INTERPRETING ORGANIZATIONAL "CONTRACTS" AND THE PRIVATE ORDERING OF PUBLIC COMPANY GOVERNANCE

MEGAN WISCHMEIER SHANER*

ABSTRACT

Corporate law is undergoing an explosion of governance by private ordering. With increasing frequency and creativity, the charter and bylaws of public corporations are being used as tools for restructuring key aspects of corporate governance. The current focus of parties, courts, and scholars has been on the facial validity of these efforts. In light of courts' willingness to uphold corporate governance contracting, legal battles will morph from validity challenges to interpretation disputes. Yet interpretation principles are a topic to which corporate scholars have devoted limited attention. With interpretation poised to take on an influential role in shaping corporate law and norms, establishing a cohesive interpretative framework is critical.

This Article rejects the contract metaphor traditionally applied to questions of charter and bylaw interpretation in favor of a more nuanced interpretative framework. Dissecting the provisions that comprise a public corporation's organizational documents reveals a rich combination of standardization, customization, and innovation. Drawing from many sides of traditional interpretation debates, this Article links the different types of organizational provisions to the interpretive theory and principles that most accurately achieve the

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primary interpretive goals attendant to each. The outcome is a framework that requires courts to engage in a more explicit and tailored analysis, resulting in a stable interpretation scheme and clear judicial guidance to market actors.

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> *"With the evolving role of bylaws, these are very interesting times in Delaware corporate jurisprudence and in corporate governance."*[1]
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> —The Honorable Henry duPont Ridgley, Justice, Supreme Court of Delaware

INTRODUCTION

Public corporations are in the midst of an explosion of governance by private ordering.[2] With increasing frequency and creativity, the certificate of incorporation and bylaws of public corporations are being used as tools for restructuring key aspects of corporate governance. Forum selection, fee-shifting, arbitration, proxy access, and proxy reimbursement provisions are some recent examples of the emerging role and use of organizational documents as a platform for ex ante corporate governance.[3] Currently, the Delaware courts have indicated a permissive attitude toward corporate governance contracting, citing to the corporate contract metaphor.[4] These decisions have further fueled the private ordering movement and corporate governance initiatives, emphasizing ex ante tactics and innovations through amendments to the charter and bylaws.[5]

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1. Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance*, 68 SMU L. REV. 317, 330 (2015).

2. Consistent with prior scholarship addressing this topic, this Article uses the term "private ordering" to mean contractual in nature. *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638 (2016) ("[F]or the most part the innovations take the form of private ordering—that is, the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law)."); D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 127 n.12 (2011).

3. Jill Fisch uses the term "new governance" to describe the rise of private ordering in organizational documents to structure governance rights. Fisch, *supra* note 2, at 1638-39.

4. *See* James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 258 (2015) ("*Boilermakers* and *ATP Tour* each reasoned from the perspective that the shareholders' relationship with the corporation, and in turn their relationship with the board of directors, are contractual so that much of the shareholders' rights can be understood to flow from certain organic documents, and most significantly and pervasively from the company's bylaws."). *But see* Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, slip op. at 49 (Del. Ch. Dec. 19, 2018) (invalidating federal forum charter provisions).

5. *See* CLAUDIA H. ALLEN, CONFERENCE BD. GOVERNANCE CTR. TRENDS IN EXCLUSIVE FORUM BYLAWS 3 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715 [https:

There is a growing body of scholarship focusing on the private ordering of public corporate governance, ranging from narrow discussions of the legality of individual provisions to broader discussions of the normative value of ex ante corporate contracting, the legitimacy of the contract metaphor in corporate law, and stockholder empowerment.[6] This Article moves past current discourse to address the next logical issue in the corporate contracting saga—interpretation of the provisions.[7] Given that there is no indication of a judicial reversal on the ability to engage in ex ante corporate governance planning and every indication that the corporate contracting trend will persist, legal battles will naturally morph from validity challenges to interpretation disputes. Interpretation principles, as applied to organizational documents, will thus become significant in a way that they have not been in the past. In anticipation of the growing importance of charter and bylaw interpretation, this Article proposes a cohesive interpretive framework for organizational documents with the goal of providing clarity to an area of the law that has, to date, largely been overlooked.

Since the early nineteenth century, the corporation has been theorized and discussed in contractarian terms. Courts and scholars describe the charter and bylaws as contracts (1) between the State

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//perma.cc/5TF2-F88N] (reporting on the announcement or adoption of forum selection provisions post-*Boilermakers*); Alison Frankel, *Sneaky New Trend in IPOs: Make Shareholders Pay if They Sue and Lose*, REUTERS (Oct. 9, 2014), http://blogs.reuters.com/alison-frankel/2014/10/09/sneaky-new-trend-in-ipos-make-shareholders-pay-if-they-sue-and-lose/ [https://perma.cc/5J9V-HH5P] (reporting on the adoption of fee-shifting bylaws in the wake of *ATP Tour, Inc. v. Deutscher Tennis Bund*); Gretchen Morgenson, *Shareholders, Disarmed by a Delaware Court*, N.Y. TIMES (Oct. 25, 2014), https://www.nytimes.com/2014/10/26/business/shareholders-disarmed-by-a-delaware-court.html [https://perma.cc/V2M9-GAD7]; *see also* Transcript of Oral Ruling at 9-10, 13, Edgen Grp. v. Genoud, No. 9055-VCL, 2013 WL 6409517 (Del. Ch. Nov. 5, 2013); Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 286 (2015); George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 639 (2016); Ridgely, *supra* note 1, at 330.

6. *See, e.g.*, Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 9-11 (2018); Cox, *supra* note 4, at 258; Fisch, *supra* note 2, at 1640-41; Geis, *supra* note 5, at 639; Smith et al., *supra* note 2, at 127, 130; Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 491 n.25 (2016).

7. This Article adopts the following description of "interpretation": "Contract interpretation is the undertaking by a judge or jury (or an arbitrator ...) to figure out what the terms of a contract are, or should be understood to be. It should be distinguished from simple enforcement." Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2005) (internal citation omitted).

and the corporation, (2) between the corporation and its stockholders, and (3) among a corporation's stockholders.[8] Relying on the contract metaphor, Delaware courts have repeatedly held that, when interpreting an entity's organizational documents, "general rules of contract interpretation apply to [their] terms."[9] Importing contract principles to resolve questions of interpretation involving the charter and bylaws is, however, problematic. Organizational documents and contracts are not mirror images. The contract metaphor fails to account for the unique mix of standardized, innovative, and customized terms that comprise organizational documents.[10] Moreover, the charter and bylaws implicate both private and public law in a way that traditional contracts do not, demanding different interpretation considerations and goals.[11] Organizational documents are instead distinctive contract-like institutions that trigger their own distinctive interpretation concerns.

Despite these differences, the charter and bylaws are identical to all contracts in one important respect: they are the product of human effort and, as such, are subject to behavioral bias, mistake, and ambiguity. As former Chief Justice of the Delaware Supreme Court, E. Norman Veasey, and Jane Simon nicely summarize: "It is a rare contract that needs absolutely no interpretation. Scriveners are not perfect, the English language can be tricky, and the future of the application of contract language cannot be unfailingly predicted at the time and in the circumstances of the negotiation."[12] Thus, not

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8. *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010); Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990).

9. Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990); *see also Airgas, Inc.*, 8 A.3d at 1188. "Indeed, the certificate of incorporation, if it needs to be interpreted, is construed as a contract." 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 1.3, 1-5 n.17 (3d ed. 2018) (citing Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1988); Ellingwood v. Wolf's Head Oil Ref. Co., 38 A.2d 743 (Del. 1944)); *see also Centaur Partners*, 582 A.2d at 928.

10. *See infra* Part II.B.

11. *See* Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts,"* 93 WASH. L. REV. 265, 268 (2018) ("But a corporation's charter and bylaws are no ordinary contracts. Rather, they are hybrid legal structures that provide a mechanism for collective choice in the context of substantial state regulation and straddle the public-private divide in ways that make them quite dissimilar from ordinary contracts."); *cf.* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 716 (1997).

12. E. Norman Veasey & Jane M. Simon, *The Conundrum of When Delaware Contract Law Will Allow Evidence Outside the Contract's "Four Corners" in Construing an Un-*

surprisingly, interpretation issues remain "the largest single source of contract litigation between business firms."[13] Yet, attention to interpretation principles has, to date, been scarce.[14] The dominance of the contractarian view of the corporation has overshadowed charter and bylaw interpretation, masking the need for meaningful discourse and examination in this area of the law. With interpretation poised to take on an influential role in shaping corporate law and norms, this deficiency can no longer be ignored; establishing a cohesive interpretative framework for organizational documents is critical.

This Article addresses the absence of a more nuanced and comprehensive interpretive framework for organizational documents. Dissecting the provisions that comprise a public corporation's organizational documents, the proposed framework requires courts first to classify the provision at issue as falling into one of five categories: (1) technical, statutorily mandated language, (2) fundamental corporate rights, (3) organizational "boilerplate," (4) novel provisions, or (5) individually negotiated provisions. Recognizing that each category elicits different policy concerns and interpretive goals, the framework then links an appropriate interpretation theory and its principles—textual, contextual, or statutory—to that category. The framework encourages courts to explicitly recognize the different parts of a charter or bylaws and the different interpretation considerations attendant to each. Adopting this framework has the benefit of communicating to the corporate community and other courts a clear interpretive scheme for organizational documents and obliges courts to explain when they depart from that scheme. The framework also provides flexibility and discretion for courts to engage in the type of case-by-case analysis that is a hallmark of corporate law.

This Article proceeds in the following manner. Part I outlines the evolving role of organizational documents in corporate law. In particular, it describes the private ordering trend in public corporation

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ambiguous Contractual Provision, 72 BUS. LAW. 893, 895 (2017).

13. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010).

14. *Cf.* Posner, *supra* note 7, at 1581; Schwartz & Scott, *supra* note 13, at 928 (asserting that scholarly commentary on contract interpretation is unhelpful and scarce).

governance. In recent years, stockholders have looked to become more active participants in corporate affairs through bylaw amendments.[15] In reply, boards of directors have pushed back by exploring avenues of limiting stockholders' rights in organizational provisions.[16] In adjudicating the enforceability of governance provisions, the Delaware courts have used strong language embracing contractual rhetoric in describing the charter and bylaws.[17] Part II provides the background for the contract metaphor frequently cited in deciding questions of charter and bylaw enforceability and interpretation then addresses why it is incorrect to transform organizational documents into contracts for interpretation analyses. Part III proposes a tailored interpretive framework for organizational documents by examining the unique makeup of the charter and bylaws. The framework provides for a two-step approach to resolving charter and bylaw interpretation disputes. Examples of the application of the framework are provided, as well as a discussion of the benefits and normative value of an explicit interpretation scheme.

I. THE EVOLVING ROLE OF ORGANIZATIONAL DOCUMENTS

Organizational documents provide for the governance of a business entity and its participants. In the corporate context, the organizational documents are the certificate of incorporation (frequently referred to as the "charter")[18] and the bylaws.[19] The charter is the more formal, publicly filed document that initiates a corporation's legal existence.[20] The courts have described the charter's role as defining "the broad and general aspects of the corporate entity's

15. *See* Smith, *supra* note 2, at 131-33.

16. *Cf. id.* at 134-37.

17. *See infra* note 95 and accompanying text.

18. Depending on the jurisdiction, the initial formation document may be referred to as the certificate of incorporation (e.g., in Delaware) or the articles of incorporation (e.g., in a Model Business Corporation Act (MBCA) jurisdiction). *See generally* DEL. CODE ANN. tit. 8, § 102(a) (2015); MODEL BUS. CORP. ACT § 2.02 (AM. BAR ASS'N 1954).

19. *See generally* DEL. CODE ANN. tit. 8, § 109(b) (2015); MODEL BUS. CORP. ACT § 2.06.

20. *See* DEL. CODE ANN. tit. 8, § 106 (1998); MODEL BUS. CORP. ACT § 2.03 (AM. BAR ASS'N 1954). The charter is typically filed with the Secretary of State. *See* MODEL BUS. CORP. ACT § 2.03(b).

existence and nature."[21] A charter is a combination of mandatory and permissive provisions.[22] All state corporate statutes require certain information to be included in every corporate charter filed in their jurisdiction.[23] There is some slight variation among states in the statutorily required provisions; nevertheless, certain requirements are universal: name of the corporation, name and address of the registered agent, name(s) and address(es) of the incorporator(s), and certain information regarding the capitalization of the corporation.[24] One provision not required by statute, but present in virtually every corporate charter, is a provision exculpating directors for duty of care violations.[25] Beyond this, a charter may contain any provision not inconsistent with law.[26] After a corporation issues stock, amendments to the charter must follow a formal process provided by statute, requiring approval of both the board of directors and the stockholders and a formal filing with the state.[27]

The other required corporate organizational document is the bylaws. The bylaws are not publicly filed with the state of incorporation and have been "characterized as the proper place to set forth 'the self-imposed rules and regulations deemed expedient for ... the ... convenient functioning' of the corporation."[28] The bylaws provide

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

22. *See infra* note 23.

23. The provisions in a charter can be divided into four broad categories: (1) statutorily required provisions, (2) optional provisions that if a corporation chooses to include must be in the charter, (3) optional provisions that may be included in the bylaws or the charter, and (4) any other provision not inconsistent with Delaware law. *See* tit. 8, § 102(a)-(b) (2015).

24. *See, e.g.*, *id.* § 102(a); MODEL BUS. CORP. ACT § 2.02(a) (1954). For example, in Delaware, the purpose of the corporation, as well as the name(s) and address(es) of the initial board of directors (if the powers of the incorporate terminate upon filing) are also required to be included in the charter. *See* tit. 8, § 102(a).

25. *See* tit. 8, § 102(b)(7); MODEL BUS. CORP. ACT § 2.02(b)(4).

26. *See* tit. 8, § 102(b)(1); MODEL BUS. CORP. ACT § 2.02(b).

27. *See* tit. 8, § 242(a)-(b); MODEL BUS. CORP. ACT § 10.03. One exception to this requirement is the board of directors' ability to unilaterally authorize series of preferred stock. *See* tit. 8, §§ 104, 151(g) (providing for certificates of designation, which are amendments to the charter). This power (typically called "blank check authority") must, however, be provided to the board in the charter. *See id.* § 102(a)(4).

28. 1 BALOTTI & FINKELSTEIN, *supra* note 9, § 1.10, 1-16 (quoting Gow v. Consol. Coppermines Corp., 165 A. 136, 140 (Del. Ch. 1933)). *See also* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 235 (Del. 2008) (describing bylaws as "procedural" and "process-oriented"); Ridgely, *supra* note 1, at 317 ("In each organization, there needed to be rules defining the organization's membership, purpose, and means of selecting its leaders. The creation and adoption of bylaws grew out of this need."). While bylaws are considered a

for the internal governance of the corporation with, for example, provisions addressing meetings of stockholders and of directors;[29] the number of directors on the board;[30] director resignations,[31] removals,[32] and filling vacancies;[33] establishing corporate officers and their duties;[34] and indemnification and advancement rights.[35] To the extent they conflict, the bylaws are subordinate to the charter and the law (state statutes, common law, and federal laws).[36] However, "by-laws are presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law [and the charter] rather than strike down the bylaws."[37] In contrast to the charter, either the stockholders or the board of directors may unilaterally amend the bylaws.[38] Bylaws may also be waived or amended formally (for example, by vote) or informally (for example, by conduct or implication), with the latter being less common.[39]

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nonpublic document under state law, publicly traded corporations must publicly file their bylaws pursuant to federal securities law and the rules of stock exchanges. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 555 (Del. 2014).

