
SHAREHOLDER LITIGATION BY CONTRACT

VERITY WINSHIP*

INTRODUCTION	486
I. DEFINING CORPORATE CONTRACT PROCEDURE	491
A. <i>The Nature of Intracorporate Litigation</i>	492
B. <i>Corporate Charters and Bylaws as Contracts</i>	495
II. THE EMERGENCE OF LITIGATION PROVISIONS IN CORPORATE CHARTERS AND BYLAWS	498
A. <i>The Backdrop of Contract Procedure</i>	498
B. <i>Forum Selection Clauses in Organizational Documents</i>	500
1. Choice of Court	500
2. Intracorporate Arbitration.....	504
C. <i>From Forum Choice to Tailored Procedure</i>	505
1. Fee-Shifting by Contract: <i>ATP Tour, Inc. v. Deutscher Tennis Bund</i>	507
2. Corporate Adoption of Fee-Shifting Provisions	511
3. The Response of Shareholders and Proxy Advisory Firms.....	513
4. State Legislative Response to <i>ATP Tour</i>	518
III. TOWARDS A THEORY OF CORPORATE CONTRACT PROCEDURE	522
A. <i>Connecting Procedure with Substantive Corporate Law</i>	522
B. <i>The Enabling Structure of State Corporate Law</i>	523
C. <i>Limits Rooted in Substantive Corporate Law</i>	524
D. <i>Beyond State Corporate Law</i>	528
IV. CALIBRATING SHAREHOLDER LITIGATION THROUGH TAILORED PROCEDURE	531
A. <i>Litigation Provisions</i>	532
B. <i>Implementation</i>	536
1. Encouraging Experimentation	536
2. Preventing Procedural Waiver.....	541
CONCLUSION.....	542

* Professor, University of Illinois College of Law. I am grateful for the comments on drafts from Amitai Aviram, Heather Elliott, Lisa Fairfax, Matteo Gargantini, Larry Hamermesh, David Hyman, Ann Lipton, John Pollack, Gordon Smith, and Gretchen Winter. The project benefitted greatly from comments at George Washington Law School's Center for Law, Economics & Finance Junior Faculty Workshop, Corporate and Securities Litigation Workshop, and Delaware Law's Visiting Scholar in Residence in Corporate & Business Law program. The research assistance of Sierra Hennings Vierra was invaluable.

This Article is about the future of shareholder litigation. Calibrating the amount and form of shareholder litigation is one of the most vexing problems in corporate and securities litigation. An emerging—and controversial—approach is to limit shareholder litigation through terms in corporate charters and bylaws. This Article provides a much-needed framework for courts and legislatures to evaluate these provisions. It develops a theory of corporate contract procedure that looks to the structure and content of substantive corporate law to define the reach of procedural terms. The Article concludes first that state corporate law lends itself to the type of tailored procedure proposed here because substantive corporate law is structured primarily as a set of default rules. Tailored procedure would mirror this enabling structure. At the same time, substantive corporate law provides the (few) mandatory provisions that would limit procedural contracting under this framework. One implication of connecting procedure and substance is that limits depend on the area of law at issue. The connection provides a rationale for the greater use of procedural provisions in disputes over the internal affairs governed by state corporate law. In legal areas characterized by mandatory terms, however, including securities litigation, the framework provides a basis for resisting their use.

INTRODUCTION

This Article proposes that shareholders and managers be enabled to use provisions in the corporation's organizational documents to tailor the procedure governing shareholder litigation based in state corporate law. The proposal would enable corporate contract procedure, with both justification and limits rooted in substantive state corporate law.

Private parties often may decide what procedural rules to apply to their disputes through ex ante contracts.¹ Many have suggested that the emergence of such "contract procedure"² or "party rulemaking"³ fundamentally changes how adjudication and court procedure should be understood. The literature considers whether this change is for good or for bad, and outlines competing concerns with freedom of contract and the role of consent, court access and relief, and the continuing role and legitimacy of public courts.⁴ Often driven by

¹ Parties may also alter procedure through agreements reached during litigation or as part of a settlement agreement. These agreements are not within the scope of this Article, which is concerned with ex ante agreements about litigation procedure.

² Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 598 (2005) (coining the term "contract procedure").

³ Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1331 (2012).

⁴ See, e.g., Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 581, 594

a view of these competing values, scholars have proposed various limits on private procedural ordering.⁵

This Article is concerned specifically with *corporate* contract procedure, a category that this literature has generally overlooked. Despite use of these provisions in commercial and consumer contracts, for a long time contract procedure appeared to have little relevance to agreements between corporate shareholders and the corporation itself. These intracorporate deals, captured in corporate charters and bylaws, rarely, if ever, included terms that shaped the procedure in litigation among the corporate actors. More recently, however, provisions that control the procedure in intracorporate litigation have begun to work their way into corporations' organizational documents. The use of these terms to govern disputes among internal corporate actors is what this Article terms "corporate contract procedure."

Corporate contract procedure has emerged as a distinctive—and controversial—phenomenon. Special features of corporate law, especially the internal affairs doctrine, made choice-of-law and choice-of-forum clauses unnecessary historically.⁶ This perceived irrelevance changed in response to litigation patterns. With the early 2000s came an explosion of litigation challenging corporate deals on state-law grounds. By the end of that decade, almost every corporate deal was challenged, often in multiple states' courts simultaneously. Corporations responded to the proliferation of multi-jurisdictional deal litigation by adopting exclusive forum clauses in corporate charters and bylaws. The clauses provided that shareholder litigation must be brought in a particular court, mostly the Delaware Chancery Court.

Court opinions holding these provisions valid opened the door to broader judicial acceptance and attention to litigation charter provisions and bylaws, particularly in Delaware.⁷ The first test of a bylaw that changed a particular procedural rule rather than selecting a forum came in Delaware in 2014. The Delaware Supreme Court approved a fee-shifting clause in the bylaws of a

(2007) (exploring the outer boundaries of freedom of contract and suggesting that parties have the ability to "opt-in" to public courts as a forum); Resnik, *supra* note 2, at 667.

⁵ See, e.g., Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 515-16 (2011) (proposing reforms "to capture the benefits that are identified with outsourcing, while ensuring the transparency, public-regarding values, and information production that are essential to sound judicial administration"); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 979 (2008) (using the example of forum selection clauses "to illustrate the perils of contract procedure and to argue for limits on the extent that contract can displace procedure").

⁶ See *infra* Section II.B.

⁷ Developments in Delaware courts shape this area because of the state's dominant position in U.S. corporate law—the majority of public companies are incorporated there, and many of its corporate-law decisions reverberate across the court systems. See 2014 DEL. DIVISION CORPS. ANN. REP. 2 (2015); 2013 DEL. DIVISION CORPS. ANN. REP. 2 (2014).

Delaware non-stock corporation in *ATP Tour, Inc. v. Deutscher Tennis Bund*⁸ (“*ATP Tour*”). This decision prompted litigation, lobbying, and proposed legislation.⁹ Advocates characterized intracorporate fee-shifting provisions as the cure for an “inefficient epidemic of questionable shareholder lawsuits”¹⁰ and a response to a “serious litigation crisis in American corporate law.”¹¹ Critics denounced such fee-shifting provisions as a tool for “render[ing] boards unaccountable for their actions”¹² and one that would “effectively close the courthouse doors to investors.”¹³

The controversy was provoked in part by aspects of these particular litigation provisions. Boards adopted many of these provisions unilaterally, without shareholder approval.¹⁴ The bylaws themselves were one-sided, with only the plaintiff having to pay.¹⁵ Instead of “loser pays” they were “losing-plaintiff pays.” Moreover, many of the fee-shifting bylaws that emerged after *ATP Tour* had features that would effectively shut down shareholder litigation. Some of the bylaws would shift fees if the suing shareholder did “not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.”¹⁶ Even a winning plaintiff could accordingly be liable

⁸ 91 A.3d 554 (Del. 2014).

⁹ See *infra* Section II.C.

¹⁰ Avrohom J. Kess & Yafit Cohn, Opinion, ‘Loser Pays’ Rules Make a Comeback, WALL STREET J., Aug. 28, 2014, at A13.

¹¹ Stephen Bainbridge, *The Case for Allowing Fee Shifting Bylaws as a Privately Ordered Solution to the Shareholder Litigation Epidemic*, PROFESSORBAINBRIDGE.COM (Nov. 17, 2014), <http://www.professorbainbridge.com/professorbainbridgecom/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html> [<https://perma.cc/WQ2S-NY4U>] (arguing that Delaware should not ban fee-shifting bylaws legislatively).

¹² J Robert Brown, Jr., *Fee Shifting in Derivative Suits and the Oklahoma Legislature*, THERACETOTHEBOTTOM.ORG (Sept. 24, 2014, 6:00 AM), <http://www.theracetothetbottom.org/home/fee-shifting-in-derivative-suits-and-the-oklahoma-legislatur.html> [<https://perma.cc/Q9PH-NH9T>] (arguing that fee-shifting bylaws “insulate challenges to boards for breach of the duty of loyalty, for bad faith, or for wasting corporate assets”).

¹³ A group of institutional investors characterized fee-shifting bylaws as “foreclos[ing] the filing of even the most meritorious of stockholder claims and effectively clos[ing] the courthouse doors to investors, eliminating their ability to bring suit to prevent and remedy unlawful conduct among corporate fiduciaries.” See Letter from Guus Warringa, Chief Counsel, APG Asset Mgmt. N.V., et al., to Martha Carter, Glob. Head of Research, Institutional S’holders Servs., Inc. (Nov. 24, 2014), [http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20ISS%20\(Final\).pdf](http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20ISS%20(Final).pdf) [<https://perma.cc/XB8Y-5LRA>].

¹⁴ Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 166 (2014).

¹⁵ See *id.* (stating that existing fee-shifting bylaws were not traditional “loser pays” bylaws because “only the plaintiff has to pay the other side’s costs”).

¹⁶ Am. Spectrum Realty, Inc., Current Report (Form 8-K), at 2 (July 17, 2014).

for fees if that plaintiff recovered less than the full amount. Moreover, judgment “on the merits” is unlikely in the context of intracorporate litigation, which mostly ends in settlement.¹⁷ Many of the provisions also put lawyers in the position of covering the shifted fees.¹⁸ This combination potentially chills shareholder litigation altogether.

In response to these particular clauses, legislation in Delaware curtailed the use of fee-shifting provisions in certain narrow circumstances.¹⁹ The legislation prevents stock corporations organized in Delaware from adopting fee-shifting provisions that affect internal corporate claims.²⁰ It does not reach non-corporate business entities or any entities organized outside of Delaware. Nor does it explicitly reach provisions that shape federal securities litigation. Moreover, it is aimed at eliminating fee shifting and establishing—with some restrictions—a safe harbor for exclusive forum clauses.²¹ It leaves other types of provisions untouched, providing no guidance for courts about the broader universe of litigation provisions.²²

This Article fills that gap. It steps back from the polarized debate and the all-or-nothing aspects of existing fee-shifting provisions to ask underlying questions about the appropriate scope of corporate contract procedure—questions that must be addressed even if some of the narrower issues about particular provisions are resolved. What are the costs and benefits of shareholder litigation by contract? Should there be any limit to the procedural provisions to which parties can contract? If so, where should courts look for limits on permissible procedural contracting?

This Article elaborates a theory of corporate contract procedure that looks to substantive state corporate law for both justification and limits. It begins with the premise that procedural law should not be used to waive mandatory provisions of substantive law. The Article then works through the implications of this premise for litigation of state corporate law claims. When applied in that context, the framework supports the broad use of contract procedure in corporate organizational documents to govern suits enforcing state corporate

¹⁷ See, e.g., James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 11 (1999).

¹⁸ See, e.g., *Am. Spectrum Realty, Inc.*, *supra* note 16, at 18 (triggering fee-shifting “in the event that (i) any current or prior stockholder of the Corporation or *anyone on their behalf*, in the capacity of a stockholder of the Corporation . . . initiates or asserts any claim or counterclaim against the Corporation . . . or joins, *offers substantial assistance to or has a direct financial interest in any Claim against the Corporation*” (emphasis added)).

¹⁹ Delaware legislation restricting fee-shifting provisions went into effect on August 1, 2015. See DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2015).

²⁰ *Id.* §§ 102(f), 109.

²¹ See *id.* § 115.

²² See *infra* Section II.C.4.

law. The tailored procedure advocated here is consistent with state corporate law's enabling structure.

The framework also defines the outer limits of procedural contracting, pointing to the (few) mandatory terms in state corporate law as the appropriate source of limits. This guiding rationale would prevent procedural provisions from being used to kill shareholder litigation altogether, but would also avoid throwing the baby out with the bathwater. Instead, provisions governing shareholder litigation could address some of litigation's costs to both shareholders and management. Such a framework might allow provisions to limit shareholder suits and weed out non-meritorious claims in a way that benefits multiple stakeholders.

The broader implication of linking the procedural terms to the substantive law is that limits differ depending on the area of law at issue. For disputes over state corporate law, the connection provides a rationale for the greater use of these procedural provisions, short of eliminating suits over the few mandatory corporate law duties. For disputes in other legal areas, including in shareholder litigation alleging violations of the federal securities laws, the framework provides a basis for *resisting* their use because the substantive law structure is composed of mandatory terms. Commentators often discuss different types of shareholder litigation together, particularly suits based in state corporate law and those based in federal securities law.²³ For some purposes this makes sense.²⁴ One implication of this proposal, however, is that these types of litigation should be analyzed separately when addressing litigation provisions. More generally, the framework this Article proposes is in some sense not trans-substantive: it will vary depending on the legal regime that is the subject of litigation.

This Article proceeds as follows. Part One defines the category of corporate contract procedure. It identifies distinctive characteristics of intracorporate litigation and notes caveats about treating corporate charters and bylaws as contracts. Part Two places this proposal in the context of the evolution of corporate contract procedure. It traces the emergence of litigation provisions in corporate organizational documents from their origins in choice-of-court clauses through the heated debate over fee-shifting bylaws. Part Three develops a more general theory of corporate contract procedure that looks to the structure and content of substantive corporate law to define the reach of litigation provisions. The Article's final step in Part Four is to consider how to implement broader use of tailored procedure. It provides illustrations of the type of tailored procedure that this Article proposes. It then concludes by

²³ See, e.g., Bainbridge, *supra* note 11 (outlining the costs of securities litigation and then suggesting that "[w]e see essentially identical concerns in areas such as state corporate law derivative litigation").

²⁴ Whether shareholder litigation is essentially circular does not depend on whether the claim is based in state or federal law, for instance. See *id.*

suggesting ways that courts and other actors could effectuate this framework. It examines the two aspects of implementation: how to encourage increased use and experimentation with these clauses, while preventing procedural waiver of mandatory substantive terms.

I. DEFINING CORPORATE CONTRACT PROCEDURE

What this Article calls “corporate contract procedure” refers to terms determined *ex ante* in corporate organizational documents (charters and bylaws) that govern litigation among corporate actors.²⁵ The types of provisions that shape the procedure in intracorporate litigation are similar to those found in commercial or consumer contracts. Current debates in corporate law are over exclusive choice-of-court clauses, arbitration clauses, and fee-shifting clauses—all of which have their equivalent in other contracting settings.

“Contract procedure” can be roughly divided into two categories. The first is of provisions that choose a set of rules by choosing the forum for resolving disputes. Commercial and consumer contracts frequently designate where a suit will take place through forum selection and arbitration clauses.²⁶ These

²⁵ Contract procedure or “party rulemaking” in commercial and consumer contracts has given rise to a large literature. *See, e.g.*, Bone, *supra* note 3; Noyes, *supra* note 4; Resnik, *supra* note 2; W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015) (reviewing the contract procedure literature and reporting an empirical study of commercial contracts).

In contrast, the literature about *corporate* contract procedure has been limited to examining specific provisions: exclusive forum clauses, arbitration clauses, and fee-shifting provisions. For discussion of exclusive forum selection clauses, see, for example, Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 326-28 (2013); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* (Sept. 3, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2622595> [<https://perma.cc/P6TT-EKWC>]; Jared I. Wilson, *The Value of Venue in Corporate Litigation: Evidence from Exclusive Forum Provisions* (Aug. 2015) (unpublished manuscript), <http://ssrn.com/abstract=2646312> [<https://perma.cc/U4TT-J3VQ>]. For discussion of arbitration clauses, see, for example, Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751 (2015); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 587-88 (2016). For fee-shifting provisions, see, for example, Bainbridge, *supra* note 11; Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INST. DEL. CORP. & BUS. L. (June 29, 2015), <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism/#sthash.WTx3qqji.KS9VqKDr.dpbs> [<https://perma.cc/P7HS-YQWS>].

²⁶ *See, e.g.*, Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1981

effectively elect both a decision maker and the set of procedural rules that accompanies the forum. If parties agree to bring suits in California state courts, for instance, the effect is to select a California judge and also the rules of California civil procedure.

The second category of contract procedure is of provisions that alter particular existing rules, which this Article terms “tailored procedure.” Instead of choosing a forum and its set of rules, some commercial and consumer contracts alter individual existing procedural rules, waiving jury rights, for instance, or limiting damages. This Article proposes increased use of the latter category—tailored procedure.

These rough categories characterize contract procedure in general, regardless of the type of contract or identity and relationship of the parties. Some aspects of corporate contract procedure are quite distinctive, however: namely, (1) the intracorporate nature of the disputes governed by these terms, and (2) the type of agreement and quality of consent. Both are the subject of this Part.

A. *The Nature of Intracorporate Litigation*

Corporate organizational documents govern the relationships internal to the corporation, which in U.S. law is generally considered to be the relationship among shareholders, the corporation, and officers and directors.²⁷ Corporate contract procedure is most focused on the relationship between shareholders and directors and the use of private ordering to shape (or to limit) shareholder litigation, although procedural provisions can also be used to shape litigation between directors and the corporation or other corporate actors.²⁸

Although this Article focuses predominantly on state corporate law claims, it sets up a framework that has implications for shareholder litigation as a whole.²⁹ Shareholder litigation is an umbrella term for lawsuits brought by corporate shareholders, including those alleging violations of U.S. securities laws or state law fiduciary duties such as the duty of loyalty or the duty of

(2006) (finding that fifty-three percent of merger and acquisition agreements from 2002 included a choice of forum).

