

## **“EXCLUSIVE” JURISDICTION IN DELAWARE’S GENERAL CORPORATION LAW: WHY STATES LACK THE POWER TO STRIP JURISDICTION FROM THEIR SISTER STATES AND THE FEDERAL COURTS**

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### I. INTRODUCTION

Delaware has carved out a niche for itself as a corporate haven.<sup>1</sup> The State Legislature has done this by taxing corporations at comparatively lower rates and enacting laws more favorable to corporations than its sister states.<sup>2</sup> The State also maintains separate courts of equity, the Delaware Chancery Courts, which are distinct from the State’s courts of law.<sup>3</sup> That division has allowed Chancery Court judges to gain expertise in corporate matters, making the Chancery Court an attractive forum for corporate litigation.<sup>4</sup> Because of those benefits, among others, most corporations choose to incorporate in Delaware.<sup>5</sup> In fact, sixty-six percent of all Fortune 500 companies are incorporated in the State.<sup>6</sup>

Despite this, it is not uncommon for corporate litigation to arise in forums outside of Delaware.<sup>7</sup> While most Fortune 500 companies are

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<sup>1</sup> Jane Haskins, *Incorporating in Delaware: Advantages and Disadvantages*, LEGALZOOM, <https://www.legalzoom.com/articles/incorporating-in-delaware-advantages-and-disadvantages> (last visited April 23, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See Why Incorporate in Delaware or Nevada?*, BIZFILINGS, <https://www.bizfilings.com/toolkit/research-topics/incorporating-your-business/why-incorporate-in-delaware-or-nevada> (last visited April 23, 2019).

<sup>6</sup> JEFFREY W. BULLOCK, DELAWARE DIVISION OF CORPORATIONS, DELAWARE DIVISION OF CORPORATIONS 2015 ANNUAL REPORT 1 (2015), [https://corp.delaware.gov/Corporations\\_2015%20Annual%20Report.pdf](https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf).

<sup>7</sup> *E.g.*, Daniel Fisher, *West Virginia Tops List of Worst States for Litigation 2015*, FORBES (Sept. 10, 2015, 1:00 AM), <https://www.forbes.com/sites/danielfisher/2015/09/10/west-virginia-tops-list-of-worst-states-for-litigation-2015/#eeb64a73b522>; U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, 2017 LAWSUIT CLIMATE SURVEY: RANKING THE STATES 1, 24–25 (2017), <http://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf>.

incorporated in Delaware, only two are headquartered in the State.<sup>8</sup> Most states apply the “internal affairs doctrine,” which holds that only one state, usually the state of incorporation, should have the authority to regulate a corporation’s internal affairs, including the interrelations of a corporation’s shareholders, directors, officers, or agents.<sup>9</sup> The internal affairs doctrine is dominant because it provides certainty and predictability.<sup>10</sup> The doctrine honors expectations and avoids subjecting corporations to the conflicting demands that may result if a single corporation operating in multiple states was subject to various competing legal standards.<sup>11</sup>

Under early applications of the internal affairs doctrine, state courts would deny having subject matter jurisdiction over controversies involving the internal affairs of corporations’ incorporation in states other than the forum state.<sup>12</sup> As clarified by the Supreme Court in 1947, however, the

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<sup>8</sup> Caitlin Dempsey, *Fortune 1000 Companies List for 2015*, GEOLOUNGE (July 25, 2015), <https://www.geolounge.com/fortune-1000-companies-list-for-2015/>.

<sup>9</sup> *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.”); 36 AM. JUR. 2D FOREIGN CORPORATIONS § 72, Westlaw (database updated Feb. 2018) (“[T]he ‘internal affairs doctrine’ posits that only one state, usually the state of incorporation, should have the authority to regulate a corporation’s ‘internal affairs,’ i.e., matters that involve the relations inter se of the corporation, its shareholders, directors, officers, or agents.”); 9 FLETCHER CYC. CORP. § 4223.50, Westlaw (database updated Sept. 2017) (“Not all jurisdictions follow the internal affairs doctrine.”); Jason S. Haller, *The Constitutionality of Outreach Statutes Under the Dormant Commerce Clause*, 37 SETON HALL L. REV. 597, 605 (2007) (“[T]he Supreme Court of the United States has never taken the position that the U.S. Constitution mandates the internal affairs doctrine. Indeed, the doctrine dominates the past and present of corporate law—courts rarely hesitate to apply it.”).

<sup>10</sup> 36 AM. JUR. 2D FOREIGN CORPORATIONS § 72, Westlaw (database updated Feb. 2018).

<sup>11</sup> *Id.*

<sup>12</sup> *Langfelder v. Universal Labs.*, 293 N.Y. 200, 204 (1944) (“[I]t is well settled that jurisdiction in any case will be declined . . . where a determination of the rights of litigants involves regulation and management of the internal affairs of the corporation dependent upon the laws of the foreign State.”); *Lapides v. Doner*, 248 F. Supp. 883, 885 (E.D. Mich. 1965) (citing *Wojtczak v. Am. United Ins. Co.*, 293 Mich. 449, 452 (1940)); *Aston v. O’Carroll*, 66 F. Supp. 585, 586 (M.D. Pa. 1946) (“These questions are so manifestly concerned with the internal affairs of the defendant company that little room is left for argument. This court, like the state courts of Pennsylvania, does not exercise visitorial powers over foreign corporations under such circumstances.”) (citing *Hopkins v. Great W. Fuse Co.*, 343 Pa. 438, 440–41 (1941)); *In re Dohring*, 142 Misc. 2d 429, 431 (N.Y. Sup. Ct. 1989) (“An action for dissolution is deemed an internal dispute of a corporation. The older view was that the internal affairs of foreign corporations were not to be litigated in courts of a state other than that of incorporation.”); DEBORAH A. DEMOTT, *Choice of Law Considerations—Internal Affairs and Statutory Outreach*, in SHAREHOLDER DERIV. ACTIONS L. & PRAC § 2:13 (2017–2018), Westlaw (database updated Nov. 2018). *But see* *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947) (“There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the

internal affairs doctrine is not a rule of law, but a consideration of forum convenience.<sup>13</sup> Over time, state courts softened their application of the internal affairs doctrine,<sup>14</sup> and, today, courts will apply the rubric of forum non conveniens to determine whether retaining jurisdiction is appropriate.<sup>15</sup> Complications arise in certain cases where the forum state lacks the power to grant the petitioned-for relief, like dissolution of the corporation, but this only factors into the forum non conveniens analysis.<sup>16</sup>

While its importance as a jurisdictional bar has waned, the internal affairs doctrine remains an important choice-of-law doctrine,<sup>17</sup> often tasking foreign states with applying the laws of the state in which the corporation was incorporated.<sup>18</sup> For example, a New Jersey state court may be asked to determine whether an officer of a corporation, incorporated under the laws of Delaware, is indemnified by the corporation for claims brought against it.<sup>19</sup> Or a Massachusetts court may need to determine whether a corporate

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internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted.”)

<sup>13</sup> *Koster*, 330 U.S. at 527; see also *O'Brien v. Virginia-Carolina Chem. Corp.*, 206 A.2d 878, 885 (N.J. 1965) (“The basic question, however, is not one of power to exercise jurisdiction but of the wisdom of doing so. In most situations it is desirable to leave such matters to the courts of the state of creation of the corporation.”).

<sup>14</sup> *In re Dohring*, 142 Misc. 2d at 432 (“This trend in the direction of expanding jurisdiction over foreign corporations was noted by the First Department in New York in 1964. While earlier courts had considered themselves jurisdictionally barred from entertaining lawsuits involving the internal affairs of foreign corporations, the more recent view was to regard the issue as one of convenience and discretion.”) (internal citations omitted); e.g., *O'Brien*, 206 A.2d at 886; *Prescott v. Plant Indus., Inc.*, 88 F.R.D. 257, 261 (S.D.N.Y. 1980) (“Although there is no rigid, generalized rule as to what constitutes ‘internal affairs’ for this purpose, courts have declined jurisdiction where a decision would affect corporate structure or policy, but have retained jurisdiction over cases involving breach of fiduciary duty, fraud, or contracts.”).

<sup>15</sup> See DEBORAH A. DEMOTT, *Choice of Law Considerations—Internal Affairs and Statutory Outreach*, in *SHAREHOLDER DERIV. ACTIONS L. & PRAC.* § 2:13 (2017–2018), Westlaw (database updated Nov. 2018) (“Once the jurisdictional impediment fell, the question became whether a court should keep jurisdiction of an internal affairs case or dismiss under the rubric of forum non conveniens.”).

<sup>16</sup> See *In re Dohring*, 142 Misc. 2d at 433 (“[T]he fact that the relief nominally sought (i.e., dissolution and forfeiture of the corporate charter) is not technically within the power of the court does not bar the award of lesser or alternative relief in this action.”).

<sup>17</sup> 9 FLETCHER CYC. CORP. § 4223.50, Westlaw (database updated Sept. 2017); *Heine v. Streamline Foods Inc.*, 805 F. Supp. 2d 383, 391 (N.D. Ohio 2011) (“The internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs—the state of incorporation.”) (quoting *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005)).

<sup>18</sup> Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 90 (2008).

<sup>19</sup> E.g., *Vergopia v. Shaker*, 922 A.2d 1238, 1239 (N.J. 2007) (applying section 145 of

action or amendment is valid under Delaware law.<sup>20</sup> Or an Alabama court may have to determine whether stockholders may demand to inspect corporate records.<sup>21</sup>

Each of the preceding examples were based on real cases and, in each of those cases, Delaware's sister states were tasked with applying Delaware law, specifically Delaware's General Corporation Law.<sup>22</sup> But an emerging issue—once called the “blunderbuss”<sup>23</sup> approach to legal advocacy—has found a home in several federal district courts and some state courts.<sup>24</sup> Under that approach, Delaware's General Corporation Law strips other courts of subject matter jurisdiction by reserving exclusive jurisdiction in the Delaware Chancery Court.<sup>25</sup>

Four sections of Delaware's General Corporation Law vest the State's Chancery Court with “exclusive jurisdiction” to hear actions brought under those sections.<sup>26</sup> They cover broad topics, including indemnification of officers and directors,<sup>27</sup> business combinations with interested stockholders,<sup>28</sup> the validity of defective corporate acts or stock and ratification thereof,<sup>29</sup> and the inspection of corporate books and records.<sup>30</sup> Some of the sections have been around for decades, but the argument that

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the Delaware Code).

<sup>20</sup> See *Finnegan v. Baker*, 35 N.E.3d 778, 787 (Mass. App. Ct. 2015).

<sup>21</sup> *Pearson v. Westervelt Co.*, 203 So. 3d 73, 83 (Ala. Civ. App. 2016).

<sup>22</sup> See *Vergopia*, 922 A.2d at 1245 (applying Delaware's General Corporation Law); *Finnegan*, 35 N.E.3d 778 at 787 (same); *Pearson*, 203 So. 3d at 79 (same).

