

THE CORPORATE CONTRACT AND THE INTERNAL AFFAIRS DOCTRINE

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In the landmark case Salzberg v. Sciabacucchi, the Delaware Supreme Court upheld the validity of a corporate charter provision restricting the rights of shareholders to bring federal securities law claims. Although rights arising under federal securities law lie beyond the internal affairs doctrine, which has traditionally defined the boundaries of state corporate law, the Salzberg court ruled that such rights may be regulated by the “corporate contract,” created by state corporate law and comprised of a corporation’s charter and bylaws. Embracing contractarian precepts, the Salzberg court rejected the lower Chancery Court’s concession theory of the corporate contract as inextricably bound by the internal affairs doctrine.

Salzberg’s contractarianism has wide-ranging implications for the role of the internal affairs doctrine, the reach of the corporate contract, and the rights of shareholders arising under both state corporate law and federal securities law. For one, Salzberg suggests that the corporate contract may be used to impose all types of restrictions to deter shareholders from bringing federal securities class actions. Most significantly, the decision opens the path to using the corporate contract to compel bilateral arbitration for all shareholder claims. In this respect, Salzberg reflects a growing divergence in corporate law between a judicial rhetoric wedded to contractarianism and a statutory framework that still bears concessionary hallmarks of state power. Whether a mandatory arbitration provision set forth in a corporation’s governing documents is enforceable against shareholders will turn on how the Delaware legislature or the courts ultimately resolve this contract-concession tension.

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INTRODUCTION

No rule of corporate law is arguably more foundational than the internal affairs doctrine.¹ The doctrine provides that the internal affairs of a corporation—that is, “matters peculiar to the relationships among or between the corporation and its current officers, directors,

1. See, e.g., Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 340 (2018) (“The internal affairs doctrine is the foundation on which modern corporate law is built.”); Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135, 140 (2004) (“The internal affairs doctrine is . . . one of the foundational principles of corporate law.”); Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 253 (2020) (“[T]he internal affairs doctrine . . . is at the foundation of the state-based system of corporate law in the United States.”).

and shareholders”²—are governed by the laws of the state in which the corporation is chartered.³

Lurking beneath this widely accepted principle,⁴ however, is an even more foundational question: Is the internal affairs doctrine simply a choice of law rule enabling a corporation and its shareholders to choose which state’s law will govern their private business arrangement? Or, does the doctrine also demarcate the outer limits of what the corporation’s governing documents may regulate? These questions lie at the core of *Salzberg v. Sciabacucchi*⁵—a landmark decision with implications for state corporate law, federal securities law, and the rights of all shareholders.

In *Salzberg*, the Delaware Supreme Court upheld the validity of a corporate charter provision requiring any shareholder claims made

2. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *accord* *McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987) (quoting *Edgar*, 457 U.S. at 645); *see also* *Salzberg v. Sciabacucchi*, 227 A.3d 102, 125–26, 131 (Del. 2020) (en banc) (insisting that Delaware law adheres to the *Edgar* articulation of “internal affairs” verbatim).

3. *See, e.g.*, *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (emphasis omitted) (“As a general matter, the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation.”); *Edgar*, 457 U.S. at 645 (“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs”); *Salzberg*, 227 A.3d at 134 (emphasis omitted) (quoting Manesh, *supra* note 1, at 260) (“[W]ith respect to internal corporate matters—matters involving the relationship between the corporation, its officers, directors, and shareholders—the internal affairs doctrine . . . focuses instead on a single, decisive factor: the corporation’s state of incorporation.”); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005) (“The internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs—the state of incorporation.”); *McDermott Inc.*, 531 A.2d at 215 (“The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs.”).

4. *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–91 (1987) (describing the internal affairs doctrine as “an accepted part of the business landscape in this country”); *Resol. Tr. Corp. v. Chapman*, 29 F.3d 1120, 1122 (7th Cir. 1994) (explaining that the internal affairs doctrine is “recognized throughout the states”); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081 (Del. 2011) (en banc) (“In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle.”); *VantagePoint*, 871 A.2d at 1113 (quoting *McDermott Inc.*, 531 A.2d at 216) (“[T]he conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation to ‘the entire gamut of internal corporate affairs.’”).

5. 227 A.3d 102 (Del. 2020) (en banc).

under the federal Securities Act of 1933⁶ (the “Securities Act”) to be brought in federal court (rather than state court).⁷ Thus, the federal forum provision (“FFP”) at issue in *Salzberg* purported to regulate shareholder rights arising under not state corporate law, but rather federal securities law.⁸ Nonetheless, the *Salzberg* court ruled that the “corporate contract,” created by state corporate law and comprised of a corporation’s charter and bylaws, may regulate the rights of shareholders to bring federal securities law claims.⁹

Before *Salzberg*, several leading corporate and securities law scholars had prominently staked out the position that the corporate contract cannot regulate shareholder rights arising under federal securities law because such rights are beyond a corporation’s internal affairs, which has traditionally defined the boundaries of state corporate law.¹⁰

6. 15 U.S.C. §§ 77a, 77j(b), 77k, 77l(a)(1)-(2).

