluntary arrangements will be contractual.<sup>21</sup>

This theory, developed and applied in the late 1980s by Frank Easterbrook and Daniel Fischel, suggests that over time the open market will direct these contractual relationships, including the promises<sup>22</sup> in each corporation's charter, to reflect the most efficient and optimal structure.<sup>23</sup> This process of adaptation will continue with the market driving efficiently structured corporations to flourish and those with inefficient structures to fail.

There are a number of criticisms levied against this economic theory. Particularly, there is criticism that it is premised on invalid market assumptions—that the market has low-to-zero transaction costs.<sup>24</sup> Critics argue that there are externalities and other costs that impede contracting, making this model unrealistic.<sup>25</sup> Several studies

19. *See infra* Part II.A.2.

20. *Id.* at 14.

21. *Id.*

22. Among the promises incorporators must choose from are the state laws under which the company will operate. Those states with efficient corporate laws will be favored. In the United States today, the market has driven most major corporations into Delaware.

23. *See generally* Easterbrook & Fischel, *supra* note 9.

24. Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 781–82, 796–97 (2006) (“The theory was based largely on perfect market assumptions and lacked empirical support. . . . The positive implication is that there are apparently impediments to contracting that may undermine the value-maximizing claim of the theory and the theory’s minimalist view of corporate law.”).

25. *Id.* at 782, 784–91. This characterization is rather misleading, however. Easterbrook and Fischel argue that the diversity among corporations should exist not in the charters alone, but in the entire corporate structure (i.e., throughout all the “contractual” relationships). *See* EASTERBROOK & FISCHEL, *supra* note 18, at 12–13.

have shown empirically that the basic structure of corporate charters is nearly uniform across the board.<sup>26</sup> For some scholars, this uniformity (or the absence of diversity among charters) is proof that “as a description of reality, or a basis for policy prescription, the theory falls short.”<sup>27</sup>

## 2. *The Legal Theory*

The *legal* classification of a corporation’s complex series of voluntary relationships as contractual, however, does not require quantifiable diversity among corporate charters. Nor does it require the assumption of a market with low-to-zero transaction costs. Casting aside normative arguments about what form corporate law should take and positive arguments about how the market drives or has driven the contracting process, there is a far simpler take-away from the contractarian theory of corporate law. This legal classification is not novel: it is discussed at length in Easterbrook and Fischel’s 1989 “The Corporate Contract.” It is, in part, the basis for the only federal decision to tackle the forum selection bylaw (the Northern District of California’s *Galaviz* decision in 2011, discussed below),<sup>28</sup> it is implicit in the mutual assent argument made in the Chevron complaint and, indeed, it is a primary motivator of Chancellor Strine’s recent dismissal of Count IV of the plaintiffs’ complaint.

The charter of a corporation, at its most basic level, *is a contract*.<sup>29</sup> The incorporators draft its provisions and the stockholders determine its price.<sup>30</sup> After execution in its initial public offering and subsequent secondary offerings, different parties enter and leave the relationship, all

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And this very clearly exists—take for example the oft-taught business school comparison between 3M, in the 1970s and 80s, and Exxon, in the 1960s; or between JetBlue and Delta in the commercial airline industry. Although these corporations’ charters are nearly identical, their structures and strategies differ greatly. It is this diversity among the relationships of participants to which Easterbrook and Fischel were likely alluding. See EASTERBROOK & FISCHEL, *supra* note 18, at 13.

26. Klausner, *supra* note 24, at 782, 786–89.

27. *Id.* at 779.

28. See *infra* Part II.C.2.

29. EASTERBROOK & FISCHEL, *supra* note 18, at 16 (“The terms present in the articles of incorporation at the time the firm is established or issues stock are real agreements.”).

30. *Id.* at 17–22.

pursuant to the charter. The parties' obligations and promises (terms) change from time to time as the charter is amended, which is reflected in the fluctuating share price.<sup>31</sup> These terms are legally binding and are governed by the laws of a particular state.

However, when the base contract (the charter) grants one party the power to unilaterally adopt new terms (bylaws), a question arises as to whether those terms form a part of the base contract, or fail for lack of mutual assent. The scope of this inquiry can be narrowed further in light of the statutory and common law limits on bylaws—(i) that they not conflict with the charter and (ii) that the drafters (the board) are subject to certain fiduciary duties (discussed below)<sup>32</sup>. This was the question put to the Chancery Court in its consideration of the defendants' motion to dismiss Count IV, which is implicit in the mutual assent argument.

