BARGAINING FOR EXCLUSIVE STATE COURT JURISDICTION

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ABSTRACT

Modern jurisdiction of courts is overlapping and multiple, crossing court systems and state and national barriers. Nonetheless, ideas of territorial jurisdiction and "local" law persist, including in the ubiquitous examples of corporate law and insurance. Indeed, states have sometimes tried to "localize" their law, keeping cases within state territory. This Article tells the story of the collision between traditional territorial jurisdiction and the new norm of complex intersystemic jurisdiction. It argues that these can coexist—albeit imperfectly—only through negotiated jurisdiction.

The Article demonstrates that states must negotiate to keep their cases. Full faith and credit requirements and constitutional grants of jurisdiction to federal courts prevent a state from excluding other state and federal courts. These structural aspects of federalism force stakeholders to negotiate with other actors for control of the forum for domestic law. They must negotiate with Congress or other states, with judges from other jurisdictions, or with private parties. In other words, stakeholders who want to "localize" an action in a world of multiplicity and overlap must bargain for exclusive jurisdiction.

The Article's framework of constitutional limits and bargaining strategies provides a missing piece to a pressing current debate. U.S. corporate law is traditionally state-based, rooted in the concept of the corporation as a creature of state law. In fact, Delaware markets its corporate law as a bundle of substantive provisions and expert decisionmakers. Litigation patterns have put pressure on Delaware, however, with suits applying Delaware corporate law increasingly filed out of state. This Article concludes that, like other states, Delaware cannot unilaterally bundle law and forum and is limited to the negotiation regime described here.

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INTRODUCTION

Imagine a state statute that both creates a cause of action and provides that "the courts of this state have exclusive jurisdiction" over such actions. The statute is designed to keep state law in that state's courts—to "localize" an action. States have used a mixture of techniques to do exactly that, and have passed statutes explicitly providing for exclusive jurisdiction in their courts over workers' compensation claims,[1] over aspects of insurer insolvencies,[2] and over a particular type of trust.[3]

Such assertions that a category of law should be adjudicated locally collide with the structure of much of modern jurisdiction that allows for, and sometimes even mandates, multiple and overlapping courts. In the context of U.S. federalism, constitutional provisions disable a state from establishing exclusive jurisdiction in its courts. A state cannot keep federal courts from adjudicating its law, primarily because this would be inconsistent with constitutional grants of jurisdiction to the federal courts. Nor can it exclude other states because of full faith and credit requirements.

Given the constitutional limits, what can a state do if it wants to keep its

1. *See generally* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965) (discussing the Workmen's Compensation Act of Georgia, GA. CODE ANN. §§ 34-9-1 to -421 (2012)).

2. *See, e.g.*, ALA. CODE § 27-42-8 (1975) (asserting exclusive jurisdiction over claims against the Insurance Guaranty Association).

3. *See, e.g.*, ALASKA STAT. § 34.40.110 (2012) (asserting exclusive jurisdiction over claims based on transfers to domestic asset protection trusts).

cases in its courts? This Article concludes that state stakeholders are forced to bargain for exclusive state court jurisdiction with other actors, including Congress, other state legislatures, judges, and private parties. In other words, in a world of multiplicity and overlap, a state that wants to make an action local must negotiate for exclusivity.

This Article offers new insight into the relationship between traditional and modern concepts of jurisdiction, contributing to the growing literature about intersystemic governance.[4] Whereas much of the literature has been dedicated to mapping a new jurisdictional landscape and challenging concepts of territoriality,[5] this Article identifies when jurisdictional localism and policies driven by it persist, including in the ubiquitous examples of corporate law and insurance, and examines how these assertions of exclusivity interact with modern jurisdiction. The concept of negotiated jurisdiction introduced here might thus be seen, in Judith Resnik's framework, as analyzing what happens when policies driven by categorical federalism (the idea that a legal area is "truly local" or "truly national") meet multifaceted federalism, which acknowledges jurisdictional multiplicity and overlap.[6] These can coexist only through negotiated jurisdiction.

U.S. corporate law is a battleground in this conflict over jurisdiction. The law governing the internal affairs of corporations has often been treated as a category of "truly local" law, with roots in a view of the corporation as a "creature[] of state law."[7] Harkening back to historical conventions that both the source of corporate law and the adjudicator should be state-based,[8] Delaware has taken steps to keep its cases in its state courts. Indeed, Delaware

4. Professor Robert Ahdieh has identified a diverse literature dedicated to the complexities of modern jurisdiction and challenging the idea that jurisdiction can be defined territorially or formally. *See, e.g.*, Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 5 (2007) (analyzing four strands that run throughout the writing in varied domestic and transnational legal areas).

5. *See, e.g.*, Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (mapping a system of "redundancy and indirection" in the context of criminal law); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619 (2001) (challenging a categorical description of jurisdiction and applying it to family law); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004) (questioning territorial sovereignty in the international system).

6. Resnik, *supra* note 5, at 623-24 (rejecting categorical federalism, "the mode of analysis for which the phrases 'truly national' and 'truly local' are touchstones" in favor of a concept of "multi-faceted federalism").

7. Cort v. Ash, 422 U.S. 66, 84 (1975); *see also* CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987) ("[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

8. *See CTS Corp.*, 481 U.S. at 78 (noting that the "internal affairs doctrine," which now calls for the application of the law of the state of incorporation to internal corporate relationships, once also mandated a forum in the state of incorporation).

markets its corporate law as a bundle of substantive provisions and expert decisionmakers.[9]

Territorial jurisdiction and multifaceted jurisdiction are on a collision course in Delaware, however. Recent litigation patterns have put pressure on Delaware's ability to deliver on its promise of a bundled product of law and forum. Commentators have noted that suits applying Delaware corporate law are increasingly filed out of state,[10] triggering steps by Delaware's courts and legislature to maintain state primacy in deciding state corporate law.[11] In response, legal scholars have become more attentive to Delaware's power to control where its law is adjudicated. To date, commentators have narrowly focused on multijurisdictional deal litigation,[12] and many have zeroed in on a single private contractual response.[13] In contrast, this Article puts Delaware in the larger context of states' attempts to localize their law, and analyzes the negotiation that must take place for a state to approximate exclusive jurisdiction within a complex system. An important implication of this Article is that Delaware advertises something it cannot guarantee. Like other states, Delaware cannot unilaterally enforce the bundling of its corporate law and forum, and is limited to the negotiation regime described here.

The Article begins in Part I by identifying states' attempts to keep the adjudication of state law in their courts. It introduces the example of corporate

9. *See, e.g.*, LEWIS S. BLACK, JR., DEL. DEP'T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007) (stating that "the source of Delaware's prestige" is not only its corporate statute, but also the Delaware courts, "and in particular, Delaware's highly respected corporate court, the Court of Chancery"); Delaware Division of Corporations, *Division of Corporations*, STATE OF DELAWARE, http://corp.delaware.gov/ ("Businesses choose Delaware because we provide a complete package of incorporation services including modern and flexible corporate laws, our highly-respected Court of Chancery, a business-friendly State Government, and the customer service oriented Staff of the Delaware Division of Corporations.").

10. *See* John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1346-47 (2012) [hereinafter Armour, Black & Cheffins, *Delaware's Balancing Act*]; John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012) [hereinafter Armour, Black & Cheffins, *Is Delaware Losing its Cases?*].

11. *See, e.g.*, Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009).

12. In this form of litigation, different groups of shareholders sue in several jurisdictions claiming to represent the same shareholder class and challenging the same corporate deal. Multijurisdictional deal litigation in state courts has become common and forces courts to decide whether to direct litigation to the state that created the cause of action.

13. *See, e.g.*, Ted Mirvis, *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A J. 17 (2007); Joseph A. Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches*, 2 (Rock Center for Corporate Governance at Stanford University Working Paper No. 91, 2010), *available at* http://ssrn.com/abstract=1690561.

law, outlining efforts by Delaware stakeholders to keep corporate law cases in state. It then describes explicit statutory assertions of exclusive jurisdiction. Part II establishes the outer limits of a state's ability to localize its law. It shows that states cannot divest federal courts of the power to decide state law, primarily because of constitutional grants of jurisdiction. It then turns to the horizontal context and the full faith and credit requirements that limit a state's power to make its forum exclusive as to other states.

Part III introduces negotiated jurisdiction as a way to resolve the conflict between state attempts to localize law, described in Part I, and the constitutional provisions that mandate multiplicity, described in Part II. Part III identifies the strategies available to a state that wants to assert exclusive jurisdiction, given these constitutional limits. It argues that state stakeholders may participate in federal lawmaking with the aim of getting a rule that favors the home state and binds all the other states. They may negotiate horizontally with other states to promulgate a uniform law and then encourage domestic enactment of that law. Judges may negotiate case-by-case with judges from elsewhere, or act alone and then rely on comity and reciprocity. Stakeholders may encourage private actors to choose the state's forum for adjudication of that state's laws. Or stakeholders and courts may adopt split-authority approaches that enable exclusive jurisdiction over component legal questions or stages of the litigation, rather than over the whole suit. Part III concludes by revisiting concrete examples of combined strategies that states must use if they want to approximate exclusive state court jurisdiction. In sum, it builds a model for the type of negotiated jurisdiction needed for modern and traditional jurisdictional frameworks to coexist.

I. STATES' ATTEMPTS TO LOCALIZE THEIR LAW

Claims to local law persist. In particular, states have attempted to keep adjudication of state law in state courts, as this Part demonstrates. Corporate law is the starting point, in part because litigation trends in Delaware have provoked a dramatic collision between claims to localized law and the realities of multiple jurisdiction. In response, Delaware stakeholders have, in various forms, asserted that the State should provide both law and forum for certain corporate claims. This Part tells this story, putting it into the context of shifting views of how local corporate law is. It then looks beyond Delaware to identify explicit statutory claims of exclusive state court jurisdiction, including in the context of insurance and trust law.

A. *The Unbundling of Delaware Corporate Law*

Corporate law is a central example of persistent local law. It has

traditionally been state-based in the United States, and the Supreme Court has repeatedly asserted that "[c]orporations are creatures of state law."[14] Courts historically treated corporate law as local for both the substantive law[15] and the forum for disputes over corporate governance—roughly the relationships among shareholders, officers, directors and the corporation. That is, for firms incorporated in Delaware, Delaware law applied to governance disputes and a Delaware court would apply it. The internal affairs doctrine was the mechanism for keeping domestic corporate law in the originating state. For instance, a New York court faced with a dispute over the governance of a Delaware corporation would have declined to hear it based on the internal affairs doctrine, which was considered to be jurisdictional.[16]

In contrast, courts now treat the internal affairs doctrine as governing only choice of law.[17] The modern doctrine does not dictate where a dispute is heard, but just means that a dispute over, for instance, the voting rights of shareholders in a corporation incorporated in Delaware would be governed by

14. Cort v. Ash, 422 U.S. 66, 84 (1975); *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) ("Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it . . . ."); CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987) ("[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

15. The source of substantive legal provisions, and in particular whether they should be state or federal law, has spawned a huge literature and much debate. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 6 (1993); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law,* REG. 26 (Spring 2003). Although this Article is concerned with the forum as separate, though related, to provision of substantive law, it is worth noting that the description of substantive corporate law as local is increasingly inaccurate. Federal regulation of corporate governance abounds, and might easily be framed as undermining any claims that corporate law is "truly local" as a descriptive matter. One might undertake for corporate law an analysis similar to Judith Resnik's, which debunked the description of family law as categorically local. *See* Resnik, *supra* note 5; *see also* Verity Winship, *Teaching Federal Corporate Law*, 8 J. Bus. & Tech. L. (forthcoming 2013) (identifying categories of corporate governance that are not controlled by state law or federal securities regulation).

16. *See, e.g.*, Wilkins v. Thorne, 60 Md. 253 (1883) ("The corporation was created under the laws of another state, and it seems to us that all such controversies [relating to the internal management of the corporation] must be determined by the courts of the State by which the corporation was created."); N. State Copper & Gold Mining Co. v. Field, 20 A. 1039, 1040 (Md. 1885) ("Our courts possess no visitorial power over [the internal affairs of a foreign corporation], and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct, nor can they exercise authority over the corporate functions, the by-laws, nor the relations between the corporation and its members, arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation."); Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 545-48 & n.79 (2005) (noting that the internal affairs doctrine was considered to be jurisdictional into the twentieth century).

17. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971) (limiting the doctrine to choice of applicable law).

Delaware law even if the suit took place in New York courts.[18] The choice of the state of incorporation might give access to a particular forum: a corporation can be sued in its state of incorporation[19] and personal jurisdiction over officers and directors of Delaware corporations can often be based on implied consent statutes.[20] It does not, however, give priority to that forum. Instead, a suit under Delaware corporate law may be brought anywhere jurisdictional requirements, including personal jurisdiction, are met. This doctrinal change indicates a shift away from viewing corporate law as categorically local, or local by its very nature.

Despite changes in the underlying doctrine, Delaware stakeholders have continued to draw this connection between law and forum. Delaware advertises, and commentators argue, that Delaware successfully attracts incorporations both because of the content of its corporate law and because of its expert, specialized courts and judges. This link between the content of the law and the forum in which it is developed and adjudicated is particularly important in this area of common law characterized by flexible standards and fluid development.[21]

For a long time, these claims that the state of incorporation should provide both law and the exclusive forum were not tested. As a descriptive matter, cases concerning Delaware corporate law were mostly filed in Delaware. Recent litigation patterns, however, have put pressure on this arrangement. Delaware corporate law is increasingly litigated in a non-Delaware forum, unbundling Delaware corporate law and forum.[22]

18. *See, e.g.*, *In re* Topps Co., Inc. S'holder Litig., No. 600715/07, 2007 WL 5018882, at *4 (N.Y. App. Div. June 8, 2007) (noting that that "there is no question that Delaware law will apply to certain aspects of this dispute" because of the internal affairs doctrine, but refusing to dismiss or stay the action in favor of a parallel action in the Delaware Chancery Court).

19. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) ("Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations—also indicates general submission to a State's powers.").

20. DEL. CODE ANN. tit. 10, § 3114 (2009) (providing for personal jurisdiction over officers and directors of Delaware corporations based on implied consent). *But see* Verity Winship, *Jurisdiction Over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. (forthcoming May 2013) (arguing that jurisdiction over non-resident corporate actors based on position alone is of uneasy constitutionality).

21. *See* Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1071 (2000) (noting that Delaware law is "surprisingly indeterminate" in part because "Delaware's corporate law rules are standards based, Delaware precedents are narrow and fact-specific, and Delaware courts employ weak principles of stare decisis leading to extensive doctrinal flux"); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1909 (1998).

22. *See generally* Armour, Black & Cheffins, *Is Delaware Losing Its Cases?*, *supra* note 10 (detailing this trend).

Delaware is "losing" cases to both federal and state courts. A pressing current example of Delaware corporate litigation in other *state* courts is multijurisdictional deal litigation, which has become common.[23] In that type of litigation, different groups of shareholders claiming to represent the same shareholder class and challenging the same corporate deal sue in different courts in the United States, often both Delaware and non-Delaware. Each of these courts has the power to resolve the dispute within broad constitutional constraints and the jurisdiction's own court-access rules. Generally the state of incorporation is a factor in deciding whether to stay or dismiss in favor of another state's courts, but is not dispositive. An example of this state-court litigation is *In re Parcell*, a class action challenging a tender offer by a Delaware corporation that conducts business in Palo Alto, California.[24] Suits were filed in Delaware Chancery Court and in California state court.

State corporate law issues arise in federal court in the same way any state law would: primarily when parties are of diverse citizenship or when the court is able to hear a claim based on supplemental jurisdiction. An example of movement of Delaware corporate law to *federal* court is the shareholder derivative litigation against AIG stemming from its subprime exposure. The case, which concerned a Delaware corporation and applied Delaware law, was part of a cluster filed in federal court in the Southern District of New York.[25]

Commentators have speculated about the reasons for this trend away from Delaware. In general, growing national business and modern personal jurisdiction rules enable this movement. More specifically, it reflects plaintiffs' attorney practices and litigation patterns. John Armour, Bernard Black, and Brian Cheffins have suggested that fee decisions and closer scrutiny of settlement may have pushed plaintiffs' attorneys to move litigation outside of Delaware.[26] Jessica Erickson has suggested that a broader pattern of parallel

23. *See* Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 349-50 (2011) (noting that the number of state class actions involving mergers and acquisitions is "skyrocketing" and now surpasses similar federal actions); Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation*, at 3-4 (Working Paper, April 2012), *available at* http://ssrn.com/abstract=1984758; *see also* Transcript of Teleconference at 12, *In re* Parcell, Civ. Action No. 7003-VCL (Del. Ch., Nov. 7, 2011) ("[T]hese types of situations [disputes over which forum should proceed] now come up several times a month . . . ."), *available at* http://www.delawarelitigation.com/files /2011/11/ParcellTranscript1.pdf.

