

The Private Ordering Solution to Multiforum Shareholder Litigation

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Abstract

This paper analyzes a private ordering solution to multiforum shareholder litigation: exclusive forum provisions in corporate charters and bylaws. These provisions require that all corporate law-related disputes be brought in a single forum, typically a court in the statutory domicile. Using hand-collected data on the 746 U.S. public corporations that have adopted the provision, we examine what drives the growth in these provisions and whether, as some critics contend, their adoption reflects managerial opportunism.

We find that nearly all new Delaware corporations adopt the provision at the IPO stage, and that the transition from zero to near-universal IPO adoption over 2007-14 is driven by law firms. Characteristics of individual companies appear to play little or no role in adoption decisions. Instead, the pattern of adoption follows what can be described as a light switch model, in which law firms suddenly switch from never adopting to always adopting the provision in the IPOs they advise.

For post-IPO (or “midstream”) adoptions, we compare corporate governance features of adopters to a matched sample of non-adopters to test the hypothesis that midstream bylaw adoption reflects managerial opportunism. If the hypothesis were correct, then we would expect to find that the midstream adopters exhibit poor corporate governance compared to non-adopters (using the metrics of good governance practices as identified by critics of the provisions). We find, however, that there are either no significant differences in governance or that it is adopters that have higher quality governance features. We also find no significant differences in governance and ownership structures between firms whose boards adopt the provisions as bylaws and those who obtain shareholder approval. The absence of significant differences across firms using disparate adoption procedures suggests that the method of adopting an exclusive forum provision – whether with or without shareholder approval - should not be a matter of import for investors.

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I. Introduction

Shareholder suits against Delaware corporations have been increasingly filed in multiple forums.¹ This trend would appear to be puzzling because it is at odds with the widely held view that the expertise of Delaware courts actually benefits shareholders.² The trend is less puzzling, however, if one appreciates that while this may be true on average, it may not be true for every individual shareholder. Further, it is shareholders' attorneys who decide in which forum to file a lawsuit, but, as has been long-recognized in the literature, attorneys' incentives may be misaligned with the interests of their clients.³

Commentators have proposed a number of responses to multiform litigation, including judicial, legislative, and private ordering solutions.⁴ This paper focuses on one private ordering

¹ E.g., John Armour, et al., *Is Delaware Losing its Cases?* 9 J. Emp. Leg. Stud. 605 (2012) [hereinafter Armour, et al., *Losing*]; Jennifer J. Johnson, *Securities Actions in State Court*, 80 U. Cin. L. Rev. 349 (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 (2012).

² E.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L., Econ. & Org. (1985); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 682-683 (2005); E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 Bus. Law. 681, 683, 694 (1998).

³ E.g., John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 58 Law & Contemp. Prob. 5 (1985). As Thompson and Thomas describe multijurisdictional corporate litigation, it is "fee distribution litigation," that is, the function of an out-of-state forum filing is to obtain for the attorney a share of a fee award, and not to contribute to the resolution of a dispute. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 Nw. Univ. L. Rev. 1753, 1801 (2012). This dynamic is possible because a settlement in one forum can release the defendant from liability for all claims related to the disputed transaction asserted by any other shareholder in any other forum. See *Matshushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 Univ. Ill. L. Rev. 467, 496-497.

⁴ These solutions are discussed in section II, *infra*. Not all commentators consider this phenomenon problematic. For articles endorsing multijurisdictional litigation, see Sean J.

solution: exclusive forum provisions. An exclusive forum provision in a corporation's charter or bylaws is analogous to a forum selection clause in a contract. It requires that all corporate law-related disputes be brought in a single forum, most typically a court in the corporation's statutory domicile. The number of firms adopting this self-help solution has dramatically increased in recent years, following its endorsement by the Delaware Chancery Court and a number of other state courts.⁵

There has been limited investigation of which firms adopt exclusive forum provisions. But a better understanding of which firms adopt exclusive forum provisions would shed light on whether shareholders should be concerned about their own firms adopting (or not adopting) the provision. It would also shed light on whether this private ordering solution obviates the need for judicial or legislative intervention. Using hand-collected data on all 746 U.S. public corporations that have adopted the provision (as of August 2014),⁶ we analyze the extent to which adoption is associated with a firm's internal governance structure versus its external influences (such as outside counsel).

Throughout the analysis, we draw a distinction between firms that have the provision at the time of their IPO ("IPO adopters") and those that have adopted a provision after their IPO

Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 *Vand. L.Rev.* 1053 (2013); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 *Del. J. Corp. L.* 57 (2009); and for articles viewing it as problematic, see John Armour, et al., *Delaware's Balancing Act*, 87 *Ind. L. J.* 1345 (2012); Benjamin D. Landry, *Mutual Assent in the Corporate Contract: Forum Selection Bylaws*, 18 *Fordham J. Corp. & Fin. L.* 1 (2013); Micheletti & Parker, *supra* note 1; Myers, *supra* note 3; Leo E. Strine, Jr., et al., *Putting Stockholders First, Not the First-Filed Complaint*, Harvard John M. Olin Fellow Disc. Paper No. 740 01/2013 (2013).

⁵ The court decisions upholding exclusive forum provisions are discussed in section II, *infra*.

⁶ The first exclusive forum bylaw was adopted by Oracle Corp. in 2006. The first exclusive forum charter provision included in the certificate of a company upon going public

(“midstream adopters”). The dynamics of adoption at these two stages differ considerably. When adoption occurs before the IPO, any potential wealth effect can be impounded into the stock price before public investors purchase their shares. In contrast, when adoption occurs after the IPO, public shareholders have no such opportunity to price-in the potential wealth effect. If the value of the provision were negative, then midstream adoption could generate a loss for shareholders. Thus, in contrast to provisions in place at the IPO, post-IPO amendments to corporate documents (often referred to as “latecomer terms”)⁷ could transfer wealth from shareholders to management (or vice versa). For this reason, we use different empirical strategies to analyze IPO and midstream adoption.

Our analysis of IPO adoption yields two principal results. First, from January 2010 to August 2014, the rate of adoption of Delaware IPOs has risen steadily from 0 to 80 percent. At this rate, we predict that by the end of 2015, virtually all Delaware IPOs will adopt an exclusive forum provision before going public. Second, company-specific characteristics, such as industry or firm size, play little to no role in the adoption decision. Instead, we find that the most significant predictor of IPO adoption is having outside counsel who has previously advised an IPO adopter. That is, the data fit a model in which law firms abruptly switch from never adopting to always adopting the provision. Although we identify a similar adoption pattern for investment banks underwriting the issues, when their role is analyzed jointly with law firms, only the law firm light switch effect remains. These results are consistent with the characterization that law firms make a once-and-for-all decision to unconditionally advise their corporate clients

(“IPO firm”) was adopted by Netsuite Inc. in 2007.

⁷ The phrase was coined by Frank Easterbrook and Daniel Fischel to emphasize the differential wealth effect of midstream charter changes from terms in place at the initiation of an investment. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L.

to adopt an exclusive forum provision before going public.

Our analysis of midstream adoption yields two related results. First, there are minimal to no differences in corporate governance between adopters and non-adopters. Further, when there is a significant difference, it is adopters that have “better” governance (at least according to what institutional investors and proxy advisors deem good governance). These findings are at odds with claims, made by those same investors and advisory services, that the provisions are adverse to shareholder interests; if they were adverse to shareholder interests, then well-governed firms would not adopt them. Second, we find no significant differences in governance characteristics between firms whose adoption was implemented by the board of directors versus those whose adoption was approved by shareholders. These findings should allay the concern that midstream adoption harms shareholders. Indeed, as midstream adopters are at least as likely as non-adopters to have mechanisms of good governance that are thought to reduce managerial opportunism, the more plausible characterization is that such provisions are, if anything, beneficial to shareholders.

The paper proceeds as follows. The next section summarizes the literature on multijurisdictional litigation and exclusive forum provisions. The third section describes the data set. The fourth section presents our methodology and results, separately for IPO and midstream adopters. The final section concludes.

II. Multijurisdictional Shareholder Litigation and the Exclusive Forum Solution

The first part of this section provides an overview of the research documenting the sharp increase in multijurisdictional litigation over the past decade, why this is thought to be a

Rev. 1416, 1442-43 (1989).

problem, and proposed solutions. In the second part, we review the empirical research on exclusive forum provisions.

A. Multijurisdictional Shareholder Litigation

Multijurisdictional litigation is a state court phenomenon. This is because there is no formal mechanism, as there is in the federal system, to consolidate lawsuits that involve the same transaction into one forum. The phenomenon is also a relatively recent one, at least in the corporate law context, as there has been a striking shift in shareholder lawsuit filings over the past decade. In 2000, most complaints brought against Delaware corporations were filed solely in Delaware, but by 2010 over half of the lawsuits against Delaware corporations were brought in multiple forums, and less than a third were filed solely in Delaware, with a similar proportion filed solely out-of-state.⁸ Most of these lawsuits involve mergers and acquisitions (M&As).⁹ At the same time as plaintiffs have been filing in more numerous venues, the proportion of M&As attracting litigation has also spiked dramatically.¹⁰

⁸ E.g., Johnson, *supra* note 1, at 374 (for example, of Delaware corporation M&A cases filed in 2010, “8 percent were single, out-of-state filings; 23 percent were Delaware-only filings; and 58 percent were multiple filings... in Delaware and out of state”); Armour, et al., *Losing*, *supra* note 1, at 625, 627 (proportion of Delaware corporation LBO cases filed in Delaware dropped from over 70 percent in 2000 to less than half from 2006 onward).

⁹ Johnson, *supra* note 1, at 371 (state securities class action filings 1997-2010); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation*, 57 *Vand. L. Rev.* 133, 167-69 (2004) (sample of all Delaware cases filed over 1999-2000).

¹⁰ Johnson, *supra* note 1, at 379; Armour, et al., *Losing*, *supra* note 1, at 621, (of 25 largest M&A transactions each year over 1994-2010, ratio of suits to deals rose from 1:1 in 2006 to 2:1 in 2009, with virtually all Delaware transactions attracting litigation by 2008, and multiple jurisdiction filings simultaneously increasing); Matthew D. Cain & Stephen Davidoff Solomon, *Takeover Litigation in 2014*, at 1-2 (manuscript 2015) (lawsuits brought in over 90 percent of corporate takeovers in 2014 compared to 39 percent in 2005, and 34 percent of 2014 deals experienced suits in multiple states compared to 8 percent in 2005). This trend appears to have slowed in 2014, when for the first time since 2009, the number of cases brought in one court exceeded the number brought in more than one forum. Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation* 3

Commentators have advanced a number of explanations for the acceleration of multiforum litigation since 2002. Some have emphasized decisions of the Delaware chancery court that sharply criticized and reduced requested attorneys' fees, along with its relaxation of the presumption granting lead counsel status to the lawyer who is "first-to-file."¹¹ Others have characterized the development as an aftereffect of changes in plaintiffs' law firm competition wrought by (1) the 1995 Private Securities Litigation Reform Act (PSLRA), which made securities lawsuits more costly for small law firms, and (2) the 1998 Securities Litigation Uniform Standards Act (SLUSA), which preempted private state securities, but not fiduciary, actions, along with (3) the breakup of the then leading plaintiffs' law firms, which are said to have served a coordinating function for law firms' fee sharing within one court filing.¹²

The explanation concerning changes in law firm competition would affect litigation against firms incorporated in any state and not simply Delaware, however. And not surprisingly, the trend of increased corporate litigation, particularly acquisitive transaction litigation, as well as the trend of increased filings in multiple jurisdictions, has been experienced by firms across the states, that is, by non-Delaware firms incorporated in states other than their headquarters

(2015).

¹¹ Id. at 643-645, 651; Johnson, *supra* note 1, at 384. Cain and Davidoff provide data suggesting that plaintiffs' attorneys filings are inversely correlated with dismissal rates and in some models, positively correlated with the size of fee awards, and that states would appear to be actively involved in the process, responding to declines (increases) in the number of suits filed by adjusting fee awards upward (downward). Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 *Iowa L. Rev.* (130-134) (forthcoming 2015) .

¹² Johnson, *supra* note 1, at 350, 361; Boris Feldman, *Shareholder Litigation after the Fall of the Iron Curtain*, 45 *Rev. Sec. & Commod. Reg.* 7 (2012); Brian Cheffins, et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 *Colum. Bus. L. Rev.* 427, 429-432 (2012).

state, as well as by Delaware corporations.¹³ Accordingly, while the vast majority of firms adopting exclusive forum clauses are Delaware corporations, a number of firms incorporated in other states have also adopted such provisions (7 percent of the firms in our sample, see table 1, panel A). The increased prevalence of such clauses has been attributed as a possible cause of a recent drop in the number of acquisitive transaction lawsuits filed in multiple courts and a corresponding rise in those brought solely in Delaware.¹⁴

Multiforum litigation is thought to be problematic for four key reasons. First, multiple suits entail duplicative litigation costs and waste judicial resources. These costs are ultimately borne by shareholders and the general public.¹⁵ Second, plaintiffs (or more accurately, their attorneys) are said to seek out courts that will rule more favorably on a complaint, or award greater attorneys' fees than would the Delaware Chancery Court. This would be a particularly worrisome type of forum shopping because, given that the same substantive law is supposed to be applied, neither the outcome nor the fee award should, in theory, vary by forum.¹⁶ Third, multiforum litigation is said potentially to generate a "reverse auction," in which defendants are

¹³ Armour, et al., *Losing*, supra note 1, at 614, 623-624, 635; Myers, supra note 3, at 470, 482, 485. Myers also notes that multijurisdictional litigation has affected firms incorporated in their headquarter state, through increases in parallel federal court filings. *Id.* at 487-488. Myers therefore contends that it is a mistake to characterize the multijurisdictional trend as unique to Delaware firms, and, given his data on option backdating cases, as unique to M&A litigation. *Id.* at 470, 479.

¹⁴ Cornerstone Research, supra note 10, at 3.

¹⁵ E.g., Johnson, supra note 1, at 381.

¹⁶ E.g., Myers, supra note 3, at 495. There are also procedural differences across states, which will follow the law of the forum rather than the statutory domicile (in contrast to whose law governs the substantive legal issues), and which plaintiffs could seek to exploit to their advantage, such as, the extent of discovery permitted, the approach to the holding of hearings on, and granting of, preliminary injunctions, the criteria for selecting lead counsel, and were the case to be litigated, the trier being a jury rather than a chancery court judge. *Id.* at 494.

believed to settle with the plaintiff who will accept the lowest payment.¹⁷ This would be equally troubling forum shopping as it would distort or even eliminate the relationship between the merits of a suit and its settlement value. Finally, multiform litigation undermines a state's ability to control the development of its corporate law, for when a lawsuit is filed out of state, its law can be determined by another state's court, potentially producing inconsistent rulings, thereby increasing legal uncertainty and operating costs for the state's domestic corporations.¹⁸

Commentators critical of multiform litigation have advanced a number of solutions. These proposals have focused on three approaches to resolution: legislative, judicial, and private ordering. Advocates of the legislative approach have proposed that Congress federalize the forum by preempting state corporate litigation (paralleling SLUSA) or mandate that lawsuits be brought solely in the corporation's statutory domicile.¹⁹ A related legislative approach would compel federal courts to stay shareholder lawsuits in favor of filings in the statutory domicile, along with permitting their removal from an out-of-state court to federal court so as to be routed

¹⁷ E.g., Griffith & Lahav, *supra* note 4, at 1082-83; Johnson, *supra* note 1, at 382. Although Griffith and Lahav identify this negative potential of multiform litigation, they contend that the phenomenon should be perceived as a benefit and not a problem, by creating a market for preclusion of claims, which improves litigation outcomes by performing a price discovery mechanism and relieving Delaware courts from having to hear every dispute. They further contend that the appropriate solution to the problem of attorney opportunism in this context is to make the market function better, by enhanced judicial oversight of complaints and settlements and improved intercourt communication about multiple lawsuits rather than eliminate it by centralizing claims in one court. *Id.* at 1057-58, 1102, 1115, 1125, 1138.

¹⁸ To the extent that the vast majority of these cases settle, conflict from a substantive decision by a foreign court is less likely than discrepancies in the nature of the settlement, and attorneys fees, that the foreign court accepts, compared to the domestic court.

¹⁹ E.g., Johnson, *supra* note 1, at 385-386 (noting possible solution); Comm. on Sec. Litig., N.Y.C. Bar Ass'n, *Coordinating Related Securities Litigation: A Position Paper* (2008) (recommending as solution) [hereinafter NYC Bar Paper]; Thomas & Thompson, *supra* note 3, at 1809-1810 (noting possible solution and rejecting as undesirable, as well as unlikely to occur).

back to the domicile state through a thereupon-imposed stay.²⁰

Courts confronted with multijurisdiction lawsuits have attempted to fashion a solution that relies on voluntary coordination—acts of judicial “comity”—that identify which court is to take charge of the litigation and can be initiated by either the courts or the parties.²¹ Defense motions, referred to as Savitt motions after the attorney initiating them, are a more polite and respectful mechanism to obtain a single forum than a conventional motion to dismiss a suit in favor of a proceeding filed elsewhere, because the moving attorney does not express a preference among courts.

The clear-cut advantage of comity techniques over proposals for preemptive federal legislation is that they require no input beyond the judges and parties to a specific lawsuit. But such techniques have an inherent drawback as they cannot resolve multiform litigation if the judges cannot agree on who should hear a case.²² Commentators have accordingly advocated alternative mechanisms to ensure coordination among state courts without resort to federal legislation, such as revising the criteria used for forum selection under current conflict of laws

²⁰ Myers, *supra* note 3, at 472.

²¹ For example, when multijurisdictional litigation initially appeared on the scene, the Chancellor of the Delaware Chancery Court advanced such a comity approach, reaching out to other courts on his own accord, without litigant prompting, to negotiate which court would hear the case, an initiative that would appear to have functioned effectively. *Id.* at 1804; *In re Allion Healthcare Shareholders Litig.*, 2011 WL 1135016 at *4 n. 12 (Del. Ch. Mar. 29, 2011) (Ch. Chandler) (stating that judges’ conferring on where a case should proceed “is a method that has worked for me in every instance when it was tried.”)

