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FIRST PRINCIPLES FOR FORUM PROVISIONS

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*In the closely watched case of *Sciabacucchi v. Salzberg*, Vice Chancellor Laster struck down as invalid provisions in three Delaware-incorporated companies' charters that required complaints brought under the Securities Act of 1933 to be filed in federal district court—and not state court. Although a cutting-edge issue of law, Vice Chancellor Laster resolved the issue by appealing to ancient “first principles”—namely, the notion that each state’s sovereignty is territorially limited.*

*In this Essay, we argue that the Salzberg opinion’s appeal to territoriality as a decisive “first principle” is deeply misguided. The notion that each state’s legislative jurisdiction is bounded by its territorial limits is a formalist and arbitrary notion that has been broadly rejected by various jurisdictions, including Delaware. Moreover, an opinion truly grounded in “first principles” would take comity—the basic framework for choice of law in the early Republic—as its lodestar, necessitating a functionally and strategically sensitive approach to determining the validity of the federal forum provisions. In this case, comity would recommend not invalidating the forum provisions, as Vice Chancellor Laster did, but rather dismissing the suit for lack of ripeness.*

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## TABLE OF CONTENTS

INTRODUCTION .....	107
I. INTERLOCKING INTERESTS AND THE PROCEDURAL BACKDROP .....	108
A. <i>Federal Securities Landscape: Puzzles and Solutions</i> .....	108
B. <i>Delaware Law and the Open Question</i> .....	110
II. RECOVERING FIRST PRINCIPLES .....	111
A. <i>“First Principles”</i> .....	112
B. <i>Comity and True First Principles</i> .....	115
III. THE COMITY-BASED APPROACH .....	118
CONCLUSION .....	122

## INTRODUCTION

In the closely watched case of *Sciabacucchi v. Salzberg*,<sup>1</sup> Vice Chancellor Laster invalidated federal forum–selection provisions appearing in the certificates of incorporation of three Delaware corporations, concluding that they were beyond the scope of permissibility under Delaware law.<sup>2</sup> Remarkably, the opinion grounded its reasoning in what Vice Chancellor Laster referred to as “first principles.”<sup>3</sup> At the heart of these first principles was territoriality—the notion that no state can legislate as to matters falling outside its territorial bounds, except to the extent such a matter falls within the scope of the internal affairs doctrine.<sup>4</sup> Finding that the internal affairs doctrine does not reach federal securities claims, Vice Chancellor Laster held the forum provisions were invalid attempts to extend Delaware law beyond its territorial limits.<sup>5</sup>

The *Salzberg* opinion’s appeal to territoriality as a decisive “first principle” is deeply misguided. The notion that each state’s legislative jurisdiction is bounded by its territorial limits is formalist and arbitrary and has been broadly rejected by various jurisdictions, including Delaware.<sup>6</sup> Moreover, fundamental notions of state sovereignty cannot

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<sup>1</sup> No. CV 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

<sup>2</sup> *Id.* at \*1.

<sup>3</sup> *Id.* at \*18–23.

<sup>4</sup> *Id.* at \*20. The internal affairs doctrine provides that matters relating to the “internal affairs” of a corporation are governed by the laws of the state of incorporation, regardless of where the corporation operates or is headquartered. *Id.*

<sup>5</sup> *Id.* at \*21.

<sup>6</sup> See *infra* text accompanying notes 53–62.

explain this understanding of the territoriality of state authority. Although it has long been assumed that historic conceptions of state sovereignty placed territorial limits on legislative jurisdiction, a more accurate reconstruction of the dominant approach to choice of law in the early Republic reveals that not to be the case. Instead, the basic framework was one of comity, a functionalist conception of choice of law that recognizes the practical necessity to interstate commerce of mutually recognized choice-of-law rules.<sup>7</sup>

An opinion truly grounded in first principles would take comity as its lodestar. Although comity might, in certain circumstances, justify invalidating these provisions out of deference to Delaware's sister states and their interests in maintaining control over litigation impacting their domiciliaries, no such justification is applicable here. Instead, the outcome most consistent with comity is to dismiss *Salzberg* on appeal for lack of ripeness. This will allow other state courts to express their views on these provisions before Delaware makes its final determination—placing Delaware in a sounder strategic position.

## I. INTERLOCKING INTERESTS AND THE PROCEDURAL BACKDROP

In recent years, corporations have adopted forum-selection provisions in an effort to gain an upper hand over the plaintiffs' bar in securities litigation.<sup>8</sup> But as the court's decision in *Salzberg* itself reveals, any effort to modify the rules risks running afoul of state or federal interests. This Part lays out the interlocking sets of procedural law bearing on the validity of the federal forum provisions at issue in *Salzberg*.

### A. *Federal Securities Landscape: Puzzles and Solutions*

An understanding of the current debate over federal forum-selection clauses is impossible without an appreciation of the procedural landscape of federal securities law. The Securities Act of 1933,<sup>9</sup> the first federal securities law, regulates the issuance and distribution of securities. It provides, for example, a cause of action to a shareholder who purchases securities in an initial public offering (IPO) that involves faulty disclosures.<sup>10</sup> The 1933 Act was enacted in the shadow of the Great

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<sup>7</sup> See *infra* Section II.B.

