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ALIGNING LAW AND FORUM: THE HOME COURT ADVANTAGE

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ABSTRACT

When courts and legislatures choose where to resolve a dispute, they often must consider whether questions of law should be decided in the "home" court. When should, for instance, Delaware state courts decide questions of Delaware state law? The choice between the home forum and others is particularly stark in corporate law, where out-of-state courts must often apply the law of the state of incorporation. Litigation over corporate deals increasingly takes place in multiple, competing jurisdictions, presenting a clear choice between resolution in the home court or out of state. Beyond corporate law, the question arises any time legislatures must decide whether jurisdiction is exclusive, or courts must determine whether to stay a case or refer a question by way of certification, abstention, primary jurisdiction, or other sorting mechanisms. All of these instances raise the same normative question: When should law be decided in the home forum?

In response, scholars and courts have pointed to vague notions of comity or focused on a single legal context. In contrast, this Article develops a robust theoretical account that crosses legal areas. It analyzes the tension in the U.S. legal landscape between doctrines that link law and forum (for instance, exclusive jurisdiction) and those that affirmatively separate them (for instance, diversity jurisdiction). It identifies two main functions of home court decisions: the lawmaking function derived from their unique power to bind, and the distinct repeat-player relationship that the home forum has with the body of law, which supports a claim to expertise. Finally, this Article uses these functions as the basis for an interest-balancing approach to determining when law should be decided at home.

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I. INTRODUCTION

Legal issues are not always resolved in the "home" court, the court within the territory that generated the legal rule. In the United States, an Illinois state court may decide an issue of Delaware law. Federal courts often hear and decide issues of state law, and, conversely, state courts hear and decide issues of federal law. Indeed, some legal doctrines affirmatively unbundle law and forum. Diversity jurisdiction, for instance, enables federal courts to interpret state law. Other doctrines promote home court decisions, bundling law and forum. For example, a federal court may certify a legal question to the highest court of the home state.

Corporate law disputes often provide clear choices between resolution in the home court or elsewhere. Because the law of the state of incorporation applies to corporate internal affairs, a judge outside of the incorporating state has to decide whether to keep a case or sort cases or questions to the home jurisdiction. In the corporate context and beyond, judges in class actions filed in multiple states may have to decide which forum's action should continue and which should be stayed. Congress may have to choose between statutes that would, for instance, mandate bundling (e.g., establishing exclusive jurisdiction in the federal courts) or promote unbundling (e.g., opening a federal forum for state-law claims without providing substantive federal law). All of these situations raise the same normative question: When should law be decided in

the home forum? When, for instance, should Illinois state courts decide Illinois state law?

Although the question arises in many contexts, the area is under-theorized. Scholars and judges have often listed so many considerations that no coherent guidance exists or have focused exclusively on a single legal context. This Article contributes to this area in two main ways. First, it re-envisions the U.S. legal landscape in terms of whether legal doctrines bundle or unbundle law and forum. This framework provides a fresh look at established doctrines, as well as pointing out the tensions in the U.S. legal system between remnants of territoriality and doctrines that acknowledge and even ensure the existence of an overlapping and complex jurisdictional system. Second, the Article analyzes the home court advantage, articulating the differences between a decision by a home court and others, highlighting a dimension of forum choice that is not often made explicit.[1]

Finally, the Article uses these insights into the relationship between the law and the forum as a foundation for an interest-balancing approach that can guide courts and lawmakers in deciding where legal issues should be determined. Not everyone will agree about the appropriate outcome in all cases. However, interest-balancing has advantages as a response to such a complex problem: it allows various areas of the law and configurations of law and forum to reflect different priorities, even while it provides more guidance than existing doctrines.

This Article identifies two categories of adjudications, which can be described as *Forum A/Law A* and *Forum B/Law A*. In the first, law and forum are aligned; that is, the law is decided in the home forum. In the second, they are not. A concrete comparison is between a California court applying California law (*Forum A/Law A*) and an Illinois court applying California law (*Forum B/Law A*). This Article uses the terms "aligned" or "bundled" to refer to the instances when

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1. For instance, Professors Issacharoff and Sharkey have suggested that "coherence is maintained" when "the source of law (federal) is ... aligned with the forum for resolution of the legal dispute (federal)" as opposed to allocating federal law to a state forum. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1359 (2006). The implication is that unbundled decisions are somehow unstable or incoherent, but the reasons for preferring bundled decisions are not spelled out. *Id.*; *see also, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236 (2004) ("One is likely to find little disagreement with the proposition that ceteris paribus it is better for a sovereign's own courts to resolve novel or unsettled questions regarding that sovereign's laws.").

the territory that created the cause of action also provides the forum.[2] These are the home court decisions.

"Forum A" is an intentionally broad phrase. It encompasses all the adjudicators within a particular territory, including both state and federal courts,[3] as well as administrative agencies and arbitrators. The term "Law A" is also deliberately broad, and does not distinguish between, for instance, statutory and common law. A straightforward example is the law that creates a cause of action, such as a standard for negligence, but personal jurisdiction rules and issue preclusion are also encompassed. These terms and working definitions permit discussion across legal areas, but of course caveats and complications apply.[4]

This Article identifies differences between these two categories—"bundled" (*Forum A/Law A*) and "unbundled" (*Forum B/Law A*)—as a way of asking if anything is gained by aligning law and forum. Is there a home court advantage? The first difference is that the highest court of the home territory has a unique power to issue broadly binding decisions on domestic law. In-territory lower courts have the potential for appeal, which can also result in a broadly binding decision.[5] In other words, the bundled decision has a unique lawmaking function.

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2. Sometimes keeping domestic law in the home court has been described as "localizing" that law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 91 (1971).

3. This Article is concerned with both horizontal and vertical relationships in the U.S. federal system; when comparing Forum A and Forum B, one forum could be in a state and the other federal, or they could be in different states. The Article thus expands on an existing literature focused exclusively on the vertical relationship between state and federal courts. For instance, a thoughtful critique of the "transjurisdictional procedural devices" of certification and abstention in the context of the federal-state relationship can be found in Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1878 (2008). This Article also participates in the emerging literature about "intersystemic governance," which analyzes complex modern jurisdiction that defies territorial or formal definition. *See, e.g.*, Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 5 (2007).

4. For instance, although clear cut distinctions between A's and B's law provide a starting point, law is not always easily categorized as one or the other (e.g., a state law might incorporate a federal standard). One implication for interest-balancing is that it may be applied by issue rather than by whole case or whole claim. It is also worth noting that the Article "counts" Forum B's decision of Law A as Law A, even though they differ in their binding force.

5. The distinction between lower courts and the highest court becomes relevant when considering a decision's precedential force, and for that reason is explored more below. *See infra* Part IV.A.

The second difference is the relationship between the body of law and the courts and its judges. The home courts usually decide more of their own law than any other forum and are accordingly repeat-players with knowledge of and interest in broad and long-term development of that law. Bundling promotes a functional interest in having a court that understands both the specific dispute and how the ruling will fit with the rest of state law.

In specific contexts, these two functions of home court decisions—lawmaking and expertise—are balanced with competing interests, including those of litigants. When deciding whether to sort a case to the home forum, a judge or policymaker should accordingly ask (1) whether a broadly binding decision is necessary; and (2) whether a particular forum has greater relative expertise in a situation in which expertise is helpful. If one or both of these interests in lawmaking or in expertise is served by bundling, then the next step is to identify and weigh the competing interests of the forum and the litigants.

This Article proceeds as follows. Part Two defines the problem of forum choice, introducing the pressing current example of multijurisdictional corporate litigation. Part Three maps existing legal doctrines in terms of whether they allocate adjudication to the home forum. It analyzes the tension between forces that sort cases so that they are decided by the originating jurisdiction and those that affirmatively divide law and forum. Part Four identifies the two main differences between bundled (*Forum A/Law A*) and unbundled (*Forum B/Law A*) decisions: the scope of the decision's binding force and the repeat-player relationship of the court to the law, which supports a particular claim to expertise. It then suggests how to balance competing interests and applies this approach to the concrete corporate law example with which the Article begins.

II. THE PROBLEM

Disputes can often be heard in multiple courts and other types of forum based on broad statutory grants of jurisdiction and expansive constitutional provisions. Accordingly, decision-making often must be allocated among multiple possible adjudicators. This Part identifies situations in which judges and policymakers must decide whether to sort cases to the home forum. It then turns to a concrete example, outlining the emerging pattern of multijurisdictional corporate litigation that takes place in state courts.

A. Choosing a Forum

Choice of forum is sometimes seen as a way for litigants to choose the applicable law based on a bet that the forum will apply its

domestic law. The plaintiff chooses the forum, knowing that the court will or is likely to apply its own law under its choice of law doctrine. For instance, a plaintiff might prefer Oklahoma state court because it thinks the court will apply Oklahoma's favorable strict liability rules to its products liability suit. Few constitutional restrictions exist on the ability of a state to apply its domestic law. It suffices that the chosen law have a "substantial contact with the activity in question."[6] Moreover, modern choice of law doctrines often allow courts to apply the law of a state with a significant interest in the dispute, permitting great freedom to courts to apply their domestic law.[7] Accordingly, often it makes sense to think of forum choice during litigation as driven by choice of applicable law. A litigant chooses among *Forum A/Law A*, *Forum B/Law B*, *Forum C/Law C*, etc.

This Article provides additional nuance to this prevalent view of the relationship between the substantive law and the forum by approaching it from a different angle. It asks what happens when the substantive law does *not* vary and the same law applies regardless of where a dispute is resolved. This approach has the advantage of allowing us to ask what else, besides a change in substantive law, drives choice of forum. The first move is accordingly to identify circumstances in which courts are constrained to apply non-domestic law.

Cases concerning corporate law frequently have this configuration because the applicable law is often the same regardless of where a dispute is resolved. The internal affairs doctrine—the special choice of law rule for corporations and some other business organizations—provides that the law of the state of organization governs the internal relationships of that entity.[8] Generally, an internal affair is one that involves corporate governance and the relationship between or among directors, officers, shareholders, and the corporation. For example, imagine that a dispute arises about a Delaware corporation and whether the directors breached their fiduciary duties. The suit may be filed anywhere allowed under the forum state's court-access rules and

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6. Allstate Insurance Co. v. Hague, 449 U.S. 302, 308 (1981); Richards v. U.S., 369 U.S. 1, 15 (1962).

7. *See, e.g.*, Patrick Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 181.

8. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 302 cmt. G (1971) ("[T]he local law of the state of incorporation should be applied except in the extremely rare situation where a contrary result is required by the overriding interest of another state in having its rule applied.").

within the bounds of constitutional due process, but Delaware law is likely to be applied because of the internal affairs doctrine. The source of this constraint is debated,[9] but most state courts view themselves as constrained in their choice of law by this rule, even if only for pragmatic reasons such as predictability and the need to apply a single governing law to geographically dispersed shareholders.[10] This constraint in choice of law reaches beyond corporations to other legal entities such as partnerships.[11]

Corporate law also provides a rich source of examples because the bundling default has changed over time. The internal affairs doctrine was once considered to be jurisdictional. In the terms of this Article, it mandated *Forum A/Law A*, with both law and forum provided by the place of organization. That is, any litigation about corporate governance within a Delaware corporation had to be resolved by a Delaware court applying Delaware law. If it were filed in another court, that court would simply point to the internal affairs doctrine as depriving it of jurisdiction, and it would defer to the Delaware court.[12] Even as the strength of that doctrine eroded and the courts came to treat it as a choice of law rule only,[13] litigation generally took place in the home courts, even though it was no longer required.[14] Recent litigation patterns—including those

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9. Delaware is unusual in considering the internal affairs doctrine to be constitutionally mandated. *See* Examen, Inc., v. VantagePoint Venture Partners, 873 A.2d 318, 323 (Del. Ch. 2005).