²² In one well-known instance, the New York and Delaware courts refused to cede jurisdiction. See *In re The Topps Co. Shareholders Litig.*, 924 A.2d 951 (Del. Ch. 2007) (denying defendants’ motion to stay court’s ruling on preliminary injunction motion to avoid having to litigate in two courts); *Matter of Topps Co Inc. Shareholder Litig.*, 200 NY Slip Op 52543(U), 19 Misc. 3d 1103(A) (N.Y. Sup. Ct. June 8, 2007) (denying defendant’s motion to dismiss or stay the proceeding because, among other reasons, New York case was filed first), available at: <http://law.justia.com/cases/new-york/other-courts/2007/2007-52543.html>. The claims were ultimately resolved in the Delaware proceeding after the New York appellate court

doctrine or drafting model legislation for states to adopt.²³ In contrast to the comity solution, such proposals have the disadvantage of requiring the affirmative decision of numerous actors (e.g., approval at the multiple stages of the ALI’s restatement revision process, along with acceptance by state courts, or by a drafting committee(s) and fifty state legislatures), and thus entail a time-consuming process with an uncertain outcome.

The implementation difficulties in judicial and legislative approaches to resolving multiform legislation lent force to commentators advocating the “self-help” private ordering solution of exclusive forum provisions that automatically coordinate across courts by identifying the forum *ex ante*. However, the key to the effectiveness of such a strategy is the provisions’ enforceability, a matter on which commentators differed when the approach was initially proposed by practitioners in the late 2000s.²⁴ Given such legal uncertainty, few firms adopted the provisions until the strategy was approvingly noted by Vice Chancellor Travis Laster, in

stayed the New York action. Myers, *supra* note 3, at 520.

²³ Strine, et al., *supra* note 4 (proposing prioritizing the statutory domicile over other factors, along with further revisions to the American Law Institute’s Restatement of Conflicts of Law); Thomas & Thompson, *supra* note 3, at 1810-11 (suggesting that the American Bar Association committee that crafts the Model Business Corporation Act could draft a legislative template for Model Act states that provides a coordinated solution).

²⁴ E.g., Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 *Bus. Law.* 325 (2013) (enforceable); Thomas & Thompson, *supra* note 3 (not enforceable). An alternative “self-help” proposal advanced by members of a prominent plaintiffs’ law firm is for plaintiffs filing M&A lawsuits in Delaware to publish a nationwide notice, which would be open for ten days in which other shareholders and their attorneys would apply to compete for the position as lead plaintiff and counsel, reducing the incentive for attorneys to file in other courts, as they would have a chance at being named lead counsel without filing elsewhere. Mark Lebovitch, et al., *Improving Multi-Jurisdictional, Merger-Related Litigation* 6 (Feb. 14, 2011), available at: <http://www.blbgilaw.com/news/publications/data/00132>. But as with the exclusive forum provision solution developed from the perspective of the corporate defendants, this proposal is a feasible solution only with judicial assistance, as it does not stop plaintiffs from filing in out-of-state courts; the proponents’ aspiration is that other courts would be more likely to stay or dismiss a proceeding in favor of Delaware under such an open and transparent process of lead

dicta in a 2010 opinion, *In re Revlon Shareholders Litigation*, in which he remarked that corporations could adopt exclusive forum charter provisions to manage multijurisdictional litigation.²⁵

Though *Revlon*'s dicta only referred to exclusive forum charter provisions, after the decision, numerous firms adopted exclusive forum bylaw provisions. Those adoptions came to a virtual standstill, however, when, following the refusal of a federal court in California (in *Galaviz v. Berg*) to enforce a bylaw (which had been adopted after the litigation had commenced and would thereby be applied retroactively),²⁶ several shareholder lawsuits were filed that challenged management-adopted bylaws as invalid under Delaware law. Although most of the sued corporations voluntarily repealed their bylaws, two chose to litigate. In a 2013 decision, *Boilermakers Local 154 Retirement Fund v. Chevron*, the Chancery Court upheld the validity of exclusive forum bylaw provisions, rejecting the plaintiffs' statutory and contractual contentions that, under Delaware law, management could not preempt shareholders' right to select a forum.²⁷

Following the *Chevron* decision, corporate adoptions of exclusive forum bylaws rapidly

counsel selection. *Id.* at 8.

²⁵ *In re Revlon Inc. Shareholders Litig.*, 990 A. 2d 940, 960 (Del. Ch. 2010) [hereinafter cited as *Revlon*]. The trend of increasing adoptions of forum selection provisions after this decision and the *Chevron* decision of then Chancellor Strine, cited in note 27, *infra*, is discussed in sections II.B and IV, *infra*.

²⁶ *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011) [hereinafter cited as *Galaviz*].

²⁷ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del Ch. 2013) [hereinafter cited as *Chevron*]; see Claudia H. Allen, Trends in Exclusive Forum Bylaws, Conference Board Director Notes 2 (2014) [hereinafter Allen 2014], available at <http://ssrn.com/abstract=2411715> (ten of twelve companies repealed bylaws when sued). Apparently wishing to avoid a Supreme Court affirmation that might have been even broader than that of the Chancery Court, the decision was not appealed. Theodore N. Mirvis, et al., Surrender in the Forum Selection Bylaw Battle, Wachtell, Lipton, Rosen & Katz (Oct. 25, 2013). The decision did include a caveat that even a valid bylaw could still be challenged as operating inequitably, indicating that the provisions could be subject to a case-by-case review of the reasonableness of their operation. *Chevron*, *supra*.

accelerated, paralleling the widespread inclusion of such provisions in IPO charters (which had not been impacted by the bylaw litigation).²⁸ Of course, for exclusive forum provisions to be effective, state courts other than the Delaware Chancery Court must also respect their validity. In contrast to the earlier federal court decision, they have overwhelmingly done so: numerous state courts, including one in California, ruling on the issue after *Chevron* have dismissed suits before them in accordance with the forum choice expressed in the defendant corporations' documents.²⁹ Accordingly, of the three potential routes for reducing the likelihood of multijurisdictional litigation—legislative, judicial and private ordering—the self-help solution has decisively emerged as the most promising, as it is by far the simplest to implement and has

²⁸ See Allen 2014, *supra* note 26, and figure 2 and accompanying discussion in section IV, *infra*.

²⁹ Glen T. Schleyer, et al., Exclusive Forum Bylaws Gain Momentum, Del. Corp. & Leg. Serv. Blog (July 8, 2014) (all state courts considering enforceability of exclusive forum bylaws have upheld them, including courts in California, New York, Illinois and Louisiana), available at <http://decals.delaware.gov/2014/07/08/exclusive-forum-bylaws-gain-momentum/> A federal court in California has also enforced a Delaware exclusive forum bylaw, contrary to the earlier decision. *In re CytRx Corp. Stockholder Derivative Litig.*, No. 2:14-cv-06414-GHK-PJW (C.D. Cal. Nov. 2, 2015) (Dismissing lawsuit on grounds of corporation's valid exclusive forum clause and that Delaware Chancery Court was adequate alternative Forum for the dispute). Only one decision, by an Oregon state court, has refused to enforce an exclusive forum clause since *Chevron*; that court rejected a bylaw adopted at the same time as the corporation entered into a merger agreement that was the subject of the underlying lawsuit; however, the court suggested that had the provision been enacted prior to the merger, it would have been enforced. *Roberts v. TriQuint SemiConductors, Inc.*, No. 1402-02441 (Ore. Cir. Ct. Aug. 14, 2014). But that decision was reversed by the state Supreme Court, and the clause enforced. *Roberts v. TriQuint Semiconductor Inc.*, No. 54 (Ore. Sup. Ct. Dec. 10, 2015). The Delaware Chancery Court upheld a Delaware corporation's bylaw that selected a court in another state (a federal district court in North Carolina) as its exclusive forum, a decision cited by the Oregon Supreme Court in reversing the lower court decision. *City of Providence v. First Citizens Bancshares, Inc.*, CA No. 9795-CB (Del. Ch. Sep. 8, 2014). But the result in that at decision has been overturned by legislative action, as the corporation code was amended to permit Delaware corporations to adopt bylaws and charter provisions making a Delaware court the exclusive forum for corporate law claims but precluding provisions selecting another state as the exclusive forum. D. G. C. L. § 115. Whether such legislation will prompt other state courts to look less favorably on Delaware exclusive forum clauses in retaliation for the express lack of comity remains to be seen.

been effective in resolving multiforum litigation. The three routes are not, however, mutually exclusive. For instance, Virginia adopted legislation permitting domestic corporations to adopt a bylaw designating Virginia or their headquarters state as an exclusive forum for shareholder litigation, and more recently, Delaware as well.³⁰

B. Exclusive Forum Provisions

The first studies examining firms' adoption of exclusive forum clauses focused almost exclusively on the number and type of provisions adopted, rather than on the characteristics of adopting firms. Claudia Allen, periodically tracking the adoption of exclusive forum provisions after the Chancery Court suggested their use in *Revlon*, reported a rapid diffusion of the provisions, including a dramatic surge in adoptions after *Chevron*.³¹ Most of the clauses are

³⁰ Hunton & Williams Client Alert, 2015 Amendments to the Virginia Stock Corporation Act (April 2015) (House Bill 1878, which, among other provisions, amends V.S.C.A. § 13.1-624 to confirm that corporations can adopt exclusive forum bylaws, was signed by the Governor, with effective date of July 1, 2015); D. G. C. L. § 115, *supra* note 29. One firm in our sample is incorporated in Virginia, a 2013 midstream bylaw adopter, which designated as the exclusive forum, the U.S. district court for the eastern district of Virginia, or the state Circuit Court of Fairfax County, if the federal court lacked jurisdiction. Albemarle Corp, Form 10-Q, filed Oct. 18, 2013.

³¹ Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws i, iv (2010-2011) (first published July 1, 2010, updated April 7, 2011) [hereinafter Allen 2011] (adoption by 82 Delaware firms as of April 2011, nearly all of which were after *Revlon*); Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws (2010-2012) (first published July 1, 2010, updated April 7, 2011, updated June 2012) [hereinafter Allen 2012] (number of adopters more than doubled to 195 firms in less than one year from prior tally, by December 2011); Allen 2014, *supra* note 27 (103 adoptions in the four months, July through October, following the *Chevron* decision). Regarding adopters' characteristics, she reports location (the state with the largest number of the adopters is California), industry (the most common sector is manufacturing) and size as represented by inclusion in the S&P 500 (few). Allen 2011, *supra*, at vi, 18 (39 percent of adopters in California, 32 percent in manufacturing); Allen 2012, *supra*, at 1 (27 of S&P 500 have clause); Allen 2014, *supra* note 27, at 2, 6 (26 percent in California of adopters in four months post-*Chevron* and 19 more in S&P 500). These data are not consistent with the characteristics of firms sued for federal securities violations, as

included in companies' charters rather than bylaws, but the bylaw adoptions increased post-*Chevron*.³² In addition, while before that decision, most bylaws were adopted concurrent with other bylaw changes, often in conjunction with annual bylaw reviews, as opposed to being adopted on a "stand-alone" basis, in the months following *Chevron*, the majority of adoptions were "stand-alone."³³ Allen interprets this change as evidence of public companies' increased "comfort" with adopting the bylaws, which, no doubt, is related to their validation by the Chancery Court.³⁴ These data underscore the tight interrelationship between a successful self-help approach and judicial recognition.

The bulk of charter provisions are not accomplished by a separate public shareholder vote. Rather, they are included in the charter of firms engaging in an initial public offering (IPO), emerging from a bankruptcy, or reincorporating.³⁵ Accordingly, most corporations that

they tend to be in the technology sector, and with size. E.g., Irene Kim & Douglas J. Skinner, *Measuring Securities Litigation Risk*, 53 *J. Acctng & Econ.* 290 (2012) (size and specific industry sectors associated with securities litigation). But the provisions apply to state and not federal claims, and the correlation between federal and state claims may not be high. E.g., Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 *Wm. & Mary L. Rev.* 1749, 1774, 1778 (2010) (30 percent of federal securities actions accompanied by state actions)

³² Allen 2011, *supra* note 31 at ii, xi. (51 percent of adoptions in charters); Allen 2012, *supra* note 31, at 1-2, 4 (56 percent of adoptions in charter amendments). After *Chevron*, there is an increase in the proportion of IPO firms placing the provisions in bylaws rather than charters (from 6.6 percent to 11 percent), but the vast majority still opt for charters. Allen 2014, *supra* note 27, at 3.

³³ Allen 2012, *supra* note 31, at 4 (16 stand-alone bylaw adoptions compared to 46 concurrent adoptions); Allen 2014, *supra* note 27 at 5 (54 percent of adoptions were stand-alone post-*Chevron* compared to 8 percent adopted by January 2012).

³⁴ *Id.* The movement to stand-alone adoptions of exclusive forum bylaws has continued apace: we find that 27 percent of pre-*Chevron* bylaws were stand-alone adoptions compared to 59 percent of the higher number of adoptions post-*Chevron*.

³⁵ Allen 2011, *supra* note 31, at ii. The majority of exclusive forum provisions in Allen's study were adopted by IPO firms (50 percent of those adopted in 2011; 61 percent of those adopted in 2010). *Id.* at iv. In tallying whether the bylaws are adopted concurrently with other bylaw changes or separately, on a "stand-alone" basis, Allen notes that a small number of the

are already publicly traded adopt the provisions as bylaws, eliminating the need for shareholder approval,³⁶ highlighting the importance of *Chevron* to public firms' use of the provisions. As discussed in section IV, bypassing a shareholder vote is still the norm for midstream adoptions.

The voting outcomes of five companies which put a forum selection clause to a shareholder vote in 2011 provide insight into why the preferred midstream adoption approach is a bylaw amendment. As Allen reports, one proposal failed and two passed by narrow margins, while adoption with considerable votes to spare occurred where insiders owned a substantial block.³⁷ She offers, as a plausible factor explaining the outcomes, opposition to the clauses of the principal proxy advisory service firms, Institutional Investor Services (ISS), the market leader, and Glass Lewis & Company (Glass Lewis), as their recommendations are routinely followed by many institutional investors.³⁸ The proxy advisory services' recommendations are

“stand-alone” bylaws are adopted at the time a firm enters a merger agreement. Allen 2011, *supra* note 31, at iv. Such event-driven bylaws have continued to occur in relatively small numbers. See section III.B, *infra*.

³⁶ *Id.* at ii. Delaware requires approval of a majority of outstanding shares for charter amendments, Del. Gen. Corp. L. § 242. Bylaws can be adopted by either the shareholders or the board, if the charter grants the board such authority, Del. Gen. Corp. L. § 109, and it would be extremely rare for a firm to not include a provision in its charter that grants the board such authority.

³⁷ Allen 2012, *supra* note 31, at 5 (percentage of outstanding shares cast for the five stand-alone proposals were 42 percent, 50.1 percent, 50.3 percent, and in the firms with what she considers sizeable insider ownership, 83.1 percent and 93.1 percent). Allen does not provide inside ownership percentages, but as she notes, those proposals' high level of support cannot be considered “representative” for predicting voting outcomes more generally. *Id.* The increase in the number of firms adopting the provision by shareholder vote since 2011 and a comparison of the characteristics of firms putting the provisions up to a vote and those adopting bylaws unilaterally, are analyzed in sections III.B and IV.B, *infra*.

³⁸ Studies have estimated that between 10-20 percent of voting shares follow the leading proxy advisory service firm's recommendations. E.g., Cindy R. Alexander, et al., *Interim News and the Role of Proxy Voting Advice*, 23 *Rev. Fin. Stud.* 4419 (2010) (proxy advisor recommendation in favor of dissidents in contested elections increases probability of their success between 14-30 percent); Jie Cai, et al., *Electing Directors*, 64 *J. Fin.* 2389 (2004) (directors for whom proxy advisors recommend withholding votes receive 19 percent fewer

in sync with the views on governance of the Council of Institutional Investors (“CII”), an influential corporate governance advocacy organization of pension and labor union funds, endowments and foundations. The CII advocates a set of corporate governance policies, which it lists on its website as “guidelines that [it] has found to be appropriate in most situations,” and the list includes not restricting shareholder lawsuits to an exclusive forum.³⁹

Allen reports that ISS took the position that it would recommend voting against an exclusive forum proposal if the company did not have four “best practice” corporate governance features.⁴⁰ Glass Lewis went even further: it stated that not only would it recommend voting against all such proposals, but also, were a company to adopt a provision without shareholder approval, it would recommend voting against the election of the director who chaired the firm’s governance committee.⁴¹ In keeping with the CII position, as Allen reports, both advisory services did not recommend voting in favor of any stand-alone forum clause proposal,⁴²

votes); Stephen Choi, et al., *The Power of Proxy Advisors: Myth or Reality?*, 59 *Emory L. J.* 869 (2010) (proxy advisor recommendations to withhold votes for directors shift 6-10 percent of votes).

³⁹ Council of Institutional Investors, *Policies on Corporate Governance*, available at: http://www.cii.org/corp_gov_policies (“1.9. Judicial Forum: Companies should not attempt to restrict the venue for shareholder claims by adopting charter or bylaw provisions that seek to establish an exclusive forum.”)

⁴⁰ Allen 2012, *supra* note 31, at 5. The “good” governance features that ISS required were annual election and majority voting of directors, no poison pill unless approved by shareholders and a “meaningful” right of shareholders to call special meetings; the latter requirement was dropped when it refined its position in the Fall of 2011, and stated it would make recommendations on a case-by-case basis. *Id.* at 6.

⁴¹ *Id.* For bundled votes, Glass Lewis provided more flexibility regarding its blanket negative recommendation for separate votes by stating that it would balance the benefit of the other provisions against the harm of the exclusive forum provision. *Id.* ISS did not issue any specific guidance regarding bundled votes, but it did recommend voting in favor of a forum selection provision that was bundled with a proposal to destagger the board. *Id.*

⁴² *Id.* at 6. For the 2015 proxy season ISS further adjusted its position to recommend shareholders withhold their vote from directors who adopt bylaws “materially adverse” to shareholders, while taking a case by case approach to bylaws “generally deemed not ‘materially

regardless of the companies' compliance with ISS's governance criteria, which are ostensibly more flexible than those of Glass Lewis. Allen concludes that the advisory services' recommendations influenced the two adverse voting outcomes, a view, no doubt, shared among practitioners, which would factor into their counseling midstream adopters to proceed by bylaw amendment in order to avoid the risk of a voting failure.