<sup>8</sup> See Keith F. Higgins et al., *A Fresh Look at Exclusive Forum Provisions*, ROPES & GRAY 1 (May 28, 2019), [https://www.ropesgray.com/-/media/Files/articles/2019/05/20190528\\_SPC\\_Article.pdf](https://www.ropesgray.com/-/media/Files/articles/2019/05/20190528_SPC_Article.pdf) (noting that forum provisions relating to 1933 Act claims began to appear “[s]everal years ago”).

<sup>9</sup> 15 U.S.C. §§ 77a–77aa (2018).

<sup>10</sup> *Id.* § 77l.

Depression, a moment when fear of corporate and stock market abuses ran high. In line with the times, the statute gave to plaintiffs “a near-absolute right to choose their preferred forum,” as it provided for concurrent state and federal jurisdiction and barred the removal of actions brought in state courts.<sup>11</sup>

It was not long, however, before concern over the abuse of these causes of action arose.<sup>12</sup> Out of a desire to limit opportunistic securities litigation under both the 1933 Act and the Securities Exchange Act,<sup>13</sup> which regulates trading in secondary markets, Congress in 1998 enacted the Securities Litigation Uniform Standards Act (SLUSA).<sup>14</sup> The legislation, in conjunction with other procedural reforms to the securities laws, effectively curtailed a large swath of securities class action litigation.<sup>15</sup> Recently, however, in *Cyan, Inc. v. Beaver County Employees Retirement Fund*,<sup>16</sup> the Supreme Court held that SLUSA altered neither the 1933 Act’s grant of jurisdiction to state courts nor its bar on removal.<sup>17</sup> As a result, a single category of state-court class action remains viable: one which exclusively alleges a violation of the 1933 Act.

This final route for forum shopping has apparently been a boon to ambitious plaintiffs’ lawyers, who have had more success bringing securities suits in state courts than in federal courts.<sup>18</sup> The Court’s decision in *Cyan* opened the door to an innovative defensive strategy: the adoption of “federal forum” provisions in corporate charters or bylaws designating the federal courts as the exclusive forum for litigating claims under the 1933 Act.<sup>19</sup> These federal forum–selection provisions require dismissal of 1933 Act claims brought in state court while providing the plaintiff the opportunity to refile in federal court.

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<sup>11</sup> Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction to Hear Securities Act Class Actions, But the Frequent Failure to Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. PA. J. BUS. L. 739, 747 (2015).

<sup>12</sup> See *Dabney v. Alleghany Corp.*, 164 F. Supp. 28, 33 (S.D.N.Y. 1958) (discussing the concerns with “strike suits” that had developed by 1934 (citation omitted)).

<sup>13</sup> 15 U.S.C. §§ 78a–78qq (2018).

<sup>14</sup> Pub. L. No. 105-353, 112 Stat. 3227 (1998).

<sup>15</sup> See *id.*

<sup>16</sup> 138 S. Ct. 1061 (2018).

<sup>17</sup> See *id.* at 1066.

<sup>18</sup> See, e.g., Brief of Amici Curiae Law Professors in Support of Petitioners at 19, *Cyan*, 138 S. Ct. 1061 (No. 15-1439). *But cf.* Brief of Amici Curiae Federal Jurisdiction and Securities Law Scholars in Support of Respondents at 24–25, 138 S. Ct. 1061 (No. 15-1439).

<sup>19</sup> Cf. Boris Feldman & Ignacio Salceda, *After Cyan: Some Prognostications*, LAW360 (Mar. 23, 2018), <https://www.law360.com/articles/1025703/after-cyansome-prognostications> [<https://perma.cc/NQ5F-RZBE>] (predicting the adoption of such clauses in *Cyan*’s wake).

### B. Delaware Law and the Open Question

Forum-selection provisions of various kinds have quickly become familiar tools for corporations seeking to counteract potentially abusive shareholder litigation.<sup>20</sup> In the influential opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,<sup>21</sup> then-Chancellor Strine found forum-selection bylaws relating to internal affairs matters facially valid.<sup>22</sup> The bylaws, he explained, were one part of a “broader contract among the directors, officers, and stockholders formed within the statutory framework” of the Delaware corporate code.<sup>23</sup> Delaware law, he noted, gave the corporation a great deal of freedom to regulate its own business.<sup>24</sup> Thus, and in the absence of explicit statutory language on point, Chancellor Strine held that such clauses are not inconsistent with Delaware law.<sup>25</sup>

Just one year later, in *ATP Tour, Inc. v. Deutscher Tennis Bund*,<sup>26</sup> the Delaware Supreme Court extended Chancellor Strine’s reasoning by upholding the validity a “fee-shifting” bylaw, which would allow the corporation to recover fees against shareholders who bring a losing claim against the firm.<sup>27</sup> Stating that “corporate bylaws are ‘contracts among a corporation’s shareholders,’” the Court held that the fee-shifting bylaw fell within the bounds permitted by Delaware law.<sup>28</sup>

The Delaware legislature quickly enacted legislation addressing both opinions. The new law endorses the decision in *Boilermakers* by explicitly allowing for bylaws or charter clauses making Delaware courts the exclusive forum for “any or all internal corporate claims,”<sup>29</sup> but it rejects the *ATP* decision.<sup>30</sup> The statute only addresses forum selection and

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<sup>20</sup> See, e.g., OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 3 (2015), <https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf> [<https://perma.cc/T228-TGDX>] (noting that “[m]ore than 300 companies” adopted forum-selection provisions related to fiduciary duty litigation).

