

JURISDICTION OVER CORPORATE OFFICERS AND THE INCOHERENCE OF IMPLIED CONSENT

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Corporate officers of most large corporations in the United States have little contact with the state of incorporation—usually Delaware—beyond the bare fact of being a corporate officer. Jurisdiction in that state’s courts thus depends on whether the position alone provides constitutionally significant minimum contacts with the state. This Article argues that statutorily implied consent is an incoherent basis for personal jurisdiction over corporate officers and is the first to identify and analyze Delaware’s widespread use of implied consent statutes for corporate and noncorporate business entities. Not only is consent ultimately irrelevant, but jurisdiction over nonresident corporate officers based only on their corporate position is of uneasy constitutionality. This Article evaluates a solution to this problem: a movement from implied to express consent.

The Article also contributes to two current debates in corporate law. Courts and commentators have recently turned their attention to corporate officers, but they have ignored a necessary first step in the analysis, which this Article provides. Without personal jurisdiction over officers, state courts cannot even begin to develop the law about their duties or protections. Moreover, the Article fills a gap in the debate over how Delaware can keep its corporate law cases in its courts. It argues that implied consent statutes are designed to ensure that Delaware business law is adjudicated in Delaware, and that the constitutional due process limits analyzed here are an important obstacle to Delaware’s attempts to bundle its corporate law and forum.

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INTRODUCTION

Imagine a shareholder derivative suit involving a company incorporated in Delaware with its principal place of business in California. Assume (reasonably) that the only contact between the state of Delaware and the corporate directors and officers is their position in the Delaware corporation. Not only do they live and work elsewhere, but they have never been to Delaware. Because of constitutional constraints, they cannot be involuntarily sued someplace unless they have minimum contacts with that state, so how can such a dispute be decided in the Delaware courts? The answer lies in director and officer implied consent statutes.

Delaware's implied consent statutes provide that directors and officers of domestic corporations "shall . . . be deemed . . . to have consented" to in-state service on an appointed agent and thus to personal jurisdiction in Delaware courts.¹ The statutes are limited to suits in which the director or officer is a "necessary or proper party" or those for "violation of a duty in such capacity."² Equivalent implied consent statutes exist for noncorporate business forms,³ and many other states assert jurisdiction over officers and directors in their long-arm statutes.⁴

1. DEL. CODE ANN. tit. 10, § 3114(a)-(b) (2013).

2. *Id.* "Such acceptance or service as such officer shall be a signification of the consent of such officer that any process when so served shall be of the same legal force and validity as if served upon such officer within this State . . ." *Id.* § 3114(b). Delaware courts have further limited jurisdiction to suits alleging breach of fiduciary duty, as discussed more below.

3. *See infra* Table 1.

4. *See infra* Table 2.

This Article argues that jurisdiction over corporate actors based on position alone is of uneasy constitutionality. The implicit claim is that actors covered by domestic business law should be able to be sued in domestic courts and that their position in the business organization establishes constitutionally significant minimum contacts. The expansion of Delaware's claimed jurisdiction to officers and other business actors is ultimately a claim that, with few limitations, Delaware's courts should be available to hear suits about the internal affairs of Delaware's business entities.

That Delaware courts should be open to governance suits may sound sensible, and at least some Delaware stakeholders seem to think so, but it runs counter to statements by the U.S. Supreme Court that choice of law does not open a forum, and that the inquiries into governing law and personal jurisdiction are independent.⁵ Whether these jurisdictional claims are constitutional turns on whether the constitutional due process analysis defers to the state's asserted interest in regulating its own business entities and business actors. Moreover, even if one were to accept the constitutionality of the director consent statute, Delaware's relatively recent inclusion of officers puts pressure on the pragmatic compromise between the interests of Delaware in adjudicating its corporate law and the interests of individual officers and directors in where they are open to suit.

This Article's analysis contributes an important piece to the developing area of the duties of corporate officers. Nondirector officers have long been neglected in case law and in commentary, and judges and scholars have only recently begun to explore the duties of these officers under state corporate law.⁶ To date, most of the debate concerns the content and nature of officers' duties.⁷ This Article goes back one missing step to examine the prerequisite to the development of substantive state law governing corporate officers: the jurisdiction of the incorporating state. Instability of the implied consent statutes would threaten Delaware's ability to hear suits against directors and nondirector officers who are not Delaware residents. The scope of litigation against directors is well-known; many of the core corporate law cases fall into this category. Although no flood of litigation against nondirector officers has mate-

5. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977); see generally Eric A. Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. (forthcoming) (arguing that the director implied consent statute is unconstitutional, especially in light of the Supreme Court's opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*).

6. See, e.g., *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (explicitly holding for the first time that “corporate officers owe fiduciary duties that are identical to those owed by corporate directors” under Delaware law).

7. See, e.g., Lawrence A. Hamermesh & A. Gilchrist Sparks, III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865, 867 n.13 (2005); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005); A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 215 (1992).

rialized, the involvement of these officers in high-profile cases, and the increased prevalence of nondirector officers because of independence requirements, suggest that this category of cases is potentially important.

This Article is also the first to integrate the analysis of personal jurisdiction into the debate over whether and how Delaware can keep its corporate-law cases in state. Scholars and other commentators have observed that Delaware corporate law is increasingly adjudicated outside Delaware in other states' courts and in federal courts,⁸ but personal jurisdiction is an aspect of this debate that has been ignored. The implied consent statutes and implicit claims about the state's exceptionally strong interest in its corporate law are aimed at making the Delaware forum available for the adjudication of corporate law claims, and are best understood as part of an array of devices designed to allow Delaware to bundle its corporate law and forum. Constitutional due process potentially limits the state's ability to bundle, sometimes preventing Delaware from deciding business-law cases.

The Article proceeds as follows. Part I traces the emergence of director and officer implied consent statutes, with particular attention to the Supreme Court's decision in *Shaffer v. Heitner*, which invalidated earlier bases of jurisdiction over officers and directors and prompted Delaware to pass its director implied consent statute.⁹ It also looks beyond Delaware corporate law to Delaware's use of implied consent to assert jurisdiction over other business entities and other actors, as well as to other states. Part II identifies the two main problems with such statutes, beginning with why their language implying consent is ultimately irrelevant. It then identifies the constitutional infirmities of jurisdiction over corporate actors based on position alone and explains why even Delaware courts acknowledge that such jurisdiction is "constitutionally sensitive."¹⁰ It relates personal jurisdiction to the broader issue of whether and how Delaware stakeholders can ensure that Delaware courts are the primary, and sometimes exclusive, adjudicators of Delaware corporate law. The final Part proposes and evaluates a solution to the instability of the consent statutes: moving from implied to express consent to jurisdiction.

8. See John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345 (2012) [hereinafter Armour et al., *Delaware's Balancing Act*]; John Armour et al., *Is Delaware Losing Its Cases?*, J. EMPIRICAL LEGAL STUD. 605 (2012); Faith Stelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 104–19 (2009) (observing the movement away from adjudicating corporate cases in Delaware and identifying strategies used by Delaware courts to keep cases); Ted Mirvis, *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 2007, at 17.

9. 433 U.S. 186 (1977).

10. See, e.g., *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, No. 3231-VCS, 2008 WL 963048, at *10 n.76 (Del. Ch. Apr. 10, 2008).

I. THE EMERGENCE OF IMPLIED CONSENT STATUTES

A. *Implied Consent by Directors*

The need to establish a forum where both the corporation and its primary corporate actors can be sued has been an issue as long as corporations have been delinked from physical location. It is an issue in part because of rules that permit all corporate actions, including board meetings, to take place outside the incorporating state. Before Delaware enacted a director implied consent statute, its jurisdiction over nonresident officers and directors rested on the interaction between two state statutes. The first provided that the court could exercise jurisdiction over a nonresident based on the seizure of his or her property located in Delaware.¹¹ The second provided that shares in a Delaware corporation were, by statutory definition, located in Delaware.¹² This statute was unusual; the broadly adopted Uniform Commercial Code deemed shares to be located where the physical certificate was.¹³ These two statutes established a sequestration procedure that based jurisdiction on the presence of property (usually unrelated to the cause of action) within the state. Although the statute is more broadly drafted, litigants in Delaware often used the process to establish jurisdiction over directors and officers in derivative suits.¹⁴

The U.S. Supreme Court's decision in *Shaffer v. Heitner* invalidated sequestration and prompted the passage of Delaware's director implied consent statute. Even before *Shaffer*, however, some had questioned the constitutionality of sequestration, but not based on *International Shoe Co. v. Washington's* requirement that defendants have sufficient minimum contacts with the forum so that suing them there was consistent with due process.¹⁵ Under the sequestration statute, the choices for a defendant were particularly unattractive. The defendant could either enter a general appearance (show up and consent to jurisdiction) or forfeit the property.¹⁶ The presence of intangible property within state bounds was

11. DEL. CODE ANN. tit. 10, § 366 (2013).

12. Tit. 8, § 169.

13. Ernest L. Folk, III & Peter F. Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749, 749 n.4 (1973) (noting that Delaware did not adopt the Uniform Commercial Code (UCC) provision that the physical certificate must be seized to attach a security); see also *Heitner v. Greyhound Corp.*, 1975 WL 417, at *2 (Del. Ch. May 12, 1975) (noting defendant's contention that of the fifty-two jurisdictions that adopted the UCC, only Delaware opted out of this rule).

14. *Shaffer*, 433 U.S. at 214 (noting that the sequestration procedure "may be most frequently used in derivative suits against officers and directors"); see also S. 341, 129th Gen. Assemb., 1st Sess. (Del. 1977) (noting that the sequestration statute had "frequently been the only means whereby non-resident corporate directors of Delaware Corporations could be brought before the courts of this State to answer for their conduct in managing the affairs of the corporation").

15. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); Folk & Moyer, *supra* note 13, at 756 (arguing that Delaware's sequestration statutes were constitutionally problematic because of concerns about notice).

16. *Shaffer*, 433 U.S. at 195-96 n.12.

accordingly leveraged to get personal jurisdiction. In *Shaffer*, the lower court cases and briefs had focused on these defects rather than on whether Delaware's procedure ran afoul of due process limits on personal jurisdiction.¹⁷ The Delaware Supreme Court even commented that "significant constitutional questions [are] at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them."¹⁸

Nonetheless, the U.S. Supreme Court's decision in *Shaffer* ultimately invalidated Delaware's sequestration statute as inconsistent with *International Shoe*. In *Shaffer*, shareholders brought a derivative suit against officers and directors of Greyhound Corporation (Greyhound) and its subsidiary.¹⁹ The only connection to Delaware in evidence was the Delaware incorporation of the parent, Greyhound.²⁰ Greyhound's headquarters were in Chicago, then later Arizona; none of the named officers or directors was a Delaware citizen; and most of the conduct had its effect in Oregon.²¹ The Court held that the Delaware courts lacked personal jurisdiction over those officers and directors, invalidating the Delaware sequestration statutes.²²

Shaffer stands for the proposition that *quasi in rem* bases for jurisdiction—jurisdiction based on in-state property unrelated to the cause of action—and indeed all exercises of jurisdiction over nonresidents served out of state, are subject to the usual minimum contacts analysis.²³ Perhaps more significantly for corporate law, in reaching this conclusion, *Shaffer* also signaled that Delaware could have asserted jurisdiction if it had been more direct about it: "If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as [plaintiff] suggests, we would expect it to have enacted a statute more clearly designed to protect that interest."²⁴ The Court pointed to other states' director implied consent statutes as examples.²⁵

17. Heitner v. Greyhound Corp., 1975 WL 417 (Del. Ch. May 12, 1975) (outlining and rejecting defendants' arguments that the stock was not located in Delaware, that the property was seized without notice, and that the Delaware statute exceeded the scope of recovery under *quasi in rem* jurisdiction).

18. Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (Del. 1976).

19. *Shaffer*, 433 U.S. at 189–90.

20. Wendy Collins Perdue, *The Story of Shaffer: Allocating Jurisdictional Authority Among the States*, in CIVIL PROCEDURE STORIES 135, 142 (Kevin M. Clermont ed., 2d ed. 2008).

21. *Id.* at 142–43. Moreover, the subsidiary was incorporated in California and headquartered in Arizona, and the contempt finding was in Illinois. *Id.*

22. *Shaffer*, 433 U.S. at 212, 216–17.

23. *Id.* at 212 ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). The *Shaffer* majority was focused on eradicating the different standards applied to *in rem* and *in personam* actions. *Id.* at 207.

24. *Id.* at 214–15. The plaintiff had argued that the position of the defendants as corporate fiduciaries in a Delaware company was sufficient contact with Delaware because of "the role of Delaware law in establishing the corporation and defining the obligations owed to it by its officers and directors." *Id.* at 214. The Court responded that "[t]his argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling." *Id.*

25. *Id.* at 216 n.47 (citing CONN. GEN. STAT. REV. § 33-322 (1976); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE ANN. § 33-5-70 (1977)).

The Delaware legislative response was rapid. Thirteen days after *Shaffer* was decided, a new Delaware statute was passed implying director consent to personal jurisdiction in Delaware.²⁶ The provision's accompanying synopsis explicitly asserted the state's "substantial interest in defining, regulating and enforcing the fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them."²⁷ It added that "[i]n promoting that interest it is essential that Delaware afford a convenient and available forum for supervising the affairs of Delaware corporations and the conduct of directors of Delaware corporations."²⁸

The U.S. Supreme Court has not revisited the implied consent statutes, but the Delaware Supreme Court found the state's director statute constitutional. In its decision in *Armstrong v. Pomerance*, the Delaware Supreme Court indicated that the existence of the director implied consent statute improved on the earlier sequestration process used for the same purpose in four main ways.²⁹

First, the statute gave those who took such a position statutory notice that they may be subject to jurisdiction in Delaware for a particular range of conduct as directors.³⁰ In contrast, the sequestration statutes gave notice that directors could be subject to suit in Delaware if they held shares, but did not indicate what they could be sued for.³¹ Second, and relatedly, the constitutionally relevant contact with the state (as defined by the statute) was more tightly tied to the cause of action.³² Jurisdiction was based on their role as directors and the cause of action was violation of their duty as directors. Third, directors "accepted significant benefits and protections under the laws of this State."³³ They benefited from the application of state law through the power to manage the corporation, receive interest-free loans, be indemnified, and, later, be

26. 61 Del. Laws ch. 119 (July 7, 1977), codified at DEL. CODE ANN. tit. 10, § 3114 (2013); see also *Armstrong v. Pomerance*, 423 A.2d 174, 179 n.8 (Del. 1980) (noting that section 3114 was passed in response to *Shaffer*, which was decided on June 24, 1977). The statute was modeled on implied consent statutes from Connecticut, North Carolina, and South Carolina—all now repealed—as well as Michigan's long-arm statute. See S. 341, 129th Gen. Assemb., 1st Session (Del. 1977) (explaining that the statute was modeled on the statutes cited *supra* note 25 as well as MICH. COMP. LAWS ANN. § 600.705(6) (West Supp. 1977)).

27. S. 341, 129th Gen. Assemb., 1st Session (Del. 1977).

28. *Id.*

29. *Armstrong*, 423 A.2d at 176–77.

30. See *id.* at 176; see also *Swenson v. Thibaut*, 250 S.E.2d 279, 290 (N.C. Ct. App. 1978) (noting that the North Carolina director consent statute gave directors specific notice).

31. See *Shaffer v. Heitner*, 433 U.S. 186, 218–19 (1977) (Stevens, J., concurring).

32. *Shaffer* made the point that Delaware did not require its directors to own shares, so that there was "no necessary relationship between holding a position as a corporate fiduciary and owning stock or other interests in the corporation." 433 U.S. 186, 214, 214 n.43 (citing DEL. CODE ANN. tit. 8, § 141(b) (Supp. 1976)).

33. *Armstrong*, 423 A.2d at 176.

shielded by exculpation provisions.³⁴ Fourth, and most importantly, was that the director implied consent statute expressed state interests, which Delaware said outweighed any litigant interests in this instance.³⁵ The court expressly pointed to the state's interest in having its own corporate law adjudicated in domestic courts, or at least making its courts available.³⁶

B. *The Extension to Corporate Officers*

In 2004—twenty-seven years after the director implied consent statute became effective—Delaware amended that statute to reach officers as well.³⁷ The notes to the legislation are mostly descriptive,³⁸ but contemporaneous commentary from Delaware judges suggests that some of the impetus for the legislative change may have been the perception that Enron and WorldCom would prompt litigation against nondirector officers.³⁹ Delaware Justice Jacobs suggested that hopes were high that the expanded personal jurisdiction over officers would allow Delaware to hold the “more likely active wrongdoers (officers) . . . independently accountable for adjudicated substantive state law breaches of fiduciary duty.”⁴⁰ Without such personal jurisdiction, Delaware would be shut out of high-profile officer cases.⁴¹

The expansion was also a pragmatic response to the effects of increasing independence requirements for boards of directors.⁴² When many of the directors were also high-level corporate officers, a statute that reached directors sufficed to reach also the CEO, CFO, etc. With independence requirements, the director implied consent statute would often reach only the CEO (because the CEO is also a director), with oth-

34. *Id.* at 176 n.4 (listing benefits to directors under Delaware law at the time); *see also* DEL. CODE ANN. tit. 8 § 102(b)(7) (2001) (permitting Delaware corporations to limit directors' liability through exculpation clauses).

35. *Armstrong*, 423 A.2d at 177.

36. *Id.*

37. S. 126, 142d Gen. Assemb. (Del. 2004) (codified in DEL. CODE ANN. tit. 10, § 3114(b) (2004)).

38. *Id.* (“This amendment enables Delaware courts to exercise personal jurisdiction over persons who accept election or appointment as officers of a Delaware corporation, or who serve in such capacity, for claims brought against them in their official capacity.”).

39. E. Norman Veasey, Speech, *Corporate Governance and Ethics in the Post-Enron WorldCom Environment*, 38 WAKE FOREST L. REV. 839, 851 (2003) (predicting “a new focus on litigation going after officers as the actors in fraud cases”).

40. Jack B. Jacobs, *The Delaware Supreme Court: Looking to the Future*, M & A LAW., June 2004, at 1, 5 (suggesting that “in today's environment, where active internal wrongdoing takes place, the source of the wrongdoing will more likely than not be at the officer, not the board, level” and that “[t]he significance of Delaware's new statutory jurisdiction over officers cannot be overstated”).

41. *See, e.g., In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 965 A.2d 763, 814–16 (Del. Ch. 2009) (dismissing the claims against these officers because the expansion of personal jurisdiction postdated the conduct at issue so no statutory basis for jurisdiction existed).

42. *See, e.g., Jacobs, supra* note 40, at 5 (“Sarbanes-Oxley, which mandates a majority of independent directors for all companies that register under the 1934 Act, will magnify that likelihood [that officers will be the source of wrongdoing].”).

er officers outside of the statute's reach. In 2003, then Chancellor William B. Chandler and then Vice Chancellor Leo Strine articulated this reason in an article promoting the extension of the statute to corporate officers.⁴³ They pointed to this gap in jurisdiction as a "subtle consequence" of "the trend toward boards comprised entirely of independent directors (with the exception of the CEO)."⁴⁴

Delaware's officer implied consent statute simply substitutes "officer" for "director, trustee or member," providing the same mechanism.⁴⁵ The only addition is that the statute defines "officer" by listing particular titles,⁴⁶ individuals identified in Securities and Exchange Commission (SEC) public filings as the "most highly compensated executive officers of the corporation," and those who have contractually agreed with the corporation to "be identified as an officer" for personal jurisdiction purposes.⁴⁷

Although to date few Delaware cases explicitly rely on the officer consent statute,⁴⁸ *Ryan v. Gifford* provides an example of the statute's use.⁴⁹ Shareholders of a corporation organized in Delaware and with its primary place of business in California brought a derivative suit against officers and directors in the Delaware Court of Chancery.⁵⁰ Plaintiffs alleged a breach of fiduciary duties based on options backdating.⁵¹ Plaintiffs acknowledged that the only source of jurisdiction over the nondirector officers was Delaware's officer consent statute.⁵² The officers were residents of California, Arizona, and Colorado, whose only contacts with Delaware were through their officer position in a Delaware corpora-

43. William B. Chandler III & Leo. E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1003 (2003).

44. *Id.* at 1002.

45. Like the director implied consent statute, the officer statute provides that officers were deemed to consent to the appointment of an in-state agent, giving rise to personal jurisdiction in actions where the officer was a "necessary or proper party" or in actions against the officer "for violation of a duty in such capacity." DEL. CODE ANN. tit. 10, § 3114(b) (2013).

46. *Id.* (listing "the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer" as corporate officers reached by the statute).

47. *Id.*

48. See *Gantler v. Stephens*, 965 A.2d 695, 704, 708-09 (Del. 2009) (relying on § 3114(b) for personal jurisdiction over corporate officers); *Lisa, S.A. v. Mayorga*, No. 2571-VCL, 2009 WL 1846308, at *5-6 (Del. Ch. June 22, 2009); *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, No. 3231-VCS, 2008 WL 963048, at *10 (Del. Ch. Apr. 10, 2008); *Ryan v. Gifford*, 935 A.2d 258, 272 (Del. Ch. 2007); see also *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157-58 (3d Cir. 2010) (stating that personal jurisdiction was appropriately based on the officer implied consent statute, but also saying that relevant defendant was a director). These cases may not reflect the statute's full influence, as it may push officer defendants not to contest personal jurisdiction. Some cases against nondirector officers whose only contact is their status do not discuss the basis for personal jurisdiction at all. See, e.g., *Dweck v. Nasser*, No. 1353-VCL, 2012 WL 161590 (Del. Ch. Jan. 18, 2012).

49. 935 A.2d 258 (Del. Ch. 2007).

50. *Id.* at 261.

51. *Id.*

52. *Id.* at 264.

tion.⁵³ Chancellor Chandler concluded that the officer implied consent statute authorized jurisdiction over the nonresident CFO because he was alleged to have breached his fiduciary duties by participating in options backdating.⁵⁴ Moreover, jurisdiction based on the CFO's "status as a corporate fiduciary . . . readily satisfie[d]" constitutional due process requirements.⁵⁵

C. *Beyond Delaware Corporations*

Implied consent statutes are relevant beyond Delaware corporate law, both for noncorporate business entities and for other states. This Section argues that a focus on directors and officers is overly narrow. To understand and critique this basis of jurisdiction requires a broader look at Delaware's use of implied consent to assert its domain over governance issues within its business entities beyond the corporation. The Section also turns to other states for alternative routes to asserting jurisdiction over domestic business actors.