<sup>23</sup> *Blunderbuss*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/blunderbuss> (last visited March 3, 2019) (meaning clumsy and unsubtle).

<sup>24</sup> *E.g.*, *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 289 (S.D.N.Y. 2006); *Foti v. W. Sizzlin Corp.*, 64 Va. Cir. 64 (2004); *Yale S. Corp. v. Eclipse Servs., Inc.*, No. 10-CV-0337-CVE-FHM, 2010 WL 2854687, at \*3 (N.D. Okla. July 19, 2010); *Lynch v. Basinger*, No. CIV. 12-637 RBK/KMW, 2012 WL 6213781, at \*5 (D.N.J. Dec. 12, 2012).

<sup>25</sup> *Reserve Sols. Inc.*, 438 F. Supp. 2d at 289 (finding the court does not have subject matter jurisdiction due to the statute's exclusive reservation of jurisdiction in the Delaware Chancery Court); *accord* *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013); *Foti*, 64 Va. Cir. at 65 (“This court has no jurisdiction to hear a claim under a Delaware statute when the Delaware legislature has conferred jurisdiction exclusively on its own courts and neither the Constitution of Virginia nor the General Assembly grants authority to supercede [sic] such restriction.”); *Yale S. Corp.*, 2010 WL 2854687, at \*3; *Lynch*, 2012 WL 6213781, at \*5; *Carbone v. Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at \*4 (Conn. Super. Ct. Oct. 3, 2013) (finding that the reservation of exclusive jurisdiction in Delaware's General Corporation Law unambiguously tried to divest other state courts).

<sup>26</sup> DEL. CODE ANN. tit. 8, §§ 145(k), 203(e), 205(e), 220(c)–(d) (West 2018) (“The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions . . . brought under this section.”).

<sup>27</sup> *Id.* § 145.

<sup>28</sup> *Id.* § 203.

<sup>29</sup> *Id.* § 205.

<sup>30</sup> *Id.* § 220.

the statutes' reservations of exclusive jurisdiction in the Delaware Chancery Court prevent other state courts from exercising subject matter jurisdiction over an action has only recently found acceptance.<sup>31</sup>

Two different courts within the Southern District of New York, along with a Virginia state trial court, have held the jurisdictional reservations in these statutes prevented their courts from exercising subject matter jurisdiction over actions brought under Delaware law.<sup>32</sup> A Connecticut state trial court agreed with that interpretation.<sup>33</sup> But the Seventh Circuit, New York State appellate courts, and a different Connecticut trial court have disagreed, albeit each for different reasons, holding Delaware's General Corporation Law either does not or cannot strip subject matter jurisdiction from *foreign* courts.<sup>34</sup> From here on, and for ease of reference, the former approach will be referred to as the "jurisdictional stripping approach" and the latter as the "internal approach." As will be discussed in depth in Part II, however, it should be noted that the differences between those courts' holdings are more nuanced.<sup>35</sup>

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<sup>31</sup> In 1998, the Seventh Circuit vociferously rejected the argument that the exclusive jurisdiction provisions stripped it of subject matter jurisdiction. *Truck Components Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061–62 (7th Cir. 1998) ("Nor do we suppose for one second that Delaware set out to contract the scope of federal jurisdiction. . . . It is an example of the blunderbuss approach to appellate advocacy. . . ."). But multiple post-2000 cases have accepted the argument. *See Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 289 (S.D.N.Y. 2006); *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013); *Foti v. W. Sizzlin Corp.*, 64 Va. Cir. 64 (2004).

<sup>32</sup> *Reserve Sols. Inc.*, 438 F. Supp. 2d at 289; *accord Transeo S.A.R.L.*, 936 F. Supp. 2d at 405; *Foti*, 64 Va. Cir. at 65.

<sup>33</sup> *Carbone v. Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at \*4 (Conn. Super. Ct. Oct. 3, 2013).

<sup>34</sup> *Truck Components Inc.*, 143 F.3d at 1062 ("Delaware maintains separate systems of courts in law and equity. Claims based on corporate arrangements go to the Court of Chancery rather than to the law courts, where other contracts are litigated. Such an intra-state allocation has no effect on federal litigation, which merged law and equity long ago."); *accord Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (App. Div. 2005); *Anderson v. Children's Corner, Inc.*, No. CV106011812S, 2011 WL 925442, at \*3 (Conn. Super. Ct. Feb. 15, 2011); *see also Finnegan v. Baker*, 88 Mass. App. Ct. 35, 41–42 (2015) (applying sections 204 and 205 of the Delaware Code).

<sup>35</sup> *Compare Reserve Sols. Inc.*, 438 F. Supp. 2d at 289 (holding the statute strips the federal court of subject matter jurisdiction), *with Foti*, 64 Va. Cir. at 64 (holding principles of comity demand Virginia honor the statute's intent to reserve subject matter jurisdiction in Delaware Chancery Court), *with Carbone*, 2013 WL 5781103, at \*4 (finding that the reservation of exclusive jurisdiction in Delaware's General Corporation Law unambiguously tried to divest other state courts, but this is in conflict with Connecticut policy and, thus, cannot divest the State of subject matter jurisdiction), *with Truck Components Inc.*, 143 F.3d at 1062 (finding the Delaware Legislature did not intend to try to strip subject matter jurisdiction and, even if it did, it had no such power), *and Anderson*, 2011 WL 925442, at \*3, *with Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (App. Div. 2005) (holding relinquishing subject matter jurisdiction would violate New York's public policy).

Whether the jurisdictional stripping approach ultimately prevails or proves simply to be a passing fad, there are huge implications not only in the field of corporate litigation, but for American choice-of-law jurisprudence as a whole—and, indeed, for federalism itself.

First, as explored in depth in Part III, the jurisdiction stripping approach overreads the Delaware Legislature's intent and fails to honor the true meaning and simplicity of the provision. The reservations of "exclusive jurisdiction" in the Chancery Court are simply intended to differentiate between Delaware's other state courts.<sup>36</sup> This is because Delaware maintains separate courts of law and equity.<sup>37</sup> The jurisdictional provisions in the General Corporation Law are meant only to differentiate between internal state courts and were never intended to strip jurisdiction from other states.<sup>38</sup>

Second, the jurisdiction stripping approach, as discussed in depth in Part IV, defies American principles of federalism and does not fit within the United States' legal system. Each state, as evinced by the Full Faith and Credit Clause of the Constitution, is presumed equally competent to adjudicate a case, even when a case calls on the state to apply the law of another.<sup>39</sup> Further, although almost all states adhere to the internal affairs doctrine, it is not a rule of law, and it is ultimately the choice of law rules and policies adopted by the *situs* state that determines what substantive law applies.<sup>40</sup> The Constitution simply does not grant state legislatures the power to reach into their sister states' territory and enact laws that would strip that state's courts of otherwise proper jurisdiction.<sup>41</sup> Moreover, under the current regime, the *situs* state has ultimate authority as to whether it would honor the enacting state's attempt to strip it of jurisdiction.<sup>42</sup>

Part II will discuss the emerging split in authorities and will discuss the nuances of each court's approach. Part III will discuss the Delaware Legislature's intent in using the term "exclusive jurisdiction." Part IV will explain why state legislatures do not have the power to strip jurisdiction from other courts—even when those states apply the laws of the drafting state. Part IV will also explain why a new subject matter jurisdiction exception for corporations is unnecessary, contrary to American principles of federalism, and potentially harmful to corporations.

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<sup>36</sup> See *infra* Part III; see also *infra* Parts II.A, F.

<sup>37</sup> See *infra* Part III; see also *infra* Parts II.A, F.

<sup>38</sup> See *infra* Part III; see also *infra* Parts II.A, F.

<sup>39</sup> See *infra* Part IV; see also *infra* Part III, Parts II.A, F.

<sup>40</sup> See *infra* Part IV; see also *infra* Parts II.A, C, F.

<sup>41</sup> *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42–43 (1965).

<sup>42</sup> See, e.g., *Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (App. Div. 2005).

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## II. THE EMERGING SPLIT

A. *Seventh Circuit Court of Appeals (1998): No Power or Intent to Strip Subject Matter Jurisdiction*

In 1984, Beatrice Company spun off a subsidiary named Brillion and sold its stock to a small group of investors who, four years later, resold it to Truck Components Inc. (Truck Components).<sup>43</sup> Brillion and Truck Components brought suit against Beatrice demanding it bear the costs of environmental cleanup at and near Brillion's facilities in Wisconsin.<sup>44</sup> Brillion and Truck Components also sued Brillion's former president who had arraigned for disposal of the company's wastes.<sup>45</sup>

The Seventh Circuit found Brillion was not the victim, but the polluter itself, and found the fact Brillion was spun off of its incorporators did not make them liable for its actions.<sup>46</sup> As for the former president, he had agreed to continue serving as president of Brillion after it was spun off in exchange for Brillion indemnifying him for any actions he took while an officer of Brillion.<sup>47</sup> The Seventh Circuit held Brillion's admission that it sued its former president as a shareholder entitled the former president to victory on the merits because any award would be circular due to the indemnity agreement.<sup>48</sup> The circuit court also held the former president was entitled to recovery of expenses under Brillion's corporate articles and bylaws, which provided for indemnification to the maximum extent allowed by state law.<sup>49</sup>

Brillion was a Delaware Corporation, so the Seventh Circuit applied Delaware's General Corporation Law, specifically title 8, section 145 of the Delaware Code, which provides an officer or director sued unsuccessfully by the firm recovers defense expenses as a matter of course.<sup>50</sup> The plaintiffs countered by alleging the Seventh Circuit lacked subject matter jurisdiction to award indemnification expenses under section 145, because subsection (k) provided: "[t]he Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise."<sup>51</sup>

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<sup>43</sup> Truck Components Inc. v. Beatrice Co., 143 F.3d 1057, 1058 (7th Cir. 1998).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1061.

<sup>46</sup> *Id.* at 1059.

<sup>47</sup> *Id.* at 1061.

<sup>48</sup> *Id.*

<sup>49</sup> *Truck Components Inc.*, 143 F.3d at 1061.

<sup>50</sup> *Id.* (applying section 145(k) of the Delaware Code).

<sup>51</sup> *Id.* (alteration in original).