²⁷ 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 3:4 (3d ed. 2010).

²⁸ Corporate bylaws sometimes include, for instance, provisions governing the resolution of any disputes between directors and the corporation, which is another type of intracorporate litigation. *See, e.g.*, Biolase, Inc., Current Report (Form 8-K), Exhibit 3.1: Sixth Amended and Restated Bylaws §§ 12.1 to .2 (June 30, 2014) (stating the “Forum for Certain Actions” and “Certain Litigation Costs” provisions, respectively); *id.* Item 5.03 (notifying the SEC of the addition of a fee-shifting provision that governs certain suits by directors).

²⁹ *See infra* Section III.D.

care.³⁰ Shareholder litigation is often representative litigation in the form of a class action or a derivative suit brought by shareholders nominally on behalf of the corporation and effectively on behalf of the shareholders as a whole.³¹ Prevalent current forms include shareholder derivative suits that challenge violations of state law fiduciary duties, such as self-dealing or other conflicts.³² Shareholder litigation also takes the form of securities class actions that allege that companies made fraudulent misstatements or omissions in violation of the securities laws.³³

The underlying rationale for shareholder litigation is that it forms part of the portfolio of monitoring and enforcement tools for policing whether managers are acting as loyal agents.³⁴ The extent to which it fulfills this role is hotly contested, but the underlying logic is that it allows shareholders another route to push managers to act in the corporation's (and shareholders') interest(s).³⁵

What is special about shareholder litigation—and differentiates it from consumer litigation—is that in some sense, shareholders are always on both sides of the litigation. In the consumer context, consumers sue the corporation. The consumers (generally) have no ownership stake in the defendant corporation, so they do not directly fund the recovery.³⁶ The concern with

³⁰ See Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1773-74 (2012).

³¹ See *id.*

³² *Id.* at 1773; see also *id.* at 1778 (identifying the separate category of “deal” litigation, in which suits challenge the terms of an acquisition, often alleging that approval by directors and officers violated their state law fiduciary duties).

³³ See Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' and Officers' Insurance Market*, 74 U. CHI. L. REV. 487, 498 (2007) (finding that ninety-three percent of securities class actions in 2005 alleged fraud via violation of Rule 10b-5 of the Securities and Exchange Act of 1934); Thomas & Thompson, *supra* note 30, at 1773-74 (outlining prevalent forms of shareholder litigation and underlying legal claims). These securities lawsuits are sometimes accompanied by shareholder derivative claims based on the same facts. See Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 53-54 (2011) (finding that, contrary to the belief that “securities class actions and government enforcement suits target fraud, while shareholder derivative suits target other types of corporate wrongdoing,” all corporate litigation, including derivative claims, focuses on fraud).

³⁴ Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 903-04 (2003) (describing shareholder suits as sharing the “purpose of countering the agency costs inherent in managers running a corporation in which they have only a small interest”).

³⁵ *Id.*

³⁶ This distinction may be a matter of degree rather than a bright line if increased costs are passed on to consumers. Shareholders do differ, however, in that an ownership stake in the corporation is inherent in the shareholder's role.

shareholder suits, at least in public companies, is that they are inherently circular. If the corporation pays harmed shareholders, that money comes from current shareholders. The money simply shifts among differently situated shareholders, minus administrative costs.³⁷ Even when the suit is against directors or officers rather than the corporation itself, shareholders still pay. D&O insurance premiums increase or shareholders pay when the corporation indemnifies its officers and directors.³⁸

One consequence of this feature is that shareholders may benefit from some limitations on shareholder litigation.³⁹ This intuition, which is prompted by the structure of shareholder litigation and the shareholders' relationship to the corporation, can be seen more concretely in a few examples in which *ex ante* limits on shareholder litigation originated with shareholders. For instance, a shareholder proposed an early fee-shifting bylaw. It would have amended corporate bylaws to require any shareholders who wanted to bring an action against the company or officers of the company to "enter into an agreement reasonably satisfactory to [the company] providing that the losing party in the action pay the prevailing party's attorneys' fees and expenses incurred in the action."⁴⁰ The *company*, rather than shareholders, argued that such a provision would violate state and federal law.⁴¹ On behalf of the 3Com Corporation, the law firm of Wilson Sonsini argued that "[i]ncluding a mandatory fee-shifting provision in the Bylaws violates public policy since the effect of the provision would be to deter stockholder-initiated securities litigation, regardless of merit."⁴² Likewise, some mandatory arbitration bylaws originated with shareholders rather than management.⁴³ Even votes to repeal an exclusive forum clause got mixed results. When put to a shareholder vote, proposals to repeal exclusive forum bylaws were defeated two of four times by wide margins.⁴⁴ These are anecdotes, and shareholder opposition is described in

³⁷ See, e.g., John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1556 (2006).

³⁸ *Id.* at 1546-47.

³⁹ See, e.g., Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1770 (1994); Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, 5-6 (1999).

⁴⁰ 3Com Corp., SEC No-Action Letter, 1999 WL 427632, at 5 (June 24, 1999).

⁴¹ See *id.*

⁴² *Id.* The shareholder ultimately withdrew the proposal before the SEC could decide on the no-action request. *Id.* at 1.

⁴³ See, e.g., Gannett Co., SEC No-Action Letter, 2011 WL 6859124, at 4 (Feb. 22, 2012); Pfizer Inc., SEC No-Action Letter, 2012 WL 587597, at 2 (Feb. 22, 2012); Allen, *supra* note 25, at 779 (discussing these proposals). But see *id.* at 779 n.147 (pointing to shareholder votes at Google and Frontier Communications Corp. on proposals for mandatory arbitration that received less than 1% and 8.1% of the relevant shareholder vote, respectively).

⁴⁴ See SULLIVAN & CROMWELL LLP, EXCLUSIVE FORUM BYLAWS GAIN MOMENTUM 6 (2014), https://sullcrom.com/siteFiles/Publications/SC_Publication_Exclusive_Forum_

detail below.⁴⁵ Nonetheless, these examples suggest that shareholders are not necessarily monolithic in their views, and also that different types of clauses may prompt different responses.

To say that existing statutory and other responses have failed to address shareholder litigation would be an oversimplification. Responses reflect disagreement not only about the costs and benefits of shareholder litigation, but also about its underlying rationale. Shareholder litigation is hotly contested and politically charged. Legislative responses push and pull between different interests, with litigation adaptively shifting forum and legal theory in their wake. Moreover, because of the difficulty of identifying the optimal amount of shareholder litigation, it is hard to evaluate whether any statutory and other interventions have worked. One way around this impasse is to allow experimentation and variation in the extent and terms of shareholder litigation, which is the subject of this Article's proposal.

B. *Corporate Charters and Bylaws as Contracts*

To alter existing procedural rules by contract, there must, of course, be a contract. A distinguishing feature of corporate contract procedure is the nature of the agreement at issue and its implications for consent. The provisions appear in the key organizational documents of corporations: corporate charters (also sometimes called articles of incorporation or certificates of incorporation) and corporate bylaws. The corporate charter defines “the broad and general aspects of the corporate entity’s existence and nature.”⁴⁶ Bylaws “set forth the rules by which the corporate board conducts its business” and “the procedures through which board and committee action is taken,”⁴⁷ and are accordingly “procedural” and “process-oriented.”⁴⁸

How closely these corporate organizational documents approach robust ideas of consent⁴⁹ depends on the type of document and when a particular

Bylaws_Gain_Momentum.pdf [https://perma.cc/S8KF-W95Q] (“[W]hile two of the corporations (Roper Industries and Superior Energy Services) repealed their bylaws, shareholders voted against repeal by large margins at the two other corporations (Chevron and United Rentals).”).

⁴⁵ See *infra* Section II.C.3.

⁴⁶ *Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933).

⁴⁷ *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1078-79 (Del. Ch. 2004) (footnote omitted), *aff’d*, 872 A.2d 559 (Del. 2005).

⁴⁸ *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 235 (Del. 2008).

⁴⁹ One of the difficulties in assessing *corporate* consent is that it implicates more general debates over contractual consent. In particular, ideals about actual consent and notice requirements break down in the context of adhesion and boilerplate contracts. See, e.g., Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006) (contrasting the “rhetoric of meeting of the minds” with the realities of “fictional” and “vestigial” consent).

provision is adopted.⁵⁰ In general, changes to existing charters are the least problematic. They approach traditional notions of contractual consent because shareholder approval is required to change existing charter provisions.⁵¹ This express consent still differs from other contracting settings in that it includes even shareholders who voted against an amendment; dissenting shareholders would be bound by the majority vote. However, because shareholders have the opportunity to approve amendments in this context, even courts that have invalidated exclusive forum bylaws have signaled that shareholder-approved inclusion in the charter would likely pass muster.⁵²

Other provisions differ from both existing corporate charters and commercial contracts in that one of the contracting parties has the power to amend the terms unilaterally. Charter provisions may be adopted at the time of incorporation, before shares are even offered to the public through an initial public offering (“IPO”).⁵³ As there are no shareholders yet to give approval, these pre-IPO charter provisions are unilaterally adopted.

Bylaws also may be adopted without shareholder approval. Shareholders have the power to adopt, amend, or appeal corporate bylaws by majority vote, and directors cannot divest them of this power.⁵⁴ However, Delaware law also provides that the certificate of incorporation may give the board of directors the power to adopt, amend, and repeal corporate bylaws unilaterally,⁵⁵ and corporations generally give directors this power. The Model Business Corporation Act (“MBCA”) gives directors this power by default unless the articles of incorporation assign it exclusively to the shareholders.⁵⁶ Much

⁵⁰ See generally Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269 (2015) (applying principles from the common law of agency to analyze shareholder consent to exclusive-forum bylaws); Hamermesh, *supra* note 14 (examining whether fee-shifting bylaws exceed the limits of corporate consent); Lipton, *supra* note 25 (assessing whether shareholder consent is contractual for purposes of the Federal Arbitration Act).

⁵¹ DEL. CODE ANN. tit. 8, § 242(b)(1).

⁵² Galaviz v. Berg, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011) (“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.”).

⁵³ See DEL. CODE ANN. tit. 8, § 102 (2011).

⁵⁴ *Id.* § 109(a); see also MODEL BUS. CORP. ACT § 10.20(a) (AM. BAR ASS’N 2010).

⁵⁵ DEL. CODE ANN. tit. 8, § 109(a).

⁵⁶ MODEL BUS. CORP. ACT § 10.20(b) (AM. BAR ASS’N 2010) (“A corporation’s board of directors may amend or repeal the corporation’s bylaws, unless: (1) the articles of incorporation . . . reserve that power exclusively to the shareholders in whole or part; or (2) [with some exceptions], the shareholders in amending, repealing or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.”).

existing debate is over litigation bylaws that were adopted unilaterally by management.

In sum, the type of document implicates consent. So does the timing of adoption of a litigation provision. For instance, pre-IPO charter provisions predate the purchase of shares and provide notice to shareholders.⁵⁷ This is not always the case for bylaw amendments, which may be adopted after shares are purchased.

In general, contract procedure raises two distinct and important issues: whether a contract exists (consent) and whether limits should be imposed on what a contract can contain. The framework below takes into account the connection between these two aspects. It is intended to allow experimentation while avoiding procedural waiver of mandatory terms. One approach to avoiding procedural waiver is to connect it to robust notions of consent. The more the litigation provision approaches waiver, the more explicit the consent required. This analysis and the complicated interplay between consent and waiver are addressed in more detail below.⁵⁸

That said, distinguishing between the two issues (contractual validity and limits on contracting) has some advantages, and this Article takes a serious look at this second issue, in part because it sometimes gets obscured by the (understandable) concern with consent. Considering limits on what a corporate contract may contain allows direct comparison of corporate contract procedure with other analyses of party rulemaking, which ask what procedural terms should be allowed, assuming no flaw in contracting.⁵⁹ Moreover, focusing on the scope of permissible terms permits the development of a framework that can be implemented in the context of existing corporate law. The courts in Delaware, the state that incorporates the majority of U.S. public companies,⁶⁰ explicitly consider both charters and bylaws to be contracts that bind shareholders.⁶¹ Judicial opinions assessing fee-shifting and exclusive forum bylaws confirm that bylaws should be treated as an intracorporate contract under Delaware law.⁶² Unlike in other contracting contexts, the rationale is not

⁵⁷ See, e.g., Hamermesh, *supra* note 14, at 169 (“It is simply more difficult to find meaningful consent to a provision adopted after someone becomes a shareholder than to establish consent to a provision that was in place, in full view, before then.”).

⁵⁸ See *infra* Section III.C.

⁵⁹ See, e.g., Bone, *supra* note 3, at 1333 (“[T]he general question is whether there should be limits on the power of parties to contractually modify procedural rules . . .”).

⁶⁰ See, e.g., 2013 DEL. DIVISION CORPS., *supra* note 7, at 2 (stating that Delaware incorporated more than half of U.S. public companies in 2013 and sixty-five percent of Fortune 500 companies).

⁶¹ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

⁶² *ATP Tour*, 91 A.3d 554 (Del. 2014); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938-39 (Del. Ch. 2013) (“As our Supreme Court has made clear, the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders . . .”).

that shareholders have consented to the terms, but rather that they have consented to the corporate governance structure that gave rise to them. Delaware case law considers shareholders to have agreed to give the board of directors power over bylaws.⁶³ Delaware courts have also held that past and future shareholders are considered to be on notice and bound by the contract.⁶⁴ Some, but not all, courts outside of Delaware agree.⁶⁵

II. THE EMERGENCE OF LITIGATION PROVISIONS IN CORPORATE CHARTERS AND BYLAWS

This Part tells the story of the emergence of corporate contract procedure as a distinct phenomenon. It lays the groundwork for evaluating the validity and viability of the type of tailored procedure proposed here. It also highlights the need for the type of guiding principles that a theory of corporate contract procedure would provide.

A. *The Backdrop of Contract Procedure*

Intracorporate contract procedure grows out of the increased acceptance of private ordering of procedure in commercial and consumer contracts. The idea that private parties could decide what procedural rules to apply to their disputes through ex ante contracts has its roots in early decisions about forum selection clauses. For a long time the use of forum selection clauses was considered invalid because it “ousted” the court from jurisdiction.⁶⁶ This first changed in *The Bremen*, a 1972 Supreme Court opinion finding a forum selection clause enforceable.⁶⁷ A gradual acceptance of private ordering of

⁶³ *E.g.*, *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995).

⁶⁴ *See ATP Tour*, 91 A.3d at 555 (holding that bylaws normally apply to all members of a non-stock corporation “regardless of whether the bylaw was adopted before or after the member in question became a member”).

⁶⁵ *Compare* *Katz v. Commonwealth REIT*, Case No. 24-C-13-001299, slip op. at 29 (Md. Cir. Ct. Feb. 19, 2014) (“[S]tockholders assent to a contractual framework that explicitly recognizes that they will be bound by bylaws adopted unilaterally pursuant to Maryland REIT law.”), *with Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (invalidating an exclusive forum bylaw adopted unilaterally by directors, stating that parties may enter into contracts containing legally enforceable forum selection clauses, but indicating that “[a] bylaw unilaterally adopted by directors . . . stands on a different footing”); *see generally* *Lipton*, *supra* note 25, at 585 nn.7-11 (analyzing cases from Massachusetts and Maryland that held that unilateral bylaws were contracts for purposes of the Federal Arbitration Act).

⁶⁶ *See* *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.”).

⁶⁷ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972) (“[A] freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening

procedure was next signaled in *Carnival Cruise Lines*, in which the Court enforced an exclusive forum selection provision found on the back of a cruise ticket.⁶⁸ *The Bremen* had enforced a contract between two commercial parties,⁶⁹ and *Carnival Cruise Lines* extended the Court's reasoning to a consumer contract.⁷⁰ The Court reasoned that "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness," but concluded that the clause at issue satisfied this standard.⁷¹ An intervening Supreme Court opinion, *Stewart Organization*, seemed to suggest that forum selection was one factor among many in a court's discretionary decision to transfer a case, preserving the court's discretion to override it.⁷² However, in its 2013 opinion in *Atlantic Marine Construction Co.*, the Supreme Court held that forum selection clauses should have controlling weight in decisions to transfer cases among federal courts absent "extraordinary circumstances unrelated to the convenience of the parties."⁷³

Outside of the context of court selection, the Court has been active in determining the validity of arbitration clauses. A series of Supreme Court decisions has interpreted the Federal Arbitration Act ("FAA") in ways that cut back on how state courts and legislatures can invalidate arbitration clauses and that permit contractual waiver of the ability to proceed as a class.⁷⁴ Meaningful distinctions exist between the type of contract procedure discussed here and the choice of arbitration. The background law differs, especially the backdrop of the FAA, which promotes judicial enforcement of arbitration clauses and which has been the focus of these Supreme Court opinions.⁷⁵ Arbitration also involves exit from the public court system, whereas the type of contract procedure discussed here modifies procedure without privatizing altogether. Nonetheless, these arbitration cases can be understood as part of a movement towards a permissive attitude to private ordering of procedure.

bargaining power, such as that involved here, should be given full effect." (footnote omitted)).

⁶⁸ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991).

⁶⁹ *The Bremen*, 407 U.S. at 15.

⁷⁰ *Carnival Cruise Lines*, 499 U.S. at 593-94.

⁷¹ *Id.* at 595.

⁷² *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

⁷³ *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 574 (2013).

⁷⁴ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (enforcing a no-class-action arbitration clause and holding that the FAA preempted the state court's interpretation of the contractual language); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (rejecting a judge-made exception to the FAA); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that the FAA preempted a state law invalidating class-arbitration waivers).

⁷⁵ *See* 9 U.S.C. § 2 (2012) (establishing the presumptive validity of arbitration agreements).

In sum, beginning with its changing approach to forum selection clauses, the Supreme Court has signaled increasing acceptance of contract procedure. Courts apply contract doctrines more generally to see if the contracting process was flawed. If the underlying contract is valid, however, courts generally apply broadly defined boundaries of reasonableness and fundamental fairness.

