



The Private Ordering Solution to Multiforum Shareholder Litigation

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This article 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 2007–2014 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 nonadopters 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 nonadopters (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 multiforum litigation, including judicial, legislative, and private ordering solutions.⁴ This article focuses on one private ordering 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 identifies a single forum, most typically a court in the corporation's statutory domicile, as the venue for corporate-law-related disputes. 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.

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

¹E.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).

²E.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, 682–83 (2005); E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 *Bus. Law.* 681, 683, 694 (1998). Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 *Journal of Empirical Legal Studies* 894 (2014) (showing that Delaware is also the most over-represented choice of law in commercial contracts).

³E.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, 496–97.

⁴These solutions are discussed in Section II. Not all commentators consider this phenomenon problematic. For articles endorsing multijurisdictional litigation, see Sean J. 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); 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*, 69 *Bus. Law.* 1 (2013–2014).

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),⁵ 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 (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")⁶ 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, adoption is approaching universality as from January 2010 to August 2014, the rate of adoption of Delaware IPOs has risen steadily from 0 to 80 percent. 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 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 nonadopters. Further, when there is a significant difference, it is adopters that have "better" governance

⁵The first exclusive forum bylaw in our sample was adopted by Oracle Corp. in 2006. The first exclusive forum charter provision included in the certificate of a company on going public (IPO firm) was adopted by Netsuite Inc. in 2007. Three corporations adopted exclusive forum provisions in the 1990s that went largely unheralded, and so, as Joseph Grundfest puts it, they were "evolutionary deadends," and, in fact, two of those companies removed the clauses in the past decade. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 *Del. J. Corp. L.* 333, 352 (2012). Grundfest further describes the evolution of the language of the clauses, which followed two templates distinguished by whether the board can waive a clause's application; the elective version—which is the type of provision that he drafted for Netsuite—has quickly come to predominate over the nonwaivable form of the earliest provisions drafted in the 1990s. *Id.*

⁶The 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. Rev.* 1416, 1442–43 (1989).

(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 nonadopters 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 article proceeds as follows. The next section summarizes the literature on multijurisdictional litigation and exclusive forum provisions. The third section describes the dataset. 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 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 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.⁷ Most of these lawsuits involve mergers and acquisitions (M&As).⁸ At the same time as plaintiffs have been

⁷E.g., Johnson, *supra* note 1, at 374 (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).

⁸Johnson, *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).

filing in more numerous venues, the proportion of M&As attracting litigation has also spiked dramatically.⁹

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 attorney fees, along with its relaxation of the presumption granting lead-counsel status to the lawyer who is “first to file.”¹⁰ 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.¹¹

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 state, as well as by Delaware corporations.¹² 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

⁹Johnson, *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 (2015), available at <http://ssrn.com>. abstract:256790 (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* (2015).

¹⁰Armour et al., *Losing*, *supra* note 1, at 643–45, 651; Johnson, *supra* note 1, at 384. Cain and Davidoff provide data suggesting that plaintiffs’ attorney 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.* 130–34 (2015).

¹¹Johnson, *supra* note 1, at 350, 361; Boris Feldman, *Shareholder Litigation After the Fall of the Iron Curtain*, 45 *Rev. Sec. & Comm. Reg.* 7 (2012); Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs’ Bar*, 2012 *Colum. Bus. L. Rev.* 427, 429–32 (2012).

¹²Armour et al., *Losing*, *supra* note 1, at 614, 623–24, 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 487–88. 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.

the number of acquisitive transaction lawsuits filed in multiple courts and a corresponding rise in those brought solely in Delaware.¹³

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.¹⁴ Second, plaintiffs (or, more accurately, their attorneys) are said to seek out courts that will rule more favorably on a complaint, or award greater attorney 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.¹⁵ Third, multiforum litigation is said potentially to generate a “reverse auction,” in which defendants are believed to settle with the plaintiff who will accept the lowest payment.¹⁶ 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, multiforum 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.¹⁷

Commentators critical of multiforum 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

¹³Cornerstone Research, *supra* note 9, at 3.

¹⁴E.g., Johnson, *supra* note 1, at 381.

¹⁵E.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.

¹⁶E.g., Griffith & Lahav, *supra* note 4, at 1082–83; Johnson, *supra* note 1, at 382. Although Griffith and Lahav identify this negative potential of multiforum 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.

¹⁷To 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 attorney fees, that the foreign court accepts, compared to the domestic court.

domicile.¹⁸ 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 back to the domicile state through a thereupon-imposed stay.¹⁹

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.²⁰ 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 multiforum litigation if the judges cannot agree on who should hear a case.²¹ 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 doctrine or drafting model legislation for states to adopt.²² 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,

¹⁸E.g., Johnson, *supra* note 1, at 385–86 (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 1809–10 (noting possible solution and rejecting as undesirable, as well as unlikely to occur).

¹⁹Myers, *supra* note 3, at 472.

²⁰For 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. Thomas & Thompson, *supra* note 3, 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”).

²¹In one well-known instance, the New York and Delaware courts refused to cede jurisdiction. See *In re 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. Shareholder Litig.*, 200 N.Y. 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 stayed the New York action. Myers, *supra* note 3, at 520.

²²Strine 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).

or by a drafting committee(s) and 50 state legislatures), and thus entail a time-consuming process with an uncertain outcome.

The implementation difficulties in judicial and legislative approaches to resolving multiforum 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.²³ Given such legal uncertainty, few firms adopted the provisions until the strategy was approvingly noted by Vice Chancellor Travis Laster, in 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.²⁴

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),²⁵ 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.²⁶

Following the *Chevron* decision, corporate adoptions of exclusive forum bylaws rapidly accelerated, paralleling the widespread inclusion of such provisions in IPO charters (which had not been impacted by the bylaw litigation).²⁷ Of course, for exclusive forum

²³E.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).

²⁴*In re Revlon Inc. Shareholders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) [hereinafter *Revlon*]. The trend of increasing adoptions of forum selection provisions after this decision and the *Chevron* decision of then Chancellor Strine, cited in note 26, is discussed in Sections II.B and IV.

²⁵*Galaviz v. Berg*, 763 F. Supp.2d 1170 (N.D. Cal. 2011) [hereinafter *Galaviz*].

²⁶*Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) [hereinafter *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> (10 of 12 companies repealed bylaws when sued). Apparently wishing to avoid a Supreme Court affirmance 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*.

²⁷See Allen 2014, *supra* note 26, and Figure 2 and accompanying discussion in Section IV.