10. *See, e.g.*, *Ex parte* Bentley, 50 So.3d 1063, 1074 (Ala. 2010) (discussing the scope and effect of the internal affairs doctrine in Alabama). *But see* CA Corp. Code § 2115 (applying California law to foreign corporations in certain circumstances).

11. *See, e.g.*, Total Holdings, Inc. v. Curran Composites, Inc., 999 A.2d 873, 884 (Del. Ch. 2009) ("[T]he logic of the internal affairs doctrine developed in regard to corporations applies with equal force in the context of a partnership.").

12. *See, e.g.*, N. State Copper & Gold Mining Co. v. Field, 20 A. 1039, 1040 (Md. 1885) (declining jurisdiction because "[o]ur courts possess no visitorial power" over the internal affairs of a foreign corporation).

13. *See, e.g.*, *Bentley*, 50 So.3d at 1074 ("[T]he 'internal-affairs doctrine' as applied in this State does not deprive the trial court of jurisdiction over the claims in the underlying action, nor does it require the trial court to dismiss the instant action in deference to litigating those claims in Delaware. . . . Rather, where the underlying claims implicate issues of corporate governance, the trial court will be constrained to apply the corporate law of Delaware.").

14. *See* John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012); Robert M. Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2012 M&A Litigation*, CORNERSTONE RESEARCH 2 (Feb. 2013), *available at* http://www.cornerstone.com/ [hereinafter "Cornerstone 2012 M&A Litigation Review"] (noting that before 2002, most lawsuits concerning mergers and acquisitions of

described in the next section—have pushed some corporate litigation out of the home court, putting pressure on this tradition of *de facto* bundling.[15]

Moreover, Delaware in particular serves as an interesting example. U.S. corporate law is often driven by Delaware because more than half of the large public corporations are incorporated there.[16] The state promotes incorporation in Delaware based on the content of its corporate law and the expertise and efficiency of its courts,[17] both of which may be particularly important in a legal area characterized by fiduciary standards that are both fact-specific and constantly evolving.[18] The state has traditionally been the locus of corporate litigation but, as described in more detail below, cases involving Delaware corporate law have increasingly been filed elsewhere, triggering state efforts to keep at least some of the corporate cases in-state.[19]

Corporate law is a clear example, but it is not unique. In the framework of this Article, diversity jurisdiction can be understood in terms of bundling. After the Supreme Court's decision in *Erie*, federal courts must apply state substantive law in diversity cases.[20] Although difficult questions sometimes arise at the boundary between substantive and procedural law, a federal court sitting in

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Delaware public corporations were filed in Delaware Chancery Court).

15. Cornerstone 2012 M&A Litigation Review, *supra* note 14, at 2. In addition to multijurisdictional deal litigation, some corporate litigation governed by Delaware law may also be in federal court as part of a pattern of securities class actions and attached claims. *Id.*; *see* Jessica Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 68 (2011) (identifying a movement of Delaware corporate cases to federal court as part of a pattern of parallel corporate fraud litigation).

16. *See, e.g.*, DEL. DIV. OF CORPS. ANN. REP. 1 (2011) (noting that Delaware is the state of incorporation of sixty-three percent of Fortune 500 companies).

17. *See, e.g.*, LEWIS S. BLACK, JR., DEL. DEP'T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

18. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1071 (2000) (noting that "Delaware's corporate law rules are standards based, Delaware precedents are narrow and fact-specific and Delaware courts employ weak principles of stare decisis leading to extensive doctrinal flux").

19. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 65 VAND. L. REV. 1053, 1057 (2013) (suggesting that Delaware sometimes benefits from outsourcing weaker corporate cases). *See generally* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. OF COMPLEX LITIG. 51 (2012) (analyzing the limits on a state's ability to keep cases in-state and identifying how states negotiate with other actors for jurisdiction).

20. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

diversity recognizes that it must apply non-domestic (state) law to issues like negligence or contract standards. In fact, diversity jurisdiction may be seen as one instance in which jurisdiction is given to a forum without a corresponding power to make law. Allocations to specialized courts or administrative agencies provide other examples, with bankruptcy courts and tax courts often in the position of applying state law.[21] These decision-makers too must determine whether they should decide an issue or decline, effectively re-bundling it.

Another relevant category is when the source of substantive law is chosen *ex ante* but the dispute can be adjudicated outside that jurisdiction. For example, a commercial contract might specify that "the laws of the state of New York will govern disputes that arise under this contract," but be silent as to where those disputes must be resolved. As a result, the suit might be brought in any forum that has jurisdiction, but the court will almost certainly apply New York law.[22] The constraint on the non-New York court is that most courts and other types of forum have come to respect contractual choice of law. The effect is the same as with diversity jurisdiction: the forum is constrained to apply non-domestic law, resulting in an unbundled decision (*Forum B/Law A*).

In sum, courts and legislatures must often choose whether an issue should be decided by the home court, particularly when the choice of law is constrained. A given forum might be assigned without the power to make substantive law, or parties may choose applicable law *ex ante* without designating a forum. Corporate law is an important area of conflict because the modern internal affairs doctrine constrains non-domestic courts, because over time corporate litigation has moved from bundled (*Forum A/Law A*) to unbundled (*Forum B/Law A*) decisions, and, finally, because Delaware stakeholders have taken some steps to maintain bundling. The next section examines these larger choices about bundled law through a current corporate example.

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21. *See* Verity Winship, *Certification of State-Law Questions by Bankruptcy Courts*, AM. BANKR. L. J., vol. 87-4 (Dec. 2013); *infra* Part III.B.

22. *See, e.g.*, Friedman v. Jamison Bus. Sys., Inc., 2002 WL 442286, at *2 (Conn. Super. Ct. 2002) (applying New York law based on a choice of law clause but rejecting arguments that the Connecticut state court lacked jurisdiction: "It is well established that Connecticut courts are competent to apply the law of a foreign jurisdiction . . . and the inclusion of this choice of law provision does not evidence an intention on the part of the parties to provide for exclusive jurisdiction in New York courts.").

B. The Example of Multijurisdictional Deal Litigation

In multijurisdictional corporate litigation, courts and legislatures face a clear choice between domestic and other types of forum. In this kind of litigation, different groups of shareholders claiming to represent the same shareholder class and challenging the same conduct sue in different courts within the United States. Commentators and courts have noted that this litigation pattern has become increasingly common over the last few years, particularly in the context of lawsuits brought in multiple states' courts to challenge corporate deals.[23]

Litigation about corporate governance that is filed in multiple courts poses a clear choice between bundled (*Forum A/Law A*) and unbundled (*Forum B/Law A*) actions. The underlying disputes are about corporate governance. In the current multijurisdictional deal litigation, plaintiffs typically allege that corporate directors violated their fiduciary duties when approving a merger or acquisition. Accordingly, the internal affairs doctrine calls for the same law—namely, the law of the state of incorporation—to apply to the duties of the corporate actors regardless of where the suit is filed.

One example of such multijurisdictional corporate litigation is *Scully v. Nighthawk Radiology Holdings, Inc.*, in which seven class actions were filed in Arizona and one in Delaware challenging the same transaction.[24] Plaintiffs were shareholders of the target company who sued directors and officers of that company for violating their fiduciary duties in agreeing to the terms of the deal.[25] Because of the internal affairs doctrine, Delaware law applied to the alleged violations of fiduciary duties in all of the lawsuits. The only question was which forum should continue with the case. In terms of this Article, the choice was between *Forum A/Law A* and *Forum*

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23. *See* John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605 (2012); Ted Mirvis, *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A J., 17, 17 (May 2007); *see also In re* Facebook IPO, 922 F. Supp.2d 445, 455–56 (S.D.N.Y. Feb. 13, 2013) (noting the potential problems raised by multijurisdictional corporate litigation); Transcript of Record at 12, *In re* Parcell, Civ. Action No. 7003-VCL (Del. Ch., Nov. 7, 2011) (Laster, V.C.) [hereinafter Parcell Transcript], *available at* http://www.delawarelitigation.com/files/2011/11/ParcellTranscript1.pdf ("[T]hese types of situations [disputes over which forum should proceed] now come up several times a month . . . .").

24. Brief of Special Counsel at 1, Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch., Mar. 11, 2011).

25. Verified Class Action Complaint, Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch., Oct. 11, 2010).

B/Law A. Other multijurisdictional deal litigation has a similar configuration. For instance, *In re Parcell* was a class action challenging a tender offer by a Delaware corporation that conducts business in Palo Alto, California.[26] Shareholder plaintiffs filed class actions in both Delaware Chancery and California state courts contesting the same deal.[27]

Lawsuits challenging corporate deals have increasingly been filed in multiple jurisdictions, many of which are outside the state of incorporation. These patterns are reflected in a study of shareholder litigation that challenged acquisitions of large Delaware public companies.[28] A 2012 study by Cornerstone Research indicated that 75% (594 of 792) of these cases were brought outside of Delaware courts in 2010.[29] The number has shifted with changes in litigation practices. In 2012, 61% (369 of 602) were brought outside of Delaware.[30] For both years, more than half of these suits were multijurisdictional: 55% were filed in multiple jurisdictions in 2010 and 65% in 2012.[31] Only 8% and 16% were filed exclusively in Delaware courts in 2010 and 2012, respectively.[32]

No one rule determines which forum may resolve the dispute. Instead, each of these courts has adjudicatory power within broad constitutional constraints, especially of due process and the jurisdiction's own court-access rules. Each of the multiple jurisdictions has some connection to the litigation; often the suit is brought in the state of incorporation and the state of the principal place of business. Deference to the first-filed action sometimes provides a pragmatic rule of the road. In these cases, however, courts sometimes ignore this rule because of concerns about whether a "race to the courthouse" makes any sense, particularly in this

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26. *See* Parcell Transcript, *supra* note 23, at 12.

27. *Id.*

28. Cornerstone 2012 M&A Litigation Review, *supra* note 14, at 2. This study analyzed shareholder lawsuits challenging acquisitions of U.S. public companies valued at $100 million or more. *Id.*

29. *Id.* In 2010, 25% of these cases were brought in Delaware courts (bundled litigation) with 63% brought in other states' courts and the remaining 12% in federal court. *Id.*

30. *Id.* In 2012, 39% were filed in Delaware, with another 53% in other states' courts and 8% in federal courts. *Id.*

31. *Id.* at 3.

32. *Id.* The remainder (after multijurisdictional litigation and litigation filed only in Delaware is taken into account) were filed in non-Delaware jurisdictions only. *Id.*

context where the court has an unusual role in the protection of absent class members.[33]

Deference to the home court is not automatic. In the context of multijurisdictional deal litigation, both legislatures and courts must decide whether to sort the cases to the home forum. This example accordingly can give a good sense of when the interest-balancing approach proposed here would inform both the exercise of judicial discretion and legislative decisions that allocate adjudicatory power.