First, the Seventh Circuit found section 145(k) did not apply on its own terms because Brillion brought the action under the Comprehensive Environmental Response, Compensation, and Liability Act, not under section 145.<sup>52</sup> In essence, the indemnification action was brought as a counterclaim and therefore subsection (k) did not apply.<sup>53</sup>

Next, reaching the deeper issue, the court held state law could not prevent a federal court from exercising jurisdiction created by Congress.<sup>54</sup> The court, in part, relied on *General Atomic Co. v. Felter*, in which the Supreme Court held a New Mexico state court lacked the power to enjoin litigants from filing and prosecuting a claim in federal court because Congress grants the right to bring an action in federal court and the states have no power to limit such right.<sup>55</sup> Because New Mexico lacked the power to restrict federal jurisdiction, the Supreme Court reversed the district court's dismissal for lack of subject matter jurisdiction.<sup>56</sup>

Finally, the Seventh Circuit relied on a prior Seventh Circuit decision for the general proposition that states have no power to enlarge or contract federal jurisdiction.<sup>57</sup>

While the states have never tried to expand federal subject matter jurisdiction, courts and commentators have long assumed that they have no power to contract federal jurisdiction either.<sup>58</sup> That assumption still holds true and was affirmed by the Supreme Court's 2006 decision in *Marshall v. Marshall*—binding precedent on the federal courts.<sup>59</sup>

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<sup>52</sup> *Id.* (applying section 145(k) of the Delaware Code).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 12, 16 (1977).

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Truck Components Inc.*, 143 F.3d at 1061 (citing *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, 409 (7th Cir. 1984)). *Beach v. Owens* cites to a Ninth Circuit case which, in turn, collects various Supreme Court cases supporting the proposition. See *Beach*, 728 F.2d at 409 (citing *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315–16 (9th Cir. 1982) (collecting cases)).

<sup>58</sup> 17A FED. PRAC. & PROC. JURIS. § 4211 (3d ed.), Westlaw (database updated Apr. 2018); *Davet v. City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006); *Thompkins v. Stuttgart Sch. Dist. No. 22*, 787 F.2d 439, 441–42 (8th Cir. 1986) (holding state legislation may not preclude a federal court from exercising pendent jurisdiction even if it vests exclusive jurisdiction in its state courts); *Markham v. City of Newport News*, 292 F.2d 711, 713 (4th Cir. 1961).

<sup>59</sup> *Marshall v. Marshall*, 547 U.S. 293, 313–14 (2006) (“It is clear, under [*Erie*] that Texas law governs the substantive elements of Vickie’s tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. We have long recognized that ‘a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction.’ Jurisdiction is determined ‘by the law of the court’s creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action.’ Directly on point, we have held that the jurisdiction of the federal



Additionally, the Seventh Circuit stated that it would not “suppose for one second” that the Delaware Legislature sought to contract federal jurisdiction when it enacted section 145(k).<sup>60</sup> Instead, the court believed the exclusive jurisdiction provision in section 145 was merely intended to differentiate between Delaware’s state courts.<sup>61</sup> As the Seventh Circuit explained, unlike the federal judiciary, which merged courts of law and equity long ago, Delaware maintains separate courts of law and equity, with the court of equity being the Chancery Court.<sup>62</sup> The Seventh Circuit thought it obvious that the recital of “exclusive” jurisdiction was simply the Delaware Legislature’s allocation of jurisdiction between its own courts, going so far as to call the Plaintiff’s argument “an example of the blunderbuss approach to appellate advocacy.”<sup>63</sup> Yet, that approach has since found a home in certain state and federal courts, including the Southern District of New York.

B. *Virginia Trial Court (2004): Jurisdiction Flows from the Governing Statute and Comity Demands Adherence, Especially in the Case of Corporations*

In *Foti v. W. Sizzlin Corp.*, Foti made a written request, as permitted by section 220 of Delaware’s General Corporation Law, that he, as a Western Sizzlin shareholder, a Delaware corporation with its principal place of business in Roanoke, Virginia, be permitted to inspect the corporate books and records.<sup>64</sup> Western Sizzlin denied his request and Foti filed a Bill of Complaint asking that a Writ of Mandamus be issued in accord with section 220, to compel Western Sizzlin to permit Foti to inspect the corporation’s books and records.<sup>65</sup> Western Sizzlin demurred, asserting that Virginian courts lack subject matter jurisdiction to mandate inspection under section 220 because subsection (d) reserves exclusive jurisdiction in the Delaware Chancery Court.<sup>66</sup> The Virginia trial court sustained Western Sizzlin’s demur.<sup>67</sup>

In a thoughtful opinion, the trial court discussed how Virginian courts may only be conferred subject matter jurisdiction by the State’s Constitution

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courts, ‘having existed from the beginning of the Federal government, [can]not be impaired by subsequent state legislation creating courts of probate.’) (internal citations omitted).

<sup>60</sup> *Truck Components Inc.*, 143 F.3d at 1061–62.

<sup>61</sup> *Id.* at 1062.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Foti v. W. Sizzlin Corp.*, 64 Va. Cir. 64, 64 (2004).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

or General Assembly.<sup>68</sup> The court said “[w]here subject matter jurisdiction is acquired from the General Assembly, the General Assembly may . . . choose to withhold, limit, or carve out exceptions” to the courts’ jurisdiction, and comity suggests that the limitations imposed by one state’s legislature must be universally acknowledged.<sup>69</sup>

Further, the court discussed how corporations are special when it comes to applying the laws of other states.<sup>70</sup> Citing the Supreme Court’s decision in *Broderick v. Rosner*, the court described how becoming a shareholder “is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation.”<sup>71</sup>

From this opinion, the court appears to have made two alternative holdings: (1) Because the applicable statute restricted subject matter jurisdiction to the Delaware Chancery Court, Virginian courts lacked subject matter jurisdiction; and, alternatively, (2) comity demands, especially in the context of shareholder disputes, that foreign states respect the state of incorporation’s limitations on jurisdiction. As discussed in Part IV, the first holding appears to be an error. And, as discussed in Part III, the second holding misconstrues Delaware law. A traditional forum non conveniens analysis would have been more appropriate here and could have resulted in the same outcome.

C. *New York Appellate Courts (2005): Comity Is Not a Rule of Law and New York Public Policy Prevails*

The New York state courts sided with the Seventh Circuit, but on different grounds.<sup>72</sup> In *Sachs v. Adeli*, the plaintiff, Richard Sachs, brought a fraud action against Adeli and Klothes (NY) LLC, a limited liability company incorporated under Delaware law.<sup>73</sup> Sachs moved to compel Adeli and Klothes (NY) “to authorize the release of tax returns filed by their predecessor in interest.”<sup>74</sup> The defendants argued New York state courts lacked subject matter jurisdiction to decide this case because the Delaware Commerce and Trade Law “vest[ed] exclusive jurisdiction over this dispute in the Delaware Court of Chancery.”<sup>75</sup>

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<sup>68</sup> *Id.* at 65.

<sup>69</sup> *Id.*

<sup>70</sup> *Foti*, 64 Va. Cir. at 65–66.

<sup>71</sup> *Id.* at 67.

<sup>72</sup> *Sachs v. Adeli*, 804 N.Y.S.2d 731, 732 (App. Div. 2005).

<sup>73</sup> *Id.* at 732.

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

<sup>75</sup> *Id.* at 733 (citing DEL. CODE ANN, tit. 6, § 18-305 (f) (West, Westlaw through 81 Del. Laws 2018, chs. 200–220)).

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The New York appellate court rejected the defendants' assertion that Delaware law could strip them of subject matter jurisdiction.<sup>76</sup> Quoting the New York Court of Appeals and the United States Supreme Court, the court held the doctrine of comity "is not a rule of law, but one of practice, convenience and expediency."<sup>77</sup> The court explained that, so long as the New York courts have an interest in the litigation, the purported "exclusive" jurisdiction of the applicable state statute does not prevent the State's courts from exercising subject matter jurisdiction.<sup>78</sup>

Moreover, the court also cited New York's strong policy "interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world."<sup>79</sup> The court held that "that interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions" occurring within the State.<sup>80</sup> Accordingly, because the complained-of transaction took place in New York, the court held New York's strong public policy must prevail over the conflicting foreign legislation.<sup>81</sup>

The ruling in *Adeli* has its roots in *Marine Midland Bank, N.A. v. United Missouri Bank*, another appellate case from New York's First Department.<sup>82</sup> In that case, the appellate court held a Kansas statute that reserved exclusive jurisdiction over the probate of Kansan estates did not divest the New York courts of subject matter jurisdiction.<sup>83</sup> Citing the same decision from the New York Court of Appeals as *Sachs*, the court relied on the fact that comity did not require, or even suggest, that the State's courts surrender their interest in adjudicating disputes, which have significant contacts with New York commerce.<sup>84</sup>

The New York state courts' approach to this issue relies on the fact that the doctrine of comity is not a rule of law and does not compel the State to apply Delaware law.<sup>85</sup> Rather, the doctrine of comity is simply one state's entirely voluntary decision to defer to the law of another to promote uniformity, encourage cooperative federalism, or express the hope for

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<sup>76</sup> *Id.*

<sup>77</sup> *Sachs*, 804 N.Y.S.2d at 733 (quoting *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980)).

<sup>78</sup> *Id.* (quoting *Ehrlich-Bober & Co.*, 49 N.Y.2d at 582).

<sup>79</sup> *Id.* (quoting *Marine Midland Bank, N.A. v. United Missouri Bank*, 643 N.Y.S.2d 528, 531 (App. Div. 1996)).

<sup>80</sup> *Id.* (quoting *Marine Midland Bank*, 643 N.Y.S.2d at 531)).

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

<sup>82</sup> 643 N.Y.S.2d 528.

<sup>83</sup> *Id.* at 531.

<sup>84</sup> *Id.*

<sup>85</sup> *Ehrlich-Bober & Co.*, 404 N.E.2d at 730 (quoting *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900)).

reciprocal advantage in a future case.<sup>86</sup> When there is conflict, New York's policy prevails over the foreign legislation.<sup>87</sup>

Importantly, the New York courts seemed to assume the reservation of exclusive jurisdiction was intended to strip subject matter jurisdiction and that application of Delaware law would require the court honor that reservation.<sup>88</sup> Consequently, the court applied New York law and opined that, even if Delaware law was to apply, the result would be the same.<sup>89</sup>

The New York appellate court's decision to apply New York law is legally sound.<sup>90</sup> But the assumptions the court appears to make about Delaware law pigeonholes lower courts and may create future issues. For example, if a New York Supreme Court (i.e., trial court) wished to apply Delaware law because a company is incorporated in Delaware and New York law would have a different result, it could not do so if the applicable Delaware statute contains an exclusive jurisdiction provision.<sup>91</sup> That is because a false dichotomy appears to have been created: either the court applies Delaware law (including the letter of the exclusive jurisdiction provision) or it applies New York law.<sup>92</sup> The trial court has no option of applying just the substantive provisions of Delaware law. As explained in Parts III and IV, a proper interpretation of Delaware law or a conventional application of federal principles would give the trial courts this option.