<sup>21</sup> 73 A.3d 934 (Del. Ch. 2013).

<sup>22</sup> *Id.* at 939.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing DEL. CODE ANN. tit. 8, § 109 (West 2013)).

<sup>25</sup> *Id.*

<sup>26</sup> 91 A.3d 554 (Del. 2014).

<sup>27</sup> *Id.* at 558.

<sup>28</sup> *Id.* (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010)). For further discussion of the concept of the contract as the foundation of business entities in Delaware, see Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 STAN. J.L. BUS. & FIN. 137 (2019).

<sup>29</sup> DEL. CODE ANN. tit. 8, § 115 (West 2017).

<sup>30</sup> DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (West 2017).

fee shifting as they relate to “internal corporate claims”; that is, those claims falling within the scope of the internal affairs doctrine.<sup>31</sup> This left open the question of whether similar provisions—either forum-selection or fee-shifting—were permissible in the context of suits asserting substantive claims outside the scope of the internal affairs doctrine, such as those based in federal securities law. But, with the adoption of federal forum provisions beginning in earnest following *Cyan*, it was only a matter of time before they, too, were tested.

## II. RECOVERING FIRST PRINCIPLES

In *Sciabacucchi v. Salzberg*,<sup>32</sup> Vice Chancellor Laster held invalid under Delaware law federal forum provisions in three corporations’ certificates of incorporation.<sup>33</sup> Vice Chancellor Laster offered two rationales for his decision. The first sought to ground the invalidity of the federal forum–selection provisions largely by reference to the analysis in *Boilermakers* and the legislature’s subsequent codification of that case’s holding.<sup>34</sup> Although Vice Chancellor Laster’s analysis was questionable, the key issues of statutory interpretation have no easy answers, as the statute’s language does not address forum-selection provisions.<sup>35</sup> It was likely this difficulty that led Vice Chancellor Laster to offer his second rationale, based not on precedent or statutory text, but on “first principles.” Relying on “fundamental starting points” regarding the “concept of the corporation” and the nature of the state’s sovereignty, he set out to explain why federal forum provisions are *necessarily* invalid because they seek to stretch Delaware’s law beyond its proper legislative jurisdiction.<sup>36</sup>

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<sup>31</sup> Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INST. OF DEL. CORP. & BUS. LAW (June 29, 2015), <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism> [<https://perma.cc/MMP6-E68W>].

<sup>32</sup> No. CV 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

<sup>33</sup> *Id.* at \*3.

<sup>34</sup> *Id.* at \*15–18.

<sup>35</sup> Vice Chancellor Laster adopted Chancellor Strine’s distinction in *Boilermakers* between bylaws that pertain to the plaintiff’s relationship with the company as a stockholder (such as forum-selection clauses for fiduciary-duty actions), and those that merely regulate “external matters” that do not implicate the plaintiff’s status as a stockholder. *Id.* at \*1 (citing *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 951–52 (Del. Ch. 2013)). Vice Chancellor Laster argued that the provision at issue in *Sciabacucchi* similarly sought to regulate an “external matter,” as the 1933 Act provides a right to the individual as a “purchaser” of the share, not as a stockholder. *Id.* at \*2. However, and in contrast to the hypotheticals posed by Strine in *Boilermakers*, the same nucleus of facts may establish the plaintiff as both a purchaser and a shareholder.

<sup>36</sup> *See id.* at \*18.

A. “First Principles”

The heart of Vice Chancellor Laster’s “first principles” argument appeals to the boundaries of the internal affairs doctrine and its relationship to broader notions of legislative jurisdiction. Each state, the opinion explains, can “exercise authority over actors and activities within their territorial jurisdictions (or which have sufficient nexus with their territorial jurisdictions).”<sup>37</sup>