Judges often must make discretionary decisions about which action goes forward. In *Parcell*, for example, Delaware's Vice Chancellor Laster had to decide whether to stay the action in favor of the California court. He declined and, in the process, identified a preference for bundling—i.e., the issues of Delaware corporate law involved should be decided in Delaware court. He pointed to two reasons: the background rule that "Delaware is the only state that can give you a definitive ruling on what the law is" and the Delaware court's "moderate comparative advantage" in adjudicating domestic law.[34]

Judges have limited power to affect other states' courts, although some have consulted with judges in other jurisdictions and still others have encouraged defense counsel to move for stays or certification in the actions brought outside the home state.[35] Occasionally they will take more unusual steps. After counsel settled the *Scully* case in the Arizona court, the Delaware Chancery Court took the unprecedented step of appointing a special master to represent "the point of view of Delaware and the public interest" because of a concern with collusive settlements.[36] The special master was tasked to determine, among other issues, the "role, if any, [of]

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33. Professor Faith Stevelman, an early observer of Delaware's efforts to protect its adjudication of Delaware corporate law, noted a movement in Delaware case law away from almost complete deference to the plaintiff's choice of forum in derivative suits and class actions, which resulted in cases remaining in Delaware courts. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 104–19 (2009).

34. Parcell Transcript, *supra* note 23, at 12.

35. *See, e.g.*, *In re* Allion Healthcare Inc. S'holders Litig., Civ. Action No. 5022-CC, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011) (suggesting that the judge's "personal preferred approach" was for defense counsel to request that the judges confer to determine where a multijurisdictional suit should proceed). *See generally* Winship, *supra* note 19, at 83–84 (discussing how judges negotiate for jurisdiction).

36. Brief of Special Counsel at 1, Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011).

the disfavored forum (here the Court of Chancery) . . . when it receives notice of what appears to be a collusive settlement."[37]

The type of bundling decision a legislator might make is illustrated by a concrete proposal made in response to the growth of multijurisdictional deal litigation. The Association of the Bar of the City of New York proposed targeted federal legislation "requiring shareholder litigation concerning proposed changes in corporate control to be brought in the state of incorporation."[38] That is, a federal statute might dictate that cases involving mergers and acquisitions in public companies or interstate commerce be filed exclusively in the courts of the state of incorporation. In the terms of this Article, this statute would mandate bundling of law and forum in a particular category of cases.

Multijurisdictional deal litigation has prompted a growing literature that identifies and analyzes the trends, considers whether Delaware stakeholders are really harmed by these patterns, and proposes mechanisms that would help channel corporate law cases to Delaware.[39] Much of this work begins with the assumption that Delaware should be the forum for these disputes.[40] What is missing and needed—and what this Article provides—is an articulated basis

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37. *Id.*

38. Ass'n of the Bar of the City of New York, Committee on Securities Litigation, *Coordinating Related Securities Litigation: A Position Paper*, 9–10 (Apr. 17, 2008) (proposing, among other positions, a federal statute providing that "[n]otwithstanding any statute or rule to the contrary, any action brought under state law against a publicly listed company challenging either (i) the company's decision to merge with or be acquired by another entity, or (ii) the company's decision to take action to prevent a change in control of the company, shall only be brought in the courts of the state of the company's incorporation").

39. *See, e.g.*, Griffith & Lahav, *supra* note 19, at 1057 (questioning whether the pattern is harmful); Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 11–12 (2012) (advocating the "State of Incorporation Rule," which would keep corporate law claims in the courts of the state of incorporation); Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 173 (2011) (proposing a statute enabling, but not mandating, forum selection in corporate charters); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multi-Jurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012); Winship, *supra* note 19, at 53.

40. *See, e.g.*, Micheletti & Parker, *supra* note 39, at 41–43 ("There is a logical and common sense elegance associated with the State of Incorporation Rule; companies that elect to incorporate under a certain state's laws, and stockholders that invest in such companies, deserve to have their corporate governance-related disputes heard in the state of incorporation.").

for deciding whether and when to send the cases to the home court. The next Part places these particular problems of forum choice in the context of the broader legal system and the tensions between doctrines that bundle law and forum and those that affirmatively divide them.

III. TENSIONS BETWEEN ALIGNMENT AND DISALIGNMENT

As a descriptive matter, the U.S. legal system sometimes directs cases and questions to the home court, and sometimes it does not. This Part sorts legal doctrines into those that promote bundling and those that unbundle the law from the forum. These examples indicate that the question of when to allocate decision-making to the home forum is widespread. Articulating the functions of a home court decision, as this Article does, accordingly approaches a wide swath of existing legal doctrine from a new angle. Moreover, expansive categories of bundled and unbundled decisions enable a discussion that gets beyond the traditional focus on the role of state sovereignty in the context of U.S. federalism.

The table below provides a summary of legal doctrines that promote bundling or unbundling. Even a quick glance reveals that each one of these doctrines raises complex issues in its own right. Moreover, this list is not exclusive; other doctrines might also fit into the rubric. However, agreement on all of the categorizations and implications is not necessary for the more general point to hold, which is that these legal doctrines can be seen as establishing a tension between forces that sort cases so that they are decided by the originating jurisdiction and those that affirmatively divide law and forum. This Part takes each category in turn, identifying examples and pointing out some caveats and complications along the way.

TABLE 1

Bundling (***Forum A/Law A***)	**Unbundling** (***Forum B/Law A***)
▪ Forum's freedom to apply domestic law ▪ Exclusive jurisdiction (e.g., copyright, patent, "local action," state penal law) ▪ Abstention ▪ Certification ▪ Primary jurisdiction ▪ *Forum non conveniens* (sometimes)	▪ Provision of a forum without substantive law (e.g., diversity jurisdiction & *Erie;* CAFA; specialized courts and agencies) ▪ Obligations to hear non-domestic law (e.g., full faith and credit requirements) ▪ Arbitration and doctrines promoting arbitration ▪ Laws allowing contractual choice of law and choice of forum to differ ▪ FED. R. CIV. P. 4(k) – governing personal jurisdiction in federal court with state law ▪ Interjurisdictional issue preclusion

A. Legal Rules That Bundle Law and Forum

1. Exclusive Jurisdiction

Legislatures explicitly face the choice between bundled and unbundled law when they decide whether to make jurisdiction over a particular cause of action exclusive in a particular court or court system. Legislatures require bundling when they say that courts of a particular territory have exclusive jurisdiction over a cause of action that territory originated.[41] The power of Congress to assert exclusive jurisdiction over federal law in federal court is well established, at least when acting on its Article III powers.[42] The federal copyright

41. "Exclusive jurisdiction" is usually a way to bundle law and forum, but not necessarily, as discussed below. *See infra* Part III.B.1 (discussing Mims v. Arrow Fin'l Servs., LLC, 132 S. Ct. 740 (2012), and the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 (2006)).

42. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 511–12 (1944) ("[A] controversy which arises under the Constitution and laws of the United States . . . is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should

statute, for instance, provides for exclusive federal court jurisdiction: "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights."[43] Congress may even designate a specific federal court to hear particular federal law, as in patent appeals.[44] The rationale given for such assignment of exclusive jurisdiction is often uniformity of interpretation and relative expertise of the selected court or court system.[45]

Congress might also be able to allocate jurisdiction among state courts, although the extent of its power to do so has not been tested.[46] For example, Congress considered such a proposal about jurisdiction in the context of the Securities Litigation Uniform Standards Act ("SLUSA").[47] SLUSA moves many securities actions based on state law to federal court, but allows certain state-law suits challenging corporate governance to remain in state courts.[48] Some legislators had considered including a bundling provision that would have limited state-law actions to home courts.[49] Both the law and

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exercise that jurisdiction concurrently with the courts of the States."); The Moses Taylor, 71 U.S. 411, 429 (1867) (holding that a California statute providing for damage suits violated exclusive federal court jurisdiction over admiralty).

43. 28 U.S.C. § 1338 (2012); *see also, e.g.*, Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(e)(1) (2000) ("[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary . . . .").

44. *See* 28 U.S.C. § 1295(a) (2012) (granting the Federal Circuit exclusive jurisdiction over appeals from district courts and the Patent and Trademark Office arising under the Patent Act).

45. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 383 (1996) (identifying "the general purposes underlying most grants of exclusive jurisdiction: to achieve greater uniformity of construction and more effective and expert application of that law").

46. *See* Winship, *supra* note 19, at 79 (discussing congressional power to allocate jurisdiction among state courts and citing, among other sources, the proposed Lawsuit Abuse Reform Act, which would have dictated venue rules for certain actions in state courts); *see also* H.R. 4571, 108th Cong. (2004); H.R. 420, 109th Cong. (2005).

47. Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 78bb(f)(1), 77r(b), 77p(b) (2006).

48. *Id.*

49. See Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 375 n.117 (2011) (citing S. REP. NO. 105-182, at 6 (1998), which states, "[T]he Committee expressly does not intend for suits excepted under this provision to be brought in venues other than the issuer's state or incorporation;" and H.R. CONF. REP. NO. 105-803, at 13–14 & n.2 (1998), which states, "It is the intention of the managers that the suits under this exception be limited to the state in which the issuer of the security is incorporated.").

the forum would be provided by the state of incorporation.[50] Again, the effect would be to bundle law and forum, although here Congress would bundle a state's law with adjudication in that state's courts.

Exclusive jurisdiction is often discussed with congressional power and federal courts primarily in mind. In contrast to the federal government, states are very limited in their ability to assert exclusive jurisdiction, in part because of full faith and credit limits.[51] Nonetheless, some categories of exclusive state court jurisdiction exist, including in the context of penal law and to some extent actions relating to real property.[52] These "local" causes of action are, in effect, bundled; the originating state also provides the exclusive forum.

2. Sorting Devices

The examples above are mostly of initial allocation of adjudicatory power, often by the federal legislature. In contrast, some bundling doctrines sort cases after they are filed in a non-originating forum. They usually involve a discretionary decision by a judge to keep the case, to stay or dismiss based on *forum non conveniens*, or to refer a case or question to the home court by way of certification, abstention, or some other mechanism that bundles law and forum.

Abstention is an example of such a sorting device, allowing federal courts sometimes to abstain in favor of the originating state court. Abstention has spawned much debate and an extensive literature, but in rough terms, it is used to avoid unnecessary decisions of federal constitutional issues, to avoid interfering with a state administrative scheme, and to allow states to resolve state-law questions or to avoid duplicative litigation.[53] *Pullman* abstention,

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50. *Id.*

51. Winship, *supra* note 19, at 69–76.

52. *See* Wilson v. Celestial Greetings, Inc., 896 S.W.2d 759, 760 (Mo. Ct. App. 1995) (dismissing an action for shareholder appraisal rights under Delaware law, reasoning that the Delaware appraisal statute required decision in a local Delaware court); Green v. Wilson, 592 S.E.2d 579, 581 (N.C. App. 2004) (asserting exclusive jurisdiction over real property within North Carolina and accordingly refusing to stay an action in favor of Georgia courts); Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L. J. 949, 965 (2006).

53. Burford v. Sun Oil Co., 319 U.S. 315, 332–33, 333 n.29 (1943); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941). *See generally* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4241 (3d ed. 2007) (discussing the development and evolution of abstention).

which is perhaps the most common, is used when a federal constitutional case raises an open state-law issue.[54] It delays federal adjudication of state law to give the state court the chance to address the question.

Of particular interest here is how abstention effectively re-bundles law and forum and, in fact, has such alignment as one of its stated purposes. The presumption when a federal court abstains is that the action will be pursued in state court. The bundling effect of abstention is even more pronounced when parties request a so-called *England* reservation to *Pullman* abstention.[55] In those circumstances, the federal issue is "reserved" so that the state court decides only the state-law issues (bundled) and the federal court will hear the federal ones (also bundled).