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.²⁸ 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 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, so did Delaware.²⁹

B. Prior Empirical Literature on Exclusive Forum Provisions

The first studies examining firms' adoption of exclusive forum clauses, by Claudia Allen and Joseph Grundfest, focused almost exclusively on the number and type of provisions adopted, rather than on the characteristics of adopting firms.³⁰ Describing a rapidly increasing number of firms adopting the provisions, they report that most provisions are in charters of newly incorporated firms, while bylaw amendments are the mechanism of the vast majority of midstream adoptions.³¹ More importantly, they characterize exclusive forum provisions as a "Delaware phenomenon" because all of the several

²⁸Glen 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).

²⁹Hunton & Williams Client Alert, *2015 Amendments to the Virginia Stock Corporation Act* (Apr. 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 an effective date of July 1, 2015); D.G.C.L. § 115 (effective Aug. 1, 2015). 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.

³⁰Claudia H. Allen, *Study of Delaware Forum Selection in Charters and Bylaws* i, iv (2010-2011) (first published July 1, 2010, updated Apr. 7, 2011) [hereinafter Allen 2011]; Claudia H. Allen, *Study of Delaware Forum Selection in Charters and Bylaws* (2010, 2012) (first published July 1, 2010, updated Apr. 7, 2011, updated Jan. 2012) [hereinafter Allen 2012]; Allen 2014, *supra* note 26; Grundfest, *supra* note 5, at 352.

³¹As discussed in Section III, this dichotomy is still the case. They also note the steady increase to dominance of elective forum clauses over time. Grundfest, *supra* note 5, at 363, 365-66; Allen, 2012, *supra* note 30, at 7-8.

hundred provisions in their studies select Delaware as the exclusive forum state.³² In addition, both Allen and Grundfest call to attention the fact that a large number of adopters are located in California, a tendency Grundfest associates with a view that California-headquartered firms are likely to “disproportionately” be sued and that the business community believes California courts to be of “lower quality” than Delaware courts.³³

Finally, both discuss the small number of firms that at the time had put adoption of a clause to a shareholder vote (two of which failed). Allen suggests the outcomes can be explained by opposition to exclusive forum clauses of the leading proxy advisory service, Institutional Investor Services (ISS), whose recommendations are routinely followed by many institutional investors,³⁴ and the extent of insider shareholdings.³⁵ Grundfest explicitly calculates the inside ownership (combining management and outside blockholders’ shares) of these firms and, paralleling Allen’s observation, he notes

³²The phrase is Grundfest’s. Grundfest, *supra* note 5, at 367. Allen only examines Delaware forum provisions and all the firms in Grundfest’s sample selected Delaware, including three firms not incorporated in Delaware. As discussed in Section III, we also find that the vast majority of adopters are Delaware firms, including all IPO adopters, but the exclusiveness of the phenomenon as a Delaware one has diminished: we find that 8 percent of midstream adopters are non-Delaware firms selecting non-Delaware forums. Moreover, although excluded from our analysis, there are numerous mutual funds and unincorporated entities with exclusive forum provisions, and a large number are not Delaware firms and do not choose a Delaware forum.

³³Allen 2011, *supra* note 30, at ii; Allen 2012, *supra* note 30, at 2; Allen 14, *supra* note 26, at 6; Grundfest, *supra* note 5, at 368–69. Grundfest describes the adoption of the provisions as a “general migration to Delaware . . . and a particular emigration from California” because in his dataset, 32 percent of Delaware adopters are located in California, but only 24 percent of Delaware corporations are located in California. In contrast, we show in Section IV.A that, in all likelihood, there is no “California effect,” at least for IPO firms over a longer timeframe than he studies. In addition to domicile (Delaware) and location (particularly California), Allen identifies adopters’ industry (largest sector is manufacturing) and size (few S&P 500 firms). Allen 2011, *supra* note 30, at vi; Allen 2012, *supra* note 30, at 1, 2; Allen 2014, *supra* note 26, at 6.

³⁴Studies 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 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). Yonca Ertimur et al., *Understanding Uncontested Director Elections: Determinants and Consequences* (2014), available at: <http://ssrn.com/abstract52447920> (ISS withholdvote recommendation for a director’s election is associated with approximately 20 percent more votes withheld). ISS’s position on exclusive forum clauses was in sync with the view of many institutional investors. See 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.”).

³⁵Allen 2012, *supra* note 30, at 5, 11 (suggesting that inside ownership levels were unrepresentatively high for two firms with successful votes and that failures affected by ISS). 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: annual election and majority voting of directors, no poison pill unless approved by shareholders, and a “meaningful” right of shareholders to call special meetings. *Id.* at 5. 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.

that inside ownership was lower in the two firms whose proposals were not approved than in those whose proposals were approved (under 15 percent compared to a range of 20–87 percent).³⁶ 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 shares 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. In keeping with such a hypothesis, the leading advisor, ISS, has substantially modified its opposition, albeit not expressly approving the clauses.³⁷ The shift may reflect a recognition by ISS that a number of its clientele of institutional investors no longer view the clauses unfavorably.³⁸

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 nonadopters, or among adopters using different methods (board-adopted vs. 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 clauses' welfare effects?³⁹ He finds that upon the adoption's announcement, firms experience a small positive price effect of 0.8 percent that is statistically significant.⁴⁰ Subdividing the adopters into those more and less

³⁶Grundfest, *supra* note 5, at 371.

³⁷For 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 adverse,'" which entails examining additional factors, such as the timing of adoption, and it identified exclusive forum provisions as falling into the category of "generally not materially adverse" bylaws. 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).

³⁸See, e.g., Allen 2014, *supra* note 26, at 8 (noting some institutional investors, such as T. Rowe Price, that "originally opposed exclusive forum provisions have changed or softened their views").

³⁹Jared I. Wilson, *The Value of Venue in Corporate Litigation: Evidence from Exclusive Forum Provisions* (Aug. 2015), available at: <http://ssrn.com/abstract=2646312>. Wilson also examines stock returns around the *Chevron* decision. Because that analysis includes non-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.

⁴⁰*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

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).⁴¹ 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).⁴² These data are consistent with the view in the literature that exclusive forum provisions benefit shareholders by reducing duplicative litigation costs.