## B. MUTUAL ASSENT

An enforceable contract requires, among other things, an offer, acceptance, consideration, and in many circumstances, mutual assent (or a “meeting of the minds”).<sup>33</sup> Indeed, “many doctrines of contract law ensure that an enforceable contract exists only when parties mutually consented to it, and not when parties did not mutually consent to it.”<sup>34</sup>

Modifying an existing contract typically also requires mutual assent. Generally, one party may not, by itself, rewrite an existing contract at some later time and expect those modifications to be enforceable against the other party. Contract modifications often require new consideration from both parties. This new consideration can itself be a modification of existing obligations, such as an increase in the performance obligations of one party or the acceptance of a reduction of the obligations of the other party. That is, “[o]ne-sided contract modifications—where only one side’s obligation changes—are

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31. *Id.*

32. *See infra* Part II.C.1.

33. I say “in many circumstances” because there are some circumstances where mutual assent is not required, and therefore, there will be no “meeting of the minds.” For example, if a person makes a statement intended to dupe another party into some sort of legal detriment, or makes a firm offer but no longer wishes to be bound, a party may be bound against her will. *See* ERIC POSNER, CONTRACT LAW & THEORY 133 (2011) (citing *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689 (Minn. 1957); *Carlill v. Carbolic Smoke Ball Co.*, [1893], 1 Q.B. 256 (U.K.)).

34. *Id.* at 41. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

vulnerable to challenges on various grounds. . . .<sup>35</sup> This is the simplest explanation of the plaintiffs' mutual assent argument in Chevron. They argue that the bylaws are a contract and that one party, in this case the board, may not unilaterally modify them without the assent of the other party, in this case the stockholders.<sup>36</sup> As will be shown, this concept of mutual assent in the context of bylaws is a red herring—the bylaws are only one part of a larger contract formed with sufficient mutual assent, which allows for certain, limited, unilateral modifications (a mechanism which is not unusual in contract law, or the real world).

### C. ARE BYLAWS A PART OF THE CORPORATE CONTRACT?

In the Chevron complaint, the plaintiffs argue that bylaws are not a part of the corporate contract because they lack mutual assent. Count IV alleges:

There was no element of mutual consent to the forum choice imposed by the Bylaw unilaterally by the Directors without any notice to the stockholders or any opportunity to reject the Bylaw. The Bylaw represented a unilateral change to the provisions of the bylaws that the Company would not have been able to accomplish under ordinary principles of contract law. . . . Under contract law, the Board could not unilaterally amend the contract. The bylaws cannot be amended as a matter of corporate law in a manner that could not be achieved under contract law.<sup>37</sup>

With respect to the mutual assent argument, the complaint punts on the issue of enforceability under Delaware corporate law by arguing that unless it would be lawful under contract law, it cannot be lawful under state corporate law.<sup>38</sup> The first court to consider this issue, the Northern District of California, also punted in the 2012 *Galaviz*<sup>39</sup> case by assuming the bylaw's validity under Delaware state law and jumping

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35. POSNER, *supra* note 33, at 32.

36. Chevron Complaint, *supra* note 1, at 3, 21–22.

37. Chevron Complaint, *supra* note 1, at 21–22.

38. A number of the complaint's other arguments, however, center on enforceability under the DGCL, but for the purposes of the mutual assent argument they punt.

39. *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

right into an analysis of contract law (discussed below).<sup>40</sup> Chancellor Strine addressed enforceability under Delaware Law in his opinion—finding that forum selection bylaws are enforceable.<sup>41</sup> And because the corporate contract does not exist in a vacuum, but within the laws of a particular state, it is important to factor in the relevant statutory law.

### *I. Delaware Statutory Law*

Section 109(a) of the Delaware General Corporation Law (“DGCL”) explicitly allows boards and stockholders to unilaterally adopt bylaws when authorized in a corporation’s charter: “any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors.”<sup>42</sup> Nearly all corporate charters utilize this rule, as bylaws are an important part of how the board manages the company’s day-to-day operations; requiring stockholder consent for mundane issues would defeat the efficiency of corporate structure.<sup>43</sup>

Section 109(b) then limits the content of bylaws to “any provision, not inconsistent with the law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its right or powers or the rights or powers of its stockholders, directors, officers or employees.”<sup>44</sup> Section 141(a) further limits the *board’s* power to adopt, amend, and repeal bylaws to matters concerning “[t]he business and affairs of [the] corporation.”<sup>45</sup>

Although the board’s power to unilaterally pass bylaws is broader than that of stockholders, *CA, Inc. v. AFSCME Employees Pension Plan*,<sup>46</sup> Section 109(a), and case law are also clear that stockholders may

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40. See *infra* Part II.C.2.