29. *See* tit. 8, §§ 211, 216 (2009).

30. *See id.* § 141(b) (2016).

31. *See id.*

32. *See id.* § 141(k) (2016).

33. *See id.* § 223(a) (2016).

34. *See id.* § 142 (2016).

35. *See id.* § 145(a) (2011).

36. *See id.* § 109(b) (2015) (stating that the bylaws may include any provision consistent with the charter and law); Oberly v. Kirby, 592 A.2d 445, 458 n.6 (Del. 1991) ("[A] corporation's bylaws may never contradict its certificate of incorporation."). However, bylaws are viewed as superior to board resolutions. *See* Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1080 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

37. *See* Frantz Mfg. Co. v. EAC Indus., Inc., 501 A.2d 401, 407 (Del. 1985); *see also* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557 (Del. 2014) (quoting *Frantz*).

38. *See* tit. 8, § 109(a) (2015). The stockholders' ability to amend the bylaws is immutable. On the other hand, under Delaware law the board only has the ability to amend the bylaws if such power is provided for in the charter. *See id.* Under the MBCA, directors have the power to amend the bylaws unless the charter divests them of that right. MODEL BUS. CORP. ACT § 10.20(b).

39. *See* tit. 8, § 109(a); Russel v. Morris, No. 10009, 1990 WL 15618, at *5 (Del. Ch. 1990) (stating that the court "does not easily recognize the amendment of a corporation's bylaws by implication"); *In re* Ivey & Ellington, Inc., 42 A.2d 508, 509 (Del. Ch. 1945) ("[A] corporate by-law may be amended by implication and without any formal action being taken by clear proof of a definite and uniform custom or usage, not in accord with the by-laws regularly adopted, and by acquiescence therein."); Star Loan Ass'n v. Moore, 55 A. 946, 948 (Del. Super. Ct. 1903) ("[B]y-laws may be adopted without the use of the corporate seal, and no entry in writing is necessary."); BALOTTI & FINKELSTEIN, *supra* note 9, § 1.10, 1-22 ("In rare instances, the existence of a by-law may be established either by custom, or by acquiescence. Similarly, by-

Collectively, a corporation's organizational documents contain a combination of legally required provisions and tailored provisions chosen by the incorporator, board of directors, and/or stockholders. The Delaware statute contemplates a large amount of leeway in crafting the charter and bylaws.[40] As explained by the Delaware Supreme Court, "[section 102(b)(1)] confers, in the most general language, the right to include in a certificate of incorporation *any provision* deemed appropriate for the conduct of the corporate affairs."[41] Similarly, section 109(b) of the Delaware General Corporation Law (DGCL) states that "[t]he bylaws may contain *any provision*, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[42] The only restriction on this freedom of design is that a provision cannot be contrary to statute or general law.[43] Yet even this limitation has been interpreted by the courts as allowing charter provisions that

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laws may be amended by implication." (internal citation omitted)).

40. This Article largely focuses on Delaware law, which has been widely recognized as the preeminent source of corporate law. *See* William T. Allen, *The Pride and Hope for Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 71 (2000) (stating that Delaware General Corporation Law (DGCL) "is certainly the nation's and indeed the world's leading organization law for large scale business enterprise"); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992) ("Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court can make such a claim."); David Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1, 2 (2017) ("Delaware does indeed have a dominant position in corporate law. Roughly 60 percent of the largest corporations are incorporated in Delaware, and more than 80 percent of corporations that choose a state of incorporation outside their home state choose Delaware."); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1760 (2004) (describing why Delaware is the "country's most important corporate law jurisdiction").

41. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 117 (Del. 1952) (emphasis added).

42. DEL. CODE ANN. tit. 8, § 109(b) (2015) (emphasis added). Recently, the Delaware Court of Chancery ruled that private ordering in a corporation's organizational documents could only reach the internal affairs of the corporation and could not regulate the forum of suits over external matters. *See* Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, slip op. at 2, 5, 45 (Del. Ch. Dec. 19, 2018).

43. *See* tit. 8, §§ 102(b)(1), 109(b); Sagusa, Inc. v. Magellan Petroleum Corp., No. 12,977, 1993 WL 512487, at *2 (Del. Ch. Dec. 1, 1993), *aff'd*, 650 A.2d 1306 (Del. 1994); *see also* EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 109.05[A], 1-94 (6th ed. 2018).

vary the common law and statutory default rules so long as they do not "achieve a result forbidden by settled rules of public policy."[44] In sum, absent a direct conflict with the law, courts have generally upheld organizational provisions so long as they are reasonable and equitable.[45]

Seizing on the enabling nature of corporate law, stockholders and boards of public corporations are increasingly using organizational documents as a vehicle for reshaping the balance of power in corporate governance. Historically, close corporations[46] and unincorporated entities (for example, limited liability companies (LLCs) and partnerships)[47] were the primary entities employing contractual governance mechanisms in their organizational documents to specifically tailor the respective rights and powers of the entity and its constituents. In contrast, contractual corporate governance in the public corporate context was more limited, occurring in stockholders agreements, preferred stock designations, debt instruments, and commercial and consumer contracts.[48] Today, however, public

44. *Sterling*, 93 A.2d at 118.

45. *See* Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971); WELCH ET AL., *supra* note 43, at § 109.06, 1-97; Ridgely, *supra* note 1, at 321 ("Director qualification bylaws will be struck down only when they are enacted for an inequitable purpose, in violation of Delaware law, or are unreasonable or arbitrary.").

46. *See* Smith et al., *supra* note 2, at 127-28 ("Shareholders in closely held corporations routinely use private ordering in the form of shareholder agreements and other contractual arrangements to impose order on the business of the corporation and to regulate the conduct of its affairs." (internal citation omitted)); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 56-57 (2013) (describing close corporations such as LLCs as contractual entities).

47. *See* DEL. CODE ANN. tit. 6, § 17-1101(c) (2010) ("It is the policy of [the Limited Partnership Act] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."); *id.* § 18-1101(b) (2013) ("It is the policy of [the LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 290 (Del. 1999) ("The Delaware [LLC] Act has been modeled on the popular Delaware LP Act.... The policy of freedom of contract underlies both the [LLC] Act and the LP Act."); Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Mark Lowenstein & Robert Hillman eds., 2014).

48. *See* Fisch, *supra* note 2, at 1637, 1642-43 (describing "old governance" devices); *see also* William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815, 1839, 1847 (2013) (describing the rights preferred stockholders can secure through the terms of preferred stock designations); Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 FORDHAM L. REV. 703, 707-

corporations' boards and stockholders alike are testing the bounds of the freedom to contract in the organizational documents. Charter and bylaw provisions are being added with increasing fervor that attempt to shape key aspects of corporate governance ex ante and shift the distribution of rights and power in the corporation.[49]

As a brief aside, the enabling nature of Delaware law that allows for the private ordering of corporate governance in organizational documents is not new. As Easterbrook and Fishel point out in their 1989 article "The Corporate Contract":

> The corporate code in almost every state is an "enabling" statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator and without effective restraint on the permissible methods of corporate governance.... [F]or equity investors, almost everything is open to choice.[50]

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09 (2008) (discussing the ability of debt instruments to be used as levers of control over corporate governance).

49. *See* Geis, *supra* note 5, at 610-11 ("Increasingly, however, shareholders and managers are emphasizing tactics that move from ex-post response to ex-ante planning."); Ridgely, *supra* note 1, at 330 (discussing the emerging role of bylaws as a corporate governance tool); Winship, *supra* note 6, at 521-22 (describing corporate contract procedure as an emerging distinctive legal phenomenon).

Illustrating the emergence of private ordering in organizational documents, in 2015, proxy advisory firms ISS and Glass Lewis included charter and bylaw provisions that impacted litigation rights as a separate category in their voting guidance to investors. *See* GLASS, LEWIS, & CO., PROXY PAPER GUIDELINES: 2015 PROXY SEASON: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE 39-40 (2014), http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf [https://perma.cc/TZ37-QHF4]; INSTITUTIONAL S'HOLDER SERVS., U.S. SUMMARY PROXY VOTING GUIDELINES: 2015 BENCHMARK POLICY RECOMMENDATIONS 23-24 (2014), http://www.issgovernance.com/file/policy/2015ussummaryvotingguidelines.pdf [https://perma.cc/9KHW-8CGK] ("Generally vote against bylaws that mandate fee-shifting whenever plaintiffs are not completely successful on the merits.").

50. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1417-18 (1989); *see also* Ridgely, *supra* note 1, at 330 ("[T]he advantage of the DGCL is its enabling nature and the ability it gives for private ordering subject to the fiduciary duties of care and loyalty."); Smith et al., *supra* note 2, at 140 ("Delaware is typically portrayed as the defender of private ordering. The law of Delaware is said to be 'enabling,' not 'regulatory.'" (internal citation omitted)); 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, 674 (2005) (describing Delaware law as "enabling" in nature).

This fact then raises the question, why now? What has changed in corporate law to spur the private ordering movement in public corporations?

Several factors are likely contributors. First is the rise of institutional investor activism. As ownership of public corporations becomes concentrated in institutional investors, these large stockholders have the clout and ability to overcome the collective action and rational apathy problems traditionally cited as limiting stockholder participation in corporate affairs.[51] In recent decades, certain institutional investors—namely public pension funds, labor unions, and hedge funds—have sought to become more active participants in the corporation.[52] These stockholders are looking to expand the tools available to them to constrain management power, including, among other tactics, amending the bylaws to impact corporate governance procedures.[53] Of course, as stockholders flex their muscles to increase their participation, boards of directors push back by exploring avenues of limiting stockholders' rights.[54] This push and

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51. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 213-15, 223 (6th ed. 2010) (discussing the collective action and rational apathy problems facing public stockholders and noting the "unprecedented growth in activism and institutional shareholders" which has compensated for some of these problems); William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 860-61 (2001); Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1962-63 (2010); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 863 (2013) ("Equity ownership in the United States no longer reflects the dispersed share ownership of the canonical Berle-Means firm.").

52. *See* O'KELLEY & THOMPSON, *supra* note 51, at 214; Fisch, *supra* note 2, at 1643-44 ("[I]t is clear that, in the United States, shareholders are more active and effective in corporate governance than ever before."); Gilson & Gordon, *supra* note 51, at 867-68 (describing the interplay of institutional and activist stockholders in influencing corporate governance); Smith et al., *supra* note 2, at 171-72.

53. *See* Geis, *supra* note 5, at 644 ("Shareholder-side initiatives, including board declassification campaigns and other activist proposals, have blossomed in recent years."); Smith et al., *supra* note 2, at 171-72 ("In recent years, as institutional investors have shown an increased inclination toward participation in corporate governance, the monitoring role of shareholders has focused on director elections. In addition to proxy access, discussed above, shareholders have created various other means of making director elections more meaningful, including withhold-the-vote campaigns, majority voting, and the abolition of cumulative voting and classified boards.").

54. *See* Smith et al., *supra* note 2, at 134-37 (discussing opposition to shareholder empowerment).

pull for power in managing the corporation is reflected in ex ante corporate governance initiatives.[55]

Another more limited contributor to the rise in ex ante corporate governance is the influence of alternative entity jurisprudence and experimentation with such entities' near absolute freedom to contract. The statutes authorizing alternative entities such as LLCs and limited partnerships (LPs) "declare as public policy the goal of granting the broadest contractual freedom possible, and permit the parties to the governing instrument to waive any of the statutory or common law default principles of law and to shape their own relationships."[56] In recent years, parties in publicly traded alternative entities have sought to eliminate bedrock protections, such as the duty of loyalty, in their organizational documents and "fully utilize the expansive contractual freedom authorized by alternative entity statutes to grant managerial discretion."[57] And, when challenged, the Delaware courts have upheld such provisions as enforceable.[58] As two prominent Delaware jurists point out, however, the freedom to contract in the organizational documents of alternative

55. *See* Geis, *supra* note 5, at 639, 644-45 (describing different current and potential future shareholder-side and management-side initiatives). The optimal balance of power between stockholders and managers in managing the corporation and the accountability mechanisms that accompany such power and control is a central problem in corporate law. *See* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 567-68 (2008); William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 993 (2003) ("One of the central problems of corporate law has always been how to create a system whereby diffuse stockholders feel comfortable entrusting their capital to centralized management."); *Report of the Task Force of the ABA Section of Business Law Corporate Governance Committee on Delineation of Governance Roles and Responsibilities*, 65 BUS. LAW. 107, 110 (2009) ("Maintaining an appropriate balance between responsibilities for corporate oversight and decision-making is critical to the corporation's capacity to serve as engine of economic growth, job creation, and innovation.").

56. Strine & Laster, *supra* note 47, at 11; *see* DEL. CODE ANN. tit. 6, § 17-1101(c) (2010) ("It is the policy of [the Limited Partnership Act] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."); *id.* § 18-1101(b) ("It is the policy of [the LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").

57. Strine & Laster, *supra* note 47, at 12; *see also* Brent J. Horton, *The Going-Private Freeze-Out: A Unique Danger for Investors in Delaware Non-Corporate Business Associations*, 38 DEL. J. CORP. L. 53, 57-58 (2013); Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 561-62 (2012).

58. *See* Gerber v. Enterprise Prods. Holdings, LLC, No. 5989-VCN, 2012 WL 34442, at *13-14 (Del. Ch. Jan. 6, 2012).

entities is not substantially different than that afforded to participants in the corporate enterprise.[59] Thus, experimentation with governance in alternative entity organizational documents, combined with judicial validation of those provisions and the reiteration of the contractual nature of organizational documents, may have influenced similar experimentation in public corporations.

Recent judicial rulings have also been cited as contributing to the upsurge in ex ante corporate governance provisions. In her research on litigation procedure bylaws, Professor Verity Winship explains that as the courts signaled an increasing acceptance and willingness to enforce provisions governing litigation procedure in commercial and consumer contracts, parties became more comfortable with adopting parallel provisions in organizational documents.[60] In a similar vein, Professor George Geis points out that as Delaware courts reiterate and reinforce the idea that charters and bylaws are contracts, corporate actors become more confident that private ordering amendments will be upheld, triggering further developments and proposals to include ex ante corporate governance features in organizational documents.[61]

The predominant venue for ex ante corporate governance in organizational documents has been the bylaws.[62] As a practical

59. *See* Strine & Laster, *supra* note 47, at 17, 22 (calling the contractual flexibility motivation cited for preferring alternative entities to the corporate form a "canard"). *But see* Cox, *supra* note 4, at 282-83 ("The juxtaposition of LLC statutes with general corporation statutes not only invites but also confirms the conclusion that a clear distinction exists between the two with respect to the embrace of private ordering. Whereas the LLC enjoys few private-ordering restrictions, corporate law provides a body of predictable mandatory rules and no open-ended invitation for their alteration. While less freedom for private ordering exists within the corporate statute, corporate statutes' greater rigidity through more standardized terms has social significance by reducing information costs for market participants as well as reducing legal uncertainty.").