Against this background of exclusively territorial jurisdiction, Vice Chancellor Laster characterized the internal affairs doctrine—which subjects matters relating to the “internal affairs” of a corporation to the laws of the state of incorporation, regardless of where the corporation operates or is headquartered<sup>38</sup>—as a limited exception.<sup>39</sup> According to *Salzberg*, the internal affairs doctrine emerges from the special relationship between the state and the corporation. The charter, he explains, is not a typical contract between private parties.<sup>40</sup> Rather, the charter “gives rise to an artificial entity,” “a ‘body corporate.’”<sup>41</sup> The reason the charter is able to generate these rights is because its issuance is “a sovereign act”;<sup>42</sup> as a result, the incorporating state’s “sovereign authority” structures its rights and powers.<sup>43</sup> This gives the state “the power through its corporation law to regulate the corporation’s internal affairs,” such as “the rights, powers and privileges of shares of stock” and the “composition and structure of the board of directors,” even where the state would otherwise lack “sufficient nexus” for territorial jurisdiction.<sup>44</sup> But this exception to the background principles of territoriality is limited and does not extend to matters that “do not arise out of internal corporate relationships.”<sup>45</sup> Vice Chancellor Laster explained that “a federal claim under the 1933 Act is a clear example of an external claim.”<sup>46</sup> For this reason, a 1933 Act claim is beyond the reach of the internal affairs doctrine and is outside the purview of Delaware law. Accordingly, the federal forum provisions are invalid.<sup>47</sup>

On one level, Vice Chancellor Laster’s reasoning is unexceptional. Settled Delaware precedent holds that the internal affairs doctrine is

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<sup>37</sup> *Id.* at \*20.

<sup>38</sup> *See generally id.* at \*20; *supra* note 4.

<sup>39</sup> *See Sciabacucchi*, 2018 WL 6719718, at \*21.

<sup>40</sup> *See id.* at \*19.

<sup>41</sup> *Id.* at \*18.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*19.

<sup>44</sup> *Id.* at \*20.

<sup>45</sup> *Id.* at \*21.

<sup>46</sup> *Id.* at \*22.

<sup>47</sup> *Id.* at \*23.

constitutionally mandated.<sup>48</sup> Additionally, the courts have frequently characterized the doctrine as a narrow exception to the general rule of territorial jurisdiction.<sup>49</sup> From there, the conclusion that Delaware’s law is invalid if it extends extraterritorially but does not fall within the internal affairs doctrine is understandable. But while this argument from “first principles” may find some purchase in the context of the internal affairs doctrine, it fails to square with the true history of conflicts of laws, both nationally and in Delaware.

The Court of Chancery ought to be forgiven for failing to articulate the source of its territorial principle. The problems of identifying the provenance of choice-of-law rules and limitations on legislative jurisdiction have plagued courts for at least a century.<sup>50</sup> Neither state legislatures nor Congress provide significant direction for choice-of-law issues, leaving courts to look elsewhere for guidance. Indeed, this makes choice of law an area of great scholarly influence, sometimes leading to abrupt and dramatic theoretical realignments.<sup>51</sup>

The foundational scholarly intervention into modern choice of law was Joseph Beale’s “vested rights” theory, which dominated both classroom and courtroom for the first half of the twentieth century.<sup>52</sup> Beale argued that each state’s legislative jurisdiction is strictly circumscribed by its territorial boundaries—a notion endorsed in *Salzberg*.<sup>53</sup> Indeed, as in Vice Chancellor Laster’s opinion, Beale grounded his theory in the very nature of sovereignty, purportedly arising *a priori* from first principles: each state’s sovereign authority is inherently connected to its physical jurisdiction, thus no state can create law that extends beyond its borders.<sup>54</sup>

Beale’s theory carries an abstract appeal. By precisely partitioning every jurisdiction’s legislative jurisdiction to remove overlap, it ostensibly leaves no discretion to courts. The courts embraced this

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<sup>48</sup> See, e.g., *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1116 (Del. 2005) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987)).

<sup>49</sup> Cf., e.g., *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 853–54 (Del. Ch. 2016), *aff’d sub nom. A & R Logistics Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Del. 2016).

<sup>50</sup> See generally Lea Brilmayer, *The Problem of Provenance: The Proper Place of Ethical Reasoning in the Selection of Applicable Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 101 (Donald Earl Childress III ed., 2012) (discussing the challenge of grounding a theory of choice of law).

<sup>51</sup> See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 949 (1994).

<sup>52</sup> See Erwin N. Griswold, *Mr. Beale and the Conflict of Laws*, 56 HARV. L. REV. 690, 690, 693–94 (1943); Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830*, 41 ME. L. REV. 307, 325 (1989).

<sup>53</sup> *Supra* text accompanying notes 4–5, 32–47.

<sup>54</sup> 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 4.12, at 46 (1935).



simplification of the judicial task, leading to the theory's broad adoption and endorsement in the *Restatement (First) of Conflict of Laws*.<sup>55</sup> But Beale's theory soon came under fervent attack from legal realists. The realists denied that there was anything inherent in the nature of law supporting Beale's strictly territorial construction of the law.<sup>56</sup> In their view, his "theory" of vested rights and sovereignty was merely a façade built to obscure the discretion of judges.<sup>57</sup>