24. Transcript of Teleconference, *supra* note 23, at 9.

25. *See In re* AIG Derivative Litig., 700 F. Supp. 2d 419 (S.D.N.Y. 2010); Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 99 (2011) (discussing this case as one of a collection of parallel litigation addressing corporate fraud in federal court).

26. *See* Armour, Black & Cheffins, *Is Delaware Losing Its Cases?*, *supra* note 10; *see also* Transcript at 18-19, Scully v. Nighthawk Radiology Holdings, Inc., Civ. Action No. 5890-VCL (Del. Ch., Dec. 17, 2011).

corporate fraud litigation explains the move, at least to federal court.[27] Delaware judges and commentators have sometimes pointed to the role of multijurisdictional litigation in fee negotiations among plaintiffs' attorneys: attorneys may leverage the ability to file in multiple jurisdictions to get a share of attorney fees.[28]

Regardless of the cause, evidence suggests that keeping Delaware corporate law adjudications in state is important to at least some stakeholders.[29] Delaware judges often say as much. For instance, in deciding not to stay the action in *In re Parcell*, Vice Chancellor Laster identified a preference for bundling—the issues of Delaware corporate law involved should be decided in Delaware court.[30] He identified the Delaware court's "moderate comparative advantage" in adjudicating home law, as well as the background rule that "Delaware is the only state that can give you a definitive ruling on what the law is."[31] Similarly, when upholding Delaware's director implied consent statute, which asserts personal jurisdiction over directors of Delaware corporations, the Delaware Supreme Court suggested that, given Delaware's power "to establish the rights and responsibilities of those who manage its domestic corporations, it seems inconceivable that the Delaware Courts cannot seek to enforce these obligations but must, rather, leave the lion's share of the enforcement task to a host of other jurisdictions with little familiarity or experience with our law . . . ."[32]

Delaware's use of procedural devices to protect its adjudication likewise indicates Delaware's interest in protecting its state court jurisdiction. Professor Faith Stevelman, an early observer of Delaware's efforts to keep adjudication of Delaware corporate law in state, noted a movement in Delaware case law away from almost complete deference to the plaintiff's choice of forum in derivative suits and class actions, which resulted in cases remaining in

27. Erickson, *supra* note 25.

28. *See, e.g.*, Transcript of Teleconference, *supra* note 23, at 15-16; Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multi-Jurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012); Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 11 (2012) ("Opening litigation on multiple fronts provides plaintiffs' counsel multiple opportunities to be the lead plaintiff, and therefore claim a bigger piece of the pie.").

29. *See, e.g.*, Micheletti & Parker, *supra* note 28, at 41 (advocating the "State of Incorporation Rule," which would keep corporate law claims in the courts of the state of incorporation). Professors Lahav and Griffith have taken a nuanced view of the problem, suggesting that Delaware is better off outsourcing certain weaker cases. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 65 VAND. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=2155809.

30. Transcript of Teleconference, *supra* note 23, at 12.

31. *Id.*

32. Armstrong v. Pomerance, 423 A.2d 174, 177 (Del. 1980).

Delaware courts.[33] The list of Delaware procedural innovations that promote the Delaware forum includes the court's appointment of a special counsel to represent the interests of Delaware in multijurisdictional deal litigation,[34] unique legislative enabling of certification of questions of Delaware law from the SEC to Delaware courts,[35] judicial endorsement of exclusive forum selection clauses in corporate charters,[36] the expansion of personal jurisdiction implied consent statutes,[37] and judicial suggestion that defense counsel in multijurisdictional litigation involving Delaware request that judges confer to determine the appropriate forum.[38]

Why would Delaware care? Several commentators have suggested that Delaware stakeholders have an interest in maintaining a stream of cases.[39] This concern might simply reflect the interest of the Delaware bar in maintaining litigation business,[40] but it may be of more concern if it influences the choice of Delaware as the state of incorporation. The idea is that if Delaware loses its primacy as an adjudicator, it loses its control over the substantive development of Delaware corporate law. Choice of its substantive corporate law (which is made primarily by incorporating in Delaware) might become less attractive, and the state would lose its associated benefits for its state treasury through incorporation fees and tax.[41] The harm of losing cases to other courts would

33. Stevelman, *supra* note 11, at 104-19 (identifying this movement and also identifying decreased deference in Delaware courts to the first-filed case in representative suits).

34. Brief of Special Counsel at 1, Scully v. Nighthawk Radiology Holdings, Inc., Civ. Action No. 5890-VCL (Del. Ch., Mar. 11, 2011) (noting that the court appointed special counsel to represent, among other things, the "point of view of Delaware").

35. 76 Del. Laws ch. 37, § 1 (2007); *see generally* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 189 (2010).

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

37. E. Norman Veasey, *Corporate Governance and Ethics in the Post-Enron WorldCom Environment*, 38 WAKE FOREST L. REV. 839, 851 (2003) (noting that one reason to expand the reach of the consent statute to officers was to ensure that high profile cases involving non-director officers could be pursued in Delaware courts); Winship, *supra* note 20 (arguing that implied consent statutes are designed to ensure that Delaware corporate law can be adjudicated in Delaware, and that constitutional due process limits to personal jurisdiction are an important obstacle to Delaware's attempts to bundle its corporate law and forum).

38. *See, e.g.*, *In re* Allion Healthcare Inc. S'holders Litig., Civ. Action No. 5022-CC, 2011 WL 1135016 (Del. Ch. Mar. 29, 2011) (discussing division of attorneys' fees in class action settlement context).

39. Armour, Black, & Cheffins, *Delaware's Balancing Act*, *supra* note 10, at 1345 (noting the importance of the "flow" of cases to Delaware); Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 139-40 (2011) (also noting the importance of the "flow" of cases).

40. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 506 (1987).

41. *See, e.g.*, Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*,

then lie in the extreme case where Delaware has an insufficient stream of cases to maintain a developed case law.[42] The problem is that it is not clear how many cases Delaware needs to maintain its dominance; even now Delaware courts maintain a full docket. Perhaps part of the concern is with quality rather than quantity. If the major corporate cases are decided or settled outside of Delaware the state could miss major developments in corporate law or suffer reputational or branding losses.

While the stream of cases argument focuses on the number or quality of cases that remain in Delaware, another possible harm focuses on the effects of corporate law decisions by non-Delaware courts. However, the harm to Delaware from these decisions cannot be direct because the non-Delaware decisions do not bind Delaware courts.[43] Moreover, no other U.S. courts have tried to develop a competing litigation business of deciding Delaware law.[44]

A plausible reason for Delaware stakeholders to be interested in adjudicating Delaware corporate law in Delaware has to do with federal preemption. To the extent that Delaware legislates and decides in the shadow of federal law,[45] it needs to show that it can develop *de facto* national corporate law. If restrictions on attorneys' fees prompted a flight from Delaware, Delaware is stuck. It could be more lax about fees, but that might attract federal legislation. Or it could continue to police fees and drive out some litigation, but the very fact that litigants can evade Delaware law by suing elsewhere may trigger federal legislation because it demonstrates the limits to Delaware's ability to provide national law. Because litigants can choose the forum, Delaware is structurally incapable of implementing effective fee policing. Indeed, the potential for federal preemption has not gone unnoticed. Delaware courts have noted that Congress had acted in the past and, "to the extent states make responsible moves to handle this [multijurisdictional deal litigation] appropriately, . . . they can address the problem and avoid the need for another round of Congressional legislation."[46]

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19 DEL. J. CORP. L. 999, 1008-09 (1994).

42. *See, e.g.*, Armour, Black & Cheffins, *Delaware's Balancing Act*, supra note 10, at 1348.

43. Perhaps Delaware could be harmed beyond the particulars of that case if one decision caused a ripple effect by influencing other decisions or best practices. However, that theory would depend on courts treating these ad hoc decisions of non-domestic courts as more broadly binding than the legal rules support.

44. *See* Armour, Black & Cheffins, *Delaware's Balancing Act*, *supra* note 10, at 1349, 1397; *Cf.* Christian Kirchner, Richard W. Painter & Wulf A. Kaal, *Regulatory Competition in EU Corporate Law after* Inspire Art*: Unbundling Delaware's Product for Europe*, 2 EUR. CO. & FIN. L. REV. 159 (2005) (discussing the possibility and barriers to this type of adjudicatory competition).

45. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 607-08 (2003).

46. Brief of Special Counsel, *supra* note 34, at 33. A concern to cut back on evasion might also explain Delaware's unusual reaction to an out-of-Delaware settlement of

In sum, evidence suggests that unbundling is taking place, that both non-Delaware state courts and federal courts are deciding Delaware corporate law, and that Delaware stakeholders want to keep (at least some) Delaware corporate law cases in-state.

B. *Explicit Claims of Exclusive State Court Jurisdiction*

Attempts to localize law are not limited to corporate law or to Delaware. Statutory language that baldly asserts that "the courts of this state have exclusive jurisdiction over an action or claim for relief brought under this title"—the Article's opening example—is based on existing state statutes. States have sometimes explicitly asserted exclusive jurisdiction in state courts, using statutory language like "the courts of this state shall have exclusive jurisdiction" or the action "must be brought in courts in this state." This Section focuses on two areas of the law in which numerous states have enacted such legislation: the law governing the validity of certain trusts and the state-based system of insurer insolvency law.

This list is not exhaustive, nor does it support a claim that states always or very frequently assert exclusive jurisdiction. States will not always want to adjudicate their own law, and clearly there are times when docket pressures or political concerns will cause them to try to close the forum to certain cases. Neither claim is crucial to the basic points, which are that state stakeholders are sometimes motivated to assert exclusive jurisdiction and that, as even these initial descriptions make clear, the effect of these assertions depends on their interaction with related federal and state statutes.

The first category concerns Domestic Asset Protection Trusts (DAPTs). Roughly speaking, DAPTs are trusts allowing the person who transfers property to a particular kind of trust to be a beneficiary of that trust and thus protect assets from creditors.[47] Whereas a common-law rule invalidated such trusts, some U.S. states have passed legislation allowing them, apparently in an effort to attract business from other states and retain trust business that may move offshore.[48]

State enabling language varies, but Alaska, Delaware, South Dakota, and

multijurisdictional deal litigation. In an unprecedented move, the Delaware Chancery Court appointed a special master to represent "the point of view of Delaware and the public interest" because of a concern with collusive settlements. *Id*. at 1.

47. *See* Duncan E. Osborne & Mark E. Osborne, ASSET PROTECTION: TRUST PLANNING, ALI-ABA Course of Study (May 16-20, 2011), *available at* SS039 ALI-ABA 1.

48. Paul M. Roder, Note, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1254 (1999); Summary of Domestic Self-Settled Asset Protection Trust Laws, 2001 WL 1585159, 1 ¶ 6.10 (current through 2011 Supp. No. 3).

Utah provide for exclusive jurisdiction in their courts.[49] So, for instance, the Utah statute provides that "[t]he courts of this state shall have exclusive jurisdiction over any action" restricting transfers of trust interests or fraudulent transfers.[50] Changes to federal law may limit the extent to which these provisions get tested in court. The DAPT example illustrates both state attempts to assert exclusive state court jurisdiction and the potential for federal response. Congress amended federal bankruptcy law to lessen the attractiveness of DAPTs by limiting the protections they offered in bankruptcy.[51]

The insurer insolvency regime also provides examples of explicit statutory claims of exclusive state court jurisdiction. In the United States, insurance has historically been regulated at the state level.[52] In some ways it mimics the federal bankruptcy system, trying to ensure consolidated and orderly liquidation and distribution of assets by centralizing claims in a single state's receivership court. State statutes generally restrict claims against insolvent insurers to the forum where the insurer is in receivership,[53] and the state where the insurer is organized often provides substantive law and forum.[54]

49. ALASKA STAT. § 34.40.110(k) (2012) ("A court of this state has exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a trust that is the subject of this section."); DEL. CODE ANN. tit. 12, § 3572 (2007) ("The Court of Chancery shall have exclusive jurisdiction over any action brought with respect to a qualified disposition."); S.D. CODIFIED LAWS § 55-16-13 (2012) ("A court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is the subject of this section."); UTAH CODE ANN. § 25-6-14 (West 2012) (same); *see generally* Roder, *supra* note 48, at 1254.

50. UTAH CODE ANN. § 25-6-14.

51. A revision to the bankruptcy code in 2005 allowed bankruptcy trustees to avoid transfers to "self-settled trust[s] or similar device[s]." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 23 (2005). The change was designed to address state statutes allowing self-settled spendthrift trusts such as DAPTs. *See* Summary of Domestic Self-Settled Asset Protection Trust Laws, *supra* note 48, at 14.

52. Dodd-Frank has put this in flux by providing for some federal oversight of insurance. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 502 (2010) (creating a Federal Insurance Office).

53. Bill Goddard, *The New World Order: Financial Guaranty Company Restructuring and Traditional Insurance Insolvency Principles*, 6 BROOK. J. CORP. FIN. & COM. L. 137, 140 (2011) ("State insurance statutes generally prohibit the bringing of any type of action against an insolvent insurer in any court other than the state receivership court administering the insolvency.").

54. *Testimony before the House Financial Services Subcommittee on Insurance, Housing and Community Opportunity, "Insurance Oversight and Legislative Proposals" Hearing*, NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS (NCIGF) (Nov. 16, 2011) [hereinafter "NCIGF Testimony"], *available at* http://ncigf.org/media/files/HFSC_Written_Testimony.pdf ("[I]nsurance receiverships are administered by the insurance commissioner of the state where the company is chartered—in effect, its state of incorporation—pursuant to the insurance receivership laws of that state, and under the supervision of a court in that state.").

Statutes governing insurance guaranty funds or associations also assert exclusive state court jurisdiction. These associations are quasi-state agencies that have insurance agencies as their members and are designed to provide back-up if an insurer fails.[55] Their organization varies and, in particular, whether they are state actors or private organizations depends on domestic state law.[56] These associations provide a useful example here because state statutes often provide that suits against the associations must be brought only in the state in which they are organized. For instance, an Alabama statute provides that certain actions against the Alabama Insurance Guaranty Association "shall be brought in the Alabama state courts" and "[s]uch courts shall have exclusive jurisdiction" over particular actions.[57] Delaware has a similar statute,[58] as do other states.[59]

As discussed more below, the insurance guaranty associations and other

55. States vary in their labels for these funds, which also may be called insolvency or security funds or pools.

56. For instance, Georgia's is a legal nonprofit organization. GA. CODE ANN. § 33-36-6(a) (2012); *see also* NCIGF Testimony, *supra* note 54, at 2 n.2 ("The form of most insurance guaranty funds is that of a special, non-governmental, not-for-profit entity established by specific state enabling legislation. However, in four states (Arizona, Arkansas, New York and Pennsylvania), at least some elements of the guaranty mechanism are operated as part of state government."); *GF Laws and Summaries by State*, NAT'L CONF. INS. GUAR. FUNDS, www.ncigf.org/GF-laws-and-summaries-by-state (last visited Oct. 7, 2012).

57. *See* ALA. CODE § 27-42-8 (1975).

58. DEL. CODE ANN. tit. 18, § 4208 (2012) ("All actions against the [Delaware Insurance Guaranty] Association must be brought in this State. This State shall have exclusive jurisdiction over all actions against the Association.").