41. See *Chevron*, 2013 WL 3191981, *supra* note 6, at \*2.

42. DEL. CODE ANN. tit. 8, § 109(a) (2010).

43. Indeed, the suggestion that bylaws are somehow unenforceable for lack of mutual assent would “turn Delaware corporate law on its ear.” Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013) (manuscript at 5), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164324](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164324).

44. DEL. CODE ANN. tit. 8, § 109(b) (2010).

45. DEL. CODE ANN. tit. 8, § 141(a) (2010).

46. 953 A.2d 227 (Del. 2008) (limiting the scope of stockholders’ ability to pass bylaws that tie directors’ hands).

trump any board-passed bylaw by enacting a stockholder bylaw or charter amendment.<sup>47</sup>

So, in a case like *Chevron's* where the charter authorizes its board to adopt bylaws on its own in satisfaction of Section 109(a), the Board need only appropriately exercise this right—in terms of adopting the Bylaw and narrowing its scope to inter-entity disputes as allowed under Sections 109(b) and 141(a)—to avoid running afoul of Delaware Law.

At dispute in *Chevron*, aside from the lack of mutual assent, is, in Count I, the extent to which the bylaw is narrow enough to fit within Sections 109(b) and 141(a)'s limitations.<sup>48</sup> Although this inquiry is valid, given the opinions of several well-respected scholars and the Delaware Chancery Court's own decision upholding an exclusive foreign jurisdiction forum selection provision, it was no surprise that Chancellor Strine easily found the bylaw to be within the limits of Delaware law.<sup>49</sup>

Under Delaware law, boards of directors are also bound by certain fiduciary duties.<sup>50</sup> These fiduciary duties of care and of loyalty are owed to both the corporation and the stockholders and are akin to those of a trustee.<sup>51</sup> "Directors of [a] corporation are trustees for the

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47. *Unisuper Ltd. v. News Corp.*, No. 1699-N, 2005 WL 3529317 (Del. Ch. Dec. 20, 2005) (describing the board's power as that of an agent's).

48. *Chevron Complaint*, *supra* note 1, at 15–18.

49. *See Baker v. Impact Holding, Inc.*, No. 4960-VCP, 2010 WL 1931032 (Del. Ch. May 13, 2010) (upholding a forum selection clause in a stockholders' agreement mandating exclusive forum in Texas); *Grundfest & Savelle*, *supra* note 43, at 42–45; Stephen M. Davidoff, *A Litigation Plan That Would Favor Delaware*, DEALBOOK (Oct. 26, 2010, 9:30 AM), <http://dealbook.nytimes.com/2010/10/26/a-litigation-plan-that-would-favor-delaware/> (discussing a similarly worded and structured bylaw provision). Chancellor Strine, in his most recent opinion, does not expressly address Section 141(a), however, given the ease with which he dispensed of the plaintiffs' 109(b) arguments, he almost certainly (indeed impliedly) would hold that the bylaws are proper under 141(a). *See Chevron*, 2013 WL 3191981, *supra* note 6, at \*2 ("The forum selection bylaws, which govern disputes related to the "internal affairs" of the corporations, easily meet [the] requirements [of Section 109(b)].").

50. *See, e.g., World Health Alts., Inc. v. McDonald (In re World Health Alts., Inc.)*, 385 B.R. 576 (Bankr. D. Del. 2008).

51. *See Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808, 813 (Del. 1944); *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939). "Directors of corporation stand in fiduciary relation to corporation and its stockholders. Their acts are subject to be tested by the familiar rules that govern the relations of a trustee to the trustee's beneficiary." DEL. CODE ANN. tit. 8, § 141, Notes to Decision – Officers

stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing, especially where their individual interests are concerned.”<sup>52</sup> These fiduciary duties will also limit the extent to which the board may unilaterally adopt new terms to the corporate contract. The duties that directors owe to stockholders include acting uninterestedly, in good faith, and on an informed basis.<sup>53</sup>

The directors’ duty to act on an informed basis is evidenced by the well-known rationale behind forum selection bylaws: that they, at least in theory, reduce non-value added corporate litigation expenses, thereby increasing stockholder value. Of course, an argument could also be made that the adoption of the bylaw was in “bad faith” or an “interested decision” insofar as it was done for the purposes of “ensur[ing] a hearing before judges likely to defer to management decisions.”<sup>54</sup> But given (i) the latitude granted to boards to make business decisions with “any rational business purpose” (the “business judgment rule”)<sup>55</sup> and (ii) the presumption that boards of directors act in good faith<sup>56</sup> (combined with the lack of evidence presented by defendants, who hold the burden of proof)<sup>57</sup> suggest that this argument would not hold water.