Certification is a near-relative of abstention. Although the mechanism is different, it also sorts legal issues to the originating court. Certification came into being as an alternative to abstention that did not require the case to be dismissed and then refiled in the home state's court, but instead allowed a particular legal question to be referred to the home court. In the terms of this Article, abstention usually aligns law and forum for the whole case, while certification is partial, aligning only the particular legal issue certified.

Certification is a good example of a sorting mechanism specifically designed to ensure that legal questions are decided by the home court. Indeed, aligning law and forum is the entire purpose of certification. A well-accepted use of it within the United States is for allocation between federal and state courts. Certification of state-law issues allows a court to send a legal question to the court of the originating state for decision. The highest state court answers the question in an opinion that, in most states, is broadly binding like any other decision of that state court. Certification is most commonly used by federal appellate courts in the context of diversity jurisdiction, but state-to-state certifications are also sometimes permitted, though not widely used.[56] Certification has occasionally also been used by administrative agencies or non-Article III courts as well,[57] with the same purpose of re-bundling questions of law by sending open state-law questions to the highest state court.

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54. *R.R. Comm'n of Tex.*, 312 U.S. at 498; Nash, *supra* note 3, at 1875.

55. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 417–19 (1964).

56. John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 431 (1988) (conducting an empirical study of state and federal judges' use of certification and identifying no state-to-state certifications from 1978 to 1987).

57. For instance, Delaware currently allows the Delaware Supreme Court to hear state-law questions certified by the Securities and Exchange Commission and

Certification is a good example not only of an alignment mechanism, but also of the struggle to identify a purpose to this alignment. Over the years, proponents of certification have attributed to it a wide and sometimes incoherent range of benefits. According to these proponents, not only does certification promote comity, federalism, and state sovereignty (variously defined), but it also achieves abstention's goals without its costs,[58] allows states to control the development of their law, solves choice-of-law problems, prevents "wrong" predictions by an entity that does not have ultimate authority to make broadly binding law (*e.g.*, federal court decisions of state law),[59] reduces pressures on federal dockets, promotes fairness to litigants,[60] prevents forum-shopping,[61] or most or all of the above.[62]

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bankruptcy courts, as well as other federal and state courts. *See* DEL. CONST. art. IV, § 11(8); DEL. SUP. CT. R. 41. *See generally* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 179, 186, 203–05 (2010) (analyzing the Delaware–S.E.C. experience and arguing that federal agencies should be permitted to certify questions to state courts); Winship, *supra* note 19 (examining certification practice in bankruptcy courts).

58. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) ("Certification procedure, in contrast [to abstention], allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.").

59. *See, e.g.*, *In re* Bostic Constr., Inc., 435 B.R. 46, 61 (Bankr. M.D.N.C. 2010) (in the absence of certification procedure, court must "predict how [the state's highest court] would rule, considering canons of construction, restatements of the law, treatises, recent pronouncements of general rules of policies, well-considered dicta, and the state's trial court decisions"); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679 (1992).

60. *See, e.g.*, John R. Brown, *Certification – Federalism in Action*, 7 CUMB. L. REV. 455, 456 (1977) (noting the frustration of litigants when the rule of law announced by the federal court turns out to be "a ticket for one ride only"). *But see* J. Bruce M. Selya, *Certified Madness: Ask a Silly Question...*, 29 SUFFOLK U. L. REV. 677, 690 (1995) (arguing that it makes little sense to differentiate between this and the widespread and accepted "unfairness" to litigants that occurs when they lose in an unreviewed lower state court decision, where the highest court ultimately decides another way).

61. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 157–58 (2d Cir. 1997) (Calabresi, J., dissenting) (arguing that the failure of federal courts to certify unsettled state-law questions promotes forum-shopping between state and federal courts).

62. *See, e.g.*, Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 134 (1992) (suggesting that certification of

Given these various rationales, when should a court certify a question? Little guidance exists, but courts generally certify when a question is open, recurrent and somehow "important."[63] The interest-balancing approach developed here addresses the underlying differences between bundled and unbundled decisions as a way of evaluating these varied rationales.

Another sorting device is primary jurisdiction, which is a judicially developed doctrine that addresses a situation where a court and administrative agency have concurrent jurisdiction. It allows (or, in some courts' view, requires) the court to stay a proceeding to allow an action to go forward in an administrative agency with particular expertise.[64] It originated in the federal courts[65] and has mostly been developed there, but states have sometimes adopted a similar doctrine.[66] It is not a perfect fit with the *Forum A/Law A* model because the administrative agency may not always have generated the law. The action may, for instance, involve statutory language rather than an agency rule.[67]

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state-law issues furthers "judicial economy, comity, ease of application, fairness to the litigants" and "avoid[s] judicial guesswork").

63. *See, e.g.*, Uniform Certification of Questions of Law Act § 3, 12 U.L.A. 53 (1995) (defining when state courts are empowered to answer questions); JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 18–19 & n.1 (1995) (listing common requirements in the state laws that enable certification).

64. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673–74 (2003) (Breyer, J., concurring); United States v. W. Pac. R.R. Co. 352 U.S. 59, 63–64, 165 (1956) ("'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (citation omitted)); *In re* Magnesium Corp. of Am., 278 B.R. 698, 706, 711 (Bankr. S.D.N.Y. 2002) (deferring to a state regulatory agency with respect to, among other things, issues involving rates).

65. *See* Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907) (deferring to the Interstate Commerce Commission).

66. *See, e.g.*, Farmers Ins. Exch. v. Superior Ct., 826 P.2d 730, 743 (Cal. 1992) (detailing California's version of the primary jurisdiction doctrine and applying it to stay in favor of the state Insurance Commissioner because "considerations of judicial economy, and concerns for uniformity in application of the complex insurance regulations here involved, strongly militate in favor of a stay to await action by the Insurance Commissioner in the present case"); Cnty. of Erie v. Verizon N., Inc., 879 A.2d 357, 366 (Pa. 2005) (transferring the case to the Pennsylvania Public Utility Commission based on Pennsylvania's primary jurisdiction doctrine).

67. *See, e.g.*, *Farmers Ins. Exch.*, 826 P.2d at 743 (sending determination of statutory provisions concerning insurance to an administrative agency).

Nonetheless, the instinct is the same—to align law and decision-maker—and this doctrine in particular can shed some light on the expertise rationale described further below.

An aspect of the supplemental jurisdiction statute might also be considered a sorting device that allows courts to bundle. This statute provides federal district courts with jurisdiction over claims that could not be brought in federal court on their own, but are closely related to the claims that give rise to federal jurisdiction.[68] After describing when such "supplemental" jurisdiction is allowed, the statute lists circumstances in which a federal court may decline to exercise it.[69] The statute reflects a preference for bundling in two ways. The federal court does not have to exercise jurisdiction over a claim that "raises a novel or complex issue of State law."[70] In terms of bundling, the statute gives permission to the federal court to re-bundle such a claim. The statute also reflects a preference for bundling by allowing federal courts to dismiss any (unbundled) claims that remain if "the district court has dismissed all claims over which it has original jurisdiction."[71]

A final example is *forum non conveniens*, which is the main mechanism for movement among state courts and is used by federal courts to dismiss in favor of foreign jurisdictions.[72] *Forum non conveniens* can act as an alignment mechanism, allowing discretionary dismissal in favor of another more appropriate forum, which will often apply its domestic law. In *Gulf Oil Corp. v. Gilbert*, the classic U.S. Supreme Court case setting out the factors for *forum non conveniens* in federal court, the Court suggested that "[t]here is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[73] Choice of law is only one of the factors in dismissal, however, and courts and legislatures have often been reluctant to allow dismissal on this ground alone.[74]

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68. 28 U.S.C. § 1367 (2006).

69. *See* 28 U.S.C. § 1367(c).

70. 28 U.S.C. § 1367(c)(1).

71. 28 U.S.C. § 1367(c)(3).

72. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260–61 (1981).

73. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). The same sort of reasoning has been applied in the context of transfer among federal courts, where one factor among others in the discretionary decision to transfer may be "the advantage of having a local court determine questions of local law." Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991).

74. *See, e.g.*, Williams v. Green Bay & W. R.R., 326 U.S. 549, 553 (1946) ("The fact that the corporation law of another State is involved does not set the case apart

Accordingly, *forum non conveniens* does not always sort cases to the home court; however, it acts as a bundling doctrine in some specific circumstances, particularly when non-U.S. law applies.[75]

The above categories can be thought of as discretionary dismissals that have as their effect, and often their purpose, realignment of law and forum. The result is often to send a legal issue or a case to the home court.

B. Legal Rules That Unbundle Law and Forum

Other doctrines affirmatively unbundle law and forum. Any time a forum is given jurisdiction to hear non-domestic law, law and forum may diverge. This section identifies some of the legal doctrines that permit unbundling by, for instance, giving federal courts jurisdiction to hear state law or establishing specialized courts such as tax or bankruptcy courts that must hear non-domestic (state-law) issues. The section then examines two ubiquitous examples of unbundled law and forum. These are the use of state long-arm statutes to define the scope of personal jurisdiction in federal courts and issue preclusion when litigation crosses jurisdictional boundaries. The section concludes by looking at some of the thorny problems raised by contractual choice of law and forum.

1. Allocating Jurisdiction

Initial decisions by legislatures about where to allocate decision-making may involve a choice of the home court. Many examples stem from particular grants of jurisdiction to courts or agencies that are not accompanied by matching substantive law.

Diversity jurisdiction is an important example of an unbundling doctrine as it, in combination with *Erie*, exists for the purpose of making a federal forum available for deciding an issue of purely state law. Although its efficacy and modern relevance have been debated, the purpose of diversity jurisdiction is often described as the avoidance of state court bias against litigants from outside the state.[76] *Erie* then dictates the use of substantive state law in

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for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it.").

75. *Piper*, 454 U.S. at 260 n.29 ("Many *forum non conveniens* decisions have held that the need to apply *foreign* law favors dismissal." (emphasis added)).

76. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 92 (2010) (describing the general purpose of diversity jurisdiction as a concern for "out-of-state prejudice . . . in

diversity cases, with the aim of avoiding forum-shopping within the boundaries of a single state.[77]

Erie can be re-envisioned as a decision about bundling. According to *Erie*, unbundling is sometimes mandated. When a federal court is sitting in diversity jurisdiction it must apply state substantive law, resulting in an unbundled decision (*Forum B/Law A*). The tension between doctrines that bundle and unbundle is present even within *Erie*, however. The opinion can be understood both to mandate the unbundling of substantive law and to permit procedure to be bundled.[78] The interest-balancing approach proposed here might accordingly be applied by legal issue rather than by whole case or whole claim.[79]

Diversity jurisdiction is one example, but other federal statutes also open a federal forum without a change in governing state law.[80] The Class Action Fairness Act is a specific example, allowing certain class actions based on state law to be filed in or removed to federal court.[81] Federal statutes governing multiparty, multiforum litigation are to similar effect, offering a federal forum for certain mass torts without providing substantive law.[82] The supplemental jurisdiction statute similarly allows state-law claims connected to federal claims into a federal forum, although it also includes the discretionary re-bundling provision discussed above.[83]

Jurisdiction in some administrative agencies and specialized courts might also be seen as deliberate unbundling in the same sort of category: a forum is opened without a corresponding power to

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a local court"); Pease v. Peck, 59 U.S. 595, 599 (1856).

77. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

78. This power to bundle procedure is rooted in Article III's grant of judicial power and the necessary and proper clause. *See id.* at 92. As Justice Reed's partial concurrence in *Erie* spelled out, "no one doubts federal power over procedure." *Id.*

79. Analyzing bundling by issue rather than case also addresses difficult instances in which law is not easily categorized as either Forum A's or Forum B's. For example, a state law might incorporate a federal standard. The scope of federal question jurisdiction in cases like *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), might be reframed in terms of bundling: the task is to balance having the particular issue of federal law bundled in federal court with having the other issues in the case (such as state-law negligence claims) bundled in state court.