B. *Forum Selection Clauses in Organizational Documents*

1. Choice of Court

Contract procedure long seemed irrelevant to corporate organizational documents. For instance, choice-of-law clauses have been commonplace in commercial contracts but have been absent from corporate organizational documents.⁷⁶ There has been no need. A special choice-of-law doctrine applies to corporations: the internal affairs doctrine calls for the application of the law of the state of organization, acting as a default choice of law.⁷⁷

For a long time, a similar divergence could be seen with choice-of-court clauses. Although less common than choice-of-law clauses in commercial contracts, they certainly appear: studies of particular sets of merger and commercial contracts have shown their use in approximately forty to fifty percent.⁷⁸ In contrast, until recently the concept of including a forum selection clause was alien to corporate charters. Again, special features of corporate law made them unnecessary. Litigation was always brought in the state of incorporation. Initially this forum choice was a matter of law.⁷⁹ Other courts

⁷⁶ See Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 74-84. Commentators vary about whether choice-of-law clauses belong in the general category of contract procedure. See, e.g., Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 733 (2011) (calling choice-of-law provisions a "hybrid"). Nonetheless, the general point holds that these clauses govern some aspects of litigation and provide an example of the divergence between commercial contracts and corporate organizational documents.

⁷⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. g (AM. LAW INST. 1971) ("[T]he local law of the state of incorporation should be applied except in the extremely rare situation where a contrary result is required by the overriding interest of another state in having its rule applied.").

⁷⁸ See Eisenberg & Miller, *supra* note 26, at 1981 (reporting that merger and acquisition agreements from 2002 always included a choice-of-law clause, but only fifty-three percent included a choice-of-forum clause); 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, 1475 (2009) (reporting that all 2882 material contracts of reporting companies studied in 2002 designated the applicable law, but only thirty-nine percent designated forum).

⁷⁹ *Wilkins v. Thorne*, 60 Md. 253, 258 (1883) ("[A]ll such [internal management] controversies must be determined by the courts of the state by which the corporation was created.").

dismissed corporate governance cases in favor of the organizing state based on the internal affairs doctrine, which was then considered to dictate exclusive jurisdiction in the chartering state.⁸⁰ The internal affairs doctrine has since constricted, so that the modern version governs only choice of law.⁸¹ Nonetheless, as a matter of practice, litigants continued to bring corporate governance suits in the state of organization, often Delaware.⁸²

The pattern shifted in 2002.⁸³ The percentage of merger transactions that were challenged increased dramatically. A study by Matthew D. Cain and Steven M. Davidoff found that 38.7% of such deals were challenged in 2005 and 94.2% in 2011.⁸⁴ Moreover, many of these challenges to corporate deals were filed outside of the chartering state, prompting commentators to note that Delaware was “losing cases” beginning in 2002.⁸⁵ Some of this litigation was filed in multiple jurisdictions at the same time.⁸⁶ In the same period that the percentage of deals challenged increased, the Cain and Davidoff study found a corresponding increase in multiforum litigation from 8.6% in 2005 to 47.4% in 2011.⁸⁷

The use of exclusive forum clauses in corporate charters and bylaws emerged in response to these litigation patterns. Faced with multiforum litigation, courts, defense counsel, and commentators began to call for a way to consolidate the litigation in the court of the state of incorporation, often Delaware.⁸⁸ One way to do this was for corporations to adopt an exclusive

⁸⁰ See, e.g., *N. State Copper & Gold Mining Co. v. Field*, 20 A. 1039, 1040 (Md. 1885) (declining jurisdiction because “[o]ur courts possess no visitorial power” over the internal affairs of a foreign corporation).

⁸¹ See Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections upon Federalism*, 84 N.Y.U. L. REV. 1149, 1157 (2009) (describing the modern internal affairs doctrine as merely a “judge-made choice-of-law rule”).

⁸² See ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, *SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 2* (2013), www.cornerstone.com/Shareholder-Litigation-Involving-M-and-A-Feb-2013.

⁸³ See *id.* (reporting that before 2002 most lawsuits concerning mergers and acquisitions of Delaware public corporations were filed in Delaware Chancery Court).

⁸⁴ Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 2 (Feb. 2, 2012) (unpublished manuscript), <http://ssrn.com/abstract=1998482> [<https://perma.cc/A9ZT-LWYQ>].

⁸⁵ John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012); see also Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 374 fig.8 (2011) (showing a rise in filings outside of Delaware).

⁸⁶ See Armour et al., *supra* note 85, at 605, 622-24 (exploring trends in multiforum litigation).

⁸⁷ Cain & Davidoff, *supra* note 84, at 2.

⁸⁸ *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 2007, at 17.

forum selection clause in their charter or bylaws.⁸⁹ As with forum selection clauses in other contexts, defendants who were sued outside of the designated court would point to the clause as a basis for dismissal (or transfer). The Delaware Chancery Court endorsed the use of exclusive forum clauses in corporate charters in a footnote in *In re Revlon Inc. Shareholders' Litigation*:⁹⁰ “[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”⁹¹

Following this encouragement from the Delaware courts, practitioners and commentators refined the exclusive forum clause, and law firms eventually began to advise corporate clients to include such clauses.⁹² A typical clause provides that:

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 DGCL, 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 Article⁹³

⁸⁹ Exclusive forum selection (or choice-of-forum) clauses may also be called “mandatory” and sometimes “prorogation” agreements. See Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51 n.4, 53 (1992). These contrast with so-called “consent to jurisdiction” clauses (also called permissive clauses), which open but do not mandate a forum. See, e.g., Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 134 (defining exclusive and non-exclusive forum selection clauses).

⁹⁰ 990 A.2d 940 (Del. Ch. 2010).

⁹¹ *Id.* at 960 n.8.

⁹² See, e.g., Grundfest & Savelle, *supra* note 25, at 326-28 (analyzing and defending such clauses); Grundfest, *supra* note 25, at 333 (same); SULLIVAN & CROMWELL LLP, *supra* note 44, at 1 (“[C]ompanies should give serious consideration to adopting [an exclusive forum] bylaw.”).

⁹³ NetSuite, Inc., Amendment No. 2 to Registration Statement (Form S-1/A), Exhibit 3.2: Amended and Restated Certificate of Incorporation, art. VI, § 8 (Nov. 29, 2007); see also Grundfest, *supra* note 25, at 352, 380-81 (quoting this provision and reporting that this version, which the author drafted with lawyers from Wilson Sonsini, had become the dominant form, with identical or nearly identical language used in 91.9% of all clauses identified at the time of his study).

The validity of these clauses was tested in Delaware Chancery Court in 2013. In *Boilermakers v. Chevron*, plaintiff shareholders challenged the validity of exclusive forum selection bylaws adopted by the Boards of Chevron and FedEx, both Delaware corporations.⁹⁴ The Delaware Chancery Court found that both of the clauses were facially valid, and that the fact that they were adopted by the board unilaterally did not change that.⁹⁵ Although *Boilermakers v. Chevron* was not a decision of the state's highest court,⁹⁶ the Delaware Supreme Court later adopted much of the underlying reasoning when it addressed the validity of a fee-shifting provision in *ATP Tour*, as discussed in detail below.⁹⁷

The reasoning in *Boilermakers v. Chevron* started with section 109(b) of the Delaware corporate code, which provides that corporate bylaws “may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”⁹⁸ In *Boilermakers v. Chevron*, the Delaware Chancery Court considered this part of the analysis to be straightforward when applied to exclusive forum bylaws that govern disputes “related to the ‘internal affairs’ of the corporation.”⁹⁹ Because of its limitation to suits brought by shareholders in their role as shareholders about cases governed by the internal affairs doctrine—in other words, disputes about corporate governance and the relationships within the corporation—these “easily meet” the requirements in Section 109(b).¹⁰⁰ In support of its holding that the clause at issue was facially valid, the court also pointed to the fact that both Delaware and federal law respect and enforce forum selection clauses in other contractual settings.¹⁰¹

Of course, in some ways it is more important to see how other states' courts treat forum selection clauses. After all, if a corporation with a clause designating Delaware courts is sued in Delaware, it is already in the selected

⁹⁴ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013).

⁹⁵ *See id.* (holding that plaintiffs assented to a “contractual framework”).

⁹⁶ Plaintiffs initially appealed the decision but ultimately withdrew the appeal. *See* Notice of Voluntary Dismissal of Appeal, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, Civ. Act. No. 7220-CS (Del. Oct. 15, 2013).

⁹⁷ *See infra* Section II.C.

⁹⁸ DEL. CODE ANN. tit. 8, § 109(b) (2011).

⁹⁹ *Boilermakers*, 73 A.3d at 939.

¹⁰⁰ *Id.* (stating that the bylaws “plainly relate to the ‘business of the corporation[s],’ the ‘conduct of [their] affairs,’ and regulate the ‘rights or powers of [their] stockholders’” because they “only regulate suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine”).

¹⁰¹ *Id.* at 939 & n.6 (citing *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143 (Del. 2010), which held that forum selection clauses are presumptively valid under Delaware law); *id.* at 957 (discussing *The Bremen* and *Carnival Cruise Lines*).

court. The action is all in the other states' courts to see if they apply Delaware law to the clause and dismiss in favor of the selected forum.¹⁰² Early signs were mixed. In *Galaviz v. Berg*,¹⁰³ a California federal court applied federal law to invalidate a Delaware exclusive forum clause in the corporation's bylaws.¹⁰⁴ But in some ways that was an unattractive test of the provision—management had adopted it unilaterally in anticipation of litigation, which might very well have failed equitable as-applied tests in Delaware as well.¹⁰⁵ More recent dismissals by New York, California, Illinois, Oregon, and Louisiana courts in favor of the chosen (Delaware) court¹⁰⁶ may turn out to be more typical, but the evidence is still incomplete. Nonetheless, corporations have increasingly adopted these provisions, with one study identifying 746 exclusive forum clauses adopted before August 2014 by U.S. reporting companies.¹⁰⁷

2. Intracorporate Arbitration

To choose a court by contract is closely related to contractual forum choice through arbitration clauses. In fact, the Supreme Court has called arbitration

¹⁰² See Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 88 (2012) (discussing how non-Delaware courts analyze exclusive forum clauses).

¹⁰³ 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

¹⁰⁴ *Id.* at 1175 (holding that the “enforceability of a purported venue requirement is a matter of federal common law” and refusing to enforce the forum selection bylaw).

¹⁰⁵ See *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (“[I]nequitable action does not become permissible simply because it is legally possible.”); see also *Black v. Hollinger Int'l Inc.*, 872 A.2d 559, 564 (Del. 2005) (affirming finding that certain bylaw amendments were “invalid in equity and of no force and effect, because they had been adopted for an inequitable purpose and had an inequitable effect”).

¹⁰⁶ *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at *2 (Cal. Super. Ct. May 14, 2014) (dismissing in favor of the Delaware court based on a forum selection clause in Safeway's bylaws that designates the Delaware Court of Chancery as “the sole and exclusive forum” for “any action asserting a claim for breach of fiduciary duty owed by, or other wrongdoing by, any director or officer of the corporation . . . to the corporation's shareholders”); *Miller v. Beam, Inc.*, Nos. 2014CH00932, 2014 WL 2727089 (Ill. Cir. Ct. Mar. 5, 2014) (enforcing an exclusive forum bylaw that designated Delaware); *Genoud v. Edgen Grp. Inc.*, No. 625244, 2014 WL 2782221 (La. Dist. Ct. Jan. 17, 2014) (enforcing an exclusive forum bylaw that designated Delaware); *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at *1 (N.Y. Sup. Ct. Nov. 4, 2013) (dismissing plaintiffs' claims in deference to an exclusive forum clause in Aspen Group's bylaws and certificate of incorporation); *Roberts v. TriQuint Semiconductor, Inc.*, No. 1403-02757, 2015 WL 8539902, at *1 (Or. Dec. 10, 2015) (ordering the trial court to dismiss a shareholder derivative suit, enforcing an exclusive forum bylaw that selected Delaware courts).

¹⁰⁷ Romano & Sanga, *supra* note 25, at 22-23.

clauses a “specialized kind of forum-selection clause.”¹⁰⁸ While extensive discussion of these clauses is outside the scope of this Article, it is worth noting that parts of the framework below could guide the adoption and analysis of these clauses as well.

Arbitration may be distinguished from the type of experimentation with tailored procedure proposed here in part because it forces exit altogether from the court system. The background law also differs: arbitration cases are decided against the backdrop of the FAA and statutorily expressed endorsement of arbitration.

Nonetheless, in part because of the commonality between arbitration and choice of court, many of the legal developments described above may also support and prompt the adoption of arbitration clauses. Particularly relevant is the increased use and viability of choice-of-court clauses reflected in the Delaware invitation in *In re Revlon* and the validation of such clauses in *Boilermakers v. Chevron*.¹⁰⁹ Indeed, some commentators pointed to mandatory arbitration clauses in corporate charters as a likely next development,¹¹⁰ although the Delaware fee-shifting legislation that went into effect in 2015 prevents Delaware stock corporations from adopting such provisions.¹¹¹

C. *From Forum Choice to Tailored Procedure*

Choice-of-court clauses or arbitration clauses choose a decision maker and set of rules, but do not change existing court procedure. In contrast, some clauses try to alter specific existing rules, tailoring procedure. This Section looks at the emergence and debate over a particular area of tailored procedure: fee-shifting by contract.

¹⁰⁸ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *see also Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995).

¹⁰⁹ *See supra* notes 94-95 and accompanying text.

¹¹⁰ Allen, *supra* note 25, at 809 (“[M]andatory arbitration bylaws are the latest attempts to address [the] problem [of too many lawsuits.]”); Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 181 (2008); Daniel J. Morrissey, *Will Arbitration End Securities Litigation?*, 40 SEC. REG. L.J. 159, 163 (2012) (arguing that shareholder suits make more sense as class actions in court than in arbitration); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU. L. REV. 65, 68 (advocating the enforcement of bylaws that mandate the arbitration of certain shareholder claims); *see also* Lipton, *supra* note 25, at 587 (discussing the non-contractual nature of corporate bylaws under the FAA).

¹¹¹ *See* DEL. CODE ANN. tit. 8, § 115 (2015) (“[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing [internal corporate] claims in the courts of this State.”).

Fee-shifting clauses are already extensively used in commercial contracts.¹¹² The classic “loser-pays” provision allows the “prevailing party” to recover “reasonable” attorneys’ fees from the other side, altering the default rule that parties pay their own costs.¹¹³ Although the specifics vary depending on how the clause is drafted, the intracorporate fee-shifting clauses adopted to-date generally allow the corporation to recover the litigation expenses (including attorneys’ fees) of the corporation and its officers, directors, and affiliates if the suing shareholder is not fully successful.¹¹⁴

The emergence of fee-shifting provisions in the intracorporate context may have been prompted by the evolution of forum selection clauses in corporate charters and bylaws. Much of the reasoning of *Boilermakers v. Chevron*—the Delaware Chancery Court case that held forum selection clauses valid—was grounded in general corporate law principles about the powers of directors and the absence of prohibitions in Delaware law.¹¹⁵ The court reasoned that the organizational document was a contract binding on all shareholders, and that unilaterally adopted bylaws were valid because anticipated in the corporate governance structure to which the shareholders had agreed.¹¹⁶ The reasoning accordingly seemed to apply with equal force to other litigation bylaws, including fee-shifting provisions.

Furthermore, Delaware’s acceptance of forum selection clauses provided a way to ensure that other procedural provisions are enforced. To protect enforcement, forum selection clauses could be bundled with those selecting a particular procedure. Such a clause would ensure that a Delaware court—that had signaled approval—was assessing the validity of the litigation bylaw. For instance, in *ATP Tour*, courts and commentators focused in isolation on the

¹¹² See, e.g., 1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 9:1 (3d ed. 2007) (“Contractual provisions and stipulations whereby one party to a contract agrees, upon stated conditions, to pay attorneys’ fees of the other contracting party, are quite commonplace in commercial and business transactions.”).

¹¹³ See *id.*; see also *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2009 WL 458779, at *4 (Del. Ch. Feb. 23, 2009) (“In the event legal action is instituted by any of the parties to enforce the terms of this Agreement or arising out of the execution of this Agreement, the prevailing party will be entitled to receive from the other party or parties reasonable attorney’s fees to be determined by the court in which the action is brought.”). For an endorsement of the “American Rule,” see, for example, *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

¹¹⁴ See, e.g., Alert Letter, Wilson Sonsini Goodrich & Rosati, The Fate of Delaware “Fee-Shifting” Bylaws (July 11, 2014), <https://www.wsgr.com/publications/PDFSearch/wsgalart-fee-shifting-0714.pdf> [<https://perma.cc/HJ44-QS29>] (describing the operation of fee-shifting bylaws).

¹¹⁵ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013).

¹¹⁶ *Id.*

fee-shifting provision included in the bylaws.¹¹⁷ However, the ATP board bundled the fee-shifting bylaw with exclusive forum selection of Delaware courts.¹¹⁸ Similarly, Biolase, one of the few public companies to adopt a fee-shifting bylaw soon after *ATP Tour* (albeit to shift fees in director suits, rather than shareholder litigation), coupled the fee-shifting provision with an exclusive forum selection clause.¹¹⁹ The increased ability to direct disputes about litigation bylaws to a particular court, along with the court's underlying reasoning in *Boilermakers v. Chevron*, support the developments described below. They are also a reason that this analysis of litigation provisions focuses primarily on Delaware state courts.

1. Fee-Shifting by Contract: *ATP Tour, Inc. v. Deutscher Tennis Bund*

A bylaw provision that tailored procedure, altering particular existing rules for disputes between the parties, was approved in May 2014 by the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*.¹²⁰ The opinion was the first to evaluate the validity of a fee-shifting bylaw.¹²¹

ATP Tour ("the ATP") is a non-stock corporation organized in Delaware that operates a worldwide men's professional tennis tour.¹²² The members of

¹¹⁷ See *infra* notes 120-46 and accompanying text.

¹¹⁸ Complaint at 2, *Deutscher Tennis Bund v. ATP Tour, Inc.*, Civ. Act. No. 07-178 (D. Del. Mar. 28, 2007), 2007 WL 4425678 (quoting ATP's Amended and Restated Bylaws, which provided that "the Delaware Courts [defined as the Chancery Court of the State of Delaware and the United States District Court for the District of Delaware] shall have exclusive jurisdiction over any dispute or controversy between [any member] and [the ATP]"). Evidence brought before the federal trial court suggested that the board of directors had met to consider proposed bylaw amendments affecting legal disputes between the ATP and its members, with the board approving bylaw amendments "governing law, venue and attorney's fees for litigation between ATP and its members." *Deutscher Tennis Bund v. ATP Tour, Inc.*, Civ. Act. No. 07-178, 2009 WL 3367041, at *1 (D. Del. Oct. 19, 2009), *vacated*, 480 F. App'x 124 (3d Cir. 2012) (quoting a specific exhibit, possibly meeting minutes).