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.⁴³ 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.⁴⁴ None of the governance characteristics are significant.⁴⁵ Thus he plausibly concludes that firms that are more likely to experience multiforum 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

market interpreting adoption of an exclusive forum clause as new information indicating the probability of the firm 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.*

⁴¹Wilson 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 discuss these results because federal securities actions are not covered by exclusive forum clauses and less than one-third of such actions are accompanied by derivative claims. 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). In addition, 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 include all acquisitions, not only those in which there might be a claim, such as a related-party transaction). However, as there are no clear proxies for shareholder litigation, we use one of the federal securities litigation predictive indicators (industry classification) in our analysis as a robustness check in Section IV.B.

⁴²Wilson, *supra* note 39, at 22.

⁴³The 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.

⁴⁴*Id.* at 39–41 (Table 3). The three takeover variables are entered into three separate regressions.

⁴⁵*Id.*

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.⁴⁶ 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 on the adoption process. Accordingly, it is essential 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 dataset, we discuss key summary statistics of each in turn.

A. Dataset Construction

The first dataset 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 dataset 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.⁴⁷ In practice, our search was overinclusive, 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 exclusive forum clauses adopted before August 14, 2014 by U.S.-domiciled corporations that report to the SEC.

The second dataset 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

⁴⁶While his sample period extends beyond ours to December 2014, because of limits to the dataset he uses to identify firm characteristics, his analysis includes only 58 IPO and 324 midstream adoptions.

⁴⁷Specifically, 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 that did not file an exhibit containing the provision.

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 dataset 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.⁴⁸ We then hand-collected corporate governance and ownership data for each midstream adopter and its matched nonadopter from SEC filings in EDGAR at the time of adoption.

B. Summary Statistics

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

Panel A of Table 1 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 of Table 1 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.⁴⁹ Of the Delaware IPOs, 59 percent have a forum clause. The vast majority of the clauses (83 percent) are elective (i.e., they permit the board to waive the application of the clause).

⁴⁸See 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., Armour et al., *Losing*, supra note 1 (acquisition target's size related to litigation); Irene Kim & Douglas J. Skinner, *Measuring Securities Litigation Risk*, 53 *J. Acctng & Econ.* 290 (2012) (size and industry related to federal securities litigation); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?* 7 *J. Law Econ. & Org.* 55, 58 (1991) (size related to shareholder litigation). 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 41), securities lawsuits, from which the industry litigation risk factors are derived, are not strongly correlated with corporate-law-related lawsuits.

⁴⁹We 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 C and our analysis of IPO forum selection clause adoptions in Section IV.

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 of Table 1 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 between two and four IPOs; 10 percent have advised between five and nine IPOs; and 8 percent (15 law firms) have advised more than 10 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.”

Table 1 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).⁵⁰ We proxy for firms’ sophistication by the rankings in the Am Law 100 (gross revenue) and the Legal 500 series (elite expertise).⁵¹ Less than one-third of the firms (27 percent) 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

⁵⁰E.g., Robert Borowski, *Combating 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 dataset 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).

⁵¹The 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 that 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 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.

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
Elective EFC		
Initial public offering	0.83	254
Midstream	0.91	357
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
Observations	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
Observations	1.00	679
<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>Revlon</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>Revlon</i> IPO (“innovative” law firm)	0.17	31

Table 1 *Continued*

	<i>Fraction</i>	<i>Number</i>
Observations	1.00	183
<i>Panel D: Exclusive Forum Clauses (Midstream Only)</i>		
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
Observations	1.00	392

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

SOURCES: Bloomberg, SDC, SEC EDGAR.

100 firms by revenue. In addition, close to half the law firms had no experience with a large M&A transaction pre-*Revlon*.

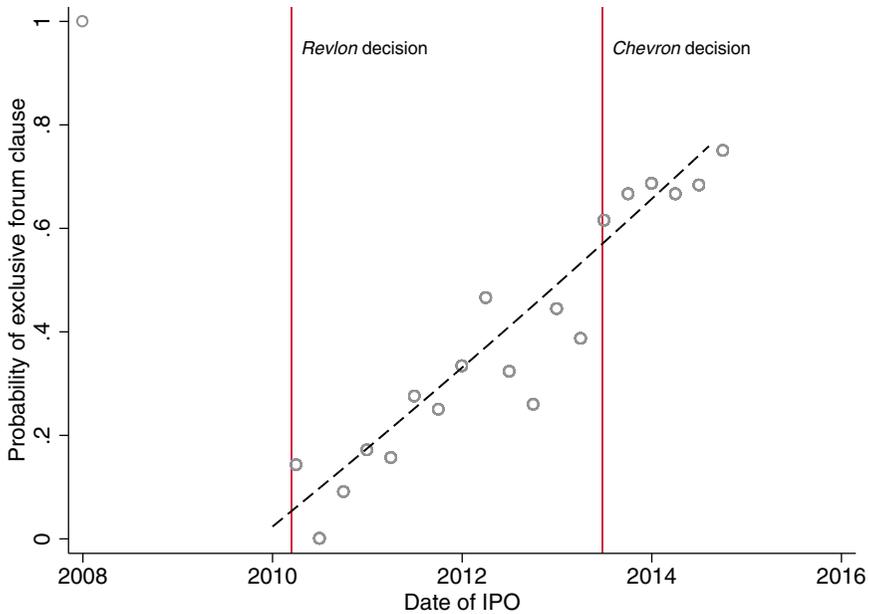
Panel D of Table 1 presents summary statistics for midstream adoptions. The vast majority (over 80 percent) are adopted as bylaw amendments. Moreover, most of the midstream charter adoptions (over 60 percent) were not subject to shareholder approval. Only 12 percent of midstream adoptions were put to 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).⁵² 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 corporation selecting Delaware.⁵³ In contrast, all IPO adopters

⁵²Three 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 Section 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.

⁵³All 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 (see note 54). Delaware's statutory proscription of such provisions in its 2015 legislation that validated the use of exclusive forum clauses, D.G.C.L. § 115, 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

Figure 1: Exclusive forum clauses at the IPO.