1. *Delaware's Business-Law Implied Consent Statutes*

Delaware statutes imply consent in the context of other, noncorporate business forms using the same mechanism as the officer and director statutes.⁵⁶ Delaware statutes imply consent to jurisdiction in Delaware courts by managers of limited liability companies (LLCs) organized in Delaware,⁵⁷ partners in general partnerships organized in Delaware,⁵⁸ general partners in limited partnerships organized in Delaware,⁵⁹ trustees of Delaware statutory trusts,⁶⁰ and the liquidating trustees of most of the above.⁶¹ They also reach an officer, director, or managing agent of an entity acting as a registered agent in Delaware for a corporation, LLC, partnership, or limited partnership (LP).⁶²

53. Opening Brief of Beck et al. in Support of Their Motion to Dismiss at 4–6, *Ryan*, 935 A.2d at 258 (No. 2213–CC), 2007 WL 2808989.

54. *Ryan*, 935 A.2d at 272. The court granted a motion to dismiss for lack of personal jurisdiction over other officers because allegations that they exercised backdated options "without any additional allegation of knowledge that the options were wrongfully granted" did not amount to a breach of fiduciary duty, and so did not fall within section 3114(b) as limited by Delaware courts. *Id.* at 270.

55. *Id.* at 273.

56. See Table 1.

57. DEL. CODE ANN. tit. 6, § 18-109 (2013).

58. *Id.* § 15-114; see also *New Media Holding Co. v. Brown*, No. 7516-CS, 2012 WL 5504058, at *1–2 (Del. Ch. Nov. 14, 2012) (dismissing a suit against a manager of a Delaware limited liability partnership for lack of personal jurisdiction because no acts satisfied Delaware's long-arm statute and section 15-114 covered only partners and liquidating trustees).

59. DEL. CODE ANN. tit. 6, § 17-109.

60. Tit. 12, § 3804.

61. Tit. 6, §§ 18-109, 15-114, 17-109.

62. Tit. 8, § 132 (registered agent for domestic corporation consent statute); tit. 6, § 18-104 (registered agent for LLC consent statute); *id.* § 15-111 (registered agent for partnership consent statute); *id.* § 17-104 (registered agent for limited partnership consent statute).

The basic structure of all of these statutes is that a person who accepts or performs a particular position in a business entity is deemed to consent to the appointment of an in-state representative to receive service of process (sometimes called substituted service).⁶³ The agent for service of process is often the registered agent of the business entity or, if none, Delaware's Secretary of State.⁶⁴ The statutes then connect this substituted service to personal jurisdiction by providing that "any process when so served shall be of the same legal force and validity as if served upon such [business actor] within the State of Delaware," which ordinarily subjects a defendant to jurisdiction in that state's courts.⁶⁵

These statutes have other elements in common. They identify the relevant business actor, reaching nonresidents and former residents.⁶⁶ Sometimes the statute defines the position with more detail, as in the case of the corporate officer⁶⁷ and the LLC manager.⁶⁸ The statutes also identify the category of lawsuits in which such jurisdiction is valid. For instance, the LLC manager implied consent statute asserts personal jurisdiction in civil actions in Delaware courts "involving or relating to the business" of the LLC, or a violation of a duty to the LLC or to any LLC member.⁶⁹

Although this Article focuses on statutes that assert Delaware's control over the internal governance of Delaware business entities, implied consent underlies much exercise of state court jurisdiction in the business and commercial area. For instance, a Delaware statute provides that contractual choice of Delaware law gives access to the Delaware forum for resolving contractual disputes in certain circumstances.⁷⁰ Again, *ex ante* choice of domestic law—either through a contractual term or through the choice of the state of incorporation or organization⁷¹—is

63. The implied consent language varies, but repeated phrases include the terms "deemed . . . to consent" or "shall signify the consent." *See, e.g.*, tit. 6, § 18-109(a) ("A manager's . . . serving as such constitutes such person's consent to" appointment of an agent for service of process, and "[s]uch service as a manager . . . shall signify the consent" that such service is equivalent to service in state). The statutes further provide that this assignment is irrevocable.

64. *See, e.g., id.* § 18-109(b).

65. *Id.* § 18-109(a); *see also* *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 618–19 (1990) (plurality opinion) (upholding jurisdiction based on service within state boundaries).

66. The statutes generally provide that the statute applies "whether or not" the business actor continues in that position when the "suit is commenced." *See, e.g.*, tit. 6, § 17-109(a) (providing that a general partner of a limited partnership could be served with process as statutorily provided "whether or not the general partner . . . is a general partner . . . at the time suit is commenced").

67. Tit. 10, § 3114(b).

68. Tit. 6, § 18-109(a).

69. *Id.*

70. *Id.* § 2708(b) ("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 . . .").

71. Choice of the state of incorporation amounts to a choice of the law that applies to corporate governance. The "internal affairs doctrine" provides that the law of the state of incorporation governs the "internal affairs" of the corporation—generally the relationships among shareholders, officers,

used to open the domestic forum through implied consent. Indeed, the partner consent statute could easily be described either way: it implies consent to a Delaware forum in a partnership agreement that had selected Delaware law, which could also be described as implying consent based on the fact that the partnership was organized in Delaware.⁷²

Moreover, a mechanism identical to that in the officer and director statutes provides jurisdiction over entities that do business in Delaware but fail to register. For instance, such unregistered foreign LPs, LLCs, and statutory trusts are deemed, by statute, to have consented to the appointment of the Delaware Secretary of State to receive process, and that process “shall be of the same legal force and validity as if served . . . personally” in state.⁷³ Similarly, every issuer of securities and applicant for registration of securities in state is required to file express consent to jurisdiction.⁷⁴ Those who violate the state securities act and have failed to file express consent are deemed to consent to substituted service and to treating that service as if it had been within the state.⁷⁵

Finally, Delaware’s corporate registration statute requires foreign corporations that want to do business in Delaware to file a certificate appointing an in-state agent to receive service of process.⁷⁶ Although Delaware courts treat registration to do business in Delaware as express consent to jurisdiction,⁷⁷ consent is also in part implied. The statute does not specify the effect of that service: foreign corporations file a certificate

directors, and the corporation. This doctrine has sometimes been extended to other noncorporate organizational forms as well.

72. Tit. 6, § 15-114; *Total Holdings USA, Inc. v. Curran Composites, Inc.*, 999 A.2d 873, 875 (Del. Ch. 2009) (holding that selection of Delaware law in a partnership agreement gave rise to jurisdiction over the general partner—an out-of-state corporation—in Delaware).

73. Tit. 6, § 17-911(a) (LPs); *id.* § 18-911(a) (LLCs); Tit. 12, § 3861(a) (statutory trusts); *see also* tit. 8, § 382(a) (same for foreign corporations transacting business in Delaware without having qualified to do business).

74. Tit. 6, § 73-702.

75. *Id.* (providing that when express consent has not been filed and personal jurisdiction cannot otherwise be obtained, “conduct prohibited or made actionable” by the Delaware securities act “shall be considered equivalent to the person’s appointment of the Commissioner . . . to be the person’s attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the person . . . which grows out of that conduct and which is brought under this chapter . . . with the same force and validity as if served on the person personally”).

76. Tit. 8, § 371(b)(2) (requiring a certificate that includes “[a] statement executed by an authorized officer of each corporation setting forth (i) the name and address of its registered agent in this State”).

77. *Sternberg v. O’Neil*, 550 A.2d 1105, 1111 (Del. 1988) (considering appointment of an agent to be express consent to jurisdiction in Delaware courts). These statutes, which are widespread among states, do not specify the effects of appointing an agent, and courts are split on how they analyze jurisdiction based on corporate registration. *Compare Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (upholding implied consent to jurisdiction without an analysis of minimum contacts), *with Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (“[A] foreign corporation that properly complies with the Texas registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible.”).

identifying an in-state agent for service of process (express consent), but from this, consent to *jurisdiction* is implied.⁷⁸

In sum, Delaware's assertion of its power to supervise business entities and to control the development of the governing law extends beyond corporations, and beyond the corporate director and officer context, which is the starting point for this Article. In other words, it is fruitful to consider the broader category of business-actor consent statutes, and even implied consent more generally.

2. *Jurisdiction over Corporate Actors in Other States*

The second category beyond Delaware is the exercise of jurisdiction over nonresident directors and officers of domestic corporations in other states. In other words, how do Illinois courts get jurisdiction over a director or officer of an Illinois corporation who does not reside in or have other contacts with Illinois?

Statutes asserting implied consent persist in other areas of the law and for some noncorporate business entities,⁷⁹ but Delaware is an outlier in the extent to which it relies on consent by directors and officers. Although such jurisdiction over corporate directors was not as rare at the time *Shaffer* was decided,⁸⁰ no other states' director consent statutes have survived.⁸¹ Statutes that refer specifically to officers and directors now are not by "consent" but simply list directors and sometimes officers in an enumerated long-arm statute.⁸² An example is the Illinois long-arm statute, which extends state court jurisdiction to "any cause of action arising from . . . [t]he performance of duties as a director or officer of a corporation organized under the laws of this State or having its principal place of business within this State."⁸³

The main difference between Delaware and other states' jurisdiction over corporate actors is factual: for states that incorporate mostly firms headquartered locally, some operations take place in-state.⁸⁴

78. See also tit. 8, § 381 (providing that foreign corporations that cease to do business in Delaware "shall be deemed to have consented that service of process in any action, suit or proceeding based upon any cause of action arising in this State, during the time the corporation was authorized to transact business in this State, may thereafter be made by service upon the Secretary of State").

79. See, e.g., N.H. REV. STAT. ANN. § 304-C:10 (2013) (managers and liquidating trustees of LLCs organized in New Hampshire consent to personal jurisdiction using language and a mechanism similar to Delaware's); CONN. GEN. STAT. ANN. § 34-508 (West 2013) (same in Connecticut for trustees of statutory trusts); WYO. STAT. ANN. § 17-23-106 (2012) (same in Wyoming for trustees of statutory trusts).

80. See *Shaffer v. Heitner*, 433 U.S. 186, 216 n.47 (1977).

81. North Carolina's was repealed because "the general jurisdiction statute [] specifically provides such jurisdiction," making a special provision in its corporate laws unnecessary. See Commentary to N.C. GEN. STAT. ANN. § 55-8-01 (West 2012).

82. Fifteen states explicitly list directors or officers and directors in their long-arm statutes. See Table 2. Others explicitly claim jurisdiction to the constitutional limits.

83. 735 ILL. COMP. STAT. 5/2-209 (2010).

84. Some data suggests that almost one third of public corporations are organized in their home states. See, e.g., Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L.

Whereas in Delaware the only contact is often the fact of being a director or officer, elsewhere courts can rely on other contacts with the forum state. For example, a court in West Virginia found personal jurisdiction over nonresident directors of a West Virginia corporation in a fiduciary duty suit.⁸⁵ It specifically differentiated between Delaware's "phantom resident[s]" and those corporations that had operations in the chartering state, as was the case there.⁸⁶

Similarly, a Texas state court found personal jurisdiction over nonresident directors of a Texas corporation for breach of their fiduciary duties.⁸⁷ The court explicitly noted that Texas had not asserted jurisdiction over corporate officers or directors by listing them or enacting an implied consent statute, but instead based statutory jurisdiction on a "doing business" provision.⁸⁸ The defendant directors were California residents, and most of the corporate business took place in California, but unlike the typical scenario in Delaware, directors had traveled to Texas several times, and the plaintiff directors were based there.⁸⁹ In other words, the court did not have to depend on the fact of being a director or officer as the sole contact.