59. *See, e.g.*, GA. CODE ANN. § 33-36-6 (2012) ("[With some exceptions,] all actions relating to or arising out of this chapter against the [Insurers Insolvency Pool] must be brought in the courts in this state. Such courts shall have exclusive jurisdiction over all actions relating to or arising out of this chapter against the pool."); LA. REV. STAT. ANN. § 22:2058 (2011) ("Except for actions by the receiver, all actions relating to or arising out of this Part against the association shall be brought in the courts in this state. The courts shall have exclusive jurisdiction over all actions relating to or arising out of this Part against the association."); OHIO REV. CODE ANN. § 3903.04 (West 2012) ("All actions authorized in [particular code] sections . . . shall be brought in the court of common pleas of Franklin county."); S.D. CODIFIED LAWS § 58-29A-108 (2012) ("[A]ny action relating to or arising out of this chapter against the [Insurance Guaranty] association shall be brought in a court in this state. The courts in this state have exclusive jurisdiction over all actions relating to or arising out of this chapter against the association."); TENN. CODE ANN. § 56-12-107(c) (2012) ("Any action relating to or arising out of this part against the [Tennessee Insurance Guaranty] association shall be brought in a court in this state. Such court shall have exclusive jurisdiction over any action relating to or arising out of this part against the association . . . ."); *cf.* TENN. CODE ANN. § 55-12-136(2) (2012) (establishing a "nonprofit, unincorporated legal entity to be known as the Tennessee automobile insurance plan" and providing that "[a]ny action relating to or arising out of this section against the plan shall be brought in a court in this state" and that "[t]he court shall have exclusive jurisdiction over any action relating to or arising out of this section against the plan").

aspects of state insurer insolvency regimes illustrate the complex web of federal statute and inter-state agreement that is required to enable effective assertions of exclusive state court jurisdiction. Many state statutes governing insurer insolvencies are modeled on a uniform act and federal courts have sometimes deferred to them because of a federal statute allocating insurance regulation to the states.[60] Moreover, the court decisions testing the force of these claims of exclusivity demonstrate that even these mechanisms imperfectly approximate exclusive jurisdiction.[61]

These two sets of examples—DAPTs and insurer insolvency—are illustrative but not exhaustive. They both concern limited funds, a situation in which establishing a single jurisdiction is key. Other assertions of exclusive state court jurisdiction include the state statutes examined in the full faith and credit context that asserted exclusive jurisdiction over wrongful death actions and workers' compensation.[62] Statutes asserting exclusive jurisdiction to enforce in-state arbitration agreements are widespread, in part because the condition is included in the Revised Uniform Arbitration Act.[63] Exclusive jurisdiction also forms part of uniform acts determining jurisdiction for parental rights, custody, and adoption disputes.[64] Tort claims against counties, municipalities, and their officers may be limited to in-state,[65] as is regulation of attorneys.[66]

In addition, state venue statutes often include language that allocates jurisdiction to a particular in-state court, but that has ambiguous reach beyond state borders. Sometimes this assertion will be of "exclusive jurisdiction" of

60. *See infra* Part III (discussing the Model Insurance Guaranty Act, Uniform Insurers Liquidation Act and the McCarran-Ferguson Act).

61. *See infra* Part III.

62. *See infra* Part II(b); *see also* Chi. & N.W. R. Co. v. Whitton, 80 U.S. 270, 271 (1871) (considering the Wisconsin statute asserting "that such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same").

63. *See* UNIF. ARBITRATION ACT § 26(b) (2000) ("An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this [Act].").

64. *See, e.g.*, UNIF. INTERSTATE FAMILY SUPPORT ACT § 205(a) (2008) ("A tribunal of this state that has issued a child-support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child-support order" under certain circumstances.).

65. N.M. STAT. ANN. § 41-4-18 (2012) ("Exclusive original jurisdiction for any claim under the Tort Claims Act [against counties, municipalities, and their officers] shall be in the district courts of New Mexico.").

66. *See, e.g.*, Prade v. Jackson & Kelly, 941 F. Supp. 596 (N.D. W. Va. 1996) (stating that the West Virginia Supreme Court of Appeals and West Virginia State Bar had exclusive jurisdiction to determine attorney misconduct); Camden Iron & Metal, Inc. v. Klehr, Harrison, Harvey, Branzberg & Ellers, LLP, 894 A.2d 94, 97 (N.J. Super. Ct. App. Div. 2006) ("The Supreme Court of New Jersey and the Supreme Court of Pennsylvania have exclusive jurisdiction to control the practice of law in their respective states.").

that court. For instance, the Kansas statute permitting inspection of corporate books asserts exclusive jurisdiction in the district court, but does not indicate whether this allocates decisionmaking only among domestic courts or also attempts to exclude those in other states.[67] Delaware has used similar language to assert exclusive jurisdiction in the Delaware Chancery Court for certain corporate law areas, including indemnification rights[68] and the inspection of corporate, partnership, or L.L.C. books and records.[69]

Out-of-state courts have sometimes interpreted this language to exclude courts of other states, rather than being limited to determining which in-state court is available.[70] Even the language of a typical venue statute, which provides that an action may be brought in "any county in which the action arose," has sometimes prompted out-of-state courts to consider the scope of intended exclusion.[71]

67. *See, e.g.*, KAN. STAT. ANN § 17-6510(c) (2012) ("The district court is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought.").

68. DEL. CODE ANN. tit. 8, § 145(k) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise.").

69. Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, § 15-403 (2012) ("The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person making the demand is entitled to the books and records or other information concerning the partnership's business and affairs sought."); Limited Liability Company Act, DEL. CODE ANN. tit. 6, § 18-305(f) (2012) ("The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought."); *see also* DEL. CODE ANN. tit. 8, § 262 (1953) (giving the Court of Chancery jurisdiction to determine shareholder appraisal rights).

70. *Compare* Wilson v. Celestial Greetings, Inc., 896 S.W.2d 759 (Mo. Ct. App. 1995) (dismissing a suit based on the Delaware appraisal statute because it was "local" to Delaware), *with* Rudebeck v. Paulson, 612 N.W.2d 450, 455 (Minn. Ct. App. 2000) (refusing to respect assertion of exclusive jurisdiction in Delaware's indemnification statute).

71. For example, an Illinois court considered whether the requirement that Missouri age and gender discrimination claims be brought in "any county" in which the cause of action arose implied exclusive jurisdiction in Missouri. *See, e.g.*, Ferreri v. Hewitt Assoc., LLC, 908 N.E.2d 1073, 1078 (Ill. App. Ct. 2009). The court reasoned that the language did not say "any county *in Missouri*," so included out-of-state counties, but that Missouri was unable to assert exclusive jurisdiction effectively because of the full faith and credit limitations discussed more below. *Id.*; *see also* Ryder Servs. Corp. v. Savage, 945 F. Supp. 232, 234 (N.D. Ala. 1996) (interpreting an Alabama statute providing that "either party may submit the controversy to the circuit court of the county which would have jurisdiction of a civil action in tort between the parties" as asserting exclusive jurisdiction in Alabama state courts) (citing ALA. CODE § 25-5-81(a)(1) (1975)); *see generally* Case Comment, *Second Circuit and New York Courts Split on Whether Venue Provision of Louisiana Statute Authorizing Direct Action Against Insurers Limits Enforcement of Statute to Louisiana*, 105 U. PA. L. REV. 745 (1957) (discussing contradictory interpretations of a Louisiana venue statute that provided "[an] injured person . . . at [his] option, shall have a right of direct action against [an alleged tortfeasor's] insurer . . . in the parish where the accident or injury

In sum, state legislatures have repeatedly asserted exclusive state court jurisdiction in its strongest, explicit form. Sometimes—as in the DAPT example—the assertion is unsupported by federal statute or coordination with other states and, as seen below, is of unlikely enforceability. Other times—as for insurance guaranty funds—these assertions are enabled by either or both, illustrating the combined strategy that is needed to approximate exclusive state court jurisdiction.

* * * * *

Developments in Delaware corporate law, taken with statutory assertions of exclusive jurisdiction, demonstrate a recurring state interest in establishing exclusive state court jurisdiction in varied settings. In all of these instances, the state has asserted a form of exclusive territorial jurisdiction. These claims to localized law are made against the backdrop of a federalist system that permits, and sometimes even mandates, the availability of multiple, overlapping courts. This backdrop is the subject of the next Part.

II. CONSTITUTIONAL LIMITS TO EXCLUSIVE STATE COURT JURISDICTION

What can a state do unilaterally to ensure that its law is decided exclusively in its courts? Could a state legislature simply pass a statutory provision that its courts have exclusive jurisdiction over a particular state-created cause of action or over disputes concerning a state-created entity? In Delaware's case, what could it do to prevent the unbundling of its law and forum? This Part analyzes the outer limits of a state's ability to localize its law and concludes that states are constitutionally disabled from unilaterally asserting exclusive jurisdiction.[72]

State law is adjudicated in both federal courts and other states' courts. Accordingly, a state that wants to provide the only forum for its cases would have to exclude both federal and state courts. This Part takes up these vertical and horizontal aspects of exclusive state court jurisdiction in turn. In outlining the constitutional limits and the main exceptions and caveats, this Part revisits the Delaware corporate law example that drives the analysis. It connects the changing conception of the corporation with exceptions to the constitutional constraints that allow "local" law to stay in state.

In terms of the broader conflict between territorial and multi-faceted jurisdiction that is at the heart of this Article, these illustrate how structural aspects of jurisdiction—here of U.S. federalism—ensure that multiple courts are available and thwart direct assertions that a particular category of law should be kept in a local forum.

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occurred or in the parish where the insured has his domicile").

72. This discussion of existing constitutional limits leaves open the argument about whether states should be allowed to localize actions as a normative matter.

A. *Exclusion of Federal Courts*

The first point is that states cannot completely divest federal courts of jurisdiction to decide state law. This stems from constitutional grants of jurisdiction to federal courts, and is well established. In an early case on the subject, *Railway Co. v. Whitton's Administrator*, Wisconsin legislation provided for exclusive jurisdiction over certain wrongful death actions in Wisconsin state courts.[73] The defendant railroad nonetheless removed the case to federal court on the basis of a newly enacted federal removal statute.[74] The U.S. Supreme Court upheld the removal.[75] It reasoned that constitutionally granted jurisdiction—there a state-law cause of action in federal court because of the diverse citizenship of the litigants—could not "be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court."[76] The Supreme Court's decision in *Marshall v. Marshall* is to similar effect.[77]

The limitations on state ability to exclude federal courts are not unqualified.[78] One exception is particularly important to this Article's analysis because it reflects the persistence of ideas that some law is categorically local, so much so that they are excepted from federal court jurisdiction, even when the ordinary requirements of federal subject matter and personal jurisdiction are satisfied. These areas include the probate exception to federal jurisdiction, domestic relations and state penal matters.[79] However, the Supreme Court has indicated that the source of the exclusion, at least in the domestic relations and

73. The Wisconsin statute limited wrongful death actions to "death[s] caused in this State," and required that such actions be pursued "in some court established by the constitution and laws of the same." *See* Chi. & N.W. R. Co. v. Whitton, 80 U.S. 270, 271 (1871).

74. *Id.* at 286.

75. *Id.* at 291.

76. *Id.* at 286 ("Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.").

77. Marshall v. Marshall, 547 U.S. 293, 297 (2006) ("Jurisdiction is determined 'by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action.'").

78. Many of the qualifications address a state's ability to close other courts as well as its own, which does not affect the concern here with states that want to open their courts and keep adjudication within those courts. *See, e.g.*, 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4211 (3d ed. 2007); Ann Althouse, *How to Build A Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1513 n.144 (1987) (explaining how states can limit federal jurisdiction of suits against the state through assertions of sovereign immunity); Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 256 n.51 (2000) (same).

79. *See, e.g.*, *Marshall*, 547 U.S. at 293; Sturgenegger v. Taylor, 5 S.C.L. (3 Brev.) 7, 7 (1811) ("[C]rimes, and the rights of real property, are local.").

probate areas, is the Supreme Court's interpretation of the diversity statute and is not constitutionally compelled.[80] In other words, the existence of these exceptions does not suggest that Congress lacks the power to allocate jurisdiction, or that states have the power to exclude federal courts, but only that Congress has declined to allow federal courts to hear such matters.

The ability to declare exclusive jurisdiction is accordingly asymmetrical. Congress can make federal court jurisdiction over federal law exclusive, at least in areas in which it has the power to legislate,[81] but state legislatures cannot make state court jurisdiction exclusive, even where they have power to legislate and the power of the highest state court to declare the content of state law in a broadly binding decision is undisputed.[82] The fact that a state has asserted exclusive jurisdiction might influence a federal court's discretionary decision not to exercise its jurisdiction, but the federal court is not obliged to respect it.[83]

A consequence of states' limited power is that federal courts may remain open even if states were to agree among themselves that state court jurisdiction is "exclusive" in the sense that other states will refuse jurisdiction in favor of the domestic courts.

B. *Exclusion of Other States' Courts*

State power to declare exclusive jurisdiction as to other *states* necessarily draws on different limitations. Key to the vertical limits discussed above are constitutional grants of jurisdiction to federal courts. State courts have no such

80. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992) (interpreting the domestic relations exception to diversity jurisdiction as an established interpretation of the diversity statute, rather than as constitutionally mandated); *Marshall*, 547 U.S. at 293 ("Among longstanding limitations on federal-court jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history.").

81. *See, e.g.*, The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866) (invalidating state causes of action within the exclusive federal court jurisdiction over admiralty); Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 (2012) ("The presumption of concurrent state-court jurisdiction, we have recognized, can be overcome 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" (internal citations omitted)).

82. *See, e.g.*, Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) ("[T]he voice adopted by the State as its own . . . should utter the last word." (internal citations omitted)); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236 (1940) ("[A]s was intimated in the Erie Railroad case, the highest court of the state is the final arbiter of what is state law.").

83. *See, e.g.*, Ryder Servs. Corp. v. Savage, 945 F. Supp. 232 (N.D. Ala. 1996) (declining to exercise jurisdiction under the federal declaratory judgment act over a suit under the Alabama Workers' Compensation Act, which claimed exclusive jurisdiction in Alabama state courts).

equivalent, although they too are in the position of deciding non-domestic state law. An Alabama court may very well decide an issue of Delaware corporate law,[84] just as a federal court sitting in diversity might, but it lacks the explicit constitutional power.

Instead, in the horizontal context, the primary limitation on state power to declare exclusive jurisdiction is the Full Faith and Credit Clause, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[85] Whereas in an international context, a nation-state might be constrained by the willingness of other states to enforce its judgments, in the United States, individual states are subject to mandatory comity and are constitutionally bound to enforce other states' judgments.[86]

An established example of the clause's application, relevant to limits on state bundling, is when *State A* applies *Law B*, then the litigants go to *State B* to collect on the judgment. *State B* is required by the Full Faith and Credit Clause to respect that judgment, regardless of the fact that *State B* had created the cause of action and regardless of whether *State B* would have decided differently.[87]

The Supreme Court's decision in *Fauntleroy v. Lum*[88] had precisely this configuration. In it, two Mississippi residents entered into a futures contract, which would have been void under Mississippi law as a form of gambling.[89] After breach, one party got an arbitration award and tried to enforce it out of state. Plaintiff won and returned to Mississippi to collect. The Mississippi court refused to respect the judgment because the futures contract would have been void under its state law, but the U.S. Supreme Court reversed. It held that the judgment was due full faith and credit because "[a] judgment . . . needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law."[90] In *Crider v. Zurich Insurance Co.*, the Supreme Court came to a similar conclusion.[91] It reasoned

84. *See, e.g.*, *Ex parte* Bentley, 50 So. 3d 1063 (Ala. 2010) (applying Delaware law).

85. U.S. CONST. art. IV, § 1.

86. *See* Wendy Collins Perdue, *The Story of* Shaffer*: Allocating Jurisdictional Authority Among the States*, in CIVIL PROCEDURE STORIES 135, 136 (Kevin M. Clermont ed., 2d ed. 2008).

87. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1971) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment . . . .").

88. 210 U.S. 230 (1908); *see also* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 432-33 (1994) (using *Fauntleroy v. Lum* as an illustration of the principle that repose and finality be given interstate effect, and that litigants get only "one bite" at recovery).

89. *Fauntleroy*, 210 U.S. at 233.

90. *Id.* at 237.