Joseph Grundfest, an early advocate of exclusive forum provisions to manage multiforum litigation, has also examined their adoption.⁴³ Grundfest examines the association between adoptions and judicial recognition, as the vast majority of adoptions in his sample occurred after *Revlon*, which, as he emphasizes, is not fortuitous.⁴⁴ Computing the number of adoptions per year for three periods: (1) pre-*Revlon*, (2) between *Revlon* and *Chevron*, and (3) post-*Chevron*, he finds that the average adoption rate statistically significantly increased in each period.⁴⁵ He concludes that the *Revlon* decision increased the rate of adoption, but that *Chevron*'s effect is

adverse,” which entails examining additional factors, such as the timing of adoption, and identifying exclusive forum provisions as falling into the category of “generally not materially adverse” bylaws. See Andrew R. Brownstein & Sebastian V. Niles, ISS Clarifies 2015 Voting Policies Regarding Proxy Access, Excluding Shareholder Proposals and “Unilaterally” Adopting Bylaw and Charter Amendments (Feb. 20, 2015). The shift may reflect a recognition by ISS that their clientele, institutional investors, do not view exclusive forum provisions unfavorably, see, e.g., Allen 2014, *supra* note 27, at 8 (noting some institutional investors, such as T. Rowe Price, that “originally opposed exclusive forum provisions have changed or softened their views”), a perception further supported by our analysis of midstream adopters in section IV, *infra*.

⁴³ Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 *Del. J. Corp. L.* 333, 352 (2012) (identifying 133 firms with exclusive forum provisions as of June 2011, the majority of which are in charters). Grundfest is associated with the drafting of the earliest adoptions of the clauses, having been involved in three of five provisions adopted before *Revlon*.

⁴⁴ *Id.* at 339 (only 16 adoptions before *Revlon*).

⁴⁵ *Id.* at 360. Grundfest also reports that the proportion of IPO adopters increased from essentially 0 to about 16 percent within the first few years after *Revlon*. *Id.* at 361-362. As discussed in section IV, the rate of adoption by IPO firms has dramatically increased.

indeterminate because it cannot be separated from the secular trend.⁴⁶

Grundfest characterizes exclusive forum provisions as a “Delaware phenomenon,” as all of the provisions specified a Delaware forum, and all but three of the adopters were incorporated in Delaware.⁴⁷ He further distinguishes the phenomenon as a “general migration to Delaware... and a particular emigration from California” because 32 percent of Delaware adopters are located in California, but only 24 percent of Delaware corporations are located in California.⁴⁸ He contends—in explanation of the phenomenon—that Delaware corporations headquartered in California are disproportionately sued and that the business community believes that California courts are of lower quality than Delaware courts.⁴⁹ In contrast, we show in section IV.A that, in all likelihood, there is no “California effect.”

Lastly, Grundfest examines inside ownership (calculated by combining management and outside blockholders’ shares) of the seven midstream adopters in his sample that put the exclusive forum provision up to a stand-alone shareholder vote. Paralleling Allen’s observation on the initial round of such votes, he notes that inside ownership was lower in the two firms whose proposals were not approved than in those where the provisions were approved (under 15

⁴⁶ Id. at 358-359.

⁴⁷ Id. at 367. As discussed in section III, we also find that the vast majority of adopters are Delaware firms, and there are only a few more non-Delaware firms in our data set. But while we exclude them from our analysis, we note that there are numerous mutual funds and unincorporated firms with exclusive forum provisions, and a large number of those entities are not Delaware firms.

⁴⁸ Id. at 368. A binomial test of whether the two distributions are identical rejects the hypothesis of equality at 4.1 percent. Id. at 407.

⁴⁹ Id. at 369 (citing data from Cain & Davidoff’s study showing that 72 percent of shareholder suits against such firms were heard in California, and noting Chamber of Commerce court ratings rank Delaware as the best and California as 46th among the states). Claudia Allen also hypothesizes a similar “California effect,” suggesting consistency between the high number of Delaware-incorporated adopters that are headquartered in California and perceptions of the state’s litigation climate. E.g., Allen 2011, *supra* note 31, at ii; Allen 2014, *supra* note 27, at 6.

percent compared to a range of 20 – 87 percent).⁵⁰ He plausibly characterizes the data as suggesting that voting outcomes will be correlated with inside ownership. In contrast, we disaggregate insider and outside blockholder share ownership in section IV.B and find that insiders hold considerably less than the combined figures in Grundfest’s study would suggest. We further find that the average inside ownership of voting firms decreases over time, while the proportion of approved proposals increases, suggesting that there is an increase over time in shareholders’ familiarity with the provisions. However, these results should be interpreted with caution because the sample sizes are small.

The Allen and Grundfest examinations of forum selection clause adoptions are useful introductions to the phenomenon—in particular, identifying an accelerating trend of adoption and differential routes followed by new and established firms. But without more information on the characteristics of adopters compared with non-adopters, or among adopters using different methods (board-adopted versus shareholder-approved provisions), it is not possible to ascertain the significance of the phenomenon or whether the rapid pace of adoptions, particularly by midstream bylaws, should be an issue of any moment for shareholders. It matters whether these are, for instance, typical firms, firms uniquely prone to litigation, or firms led by entrenched executives.

In a recent paper, Jared Wilson undertakes an event study, analyzing stock price reactions to exclusive forum provision adoptions, seeking to answer a key question not addressed by Allen and Grundfest, what are the welfare effects?⁵¹ He finds that upon the adoption’s announcement,

⁵⁰ Grundfest, *supra* note 43, at 371.

⁵¹ Jared I. Wilson, *The Value of Venue in Corporate Litigation: Evidence from Exclusive Forum Provisions* (August 2015), available at SSRN: <http://ssrn.com/abstract=2646312>. Wilson also examines stock returns around the *Chevron* decision. Because the analysis includes non-

firms experience a small positive price effect of 0.8 percent that is statistically significant.⁵² Subdividing the adopters into those more and less likely to be subject to be acquired, and hence more and less likely to be subject to multiforum shareholder litigation, he further finds that the announcement returns of firms with a higher probability of takeover are both higher and statistically significant, at 1.3 percent, compared to those with a lower probability (0.41 percent).⁵³ He finds a similarly stark difference in returns subdividing firms by whether they become takeover targets in the future: firms that receive a bid have higher and significantly positive returns of 6.8 percent upon announcement of adoption, compared to those that do not (0.45 percent).⁵⁴ These data are consistent with the view in the literature that exclusive forum provisions benefit shareholders, by reducing duplicative litigation costs.

Delaware firms, which the decision did not directly impact, without providing a breakout of their proportion across variously examined subsamples, we think there is considerable noise in the return estimation and we do not discuss it.

⁵² Id. at 21, 43. When subdivided by whether the firms experienced a bid before adoption of a provision, the returns are insignificantly positive and not significantly different across the groups. Id. at 43. He provides two reasons why the positive stock price returns are not explained by a signaling effect, that is, they are not due to the market interpreting adoption of an exclusive forum clause as new information indicating the probability of the firm's receiving a bid. First, he separately examines the stock price effect for firms that experienced a withdrawn bid before adoption, contending that for these firms the announcement effect is not likely to be confounded with unanticipated information about future bids. He finds that these firms experience a similar positive price effect (albeit insignificant, which is likely due to the small sample size). Id. at 23. Second, he contends that the event study of the *Chevron* decision is not subject to these firm-specific concerns, and that the results of that analysis are consistent with the provisions' having a positive effect independent of a signal. Id.

⁵³ Wilson also divides firms into the likelihood of experiencing federal securities litigation or making an acquisition, along with experience of such events before and after adoption. We do not refer to these results because we believe they are not particularly relevant: federal securities actions are not covered by exclusive forum clauses and less than one-third of such actions are accompanied by derivative claims, Erickson, *supra* note 31, and there are exceedingly few transactions in which shareholders of an acquirer of another company could state a fiduciary claim (and the data used to predict and identify acquisitions includes all acquisitions, not only those in which there might be a claim, such as a related party transaction).

⁵⁴ Wilson, *supra* note 51, at 22.

Wilson also seeks to explain which firms adopt exclusive forum provisions by firm characteristics, including several governance features related to board independence and institutional ownership, and the aforementioned takeover variables.⁵⁵ He finds that adoption is positively related to firm size and past and future takeover bids (takeover probability is only marginally significant), and negatively related to prior stock performance.⁵⁶ None of the governance characteristics are significant.⁵⁷ Thus he plausibly concludes that firms that are more likely to experience multiform litigation (given the significance of the takeover variables) are more likely to adopt the provisions.

Wilson provides a valuable contribution to our understanding of the working of exclusive forum provisions and whether they benefit shareholders and not solely managers. However, there is a limit to the value-added of his analysis of which firms adopt the provisions, which muddies the interpretation of who benefits, because it combines IPO and midstream adopters, as well as midstream adoptions by bylaw and by shareholder vote.⁵⁸ Yet the core difference for public shareholders in the timing of adoption (investors in IPOs can adjust for a provision's presence in the purchase price) as well as the mode of midstream adoption (bylaws do not require shareholder approval), suggests not only that the factors driving adoption could well differ in these contexts, but also that the key questions for assessing the benefits differ depending

⁵⁵ The governance variables included are the percentage of independent directors, the percentage appointed after the CEO's appointment, the percentage of directors who serve on at least three other public company boards, the separation of the CEO and Chairman positions, the presence of institutional blockholders and the percentage of shares held by institutions.

⁵⁶ *Id.* at 39-41 (Table 3). The three takeover variables are entered into three separate regressions.

⁵⁷ *Id.*

⁵⁸ While his sample period extends beyond ours to December 2014, because of limits on the dataset he uses to identify firm characteristics, his analysis includes only 58 IPO and 324 midstream adoptions.

on the adoption process. Accordingly, it is important that the empirical analysis distinguish across the forms of adoption.

III. Data

Our data consist of three samples: (1) companies that have adopted an exclusive forum clause, (2) initial public offerings, and (3) a control group of companies that have not adopted an exclusive forum clause. After explaining the construction of each data set, we discuss key summary statistics of each in turn.

A. Data set construction

The first data set is our population of interest: all U.S.-domiciled public corporations that have adopted an exclusive forum clause. These include both corporations that adopted before their IPO (“IPO adopters”) and those adopting after their IPO (“midstream adopters”). We constructed the data set by searching the SEC EDGAR database for all instances in which the terms “exclusive” and “forum” appear in the same sentence in either a bylaw or a charter.⁵⁹ In practice, our search was over-inclusive, and so we read through each bylaw or charter to confirm that it contained an exclusive forum clause and that the issuer was a U.S. public corporation. It is possible that our search did not recover every exclusive forum clause ever adopted. However, given our study of the phrasing of the clauses, we are confident that our sample contains virtually all—if not all—exclusive forum clauses adopted before August 14, 2014 by U.S.-domiciled corporations that report to the SEC.

⁵⁹ Specifically, we searched for “exclusive /S forum” on the Bloomberg Law EDGAR search tool and limited the search to “Exhibit 3 (bylaws and charters). We also conducted a similar search of proxy statements in Lexis to identify provisions subjected to a vote. This search picked up a few additional firms which did not file an exhibit containing the provision.

The second data set is a comparison group for IPO adopters. We collected data on all IPOs from January 2010 to August 2014. We commenced the data collection in 2010 because only one exclusive forum clause was included in an IPO charter before that year. We restricted the sample to IPOs by U.S.-domiciled corporations that report to the SEC (i.e., the same sample for which we hand-collected the exclusive forum provision data). Our data on the firms are of three types: (1) identification and financial variables such as firm name, firm size, and IPO proceeds, (2) the name of the law firm that advised the company during its IPO, and (3) corporate governance variables such as state of incorporation and whether the board was classified at the time of the IPO. The IPO-related data come from the SDC Platinum database maintained by Thomson Reuters. The governance data were obtained from the firms' SEC filings in the EDGAR database.

The third and final data set is a comparison group for midstream adopters. We used an algorithm to match each midstream non-event-driven bylaw adopter to a similar corporation that had not adopted an exclusive forum clause. The algorithm matched companies by year, firm size, industry, and domicile.⁶⁰ We then hand-collected corporate governance and ownership data for each midstream adopter and its matched non-adopter from SEC filings in EDGAR at the time of adoption.

B. Summary statistics

⁶⁰ See the Appendix for details of the matching procedure. Size and industry are standard characteristics used in the literature to identify comparable companies. A further rationale arguably also informs our use: both size and industry are key factors the literature identifies with litigation risk, see, e.g., Kim & Skinner, *supra* note 30. It is desirable in our context to match on proxies for litigation risk, to reduce the possibility of bias in the comparison to the extent that litigation risk is a factor in the decision to adopt a clause, although as noted earlier, note 30, *supra*, securities lawsuits, from which the litigation risk factors are derived, are not strongly correlated with corporate law-related lawsuits.

Table 1 presents summary statistics. The data are split into four panels, each representing a different unit of analysis: (A) all exclusive forum clauses, (B) IPOs between 2010 – 2014, (C) law firms advising IPOs, and (D) exclusive forum clauses adopted midstream.

Panel A considers all 746 exclusive forum clauses adopted by U.S.-domiciled public corporations. Of these, 93 percent specify Delaware as the exclusive forum. The 746 instances of adoption are split roughly 50/50 between IPO adopters and midstream adopters. Panel A also shows that exclusive forum clauses are a quite recent phenomenon: Over 70 percent of existing provisions were adopted in the last two years of the sample (the two years prior to August 2014). Only 4 percent were adopted before 2011.

Panel B presents data on all IPOs of U.S.-domiciled corporations between January 2010 and August 2014 in the SDC database. There are 679 IPOs in total; 45 percent had an exclusive forum clause in the charter, 76 percent were Delaware corporations, and 25 percent (the plurality) were headquartered in California.⁶¹ Of the Delaware IPOs, 59 percent have a forum clause. Most IPOs generated more than \$50 million in proceeds and most were by corporations with over \$100 million in assets (68 and 58 percent, respectively).

In panel C, the unit of analysis is the law firm. The panel includes all law firms that have advised at least one of the 679 IPOs from January 2010 to August 2014 (i.e., the sample of IPOs in panel B). There are 183 unique law firms in total. The average number of IPOs per law firm is 3.7 (679 IPOs / 183 law firms), but the distribution is skewed. Of the 183 total law firms, about half have advised only one IPO since January 2010. One third of law firms have advised

⁶¹ We identified a total of 351 IPO firms with exclusive forum clauses in our EDGAR search, as indicated in panel A. Thirty-two of those IPOs were corporate spinoffs, a transaction type not included in the SDC IPO database. An additional 13 of the IPO firms identified in our search were also not in the SDC database. Those 45 firms are excluded from the counts in panel

between two and four IPOs; 10 percent have advised between five and nine IPOs; and 8 percent (fifteen law firms) have advised more than ten IPOs.

The distribution of exclusive forum clauses per law firm is commensurately skewed. More than half of all law firms (61 percent) have never adopted an exclusive forum clause at the IPO; 16 percent have adopted it exactly once; 10 percent have adopted it two or three times; and 13 percent have adopted it four or more times. In addition, the first IPO after *Revlon* of 31 law firms (17 percent) contained a provision. Such firms can be characterized as legal “innovators.”

The table also presents summary data on law firm characteristics that would be relevant to a law firm’s propensity to use an exclusive forum provision: sophistication and pre-*Revlon* experience with large M&A transactions (as larger deals are frequent targets of multiforum litigation).⁶² We proxy for firms’ sophistication by the rankings in the Am Law 100 (gross revenue) and the Legal 500 series (elite expertise).⁶³ Less than one-third of the firms (27 percent)

C and our analysis of IPO forum selection clause adoptions in section IV.

⁶² E.g., Robert Borowski, *Combatting Multiforum Shareholder Litigation: A Federal Acceptance of Forum Selection Bylaws*, 44 Sw L.R. 149, 150 (2014) (in 2012, 93 percent of deals over \$100 million and 96 percent of deals over \$500 million were subject to shareholder litigation, over half of which were brought in multiple states). M&A experience is constructed by extracting from Thompson-Reuters’ SDC M&A data set all completed, unconditional M&As of U.S. publicly traded corporations whose deal value was at least \$100 million, with an announcement date from Jan.1, 2005 to the *Revlon* decision. Creditor acquisitions of a bankrupt firm, recapitalizations, spinoffs, repurchases and purchases of minority stakes were excluded. This identified 987 deals (deals where at least one legal advisor, on either the target or acquirer side, was reported). Experience is measured as the total number of transactions between 2005-2010 for which the law firm is reported as the lead advisor (for either the target or acquirer).

⁶³ The American Lawyer ranks law firms each year by gross revenue. For each year of Am Law 100 rankings over 2010-2013, we grouped the IPO law firms by whether they ranked in the top 25, next 26-50, bottom half, or were not ranked. For the regressions, we assigned a firm to the group in which it appeared in three of the four years. Most law firms (115) were not ranked, and these firms worked on most of the IPOs that did not have forum clauses (85 percent). The remaining law firms were evenly divided across the ranked groups, and the higher the ranked group, the higher the percentage of firms had used such a clause at least once. The Legal 500 Series ranks law firms based on a series of performance metrics using client and peer

were in the elite tiers of advisors to issuers of equity offerings and large M&A transactions and only slightly more (37 percent) are in the top 100 firms by revenue. In addition, close to half of the law firms had no experience with a large M&A transaction pre-*Revlon*.

Panel *D* presents summary statistics for midstream adoptions. The vast majority (over 80 percent) are adopted as bylaw amendments. Moreover, most of the midstream charter adoptions (over 60 percent) were not subject to shareholder approval. Only 12 percent of midstream adoptions were put to a shareholder vote, with half of these occurring as stand-alone votes and half as bundled votes (primarily as a vote on a reincorporation, in which the new domicile firm's charter—which is not subject to a separate vote—has an exclusive forum provision).⁶⁴ An additional 4 percent were approved by written consent, most of which were bundled with a reincorporation.