D. *Southern District of New York (2006): Without Explanation, State Legislatures May Strip Subject Matter Jurisdiction*

Unlike the New York state courts, the Southern District of New York gave effect to the exclusive jurisdiction provisions in Delaware's General Corporation Law in two cases.<sup>93</sup> In *Reserve Solutions Inc. v. Vernaglia*, the plaintiff, Reserve Solutions, Inc., brought a breach of fiduciary duty action against Vernaglia, a former officer and director and a current shareholder of the company.<sup>94</sup> Vernaglia counterclaimed for, among other things, inspection of the corporate books and records.<sup>95</sup> Reserve Solutions was

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See Sachs*, 804 N.Y.S.2d at 735.

<sup>89</sup> *Id.* at 734–35.

<sup>90</sup> *See Ehrlich-Bober & Co.*, 404 N.E.2d at 730.

<sup>91</sup> *See Sachs*, 804 N.Y.S.2d at 733.

<sup>92</sup> *See id.*

<sup>93</sup> *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013) (declining subject matter jurisdiction pursuant to Delaware's exclusive jurisdiction provision); *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 289 (S.D.N.Y. 2006) (same).

<sup>94</sup> *Reserve Sols. Inc.*, 438 F. Supp. 2d at 284.

<sup>95</sup> *Id.*

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incorporated under Delaware law, but had offices located in Manhattan, New York.<sup>96</sup>

Reserve Solutions argued section 220 of Delaware's General Corporation Law unmistakably vested the Delaware Chancery Court with exclusive jurisdiction over claims to compel the inspection of books and records under the applicable statute.<sup>97</sup> Pursuant to the statutory mandate, Reserve Solutions asked the Southern District of New York to dismiss Vernaglia's counterclaim for lack of subject matter jurisdiction.<sup>98</sup>

Vernaglia, in response, contended that the statutory provision reserving exclusive jurisdiction in the Delaware Chancery Court was either procedural or remedial.<sup>99</sup> Statutory provisions that are procedural or remedial, Vernaglia argued, have no bearing on substantive rights and, therefore, the Southern District of New York has subject matter jurisdiction despite the statutory reservation.<sup>100</sup> Vernaglia's argument rested entirely on a district court case from the Western District of Pennsylvania, *NVF Co. v. Sharon Steel Corp.*<sup>101</sup> In that case, the district court, in considering an identical recital of exclusive jurisdiction, held the provision was either procedural or remedial, and the district court could exercise subject matter jurisdiction.<sup>102</sup>

The Southern District of New York sided with Reserve Solutions.<sup>103</sup> The court held it lacked subject matter jurisdiction pursuant to the exclusive reservation of jurisdiction in Section 220.<sup>104</sup> The implications of this ruling are striking when taken to its logical ends. In a few sentences, the Southern District of New York surrendered its ability to hear petitions for the inspection of corporate books and records arising under Delaware law.<sup>105</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> Reply Memorandum of Law in Further Support of Plaintiff and Third-Party Defendants' Motion to Dismiss the Counterclaim and Third-Party Complaint and in Opposition to Defendant/Third-Party Plaintiff's Cross-Motion for Leave to File and Serve Second Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint at 10, *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280 (S.D.N.Y. 2006) (No. 05-8622), 2006 WL 738793.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> Memorandum of Law of Defendant/Third-Party Plaintiff i) in Opposition to Motion of Plaintiff and Third-Party Defendant to Dismiss the Counterclaim and Third-Party Complaint, and ii) in Support of Motion of Defendant/Third-Party Plaintiff for Leave to File and Serve Second Amended Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint at 10, *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280 (S.D.N.Y. 2006) (No. 05-CV-8622), 2006 WL 738792.

<sup>100</sup> *Id.* at 10–11.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*; *NVF Co. v. Sharon Steel Corp.*, 294 F. Supp. 1091, 1093 (W.D. Pa. 1969).

<sup>103</sup> *Reserve Sols. Inc.*, 438 F. Supp. 2d at 288–89.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*; *see also* *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013).

And this ruling may not be limited to actions for inspection because, as discussed above, various other sections of Delaware's General Corporation Law contain these recitals of exclusive jurisdiction.<sup>106</sup>

Though this ruling is not binding in subsequent cases within the Southern District of New York, in 2013, the Southern District followed its holding in *Reserve Solutions*.<sup>107</sup> This trend, if it continues, amounts to an astonishing abdication by the federal court seated in the heart of the nation's largest financial center.<sup>108</sup> But more problematic is that, if other federal courts follow this approach and respect reservations of exclusive jurisdiction, then the federal courts would, in effect, allow state legislatures to contract federal jurisdiction in cases where the federal court applies the state's laws.<sup>109</sup> As explained in Part IV.A, states do not have such power.

E. *Proliferation of the Southern District of New York's Approach*

The approach to these recitals of exclusive jurisdiction taken by the Southern District of New York in *Reserve Solutions* and *Transeo*, appears to be proliferating.<sup>110</sup> In *Yale South Corp.*, an unpublished opinion from 2010, the Northern District of Oklahoma declined to assert subject matter jurisdiction over a petition for inspection of a corporation's books and records, because of section 220's recital of exclusive jurisdiction.<sup>111</sup> The court relied on *Reserve Solutions* and *Foti*.<sup>112</sup>

Then, citing both *Reserve Solutions* and *Yale*, in another unpublished opinion, the District of New Jersey also dismissed an action brought under section 220 of Delaware's General Corporation Law.<sup>113</sup> The court held it lacked subject matter jurisdiction to hear the action because of the statute's

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<sup>106</sup> DEL. CODE ANN. tit. 8, §§ 145(k), 203(e), 205(e), 220(c)–(d) (West, Westlaw through 81 Del. Laws 2018, chs. 200–220) (“The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions . . . brought under this section.”).

<sup>107</sup> *Transeo S.A.R.L.*, 936 F. Supp. 2d at 405.

<sup>108</sup> See *The Leonard Lopate Show, America's Influential Trial Court and the Evolution of the Justice System*, WNYC (Nov. 18, 2014), <http://www.wnyc.org/story/americas-most-influential-trial-court-and-evolution-justice-system/>; Ben Moshinsky, *The 20 Most Powerful Financial Centres in the World*, BUS. INSIDER (Sept. 12, 2017, 4:32 AM), <http://www.businessinsider.com/most-powerful-financial-centres-gfci-index-for-2017-2017-9/#20-shenzhen-the-chinese-city-climbed-two-places-to-reach-the-top-20-scoring-highly-in-the-infrastructure-category-1>.

<sup>109</sup> See *Yale S. Corp. v. Eclipse Servs., Inc.*, No. 10-CV-0337-CVE-FHM, 2010 WL 2854687, at \*3 (N.D. Okla. July 19, 2010) (declining jurisdiction because statute contained an exclusive jurisdiction provision); *Lynch v. Basinger*, No. CIV. 12-637 RBK/KMW, 2012 WL 6213781, at \*5 (D.N.J. Dec. 12, 2012) (same).

<sup>110</sup> See *Yale S. Corp.*, 2010 WL 2854687, at \*3; *Lynch*, 2012 WL 6213781, at \*5.

<sup>111</sup> *Yale S. Corp.*, 2010 WL 2854687, at \*3.

<sup>112</sup> *Id.*

<sup>113</sup> *Lynch*, 2012 WL 6213781, at \*5.

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exclusive reservation of jurisdiction in the Delaware Chancery Court.<sup>114</sup>

F. *Connecticut's Twin Approaches: No Power or Intent to Strip Jurisdiction vs. Connecticut Public Policy Prevails*

Two thoughtful opinions issued by trial courts in the State of Connecticut explicitly address the emerging controversy over Delaware General Corporations Law's exclusive jurisdiction reservations.<sup>115</sup> The first is *Anderson v. Children's Corner, Inc.* Children's Corner was a Delaware corporation that had its principal place of business in Ridgefield, Connecticut.<sup>116</sup> Three stockholders filed a one-count complaint asserting their rights to inspect the corporate books and records under section 220 of Delaware's General Corporations Law.<sup>117</sup> The defendant-corporation filed a motion to dismiss for lack of subject matter jurisdiction on the ground that section 220 vested exclusive jurisdiction to decide controversies under the statute in the Delaware Court of Chancery.<sup>118</sup>

The question was one of first impression for the Connecticut courts.<sup>119</sup> Citing *Fotiand Sachs*, the court recognized the split in authorities and, instead, turned to statutory history of section 220 to determine the Delaware Legislature's intent.<sup>120</sup>

The court found that, before section 220 was enacted in 1967, the inspection of corporate books and records was not grounds for independent and primary relief.<sup>121</sup> This meant that, while the inspection of corporate books and records could be a remedy incidental to another cause of action, it was not sufficient to establish standing in the Delaware courts.<sup>122</sup> In other words, the inspection of corporate books and records was initially a remedy, but not a cause of action.<sup>123</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Anderson v. Children's Corner, Inc.*, No. CV106011812S, 2011 WL 925442, at \*2 (Conn. Super. Ct. Feb. 15, 2011) ("There is a split in authority in other jurisdictions as to whether the Delaware statute divests sister states of jurisdiction to hear an action under § 220."); *Carbone v. Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at \*5 (Conn. Super. Ct. Oct. 3, 2013) ("Several other courts that have addressed the meaning of the exclusive jurisdiction provision in § 220 have come to the same conclusion . . . . In contrast to those decisions, the court in [*Anderson*], determined that § 220(c) did not deprive other states of jurisdiction over claims under that statute.").

<sup>116</sup> *Anderson*, 2011 WL 925442, at \*1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (citing *Perrott v. U.S. Banking Corp.*, 53 F. Supp. 953, 957 (D. Del. 1944); *State v. Standard Oil Co. of Kansas*, 18 A.2d 235, 237–38 (Del. Super. Ct. 1941); *Parrish v. Commonwealth Tr. Co.*, 181 A. 658, 659 (Del. Ch. 1935)).

<sup>122</sup> *Perrott*, 53 F. Supp. at 957.

<sup>123</sup> *Id.*; Letter from Collins J. Seitz, Chancellor, Del. Chancery Court, to Irving Morris 2

Because the inspection remedy was only incidental and not a cause of action, either the Delaware Superior Court or Chancery Court could order such a remedy, if deemed appropriate, in any case brought before them on other grounds.<sup>124</sup> The court in *Anderson* found the Delaware Corporation Law Revision Committee explicitly named the Court of Chancery to allow new, standalone actions for inspection to be resolved expeditiously by one trial-level court.<sup>125</sup>

In light of section 220's statutory history, the court declined to find the Delaware Legislature intended to try to divest her sister states' courts of subject matter jurisdiction.<sup>126</sup> Instead, and like the Seventh Circuit, the court held Connecticut courts did have subject matter jurisdiction because the explicit reservation of "exclusive jurisdiction" was intended only to differentiate between Delaware's internal courts.<sup>127</sup>

Nonetheless, the court went on to differentiate *Foti* on other grounds.<sup>128</sup> The court appears to have assumed from the *Foti* opinion that Virginia law does not have some provision that grants its courts general jurisdiction on matters arising within the state.<sup>129</sup> Instead, it appears the court in *Anderson* believed that subject matter jurisdiction in Virginia must be specifically granted in each statute or in specific matters identified by the Virginia Constitution.<sup>130</sup> The court goes on to cite several Connecticut statutes that

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(Apr. 22, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf> ("Although he does not say so, he seems to assume that an equitable owner could obtain inspection in Chancery. I am not sure that this is the law. I believe that inspection in Chancery either has to be incidental to a pending case in Chancery or in the law court. Thus, although I could be wrong, I believe the granting of a right to inspect to an equitable owner, apart from pending litigation, would amount to the granting of a new right."); Letter from Irving Morris to All Members of the Del. Corp. Law Revision Comm'n, Stock Holder's Rights of Inspection 1 (May 6, 1965),

<http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf> ("As we know, granting an equitable owner of stock or a voting trust certificate holder (legal or equitable) a right of inspection would introduce a new right in our law.").