The realist critique set off the "conflict-of-law revolution."<sup>58</sup> In reality, however, the aftermath of the rejection of Beale's theory has primarily been fragmentation. Courts today embrace a variety of choice-of-law theories, with some retaining the territorial model.<sup>59</sup> Notably, Delaware has instead embraced the approach set out in the revisionist *Restatement (Second) of Conflict of Laws*—a flexible but unpredictable methodology based around a multi-factor balancing test.<sup>60</sup> The *Restatement (Second)* provides little theoretical discussion and is considered an unruly mess by academic literature,<sup>61</sup> but it correctly jettisons Beale's territorialist view. Instead, the *Restatement (Second)* assumes each state's law extends as broadly as is constitutionally permissible, leaving courts to choose which of the overlapping jurisdictions' laws is most appropriately applied in a particular case.<sup>62</sup>

Placed in historical context, the *Salzberg* opinion looks like an attempt to revive a long-buried relic. Delaware joined the conflicts revolution decades ago when it accepted the *Restatement (Second)* and rejected the territorial theory as an arbitrary restraint on judicial

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<sup>55</sup> See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311 (AM. LAW INST. 1934). Of course, Beale himself was the Reporter for the *Restatement (First)*.

<sup>56</sup> See Wardhaugh, *supra* note 52, at 341.

<sup>57</sup> See L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435 (1934).

<sup>58</sup> SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE I* (2006).

<sup>59</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 61 (2018).

<sup>60</sup> See *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464–65 (Del. 2017) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971)); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) (arguing that with respect to torts, for example, the *Restatement (Second)* "lists a dizzying number of factors with no hint as to their relative weight" (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145)). Dissatisfaction with the *Restatement (Second)* has led to the development of a *Restatement (Third)*, which is currently being drafted. See Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J. FORUM 266, 267 (2018).

<sup>61</sup> See, e.g., Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989) ("The Second Restatement[] . . . mystifies rather than clarifies . . .").

<sup>62</sup> Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 515 (2014).

discretion.<sup>63</sup> Applied to *Salzberg*, the *Restatement (Second)* approach would recommend upholding the facial validity of these provisions, leaving subsequent courts to decide whether to enforce an individual provision when the issue arises.

Even the *Restatement (Second)* approach, however, is ultimately unsatisfactory. The most contentious invocation of federal forum-selection clauses will be when defendants move courts such as California's to dismiss and allow for refiling in federal court. California courts' responses to such motions might be different from those of, say, New York courts. The Court of Chancery, and ultimately the Delaware Supreme Court, may well have an interest in intervening to provide for a uniform result or to otherwise have a say in the functioning of these provisions. But to do so, Delaware must adopt a more sophisticated choice-of-law model than that offered by the *Restatement (Second)*. The next Section lays out such a model based on a principle even more fundamental than those to which Vice Chancellor Laster appealed: comity.

### B. *Comity and True First Principles*

Although most modern commentators mistakenly trace Beale's territorial view to the early 1800s,<sup>64</sup> the prevailing choice-of-law model in the nineteenth century assumed a very different notion of the relationship between territory and sovereignty. As Justice Story described in his *Commentaries on the Conflict of Laws*, the reach of each state's courts over foreign litigants was tightly circumscribed by the state's geographical boundaries.<sup>65</sup> Any effort to adjudicate the rights of a person or property outside of that territorial reach would be considered invalid by other courts and in violation of the law of nations.<sup>66</sup> But, once a defendant was served process within the state's territory, its courts could adjudicate any dispute according to the law of the forum—even if the conduct in question occurred elsewhere.<sup>67</sup> In modern terminology,

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<sup>63</sup> Cf. *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del. 1978) (applying Delaware law because "th[e] State ha[d] such a close relationship to the transaction" at issue).

<sup>64</sup> See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 252 (1992).

<sup>65</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACT, RIGHTS AND REMEDIES, AND SPECIFICALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS* § 21 (2d ed. 1841) (1834).

<sup>66</sup> See William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085–86 (2015).

<sup>67</sup> See Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 18–19 (1966). This distinction can be seen in the fact that state court decisions that violated the limits of personal

personal jurisdiction, but not legislative jurisdiction, was territorially limited.

This authority to apply forum law to any matter within the jurisdiction of a state's courts was considered an important aspect of each state's sovereignty. It was also understood, however, that such a system could breed a great deal of uncertainty, potentially crippling interstate commerce.<sup>68</sup> For this reason, nineteenth-century American courts embraced the notion of comity—a concept that originated among Dutch jurists more than a century earlier as a model for international adjudication,<sup>69</sup> but which was embraced as similarly applicable to the American states.<sup>70</sup> Today, comity is a term that is both familiar and misunderstood.<sup>71</sup> Although courts—including Delaware's—refer to comity in the context of considering how their rulings will affect other jurisdictions, it is generally understood as a narrow doctrine of abstention, applying only when a court decides not to exercise its authority to avoid affronting another state's interests.<sup>72</sup> Justice Story explicitly denied this narrow understanding of the comity framework, explaining that it represents an essential aspect of the relationship between sovereigns.<sup>73</sup> While it was the law of nations that required a state to adhere to the strict territorial rules of personal jurisdiction, it was the “comity of nations” that generally motivated a jurisdiction to adopt voluntarily rules—usually as a matter of local common law—directing its courts to enforce the law of a sister state rather than forum law in certain circumstances.<sup>74</sup>

The goal of comity was to guide the states into independently adopting a uniform set of choice-of-law rules—ensuring, for example, that every contract would be enforced according to the law of the place in which it was made, regardless of where the subsequent contract dispute was adjudicated. There was nothing inherent in the nature of sovereignty demanding that these choice-of-law rules be adhered to. Rather, the state

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jurisdiction were subject to collateral attack, while those inconsistent with the comity-derived limits of legislative jurisdiction were not. *Compare* *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 184–86 (1809) (allowing for collateral attack on personal jurisdiction grounds), *with* *Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828) (denying a right to collaterally attack on choice-of-law grounds).