91. 380 U.S. 39 (1965).

that Alabama state courts could take jurisdiction of an action under the Georgia Workmen's Compensation Act, even though that act provided for exclusive jurisdiction by the Georgia Compensation Board.[92]

Full faith and credit requirements are not absolute, however, and a few exceptions are particularly relevant here. First, states are not required to respect the judgment of another state's court when the state awarding the judgment lacked personal jurisdiction or subject matter jurisdiction.[93] Second, there is an exception for a "strong public interest."[94] Third, several categories of exceptions, such as those for real property and penal law, might be described as "local."

The first two exceptions to the full faith and credit requirement are fairly straightforward in their application here. Whether a state could assert exclusive jurisdiction in a particular area based on the first exception depends on whether the state can deprive other courts of subject matter jurisdiction. Take an example from the context of Domestic Asset Protection Trusts (DAPTs), where several states have asserted exclusive state court jurisdiction as a way to ensure the validity of the trusts, which were traditionally invalid under common law.[95] Assume that someone sues and gets a judgment against the DAPT trustee in California, then goes to Alaskan courts to try to collect on the judgment. Can the Alaskan courts refuse to respect the California judgment, pointing to Alaska's own statute as depriving the Californian courts of subject matter jurisdiction? Surely not, and in fact most of the cases dealing with subject matter jurisdiction look to the subject matter rules of the rendering state (California, in the above example).[96]

What if New York state courts rendered a decision of Illinois law? Could Illinois courts refuse to respect the judgment because it was against the policy interest of Illinois? The public interest exception, where a state refuses to

92. *Id*. at 42. Interestingly, on remand the Alabama courts again found that they lacked jurisdiction. *See* Crider v. Zurich Ins. Co., 348 F.2d 211, 213 (5th Cir. 1965) ("If this Court was in the constitutional area of full faith and credit, . . . we were not aware of it.").

93. *See* Reynolds, *supra* note 88, at 424-30; Nevada v. Hall, 440 U.S. 410, 421 (1979) ("A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter.").

94. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971) ("A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.").

95. *See, e.g*., ALASKA STAT. § 34.40.110 (2012); DEL. CODE ANN. tit. 12, § 3572 (2007); S.D. CODIFIED LAWS § 55-16-13 (2012); UTAH CODE ANN. § 25-6-14 (West 2012); *see supra* Part I.A.

96. *See* Reynolds, *supra* note 88, at 424-25 (citing Durfee v. Duke, 375 U.S. 106, 116 (1963), which stated that "further litigation [is] precluded" when the "jurisdictional issues [have] been fully and fairly litigated by the parties and finally determined").

enforce another state's law as against the forum's public policy, is a narrow one.[97] Maybe the most well-known description is Judge Cardozo's: the exception applies where enforcing the other state's law would violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[98] This exception has attracted recent interest because of conflicts about same-sex marriage, but its application in most of the examples here is not compelling. *Fauntleroy v. Lum* suggests that, in the above example, Illinois would have to enforce a contract it considered to be an illegal gambling contract. That, in combination with the narrowness of the exception, suggests that it offers weak support for exclusive state court jurisdiction in most contexts. In the specific context of corporate law, this conclusion is further bolstered by statements by the Supreme Court to the effect that "[t]he fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it."[99]

The final set of relevant exceptions again raises the question of whether jurisdiction can be based on a categorical view of law and, in particular, on whether certain categories of law are "truly local."[100] Assume that a New York state court rendered a decision of Illinois law. Could Illinois courts refuse to respect the judgment because the issue was one of "local" law? The extent to which this exception allows exclusive state court jurisdiction depends on whether a particular area of the law is considered to be local by nature and, if it is not, on the state's limited ability to elect how to characterize a set of laws.

Historically some categories were generally recognized as "universally local by nature."[101] In particular, penal actions and some actions relating to real property were in this category.[102] The categories of "local" and "transitory"

97. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (calling the exception for strong state interests "extremely narrow"); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971-76 (1997).

98. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

99. Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 556-57 (1946).

100. *See* Resnik, *supra* note 5.

101. Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 957-65 (2006).

102. *Id.*; *see, e.g.*, Fall v. Eastin, 215 U.S. 1, 11-12 (1909) ("[W]here the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the State where the subject-matter is situated. This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any State to be given full faith and credit in the courts of every other State. This provision does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.") (citations omitted); Green v. Wilson, 592 S.E.2d 579, 581 (N.C. Ct. App. 2004) (asserting exclusive jurisdiction over real property within North

law have been replaced in many places with venue statutes, and recent revisions to the federal venue statutes specifically reject the distinction.[103] Questions about these categories' continuing validity arise in part because of the difficulty of distinguishing between jurisdiction over property and jurisdiction over someone with ownership rights in that property.[104] Nonetheless, local law persists in some areas. Illinois courts could, for instance, refuse to respect the judgment of a New York court about Illinois penal law or title to Illinois real property, although courts have construed both such exceptions narrowly.[105]

Corporate law is an interesting example because of the shift in how local corporations are considered, corresponding with a move away from considering corporations to be locally created creatures of the state. The history of the internal affairs doctrine introduced above[106] provides evidence of this shift. It used to require disputes applying Delaware corporate law to be heard in Delaware courts. Under that regime, Illinois courts could refuse to respect the judgment of a New York court about the corporate governance of an Illinois corporation, just as it could do for penal law or real property. Courts view the modern doctrine, however, as requiring only that Delaware law be applied to the internal relationships of firms incorporated in Delaware. In this respect, corporate law is no longer treated as purely local by nature, and a shift in the internal affairs doctrine reflects the erosion of the categorical treatment of corporate law.

Penal law provides a useful counterpoint, as this area is one of the few in which state law is reliably localized, as suggested by the well-known provision that one sovereign's courts will not "execute the penal laws of another."[107] A few points are worth making here. First, one sovereign's courts will occasionally execute another sovereign's penal laws. In other words, the maxim

Carolina and accordingly refusing to stay an action in favor of Georgia courts).

103. *See* 28 U.S.C. § 1391(a)(2) (2006) ("[T]he proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature."); 157 CONG. REC. H1367, H1369 (daily ed. Feb. 28, 2011) ("[e]liminat[ing] the outdated 'local action' rule, which restricts where certain actions involving real property can be brought . . . .").

104. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.").

105. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, cmt. a (1971) ("[The penal law exception] applies only to actions brought for the purpose of punishing the defendant for a wrong done by him . . . [T]he rule does not apply to actions brought by a private person or public body to recover compensation for a loss."); Reynolds, *supra* note 88, at 435 (noting the narrowness of the penal law "exception" and citing Huntington v. Attrill, 146 U.S. 657 (1892), for the proposition that whether an action is penal "depends upon . . . whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act").

106. *See supra* Part I.A.

107. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

is not absolute. Prosecutions against federal officers in state courts can, for instance, be removed to federal courts.[108] Moreover, historically, civil rights statutes contemplated a removal power for certain criminal prosecutions.[109] Second, one might imagine what would happen if criminal law went through the same process that corporate law has. That is, what would happen if it changed from being treated as categorically local by nature to being a choice-of-law rule? Would anything within the constitutional structure allow states to fight that change? The answer would likely depend on a claim that penal law was exceptional, as even real property and probate are treated as local by policy but not by constitutional mandate.[110] Finally, taking penal law as an unusual example of consistently local law, perhaps it provides an option for states looking to localize certain issues. This option likely exists more in theory than in practice, but a state that wanted fiduciary duties to be adjudicated only in its home courts might take advantage of the treatment of penal law and criminalize their violation.

When issues outside of these traditional categories of local law—as corporations now are—are concerned, the question is whether states retain any power to designate something as local. Traditionally, the sovereign could designate causes of action as local when remedies and rights were inextricable.[111] However, the Supreme Court's decision in *Tennessee Coal v. George* suggested that states' efforts to localize actions are ineffective.[112] An engineer injured in Alabama sued the railroad company in Georgia based on an Alabama statute that required that "all actions . . . must be brought in a court of competent jurisdiction within the state of Alabama and not elsewhere."[113] This attempt to establish exclusive state court jurisdiction was unsuccessful. The U.S. Supreme Court held that "a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction," and reasoned that "[t]he courts of the sister State

108. *See* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 278 (2011) (discussing the prosecution of state crimes in federal courts).

109. *Id*. at 282 (noting that Reconstruction-era civil rights statutes allowed removal of certain criminal prosecutions, although the courts quickly read them narrowly, limiting their use).

110. The point is made above that *Marshall v. Marshall* deferred to state probate jurisdiction because of policy but not because of a constitutional mandate. *See supra* note 80.

111. *See* Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354, 359 (1914) (suggesting that other states should decline to exercise jurisdiction where a state statute created a "right and remedy . . . so united that the right cannot be enforced except in the manner and before the tribunal designated by the act").

112. *Id*.; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 91 (1971) (indicating that states can hear actions even if "the state of the applicable law" has attempted to "localiz[e]" the action by providing that "action on the particular claim shall not be brought outside its territory").

113. *Tennessee Coal*, 233 U.S. at 358 (quoting ALA. CODE § 6115).

trying the case would be bound to give full faith and credit to all those substantial provisions of the statute" but not to venue, which "is no part of the right."[114] Lower courts have come to the same conclusion that any obligation to apply non-domestic law reaches only substantive law, and that venue requirements (including where the cause of action must be brought) are procedural.[115]

Nonetheless, whether a state legislature designates an action "local" remains relevant to the discretionary allocation of decisionmaking among courts. The fact, for instance, that a suit involves the internal affairs of a corporation from another state would not foreclose the court from entertaining the suit, nor is it alone reason enough to dismiss, but that factor may be one among many in a decision whether to dismiss based on forum non conveniens.[116]

Some state courts have applied state-law distinctions between local and transitory actions to make discretionary decisions whether to stay or dismiss an action in favor of another forum. The Missouri courts applied these principals in a 1995 case in which a shareholder sued a company headquartered in Missouri but incorporated in Delaware.[117] The shareholder plaintiff sought appraisal of her stock—essentially a court valuation of shares and a judgment against the corporation for that value. The suit was in a Missouri state court, but the applicable Delaware statute entitled dissenting shareholders "to an appraisal by the [Delaware] Court of Chancery of the fair value of" his shares of stock.[118] Distinguishing between local and transitory causes of action, the court dismissed the complaint, determining that the cause of action was local because

114. *Id*. at 360.

115. *See, e.g*., Williams v. Ill. St. Scholarship Comm'n, 563 N.E.2d 465 (Ill. 1990) (refusing to be bound by a Michigan venue statute purporting to establish exclusive jurisdiction over railroads because the statute was "procedural only" and had "no relation to the power of a court to decide the merits of a case"); Ferreri v. Hewitt Assocs., LLC, 908 N.E.2d 1073, 1078 (Ill. App. Ct. 2009) ("[T]he venue provisions of a foreign statute cannot be used to bar a forum state from hearing an action arising under that foreign statute.").

116. *See, e.g*., Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947) ("There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted."); Note, *Forum Non Conveniens as a Substitute for the Internal Affairs Rule*, 58 COLUM. L. REV. 234, 234 (1958) (same).

117. *See, e.g*., Wilson v. Celestial Greetings, Inc., 896 S.W.2d 759, 760 (Mo. Ct. App. 1995) (dismissing in favor of another state's courts because an action was "local"). *But see* J.C.W. & T.D.W. v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009) (en banc) (holding that Missouri circuit courts have jurisdiction over all civil actions, with the exception only of exclusive federal jurisdiction). *See generally* David Jacks Achtenberg, *Venue in Missouri after Tort Reform*, 75 UMKC L. REV. 593 (2007).

118. DEL. CODE ANN. tit. 8, § 262 (1994).

the Delaware appraisal statute "provide[d] for a specific remedy, limited and prescribed, and tied to a local court."[119]

Not all states' courts have taken this approach: the same Delaware appraisal remedy has been adjudicated without discussion of the "local" nature of the action in New York and Wisconsin state courts.[120] Similarly, a Delaware statute asserts exclusive jurisdiction in the Delaware Chancery Court over claims for indemnification for Delaware corporations and directors.[121] A Minnesota state court faced with a claim for indemnification did not defer to Delaware because it considered the action "transitory."[122] It applied Delaware law, following the internal affairs doctrine, but did not consider Delaware to have exclusive jurisdiction.[123] The result is that if a state asserts exclusive jurisdiction in its statutes, another state might respect it, but is not compelled to.[124]

Up to this point, the discussion has focused on limits on states deriving from the Full Faith and Credit Clause. The dormant Commerce Clause may also disable states from asserting exclusive jurisdiction. The corollary of the Commerce Clause grant of power is an implied limit on states' ability to burden interstate commerce.[125] States are disabled from disfavoring other states' business in their legal structure. The burden imposed by exclusive state court jurisdiction may be on businesses that operate in interstate commerce, who are forced into a particular forum.[126] Alternatively, state attempts to keep litigation

119. *Wilson*, 896 S.W.2d at 760 (citing State *ex rel*. U.S. Fid. & Guar. Co. v. Mehan, 581 S.W.2d 837 (Mo. App. Ct. 1979)).

120. Skipwith v. Fed. Water and Gas Corp., 56 N.Y.S.2d 804 (Sup. Ct. 1945); Stauffacher v. Checota, 441 N.W.2d 755, 1989 WL 58598 (Wis. Ct. App. 1989).

121. *See* DEL. CODE ANN. tit. 8, § 145(k) ("The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise.").

122. Rudebeck v. Paulson, 612 N.W.2d 450, 455 (Minn. Ct. App. 2000) (refusing to respect assertion of exclusive jurisdiction in DEL. CODE ANN. tit. 8, § 145(k) (Supp. 1998)).

123. *Id*.

124. *See, e.g*., Sachs v. Adeli, 804 N.Y.S.2d 731, 733 (App. Div. 2005) ("[A]lthough KNY was incorporated in Delaware, that does not divest New York of its interest in adjudicating this matter. The defendants-respondents' allegation that New York lacks jurisdiction to decide this case is based solely on the fact that Delaware Commerce and Trade Law (DEL. CODE ANN. tit. 6, § 18-305 [f]) vests exclusive jurisdiction over this dispute in the Delaware Court of Chancery. That, however, does not mandate that this case be tried in Delaware. This Court has repeatedly held that '[a] statute or rule of another State granting the courts of that state exclusive jurisdiction over certain controversies does not divest the New York courts of jurisdiction over such controversies.'") (citation omitted).

125. *See, e.g*., CTS Corp. v. Dynamics Corp., 481 U.S. 69, 87 (1987) ("The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.").

126. *Cf*. Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888 (1988) (applying the Commerce Clause to invalidate judicial remedies, reasoning that if "a State denies ordinary

business in state and to foreclose other states from attracting it could be seen as burdening the interstate market for litigation business. Whether this argument is viable partially depends on the extent to which litigation business might be thought of as equivalent to other types of interstate businesses that may not be burdened by the states.

In sum, state attempts to localize a cause of action have generally failed to pass constitutional muster when challenged.[127] Although there may be some space for states to assert exceptions to full faith and credit requirements, states are often disabled from taking this route. The Dormant Commerce Clause argument, although more attenuated, may provide another ground for challenging a state's efforts to bundle its law and forum.

What can mediate the conflict between state attempts to localize causes of action, described in Part I, and the constitutional limitations that mandate jurisdictional multiplicity, described above? State stakeholders must negotiate for jurisdiction, which is the subject of the next Part.

III. STATE STRATEGIES: NEGOTIATING JURISDICTION

Given that the state cannot make its jurisdiction to decide its law exclusive or, at the very least, that its ability to do so is limited and constitutionally contested, what strategies are available to a state interested in controlling where its law is adjudicated? That is the subject of this Part, which concludes that, from the state perspective, the structure forces negotiation with other governmental and private actors.

This Part identifies four main strategies available to states. State legislatures, judges, and other actors can negotiate with (1) the federal legislature to get binding federal statutes; (2) other states to get a uniform act; (3) other states' judges to determine the forum case-by-case; and (4) private contracting parties to influence private choice of an exclusive forum. Stakeholders might alternatively adopt an approach that splits authority among different courts for component legal issues or stages of the case. Drawing on a broad range of existing examples and potential areas for further development, this Part ultimately concludes that a state acting unilaterally can approximate exclusive state court jurisdiction only by combining strategies.

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legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or is an impermissible burden on commerce").