¹¹⁹ Biolase, Inc., *supra* note 28, Exhibit 3.1: Sixth Amended and Restated Bylaws §§ 12.1 to .2 (adding a forum selection clause and a fee-shifting provision); see also Echo Therapeutics, Inc., Current Report (Form 8-K/A), Item 5.03 (June 27, 2014) (reporting that the board simultaneously adopted an exclusive forum bylaw and a fee-shifting bylaw).

¹²⁰ 91 A.3d 554, 554 (Del. 2014).

¹²¹ Although the validity of a fee-shifting bylaw had been challenged earlier, the court had not reached the issue. In *Sternberg v. Nanticoke Memorial Hospital, Inc.*, a defendant requested attorneys' fees pursuant to a bylaw, but the court awarded fees under a statute and declined to address a fee award under the bylaw. Civ. Act. No. 07C10-011(TGH), 2009 WL 3531791, at *32 (Del. Super. Ct. Sept. 18, 2009), *aff'd in part and rev'd in part*, 15 A.3d 1225 (Del. 2011).

¹²² Opening Brief of Appellants at 1, *ATP Tour*, 91 A.3d 554 (No. 534, 2013), 2013 WL 6064805.

the corporation are men's professional tennis players and tournaments, and a seven-member board governs the ATP.¹²³ As part of what it called the "Brave New World" plan, the ATP board decided to restructure a tournament that took place in Germany.¹²⁴ Members that jointly owned and operated the German tour challenged the restructuring decision in court, suing the ATP and several of its directors and officers in federal court in Delaware.¹²⁵ The complaint included federal antitrust claims and state-law claims of breach of fiduciary duty, tortious interference, and conversion.¹²⁶ The ATP prevailed on all claims: the court granted the ATP's motion for judgment as a matter of law on the state law claims and a jury found in favor of the ATP on the antitrust claims.¹²⁷

The ATP then moved to recover more than seventeen million dollars in attorneys' fees, costs, and expenses based on a fee-shifting provision included in its bylaws.¹²⁸ The bylaw provided that a member or owner who makes a legal claim against the ATP and "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought," had to reimburse the ATP's litigation fees and other expenses.¹²⁹ The ATP board discussed and eventually adopted this bylaw and others that affected disputes

¹²³ *Id.* The board includes three representatives of tournament members, three player representatives, and the Executive Chairman/President of the ATP. *See* Complaint, *supra* note 118, at 8.

¹²⁴ Complaint, *supra* note 118, at 8-9.

¹²⁵ *Id.* at 2-3.

¹²⁶ *Id.* at 36-48.

¹²⁷ The appeals court affirmed the judgment. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010), *cert. denied*, 562 U.S. 1064 (2010).

¹²⁸ *Deutscher Tennis Bund v. ATP Tour, Inc.*, Civ. Act. No. 07-178, 2009 WL 3367041, at *1 (D. Del. Oct. 19, 2009), *vacated*, 480 F. App'x 124 (3d Cir. 2012).

¹²⁹ At the time of the case, the relevant bylaw was as follows:

In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial assistance to or has a direct financial interest in any Claim against the League or any member or Owners (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.

Deutscher Tennis Bund, 480 F. App'x, at 126 (quoting Article 23.3 of the ATP's bylaws). The ATP's board adopted these bylaws on October 22, 2006. *Deutscher Tennis Bund*, 2009 WL 3367041, at *1.

between members and the ATP at the same time it considered the structural changes in the tour that later gave rise to the dispute.¹³⁰

The federal district court refused to award fees, reasoning that the ATP had failed to overcome the strong presumption in U.S. law against awarding attorneys' fees.¹³¹ The court expressed concern that permitting an antitrust defendant to collect attorneys' fees could chill private enforcement, running counter to the policies underlying the statutory provision for treble damages in antitrust suits.¹³² It also pointed to a lack of support for enforcing such a contractual provision. The ATP had failed to cite any cases holding "that a board-adopted corporate bylaw can form the basis for the recovery of attorney's fees from members who sue the corporation, much less in actions where the bylaws are not directly at issue in the dispute."¹³³ Nor had the ATP pointed to prior awards of attorneys' fees to the defendant in any antitrust matter or where fee-shifting bylaws had been adopted after the plaintiffs had joined the corporation.¹³⁴

On appeal, the U.S. Court of Appeals for the Third Circuit vacated and remanded for the trial court to consider whether the fee-shifting bylaw was valid under Delaware law.¹³⁵ The appeals court remanded to avoid deciding whether federal antitrust law preempted the provision: the court would not need to address federal preemption if the fee-shifting bylaw were invalid under Delaware law.¹³⁶ The appeals court opined that Delaware might not enforce the provision based on the circumstances of the provision's creation—"adopted as an internal dispute was brewing"—and the high burden on plaintiffs—requiring them to "*substantially* achieve[] . . . the *full* remedy sought" instead of merely obtaining a favorable settlement.¹³⁷

On remand, the federal trial court granted defendants' request for certification of questions to the Delaware Supreme Court.¹³⁸ The court agreed

¹³⁰ *Deutscher Tennis Bund*, 2009 WL 3367041, at *4 n.4 (discussing the court's concerns about the timing of bylaw adoption).

¹³¹ *Id.* at *4.

¹³² *Id.* at *3-4.

¹³³ *Id.* at *3.

¹³⁴ *Id.*

¹³⁵ *Deutscher Tennis Bund v. ATP Tour Inc.*, 480 F. App'x 124, 128 (3d Cir. 2012).

¹³⁶ *Id.* at 126-27 ("Because a determination that Article 23.3 is invalid under Delaware law would allow us (and the District Court) to avoid the constitutional question of preemption, it is an independent state law ground. Consequently, the by-law validity issue needs to be addressed, and a finding of validity must be made, before the constitutional issue of preemption can be considered.").

¹³⁷ *Id.* at 127-28 & n.4.

¹³⁸ *Deutscher Tennis Bund v. ATP Tour, Inc.*, Civ. Act. No. 07-178, 2013 WL 4478033, at *1 (D. Del. Aug. 20, 2013) (certifying defendants' questions without further elaboration). Certification of questions of law permits a court to refer a question of state law to the

to respond to the certified questions of law concerning: (1) the validity of the fee-shifting bylaw; (2) the enforcement “against a member that obtains no relief at all on its claims against the corporation, even if the bylaw might be unenforceable in a different situation where the member obtains some relief”; (3) whether the bylaw is unenforceable if board members had the subjective intent “to deter legal challenges by members to other potential corporate action then under consideration”; and (4) whether the bylaw was binding where the board adopted it after the member had joined the corporation.¹³⁹

The Delaware Supreme Court held that “fee-shifting provisions in a non-stock corporation’s bylaws can be valid and enforceable under Delaware law.”¹⁴⁰ Bylaws are ordinarily enforceable unless contrary to the Delaware General Corporation Law (“DGCL”), in conflict with the corporation’s certificate of incorporation, or otherwise prohibited.¹⁴¹ The court held that no Delaware statute or common law principle prohibited such a fee-shifting bylaw.¹⁴²

Moreover, a bylaw that “allocates risk among parties in intra-corporate litigation” satisfied the DGCL’s requirement that bylaws “relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”¹⁴³ Furthermore, “bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.”¹⁴⁴

The opinion was limited to the facial validity of the clause. The procedural posture—that the Delaware Supreme Court was responding to a certified question from the federal court—limited the opinion to matters of law, rather than factual disputes. As the Delaware Supreme Court pointed out, “because certifications by their nature only address questions of law, we are able to say only that a bylaw of the type at issue here is facially valid, in the sense that it is permissible under the DGCL, and that it may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose.”¹⁴⁵ On

relevant state court. In Delaware, the Delaware state constitution and a rule of the Delaware Supreme Court enable certification. DEL. CONST. art. IV, § 11(8); DEL. SUP. CT. R. 41.

¹³⁹ *ATP Tour*, 91 A.3d 554, 557 (Del. 2014).

¹⁴⁰ *Id.* at 555, 558.

¹⁴¹ *Id.* at 557-58 (citing DEL. CODE ANN. tit. 8, ch. 1 (2011); *id.* § 109(b) (“The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation”); *Crown EMAC Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (“[A] bylaw provision that conflicts with the DGCL is void.”)).

¹⁴² *ATP Tour*, 91 A.3d at 558.

¹⁴³ *Id.* (internal quotation marks omitted).

¹⁴⁴ *Id.* at 555.

¹⁴⁵ *Id.* at 559 (footnote omitted). As with certified questions more generally, the next step in certification is for the certifying court to apply the law to the relevant facts. Or the case settles, of course.

the face of it, the opinion was also limited to non-stock, membership corporations like the ATP. The Delaware court specifically held that fee-shifting provisions “in a non-stock corporation’s bylaws” can be valid and enforceable.¹⁴⁶

2. Corporate Adoption of Fee-Shifting Provisions

Fee-shifting bylaws and pre-IPO charter provisions gradually emerged after *ATP Tour*. A list promulgated by the Council of Institutional Investors identified eighty-one firms that had adopted fee-shifting bylaws as of May 13, 2015.¹⁴⁷ The adopting firms included corporations, limited liability companies (“LLCs”), and limited partnerships.¹⁴⁸

The adoption of fee-shifting bylaws prompted legal challenges to their use, but the adopting firms ultimately showed little appetite for pressing the issue. For example, the board of directors of Hemispherx Biopharma adopted a fee-shifting provision in July 2014.¹⁴⁹ It then invoked the clause in the Delaware Chancery Court in *Kastis v. Carter*.¹⁵⁰ The plaintiffs challenged the clause,¹⁵¹ and the court seemed poised to address its validity. The context was new—although *ATP Tour* laid groundwork for broader use of fee-shifting provisions, it was limited to their use in a non-stock company.¹⁵² Hemispherx Biopharma was a for-profit stock company, so the suit would test this extension.¹⁵³ The language and adoption process could also be differentiated. The Hemispherx Biopharma board had adopted the provision during litigation,¹⁵⁴ whereas the ATP board had adopted it while restructuring the tour before litigation commenced.¹⁵⁵ Moreover, the language and operation of the fee-shifting

¹⁴⁶ *Id.* at 555 (emphasis added).

¹⁴⁷ See LEE RUDY, COUNCIL OF INSTITUTIONAL INV’RS, FEE-SHIFTING BYLAWS (2015), http://www.cii.org/files/issues_and_advocacy/legal_issues/5-13-15%20Fee-Shifting%20Bylaws.pdf [<https://perma.cc/VGS6-LCP5>]; Sec. & Exch. Comm’n Inv’r Advisory Comm., *Draft Minutes of October 9, 2014 Meeting*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac100914-minutes.htm> [<https://perma.cc/S6P7-AY28>] (recounting the testimony of John C. Coffee, Jr. regarding fee-shifting bylaws, and stating that he had identified twenty-four fee-shifting provisions adopted between May 2014 and October 2014).

¹⁴⁸ See RUDY, *supra* note 147.

¹⁴⁹ Hemispherx Biopharma, Inc., Current Report (Form 8-K), Item 5.03 (July 10, 2014).

¹⁵⁰ No. 8657-CB, 2014 WL 6684596 (Del. Ch. Nov. 25, 2014).

¹⁵¹ Motion to Invalidate Retroactive Fee-Shifting and Surety Bylaw at 1, *Kastis*, No. 8657-CB (Del. Ch. July 21, 2014), 2014 WL 3708238.

¹⁵² *ATP Tour*, 91 A.3d 554, 555 (Del. 2014).

¹⁵³ See Motion to Invalidate Retroactive Fee-Shifting and Surety Bylaw, *supra* note 151, at 7.

¹⁵⁴ The derivative litigation was filed in July 2013 and the board adopted the provision in July 2014. See *id.* at 2-3.

¹⁵⁵ See *ATP Tour*, 91 A.3d at 556.

provision differed from that in *ATP Tour* in several significant ways. The Hemispherx clause was quite aggressively drafted. It both required a bond upfront from shareholders with holdings of less than five percent, and imposed liability on plaintiffs for fees if they were to “continue or maintain” the litigation and failed to obtain “a judgment on the merits.”¹⁵⁶

The bylaw set up a potential Catch-22: a challenge to the bylaw could trigger fee shifting, apparently leaving no path available to test it.¹⁵⁷ The court and parties took a pragmatic approach. Defendants’ counsel agreed to the court’s request that it not “seek to enforce this bylaw insofar as it would concern litigation over the validity of the bylaw or whether it was adopted inequitably.”¹⁵⁸ The parties submitted briefs for and against the validity of the bylaw,¹⁵⁹ but no court opinion resulted. The defendants ultimately informed the court that they had agreed not to apply the bylaw to this case, making moot the arguments and proposed amendment to the complaint, and leaving the validity of such a clause unresolved.¹⁶⁰

Corporate reluctance to test the water—or to keep toes in the water—may be seen in the context of forum selection clauses as well. Both Chevron and FedEx retained their forum selection clauses, which were tested and found facially valid in *Boilermakers v. Chevron*.¹⁶¹ But they were only two of twelve companies whose clauses were challenged in similar litigation around the same

¹⁵⁶ Hemispherx Biopharma, Inc., *supra* note 149, at 3.

¹⁵⁷ See Motion to Invalidate Retroactive Fee-Shifting and Surety Bylaw, *supra* note 151, at 5-6 (cautioning that judicial enforcement of the bylaw would render litigation against the company “economically irrational”).

¹⁵⁸ Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw at 20, *Kastis v. Carter*, No. 8657-CB (Del. Ch. Aug. 15, 2014), 2014 WL 4425407; *id.* at 22-23 (“The company’s position on that question, Your Honor, is if the amount of discovery required is reasonably cabined so we’re not talking about 20 depositions, then, yes, we will commit not to seek to apply the bylaw against plaintiffs for an as-applied or is-it-equitable type of challenge.”).

¹⁵⁹ See Motion to Invalidate Retroactive Fee-Shifting and Surety Bylaw, *supra* note 151; Response of Nominal Defendant Hemispherx Biopharma, Inc. to Plaintiff’s Motion to Invalidate Retroactive Fee-Shifting and Surety Bylaw, *Kastis*, No. 8657-CB (Del. Ch. Aug. 8, 2014), 2014 WL 3952315.

¹⁶⁰ Letter to Chancellor Bouchard, *Kastis*, No. 8657-CB (Del. Ch. Sept. 16, 2014) (stating that the defendants had agreed “that the bylaw will have no application to this litigation, and [Hemispherx Biopharma] will not assert the bylaw as a basis for fee-shifting in this case”); see Order Denying Plaintiff’s Motion for Leave to File an Amended Complaint, *Kastis*, No. 8657-CB (Del. Ch. Sept. 16, 2014); see also *Strougo v. Hollander*, 111 A.3d 590, 596 (Del. Ch. 2015) (observing that the validity of a fee-shifting bylaw had been briefed in that case but that the court did not reach the issue because “the present motion focuses on the timing of the Bylaw’s adoption”).

¹⁶¹ 73 A.3d 934, 956-63 (Del. Ch. 2013).

time. The other ten companies voluntarily repealed their bylaws, and their suits were dismissed.¹⁶²

3. The Response of Shareholders and Proxy Advisory Firms

Adoption of fee-shifting provisions may have been limited following *ATP Tour* in part because fee-shifting bylaws could prompt a fight with shareholders and with the proxy advisory firms that provide services to institutional investors, making influential recommendations about how to vote on particular issues within the corporation.¹⁶³ As at least one law firm's client memorandum warned soon after *ATP Tour*, the adoption of fee-shifting bylaws was likely to be unpopular with shareholders.¹⁶⁴ This disapproval could be expressed in public statements or by "stockholder proposals to repeal any board-adopted bylaw and/or 'vote no' campaigns against some or all directors who supported adoption of the offending bylaw."¹⁶⁵ The responses of institutional investors and proxy advisory firms to fee-shifting bylaws, *ATP Tour*, and exclusive forum clauses are the subject of this Section.

Institutional investors explicitly expressed their disapproval of the result in *ATP Tour* and potential extension to stock companies in a series of letters sent in November 2014.¹⁶⁶ When a bill was proposed in the Delaware General Assembly to prohibit the use of fee-shifting provisions,¹⁶⁷ the Council for

¹⁶² *Id.* at 945.

¹⁶³ *Cf.* Stephen J. Choi et al., *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 650-51 (2009) (discussing the emergence of proxy advisors and emphasizing their broad influence on shareholder voting).

¹⁶⁴ *See* Press Release, Skadden, Arps, Slate, Meagher & Flom LLP, Fee-Shifting Bylaws: The Delaware Supreme Court Decision in *ATP Tour*, Its Aftermath and the Potential Delaware Legislative Response 1 (May 22, 2014), https://www.skadden.com/sites/default/files/publications/The_Delaware_Supreme_Court_Decision_in_ATP_Tour_and_the_Potential_Legislative_Response.pdf [<https://perma.cc/CJF6-AX8U>] (pointing to a "significant risk that efforts by boards of directors of public companies to curtail stockholder litigation will be perceived by some stockholders, governance advocates and proxy advisory firms as protectionist, anti-corporate governance actions deserving prompt and clear disapproval if attempted").

¹⁶⁵ *Id.* at 1-2; *see also* Press Release, Skadden, Arps, Slate, Meagher & Flom LLP, Fee-Shifting Bylaws: The Current State of Play (June 20, 2014), https://www.skadden.com/sites/default/files/publications/Fee-Shifting_Bylaws_The_Current_State_of_Play.pdf [<https://perma.cc/68FB-MDUT>].

¹⁶⁶ A collection of these letters is available at *Fee-Shifting Bylaws*, COUNCIL OF INSTITUTIONAL INV'RS, http://www.cii.org/fee_shifting_bylaws [<https://perma.cc/C3CJ-PRLY>] (describing fee-shifting bylaws as a "growing threat to board accountability").