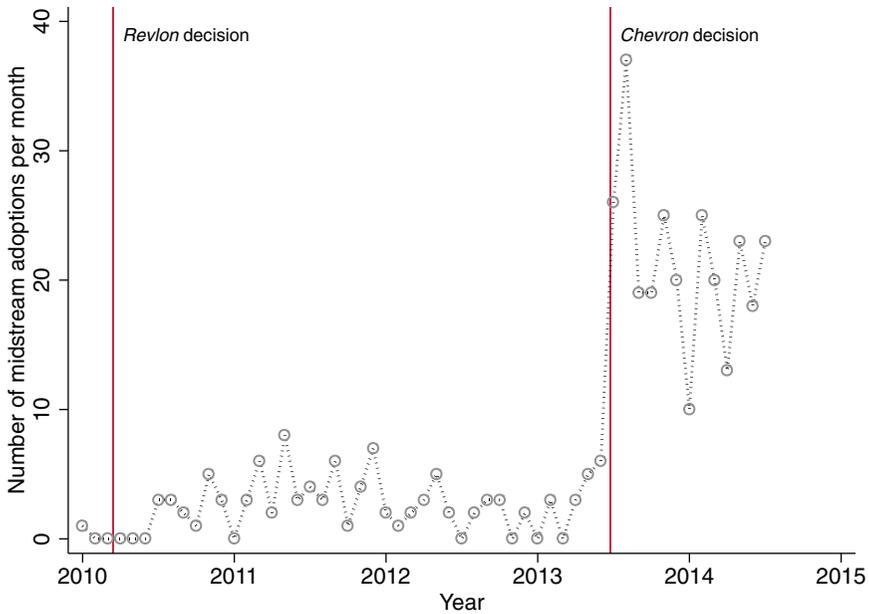
NOTES: This figure graphs the probability that a corporate charter includes an exclusive forum clause at the IPO. In *Revlon*, the Delaware Chancery Court suggested in dicta that corporations could adopt “charter provisions selecting an exclusive forum for intra-entity disputes.”

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). Elective clauses predominate nonwaivable ones in the midstream adoptions by an even higher percentage than in the IPO adoptions, particularly in the post-*Chevron* timeframe when nearly every clause (97 percent) provides for directorial discretion. Indeed, a chi-

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.

Figure 2: Exclusive forum clauses (midstream adopters).



NOTES: 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.

square test of the difference in exclusive forum clause format across midstream and IPO adoptions is statistically significant in the post- but not the pre-*Chevron* period.

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.⁵⁴ 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

⁵⁴The decision of an Oregon court declining to follow a Delaware exclusive forum provision adopted in conjunction with a merger was overturned by the Oregon Supreme Court, *Roberts v. TriQuint Semiconductor Inc.*, No. 54 (Ore. Sup. Ct., Dec. 10, 2015), following a Delaware Chancery Court opinion rendered in the interim, enforcing a North Carolina exclusive forum clause. *City of Providence v. First Citizens Bancshares, Inc.*, CA No. 9795-CB (Del. Ch., Sep. 8, 2014). All these decisions were rendered after our dataset collection concluded. With any uncertainty over the validity of event-driven provisions seemingly resolved, there may be more event-driven adoptions in the future.

firms not in high securities litigation risk industries, and they would therefore be most concerned about multiforum 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. 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.⁵⁵ 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.⁵⁶

⁵⁵A quadratic fit of the data in Figure 1 would predict universal adoption by the end of 2015. 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.

⁵⁶Michael 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, 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 26, 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

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 multiforum 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 multiforum 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, 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

some of the nonuniformity may be due to experimentation given the clauses’ early stage of development rather than tailoring to firms’ specific circumstances. For instance, in the later years of our dataset, virtually all the provisions permit the board to waive the clause. Further, staggered boards, a takeover defense that Klausner considers to be problematic charter boilerplate, are not universal in IPO charters, indicating that customization does indeed occur, as discussed in Section IV.A.3. It is alternatively possible, however, that the pattern of charter innovation that we identify is unique to exclusive forum clauses, given their legal subject matter.

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, 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.⁵⁷ Robert Daines finds that IPO firms are more likely to be incorporated in Delaware than in their home state when advised by a national law firm as opposed to by local legal counsel.⁵⁸ John Coates finds that firms going public in 1991–1992 that were advised by New York law firms are more likely to have anti-takeover 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 1998–1999, 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.⁵⁹ 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.

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, for example, "0, 0, 0, 1, 1, 1."

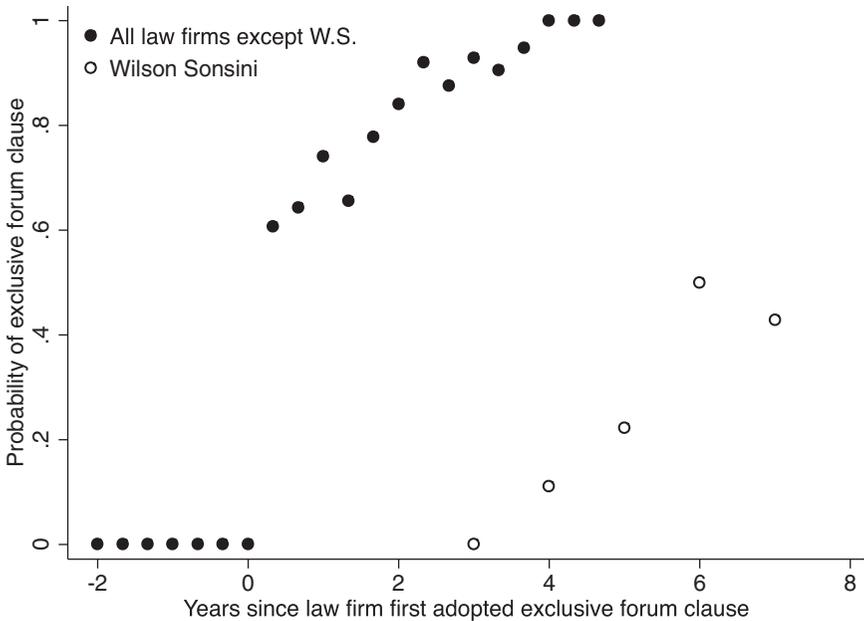
Figure 3 tests the light-switch model in a simple event analysis framework. The event is the first time that the law firm advises an IPO adopter. Subsequent IPOs are all "postevent" for the law firm. If the light-switch model were perfectly correct, all postevent

⁵⁷John 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).

⁵⁸Daines, *supra* note 57, at 1595.

⁵⁹Coates, *supra* note 57, at 1304, 1362–65, 1370–73, 1377, 1380.

Figure 3: The light-switch model.



NOTES: 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.

IPOs would include an exclusive forum clause and the adoption rate would immediately jump from 0 to 1. The postevent 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 24 IPOs have included an exclusive forum clause.