127. In the narrow context of DAPTs, mentioned above, commentators have long doubted their effectiveness. *See, e.g.*, Summary of Domestic Self-Settled Asset Protection Trust Laws, *supra* note 48 ("The effectiveness of this legislation, beyond its *in terrorem* value, has always been doubtful.").

A. *Negotiation with Congress*

A state with an interest in retaining certain cases can participate in the type of lawmaking that generates a rule that binds all of the states. The object would be to get procedural protections or to thwart other states from receiving those protections. The main advantage of state involvement in federal lawmaking is the obvious one. In a context like the United States where one level of government has preemption power, the statute would bind all states. Even state-to-state negotiations described below lack this broad ability to bind.

Federal involvement in choice of state forum can take several forms, including offering access to an additional federal forum either through preemption by federal substantive law or through statutory enlargement of federal jurisdiction over state-law claims.[128] Federal lawmakers might even foreclose a state forum in favor of a federal court by establishing exclusive federal jurisdiction. For a state interested in having its law adjudicated only in its own courts, however, the desirable form of federal intervention is through a law allocating jurisdictional authority. For instance, Congress might pass a statute requiring suits to be filed in the state of incorporation or prescribing standards for forum non conveniens dismissals.

The rule could be facially neutral, but have a disparate effect. An analogy is to the retention of state court jurisdiction over certain corporate governance class actions that would otherwise have been litigated only in federal court. The Securities Litigation Uniform Standards Act (SLUSA) is a federal statute that eliminates state and federal jurisdiction over cases based on state law alleging a misrepresentation connected to securities trading nationally and listed on an exchange.[129] An exception allows state courts to hear any "covered class action . . . that is based upon the statutory or common law of the State in which the issuer is incorporated . . . ."[130] The exception reaches all covered class actions based on the law of the state of incorporation, regardless of which state it is.[131] However, given that more than half of the U.S. public corporations are incorporated in Delaware,[132] it has a disproportionate effect on, and possibly

128. *See, e.g.*, Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370 (2006) (categorizing types of federal intervention). Federal intervention may also take the form of federal statutes or court decisions that affect the enforceability of forum selection clauses. *See, e.g.*, Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (enforcing a boilerplate forum-selection clause); Federal Arbitration Act, 9 U.S.C. § 2 (2006).

129. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 78bb(f)(1), 77r(b), 77p(b) (2006).

130. 15 U.S.C. § 78bb(f)(3)(A)(i) (2006).

131. *Id.*

132. *See, e.g.*, Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389, 391 tbl.2 (2003) (analyzing the distribution by state of publicly traded U.S. firms); *2010 Annual Report*, DELAWARE DIVISION OF CORPORATIONS

benefit to, that state and thus is known as the "Delaware Carveout."

Could a federal statute allocate jurisdiction among states in purely state law cases? Several proposals and bills give concrete examples of the type of jurisdictional rule at issue here. Congress considered a rule that would have bundled state law and state forum in the context of securities class actions when it enacted SLUSA. As the text suggests and courts have held, the exception requires the application of the law of the state of incorporation, but is silent on the forum.[133] Some legislators had considered, however, limiting the forum to the state of incorporation[134] by adding language to the effect that a class action "that is based upon the statutory or common law of the State in which the issuer is incorporated . . . may be maintained *only* in *a court of the State in which the issuer is incorporated*."

Congressional power to pass such a statute has not been tested, but both the Full Faith and Credit Clause and the Commerce Clause are potential bases of congressional power to pass such a statute. The second sentence of the Full Faith and Credit Clause allocates power to Congress: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."[135] Based on this language, some commentators have taken congressional power to limit venue in state courts or to require dismissals for forum non conveniens as a straightforward application of the basic congressional power under the Full Faith and Credit Clause to control the effect of judgments.[136]

The argument that Congress can allocate state adjudicatory power over state law actions was articulated in the context of tort reform. In 2004, the House of Representatives passed the Lawsuit Abuse Reform Act (LARA). The bill was also reintroduced in 2005,[137] although never enacted. Its aim was to prevent forum shopping for "plaintiff friendly" jurisdictions in personal injury

(Apr. 5 2011), http://corp.delaware.gov/10CorpAR.pdf (noting that Delaware is the state of incorporation of sixty-three percent of Fortune 500 companies).

133. *See* Johnson, *supra* note 23, at 375.

134. *See id*. at 375 n.117 (citing S. REP. NO. 105-182, at 6 (1998), which states "[T]he Committee expressly does not intend for suits excepted under this provision to be brought in venues other than the issuer's state or incorporation;" and H.R. CONF. REP. NO. 105-803, at 13-14 & n.2 (1998), stating "It is the intention of the managers that the suits under this exception be limited to the state in which the issuer of the security is incorporated.").

135. U.S. CONST. art. IV, § 1.

136. *See, e.g*., Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 102 (1984) (briefly noting that Congress could limit venue in state courts by determining the degree of respect they get outside the rendering court, and making the larger point that full faith and credit should be the main vehicle for controlling "state courts' extraterritorial reach" with due process analysis limited to evaluating basic fairness to defendants).

137. *See* H.R. 4571, 108th Cong. (2004); H.R. 420, 109th Cong. (2005); *see generally* Bellia *supra* note 101, at 951 (providing an historical analysis of congressional power over state court jurisdiction and discussing LARA).

suits.[138] The text of LARA reads like a fairly typical venue statute.[139] The oddity, and what makes it a relevant example here, is that this proposal consisted of a federal statute governing venue in state courts in purely state-law actions. Interestingly, to enact LARA, Congress relied on its power to regulate interstate commerce rather than its power under the Full Faith and Credit Clause. The House of Representatives, which passed LARA, reasoned that forum shopping in personal injury cases had a substantial effect on interstate commerce.[140]

In addition to congressional power based in the Full Faith and Credit or Commerce Clauses, designating particular state courts for the determination of state-law issues is a lesser intervention than stepping in to federalize the whole area. Perhaps the greater power (to exclude states altogether by federalizing the law) implies the lesser (to determine which state court has jurisdiction).[141]

It is worth noting that a mandatory venue provision is not going to be everyone's preference. Take for instance the proposal that the Association of the Bar of the City of New York made as a response to multijurisdictional deal litigation. It advocated targeted federal legislation "requiring shareholder litigation concerning proposed changes in corporate control to be brought in the state of incorporation."[142] Defendants who bear costs of multijurisdictional litigation may very well have an interest in having it rationalized, but at the same time, they may prefer flexibility that comes with other alternatives, including rules about respecting contractual forum selection. Delaware stakeholders might prefer not to have a federally imposed rule that shareholder class actions had to be brought in the state of incorporation because it might

138. H.R. REP. NO. 109-123, at 3-4 (2005); *see* Bellia, *supra* note 101, at 1002.

139. H.R. 420, 109th Cong. § 4(a) (2005) (allowing filings of personal injury actions only in the state where the plaintiff resided at the time of filing or at the time of alleged injury, in the state where the alleged injury occurred or in the state where "defendant's principal place of business" is located).

140. *See* H.R. DOC. NO. 108-682, at 28-29 (2004) ("Congress unquestionably has the authority to regulate economic activities that 'affect' interstate commerce, and forum shopping clearly has a substantial effect on interstate commerce by allowing opportunities for personal injury lawyers to exploit lax venue and forum non conveniens rules to pick and choose those courts with a reputation for consistently awarding near-limitless awards.") (citations omitted); Bellia, *supra* note 101, at 1007 n.261.

141. *Cf.* Abrams & Dimond, *supra* note 136, at 102 n.131 ("[L]imitations on venue would, depending on their severity as applied in particular cases, be less severe than the exercise of either exclusive federal subject matter jurisdiction (state jurisdiction ousted, state judgments a nullity) or removal (state court forbidden to proceed further with case).").

142. ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON SEC. LITIG., COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER 9-10 (2008) (proposing, among other positions, a statute providing "Notwithstanding any statute or rule to the contrary, any action brought under state law against a publicly listed company challenging either (i) the company's decision to merge with or be acquired by another entity, or (ii) the company's decision to take action to prevent a change in control of the company, shall only be brought in the courts of the state of the company's incorporation.").

affect where firms choose to incorporate. Moreover, if commentators are correct that judges sometimes deliberately keep out of the "hot seat" by staying in favor of another state's court,[143] a rule requiring suit to be filed in that state might prevent that discretionary decline of jurisdiction.

Despite these constraints, this Section assumes that at least some stakeholders would like a bundling statute. Indeed, the Association of the Bar of the City of New York's proposal suggests that this assumption is reasonable. The above discussion simply identifies lobbying for a federal statute as one way to achieve this, given limited state power to act unilaterally.

B. *State-to-State Negotiation*

State uniform or model acts provide a state-level approach to devising a uniform national rule allocating adjudicatory power. The aim, as with negotiating with Congress, would be to enact a uniform and widely adopted rule. The process differs, however. An organization must propose a uniform or model law and then each state legislature must adopt it as a matter of state law. Efforts by the National Conference of Commissioners on Uniform State Laws (NCCUSL) are some of the most prominent, but the American Law Institute, the American Bar Association, and other organizations have also made proposals, including for uniform acts that allocate forum.[144]

Several attempts have been made in the United States to promulgate common rules about forum non conveniens and about the enforcement of contractual forum selection clauses. Uniform acts allocating adjudicatory power generally either provide for transfer among states or promote enforcement of contractual choice of forum. The short-lived Uniform Transfer of Litigation Act, promulgated in 1991, is an example of the former. It proposes to replace dismissals for lack of personal jurisdiction or for forum non conveniens with an interstate transfer system akin to that at the federal level.[145] The Uniform Choice of Court Act, approved by the NCCUSL in 2010, is an example of the latter.[146] As with the earlier attempt in the Model Choice of Forum Act, it is designed to implement (potential) international obligations

143. *See* Stevelman, *supra* note 11, at 128-29 (suggesting that Delaware stayed an action before it in favor of a New York court for this reason) (citing *In re* Bear Stearns Cos., S'holder Litig., No. 3643-VCP, 2008 WL 959992, at *1 (Del. Ch. Apr. 9, 2008)).

144. *See, e.g.*, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1197-99 (2005) (listing uniform and model laws of civil procedure, including those that allocate forum).

145. *See* UNIF. TRANSFER OF LITIG. ACT 6 (Nat'l Conference of Comm'rs on Unif. State Laws 1991), *available at* http://www.uniformlaws.org/shared/docs/transfer%20of%20litigation/utla_final_91.pdf.

146. Stephen Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIVATE INT'L L. 287 (2006).

domestically, and calls for the enforcement of choice of forum clauses in international cases and a commitment not to dismiss such suits on the ground of inconvenient forum.[147]

Use of the uniform laws process has often been promoted as offering the advantages of a uniform rule while avoiding top-down federal uniform rules. Disadvantages, however, include the difficulties of coordination among states. The track record is not particularly encouraging. If uniform state law is the goal, success might be measured by the extent to which states adopt a specific act. Although the verdict is still out on the Uniform Choice of Court Act, uniform laws on similar topics had very low levels of state adoption.[148] Moreover, no obvious quid pro quo or consensus as to the content of the rule exists. For instance, Delaware stakeholders might be interested in a rule allocating cases to the state of incorporation, and willing to bear costs to promulgate such a rule, but it is unclear that other states have an equivalent interest.

Uniform or model laws that try to achieve exclusive jurisdiction are present and more successful in certain specific legal areas. Many domestic relations and family law actions, including child custody, adoption, and other domestic relations, are governed by uniform acts that include among their provisions exclusive forum selection.[149] By adopting the provisions of the model act, the state commits to respect other states' assertions of exclusive jurisdiction. For instance, the Uniform Interstate Family Support Act provides that states that have adopted the uniform act or one "substantially similar" "shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state."[150]

Uniform acts provide for jurisdiction to confirm in-state arbitrations to "prevent forum-shopping in confirmation proceedings" and to allow "party autonomy" in choosing where to arbitrate.[151] Similarly the insurance insolvency regime is based on several uniform acts, and includes assertions of exclusive jurisdiction.[152] Many of these areas have a better track record of state adoption than uniform acts aimed at more generic forum choice.

147. *Id*.

148. For instance, only two states adopted the Model Choice of Forum Act between its approval in 1968 and its withdrawal in 1975. *See* Burbank, *supra* note 146, at 15 n.62. Only six states adopted the Uniform Interstate and International Procedure Act before it was withdrawn in 1977. UNIF. INTERSTATE DEPOSITION & DISCOVERY ACT 1-2 (Nat'l Conference of Comm'rs on Unif. State Laws 2007), *available at* http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf.

149. *See, e.g*., UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT 3 (Nat'l Conference of Comm'rs on Unif. State Laws 1997), *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf.

150. UNIF. INTERSTATE FAMILY SUPPORT ACT 2008 § 205(c).

151. UNIF. ARBITRATION ACT (2000) § 26, cmt. 3.

152. *See infra* note 243 and accompanying text (discussing the Model Insurance Guaranty Act and the Uniform Insurers Liquidation Act).

Finally, even the uniform act process may be combined with other strategies described here. For instance, some proposals for uniform laws about forum selection provide for federal default legislation that will be triggered if states do not adopt the uniform act within a prescribed period.[153]

C. *Judicial Negotiation*

The third type of negotiation is *ad hoc* negotiation among judges. This Section deals with two forms this negotiation might take. The first is particularly relevant in the context of multijurisdictional litigation of any sort, where related cases are filed in multiple courts or locations, and all or some of the judges hearing related cases communicate and negotiate to figure out which cases should go forward and how. In a second approach, judges may take unilateral steps and then rely on basic principles of comity or reciprocity to create agreement among courts.[154]

Anecdotal information suggests that judicial negotiation and coordination takes place in multijurisdictional litigation, both internationally and domestically.[155] Transnational bankruptcy proceedings are sometimes cited as an example of international judicial coordination, as judicial communications have resulted in negotiated protocols.[156]

Delaware judges have explicitly endorsed such judge-to-judge negotiation in domestic corporate law cases. Chancellor Chandler of the Delaware Chancery Court suggested that his "personal preferred approach, for what it's worth, is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the cases should go forward."[157] Defendants have adopted the suggestion in multijurisdictional

153. *See* Alternative Provisions of Federal Legislation Requiring States to Adopt the Uniform Choice of Court Agreements Act, http://www.uniformlaws.org/shared/docs/choice_of_court/coca_draft%20federal%20implementation%20provision.pdf; Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 323-24 (2005) (noting the potential for federal default legislation accompanying a uniform act).

154. One could dispute the labels, but the basic point that courts are limited to persuading and coordinating with other actors to obtain exclusive jurisdiction does not turn on calling it negotiation.

155. *See, e.g.*, Jay Lawrence Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567, 567 (2003).

156. *See* Hannah L. Buxbaum, *Forum Selection in International Contract Negotiation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185, 186-87 (2004); Westbrook, *supra* note 155, at 571-73.

157. *In re* Allion Healthcare Inc. S'holders Litig., Civ. Action No. 5022-CC, 2011 WL 1135016, at *4 n.12 (Mar. 29, 2011) (allocating attorneys' fees in the context of class action settlement).

class action deal litigation.[158] A group of shareholder class actions were filed in Delaware and New York state courts in May 2011 challenging a particular acquisition.[159] On cross-motions to appoint lead counsel, the defendants followed the suggestion of the Chancery Court and asked the judges to confer. They did, and the New York plaintiff voluntarily agreed to stay the action as long as they got "the same document and deposition discovery" and "an opportunity to litigate equally with" Delaware plaintiffs.[160]

Like the other strategies, judicial negotiation may be combined with other approaches. One model for judicial negotiation is in fact contained in one of the more successful uniform acts concerning jurisdictional allocation: the Uniform Child Custody Jurisdiction and Enforcement Act (1997) (UCCJEA).[161] The act authorized, and sometimes required, judicial communication about jurisdiction.[162] It dealt explicitly with issues likely to arise if judge-to-judge negotiation becomes more used in other contexts, such as what records are required, parties' access to records of conversations, when parties may participate in the conversations, and when such a conversation will be considered a "hearing."[163] Coordination in this area may be subject-specific, however, as international family law has often let to judicial cooperation as well.[164]

One advantage of judicial negotiation is that it promotes case-specific information sharing, reducing the reliance on parties to communicate about the case status. It might share information to which one court has better access. For instance, one court might be aware of repeat plaintiffs or counsel, aspects that suggest collusion, institutional relationships, etc. The information might consist

158. *See* Francis Pileggi, *In Selection of Class Counsel, Court of Chancery Follows Procedures Envisioned by In re* Allion Healthcare Inc. Shareholders' Litigation, DEL. CORP. & COM. LITIG. BLOG (June 10, 2011), http://www.delawarelitigation.com/2011/06/articles/chancery-court-updates/in-selection-of-class-counsel-court-of-chancery-follows-procedures-envisioned-by-in-re-allion-healthcare-inc-shareholders-litigation/ (citing Nierenberg v. CKx, Inc., Civ. Action No. 5545-CC, 2011 WL 2185614 (Del. Ch. May 27, 2011)) (describing the coordination between Delaware and New York state courts in class action filings concerning a proposed acquisition).