As is true of IPO adopters, most midstream adopters are Delaware corporations selecting Delaware courts as the exclusive forum (88 percent). However, five midstream adopters selected a forum other than their statutory domicile, including two Delaware corporations and a Texas

rankings and analysis of private information from the law firms to identify a set of elite firms by area of specialty, which are divided into several tiers. For a description of the ranking methodology, see *The Legal 500 Series, How Do You Rank Firms/Sets?*, available at: <http://www.legal500.com/assets/pages/about-us/how-it-works.html#rank>. We searched four specialties: capital markets, equity offerings (advice to issuers); large and mega M&A transactions; M&A litigation; and securities shareholder litigation.

⁶⁴ Three firms put a board-adopted bylaw up to a shareholder vote (two a year later the other within six months); we exclude the board adoptions from the midstream bylaw count and include these adoptions only in the separate vote counts. Although the overwhelming number of firms seeking shareholder approval do so for charter amendments, five of the separate votes were on clauses located in bylaws. Three firms with exclusive forum charter provisions are included in panel *A* as midstream adoptions but are excluded from panel *D* and the analysis of midstream adoptions in part IV because they were identified as IPOs by SDC but the SEC filings indicated that the firms had already been publicly traded, albeit to a limited extent in over-the-counter markets.

corporation selecting Delaware.⁶⁵ In contrast, all IPO adopters chose their statutory domicile. The number of adopters that are non-Delaware corporations is higher for midstream than IPO adopters, and much higher than that reported in the earlier Allen and Grundfest studies. The recent growth in the number of adopters choosing non-Delaware forums suggests that there are other explanations, besides a preference for the expertise of the Delaware Chancery Court, for why firms adopt the provisions, such as the convenience of being sued locally as well as the avoidance of duplicative litigation expense.

In contrast to IPO adopters, the bulk of midstream provisions (74 percent) were adopted after Delaware validated bylaw adoption in *Chevron* (compare figures 1 and 2). Almost as many provisions were adopted in the first five months of 2014 as were adopted in the six months following the decision in 2013. The post-*Chevron* surge is greater for midstream bylaw than midstream charter adoptions (80 percent compared to 43 percent). These data are at odds with Grundfest's contention that *Revlon* was the more significant decision for midstream adoptions—that contention is accurate only for provisions located in charters (whether by midstream charter amendment or in an IPO charter). As indicated in figure 2, midstream bylaw adoption approximately tripled immediately after *Chevron*. Both the level and the steepness of midstream bylaw adoptions post-*Chevron* are far greater than what Grundfest perceived to be a secular trend.

⁶⁵ All of these adoptions were post-*Chevron*. One of the Delaware firms adopted the provision in conjunction with a merger, and the provision was upheld against a challenge by shareholders seeking to sue in Delaware, as mentioned in note 29, supra.. Delaware's statutory proscription of such provisions, see note 29, seems quite unnecessary, given the small number of Delaware firms not designating the state as the exclusive forum (less than one half of 1 percent). The Texas corporation had sought to reincorporate in Delaware three years earlier, with a charter including an exclusive forum provision, but the reincorporation proposal was withdrawn without being put to a shareholder vote.

Lastly, event-driven bylaw adoptions are still relatively rare. Twenty midstream provisions (5 percent) were adopted by a corporation at the time it entered into a merger agreement in which it was being acquired. The small number might be explained by uncertainty over their validity at the time our data were collected, as there were as yet no decisions explicitly enforcing an exclusive forum bylaw adopted at the time of a specific transaction to litigation over the same transaction.⁶⁶ Uncertainty over event-driven bylaws' enforceability encourages firms to act prophylactically and adopt a provision ex ante, well before any transaction is on the horizon. Namely, ensuring the validity of an exclusive forum provision should the firm enter into an acquisition in the future plausibly explains the post-*Chevron* surge in bylaw adoptions, because most are adopted by firms not in high litigation risk industries, and they would therefore be most concerned about multiform litigation arising in an acquisition context.

IV. Results

Because of the possible wealth transfer from shareholders to managers from latecomer terms, we separate the analysis of exclusive forum provisions by the time of adoption. The first part of this section analyzes exclusive forum clauses that are adopted at the IPO; the following part examines those adopted midstream.

A. Adoption at the IPO

The dynamics of exclusive forum clause adoption at the IPO and midstream stage differ not only with respect to the opportunity for wealth transfers but also in the adoption process.

⁶⁶ As discussed in note 29, *supra*, the Delaware chancery court decision in *City of Providence* enforced an exclusive forum provision that was adopted in conjunction with a merger, but that opinion came down after our data set collection concluded. The Oregon lower court decision refusing to honor an event-driven bylaw also was decided after our data set collection concluded, and, as previously noted, that decision was reversed on appeal. With the uncertainty over the validity of event-driven provisions seemingly resolved, there may be more

Virtually all Delaware firms now go public with exclusive forum provisions in their charters, with IPO law firms playing a crucial role in their adoption.

1. The transition toward universal adoption

The dicta of *Revlon* sparked a revolution in IPO charters. This is evident on visual inspection of Figure 1. The figure graphs the probability that a charter includes an exclusive forum clause at the IPO. In December 2007, the NetSuite IPO was the first to include an exclusive forum clause in its charter. Thereafter, prior to *Revlon*, no other IPO included an exclusive forum clause.

Revlon was issued on March 15, 2010. Since the decision, exclusive forum clause adoption has grown at a constant linear rate of over 15 percentage points per year. The quadratic fit shown in Figure 1, though not statistically significant, suggests that if anything the growth is slightly accelerating. In any case, by 2013, exclusive forum clauses were being incorporated into over half of all Delaware firms' charters at the IPO. As of August 2014 (the end of the sample), the adoption rate is 80 percent. Extrapolating a year into the future, exclusive forum clauses could be universal among Delaware firms by the end of 2015.⁶⁷ The rapid pattern of adoptions indicates how innovative IPO chartering is, contrary to a contention in the literature that IPO charters consist of rote boilerplate provisions and exhibit no innovation.⁶⁸

event driven adoptions in the future.

⁶⁷ This prediction is based on the quadratic fit in figure 1. This comes from an OLS regression in which the dependent variable is an indicator for adopting an exclusive forum clause and the independent variables are years (since 2010) and years-squared. The sample for the regression is all U.S. corporate IPOs since 2010.

⁶⁸ Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 *Stan. L. Rev.* 1325, 1329 (2013). Although Klausner sees a failure to innovate and customize to maximize share value in IPO charters' seemingly boilerplate inclusion of provisions, the data on exclusive forum clauses suggest that a contrary conclusion could well be drawn from such a pattern: innovations rapidly diffuse, achieving near universal adoption when lawyers (and

The effect of *Revlon* on adoption at the IPO has been remarkably constant since the day that *Revlon* was issued. In contrast, neither the 2013 *Chevron* case (on the validity of bylaw adoption) nor any other event seems to have affected this trend. (By contrast, midstream adoptions were dramatically effected by *Chevron*, as indicated in Figure 2.) The inapplicability of *Chevron* to the decision for IPO adoption (which is almost always through a charter provision) confirms our distinction – indeed, the literature’s distinction – between IPO and midstream adoption. This distinction is further validated by the fact that, whereas IPO adoption is now almost universal, midstream adopters are still a small minority (only a few hundred out of thousands of public companies).

Figure 1 also motivates a reappraisal of the empirical approach to studying exclusive forum clause adoption. The previous literature has focused on explaining the adoption decision for any given firm. The core idea is that firms that are particularly at risk of multi-forum litigation should be more likely to adopt an exclusive forum clause. Such “litigation risk factors” could work both in favor and against the case for exclusive forum clauses: in favor if multiform litigation is driven by lawyer opportunism or a perceived tendency of some foreign courts to assume jurisdiction even without an obvious efficiency or fairness rationale (e.g., the “California effect” discussed in the Allen and Grundfest studies); or against if, as some critics would argue,

derivatively, their clients) perceive the provisions to have universal value. In addition, there is variation in the formulation of the clauses, concerning matters such as the number of permissible forums and the specification of investors’ deemed consent; Allen 2014, *supra* note 27, at 5, and whether operation of the clause may be waived by the board, again contrary to the contention that IPO charter choices are rote boilerplate, although some of the nonuniformity may be due to experimentation given the clauses’ early stage of development rather than tailoring to firms’ specific circumstances. Further, staggered boards, a takeover defense that Klausner considers to be problematic charter boilerplate are far from universal in IPO charters, indicating that customization does indeed occur, as discussed in part IV.A.3, *infra*. It is alternatively possible that the pattern of charter innovation that we identify is unique to exclusive forum clauses, given

the exclusive forum clause is just another mechanism to entrench management. The existing literature essentially combines these two possibilities into a single “litigation risk” measure.

An approach that focuses on individual firms’ decisions may continue to be sensible when considering midstream adoption, since this is the case in which a board acts unilaterally and perhaps in anticipation of a litigation-prone event such as a merger. But for IPO adoption, Figure 1 demonstrates that the game may soon be over; universal adoption is nigh.

Figure 1 thus motivates an approach that explains not just an individual firm’s decision, but the entire *transition* itself, the shift from 0 to (nearly) 100 percent adoption for IPOs. There are two possible explanations for this transition: (1) exclusive forum clauses are adopted seemingly at random; they are in most firms’ interest but whether or when a firm adopts one is not determined by any important characteristic of the firm itself, or (2) there is some kind of selection effect that drives a diffusion process; some types of firms are particularly likely to adopt it while others simply follow the trend.

2. Law firms as the drivers of the transition: A light switch hypothesis

The question is: What is the vehicle of diffusion? The fact that the trend in Figure 1 is linear actually eliminates a large class of possibilities. Specifically, we can reject a standard diffusion model that is based on individual firms. A standard diffusion model would posit that the likelihood of adoption is an increasing function of the current state of prevalence: The individual likelihood of adoption is some fixed probability (whether high or low) multiplied by the current rate of adoption. In this case, adoption rates are accelerating (this is the first part of the so-called “S-curve” found in studies of the diffusion of innovations). The higher the current state of adoption, the larger the change in adoption rate for the next period. The observed trend,

their legal subject matter.

however, is not accelerating. The quadratic fit is graphed in Figure 1 and the coefficient on the quadratic term is neither substantial nor statistically significant (0.005 with standard error 0.01). The best fit is thus linear. The first-pass analysis suggests that the rate of diffusion through IPOs is constant; a given company's decision to adopt does not depend multiplicatively on the current level of adoption.

If the vehicle of diffusion is neither randomness nor the companies themselves, another potential source could be legal counsel. Suggestive of such an hypothesis, two studies have provided evidence that law firms influence IPO charters.⁶⁹ Robert Daines finds that IPO firms are more likely to be incorporated in Delaware than their home state when advised by a national law firm as opposed to local legal counsel.⁷⁰ John Coates finds that firms going public in 1991-92 that were advised by New York law firms are more likely to have antitakeover defenses in their charters than IPOs counseled by Silicon Valley law firms, with the law firms' M&A experience strongly correlated with the presence of defenses. He further finds that by 1998-99, the difference had disappeared. He attributes the transition to law firm learning, as Silicon Valley corporations experienced hostile bids for the first time in the mid-1990s.⁷¹ The disparate content across charters is interpreted as a function of law firm expertise and potential agency problems of lawyers' interests not being well aligned with those of issuers. We adapt these insights on lawyers' key role in the crafting of IPO charters to explain what is a quite different pattern of exclusive forum provision adoptions, compared to the domicile and takeover defense decisions explored in those studies.

⁶⁹ John Coates, Explaining Variation in Takeover Defenses: Blame the Lawyers, 89 Cal. L. Rev. 1301 (2001); Robert Daines, The Incorporation Choices of IPO Firms, 77 N.Y.U. L. Rev. 6 (2002).

⁷⁰ Daines, *supra* note 69, at 1595.

Specifically, a linear trend of exclusive forum provision adoptions could be explained by a model in which law firms are the vehicle of diffusion for this new legal technology. Imagine the stylized case in which there are N law firms and each law firm advises a fixed number of IPOs per year. Suppose further that, each year, one of these law firms (or any other constant number) suddenly decides that, from then on, all of the IPOs it advises will include an exclusive forum clause. Call this the “light switch” model of diffusion; the idea being that when a law firm suddenly switches from zero adoption to total adoption, the time series of adoption for that law firm resembles a light switch, e.g., “0, 0, 0, 1, 1, 1.”

Figure 3 tests the light switch model in a simple event analysis framework. The event is the first time that the law firm advises an IPO adopter. Subsequent IPOs are all “post-event” for the law firm. If the light switch model were perfectly correct, all post-event IPOs would include an exclusive forum clause and the adoption rate would immediately jump from 0 to 1. The post-event sample includes 315 IPOs advised by 43 law firms.

The light switch model shows promise. Figure 3 separates two groups of law firms: (1) Wilson Sonsini and (2) everyone else (as explained later). First consider law firms other than Wilson Sonsini. The instantaneous light switch effect is about 60 percent for these law firms. That is, when these law firms adopt for the first time, the likelihood of adoption for their next IPO jumps to 60 percent. Within two years, their adoption rate climbs to 85 percent. Within 3.5 years, their adoption rate is – remarkably – 100 percent. Seven law firms (excluding Wilson Sonsini) have over 3.5 years’ experience, and all of their last twenty-four IPOs have included an exclusive forum clause.

⁷¹ Coates, *supra* note 69, at 1304, 1362-65, 1370-73, 1377, 1380.

Wilson Sonsini is a special case: Wilson Sonsini advised the first IPO to adopt an exclusive forum clause, NetSuite in 2007, well before *Revlon*. NetSuite's adoption seems to have been a kind of legal experiment.⁷² After NetSuite, no other IPO adopted an exclusive forum clause until after *Revlon* (in 2010). Wilson Sonsini itself did not adopt one again until 2011. In the interim, Wilson Sonsini had advised another twelve IPOs. Wilson Sonsini's "event time" is thus somewhat out of sync with other law firms. Yet even if one syncs it back by dropping the NetSuite IPO, Wilson Sonsini remains an outlier (though the difference is less stark). While all of its peer law firms have quickly transitioned to 100 percent adoption, Wilson Sonsini's adoption rate has grown but at a much slower pace. It is currently at approximately 50 percent.

Table 2 tests the light switch model in a regression framework. The unit of observation is the IPO. Each column lists the results of an OLS regression in which the dependent variable is an indicator equal to 1 if the corporation has an exclusive forum clause at its IPO.⁷³ The first specification includes only a constant (column 1). It estimates that 45 percent of all IPOs since 2010 have included an exclusive forum clause.

⁷² See Grundfest, *supra* note 43.

⁷³ A probit or logit specification is typically used to estimate a probability model. However, the probit and logit maximum likelihood estimates of the light switch coefficient do not exist because the light switch variable perfectly predicts failure, a problem that is known in the literature as the "quasi-complete separation" problem in limited dependent variable models. A. Albert & J.A. Anderson, On the Existence of Maximum Likelihood Estimates in Logistic Regression Models, 71 *Biometrika* 1 (1984). Namely, the light switch variable equal to 0 always implies that there is no exclusive forum clause, which would imply a probit or logit coefficient of infinity. We therefore use the linear probability model (OLS), which can be estimated. Although the predicted values can fall outside the 0 to 1 probability range, OLS provides a consistent estimator of the marginal effect of the light switch coefficient, which is the measure of interest for our analysis.

The second specification tests the light switch hypothesis (column 2). It omits the constant term and includes only one control: a variable that we refer to as the “light switch” indicator. The light switch indicator is equal to 1 if the IPO is advised by a law firm that (a) has previously adopted an exclusive forum clause or (b) is now adopting one for the first time. We call this the “light switch” variable because, for every law firm, it starts at 0 and then permanently switches to 1 the first time the law firm adopts an exclusive forum clause. The mean of this variable is 0.57, as indicated in table 1, panel *B*, so “post-light switch” law firms advised 57 percent of all IPOs since 2010.

If the light switch indicator’s coefficient were exactly 1, then the light switch model perfectly explains the data and law firms make a once-and-for-all decision to adopt exclusive forum clauses for all of their IPOs. If adoption bears no relation to the advising law firm, the light switch indicator’s coefficient will be approximately 0.45 (the unconditional adoption rate from specification 1).⁷⁴ The estimated coefficient with the full sample is 0.79 (standard error 0.02). Thus, the model estimates that the average light switch effect is nearly 80 percent complete.

The next specification separately considers a few of the determinants of adoption that are discussed in the literature (column 3).⁷⁵ These include indicators for whether the company is incorporated in Delaware, whether the company headquarters is in California, small versus large firms, year fixed effects, and industry fixed effects. Not surprisingly, firms incorporated in

⁷⁴ They would be exactly equal (in expectation) if we excluded IPOs in which the law firm adopts for the first time. We do this as a robustness check and find that the main results do not change.

⁷⁵ See the literature review in section II.B.

Delaware as well as large IPOs (over \$50 million in proceeds) are more likely to include an exclusive forum clause (38 and 23 percentage points, respectively).

However, these effects significantly diminish in the full specification that combines the literature's determinants with the light switch model (column 4). Both the large IPO and Delaware corporation coefficients plummet. The coefficient for large IPOs drops to 6 percentage points and remains (marginally) significant. The Delaware effect drops to 5 percentage points and is no longer significant.

Further, the California effect becomes *negative* 7 percent and significant. This is surprising given the discussions of previous studies, which suggest that, in an effort to avoid California courts, firms headquartered in California would be *more* likely to adopt an exclusive forum clause.⁷⁶ In subsequent specifications (described below) the California effect remains negative but not always statistically significant. Even if the true California effect were positive, it is unlikely to be large.⁷⁷

The next specification (column 5) includes an additional indicator that the law firm has previously adopted an exclusive forum clause more than two years ago. This is the case for 26 percent of IPOs (see table 1, panel B). This coefficient would be positive if the light switch model were true but not instantaneous, the full transition instead occurring over a few years. Figure 3 has already shown this to be the case for seven of the eight law firms that have over 3.5 years of experience, for whom all of the last 24 IPOs have included an exclusive forum clause. In the full sample (column 5), this coefficient is not statistically significant and it does not

⁷⁶ See Allen 2011, *supra* note 31, at ii; Grundfest, *supra* note 43, at 368; and section II.B, at notes 49-51 & 59-60, discussing the studies' analyses of a California effect.