¹⁶⁷ Act to Amend Title 8 of the Delaware Code Relating to General Corporation Law, S.B. 236, 147th Gen. Assemb., 2d Reg. Sess. (Del. 2014).

Institutional Investors (“CII”),¹⁶⁸ public pension funds, and other institutional investors sent letters of support to the Delaware governor, the bill’s sponsor, the Chair of the state bar’s corporation law section, and proxy advisory firms.¹⁶⁹ The content of these letters varied depending on their audience, but they were all targeted at *ATP Tour* and the use of fee-shifting provisions. They also explicitly countered the letters from the Chamber of Commerce and others that had made the argument that fee-shifting protects shareholder interests: “Far from protecting corporations from ‘frivolous litigation,’ these fee-shifting provisions effectively bar any judicial oversight of misconduct of corporate directors,” undermining “the most fundamental premise of the corporate form—that stockholders, simply by virtue of their investment, cannot be responsible for corporate debts.”¹⁷⁰

In letters to two prominent proxy advisory firms—Glass Lewis and Institutional Shareholder Services (“ISS”)—the CII and pension funds urged them to recommend that shareholders vote to remove directors who adopt fee-shifting bylaws.¹⁷¹ In their 2015 guidance, ISS and Glass Lewis strongly disfavored existing versions of fee-shifting bylaws, albeit with slightly different mechanisms and language. ISS recommended that institutional shareholders reject existing aggressively drafted bylaws that require fee

¹⁶⁸ See *About Us*, COUNCIL OF INSTITUTIONAL INV’RS, http://www.cii.org/about_us [<https://perma.cc/QDZ9-RCT5>] (describing itself as a “nonprofit, nonpartisan association of corporate, public and union employee benefit funds and endowments with a focused policy mission: to be the leading voice for effective corporate governance practices for U.S. companies and strong shareowner rights and protections”).

¹⁶⁹ See, e.g., Alison Frankel, *Big Pension Funds Mobilize Against Delaware Fee-Shifting Clauses*, REUTERS (Nov. 26, 2014), <http://blogs.reuters.com/alison-frankel/2014/11/26/big-pension-funds-mobilize-against-delaware-fee-shifting-clauses/> [<https://perma.cc/ZQU3-EJBN>] (reporting that the letters argued that fee-shifting provisions would worsen corporate governance and discourage investment in Delaware corporations); see also COUNCIL OF INSTITUTIONAL INV’RS, CORPORATE GOVERNANCE PRINCIPLES (2015), http://072012d.membershipsoftware.org/files/committees/policies/2015/04_01_15_corp_gov_policies.pdf [<https://perma.cc/U27A-6G82>] (“Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareowners from the courts through the introduction of forced arbitration clauses.”).

¹⁷⁰ Letter from Guus Warringa, Chief Counsel, APG Asset Mgmt. N.V., et. al. to Governor Jack Markell (Nov. 24, 2014), [http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20Governor%20Markell%20\(Final%20Revised%20December%202018\).pdf](http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20Governor%20Markell%20(Final%20Revised%20December%202018).pdf) [<https://perma.cc/QRY5-2YUF>].

¹⁷¹ Letter from Guus Warringa, Chief Counsel, APG Asset Mgmt. N.V., et. al. to Martha Carter, Glob. Head of Research, Institutional S’holder Servs. 1 (Nov. 24, 2014), [http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20ISS%20\(Final\).pdf](http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20ISS%20(Final).pdf) [<https://perma.cc/FTV9-J7M2>].

shifting when plaintiffs do not completely prevail on the merits.¹⁷² Glass Lewis “strongly opposed” bylaws that impose legal expenses on plaintiffs unless they are completely successful because they “will likely have a chilling effect on even meritorious shareholder lawsuits” because shareholders would have a “strong financial disincentive not to sue a company.”¹⁷³

Charter and bylaw provisions that affect “litigation rights” emerged as a separate category in the 2015 guidance from proxy advisory firms. Both ISS and Glass Lewis considered existing uses of exclusive forum clauses (both court and arbitration) and the fee-shifting provisions detailed above, as well as anticipated future variations.¹⁷⁴ Both proxy advisory firms connected the issues about litigation bylaws with concern about unilateral adoption of particular provisions. In both the 2015 and 2016 guidance, ISS issued a broad recommendation that institutional shareholders vote against or withhold votes from directors if a bylaw or charter provision was adopted without shareholder consent and the amendment “materially diminishes shareholders’ rights or . . . could adversely impact shareholders.”¹⁷⁵ Glass Lewis was similarly focused on shareholder consent, and indicated that it “may recommend” that shareholders vote against the chair of the governance committee or the committee as a whole when a board made an amendment that “impede[s] the ability of shareholders to exercise [important shareholder rights], and has done so *without seeking shareholder approval*.”¹⁷⁶ It gave the example of “the adoption of provisions that limit the ability of shareholders to pursue full legal recourse,” including arbitration and fee-shifting bylaws.¹⁷⁷

Several aspects of these proxy advisor recommendations are noteworthy in the context of this Article’s proposal to expand the universe of tailored

¹⁷² INSTITUTIONAL S’HOLDER SERVS., U.S. SUMMARY PROXY VOTING GUIDELINES: 2015 BENCHMARK POLICY RECOMMENDATIONS 23-24 (2014) [hereinafter 2015 ISS PROXY VOTING GUIDELINES], <http://www.issgovernance.com/file/policy/2015summaryvotingguidelines.pdf> [https://perma.cc/8M4Q-NHFG] (“Generally, vote against bylaws that mandate fee-shifting whenever plaintiffs are not completely successful on the merits . . .”).

¹⁷³ GLASS, LEWIS, & CO., PROXY PAPER GUIDELINES: 2015 PROXY SEASON: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 39-40 (2014) [hereinafter 2015 GLASS LEWIS PROXY PAPER], http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf [https://perma.cc/W724-RYT2].

¹⁷⁴ *See id.* at 39-40; 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 23-24.

¹⁷⁵ 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 12; INSTITUTIONAL S’HOLDER SERVS., AMERICAS PROXY VOTING GUIDELINES UPDATES: 2016 BENCHMARK POLICY RECOMMENDATIONS 3-4 (2015), <http://www.issgovernance.com/file/policy/2016-america-policy-updates.pdf> [https://perma.cc/UW9U-4ZD9].

¹⁷⁶ *See* 2015 GLASS LEWIS PROXY PAPER, *supra* note 173, at 14 (emphasis added).

¹⁷⁷ *Id.*; GLASS, LEWIS, & CO., PROXY PAPER GUIDELINES: 2016 PROXY SEASON: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 14 (2015) [hereinafter 2016 GLASS LEWIS PROXY PAPER], http://72.3.217.176/glccom/wp-content/uploads/2015/11/GUIDELINES_United_States_20161.pdf [https://perma.cc/3JL8-JY4F].

shareholder litigation provisions. As it had done in 2014 in the context of exclusive forum bylaws,¹⁷⁸ ISS's 2015 guidance recommended voting "case-by-case" on litigation bylaws.¹⁷⁹ While it would be an overstatement to suggest that this indicates support for these clauses,¹⁸⁰ it does suggest that only certain features of existing corporate contract provisions are driving shareholder resistance—aggressive fee-shifting and unilaterally adopted provisions—which may leave open the possibility of support or neutrality on other provisions that lack these flaws.

The recommendations also serve as a reminder of some of the distinctive features of shareholder litigation noted above.¹⁸¹ One of the factors that ISS lists that influences the recommended vote on "litigation rights" is "[d]isclosure of past harm from shareholder lawsuits in which plaintiffs were unsuccessful or shareholder lawsuits outside the jurisdiction of incorporation."¹⁸² The phrasing of this recommendation suggests that shareholder litigation can have costs that are borne by the current shareholders as a whole. Even Glass Lewis, which voiced stronger recommendations against both existing types of procedural provision, began its recommendation on exclusive forum and fee-shifting bylaw provisions by acknowledging that "companies may be subject to frivolous and opportunistic lawsuits, particularly in conjunction with a merger or acquisition, that are expensive and distracting."¹⁸³

The "breadth of application of the bylaw" is another factor that ISS indicated should influence the vote, "including the types of lawsuits to which it would apply and the definition of key terms."¹⁸⁴ One of this Article's suggestions is that the limits of corporate contract procedure depend on the legal context. In particular, state corporate law and suits governed by the

¹⁷⁸ INSTITUTIONAL S'HOLDER SERVS., 2014 U.S. PROXY VOTING SUMMARY GUIDELINES 24 (2013), <http://www.issgovernance.com/file/files/ISSUSSummaryGuidelines2014.pdf> [<https://perma.cc/M8R7-DMQK>].

¹⁷⁹ See 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 23 (recommending a case-by-case analysis with particular attention to the board's reason for adopting the provision, any past harm suffered because of a lack of such a provision, and the ability of shareholders to repeal the provision later).

¹⁸⁰ See, e.g., SULLIVAN & CROMWELL LLP, *supra* note 44, at 1 (describing proxy advisory firms and institutional investors as generally unsupportive of exclusive bylaw provisions). For instance, when four funds submitted shareholder proposals that called for repeal of exclusive forum bylaws for inclusion in 2012 proxy statements, ISS advocated a vote for repeal. *Id.* at 6-7.

¹⁸¹ See *supra* Section I.A.

¹⁸² 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 23.

¹⁸³ 2016 GLASS LEWIS PROXY PAPER, *supra* note 177, at 38; 2015 GLASS LEWIS PROXY PAPER, *supra* note 173, at 39.

¹⁸⁴ 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 23 (implying that a limited bylaw that refrained from over-reaching could earn ISS approval or at least neutrality).

internal affairs doctrine may lend themselves to procedural provisions, as so much of the substantive corporate law is enabling rather than mandatory. This argument that the scope of corporate contract procedure is not trans-substantive is consistent with the ISS suggestion that it matters what type of lawsuit the litigation provision governs.¹⁸⁵

Shareholder response may vary depending on the type of litigation-shaping provision at issue. Some differences between exclusive forum clauses and fee-shifting provisions are illustrative. Although the adoption of fee-shifting provisions could have followed the same sort of pattern of innovation and adoption as exclusive forum clauses, it has some distinctive features. Forum selection did not prevent the litigation of claims altogether, but instead designated a decision maker and set of rules within the public court system.¹⁸⁶ Moreover the motivation for adoption differs. The adoption of forum selection provisions seemed to be prompted by defendants' desire to consolidate multiforum litigation rather than to chill such litigation completely.¹⁸⁷

These differences among types of litigation provisions are reflected in some shareholder and proxy advisory firms' reactions. Not only did ISS recommend that litigation provisions be considered on a "case-by-case" basis¹⁸⁸ but the proxy advisory firms sometimes explicitly distinguished between the types of clauses. Glass Lewis, for instance, indicated that fee-shifting bylaws were an "even stronger impediment on shareholder legal recourse" than an exclusive forum provision, and thus recommended that fee-shifting prompt a broader vote against those who approved the provision.¹⁸⁹

¹⁸⁵ Other factors that ISS says should influence the vote over litigation provisions are "[t]he company's stated rationale for adopting such a provision"; "[t]he breadth of application of the bylaw"; and "[g]overnance features such as shareholders' ability to repeal the provision at a later date (including the vote standard applied when shareholders attempt to amend the bylaws) and their ability to hold directors accountable through annual director elections and a majority vote standard in uncontested elections." *Id.* at 23-24.

¹⁸⁶ Whether the forum is viewed as neutral depends on one's position in the long-standing debate about the interest alignment of Delaware's courts and corporate law. One law firm promoted the use of forum bylaws specifically because they would "minimize the impact" of "exorbitantly expensive" derivative suits by selecting "corporation-friendly Delaware" as the exclusive forum. Leslie A. Gordon, *Pick Your Forum: Designating Delaware as Your Venue Can Help Minimize the Impact of Derivative Suits*, BINGHAM MCCUTCHEN PARTNER ADVISORY, Summer 2006, at 36 (arguing that exclusive forum selection in Delaware ensures that "stricter pleading and discovery standards" will apply to plaintiffs, reducing their chances of success in litigation).

¹⁸⁷ See Grundfest, *supra* note 25, at 351 (suggesting that intracorporate forum selection clauses emerged as a reaction to the explosion of forum shopping by litigants).

¹⁸⁸ See 2015 ISS PROXY VOTING GUIDELINES, *supra* note 172, at 23.

¹⁸⁹ 2015 GLASS LEWIS PROXY PAPER, *supra* note 173, at 18-19. The particular example is when these provisions are included in a charter or bylaw before the IPO, which avoids a shareholder vote on the provision. *Id.* If an exclusive forum selection clause was adopted

The plaintiff-side dynamics may also differ depending on the specific type of litigation provision. Aggressively drafted fee-shifting clauses may shut down litigation altogether, preventing action by the whole plaintiffs' bar. In contrast, the interests of plaintiffs' lawyers may be more varied in relation to exclusive forum provisions. In the context of multiform litigation, lawyers seemed to be filing cases outside of Delaware to force negotiation about how fees were allocated among the multiple plaintiffs' law firms that collectively represent plaintiffs.¹⁹⁰ Accordingly, forum selection clauses could garner support (or at least not elicit strong opposition) from the segments of the plaintiffs' bar that chose to file in Delaware and that, before consolidation, had to give part of the fee to out-of-state filers.¹⁹¹

In sum, not all litigation provisions are equal, and one might rationally oppose waiver provisions such as the existing fee-shifting bylaws while still suggesting that some other provisions would be beneficial to shareholders as well as management.

4. State Legislative Response to *ATP Tour*

Although the ATP was a non-stock corporation, the possibility that stock corporations would adopt similar bylaws in an attempt to restrict shareholder litigation was immediately apparent.¹⁹² In response, the Delaware State Bar Association drafted and proposed a state senate bill to amend the Delaware corporate code, which Delaware Senator Bryan Townsend introduced less than a month after the Delaware Supreme Court's *ATP Tour* decision was filed.¹⁹³

this way, Glass Lewis recommended a vote against the chairman of the governance committee. *Id.* If a fee-shifting clause was adopted in this way, Glass Lewis recommended a vote against the *entire* governance committee. *Id.* at 1-2, 18-19.

¹⁹⁰ See, e.g., Thomas & Thompson, *supra* note 30, at 1753 (describing "fee distribution litigation" as "multijurisdictional suits . . . filed by plaintiffs' law firms largely to obtain a slice of the total pool of plaintiffs' attorneys' fees that are paid in a global settlement").

¹⁹¹ Cf. *id.* at 1801, 1811-12 (describing multijurisdictional litigation as imposing "greater private costs" on "established plaintiffs' firms" and suggesting "forum selection provisions in corporate charters or bylaws" as a potential solution).

¹⁹² For one thing, the Delaware Code provides that the DGCL applies to non-stock corporations and the references to corporate "stockholders" apply to members of a non-stock corporation. DEL. CODE ANN. tit. 8, § 114 (2011); see also Bainbridge, *supra* note 11 ("It is widely assumed that the legal basis for upholding such a bylaw in the context of a membership corporation will carry over to a stock corporation.").

¹⁹³ Act to Amend Title 8 of the Delaware Code Relating to General Corporation Law, S.B. 236, 147th Gen. Assemb., 2d Reg. Sess. (Del. 2014) (proposing to amend DGCL § 102 to limit provisions "imposing personal liability for the debts of the corporation on its stockholders" to liability "based solely on their stock ownership" and to add DGCL § 331, which would provide that "neither the certificate of incorporation nor the bylaws of any corporation may impose monetary liability, or responsibility for any debts of the corporation, on any stockholder of the corporation").

As described in the accompanying bill synopsis, the amendments were designed to limit the applicability of the holding in *ATP Tour* to non-stock corporations.¹⁹⁴

The U.S. Chamber of Commerce's Institute for Legal Reform responded rapidly. It sent a letter to the Senator who proposed the bill.¹⁹⁵ The letter advocated deferred consideration of the bill. It expressed concern that the proposed legislation would “take[] away a new tool authorized by the Delaware Courts, corporate bylaws authorizing legal fee shifting, which businesses could use to reduce the amount of unnecessary litigation that accompanies corporate mergers and acquisitions.”¹⁹⁶ Its particular target was the type of state corporate law claim that is the subject of this Article: “the burgeoning problem of questionable state-based M&A litigation.”¹⁹⁷

A decision on this legislation was initially delayed. The Delaware Senate adopted a resolution directing the Delaware State Bar Association, its Corporation Law Section, and the Section's council to continue examining Delaware “business entity laws with an eye toward maintaining balance, efficiency, fairness and predictability.”¹⁹⁸ So they did, and the Corporation Law Council of the Delaware State Bar Association released draft legislation in the spring of 2015.¹⁹⁹ The eventual result was proposed state legislation that the governor signed into law on June 24, 2015, and that went into effect on August 1, 2015.²⁰⁰

The legislation targets a limited category of litigation provisions. The legislation applies only if (1) the entity is a stock corporation, (2) the state of organization is Delaware, (3) the affected claim concerns internal corporate governance, (4) the litigation provision is a fee-shifting, exclusive forum or

¹⁹⁴ *Id.*

¹⁹⁵ Letter from Andrew Wynne, Dir. of State Legislative Affairs, U.S. Chamber Inst. for Legal Reform, to Bryan Townsend, Del. Senator (June 5, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1184979/chamber-letter-to-townsend.pdf> [<https://perma.cc/7AZV-65VS>] (asking that consideration of the bill be deferred until the business community has “an opportunity to contribute valuable perspectives on the negative impact of unnecessary litigation”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See S.J. Res. 12, 147th Gen. Assemb., 2nd Reg. Sess. (Del. 2014) (putting off the decision on the proposed amendments until at least 2015 in order to “provide all interested parties with adequate time to participate in the development of a comprehensive legislative response”).

¹⁹⁹ See CORP. LAW SECTION, DEL. STATE BAR ASS'N., ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW (2015), <https://www.wsgr.com/PDFs/1182013.pdf> [<https://perma.cc/5XZ3-PCYH>].