80. *See, e.g.*, Issacharoff & Sharkey, *supra* note 1 at 1414–15 (listing federal statutes that provide a federal forum without substantive federal law and calling them "Unstable Hybrids" and examples of "Partial Federalization").

81. 28 U.S.C. § 1332(d) (2006).

82. *See* 28 U.S.C. § 1369 (providing for federal jurisdiction over cases involving a single accident that resulted in 75 or more deaths and where multiple jurisdictions have an interest in the litigation).

83. *See* 28 U.S.C. § 1367.

make law. Bankruptcy courts frequently must decide state-law issues, within the limits of Article III.[84] Bankruptcy courts are statutorily permitted to abstain "in the interest of justice, or in the interest of comity with State courts or respect for State law" and to remand "on any equitable ground."[85] These jurisdictional grants and discretionary declines of jurisdiction can be thought of in terms of alignment of law and forum: the broad unbundling (federal bankruptcy court/state law) permitted by the scope of bankruptcy jurisdiction is accompanied by the discretion to re-bundle through broad abstention and remand powers.

Tax provides other examples, as the underlying "legal interests and rights" are created by state law, with federal law determining the tax consequences.[86] In fact the question of when to align law and forum has explicitly arisen in the tax context. The IRS issued advice acknowledging that "numerous areas of tax law are affected by state law (i.e., alimony, divorce, partnership law, insurance, and estate tax)" but declining to certify an issue to the Montana state court.[87]

Sometimes a federal statute may even make unbundling mandatory. Although exclusive jurisdiction ordinarily aligns law and forum, one exception was addressed in the Supreme Court's 2012 opinion in *Mims v. Arrow Financial Services*.[88] In *Mims*, the Court considered whether the Telephone Consumer Protection Act ("TCPA")[89] established exclusive jurisdiction in state court over a federally created cause of action.[90] Although the Court ultimately decided that this particular statute was not sufficiently explicit to establish exclusive jurisdiction, the decision left open the possibility

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84. State-law issues frequently arise because the underlying property rights are defined by state law. *See In re* Kaiser, 791 F.2d 73, 74 (7th Cir. 1986) (citing Butner v. United States, 440 U.S. 48 (1979)); *see also* Stern v. Marshall, 131 S.Ct. 2594, 2620 (2011) (identifying Article III limits on bankruptcy courts' power to adjudicate a state-law counterclaim).

85. 28 U.S.C. § 1334(c)(1) ("[N]othing in this section prevents a . . . court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."); 28 U.S.C. § 1452.

86. Morgan v. Comm'r, 309 U.S. 78, 80 (1940). *See generally* Comm'r v. Estate of Bosch, 387 U.S. 456 (1967); Paul L. Caron, *The Role of State Court Decisions In Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781, 850–52 (1992).

87. I.R.S. Tech. Adv. Mem. 8562 (June 15, 1988) (concluding that Montana state law allowed certification from the tax court, and the tax court was permitted to certify, but that the state-law issue would not be dispositive and was an issue of statutory construction on which there was "ample case law").

88. Mims v. Arrow Fin. Servs., 132 S.Ct. 740 (2012).

89. 47 U.S.C. § 227.

90. *Mims*, 132 S.Ct. at 744.

that Congress could have established exclusive state court jurisdiction over a federal statute.[91] The example is unusual because it involves exclusive jurisdiction that would mandate unbundling: *Forum B* (state court)/*Law A* (federal law).[92]

The Anti-Injunction Act also reflects such a prohibition on bundling. It protects concurrent jurisdiction by preventing federal courts from enjoining state courts absent narrow exceptions: "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[93] Even if one of these exceptions applies, "principles of equity, comity, and federalism" may "restrain a federal court when asked to enjoin a state court proceeding."[94]

2. Personal Jurisdiction and Issue Preclusion

Personal jurisdiction and issue preclusion are rich and frequently occurring examples of unbundling. In the context of personal jurisdiction, federal courts (*Forum B*) routinely apply state statutes (*Law A*) that define the extent to which the courts may exercise personal jurisdiction. The use of these state long-arm statutes to define the jurisdiction of federal courts is mandated by the Federal Rules of Civil Procedure. Rule 4(k) provides that federal courts can reach defendants that are "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[95] Exceptions exist, but the rule generally defines the reach of federal courts by reference to state court jurisdiction. This rule could be changed, but as it currently stands, it forces unbundling.

Federal courts certify legal questions about the interpretation of the long-arm statute to the originating state's highest court, suggesting some instinct of federal courts that these should sometimes be decided by the home court. As the U.S. Court of Appeals for the Second Circuit recently suggested: "[D]etermining

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91. The Supreme Court suggested that Congress could pass a statute making state court jurisdiction exclusive over a federally created cause of action if it used explicit language calling for jurisdiction "exclusively" or "only" in particular courts. *Mims*, 132 S.Ct. at 748.

92. Alternatively, federal law might be considered to be part of a state's law because of the supremacy clause, *see* Testa v. Katt, 330 U.S. 386, 394 (1947), in which case it might be considered bundled.

93. 28 U.S.C. § 2283.

94. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4226 (3d ed. 2007).

95. FED. R. CIV. P. 4(k)(1)(A).

the scope of the New York long-arm statute is—as we have previously noted in certifying other jurisdictional questions—a task that requires the exercise of 'value judgments and important public policy choices,' best left to New York's highest court, if possible."[96] Other federal courts have certified questions about whether someone's allegedly defamatory statements posted on a website subjected her to jurisdiction under the Florida long-arm statute,[97] the validity of conspiracy theories of personal jurisdiction,[98] and other issues arising under the state law jurisdictional limits that apply in federal courts.[99]

Preclusion is another ubiquitous example of a legal doctrine that requires unbundling. Preclusion questions always involve more than one litigation, which may take place in multiple jurisdictions. When a court has to evaluate the effect of an earlier decision on the matter before it, it generally looks to the preclusion law of the place of the earlier decision.[100] In terms of this Article, the result is an unbundled decision about preclusion: Forum B has to apply Forum A's preclusion law.

Again, sometimes these questions about state preclusion rules are sorted to the home court through certification. For instance, federal district and appellate courts have certified questions to state courts about the preclusive effect of a state attorney general's earlier

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96. Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 74 (2d Cir. 2012) (citation omitted).

97. Internet Solutions Corp. v. Marshall, 39 So. 3d 1201, 1202–03 (Fla. 2010) (answering a question about the Florida long-arm statute certified by the U.S. Court of Appeals for the Eleventh Circuit).

98. Mackey v. Compass Mktg., 892 A.2d 479, 481 (Md. 2006) (answering a question certified by a Maryland federal district court about the validity of a conspiracy theory of personal jurisdiction as a matter of Maryland state law).

99. *See, e.g.*, White v. Pepsico, 568 So. 2d 886, 887 (Fla. 1990) (answering a certified question from the U.S. Court of Appeals for the Eleventh Circuit about whether "service on a registered agent . . . conferred upon a court personal jurisdiction over a foreign corporation without a showing that a connection existed between the cause of action and the corporation's activities in Florida"); Penguin Group (USA) Inc. v. American Buddha, 946 N.E.2d 159, 161 (N.Y. 2011) (answering a question certified to it by the U.S. Court of Appeals for the Second Circuit about how the New York long-arm statute treats the location of injury in copyright cases).

100. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (holding that federal law governed the claim preclusive effect of a federal judgment in a diversity action, but that the content of that federal law is usually the law of the state in which that first court sat); Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373, 380 (1985) (directing federal courts sitting in diversity to look to the preclusion law of the state where the first action took place, unless an intervening statute provides otherwise).

proceeding,[101] of various administrative and court proceedings,[102] and of default judgments that a court had imposed as a type of penalty.[103]

3. Private Ordering

The final broad category of legal doctrines that unbundle law and forum consists of rules that allow private ordering to delink law and forum. Arbitration and the Federal Arbitration Act ("F.A.A."), the federal statute promoting judicial enforcement of arbitration clauses,[104] allow parties to provide for a non-originating forum—there, the non-court forum of arbitration. In the terms of this Article, increased privatization of dispute resolution may also result in unbundling of law and forum.

Given its prevalence, at least in the commercial context, another important category is the contractual choice of law and forum. This example often poses exactly the choice between *Forum A/Law A* and *Forum B/Law A* examined here. As a descriptive matter, even parties that chose the applicable law by contract often forego contractual choice of forum.[105] So, for instance, a contractual dispute governed by a contractual choice of New York law but silent about forum choice might be pursued in any court or other type of forum

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101. Brown & Williamson Tobacco Corp. v. Gault, 627 S.E. 2d 549, 551 (Ga. 2006).

102. *See, e.g.*, Carlisle v. Phenix City Bd. of Educ., 543 So. 2d 194, 194–95 (Ala. 1989) (answering a question certified by a federal district court about the effects of an earlier state administrative proceeding on a teacher's claim raised in the federal court proceeding); Shields v. Bellsouth Adver. & Publ'g Corp., 545 S.E.2d 898, 898–99 (Ga. 2001) (answering a certified question about the preclusive effect of a state court's decision in an unemployment compensation appeal).

103. Malfatti v. Bank of Am., N.A., 99 So. 3d 1221, 1222 (Ala. 2012) (answering a question about Alabama preclusion doctrine certified to it by the Bankruptcy Appellate Panel for the Ninth Circuit).

104. *See* 9 U.S.C. § 2 (2012).

105. *See* Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1981 (2006) [hereinafter Eisenberg & Miller, *Ex Ante*] (noting that merger and acquisition agreements from 2002 always included a choice-of-law clause, but only 53% included a choice of forum); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1475, 1478 (2009) [hereinafter Eisenberg & Miller, *The Flight to New York*] (noting that all 2,882 material contracts of reporting companies studied in 2002 designated law, but only 39% designated forum).

with jurisdiction over the dispute.[106] Contracting parties are not obliged to choose the same law and forum. In that sense, the absence of rules linking contractual choice of law and choice of forum might be seen as permitting unbundling by private actors.

On the other hand, states sometimes attempt to enable bundling in these circumstances by statute. Delaware, for instance, implies consent to jurisdiction based on contractual choice of that state's law,[107] making Delaware courts available, though not mandatory, for the resolution of such disputes. Moreover, a number of state statutes prevent parties from excluding the home state by contract. For instance, the California Partnership Act provides that "[a] partner may, in a written partnership agreement or other writing, consent to be subject to the nonexclusive jurisdiction of the courts of a specified jurisdiction, or the exclusive jurisdiction of the courts of this state."[108]

These statutes preserve the option of bundling law and forum, although they do not go so far as to make it mandatory. They also recognize that parties could split forum and law contractually absent such a statute, choosing, for instance, Delaware law and a New York forum.[109] Contractual choice of law and forum is obviously a complex example, and it resists categorization as either purely pro-bundling or against it, but the choices for contractors can profitably be viewed through this lens.

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106. *See, e.g.*, Gemini Ins. Co. v. Kukui'ula Dev. Co. (Hawai'i), 855 F.Supp. 2d 1125, 1141 (D. Haw. 2012) (applying New York law in Hawai'ian courts based on contractual choice of New York law).

107. DEL. CODE ANN. tit. 6, § 2708(b) (2005) ("Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains [a Delaware choice-of-law] provision.").