Nevada is an interesting comparison to Delaware because Nevada also incorporates firms headquartered out-of-state.⁹⁰ Nevada, however, has not enacted a director or officer implied consent statute, instead relying on a jurisdictional statute that reaches to the constitutional limits.⁹¹ This may simply indicate that Nevada does not compete with Delaware for incorporation business⁹² or that Nevada, unlike Delaware, is interested in incorporation fees but not in associated litigation business. It may alternatively suggest that implied consent statutes are of limited value because officers and directors may be reached on other jurisdictional bases and neither avoids the due process analysis. Indeed, in a 2012 decision, the Nevada Supreme Court held that Nevada courts could exercise

& ECON. 383, 394 tbl.4 (2003) (analyzing in-state versus out-of-state incorporations of publicly traded U.S. firms).

85. See *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 524–25 (4th Cir. 1987) (finding personal jurisdiction under West Virginia law over officers and directors whose only contact with West Virginia was their corporate position, but the company itself was doing business in West Virginia).

86. *Id.* at 528 ("Unlike *Shaffer*, this is not a case where the corporation is a phantom resident of the chartering State. Although [defendant] directors[] live in contiguous Virginia, Mid Allegheny apparently does business only in West Virginia, and its president lives and maintains his office in West Virginia.")

87. *TexVa, Inc. v. Boone*, 300 S.W.3d 879, 891 (Tex. App. 2009).

88. *Id.* at 887.

89. *Id.* at 888.

90. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 714 (2002) ("As in Delaware, and unlike any other state, a large percentage of the public companies incorporated in Nevada are headquartered in other states.")

91. NEV. REV. STAT. ANN. § 14.065 (LexisNexis 2012).

92. See Kahan & Kamar, *supra* note 90, at 714 (pointing out that Nevada has not adopted implied consent statutes and using this to support the argument that states do not compete for corporate law).

personal jurisdiction over nonresident officers and directors of a Nevada corporation because they “purposefully direct[ed] harm towards a Nevada citizen,” the Nevada corporation.⁹³ In a way, Nevada’s approach is more direct than Delaware’s; regardless of consent, a director’s position either gives rise to constitutionally adequate minimum contacts or it does not.

II. THE PROBLEMS WITH IMPLIED CONSENT

Can Delaware’s implied consent statutes reliably open the Delaware forum to suits against directors, officers, and other business actors? This Part points out the difficulties with reconciling such exercises of jurisdiction with constitutional due process requirements, including some specific language in *Shaffer*. Even Delaware courts have called jurisdiction based on these statutes “constitutionally sensitive,” and have accordingly implied limitations beyond the broad sweep of the statutory language.⁹⁴ This Part then suggests that, even accepting the constitutionality of jurisdiction based on *director* consent, officer consent statutes put pressure on this fragile construct because of corporate-law differences between the two positions.

The role of consent in personal jurisdiction is a subject of ongoing discussion, with much of the literature focused on whether the concept of consent legitimizes the exercise of personal jurisdiction, providing a missing rationale for restrictions on the reach of courts.⁹⁵ One aspect is tacit consent, where certain conduct arguably can be treated as agreement to be subject to a territory’s adjudicative power.⁹⁶ This Article is concerned with a particular problem of tacit consent: Can a state affect its jurisdiction by asserting through statute that some status or action shall be deemed consent to jurisdiction? In particular, can “consent” be based on taking a position in a domestic entity with duties governed by that state’s law? This problem is addressed in a few works about corporate registra-

93. *Consipio Holding, BV v. Carlberg*, 282 P.3d 751, 755, 756 (Nev. 2012) (considering personal jurisdiction in a derivative suit against nonresident officers and directors who were based in Europe and who had rarely, if ever, been to Nevada, and holding that “a district court can exercise personal jurisdiction over nonresident officers and directors who directly harm a Nevada corporation”).

94. *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, No. 3231-VCS, 2008 WL 963048, at *10 n.76 (Del. Ch. Apr. 10, 2008).

95. See, e.g., *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2799 n.4 (2011) (Ginsburg, J., dissenting) (contrasting academic literature that rejects consent as a basis for jurisdiction with articles that adopt consent as the underlying rationale for personal jurisdiction); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304–06 (1989) (arguing that theories of consent as a basis for personal jurisdiction are circular); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536–44 (1991) (same); Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 2 (“[T]he consent principle neatly explains the dynamics of many of our jurisdictional doctrines.”); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853 (1989) (arguing that the Supreme Court should “ground[] its federal common law of jurisdiction on the principle of political consent”).

96. See Perdue, *supra* note 95, at 536–44 (identifying and criticizing such categories of tacit consent).

tion statutes,⁹⁷ statutes that base general jurisdiction over nondomestic corporations on registration. With few exceptions,⁹⁸ however, the implied consent statutes have been used without challenge as the basis for jurisdiction in most of Delaware's corporate governance cases ever since Delaware declared them constitutional in 1980.⁹⁹

A. *The Irrelevance of Consent*

Although personal jurisdiction case law is complex, broad agreement exists about the basic steps of the analysis. To determine whether a state court has personal jurisdiction over a nonresident who is served outside of the state, the first question is whether the state has asserted personal jurisdiction in its long-arm statute and other statutes defining its courts' jurisdiction. If so, then the court must assess whether exercise of personal jurisdiction meets constitutional due process requirements. The general constitutional test is captured by *International Shoe's* requirements that the defendant have "minimum contacts with [the territory of the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."¹⁰⁰

How does this analysis apply to the director and officer implied consent statutes? These statutes may simply be considered part of step one: Has the state asserted jurisdiction over the officer or director through its statutes? This step is one of statutory interpretation. In this particular context, it raises such questions as: Is the defendant an officer for personal jurisdiction purposes? Is the suit for a violation in the capacity of the officer or director? A similar analysis would take place in a state without a consent statute. Courts that have reached nonresident officers

97. In a brief description of consent within a larger work on general jurisdiction, Lea Brilmayer noted the problem of the corporate registration statutes, suggesting that "[t]he most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment." Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 757 (1988); see also Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 9 (1990); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 4 (1990) (arguing that "treating a foreign corporation's appointment of a resident agent, in compliance with a state's registration requirements, as the basis for altering the state's jurisdictional power over the corporation imposes an unconstitutional condition on a foreign corporation's opportunity to transact business in the state"); Pierre Riou, Note, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not Gold Issue Mining*, 14 REV. LITIG. 741, 748-52 (1995); Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1168 (2003) (arguing that due process requirements prevent assertion of general jurisdiction based on the implied consent statutes).

98. Most notably, Professor Eric Chiappinelli recently analyzed the Supreme Court's plurality opinion in *Nicastro* to argue that the director implied consent statute is unconstitutional. Chiappinelli, *supra* note 5.

99. See *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980).

100. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (internal quotation marks omitted); see also *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

or directors of domestic companies through provisions of state long-arm statutes have analyzed the statutory basis and constitutional limits.¹⁰¹

The question is whether the implied consent statute, on its own, allows the analysis to end here. In other words, does the statutorily implied consent establish jurisdiction even when constitutionally sufficient contacts do not exist? Delaware case law has answered this question for the officer and director statutes, readily acknowledging the necessity of establishing constitutionally required minimum contacts.¹⁰²

Delaware's cautious approach is consistent with U.S. Supreme Court language about the abandoning of constructive consent as a basis for jurisdiction. The classic case is *Hess v. Pawloski*, a 1927 Supreme Court decision that involved a Massachusetts out-of-state-motorist statute.¹⁰³ The statute provided that the acceptance by a nonresident of the "privilege" of driving in Massachusetts "shall be deemed equivalent" to the appointment of the registrar of motor vehicles to receive service of process and, in combination with actual notice, would subject the defendant to suit in Massachusetts courts.¹⁰⁴ At the time, the implied consent statute was considered to be sufficient to establish jurisdiction and to obviate the constitutional due process analysis.¹⁰⁵ *Hess* was decided, however, before *International Shoe* and the modern minimum contacts analysis, and implied consent as an independent basis for jurisdiction has been largely abandoned, with the more recent Supreme Court decisions "cast[ing] . . . aside" notions of consent as a basis for jurisdiction absent other contacts.¹⁰⁶

Although the Delaware courts have undertaken a constitutional "minimum contacts" analysis when faced with the officer and director statutes, whether personal jurisdiction can be based solely on implied consent is not so easily answered more generally, and has resulted in inconsistent treatment of the Delaware consent statutes viewed more broadly. In particular, this question has resulted in conflicting court opinions in a related area, which is the use of corporate registration statutes to establish general jurisdiction. Foreign corporations who do business in Delaware must appoint an agent for service of process.¹⁰⁷ Delaware courts read this appointment as "express consent" to jurisdiction

101. See, e.g., *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 527 n.7, 527–28 (4th Cir. 1987) (basing personal jurisdiction over nonresident directors on the "transacting any business in this State" provision in West Virginia's long-arm statute); *United States v. Ivey*, 747 F. Supp. 1235, 1239 (E.D. Mich. 1990) (finding personal jurisdiction over the nonresident president and director of a Michigan corporation, and reasoning that "[e]ven though defendant [officer and director] contacts fit within the framework of the Michigan 'Long-arm' statute, it is necessary to determine whether exercise of jurisdiction over him passes constitutional muster").

102. See, e.g., *Ryan v. Gifford*, 935 A.2d 258, 272–73 (Del. Ch. 2007) (analyzing the statutory basis for jurisdiction over a nonresident officer and then the constitutionality of its exercise).

103. 274 U.S. 352 (1927).

104. *Id.* at 354 (quoting c. 90, Gen. Laws of Mass., as amended by Stat. 1923, c. 431, § 2).

105. See *id.* at 357.

106. *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 618 (1990) (plurality opinion).

107. DEL. CODE ANN. tit. 8, § 371 (2013).

that obviates the need for a constitutional analysis of contacts.¹⁰⁸ The result is that Delaware law does not require a constitutional analysis for the corporate registration statutes (even though registrants arguably consent only to service of process), but does require it for the director and officer consent statutes (even though these spell out the legal effect of substituted service).¹⁰⁹

In sum, the concept of consent may be relevant because it indicates implied consent to a particular form of substituted service or because it emphasizes the statute's notice function. It also responds to *Shaffer's* legislative prompt. In suggesting that Delaware should have passed a statute asserting its interest in jurisdiction over directors, *Shaffer* cited existing state statutes all phrased in terms of consent.¹¹⁰ Nonetheless, the Delaware courts do not rely on consent alone to establish jurisdiction over business actors, but instead undertake a constitutional analysis, which is the subject of the next Section.

B. *Why Status-Based Jurisdiction Is "Constitutionally Sensitive"*

Assume that a state asserts jurisdiction over a nonresident officer or director who has no other contact with the state and that this falls within the language of the jurisdictional statutes. Is exercise of that jurisdiction constitutional? Does the defendant have sufficient minimum contacts with Delaware so that suit there is fair? In these circumstances, assertion of jurisdiction amounts to a claim that the fact of being a corporate officer or director (or manager of an LLC, general partner, etc.) supplies the constitutionally sufficient contact with the forum.