<sup>124</sup> *Anderson*, 2011 WL 925442, at \*2; Letter from Collins J. Seitz, Chancellor, Del. Chancery Court, to Irving Morris 2 (Apr. 22, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf>; Letter from Irving Morris to All Members of the Delaware Corporation Law Revision Commission, Stock Holder's Rights of Inspection 1 (May 6, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf>.

<sup>125</sup> *Anderson*, 2011 WL 925442, at \*2; *see also* Letter from Ernest Folk III to Richard F. Corroon (Dec. 20, 1966), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf> ("I am glad that Delaware will retain the established method of keeping corporate litigation in the Court of Chancery.").

<sup>126</sup> *Anderson*, 2011 WL 925442, at \*3.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



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vest the Connecticut Superior Court with original jurisdiction for all causes of action arising within the states, except probate actions and those where jurisdiction is explicitly provided by statute.<sup>131</sup>

This is an interesting point on its face, but one without substance. Virginia civil courts do have general jurisdiction over civil claims, which presumes original jurisdiction just like that of the Connecticut Superior Court.<sup>132</sup> Moreover, if the court's understanding in *Anderson* was correct, then Virginia could never exercise subject matter jurisdiction over cases in which its courts would apply foreign law because the Virginian court would have no statutory or constitutional provision granting it jurisdiction. This is, obviously, not the case, as Virginian courts have applied foreign law, including Delaware's General Corporation Law.<sup>133</sup>

In *Carbone v. Nxegen Holdings, Inc.*, the Superior Court of Connecticut for the District of Hartford disagreed with the District of New Haven's approach in *Anderson*, primarily that the *Anderson* court examined the statutory history of the Delaware law where the statute, in the *Carbone* court's opinion, was "unambiguous" on its face.<sup>134</sup> The court in *Carbone* found no Delaware case interpreting the exclusive jurisdiction provision and, accordingly, applied Delaware's rules of statutory construction.<sup>135</sup> Pursuant to Delaware's rules of statutory construction, the Connecticut court was tasked with determining whether the relevant statute was ambiguous, meaning it could be reasonably interpreted in two or more different ways or a literal reading would lead to an unreasonable or absurd result.<sup>136</sup> If the statute is determined unambiguous, the *Carbone* court stated it must give the statutory language its plain meaning.<sup>137</sup> Moreover, the *Carbone* court explained that, in accord with Delaware's rules of construction, it must presume that the General Assembly purposefully chose particular language and that the court ought to avoid rendering any of the statute's terms

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<sup>131</sup> *Id.*

<sup>132</sup> See *Virginia Courts in Brief*, VIRGINIA'S JUSTICE SYSTEM (2009), <http://www.courts.state.va.us/courts/cib.pdf> ("The circuit court also handles any case for which jurisdiction is not specified in the Code of Virginia."); VA. CODE ANN. § 17.1-513 (West, Westlaw through End of the 2017 Reg. Sess.) ("[The circuit courts] shall have original and general jurisdiction of all civil cases, except . . ."); VA. CODE ANN. § 16.1-77 (West, Westlaw through End of the 2017 Reg. Sess.).

<sup>133</sup> *E.g.*, *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 609 (2005) ("[B]ecause the controversy involves the internal affairs of the corporation, the laws of Delaware, the state of incorporation, apply.").

<sup>134</sup> *Carbone v. Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at \*5 (Conn. Super. Ct. Oct. 3, 2013) ("The court in *Anderson* did not, however, perform a proper statutory analysis.").

<sup>135</sup> *Id.* at \*4.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

superfluous.<sup>138</sup>

Despite recognizing the split in authorities over the interpretation of section 220's exclusive jurisdiction provision, the *Carbone* court found the statute unambiguous.<sup>139</sup> Specifically, the *Carbone* court looked to the plain meaning of the term "exclusive" and two other parts of section 220, which state: "The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business," and "[t]he Court may order books, documents and records . . . to be brought within this State and kept in this State upon such terms and conditions as the order may prescribe."<sup>140</sup> The *Carbone* court believed it was clear that the Delaware Legislature, as evinced by its choice in terms and by the provisions quoted above, intended to permit only "the Delaware Chancery Court to adjudicate the inspection rights of shareholders of a Delaware corporation."<sup>141</sup> Accordingly, the *Carbone* court found the Delaware law was in conflict with Connecticut law and moved on to a conflict-of-laws analysis.<sup>142</sup>

The *Carbone* court began by describing how Connecticut generally follows the internal affairs doctrine when it comes to corporate matters but may apply its own law where Connecticut has a dominant interest contrary to the applicable foreign law.<sup>143</sup> The court then stated that several factors weighed in favor of applying Connecticut law, namely, that Nxegen Holdings' principal place of business was in Connecticut and the company only did business in the State of Connecticut—not in Delaware.<sup>144</sup> Because of these two facts, and in light of the state's interest in providing a convenient forum for those doing business in the state, the *Carbone* court concluded Connecticut had a dominant interest in the litigation and held it should apply Connecticut inspection laws—and not the laws of Delaware (i.e., section 220), the state in which the corporation was incorporated.<sup>145</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*4–5.

<sup>140</sup> *Carbone*, 2013 WL 5781103, at \*4 (quoting DEL. CODE ANN. tit. 8, § 220 (b)–(c) (West 2010)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*5 ("Accordingly, the exclusive jurisdiction provision in § 220 creates an outcome determinative conflict of law between Delaware and Connecticut shareholder inspection rights provisions. The court must therefore perform a conflict of law analysis to determine whether Delaware or Connecticut law should be applied.").

<sup>143</sup> *Id.* at \*7.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at \*7–8 ("Connecticut's interest in providing a shareholder an efficient adjudication of its inspection rights, in conjunction with the other factors discussed above, outweighs whatever Delaware's interest may be in having shareholder inspection disputes adjudicated solely in its Chancery Court. Accordingly, Connecticut law should be applied in the present matter.").

The *Carbone* court's ruling is an important illustration of how, even if the jurisdictional stripping approach prevails—which may seem like a boon for corporations because it would force prospective litigants to travel to Delaware to sue the company—such approach could backfire and be even less favorable to corporations than the internal approach. This is because Delaware law is largely more favorable to corporations,<sup>146</sup> and, if the jurisdictional stripping approach prevails, rather than the situs state abdicating subject matter jurisdiction, it may simply choose to apply its law out of public policy concerns.<sup>147</sup> Under the *Carbone* court's approach—and, indeed, the New York court's approach—rather than these exclusive jurisdiction provisions promoting consistency in the adjudication of a corporation's internal affairs, these provisions may undermine the internal affairs doctrine by forcing states to choose between surrendering subject matter jurisdiction or applying the situs state's laws.

The following section addresses the Delaware Legislature's intent in utilizing recitals of “exclusive” jurisdiction. While this may not be availing to jurisdictions that fail to find ambiguity in the recital, it is important nonetheless because it vindicates the Seventh Circuit's and the *Anderson* court's approach.

G. *Alaska Supreme Court (2018): States Cannot Strip Other States of Jurisdiction*

In *Toni 1 Trust, by Tangwall v. Wacker*, a Montana state court found the defendant fraudulently transferred property to a trust established under Alaska law and the transfers were void as a result.<sup>148</sup> The defendant filed an action in Alaska, claiming the Alaska statute governing fraudulent transfers of property vested exclusive jurisdiction in Alaskan courts.<sup>149</sup>

The statute at issue stated: “A court of this state has exclusive jurisdiction over an action brought under a cause of action or claim for relief that is based on a transfer of property to a trust that is the subject of this section.”<sup>150</sup> Taking up the issue, the Alaska Supreme Court said “we have no doubt the Alaska legislature's purpose in enacting that statute was to prevent other state and federal courts from exercising subject matter jurisdiction over fraudulent transfer actions against such trusts. The question, however, is whether “[it] can achieve that intended result.”<sup>151</sup> The

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<sup>146</sup> Haskins, *supra* note 1.

<sup>147</sup> *E.g.*, *Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (App. Div. 2005).

<sup>148</sup> 413 P.3d 1199, 1201 (Alaska 2018).

<sup>149</sup> *Id.*

<sup>150</sup> ALASKA STAT. § 34.40.110(k) (2018).

<sup>151</sup> *Toni 1 Tr., by Tangwall*, 413 P.3d at 1203 (citations omitted).

Court held it could not.<sup>152</sup>

Discussing *Tennessee Coal, Iron & R.R. Co. v. George*,<sup>153</sup> the Alaska Supreme Court noted the United States Supreme Court long ago held states were not required to acquiesce to attempts by their sister states to limit their jurisdiction.<sup>154</sup> “[A]cknowledg[ing] that several of [its] sister states have concluded that similar statutes do, in fact, restrict their jurisdiction,” the Court found those cases distinguishable because they were based on differences in state law or policy that was not applicable to Alaska.<sup>155</sup> The Court found that under *Tennessee Coal* the assertion of exclusive jurisdiction could not render the judgment against the Alaskan trust unenforceable.<sup>156</sup>

### III. THE DELAWARE LEGISLATURE’S TRUE INTENT

From the hodgepodge of opinions above,<sup>157</sup> three approaches can be distilled with respect to the intent of the recitals. Courts like the Seventh Circuit and the *Anderson* court looked to the legislative history and structure of the Delaware state courts to try and understand what the Delaware Legislature intended.<sup>158</sup> The Appellate Division of the New York Supreme Court did not consider the Delaware Legislature’s intent and defaulted to its own policy interests to apply New York law.<sup>159</sup> Similarly, the Western District of Pennsylvania also did not look to intent, but relied on general choice of laws conventions.<sup>160</sup> The *Carbone* court was the only court to explicitly reject considering the legislative intent,<sup>161</sup> but joined Virginia, the Southern District of New York, the District of New Jersey, and the Northern District of Oklahoma in, presumably, finding the statute unambiguous.<sup>162</sup> In

<sup>152</sup> *Id.*

<sup>153</sup> 233 U.S. 354 (1914).