60. *See* Winship, *supra* note 6, at 498-99 (discussing the backdrop of contract procedure and how it contributed to the emergence of litigation provisions in corporate organizational documents).

61. *See* Geis, *supra* note 5, at 644-45 ("One clear driver of these initiatives is a renewed emphasis on corporate bylaws as contracts. By conceptualizing the corporate relationship as an unfolding agreement between shareholders and firms, lawmakers can view bylaw modification efforts as the permissible product of flexible private ordering.").

62. *See generally* Choi & Min, *supra* note 6 (describing developments in using bylaws to provide for corporate governance rights); *see also* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 595-98 (2016); Ridgely, *supra* note 1, 317, 319-20 (discussing the emerging use of bylaws to provide for corporate governance).

matter, the bylaws are the more attractive place for testing the limits of contractual corporate governance. First, the bylaws may be unilaterally amended by the stockholders and, at almost all public corporations, the board.[63] There are only narrow restrictions on the power of stockholders or directors to amend the bylaws,[64] and each group may amend the bylaws despite the opposition of the other.[65] Thus, in comparison to the charter—which requires both board and stockholder approval and, unless altered in the governing documents, a higher vote standard for stockholder approval—it is easier and faster to amend the bylaws.[66] Second, the fallout from an aggressive bylaw provision, calling into question the validity of the bylaws in their entirety, does not threaten the corporate existence the way invalidation of a corporate charter would.[67]

Picking up on the latitude expressed in the statute, as well as the ease with which bylaws can be amended, the focus of recent attempts at ex ante governance has been the private ordering of stockholder litigation in the bylaws. This trend has involved boards limiting stockholder litigation through forum-selection bylaws,

63. *See* DEL. CODE ANN. tit. 8, § 109(a) (2018).

64. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 (Del. 2008) (holding that "the shareholders' statutory power to adopt, amend or repeal bylaws is not coextensive with the board's concurrent power" under Section 141(a) and that there could be times where a stockholder bylaw would be an invalid infringement on Section 1141(a)); Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985) (characterizing the stockholders' power to amend the bylaws "as an inherent feature of the corporate structure"); BALOTTI & FINKELSTEIN, *supra* note 9, § 1.11, 1-24. One specific example of a limit on the power to amend the bylaws is Section 216 of the Delaware General Corporation Law, which provides "[a] bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors." Tit. 8, § 216. Note that this is different from the validity of the bylaw provision itself.

65. *See Frantz Mfg. Co.*, 501 A.2d at 407; Am. Int'l Rent A Car, Inc. v. Cross, No. 7583, 1984 WL 8204, at *3 (Del. Ch. May 9, 1984). This is, of course, subject to the rule articulated in *Schnell v. Christ-Craft Industries, Inc.*, that otherwise legal director action may be invalidated if taken for an inequitable purpose. 285 A.2d 437, 439 (Del. 1971).

66. *See* ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW § 109, 23-24 (1st ed. 1972) (commenting that incorporators generally prefer to insert provisions in the bylaws as opposed to the charter). The default voting standard for stockholder approval of a bylaw amendment is a majority of the shares present and entitled to vote on the matter. *See* tit. 8, §§ 109(a), 216(1). In contrast, the voting standard for stockholder approval of a charter amendment is a majority of the outstanding shares entitled to vote, and this does not take into account any separate class or series votes that may also be triggered. *See id.* § 242(b)(2).

67. *See* WELCH ET AL., *supra* note 43, § 102.9, 1-24 ("The invalidity of one provision in a certificate of incorporation *will not necessarily* affect the validity of other provisions or matters approved by stockholders in the same vote." (emphasis added)).

fee-shifting bylaws, arbitration provisions, and minimum threshold requirements.[68] Forum selection provisions in charters and bylaws were the first of these procedural mechanisms to emerge, arising in response to a dramatic increase in multiforum litigation.[69] The forum selection clause movement gained momentum following the Delaware Court of Chancery's endorsement of such a provision in a footnote in *In re Revlon Inc. Shareholders' Litigation*[70] and peaked after the court expressly upheld the facial validity of an exclusive forum selection bylaw in *Boilermakers Local 154 Retirement Fund v. Chevron Corp*.[71] Today, forum selection provisions can be found with increasing frequency in public corporations' organizational documents.[72] Litigation fee-shifting bylaws followed closely behind

68. *See* Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 176, 177-81 (Sean Griffith et al., eds., Edward Elgar Pub. 2018) (summarizing developments in the private ordering of stockholder litigation); Winship, *supra* note 6, at 500-18 (documenting the development of corporate contract procedure).

69. *See* Winship, *supra* note 6, at 501-03 (describing the development of forum selection clauses including the rise in multiforum litigation); *see also* Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2011, at 2 (Feb. 2, 2012) (unpublished manuscript), http://ssrn.com/5013/papers.cfm?abstract_id.=1998482 [https://perma.cc/3GCK-9HJ4] (documenting the rise in merger and acquisition litigation and multiforum litigation). For discussion of forum selection provisions, see generally 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); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333 (2012); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* (Nat'l Bureau of Econ. Research, Working Paper No. 21362), https://www.nber.org/papers/w21362.pdf [https://perma.cc/L8CF-BD7X]; Jared I. Wilson, The Value of Venue in Corporate Litigation: Evidence from Exclusive Forum Provisions (Oct. 2016) (unpublished manuscript), http://ssrn.com/5013/papers.cfm?abstrac_id.=2646312 [https://perma.cc/U4FB-T63R].

70. 990 A.2d 940, 960 n.8 (Del. Ch. 2010); *see also* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 944 (Del. Ch. 2013) (citing to the rise in public corporation adoption of forum selection bylaws leading up to the case); Romano & Sanga, *supra* note 69 (documenting the proliferation of forum selection provisions).

71. 73 A.3d 934, 956 (Del. Ch. 2013) (citing to the broad language of Section 109(b) and holding that the exclusive forum selection bylaws were facially valid even though they were unilaterally adopted by the board); *see also* ALLEN, *supra* note 5, at 3 (stating that following *Boilermakers* (June 2013 through October 2013), at least 112 Delaware corporations adopted or announced plans to adopt such bylaws). The court has since clarified that forum selection bylaws are only valid and enforceable with respect to suits addressing the internal affairs of the corporation and not external disputes. *See* Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, slip op. at 2-5 (Del. Ch. Dec. 19, 2018).

72. *See* Joseph M. McLaughlin, *Enforceability of Board-Adopted Forum Selection Bylaws;*

forum selection bylaws. Less than a year after *Boilermakers*, the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund* upheld fee-shifting bylaws as "valid and enforceable under Delaware law."[73] While the fee-shifting bylaw in *ATP Tour* occurred in the nonstock corporate context, the implications for stock corporations were clear.[74] Several public corporations adopted such provisions in its wake.[75] Ultimately, the Delaware state legislature amended the General Corporation Law to bar the use of fee-shifting provisions as applied to intracorporate disputes involving stock corporations, stunting private ordering of this type.[76]

Corporate Litigation, N.Y. L.J. (Oct. 9, 2014), https://www.law.com/newyorklawjournal/almID/1202672782148/Enforceability-ofBoardAdopted-Forum-Selection-Bylaws/?slreturn=20181121114815 [https://perma.cc/4W2D-6AWD] (reporting on exclusive forum bylaws at over one hundred public corporations); Romano & Sanga, *supra* note 69; SULLIVAN & CROMWELL LLP, EXCLUSIVE FORUM BYLAWS GAIN MOMENTUM 1 (2014), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Exclusive_Forum_Bylaws_Gain_Momentum.pdf [https://perma.cc/M3T2-B38L] (reporting on the adoption of more than two dozen forum selection bylaws at large corporations in 2013 and 2014).

73. 91 A.3d 554, 555 (Del. 2014). The case occurred in the context of a certified question of law from the United States District Court for the District of Delaware. *Id.*

74. The statutes cited and interpreted as supporting fee-shifting bylaws for nonstock corporations apply in the same manner to stock corporations. *See* Stephen Bainbridge, *The Case for Allowing Fee Shifting Bylaws as a Privately Ordered Solution to the Shareholder Litigation Epidemic*, PROFESSORBAINBRIDGE.COM (Nov. 17, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/11/the-case-for-allowing-fee-shifting-bylaws-as-a-privately-ordered-solution-to-the-shareholder-litigat.html [https://perma.cc/533L-YKSS] ("It is widely assumed that the legal basis for upholding such a bylaw in the context of a membership corporation will carry over to a stock corporation.").

75. *See* Tom Hals, *US Companies Adopt Bylaws That Could Quash Some Investor Lawsuits*, REUTERS (July 7, 2014, 4:02 PM), https://www.reuters.com/article/usa-litigation-companies/us-companies-adopt-bylaws-that-could-quash-some-investor-lawsuits-idUSL2NOPE1YZ20140707 [https://perma.cc/2QGH-RG55] (reporting on the first Delaware corporations to adopt fee-shifting bylaws).

76. *See* DEL. CODE ANN. tit. 8, § 102(f) (2018); BALOTTI & FINKELSTEIN, *supra* note 9, § 1.10, at 1-22 (describing *ATP Tour* and the adoption of Section 102(f)). The amendment also eliminates the ability for stock corporations to include exclusive forum or mandatory arbitration clauses that affect intracorporate disputes. Tit. 8, § 115. Thus, while mandatory arbitration clauses had been predicted to be the next iteration of ex ante corporate contract procedure, the statute effectively foreclosed that possibility. *See* Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 809 (2015) ("[M]andatory arbitration bylaws are the latest attempts to address [the] problem [of too many lawsuits]."); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 68 (2013).

Corporate governance through private ordering has not been a one-sided endeavor. Stockholders, led by activist hedge funds and other large institutional holders, have proposed bylaw amendments aimed at increasing stockholders' role in corporate decision-making and, relatedly, increasing management accountability. Two prominent efforts have been majority voting bylaws and proxy access bylaws.[77] In 2005, stockholders put forth proposals to amend corporate bylaws to shift to electing directors under a majority voting standard as opposed to a plurality voting standard.[78] The majority voting movement has had widespread success, with some form of majority voting in place at over 90 percent of S&P 500 companies in 2014.[79] A more recent initiative was amending the bylaws to provide stockholders with access to the corporation's proxy statement for purposes of nominating director candidates.[80] Despite a failed federal regulatory attempt to mandate proxy access for director nominations,[81] the private ordering of proxy access in corporations' bylaws by stockholders has been successful.[82] In 2009, the Delaware legislature amended the DGCL to allow a corporation to provide for both proxy access and reimbursement of proxy

77. Other governance reform efforts by stockholders have also included poison pill redemption bylaws; increased board independence; increased ability for stockholders to call a special meeting; director qualifications and incentives; separation of the chairman of the board and CEO positions; changes to executive compensation; and repealing classified boards. *See* Fisch, *supra* note 2, at 1644-52 (describing stockholder efforts at corporate governance reform). *See generally* Smith et al., *supra* note 2 (describing stockholder private ordering efforts).

78. *See* Fisch, *supra* note 2, at 1649-50; *see also* David C. McBride & Rolin P. Bissell, *Delaware's Flexible Approach to Majority Voting for Directors*, 10 WALL ST. LAW., June 2006, at 1.

79. *See* Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1121 (2016). In comparison, in 2005 only nine of S&P 100 companies had majority voting in place. *Id.*

80. *See* Fisch, *supra* note 2, at 1648.

81. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (invalidating federal proxy access rule, Rule 14a-11).

82. *See* Fisch, *supra* note 2, at 1649; Nick Grabar & Leah LaPorte Malone, *Getting Ready for Proxy Access*, CLEARY GOTTLIEB (Oct. 20, 2015), http://www.clearymawatch.com/2015/10/getting-ready-for-proxy-access/ [https://perma.cc/D37Z-T8K2] (stating that "[p]roxy access bylaws are proliferating"); *Boardroom Accountability Project*, N.Y.C. COMPTROLLER, http://comptroller.nyc.gov/boardroom-accountability/ [https://perma.cc/Q5G7-MK2K]; *see also* Geis, *supra* note 5, at 614-17; Skeel, *supra* note 40, at 5-8 (summarizing the history of proxy access bylaws); Smith et al., *supra* note 2, at 161-63.

solicitation expenses in its bylaws.[83] These amendments specifically enable proxy access through private ordering in a corporation's organizational documents.[84] Indeed, the Court of Chancery stated in explaining the statutory amendments that they "make plain that which had always been understood by most Delaware corporate lawyers, which is that the stockholders of Delaware corporations have the authority to adopt potent bylaws shaping a more competitive election process."[85]

* * *

In sum, public corporations are increasingly becoming "laboratories of corporate governance,"[86] from experimenting with different private ordering approaches to calibrating governance through ex ante contracting in the entity's organizational documents.[87] This phenomenon raises two important questions for corporate law going forward: (1) What is the proper framework for delineating enforceable provisions?[88] and (2) If enforceable, what is the proper framework for interpreting these provisions? It is the latter question that is the focus of the remaining sections.

II. ORGANIZATIONAL "CONTRACTS"

The combination of a corporation's certificate of incorporation, bylaws, and applicable state statutes has been described by the Delaware courts as a "flexible contract" (1) between the State and the corporation, (2) between the corporation and its stockholders,

83. *See* DEL. CODE ANN. tit. 8, §§ 112-13 (2009). These amendments overruled the Delaware Supreme Court's earlier decision in *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (invalidating a stockholder proposed proxy access bylaw).

84. *See* tit. 8, §§ 112-13.

85. Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 356 n.244 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011) (mem.).

86. *See* Smith et al., *supra* note 2, at 181.

87. There are some scholars who would assert that current law does not yet allow for optimal private ordering in the public corporation context and advocate for statutory reform to allow for even more corporate governance contracting. *See id.*

88. For a discussion of this question see generally, for example, Geis, *supra* note 5, and Winship, *supra* note 6.

and (3) among the stockholders of the corporation.[89] This view is a reflection of the contractarian theory of the firm—the legal fiction that describes the corporation as a nexus of contracting relationships—which also has been cited as providing the normative basis for the private ordering of corporate governance in organizational documents.[90] Relying on the contract metaphor, the Delaware courts[91] have repeatedly held that when interpreting an entity's organizational documents, "general rules of contract interpretation apply to [their] terms."[92] In Delaware, those general rules include giving terms their plain meaning by applying the "four corners" rule to determine if extrinsic evidence should be considered in interpreting ambiguous words or phrases and applying the principle of *contra proferentem*.[93]

This Part begins by providing the background for the contract metaphor that has served as the basis for importing contract principles to resolve questions of interpretation. While metaphors can be a useful tool in explaining unfamiliar or new concepts and

89. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939, 952, 957 (Del. Ch. 2013); *see also* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010). For a discussion of whether LLC operating agreements are common law contracts, see Joan MacLeod Heminway, *The Ties that Bind: LLC Operating Agreements as Binding Commitments*, 68 SMU L. REV. 811, 820, 828 (2015).

90. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976); *see also* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 378-79 (2018).

91. Section 111 of the DGCL provides the Court of Chancery with "[j]urisdiction to interpret, apply, enforce or determine the validity of corporate instruments and provisions," which specifically includes charters and bylaws, among other documents. DEL. CODE ANN. tit. 8, § 111 (2018); *cf. id.* tit. 6, § 17-111 (2018) (giving the Delaware Chancery Court jurisdiction over the interpretation of partnership agreements).

92. Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990); *see Airgas, Inc.*, 8 A.3d at 1188. "Indeed, the certificate of incorporation, if it needs to be interpreted, is construed as a contract." BALOTTI & FINKELSTEIN, *supra* note 9, § 1.3, 1-5 n.17 (citing Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1988); Ellingwood v. Wolf's Head Oil Ref. Co., 38 A.2d 743 (Del. 1944)); *see also* Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990).

93. *See* Activision Blizzard, Inc. v. Hayes, 106 A.3d 1029, 1033 (Del. 2013) ("[T]he terms of a charter provision ... are given their plain meaning."); Twin City Fire Ins. Co. v. Del. Racing Ass'n, 840 A.2d 624, 630 (Del. 2003) ("*[C]ontra proferentem* [is the well-established] principle of construction, which [asserts] that ambiguities in a contract should be construed against the drafter."); Citadel Holding Corp. v. Roven, 603 A.2d 818, 824 (Del. 1992) ("When construing a contract, and unless a contrary intent appears, we will give words their ordinary meaning.").

making sense of less settled areas of the law, there is a danger that, over time, legal metaphors can evolve into propositional statements.[94] Recent decisions legitimizing the private ordering of litigation procedures contain strong language embracing the contract metaphor that appears to cross that line.[95] The second half of this Part addresses why it is a normative misstep to transform organizational documents into contracts for interpretation analyses.

A. The Contract Metaphor

The rhetoric of contract law is a well-established part of corporate jurisprudence. For almost two centuries, the contract metaphor has been used in theorizing the corporation and developing the principles that govern the role, enforcement, and interpretation of a corporation's organizational documents.[96] In 1819, the United States Supreme Court in *Trustees of Dartmouth College v. Woodward* held that a corporate charter was "a contract made on a valuable consideration," and a "contract for the security and disposition of property."[97] Twenty years later, the Delaware Court of Chancery similarly declared that the "charter is the contract between the company and the State."[98] While these early cases centered on the corporation's relationship with the State, subsequent descriptions of a corporation's organizational documents included stockholders in the contractual relationship.[99] In Delaware, the following

94. *See* Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 803 (2002) ("Metaphor theorists warn against mistaking metaphors for 'propositional statements.'").

95. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013); *see also* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010).

96. *See infra* notes 97-100 and accompanying text.

97. 17 U.S. 4 (Wheat.) 518, 644 (1819). In *Dartmouth College*, the Court was faced with the "political question of the degree of freedom that private corporations should have from legislative control." *See* JESSE H. CHOPER, JOHN C. COFFEE, JR., & RONALD J. GILSON, CASES AND MATERIAL ON CORPORATIONS 22 (8th ed. 2013). Specifically, the Court had to address whether a corporate charter was a contract in light of the constitutional limitation on a state's ability to impair the obligations of a contract. *Id.* at 21. While *Dartmouth College* involved the charter of a college, it was understood to extend well beyond that limited context to corporations more generally. *See id.* at 22.

98. State v. Wilmington Bridge Co., 2 Del. Ch. 58, 60 (1838).

99. *See* Morris v. Am. Pub. Utils. Co., 122 A. 696, 700 (Del. Ch. 1923) (finding that the corporate charter served as a contract between (1) the state and the corporation, (2) the corporation and its stockholders, and (3) "the stockholders inter sese").

language from *Lawson v. Household Financial Corp.* is frequently cited in applying the contract metaphor:

> Ever since the decision in the *Dartmouth College Case* ..., it has been generally recognized in this country that the charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition.[100]

The loosening of corporate statutes and creation of the enabling corporate law statutory regime illustrates the influence of the contract metaphor on the evolution of corporate law.[101] During the late nineteenth century and early twentieth century, the special chartering system, which previously provided for strict regulation of corporations, gave way to incorporation statutes.[102] Over time, these statutes evolved into the enabling statutory regime governing corporations today.[103] Modern corporation statutes recognize freedom of contracting in the creation of enforcement of organizational documents.[104] Indeed, "[c]ontractual freedom is ... the overriding concept."[105] As explained by two renowned corporate jurists:

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100. 152 A. 723, 727 (Del. Ch. 1930).

101. *See* JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 33-34 (2d ed. 2002) (describing the evolution of corporate law and stating that "today all states have broadly permissive enabling corporation statutes with very little evidence in any state statute of regulatory or paternalistic provisions").

102. *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 132-35 (1970); Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 998-1006 (2008). *See generally* Allen et al., *supra* note 51, at 861 (describing the evolution of corporation law).

103. HURST, *supra* note 102, at 70-71; Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 501 (2002); Taylor, *supra* note 102, at 998-1000.

104. *See* Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) ("At its core, the Delaware General Corporation Law is a broad enabling act which leave latitude for substantial private ordering[s]."); *see also* Leo E. Strine, Jr., *Delaware's Corporate-Law System*, 86 CORNELL L. REV. 1257, 1260 (2001) (describing the DGCL as creating "a wide realm for private ordering"). Arguably, corporate statutes do this implicitly, while unincorporated entity statutes do so explicitly. *See* Cox, *supra* note 4, at 281-83 ("For example, the Delaware Limited Liability Company Act provides: 'It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.' General corporate statutes, even in Delaware, lack any parallel to this provision." (footnotes omitted)).

105. WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS

> The Delaware General Corporation Law ..., which has emerged as the market leader, is "broadly enabling" and designed to facilitate individual tailoring rather than "one-size-fits-all" solutions.... [T]he DGCL and its counterparts predominantly offer default rules that can be altered through private ordering via the corporation's certificate of incorporation and bylaws.[106]

This emphasis on private ordering reinforces and perpetuates the idea that the charter and bylaws are "contracts" that allow for parties to customize their provisions.[107]

But it is the law-and-economics movement that has been credited with firmly cementing the contract metaphor in how the corporation is conceptualized today. As large public corporations came to dominate the United States, economists developed the "nexus-of-contracts" model to distinguish and justify the "firm" as a means of production.[108] Legal scholars imported the nexus-of-contracts theory to explain the corporate form and soon the "contractual theory of the firm ... dominate[d] the thinking of most economists and economically oriented corporate law scholars."[109] Under this theory of the firm, the relationship between directors, officers, and stockholders can be characterized as contractual in nature with the charter and bylaws serving as a primary source of this contractual arrangement.[110]

ORGANIZATION 93 (3d ed. 2009).

106. Strine & Laster, *supra* note 47, at 14; *see also* COX & HAZEN, *supra* note 101, at 57 ("Under the corporation acts of most states, wide latitude is given to the organizers to include in the articles certain optional provisions and to make certain special variations on the ordinary rules prescribed by statute."); Strine et al., *supra* note 46, at 56-57.

107. Strine et al., *supra* note 46, at 56-57.

108. *See* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA, 386-405 (1937); Jensen & Meckling, *supra* note 90, at 311.

109. Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1705 (1989). *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12, 163 (1991); Easterbrook & Fischel, *supra* note 50, at 1430-33; *see also* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 415-17 (1989) (describing the work of early scholars behind the nexus-of-contracts metaphor).

110. *See* COX & HAZEN, *supra* note 101, at 59 ("The essence of the contract is the corporation's articles of incorporation and the laws of the state of incorporation. The relationships and their corresponding duties and rights that flow through these documents underscore the view, discussed earlier, that the corporation is a 'nexus of contracts.'"). State corporate law also serves as an important source of the corporate "contract." *See* Easterbrook & Fischel, *supra* note 50, at 1417.

Today, conceptualizing the corporation and its organizational documents as contracts is well entrenched.[111] The contractarian influence in shaping corporate law theory and doctrine can be easily seen.[112] American corporate law statutes rebuffed a mandatory approach, instead developing as a "specialized contract law" that allows for the private ordering of the vast majority of corporate characteristics.[113] And in Delaware, the courts have embraced and endorsed the contract metaphor, holding that contract law presides over issues involving both the enforcement and interpretation of the charter and bylaws.[114]

B. A Unique "Contractual" Institution

In deciding recent disputes over the validity of ex ante corporate governance provisions, the language used by the Delaware courts appears to take the contract metaphor one step further, equating charters and bylaws with contracts. For example, in *Boilermakers*, then-Chancellor Strine wrote, "In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a

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111. *See* JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 22 (2008) ("It has long been recognized ... that the corporation ... should be viewed as a 'nexus of contracts' or set of implicit and explicit contracts."); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1471-72 (1989) (describing the history of the nexus-of-contracts model's rise to prominence); Joo, *supra* note 94, at 780 (describing the nexus-of-contract theory as "near-orthodoxy in academic corporations law").

112. *See* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449, 1449 (1989) ("Critics and advocates agree that a revolution, under the banner 'nexus of contracts,' has in the last decade swept the legal theory of the corporation."); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 303 (1993) ("[T]he nexus-of-contracts view of the modern corporation and the principal-agent explanation of some important aspects of the firm ... have had profound implications for some of the most important issues of corporation law.").

113. *See* Strine et al., *supra* note 46, at 56-57 ("American corporate law statutes essentially operate as a specialized contract law governing the relations of the fiduciaries who manage a corporation and the corporation's stockholders."); *see also* Fisch, *supra* note 90, at 378-80.

114. *See, e.g.*, Airgas, Inc. v. Air Prods. & Chems., Inc. 8 A.3d 1182, 1188 (Del. 2010); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013).

Delaware corporation and its stockholders."[115] In the opinion, Chancellor Strine rejected a holding by the U.S. District Court for the Northern District of California, stating that the decision "rest[ed] on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders."[116] The Delaware Supreme Court espoused similar sentiments in *ATP Tour*, stating that:

> Because corporate bylaws are "contracts among a corporation's shareholders," a fee-shifting provision ... would fall within the contractual exception to the American Rule [which permits the parties to alter by contract the ordinary rule that each party pays its own attorney's fees]. Therefore, a fee-shifting bylaw would not be prohibited under Delaware common law.[117]

Critics of these decisions assert that they evidence a transformation from treating organizational documents like contracts to allowing organizational documents to become contracts themselves.[118] Because of the breakdown in traditional notions of contract formation, primarily mutual assent, when considering organizational documents, critics contend that casting the charter and bylaws as contracts for determining enforceability is normatively problematic.[119] Notably, legal scholarship to date has not specifically taken

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115. *Boilermakers*, 73 A.3d at 955; *see id.* at 939 ("[T]he bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL. This contract is, by design, flexible and subject to change in the manner that the DGCL spells out.").

116. *Id.* at 956 (discussing Galaviz v. Berg, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011)).

117. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014).

118. *See, e.g.*, Cox, *supra* note 4, at 274; Geis, *supra* note 5, at 611-12.

119. *See* Cox, *supra* note 4, at 259 (asserting that a shareholder's relationship with the corporation is not contractual in nature); DeMott, *supra* note 5, at 287-88 (critiquing the concept of consent underlying enforcement of forum selection bylaws unilaterally adopted by the board); Geis, *supra* note 5, at 630; *see also* Fisch, *supra* note 90, at 382-83 (objecting to the contract metaphor in adjudicating ex ante corporate contracting based on the unequal powers of boards and stockholders); Larry A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 166 (2014) (examining corporate consent in the context of fee-shifting bylaws); Lipton, *supra* note 62, at 603-16 (discussing the many aspects of the corporate form and its participants that make it unlike a contractual relationship). For scholarship supporting corporate contracting, see Smith et al., *supra* note 2, at 127 (proposing "empower[ing] shareholders in public corporations by facilitating their ability to contract" using bylaws); Winship, *supra* note 6, at 486 (supporting the private ordering of litigation procedure within a proposed framework).

issue with contract law presiding over the principles of interpretation applied to organizational documents.[120] For example, Professor George Geis, who questions the application of contract law in resolving ex ante disputes, writes that "the tools of contract interpretation seem to work quite well for resolving uncertain meaning in corporate instruments."[121] Contract interpretation principles do not, however, apply neatly to charters and bylaws. Some of the same objections levied against describing charters and bylaws as contracts for purposes of enforceability also make application of contract interpretation principles problematic. In particular, the concept of mutual assent, which is consistently cited as lacking in bylaw and charter formation, underlies several interpretation principles (for example, the parol evidence rule).[122]

Further, the purpose underlying contract interpretation principles—to serve as tools to assist the courts in ascertaining the parties' intentions at the time the contract was entered into—is an ill fit when considering corporate organizational documents.[123] This is because the framework and assumptions surrounding contract formation and those surrounding charter and bylaw formation are dissimilar in important respects. First, stockholders lack the same ability to bargain for their own interests as is assumed to exist under contract principles; as a result, stockholders can be more accurately described as "wards," rather than as contracting counterparties, in the corporate structure.[124] Second, the legal framework for contract interpretation envisions a system where parties privately create and structure the terms governing their relationship; in contrast, the legal framework for the corporation takes into account public, state law duties.[125] Instead of seeking to ascertain

120. *See infra* note 121 and accompanying text.

121. Geis, *supra* note 5, at 637; *cf.* Cox, *supra* note 4, at 272-74 (taking issue with the application of contract law for determining substantive rights but not for interpreting organizational documents). Professor Geis does acknowledge that applying contract interpretation principles to organizational documents will not work perfectly. Geis, *supra* note 5, at 637 n.164 (noting that different jurisdictions apply different interpretation principles and that the contextualist approach may be more difficult to implement).

122. *See* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 498-99, 505 (2004).

123. *See* Lipton, *supra* note 68, at 612-13.

124. *Id.* at 605-11.

125. *See id.* at 612 ("In the corporate context, however, courts do not evaluate whether

the specific parties' intentions at the time of contract formation, courts in the corporate context must evaluate and construe the terms of the charter and bylaws in accordance with the state-imposed terms at the time of the dispute.[126]

Decisions preceding *Boilermakers* and *ATP Tour* that employ less forceful contractarian language are also cause for concern. These cases cite heavily to the contract metaphor in deciding questions of interpretation.[127] While useful, metaphors are of limited normative value.[128] In order to work, a metaphor requires a simplifying of the concepts being compared.[129] As explained by Professor Thomas Joo:

> Mapping can be done only between abstractions, not between messy realities. Because analogy and metaphor use abstracted portraits to stand in for more complex real phenomena, they always make use of a kind of metonymy. For both the source and the target, the name of a thing or concept is used to refer to something less than the whole and that essentialized part is taken to stand for the whole.[130]

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managers behaved in accordance with shareholders' intentions, but rather whether they behaved in accordance with state-imposed duties of conduct."); *see also* Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, slip op. at 3 (Del. Ch. Dec. 19, 2018) ("The certificate of incorporation differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations. When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a 'body corporate'—a legally separate entity. The State of Delaware is an ever-present party to the resulting corporate contract, and the terms of the corporate contract incorporate the provisions of the DGCL.").