Wilson Sonsini is a special case: Wilson Sonsini advised the first IPO to adopt an exclusive forum clause, NetSuite in 2007, well before *Revolon*. NetSuite’s adoption seems to have been a kind of legal experiment.⁶⁰ After NetSuite, no other IPO adopted an exclusive forum clause until after *Revolon* (in 2010). Wilson Sonsini itself did not adopt one again until 2011. In the interim, Wilson Sonsini had advised another 12 IPOs. Wilson Sonsini’s “event time” is thus somewhat out of sync with other law firms. Yet even if

⁶⁰See Grundfest, *supra* note 5.

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)
Constant	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 United States 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 an exclusive forum clause in an IPO more than two 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.

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.⁶¹ 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.

⁶¹A 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 second specification tests the light-switch hypothesis (Column 2 of Table 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 (1) has previously adopted an exclusive forum clause or (2) 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 Panel B of Table 1, 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 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).⁶² 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 of Table 2).⁶³ 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 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 of Table 2). 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.⁶⁴ 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.⁶⁵

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.

⁶²They 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.

⁶³See the literature review in Section II.B.

⁶⁴See Allen 2011, *supra* note 30, at ii; Grundfest, *supra* note 5, at 368; and Section II.B, at note 33, discussing the studies’ analyses of a California effect.

⁶⁵The 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 excludes it (i.e., from Column 5 to 6).

The next specification (Column 5 of Table 2) 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 Panel B of Table 1). 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 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 of Table 2). The differences are stark. For Delaware corporations, the light-switch coefficient is 76 percent and highly significant.⁶⁶ For non-Delaware IPOs, the light-switch coefficient plummets to 31 percent and is not significant. This is not surprising since only four 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 are nearing universality, going from essentially zero pre-*Revlon* to about 80 percent by August 2014. Our analysis further suggests that the transition is driven primarily by the corporate bar. Law firms that advise IPOs seem to follow approximately 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

⁶⁶The 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 that these results are not shown in Table 2.

controls. We can reject the hypothesis that the two models explain the data equally well. (The p value is below 0.001.⁶⁷)

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 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 and 3 and Table 2 for staggered boards. As indicated in Panel B of Table 1, at the time of their IPO, more firms have staggered boards than exclusive forum provisions (66 percent compared to 45 percent, respectively).⁶⁸

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.⁶⁹

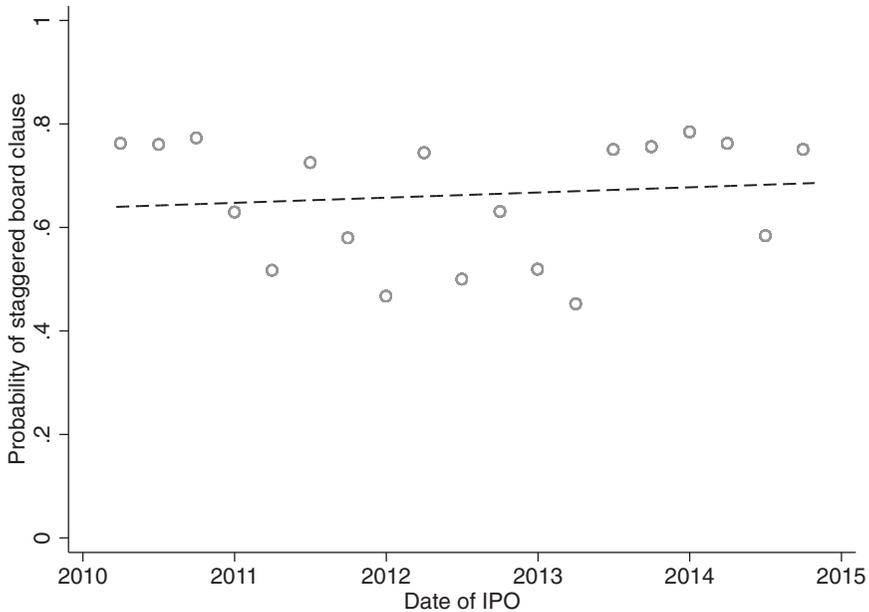
We present this placebo test in order to contrast two models of the dynamics of corporate governance. Exclusive forum clauses are seemingly adopted at the law-firm level and then applied in every circumstance as a kind of “best practice” or boilerplate, as best practices become boilerplate over time. 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 parties, while the latter are generally considered as geared

⁶⁷We cannot perform a standard F test to compare goodness of fit because the two specifications are nonnested. 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. See Quang H. Vuong, *Likelihood Ratio Tests for Model Selection and Non-Nested Hypotheses*, 57 *Econometrica* 307 (1989).

⁶⁸The presence of a staggered board at the time of the IPO is manually collected from firms' SEC filings in EDGAR.

⁶⁹The 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. However, 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 1988–1992 and 44 percent in 1994–1997, to 66 percent in 1998 and 82 percent in 1999. Coates, *supra* note 57, at 1377. Such variability is not consistent with a light-switch model.

Figure 4: Staggered board clauses at the IPO.



NOTES: This figure graphs the probability that the corporate charter or bylaws include a staggered board clause at the IPO.

toward entrenching management.⁷⁰ 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.⁷¹

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

⁷⁰Most 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).

⁷¹For 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, 117 *J. Fin. Econ.* 307 (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).

of underwriters on all 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 reran the regressions in Table 2 (the light-switch model) both for underwriters by themselves and jointly for underwriters and law firms.⁷² When tested by themselves, 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.⁷³ It is also possible that 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.⁷⁴ That could be so,

⁷²The 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 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 the IPOs for which a bank was listed. There are 51 (80) underwriters that 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 $\ll 0.0001$.

⁷³E.g., Michal Barzuza & Quinn Curtis, Board Interlocks and Outside Directors' Protection, *J. Leg. Stud.* (forthcoming) (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 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).

⁷⁴It 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. Bowman, 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'

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.⁷⁵ We then used these data to construct an analogous “director light-switch” indicator, which is equal to 1 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 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 for 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.

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 firms on whose boards they were already serving.

⁷⁵The Boardex dataset contains information on the affiliations of directors on the boards of over 17,000 companies since 1999; as the dataset tracks both individual directors as well as companies, even if company X is not in the dataset, if a director on company Y that is in the dataset also serves on the board of X, that interlock will be identified (in the individual’s entry). Counting by firm entries, 605 of 680 IPO firms (89 percent) are in the Boardex dataset, and all the missing firms are nonadopters, so there is no loss in identifying an interlocking director.

a. *Courts.* Perhaps the most straightforward hypothesis is that the timing of a law firm's adoption is entirely driven by the *Revlon* decision.⁷⁶ The simplest version of this hypothesis is that all law 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 *n*-th post-*Revlon* IPO; the *y*-axis is the fraction of Group 2 law firms that have ever adopted a provision after *Revlon*.⁷⁷ 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).⁷⁸ 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 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.