⁷⁷ The negative California effect also seems to be entirely driven by Wilson Sonsini. It disappears when one moves from the specification that includes Wilson Sonsini to the one that

explain any additional variance (the R-squared remains 0.80 with and without it). As one might expect, if we exclude Wilson Sonsini, both the light switch and the transition coefficients increase and are significant (column 6). The average effect is 76 percentage points; the additional effect after two years is 9 percentage points. Thus, with the full set of controls (and excluding Wilson Sonsini), law firms with over two years of experience adopt exclusive forum provisions 85 percent of the time.

The final two specifications compare IPOs for Delaware versus non-Delaware corporations (columns 7 and 8). The differences are stark. For Delaware corporations, the light switch coefficient is 76 percent and highly significant.⁷⁸ For non-Delaware IPOs, the light switch coefficient plummets to 31 percent and is not significant. This is not surprising since only 4 out of 167 IPOs by non-Delaware corporations have included an exclusive forum clause. Thus, both the light switch model and the exclusive forum clause are Delaware-specific phenomena.

To summarize, the *Revlon* dicta ushered in a transition period for the charters of new public companies. In five years, IPO adoption of exclusive forum provisions went from essentially zero pre-*Revlon* to about 80 percent by August 2014. At current growth rates, this could be 100 percent by the end of 2015. Our analysis further suggests that the transition is driven primarily by the corporate bar. Law firms that advise IPOs seem to follow approximately

excludes it (i.e., from column 5 to 6).

⁷⁸ The transition coefficient (having more than two years' experience) is negative and statistically significant, but this is again completely due to Wilson Sonsini. When Wilson Sonsini is omitted, this coefficient becomes positive (0.08 with standard error 0.04) and the light switch coefficient also increases (0.75 with standard error 0.03). Note these results are not shown in table 2.

a “light switch” model in which the law firm makes a once-and-for-all decision to adopt an exclusive forum clause in its IPOs.

3. Robustness of the finding that law firms drive the transition

At first glance, the results suggest that law firms are the primary drivers of the transition toward universal adoption of exclusive forum clauses. Indeed, the light switch indicator by itself explains twice as much variance as all of the other controls combined. Comparing the adjusted R-squared from columns 2 and 3 in table 2, the light switch model by itself explains about 80 percent of the variance versus about 40 percent for all other controls. We can reject the hypothesis that the two models explain the data equally well. (The p-value is below 0.001.⁷⁹)

However, there is a crucial caveat to this analysis: The company going public chooses its law firm. It is therefore possible that companies that want exclusive forum clauses are simply choosing law firms that have adopted them in the past. A more nuanced version of this concern would posit that a company does not necessarily choose a law firm based on its tendency to adopt exclusive forum clauses per se, but rather based on its tendency to insert charter provisions that, at least according to some critics, work in management’s favor.

To address this selection concern, we conduct a placebo test to see if the presence of another popular charter provision—a staggered board—follows a similar trend of diffusion. To do this, we replicate the analysis for exclusive charter provisions in figures 1, 3 and table 2 for staggered boards. As indicated in table 1, panel *B*, at the time of their IPO, more firms have

⁷⁹ We cannot perform a standard F-test to compare goodness-of-fit because the two specifications are non-nested. That is, neither model’s set of independent variables is a subset of the other. Instead, we perform the likelihood ratio test suggested by Vuong (1989). See Quang H. Vuong, “Likelihood Ratio Tests for Model Selection and Non-Nested Hypotheses,” 57 *Econometrica* 307 (1989).

staggered boards than exclusive forum provisions (66 percent compared to 45 percent, respectively).⁸⁰

In contrast to exclusive forum provisions, the adoption of a staggered board does not seem to follow any kind of diffusion process or light switch model. Figure 4 shows that the likelihood that a corporation has a staggered board (in either the charter or bylaws) at the time of the IPO was roughly constant over the same period (at 66 percent). This contrast is clear when one compares figure 4 with figure 1 (the adoption of exclusive forum clauses at the IPO). Further, the light switch coefficient for staggered board clauses is either small (less than one fourth the magnitude for exclusive forum clauses) or insignificant. Law firms do not explain nearly as much variance in staggered board clauses as they do for exclusive forum clauses.⁸¹

We present this placebo test in order to contrast two models of the dynamics of corporate governance. Exclusive forum clauses are seemingly adopted at the law firm level and then applied in every circumstance as a kind of “best practice” or boilerplate, as, best practices become boilerplate over time. Staggered boards, by contrast, appear to be adopted at the company level; that is, law firms would seem to be advising their clients to adopt them on a case-by-case basis. This is perhaps to be expected since the former are arguably in the interest of all

⁸⁰ The presence of a staggered board at the time of the IPO is manually collected from firms’ SEC filings in Edgar.

⁸¹ The results are on file with the authors. In contrast to exclusive forum provisions, corporations have had staggered boards for centuries, and it is possible that when staggered board clauses were new, a light switch model would have fit the data better. But other data suggest that might not be the case. Studies of the prevalence of staggered boards in IPOs occurring after the increase in hostile takeovers of the 1980s indicate that the proportion has varied considerably, from 34-35 percent of IPOs in 1988-92 and 44 percent in 1994-97, to 66 percent in 1998 and 82 percent in 1999, Coates, *supra* note 69, at 1377. Such variability is not consistent with a light switch model.

parties, while the latter are generally considered as geared toward entrenching management.⁸²

To put the point another way, the light switch adoption of exclusive forum provisions but not of staggered boards is consistent with a characterization of forum clauses (or law firms' perceptions of them) as universally enhancing shareholder wealth but takeover defenses as wealth-enhancing for only a subset of firms.⁸³

A second concern regarding the interpretation of law firms as drivers of exclusive forum provision adoptions is that the analysis may have omitted a key alternative source of innovation, the IPO firm's investment banker. This would be especially a problem if the selection of a law firm were highly correlated with the selection of an underwriter. That is, a large law firm could tend to work with the same underwriter or small group of underwriters on all of its deals. The concern, then, is that it is in fact the underwriters - not the law firms - that advise new corporations to include an exclusive forum provision in their charter.

To address this concern, we collected data on the underwriter for each of the IPOs in our sample. We then re-ran the regressions in table 2 (the light switch model) both for underwriters by themselves and jointly for underwriters and law firms.⁸⁴ When tested by themselves,

⁸² Most of the literature views takeover defenses, such as staggered boards, as management entrenchment devices. E.g., Robert Daines & Michael Klausner, Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs, 17 J. L., Econ. & Org. 83, 83 (2001).

⁸³ For example, William Johnson and colleagues advance a "bonding hypothesis" of takeover defenses in IPO charters for which they provide empirical support: for firms with important long-term business relations with a large customer or supplier, defenses serve as commitment devices that their business strategies will not be altered and diminish (or expropriate) the value of those business partners' investments in the relationship (quasi-rents). William C. Johnson, et al., The Bonding Hypothesis of Takeover Defenses: Evidence from IPO Firms (manuscript 2015). In addition, defenses might reduce managerial myopia for the set of firms that need to invest in long-term projects. See Jeremy C. Stein, Takeover Threats and Managerial Myopia, 96 J. Pol. Econ. 61 (1988).

⁸⁴ The unreported regression results are available from the authors. SDC reported a financial advisor (i.e., underwriter) for 83 percent of the sample IPOs. Most IPOs have multiple

underwriters have a large and significant light switch coefficient. Depending on the specification, it hovers around 0.65. However, when controls are added, the underwriter light switch coefficient drops significantly. When tested together with law firms, it drops further to at most 0.1 and sometimes closer to zero. By contrast, the law firm's light switch coefficient remains high across all specifications. This result is robust across the specifications in table 2. We therefore conclude that it is not likely that underwriters drive the transition rather than law firms.

Finally, we investigate a third potential transmission channel that might be as or more consequential than law firms, overlapping (also referred to as interlocking) directors on IPO firms' boards. A director on the board of a company with an exclusive forum provision can serve as an information conduit concerning the provisions for another firm on whose board the director also serves. In the context of adopting a novel legal device, such as an exclusive forum provision, a director's ability to opine from experience could increase the comfort level of other board members to innovate. There is, indeed, support for the presence of such an effect, as studies have found that companies are more likely to adopt governance-related innovations when they share a director with a firm that has already adopted the innovation.⁸⁵ It is also possible that

financial advisors. We ran two sets of regressions, one using as the underwriter variable only the first entity listed for an IPO (which would be the first investment bank listed in the offering's tombstone), and another counting all of the IPOs for which a bank was listed. There are 51 (80) underwriters which are first-listed (listed in any position) in the sample, 10 (27) of which underwrote only one IPO and 20 (30) of which never underwrote an IPO with an exclusive forum provision. We can reject the hypothesis that legal and financial advisors are independently distributed with p -value $\ll 0.0001$.

⁸⁵ E.g., Michal Barzuza and Quinn Curtis, Board Interlocks and the Diffusion of Director Indemnification after *Schoon* (Manuscript 2015) (tracking spread of indemnification provisions in the wake of a change in the law, firms with directors on the board of a company that had adopted enhanced indemnification provisions are three times more likely to adopt the provisions than firms without such directors); Gerald Davis, Agents without Principles? The Spread of the

rather than serving as information conduits, overlapping board members could generate a selection effect obscuring the relation between law firms and exclusive forum clause adoptions.⁸⁶ That could be so, if, for instance, individual directors prefer to work with specific law firms, and more particularly, if directors in “demand” to serve on IPO boards prefer law firms that use exclusive forum provisions.

To address this concern, we performed a test that is similar to the previous robustness check for underwriters. We collected data on the directors of each of the IPOs in our sample, as well as for midstream adopters from the board and directors databases constructed by Boardex . We then used this data to construct an analogous “director light switch” indicator, which is equal to one if any director on the IPO firm is on the board of a company that has previously adopted an exclusive forum provision (either another IPO or midstream). The results are even starker than for the underwriter setting. When tested by themselves, overlapping directors have a large and significant light switch coefficient. However, when tested together with law firms, the director light switch coefficient is small and statistically insignificant. With full controls, the coefficient is 0.02 (with standard error 0.03). This qualitative result holds for including the director light switch variable in all specifications in table 2. It also holds when we use the

Poison Pill through the Intercorporate Network, 36 *Adm. Sci. Q.* 583 (1991) (tracking diffusion of poison pill takeover defense upon its judicial validation, firms with more director interlocks to prior adopters are more likely to adopt a pill, although by the end of the sample period, as 60 percent of firms had pills, a set of firms with many interlocks remained without them).

⁸⁶ It is also possible that directors are selected because of the governance features of the firms on whose boards they already serve. See Christa H.S. Bouwman, *Corporate Governance Propagation Through Overlapping Directors*, 24 *Rev. Fin. Stud.* 2358 (2011) (examining the presence of five governance practices and board overlaps finds support for both interlocking director influence on governance adoption and selection of directors for being on companies with the same governance practices). But given the numerous dimensions of firms’ governance, we think it improbable that the selection criterion would be the presence of an exclusive forum provision, were an IPO firm to be choosing directors according to the governance practices of

number or percentage of board members that have been on boards of prior adopters (instead of the light switch indicator for whether any board member has been on the board of a prior adopter). Together with the underwriter results, this strengthens the conclusion that the transition is indeed driven by law firms.

4. Explaining the timing of the transition

The analysis above suggests that law firms are the primary drivers of the transition toward universal adoption of exclusive forum clauses. This finding in turn motivates a further question: What drives the *timing* of this transition? That is, what determines when a law firm makes its once-and-for-all decision to adopt exclusive forum clauses at all IPOs?

This section discusses the potential roles of three actors behind the timing of this transition: courts, lawyers, and companies. Of these three, we conclude that courts and lawyers are, in all likelihood, the most influential. However, we also conclude that it is difficult to predict when any given law firm will “flip the switch,” that is, when it will transition from never adopting to always adopting.

a. Courts

Perhaps the most straightforward hypothesis is that the timing of a law firm’s adoption is entirely driven by the *Revlon* decision.⁸⁷ The simplest version of this hypothesis is that all law

firms on whose boards they were already serving,

⁸⁷ Where a novel provision, such as an exclusive forum clause, might appear to benefit managers at shareholders’ expense, investment bankers would tend to caution against including it, out of concern for an IPO’s pricing were a provision to limit shareholders’ rights. In such a context, the Chancery court’s validation of the provision can provide credibility that it will benefit shareholders, reducing the cost of innovation, as lawyers can tell the bankers that the provision has been accepted and will work.

firms “flipped the switch” right after *Revlon*. From the previous section (and figure 1 specifically) we already know that this is not the case; the transition took several years.

However, consider a slightly refined version of this hypothesis. Suppose we separate law firms into two groups: (1) law firms that have never adopted an exclusive forum clause and (2) law firms that have adopted at least once. Suppose further that we find that all law firms of the latter group adopted an exclusive forum clause in their first post-*Revlon* IPO. This would be strong evidence that the timing of adoption is driven by the *Revlon* decision.

Figure 5 shows that, roughly speaking, *Revlon* could account for up to 44 percent of the timing decision. Figure 5 graphs how long it took for law firms to adopt an exclusive forum clause for the first time after *Revlon*. The sample is restricted to “group 2” law firms, law firms that eventually adopted a provision at least once (71 of 183). The x -axis indicates the law firm’s x -th post-*Revlon* IPO; the y -axis is the fraction of group 2 law firms that have ever adopted a provision after *Revlon*.⁸⁸ By definition, the fraction that have ever adopted a provision post-*Revlon* is equal to 0 at time zero (the first circle in figure 5) and equal to 1 when the last “surviving” law firm finally adopts a provision for the first time (the last circle).

The second circle of figure 5 shows that 44 percent of law firms (31 of 71) adopted an exclusive forum clause in their very first post-*Revlon* IPO. The next circle shows that 68 percent of law firms had adopted by their second post-*Revlon* IPO (48 of 71).⁸⁹ This figure eventually climbs to 100 percent by the 10th IPO. Thus, many law firms that eventually “flipped the switch” waited for several IPOs after *Revlon*. Since 44 percent of law firms that have ever adopted did

⁸⁸ Technically speaking, figure 5 is 1 minus the survival rate of law firms, where the event is the first time a law firm adopts an exclusive forum clause since *Revlon*.

⁸⁹ That is, $48 = 31$ law firms that adopted in the first IPO + 17 that did not adopt in the first but adopted in the second IPO.

so in their first post-*Revlon* IPO, a generous (and admittedly loose) interpretation of these data is that *Revlon* accounts for 44 percent of the timing of the transition.

b. Lawyers

There are several possible reasons why law firms that eventually adopted exclusive forum clauses did not do so immediately after *Revlon*. One possibility is that the transition mechanism works through a diffusion process. For example, law firms could drive the process through word of mouth, which takes time. Similarly, it could be that a law firm will adopt a new legal technology only after observing that certain other law firms have successfully adopted it. Some law firms may be slower to learn about the latest legal technology, or they may be particularly difficult to convince, if, for instance, they have strong contrary priors concerning the efficacy of the technology. Put another way, some law firms may be more willing to try new legal strategies while others may simply follow the trend. All these hypotheses are ultimately based on law firms' willingness or ability to innovate.

One interpretation of figure 5 is that it graphs the "willingness to innovate" thresholds for law firms. According to figure 5, 44 percent of law firms adopted an exclusive forum clause in their first post-*Revlon* IPO. These 44 percent might be labeled "legal innovators" since they were willing to innovate immediately after the Delaware court's endorsement. The law firms whose first-time adoption was their second post-*Revlon* IPO (about 24 percent)⁹⁰ might in turn be called "early adopters," since they are willing to adopt but only after observing that others

⁹⁰ This is equal to 68 minus 44 percent; that is, the percent that had adopted at least once by the second IPO minus the percent that adopted at the first IPO.

have successfully innovated. By this interpretation, law firms that wait for their third, fourth, or later post-*Revlon* IPO are successively less willing to innovate.⁹¹

We can also learn about the transition timing by comparing figure 5 with figure 1. Both graph essentially the same concept – the rate of diffusion of exclusive forum clauses – but from different perspectives. Figure 1 graphs the process where the unit of observation is the IPO, while figure 5 graphs the process where the unit of observation is the law firm. Neither fit the standard “S-curve” innovation diffusion process, in which diffusion is first accelerating and then decelerating. The IPO process (figure 1) is linear, so diffusion occurs at a constant rate. In contrast, the law firm process (figure 5), which we have described as a “light switch approach,” is first discontinuous and then decelerating; the light switch effect essentially skips the first part of the S-curve and jumps straight to the second part. The fact that we do not observe an analogous light switch effect for IPOs (i.e., there is no discontinuous jump after *Revlon* in figure 1) is further evidence that the light switch model applies only to law firms and not to corporations generally.