126. *See* Lipton, *supra* note 68, at 613 ("Michael Klausner and Henry Hansmann argue that incorporators and shareholders thus voluntarily opt into a system whereby the state—rather than themselves—will construct the terms of the corporate contract on an ongoing basis because (given the indefinite life of the corporate entity) the law can respond more completely and rapidly to changes necessitated by business exigencies than can the corporate-governance documents." (citing Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 2, 9 (2006))); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1330 (2013)).

127. *See, e.g.*, Activision Blizzard, Inc. v. Hayes, 106 A.3d 1029, 1033 (Del. 2013) ("[T]he terms of a charter provision, *like any other contract*, are given their plain meaning." (emphasis added)); BALOTTI & FINKELSTEIN, *supra* note 9, § 1.3, 1-5 n.17 ("Indeed, the certificate of incorporation, if it needs to be interpreted, is construed as a contract." (citing Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1988); Ellingwood v. Wolf's Head Oil Ref. Co., 38 A.2d 743 (Del. 1944)).

128. *See* Joo, *supra* note 94, at 784, 799.

129. *See id.* at 799.

130. *Id.* at 799; *see also* Cox, *supra* note 4, at 260 (cautioning that the contractarian

Thus, using the metaphor to apply contract doctrine to questions of charter and bylaw interpretation can lead courts to skip over the "messy realit[y]" (in other words, nuances) of organizational documents in favor of the ease of decision-making.[131]

A corporation's organizational documents are differently situated than most commercial contracts in important respects. Characteristics such as the ability of parties to unilaterally amend certain provisions (and relatedly the concept of consent); the intended longevity of the documents; the number of "parties" to an organizational document (especially in the public corporation context); and the process of creating, drafting, and negotiating the terms of these documents are among those characteristics that distinguish organizational documents from traditional contracts.[132] As one corporate treatise correctly explains:

> The articles of incorporation are not merely a private contract between the incorporators or organizers as to their own individual enterprise. They are much more, *viz.*, the constitution of a continuing statutory business association that consists of a shifting group of associates who are expected to invest their money in the enterprise or take by transfer the places of those who have invested. Future shareholders have no voice in drafting the articles of incorporation that limit and define their rights. Most investors become stockholders without reading the

language "is impactful because it is more than just a metaphor; it has substantive bite").

131. *See* Joo, *supra* note 94, at 799, 805 ("Thus, the model lulls us into thinking we can avoid the hard questions of how the law reaches its value judgments."). The legitimacy of the contract metaphor in and of itself has also been questioned. *See id.* at 789 ("Contractarianism is a highly figurative metaphor. Corporation as contract is not based on a set of clear structural correspondences between corporations and contracts. Although the metaphor lacks analogical structure, it derives power from multiple, 'cross-weaving' layers of associated concepts that simultaneously make descriptive and normative arguments about 'corporations,' as well as about 'contracts.' The lack of structure should make us question the reliability of the metaphor as a heuristic."); *id.* (pointing out the difference between the legal and economic definition of "contract" and that "the metaphor plays fast and loose with the legal concept of 'contract'"); *see also* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1274-76 (1999) (arguing against the application of a contractual approach to the duty of loyalty); Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779, 784 (2006) ("The contractarian theory has turned out to be based largely on an entirely plausible, but in fact imaginary, world of contracting.").

132. *See* COX & HAZEN, *supra* note 101, at 143-44; John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1659 (1989); Geis, *supra* note 5, at 630-32; Joo, *supra* note 94, at 794.

> articles of incorporation to ascertain provisions that may deprive shareholders of their customary rights and protections.[133]

Given the corporate context in which they are created and operate, organizational documents are their own unique contract-like institution. The metaphor of the charter and bylaws as contracts evokes a notion of formation and function that is different than reality in public corporations.[134]

Contract interpretation principles also need to be adjusted to take into account the state statutory and fiduciary duty backdrop against which organizational documents exist.[135]As Professor James Cox succinctly points out, "Contracts and corporate law are not mirror images."[136] Corporate law's enshrinement of fiduciary principles and its system of checks-and-balances on corporate power create expectations in parties and implicate policy considerations that are fundamentally distinct from those in contract law.[137] As a result, courts should not simply interpret and enforce the "contract" as written. Interpretation analysis of the charter and bylaws should instead take into account the parties' intent and social welfare considerations as opposed to only the "hypothetical bargain" and "arms-length negotiation" constructs from contract law.[138]

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133. COX & HAZEN, *supra* note 101, at 57; *see also* Joo, *supra* note 94, at 792-93 (asserting that while bargaining over corporate governance terms in the charter and bylaws may take place in "small corporations, nothing of the sort happens in a large publicly traded corporation").

134. *See* COX & HAZEN, *supra* note 101, at 57.

135. *See* Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1989) ("Nevertheless, the contract rights of the stockholders of the corporation are also subject to the provisions of the Delaware General Corporation Law.").

136. Cox, *supra* note 4, at 268-69.

137. *See id.* (citing the imposition of fiduciary duties as a "fundamental distinction between judging the parties' behavior through the contract lens versus the corporate law lens"). Judge Cardozo's famous opinion in *Meinhard v. Salmon* is often quoted to highlight the distinction in judging the conduct of contracting parties as compared to fiduciaries: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." 164 N.E. 545, 546 (N.Y. 1928).

138. *See* Joo, *supra* note 94, at 798-99, 820 ("[A] court interpreting the corporate 'contract' does not ask what the parties *would have* consented to; it tells them what they *should have* consented to."); *see also* Coffee, *supra* note 132, at 1622 ("[C]ourts will not seek simply to enforce the contract as written, but will to some uncertain extent serve as an arbiter to determine how the powers granted to management by the corporate charter may be exercised under unforeseen circumstances.").

There is evidence that the Delaware courts are, from time to time, already making this adjustment—declining to strictly import and apply contract law principles when interpreting organizational documents. Noting that corporate organizational documents are generally not the product of a bilateral negotiation, the courts have not applied and considered parol evidence with the same force as in the case of a commercial contract.[139] Where corporate organizational provisions were ambiguous, they were construed in favor of the stockholder franchise.[140] Relatedly, a charter provision has been interpreted in a manner that vests decision-making power in the traditional majority vote as opposed to vesting special rights in certain directors or stockholders.[141] Courts are not, however, consistent in reconciling contract and corporate principles in interpreting charter and bylaw provisions.[142] For every example of the court diverging from traditional contract principles to account for corporate doctrine and policy, there are many examples of strict importation and application of contract law without consideration or deference to the corporate context in which such provisions exist.[143] Moreover, even in the cases where the court departs from contract principles, the court cites the familiar contract metaphor.[144] The reference to the contract metaphor in and of itself can be damaging in that it masks the fact that the court's analysis involves fiduciary considerations and value judgments attendant to the separation of powers in a corporation.[145]

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139. *See* WELCH ET AL., *supra* note 43, § 102.16 (citing KFC Nat'l Council & Advert. Coop., Inc. v. KFC Corp., No. 5191-VCS, slip op. at 28-33 (Del. Ch. Jan. 31, 2011)).

140. Airgas, Inc. v. Air Prods. & Chems., Inc., No. 5817-CC, 2010 WL 3960599, at *4-5 (Del. Ch. Oct. 8, 2010); *see* Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 310 (Del. Ch. 2002).

141. *See KFC*, slip op. at 28-33.

142. *See* Aleynikov v. Goldman Sachs Grp., 765 F.3d 350, 370-73 (3d Cir. 2014) (Fuentes, J., dissenting) (criticizing the majority opinion as misapplying Delaware's contractual jurisprudence, as well as disregarding Delaware's corporate public policy surrounding advancement that would have favored application of *contra proferentem* to the bylaws).

143. *See, e.g.*, ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); Activision Blizzard, Inc. v. Hayes, 106 A.3d 1029, 1033 (Del. 2013); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939, 956-57 (Del. Ch. 2013).

144. *See, e.g.*, *Airgas, Inc.*, 8 A.3d at 1188 (reiterating that "bylaws are contracts among a corporation's shareholders"); *KFC*, slip op. at 22, 29-30, 33; *Harrah's Entm't*, 802 A.2d at 309, 311-12.

145. *See* Joo, *supra* note 94, at 805 ("[The contract metaphor] misleadingly suggests that the law imposes no value judgments but merely rubber stamps freely made individual

The distinctions discussed herein between organizational documents and traditional commercial contracts have important implications for interpretation principles. The dominance of the contractarian view of the corporation has, however, overshadowed this area of the law. Corporate scholarship and jurisprudence to date has failed to examine explicitly the unique stature of the charter and bylaws as compared to traditional contracts and then link that analysis to the proper interpretation framework to be applied. The next section attempts to do just that.

III. INTERPRETING ORGANIZATIONAL "CONTRACTS"

"Under the modern American law of contracts, almost all applications of legal doctrine turn on questions of interpretation."[146]

If there was ever an appropriate time to address the issue of charter and bylaw interpretation, it is now. Corporate governance initiatives involving amending the charter and bylaws are on the rise and have shown no signs of slowing down.[147] In considering recent efforts, the Delaware courts have shown a willingness to uphold ex ante governance provisions in organizational documents.[148] Accordingly, charter and bylaw interpretation will quickly take on an influential role in shaping corporate law and norms that it arguably has not historically had. As ex ante corporate governance provisions, such as forum selection bylaws, survive enforceability challenges, disputes surrounding their interpretation and application will naturally follow. Indeed, interpretation will become more and more important as the courts are asked to "draw fine-grained distinctions between bylaw variants" that result from creative lawyering.[149] Interpretation will also play a central role in the adjudication of new innovations in ex ante governance provisions.[150]

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decisions.").

146. Katz, *supra* note 122, at 496.

147. *See supra* Part I.

148. *See* Winship, *supra* note 6, at 502-03, 507, 510.

149. *See* Geis, *supra* note 5, at 640.

150. *See id.* at 639 ("If corporate governance initiatives are indeed emphasizing ex-ante tactics, we should expect to see a wide range of innovative bylaws in the coming years."); Ridgley, *supra* note 1, at 325, 330 (assessing the rise in bylaw governance provisions); Winship, *supra* note 6, at 487 (describing an increase in corporate procedure provisions); *cf.* Katz, *supra* note 122, at 496.

Interpretation disputes in this area of corporate law are inevitable. The charter and bylaws (and any amendments thereto) are the product of human effort and, as such, are subject to error and ambiguity.[151] Bounded rationality,[152] framing and endowment effects,[153] self-interestedness,[154] status quo bias,[155] and other behavioral biases and limitations can all impact the drafting of a provision.[156] Indeed, research has observed patterns in charters suggesting the influence of these types of behavioral phenomena on their drafting.[157] Moreover, scholars across all disciplines agree that structuring a relationship and accurately reducing parties' expectations to words is a difficult, if not impossible, task.[158] And the

151. In this sense, organizational documents and contracts are identical. *Cf.* Katz, *supra* note 122, at 502.

152. Bounded rationality has been described as the "fact that people have a limited capacity to absorb and process information; consequently, real people will often rely on 'rules of thumb' or heuristics to assist in their decision-making processes." Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 174-75 (2011); *see* Herbert A. Simon, *Bounded Rationality*, *in* UTILITY AND PROBABILITY 15, 15 (John Eatwell et al. eds., 1990); *see also* Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449 (2003).

153. *See* Quinn, *supra* note 152, at 174-77 (describing how the way decisions are framed can affect the outcome of a decision, including whether a contractual provision is endowed (in other words, a default term)).

154. *See* Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW & ECONOMICS 13, 14-16 (Cass R. Sunstein ed., 2000).

155. *See generally* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

156. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1271 (2003); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1586 (1998); Korobkin, *supra* note 155, at 656; Quinn, *supra* note 152, at 142 ("Behavioral economics suggests the framing of decisions, including the selection of contract defaults, is important in determining outcome of such decisions.").

157. *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 361 (1996); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 822 (1995). *See generally* Quinn, *supra* note 152 (summarizing research on behavioral economics).

158. *See* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 576 (2006) ("[C]ourts, whether implicitly or explicitly, and regardless of their jurisprudential philosophy ... acknowledge the impracticality (due to transaction costs) and the impossibility (due to the limits of human imagination ...) of producing an all-encompassing, express agreement."); Grundfest, *supra* note 69, at 382-83 ("To be sure, every contract is incomplete, and this forum selection language can generate disputes over its application in specific instances."); Claire

probability for error is even higher when, as is the case with organizational documents, language is intended to project into the future and govern a long-term relationship.[159] Thus, organizational documents will always be flawed, necessitating judicial involvement.[160]

A. An Interpretation Framework

Organizational documents are their own unique contractual institution and therefore demand their own interpretation framework. In order to structure a framework, the first step is to recognize the different types of provisions in the charter and bylaws. They can be categorized as follows: (1) technical, statutorily mandated language, (2) fundamental corporate rights, (3) organizational "boilerplate," (4) novel provisions, and (5) individually negotiated provisions. Each category elicits different policy concerns relevant to interpretation. Deciding which interpretation theory is best suited for a particular category requires consideration of the following questions: "First, what goals should the state's interpretive rules attempt to implement? Second, what rules best implement these goals?"[161] The

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A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 193-94, 198 (2009); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1147 (1995) ("The assumption that most parties in fact reduce their entire agreement to a single, perfectly accurate writing [is] unrealistic."); Veasey & Simon, *supra* note 12, at 895 ("It is a rare contract that needs absolutely no interpretation."); Eric A. Zacks, *Contract Review: Cognitive Bias, Moral Hazard, and Situational Pressure*, 9 OHIO ST. ENTREPRENEURIAL BUS. L.J. 379, 380 (2015) ("Drafting and reviewing a written contract is already understood to be a complicated and complex process.").

As Chief Justice Strine and Vice Chancellor Laster have observed in their experience adjudicating business disputes:

> [C]ontractual drafting is a difficult task.... Different language sets up the possibility of a different result, creating opportunities for litigation that otherwise might not exist. Greater complexity also increases the possibility for human error, conflicting contractual provisions, and ambiguity, all of which can leave [parties] potentially exposed.

Strine & Laster, *supra* note 47, at 13.

159. *See* Coffee, *supra* note 132, at 1659.

160. *See id.* at 1620 (asserting that just like judicial involvement in long-term contracts, "judicial involvement [in corporate governance] is not an aberration but an integral part of such contracting").