159. *Id*.

160. *Id*.; *see also* Transcript of Teleconference, *supra* note 23, at 9-10 (noting that defendants made motions in California and in Delaware asking the judges to confer to decide on a single forum in which the action would go forward).

161. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 110(a) (1997) [hereinafter UCCJEA]; *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 524-26 (2000) (looking to the UCCJEA for a model for class action coordination).

162. *See* UCCJEA § 110(a) ("A court of this State may communicate with a court in another State concerning a proceeding arising under this [Act].").

163. *See* UCCJEA § 110, cmt.

164. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89; Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

of physical copies of the documents in the parallel litigation, and might take the form of an exchange among courts of settlement documents, copies of all pleadings, significant case documents, rulings, and transcripts.[165]

The problem with a strategy of judicial negotiation is the content of the negotiation: on what basis do or should judges decide which case should go forward? Professor Westbrook has suggested that, at least in the international context, judges are increasingly interested in identifying and channeling litigation to the "optimal forum,"[166] but how that is identified needs explication.

Rather than coordinate, judges may just act unilaterally and rely on principles of comity or reciprocity. The idea is that a state court with jurisdiction would defer to a state with a greater interest in a particular suit in the hope that the other state would do the same in reversed circumstances.

State use of certification provides one example. Certification allows a court to ask another court for an opinion on that jurisdiction's law. Its purpose is to have a legal issue decided by a court in the territory that created the cause of action. Available studies suggest it is usually used by federal courts to ask local state courts questions, although many highest state courts are enabled by their jurisdictional statute to ask and answer questions "horizontally" from state to state.[167] By using certification to defer to other states when their corporations are concerned, Delaware courts signal interest in comity and reciprocity. A recent example is *Teachers' Retirement System of Louisiana v. PriceWaterhouseCoopers, LLP,* in which the Delaware Supreme Court certified a question of New York law to the highest New York state court.[168] The court reasoned that the decision "depend[ed] on significant and unsettled questions of New York law that are properly answered, in the first instance, by the New York Court of Appeals."[169]

Whether comity and reciprocity is a satisfactory bundling tool depends on the existence of something to trade or with which to reciprocate. State courts

165. Such an exchange was proposed in the brief of the special counsel appointed by the Delaware Chancery Court to represent the "point of view of Delaware" in *Scully v. Nighthawk Radiology Holdings, Inc*., Civ. Action No. 5890-VCL (Del. Ch. Mar. 11, 2011). The special counsel—who was also the chair of the Court of Chancery Rules Committee—proposed that the state procedural Rules Committee consider requiring common parties (defendants) to disclose information to the settlement forum when the non-settlement forum is the Delaware Chancery Court. *Id*. at 34-35.

166. Westbrook, *supra* note 155, at 568 (noting increasing interest of judges in identifying the "optimal forum" in transnational cases).

167. John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 431 n.94 (1988) (conducting an empirical study of state and federal judges' use of certification and identifying no state-to-state certifications from 1978 to 1987).

168. 998 A.2d 280, 280 (Del. 2010).

169. *Id*.

may respect a statutory assertion of exclusive state court jurisdiction as a matter of comity, even where they are not obliged to. A relevant example involves construction bonds. Many states statutes provide that bonds for construction of public projects are deemed to include an exclusive forum provision.[170] Generally courts are not obliged to defer to these, although state law principles may lead them to respect "local" actions.[171] A Connecticut statute limited suits for construction bonds to the county of performance.[172] Interpreting this statute, a New York court reasoned that "[i]n identical circumstances New York courts have treated such a limitation as creating a purely local—not a transitory—cause of action that is enforceable only in the state of performance" and concluded that "the same result is called for as a matter of comity."[173]

In the context of corporate law, Delaware courts have, unsurprisingly, at times recognized the importance of comity in allocating cases among states.[174] However, because few businesses are physically located in Delaware, its courts have personal jurisdiction in business law cases mostly based on where the business is organized. Delaware courts may not have many opportunities to hear cases about non-domestic entities, so may have little to trade. In contrast, because California is a common place for headquarters, its courts hear cases concerning the internal affairs of corporations organized out-of-state as well as those incorporated in California. California would have something to trade, declining to exercise jurisdiction in the expectation that other states would do the same for its corporations, but some signals indicate that California stakeholders may not be interested in such reciprocity.[175]

170. *See, e.g.*, 30 ILL. COMP. STAT. ANN. 550/2 (2012) ("Such action shall be brought only in the circuit court of this State in the judicial district in which the contract is to be performed.").

171. *See* State *ex rel*. U.S. Fid. & Guar. Co. v. Mehan, 581 S.W.2d 837 (Mo. Ct. App. 1979) (deferring to an Illinois statute requiring disputes over a payment and performance bond to be brought in Illinois because of a Missouri state-law distinction between local and transitory actions).

172. CONN. GEN. STAT. ANN. § 49-42 (2009) ("Every suit instituted under this section shall be brought . . . in the superior court for the judicial district where the contract was to be performed . . . .").

173. Omega N.Y. Prods. Corp. v. Parisi Bros. Inc., 293 N.Y.S.2d 878, 879 (N.Y. Sup. 1968); *see also* Pennsylvania v. Beals, 249 N.Y.S. 232 (Sup. Ct. 1931); Long v. Ferris, 94 N.Y.S.2d 493 (N.Y. City Ct. 1949).

174. Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 442 (Del. Ch. 2007) ("Of all the states of the union, Delaware should be most sensitive to the need to afford comity to the courts of the jurisdiction that charters an entity."). Dismissing in favor of a non-Delaware forum based on a forum selection clause, Vice Chancellor Strine suggested that courts "ought to refuse to make a determination of another state's law and refer the matter, by abstention and appropriate enforcement of a forum selection clause, to the courts of the state whose law and public policy is affected by the resolution of the key question." Third Ave. Trust v. MBIA Ins. Corp., No. 4486-VCS (Del. Ch. Oct. 28, 2009), *reprinted in Unreported Cases*, 35 DEL. J. CORP. L. 730, 730 (2010).

175. *Compare* CAL. CORP. CODE § 2115 (West 2010) (applying California law to

D. *Negotiation with Private Actors*

A state might try to implement exclusive state court jurisdiction through private ordering and through state support and promotion of contractual forum selection. This Section examines how a state can encourage, discourage, or require certain *ex ante* forum choices by litigants and lawyers. It focuses on two strategies. The first is to encourage parties to contract explicitly for an exclusive forum by pre-committing to enforce such a provision. The second is to link *ex ante* choice of law to an exclusive choice of forum through state statute. This Section concludes that neither provides a reliable way to implement *de facto* exclusive state court jurisdiction.

Parties may specify the forum as well as the governing law *ex ante*. The type of forum selection clause most relevant here provides for an exclusive forum.[176] For instance, a clause tested before the Supreme Court provided that: "It is agreed by and between the [contracting parties] that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."[177] Although historically considered invalid because they "ousted" jurisdiction, since the Supreme Court's decisions in *The Bremen* and *Carnival Cruise Lines*, "reasonable" clauses have generally been enforced under federal law.[178]

1. *Pre-Commitment to Enforce Contractual Forum Choice*

Although all of these clauses are put in place by private parties, a state can influence private choice. One way to promote *ex ante* forum selection is by statutory commitment to enforce forum selection clauses. New York provides an example. It commits to enforcing forum selection clauses in contracts worth more than one million where a choice of New York law has been made.[179]

foreign corporations in certain circumstances), *with* Examen, Inc., v. VantagePoint Venture Partners 1996, 873 A.2d 318 (Del. 2005) (holding that the internal affairs doctrine is constitutionally mandated).

176. These 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 (1992). These contrast with so-called "consent to jurisdiction" clauses (also called permissive clauses), which open but do not mandate a forum.

177. Carnival Cruise Lines v. Shute, 499 U.S. 585, 587-88 (1991).

178. *Id*.; The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30-31 (1988) (analyzing forum selection clauses as one consideration among several in the context of venue transfers within the federal court system).

179. *See* N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2012) ("[A]ny person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or

Another statutory provision ensures that New York courts will not dismiss such contracts for inconvenient forum.[180] Although the details vary, California and Ohio also pre-commit to enforce certain agreements to submit to the jurisdiction of the state's courts when state law has been chosen.[181]

Delaware makes a similar commitment,[182] but has also gone one step further. The Delaware Chancery Court's opinion in *In re Revlon Securities Litigation*, a shareholder class action challenging a merger, signaled that Delaware courts would enforce forum selection clauses in corporate charters.[183] Vice Chancellor Laster of the Delaware Chancery Court indicated that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."[184]

The advantage of a private, consent-based approach to forum protection is that it is a low-cost and flexible way for parties to make it more likely that a suit be pursued in the chosen forum. A jurisdiction like New York with commercial contracting or Delaware with its incorporations both signals respect for private ordering and promotes selection of its forum. Ultimately, however, because the effect of these clauses depends on other jurisdictions' enforcement and interpretation of a forum selection clause in that new context, this proposed solution poses another version of the difficult problem of resolving competing, legitimate claims to adjudicatory authority.

From the perspective of a forum that is interested in protecting its exclusive jurisdiction, the first problem is that the adoption depends on private actors. Explicit, up-front mandatory forum selection is notoriously lacking in

undertaking for which a choice of New York law has been made in whole or in part . . . and which (a) is a contract, agreement or undertaking . . . relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state."). *See generally* Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2088 (2009) (tracing New York's self-conscious pre-commitment to enforcing choice of law and forum clauses).

180. *See* N.Y. C.P.L.R. 327 (McKinney 2012) ("[T]he court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract . . . to which section 5-1402 of the general obligation law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.").

181. *See* CAL. CIV. PROC. CODE § 410.40 (West 2012); OHIO REV. CODE ANN. § 2307.39 (LexisNexis 2012).

182. DEL. CODE ANN. tit. 6, § 2708 (2012) (committing to enforce Delaware choice of law clauses in contracts involving $100,000 or more and opening Delaware courts to adjudicate conflicts under such a contract).

183. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 & n.8 (Del. Ch. 2010).

184. *Id*. at 960.

commercial contracting generally[185] and in the new context of such provisions in corporate charters and bylaws.[186]

Even if the adoption problem were solved, however,[187] and every corporate charter or commercial contract came to include a choice of forum, Delaware's announcement in *In re Revlon* is the equivalent of a pre-commitment strategy on the part of Delaware to enforce choice of forum clauses. A forum selection clause has no effect if a case based on Delaware law is filed in Delaware initially and the Delaware court has personal jurisdiction over the defendants.[188] The intended effect is on other states' courts. As detailed below, the enforcement of such clauses depends on the other forum's choice of law, willingness to consider the corporate charter a contract in the usual sense, and the enforceability (reasonableness, conscionability) of such a clause, even if contractual in nature.[189]

185. Professors Eisenberg and Miller found that merger and acquisition contracts studied in 2002 always included a choice of law clause, but only about half (fifty-three percent) included a choice of forum. *See* Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1981 (2006) (studying all merger and acquisition agreements included as exhibits to Form 8K SEC filings for seven months in 2002, and noting that "the frequent failure of the parties to specify a forum for resolution of disputes presents a theoretical puzzle"). Even more dramatically, of 2882 material contracts of reporting companies studied in 2002, all designated law, but only thirty-nine percent designated forum. 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, 1478 (2009).

186. Grundfest, *supra* note 13, at 12. The number of clauses adopted is a moving target, as more companies consider them, but Professor Grundfest identified thirty-nine "intra-corporate forum selection provisions" from January 1, 1991 to September 30, 2010. *Id*. at 2. The provisions were in charters, bylaws, and organizational documents of publicly traded corporations, LLPs or LLCs, with about thirty-six percent in LLC or LLP agreements. *Id*. Almost sixty percent of these were adopted after *Revlon*. *Id*. at 3. A more recent study identified eighty-two bylaw or charter forum provisions adopted by Delaware corporations. *See* CLAUDIA H. ALLEN, NEAL, GERBER & EISENBERG LLP, STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS, at i (2011), *available at* http://www.ngelaw.com/files/Uploads/Documents/Exclusive_Forum_Provisions_ Study_4_7_11.pdf.

187. Various explanations have been put forward to explain relative reluctance to designate a forum, even when choice of law is contractually selected. *See, e.g.*, Quinn, *supra* note 38, at 173 (positing that behavioral reasons, especially status quo bias, may explain this reluctance, and proposing a statute enabling, but not mandating, forum selection in corporate charters).

188. It might establish personal jurisdiction, if lacking, but this should not be needed for jurisdiction over a Delaware corporation and may not be needed for officers or directors of a Delaware corporation, given Delaware's implied consent statutes. *See* DEL. CODE ANN. tit. 10, § 3114 (2012) (asserting personal jurisdiction over officers and directors of Delaware corporations).

189. Professor William Woodward has helpfully divided the analysis of forum selection clauses into three steps: first "an initial conflict of laws question of which state's contract law governs the choice of law or choice of forum provision in the contract;" second, the

The first question is which law applies. For pre-commitment to have any influence outside that jurisdiction, other states' courts must apply the law of the pre-committing state. The question arises whether a choice-of-law clause controls which law determines the validity of that same clause.[190] Alas, states vary in whether they apply their own law or the law designated in the choice of law clause, so the results of the approach may also vary.[191] Indeed, federal courts often apply federal law to determine the validity of these clauses.[192]

Once the choice of law is determined, a court must decide whether a contract exists.[193] But even then, not all jurisdictions enforce forum selection clauses, and many carve out exceptions for unfairness. For instance, a California state statute specifically provides that a court may refuse to enforce a contract or contractual clause if unconscionable, and California case law provides that this unconscionability analysis applies to forum selection clauses.[194]

Finally, even a valid, enforceable forum selection clause is open to variations in interpretation. Is it mandatory? How does a court treat multiple

application of that law to figure out whether the clause is "binding on the parties as a matter of contract law;" and third, "if the court does find the provision to be binding under applicable contract law, . . . a second conflict of laws question: whether the forum court should recognize the contractual choice of law or choice of forum the parties collectively made or whether the forum state's policies should override the parties' agreement to the choice of law or forum." William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 17 (2006).

190. In the corporate context, courts might alternatively ask whether the choice of forum for resolution of internal corporate disputes is a question of internal affairs to be governed by the incorporating state's law.

191. *Compare, e.g.*, Moon v. CSA-Credit Solutions of Am., Inc., 696 S.E.2d 486, 488 (Ga. Ct. App. 2010) ("Because Georgia is the forum state in the present action, the rule of *lex fori* requires the application of Georgia law to determine the validity of the forum selection provision, despite the fact that the contract also contains a choice of Texas law provision."), *with* Cerami-Kote, Inc. v. Energywave Corp., 773 P.2d 1143, 1145 (Idaho 1989) ("Florida bears a reasonable relation to the transaction and the district court technically should have applied Florida law expressly to determine the validity of the forum selection clause in the contract.").

192. *See* Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011) (applying federal law to invalidate a Delaware exclusive forum selection clause in the corporation's bylaws).

193. *See* William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 5 (2006) (discussing the prior question in the context of adhesion contracts).