Chancellor Strine did not address the fiduciary duty argument in his opinion, as no evidence of improper purpose was presented to the court.

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Powers and Duties (LexisNexis 2013); *Bowen v. Imperial Theatres, Inc.*, 115 A. 918, 922 (Del. Ch. 1922). *But see* *Gottlieb v. McKee*, 107 A.2d 240, 243 (Del. Ch. 1954) (stating that corporate officers and directors are not technically trustees).

52. DEL. CODE ANN. tit. 8, § 141, Notes to Decision – Officers Powers and Duties (LexisNexis 2013).

53. *See* *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1986) (discussing the requirements for a decision of a board of directors to qualify for deference under the business judgment rule).

54. *Chevron Fights 2-Front War Over Where Shareholders can Sue*, WESTLAW J., Apr. 23, 2012, at 12, available at [http://www.ngelaw.com/files/News/65c36e09-edc1-42dd-8620-234823bb0b5b/Presentation/NewsAttachment/6efe59f2-be72-4fbb-881f-5278d2cecd20/nge\\_Claudia%20Allen%20in%20Corporate%20Officers%20%20Directors%20Liability%20re%20Chevron\\_04%2023%2012.pdf](http://www.ngelaw.com/files/News/65c36e09-edc1-42dd-8620-234823bb0b5b/Presentation/NewsAttachment/6efe59f2-be72-4fbb-881f-5278d2cecd20/nge_Claudia%20Allen%20in%20Corporate%20Officers%20%20Directors%20Liability%20re%20Chevron_04%2023%2012.pdf).

55. *Kaplan v. Goldsamt*, 380 A.2d 556, 568 (Del. Ch. 1977).

56. *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974), *aff’d*, 316 A.2d 619 (Del. 1974).

57. *See* *Maldonado v. Flynn*, 413 A.2d 1251, 1254 (Del. Ch. 1980), *rev’d on other grounds sub nom. Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).



This is further evidence that, by itself, the passing of a forum selection bylaw conforms to the fiduciary requirements placed on directors.<sup>58</sup>

The question then turns to federal contract law and the extent to which a bylaw requires mutual assent to be binding upon stockholders—or, whether bylaws are a part of the corporate contract at all.

## 2. Contract Law: Federal Precedent

This issue has only come before one federal court: a 2012 case before Judge Richard Seeborg in the Northern District of California.<sup>59</sup> Without deciding on validity under Delaware law, the Northern District refused to uphold a forum selection bylaw on the grounds that, even if the adoption of the bylaw was lawful under Delaware law, it was not enforceable under federal common law.<sup>60</sup> The court held that, “under contract law, a party’s consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions.”<sup>61</sup> The court adopted the legal theory that the charter represented a contract between the stockholders and the board, and that the bylaw was an unenforceable unilateral amendment to that contract.

In *Galaviz*, the board of directors of Oracle allegedly anticipated liability for fraudulently overcharging the government on certain of the company’s contracts, and in response, adopted a forum selection bylaw to limit the impending litigation to the Delaware Chancery Court.<sup>62</sup> The Northern District explained: “[h]ere . . . the venue provision was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired

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58. See *Chevron*, 2013 WL 3191981, *supra* note 6, at \*16 (stating that a “[a proper] plaintiff may also argue that, under [*Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971)] the forum selection clause should not be enforced because the bylaw was being used for improper purposes inconsistent with directors’ fiduciary duties” but that such a situation was not presented to the court in this case).

59. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

60. See *id.* at 1174-75.

61. *Id.* at 1174.

62. See *id.* at 1171-72.

their shares when no such bylaw was in effect.”<sup>63</sup> According to the Northern District, the directors had unclean hands.