<sup>154</sup> *Toni I Tr., by Tangwall*, 413 P.3d at 1203 (citing *Tennessee Coal*, 233 U.S. at 360).

<sup>155</sup> *Id.* at 1204.

<sup>156</sup> *Id.* at 1205–06.

<sup>157</sup> *Truck Components, Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061–62 (7th Cir. 1998); *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013); *Lynch v. Basinger*, No. 12-637, 2012 WL 6213781, at \*5 (D.N.J. Dec. 12, 2012); *Yale S. Corp. v. Eclipse Servs., Inc.*, No. 10-CV-0337-CVE-FHM, 2010 WL 2854687, at \*3 (N.D. Okla. July 19, 2010); *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 288–89 (S.D.N.Y. 2006); *NVF Co. v. Sharon Steel Corp.*, 294 F. Supp. 1091, 1093 (W.D. Pa. 1969); *Toni I Tr., by Tangwall*, 413 P.3d at 1203; *Carbone v. Nxegen Holdings, Inc.*, No. HHDCV136039761S, 2013 WL 5781103, at \*5 (Conn. Super. Ct. Oct. 3, 2013); *Anderson v. Children’s Corner, Inc.*, No. CV106011812S, 2011 WL 925442, at \*3 (Conn. Super. Ct. Feb. 15, 2011); *Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (N.Y. App. Div. 2005); *Foti v. W. Sizzlin Corp.*, 64 Va. Cir. 64, 65 (Va. Cir. Ct. 2004).

<sup>158</sup> *See Truck Components Inc.*, 143 F.3d at 1061–62; *Anderson*, 2011 WL 925442, at \*3.

<sup>159</sup> *Sachs*, 804 N.Y.S.2d at 733.

<sup>160</sup> *See NVF Co.*, 294 F. Supp. at 1093.

<sup>161</sup> *See Carbone*, 2013 WL 5781103, at \*5.

<sup>162</sup> *See id.*; *Transeo S.A.R.L.*, 936 F. Supp. 2d at 405; *Lynch*, 2012 WL 6213781, at \*5;

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sum, most courts have considered the Delaware Legislature's intent, and a majority read the statute as unambiguously trying to strip jurisdiction from all other courts.<sup>163</sup> The minority disagreed or completely avoided the issue.<sup>164</sup>

In 2014, the Delaware Chancery Court finally spoke on the issue in *Ex rel. Daniel Kloiber Dynasty Trust*.<sup>165</sup> In that case, William Nicholas Kloiber ("Nick"), the former special trustee of the Kloiber Dynasty Trust, allegedly took "action contrary to the status quo orders" issued by a Kentucky Family Court.<sup>166</sup> The current special trustee, PNC Bank, and Nick "filed petitions seeking instructions and declarations" from the Delaware Chancery Court.<sup>167</sup> The two parties contended that the Kentucky Family Court improperly asserted jurisdiction over the trustee, the special trustee, and the trust because the Delaware Chancery Court had primary jurisdiction over the trust.<sup>168</sup> They implored the Chancery Court to "intervene to curb the perceived excesses of the Kentucky Family Court."<sup>169</sup> In particular, Nick sought a temporary restraining order (TRO) to prevent Daniel Kloiber's estranged, soon-to-be ex-wife from seeking enforcement of the *status quo* orders.<sup>170</sup>

The trust at issue was an irrevocable trust agreement, executed in Delaware, by PNC Bank, Delaware.<sup>171</sup> Moreover, the trust agreement selected Delaware as the original situs for the trust and called for Delaware law to govern the validity, construction, and effect of the trust agreement's provisions.<sup>172</sup>

In its petitions, PNC Bank argued the Delaware Chancery Court had exclusive jurisdiction over the trust pursuant to sections 3572(a) of

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*Yale S. Corp.*, 2010 WL 2854687, at \*3; *Reserve Sols. Inc.*, 438 F. Supp. 2d at 288–89; *Foti*, 64 Va. Cir. at 65.

<sup>163</sup> See, e.g., *Truck Components Inc.*, 143 F.3d at 1061–62 (considering the Delaware Legislature's intent); *NVF Co.*, 294 F. Supp. at 1093 (not addressing intent); *Sachs*, 804 N.Y.S.2d at 733 (not addressing intent); *Anderson*, 2011 WL 925442, at \*3 (considering the Delaware Legislature's intent); see also *Transeo S.A.R.L.*, 936 F. Supp. 2d at 405 (reading the exclusive jurisdiction provision as unambiguous); *Lynch*, 2012 WL 6213781, at \*5 (same); *Yale S. Corp.*, 2010 WL 2854687, at \*3 (same); *Reserve Sols. Inc.*, 438 F. Supp. 2d at 288–89 (same); *Foti*, 64 Va. Cir. at 64–65 (same); *Carbone*, 2013 WL 5781103, at \*5 (same).

<sup>164</sup> See, e.g., *Truck Components Inc.*, 143 F.3d at 1061–62 (no intent to strip); *NVF Co.*, 294 F. Supp. at 1093 (not addressing intent); *Sachs*, 804 N.Y.S.2d at 733 (not addressing intent); *Anderson*, 2011 WL 925442, at \*3 (no intent to strip).

<sup>165</sup> 98 A.3d 924 (Del. Ch. 2014), *appeal denied*, 100 A.3d 1020 (Del. 2014).

<sup>166</sup> *Id.* at 927 n.1, 928.

<sup>167</sup> *Id.* at 928.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Ex rel. Daniel*, 98 A.3d at 928.

<sup>172</sup> *Id.*

Delaware's Qualified Dispositions Act.<sup>173</sup> Section 3572(a) contains a familiar recital: "*The Court of Chancery shall have exclusive jurisdiction over any action brought with respect to a qualified disposition.*"<sup>174</sup>

Without hesitation, the court dispelled any uncertainty about the meaning of the recitals of exclusive jurisdiction in Delaware statutes.<sup>175</sup> Echoing the Seventh Circuit and the *Anderson* court, albeit in greater detail, the Delaware Chancery Court affirmed that the "exclusive" jurisdiction provisions, which are common throughout Delaware law, are used to differentiate between the state's various internal courts of general and limited jurisdiction.<sup>176</sup> The Chancery Court explained that, in addition to its court of general jurisdiction—the Superior Court—Delaware has various courts of limited jurisdiction: the Family Court, the Court of Common Pleas, the Justice of the Peace courts, and the Chancery Court.<sup>177</sup> The Chancery Court explained that the Legislature was likely trying to allocate jurisdiction among the state's courts—not to strip other states' courts of jurisdiction.<sup>178</sup>

The Chancery Court further explained why these recitals of "exclusive" jurisdiction are so common in Delaware.<sup>179</sup> As the court described, the Chancery Court is unusual because it was created by the Delaware Constitution, which established the court "to administer the remedies and principles of equity."<sup>180</sup> This line was interpreted by the Delaware Supreme Court, in *DuPont v. DuPont*,<sup>181</sup> as granting the Chancery Court "residual equitable jurisdiction," meaning the Chancery Court is presumed to have jurisdiction over all equitable actions.<sup>182</sup> In that case, the Delaware Supreme Court held that, in order to divest the Chancery Court of jurisdiction, the Legislature must both confer exclusive jurisdiction on another court and ensure that the remedies in the alternate forum are equivalent to those available in the Chancery Court.<sup>183</sup>

This explanation would make sense if the exclusive jurisdiction provisions in the statutes at issue named other Delaware courts of limited jurisdiction, but the Chancery Court's explanation with regard to the court's residual jurisdiction is dubious. In fact, the residual equitable jurisdiction

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<sup>173</sup> *Id.* at 938 (discussing Qualified Dispositions Act, 12 DEL. CODE ANN. §§ 3570–3576).

<sup>174</sup> DEL. CODE ANN. tit. 12, § 3572(a) (West 2017) (emphasis added); *see Ex rel. Daniel*, 98 A.3d at 938.

<sup>175</sup> *Ex rel. Daniel*, 98 A.3d at 938–39.

<sup>176</sup> *Id.* at 939.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 938.

<sup>181</sup> 85 A.2d 724, 729 (Del. 1951).

<sup>182</sup> *Ex rel. Daniel*, 98 A.3d at 938.

<sup>183</sup> *Id.* at 938–39.

seems to cut against the court's conclusion because, by default, the Chancery Court would have subject matter jurisdiction—there would be no need to confer it explicit jurisdiction as the Chancery Court is presumed to have subject matter jurisdiction in equitable actions.<sup>184</sup>

Setting that explanation aside, the Chancery Court also stated that the recitals of exclusive jurisdiction were intended by the Legislature to strip the Superior Court of jurisdiction, which originally had jurisdiction over corporate matters.<sup>185</sup> This point echoes the findings of the *Anderson* court,<sup>186</sup> and makes more sense, especially in light of the Delaware Corporation Law Revision Commission's committee documents.<sup>187</sup>

In a 1965 letter from Judge Collins J. Seitz<sup>188</sup> to Irving Morris,<sup>189</sup> Judge Seitz explained how the enactment of section 220 of the General Corporation Law would create a new legal right from a remedial right shared by the Chancery and Superior Court.<sup>190</sup> In a memo written to the Commission just

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<sup>184</sup> *Id.* at 939 (“To divest the Court of Chancery of its power to hear a particular class of cases in equity, the General Assembly must both (i) confer ‘exclusively upon some other tribunal jurisdiction of causes theretofore heard and determined in the Court of Chancery’ and (ii) ensure that the remedies provided by the new tribunal are ‘the equivalent of the remedy available in the Court of Chancery.’” (quoting *DuPont*, 85 A.2d at 729–30)).

<sup>185</sup> *Id.*

<sup>186</sup> *Anderson v. Children's Corner, Inc.*, No. CV106011812S, 2011 WL 925442, at \*2 (Conn. Super. Ct. Feb. 15, 2011).

<sup>187</sup> *Cf.* Letter from Irving Morris to All Members of the Delaware Corporation Law Revision Commission, Stock Holder's Rights of Inspection (May 6, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf>; Letter from Collins J. Seitz, Chancellor, Delaware Chancery Court, to Irving Morris (April 22, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf>.

<sup>188</sup> Judge Collins J. Seitz was a well-respected Chancery Court judge whose opinions in cases like *Belton v. Gebhart* were upheld and cited in the Supreme Court's landmark *Brown v. Board of Education* decision. Harry Thamel, *Remembering Collins J. Seitz, Delaware's Greatest Judge*, DEL. ONLINE (Sept. 9, 2016), <http://www.delawareonline.com/story/opinion/columnists/harry-thamal/2016/09/09/remembering-collins-j-seitz-delawares-greatest-judge/90124096/>; Wolfgang Saxon, *Judge Collins Seitz Dies at 84; Refuted Segregation in Schools*, N.Y. TIMES (Oct. 21, 1998), <http://www.nytimes.com/1998/10/21/us/judge-collins-seitz-dies-at-84-refuted-segregation-in-schools.html?mcubz=3>.