7. See *Salzberg*, 227 A.3d at 114 (“[A] bylaw that seeks to regulate the forum in which . . . ‘intra-corporate’ litigation can occur is a provision that addresses the ‘management of the business’ and the ‘conduct of the affairs of the corporation,’ and is, thus, facially valid . . .”).

8. See *id.* at 111–12 (quoting the FFPs at issue to stipulate a federal forum for “any complaint asserting a cause of action arising under the Securities Act of 1933”).

9. See *id.* at 114.

10. Two separate white papers, each signed by over twenty law professors, advocated for this position. See DELAWARE LAW STATUS OF BYLAWS REGULATING LITIGATION OF FEDERAL SECURITIES LAW CLAIMS 1–3, <https://secureoursavings.com/wp-content/uploads/2018/11/Arbitration-bylaw-white-paper.pdf> [<https://perma.cc/G35M-WB64>] (white paper signed by twenty-one law professors arguing that the Delaware statutory and case law does not “authorize provisions regulating litigation under the federal securities laws”); Jacob Hale Russell, *Mandatory Securities Arbitration’s Impermissibility Under State Corporate Law: An Analysis of the Johnson & Johnson Shareholder Proposal*, at 1–3 (Rock Ctr. for Corp. Governance, Stan. L. Sch., Working Paper No. 237, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332853 (white paper signed by twenty-five law professors arguing that “[b]ecause bylaws may only include provisions ‘relating to’ the business or affairs of the corporation, bylaws may only regulate ‘internal affairs claims brought by stockholders’” and that “[d]irect litigation under federal securities laws does not raise an ‘internal’ claim”); see also Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 597–600 (2016) (making and elaborating on the same argument).

At the same time, prior to the Delaware Supreme Court’s *Salzberg* decision, other professors suggested that section 11 Securities Act lawsuits could be characterized as internal corporate affairs. See Dhruv Aggarwal et al., *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 416–20 (2020) (noting that prior Delaware jurisprudence supports a flexible interpretation of the internal affairs doctrine); Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, 75 BUS. LAW. 1319, 1359–60, 1364–65 (2020) (explaining that a section 11 cause of action is necessarily internal);

Indeed, an erudite opinion by the Delaware Chancery Court in *Sciabacucchi v. Salzberg*¹¹ came to that same conclusion—that the scope of the corporate contract is inextricably tied to the internal affairs doctrine.¹²

In *Salzberg*, however, the Delaware Supreme Court ruled that the internal affairs doctrine is merely a choice-of-law principle and *not* a limit on the scope of the corporate contract that state corporate law creates.¹³ Thus, the high court concluded that although rights arising under federal securities law lie beyond the internal affairs doctrine, such rights are nonetheless within the “Outer Band” of what may be regulated by a corporation’s governing documents.¹⁴ Prior to *Salzberg*, this “Outer Band”—sandwiched between internal corporate affairs and external matters—was unknown to the law of corporations.

Despite its novelty, *Salzberg* might be interpreted pragmatically, as another Delaware court decision responding to the needs of the state’s all-important corporate constituency.¹⁵ The FFP at issue in *Salzberg* offered a tidy state corporate law solution to a federal securities law problem created by the recent U.S. Supreme Court decision, *Cyan, Inc. v. Beaver County Employees Retirement Fund*.¹⁶ And Delaware’s high court was loath to let its state law stand in the way, particularly when other states, hoping to divert corporate charters away from Delaware, would likely be more accommodating.

Beyond instrumentalism, however, corporate theory offers another, more illuminating interpretation.¹⁷ From a theoretical perspective, *Salzberg* represents the Delaware Supreme Court’s further embrace of the contractarian theory of corporations.¹⁸ Under contractarian

Manesh, *supra* note 1, at 302–04 (explaining that the boundaries of the internal affairs doctrine are inherently indeterminate and, therefore, shareholder rights arising under federal securities law are arguably within the scope of the doctrine).

11. No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018), *rev’d*, 227 A.3d 102 (Del. 2020) (en banc).

12. *See id.* at *20.

13. *See infra* Section I.B.

14. *See Salzberg*, 227 A.3d at 130–32.

15. *See infra* Section I.C.

16. 138 S. Ct. 1061 (2018).

17. *See infra* Part II.