The decision was controversial both legally and factually. As two scholars ask:

How is it a violation of a fiduciary duty to adopt a bylaw stating that intra-corporate litigation involving a Delaware corporation (even if the potential allegation is known to the board) is to be adjudicated in Delaware under Delaware law? The directors do not avoid any liability by adopting this rule, and are Delaware courts not to be trusted when it comes to enforcing fiduciary duties? The court’s reliance on the underlying sequence of events thus rests on critical unproven assumptions of fact and operates through a mysterious, undescribed principle of law.<sup>64</sup>

A priori, however, the Court’s underlying concern is valid—the adoption and then retroactive application of a bylaw has the effect of subjecting stockholders to terms to which they did not consent, and more importantly, to which they could not take reversing or ameliorating action (which will be explored in detail below).<sup>65</sup> As two practitioners suggest: “[h]ad [the company’s] bylaws included a forum selection clause prior to any alleged wrongdoing . . . the district court may have come to a different conclusion.”<sup>66</sup>

The *Galaviz* decision, then, turned on two grounds: (1) the legal classification of the adoption of a bylaw as an amendment to a contract that required mutual assent and (2) the retroactive effect of the bylaw.

As will be shown, the first argument is incomplete because it does not consider the permission granted to the board in the charter to take certain unilateral action, and the second makes the case easily distinguishable from *Chevron*.<sup>67</sup> Indeed, Chancellor Strine quickly set aside the *Galaviz* decision because it “rests on a failure to appreciate the contractual framework established by the DGCL for Delaware

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63. *Id.* at 1174.

64. Grundfest & Savelle, *supra* note 43, at 76.

65. *See infra* Part II.C.3.

66. Client Memorandum from Willkie Farr & Gallagher LLP, California Court Rejects the Enforceability of a Delaware Forum Selection Clause in Corporate Bylaws (Jan. 7, 2011), available at [http://www.willkie.com/files/tbl\\_s29Publications%5CFileUpload5686%5C3643%5CCalifornia-Court-Rejects-The-Enforceability.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3643%5CCalifornia-Court-Rejects-The-Enforceability.pdf).

67. Grundfest & Savelle, *supra* note 43, at 76 (regarding distinguishability).

corporations and their stockholders.”<sup>68</sup> Still, the second ground of *Galaviz* appears to require a qualification regarding the enforceability of forum selection bylaws (at least under federal law), discussed in part III.C.4.

### 3. Contract Law: Analysis

The Supreme Court has long held forum selection provisions to be enforceable. In the seminal case, *The Bremen v. Zapata Offshore Co.*,<sup>69</sup> the Court concluded that absent a strong showing “that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching,” a “freely negotiated” forum selection provision should not be set aside.<sup>70</sup> Under federal law today, forum selection provisions “are prima facie valid and [will] be enforced unless enforcement is shown to be unreasonable under the circumstances of the particular contract.”<sup>71</sup>

In the infamous *Carnival Cruise Lines, Inc. v. Shute* case, the Supreme Court upheld an un-negotiated, unilaterally drafted form contract containing a venue provision.<sup>72</sup> The Court noted that the plaintiffs had conceded “they had notice of the clause and that they therefore, ‘presumably retained the option of rejecting the contract with impunity.’”<sup>73</sup> The ability of a party to—at the very least—walk away from a contract is important under the Supreme Court’s analysis.

The *Galaviz* court argued that unlike the plaintiffs in *Carnival*, the plaintiffs in *Galaviz* never had the option to opt out of the contract because it was retroactively applied.<sup>74</sup> And, as discussed, this concern is valid—it seems that even under *Bremen*, it could be considered unreasonable to retroactively apply the bylaw provision. However, recall that the *Galaviz* court argued more broadly: while “a party’s consent to a written agreement may serve as consent to all the terms

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68. *Chevron*, 2013 WL 3191981, *supra* note 6, at \*14.

69. 407 U.S. 1 (1972).

70. *Id.* at 15.

71. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (West 2013).

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

73. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 n.4 (N.D. Cal. 2011) (quoting *Carnival Cruise Lines*, 499 U.S. at 595).

74. *Galaviz*, 763 F. Supp. 2d at 1174.

therein . . . it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions.”<sup>75</sup> Here is where the analysis in *Galaviz* falls apart.

The problem is that the bylaw is not *the* contract. The bylaws, the charter, and the laws of the state of incorporation must be considered together. A company’s charter is the contract voluntarily entered into by the parties and can only properly be modified by mutual assent (or in corporate law terms, by a majority stockholder vote). This mutually assented to contract contains many provisions, each of which is a “real agreement.”<sup>76</sup> And, one of these agreements allows the board of directors to unilaterally adopt bylaws, subject to certain statutory and fiduciary limitations.