<sup>68</sup> STORY, *supra* note 65, § 242.

<sup>69</sup> Thomas Schultz & Niccolò Ridi, *Comity in US Courts*, 10 NE. U. L. REV. 280, 291–92 (2018).

<sup>70</sup> *Id.* at 283.

<sup>71</sup> *See* *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201–02 (N.Y. 1918) (Cardozo, J.) (referring to comity as a “misleading word”).

<sup>72</sup> *See, e.g., Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 387 (Del. 2013).

<sup>73</sup> Justice Story specifically denied that comity referred to such a grant of individual discretion, explaining that he was interested in the “comity of nations,” not the “comity of the courts.” *See* STORY, *supra* note 65, § 38.

<sup>74</sup> *Id.*

would adopt such rules because it would be, Justice Story explained, in their “mutual interest and utility.”<sup>75</sup> This includes, for example, the modern internal affairs doctrine, which arose not out of some special metaphysical connection between the corporation and the chartering state, as the *Salzberg* opinion suggests, but rather out of interstate recognition of the need to constrain shareholder opportunism after personal jurisdiction rules began to liberalize in the late nineteenth century.<sup>76</sup>

At the same time, however, it was also understood that, in some cases, the benefits to be procured from uniformity would not sufficiently outweigh the benefits of simply applying forum law. In such cases, it would be consistent with the general notion of comity to adopt a choice-of-law rule that directed the state court to apply its own jurisdiction’s law. Thus, for example, in *Le Roy v. Crowninshield*, Justice Story held that it would be appropriate for a forum court to apply its own statute of limitations to a claim arising from a contract made outside of the state because the forum’s interest in adhering to its own procedural rules outweighed the costs of disuniformity such a rule would introduce.<sup>77</sup>

As illustrated in *Le Roy*, the paradigmatic invocation of comity involved a forum court weighing the interests of its own state against the benefits that accrue from uniformity across state lines.<sup>78</sup> But that uniformity is only realized if other states adopt similar rules. This means that comity is fundamentally about considering how one’s choice-of-law decision will impact and garner responses from other states. In game-theoretical terms, comity captures the idea that each state is a repeat player in a multi-party coordination problem in which, by sometimes accommodating the interests of other states, everyone could be made better off.<sup>79</sup> In certain cases, this might demand that a jurisdiction voluntarily circumscribe the geographic reach of its own laws. For example, if Nevada thinks that California will not impose Nevada’s special safety requirements on products sold in Nevada, the state might preemptively decide not to extend the law’s reach to products originating in California—concerned that to do otherwise would generate uncertainty

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<sup>75</sup> *Id.* § 25 (citing *Blanchard v. Russel*, 13 Mass. 1 (1816)).

<sup>76</sup> See Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 371 (2018).

<sup>77</sup> 15 F. Cas. 362 (Story, Circuit Justice, C.C.D. Mass. 1820) (No. 8269).

<sup>78</sup> See Daniel B. Listwa, *Jurisdictional Problems, Comity Solutions* 15–26 (unpublished manuscript) (June 26, 2019) (on file with author) (reconstructing Justice Story’s theory of choice of law).

<sup>79</sup> Cf. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 162 (1991) (using game theory to describe the benefits of reciprocity in choice of law); Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law* (unpublished manuscript) (Aug. 6, 2019) (on file with authors) (offering a novel theorization of choice of law grounded in game-theoretical reasoning).

for manufacturers. More pointedly, Nevada might be worried about reprisal from California and limit the reach of its law for that reason.

This more future-oriented invocation of comity also has deep roots in American law and is the basis for the “presumption against extraterritoriality” that is sometimes relied upon by courts. For example, in *American Banana Co. v. United Fruit Co.*,<sup>80</sup> the U.S. Supreme Court held that American antitrust laws did not extend to acts committed in Costa Rica and Panama.<sup>81</sup> In his opinion for the Court, Justice Holmes grounded his opinion in “the comity of nations,” explaining that extraterritorial enforcement of the law might provoke just resentment by the other nations.<sup>82</sup> Consistent with comity, the Supreme Court does not rely on the presumption in every case, but only after balancing the interests of the U.S. in extending its law against the repercussions of such an extension.<sup>83</sup> The same is true of states that have invoked the presumption against extraterritoriality in the interstate context.<sup>84</sup>

An analysis of the validity of the federal forum provisions grounded in “first principles” clearly should have considered the clauses from the perspective of comity, not territoriality. The result of a comity analysis may result in the same outcome reached by Vice Chancellor Laster, but the *Salzberg* opinion offers no such inquiry. Instead, it merely cites territoriality as a decisive, if arbitrary, factor. Heeding the lessons of the legal realists, one should not be satisfied with that determination.