161. Schwartz & Scott, *supra* note 13, at 937. Schwartz and Scott also include a third question: "Third, should the rules be mandatory or defaults?" *Id*.

primary sources of contract law—the UCC, the Second Restatement of Contracts, and state common law—reflect a goal of neutral preference, (in other words, the court's goal is to ascertain the parties' objective intentions).[162] In contrast to traditional contracts, public corporations' organizational documents play a unique role in providing for the individual governance of a corporation as well as shaping the broader corporate community and markets.[163] Taking into account the public law aspects of these organizational documents, a strong argument can be made that the first order goal for interpretation of certain provisions should be the parties' intent in light of social welfare considerations.[164] Given their distinctive status as creatures of both private contract law and public law, different types of provisions in public corporations' charters and bylaws implicate different goals, and thus application of different interpretive rules.[165]

Analyzing the relevant policy concerns and interpretive goals, this framework links an appropriate interpretation theory and its principles—textual, contextual, or statutory—to that category. A summary of this analysis can be found in Table 1. A textualist or formalist theory of interpretation advocates for a "narrow evidentiary base" in making interpretation determinations, with the contract itself being the most important component of any analysis.[166] Textualist interpretive principles include using a hard parol evidence rule, applying the plain meaning rule, giving effect to

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162. *See id.* In the traditional commercial contract setting, however, a strong line of scholarship advocates for maximizing contractual surplus as the first order goal. *See, e.g.*, *id.* at 928 (advocating for this goal in the merchant-to-merchant setting); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544, 598-99, 612 (2003). In their work, Schwartz and Scott then point out that "an intelligent pursuit of this goal satisfies such second order goals as predictability and stability." Schwartz & Scott, *supra* note 13, at 928 n.5.

163. For a discussion of the systemic implications and role of public corporations' organizational documents, see Part III.A.3.

164. Indeed, some scholars assert that this already takes place in the corporate interpretation analyses. *See* Coffee, *supra* note 132, at 1622; Joo, *supra* note 94, at 798-99.

165. *See* Hershkoff & Kahan, *supra* note 11, at 268 (stating that the charter and bylaws are "hybrid legal structures that ... straddle the public-private divide").

166. Schwartz & Scott, *supra* note 162, at 569. This is the traditional Willistonian approach. *See* SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631, at 948-49, 951-52 (Walter H. E. Jaeger ed., 1961); *see also* Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1146 (2006).

integration/merger clauses, and permitting courts to resolve interpretation disputes on summary judgment.[167] New York and Delaware, along with a majority of the states, adopt a textualist approach to contract interpretation.[168] In contrast, California, as well as the Uniform Commercial Code and the Second Restatement of Contracts, follow a contextual theory of contract interpretation.[169] A contextual theory holds that the context in which a contract was drafted is necessary for proper interpretation.[170] A contextualist court thus allows a broad evidentiary base in resolving an interpretation dispute.[171] To that end, contextual principles include using a soft parol evidence rule, denying presumptive effect to integration/merger clauses, rejecting the four corners rule, and allowing extrinsic evidence.[172] Finally, a statutory theory of interpretation focuses on determining the original intent of the drafters and the historic context in which the drafting occurred.[173] This theory looks to legislative intent in adjudicating interpretation cases.[174]

1. Technical, Statutorily Mandated Language

The first category of provisions exists only in the charter. Under section 102(a) of the DGCL, a charter must contain certain information to be valid and effective: (1) the name of the corporation (which must satisfy certain parameters); (2) the name and address of the registered agent; (3) a statement of the corporation's purpose; (4) the number of authorized shares of each class of stock created, including par value; (5) the name(s) and address(es) of the incorporator(s); and (6) the name(s) and address(es) of the initial director(s), if the power

167. *See* Schwartz & Scott, *supra* note 13, at 932.

168. *See id.* at 928 n.1 (reporting that a strong majority of states adopt a textualist interpretative approach); Veasey & Simon, *supra* note 12, at 898-99.

169. Schwartz & Scott, *supra* note 13, at 928.

170. This is Corbin's advocated approach to interpretation. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 499-500 (1952); *see also* Choi & Gulati, *supra* note 166, at 1132, 1151.

171. *See* Schwartz & Scott, *supra* note 13, at 939.

172. *See, e.g.*, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643-45 (Cal. 1968) (explaining how an inclusive parol evidence rule limits interpretation discrepancies); Schwartz & Scott, *supra* note 13, at 939.

173. *See* Choi & Gulati, *supra* note 166, at 1160. Similar to contract interpretation, statutory interpretation divides into different camps of straight textualism and historical conceptualism. *See id.* at 1161 n.108.

174. *See id.* at 1131.

of the incorporator(s) is to terminate before the first election of directors.[175] By statute, strict compliance with section 102(a) is required for a valid corporate existence.[176]

The provisions in a charter that are a product of section 102(a)'s requirements can be characterized as technical in nature. Not only are the presence of the provisions mandated by statute, but to a large degree the actual content of each provision is also dictated by statute.[177] Moreover, the purpose of these provisions is to put the public on notice of the limited liability nature of the enterprise and to serve process on the entity.[178] These provisions do not implicate fundamental corporate rights in a way that others discussed below do.[179] In light of the structured nature of section 102(a)'s provisions, applying a formalist or textualist theory of interpretation would make sense. The DGCL's "all or nothing" position for satisfying the corporate formation requirements, combined with the detailed, mandatory nature of the applicable statutory provisions, means only a limited evidentiary base is needed in interpreting the language, thus weighing in favor of a textualist theory of interpretation.[180] There will likely be little to interpret with respect to section 102(a)'s provisions,[181] and it is highly unlikely that the broader evidentiary base allowed under a contextualist theory would even exist to apply to an interpretation analysis. For example, section 102(a)(1) contains a specific list of words (for example, "corporation," "incorpo-

175. *See* DEL. CODE ANN. tit. 8, § 102(a) (2015).

176. *See id.* ("The certificate of incorporation *shall* set forth:" (emphasis added)); *id.* § 106. In contrast, limited partnerships and limited liability companies only require "substantial compliance" with the statute for valid existence. *See* DEL. CODE ANN. tit. 6, § 18-201(b) (2017); REVISED UNIF. LTD. LIAB. CO. ACT § 201(d)(3), (e)(3) (2006); UNIF. LTD. P'SHIP ACT § 201(c) (2001).

177. For example, section 102(a)(4) requires that the charter contain the following specific information concerning the capitalization of the entity: the total number of authorized shares of stock; if applicable, the total number of each class of stock created; and the exact par value or no par value of each class of stock. Tit. 8, § 102(a)(4). Section 102(a)(2) and section 131 require that the address for the registered office must include the street address, city, state, county, and zip code. *Id.* §§ 102(a)(2), 131(c); *see also id.* §§ 131-32 (requiring each corporation incorporated in Delaware to continuously maintain a registered office and agent within the state).

178. *See* BALOTTI & FINKELSTEIN, *supra* note 9, § 1.3, n.25.

179. *But see infra* notes 185-89 and accompanying text (explaining two exceptions to this statement).

180. *See generally* tit. 8, §§ 101-15.

181. *See id.* § 102(a).

rated," "company"), and requires that the name of a corporation contain at least one, or an abbreviation of one, of those words and be distinguishable from other entities on the Secretary of State's records.[182] Thus, almost universally, all public corporations' charters provide in article one the following language: "The name of the corporation is [Name], [a section 102(a) statutorily required suffix]."[183] Similarly, all information required to satisfy the inclusion of the address(es) of the registered agent(s), incorporator(s), and, if applicable, initial board of directors, is explicitly provided for in the statute.[184] As a result, there is little room for tailoring or variation that would trigger a need for interpretation. Rather, the most common inquiry would involve validity—whether the statute's explicit requirements were satisfied or not.

There are two section 102(a) provisions that, depending on the specific charter being reviewed, may not always fit the above analysis. Section 102(a)(3) requires that the charter contain a statement of the "nature of the business or purposes to be conducted or promoted" by the corporation.[185] In satisfying this requirement, corporations generally take one of two routes: (1) include a general statement of purpose that tracks the language suggested in the statute, in other words, "[T]he purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware"; or (2) insert a highly defined purpose clause into the charter.[186] If a corporation chose to do the former, then such provision would fall in the technical, statutorily mandated category for interpretation. If a corporation chose the latter, it could potentially fall under individually negotiated provisions or fundamental corporate rights, depending on the exact language in the provision.[187] Similarly, under section 102(a)(4) the charter must contain certain information

182. *See id.* 8, § 102(a)(1); Trans-Americas Airlines, Inc. v. Kenton, 491 A.2d 1139, 1142 (Del. 1985) ("[T]he Secretary of State has only one statutory duty: to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on the records of the Division of Corporations from those names previously registered.").

183. *See* BALOTTI & FINKELSTEIN, *supra* note 9, at FORM 1.5.

184. *See* tit. 8, §§ 102(a)(2), (5)-(6), 131(c).

185. *Id.* § 102(a)(3).

186. *See id.* Of note, a highly defined purpose clause in a public corporation's charter would be extremely rare.

187. *See infra* Parts III.A.2 and III.A.5.

regarding the capitalization of the corporation.[188] To the extent that a corporation has a basic capitalization structure with only common stock, the language would be the technical language triggering a formalistic interpretation. If, on the other hand, a corporation had a much more complex capitalization structure, the common stock terms may fall into the technical category, while the language providing for the preferred stock's rights, powers, and preferences would fall under the individually negotiated category described below.[189] As these two examples illustrate, where a particular type of provision is classified will depend on its specific language and context, thereby requiring a case-by-case interpretation analysis from the courts.

2. Fundamental Corporate Rights

In addition to the contract metaphor, the charter and bylaws of a corporation have been described as the constitutional documents of a corporation.[190] Characterizing organizational documents as constitution-like highlights that the charter and bylaws set forth fundamental rights, responsibilities, and powers for the governing of the corporation and its participants. In this regard, many provisions are relational provisions regulating the intracorporate dealings among the directors, officers, and stockholders.[191] Where the charter and bylaws implicate fundamental corporate rights, corporate law concerns should override strict application of contract interpretation principles.[192] A contextual approach allowing for a broad base of evidence to be considered, including corporate law policy and principles, would be appropriate in an interpretation analysis of these types of provisions.

188. *See* tit. 8, § 102(a)(4).

189. *See infra* Part III.A.5.

190. *See, e.g.*, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1155 (Del. Ch. 1994) (describing the organizational documents as "the constitutional documents of a corporation"); ALLEN ET AL., *supra* note 105, at 92-94; Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 564, 574 (2011).

191. *See* ALLEN ET AL., *supra* note 105, at 94.

192. *See* Cox, *supra* note 4, at 271-72 ("Principles and perspectives in the rugged contract setting simply do not survive in the relational setting of corporate law.").

How does one determine which provisions implicate fundamental corporate rights? One category would be provisions touching on fundamental stockholder rights, which have traditionally been described as the rights to "vote, sell, [and] sue."[193] The right to vote, for example, has been an influential factor in prior Delaware decisions where the court adjusted the traditional contract interpretation analysis to take into account broader corporate law policies.[194] For instance, where corporate organizational provisions were ambiguous, the Delaware courts construed such ambiguity in favor of the stockholder franchise.[195] Relatedly, the courts have interpreted a charter provision in a manner that vests decision-making power in the traditional majority vote as opposed to vesting special rights in certain directors or stockholders.[196] And in interpreting ambiguous language in advance notice bylaw provisions, the courts have resolved doubts in favor of the stockholders' electoral rights.[197]

Stated differently, a provision falling in the fundamental rights category could be described as one that implicates the "rights and expectations established under existing corporate law."[198] Proponents of ex ante contracting recognize that there must be a limit to permissible provisions, and that line is drawn when private ordering begins to impinge on the strong and reasonable expectations

193. Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215, 216 (1999) (discussing the fundamental rights of stockholders); *see* Megan W. Shaner, Introduction, *Confronting New Market Realities: Implications for Stockholder Rights to Vote, Sell, and Sue*, 70 OKLA. L. REV. 1 (2017).

194. *See infra* notes 195-97 and accompanying text.

195. *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010); Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 310 (Del. Ch. 2002); *see also* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (referencing the "central importance of the [stockholder] franchise to the scheme of corporate governance" and applying heightened scrutiny to the directors' actions).

196. *See* KFC Nat'l Council & Advert. Coop., Inc. v. KFC Corp., No. 5191-VCS, slip op. at 27-33 (Del. Ch. Jan. 31, 2011).

197. *See* Edward P. Welch & Jenness E. Parker, *Delaware Court of Chancery Advises Careful Drafting of Advance Notice Laws*, 12 M & A LAW. 1, 1-3 (2008) (summarizing advance notice bylaw cases and concluding that "[t]he overall focus seems to be on fairness to stockholders, given the importance of stockholders' rights to nominate and elect directors").

198. Hamermesh, *supra* note 119, at 172 (asserting that for consent considerations it is important to ask whether the provision "place[s] too great a strain on rights and expectations established under existing corporate law").

of stockholders created by substantive corporate law.[199] Another way to conceptualize which corporate law rights are fundamental is to ask whether the provision impacts rights akin to private law or public law, with the latter being a fundamental rights provision. For example, issues implicating fiduciary duties serve a public law purpose, while restrictions on dividends or preferred stock rights serve a private law purpose.[200] The public law nature of fundamental rights provisions favors a first order interpretation goal of enforcing the parties' objective intentions in light of social welfare considerations.[201] The interpretive rules that best implement this goal can be found in a contextualist theory of interpretation, because they allow for examination of a much broader body of evidence and policy.

A frequent objection to applying the contextual interpretive approach is that it introduces cost and unpredictability by broadening the court's inquiry into the context and circumstances surrounding the disputed language.[202] Debates over a textual theory versus contextual theory of interpretation highlight the advantages and disadvantages of each. A textualist theory, given the limited universe of evidence allowed and ability to dispose of disputes on summary judgment, minimizes the cost of adjudicating a dispute at the expense of accuracy.[203] On the other hand, a contextualist theory maximizes the likelihood of accuracy in interpretation, but with the downside being a more costly process for both the parties and the court, as well as increasing the chances of unpredictability.[204] Where the provision touches on fundamental corporate rights that are of a public law nature, the need for an accurate interpretation outweighs the attendant cost and unpredictability of a contextualist approach.[205] This need is heightened in the context of Delaware corporate law, where it is widely recognized that the courts' decisions

199. *See id.* at 169; Winship, *supra* note 6, at 526-27 (proposing limits on corporate contract procedure involving mandatory substantive corporate law).

200. *See, e.g.*, Cox, *supra* note 4, at 267-70.

201. *See* Coffee, *supra* note 132, at 1622; Cox, *supra* note 4, at 267-69; Joo, *supra* note 94, at 798-99.

202. *See, e.g.*, Choi & Gulati, *supra* note 166, at 1131-32; Geis, *supra* note 5, at 637 n.164.

203. *See* Schwartz & Scott, *supra* note 13, at 930-31.

204. *Id.*

205. *Cf. id.* at 930 ("[A]lthough accurate judicial interpretations are desirable, accurate interpretations are costly for parties and courts to obtain.").

reach well beyond the individual parties and influence corporate and market behavior more broadly.[206] Given the weight afforded to Delaware's judicial interpretations, accuracy becomes an even more important factor.

The Third Circuit's opinion in *Aleynikov v. Goldman Sachs Group, Inc.*,[207] provides a nice fact pattern to illustrate the impact of analyzing a fundamental corporate rights provision under the proposed interpretative framework. In *Aleynikov*, the Third Circuit, applying Delaware law, was tasked with reconciling a contract reading of Goldman Sachs Group's (Goldman) bylaws with Delaware's pro-advancement policies.[208] Specifically at issue was the definition of "officer" in Goldman's advancement bylaw provisions and whether Sergey Aleynikov, who served as a vice president at Goldman, Sachs & Co., a subsidiary of Goldman, was included in that definition.[209] The issue before the court highlighted the tension between Delaware's "strong public policy in favor of [advancement]"[210] and contract interpretation principles.