This type of contractual arrangement is not unique. For example, requirements contracts under the Uniform Commercial Code allow for quantity terms to be determined unilaterally by one party, subject to certain contractual and statutory limitations.<sup>77</sup> The ability of trustees to take unilateral action regarding the disposition of assets of beneficiaries, subject to certain statutory, fiduciary, and contractual limitations is another example. In each of these paradigms, the power to take certain, limited unilateral action is granted through mutual assent in an original, underlying contract.<sup>78</sup> Few would argue that we should ignore the underlying contractual relationship and focus exclusively on the unilateral act. This notion that unilateral action, in and of itself, is somehow a *prima facie* violation of contract law is misplaced.<sup>79</sup> Parties

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75. *Id.*

76. EASTERBROOK & FISCHER, *supra* note 18, at 16 (“The corporate venture has many real contracts. The terms present in the articles of incorporation at the time the firm is established or issues stock are real agreements. *Everything* to do with the relation between the firm and the suppliers of labor (employees), goods and services (suppliers and contractors) is contractual.”).

77. See U.C.C. §§ 2-201, § 2-306 (2011).

78. This limitation is key because a contract in which (i) one party retains the unlimited unilateral ability to modify the entire agreement or (ii) one party is obligated to perform only if the other party “wants,” as opposed to “needs” (as in a requirements contract), will certainly fail for lack of consideration.

79. “It is unimportant that [unilaterally adopted terms] may not be ‘negotiated’; the pricing and testing mechanisms are all that matter . . . This should come as no shock to anyone familiar with the Coase Theorem.” EASTERBROOK & FISCHER, *supra* note 18, at 17.

are free to contract as they wish,<sup>80</sup> and if the contract between the stockholder, her company, and the board specifically allows for the board to make certain unilateral decisions that (i) do not conflict with the underlying contract; (ii) do not breach its fiduciary duties; and (iii) are limited to certain statutory matters, why should they be estopped from doing so?

Indeed as far back as the 1980s, during the development of the underlying economic theory, Easterbrook and Fischel tackled this issue:

And of course the rules that govern how rules change are also real contracts. The articles of incorporation typically allow changes to be made by bylaw or majority vote . . . . Sometimes terms are not negotiated directly but are simply promulgated, in the way auto rental companies promulgate the terms of their rental contracts. The entrepreneurs or managers may adopt a set of rules and say “take them or leave them.” This is contracting nonetheless.<sup>81</sup>

And just as it is unimportant whether the original terms of the charter are “negotiated” at a table by the board and stockholders—recall that stockholders control (i) whether they assent and (ii) the price they pay to assent—the passing of bylaws within the statutory and fiduciary limits need not be negotiated: stockholders may (i) reject the bylaws by passing their own (in Delaware, under Section 109(a), which trump the board’s bylaws) or (ii) sell their shares and walk (“take them or leave them”).<sup>82</sup> From the moment a stockholder purchases her shares, she is

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80. The argument levied against the freedom of contract position in free market ideologies is that it ignores the often extreme bargaining inequalities between the parties—like for instance that between a single stockholder and a corporation. See Kent Greenfield, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 19 (2006). While bargaining inequalities absolutely exist, the fact remains that even the participant with the least amount of leverage still has the option to walk away—like in *Carnival*. The lack of this option, however, can be problematic, as will be discussed, but, generally, even an inequality in leverage affords the least well-off participant the ability to choose.

81. Easterbrook & Fischel, *supra* note 9, at 1429.

82. This is not a purely federal contract law rational—the Delaware Chancery Court has adopted it as well. See *In re MONY Group Inc. S’holder Litig.*, 853 A.2d 661 (Del. Ch. 2004) (stating that, generally, stockholders have only two protections against the perceived inadequate business performance of their corporation: sell the stock or vote to replace the directors).

on notice that the charter grants the board the power to unilaterally adopt bylaws, which will be binding on stockholders without their approval.<sup>83</sup>