The Delaware Chancery Court's opinion in *Ryan v. Gifford* provides an example in the context of corporate officers.¹¹¹ The opinion devotes pages to a discussion of whether particular acts fit into the statutory text of the officer implied consent statute.¹¹² Although it acknowledged that personal jurisdiction has to comport with both the jurisdictional statutes and constitutional due process requirements, the constitutional analysis amounted—almost in its entirety—to this: "It almost goes without any further elaboration that, as chief financial officer of a Delaware corporation, [defendant] availed himself of Delaware law such that he

108. *Sternberg v. O'Neil*, 550 A.2d 1105, 1111 (Del. 1988) (exercising personal jurisdiction over the Ohio parent of a Delaware subsidiary based on its statutory registration and holding that "express consent is a valid basis for the exercise of general jurisdiction in the absence of any other basis for the exercise of jurisdiction, i.e. 'minimum contacts'"). The court hedged, however, suggesting that the fact that the Ohio corporation was the parent of the Delaware subsidiary directly involved with the wrong provided constitutionally mandated minimum contacts. *Id.*

109. *Kipp*, *supra* note 97, at 39–43 (pointing out that "a corporation's consent is just as fictional as a director's consent, if not more so"); *Riou*, *supra* note 97, at 748–52 (arguing that the Supreme Court decisions approving corporate registration statutes that imply consent are better understood as limited to consent to substituted process rather than consent to jurisdiction).

110. *See Shaffer v. Heitner*, 433 U.S. 186, 216 n.47 (1977).

111. *Ryan v. Gifford*, 935 A.2d 258, 272–73 (Del. Ch. 2007).

112. *Id.* at 270–72.

should reasonably anticipate being haled into Delaware's courts."¹¹³ In other words, status as a corporate officer with duties defined by Delaware law gave the defendant notice that he might be sued in Delaware courts. According to the Chancery Court, it was in itself sufficient purposeful availment to make it fair to bring the defendant into Delaware courts.

This Section argues that jurisdiction based on status as a corporate actor ultimately amounts to an assertion of corporate law (or business law) exceptionalism. The implicit claim is that states have a special interest in regulating their business actors, an interest so strong that the forum should be open to adjudicate cases about their duties in that position. The assertion of jurisdiction amounts to a bid to bundle Delaware law with a Delaware forum, and links this issue to other debates about the extent to which Delaware can keep its corporate-law cases in state.

To isolate the rationale for jurisdiction based on these statutes, one might imagine a hypothetical implied consent statute that substitutes "employee" for "director" or "officer."¹¹⁴ Such a statute would satisfy many of the points made by *Armstrong* in defense of the director implied consent statute.¹¹⁵ It gives statutory notice to employees, who have voluntarily entered into employment for a Delaware corporation. It ties the cause of action to the contacts. It even asserts a state interest.

What then differentiates the employee consent statute? It may be more reasonable to imply consent to jurisdiction when the actors are sophisticated and otherwise engaged in contracting about their role in the corporation, as at least directors and high-level officers may be. Furthermore, directors and officers are within the scope of corporate law and Delaware law defines their duties because of the internal affairs doctrine. In contrast, employees are outside the scope, and general choice of law principles kick in.¹¹⁶ The reach of asserted jurisdiction thus approximates the reach of corporate law.¹¹⁷

113. *Id.* at 273.

114. Modeled on the existing implied consent statutes, it might read something like: "Every non-resident of this State who accepts a position as an employee of a corporation organized under the laws of this State shall be deemed thereby to have consented to the appointment of the registered agent. . . . Such acceptance or service as such employee shall be a signification of the consent of such employee that any process when so served shall be of the same legal force and validity as if served upon such employee within this State."

115. See *supra* notes 29–36 and accompanying text.

116. This observation is complicated by the undertheorized officer role. Formally senior executives may act sometimes as officers—exercising the duties as detailed in the corporate code, or in the certificate of incorporation or bylaws—and sometimes may be seen to be nonofficer agents. Cf. Amitai Aviram, *Officers' Fiduciary Duties and the Distinction Between Corporate Agents & Corporate Organs*, 2013 U. ILL. L. REV. 763 (distinguishing between corporate organs and corporate agents based on whether the principal or a judge may decide whether to approve acts in the "fiduciary duty penumbra").

117. The overlap between the opening of Delaware courts through implied consent statutes and the scope of Delaware corporate law is substantial but not absolute. No controlling shareholder implied consent statute exists, for instance, although it may simply be unnecessary if they have multiple roles and are thus reached by existing statutes.

Delaware courts themselves have expressed concern about the possible unconstitutionality of the implied consent statutes' outer reaches, which has prompted their cautious application.¹¹⁸ Despite broad statutory language, the Delaware courts have imposed judicially created limits to the exercise of personal jurisdiction based solely on status as a corporate officer or director, roughly to fiduciary duty breaches.¹¹⁹ In *Total Holdings USA, Inc. v. Curran Composites, Inc.*, for instance, then-Vice Chancellor Strine noted that Delaware courts had limited such jurisdiction to internal affairs and closely related claims to ensure that the exercise of personal jurisdiction was constitutional.¹²⁰ Similarly, in *Corporate Property Associates 14 Inc. v. CHR Holding Corp.*, the Delaware Chancery Court called the application of the consent statute "constitutionally sensitive" and pointed to "restrained application" as a way to ensure that the consent statutes "will be a reliable vehicle for plaintiffs seeking to hold directors and officers accountable for Corporate Claims."¹²¹

These judicially created limits attempt to make the exercise of jurisdiction under these statutes always constitutional. Not all of Delaware's exercises of jurisdiction reflect this restraint, however. Delaware courts have indicated that once personal jurisdiction is based on a viable fiduciary duty claim, other related claims might also be brought, in a form of pendant personal jurisdiction.¹²² The rationale is that directors or officers are on sufficient notice so that it is fair to make them defend closely related claims.¹²³ The Delaware courts have also found personal jurisdiction over nonresident directors based on implied consent where the action was brought by creditors rather than shareholders.¹²⁴

118. See, e.g., *Ryan*, 935 A.2d at 268 (noting the concern that jurisdiction when a director was a necessary or proper party to a suit against a corporation "might be overly broad and, thus, unconstitutional"). Uncertainty about the appropriate constitutional reach may also explain why Delaware was slow to expand jurisdiction to officers. Certainly practical reasons for this exist, but avoidance of overreaching and prompting constitutional challenge might also explain this time lag.

119. See, e.g., *Hana Ranch, Inc. v. Lent*, 424 A.2d 28, 30-31 (Del. Ch. 1980) (limiting the statute's application "only to those actions directed against a director of a Delaware corporation for acts on his part performed only in his capacity as a director"); *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263, 267 (Del. Super. Ct. 1982) (rejecting jurisdiction over nonresident directors when the alleged "acts do not arise out of or relate to any breaches of duties imposed on the individual Defendants by the very laws which empowered the Defendants to act in their corporate capacities"). The Delaware courts have applied the limitations developed in the context of the director consent statute to personal jurisdiction based on officer consent. See *Ryan*, 935 A.2d at 266.

120. 999 A.2d 873, 875 (Del. Ch. 2009) (considering § 15-114 of the Delaware Revised Uniform Partnership Act); see also *id.* at 885-86 (rejecting the "literal application of a statute's consent to jurisdiction provision" to prevent "unpredictable results").

121. *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, No. 3231-VCS, 2008 WL 963048, at *10 n.76 (Del. Ch. Apr. 10, 2008). The Delaware courts have also been careful not to include actions by directors in their capacity as shareholders. See, e.g., *Harris v. Carter*, 582 A.2d 222, 232 (Del. Ch. 1990) (finding no personal jurisdiction over director relating solely to his personal sale of stock); *Hana Ranch*, 424 A.2d at 31-32 (finding no personal jurisdiction over director acting as the representative of a class of stockholders).

122. See, e.g., *Infinity Investors Ltd. v. Takefman*, No. Civ.A. 17347, 2000 WL 130622, at *6 (Del. Ch. Jan. 28, 2000).

123. See, e.g., *Corporate Prop. Assocs. 14 Inc.*, 2008 WL 963048, at *10 n.76.

124. See *Kidde Indus. Inc. v. Weaver Corp.*, 593 A.2d 563, 566-67 (Del. Ch. 1991).

Moreover, unlike the cases limiting the director and officer statutes, which try to ensure that all exercises of jurisdiction comport with due process, the courts have read the statutory text of the LLC statute more broadly, relying on the separate constitutional analysis to police compliance with due process rather than limiting the text to do so.¹²⁵ Although Delaware courts have interpreted the “rights, duties and obligations as a manager of a Delaware LLC,” for instance, to “refer to rights, duties, and obligations a manager *owes to his organization*,”¹²⁶ they have also asserted an interest in policing more than fiduciary misconduct, reaching disagreements about the rights and obligations of LLC managers.¹²⁷

Jurisdiction based on status as a business actor is troubling for a few reasons. *First*, jurisdiction based only on corporate position is inconsistent with some of *Shaffer*’s language. In *Shaffer*, the Supreme Court specifically said that the officers and directors of a Delaware corporation “simply had nothing to do with the State of Delaware.”¹²⁸ An implied consent statute does nothing to increase the factual contacts between the defendant and the state.¹²⁹

Second, choice of law does not automatically open a forum. *Shaffer* itself includes strong language suggesting that the inquiries into law and forum are separate.¹³⁰ Accepting a position as a director of a Delaware corporation “establishes only that it is appropriate for Delaware law to govern the obligations” and no purposeful availment existed “in a way

125. See *Assist Stock Mgmt. LLC v. Rosheim*, 753 A.2d 974, 980–81 (Del. Ch. 2000).

126. *Vichi v. Koninklijke Philips Elecs. N.V.*, No. 2578-VCP, 2009 WL 4345724, at *8 (Del. Ch. Dec. 1, 2009) (emphasis added); see also *PT China LLC v. PT Korea LLC*, No. 4456-VCN, 2010 WL 761145, at *8 (Del. Ch. Feb. 26, 2010) (jurisdiction based on implied consent statute); *Fisk Ventures, LLC v. Segal*, No. 3017-CC, 2008 WL 1961156, at *7–8 (Del. Ch. May 7, 2008) (no jurisdiction based on LLC-member-consent statute); *Cornerstone Techs., LLC v. Conrad*, No. 19712-NC, 2003 WL 1787959, at *12 (Del. Ch. Mar. 31, 2003).

127. *Assist*, 753 A.2d at 981 (“The bulk of the case law . . . assumes that the state’s interest is only in redressing injuries allegedly caused by fiduciary *misconduct*. As I see it, the failure of co-managers to agree as to the scope of their respective rights and obligations in their capacity as managers (or their exercise or performance of those rights and obligations) is also a matter of substantial interest to this state. The controlling agreement relies on Delaware law to delineate those rights and obligations, and the state has a compelling interest in the resolution of disagreements about them.”); see also *Hartsel v. Vanguard Grp., Inc.*, No. 5394-VCP, 2011 WL 2421003, at *9 (Del. Ch. June 15, 2011) (“Due process would not be offended if . . . (1) the allegations against the defendant-manager focus centrally on his rights, duties and obligations as a manager of a Delaware LLC; (2) the resolution of the matter is inextricably bound up in Delaware law; and (3) Delaware has a strong interest in providing a forum for the resolution of the dispute relating to the manager’s ability to discharge his managerial functions.”); cf. *Rollins Envtl. Servs. (FS) Inc. v. Wright*, 738 F. Supp. 150, 155 (D. Del. 1990) (“When section 3114 is applied to trustees of liquidating trusts, it is not necessary that a breach of fiduciary duty be alleged, but only that the dispute be ‘related to’ the trustees’ role as trustees.”).

128. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

129. As Justice Brennan said in his partial concurrence and dissent in *Shaffer*, “I cannot understand how the existence of minimum contacts in a constitutional sense is at all affected by Delaware’s failure statutorily to express an interest in controlling corporate fiduciaries.” *Id.* at 226 (Brennan, J., concurring in part and dissenting in part).

130. Whether choice of law and personal jurisdiction *should* be independent inquiries is a separate issue. See, e.g., *Perdue*, *supra* note 95, at 561, 572 (noting that litigants are motivated to choose a forum because of the law it will apply, and suggesting that personal jurisdiction could be “a tool for implementing choice of law doctrine”).

that would justify bringing [defendant officers and directors] before a Delaware tribunal.”¹³¹ Moreover, the Supreme Court’s opinion in *Burger King Corp. v. Rudzewicz* explicitly addressed the role of a choice-of-law clause in the constitutional analysis, concluding that it may be evidence of purposeful availment, but that “such a provision standing alone would be insufficient to confer jurisdiction.”¹³² Similar reasoning applies to the choice of Delaware law for corporate governance through the choice of the state of incorporation.

Third, beyond *Shaffer* and the Supreme Court’s repeated assertions that choice of law does not automatically open the forum, the importance of individual liberty interests to the due process analysis may limit a state’s ability to assert jurisdiction over nonresident officers and directors. Such assertion depends on the weight given a state’s interest in adjudicating the particular dispute in establishing personal jurisdiction.

U.S. Supreme Court decisions have included state interests as a factor courts should consider when deciding whether exercising personal jurisdiction over defendants is fair. In *World-Wide Volkswagen Corp. v. Woodson*, the Court said that the “burden on the defendant” is “always a primary concern,” but fairness might “be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute.”¹³³ Commentators have suggested that separate analysis of the connection between the lawsuit and the forum would clarify the Supreme Court’s personal jurisdiction cases.¹³⁴ Even so, the defendant must have some connection with the forum,¹³⁵ which *Shaffer* disclaimed in the context of directors. Moreover, in its 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, the Supreme Court plurality recognized that the state “doubtless” had a strong interest in “protecting its citizens from de-

131. *Shaffer*, 433 U.S. at 216. The Court noted that Delaware’s interest in controlling directors of the corporations organized in state “may support the application of Delaware law to resolve any controversy over appellants’ actions in their capacities as officers and directors.” *Id.* at 215. The Court went on to explain: “But we have rejected the argument that if a State’s law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.” *Id.*; *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (“A sovereign’s legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.”); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 778 (1984) (separating choice of the applicable statute of limitations from the choice of forum and stating: “[W]e do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry”); *see also* *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (“[The State] does not acquire . . . jurisdiction by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants].”). *Armstrong* discounts *Shaffer*’s language as dictum, although this road is a dangerous one as *Shaffer*’s comments about the desirability of a director consent statute might also be characterized that way, depriving these statutes of an implied safe harbor. *See* *Armstrong v. Pomerance*, 423 A.2d 174, 179 (Del. 1980).

132. 471 U.S. 462, 482 (1985).

133. 444 U.S. 286, 292 (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

134. *See, e.g.*, Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 892 (2012).

135. *Id.* at 902 (“[A] strong connection between the lawsuit and the forum is not a substitute for any connection at all between the defendant and the forum.”).

fective products.”¹³⁶ It rejected, however, the argument that this interest outweighed the liberty interests of the defendant.¹³⁷

McGee v. International Life Insurance Co. provides perhaps the closest analogy to Delaware’s assertion of jurisdiction over business actors.¹³⁸ In *McGee*, personal jurisdiction over an out-of-state insurance company was permitted based on a single life insurance contract.¹³⁹ In fact, *McGee* is directly relevant to implied consent, as jurisdiction was based on a California statute implying consent to jurisdiction based on insurance activities.¹⁴⁰ Later court opinions backed away from *McGee*’s expansive interpretation by limiting the case to its facts, focusing in particular on the special interest of the state in regulating insurance.¹⁴¹ Jurisdiction based on status as a business actor invokes the same sort of rationale as *McGee*: the most minimal of contacts is necessary because of the strong state interest in this particular, special area of corporate law, or business law more generally. The difficulty is that jurisdiction over corporate actors based on state interest depends in part on the strength of a state’s interest in supervising corporations it creates, which runs into the next problem.

Fourth, no blanket rule bundles substantive corporate law with the forum that originates that law, and Delaware’s expressed interest in providing both law and forum for Delaware corporate law is not always respected. In fact, Delaware cannot prevent other states from deciding issues of Delaware corporate law because of full faith and credit limitations.¹⁴² Nor can it prevent federal courts from deciding Delaware corpo-

136. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2791 (2011) (Kennedy, Roberts, Scalia, & Thomas, JJ., judgment of the court) (quoting lower court opinion).

137. *Id.* (“[T]he Constitution commands restraint before discarding liberty in the name of expediency.”).

138. 355 U.S. 220 (1957). In fact, *McGee* was the one case the Court, in *World-Wide Volkswagen*, cited in support of the state-interest factor. 444 U.S. at 292.

139. 355 U.S. at 223; *see also* *Stearn v. Malloy*, 89 F.R.D. 421, 423 (E.D. Wis. 1981) (citing *McGee* for the proposition that “[i]t is true that [defendant director’s] contacts with Wisconsin are otherwise minimal, but this is no bar to the assertion of jurisdiction where the state’s interest in providing a forum is strong”); *Armstrong v. Pomerance*, 423 A.2d 174, 177 & n.6 (Del. 1980) (citing *McGee* to support the conclusion that Delaware’s “significant and substantial interest . . . far outweighs any burden to defendants”).

140. *See* California Unauthorized Insurers Process Act, CAL. INS. CODE § 1610 (West 2012) (“Any of the [described acts by a foreign nonadmitted insurer] is equivalent to and shall constitute an appointment by such insurer of the commissioner . . . to be its true and lawful attorney, upon whom may be served all lawful process . . . and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.”).

141. *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) (differentiating *McGee* because “there the State had enacted special legislation . . . to exercise what *McGee* called its ‘manifest interest’ in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation”).

142. *See, e.g.,* Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STANFORD J. COMPLEX LITIG. 51 (2012) (analyzing the limits on a state’s ability to assert exclusive jurisdiction to adjudicate its law).

rate law.¹⁴³ Moreover, the U.S. Supreme Court has said that courts cannot refuse to hear a case because it is based on nondomestic corporate law.¹⁴⁴

Changes to the function of the internal affairs doctrine similarly reflect the unbundling of Delaware law and forum. Delaware courts still evoke the “logic of the internal affairs doctrine” in support of keeping Delaware’s internal governance cases in its forum.¹⁴⁵ Whereas once states would decline to hear cases involving Delaware corporate law based on the internal affairs doctrine, however, the modern version applies Delaware law to corporate governance, but any forum that has jurisdiction over the parties can apply it.¹⁴⁶ These doctrines undercut any claims that Delaware’s control over its corporate actors through its forum is constitutionally required.

Assertions of personal jurisdiction that rest on the premise that Delaware courts should adjudicate Delaware law—as is the case with the implied consent statutes—should be seen as part of the debate over Delaware’s ability to bundle its corporate law and forum. Delaware advertises its corporate law as a bundled product of content and expert adjudicators.¹⁴⁷ Commentators, however, have noted that Delaware corporate law is increasingly being decided in federal courts¹⁴⁸ or in other states’ courts,¹⁴⁹ prompting procedural innovations aimed at keeping some of these cases in state.¹⁵⁰

How do the implied consent statutes fit into this debate? Although they do not mandate resolution in Delaware, they open Delaware for lawsuits based on Delaware corporate law and business law more generally. The Delaware Supreme Court’s decision in *Armstrong*, which validated the director consent statute, explicitly made the case for bundling

143. *Id.* (noting that states cannot prevent adjudication of their law in federal court because of constitutional grants of jurisdiction to the federal courts).

144. *See* *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947) (“There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation.”). The choice of law may be one factor among many in a discretionary dismissal, however.

145. *Total Holdings USA, Inc. v. Curran Composites, Inc.*, 999 A.2d at 873, 884 (Del. Ch. 2009) (referring to the “logic of the internal affairs doctrine” in support of its statement that “Delaware also has a compelling policy interest in adjudicating this dispute in its court”).

146. *See, e.g.*, Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 44 (1987) (noting that the internal affairs doctrine “began as a forum derogation concept”).

147. *See, e.g.*, *Division of Corporations*, STATE OF DELAWARE, <http://corp.delaware.gov/> (last updated Feb. 22, 2013) (“Businesses choose Delaware because we provide a complete package of incorporation services including modern and flexible corporate laws, our highly-respected Court of Chancery, a business-friendly State Government, and the customer service oriented Staff of the Delaware Division of Corporations.”).

148. *E.g.*, Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 97 (2011) (arguing that parallel corporate fraud litigation has moved some state corporate law actions to federal court).

149. *See* Armour et al., *Delaware’s Balancing Act*, *supra* note 8, at 1354–63.

150. Stevelman, *supra* note 8, at 131–36; Winship, *supra* note 142.

law and forum.¹⁵¹ It laid special claim to controlling the development of Delaware corporate law and overseeing domestic corporations:

If it be conceded, as surely it must, that Delaware has the power to establish the rights and responsibilities of those who manage its domestic corporations, it seems inconceivable that the Delaware Courts cannot seek to enforce these obligations but must, rather, leave the lion's share of the enforcement task to a host of other jurisdictions with little familiarity or experience with our law . . .¹⁵²

Due process concerns may block such adjudication in domestic courts, limiting the ability to bundle unless the mere fact of the role in a domestic business entity is enough to constitute the constitutionally required contacts.

C. *Jurisdiction over Corporate Officers*

Even if one were to accept the constitutionality of personal jurisdiction based on a *director* implied consent statute, that does not necessarily mean that *officer* implied consent provides a solid basis. The officer statute is open to renewed challenge because of differences in the corporate-law roles of these actors. Justice Brennan's concurrence in *Shaffer* suggests how officer consent pushes constitutional boundaries. He accepted that a state's interests justified jurisdiction over "a derivative action which raises allegations of abuses of the basic management of an institution whose existence is created by the State and whose powers and duties are defined by state law," but rejected the suggestion "that Delaware's varied interests would justify its acceptance of jurisdiction over any transaction touching upon the affairs of its domestic corporations."¹⁵³ Officer jurisdiction begins to move from the first category to the second, particularly for officers distant from corporate internal affairs.

The first difference is that power to manage the corporation is statutorily assigned to the board of directors.¹⁵⁴ Based on this power, jurisdiction over directors, although it has the weaknesses described above, might be defended as a core category of corporate actor, with a unique, statutorily granted relationship to the corporation and to the state of incorporation.