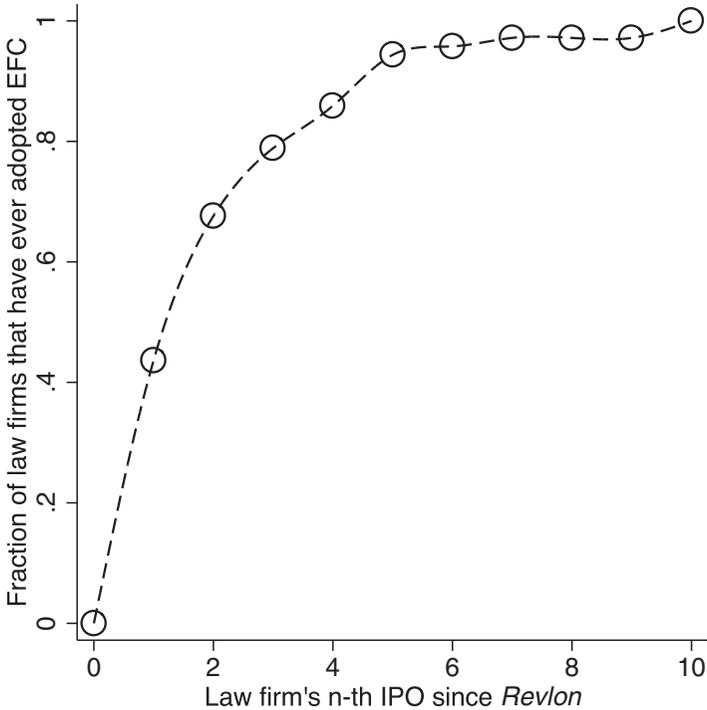
b. *Lawyers.* There are several possible reasons why law firms that eventually adopted exclusive forum clauses did not do so immediately after *Revlon*. One possibility is that

⁷⁶Where 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.

⁷⁷Technically 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*.

⁷⁸That 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.

Figure 5: Timing of the light-switch model.



NOTES: 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.

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)⁷⁹ might in turn be called “early adopters,” since they are willing to adopt but only after observing that others 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.⁸⁰

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, 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,⁸¹ along with their pre-*Revlon* IPO and M&A experience.⁸² We also experimented with specifications that use the IPO (rather

⁷⁹This 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.

⁸⁰Two 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 five 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.”

⁸¹The 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 51), 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.

⁸²The IPO dataset 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 dataset is as described in note 50. 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

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 ($\frac{\#Pre-Revlon\ IPOs}{10}$)	-0.05			-0.05				-0.01 -0.05 -0.01			
	(0.03)			(0.03)				(0.08) (0.08) (0.08)			
Experience ($\frac{\#Pre-Revlon\ M\&As}{10}$)	0.03		0.04*				0.03 0.04 0.03				
	(0.02)		(0.02)				(0.02) (0.02) (0.02)				
Legal 500 (ever ranked)	0.12			0.19*				-0.01 -0.03 -0.07			
	(0.07)			(0.08)				(0.10) (0.11) (0.10)			
Am Law (top 100)	0.04			0.04				0.02 0.07 0.07			
	(0.07)			(0.07)				(0.07) (0.07) (0.07)			
Delaware corporation								0.36*		0.32*	
								(0.08)		(0.09)	
California headquarters								0.07		0.07	
								(0.11)		(0.11)	
Proceeds > \$50m								0.28*		0.18*	
								(0.09)		(0.08)	
Assets > \$100m								-0.10		-0.00	
								(0.08)		(0.08)	
Constant											
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	-0.00	0.03	0.06	0.06	-0.01	0.18	0.11	0.21
Observations	183	183	183	130	183	183	183	130	129	130	129

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.

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.⁸³ We found no robust association between any law firm characteristic and its

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.

⁸³The 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

willingness to innovate.⁸⁴ The conclusion that we draw from this exercise 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 is not a compelling hypothesis. First, the sample of first-time adoption is only a 10th 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.

Finally, in results not reported, we also test for correlation between corporate governance features and an exclusive forum provision by including an indicator for a staggered board in all the specifications of Table 2. The coefficients are small and statistically insignificant.

B. Midstream Adoptions

Outside counsel no doubt can influence midstream adoptions by suggesting to public companies' general counsel that they should adopt the provisions.⁸⁵ However, it is not possible to test a light-switch hypothesis for midstream adoptions. Data on public corporations' use of outside counsel are not publicly available.⁸⁶ Further, the adoption of a

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.

⁸⁴We also included in the regressions measures of the distance of the law firm from Delaware (an indicator variable for proximity defined as whether the law firm was located less than one-half 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.

⁸⁵See, 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 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. However, 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 nonadopters. The paired difference of 0.03 is insignificant (standard error of 0.04).

⁸⁶Only corporate officers sign the SEC filings of bylaws and certificates of incorporation, and the accompanying 8k, 10k, or 10q filing documents contain no references to outside counsel, even if an external law firm drafted the provisions. Of course, outside counsel also do not sign the certificates of incorporation and bylaws of IPO firms, but the offering's outside counsel is identified in the accompanying prospectus.

provision by a public corporation midstream will be determined by the firm's in-house counsel, a decision that may be independent of outside counsel's advice. As each general counsel only advises one company, a law firm light-switch model would not likely hold across the midstream sample, were data on the use of outside counsel available to test that hypothesis.

Accordingly, in this section, we instead examine midstream adoptions in terms of the contention of proxy advisory service providers and institutional investors that exclusive forum provisions are detrimental to shareholder interests and reflect poor corporate governance.⁸⁷ The policy position of proxy advisors is consequential because of their influence on shareholder voting; the leading provider alone affects as much as 20 percent of shareholder votes, and directors' actions are affected by negative votes.⁸⁸ Criticism of exclusive forum provisions is most apt when considering midstream bylaw adoptions as they do not require a shareholder vote. The potential for opportunism in latecomer terms is significantly mitigated in the case of charter adoptions that require shareholder approval.