²⁰⁰ See S.B. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015); *codified at* DEL. CODE ANN. tit. 8, §§ 102(f), 109(b), 114(b), 115 (2015) (codifying the relevant provisions).

mandatory arbitration clause, *and* (5) the provision is in a corporate charter or bylaws rather than another type of agreement.²⁰¹

The legislation thus intervenes in a limited set of provisions, leaving the broader universe of litigation provisions untouched. The legislation affects stock corporations; it does not govern other types of business entities in Delaware. Of the firms that had adopted fee-shifting bylaws by May 2015, twenty-two percent were non-corporate entities, mostly LPs,²⁰² suggesting that this category may be significant.²⁰³ Nor does the legislation affect any business entities organized anywhere else. A recent study identified fee-shifting provisions in companies organized in Nevada, Colorado, Florida, Maryland, and Utah,²⁰⁴ suggesting at least some interest beyond Delaware's borders.

Moreover, the legislation restricts only provisions governing "internal corporate claims." The legislation defines these as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery."²⁰⁵ It arguably does not apply to provisions that purport to restrict other types of shareholder litigation, including securities claims.²⁰⁶

The legislation also provides guidance about only a limited set of specific litigation provisions: fee-shifting, exclusive forum selection, and mandatory arbitration. The legislation was primarily aimed at restricting the reach of *ATP Tour* and preventing the use of fee shifting in stock corporations.²⁰⁷ It did so by

²⁰¹ Del. S.B. 75, Synopsis §§ 2-5. Provisions in a shareholder agreement or other agreement signed by the shareholder would be enforceable. *See id.*

²⁰² *See* RUDY, *supra* note 147.

²⁰³ *See* Peter Molk & Verity Winship, *LLCs and the Private Ordering of Dispute Resolution*, 41 J. CORP. L. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710159 [<https://perma.cc/G55A-SNH7>] (finding clauses that shifted litigation fees in about fifteen percent of a sample of private LLC operating agreements).

²⁰⁴ *See* Craig Eastland, *Survey of Fee-Shifting Bylaws Suggests DGCL Amendments Won't End Debate*, THOMSON REUTERS: LEGAL SOLUTIONS BLOG (June 5, 2015), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/survey-of-fee-shifting-bylaws-suggests-dgcl-amendments-wont-end-debate/> [perma.cc/2LZJ-CE8Y].

²⁰⁵ DEL. CODE ANN. tit. 8, § 115.

²⁰⁶ *See* John C. Coffee, Jr., *What Happens Next?*, BANK & CORP. GOVERNANCE L. REP., June 2015, at 11, <http://www.lawreporters.com/jun15b&c.pdf> [<https://perma.cc/DFZ2-T72K>] (arguing that the Delaware legislation, "read strictly, permits fee-shifting bylaws that apply to federal securities, antitrust and fraud actions"); Neil J. Cohen, *Does Delaware Bill 75 Cover Fee Shifting in Securities Cases?*, BANK & CORP. GOVERNANCE L. REP., June 2015, at 7; Eastland, *supra* note 204.

²⁰⁷ *See* STAFF OF H.R. COMM. ON THE JUDICIARY, 148TH GEN. ASSEMB., 1ST REG. SESS., REP. ON S.B. 75 (Del. 2015) (describing the purpose of the bill: to "ban corporations from adopting bylaws that would force the loser of a stakeholder lawsuit to pay the corporate legal fees"); CORP. LAW SECTION, DEL. STATE BAR ASS'N, FEE-SHIFTING FAQs (2015),

prohibiting any charter or bylaw provision that “would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an internal corporate claim.”²⁰⁸

The legislation also addressed forum selection clauses. Section 115 allows charters or bylaws to “require . . . that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.”²⁰⁹ This new section explicitly permits exclusive forum selection provisions that select Delaware courts, but overrules prior Delaware decisions that would have allowed Delaware corporations to choose an exclusive forum outside of Delaware.²¹⁰ Although the legislative text does not mention arbitration, its synopsis explains that Delaware courts cannot be excluded, even in favor of arbitration. The legislation “invalidates such a provision selecting the courts in a different State, *or an arbitral forum*, if it would preclude litigating such claims in the Delaware courts.”²¹¹

The law’s drafters, the Corporation Law Council of the Delaware State Bar Association, noted that “the proposed legislation does not deprive corporations of the ability to adopt other provisions that address unproductive stockholder litigation by means other than fee-shifting.”²¹² In other words, the other types of litigation provisions remain available.

* * *

Corporate contract procedure has emerged over the last decade as a distinctive—and contested—legal phenomenon. The use of litigation provisions in corporate organizational documents implicates deep

<http://www.law.du.edu/documents/corporate-governance/legislation/delaware-stat-revisions/Council-Second-Proposal-FAQs-3-6-15.pdf> [https://perma.cc/3BUC-JTBB] (“Q. What prompted this legislation? A. On May 8th of last year, the Delaware Supreme Court decided the ATP case, which permitted a membership corporation to enforce a ‘fee-shifting’ bylaw Because the DGCL does not have separate provisions for stock and member corporations, some corporate practitioners saw the case as an opportunity to press for fee shifting provisions for profit stock corporations, including publicly traded corporations.”).

²⁰⁸ S.B. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015) (enacted) (amending DEL. CODE ANN. tit. 8, §§ 102, 109(b)).

²⁰⁹ DEL. CODE ANN. tit. 8, § 115.

²¹⁰ *See, e.g.,* Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 242 (Del. Ch. 2014) (enforcing a Delaware corporation’s provision that selected a non-Delaware court).

²¹¹ *See* Del. S.B. 75, Synopsis § 5 (emphasis added).

²¹² CORP. LAW SECTION, DEL. STATE BAR ASS’N, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL (2015), <http://www.law.du.edu/documents/corporate-governance/legislation/delaware-stat-revisions/Council-Second-Proposal-Explanatory-Paper-3-6-15.pdf> [https://perma.cc/56BM-7PRW].

disagreement about the efficacy and purposes of shareholder litigation, as well as polarized views of the appropriate role of the plaintiffs' bar.

At the same time, the developments in the law provide space for tailored procedure and lay the groundwork for the validity of a variety of provisions that calibrate (rather than eliminate) shareholder litigation. Open questions remain about Delaware's approach, but *Boilermakers v. Chevron, ATP Tour*, and even the abortive discussion in *Kastis* suggest a basic framework for the state courts' approach. The decisions to date have found litigation bylaws facially valid and within the power of directors to adopt under Delaware law.

The response to litigation provisions has so far been piecemeal. The legislative response to fee shifting, for instance, targets that particular practice in one state and in one type of business entity. It does not provide a framework for evaluating litigation provisions going forward. Beginning to build such a framework is the aim of the next Part.

III. TOWARDS A THEORY OF CORPORATE CONTRACT PROCEDURE

Corporate contract procedure has emerged as a distinct phenomenon. Some of the issues it raises would be encountered in any contractual area: the importance of access to a public court system and the pressure on notions of consent. Others, though, are distinctive and call for the development of a framework for figuring out appropriate limits—if any—to procedural provisions that govern shareholder litigation. This Part begins to map out a framework that borrows from the background substantive law.

A. *Connecting Procedure with Substantive Corporate Law*

The premise of this proposal is a particular view of the connection between substantive and procedural law. Decisions about the scope of shareholder procedural provisions should be based on corporate substantive law. The motivating concern is that parties should not be allowed to circumvent mandatory substantive law by shaping procedure, particularly where one party dictates the contractual terms. If a party cannot contract around a substantive obligation, then the party should not be able to eliminate it by disabling enforcement. For instance, if the substantive law prevents opting out of fiduciary duties, the parties could not effectively opt out by contractually barring litigation about those duties.

Why locate the decisions about the scope of procedural provisions in substantive law? To a certain extent, this Article takes this premise as a starting point and examines the consequences for corporate contract procedure. But there are reasons to start here, including concerns with legitimacy. The lines between mandatory and permissive provisions in substantive law have generally been developed through a public legislative process subject to debate or through the adversarial process in litigation. This proposed starting point has

been explored in a more general context of contract procedure,²¹³ but has divergent implications for *corporate* contract procedure. These implications are the subject of this Part.

B. *The Enabling Structure of State Corporate Law*

One consequence of the premise that procedural contracting should be rooted in substantive law is the conclusion that contract procedure is uniquely suited to state corporate law. The enabling structure of substantive state corporate law supports a corresponding system of procedural default rules.

Commentators have described the emergence of contract procedure in commercial and consumer agreements as the emergence of a new view of the rules governing procedure in public courts (the Federal Rules of Civil Procedure and similar rules). They are now more like default rules, with parties contracting around them with great freedom.²¹⁴ The notion of default rules is deeply embedded in the substantive provisions of state corporate law. Often U.S. corporate law is characterized as “enabling,”²¹⁵ or at least as providing a mix of enabling and mandatory terms.²¹⁶ A contractarian approach to the corporate form views it as primarily providing default substantive provisions to enable efficient formation and governance of corporations, with great latitude of parties to contract around them.²¹⁷ In other words, substantive obligations may usually be tailored.

This default structure is sometimes explicit in corporate codes. Some provisions specify that they are optional. Many sections of the Delaware General Corporation Law preface directives with the phrase “[u]nless otherwise restricted by the certificate of incorporation.”²¹⁸ The Model Business

²¹³ See Dodge, *supra* note 76, at 784 (advocating a “symmetrical theory of procedural contracting” that would prevent “the use of procedure to contract away those rights the legislature has already designated as non-waivable”).

²¹⁴ See, e.g., Michael L. Moffit, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (arguing that the rules of civil procedure should be reconceptualized as “default rules, rather than . . . non-negotiable parameters”).

²¹⁵ See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1417 (1989).

²¹⁶ See John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1618 (1989) (“A half-filled glass of water can be described as either half full or half empty. The structure of American corporate law—partly enabling, partly mandatory in character—can be viewed in much the same way.”).

²¹⁷ Compare Easterbrook & Fischel, *supra* note 215, with William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 180-181 (1992) (critiquing the depiction of the corporation as simply a nexus of contracts, and proposing a new heuristic that focuses on the corporation as a “complex of relationships”).

²¹⁸ See, e.g., DEL. CODE ANN. tit. 8, §§ 141(b), (d), (f)-(i), 223(a), 228(a) (2011).

Corporation Act includes similar language, allowing corporations to opt out of provisions through the corporate charter and bylaws. The Model Act provides, for instance, that directors are elected by a plurality of shares entitled to vote “[u]nless otherwise provided in the articles of incorporation.”²¹⁹ It provides a default definition of quorum that applies “[u]nless the articles of incorporation or bylaws require a greater number.”²²⁰ Other provisions are structured to allow corporations to opt into (rather than out of) the MBCA provisions.²²¹ All establish provisions that are explicitly non-mandatory. Against this backdrop of largely default terms, litigation provisions should generally be permissible in the context of state corporate law.

The proposed framework does not avoid a debate over what aspects of corporate law are mandatory and what aspects provide defaults that can be contracted around. The mandatory/default divide is already a component of debates over the appropriate role of corporate law, and the choices embedded in corporate law are contested.²²² This approach does not support any one allocation among mandatory and default provisions. The move in the framework proposed here is to locate this debate over mandatory versus default terms within the substantive law and to have the procedural limits follow.

C. *Limits Rooted in Substantive Corporate Law*

The premise that the procedural provisions should not waive mandatory substantive law also provides a rationale for identifying limits to permissible litigation provisions. As noted above, much of the time, corporate law (especially Delaware corporate law) provides defaults rather than mandatory provisions. Some duties cannot be avoided by contract, however. A key example is the contrast between two fiduciary duties: the duty of care and the duty of loyalty. The duty of care is essentially the duty of directors not to be grossly negligent.²²³ The Delaware corporate code permits corporations to adopt provisions in their corporate charters insulating directors from monetary liability for duty of care violations.²²⁴ The framework proposed here would look to that substantive law and say that duty of care claims are waivable in

²¹⁹ MODEL BUS. CORP. ACT § 7.28(a) (AM. BAR ASS’N 2010).

²²⁰ *Id.* § 8.24(a); *see also id.* § 8.25 (“Unless this Act, the articles of incorporation or the bylaws provide otherwise, a board of directors may create one or more committees . . .”).

²²¹ *E.g.*, MODEL BUS. CORP. ACT § 8.06 (“The articles of incorporation may provide for staggering the terms of directors . . .”).

²²² *See, e.g.*, Coffee, *supra* note 216, at 1619 (“[A]nticontractarians believe that shareholders should not be permitted to opt out from the mandatory core of corporate law . . .”); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989) (examining justifications for mandatory provisions within a contractual structure).

²²³ *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

²²⁴ DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

these circumstances,²²⁵ so there is no bar to procedural provisions that alter or even effectively waive a shareholder's ability to pursue such claims.²²⁶

In contrast, the duty of loyalty is generally non-waivable, so suits vindicating it should not be eliminated. This type of fiduciary duty owed by directors to shareholders and the corporation is aimed at preventing directors from acting against the interests of the corporation or self-dealing in ways that benefit them personally. The provision mentioned above that limits monetary liability for a director's duty of care violations also prohibits "eliminat[ing] or limit[ing]" a director's liability for "any breach of the director's duty of loyalty to the corporation or its stockholders," for "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law," or for self-dealing transactions in which the director "derived an improper personal benefit."²²⁷ This non-waivability of the duty of loyalty is also expressed in the scope of permissible indemnification.²²⁸ The treatment in *corporate* law contrasts with that in other business forms. Partnerships, for instance, cannot waive the duty of loyalty in their partnership agreements under the Revised Uniform Partnership Act, but can limit it extensively.²²⁹

The framework here is concerned with waiver, but would not prevent procedural limits that fall short of waiver. The line between eliminating an action through procedural waiver and limiting it is not a bright one, but courts have had to engage in this kind of line drawing in other areas. One example is the question of whether arbitration permits "effective vindication" of statutory rights.²³⁰ The Supreme Court's opinion in *American Express Co. v. Italian*

²²⁵ Delaware law allows directors to be protected from monetary liability for duty of care violations, but this provision does not reach injunctive relief or a corporate *officer's* duty of care. *Id.*

²²⁶ Exculpation must be in the corporate charter rather than bylaws. *Id.* One implication of a framework that connects substantive and procedural law may be that procedural waiver of the duty of care should also be limited to charter provisions.

²²⁷ *Id.*

²²⁸ See DEL. CODE ANN. tit. 8, § 145(b) (providing that a corporation has the power to indemnify a person only "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation"); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[T]he fiduciary duty of loyalty . . . encompasses cases where the fiduciary fails to act in good faith.").

²²⁹ UNIF. P'SHIP ACT § 103(b) (UNIF. LAW COMM'N 2013) ("The partnership agreement may not . . . eliminate the duty of loyalty" but "may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable" or the partners may authorize or ratify an act that "otherwise would violate the duty of loyalty").

²³⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *id.* at 637 n.19 ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue

*Colors Restaurant*²³¹ held that class action waivers did not prevent effective vindication, given the availability of individual actions,²³² but nonetheless noted examples of provisions that would likely prevent effective vindication. It pointed to “a provision in an arbitration agreement forbidding the assertion of certain statutory rights” and “perhaps . . . filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”²³³

Waiver is the main concern. The strong version of this theory would not permit procedural waiver of a mandatory substantive term *regardless of consent*.²³⁴ Under this version, prohibitions of disloyal behavior, for instance, that did not allow contractual waiver of that requirement would also impliedly prohibit procedural limits that would prevent enforcement of the loyalty requirement. The nature of the consent would not matter. These types of provisions would simply be prohibited as a matter of public policy.

The semi-strong version of this theory would connect procedural waiver with consent. Procedural waiver of a mandatory substantive provision would not be banned outright, but would trigger a heightened consent requirement. It would not be enough to consent to the governance structure, rather than to specific bylaws—the type of consent that Delaware has relied on to justify treating unilateral bylaws as contracts that bind (past and future) shareholders.²³⁵ Instead consent would have to be express, in the sense that approval of the specific provision by a majority of shareholders would be required. Examples are amendments to existing corporate charter provisions or other provisions that have been made subject to shareholder approval.²³⁶

Alternatively, courts could implement a sliding scale—the more a litigation provision approached waiver, the more evidence of actual consent would be required. This sliding scale gives courts a difficult job, but it has advantages in such a complicated area. In part, it would allow courts to accommodate variation in the extent to which a litigation provision limits shareholder suits. Courts might, for instance, distinguish between a five-percent shareholder requirement for bringing a suit and a fifteen-percent requirement, calibrating the consent requirement in response.

statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”).

²³¹ 133 S. Ct. 2304 (2013).

²³² *Id.* at 2307 (“[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

²³³ *Id.* at 2310-11 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights.”)).

²³⁴ *Cf.* Dodge, *supra* note 76, at 787.

²³⁵ *E.g.*, *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995).

²³⁶ *See supra* Sections I.B, II.C.4.

Some precedent exists for this structure. A court that considered the validity of an arbitration bylaw took a similar approach. Because the arbitration provision forced exit from the court system, the court required actual consent to it as an exception to the usual rule.²³⁷ Indeed the 2015 Delaware fee-shifting legislation effectively imposes a heightened consent requirement for fee-shifting. A Delaware stock corporation may not impose fee shifting in its charter or bylaws, in part because of concerns with shareholder consent, but it may impose fee shifting in a shareholder agreement or other agreement signed by the shareholder against whom it is enforced.²³⁸

The relationship between mandatory/default and waiver/limits is summarized in the table below. The table also indicates the consequences for the validity of the litigation provision in each circumstance.

		Type of Substantive Provision	
		Default	Mandatory
Scope of Litigation Provision	Limit	Valid (even without express consent)	Valid (even without express consent)
	Waive	Valid (even without express consent)	Invalid (strong version) Valid only with express consent (semi-strong version)

Take as an example one of the fee-shifting bylaws put into place after *ATP Tour*. As drafted, these fee-shifting bylaws would be invalid because they effectively waive mandatory substantive rights and do so unilaterally. The mandatory substantive claim is the core duty of loyalty claim within the umbrella of state-law fiduciary duty suits. The clauses also waive rather than limit shareholder litigation. Not only are they one-sided “losing-plaintiffs pay” provisions, but they also shift fees if the suing shareholder did “not obtain a judgment on the merits that substantially achieves, in substance and amount,

²³⁷ See *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 158, 162-63 (3d Cir. 2009) (holding that a shareholder could not be “compelled to arbitrate her civil rights claims pursuant to corporate bylaws to which she has not explicitly assented”).