A second difference is the degree to which the category of corporate actor is identifiable and consistently defined. While directors are usually easily identified, the definition of officer is more fluid, and may vary by corporation or by area of the law. "Officer" means one thing for personal jurisdiction, another for securities disclosure rules, and who-

151. *Armstrong v. Pomerance*, 423 A.2d 174, 177–78 (Del. 1980).

152. *Id.* at 177.

153. *Shaffer v. Heitner*, 433 U.S. 186, 224 (1977) (Brennan, J., concurring in part and dissenting in part).

154. DEL. CODE ANN. tit. 8, § 141(a) (2013) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .").

knows-what for triggering state-law fiduciary duties. How definitions vary depending on the purpose is indicated by *In re Brocade Communications Systems, Inc. Derivative Litigation*, in which a California federal court held that the controller of a Delaware corporation was not a corporate officer under the facts of the case and for the purpose of determining his duties, despite being defined as an officer in Delaware's personal jurisdiction statute.¹⁵⁵ To the extent that officer status is contested, notice that one may be sued in Delaware may be impaired. Moreover, a mismatch between jurisdiction and state fiduciary duties may pose a problem, in part because the basis for jurisdiction is Delaware's claim to a special interest in policing fiduciary duties through both law and adjudication in the forum.

Finally, courts and commentators sometimes point to the need to provide a forum where a shareholder can get jurisdiction over all of the necessary defendants in derivative suits as a rationale for the implied consent statutes.¹⁵⁶ As a practical matter, the availability of another place in which to sue officers may affect whether courts are willing to stretch to allow jurisdiction based on corporate position alone. Factual differences between officers and directors may mean that often a forum exists where all the officers might be reached (for instance, the principal place of business), whereas this may not always be true of directors.

This is not to say that all differences between officers and directors undermine the rationale for personal jurisdiction. As with directors, part of the evidence for the constitutional fairness of jurisdiction is a quid pro quo: officers benefit from domestic law (e.g., indemnification), so should also get the burden (subject to suit).¹⁵⁷ A notable difference between the benefits to officers and those to directors is that the exculpation provision in section 102(b)(7) of the Delaware Code explicitly reaches only directors.¹⁵⁸ Nonetheless, the protections do not need to be identical to support the general point that officers of Delaware corporations—like directors—receive some protections and might submit to some obligations in return.

Nor do all differences cut in favor of subjecting directors to jurisdiction and not officers. One might ask as a factual matter who is most in-

155. 615 F. Supp. 2d 1018, 1049–50 (N.D. Cal. 2009).

156. See, e.g., *Armstrong*, 423 A.2d at 177, 178 (“[h]ighlight[ing] some of the significant ramifications which would undeniably (and unfortunately) flow” from finding jurisdiction based on the director consent statute unconstitutional, including that “a shareholder may not be able to bring a derivative suit against management anywhere else if unable to bring such a suit in Delaware” (quoting David L. Ratner & Donald E. Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 BROOK. L. REV. 641, 650 (1979))).

157. See *Ryan v. Gifford*, 935 A.2d 258, 273 & n.45 (Del. Ch. 2007) (pointing to indemnification as an example of Delaware's “specific protections for officers”).

158. Tit. 8, § 102(b)(7) (2013) (allowing Delaware corporations to exculpate directors from money damages for duty of care violations). *Gantler v. Stephens*, the 2009 Delaware Supreme Court case developing officer fiduciary duties, explicitly noted that “[a]lthough legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers.” 965 A.2d 695, 709 n.37 (Del. 2009).

involved with choosing the place of incorporation or choice of applicable law, which has sometimes been a justification for exercising personal jurisdiction.¹⁵⁹ Nonetheless, the contacts supplied by director and officer positions are not necessarily coextensive, and the expansion to officers and to the internal governance of other business entities may prompt revisiting the underpinnings of director implied consent.

III. MOVING FROM IMPLIED TO EXPRESS CONSENT

How can the incoherence of statutorily implied consent as a basis for personal jurisdiction be overcome? Moving to express consent to jurisdiction presents a potential solution. This Part examines how express consent could be implemented in the context of the broad sweep of asserted jurisdiction over business actors analyzed here.

Take this Article's opening example: an officer of a corporation organized in Delaware with its principal place of business in California. Assume now that consent to jurisdiction in Delaware's courts is express. Perhaps the officer has a contract with the corporation that includes a clause reading "the officer hereby consents to personal jurisdiction in state court in Delaware in any action or proceeding arising out of or relating to the officer's fiduciary duties." If so, the officer could be sued in Delaware, because he or she expressly consented to jurisdiction within that state, or anywhere else that personal jurisdiction could be established. This would likely include California for factual reasons: the officer probably had contacts with the state of California because that was where much of the business took place. The officer might reside there, have an office there, attend meetings there, telephone there, etc. The consent-to-jurisdiction clause would establish jurisdiction within courts in Delaware, but makes no claim to exclude other courts.

The first point is that the business entity and the business actor could contract privately to provide that the actor submitted to personal jurisdiction in Delaware courts, putting aside for a moment the question of whether they would ever want to. Indeed, Delaware's officer implied consent statute previews this potential solution by suggesting that any employee could qualify as an "officer" under the statute by contracting with the corporation to be designated as an "officer" subject to jurisdiction in Delaware courts.¹⁶⁰ To avoid the constitutional analysis and associated infirmities identified above,¹⁶¹ this clause should indicate not only

159. In the context of an LLC organized in Delaware, the Delaware Chancery Court commented that personal jurisdiction reaches individual defendants who have "personally participated in the choice to invoke the laws of this state to govern the internal affairs of [the disputed] entities and the contractual duties running among their members." *Cornerstone Techs., LLC v. Conrad*, No. 19712-NC, 2003 WL 1787959, at *2 (Del. Ch. Mar. 31, 2003).

160. Tit. 10, § 3114(b) (2013) ("[T]he word 'officer' means an officer of the corporation who . . . (iii) has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.").

161. See *supra* Part II.B-C.

that the individual may be considered an officer, so that implied consent kicks in, but also that he or she consents to jurisdiction in Delaware courts.

The ability of individuals to consent to jurisdiction in a particular forum is well established. Challenges to personal jurisdiction may often simply be waived by showing up and not contesting jurisdiction or by failing to include them early in the litigation.¹⁶² Contractual consent to jurisdiction merely moves this waiver to an earlier, pre-litigation, point in time. Parties to a contract may include a clause in which they consent to jurisdiction in a particular forum, without making it the only forum in which they can litigate. The U.S. Supreme Court has indicated that “it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court.”¹⁶³ Because the so-called consent to jurisdiction or “permissive” clause is not exclusive, it would not face some of the challenges to validity that exclusive jurisdiction clauses do.¹⁶⁴

Implementation has some difficulties, however. First, resolving jurisdictional issues by private contract assumes that the entity and actor were motivated to contract about forum. This is not self-evident, in part, because shareholder litigants may be the beneficiaries but do not make the agreements. Corporations or other business entities are unlikely to want to enable litigation against their officers or directors. Moreover, despite the prediction by some that express consent will naturally take the place of implied consent to fix jurisdictional problems,¹⁶⁵ several studies have suggested that adoption rates are low—forum selection clauses are routinely omitted from commercial contracts, for instance, even when the agreement includes a choice-of-law clause.¹⁶⁶

Even if the actors were motivated to contract about forum, the adoption also requires identifying an agreement in which consent to ju-

162. Cf. FED. R. CIV. P. 12 (waiving defenses of lack of personal jurisdiction).

163. *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964); see also *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (“A person may submit to a State’s authority in a number of ways. There is, of course, explicit consent.”); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

164. Exclusive or “mandatory” forum selection clauses limit where the suit can be brought. Although historically disfavored because they “ousted” courts of their jurisdiction, reasonable clauses are generally now respected. Courts, however, have sometimes interpreted such clauses strictly. See generally *Winship*, *supra* note 142 (discussing the limits to private contracting for exclusive jurisdiction).

165. See, e.g., Epstein, *supra* note 95, at 34 (suggesting that “[s]o long as the parties to a contract can convert cases of implied consent into cases of explicit consent, the percentage of jurisdictional cases that rest on a firm footing should increase, not decrease, over time”).

166. See, e.g., Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973, 1981 (2006) (finding that merger and acquisition contracts studied in 2002 always included a choice of law clause, but only about half (fifty-three percent) 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, 1478, 1491 tbl.3 (2009) (finding that all of 2,882 material contracts of reporting companies studied in 2002 designated law, but only thirty-nine percent designated forum).

risdiction could be specified. CEOs often have some contractual arrangement with the corporation,¹⁶⁷ but more information would be required about other actors. Another option would be a forum selection clause in the entity's governance documents, as has been suggested as a response to multijurisdictional deal litigation.¹⁶⁸ The question there would be scope, and whether such a clause could reasonably be treated as an officer's express and actual consent.

If state stakeholders have an interest in opening the state forum to suits concerning internal affairs, as the prevalence of Delaware's business-actor consent statutes suggest, a state-driven solution is plausible. The state could require express consent, drawing on the examples of the corporate registration statutes and Delaware Securities Act. As noted above, the corporate registration statutes require appointment of an agent for service of process, and Delaware courts deem that express consent to jurisdiction.¹⁶⁹ The Delaware Securities Act requires express consent to appointing an agent and provides that service will be "with the same force and validity as if served personally on the person filing the consent."¹⁷⁰ Another version of this approach has been proposed by Professor Eric Chiappinelli, who suggests that Delaware officers and directors be required to consent expressly to jurisdiction as part of the corporate annual report.¹⁷¹

Three points about implementation deserve particular attention. First, states should learn from the split in courts over the treatment of corporate registration statutes and specify the jurisdictional effect of appointing an in-state agent for service of process. Such specification might resemble private contractual terms, which expressly consent to personal jurisdiction in state courts in specified actions or proceedings. Or it might take the form of the Delaware Securities Act, specifying that the express consent is both to the appointment *and* to treating service on this agent as if it had been made personally on the actor within the state.

Second, implied consent to jurisdiction is not limited to corporate officers and directors, so that forcing the express consent of those particular categories of fiduciaries is overly limited. Delaware has used implied consent in the context of the duties of LLC managers and others, and has also used contractual choice of law as a basis of jurisdiction over contracting parties, who are decidedly not fiduciaries.

167. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 241 (2006) (noting that not all CEOs have employment contracts, but that many have "contractual agreement relating directly to their employment with their company").

168. See, e.g., Mirvis, *supra* note 8, at 17 (recommending the adoption of exclusive forum selection clauses in corporate charters or bylaws).

169. See *supra* notes 76–78 and accompanying text.

170. DEL. CODE ANN. tit. 6, § 73-702 (2013); see also tit. 18, § 6235 (2013) (requiring fraternal benefit societies authorized to do business in state to appoint in writing the insurance commissioner to receive service of process).

171. Chiappinelli, *supra* note 5.

Third, a statute requiring express consent needs to provide for compliance failures. The Delaware Securities Act is an example. It requires the filing of express consent to service of process in-state as a condition of securities registration, but backs up this requirement with an implied consent provision, deeming conduct to be the equivalent of consent to jurisdiction, even where no other basis for personal jurisdiction exists.¹⁷² Addressing this gap, however, leads back to the difficulties of implied consent.