Finally, we investigate whether law firms’ characteristics predict the timing of the transition. One might think that a law firm’s size, quality or past experience with IPOs or M&A activity (where recent years’ high litigation rates could suggest the value of an exclusive forum clause), might predict whether it flips the switch early or late in the transition. To address this,

⁹¹ Two caveats are in order. First, we do not argue that figure 5 proves this interpretation. We only offer this as one way of interpreting it. Second, figure 5 only includes the 71 (out of 183) law firms that have ever adopted an exclusive forum clause. Thus, the numbers above only apply to the subpopulation of law firms that are eventually willing to innovate (at least within 5 years of *Revlon*). Roughly speaking, one would multiply these figures by 0.39 (71/183) to recover the percentages for the full sample of law firms that have advised post-*Revlon* IPOs. So for example, only $0.39 * 44 = 17$ percent of the full sample are “legal innovators.”

we defined two measures of a law firm's willingness to innovate, whether its first post-*Revlon* IPO had an exclusive forum provision and its total number of post-*Revlon* IPOs till first adoption. We then ran regressions for each of these on the law firms' Am Law 100 and Legal 500 rankings,⁹² along with their pre-*Revlon* IPO and M&A experience.⁹³ We also experimented with specifications that use the IPO (rather than the law firm) as the unit of observation. Table 3 presents the results of regressions for law firms' innovation propensity measured as whether they adopted a provision in the first IPO after *Revlon*. As it indicates, the results are mixed, small, and only occasionally significant.⁹⁴ We found no robust association between any law firm characteristic and its willingness to innovate.⁹⁵ The conclusion that we draw from this exercise

⁹² The reported regression uses an indicator variable for whether the law firm was ranked in the Am Law 100. As a robustness check, we also regressed indicators for various gradations in the Am Law rank (e.g., whether the law firm ranked in the top 10, the top 25; ranks 25-50), and the results were substantially unchanged. Because of the small number of firms ranked in any of the specified Legal 500 series practice specialties, see note 62, *supra*, the Legal 500 variable is an indicator that equals 1 for any law firm ever ranked in any of the tiers in any of those specialty areas over 2009-2014.

⁹³ The IPO data set is as previously described, tallying the law firm's experience from January 1, 2005 until the *Revlon* decision on March 10, 2010, and the M&A data set is as described in note 61, *supra*. As a robustness check, we ran the regressions with three alternative methods of defining M&A experience: (1) only transactions for which firms advised targets, (2) only transactions for which they advised acquirers, and (3) all transactions for which firms are listed as an advisor, whether or not it was "lead advisor" status. (Our reported regressions did not count non-lead advisor roles as experience because of the possibility that subsequently listed legal advisors may be counsel for specialized issues, such as antitrust or regulatory concerns, or local counsel in cross-border transactions, and hence might not have been involved in any shareholder litigation.) There were no significant differences across the various formulations.

⁹⁴ The results are the same using the other proxies for innovation propensity. The Am Law, Legal 500 and M&A experience variables are occasionally significantly positive, but when controls for the IPO characteristic are included (e.g., size, Delaware domicile), they typically lose their significance. IPO experience, with a coefficient close to zero, is never significant. Because of the high variance in M&A experience, we also ran the regressions using a log transformation and other formulations, such as an indicator variable for experience above the median level; there was no significant difference across the formulations. The results of these unreported regressions are on file with the authors.

⁹⁵ We also included in the regressions measures of the distance of the law firm from

is that the observable characteristics of law firms do not robustly predict the timing of the transition.

c. Companies

An alternative hypothesis is that the first adoption decision is somehow driven by the characteristics of the current IPO firm or by the law firm's history of IPO firms. There are both practical and logical reasons for why this not a compelling hypothesis. First, the sample of first-time adoption is only a tenth of the total sample of IPOs (71 of 679). Even if we did find that the IPOs in which law firms adopt for the first time were, for example, of disproportionately large companies, the sample size is probably too small to conclude much from this. Second, we already found in the previous section that the explanatory power of all other controls related to the IPO was significantly less than the light switch model by itself. Third, it is not clear how one would formulate a hypothesis about how the history of a law firm's IPOs should affect the timing of its decision to adopt an exclusive forum clause. Any particular hypothesis would therefore seem arbitrarily selected.

B. Midstream adoptions

The potential for opportunism accompanying latecomer terms is significantly mitigated in the case of midstream adoption by charter amendment, which requires shareholder approval, but this mode of adoption is rare. Our analysis of midstream adoptions focuses on governance

Delaware (an indicator variable for proximity defined as whether the law firm was located less than 1/2 the distance from Wilmington to Los Angeles, or less than 1/10th the distance, which respectively includes firms as far west as Chicago, or essentially only New York firms), on the view that the further the law firm from Delaware, the lower the propensity to include an exclusive forum clause, as its cost of litigating in Delaware would be higher than a firm located closer to Delaware. Neither formulation of the distance variable was significant. This finding suggests that a law firm's failure to adopt an exclusive forum clause would not be due to a direct conflict of interest between the law firm and its client regarding the venue of litigation.

characteristics, in contrast to our analysis of IPO adoptions,⁹⁶ in order obtain a better handle on whether the provisions are being opportunistically adopted at shareholders' expense. The rationale for this approach is that if proxy advisory service providers and institutional investors were accurate in their contention that exclusive forum clauses are harmful to shareholders, then we would expect that firms adopting such provisions unilaterally would not possess the same, or as many, good governance characteristics compared to non-adopters. For if they have such governance mechanisms, then that should prevent the adoption of bylaws adverse to shareholder welfare. It would be straining credulity to contend that exclusive forum bylaws harm shareholders if firms adopting them are, in fact, more likely to follow the very policies deemed to be good governance by the advisory service providers and institutional investors than firms not adopting such provisions. That should also be true of a comparison between midstream bylaw adopters and adopters by shareholder vote.

1. Comparison of Midstream Bylaw Adopters and Non-Adopters

⁹⁶ Outside counsel no doubt influence midstream adoptions by suggesting to public companies' general counsel that they should adopt the provisions. See, e.g., Richard A. Rosen & Stephen P. Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, 47 BNA Sec. Reg. & L. Rep. 285 (Feb. 9, 15) (discussing how to adopt the provisions in order to reduce risk of litigation over their enforcement). It is not possible to track the relation between outside law firms and the diffusion of clauses midstream because such information is not publicly available. But general counsel may also adopt these provisions independently of advice of outside counsel, given a firm's prior litigation experience or anticipation of transactions that might result in litigation, as suggested by the results in Wilson, *supra* note 50 (finding adopters are associated with higher probability of being acquired). It is also possible that directors could be influential in adopting the provisions midstream, as there may be more interlocks in mature companies, with a corresponding reduced impact of outside counsel on board decisions, in contrast to the drafting of legal documents at the IPO stage. We do have data on interlocking directors, and there does not seem to be any such effect. The percentage of midstream adopters with at least one director on a board that has adopted an exclusive forum provision is 0.33, compared to 0.30 for non-adopters. The paired difference of .03 is insignificant (standard error of 0.04).

We collected data on four “good governance” characteristics: (1) annual election of directors, (2) majority voting for directors, (3) the absence of a poison pill unless adopted by shareholder approval; and (4) an independent board chairman.⁹⁷ The first three characteristics were identified by ISS as informing its recommendations regarding shareholder voting on exclusive forum clauses when the provisions began to be more widely introduced.⁹⁸ These characteristics are also a focus of institutional investors’ attention: annual elections, an independent board chairman and majority voting for directors are at the top of the list of requirements for board good governance practices according to the CII.⁹⁹

CII considers majority voting (as opposed to plurality voting) as key to board accountability because when votes “count” (i.e., when directors can fail to be reelected), directors are expected to be more effectively constrained by and hence more responsive to shareholders.¹⁰⁰ Annual director elections are perceived to serve a similar function. CII also emphasizes the importance of an independent board chairman for board accountability. An independent chairman is said to enhance the board’s ability to fulfill its “primary duty” of

⁹⁷ We hand collected governance data from firms’ SEC filings in Edgar, using the proxy statement and annual reports filed in the year of the adoption of the exclusive forum provision.

⁹⁸ See Allen 2012, *supra* note 31, at 5, and note 39, *supra*.

⁹⁹ See CII, Policies on Corporate Governance, available at: http://www.cii.org/corp_gov_policies#intro. CII also includes in its board governance policies, having two-thirds of the board be independent directors, but as stock exchange rules require a majority to be independent, there is limited potential variation in this variable across firms. We therefore do not include the variable in the analyses reported in the paper. But we did collect board independence data and there was no significant difference across adopters and their matched non-adopters, with both groups having 80 percent independent directors, nor was it significant when included in the multivariate regression.

¹⁰⁰ E.g., CII, Majority Voting for Directors, at http://www.cii.org/majority_voting_directors. Consistent with that perception, Yonca Ertimur and colleagues find that boards subject to majority voting are more responsive to shareholder proposals (increasing the rate of implementation) and to withheld votes in elections. Yonca Ertimur, et al., Does the Director Election System Matter? Evidence from Majority Voting, 20

monitoring management. The logic is that an independent chairman would constrain the CEO's influence on the board and its agenda, thereby preventing insiders' conflicts of interest.¹⁰¹ ISS and shareholders also oppose poison pills adopted without shareholder approval as well as staggered boards, for being managerial entrenchment devices that thwart hostile bids, with the combination considered particularly potent because, at least theoretically, the bidder would have to wait two years in order to elect a board majority and repeal the pill.¹⁰²

We also collected data on ownership of insiders (directors and officers), financial institutions, and other blockholders, as governance characteristics, as well as adoption method, can be expected to vary with ownership composition.¹⁰³ In addition, financial blockholders can be characterized as a governance mechanism complementing majority voting, independent chairmen and annual elections. Such blockholders can serve a monitoring function because the cost-benefit calculation of a blockholder is favorable for obtaining information and engaging in oversight. We compare the governance and ownership features in firms whose boards have adopted exclusive forum bylaws to non-adopters in this section, and to firms whose exclusive forum provisions have been approved by shareholders in the next section.

The bylaw adopters used in our comparison tests consist solely of "clean" bylaw adoptions, which we define as exclusive forum bylaws that are adopted in the ordinary course of business, and not event-driven (that is, for example, not adopted in conjunction with a merger

Rev. Account. Stud. 1 (2015).

¹⁰¹ E.g., CII, Independent Board Chair, http://www.cii.org/independent_boardchair.

¹⁰² E.g., Lucian Bebchuk et al., The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 Stan. L. Rev. 887 (2002). In many if not most instances, however, when a bidder succeeds in electing a minority, a board will respond to the bid and not engage in a multi-year contest.

¹⁰³ Ownership data were hand collected from the firms' proxy statements and annual reports filed with the SEC available on Edgar, in the year in which the bylaw was adopted.

agreement). As indicated in table 1, panel *D*, there are 291 such adoptions in total.¹⁰⁴ A higher proportion of the clean adoptions are by non-Delaware domiciled firms (13 percent) compared to the full set of midstream adoptions.¹⁰⁵ In addition, they are not especially subject to litigation: only 30 percent of clean adopters are in industry sectors conventionally identified as at high risk for securities litigation, the same percentage as in the full sample.¹⁰⁶ By contrast, a higher percentage of firms whose bylaws were adopted in conjunction with a merger are in the high-risk litigation sectors (45 percent).¹⁰⁷ In addition, slightly under half of clean midstream bylaws were adopted simultaneously with other bylaw changes (47 percent), suggesting that in such instances the provision might well have been added following a comprehensive “housekeeping” review of the company’s governance, although it is also possible that in instances of multiple amendments, consideration of a forum selection clause sparked the broader evaluation.

¹⁰⁴ There are 36 exclusive forum bylaws that are not clean unilateral adoptions: 24 adopted in conjunction with a merger; three adopted simultaneous with emergence from a bankruptcy reorganization; and nine approved by shareholders (votes or written consents). As indicated in table 1, panel *D*, the remaining 65 midstream forum selection clauses are charter amendments.

¹⁰⁵ A much higher percentage of firms putting the provision up to a shareholder vote, both separate or bundled, are Delaware firms (98 percent), while that of firms using written consent (88 percent) is roughly the same as that of firms with board-adopted bylaws (87 percent).

¹⁰⁶ The literature on federal securities litigation has identified firms as high risk in four-digit SIC codes for the biotech, computer, electronics and retail sectors. Kim & Skinner, *supra* note 31, at 295 n. 18 & 297. Shareholder derivative suits are reported as accompanying approximately 30 percent of federal securities lawsuits. Erickson, *supra* note 31. Because there is no comparable work identifying industries prone to derivative suits, we use the industries identified as high risk for federal securities litigation as our proxy for firms being at high risk for state law litigation.

¹⁰⁷ The higher percentage could be related to mergers occurring in waves clustered by industry. See, e.g., Gregor Andrade, et al., *New Evidence and Perspectives on Mergers*, 15 *J. Econ. Persps.* 103, 104 (Spring 2001) (“[T]wo most consistent empirical features of merger activity over the last century [are that] mergers occur in waves; and within a wave, mergers strongly cluster by industry.”)

We use clean bylaw adopters, whether the bylaw was adopted solely or with other provisions, for our governance comparison tests because the decision to adopt a provision in these instances is not confounded by other events, such as a merger, that could be related to governance characteristics. However, we exclude bylaw adoptions of controlled companies (a stock exchange classification for firms with a 50 percent shareholder that permits exceptions from independent director requirements), dual-class stock companies, and of companies that subsequently put the bylaw to a shareholder vote. The rationale for the exclusions is that those companies either could have obtained (or actually did obtain) shareholder approval for the provision, so the mode of adoption—board rather than shareholder action—is of no practical consequence, and hence we would not learn anything useful about the efficacy of unilateral board adoption by comparing such adopters to non-adopters or to adopters by actual shareholder vote. In addition, the governance of firms with a controlling shareholder cannot be compared to that of firms without such a shareholder, because even the same mechanism on paper will operate differently in a control context. Their inclusion would therefore confound an analysis comparing the governance quality of adopters by unilateral board action and non-adopters. This results in a final sample of 249 bylaw adopters.

To construct a comparison group, we matched each of the 249 bylaw adopters to a non-adopter according to year, industry, firm size, and domicile.¹⁰⁸ Seven bylaw adopters could not be matched.¹⁰⁹ This left a sample of 242 bylaw adopters and a matched sample of 242 non-adopters. The 242 adopters are representative of the full sample of 291 “clean” midstream bylaw adopters. The same proportion are non-Delaware domiciled firms (13 percent) and in high-risk

¹⁰⁸ See the appendix for details on the matching procedure.

¹⁰⁹ Six adopting firms were not in the CRSP database and one firm could not be matched

litigation industries (30 percent). In addition, approximately the same proportion adopted multiple bylaw amendments with the exclusive forum clause (48 percent). Finally, the same percentage adopted the bylaw post-*Chevron* (80 percent). They can therefore reasonably be said to be a representative sample of the population of clean adopters.

Table 4 presents paired t-tests of differences in means of the governance and ownership variables between clean midstream bylaw adopters and their matched non-adopters. As shown in the table, two good governance variables, the presence of an independent chairman of the board and majority voting for directors, are significantly higher among adopting firms than non-adopters.¹¹⁰ There are no significant differences in takeover defenses (staggered boards and poison pills) or any of the ownership variables. These findings are distinctively at odds with the view of ISS and CII that exclusive forum provisions reflect poor corporate governance. They also differ from that of Wilson's study, which found that the separation of the CEO and chairman position was not significantly related to adoption, a difference which underscores the need to separately analyze the different types of adoptions. The absence of indicia of managerial entrenchment along with the more frequent presence of features that institutional investors regard as good governance (independent chairmen and majority voting) among adopters than non-adopters is consistent with the inference that boards adopting exclusive forum provisions are behaving as responsible fiduciaries of their shareholders.

according to our procedure because there was no non-adopter that was "close." See appendix.

¹¹⁰ We report the findings for a stricter definition of independent chairman than there simply being different individuals in the positions, to require that there be a non-executive chairman, that is, excluding from the classification of independent chair, firms that have separated the positions but whose chairman is an executive employed by the firm, as well as firms whose chairman is a former executive but counted as independent under stock exchange rules for having been retired for three years. The results are unaffected if we use any of the three possible definitions of independence, different individuals, only non-executive chairmen, and

As a robustness check, we rerun the paired t-tests separately for firms in high litigation risk sectors (70 firms) and those that are not (160 firms). There are no significant differences in mean in the governance variables for the smaller sized subsample of high risk litigation firms, and the direction is the same as in the full sample, that is, adopters have a higher proportion of independent chairmen and majority voting, albeit insignificantly so, than non-adopters.¹¹¹ These data provide further support for a characterization of exclusive forum bylaw adoptions as not adverse to shareholders because we do not find that non-adopters have better governance than adopters when we separately examine firms that might be more likely to have use of the clauses (those in high risk litigation sectors).

We also run a logit regression for the probability of adoption of an exclusive forum clause on the governance and ownership variables, the percentage of independent directors and an indicator variable for high litigation risk firms. We run the regressions using all observations and using only observations where both the adopter and nonadopter of a pair have no missing observations (resulting in 463 and 446 observations, respectively). As reported in Table 5, in both specifications, the presence of majority voting and an independent chairman are significantly positively related to the presence of the provision, as is the percentage owned by blockholders that are financial institutions. No other variables are significant.¹¹² These findings bolster the conclusion from the paired comparison tests regarding the implausibility that

only non-executive chairmen who are also not former executives.

¹¹¹ If the simple definition of independent chairman referring to firms in which different individuals hold the two positions is used, then the mean difference for the high risk litigation matched pairs of .1571 with a t-statistic of 1.953 is significant at 6 percent. The independent chairman variable remains significant for the larger subsample of firms in sectors not at high risk of litigation, but the majority voting variable is no longer significant.

¹¹² We also ran the regressions including the director interlock variable described in note 96, supra; it was insignificant.

exclusive forum provisions harm shareholders, for they indicate that the managers of adopters are likely to be subject to more effective monitoring, and hence more effectively constrained from taking opportunistic action, than nonadopters.

2. Comparison of Midstream Adopters by Approval Process

We next compare the governance and ownership characteristics of adopters according to the mechanism of adoption, by bylaw or by shareholder vote or written consent. The rationale for this approach is that were there significant governance differences across these subsamples of midstream adopters, then the difference in the mechanism of adoption (by board or shareholder approval) could matter quite importantly. In particular, were critics correct that midstream bylaw adoptions are instances of managerial opportunism that reduce shareholder wealth, then we should expect to find that bylaw adopters are more poorly-governed than adopters that seek, and obtain, shareholder approval, for the managers who would engage in such action should be those not subject to effective board or shareholder monitoring.