108. CAL. CORP. CODE § 15901.17 (West Supp. 2013); *see also*; DEL. CODE ANN. tit. 6, § 17-109(d) (2005) (limited partnership); DEL. CODE ANN. tit. 6, § 18-109(d) (2005) (LLCs); MISS. CODE ANN. § 79-29-1211 (Supp. 2012); N.H. REV. STAT. ANN. § 304-C:10 (2005); VA. CODE ANN. § 13.1-1023.1 (2011); 72 Del. Laws 672 (2000).

109. Again, the Eisenberg and Miller study of material contracts of reporting companies is pertinent. Of the contracts that designated both Delaware choice of law and specified a forum, the Delaware courts were selected only approximately 69% of the time, with the rest choosing unbundled law and forum by contract. They designated a New York forum (approximately 10%), California forum (2.5%), or "Other" (18%). *See* Eisenberg & Miller, *The Flight to New York*, *supra* note 105, at tbl. 12.

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To this point, this Article has been concerned with description and categorization: when do law and forum align? It has accordingly sorted legal doctrines between those that bundle and those that affirmatively unbundle law and forum. The rest of the Article addresses the normative question: when *should* law and forum align? For instance, when should an Illinois state court decide an issue of Illinois state law, even though another forum is available and permissible under existing court-access rules?

IV. WHEN LAW AND FORUM SHOULD ALIGN

To answer the normative question about alignment, this Part argues that two functions distinguish a decision by Forum A of Law A (bundled) from one by Forum B (unbundled): lawmaking and allocation according to expertise. This Part outlines the analytic steps for a judge or legislator who must decide whether to direct disputes to the home court.[110] The first step is to determine whether a broadly binding opinion is needed. Step two is to evaluate the home court's expertise and the need for expertise in the particular dispute. Finally, the third step is to evaluate these two functions of bundled decisions in light of the competing interests of litigants and non-domestic courts and other types of forum.

The starting place for this analysis is the assumption that it is not enough to say that the home court should be able to decide all questions of domestic law (or even all open questions) for reasons of territory or sovereign rights. There are a few reasons for this. Such territory-based decision-making does not work as a general description of modern adjudication. With a few exceptions, concurrent jurisdiction is a basic premise of our federal system, whether between state and federal courts[111] or among state courts.[112] A rule that law should be decided in the home court would

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110. This proposal provides an account of the function of home court decisions and a normative suggestion of when this alignment makes sense from a systemic perspective, but it is not an account of the incentives of the various existing players. Another useful aspect of this Article's suggested framework may be that it highlights potential incentive problems in the way cases are currently sorted.

111. *See, e.g.*, Mims v. Arrow Fin'l Servs., LLC, 132 S. Ct. 716, 730 (2012) ("[T]he 'presumption in favor of concurrent state court jurisdiction' in federal question cases is 'deeply rooted.'").

112. U.S. CONST., art. IV, § 1; Hughes v. Fetter, 341 U.S. 609, 611 (1951); *see also, e.g.*, Ferreri v. Hewitt Assocs., 908 N.E.2d 1073, 1077 (Ill. App. Ct. 2009) (noting that the Full Faith and Credit Clause requires Illinois courts to "recognize the laws

reinstate a type of territoriality abandoned in many legal doctrines.[113] Moreover, limiting the last word to the highest domestic court already protects the sovereign interests of the originating territory, lessening the need to sort to the originating jurisdiction solely to respect its sovereign power, although other reasons may exist. In sum, law and forum should sometimes, but not always, align. The task is to figure out when that should be, which is the subject of this Part.

A. The Lawmaking Function

The first difference between bundled (*Forum A/Law A*) and unbundled (*Forum B/Law A*) decisions is the unique power of the originating territory's highest court to issue broadly binding decisions and the availability of appeal from the territory's lower courts. This section considers consequences of this lawmaking function for a theory of alignment.

The accepted rule is that the highest state court's opinion of its state law binds other jurisdictions.[114] Its corollary is that a decision by a state or federal court of non-domestic law generally binds only the parties.[115] Another way of describing this rule is that a bundled decision is broadly binding (or can become broadly binding on appeal), while an unbundled decision is *ad hoc*.

At this point, the bundled (*Forum A/Law A*) category must be broken down into decisions of A's highest court and decisions of A's lower courts. The highest court has the last word; it is "the final arbiter of what is [domestic] law."[116] The lower court decisions are not broadly binding.[117] Unlike *Forum B/Law A* decisions, however,

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of sister states and may not refuse to entertain lawsuits on the ground that they are based on foreign causes of action").

113. See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619, 623–25 (2001) (rejecting "categorical federalism"—"the mode of analysis for which the phrases 'truly national' and 'truly local' are touchstones"—in favor of a concept of "multi-faceted federalism"); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1403 (2005) [hereinafter Schapiro, *Interjurisdictional Enforcement*]; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1411 (1999) [hereinafter Schapiro, *Polyphonic Federalism*].

114. West v. Am. Tel. & Tel. Co, 311 U.S. 223, 236 (1940).

115. 20 AM. JUR. 2D *Courts* §§ 141, 143, 147 (2005).

116. *West*, 311 U.S. at 236.

117. This description is somewhat simplified, as the degree to which non-domestic courts should follow lower state court decisions is sometimes debated. *See, e.g.*, Caron, *supra* note 86, at 850–52.

they are subject to appeal to the court that can issue a broadly binding opinion. These differences are summarized in the table below.

TABLE 2

Forum	Law	Precedential Force
Forum A (highest court)	**Law A**	Broadly binding
Forum A (lower courts)		Not broadly binding Broadly binding on appeal
Forum B (any court or other forum)		Not broadly binding Not broadly binding on appeal

The rule that the highest state court gets the last word on its state law has been most explored in the context of federal decisions and is usually thought to derive from *Erie* and *Murdock v. City of Memphis*.[118] Although the obligations on the U.S. Supreme Court are disputed around the edges,[119] as is the precedential value of state lower court decisions,[120] *Erie*, *Murdock* and their descendants indicate that the decisions of the highest state court bind lower

118. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938); Murdock v. City of Memphis, 87 U.S. 590, 632–33, 635 (1874).

119. *See, e.g.*, Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1295–301 (1986) (discussing the "independent state grounds" basis for Supreme Court review); Jonathan F. Mitchell, *Reconsidering* Murdock: *State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1345–63 (2010) (suggesting that the Supreme Court should recognize an option to reverse on state-law grounds).

120. *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1544 (1997).

federal courts.[121] One result is that the state-law decisions of a federal court sitting in diversity are sometimes referred to as "*Erie* guesses,"[122] as they are predictions of what the highest state court would decide.

What *Erie* requires of other states is less developed, although one reason for this may be that it seems to be an obvious consequence of state sovereignty that only the decision of the highest state court of the state that created the cause of action is broadly binding on other states. This principle is so basic that, at least in the horizontal, state-to-state context, its source may lie in fundamental notions of coequal, lawmaking states.[123] *Erie* is more concerned with the source of law than the entity it binds, so it does not seem to distinguish between horizontal and vertical relationships in its discussion of precedential force. Under *Erie*'s positivist account, state law exists only by virtue of the state authority behind it, so "the voice adopted by the State as its own . . . should utter the last word."[124] *Erie* suggests that this rule protects lawmaking power, "recogniz[ing] and preserv[ing] the autonomy and independence of the States—independence in their legislative and independence in their judicial departments."[125]

The division between broadly binding and *ad hoc* decisions could also be understood as two ends of a spectrum of precedential force, which might capture some nuances missed when they are treated as binary. For instance, a decision by a federal court of state law may bind the federal courts within that circuit, at least until the state's highest court speaks on the issue.[126] At the other extreme, an arbitrator's decision may not even be public, so it might have even less precedential effect than a court's decision of non-domestic law.

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121. *West*, 311 U.S. at 236 (1940) ("[A]s was intimated in [*Erie*], the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.").

122. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679 (1992).

123. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 507–08 (2008).

124. Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938).

125. *Id.* at 78–79.

126. *See, e.g.*, Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) (holding that federal appellate decisions of state law bound the district court). *See generally* Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and* Erie *State Law Predictions*, 3 SETON HALL CIRCUIT REV. 1, 29 (2006) (citing cases and noting that courts vary in their approach and, in particular, on the deference they give to intervening state court appellate decisions).

After all, a court's decision may be both available and persuasive, even if not binding. Nonetheless, even acknowledging a range of binding force, the basic point holds that bundled decisions are on the most broadly binding end of the spectrum.

To determine how this lawmaking function can help guide policymakers and judges, the next question is when a broadly binding decision is needed. A starting point is by analogy to appeals, which are often thought of as having a dual function of error correction and lawmaking.[127] The appellate courts, like the home courts that are the focus of this Article, have a unique lawmaking function to "announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."[128]

As in the context of appeals, a broadly binding opinion may be used to resolve splits among non-domestic courts and other types of forum. Only a decision by the state's highest court can resolve conflicting interpretations by multiple, non-domestic courts. Examples arise in the context of certification, which potentially operates as a form of cross-jurisdictional appeal. It can be (and has been) used to resolve or avoid a split amongst federal courts.[129] For example, bankruptcy courts differed in how they interpreted the Florida homestead exemption and how it interacted with the state's personal property exemptions.[130] In response, the U.S. Court of

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127. *See, e.g.*, PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2, 3 (1976) (describing the "two-fold" function of appeals: "correctness" review and so-called "institutional" review that "is concerned with the general principles which govern the affairs of persons other than those who are party to the cases decided").

128. *Id.* at 3; *see also* KARL N. LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS 11–15 (1960).

129. *See, e.g., In re* Trahan, 444 B.R. 865, 867 (Bankr. S.D. Ohio 2011) (noting that "[f]ederal courts have certified questions of state law . . . in cases involving conflicting federal interpretations as to an important state law question that would otherwise evade state court review" (internal citation omitted)); *In re* Hogue, 286 S.W.3d 890, 894 (Tenn. 2009) (noting that at the time it accepted a certified question, the Tennessee bankruptcy courts were split as to the particular issue); *In re* Elliott, 446 P.2d 347, 355 (Wash. 1968) (indicating that the reason for certifying is "to obtain an authoritative decision" and to resolve the split between "different referees of the bankruptcy courts [that] have given conflicting interpretations of the statute").

130. *Compare In re* Bennett, 395 B.R. 781, 790 (Bankr. M. D. Fla. 2008) (holding that debtors who do not affirmatively claim a homestead exemption are entitled to Florida's personal property exemption under Florida Statute § 222.25(4)), *with In re* Kent, 411 B.R. 743, 755–56 (Bankr. M. D. Fla. 2009) (concluding that a debtor who keeps the home benefits from Florida's constitutional homestead exemption and is not entitled to the personal property exemption), *and In re* Brown, 406 B.R. 568, 571 (Bankr. M.D. Fla. 2009) (same).

Appeals for the Eleventh Circuit certified the question to the Florida state court,[131] which resolved the conflict in a broadly binding opinion.[132]

Other markers for the need for a broadly binding opinion are the recurrence of the legal issue and the extent to which the law in dispute constrains decision-makers. Such splits are likely to arise and be worth resolving in the context of recurring questions. This relationship between recurrence and conflicting opinions is partially a consequence of having multiple decisions; no split between courts occurs when a law is applied only once. The emphasis on recurrence is also related to a practical concern that the lawmaking powers of the home court be invoked only when necessary to create uniformity going forward. It accordingly already forms part of some courts' consideration of whether to use a sorting device such as certification.[133]

Conflicting decisions may be more likely, moreover, in the context of law that is flexible and permits the decision-maker broad discretion. Obviously, no bright line exists between broad grants of discretion and law that constrains, and it echoes the debate about differences between standards and rules. Nonetheless, a legal directive that something be "reasonable" may be open to more divergent interpretations than one that calls for a filing within five days. When the source of law is more like the latter, the need for a broadly binding opinion is diminished.