18. *See infra* Section II.A.2. As noted by others, the contractarian or “nexus of contract” theory described herein is merely a modern-day version of what is commonly referred to in corporate theory literature as the aggregate theory of the corporation because of its focus on the individuals composing the corporation. *See, e.g.*, Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*,

theory, corporate law is a species of private law, specifically contract law.¹⁹ In the contractarian framework, the internal affairs doctrine is merely a choice-of-law rule that accommodates contractual freedom and private ordering—akin to a choice-of-law provision typically found in other, commercial contracts. The doctrine enables the contract parties to choose which state’s corporate law will govern their relationship. As a mere choice-of-law rule, however, the doctrine simply does not speak to what the parties may address in their private contractual agreement. The doctrine does nothing to limit the scope of the corporate contract.

The Delaware Supreme Court’s embrace of contractarianism stands in sharp contrast to the concession theory of corporations espoused by the Chancery Court in *Salzberg*—a theory that the state supreme court would ultimately reject.²⁰ Under concession theory, corporate law is a species of public law.²¹ In the concession framework, the internal affairs doctrine is an expression of state sovereignty, rather than private autonomy. The exclusive right of the chartering state to govern the internal affairs of a corporation derives from the chartering state’s integral role in bringing the corporation into existence. As a corollary, however, the internal affairs doctrine also marks the regulatory limits of the chartering state’s sovereignty and, therefore, the boundaries of the corporate contract that state corporate law creates.

The contract-concession divide between the Delaware Supreme Court and the Court of Chancery in *Salzberg* echoes a broader and enduring debate about the essential nature of the corporation.²² Is the

49 U.C. DAVIS L. REV. 1719, 1745 (2016); Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 331 (2014); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1071 (1994).

19. See *infra* Section II.A.1.

20. See *infra* Section II.B.2. As noted by others, the concession theory described herein is commonly also referred to in corporate theory literature as the artificial entity theory of the corporation because of its focus on the corporation as an artificial creation of state law. See, e.g., Chaffee, *supra* note 18, at 1741; Padfield, *supra* note 18, at 331; Phillips, *supra* note 18, at 1064.

21. See *infra* Section II.B.1.

22. See, e.g., William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–72 (1992) (describing the unresolved tension between competing property and entity conceptions of the corporation); William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 432–42, 464–65 (1989) [hereinafter Bratton, *The “Nexus of Contracts”*] (providing a history of competing corporate theories over time and concluding that the “concepts that make up theories of the firm—entity and aggregate, contract and concession, public and private, discrete and relational—will stay in internal opposition”); William

corporation a state-created entity imbued with a public dimension? Or is the corporation merely an aggregation of individuals that serves only private aims? *Salzberg* is a vivid reminder that the position courts take—whether consciously or not—on these lofty questions can have stark practical consequences.²³

Indeed, the contractarian theory embraced by the Delaware Supreme Court in *Salzberg* has far-reaching implications for both state corporate law and federal securities law that go well beyond the immediate issue of the case.²⁴ For one, *Salzberg* recasts the role of the internal affairs doctrine in contemporary corporate law.²⁵ By severing the internal affairs doctrine from concession theory tenets of comity and deference to the sovereignty of the chartering state, *Salzberg* has reduced the doctrine to a mere choice-of-law rule and removed any barrier the doctrine might present to the regulatory reach of the corporate contract that state corporate law creates. In doing so, the Delaware Supreme Court has opened the door to other types of “Outer Band” provisions in corporate charters and bylaws, such as forum selection and loser pays provisions governing class actions brought under section 10(b) or Rule 10b-5 of the federal Securities Exchange Act of 1934²⁶ (the “Exchange Act”).²⁷

W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1526–27 (1989) (arguing that theoretical debates about the essential nature of corporations endure because corporate law does not aim to “achieve analytical consistency” by privileging one particular theory over others but instead “builds the contradictions [of competing theories] into a capacious structure that loosely contains real-world producing organizations”); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201–40 (1990) (providing a history of corporate theories distinguished along the dimensions of entity versus aggregate, state creation versus private initiative, and public versus private).

23. See, e.g., Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”*, 93 WASH. L. REV. 265, 267 (2018) (“[H]ow courts characterize the corporation significantly affects legal doctrines that impact not only the corporation, but also third parties such as shareholders, vendors, and political candidates. The characterization question is important even for the most technical sounding rules of corporate practice.”); Millon, *supra* note 22, at 201 (“While apparently metaphysical questions about ‘the nature of the corporation’ might strike one as vaguely continental and surely alien to our hard-headed, pragmatic legal culture, theorizing about ‘what corporations are’ . . . has played an important role in arguments about concrete questions of corporate law.”).

24. See generally *infra* Part III.

25. See *infra* Section III.A.

26. 15 U.S.C. §§ 78a, 78j(b).