²³⁸ S.B. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015) (enacted) (amending DEL. CODE ANN. tit. 8, §§ 102, 109(b)); Del. S.B. 75, Synopsis §§ 2-5.

the full remedy sought,”²³⁹ so sometimes they amount to “winning-plaintiff pays” provisions. As one of the plaintiffs’ lawyers pointed out in challenging Hemispherx’s fee-shifting bylaw before the Chancery Court: “I’ve litigated many cases on behalf of stockholders in my 36 years at the bar, and very few result in a judgment on the merits. Fewer still a judgment on the merits for plaintiffs.”²⁴⁰ In this context, most cases resolve through settlement. Although usually considered a successful resolution, such a result would trigger the plaintiffs’ and counsel’s obligation to pay. Because of these aspects, they would eliminate shareholder litigation altogether.

Under the strong version of this framework, the language of these fee-shifting provisions would be invalid regardless of whether they were subject to shareholder approval (express consent) or unilaterally adopted by management. They would be in that relatively small category of litigation provisions prohibited as a matter of public policy.²⁴¹ The semi-strong version would allow the fix—supported in other contexts by shareholders and proxy advisory firms—of subjecting the provision to shareholder approval. Express consent would validate the waiver of mandatory provisions.

In sum, the validity of litigation provisions would depend on the answers to three questions: Is the substantive claim mandatory or default? Is the litigation provision a waiver? What was the nature of shareholder consent? This framework would prevent backdoor elimination of claims, but would also permit experimentation with litigation provisions that limit shareholder litigation. Most litigation provisions governing state corporate law claims would be valid, driven by the motivating principle that the procedural structure should follow the substantive one, which is mostly composed of default terms.

D. *Beyond State Corporate Law*

Suits concerning state corporate law are not the only type of shareholder suit. Securities class actions are a significant part of the landscape, and the debate over the function and efficacy of shareholder litigation is equally salient in the context of securities litigation.²⁴² State lawsuits and securities litigation are in some sense substitutes²⁴³ or complementary.²⁴⁴

²³⁹ See *Am. Spectrum Realty, Inc.*, *supra* note 16, at 18.

²⁴⁰ Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw, *supra* note 158, at 28.

²⁴¹ *Cf. Hamermesh*, *supra* note 14, at 171 (suggesting that existing fee-shifting bylaws are “a perhaps rare example of a provision that contravenes what might be called the constitutional limits of corporate law, in that it is not an appropriate subject for private ordering, at least in publicly traded companies”).

²⁴² See Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. REV. 913, 913-14 (2015).

²⁴³ Thompson & Sale, *supra* note 34, at 860-62.

Moreover, state lawsuits do not always drive the adoption of intracorporate contract procedure. In *Kastis v. Carter*, for instance, counsel for the defendant corporation explicitly said that the fee-shifting bylaw was adopted with securities class actions in mind.²⁴⁵ Most of the existing fee-shifting charter and bylaw provisions are quite broadly worded, reaching “any claim or counterclaim . . . against the Company and/or any Director, Officer, Employee or Affiliate.”²⁴⁶ The Hemispherx Biopharma fee-shifting bylaw specifically defined covered “internal matter[s]” to include both state corporate law claims and federal securities suits.²⁴⁷ The recent IPO of Alibaba was a high-profile example: Alibaba included a fee-shifting provision in its charter before going public.²⁴⁸ The provision reached all shareholder claims against the company.²⁴⁹

The approach detailed here—which locates the limits to procedural clauses in the content of the specific substantive law—could apply to litigation provisions that limit securities litigation by shareholders. Unlike in the state corporate law context described above, however, securities law does not have an enabling structure that would support the broad experimentation advocated

²⁴⁴ See, e.g., Erickson, *supra* note 33, at 51-52, 82 (“[T]he world of . . . corporate fraud litigation [is] a world in which the same allegations of corporate fraud can give rise to different lawsuits based on different theories of liability.”).

²⁴⁵ Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw, *supra* note 158, at 23 (“I think [plaintiffs will] find out [from discovery] that there’s securities litigation in the Eastern District of Pennsylvania which is really the central reason for adoption of the bylaw.”).

²⁴⁶ See, e.g., The LGL Grp., Inc., Current Report (Form 8-K), Exhibit 3.1: Amendment No. 1 to the Bylaws (June 17, 2014).

²⁴⁷ Hemispherx Biopharma, Inc., *supra* note 149, at 3 (defining covered “Internal Matter” as “(i) any derivative action or proceeding brought on behalf of or in the right of the Company, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Company to the Company or the Company’s security holders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, (iv) any action asserting a claim arising pursuant to any provision of the federal securities laws, and any regulation promulgated pursuant thereto, or (v) any action asserting a claim governed by what is known as the internal affairs doctrine”); see also Smart & Final Stores, Inc., Amendment No. 5 Registration Statement (Form S-1/A), Exhibit 3.1: Second Amended and Restated Certificate of Incorporation, at 10 (Sept. 19, 2014) (applying a fee-shifting provision to “any current or prior stockholder or anyone on their behalf” who initiated “any action, suit or proceeding, whether civil, criminal, administrative or investigative or asserts any claim or counterclaim” against the corporation or its officers, directors, etc.).

²⁴⁸ Alibaba Grp. Holding Ltd., Amendment No. 6 to Registration Statement (Form F-1), Exhibit 3.2: Amended and Restated Memorandum and Articles of Association § 173 (Sept. 5, 2014).

²⁴⁹ *Id.*

here.²⁵⁰ The concern in the securities litigation context is conflict with mandatory statutory provisions in the securities laws and the securities laws' explicit anti-waiver provisions.²⁵¹

Litigation provisions could easily be drafted to distinguish between securities and state corporate law claims in shareholder litigation. In fact, some existing clauses focus on claims based on the internal relations of a corporation, especially between directors and shareholders. Forum selection clauses are often explicitly limited. Chevron's forum selection bylaw, for instance, selected Delaware courts 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.²⁵²

A study of intracorporate forum selection provisions found that more than ninety percent use a similarly limited version.²⁵³ When the Chevron bylaw was tested in court, the Delaware Chancery Court found this litigation bylaw to be valid in part because it "only regulate[d] suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine" so "plainly relate[d]" to the "business of the corporation[s]," the "conduct of [their] affairs," and regulated the "rights or powers of [their] stockholders."²⁵⁴

Advice from some law firms reflects this limitation to state lawsuits. In a 2015 memorandum co-authored by a former Vice Chancellor of the Delaware Chancery Court, the law firm of Paul, Weiss recommended that "[a]n effective, enforceable forum selection clause should be drafted to apply only to disputes

²⁵⁰ See, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987) (invalidating provisions that denied shareholders the ability "to enforce the statutory rights created by" the 1933 Act); cf. John C. Coffee, Jr., *Forum Selection Clauses and the Market for Settlements*, N.Y. L.J., May 17, 2012, at 4.

²⁵¹ Securities Exchange Act § 29(a), 15 U.S.C. § 78cc(a) (2012) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void."); see also Securities Act of 1933 § 14, 15 U.S.C. § 77n (2012) (same).

²⁵² *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 942 (Del. Ch. 2013).

²⁵³ See Grundfest, *supra* note 25, at 380-81.

²⁵⁴ *Boilermakers*, 73 A.3d at 939.

arising out of the company's governance and internal affairs, of the sort governed by the law of the state in which the company is incorporated."²⁵⁵

Some existing fee-shifting provisions are also limited to state law claims. One such clause limited fee shifting to:

(1) any derivative action or proceeding brought on behalf of the Company, (2) any claim of breach of a fiduciary duty owed by any director, officer, employee or agent of the Company to the Company or its stockholders, (3) any action against the Company or any of its directors, officers, employees or agents arising pursuant to any provision of the General Corporation Law of the State of Delaware, our Amended and Restated Certificate of Incorporation or our Amended and Restated Bylaws, or (4) any action asserting a claim governed by the internal affairs doctrine²⁵⁶

The securities litigation example highlights the fact that the framework this Article proposes is in some sense *not* trans-substantive: it will vary depending on the substantive legal regime that is the subject of litigation.

IV. CALIBRATING SHAREHOLDER LITIGATION THROUGH TAILORED PROCEDURE

Building on the generally enabling structure of state corporate law, this final Part proposes more expansive use of tailored procedure to calibrate litigation over state corporate law claims. It outlines what tailored procedure could look like in the corporate context, with specific examples that draw on existing and proposed provisions in other contracting settings. It then turns to the two main aspects of implementation: encouraging the type of experimentation and calibration suggested here and establishing the limits on procedural waiver.

The underlying aspiration is to allow individual firms to act as “laboratories of corporate governance.”²⁵⁷ This aspiration is not unique to litigation bylaws; it justifies many decentralized, private ordering solutions. Its aim is efficient tailoring that reflects different corporate structures and preferences.²⁵⁸ If widespread enough, the use of these clauses also potentially generates information about the clauses that companies adopt and the effects of these clauses on other measures of performance or litigation risk.²⁵⁹

²⁵⁵ Richard A. Rosen & Stephen P. Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, 47 *Sec. Reg. & L. Rep.* (BNA) 285 (Feb. 8, 2015).

²⁵⁶ Townsquare Media, LLC, Registration Statement (Form S-1), at 36 (June 24, 2014) (providing for fee shifting in a pre-conversion, LLC to corporation, certificate of incorporation).

²⁵⁷ D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 *FORDHAM L. REV.* 125, 181 (2011).

²⁵⁸ *See id.* at 171.

²⁵⁹ *See id.*

Ample precedent exists for statutory and judicial adoption of procedural mechanisms to calibrate shareholder litigation. In the context of derivative suits, the demand requirement, bond requirements in some states, and requirements that plaintiffs plead “with particularity”²⁶⁰ are meant to calibrate the number and quality of these suits. In securities class actions, this role is played by such procedural features as heightened pleading requirements,²⁶¹ expanded safe harbors,²⁶² limits on the number of times a plaintiff can act as lead plaintiff,²⁶³ or delays of discovery.²⁶⁴ These are designed to tamp down what was seen as excessive litigation or as an attempt to sort meritorious suits from frivolous ones. The aspiration is that promoting creative tailoring of procedure through charters and bylaws would allow cheaper and better experimentation than the existing series of statutory and rule amendments.

The laboratory benefit is also a reason to prefer tailored procedure to other forms of contract procedure that select a court. Forum selection does not offer this opportunity for experimentation. Its main function in the context of corporate litigation is to consolidate disputes in one forum.

A. *Litigation Provisions*

Permitting tailored procedure responds in part to the intractability of the debate over shareholder litigation more generally. This response to shareholder litigation takes as its starting point and motivation the fact that such litigation is deeply contested and that little agreement exists about the optimal amount of or even, among critics, the problem with shareholder litigation. So, in a sense, the purpose here is not to dictate the use of particular provisions, but rather to suggest a framework for their use and to illustrate some of the potential terms within a broader universe of tailored procedure.

Outside of the corporate context, commentators have pointed to a broad range of possible and prior uses of these clauses to govern aspects of pretrial proceedings, trial, remedies, or appeals.²⁶⁵ In addition to clauses that designate the forum (court or arbitration) for dispute resolution, commercial and

²⁶⁰ See FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1.

²⁶¹ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 747 (1995) (codified at 15 U.S.C. § 78u-4(b)(2)(a) (2012)).

²⁶² 15 U.S.C. § 77z-2.

²⁶³ 15 U.S.C. § 77z-1(a)(3)(B)(vi) (“[A] person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.”).

²⁶⁴ 15 U.S.C. § 77z-1(b).

²⁶⁵ See, e.g., Bone, *supra* note 3, at 1331 (discussing three possible ways parties can control the procedural aspects of litigation).

consumer contracts modify existing procedural rules through jury waivers,²⁶⁶ contractual statutes of limitations,²⁶⁷ and damage limitations.²⁶⁸ Courts have enforced a broad range of agreements, including those that “waive hearsay objections, objections to authenticity of documents, objections to qualifications of expert witnesses, and invocations of privileges.”²⁶⁹

Provisions that alter discovery rules are one example of a potential type of litigation provision. Although many intracorporate suits are resolved early in the litigation process, the need for control of discovery is suggested by trends towards shareholder suits brought after a deal closes where the strategic tool of choice is discovery and discovery costs.²⁷⁰ In the corporate context, restrictions on the availability of information also may implicate shareholders’ rights to inspect corporate books and records, which can be a precursor to filing a suit and can sometimes give rise to separate litigation.²⁷¹

Discovery rules can be tailored *during* litigation. The Federal Rules of Civil Procedure reflect an increasingly permissive approach to party alteration of discovery rules. Rule 29, “Stipulations About Discovery Procedure,” specifically provides that parties may make stipulations concerning the

²⁶⁶ *E.g.*, PRACTICAL LAW COMMERCIAL, BOILERPLATE CLAUSES ¶ 21: WAIVER OF JURY TRIAL (2015), Practical Law 9-500-3942 (“Each party acknowledges and agrees that any controversy that may arise under this Agreement [or the other Transaction Documents] is likely to involve complicated and difficult issues and, therefore, each such party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement[, the other Transaction Documents] or the transactions contemplated hereby [or thereby].”).

²⁶⁷ PRACTICAL LAW COMMERCIAL, GENERAL CONTRACT CLAUSES: CONTRACTUAL STATUTE OF LIMITATIONS (2015), Practical Law 1-521-7560 (providing a model clause that limits the statute of limitations by indicating that parties “must file any Action arising directly or indirectly from [the agreement] no later than [some time period] after the claim has accrued” and that the parties waive rights to file such actions under any longer statute of limitations).

²⁶⁸ *See* Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 473 (2013). *But see* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389 (searching commercial contracts and reporting limited private ordering of procedure).

²⁶⁹ Noyes, *supra* note 4, at 607-08.

²⁷⁰ Grundfest & Savelle, *supra* note 25, at 337 (describing a trend towards post-closing litigation characterized by “extensive discovery, especially against the executives of the acquirer, who now control the purse strings” (quoting Boris Feldman, *Litigating Post-Close Merger Cases*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Nov. 9, 2012), <http://blogs.law.harvard.edu/corpgov/2012/11/09/litigating-post-close-merger-cases/> [<https://perma.cc/9AQW-J86V>])).

²⁷¹ *See, e.g.*, George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 275 (2014) (explaining that shareholder plaintiffs use books and records requests to develop information to meet heightened pleading standards in derivative litigation).

procedure for depositions and may modify “other procedures governing or limiting discovery.”²⁷² Successive amendments have been aimed at “giv[ing] greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery.”²⁷³ This permissive attitude to party tailoring during litigation carries over to specific discovery rules. Rules permit parties to stipulate to the timing and scope of initial disclosures,²⁷⁴ the timing of discovery more generally,²⁷⁵ disclosure requirements regarding expert witnesses,²⁷⁶ deposition procedures,²⁷⁷ number of interrogatories,²⁷⁸ and more. This built-in ability to alter discovery rules is not limited to federal court. State court provisions often mirror these requirements. Delaware Chancery Court, for instance, has a provision allowing the same sort of party stipulation about discovery procedure,²⁷⁹ as do other state courts’ codes of civil procedure.²⁸⁰

Alteration of discovery rules during litigation is widely permitted. This does not automatically permit ex ante agreement to alter discovery, but it does signal flexibility in this particular procedural area. Commentators writing about contract procedure more generally have pointed to ex ante agreements about discovery, and have suggested that courts are likely to uphold such limitations.²⁸¹

One of the few provisions to be tested in court limited the contracting parties’ inspection of books and records.²⁸² When its validity was challenged in

²⁷² FED. R. CIV. P. 29(b); Bone, *supra* note 3, at 1345.

²⁷³ FED. R. CIV. P. 29 advisory committee’s notes (1970 & 1993 amendments).

²⁷⁴ FED. R. CIV. P. 26(a)(1)(A) (requiring initial disclosure except “as otherwise stipulated”); *id.* 26(a)(1)(C) (providing a time limit for initial disclosures “unless a different time is set by stipulation”).

²⁷⁵ *Id.* 26(d)(1).

²⁷⁶ *Id.* 26(a)(2)(B)-(D).

²⁷⁷ *Id.* 30-31.

²⁷⁸ *Id.* 33.

²⁷⁹ See DEL. CH. CT. R. 29 (“Stipulations regarding discovery procedure. Unless the Court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these Rules for other methods of discovery.”).

²⁸⁰ See, e.g., TENN. R. CIV. P. 29; UTAH R. CIV. P. 29.

²⁸¹ Bone, *supra* note 3, at 1345-47.

²⁸² The provision stated that “[t]he producer shall have the right, at its sole cost and expense, through any national firm of certified public accountants . . . , at all reasonable times during business hours, to inspect and audit and make extracts from said books and records and supporting documents and vouchers with reference to all such gross receipts and expenses and all other matters entering into the computations to be shown on the statements to be furnished by the distributor as hereinafter provided, but only insofar as such books, records, documents and vouchers relate to the distribution of said photoplay.” Elliot-

Elliot-McGowan Productions v. Republic Productions, Inc., the court treated the term as an ex ante contractual agreement to alter Rule 34 discovery rights about document production.²⁸³ It reasoned that the agreement provided a “reasonable” discovery substitute and could be upheld, particularly given prior decisions upholding private agreements that shortened the statute of limitations and selected the forum.²⁸⁴

The focus on discovery is not intended as a limitation. Some other provisions have precedent in corporate organizational documents. The Hemispherx Biopharma bylaw, for instance, had other components besides fee shifting.²⁸⁵ In particular, it required owners of less than five percent of outstanding common stock to post a bond before bringing suit.²⁸⁶ The bylaw effectively imported requirements that exist in some state law, notably New York corporate law.²⁸⁷ This is not to endorse the Hemispherx bylaw as a whole. When bundled with aggressive fee shifting, it effectively chills shareholder litigation altogether, highlighting the importance of looking at the whole suite of litigation provisions to determine its effect.²⁸⁸ However, it illustrates another approach to tailoring shareholder litigation.

Within the limits detailed above, corporate organizational documents might require ownership percentages for bringing suit, implement contemporaneous ownership requirements, or require the posting of a bond.²⁸⁹ Provisions might

McGowan Prods. v. Republic Prods., Inc., 145 F. Supp. 48, 50 (S.D.N.Y. 1956). It also limited the time period during which such claims and inspection could be made. *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Hemispherx Biopharma, Inc., *supra* note 149.