The first three columns of Table 6 report differences in mean comparison tests between clean bylaw adopters and companies that adopted a provision by (1) a separate shareholder vote, (2) a bundled shareholder vote, and (3) written consents.¹¹³ There are no significant differences in governance characteristics between companies with board-adopted exclusive forum provisions and those whose provisions were adopted by separate shareholder votes (column 1). In contrast,

¹¹³ Because all but one of the written consents to an exclusive forum provision were bundled with other items, it is combined with the bundled consents for the analysis. We calculate the t-test significance levels both with and without using the Bonferroni method of adjustment for multiple comparison tests. See, e.g., Paul E. Green, *Analyzing Multivariate Data* 221-23 (1978). As these comparison tests compare subsets of adopters over the same variables, in contrast to the t-tests in Table 4 that are not interdependent, the Bonferroni adjustment is appropriate in assessing the significance of the differences in means in this table as opposed to that one.

companies that adopted the provisions in bundled votes or by written consent are less likely to have majority voting than companies with clean bylaw adoptions (columns 2 and 3). These data suggest that criticism of midstream bylaw adoption is misplaced, as adopters that did not have shareholder consent are, if anything, more likely to exhibit good governance. However, it should be noted that these are small samples, so the tests have low power. There are 291 clean bylaws, but only 25 separate shareholder votes, 23 bundled votes, and 17 written consents.¹¹⁴

Firms using written consent have significantly higher insider ownership, significantly lower ownership by financial institutions, and significantly fewer outside blockholders than bylaw adopters or those putting the proposals up to a shareholder vote. This is as expected because, to use the written consent route successfully, insiders need to have over 50 percent of shares (or close enough so that they can ally with an outside blockholder and meet the threshold). Indeed, the over 20 percent higher ownership of written consent firms is approximately equal to the higher margin of approval received by provisions adopted by written consent compared to those voted on at meetings (78 percent approval by written consent compared to 65 and 67 percent, respectively, for separate and bundled votes). The absence of a significant difference between support for exclusive forum clauses across separate and bundled votes is at odds with the contention of critics of bundled voting that provisions approved when bundled would not be

¹¹⁴ Logit regressions were also run for the probability of a firm adopting by a shareholder vote on the governance and ownership variables and a high litigation risk dummy. Whether firms adopting by written consents are included as firms adopting by a shareholder vote, or excluded from the regression, the presence of majority voting is significant and negative, that is, bylaw adopters have higher quality governance (the presence of majority voting is a predictor of adoption by unilateral board action), which is at odds with a negative perception of that mode of adoption. In addition, when written consents are included in the analysis, blockholder ownership is positively related to adoption by shareholder approval; the effect becomes only marginally significant (at 7 percent), when those firms are excluded from the analysis. No other variables are significant in either regression.

approved if separately proposed.¹¹⁵

The more important finding regarding ownership composition is that there is no significant ownership difference between bylaw adopters and adopters by separate shareholder vote. Indeed, the difference is so small that it would not be sufficient to make a difference in outcome were the mode of adoption reversed across the firms.¹¹⁶ Hence, a plausible explanation

¹¹⁵ See Lucian Bebchuk & Ehud Kamar, Bundling and Entrenchment, 123 Harv. L. Rev. 1549, 1594-95 (2010) (bundling merger approvals with a staggered board in the surviving entity's charter are provided as evidence that the subjects of bundled votes would not be approved if voted separately and concludes by advocating "state and federal public officials ... take the necessary steps to prevent [any bundled voting] from "undermining the value of shareholder voting..") The CII's corporate governance policies also disfavor bundled votes, as opposed to advocating a policy that would tailor opposition to bundling informed by the nature of the proposals. See http://www.cii.org/corp_gov_policies ("Bundled Voting: Shareowners should be allowed to vote on unrelated issues separately. Individual voting issues (particularly those amending a company's charter), bylaws or anti-takeover provisions should not be bundled."). Further, the absence of differential voting support for the exclusive forum provision bundled votes is not a function of greater inside ownership in those firms compared to firms holding separate votes, for, as discussed in part IV.B, *infra*, there is also no significant difference in inside ownership across the firms.

¹¹⁶ For example, the two firms whose separate vote proposals failed had far lower inside, block and financial institution ownership than the average of firms whose proposals were approved, as well as of all midstream adopters, and 4 or 5 percent more shares (the average ownership difference between shareholder approved adopters and midstream bylaw adopters) would not have made a difference in those outcomes. Allstate Corp.'s proposal received 42 percent of outstanding shares and Cameron International Corp.'s received 40 percent. Calculated from Allstate Corp., Form 8-K, filed May 18, 2011 and Form Def.14A, filed Apr. 1, 2011; and Cameron International Corp., Form 8-K, filed May 15, 2012 and Form Def. 14A, filed Mar. 28, 2012. Both firms' governance characteristics were not qualitatively worse than those of the firms whose proposals were approved: they both had annual election and majority voting (compared to less than half of firms with approved provisions), but not independent chairmen (as also true of over half of firms with approved provisions). Moreover, like all but one of the firms with approved provisions, they did not have poison pills. In short, the two firms whose proposals were defeated met all of ISS's stated governance criteria, in contrast to most firms putting up the provisions to a separate vote, although ISS did not recommend voting in favor of those provisions or any other. Allen 2012, *supra* note 31, at 6. There would appear to have been other problems at Allstate which created shareholder discontent because the "say-on-pay" vote, in which shareholders are asked to approve the Chief Executive's compensation package on an advisory basis, received an extremely low level of support at 57 percent.

for why boards continue to opt for unilateral adoption is not because of fear that shareholders would disapprove, but because it is simply cheaper. We would not, however, expect exclusive forum provisions to become as universal among publicly-traded companies as they are in IPOs without a shift in the position of influential investor organizations such as ISS and CII with respect to the clauses. Given that most shareholder litigation involves acquisitions and the probability of being acquired is quite low for most corporations, many independent directors may calculate the benefits of the provision as remote compared to the cost of taking action that might lead to a negative voting recommendation by the proxy advisory services, and consequent reputational damage.¹¹⁷

Taken as a whole, the findings are at odds with critics' view of exclusive forum bylaws and particularly the positions of the CII and proxy advisory services. In the view of those institutions, a responsible board of directors would not adopt an exclusive forum provision unilaterally but would only adopt such a provision, if at all, by putting it to a separate shareholder vote. Yet by their own standards, bylaw companies exhibit no worse, and in some instances exhibit higher, quality governance than those putting the provisions up to shareholder approval (whether voted on separately or bundled). Because there is also no difference in inside ownership between bylaw adopters and separate vote adopters, one cannot assume that the bylaw

¹¹⁷ There are data suggestive of this concern: ISS recommendations against a directors' election result in higher levels of no or withheld votes, e.g., Yonca Ertimur, et al., *Understanding Uncontested Director Elections: Determinants and Consequences* (2014), available at <http://ssrn.com/abstract=2447920>, and a comprehensive study of director elections found that directors who receive a high percentage of withheld votes are more likely to lose their position on that board or on other firms' boards. Reena Aggarwal, et al., *The Power of Shareholder Votes: Evidence from Director Elections*, Georgetown University McDonough School of Business Center for Financial Markets and Policy Working Paper, May 2015 (examining all elections from 2003 to 2010 or over 59,000 individual director events, finds the proportion of withheld votes is significantly related to turnover on that board and other

mechanism was used solely to avoid a losing shareholder vote. In sum, bylaw adopters are subject to no less monitoring by shareholders or directors than are shareholder vote adopters.

It might be alternatively contended that firms strategically adopt good governance features as a means of obtaining shareholder goodwill, which they then can exploit by taking other opportunistic actions such as adopting an exclusive forum clause without fear of shareholder retaliation. While we are skeptical of such a speculation, more importantly, it seems implausible that an opportunistic board would draw down its goodwill on an exclusive forum provision rather than for a far more consequential entrenching provision, such as a staggered board or plurality voting, which is the ostensible tradeoff in the data. Indeed, the costs of multijurisdictional litigation are not even directly borne by board members, as outside directors are rarely, if ever, personally liable for fiduciary breach.¹¹⁸

V. Conclusion

In this paper, we have documented the rise of exclusive forum provisions—provisions that corporations adopt in their bylaws or charters in order to prevent multiforum shareholder litigation. In particular, we ask what drives the extraordinary growth in these provisions and whether (as some critics contend) their adoption reflects bad corporate governance or managerial

directorships within one year of that election).

¹¹⁸ See, e.g., Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 *Stan. L. Rev.* 1055 (2006) (finding only thirteen cases in past twenty-five years in which an outside director of a public company made an out-of-pocket payment, and noting most of these fact patterns would not result in personal payouts for companies with “state-of-the-art” directors’ and officers’ liability insurance policies,) That is not to say that directors bear no cost, as litigation can be accompanied by considerable non-monetary costs, such as the personal stress from being a defendant or potential reputational damage. But the higher legal expense for having to litigate in multiple courts comes from the corporation’s coffers and hence the shareholders’ pockets.

opportunism. To answer these questions, we separately analyze companies that adopted such provisions at the IPO stage and those that adopted them midstream.

We draw two principal conclusions from the IPO data: (1) the rate of exclusive forum clause adoption at the IPO has increased steadily from 0 to 80 percent between 2010—2014 and will likely reach 100 percent of Delaware IPOs by the end of 2015 and (2) the entire transition is primarily – if not entirely – driven by law firms; the characteristics of individual companies play little or no role even in individual adoption decisions, and the effect of investment bankers, as well as of interlocking directors (that is, directors who serve on firms with exclusive forum clauses), is swamped by that of the law firms. Moreover, the pattern of adoption follows what can be described as a light switch model, in which once a law firm includes a clause in an IPO, it does so for all subsequent IPOs. The near-universal adoption of these provisions across IPO firms, in comparison to staggered boards, further suggests that lawyers have come to perceive that, in contrast to takeover defenses, exclusive forum provisions are universally beneficial.

For the midstream adoptions, we find almost no significant differences in governance features across midstream bylaw adopters and non-adopters. Further, when there is a significant difference, it is the adopters that have higher quality governance (using the metrics of organizations that are critics of the provisions, ISS and CII). We also find no significant differences in ownership and governance structures between firms whose boards adopt bylaws and those who obtain shareholder approval. The findings are consistent with the contention that boards that unilaterally adopt a bylaw provision are acting as responsible fiduciaries, and accordingly that the mode of adoption should not be of import to investors.

VI. Appendix: Matching procedure for midstream adopters

We matched each midstream adopter to a non-adopting corporation according to year,

industry, and firm size. Each midstream adopter was matched to the “closest” firm as of the end of the year prior to adoption, where “close” is determined according to differences in firm size and industry. We matched on size and industry in the prior year because a substantial number (35 percent) of midstream adoptions occurred in 2014 and that year’s data were not yet available. The tradeoff between firm size and industry follows a simple rule that is outlined below. A non-adopting company is matched to at most one midstream adopter.

The matching procedure is as follows:

1. Restrict the pool of potential matches to all U.S-domiciled public corporations that have never adopted an exclusive forum clause and are neither controlled nor dual-class stock companies.
2. For each midstream adopter:
 - a. Restrict potential matches to firms that have the same statutory domicile (Delaware or non-Delaware). Further restrict to firms operating in the same year in which the midstream firm adopted the exclusive forum clause. For example, if the firm adopted the clause in 2012, then only firms operating in 2012 are potential matches and differences in firm size and industry (referenced below) are with respect to firm size and industry of the potential matches as of the end of 2011.
 - b. Rank all potential matches according to their absolute percentage difference in firm size.
 - c. Find the closest firm (in terms of firm size) that has the same 4-digit Standard Industrial Classification (SIC) code. If the difference in firm size is less than 50

percent, assign that firm as the match, skip the remaining steps, and proceed to the next midstream adopter to be matched. Otherwise, continue.

- d. Find the closest firm (in terms of firm size) that has the same 3-digit SIC code. If the difference in firm size is less than 50 percent, assign that firm as the match, skip the remaining steps, and proceed to the next midstream adopter to be matched. Otherwise, continue.
- e. Find the closest firm (in terms of firm size) that has the same 2-digit SIC code. If the difference in firm size is less than 50 percent, assign that firm as the match, skip the remaining step, and proceed to the next midstream adopter to be matched. Otherwise, continue.
- f. Find the closest firm (in terms of firm size) that has the same 2-, 3-, or 4-digit SIC code. Assign that firm as the match and proceed to the next midstream adopter to be matched.

If step 2 matches the same non-adopter to more than one adopter, the non-adopter is assigned to the adopter for which it is ranked higher (according to firm size and industry). For example, suppose Non-Adopter A is matched to both Adopter Y and Adopter Z. If A was Y's third-closest match but Z's first-closest match, then A is assigned to Z. Y is then assigned to its next-closest match.

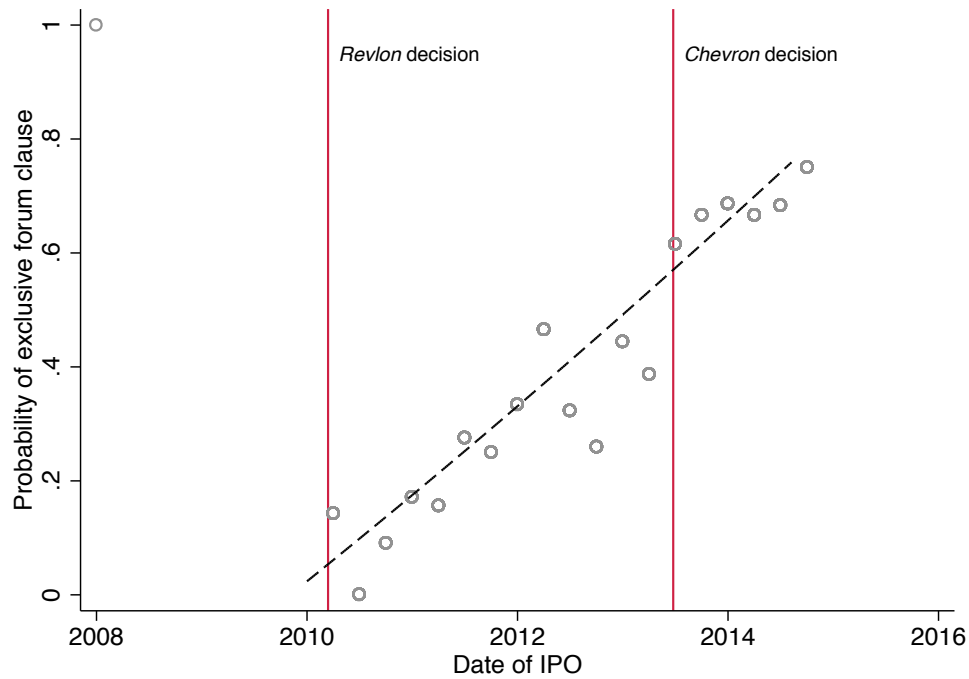


Figure 1: *Exclusive forum clauses at the IPO*. This figure graphs the probability that a corporate charter includes an exclusive forum clause at the IPO. In *Revlon*, the Delaware Chancery Court suggested in dicta that corporations could adopt “charter provisions selecting an exclusive forum for intra-entity disputes.”

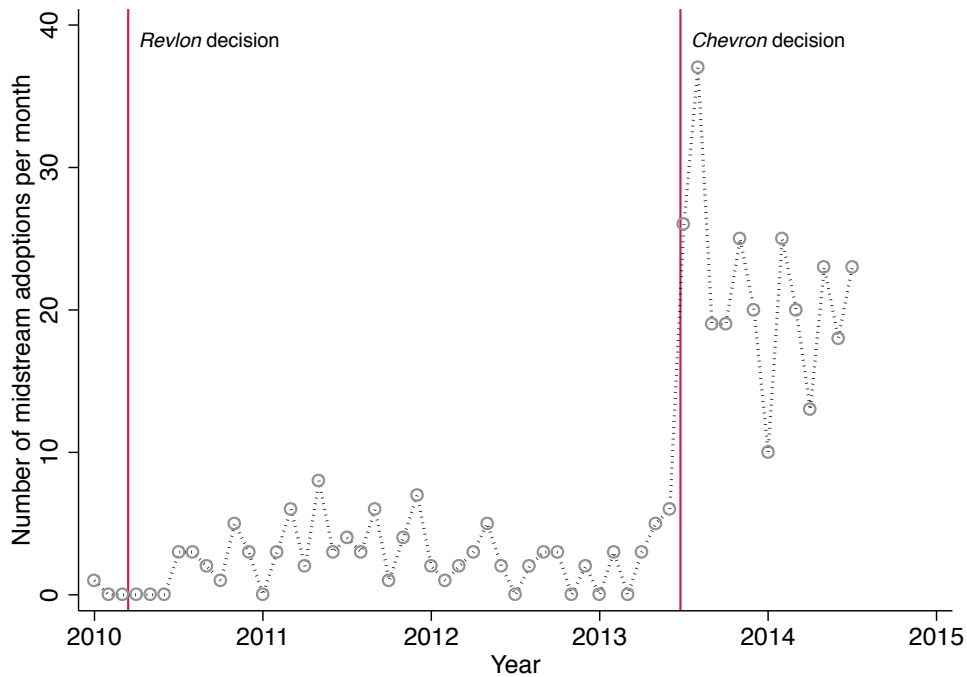


Figure 2: *Exclusive forum clauses (midstream adopters)*. For each month, this figure graphs the number of U.S. public corporations that adopted an exclusive forum clause. In *Chevron*, the Delaware Chancery Court held that such clauses, even if unilaterally adopted by a board via bylaw amendment, are facially valid under Delaware law.