If their criticism were well founded, and exclusive forum clauses were indeed harmful to shareholders, then we would expect that firms adopting such provisions unilaterally would not possess the same, or as many, good governance characteristics as nonadopters. For if they have such governance mechanisms, then that should prevent the adoption of bylaws adverse to shareholder welfare. That should also be true of a comparison between midstream bylaw adopters and adopters by shareholder vote. Otherwise, advisory service providers and institutional investors would be mistaken either about exclusive forum provisions or about measures of good governance (or about both the clauses and measures); their position cannot be accurate with respect to both.

1. Comparison of Midstream Bylaw Adopters and Nonadopters

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.⁸⁹ We include the first three characteristics because those were identified by ISS as informing its recommendations regarding shareholder voting on exclusive forum clauses when it

⁸⁷For example, proxy advisory services firm Glass Lewis recommended voting against the election of the director serving as chairman of the governance committee of corporations adopting a forum selection clause without obtaining shareholder approval, or those seeking approval in a bundled vote. Allen 2012, *supra* note 30, at 6. As Allen notes, the rationale Glass Lewis offered for its position was that the exclusive forum clauses are "not in the best interests of shareholders."

⁸⁸See note 34 (collecting studies of voting impact of leading proxy advisory service firm) and Ertimur et al., *supra* note 34 (finding close to half of firms for which ISS issued a withhold-vote recommendation respond to the underlying issue by the following year, such as adopting the subject of a successful shareholder proposal that they had previously ignored). Allen attributes the defeat of two proposals to adopt exclusive forum clauses to the opposition of the proxy advisory services. Allen 2012, *supra* note 30, at 5, 11.

⁸⁹We 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.

moved to case-by-case recommendations on the proposals.⁹⁰ 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 Council of Institutional Investors (CII), an influential corporate governance advocacy organization of pension and labor union funds, endowments, and foundations.⁹¹ As the proxy advisory service providers work hand in glove with CII members, it is not surprising that their views on what constitutes good governance are largely identical.

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.⁹² 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 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.⁹³ ISS and institutional investors 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.⁹⁴

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.⁹⁵ In addition, financial

⁹⁰See Allen 2012, *supra* note 30, at 6, and note 35, *supra*. It should be noted that despite these criteria, according to Allen, it did not recommend in favor of any of the provisions. Allen 2014, *supra* note 26, at 8, 12.

⁹¹See 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 article. However, we did collect board independence data and there was no significant difference across adopters and their matched nonadopters, with both groups having 80 percent independent directors, nor was it significant when included in the multivariate regression.

⁹²E.g., CII, Majority Voting for Directors, available 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 *Rev. Account. Stud.* 1 (2015).

⁹³E.g., CII, Independent Board Chair, available at: http://www.cii.org/independent_boardchair.

⁹⁴E.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 multiyear contest.

⁹⁵Ownership 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.

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 nonadopters 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 (i.e., e.g., not adopted in conjunction with a merger agreement). As indicated in Panel D of Table 1, there are 291 such adoptions in total.⁹⁶ A higher proportion of the clean adoptions are by non-Delaware domiciled firms (13 percent) compared to the full set of midstream adoptions.⁹⁷ 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.⁹⁸ 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).⁹⁹ 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 quite possible that in instances of multiple amendments, consideration of a forum selection clause sparked the broader evaluation.

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

⁹⁶There 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 Panel D of Table 1, the remaining 65 midstream forum selection clauses are charter amendments.

⁹⁷A 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).

⁹⁸The 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 48, at 295 n.18 & 297. Shareholder derivative suits are reported as accompanying approximately 30 percent of federal securities lawsuits. Erickson, *supra* note 42. 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, recognizing that the correlation is low.

⁹⁹The 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) (“two 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”).

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 nonadopters 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 controlled company context. Their inclusion would therefore confound an analysis comparing the governance quality of adopters by unilateral board action and nonadopters. 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 nonadopter according to year, industry, firm size, and domicile.¹⁰⁰ Seven bylaw adopters could not be matched.¹⁰¹ This left a sample of 242 bylaw adopters and a matched sample of 242 nonadopters. 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 securities 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 nonadopters. 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 among nonadopters.¹⁰² There are no significant

¹⁰⁰See the Appendix for details on the matching procedure.

¹⁰¹Six adopting firms were not in the CRSP database and one firm could not be matched according to our procedure because there was no nonadopter that was “close.” See the Appendix.

¹⁰²We 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 nonexecutive 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 nonexecutive chairmen, and only nonexecutive chairmen who are also not former executives. We also constructed a governance “index,” the sum for each firm of the number of the four good governance variables that it has; the adopters have better total governance, averaging a score of 2.4, compared to 2.2 for the nonadopters, but a paired *t* test is marginally significant at 9 percent (two-tailed test).

Table 4: Midstream Governance Differences: EFC Adopters v. Nonadopters (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 clean adoption (i.e., not adopted in conjunction with an event, such as a merger) 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.

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 that underscores the need to separately analyze 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 nonadopters is consistent with the inference that boards adopting exclusive forum provisions are behaving as responsible fiduciaries of their shareholders.¹⁰³

¹⁰³This interpretation is further supported by the fact that shareholders of the vast majority of the firms could repeal the bylaw if they so desired. Only slightly more than one-quarter (27 percent) of the adopting firms have a supermajority requirement for shareholder bylaw amendments, compared to 25 percent of the nonadopters, a difference that is statistically insignificant (paired *t* test value of 0.52). Scott Hirst reports that 42 percent of the firms in the Russell 3000 index have supermajority requirements for all or some bylaw changes. Scott Hirst, *Frozen Charters*, 34 *Yale J. Reg.* (forthcoming). That proportion is higher than the corresponding proportion of exclusive forum clause adopters, as well as their matches (36 percent and 38 percent, respectively). While given the focus of his analysis Hirst treats the two types of supermajority requirements as interchangeable, it should be noted that when supermajority requirements apply to only specified bylaws (9 and 13 percent of adopters and matches, respectively), the locked-in provisions concern shareholder meetings, director elections, and indemnification, and hence do not impact shareholders' ability to overturn an exclusive forum clause.

As a robustness check, we rerun the paired *t* tests separately for firms in high securities 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 do nonadopters.¹⁰⁴ These data provide further support for a characterization of exclusive forum bylaw adoptions as not adverse to shareholders because we do not find that nonadopters have better governance than adopters when we separately examine firms that might be more likely to have use of the clauses (those in high securities 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. 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.¹⁰⁵ These findings bolster the conclusion from the paired comparison tests regarding the implausibility that 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

¹⁰⁴If 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 0.1571 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.