<sup>189</sup> Irving Morris was an esteemed Delaware lawyer who fought to desegregate Delaware schools and was a leader in the corporate bar. See John Paul Stevens, *A Struggle with the Police & the Law*, N.Y. REV. OF BOOKS (Apr. 5, 2012), <http://www.nybooks.com/articles/2012/04/05/struggle-police-law/>; Sam Roberts, *Irving Morris, Who Fought for Justice Pro Bono, Dies at 90*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/2016/07/02/us/irving-morris-who-fought-for-justice-pro-bono-dies-at-90.html>.

<sup>190</sup> Letter from Collins J. Seitz, Chancellor, Delaware Chancery Court, to Irving Morris 2 (April 22, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf> (“Although he does not say so, he seems to assume that an equitable owner could obtain inspection in Chancery. I am not sure that this is the law. I believe that inspection in Chancery either has to be incidental to a pending case in Chancery or in the law court. Thus, although I could be wrong, I believe the granting of a right to inspect to an equitable owner, apart from pending litigation, would amount to the granting of a new right.”).

a month later, Morris presumed the Commission understood that the enactment of section 220 would create a new right under Delaware Law.<sup>191</sup>

This means that without the express grant of jurisdiction, the Chancery Court may not have been presumed to have jurisdiction, because the newly created right of action, though equitable, had basis only in the common law as a remedy. And, even though the Commission's documents are not explicit, it is evident that the Commission was trying to divest the Superior Court—not every other court in the nation—of subject matter jurisdiction.<sup>192</sup>

Evidence of this intent is not confined to section 220 either. As the Chancery Court explains in *Ex rel. Daniel Kloiber Dynasty Trust*, actions for indemnification under section 145 of Delaware's General Corporation Law, the law at issue in the Seventh Circuit case (discussed in Part II.A), was originally confined to the Superior Court because the remedy involved money damages.<sup>193</sup> In 1994, the Delaware Legislature reassigned corporate indemnification cases to the Chancery Court through the enactment of subsection 145(k), which contains the same recital of "exclusive" jurisdiction found throughout Delaware's General Corporation Law.<sup>194</sup>

Finally, in *Ex rel. Daniel Kloiber Dynasty Trust* the Delaware Chancery Court succinctly found: "When a Delaware state statute assigns exclusive jurisdiction to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case."<sup>195</sup> Further, regardless of whether Delaware even has the ability to strip its sister states of subject matter jurisdiction, the Chancery Court found it (i.e., Delaware) would not arrogate such power to itself.<sup>196</sup>

In light of the evidence above and the Delaware Chancery Court's opinion, it is appreciable that the intent of the "exclusive" jurisdiction provisions throughout Delaware's General Corporation Law was merely a way of allocating power between the state's internal courts. Specifically, it is apparent that the Delaware Legislature intended to strip its Superior Court

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<sup>191</sup> Letter from Irving Morris to All Members of the Delaware Corporation Law Revision Commission, Stock Holder's Rights of Inspection 1 (May 6, 1965), <http://delawarelaw.widener.edu/files/resources/committeedocuments.pdf> ("As we know, granting an equitable owner of stock or a voting trust certificate holder (legal or equitable) a right of inspection would introduce a new right in our law.").

<sup>192</sup> See *id.*; Letter from Collins J. Seitz, Chancellor, Delaware Chancery Court, to Irving Morris (April 22, 1965), <http://delawarelaw.widener.edu/files/resources/committee documents.pdf>.

<sup>193</sup> *Ex rel. Daniel Kloiber Dynasty Tr.*, 98 A.3d 924, 939 (Del. Ch. 2014).

<sup>194</sup> *Id.* Compare DEL. CODE ANN. tit. 8, § 145(k) (West, Westlaw through 81 Del. Laws 2018, chs. 200–220), with *id.* §§ 203(e), 205(e), 220(c)–(d).

<sup>195</sup> *Ex rel. Daniel*, 98 A.3d at 939 (emphasis in original).

<sup>196</sup> *Id.*



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of subject matter jurisdiction, likely intending to funnel corporate claims arising within the state to the state's Chancery Court, which is highly regarded for its expertise in corporate matters.<sup>197</sup> This is a much more banal interpretation than that of courts reading the provisions as staking a novel, covetous claim to all corporate litigation arising under the state's laws. Rather than viewing Delaware as a jealous sister, other states should honor Delaware's interpretation of its own statutes.

#### IV. STATE LEGISLATURES CANNOT STRIP SUBJECT MATTER JURISDICTION FROM COURTS IT HAS NO AUTHORITY OVER

A much larger and more important question is whether state legislatures even have the power within the federal system to strip subject matter jurisdiction from federal or state courts. As explained below, the answer is no.

##### A. Vertical Jurisdiction Stripping

It has long been held black letter law that the Constitution does not allow states to contract federal jurisdiction.<sup>198</sup> Only Congress may alter the scope of federal jurisdiction, and the states are powerless to prevent the enforcement of rights granted under its laws from being vindicated in federal court.<sup>199</sup> But no rule is without exceptions. State courts may contract federal jurisdiction indirectly by completely eliminating a right under state law, thereby closing both the state and federal courts to any action that would have arose from the state law.<sup>200</sup>

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<sup>197</sup> See Haskins, *supra* note 1.

<sup>198</sup> 17A FED. PRAC. & PROC. JURIS., *State Attempts to Limit Federal Jurisdiction* § 4211, Westlaw (database updated Apr. 2017) ("Long ago Dean—later Judge—Dobie thought it so clear that it could be stated as black-letter law that the jurisdiction of the federal courts 'cannot be limited or taken away by state statutes.' This is still generally true, but it cannot be stated without qualification."). See *Chicago & N.W.R. Co. v. Whitton*, 80 U.S. 270, 286 (1871); *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1109 (3d Cir. 1995) (collecting cases).

<sup>199</sup> *Chicago*, 80 U.S. at 286 ("In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient."); *MCI Telecomm. Corp.*, 71 F.3d at 1109 (collecting cases).

<sup>200</sup> See *Angel v. Bullington*, 330 U.S. 183, 188 (1947) ("This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'") (internal citations omitted).

But it is still black letter law that the Delaware Legislature and, indeed, all state legislatures lack the power to strip jurisdiction from federal courts by a mere recital stating that one of their courts shall have jurisdiction exclusive of all others.<sup>201</sup> The United States Supreme Court's precedent on this issue has endured for well over a century: the Constitution simply does not allow for a state to condition the vindication of a right granted by its laws on the proponent bringing his or her claim in the state's courts.<sup>202</sup>

Despite this, the Supreme Court's holdings are not absolute; there are exceptions which provide a state may exercise exclusive jurisdiction. Nevertheless, such exercises of "exclusive" jurisdiction are not derived from powers of the state, but are based more on tradition and judicial economy. This will be addressed in this Subsection C of this Part.

### B. *Horizontal Jurisdiction Stripping*

As the Delaware Chancery Court recognized in *IMO Daniel Kloiber Dynasty Trust* the Constitution is not as clear when it comes to the horizontal powers of the States.<sup>203</sup> That said, the Full Faith and Credit Clause comes close.<sup>204</sup>

The Supreme Court has long held that the Full Faith and Credit Clause disallows states from trying to divest their sister states of the ability to hear claims arising under their laws or refusing to apply the law of their sister state where appropriate.<sup>205</sup> This interpretation of the Full Faith and Credit Clause has roots in a more than one hundred year-old Supreme Court case, *Tennessee Coal, Iron & R.R. Co. v. George*.<sup>206</sup> The case was brought by Wiley George, an engineer who, while lying under a locomotive trying to repair the brakes, was seriously injured after a defective throttle allowed steam to leak into the locomotive engine causing the locomotive to jerk forward.<sup>207</sup> George brought suit by attachment in Atlanta, Georgia, pursuant to section 3910 of the Alabama Code, which made a master liable to the employee if he was injured by a defect in the condition of the ways, works,

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<sup>201</sup> *Chicago*, 80 U.S. at 286; *MCI Telecomm. Corp.*, 71 F.3d at 1109 (collecting cases); see also *Toni 1 Trust, by Tangwall v. Wacker*, 413 P.3d 1199, 1207 (Alaska 2018).

<sup>202</sup> *Chicago*, 80 U.S. at 286; *MCI Telecomm. Corp.*, 71 F.3d at 1109 (collecting cases); *Ex rel. Daniel*, 98 A.3d 924, 939 (Del. Ch. 2014) ("Any challenge to the federal court's jurisdiction based on Section 145(k) conferring exclusive jurisdiction on the Court of Chancery would fail, defeated by the federal diversity statute, 28 U.S.C. § 1331, and the Supremacy Clause of the United States Constitution.").

<sup>203</sup> *Ex rel. Daniel*, 98 A.3d at 939.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 939–40 (citing *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42–43 (1965); *Hughes v. Fetter*, 341 U.S. 609, 613 (1951)).

<sup>206</sup> 233 U.S. 354, 359–60 (1914).

<sup>207</sup> *Id.* at 358.

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machinery, or plant connected with or used in the business of the master.<sup>208</sup> Tennessee Coal pleaded that George's action should be dismissed because section 6115 of the Alabama Code provided: "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere."<sup>209</sup> Tennessee Coal argued that to deny effect to Alabama's reservation of exclusive jurisdiction, the Georgia courts would defy the principles of the Constitution's Full Faith and Credit Clause.<sup>210</sup> George's demurral on Tennessee Coal's motion to dismiss was granted and sustained on appeal.<sup>211</sup>

Tennessee Coal appealed the case all the way to the United States Supreme Court where, writing for the majority, Justice Joseph Lamar affirmed George's demurral.<sup>212</sup> Justice Lamar explained that the jurisdiction in which a claim may be brought is not part of the cause of action itself.<sup>213</sup> While the court trying a case arising out of the laws of its sister state must apply the substantive provisions of that law, venue is not a "substantive" aspect of the right.<sup>214</sup> The Court stated:

A state cannot create a . . . cause of action and at the same time destroy the right to sue on that . . . cause of action . . . . [J]urisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action.<sup>215</sup>

The Court held that the Full Faith and Credit Clause was properly satisfied by this approach.<sup>216</sup> Interestingly, Justice Holmes dissented, but did not write an opinion explaining his position.<sup>217</sup>

The Supreme Court's ruling in *Tennessee Coal* was most recently reaffirmed in 2006 in *Marshall v. Marshall*.<sup>218</sup> In *Marshall*, the United States Supreme Court quoted the above language in *Tennessee Coal* and held that the Texas Legislature could not render its courts exclusively competent to hear actions arising under the State's probate code.<sup>219</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Tennessee Coal*, 233 U.S. at 358, 361.

<sup>213</sup> *Id.* at 359.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 360.

<sup>216</sup> *Id.* at 361.