Of course, a loss still exists. There is a cost borne by disapproving stockholders *even if they pass their own bylaw or sell their shares*. Taking any sort of collective stockholder action (like passing a bylaw or initiating a proxy contest) is wrought with transaction costs, all of which slow down the process considerably. During this time, the disapproving stockholder must endure the bylaw and if this stockholder walks away, she must also bear a cost. Assume the adoption of the forum selection bylaw lowers the share price of a company's stock: in order to walk away, the disapproving stockholder must accept the lower price for her share (even if the long-term result is a net gain in the share price). Although this "latecomer term" situation presents a problem for disapproving stockholders, the exact same problem exists in transactions with the bylaw-specific mutual assent that the plaintiffs call for.<sup>84</sup> Suppose, instead, that the forum selection provision is adopted by stockholder bylaw or charter amendment, unless the provision is passed unanimously, a minority of stockholders will dissent. These dissenting stockholders will face the same costs—if the share price falls as a result and they choose to sell, they sell at a loss. The latecomer term problem permeates all forms of corporate contractual modification—it is not remedied by prohibiting unilateral board-adopted bylaws. What is important to understand is that, even ignoring economics, after a bylaw is lawfully adopted or amended, stockholders have both notice and the ability to take reversing action or walk away—the same ability the plaintiffs had in *Carnival Cruise Lines*. Indeed, in Chancellor Strine's recent opinion, he points out that stockholders have an additional level of safety: "Unlike cruise ship passengers, who have no mechanism by which to change their ticket's terms and conditions, stockholders retain the right to modify the corporation's bylaws."<sup>85</sup>

What's puzzling about the *Galaviz* decision is how broadly the court felt it had to rule. The court stated, "[the board] has not shown federal law requires or even permits the federal courts to defer to any provision of state corporate law that might purport to give a corporation's directors the power to control venue under the

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83. Grundfest & Savelle, *supra* note 43, at 48.

84. EASTERBROOK & FISCHER, *supra* note 18, at 32.

85. See *Chevron*, 2013 WL 3191981, *supra* note 6, at \*15.

circumstances discussed above.”<sup>86</sup> However, this is because the court *does not need to defer to state corporate law*. All it must do is recognize the charter as the base contract between the parties. If it finds the charter to be a validly enforceable contract, then the court should recognize the power it grants to the board to take unilateral action that conforms to the contractual limitations in the charter. This type of unilateral action takes place every day in thousands of corporations across the country, and it can all be categorized as contractual without the need to defer to state corporate law.

Under Delaware case law, the analysis is the even clearer. Not only has Delaware expressly adopted the Supreme Court’s position in *Bremen*,<sup>87</sup> but the Chancery Court has expressly held that “bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”<sup>88</sup> This is a state corporate law position that has been accepted by the Chancery Court for “several generations.”<sup>89</sup> In 1995, in *Kidsco*, the court stated: “It is undisputed that the [corporation’s] certificate of incorporation expressly authorize[d] the directors to amend or repeal the by-laws without obtaining stockholder approval. Therefore, although the by-laws are a contract between the corporation and its stockholders, the contract was subject to the board’s power to amend the by-laws unilaterally.”<sup>90</sup>

Thus, even after we show that the adoption of a forum selection bylaw is lawful under federal contract law and Delaware statutory and case law (as Chancellor Strine held in his recent opinion), we still have the situation in *Galaviz* where certain litigious acts or events that occurred before the adoption of the bylaw are retroactively swept up under the scope of the clause.

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86. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174, 1177 n. 4 (N.D. Cal. 2011).

87. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010). Chancellor Strine makes mention of this point several times in his recent opinion. *Chevron*, 2013 WL 3191981, *supra* note 6, at \*6, \*36.

88. “In 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.” *See Chevron*, 2013 WL 3191981, *supra* note 6, at \*14. *See also*, Grundfest & Savelle, *supra* note 43, at 48 “[The vested rights] theory has been roundly rejected for decades by courts in Delaware and in California.”

89. *Id.* *See also Kidsco, Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch. 1995).

90. 674 A.2d at 492 (internal citations omitted).

#### 4. Contract Law: Qualification on Retroactive Application

In a scenario where a bylaw is passed that has an effect on acts or events that occurred prior to the bylaw's adoption, federal contract law appears to require a qualification. This scenario was not before Chancellor Strine in his considering of the defendants' motion to dismiss and therefore, he properly declined to address it and the "array of purely hypothetical situations in which the bylaws of Chevron and FedEx might operate unreasonably."<sup>91</sup> We, however, are not so constrained.