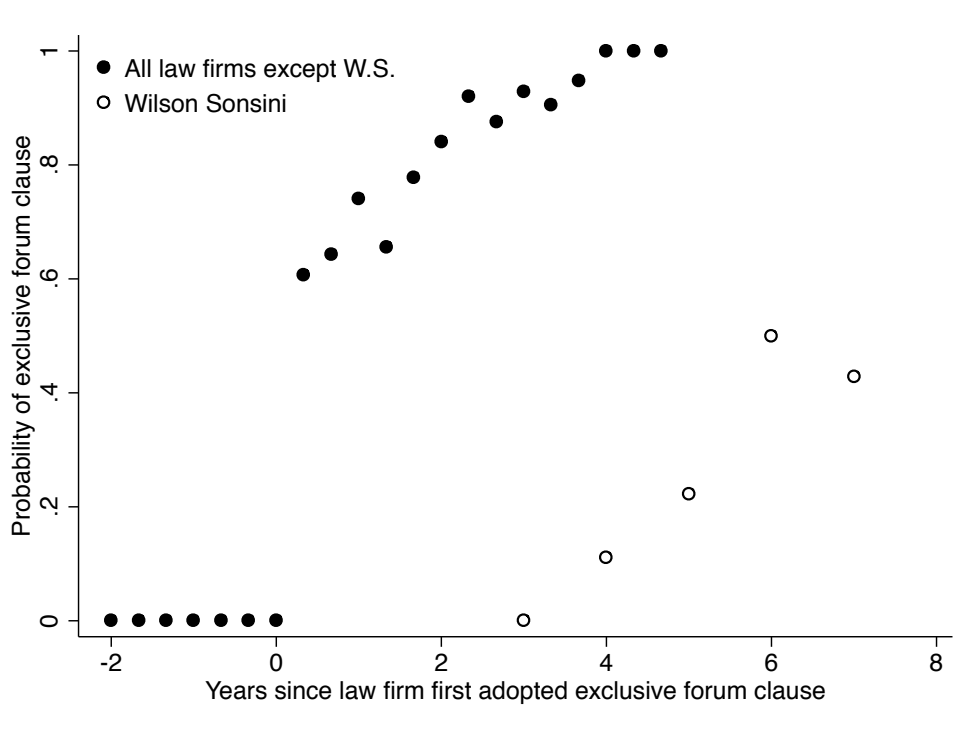


Figure 3: *The light switch model.* This figure graphs the likelihood that a law firm adopts an exclusive forum clause in the corporate charter at the IPO, before and after adopting it for the first time. The “light switch” hypothesis posits that law firms make a once-and-for-all decision to adopt exclusive forum clauses, inducing a discontinuous jump in adoption rates before and after first-time adoption. In the extreme case, the adoption rate would jump from 0 to 100 percent.

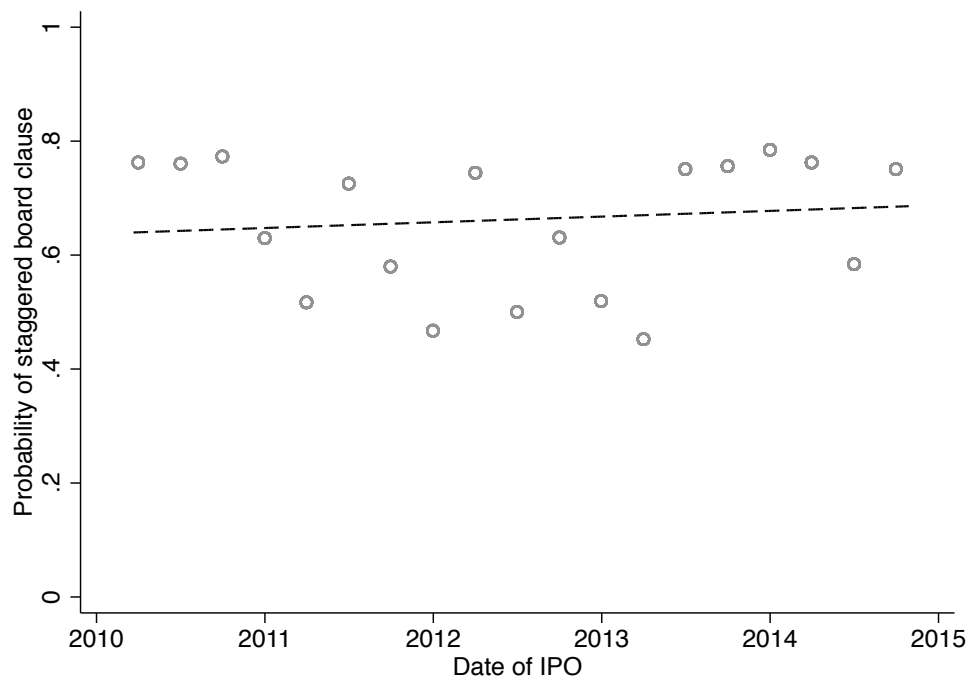


Figure 4: *Staggered board clauses at the IPO*. This figure graphs the probability that the corporate charter or bylaws include a staggered board clause at the IPO.

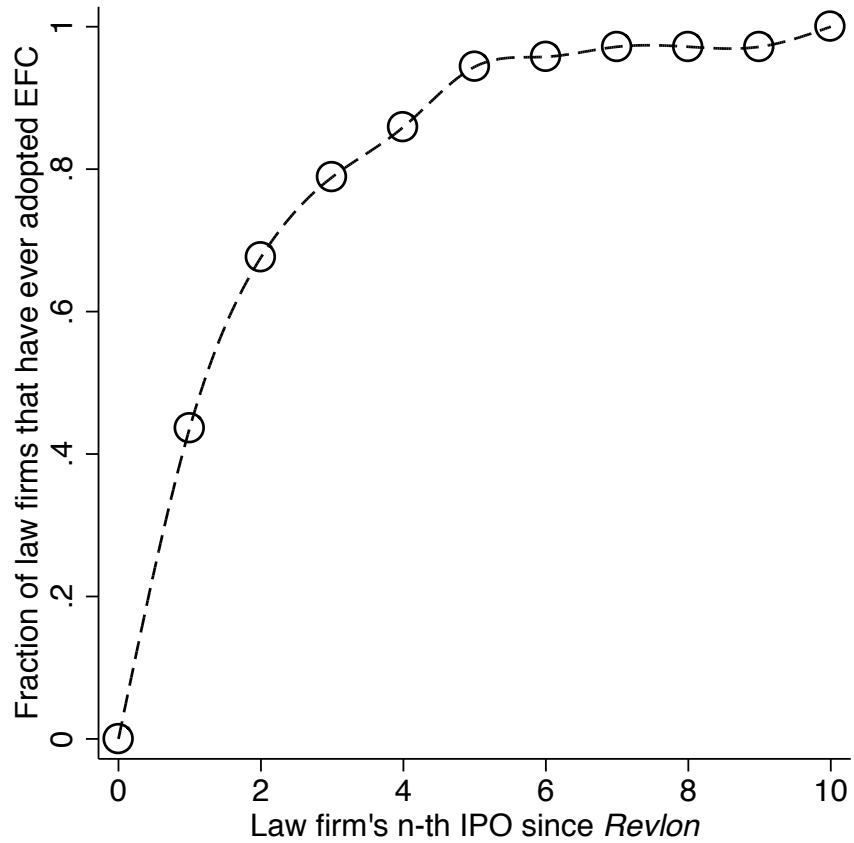


Figure 5: *Timing of the light switch model.* This figure graphs the fraction of law firms that have adopted an exclusive forum clause at least once since the *Revlon* decision. The sample is all law firms that have ever adopted an exclusive forum clause (71 law firms in total). The dashed line is the cubic spline fit.

Table 1: Summary Statistics

	<i>Fraction</i>	<i>Number</i>
<i>Panel A: Exclusive forum clauses (all)</i>		
Delaware forum	0.93	695
Stage of adoption		
Initial public offering	0.47	351
Midstream	0.53	395
Year of adoption		
2006	< 0.01	1
2007	< 0.01	1
2010	0.04	31
2011	0.12	87
2012	0.11	79
2013	0.38	283
2014 (Jan–Aug)	0.35	264
<i>Observations</i>	1.00	746
<i>Panel B: Initial Public Offerings (2010–2014)</i>		
Exclusive forum clause (EFC)	0.45	305
Delaware corporation	0.76	517
California headquarters	0.25	171
Proceeds > \$50m	0.68	460
Assets > \$100m	0.58	395
Advising law firm has adopted EFC ≥ 1 time	0.57	386
Advising law firm has adopted EFC ≥ 2 years ago	0.26	174
Classified board	0.66	450
Advised by top 100 law firm	0.64	435
<i>Observations</i>	1.00	679

(Continued)

Table 1: Summary Statistics – continued

	<i>Fraction</i>	<i>Number</i>
<i>Panel C: Law firms advising IPOs (2010–2014)</i>		
#IPOs law firm advised		
1	0.49	90
2–4	0.33	60
5–9	0.10	18
≥ 10	0.08	15
#EFCs law firm adopted at IPO		
0	0.61	112
1	0.16	30
2–3	0.10	18
≥ 4	0.13	23
#M&As law firm advised pre- <i>Reylon</i>		
0	0.49	89
1–5	0.24	44
6–19	0.14	26
≥ 20	0.13	24
Am Law Top 100	0.37	67
Legal 500	0.27	50
EFC in 1st post- <i>Reylon</i> IPO (“innovative” law firm)	0.17	31
<i>Observations</i>	1.00	183

Panel D: Exclusive forum clauses (midstream only)

Delaware forum	0.88	346
Post- <i>Chevron</i>	0.74	291
High litigation industry	0.31	121
Clean midstream bylaws	0.74	291
Charter	0.17	65
Separate shareholder votes	0.06	25
Bundled shareholder votes	0.06	23
Written consents	0.04	17
Merger (adopting corporation disappears)	0.05	20
Merger (adopting corporation survives)	0.01	5
Bankruptcy	0.02	8
Splitoff	0.01	3
<i>Observations</i>	1.00	392

Notes: Each panel reports summary statistics according to different units of observation.

Sources: Bloomberg, SDC, SEC EDGAR.

Table 2: Exclusive forum clause at IPO

<i>Dependent variable is an indicator for exclusive forum clause</i>								
	<i>All IPOs, 2010–2014</i>					<i>non-W.S.</i>	<i>Del.</i>	<i>non-Del.</i>
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Law firm has adopted ≥ 1 time		0.79*		0.71*	0.73*	0.76*	0.76*	0.31
		(0.02)		(0.03)	(0.03)	(0.03)	(0.03)	(0.18)
Law firm has adopted ≥ 2 years ago					-0.08	0.09*	-0.11*	0.19
					(0.04)	(0.04)	(0.04)	(0.31)
Delaware corporation			0.38*	0.05	0.05	0.03		
			(0.04)	(0.03)	(0.03)	(0.03)		
California headquarters			0.01	-0.07*	-0.06*	-0.01	-0.04	-0.08
			(0.04)	(0.03)	(0.03)	(0.03)	(0.03)	(0.06)
Proceeds > \$50m			0.23*	0.06*	0.07*	0.08*	0.08*	0.04
			(0.04)	(0.03)	(0.03)	(0.03)	(0.04)	(0.02)
Assets > \$100m			0.01	-0.00	-0.00	-0.01	-0.01	-0.02
			(0.03)	(0.03)	(0.03)	(0.02)	(0.03)	(0.03)
cons.		0.45*						
		(0.02)						
Year fixed effects			Yes	Yes	Yes	Yes	Yes	Yes
Industry fixed effects			Yes	Yes	Yes	Yes	Yes	Yes
Adj. R^2	0.45	0.79	0.40	0.80	0.80	0.86	0.82	0.37
Observations	679	679	678	678	678	638	517	161

Notes: Each column lists the coefficients from an OLS regression. The main sample is all IPOs since 2010 for corporations domiciled in the U.S. and subject to federal securities law. “Non-W.S.” restricts the sample to IPOs for which Wilson Sonsini was not the advising law firm. “Del.” restricts the sample to IPOs of Delaware corporations. “Law firm has adopted ≥ 1 time” is an indicator equal to 1 if the law firm advising the IPO has previously adopted an exclusive forum clause or if this is the first time. “Law firm has adopted ≥ 2 years ago” is an indicator equal to 1 if the law firm has previously adopted more than 2 years ago. The unit of observation is the IPO. Standard errors clustered by law firm are in parentheses. * indicates statistically significantly different from zero at 95 percent confidence.

Sources: Bloomberg, SDC, SEC EDGAR.

Table 3: Law firms' willingness to innovate

Dependent variable	Indicator for adopted on first post-Revlon IPO										
Unit of observation	Law firm										
Sample	Law firm's first post-Revlon IPO										
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Law firm's											
Experience $\left(\frac{\# \text{ Pre-Revlon IPOs}}{10}\right)$	-0.05 (0.03)				-0.05 (0.03)				-0.06* (0.02)	-0.05* (0.02)	-0.05* (0.02)
Experience $\left(\frac{\# \text{ Pre-Revlon M\&As}}{10}\right)$		0.03 (0.02)				0.04* (0.02)			0.03 (0.02)	0.04 (0.02)	0.03 (0.02)
Legal 500 (Ever ranked)			0.12 (0.07)				0.19* (0.08)		-0.10 (0.10)	-0.08 (0.11)	-0.11 (0.10)
AmLaw (Top 100)				0.20* (0.06)				0.25* (0.07)	0.17* (0.09)	0.12 (0.10)	0.11 (0.09)
Delaware corporation									0.28* (0.06)		0.26* (0.06)
California headquarters									0.08 (0.09)		0.07 (0.09)
Proceeds > \$50m										0.22* (0.08)	0.15* (0.07)
Assets > \$100m										-0.06 (0.06)	0.01 (0.06)
cons.											
Year fixed effects					Yes	Yes	Yes	Yes	Yes	Yes	Yes
Industry fixed effects									Yes	Yes	Yes
Adj. R^2	0.01	0.02	0.02	0.06	0.03	0.06	0.06	0.10	0.23	0.16	0.24
Observations	183	183	183	183	183	183	183	183	182	183	182

Notes: Each column lists the coefficients from an OLS regression. * indicates statistically significantly different from zero at 95 percent confidence.

Sources: Bloomberg, SDC, SEC EDGAR.

Table 4: Midstream governance differences: EFC adopters v. non-adopters (paired t -tests)

<i>Governance</i>	<i>EFC firms</i>	<i>non-EFC firms</i>	<i>Difference</i>	<i>Observations</i>
No staggered board	0.58 (0.03)	0.62 (0.03)	-0.04 (0.04)	242
No poison pill	0.83 (0.02)	0.86 (0.02)	-0.03 (0.03)	237
Independent chair	0.44 (0.03)	0.34 (0.03)	0.10* (0.04)	230
Majority voting	0.48 (0.03)	0.40 (0.03)	0.08* (0.04)	242
% Financial institution ownership	23.99 (1.00)	23.67 (0.99)	0.32 (1.29)	240
% D&O ownership	9.16 (0.72)	9.24 (0.71)	-0.09 (0.86)	240
% Blockholder ownership	25.97 (0.97)	27.01 (1.03)	-1.04 (1.30)	239
# Blockholders	3.16 (0.12)	3.29 (0.11)	-0.14 (0.15)	241

Notes: This table reports differences in governance characteristics between firms that have adopted an exclusive forum clause midstream (“EFC firms”) and firms that have not (“non-EFC firms”). The sample is all EFC firms (242 total) and a matched sample of 242 non-EFC firms. The “Difference” column lists the results of a paired t -test. Standard errors are in parentheses. * indicates statistically significantly different from zero at 95 percent confidence.

Sources: Bloomberg, SEC EDGAR.

Table 5: Midstream governance differences:
EFC adopters v. non-adopters (multivariate analysis)

<i>Governance</i>	<i>Sample</i>	
	All	Non-missing pairs
No staggered board	-0.14 (0.20)	-0.09 (0.21)
No poison pill	-0.18 (0.27)	-0.22 (0.27)
Independent chair	0.42* (0.20)	0.43* (0.20)
Majority voting	0.50* (0.21)	0.46* (0.22)
% Financial institution ownership	0.04* (0.02)	0.03* (0.02)
% D&O ownership	0.01 (0.01)	0.01 (0.01)
% Blockholder ownership	-0.01 (0.02)	-0.01 (0.02)
# Blockholders	-0.26* (0.13)	-0.25 (0.13)
cons.	0.08 (0.36)	0.10 (0.36)
Observations	463	446

Notes: The dependent variable an indicator equal to 1 if the firm has adopted an exclusive forum provision midstream by a bylaw amendment. The sample is all EFC firms (242 total) and a matched sample of 242 non-EFC firms. * indicates statistically significantly different from zero at 95 percent confidence.

Sources: Bloomberg, SEC EDGAR.

Table 6: Midstream governance differences: By method of EFC adoption

<i>Governance</i>	<i>Difference between groups (avg. of first group – avg. of second group)</i>				
	Separate vote v. Bylaw	Bundled vote v. Bylaw	Written consent v. Bylaw	Separate vote v. Bundled	Any vote v. Written consent
No staggered board	-0.12 (0.10)	-0.07 (0.11)	0.19 (0.13)	-0.04 (0.15)	-0.29 (0.15)
No poison pill	0.08 (0.08)	0.10 (0.09)	0.16 (0.12)	-0.02 (0.08)	-0.07 (0.08)
Independent chair	-0.16 (0.11)	-0.14 (0.11)	-0.28 (0.19)	-0.02 (0.14)	0.13 (0.18)
Majority voting	-0.16 (0.10)	-0.28 [†] (0.12)	-0.36 [†] (0.14)	0.12 (0.13)	0.14 (0.13)
% Financial institution ownership	0.90 (3.42)	-3.37 (3.72)	-21.32* (5.16)	4.27 (5.30)	20.27* (5.68)
% D&O ownership	4.72 (3.97)	7.23 (4.27)	28.48* (5.99)	-2.51 (6.95)	-22.62 [†] (8.83)
% Blockholder ownership	7.69 (3.93)	2.68 (4.28)	20.63* (6.39)	5.01 (6.45)	-15.23 (9.29)
# Blockholders	0.43 (0.39)	0.25 (0.43)	-2.03* (0.59)	0.18 (0.70)	2.38* (0.76)
Litigation	-0.02 (0.10)	0.00 (0.10)	0.11 (0.12)	-0.02 (0.13)	-0.12 (0.13)
Fraction in first group	0.08	0.07	0.06	0.52	0.74
Observations (min–max)	303–316	301–314	287–308	43–48	51–65

Notes: Standard errors from an unpaired *t*-test are in parentheses. “Observations” gives the range of the total number of observations in the two groups. There is a range because of missing data. † indicates statistically significantly different from zero at 95 percent confidence *without* correcting for multiple hypothesis testing. * indicates statistically significantly different from zero at 95 percent confidence after correcting for multiple hypothesis testing with Bonferroni-adjusted significance levels.

Sources: Bloomberg, SEC EDGAR.