²⁸⁶ *Id.* at 3 (“Unless the Claimant holds and continues to hold five percent or more of the Company’s outstanding common stock or hold voting trust certificates or a beneficial interest in shares representing five percent or more of the Company’s outstanding common stock, the Company shall be entitled at any stage of the proceedings before final judgment to require the Claimant to provide surety for the reasonable expenses, including attorney’s fees, which may be incurred by the Company in connection with such action and by the other parties defendant in connection therewith for which the Company may become liable.”).

²⁸⁷ N.Y. BUS. CORP. LAW § 627 (McKinney 2003); *see also* Geis, *supra* note 271, at 308 n.234 (indicating that most jurisdictions do not require an explicit ownership threshold to bring a shareholder derivative suit, but that exceptions exist, including New York).

²⁸⁸ *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (“We . . . note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”).

²⁸⁹ *See* Malaika M. Eaton et al., *The Continuous Ownership Requirement in Shareholder Derivative Litigation: Endorsing a Common Sense Application of Standing and Choice-of-*

require prerequisites to filing derivative suits, buying time for plaintiffs' law firms to make requests for a company's books and records. The idea would be to promote the stronger cases and support a set of plaintiffs' firms who may act as effective gatekeepers.

Fee shifting itself—in a different form than it currently exists—might also be an area of experimentation, albeit outside of Delaware stock corporations, given Delaware statutory limits.²⁹⁰ For instance, some commentators have suggested that intracorporate fee-shifting provisions could be triggered by shareholder derivative suits brought “without reasonable cause or for an improper purpose.”²⁹¹ This language mirrors the provision of the Model Business Corporation Act, adopted by about half the states, which permits the court to order fee shifting in those circumstances.²⁹² In sum, many proposals for reducing the costs of shareholder litigation and sorting meritorious from non-meritorious suits could be implemented through charter or bylaw provisions.

B. *Implementation*

Rooting litigation provisions in the mandatory/default structure of substantive law has two consequences. The predominance of default terms that can be freely contracted around would result in a corresponding broad range of procedural contracting. At the same time, enforcement of the few mandatory terms could not be eliminated. This Section examines the implementation of a framework that addresses both of these aspects, encouraging experimentation while also preventing procedural waiver of mandatory terms.

1. Encouraging Experimentation

Uncertainties about the validity of litigation provisions and concern that shareholders will react negatively have been barriers to adoption. Some evidence for this can be seen in law firm memoranda. In the context of exclusive forum bylaws, a law firm memorandum from May 2014 indicated that “[m]any public companies . . . determined to take a wait-and-see approach, in order to assess whether non-Delaware courts would enforce the bylaw and whether companies that adopted the bylaw received negative investor feedback in the 2014 proxy season or otherwise.”²⁹³ Once that information was available, the law firm recommended that companies seriously consider adopting exclusive forum bylaws, pointing to relatively mild shareholder

Law Principles, 47 WILLAMETTE L. REV. 1, 5-14 (2010) (describing jurisdictional differences in ownership requirements for bringing shareholder derivative suits).

²⁹⁰ DEL. CODE ANN. tit. 8, § 102(f) (2015).

²⁹¹ See Geis, *supra* note 271, at 309.

²⁹² *Id.* at 308 & n.235 (citing MODEL BUS. CORP. ACT § 7.46(2) (AM. BAR ASS'N 2010)).

²⁹³ SULLIVAN & CROMWELL LLP, *supra* note 44, at 1.

reaction and to non-Delaware court decisions upholding these clauses.²⁹⁴ Similar concerns prompted defense counsel's hesitation to endorse fee-shifting bylaws. Law firms cautioned their clients of potential conflict with proxy advisory firms and shareholder groups.²⁹⁵

To a certain extent, uncertainty about the validity of bylaws—the first barrier to adoption—may be temporary. Courts may issue binding decisions in the future. The relevant court will likely be a Delaware court, particularly if these provisions are bundled with exclusive forum provisions.²⁹⁶ Alternatively, legislation could provide certainty about the facial validity of these provisions. A legislative approach that would be consistent with the enabling structure of Delaware corporate law and that would eliminate uncertainty about the validity of certain types of litigation provisions would be to include litigation clauses on the statutory list of permissible charter or bylaw provisions. The Delaware legislation enacted in the wake of *ATP Tour* takes this approach for one category of clauses. It provides a safe harbor for clauses that select Delaware courts as the exclusive forum for disputes over internal corporate affairs.²⁹⁷

Apart from uncertain validity, a significant barrier to increased experimentation is opposition by shareholder groups and proxy advisory firms.²⁹⁸ In fact, any discussion about corporate contract procedure has the potential to be as polarized as the debates have been in the context of other statutory and judicial limits on shareholder litigation. Adoption of fee-shifting provisions triggered lobbying and eventually legislation in Delaware to ban them from stock companies.²⁹⁹ And corporations have sometimes decided not to enforce such a bylaw in particular cases, as in the case of Hemispherx Biopharma.³⁰⁰ Forum selection clauses sometimes met a similar fate before

²⁹⁴ *Id.*

²⁹⁵ See Press Release, Sidley Austin LLP, The Elusive Promise of Reducing Shareholder Litigation Incentives Through Corporate Bylaws 1 (June 4, 2011); Skadden, Arps, Slate, Meagher & Flom LLP, *supra* note 165, at 2.

²⁹⁶ See *supra* Section II.B.1 (examining how exclusive forum provisions protect the enforcement of procedural provisions).

²⁹⁷ DEL. CODE ANN. tit. 8, § 115 (2015); see also Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 173 (2011) (proposing a statute enabling, but not mandating, forum selection in corporate charters).

²⁹⁸ See *supra* Section II.C.3.

²⁹⁹ Act to Amend Title 8 of the Delaware Code Relating to General Corporation Law, S.B. 236, 147th Gen. Assemb., 2d Reg. Sess. (Del. 2014).

³⁰⁰ Letter to Chancellor Bouchard, *supra* note 160 (stating that the parties had agreed “that the bylaw will have no application to this litigation, and [Hemispherx] will not assert the bylaw as a basis for fee-shifting in this case”).

they became widely adopted, as some companies withdrew them rather than have an extended fight.³⁰¹

One approach to reducing shareholder opposition would be to enhance shareholder participation in bylaw production.³⁰² Delaware law provides shareholders with power over bylaws, allowing them to adopt, amend or appeal them by majority vote.³⁰³ Directors cannot divest shareholders of their power over the bylaws and it is in this sense shared.³⁰⁴ Nonetheless, practical limits to the shareholders' exercise of this power exist.³⁰⁵ Increased shareholder participation could be achieved case-by-case in a negotiated solution. Companies sometimes choose to subject some of the exclusive forum selection bylaws to shareholder approval, even absent such a requirement.³⁰⁶

Shareholder participation in bylaws might also be the aim of a broader set of reforms. The fate of shareholder proposals to adopt or amend litigation bylaws turns in part on the SEC, which polices whether companies must include shareholder proposals on corporate proxy statements.³⁰⁷ Corporations that wish to exclude a shareholder proposal must contact the SEC Division of Corporation Finance and argue that the particular proposal fits into one of the exceptions permitted by SEC rules.³⁰⁸ If the SEC staff determines not to take action against the corporation for excluding the shareholder proposal, it issues

³⁰¹ See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 945 (Del. Ch. 2013) (discussing how ten of twelve corporations sued by stockholders due to their forum selection clauses withdrew the provision rather than proceeding with the litigation).

³⁰² Cf. Smith et al., *supra* note 257, at 181 (proposing several ways to enhance shareholder participation in bylaw production). Although considered here in the context of implementation, enhanced shareholder bylaw participation would also address some concerns about robust contracting and consent. *Id.* at 139 (“[B]ylaws serve as a contracting platform for shareholders, providing a logical, accessible channel for private ordering in public corporations.”).

³⁰³ DEL. CODE ANN. tit. 8, § 109(a) (2011).

³⁰⁴ *Id.*

³⁰⁵ Smith et al., *supra* note 257, at 140 (detailing limits on shareholder power to pass bylaws).

³⁰⁶ Grundfest, *supra* note 25, at 342; cf. *Iron Mountain Inc.*, SEC No-Action Letter, 2014 WL 6449648, Incoming Letter, at 8 (Nov. 17, 2014) (“The stockholders of IMI will be separately and specifically asked . . . to consider and vote upon a proposal to ratify and approve the Exclusive Forum Bylaw [T]he proposal . . . is [for] an advisory, non-binding vote, [but] if the stockholders of IMI do not ratify and approve the Exclusive Forum Bylaw, then IMI REIT’s board of directors intends to . . . eliminate the Exclusive Forum Bylaw.”).

³⁰⁷ 15 U.S.C. § 78n(a) (2012).

³⁰⁸ SEC Rule 14a-8, 17 C.F.R. § 240.14a-8 (2015).

a “no-action” letter.³⁰⁹ Of most relevance here is that a shareholder proposal may be excluded under the rules when it “relat[es] to a company’s ordinary business operations”³¹⁰ and lacks “significant policy, economic or other implications.”³¹¹ The rationale is that these proposals should not interfere with management functions.³¹²

Precedent exists for allowing shareholders to include proposals to amend corporate litigation bylaws in proxy statements. A shareholder proposal to amend a litigation bylaw was the subject of the SEC’s no-action process in 2012.³¹³ The board of directors of Roper Industries had unilaterally adopted an exclusive forum bylaw designating Delaware Chancery Court as the exclusive forum for state-law intracorporate claims.³¹⁴ The shareholder, an index fund, wanted to include a proposal in the company’s proxy statement requesting that the board repeal the company’s exclusive forum bylaw.³¹⁵ The company

³⁰⁹ See *id.*; Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 938-39 (1998).

³¹⁰ 17 C.F.R. § 240.14a-8(i)(7).

³¹¹ Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12,999, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976); Div. of Corp. Fin., *Staff Legal Bulletin No. 14C*, U.S. SEC. & EXCHANGE COMMISSION (June 28, 2005), <https://www.sec.gov/interps/legal/cfslb14c.htm> [<https://perma.cc/3FXX-XDY5>] (allowing companies to exclude shareholder proposals that deal with ordinary business operations unless they implicate “significant social policy” issues that “transcend the day-to-day business matters” of the company).

³¹² Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40,018, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998) (describing the underlying policy of the ordinary business exclusion as “consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting”).

³¹³ See, e.g., Roper Indust., Inc., SEC No-Action Letter, 2012 WL 417665, at 2 (Mar. 29, 2012) [hereinafter Roper SEC No-Action Letter].

³¹⁴ The relevant bylaw read:

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 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.

Id. at 43-44 (quoting Section 12.01 of the Roper Industries bylaws, adopted March 2011).

³¹⁵ *Id.* at 26 (providing a shareholder proposal asking “the board of directors to repeal the Company’s ‘exclusive forum’ bylaw, which was unilaterally adopted by the board of directors and which generally requires shareholders to bring certain types of legal actions only in Delaware, the state where the Company is incorporated”).

argued that this proposal could be excluded based on the “ordinary business” exception because it interfered in the company’s management of litigation strategy, micromanaged decisions about administrative expenses, and interfered in how the company complied with the law.³¹⁶ The company also argued that no significant policy issue was implicated; the use of exclusive forum clauses simply did not reach what it characterized as a high bar of public interest.³¹⁷

SEC staff, however, rejected the company’s argument that the bylaw related to the company’s ordinary business operations. It did not explain the underlying rationale for its decision,³¹⁸ leaving open several arguments. Shareholder litigation against the company might not be the type of “ordinary business” litigation strategy that is handled by management. Or litigation provisions might be within the definition of ordinary business, but be included in proxy statements because they implicate currently debated policy issues. If anything, the argument for the latter has grown stronger with the emergence of the fee-shifting provisions and the potential move—advocated here—into a broader domain of intracorporate litigation provisions.³¹⁹ The history of the emergence of litigation provisions in corporate charters and bylaws detailed above supports the conclusion that the use of these bylaws reaches significant levels of public debate, so shareholder proposals concerning them should be allowed.

Some commentators have suggested that one way to promote shareholder participation in bylaw production would be for the SEC to eliminate this restriction altogether, allowing shareholders to make proposals that address “ordinary business operations.”³²⁰ This change has the disadvantage of requiring SEC rulemaking but, particularly if litigation bylaws became more common, would prevent the bylaws from becoming run-of-the-mill “ordinary business” in which shareholders had no say.

In sum, uncertain validity and shareholder reluctance currently limit implementation and experimentation. More robust shareholder participation in bylaw production might lessen opposition and enable creative control of litigation through contractual terms.

³¹⁶ *Id.* at 5 (providing a letter from Joseph Rinaldi of Davis Polk to the SEC’s Office of Chief Counsel).

³¹⁷ *Id.* at 6, 21 (arguing that a topic must have “emerged as a consistent topic of widespread public debate” to qualify as a significant policy issue (citing Comcast Corp., SEC No-Action Letter, 2011 WL 87740 (Feb. 15, 2011))).

³¹⁸ The SEC’s response letter said only that “[w]e are unable to conclude that Roper has met its burden of establishing that it may exclude the proposal under rule 14a-8(i)(7) as a matter relating to the company’s ordinary business operations. Accordingly, we do not believe that Roper may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(7).” Roper SEC No-Action Letter, *supra* note 313, at 2.

³¹⁹ See *supra* Part II; Winship, *supra* note 242.

³²⁰ See Smith et al., *supra* note 257, at 181.

2. Preventing Procedural Waiver

The second part of implementation is the non-waiver of terms that are mandatory in substantive law. This last Section points out how Delaware courts could implement such a limit, even within existing corporate law.

For Delaware courts, the main way to implement this limit, given the decisions in *ATP Tour* and *Boilermakers*, would be to consider procedural waiver to be an improper purpose for bylaws. In *Boilermakers* and *ATP Tour*, the Delaware courts considered only the facial validity of litigation bylaws.³²¹ Both cases pointed to a second analytical step: the court must determine whether a facially valid litigation bylaw should be enforced as applied in a particular case.³²² The courts reserve the possibility of invalidating specific provisions on equitable grounds, a so-called “*Schnell* claim” under Delaware law.³²³ As the Delaware Supreme Court pointed out in *ATP Tour*, “[w]hether the specific ATP fee-shifting bylaw is enforceable . . . depends on the manner in which it was adopted and the circumstances under which it was invoked. . . . Legally permissible bylaws adopted for an improper purpose are unenforceable in equity.”³²⁴

In the context of corporate contract procedure, the claim would be that a litigation bylaw was invalid because adopted for an improper or inequitable purpose.³²⁵ The Delaware Supreme Court said in *ATP Tour* that: “The intent to deter litigation . . . is not invariably an improper purpose. Fee-shifting provisions, by their nature, deter litigation. Because fee-shifting provisions are not *per se* invalid, an intent to deter litigation would not necessarily render the bylaw unenforceable in equity.”³²⁶ Although signaling that deterring litigation is a proper purpose for bylaws under Delaware law, Delaware courts could still draw a line between limiting and eliminating shareholder litigation altogether, considering the latter to be improper.³²⁷

³²¹ See *ATP Tour*, 91 A.3d 554, 558 (Del. 2014); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938 (Del. Ch. 2013).

³²² *ATP Tour*, 91 A.3d at 559; *Boilermakers*, 73 A.3d at 349.

³²³ The landmark Delaware decision that applies to bylaws more generally is *Schnell v. Chris-Craft Industries, Inc.*, which directed that “inequitable action does not become permissible simply because it is legally possible.” 285 A.2d 437, 439 (Del. 1971); see also *Black v. Hollinger Int’l, Inc.*, 872 A.2d 559, 564 (Del. 2005) (affirming finding that certain bylaw amendments were “invalid in equity and of no force and effect, because they had been adopted for an inequitable purpose and had an inequitable effect”).

³²⁴ *ATP Tour*, 91 A.3d at 558-60.

³²⁵ *Id.* at 558 (“Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.”); Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw, *supra* note 158, at 21 (Chancellor Bouchard).

³²⁶ *ATP Tour*, 91 A.3d at 560.

³²⁷ See Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 329 (2015) (“[A] significant issue exists as to whether a bylaw,

Relying on as-applied equitable review is not a perfect fix. The Delaware courts point to this equitable evaluation as an important shareholder protection.³²⁸ Reaching the issue may be difficult, however. Barriers may be particularly high when a litigation provision sets up a Catch-22 where the litigants and lawyers may be liable for costs if they lose the argument about the *Schnell* claim itself, and if the *Schnell* claim requires discovery.³²⁹

CONCLUSION

Although private parties enter *ex ante* agreements about the procedural rules that govern disputes among the contracting parties, contract procedure long seemed irrelevant to corporate organizational documents. This has changed. This Article chronicles the emergence of corporate contract procedure as a distinctive legal phenomenon and the transition from choice of forum to the tailoring of particular aspects of litigation. It also identifies a universe of contractual provisions that can and should be used in corporate charters and bylaws to tailor shareholder litigation.

Use of tailored procedure raises important structural questions. Should there be any limit to the procedural provisions to which parties can contract? If so, where should courts look for limits to permissible procedural contracting? This Article proposes a framework for answering these broad questions. It develops a theory of corporate contract procedure that looks to the structure and content of substantive corporate law to define the reach of procedural terms. In the context of state corporate law, the connection to substantive provisions supports the use of tailored procedure. A default approach to procedural rules mimics the enabling structure of U.S. corporate law. The proposed framework also provides safeguards by preventing the use of procedural terms to limit substantive liability in a way that would be impermissible under substantive law.

unilaterally adopted by a board, which eliminates the equitable standing of a stockholder to sue derivatively on behalf of a corporation is *per se* inequitable under an *ATP* analysis.”).

³²⁸ See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d at 954 (“And as with all exercises of fiduciary authority, the real world application of a forum selection bylaw can be challenged as an inequitable breach of fiduciary duty.”).

³²⁹ See Transcript of Scheduling Conference and Discussion Concerning Amendment of Bylaw, *supra* note 158, at 21-23 (documenting Chancellor Bouchard’s concern on this matter); *supra* Section II.C.2.