¹⁰⁵We also ran the regressions including the percentage of independent directors, a high securities litigation risk indicator variable, and the director interlock variable, described in note 85; these variables were all insignificant. We further ran the regression replacing the four governance variables with the governance index (see note 102); the index is marginally significant at 10 percent. Finally, we separately ran the regression for pairs of firms adopting the clause before and after the *Chevron* decision. The majority voting and independent chairmen votes are significantly positive in the larger post-*Chevron* sample but insignificant in the pre-*Chevron* sample, which may well be a function of the test's low power, given the smaller size of the sample (20 percent of the full group), as the direction is the same (more of the adopters have these provisions than do the nonadopters).

Table 5: Midstream Governance Differences: EFC Adopters v. Nonadopters (Multivariate Analysis)

<i>Governance</i>	<i>Dependent Variable is an Indicator for Exclusive Forum Clause</i>	
	<i>Sample</i>	
	<i>All</i>	<i>Nonmissing Pairs</i>
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)
Constant	0.08 (0.36)	0.10 (0.36)
Observations	463	446

NOTES: The sample is clean adoption (i.e., not adopted in conjunction with an event, such as a merger) 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.

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, or (3) written consents.¹⁰⁶ There are no significant differences in governance characteristics between companies with board-

¹⁰⁶Because 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. As there is no significant difference in the proportion adopting elective clauses by type of midstream adoption—whether the bylaws are compared to the three different voting categories or all shareholder-approved proposals combined (respective chi-squares of 1.07 ($p = 0.301$) and 2.4 ($p = 0.499$)) we do not analyze any of the governance differences in relation to the format of the clauses. The average variable values for clean bylaw adopters used in these tests vary slightly from those reported in Table 4 because the comparisons in this section include all clean bylaw adopters and not only those that could be matched.

Table 6: Midstream Governance Differences: By Method of EFC Adoption

Governance	Difference Between Groups (Avg. of First Group – Avg. of Second Group)				
	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.

adopted exclusive forum provisions and those whose provisions were adopted by separate shareholder votes (Column 1).¹⁰⁷ In contrast, 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 mid-stream 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

¹⁰⁷Consistent with the contention that bylaw adopters are not less prone to be effectively monitored, the action of boards adopting the provisions unilaterally are not more likely to be subject to reversal by shareholder action than those of firms putting the clauses up to a separate shareholder vote. That is because there is no statistically significant difference in the percentage of firms with supermajority requirements for shareholder bylaw changes between clean bylaw adopters and firms putting the provisions to a separate shareholder vote (27 percent compared to 32 percent, respectively).

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.¹⁰⁸

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 approved if separately proposed.¹⁰⁹

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.¹¹⁰ Hence, a

¹⁰⁸Logit 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.

¹⁰⁹See 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 the paper 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 achieved by bundled votes is not a function of greater inside ownership in those firms compared to firms holding separate votes, for there is also no significant difference in inside ownership across the firms.

¹¹⁰For 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

plausible explanation for why boards continue to opt for unilateral adoption is not because of fear that shareholders would disapprove, but because it is 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 rationally 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.¹¹¹

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 that standard, companies adopting exclusive forum bylaws 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 mechanism was used solely to avoid a losing shareholder vote. In sum, bylaw adopters would appear to be 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. The prevalence of elective provisions might suggest that to be the case, as the motivation for their adoption is unclear.¹¹² However, misuse of

independent chairmen (as is 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 30, at 6. There would appear to have been other problems at Allstate that 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.

¹¹¹There are data suggestive of this concern: ISS recommendations against a directors' election result in higher levels of no or withheld votes, e.g., Ertimur et al., supra note 34, 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 Uncontested Director Elections*, Georgetown University McDonough School of Business Research Paper No. 2609532, Nov. 2016 (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 directorships within one year of that election).

¹¹²Grundfest states that the elective format is a "savings" clause, intended to operate as a "fiduciary out," so that directors can fulfill their fiduciary obligations where it would be in the shareholders' best interest to sue outside of the exclusive forum state. Grundfest, supra note 5, at 383. However, by providing the directors the choice of forum, it could be viewed as providing directors with an "out" to pursue a collusive settlement with a more amenable plaintiff in another state. Cf. Allen 2012, supra note 26, at 7 ("plaintiffs' bar might argue [it] allow[s] the board ... to engage in forum shopping").

this feature should not be troubling. The Delaware courts can be expected to police an election to settle with a more amenable plaintiff elsewhere (as other plaintiffs would seek to enforce the exclusive forum clause in Delaware) as they have a longstanding recognition of the problem of collusive settlements,¹¹³ and, along with the legislature and bar, have strong incentives to control their case law, as it is a source of substantial revenue for the state.¹¹⁴ It would, moreover, seem implausible that an opportunistic board would draw down its goodwill on an exclusive forum provision, whether or not elective, 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.¹¹⁵

V. CONCLUSION

In this article, 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 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 is approaching universality as it has increased steadily from 0 to 80 percent between 2010–2014 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 (i.e., 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

¹¹³Grundfest, *supra* note 5, at 387. That recognition is evidenced by a recent trend of Chancery Court decisions to reject settlements in a subset of acquisition cases, in which defendants make nonmaterial additional disclosures and pay six-digit fees to plaintiffs' attorneys in exchange for a universal release. E.g., *In re Trulia, Inc. Stockholders Litig.*, CA No. 10020-CB, 2016 WL 325008 (Del. Ch. Jan. 22, 2016).

¹¹⁴E.g., Roberta Romano, *The Genius of American Corporate Law* 7–8 (1993).

¹¹⁵See, e.g., Bernard Black, Brian Cheffins & Michael Klausner, *Outside Director Liability*, 58 *Stan. L. Rev.* 1055 (2006) (finding only 13 cases in the past 25 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 nonmonetary 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.

that lawyers have come to perceive that, in contrast to takeover defenses, exclusive forum provisions are “best practice” and universally beneficial.

For the midstream adoptions, we find almost no significant differences in governance features across midstream bylaw adopters and nonadopters. Further, when there is a significant difference, it is the adopters that have higher-quality governance (using the metrics of prominent organizations that are leading 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.

APPENDIX: MATCHING PROCEDURE FOR MIDSTREAM ADOPTERS

We matched each midstream adopter to a nonadopting 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 nonadopting 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 four-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 three-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 two-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 two-, three-, or four-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 nonadopter to more than one adopter, the nonadopter is assigned to the adopter for which it is ranked higher (according to firm size and industry). For example, suppose Nonadopter 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.