194. CAL. CIV. CODE § 1670.5(a) (West 2012) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."). This analysis may be complicated by the Supreme Court's decision in *Concepcion*, which addresses California's analysis of unconscionability in the context of arbitration clauses. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

related contracts selecting different courts?[195] Even the *Revlon* opinion itself suggests that Delaware might have a more nuanced approach if a Delaware corporation selected a non-Delaware forum, a possibility the court contemplates.[196]

Like other strategies, encouraging private choice of exclusive forum is most reliable when used in combination. Agreements to arbitrate provide a useful comparison, as they combine private ordering with federal preemption. Choices to arbitrate have much in common with contractual court choice. Both are *ex ante* contractual forum designations that depend on their enforcement in other jurisdictions. Unlike other forum selection clauses, however, privately negotiated arbitration clauses work against the backstop of a federal statute that promotes their enforcement throughout the United States; the Federal Arbitration Act pushes state and federal courts to respect arbitration clauses.[197]

2. *Implied Consent to Forum*

Pre-commitment to enforce such clauses, whether through comments in cases or through opt-in legislation, is not the only option available to a state. Ex ante choice of law is often unaccompanied by choice of forum, so the question arises whether choice of law has any implications for choice of forum and whether state legislatures can affect that relationship.

Two types of existing statutes are designed to ensure that the domestic forum is open to adjudicate domestic law: (1) statutes preventing parties from excluding the domestic forum in its choice of forum; and (2) statutes implying consent to jurisdiction based on contractual choice of law. Legislation that prevents contracting parties from excluding the domestic forum is relatively widespread, particularly in non-corporate business forms such as limited liability companies (LLCs). The typical statute provides that contractors may choose an exclusive domestic forum or non-exclusive out-of-state forum. For instance, the California Partnership Act provides that "[a] partner may, in a written partnership agreement or other writing, consent to be subject to the nonexclusive jurisdiction of the courts of a specified jurisdiction, or the

195. *See generally* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 973 (2008) (pointing out that a "clause enforcement decision in any particular case [is] uncertain and confused").

196. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 n.8 (Del. Ch. 2010) ("envision[ing] that the Delaware courts would retain some measure of inherent residual authority so that entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight," but leaving the resolution of such issues for another day).

197. Federal Arbitration Act, 9 U.S.C. § 2 (2006) (providing that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

exclusive jurisdiction of the courts of this state."[198] Other statutes imply consent to jurisdiction based on contractual choice of law. For instance, a Delaware statute suggests that contractual choice of Delaware law implies consent to the Delaware forum for resolving contractual disputes.[199]

Unlike those examples, which open but do not mandate a forum, a third type of statute is most relevant to making jurisdiction exclusive. Building on existing statutory language, a statute might include the following language:

> "Parties to any contract, agreement or other undertaking for which a choice of [this State's] law has been made in whole or in part shall be deemed thereby to have consented to the exclusive jurisdiction of the courts within this State . . . ."

An existing statute on this model implies an exclusive jurisdiction condition on a state-issued bond.[200] An Illinois statute governing construction bonds for public projects provides that "[e]ach . . . bond is deemed to contain the following provisions whether such provisions are inserted in such bond or not . . . ." [201] One of the implied provisions is that "[s]uch action shall be brought only in the circuit court of this State in the judicial circuit in which the contract is to be performed."[202]

198. CAL. CORP. CODE § 15901.17 (West 2012); *see also Id*. § 17061 (LLCs); DEL. CODE ANN. tit. 6, § 18-109(d) (2012) (LLCs); *Id*. § 17-109(d) (limited partnership); N.H. REV. STAT. ANN. § 304-C:10 (2012) (LLCs); MISS. CODE ANN. § 79-29-1211 (2011) (LLCs); VA. CODE ANN. § 13.1-1023.1 (2012) (trusts); WYO. STAT. ANN. § 17-23-106 (1977) (trustee of statutory trust). *But see* Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 289 (Del. 1999) (enforcing a forum selection clause in an LLC agreement that selected California courts despite Delaware's statute prohibiting this choice).

199. DEL. CODE ANN. tit. 6, § 2708 (2012) (Choice of law) ("(b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains [a Delaware choice-of-law] provision."); Total Holdings USA, Inc. v. Curran Composites, Inc., 999 A.2d 873, 874-75 (Del. Ch. 2009) (holding that the Delaware court could exercise personal jurisdiction over a Missouri corporation with no operations in Delaware because it was a general partner in a partnership that had selected Delaware law and the Delaware Revised Uniform Partnership Act included a jurisdictional consent provision, DEL. CODE ANN. tit. 6, § 15-114, that applied to litigation over a partnership agreement with a Delaware choice-of-law clause).

200. ALA. CODE § 36-17-2 (1975) ("In all actions upon the bond of the Treasurer or against the sureties of insurers of such bond, the courts of the State of Alabama shall have exclusive jurisdiction, and this shall be deemed a condition of such bond."); *see also* CONN. GEN. STAT. ANN. § 49-42(b) (2012) ("Every suit instituted under this section [mortgages and liens] shall be brought in the name of the person suing, in the superior court for the judicial district where the contract was to be performed . . . .").

201. 30 ILL. COMP. STAT. ANN. 550/1 (2012); *see also* State *ex rel*. U.S. Fid. & Guar. Co. v. Mehan, 581 S.W.2d 837 (Mo. Ct. App. 1979) (applying the Missouri state law distinction between local and transitory actions to dismiss a construction bond suit based on this Illinois assertion of exclusive jurisdiction).

202. 30 ILL. COMP. STAT. ANN. 550/2 (2012).

The limitations to this approach have to do with party choice and problems with jurisdiction based on implied consent. At some point, parties interested in leaving open the choice of forum may balk and choose another state in which to organize, or another state's choice of law in a commercial contract. Moreover, implied consent alone is a shaky ground for jurisdiction. Delaware courts that interpret the implied consent statutes for corporate directors and officers also undertake a constitutional minimum contacts analysis,[203] so that might be required here as well.[204] The constitutional analysis in turn runs into the problem that the Supreme Court has said that choice of a forum's law does not automatically open that forum.[205]

* * * * *

In sum, encouraging private contractual selection of an exclusive forum is a potential bundling strategy, but it is akin to other forms of pre-commitment to enforce forum selection clauses, and ultimately does not solve the problem of multiple jurisdictions' each applying its own court-access and jurisdictional rules. Absent another layer, possibly of federal preemption as in the arbitration context, this "solution" is partial at best. Finally, statutory influence on private choice of forum is not limited to pre-committing to enforcement, but may also involve restricting parties' ability to exclude the home forum, or even attempting to imply exclusive jurisdiction, although the concern about reactions of contracting parties and the effectiveness of implied consent may dampen state enthusiasm.

E. *Split-Authority Approaches*

To this point, the strategies have been based on the assumption that jurisdiction is all-or-nothing, and that a state's interest in exclusive jurisdiction reaches every aspect of a case. Take the procedural posture of *Scully v. Nighthawk* as an example.[206] In a class action filed by different plaintiffs and

203. *See, e.g.*, Ryan v. Gifford, 935 A.2d 258, 272-73 (Del. Ch. 2007) (analyzing the statutory basis for jurisdiction over a nonresident officer and then the constitutionality of its exercise).

204. Winship, *supra* note 20 (arguing that an analysis of minimum contacts is likely required for statutes that imply consent based on contractual choice of law).

205. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 215 (1977) ("[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute . . . . The issue is personal jurisdiction, not choice of law.") (internal quotations omitted); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) ("Nothing in our cases, . . . suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes . . . [a]lthough such a provision standing alone would be insufficient to confer jurisdiction . . . .").

206. Scully v. Nighthawk Radiology Holdings, Inc., Civ. Action No. 5890-VCL (Del. Ch., Mar. 11, 2011).

their counsel in Arizona and in Delaware, either the Delaware or Arizona court could resolve the case, but not both. In contrast, this Section suggests that a way out of at least some of these seemingly irresolvable jurisdictional conflicts may be to separate the component parts of cases.

The split-authority approaches described in this Section take advantage of the varied reasons that a court might want to establish exclusive jurisdiction in its courts. Delaware might have an interest in determining the content of its law, but Arizona might have an interest in adjudicating cases against corporations headquartered there. Splitting adjudication may address both interests.

Lawsuits may be broken down into legal issues or stages of the litigation. This Part examines existing mechanisms that divide adjudication of individual cases into its components. These include certification of open legal questions from one court to the originating jurisdiction. So, for instance, a New York court might ask Delaware's highest court to resolve an open question of Delaware law. One might alternatively draw on the model of multidistrict litigation in the federal courts, which consolidates certain fact-finding stages of the litigation and then re-disperses the litigation for resolution of individual damages. Each divides authority over aspects of a dispute and provides a model for this type of strategy.

1. *Splitting the Legal Issues*

Certification allows courts and some other entities to certify an open question of state law to the relevant state court for decision. If it chooses to accept the question, the highest state court issues an opinion, which the certifying court then applies in its proceeding and which generally acts as binding state law on the issue going forward. The U.S. Supreme Court has praised certification procedures from federal courts to state courts for "help[ing] build a cooperative judicial federalism."[207] Following the Supreme Court's lead and the publication of a uniform act,[208] almost all states allow their highest courts to decide issues certified to them by entities listed in the state statutes, court rules, and sometimes constitutions defining state court jurisdiction.[209] The most common iteration is the certification by federal courts of appeals to the highest court of a state, which most states permit in their jurisdictional statute or rules and at least to a certain degree have drawn

207. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

208. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 53 (1995); UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT (1967).

209. *See, e.g.*, 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248 (3d ed. 2007).

upon.[210] Nineteen states also allow their highest state courts to accept certification from other states' highest courts,[211] although use of this horizontal type of certification has been quite rare.[212]

A few aspects of certification make it a potential approach to problems of jurisdictional allocation. Unlike uniform laws or treaty-like options, this alternative would not require mobilizing state legislatures. Many states have already authorized state-to-state certification in their enabling language. Moreover, many of the early challenges to certification, including whether it involved impermissible advisory opinions, have been resolved to allow use of the procedure. Certification also has the advantages common to split-authority approaches; it accommodates competing interests. For instance, it lets one court decide domestic law while the other court gets the litigation business.

For certification to offer an attractive split-authority model, the threshold requirements for a certified question would have to be met. The question must be one of non-domestic law. For example, a question of Texas state law must arise in a California state court.[213] States usually require that no controlling precedent exist in state law and that the certified question be "dispositive" or "determinative" of the matter before the certifying court.[214] The receiving state must have an interest in determining the content of its own law,[215] and, obviously, the issue has to be one where it would be worth it for the certifying forum and/or the parties before it to certify.

Because of its demonstrated interest in deciding its own corporate law, Delaware is a clear candidate for using certification to achieve, albeit only partially, goals of keeping adjudication of state corporate law in the state's

210. *Id*.

211. *See, e.g*., DEL. CONST. art. 4, § 11; CONN. GEN. STAT. ANN. § 51-199b (2012); CAL. R. CT. 8.548; DEL. SUP. CT. R. 41(a)(ii); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27; UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 53 (1995) ("The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another State . . . .").

212. *See, e.g*., UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 53 (1995) (suggesting that state-to-state certification is not used "as frequently as it could and should be"); Corr & Robbins, *supra* note 167; *see also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 373 n.3 (2000) (noting that, as of Oct. 13, 2000, no out-of-state court had used New York's certification procedure).

213. This point is non-trivial because in our example California would apply its choice of law doctrine, and because modern choice of law doctrines often favor the application of domestic (here Californian) law, the situation has to be one in which another state's law clearly applies.

214. *See* JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 18-19 (1995) (studying certification decisions and authorizations).

215. Such an interest is not a general requirement to accept a certified question, but for certification to be an appealing route to approximating exclusive jurisdiction, it needs to satisfy at least one of the goals.

courts. Moreover, the prerequisite that the certifying court be in a position of applying non-domestic law is also often the case in Delaware corporate cases. Courts may be obliged to apply Delaware corporate law because of the internal affairs doctrine regardless of where disputes are adjudicated.

Indeed, the possibilities of certification have not escaped the notice of Delaware's judges and legislature. Delaware is unusual in its broad definition of what constitutes a certifiable question; it must "appear[] to the [Delaware] Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it."[216] Furthermore, over the past few decades, Delaware has expanded the list of permissible certifying entities and is the only state to allow certification from a federal agency.[217] Although existing data are limited, the pattern of certification to Delaware also stands out, with an unusual percentage of out-of-state certifications.[218] Justice Ridgely of the Delaware Supreme Court has indicated that, from the Delaware perspective, certification is underused.[219] As in the context of judicial negotiation, Justice Ridgely suggests that counsel move for certification of open legal issues to Delaware in non-Delaware courts,[220] allowing Delaware to reach out-of-state decisionmakers through defense counsel.

2. *Splitting the Stages of Litigation*

Whereas certification splits the legal issues within a case, a law suit might alternatively be broken down among stages of litigation. One model for this is the federal Multi-District Litigation (MDL) statute, which provides for different decisionmakers for various stages of the lawsuit. The statute allows transfer of

216. DEL. CONST. art. IV, § 11, para. 8.

217. *See* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 195-96 (2010); Daniel R. Kahan, Note, *The Administrative State(s): Delaware's New Administrative Certification Procedure*, 10 J. BUS. & SEC. L. 35, 36 n.5 (2009) (internal citations omitted). It is no accident that certification is aimed at Delaware corporate law. According to the sparse legislative history, the SEC was added to the list of entities that can send questions to the Delaware Supreme Court because "[m]ore than half of the publicly traded companies in the United States are Delaware corporations." S.B. 333, 143d Gen. Assemb. (Del. 2006).

218. A search of published opinions of the Delaware Supreme Court between the broadening of the certification statute in 1993 and the end of 2011 identified 17 opinions answering certified questions. Of these, almost half (8 or 47%) were from out-of-state and out-of-circuit courts, with one from the Securities and Exchange Commission.

219. *See generally* Henry duPont Ridgely, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 SMU L. REV. 1127 (2010) (discussing the benefits of certification in clarifying issues before the Court).

220. *Id*. at 1133 ("[I]f another jurisdiction is faced with a significant and unanswered question of Delaware corporation law, it makes sense for counsel to suggest consideration of a certification of the question to the Delaware Supreme Court. Otherwise, it is a missed opportunity.").

class actions pending in multiple federal district courts into a single court for consolidated resolution of pre-trial issues. The structure provides for remand to the original district once those issues are resolved.[221] The model delegates the case-by-case determination of the appropriate forum to an expert committee with representation from multiple states.[222]

Of relevance here is how the MDL model splits authority. As currently structured, MDLs do not reach cases in state court, although several commentators have made proposals to expand removal so that the MDL structure reaches litigation spanning federal and state courts.[223] Applying this model to multijurisdictional state court litigation, an interstate panel might identify a single forum.[224] The suits would be consolidated in that forum for initial proceedings, then sent back to the originating courts. For instance, discovery might be consolidated, but merit decisions might be made in the originating court.

As is the case for all of these split-authority approaches, the advantage is that it potentially accommodates states that have interests in different aspects of the litigation. For instance, a state with an interest in litigation business could get some portion of the case. A state interested in resolving major issues of its own common law would be able to do so in the merits portion.

This split authority approach has serious disadvantages, however. In addition to questions about the desirability of centralization and concerns that an MDL system forces settlement,[225] implementation would be difficult. The structure does not solve the problem of identifying the appropriate forum, but merely centralizes the decision in a panel rather than in courts that negotiate case-by-case. The composition and processes of the panel become important as states have varying interests and levels of interest in resolving these multijurisdictional litigations.[226] Moreover, to be put in place the system would

221. 28 U.S.C. § 1407 (2006).

222. *Id*. § 1407(d) ("The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.").

223. Several proposals would expand it to address litigation spanning federal and state courts. *See, e.g*., William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1533 (1995) (proposing the expansion of removal so that the MDL procedure could reach cases filed in state court).

224. Professor Quinn has made a related suggestion to form an interstate panel, akin to the MDL panel in the federal courts. *See* Quinn, *supra* note 38, at 16263.

225. *See, e.g*., Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008) (making the case against centralization, especially in the context of mass torts).

226. *Cf*. Quinn, *supra* note 38, at 162-63 (noting Delaware may have a strong interest in forming a panel analogous to the MDL panel, which may allocate issues of Delaware law to

require a uniform approach on either the federal or state level, posing another version of the coordination problem raised above.

3. *Conditional Dismissals and Stays*

The final split-authority model builds on the existing ability of courts to condition dismissals or stays as a way of controlling whatever the originating jurisdiction finds important and might otherwise protect through exclusive jurisdiction.