Because splits and recurrence indicate the need for a binding opinion, this analysis accommodates decisional plurality.[134] Lawmaking is needed as a form of cross-jurisdictional appeal to resolve splits. If a split exists, multiple decision-makers have already had a chance to interpret the law. Particular sorting mechanisms might also be tailored to allow for multiple and overlapping decision-makers. For instance, Judge Calabresi is a proponent of certification

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131. Osborne v. Dumoulin (*In re* Dumoulin), 326 Fed. Appx. 498, 498 (11th Cir. 2009) (certifying to the Florida Supreme Court the question of whether "a debtor who elected not to claim a homestead exemption and indicated an intent to surrender the property was entitled to the additional exemptions for personal property . . .").

132. Osborne v. Dumoulin, 55 So. 3d 577 (Fla. 2011).

133. Statutes and rules governing certification generally do not require that a legal issue be recurrent for certification to be appropriate. Many certifying and answering courts have introduced this consideration, however. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Mallela, 372 F.3d 500, 505 (2d Cir. 2004) (noting that certification is appropriate where, among other considerations, an issue "is likely to recur"); Winship, *supra* note 21 (citing cases).

134. Professor Schapiro has called this "interpretive plurality," and has extolled its benefits. Schapiro, *Interjurisdictional Enforcement*, *supra* note 113, at 1419.

from federal to state courts, but has suggested that federal courts be required to indicate how they would resolve the state law issue before certifying.[135]

In sum, bundled decisions have a unique lawmaking power, which is needed in the context of existing splits, where legal questions frequently recur, and where the applicable law allows broad discretion.

B. The Role of Expertise

The second difference between decisions that are aligned and those that are not is the relationship between the forum's decision-maker and the law. The starting point is descriptive: the originating forum is usually more frequently and broadly exposed to its own law than is a foreign forum. This assertion may be uncontroversial, but a few examples make the point. For instance, in 2011, federal district courts primarily decided issues of federal (home) law.[136] Non-diversity cases made up approximately 63% of the docket of federal district courts.[137] This percentage provides only a rough estimate as it omits state-law issues in federal court on supplemental jurisdiction and also does not indicate how many different states' laws the courts decide. However, it does support the intuition that the federal courts primarily apply federal law.

This point also follows from loose full faith and credit constraints on choice of law and the spread of choice of law standards that enabled greater use of forum law.[138] One consequence is that state courts mostly decide issues of domestic state law. That is, an Illinois state court is likely to decide primarily issues of Illinois state law. The state court's focus on state law is particularly striking if procedural issues are taken into account because courts routinely apply their own procedure, bundling law and forum for those issues.

Based on this repeat-player relationship between the court/judge and the state's law, an interest served by alignment is functional.

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135. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003); Nash, *supra* note 3, at 1880 (discussing Judge Calabresi's proposal).

136. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2010 AND 2011, Table C-2, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf.

137. *Id.*

138. *See supra* Part II.A.

Forum A may be "better" at deciding Law A.[139] This functional difference depends both on a claim to accuracy and the state court's commitment to be a long-term repeat player invested in the jurisdiction's legal system and laws as a whole. This special relationship to state law is characterized by (1) subject-matter expertise; (2) access to information and (3) latitude in interpretation, which this section discusses in turn.

A relevant analogy is to primary jurisdiction, which is a mechanism that sorts legal issues to the home forum (i.e., a bundling doctrine). This judicially developed doctrine allows a federal court that has jurisdiction over the matter to stay a proceeding to allow an action to go forward in an administrative agency with particular expertise. Justice Breyer has described the purpose of this doctrine as "produc[ing] better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime."[140] In deciding whether to stay based on this doctrine, courts have considered whether the case "rais[es] issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion" because agencies "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."[141] Similarly, bankruptcy courts deciding whether to abstain or remand sometimes consider whether the originating court has "greater expertise."[142]

When is this type of expertise important? Constraint is relevant, as it was for the lawmaking function above. If the law constrains, then the difference between an expert and non-expert is reduced.

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139. *But see* Nash, *supra* note 3, at 1872 (suggesting that state court bias against out-of-state parties may make them "less able than federal courts to resolve state law questions 'correctly'"). In this Article's framework, this concern for state-court bias would not determine the analysis of expertise, but would be considered in the context of countervailing structural interests. *See infra* Part IV.C.

140. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 673 (2003) (Breyer, J., concurring) (citing United States v. W. Pac. R.R. Co., 352 U.S. 59, 63–65 (1956)).

141. Far E. Conf. v. United States, 342 U.S. 570, 574–75 (1952) ("[A]gencies created by Congress for regulating the subject matter should not be passed over . . . even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies . . . .").

142. *See* Dalen v. Clamage, No. 97C5174, 1997 WL 652343, at *6 (N.D. Ill. Oct. 10, 1997) (listing factors for remand to state court including "whether the court in which the action originated has greater expertise").

Constraint might be in the form of existing decisions that restrict the range of possible outcomes, or of law that is more like a detailed rule than a broad standard. These two types of constraint are related but not identical. A question might be "open" in the sense that the highest state court has not decided a particular issue or little guidance exists in any case law. Decision-makers might nonetheless be constrained because of a specific, rule-like statute. Applications of state law in bankruptcy and tax are often examples of the first, where the law is well-settled so expertise in the sense used here (deriving from repeated and broad exposure) is not needed. One possible guide for when law and forum should align is accordingly that originating jurisdictions should be strongly preferred in areas of greatest discretion (e.g., standards rather than rules) and weakly preferred when other jurisdictions are constrained (e.g., uniform acts, rules rather than standards).

A home forum might have practical or factual information because of its position as a repeat player. The forum might, for instance, be aware of repeat plaintiffs or counsel, aspects that suggest collusion, or institutional relationships.[143] The instinct that the originating state court may have more practical information about the whole body of the law is sometimes reflected in existing law. The Restatement (Second) of Conflicts of Law suggests that dismissal of corporate cases in favor of the incorporating jurisdiction may sometimes be appropriate "because . . . the giving of proper attention to local custom that is not reflected in law books, can best be assured by having the action tried in the state of incorporation."[144]

Another aspect of the relationship between the home forum and home law is the greater latitude the forum has to incorporate policy concerns in its decisions. Courts deciding non-domestic law must parse the evidence of how the home court would come out, using materials such as state trial court decisions, statutes, and secondary authority. The originating court, in contrast, may rely on common sense and policy concerns.[145] In Judge Friendly's words: "Whereas

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143. *See, e.g.*, Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089 (2013).

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 (1971).

145. *See, e.g.*, Wilson v. Paine, 288 S.W.3d 284, 289 (Ky. 2009) ("We believe the wiser approach to be the 'disinterested majority' test, as it comports with both common sense and human nature."); Drury Dev. Corp. v. Found. Ins. Co., 668 S.E.2d 798, 800 (S.C. 2008) ("In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.").

the highest court of the state can 'quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,' a federal court often must exhaustively dissect each piece of evident thought to cast light on what the highest state court would ultimately decide."[146]

Several examples arise in the context of certification, which can allocate a question of law to the court that can decide how formalist to be. Re-bundling through certification may allow the certifying court to avoid what it sees as inequitable results that a literal reading of a state statute could cause. To take advantage of this difference, the Second Circuit certified an issue that first arose in a bankruptcy proceeding.[147] The court explicitly noted that the result would be harsh if it read the statutory language literally, but as a non-domestic court it was reluctant to opine on the degree of formalism in Vermont state law.[148] It resolved this problem by certifying to Vermont's highest state court.[149]

This repeat-player relationship between the home court and its domestic law is neither absolute nor immutable. It is not absolute in that certain issues or subject areas may arise more frequently in a particular non-domestic forum. Some state-law issues do not come up in state court and are instead predominately or completely decided by courts in another system. Bankruptcy courts may, for instance, have more opportunities to interpret state homestead laws than state courts, or may hear as many or more U.C.C. issues.[150] Similarly, federal courts may often be in the position to interpret a state's long-arm statute, although the occasional certification of such questions to the originating state court signals that federal courts

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146. HENRY FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 142 (1973) (citations omitted).

147. *In re* Potter, 313 F.3d 93, 96 (2d Cir. 2002) (certifying to the state court where "formalism is by no means the only possible approach to cases like this" and "the rule appears particularly harsh in the context in which it is most likely to arise—bankruptcy proceedings, where its consequence is that the bankruptcy trustee can avoid a mortgage that the original grantor would not be able to avoid").

148. *Id.*

149. *Id.*

150. *See, e.g.*, *Potter*, 313 F.3d at 96 ("[T]he effect that filing a foreclosure complaint has on an improperly witnessed mortgage is much more likely to arise in federal bankruptcy courts than in state courts. . . . Perhaps as a result, even though the question raises an important question of state law, apparently no Vermont court has ruled on it."); Chem. Bank v. First Trust, N.A. (*In re* Se. Banking Corp.), 710 N.E.2d 1083, 1085–86 (N.Y. 1999) ("[S]ince the issue of post-petition interest arises almost exclusively in bankruptcy proceedings, New York courts have not previously considered the issue.").

are sometimes interested in aligning that particular issue.[151] Arbitration is another relevant counter-example because, on the one hand, it is almost entirely a business of applying law that it does not generate.[152] On the other hand, at least in theory, arbitration offers expert decision-making.

Moreover, the relationship between the decision-maker and the law is not immutable. Other states or other fora could become repeat players by committing to expertise in non-domestic law. A state that wants litigation business might adopt a strategy of attracting it through the speed, expertise and predictability of its courts in deciding other states' law. In corporate law, for instance, Nevada is sometimes seen as one of the few states that may be competing with Delaware for incorporations.[153] Nevada could set up a business of competing with Delaware in deciding *Delaware* law.[154] Most states require some connection between the designated law and the parties or contract it governs, but these requirements are generally not onerous, and this scenario is not farfetched. An international example is of commercial contracting for dispute resolution in English courts: the Law Society of England and Wales, which represents solicitors there, advertised the choice of the English court system or arbitration there "whatever the governing law."[155]

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151. *See, e.g.*, Licci *ex rel.* Licci v. Leb. Can. Bank, SAL, 673 F.3d 50, 54 (2d Cir. 2012) (certifying a question about the New York long-arm statute to the highest New York state court).

152. *But see* Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. OF TRANSNATIONAL L. ___ (forthcoming 2014) (examining why arbitrators may favor resorting to the Lex Mercatoria—which could be seen as law generated by arbitrators—rather than law of a particular territory).

153. *See, e.g.*, Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 935 (2012) (suggesting that "[m]arket segmentation with lax law" has allowed Nevada to compete with Delaware in the interstate market for incorporations).

154. In the context of recent M&A litigation, although recent studies suggest that adjudication of Delaware corporate law has moved from taking place almost entirely in Delaware (bundled) to also taking place in part in out-of-state courts (unbundled), no other forum rivals Delaware's repeat-player status in relationship to Delaware law; instead the other cases are spread among federal and state courts. *See* John Armour, Bernard Black, & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1345 (2012).