The final point is that another approach to stabilizing jurisdiction over business actors would be to require more contacts with the state. Maybe some meetings must be held in-state, or certain physical presence should be maintained. This response may not be worth the cost to states or businesses, but it highlights the basic conflict between the continuing importance of contacts with the state in the law about personal jurisdiction and increasingly deracinated business law.

CONCLUSION

Often the only way Delaware has personal jurisdiction over nonresident business actors is if it asserts it by statute and these actors' corporate positions alone provide sufficient contacts with the forum state to meet constitutional due process requirements. This Article argues that the expansion of implied consent to officers and other business actors puts pressure on the fragile premises of these jurisdictional statutes. What is often viewed as a procedural problem of personal jurisdiction is ultimately also about the appropriate scope of corporate law and the power of Delaware to bundle its substantive law with its expert decision makers.

The expansion to officers and to noncorporate forms represents a move from claiming that directors have a special relationship to the incorporating state that amounts to minimum contacts, toward asserting that the forum of the organizing state should be available to hear claims against the subjects of business law for violations in their business capacity. It preserves Delaware's ability to adjudicate issues of Delaware business law, aligning the choice of Delaware law through the internal affairs doctrine with the availability of the Delaware court. This expansion, however, runs counter to the U.S. Supreme Court's assertions that that choice of law does not imply the ability to access that forum and that state interests do not trump individual liberty interests. It accordingly threatens the balance between Delaware's interest in controlling its busi-

172. Tit. 6, § 73-702 (providing that when a person engages in conduct prohibited by state securities laws and "has not filed a consent to service of process" and "personal jurisdiction over the person cannot otherwise be obtained in this State, that conduct shall be considered equivalent to the person's appointment of the Commissioner . . . to receive service of any lawful process" for civil actions under the Securities Act and that service will have "the same force and validity as if served on the person personally").

ness entities and the interests of individual business actors in predicting and limiting where they may be sued.

TABLE 1: DELAWARE'S BUSINESS-ACTOR CONSENT STATUTES

<p>DEL. CODE ANN. tit. 10, § 3114(a)</p>	<p>Directors of Delaware Corporations</p> <p>Every nonresident of this State who after September 1, 1977, accepts election or appointment as a director, trustee or member of the governing body of a corporation organized under the laws of this State or who after June 30, 1978, serves in such capacity, and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director, trustee or member is a necessary or proper party, or in any action or proceeding against such director, trustee or member for violation of a duty in such capacity, whether or not the person continues to serve as such director, trustee or member at the time suit is commenced. Such acceptance or service as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.</p>
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DEL. CODE ANN. tit. 10, § 3114(b)	<p>Officers of Delaware Corporations</p> <p>Every nonresident of this State who after January 1, 2004, accepts election or appointment as an officer of a corporation organized under the laws of this State, or who after such date serves in such capacity, and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such officer is a necessary or proper party, or in any action or proceeding against such officer for violation of a duty in such capacity, whether or not the person continues to serve as such officer at the time suit is commenced. Such acceptance or service as such officer shall be a signification of the consent of such officer that any process when so served shall be of the same legal force and validity as if served upon such officer within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable. As used in this section, the word "officer" means an officer of the corporation who (i) is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful, (ii) is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful, or (iii) has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.</p>
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DEL. CODE ANN.
tit. 6, § 18-109(a)

Managers or Liquidating Trustees of Delaware LLCs

A manager or a liquidating trustee of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager or the liquidating trustee of a duty to the limited liability company or any member of the limited liability company, whether or not the manager or the liquidating trustee is a manager or a liquidating trustee at the time suit is commenced. A manager's or a liquidating trustee's serving as such constitutes such person's consent to the appointment of the registered agent of the limited liability company (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made as provided in this section. Such service as a manager or a liquidating trustee shall signify the consent of such manager or liquidating trustee that any process when so served shall be of the same legal force and validity as if served upon such manager or liquidating trustee within the State of Delaware and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable. As used in this subsection (a) and in subsections (b), (c) and (d) of this section, the term "manager" refers (i) to a person who is a manager as defined in § 18-101(10) of this title and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of this title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in § 18-101(10) of this title shall not, by itself, constitute participation in the management of the limited liability company.

<p>DEL. CODE ANN. tit. 6, § 15-114(a)</p>	<p>Partners in General Partnerships Organized in Delaware, and Their Liquidating Trustees</p> <p>A partner or a liquidating trustee of a partnership which is formed under the laws of the State of Delaware or doing business in the State of Delaware may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the partnership or a violation by the partner or the liquidating trustee of a duty to the partnership or any partner of the partnership, whether or not the partner or the liquidating trustee is a partner or a liquidating trustee at the time suit is commenced. A person who is at the time of the effectiveness of this section or who becomes a partner or a liquidating trustee of a partnership thereby consents to the appointment of the registered agent of the partnership (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made as provided in this section. Any process when so served shall be of the same legal force and validity as if served upon such partner or liquidating trustee within the State of Delaware and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.</p>
<p>DEL. CODE ANN. tit. 6, § 17-109(a)</p>	<p>General Partners in Limited Partnerships Organized in Delaware, and Their Liquidating Trustees</p> <p>A general partner or a liquidating trustee of a limited partnership may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited partnership or a violation by the general partner or the liquidating trustee of a duty to the limited partnership, or any partner of the limited partnership, whether or not the general partner or the liquidating trustee is a general partner or a liquidating trustee at the time suit is commenced. The fil-</p>

	<p>ing in the Office of the Secretary of State of a certificate of limited partnership executed, and the execution thereof, by a resident or nonresident of the State of Delaware which names such person as a general partner or a liquidating trustee of a limited partnership, or the acceptance by a general partner or a liquidating trustee after August 1, 1999, of election or appointment as a general partner or a liquidating trustee of a limited partnership, or a general partner or a liquidating trustee of a limited partnership serving in such capacity after August 1, 1999, constitute such person's consent to the appointment of the registered agent of the limited partnership (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made as provided in this section. Such execution and filing, or such acceptance or service, shall signify the consent of such general partner or liquidating trustee that any process when so served shall be of the same legal force and validity as if served upon such general partner or liquidating trustee within the State of Delaware and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.</p>
<p>DEL. CODE ANN. tit. 12, § 3804(b)</p>	<p>Trustees of Delaware Statutory Trusts</p> <p>A trustee of a statutory trust may be served with process in the manner prescribed in subsection (c) of this section in all civil actions or proceedings brought in the State involving or relating to the activities of the statutory trust or a violation by a trustee of a duty to the statutory trust, or any beneficial owner, whether or not the trustee is a trustee at the time suit is commenced. Every resident or nonresident of the State who accepts election or appointment or serves as a trustee of a statutory trust shall, by such acceptance or service, be deemed thereby to have consented to the appointment of the Delaware trustee or registered agent of such statutory trust required by § 3807 of this title (or, if there is none, the Secretary of State) as such person's agent upon whom ser-</p>

	<p>vice of process may be made as provided in this section. Such acceptance or service shall signify the consent of such trustee that any process when so served shall be of the same legal force and validity as if served upon such trustee within the State and such appointment of such Delaware trustee or registered agent (or, if there is none, the Secretary of State) shall be irrevocable.</p>
<p>DEL. CODE ANN. tit. 8, § 132(f)(3) for a domestic corporation</p>	<p>“An officer, director, or managing agent of an entity acting as a registered agent”</p> <p>Any person who, on or after January 1, 2007, serves as an officer, director or managing agent of an entity acting as a registered agent in the State of Delaware shall be deemed thereby to have consented to the appointment of such registered agent as agent upon whom service of process may be made in any action brought pursuant to this section, and service as an officer, director or managing agent of an entity acting as a registered agent in the State of Delaware shall be a signification of the consent of such person that any process when so served shall be of the same legal force and validity as if served upon such person within the State of Delaware, and such appointment of the registered agent shall be irrevocable.</p>
<p>DEL. CODE ANN. tit. 6, § 18-104(i)(3) for a domestic LLC</p>	
<p>DEL. CODE ANN. tit. 6, § 15-111(i)(3) for a domestic partnership</p>	
<p>DEL. CODE ANN. tit. 6, § 17-104(i)(3) for a domestic limited partnership</p>	

TABLE 2: DIRECTOR AND OFFICER JURISDICTION STATUTES

State	Citation	Business Actors Covered			Covered Businesses		Actions
		Director	Officer	Other	Domestic Corps.	PPB in State	
Alaska	ALASKA STAT. § 09.05.015 (2013).	X	X		X		Claims arising from acts in role or from activities of corporation while the defendant held office
Del.	DEL. CODE ANN. tit. 10, § 3114 (a) & (b) (implied consent statutes).	X	X		X		Necessary or proper party to suit against corporation, or violation of a duty in corporate capacity
Ill.	735 ILL. COMP. STAT. ANN. 5/2-209 (West 2011).	X	X		X	X	Performance of duties
Ind.	IND. CODE ANN. § 34-33-2-1 (West 2013). (re service of process)	X			X		Necessary or proper party to suit against domestic corporation
Kan.	KAN. STAT. ANN. § 60-308 (West 2013).	X	X	Manager or trustee of domestic corporation	X	X ¹⁷³	Claims arising from acts in role

173. The statute reaches beyond the principal place of business to corporations “having a place of business in this state.”

State	Citation	Business Actors Covered			Covered Businesses		Actions
		Director	Officer	Other	Domestic Corps.	PPB in State	
Me.	ME. REV. STAT. tit. 14, § 704-A (2013).	X	X	Manager trustee or other officer	X	X	Claims arising from acts in role
Mich.	MICH. COMP. LAWS ANN. § 600.705(6) (West 2013).	X	X	Manager trustee or other officer	X	X	Claims arising out of an act which creates any of the following relationships
Mont.	MONT. R. CIV. P. 4B (2013).	X	X	Manager trustee or other officer	X	X	Claims arising from acts in role
N.C.	N.C. GEN. STAT. ANN. § 1-75.4 (West 2012).	X	X		X		Claims arising from acts in role or from activities of corporation while the defendant held office
N.D.	N.D. R. CIV. P. 4(b)(2) (2012).	X	X	Manager or trustee	X	X	Claims arising from acts in role
Or.	OR. R. CIV. P. 4 (2012).	X	X		X		Claims arising from acts in role or from activities of corporation while the defendant held office

No. 3]

JURISDICTION OVER CORPORATE OFFICERS

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State	Citation	Business Actors Covered			Covered Businesses		Actions
		Director	Officer	Other	Domestic Corps.	PPB in State	
Pa.	42 PA. CONS. STAT. ANN. § 5322 (West 2012).	X	X		X		Claims arising from acts in role
S.C.	S.C. CODE ANN. § 15-9-430 (2011). (re service of process)	X			X		Relating to actions of such corporation and arising while he held office as director of such corporation
S.D.	S.D. CODIFIED LAWS § 15-7-2 (2012).	X	X	Manager, trustee, or other officer	X	X	Claims arising from acts in role
Tenn.	TENN. CODE ANN. § 20-2-223 (2012).	X	X		X		Claims arising from acts in role or from activities of corporation while the defendant held office
Wis.	WIS. STAT. ANN. § 801.05 (West 2012).	X	X	Director, officer or manager of a domestic corporation or LLC	X		Claims arising from acts in role or from activities of corporation or LLC while the defendant held office