When a court dismisses or stays an action in favor of another forum, it may require that parties agree to certain conditions such as taking certain steps or waiving particular defenses. Conditional forum non conveniens dismissals are common, with the most prevalent conditions designed to ensure that an alternate forum is available.[227] Although most existing analysis is of dismissals in favor of foreign, non-U.S. jurisdictions,[228] the most relevant category for the purposes of understanding exclusive state court jurisdiction is of similarly conditioned dismissals within the United States. For instance, a California court may dismiss on forum non conveniens grounds in favor of a Nevada state forum and impose certain conditions. When dismissals or stays are conditioned on aspects unrelated to opening the alternative forum—conditions dealing with discovery, agreement to abide by previous rulings, etc.—they split the authority of two courts over the same dispute and can be thought of as a way to allocate jurisdiction among states.

Creative conditioning is taking place, suggesting that it is an available strategy for jurisdictional allocation. In a litigation filed in multiple states, one judge might dismiss in favor of the other state only if the litigants agree to a particular scope of discovery. For instance, in the context of interstate conditional dismissals, a California court stayed a case in favor of a Nevada forum, but required that depositions of plaintiffs and medical witnesses take place in San Diego, where plaintiffs were located.[229] A Washington state court

Delaware, but other states may have little incentive to expend the resources necessary to solve a problem that does not affect them).

227. *See, e.g.*, John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 501 (2000); *see also, e.g.*, Delfosse v. C.A.C.I., Inc.-Fed., 267 Cal. Rptr. 224, 228 (Ct. App. 1990) (conditioning dismissal on waiver of statute of limitations in Virginia state courts, submission to service in Virginia, and Virginia's acceptance of the case).

228. *See, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (dismissing with conditions in favor of a foreign jurisdiction); Stangvik v. Shiley Inc., 819 P.2d 14, 17 n.2 (Cal. 1991) (dismissing in favor of a Scandinavian forum on condition that parties consent to have past and present employees testify there and to produce documents there at the expense of the party that moved for dismissal, and an agreement to pay any final judgment).

229. *See* Dendy v. MGM Grand Hotels, Inc., 187 Cal. Rptr. 95, 99 (Ct. App. 1982). The court also retained jurisdiction in California "if for any reason [plaintiffs'] rights were being

dismissed an asbestos case in favor of an Arkansas forum on the condition that the defendants consent to proceeding in the Arkansas state courts, waiving the right to remove to Arkansas federal court. [230] The court designed the condition to prevent removal to federal court and consequent consolidation with an existing MDL proceeding in Philadelphia because it viewed the delay involved as overly burdensome to the plaintiff.[231]

Existing limitations on courts' ability to impose conditions, whether in the federal courts or state courts, are not well defined.[232] Several state statutes or rules expressly permit their courts to dismiss or stay for forum non conveniens "on any conditions that may be just."[233] Conditional dismissals were expressly contemplated in some of the uniform acts: the Uniform Transfer Act authorized transferring courts to impose "terms of the transfer," and permitting the receiving state to depart from the terms only if "good cause" existed.[234]

Conditional dismissals or stays allow an associated splitting of control. One state may maintain some control over discovery, effect of prior rulings, etc., while another resolves the dispute in its courts. The main limitation on setting conditions may be the willingness of other states' courts to accept jurisdiction and respect parties' contractual agreements governing procedure. Conditional dismissals, although backed by the courts' powers, are based on parties' agreements to certain procedural rules and implicate all of the complicated issues of "contract procedure."[235] In sum, like many of the other strategies discussed here, conditional dismissals are likely to occur in combination with other approaches and to provide only partial response to the problems of jurisdictional allocation.

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No approach to bargaining for exclusive state court jurisdiction is perfect.

impinged either directly or by delay in Nevada." *Id*.; *Cf*. Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424, 1430-31 (11th Cir. 1996) (dismissing a case in favor of a French forum on the condition, among others, that discovery conducted in the United States would be subject to the Federal Rules of Civil Procedure).

230. Sales v. Weyerhaeuser Co., 156 P.3d 303, 309 (Wash. Ct. App. 2007).

231. *Id*. at 304.

232. *See, e.g*., Bies, *supra* note 227, at 503-04 (focusing on federal courts and noting that little appellate review exists and that "there is no settled judgment on what constitutes abuse of discretion in conditioning forum non conveniens dismissals").

233. *See, e.g*., ARK. CODE ANN. § 16-4-101 (West 2012) ("When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just."); CAL. CIV. P. CODE § 410.30(a) (West 2012) (outlining the same). The common language here is a remnant of several states' adoption of the Uniform Interstate and International Procedure Act 1.05, which was published in 1962 and withdrawn in 1977.

234. UNIF. TRANSFER OF LITIG. ACT §§ 105, 208 (amended 2005).

235. *See generally* Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593 (2005) (identifying a trend towards contract procedure and raising fundamental questions about the limits of parties' power to contract for jurisdiction, choice of law and privacy).

The table below summarizes the individual strategies (negotiation with Congress, other states, other judges, and private actors), as well as split-authority approaches. It also provides a consolidated list of examples of how they work in combination with other negotiation strategies.

Table: Summary of Negotiation Strategies

Approach / Combination of Approaches		**Example(s)**
Negotiation with Congress (Part III.A.)	Alone	Preemptive federal statutes that allocate venue for state-law issues in state court: • SLUSA proposal to allocate adjudication to the state of incorporation. • LARA bill to allocate venue in state court for certain tort actions.
	State-to-State	Uniform or model acts backed by federal default legislation: • Uniform Choice of Court proposal with federal default legislation if the state-to-state uniform act failed to be implemented. • Insurer insolvency regime uniform acts (Insurers Rehabilitation and Liquidation Model Act, Insurer Receivership Model Act, and Uniform Insurers Liquidation Act) backed by McCarran-Ferguson Act allocating insurance regulation to the states.
	Judicial Negotiation	—
	Private Actors	Federal statute promoting enforcement of contractual choice of forum: • Federal Arbitration Act.

State-to-State Negotiation
 	
(Part III.B.)
	Alone	Uniform or model acts:
		• That allocate forum:
		  ○ Uniform Transfer of Litigation Act.
		• Specific legal subject areas:
		  ○ Insurer insolvency regime.
		  ○ Domestic relations, child custody, adoption.
		  ○ Arbitration enforcement.

	Congress	*See above*.
	Judicial Negotiation	Uniform Child Custody Jurisdiction and Enforcement Act (requiring and standardizing judicial negotiation).
	Private Actors	Uniform acts enforcing contractual choice of forum: • Uniform Choice of Court.
Judicial Negotiation (Part III.C.)	Alone	Case by case negotiation: (e.g., cross-border insolvency approach). Comity & reciprocity.
	Congress	__
	State-to-State	*See above*.
	Private Actors	__
Negotiation with Private Actors (Part III.D.)	Alone	Exclusive forum selection clauses: • Pre-commitment to enforcement. • Implied consent to jurisdiction.
	Congress	*See above*.
	State-to-State	*See above*.
	Judicial Negotiation	__
Split Authority (Part III.E)		Splitting the legal issues: • Certification.
		Splitting the litigation stages: • MDL model.
		Conditional Dismissals.

One consequence of the constitutional limitations described in detail above is that the closest approximations of exclusive state court jurisdiction combine the above methods. In the Delaware context, litigation patterns increasingly separate law and forum, creating pressure to realign Delaware's corporate law with a Delaware forum. The main solution proposed has been the adoption of forum selection clauses in corporate charters and bylaws. Commentary has

accordingly focused on describing the progress of adoption,[236] recommending the best structure for such clauses,[237] or making proposals to try to overcome resistance by parties or courts.[238] This approach is perfectly reasonable, but has all of the limitations detailed above that make enforcement and interpretation of these clauses outside of Delaware—where it really matters—uncertain.[239] Even the preferred contractual "solution" being tendered requires some other action as well, perhaps strengthening out-of-state courts' respect for forum selection clauses through federal statute analogous to the Federal Arbitration Act. Delaware has, in fact, adopted a mixed approach, although some options, like judicial negotiation, remain somewhat undeveloped. Delaware courts sometimes certify to other states' highest court, and judges have signaled interest in comity as well as prompting defense counsel to push judicial negotiation[240] and even to move for certification.[241]

These mixed approaches have parallels in the state-based insurer insolvency regime. As noted above, this area of the law provides a widespread example of explicit assertion of exclusive state court jurisdiction. A typical statute governing claims against insurance guaranty associations provides that, with some exceptions, "all actions" against the Insurance Guaranty Association "must be brought in the courts in this state" and that "[s]uch courts shall have exclusive jurisdiction" over all such actions.[242] Moreover, the insurer insolvency regime is particularly relevant to the corporate example because it tries to approximate with various state-to-state and state-to-federal bargains what could be provided at the federal level through federal power to preempt and to establish exclusive jurisdiction.

As for state-to-state negotiation, many state statutes relating to insurer insolvency are based on one of three uniform laws.[243] As with any uniform or

236. *See, e.g.*, Claudia H. Allen, *Delaware Corporations Seek to Counter Forum Shopping*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (Feb. 14, 2012, 9:36 AM), http://blogs.law.harvard.edu/corpgov/2012/02/14/delaware-corporations-seek-to-counter-forum-shopping.

237. Grundfest, *supra* note 13, at 2.

238. *See, e.g.*, Quinn, *supra* note 38, at 163 (proposing a statute enabling forum selection in corporate charters).

239. *See supra* Part III.D.

240. *In re* Allion Healthcare Inc. S'holders Litig., Civ. Action No. 5022-CC, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011) (recommending that defense counsel "file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the cases should go forward").

241. Ridgely, *supra* note 219, at 1133 ("[I]f another jurisdiction is faced with a significant and unanswered question of Delaware corporation law, it makes sense for counsel to suggest consideration of a certification of the question to the Delaware Supreme Court. Otherwise, it is a missed opportunity.").

242. This example is modeled on GA. CODE ANN., § 33-36-6 (West 2012).

243. *See* INSURERS REHABILITATION AND LIQUIDATION MODEL ACT; INSURER

model act, it depends on state legislative adoption, and states vary in the pieces they have enacted, though many are based on aspects of these uniform laws. Illustrating how complex these arrangements can be is the existence of an organization to support the uniform law and insolvency process. The National Conference of Insurance Guaranty Funds (NCIGF) is a non-profit organization that has the state guaranty funds as its members. [244] It coordinates claims payment by member funds, among other functions.

To approximate exclusive state court jurisdiction requires not only state-to-state agreements and a coordinating organization, but also federal action. To protect state-based regulation of insurance, the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[245]

Even with these mechanisms—uniform acts, a coordinating body, and a federal statute supporting state-based regulation—in place, assertions of exclusive jurisdiction are sometimes of uncertain effect. In actions against insolvent insurers in other states, "reciprocal" states that have enacted similar language will often stay proceedings.[246] However, state adoption has not been universal, and states that have not enacted such language are not obliged to stay any actions just because the other state has asserted exclusive jurisdiction.[247] As for the effect of federal statutes, federal courts are split on whether the McCarran-Ferguson Act forces a federal court to respect the state's assertion of exclusive jurisdiction over insolvent insurers.[248]

RECEIVERSHIP MODEL ACT; UNIFORM INSURERS LIQUIDATION ACT ("UILA"); Bill Goddard, *The New World Order: Financial Guaranty Company Restructuring and Traditional Insurance Insolvency Principles*, 6 BROOK. J. CORP. FIN. & COM. L. 137, 138 (2011) (noting that many states have adopted the Insurers Rehabilitation and Liquidation Model Act).

244. NCIGF Testimony, *supra* note 56, at 5.

245. 15 U.S.C. § 1012(b) (2006).

246. *See, e.g.*, State v. Ramos, 534 N.E.2d 885, 887 (Ohio Ct. App. 1987) (deferring to a stay by Indiana courts and holding that the district court did not abuse discretion in "invoking the doctrine of 'judicial comity' to give effect to the Indiana stay" in light of the purposes of the model liquidation code and reciprocity).

247. *See, e.g.*, Bonura v. United Bankers Life Ins. Co., 552 So. 2d 1248, 1251 (La. Ct. App. 1989) (holding that it had subject matter jurisdiction over a suit by Louisiana residents against a Texas insurance guaranty fund and a Texas receiver because Texas was not a reciprocal state under the Uniform Insurers Liquidation Act).

248. *Compare* U.S. Fin. Corp. v. Warfield, 839 F. Supp. 684, 689 (D. Ariz. 1993) (reluctantly concluding that it lacked jurisdiction based on the combination of McCarran-Ferguson and an Arizona statute claiming exclusive jurisdiction in an Arizona state court over actions against insolvent insurers), *and* Corcoran v. Universal Reinsurance Corp., 713 F. Supp. 77 (S.D.N.Y. 1989) (same), *with* Gross v. Weingarten, 217 F.3d 208, 222 (4th Cir. 2000) (finding federal jurisdiction despite a Virginia statute asserting exclusive jurisdiction in a state commission because the exercise of federal jurisdiction did not "impair"—in the words of the McCarran-Ferguson Act—state insurance law), *and* Grimes v. Crown Life Ins.

Furthermore, the possibility of federal preemption is always in the background. The recent creation of the Federal Insurance Office tasked with studying "[t]he costs and benefits of potential Federal regulation of insurance" is a reminder of this possibility, and puts the state-based insurance regulation and insurer insolvency regime in some flux.[249] This recalls a similar concern that arises in the context of corporate law. As suggested above, one reason for Delaware to be concerned with losing cases is the potential for federal preemption if states demonstrate that constitutional limitations detailed above disable them from effectively regulating certain legal areas.[250]

In the insurer insolvency context, both federal statute and inter-state agreement were required to enable effective assertions of exclusive jurisdiction. Even then, the insurance guaranty acts and insurer insolvency regimes also provide a somewhat cautionary tale as structural limits make these state-based arrangements potentially unstable. Although imperfect and messy, these negotiating strategies are what remain to a state that wants to localize causes of action within a constitutional structure that mandates jurisdictional multiplicity.

CONCLUSION

What happens when policies and laws based on traditional territorial and categorical conceptions of court jurisdiction collide with jurisdictional rules that allow for multiple actors and courts? This Article explores this jurisdictional conflict through the example of state efforts to control where state law is adjudicated. The constitutional provisions identified above not only limit a state's ability to keep its cases, but also encourage and sometimes mandate the availability of multiple courts. Unable to make its jurisdiction reliably exclusive, a state interested in localizing its law is forced to negotiate for a rule that binds other states, or to negotiate case by case with other judges. Private forum selection and comity are both partial solutions to what is, from the state perspective, both a practical problem and a structural issue.

Corporate law is a key example because claims that corporate law should be localized are in a collision course with structural aspects of federalism that open multiple courts. Delaware is central to this story of jurisdictional conflict because various stakeholders have expressed an interest in bundling the state's law and forum, because it has a long history of successfully selling bundled law, and because its ability to bundle has unraveled lately in the context of federal fraud actions with pendant state claims and multijurisdictional litigation

Co., 857 F.2d 699, 702, 706 (10th Cir. 1988) (holding that the federal court had jurisdiction, but abstaining).

249. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §§ 502, 502(p)(3)(A) (2010) (enacted).

250. *See supra* note 45 and accompanying text.

about corporate deals.

A state can open its courts through its court access rules or through innovative inter-jurisdictional procedures like certification from other states. It can attract the filing of litigation through speedy process, expert judges, or adjusting its fee regulation. But ultimately this Article concludes that a state does not have the power unilaterally to bundle its law with its forum and is stuck with coordinating with, consulting or convincing other actors. Despite its undisputed lawmaking power—and unlike the federal government—a state must bargain for exclusive state court jurisdiction.

This Article has focused on U.S. states and the framework of multiple and overlapping jurisdiction that is built into U.S. federalism and dictated by constitutional provisions. Nonetheless, the concept of negotiated jurisdiction has broader implications. It is a way to mediate between continued reliance on categories of "local" law and a modern jurisdictional framework whenever they collide. Any entity—national or international, state or not—that asserts territoriality within a framework of multi-faceted jurisdiction can do so only imperfectly, and only by negotiating jurisdiction.