The majority in *Aleynikov* found that the term "officer" was ambiguous and allowed the introduction of extrinsic evidence to

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206. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997). This of course assumes that the Delaware courts' opinions are accurately conveyed to the corporate community. *See* Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 848-49, 852, 860.

207. 765 F.3d 350 (3d Cir. 2014).

208. *Id.* at 353.

209. *Id.* Section 4.1 of Goldman's bylaws, in relevant part, authorizes Goldman's Board of Directors to "elect [such officers as necessary, including] ... one or more Vice Presidents." Section 6.4 provides a specific advancement provision for officers of Goldman Sachs Group subsidiary companies and states, defining, in relevant part, that

> the term "officer," ... when used with respect to a Subsidiary ... shall refer to any person elected or appointed pursuant to the by-laws of such Subsidiary or other enterprise or chosen in such manner as is prescribed by the by-laws ... [and] shall include in addition to any officer of such entity, any person serving in a similar capacity or as the manager of such entity.

Amended and Restated By-Laws of the Goldman Sachs Group, Inc. (amended and restated as of May 22, 2013), http://www.sec.gov/Archives/edgar/data/886982/000119312513237445/d545345dex31.htm [https://perma.cc/JM3V-DK7K].

210. Stockman v. Heartland Indus. Partners, L.P., Nos. 4427-VCS, 4427-VCS, 2009 WL 2096213, at *18 n.75 (Del. Ch. July 14, 2009) (quoting LeLucca v. KKAT Mgmt., LLC, No. Civ.A. 1384-N, 2006 WL 224058, at *7 (Del. Ch. Jan. 23, 2006)); *see also* Homestore, Inc. v. Tafeen, 888 A.2d 204, 211, 218 (Del. 2005).

determine its meaning.[211] At the same time, the court rejected applying *contra proferentem* to the bylaw, stating that it would be "inappropriate" to do so because the principle is employed to resolve ambiguity with respect to the scope of advancement rights and not whether an individual is entitled to advancement in the first place.[212] Ultimately, the court concluded that Aleynikov did not fall within the definition of "officer" for purpose of advancement rights.[213]

The dissent criticized the majority's opinion for relying heavily on the application of strict contract principles to the exclusion of the relevant corporate doctrine overlay regarding advancement.[214] Prior Delaware cases had indicated that "[a]lthough courts use the tools of contractual interpretation when construing bylaw provisions relating to indemnification and advancement, they simultaneously apply the patina of section 145's policy."[215] As pointed out by the dissent, the majority's opinion misapplied not only Delaware's contractual jurisprudence, but also disregarded Delaware corporate public policy surrounding advancement, which would have favored application of *contra proferentem* to the bylaws.[216] Indeed, the Delaware Chancery Court, in addressing a parallel suit for advancement by Aleynikov, agreed with the dissent in its assessment.[217] Noting that issue preclusion prevented Aleynikov from relitigating the interpretation issues resolved in the prior decision, the court nonetheless indicated in dicta that the Third Circuit had erred in failing to apply the doctrine of *contra proferentem* as well as "Delaware's policy in favor of advancement and indemnification and the resulting interpretive canon that, where reasonable, bylaws should be read in favor of the existence of advancement and indemnification rights."[218]

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211. *Aleynikov*, 765 F.3d at 362, 366-67.

212. *Id.*

213. *Id.* at 367.

214. *See id.* at 370-73 (Fuentes, J., dissenting).

215. Reinhard & Kreinberg v. Dow Chem. Co., No. 3003-CC, 2008 WL 868108, at *2 (Del. Ch. Mar. 28, 2008); *see also* Sun-Times Media Grp. v. Black, 954 A.2d 380, 383 (Del. Ch. 2008).

216. *Aleynikov*, 765 F.3d at 370-73 (Fuentes, J., dissenting).

217. Aleynikov v. Goldman Sachs Group, Inc., No. 10636-VCL, 2016 WL 3763246, at *3-7 (Del. Ch. July 13, 2016).

218. *See id.* at *6-7 ("Nevertheless, 'issue preclusion prevent[s] relitigation of wrong

Applying the proposed framework herein, the interpretation analysis of "officer" in *Aleynikov* would follow the dissent and Court of Chancery's line of reasoning. Given Delaware's strong policy in favor of advancement and indemnification rights,[219] coupled with the court's protection of officer's and director's reasonable expectations of protection in the face of ambiguous language,[220] advancement provisions would be considered a fundamental right—that is, a right that implicates the "rights and expectations established under existing corporate law."[221] Accordingly, a contextual approach, allowing for the consideration of a broad body of evidence, would be appropriate. The Chancery Court's dicta analysis in *Aleynikov*, in fact, did just this by evaluating the following evidence: the bylaw language itself; drafting history; the ordinary and plain meaning of the language at issue; industry standards/trade usage; corporate policy considerations; applicable state and federal government regulations; the conduct of the parties themselves; and the transactional context.[222] Taking into consideration this larger body of evidence yields a different outcome than that reached by the Third Circuit. Importantly, a broader, contextual analysis also allows for the court to reinforce broader corporate welfare considerations, such as the strong public policy in favor of advancement.[223]

3. Organizational "Boilerplate"

In their work, Professors Choi and Gulati observe that sophisticated parties across different markets consistently engage in boilerplate contracting, where their contractual output consists of only

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decisions just as much as right ones.' Whether I agree or disagree with the Court of Appeals is of no moment." (quoting B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1308 (2015)).

219. *See id.* at *6; Stockman v. Heartland Indus. P'rs, L.P., C.A. No. 4227-VCS, 2009 WL 2096213, at *1 n.2 (Del. Ch. July 14, 2009).

220. *See Stockman*, 2009 WL 2096213, at *5.

221. Hamermesh, *supra* note 119, at 172 (asserting that for consent considerations it is important to ask whether the provision "place[s] too great a strain on rights and expectations established under existing corporate law").

222. *Aleynikov*, 2016 WL 3763246, at *3-7.

223. The Court of Chancery also noted that the Third Circuit's interpretation analysis and failure to apply "the doctrine of *contra proferentem* in this context has the potential to create problems for advancement proceeds, which are supposed to be summary in nature." *Id.* at *6.

slight variations on the same set of boilerplate terms.[224] Boilerplate terms, they argue, often have systemic importance in the market, thus necessitating both uniformity and accuracy in judicial interpretation.[225] Similar to boilerplate, certain provisions in public organizational documents have gained widespread acceptance and use. For example, in 2003, before staggered boards began to fall out of favor with stockholders, forty-four of the S&P 100 Companies had such a provision.[226] Comparing the staggered board provisions at different corporations reveals only slight variations in the language used, despite the fact that the corporations adopting such a provision may operate in different industries with different investor bases and different financial profiles.[227] Thus, classified board provisions across all public corporations largely included the same set of terms. In this regard, the staggered board has become "standardized."[228]

"Boilerplate" charter and bylaw provisions further parallel contractual boilerplate with respect to the larger role they play in the market. Organizational documents experience network effects, learning benefits, and switching costs similar to boilerplate contract

224. *See* Choi & Gulati, *supra* note 166, at 1130-33 (using sovereign debt contracts's pari passu clauses and the derivatives markets' swap contracts as two case studies of commercial boilerplate). Choi and Gulati note that "[l]arge portions of the markets for bonds and derivatives are dominated by boilerplate." *Id.* at 1130.

225. *Id.* at 1130-31.

226. *See* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1008 (2010). By 2009, only fifteen S&P Companies had a staggered board. *Id.*

227. The Delaware courts have recognized that there are two primary forms of classified board language used in public corporations' charters: (1) the "Annual Meeting Term Alterative" providing for a class of directors to serve until the "annual meeting of stockholders to be held in the third year following the year of their election," and the (2) the "Defined Term Alternative" providing for a class to serve a "term of three years." *See* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010). Despite the variation in language employed, the courts have found the provisions are intended to operate in the same manner. *Id.* at 1191-95.

228. The standardization of terms in M&A agreements has also been well-documented. *See, e.g.*, THERESE H. MAYNARD, MERGERS AND ACQUISITIONS: CASES, MATERIALS, AND PROBLEMS 317 (2009) (["T]he basic architecture of any acquisition agreement follows a certain convention regardless of the deal structure."); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 257-62 (1984) (discussing the standardization of the form of M&A agreements); Kahan & Klausner, *supra* note 11, at 718-29 (discussing standardization in corporate contracting). Standardization can also be found in poison pills. *Cf.* Fisch, *supra* note 2, at 1638.

terms.[229] Because of these effects, scholars have observed "population-level" learning[230] in the development of corporate contracting: "Corporations learn by transacting, both directly and vicariously."[231] Further, scholars have found corporations and their counsels quick to react to and adjust corporate drafting practices to account for judicial decisions.[232] These actions indicate that a public corporation's organizational documents have effects beyond that particular entity. Corporate management, investors, regulators, banks, capital markets, and other groups are sensitive to corporate governance practices and the courts' enforcement, interpretation, and general commentary on those practices.[233] Therefore, uniformity in the interpretation of provisions that proliferate public corporate organizational documents is important because it enables the underlying governance provisions to be priced into the corporation's shares.[234] Organizational documents thus have microeffects on the individual firms as well as macroeffects in terms of their systemic importance to capital markets and corporate governance expectations.

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229. *Cf.* Kahan & Klausner, *supra* note 11, at 718-29 (discussing the "learning benefits," "network benefits," and "switching costs" of using boilerplate contractual terms).

230. For a discussion of population-level learning, see Anne S. Miner & Philip Anderson, *Industry and Population-Level Learning: Organizational, Interorganizational, and Collective Learning Processes*, 16 ADVANCES STRATEGIC MGMT. 1 (1999); Anne S. Miner & Pamela R. Haunschild, *Population Level Learning*, 17 RES. ORG. BEHAV. 115 (1995).

231. Smith et al., *supra* note 2, at 174; *see* Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 214 (1950); Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOC. 319, 321 (1988); D. Gordon Smith & Brayden King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 29 (2009).

232. *See generally* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 336-37, 376, 384 (2000) (finding evidence that lockup types and incidence in M&A transactions are sensitive to Delaware case law); Megan Wischmeier Shaner, *Deal Protection Devices: The Negotiation, Protection, and Enforcement of M&A Transactions*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 216 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (describing the back and forth between the courts and corporate drafters in developing terms in M&A transactions).

233. *See* Smith et al., *supra* note 2, at 170-71.

234. *See* EASTERBROOK & FISCHEL, *supra* note 109, at 16 ("The corporate venture has many real contracts ... [including] the rules in force when the firm raises money ... the terms of which affect the price of the [equity] issue."). *Cf.* Choi & Gulati, *supra* note 166, at 1130. *But see* Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 657-58 (2016) (questioning the extent to which stock prices accurately reflect the market's valuation of governance arrangements); *id.* at 658-59 (positing that inconsistent results regarding the price effect of governance provisions might be "due in part to the well-known methodological problems associated with measuring the wealth effects of corporate governance terms").

Given these similarities, Choi and Gulati's work addressing the role and interpretation of boilerplate is instructive. They argue that applying a formalist approach in interpreting boilerplate imposes large costs on even the most sophisticated parties.[235] They explain:

> [O]ver time, slight mutations in the precise language that different actors have in their contracts often emerge—mutations which may not have any particular meaning for the contracting parties and that a court taking a textualist approach may attach too great weight. Different boilerplate terms may get cobbled together in the same contract, leading to potential inconsistencies when interpreted through a purely textualist approach. The chance for court error in interpreting boilerplate is therefore high.[236]

A contextual approach, which broadens the universe of evidence in an effort to determine the actual intentions of the specific parties, is similarly not suitable. As Choi and Gulati explain:

> Deference to the intentions of the specific parties before a court is especially inappropriate where there are third party effects. In the contexts on which we focus, an interpretation of the contract language in one case will impact the contracts for a multitude of other parties who all have essentially the same boilerplate language in their contracts. Deferring to the intentions of the parties to the dispute may produce problems where these parties do not represent the interests of the others in the market who have no say in the current litigation.[237]

Instead of a contractual interpretation analysis, Choi and Gulati argue that judges should apply an analytical framework closer to statutory analysis in interpreting boilerplate.[238] Under a statutory-like interpretive framework, courts would take a more historical approach to the analysis by looking at the intent of the original drafters, the overall history of a term, "the process by which the

235. *See* Choi & Gulati, *supra* note 166, at 1130-31.

236. *Id.* at 1131.

237. *Id.* at 1132.

238. *See id.* at 1133. For a discussion of when the originalist, statutory interpretation approach may be ill-suited for contract interpretation, see John F. Coyle, *The Canons of Construction for Choice of Law Clauses*, 92 WASH. L. REV. 631, 686-87 (2017).

term became a standard ... in the industry," and the greater commercial environment.[239] This interpretative framework accounts for the fact that boilerplate provisions do not represent the specific intentions of the parties; rather "[t]hey are more like incantations, where the parties, by invoking the boilerplate language, avail themselves of the historical reasons for the survival of these terms in generations of contracts."[240] Given their strong similarities to organizational documents in terms of development and policy considerations, interpretation of organizational "boilerplate" should likewise receive the statutory-like approach to interpretation proposed by Choi and Gulati.

The decision in *Airgas, Inc. v. Air Products and Chemicals, Inc.*, nicely illustrates the considerations and proposed framework for organizational "boilerplate."[241] In *Airgas,* the Delaware Supreme Court addressed the validity of a stockholder-proposed bylaw that would accelerate Airgas's annual meeting by approximately eight months.[242] The validity of the bylaw turned on whether it was inconsistent with the staggered board provision in Airgas's charter providing that directors' terms would expire "at the annual meeting of stockholders held in the third year following the year of their election."[243] The court found the language at issue, which defined the duration of the directors' terms, to be ambiguous.[244] Looking to extrinsic evidence to construe that provision, the court found that the language "has been understood to mean that the Airgas directors serve three year terms."[245] Accordingly, the court held that the bylaw was invalid because it "prematurely terminate[d]" the three-year terms of Airgas's directors provided by statute and Airgas's charter.[246]

The *Airgas* decision has been criticized as giving lip service to corporate principles favoring the stockholder franchise while relying

239. *See* Choi & Gulati, *supra* note 166, at 1131.

240. *Id.* at 1160.

241. *See* 8 A.3d 1182, 1184-85 (Del. 2010) (addressing the interpretation of ambiguous language found in the corporate bylaws).

242. *Id.* at 1184.

243. *Id.* at 1185.

244. *See id.* at 1189.

245. *Id*. at 1185.

246. *Id.*

heavily on contract principles.[247] While prior Delaware case law provided for interpretation of ambiguous provisions in corporate organizational documents in favor of the stockholder franchise (which, as the lower court found, would have favored upholding the stockholder-proposed bylaw), the Delaware Supreme Court appeared to use a straightforward application of contract law principles to reach its conclusion.[248] The outcome in *Airgas* has since been explained as "strategic" decision-making by the court.[249] A simpler explanation, however, is that the staggered board provision was organizational "boilerplate" and thus, under a statutory interpretation framework, the language at issue entitled directors to a three-year term.