This retroactive application scenario would effectively impose the new bylaw on wrongdoing that affected stockholders at a time when they had neither the option to take reversing action nor the option to walk away. In these circumstances, as was the case in *Galaviz*, the federal common law appears not to support the retroactive application of the bylaw—it would deny stockholders their reversing or ameliorating rights, as required by *Carnival*, and could arguably (although, tenuously) rise to the level of "unreasonable or unjust" as established in *Bremen*.<sup>92</sup>

Therefore, for the bylaw to be applicable, it appears that federal common law only requires that the underlying act or event of the cause of action have occurred after the adoption of the forum selection bylaw.<sup>93</sup> That being said, one could imagine a corporate charter providing that the board may adopt bylaws with forward and backward effect. This scenario would give rise to an interesting situation because (1) such a bylaw would give stockholders the notice required by *Carnival*, (2) there would be no contractual limitation in the charter, and (3) assuming the provisions did not conflict with a different provision of the charter, there would be no statutory violation under a state law similar to Delaware's Sections 109(b) and 141(a). A bylaw with such a broad reach *might* trigger the unreasonability restriction in *Bremen*, however absent a provision in the charter granting the board retroactive

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91. See *Chevron*, 2013 WL 3191981, *supra* note 6, at \*3 ("[I]t would be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts. . . . Under our law, our Courts do not render advisory opinions about hypothetical situations that may not occur.").

92. See *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 15 (1972)

93. This point is not universally supported. See *Grundfest & Savelle*, *supra* note 43, at 75.



powers, federal common law likely limits the reach of forum selection bylaws to acts and events occurring after its adoption.

In sum, in Chevron's case, it is clear that (i) under Delaware law the adoption of the bylaw was valid and enforceable and (ii) under the federal contract law, as articulated by the Supreme Court, the bylaw is enforceable. Only if a cause of action is rooted in an act or event occurring *before* the adoption of the bylaw could a court lawfully refuse to enforce it. This is the *Galaviz* caveat.

Indeed, Boeing Corporation has adopted a forum selection bylaw with the *Galaviz* caveat.<sup>94</sup> Boeing's bylaw begins: "With respect to any action arising out of any act or omission occurring after the adoption of this By-Law . . ." <sup>95</sup> This language seems to moot the issue in *Galaviz*,<sup>96</sup> and therefore complies with the requirements of federal contract law, as gleaned above.

### CONCLUSION

The emergence of the exclusive forum selection bylaw has brought the contractarian theory of corporate law into the spotlight. Challenges to the theory as applied legally—that the bylaw should be viewed in isolation and require special mutual assent to be enforceable against stockholders—are, while interesting fodder for academic discussion, unpersuasive when given a hard look. And practically, these challenges move us no closer to solving the burgeoning problem of low-value added, frivolous multijurisdictional stockholder litigation.<sup>97</sup>

Despite the academic resistance to economic theories premised on zero to low transaction cost markets, the long-standing legal

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94. However, Boeing adopted its bylaw, including the *Galaviz* caveat, in August 2011, prior to the ruling in *Galaviz* and the current Chevron litigation. Boeing Co., Current Report (Form 8-K) (Aug. 29, 2011), available at <http://www.sec.gov/Archives/edgar/data/12927/000119312511236668/d8k.htm>.

95. Boeing Co., Bylaws of the Boeing Co., art. VII, § 4 (Aug. 27, 2012), available at [http://www.boeing.com/corp\\_gov/bylaws.pdf](http://www.boeing.com/corp_gov/bylaws.pdf).

96. CLAUDIA H. ALLEN, NEAL, GERBER & EISENBERG LLP, STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS 8 (2012), available at <http://www.ngelaw.com/files/Uploads/Images/StudyofDelawareForum012512.pdf> ("This [Boeing] language seems to respond to the *Galaviz* opinion . . .").

97. Frankel, *supra* note 11.

classification of the relationship between the stockholder, her corporation, and the board as contractual provides a clear answer:

[B]ylaws, together with the certificate of incorporation and the [laws of the state of incorporation], form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations.<sup>98</sup>

Bylaws are a necessary mechanism built into the contract between stockholders and boards of almost all US corporations. The bylaw mechanism gives boards the power to unilaterally draft certain, limited governing terms, subject to the parameters set by law. Importantly, this power is specifically granted to boards in their charters—contracts formed with nearly undisputed and sufficient, albeit non-traditional, mutual assent. Only when a bylaw attempts to apply retroactively do stockholders appear to have a colorable claim under federal contract law.

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98. See *Chevron*, 2013 WL 3191981, *supra* note 6, at \*2.