### III. THE COMITY-BASED APPROACH

With the Court of Chancery’s decision in *Salzberg* now final,<sup>85</sup> Delaware’s Supreme Court will soon confront the issue itself. If the Court is also drawn to offering a reason based in “first principles,” then its first step must be to consider comity. The outcome most consistent with comity is to dismiss the case on ripeness grounds, providing an opportunity for other states’ courts to clarify their positions on these provisions.

A comity-based approach is ultimately grounded in the interests of the implicated jurisdictions. Each state has, essentially, two sets of related

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<sup>80</sup> 213 U.S. 347 (1909).

<sup>81</sup> *Id.* at 357.

<sup>82</sup> *Id.* at 356.

<sup>83</sup> See Dodge, *supra* note 66, at 2102–03.

<sup>84</sup> Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT’L L. 381, 395 (2017).

<sup>85</sup> See *Chancery Awards \$3M Fees For ‘Significant’ Bylaws Challenge*, LAW360 (July 8, 2019), <https://www.law360.com/delaware/articles/1175868/chancery-awards-3m-fees-for-significant-bylaws-challenge> [<https://perma.cc/J4AP-3QPD>].

interests: first, in protecting its constituents by retaining the ability to make an independent judgment about whether the forum-selection clauses should be enforced; and, second, in the benefits of uniformity. Ideally, states would negotiate directly to achieve a compromise which balances both sets of interests. However, state courts are confined to taking unilateral actions in individual cases.

Comity provides a solution. It recognizes that courts are involved not in a single-shot prisoner's dilemma, but rather an iterated coordination game. Taking this broader view, jurisdictions can "negotiate" through signaling, deference, and reciprocity. Indeed, that is essentially the process that has played out for forum-selection provisions concerning internal affairs. In *Galaviz v. Berg*,<sup>86</sup> one of the first tests of a unilaterally adopted forum-selection bylaw, the federal court of the Northern District of California refused to enforce the bylaw as a matter of federal common law, holding, among other things, that that the conditions under which the board of directors adopted the provision—namely, after engaging in allegedly fraudulent behavior—cast suspicion on whether it was truly adopted with the interests of the shareholders in mind.<sup>87</sup> When Delaware later spoke on the issue in *Boilermakers*, then-Chancellor Strine strongly signaled Delaware's intention to support these provisions, but also deferred to the sort of misgivings discussed by the federal court by recognizing the validity of as-applied challenges.<sup>88</sup>

The *Boilermakers* decision signaled a move toward an equilibrium balancing the different jurisdictions' interests: joining a strong presumption of enforceability with a safety valve for as-applied challenges. Recognizing the value of this compromise, both federal and state courts have endorsed it by subsequently upholding forum-selection provisions while retaining the power to decline to enforce such a provision on an as-applied basis.<sup>89</sup> As a result of this indirect dialogue between jurisdictions, "non-chosen" courts maintain a degree of control over the enforcement of these provisions while corporations have a fair degree of confidence that these provisions will be upheld so long as they are adopted on a "clear day."<sup>90</sup>

*Salzberg* provides a stark contrast to the successful application of comity in the *Boilermakers* line of cases. By invalidating the federal forum provision on a facial challenge, the court in *Salzberg* eliminated any possibility for an inter-court dialogue. That is not to say, of course, that such a decision is necessarily unjustified. Although the court

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<sup>86</sup> 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

<sup>87</sup> See *id.* at 1175.

<sup>88</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 957 (Del. Ch. 2013).

<sup>89</sup> See, e.g., *North v. McNamara*, 47 F. Supp. 3d 635, 640–43 (S.D. Ohio 2014).

<sup>90</sup> See John C. Jorgenson, Note, *Drafting Effective Delaware Forum-Selection Clauses in the Shadow of Enforcement Uncertainty*, 102 IOWA L. REV. 353, 373 (2016).

declined to provide a functionally relevant justification for the restriction, one could conceive such an argument.

The best comity-based justification for *invalidating* these provisions is grounded in the concern that validating them would invite unwelcome responses from other interested jurisdictions—the same reasoning offered by Justice Holmes in *American Banana*.<sup>91</sup> While plausible, this reasoning is ultimately unpersuasive. Consider first the interests of the federal government. Although Vice Chancellor Laster did not reach the issue, he noted that the plaintiffs argued that validating the federal forum provisions would “take Delaware out of its traditional lane of corporate governance and into the federal lane of securities regulation.”<sup>92</sup> As former Chief Justice Steele has suggested, it is in Delaware’s interest to maintain a “solid line” between these two lanes to prevent federal incursion into the realm of corporate law.<sup>93</sup> This is but comity by another name.