<sup>217</sup> *Id.*

<sup>218</sup> 547 U.S. 293, 313–14 (2006).

<sup>219</sup> *Id.*

The Court, however, did recognize the existence of a “probate exception” in *Marshall*.<sup>220</sup> The following Part discusses exceptions which permit states to exercise exclusive jurisdiction and whether any such exception—or, perhaps, a new exception—ought to be made for corporate cases.

### C. *Are Corporations Special?*

The Supreme Court derived the probate exception from language in the Judiciary Act of 1789 and, to quote Justice John Paul Stevens, “incoherent” obiter dicta in *Markham v. Allen*.<sup>221</sup> While limiting the largely foregone exception, the Court explained that the probate exception to federal jurisdiction arises in one of the three following circumstances: (1) where a federal court is asked to probate or annul a will; (2) where a federal court is asked to administer a decedent’s estate; or (3) where the federal court’s exercise of jurisdiction will result in the attempt to dispose of property that is in the custody of a state probate court.<sup>222</sup> In each of these cases, a federal court will not have subject matter jurisdiction.<sup>223</sup> In his concurrence, Justice Stevens stated the he would have put the probate doctrine to rest by “provid[ing] the creature with a decent burial in a grave adjacent to the resting place of the *Rooker–Feldman* doctrine.”<sup>224</sup>

There is also another exception for “local” causes of action.<sup>225</sup> “The local action doctrine requires that ‘a local action involving real property . . . only be brought within the territorial boundaries of the state where the land is located.’”<sup>226</sup> Under the local action doctrine, a claim of trespass on a piece of real property or recovery of title or possession on that real property may be brought only in the situs state of the real estate.<sup>227</sup> That exception is similar to the “domestic relations exception,” which holds federal courts cannot hear cases relating to divorce, alimony, and child custody.<sup>228</sup> There

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<sup>220</sup> *Id.* at 308.

<sup>221</sup> *Id.* at 315 (Stevens, J., concurring).

<sup>222</sup> Robert M. Harper, *The Probate Exception to Federal Jurisdiction—Perplexed No Longer—Probate Court Disposes of Property*, 23 PROB. & PROP. 60 (Jan./Feb. 2009), <http://www.farrellfritz.com/wp-content/uploads/art-338.pdf>. As an aside, the *Rooker–Feldman* doctrine was a doctrine of civil procedure that held federal courts, besides the Supreme Court of the United States, should not sit in review of state court decisions. *Rooker–Feldman Doctrine Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/r/rooker-feldman-doctrine/> (last visited Mar. 14, 2019).

<sup>223</sup> Harper, *supra* note 222.

<sup>224</sup> *Marshall*, 547 U.S. at 318 (Stevens, J., concurring in part and concurring in judgment).

<sup>225</sup> *Bailey v. Shell W. E&P, Inc.*, 609 F.3d 710, 721 (5th Cir. 2010).

<sup>226</sup> *Id.* at 721; *see Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895).

<sup>227</sup> *See Ellenwood*, 158 U.S. 105 at 107.

<sup>228</sup> Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L. J. 1364, 1366 (2016).

is still an unresolved question as to whether it is a doctrine of venue or subject matter jurisdiction,<sup>229</sup> but resolving that issue is another Comment.

No court has ever applied the local action doctrine to a corporation, but, for such well-respected courts like the Southern District of New York to allow Delaware's Chancery Court to exercise exclusive jurisdiction over corporate matters,<sup>230</sup> it bears noting the similarities in legal principle between families, estates, real property, and corporations. Each are special entities defined by the laws of their home state, and each are entitled to special protections when it comes to administration. This begs a few questions: Ought corporations to be treated with special care? Should the state of incorporation be the only place where venue or subject matter ought to be recognized? Or should it be left to the court in which the action is brought to determine if the action is more properly heard in the state of incorporation (i.e., rely on traditional principles of *forum non conveniens*)?

To a small degree, something akin to the local action doctrine already applies to corporations. Today, courts other than those within the state of incorporation lack the practical power to dissolve foreign corporations,<sup>231</sup> though this has not stopped some courts from attempting to fashion remedies in lieu of dissolution.<sup>232</sup> Many courts that have considered that issue accept that the internal affairs doctrine limits their ability to dissolve foreign corporations.<sup>233</sup> Some courts have even expanded this beyond dissolution: "Courts other than those of the State creating it . . . have no visitorial powers over such corporation, have no authority to remove its officers, or to punish them for misconduct committed in the State which created it, nor to enforce a forfeiture of its charter."<sup>234</sup>

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<sup>229</sup> *Bailey*, 609 F.3d at 721 n.4 ("This Court has noted that questions remain as to whether the local action doctrine runs to the jurisdiction or the venue of a court.").

<sup>230</sup> See *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 405 (S.D.N.Y. 2013); *Reserve Sols. Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 288–89 (S.D.N.Y. 2006).

<sup>231</sup> Peter B. Ladig & Kyle Evans Gay, *Judicial Dissolution: Are the Courts of the State that Brought You In the Only Courts that Can Take You Out?*, 70 BUS. LAW. 1059, 1075 (2015) ("[F]or an order of judicial dissolution to be effective, an official act must be performed in the state of formation. In Delaware, if a corporation is dissolved by order of the Court of Chancery, the Register in Chancery must file the judgment with the Secretary of State.").

<sup>232</sup> Peter Mahler, *A Split No More: First Department Agrees, No Subject Matter Jurisdiction to Dissolve Foreign Business Entities*, FARRELLFRITZ (Feb. 29, 2016), <https://www.nybusinessdivorce.com/2016/02/articles/deadlock/a-split-no-more-first-department-agrees-no-subject-matter-jurisdiction-to-dissolve-foreign-business-entities/>.

<sup>233</sup> Ladig & Gay, *supra* note 231, at 1064, 1071 ("Other states' courts have similarly glossed over the distinction between discretion and jurisdiction . . . . In the other camp are courts that have expressly considered the issue at any length. Those courts uniformly have held that they had no power to order dissolution of a foreign entity.").

<sup>234</sup> *Valone v. Valone*, 80 Va. Cir. 45, 47 (2010) (citing *Taylor v. Mut. Reserve Fund Life Ass'n of New York*, 33 S.E. 385, 388 (Va. 1899)).

Nevertheless, there is considerable confusion as to which legal principle the bar on foreign dissolution is grounded in, specifically, whether the bar on dissolution falls under a *forum non conveniens* analysis, subject matter jurisdiction analysis, or a choice of law analysis.<sup>235</sup> The bar is, in fact, discretionary, meaning it falls under the *forum non conveniens* analysis.<sup>236</sup> Dissolution is unique, but only because it also has a practical dimension, namely, that foreign states lack the actual power to dissolve corporations incorporated in other states.<sup>237</sup> The lack of power to dissolve a corporation is simply a strong consideration in the *forum non conveniens* analysis—it does not mean a foreign court cannot hear the action and attempt to fashion an appropriate remedy.<sup>238</sup>

In situations where the forum state's remedial powers are so limited, a traditional *forum non conveniens* analysis will sufficiently safeguard the corporation.<sup>239</sup> A defendant-corporation could simply make a motion for a discretionary dismissal for *forum non conveniens* rather than a motion for dismissal for lack of subject matter jurisdiction.

The fact that the Delaware Chancery Court has made a name for itself as an expert court in the matter of corporate litigation, while this has, understandably, led some courts to make assumptions about the Delaware Legislature's power with respect to corporate law, it would be a mistake to create a new exception for exclusive jurisdiction in corporate matters. To create a new subject matter or venue exception in cases involving the internal affairs of a corporation would, most immediately, heavily burden the Delaware Chancery Court. The Chancery Court itself has disclaimed

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<sup>235</sup> See Ladig & Gay, *supra* note 231, at 1074 (noting most courts applying the internal affairs doctrine view it as a discretionary analysis, and arguing that states other than the state of incorporation lack subject matter jurisdiction, because foreign states must give full faith and credit to the state of incorporation and the foreign state-judgements interfere with privileges granted by the state of incorporation and states like Delaware have explicitly reserved exclusive jurisdiction).

<sup>236</sup> See *supra* Parts III, IV.A., B.

<sup>237</sup> See *Raharney Capital, LLC v. Capital Stack LLC*, 138 A.D.3d 83, 87 (N.Y. App. Div. 2016) (“An order of dissolution from a New York court would infringe on the sovereign authority of another state by, in effect, forcing that state to extinguish an entity formed under its own laws.”).

<sup>238</sup> See *id.* at 88; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (“[T]he central focus of the *forum non conveniens* inquiry is convenience, . . . dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).

<sup>239</sup> See Ladig & Gay, *supra* note 231, at 1066 (“While there may be instances in which a court can or may exercise jurisdiction in its discretion, there are certain types of cases in which there is no discretion involved—those in which the court has no power to grant the relief sought. In cases involving visitorial powers, such as seeking dissolution of a foreign entity, the court has no power to enter the relief sought, so there is no question of jurisdiction.”).

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exclusive jurisdiction,<sup>240</sup> and to force it upon the State would not only defy expectations, but also overburden the State's judicial system. Moreover, such an exception would heavily discourage corporate litigation due to the potential expense and strain of litigating in a state that could be thousands of miles from the state of incorporation.

And finally, such an exception would lay waste to all choice of law provisions in corporate documents and collapse an entire field of corporate law. Rather than leaving corporations the freedom to specify a forum in their corporate documents, the state of incorporation would become the mandatory site of, perhaps, all litigation related to a corporation's internal affairs. A corporation doing business in New York might wish to resolve an internal dispute within the state, but if it was incorporated elsewhere, under a new exception to jurisdiction, the corporation and State of New York would lose discretion in settling the dispute in New York. For some corporations, this exception may prove more of a burden than a boon. The creation of such an exception would be a monumental and calamitous shift in corporate law, and such a cataclysm should be averted.

#### V. CONCLUSION

Despite the current confusion, the principles announced by Supreme Court ring as true today as they did in the late 1800s. The fact that the Delaware Chancery Court has developed a unique expertise in the field of corporate litigation over the last fifty years does not alter the Constitution. The current error taking root in certain courts should be deracinated. State legislatures lack the power to strip other states' courts of subject matter jurisdiction or the power to contract federal subject matter jurisdiction. And, finally, while corporations are undoubtedly special legal entities, they are not so special that a new exception to venue or subject matter jurisdiction needs to be carved out that mandates all claims against a corporate be brought in their state of incorporation. Such a shift would be overly burdensome for the courts, potential litigants, and the corporations themselves. It is more in line with American jurisprudence to employ a *forum non conveniens* analysis in cases where corporations foreign to the forum state assert that their interests will be prejudiced or that the court lacks sufficient power to settle the dispute.

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<sup>240</sup> *Ex rel. Daniel Kloiber Dynasty Tr.*, 98 A.3d 924, 939 (Del. Ch. 2014).