155. THE LAW SOC'Y OF ENG. & WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE 12, *available at* http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf ("Parties may agree to select England and Wales as the jurisdiction in which to resolve their dispute whatever the law governing their dispute. The English High Court is experienced in hearing evidence of foreign law and deciding issues in accordance with that law.").

Even with these qualifications and nuances, expertise may be particularly relevant when a decision-maker has subject-matter expertise and the legal question is within that area, when it has special access to information or when its power to decide with attention to broad policy concerns is needed to avoid inequitable results.

C. Interest Balancing

As noted above, the main aims of this Article are to describe the legal landscape in terms of alignment/disalignment, to identify differences between bundled (*Forum A/Law A*) and unbundled (*Forum B/Law A*) decisions, and to suggest what interests may be promoted by bundled decisions.[156] This Part concludes by highlighting a few categories of competing interests and revisiting the example of multijurisdictional deal litigation with which this Article began.

This list of countervailing concerns is not exclusive. Nor does it diminish the importance of such competing interests. The Article's focus is on making transparent the theoretical moves necessary to the interest-balancing approach, and the points of potential basic disagreement about its appropriateness as a method for allocating decisional power or the outcome in any particular case. The suggestion is simply that whether sorting to the originating state is appropriate depends in part on the balance between the lawmaking function (as measured by recurrence of the issue and court splits), the need for expertise, and views on the competing interests, if any.[157]

One set of competing interests is that of litigants. Forum choice is often primarily a story of litigant and lawyer shopping among the available types of forum based on applicable court-access rules and

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156. Various doctrinal areas already require lawmakers to identify and weigh the competing interests at stake. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (calling for the application of federal preclusion law when a "countervailing federal interest" exists). By articulating the lawmaking and expertise functions of home court decisions, this Article accordingly offers new content to existing interest-based tests.

157. The instinct that interest-balancing can accommodate a complex and overlapping jurisdictional system draws on the literature on conflicts of law. *See, e.g.*, Currie, *supra* note 7, at 181. However, the interest balancing this Article suggests is not identical to that used in modern choice-of-law. As noted above, it applies to situations where the applicable law is the same no matter where the suit is brought, rather than the choice-of-law interest analysis that ordinarily permits each forum to apply its own law. *See id.*; *supra* Part II.A.

broad due process constraints. Courts often defer to forum choice by plaintiffs. Sometimes bundling would override a litigant's choice of forum, and could even be seen as forum choice by judges. So, for instance, one argument supporting certification is that judges can use it to prevent (undesirable) forum-shopping.[158] In the approach described here, even if lawmaking and expertise interests are served by bundling, in some circumstances these would be overridden by strong countervailing interests in protecting the litigants' choice of forum.

Another competing interest is the structural interest in the relationship between the legislature and the courts. Sometimes the legislature has given the courts certain jurisdiction, which the courts decline to exercise in favor of sending a question to the home court (bundling).[159] The main example is diversity jurisdiction. Sorting devices that re-bundle law and forum raise concerns that federal Article III courts or litigants are simply using the process to avoid the implications of diversity jurisdiction, and that bundling in these circumstances overrides an express jurisdictional grant from Congress.[160] Abstention has been open to this critique, with some commentators arguing that abstention by federal courts violates separation-of-power principles.[161] Others counter this critique by suggesting that the initial legislative grant included an implied delegation to courts to use their discretion in some instances.[162]

Bundling does not always implicate the relationship between the legislature and judiciary, however. Separation of powers is not at issue when the legislature decides how to allocate jurisdiction in the first place or when statutory provisions allow or enable judges to

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158. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance, Madison Lecture*, 78 N.Y.U. L. REV. 1293, 1300 (2003).

159. Because of these concerns, courts have sometimes cautioned that certification or abstention or *forum non conveniens* should be the exception rather than the rule. *See, e.g.*, *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig. (Miss. Plaintiffs), 668 F.3d 281, 290 (5th Cir. 2012) ("The court should exercise that discretion sparingly, certifying only in 'exceptional case[s].'" (citation omitted)).

160. Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1675 (2003) (noting the tension between certification from federal Article III courts and the "fundamental purpose of federal diversity jurisdiction").

161. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76 (1984) (characterizing the various abstention doctrines as "a judicial usurpation of legislative authority, in violation of the principle of separation of powers").

162. *See, e.g.*, Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1259 (2001); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 48–49 (1990).

exercise their discretion to bundle law and forum. For example, such judicial sorting devices as abstention are sometimes explicitly enabled by statute, as in the context of the bankruptcy courts' statutorily granted power to abstain in favor of state courts "in the interest of justice, or in the interest of comity with State courts or respect for State law."[163] The supplemental jurisdiction statute similarly expressly provides a federal court with the power to decline to exercise its supplemental jurisdiction,[164] reducing concerns about separation of powers.

These competing interests, whether of litigants, structural or other concerns, balance with the interests in lawmaking and expertise. One example of how the balancing approach works can be seen by revisiting the multijurisdictional corporate litigation with which the Article opened, and applying the interest-balancing proposed here. As noted above, in this type of litigation shareholders challenge a corporate deal by filing suit in several different jurisdictions in the United States. Because the internal affairs doctrine applies, the same law applies to the duties of defendant corporate actors regardless of where the suit is filed. The situation accordingly presents a clear question of whether law and forum should be bundled.[165]

The first step is to determine whether a binding opinion is needed. It is not enough to say that Delaware stakeholders would like to keep the cases in-state, although some policies and legal decisions indicate that stakeholders would like to keep at least some cases in Delaware state courts.[166] Instead, the focus is on whether the power to issue a broadly binding opinion (or to do so on appeal) is needed.

Constraint is relevant to both the lawmaking and expertise functions of home court opinions. The particular corporate laws in question provide scant guidance or constraint to a non-domestic forum, potentially making expertise more important. Relaxed principles of stare decisis, reliance on flexible standards, and change

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163. 28 U.S.C. § 1334(c)(1) (2006).

164. 28 U.S.C. § 1367(c) (permitting federal district courts to "decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction").

165. *See supra* Part II.B.

166. Winship, *supra* note 19, at 59–60 (identifying evidence that some Delaware stakeholders are interested in keeping at least some domestic cases in state).

of these standards over time, particularly for issues like fiduciary duties, makes Delaware law notoriously indeterminate, providing little constraint for other decision-makers.[167] As a result, conflicting decisions are more likely because of the latitude for decision-making.

Other aspects of determining whether a binding decision is necessary are trickier. The issues are often one-off, with little recurrence in litigation, but with influence on the way future business arrangements and relationships are shaped. Moreover, many of the opinions that come out of multijurisdictional deal litigation, including in the examples of *In re Parcell* and *In re Allion* given above,[168] are in the form of settlement approvals or allocation of attorneys' fees. Neither fits comfortably within the most clear example of a binding, final opinion. The lawmaking effect of these decisions should not be discounted, however. Much, if not most, of the law in the corporate area is generated at these early stages of disputes.

Even if the need for lawmaking (a final, broadly binding opinion) is not dispositive, Delaware courts are unusual in their claim to subject-area expertise.[169] They might even be understood as analogous to an administrative agency.[170] Moreover, as noted above, little constraint exists in this area of the law to lessen the differences between expert and non-expert decision-makers. As a repeat decider of corporate law, exposed to both the legal issues and the members of the bar, these home courts have both information and expertise advantages.

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167. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 286 (Del. Ch. 2003); Stone v. Ritter, 911 A.2d 362 (Del. Supr. 2006) (gradual development of good faith requirements and relationship to fiduciary duties); Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 92 (1990); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1071 (2000) (noting the conflict between the view that the attractiveness of Delaware lies in part in its developed precedent and the reality that Delaware law is "surprisingly indeterminate"); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1909 (1998).

168. *See In re* Allion Healthcare Inc. S'holders Litig., Civ. Action No. 5022-CC, 2011 WL 1135016, at *1 (Del. Ch. Mar. 29, 2011) (attorneys' fees); Parcell Transcript, *supra* note 23, at 16 (settlement negotiations).

169. *See, e.g.*, Thomas & Thompson, *supra* note 39, at 1771–72 (noting that 75% of the Delaware Court of Chancery's docket involves corporate law and that many of the judges had practice experience in corporate law before they were appointed to the bench).

170. *Cf.* Fisch, *supra* note 167, at 168 (suggesting that the Delaware courts' process of lawmaking resembles legislation).

Finally, competing interests of the non-originating forum and litigants are weak in this particular instance. The same class will be represented, regardless of the forum in which the suit goes forward. The difference is primarily in which counsel represents the class. Evidence suggests that these multiple filings are a way of forcing negotiation about the allocation of attorneys' fees. Delaware judges have sometimes pointed to the role of multijurisdictional litigation in fee negotiations among plaintiffs' attorneys; attorneys may leverage the ability to file in multiple jurisdictions to get a share of attorney fees.[171] John Armour, Bernard Black, and Brian Cheffins have suggested that fee decisions and closer scrutiny of settlement may have pushed plaintiffs' attorneys to move litigation outside of Delaware.[172] Randall Thomas and Robert Thompson call this "fee distribution litigation."[173] In a particular instance like this, where mandatory bundling has been proposed, the expertise interest is served by a bundling statute and the litigant interests are weak pressures in the other direction.

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In sum, this Article's proposed interest balancing works as follows. The first step is to determine whether either of the interests promoted by bundling—lawmaking or expertise—is served in the particular instance. A broadly binding opinion is valuable in the context of conflicting non-domestic decisions, recurring issues, and legal directives that give decision-makers broad latitude. Whether expertise is needed in a particular instance depends on constraint; where the law constrains, the difference between an expert and non-expert is lessened. The value of expertise also depends on the need for technical expertise in a particular area of the law, the impact of a decision on state-law as a whole, and a comparison of the domestic and other decision-makers. If there is no lawmaking interest and no need for expertise, then the argument for bundling is not compelling. If one or both of these interests is served by bundling, then the next

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171. *See, e.g.*, Parcell Transcript, *supra* note 23, at 16.

172. *See* Armour, Black, & Cheffins, supra note 14. *But see* Jessica Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 99 (2011) (suggesting that a broader pattern of parallel corporate fraud litigation explains the move, at least to federal court).

173. Thomas & Thompson, *supra* note 39, at 1753 (describing "fee distribution litigation" as "multijurisdictional suits ... filed by plaintiffs' law firms largely to obtain a slice of the total pool of plaintiffs' attorneys' fees that are paid in a global settlement in one of these cases").

task is to identify and weigh competing interests, including those of other territories and litigants.

V. CONCLUSION

One normative question underlies many legislative and judicial decisions that allocate decision-making power: When should law be decided in the home forum? What, in other words, is the home court advantage? This Article proposes an approach to deciding when law and forum should align that accommodates varied legal areas and questions whose complexity resists bright-line rules.

This Article provides guidance for judicial and legislative responses to a pressing current issue in corporate law: the explosion of multijurisdictional deal litigation in state courts. It also uses insights from corporate law to make two main contributions to the literature about judicial jurisdiction. It first provides an innovative map of the U.S. legal landscape in terms of doctrines that bundle law and forum (for instance, exclusive jurisdiction) and those that ensure unbundling (for instance, diversity jurisdiction). Much of the literature about court jurisdiction maps the complex, overlapping modern system of courts. This Article builds a necessary and complementary account of the areas in which the preference for the home court persists.

Second, the Article articulates the interests promoted by having law decided in the home court: a lawmaking function of creating binding law and allocation according to expertise. Ultimately, it uses these functions of home court decisions as the basis for an interest-balancing approach that provides policymakers and courts with a broadly applicable response to the ubiquitous question of when law and forum should align.