But while the desire to maintain such separation in the interest of preventing federal intervention is legitimate, federal forum provisions present little risk of such intrusions. Congress would likely only intervene if it decides that restricting shareholders to suits in federal courts in 1933 Act cases runs against the statutory scheme. However, the federal interest in maintaining the availability of state courts in 1933 Act cases is weak. While the enacting Congress may have sought to allow for suits in state court as part of a generally pro-plaintiff orientation, Congress’s amendments to the statutory scheme have trended toward shifting control away from the plaintiff.<sup>94</sup> Indeed, many courts had long interpreted SLUSA as depriving state courts of jurisdiction over 1933 Act claims without any reaction from Congress.<sup>95</sup> Moreover, the Supreme Court has enforced pre-dispute agreements to arbitrate 1933 Act claims, holding that such agreements do not impinge on the substantive rights provided

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<sup>91</sup> See *supra* text accompanying note 82.

<sup>92</sup> *Sciabacucchi v. Salzberg*, No. CV 2017-0931-JTL, 2018 WL 6719718, at \*23 (Del. Ch. Dec. 19, 2018).

<sup>93</sup> See Chief Justice Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. SCH. L. REV. 503, 506–07 (2007–08).

<sup>94</sup> Although the 1933 Act provided for concurrent state and federal jurisdiction and barred removal, every subsequent securities statute has taken a more restrictive position. Enacted only a year later, the Securities Exchange Act of 1934 granted federal courts “exclusive jurisdiction” over claims brought under the statute. 15 U.S.C. § 78aa (2018). This denial of concurrent jurisdiction is consistent with the generally higher burden placed on a plaintiff bringing an Exchange Act claim, as opposed to one grounded in the 1933 Act. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (discussing the “heavier burden” imposed on the plaintiff). In 1995, Congress further restricted securities suits through the Private Securities Litigation Reform Act (PSLRA), which imposed various procedural requirements for cases in federal courts. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>95</sup> See, e.g., *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) (denying state courts jurisdiction over such claims).

by the statute.<sup>96</sup> It is difficult to see how requiring that such claims be brought in federal court would be found more problematic from a federalism perspective than forced arbitration.

Delaware's sister states, however, might be less willing than Congress to defer to these forum-selection provisions and would be more likely to view them as an illegitimate power-grab by Delaware. California courts may believe that they can more effectively ensure the vindication of the rights of California securities-purchasers than a federal court. More problematically, a state court may retain jurisdiction in order to protect the fees of the local plaintiffs' bar. For internal affairs suits, states have reached an equilibrium deferential to Delaware's jurisdiction.<sup>97</sup> But the balancing of interests applicable to that limited set of cases does not necessarily extend to federal forum provisions. Delaware courts might be concerned that sister states will perceive a move to validate federal forum provisions as an attempt to unreasonably expand the scope of the internal affairs doctrine, triggering greater scrutiny of the doctrine as a whole and destabilizing the current equilibrium.

While protecting the current equilibrium is reasonable, an alternative solution exists which would avoid preemptively invalidating these important mechanisms for private ordering. The Delaware Supreme Court can instead dismiss the suit for lack of ripeness, making clear Delaware's intention to proceed cautiously in order to respond effectively to the interests and concerns raised by other courts.

Were the Court to do so, Delaware's courts would likely have the opportunity to address the issue once again. If a sister state ever declines to enforce such a provision, the defendant corporation could attempt to obtain an anti-suit injunction against the plaintiff in the Delaware Court of Chancery.<sup>98</sup> Then, the Delaware court would not only know that the other court declined to enforce the provision, but also its reason for doing so. This would allow the Delaware court to confront the issue in a more nuanced and reciprocity-oriented manner, much as then-Chancellor Strine did in *Boilermakers*.<sup>99</sup> Further, if other states decide to enforce these provisions, then Delaware need not confront the issue at all. If Delaware were eventually required to issue an anti-suit injunction, it would be in a strong, consensus-enforcing position to do so. Dismissing on ripeness grounds leaves open these alternative routes, thus presenting a superior solution to preemptively striking down the provisions.

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<sup>96</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

<sup>97</sup> *See supra* text accompanying note 76.

<sup>98</sup> *See Edgen Grp. Inc. v. Genoud*, No. 9055-VCL, 2013 WL 5939861 (Del. Ch. Oct. 31, 2013).

<sup>99</sup> *See supra* text accompanying note 88.



## CONCLUSION

By invoking territorial limitations on legislative jurisdiction as a “first principle” upon which to rest his opinion invalidating federal forum provisions, Vice Chancellor Laster mistakenly revived a long-buried and misguided formalism. The territoriality principle is inconsistent with both the modern choice-of-law model followed by Delaware, which was heavily influenced by the legal realism movement, and historical conceptions of state sovereignty dating to the time of the early Republic. A more accurate appeal to first principles would recommend reliance on a comity framework, highlighting the strategic considerations that ought to guide judicial decisions implicating multiple jurisdictions. If Delaware is concerned, for strategic reasons, with appearing overly aggressive, then the most comity-oriented solution would be to dismiss *Salzberg* for lack of ripeness, allowing other states’ courts to address the issue before Delaware reaches its final decision.