At the time Airgas adopted its staggered board, such provisions were common at many public corporations. As the court pointed out in its opinion, there were two primary standardized forms of staggered board provisions.[250] While Air Products argued that the differences between the two form provisions clearly indicated a contrary intent in how the staggered board would operate, the court rejected such a formalist interpretation.[251] Instead, the court relied on the historical context in which staggered board provisions were drafted and adopted, including the industry practice and understanding, and found that the slight mutations in the precise language that different corporations used in their classified board provisions was a distinction without a difference.[252] Thus, while the court did not state it was adopting a statutory-like interpretative approach, that is in essence what it did. While the interpretation framework for boilerplate provisions would not alter the outcome in *Airgas* (indeed, it would come out the same), reference to the proposed framework has the added benefit of providing clarity and predictability to corporate actors and markets as to why and how

247. *See generally* Steven M. Davidoff, *A Case Study:* Air Products v. Airgas *and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502.

248. *See id.* at 515.

249. *See id.* at 505, 534.

250. *See supra* note 227 (discussing the two primary forms of staggered board provisions adopted by public corporations).

251. *See Airgas*, 8 A.3d at 1184-85.

252. *See id.* at 1189-95 (considering Delaware precedents, industry practice, model forms and commentary, and other commentary in interpreting the classified board provision).

the court analyzes a particular provision, as opposed to the perceived opacity of the court's rationale that existed post-*Airgas*.

4. Novel Provisions

Corporate actors and their counsel are continually exploring new avenues and structures for governance. Indeed, the phenomenon of private ordering of public corporate governance is just the most recent example of such innovation.[253] Where the court projects that a novel provision has the potential to be precedent setting, a contextual interpretive approach would be appropriate. Schwartz and Scott, strong proponents of the textualist theory of interpretation, acknowledge the value of a contextualist approach for these types of terms: "When a correct interpretation is particularly important—say the interpretation of a new contract that is expected to be widely used—a party may prefer a court to hear all the available evidence."[254] The desire for accuracy in determining the parties' intentions, as it relates to novel provisions, is consistent with the statutory interpretation scheme for boilerplate provisions.[255] Such a scheme encourages courts to determine the original drafters' intent and the historical context of the original drafters.[256] The analysis of a novel provision essentially predicts the provision's future evolution into boilerplate but is engaging in the analysis of the intent and context of the original drafters from a real-time perspective, for which contextual principles are appropriate, rather than from a retrospective stance, for which statutory interpretation principles are appropriate.

Forum selection clauses are a good illustration of a novel provision.[257] Prior to *Boilermakers*, where the court was asked to address the validity of the forum selection clause, over 250 publicly traded corporations had adopted such provisions.[258] The widespread

253. *See* Fisch, *supra* note 2, at 1638.

254. Schwartz & Scott, *supra* note 13, at 946.

255. *See* Choi & Gulati, *supra* note 166, at 1131-32.

256. *See id.* at 1131.

257. An argument could also be made that forum selection clauses, given their impact on stockholders' right to sue, also implicate a fundamental corporate right triggering a contextual approach to interpretation.

258. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 944 (Del. Ch.

adoption of forum selection provisions, even in the shadow of uncertain enforceability, signaled their potential to become pervasive in public corporate governance.[259] Indeed, after *Boilermakers*, many more corporations have adopted forum selection provisions.[260] The prevalence of forum selection provisions brings with it great potential to influence corporate governance norms, thus making accuracy in interpreting their terms a top priority.

5. Individually Negotiated Provisions

Certain provisions in the charter and bylaws closely mimic the traditional contract setting.[261] These provisions are the product of a more adversarial negotiating process and require individual agreement with the corporation, thus more closely fitting the mutual assent requirement in contract law.[262] Further, the specific terms in these provisions typically implicate private, individual, interests within the corporation, as opposed to public interests. Accordingly, this category of provisions would trigger the more tightly structured, formalist textual interpretation principles Delaware applies in the commercial context (for example, a hard parol evidence rule and the plain meaning rule).

The most prominent example of an individually negotiated provision is a preferred stock designation.[263] Because they deviate from common stock rights, preferred stockholders' rights, powers, and preferences must be clearly and expressly stated in the instrument

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2013).

259. *See* ALLEN, *supra* note 5, at 3 (stating that companies comfortably adopted forum selection provisions while awaiting a determination from the Delaware Supreme Court after *Boilermakers*).

260. *See id.* (stating that, following *Boilermakers*, at least 112 Delaware corporations adopted or announced plans to adopt such bylaws).

261. *See* Hamermesh, *supra* note 119, at 163.

262. Because of the limited number of actors that are typically parties to these provisions and their agreement to all of the terms at the outset (which are also typically difficult to amend without unanimous approval), preferred stock provisions do not trigger the same consent concerns as provisions that impact the corporation and its stockholders more generally. *See, e.g.*, Hamermesh, *supra* note 119, at 164-65; Winship, *supra* note 6, at 497-49, 503.

263. Another example would be provisions governing the declaration and issuance of dividends.

creating the preferred stock[264]—the preferred stock designation—which is part of the corporate charter.[265] In the public corporation context, preferred stock is typically used to raise capital for the corporation, and the specific terms of the stock are negotiated between the investor(s) and the corporation.[266] The resulting legal relationship "thus strongly resembles the relationship among the participants in what we might more readily describe as contractual entities, like limited liability companies [or close corporations]."[267] As an investor, a potential preferred stockholder can pursue its rugged self-interest in negotiating the terms of its equity investment and exercise informed consent in agreeing to the terms of the preferred stock rights, powers, and preferences set forth in the designation. This drafting and consent process most closely resembles the formation of a commercial contract. As a result, straight application of contract interpretation principles make sense. Further, studies have found that sophisticated parties commonly prefer a textualist interpretation in this context.[268] The typical preferred stockholder making a long-term investment in a public corporation would be classified as a sophisticated business party. Thus, applying Delaware's traditional textualist approach in interpreting preferred stock designations would be consistent with majoritarian preferences and expectations.

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264. *See* Elliott Assocs., L.P. v. Avatex Corp., 715 A.2d 843, 852-53 (Del. 1998).

265. *See* HB Korenvaes Invs., L.P. v. Marriott Corp., No. 12822, 1993 WL 205040, at *5 (Del. Ch. June 9, 1993).

266. *See* Bratton & Wachter, *supra* note 48, at 1817-18; Leo E. Strine, Jr., Response, *Poor Pitiful or Potently Powerful Preferred?*, 161 U. PA. L. REV. 2025, 2025-26 (2013).

267. Strine et al., *supra* note 46, at 57.

268. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1511 (2009) (finding that parties chose the textualist New York courts in choice of law and choice of forum clauses over the contextualist California courts); Geoffrey P. Miller, *Bargaining on the Red-Eye: New Light on Contract Theory* (NYU Ctr. for Law & Econ., Working Paper No. 08-21, May 2008), https://ssrn.com/abstract=1129805 [https://perma.cc/3SSV-A75N] ("The revealed preferences of sophisticated parties support arguments by Schwartz, Scott and others that formalistic rules offer superior value for the interpretation and enforcement of commercial contracts."); *see also* Schwartz & Scott, *supra* note 13, at 931-32; Robert E. Scott, *Text Versus Context: The Failure of the Unitary Law of Contract Interpretation*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 312, 312-35 (F.H. Buckley ed., 2013) (discussing the differences between textualist and contextualist theories of contract interpretation and asserting that inefficiencies arise when contextualist principles are applied in disputes between commercial entities).

Applying contract interpretation principles to preferred stock designations is not a controversial proposal. Under Delaware law, the rights of preferred stockholders are already viewed as primarily contractual in nature.[269] Recognizing that traditional contract principles work well given the negotiated nature of the provisions, the courts have characterized preferred stockholders as contractual claimants and applied rules of contract construction in interpreting the relevant charter provisions.[270] As the preferred stock cases illustrate, the proposed interpretation scheme for this subset of charter provisions merely reinforces the analysis courts are already undertaking, albeit in a more deliberate, explicit manner.

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269. *See* Shintom Co., Ltd. v. Audiovox Corp., No. Civ.A. 693-N, 2005 WL 1138740, at *3 (Del. Ch. May 4, 2005) (stating section 151 established that "the rights that a preferred stockholder holds against the corporation are formed via contract, and the stockholder can only claim those rights enunciated in the certificate"); GREGORY V. VARALLO, DANIEL A. DREISBACH & BLAKE ROHRBACHER, FUNDAMENTALS OF CORPORATE GOVERNANCE 57 (2d ed. 2009) (stating that the "rights and obligations of preferred shareholders are 'essentially contractual'"); Cox, *supra* note 4, at 273 ("Charter terms, therefore, were seen as contracts with the preferred holders so that the preferred holders' rights were determined from that instrument's four corners, and there was no application of fiduciary or equitable notions extraneous to the charter."); Strine et al., *supra* note 46, at 56-57 ("Even where a corporation's shares are publicly traded and widely held, moreover, there are disputes on matters of internal corporate affairs that are also essentially contractual in nature, such as controversies over the interpretation of the dividend, voting, or other rights of preferred stock. In these cases, the courts have been explicit that principles applicable to contract interpretation in general are equally applicable where the interpretational issue involves a provision of the corporate charter or bylaws." (internal citation omitted)).

270. *See, e.g.*, Elliott Assocs., L.P. v. Avatex Corp., 715 A.2d 843, 852-53 (Del. 1998); HB Korenvaes Invs., L.P. v. Marriott Corp., No. 12922, 1993 WL 205040, at *5 (Del. Ch. June 9, 1993); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 594 (Del. Ch. 1986); Gaskill v. Gladys Belle Oil Co., 146 A. 337, 339 (Del. Ch. 1929); *see also* Strine, *supra* note 266, at 2027-28.

The Delaware courts' analysis of preferred stock terms can appear at times to deviate from the contractual approach. These cases, however, can be explained as a function of the equity-contract characteristics of preferred stock:

> [W]ith respect to matters relating to preferences or limitations that distinguish preferred stock from common, the duty of the corporation and its directors is essentially contractual and the scope of the duty is appropriately defined by reference to the specific words evidencing that contract; where however the right asserted is not to a preference as against the common stock but rather a right shared equally with the common, the existence of such right and the scope of the correlative duty maybe measured by equitable as well as legal standards.

Jedwab, 509 A.2d at 594; *see also* VARALLO ET AL., *supra* note 269, at 57; Strine, *supra* note 266, at 2027.

B. Benefits of an Explicit Framework

As the framework reveals, a corporation's organizational documents are a rich combination of standardization, customization, and innovation.[271] This unique feature, however, demands a nuanced interpretation scheme. The framework proposed here would encourage courts to recognize explicitly the different parts of a charter or bylaws and the different interpretation considerations attendant to each. To the extent that courts are already engaging in analysis similar to that offered here, the contract metaphor masks the actual legwork that the court is performing. An explicit analysis makes clear a broader interpretive scheme for organizational documents and obliges courts to explain when they depart from that scheme. For example, where after *Airgas*[272] commentators and scholars proffered several different theories for the court's decision, applying the above framework would resolve the perceived murkiness in the court's rationale. The proposed framework thus provides uniformity and predictability in interpretation, as well as transparency in the court's interpretive analysis. This framework has the benefit of signaling to the corporate community and other courts which interpretation principles govern charter and bylaws provisions.

The framework also retains space for the case-by-case analysis and judicial discretion that is so integral to corporate law. Inevitably, some provisions could be argued to fall into more than one category (for example, a novel provision that implicates fundamental corporate rights).[273] Where a provision could reasonably be placed in more than one category, the court, exercising its discretion, will need to assess the competing policy and normative considerations and choose the proper classification. Moreover, the framework is flexible; a provision's categorization is not permanently fixed. Rather, over time a provision may evolve such that it migrates from one category to another (for example, when a novel

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271. *See* Kahan & Klausner, *supra* note 11, at 716 (explaining the balance of standardized, customized, and innovative provisions in corporate contracts as a function of learning externalities and network externalities).

272. 8 A.3d 1182 (Del. 2010).

273. *See supra* text accompanying notes 185-89, 257.

provision becomes so standardized it is boilerplate). Again, when and where a provision will transfer across categories will be a determination for the court.

In sum, the proposed framework embraces two key features of corporate law simultaneously: (1) case-by-case analysis, and (2) predictability. The framework achieves this through its requirement that courts engage in a more explicit and tailored interpretation analysis of organizational documents, yet still preserves significant room for judicial discretion in applying the framework to any particular charter or bylaw provision.

CONCLUSION

The ex ante corporate governance movement has shown no signs of slowing down. Stockholders, management, and their counsel will continue to test the bounds of contractual flexibility in drafting charter and bylaw amendments. As the courts develop a portfolio of ex ante governance provisions that pass legal and equitable muster, disputes will naturally progress to raising questions of interpretation.

Interpretation—in particular as applied to corporate organizational documents—has, to date, been largely overlooked by scholars.[274] Yet, the need for discourse and theorizing is great. In an era of private ordering of public company governance, charter and bylaw interpretation is poised to take on an influential role in shaping corporate law and norms.

This Article seeks to provide a comprehensive interpretative framework that takes into account the unique "contractual" institution that is a public corporation's organizational documents. Transactional law places a premium on stability and predictability in the relevant legal constructs that will be applied. Corporate management, investors, regulators, banks, capital markets, and other groups are sensitive to corporate governance practices and the courts' enforcement, interpretation, and general commentary on those practices.[275] A public corporation's organizational documents

274. *See* Posner, *supra* note 7, at 1581; Schwartz & Scott, *supra* note 13, at 928 (asserting that scholarly commentary on contract interpretation is unhelpful and scarce).

275. *See* Smith et al., *supra* note 2, at 170-71.

are especially sensitive to the need for stability and predictability given factors such as the intended longevity of the documents; the micro and macroeffects on individual firms and capital markets, respectively, when there are shifts in drafters' expectations regarding interpretation and enforcement; and the difficulties in adapting charters to post-adoption changes in the law.[276] The framework proposed in this Article provides uniformity and predictability in interpretation while at the same time retaining flexibility and space for judicial discretion. By requiring the courts to engage with the proposed framework when deciding questions of interpretation, the result will be clearer judicial guidance to market actors.

Table 1.

Type of Provision	**Primary Interpretive Goal**	**Interpretive Theory**
Technical, Statutorily Mandated Language	Compliance with statute	Textualist
Fundamental Corporate Rights	Corporate policy/social welfare considerations	Contextualist
Organizational "Boilerplate"	Original drafter's intent	Statutory
Novel Provisions	Parties' objective intent & accuracy	Contextualist
Individually Negotiated Provisions	Parties' objective intent & cost	Textualist

276. *See* Strine et al., *supra* note 46, at 57 ("More broadly, there is a widely held conception of the corporation as a 'nexus of contracts,'.... On this view of the corporation, the same importance ascribed to consistent contract enforcement and clear judicial guidance to market actors applies equally to the handling of disputes involving internal corporate affairs." (internal citation omitted)).