27. See *infra* Section III.B.

More importantly, however, *Salzberg* establishes the doctrinal foundation for mandatory arbitration of all shareholder claims, irrespective of whether such claims arise under state corporate law or federal securities law.²⁸ After all, if a corporation's governing documents are simply a species of contract, as *Salzberg* suggests, then the corporate contract is subject to the Federal Arbitration Act²⁹ (the "FAA").³⁰ Under the U.S. Supreme Court's interpretation of the FAA, a binding arbitration provision in the corporate contract would be enforceable, notwithstanding contrary state law or the anti-waiver provisions of the federal securities statutes. Should mandatory arbitration of corporate and securities law claims proliferate, it would radically alter the economics and, therefore, frequency of such claims as well as the development of corporate and securities law.

Thus, the contractarian interpretation of the internal affairs doctrine that *Salzberg* espouses has profound implications for shareholder rights and the remedial and deterrence functions that shareholder litigation plays in both corporate governance and capital markets. Given these implications, it would be unsurprising to see the Delaware legislature reassert itself, revisit *Salzberg*, and remind the courts that the corporation is a statutory entity and not merely a private contractual arrangement.³¹

The remainder of this Article proceeds in three parts. Part I describes the Delaware Chancery Court and Supreme Court decisions in *Salzberg* as well as the federal and state law context in which the case was decided. Given that context, Part I offers an interpretation of the Delaware Supreme Court's decision in *Salzberg* as an exercise in pragmatism.

But pragmatism, alone, has limited explanatory power. Therefore, Part II provides an alternative frame to interpret *Salzberg* based on corporate theory rather than pragmatism. Specifically, the conflicting decisions of the Delaware Supreme Court and Court of Chancery reflect conflicting theories of corporate law rooted in contract and concession, respectively.

28. See *infra* Section III.C.

29. 9 U.S.C. §§ 1–14.

30. See 9 U.S.C. § 2 (emphasis added) ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

31. See *infra* Section III.D.

Part III turns to consider the far-reaching implications of *Salzberg*'s contractarianism for the internal affairs doctrine, the boundaries of the corporate contract, and the applicability of the FAA to a corporation's governing documents. *Salzberg* reflects a contradiction in corporate law between a judicial rhetoric wedded to contractarianism and a statutory framework that still bears concessionary hallmarks of state power. Until that contradiction is resolved, this Part concludes, the applicability of the FAA to the corporate contract remains uncertain.

I. SALZBERG AND ITS ANTECEDENTS

Sitting at the intersection of state corporate law and federal securities law, *Salzberg* has antecedents in each. Section A explains the shifting state and federal law landscapes that collided in *Salzberg*. Section B then describes the decision of the Delaware Court of Chancery in *Salzberg* and its reversal at the Delaware Supreme Court. Finally, Section C offers a pragmatic interpretation of the high court's *Salzberg* ruling.

A. Antecedents in Federal and State Law

At the federal level, the path to *Salzberg* can be traced to the 2018 decision of the U.S. Supreme Court in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, which created the impetus for FFPs governing Securities Act claims.³² And at the state level, Delaware corporate law was already in the midst of a rapid evolution in the use of corporate charters and bylaws to regulate the litigation rights of shareholders. This Section considers each of these antecedents in turn.

1. Federal securities law

In 1995, Congress enacted the Private Securities Litigation Reform Act³³ (PSLRA) "principally to stem 'perceived abuses of the class-action vehicle in litigation involving nationally traded securities.'"³⁴ The PSLRA made various substantive changes to federal securities law and introduced procedural reforms affecting class action securities lawsuits filed in federal courts.³⁵ In response to the PSLRA, many plaintiff's

32. *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018).

33. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

34. *Cyan*, 138 S. Ct. at 1066.

35. *See id.* at 1066–67.

attorneys migrated their class action lawsuits to state courts.³⁶ Although the substantive law would be the same whether a securities class action was litigated in state or federal court, a state court action would allow a plaintiff to avoid the PSLRA's procedural rigors in favor of the more plaintiff-friendly procedural rules of state courts.³⁷

In 1998, Congress responded by enacting the Securities Litigation Uniform Standards Act³⁸ (SLUSA). SLUSA barred plaintiffs from filing class actions in state courts asserting state securities law claims.³⁹ But courts disagreed as to whether the SLUSA bar also applied to class actions in state courts asserting federal Securities Act claims.⁴⁰ Unlike the Exchange Act, the Securities Act provides concurrent jurisdiction to both state and federal courts to hear cases brought under its provisions, with no right for defendants to remove state court actions to federal court.⁴¹ Resolving the lower court split, a unanimous U.S. Supreme Court in *Cyan* held that SLUSA did not strip state courts of concurrent jurisdiction to hear Securities Act class action lawsuits.⁴²

Securities Act class actions are primarily brought under section 11 of the statute.⁴³ Section 11 provides investors who purchase shares in a public stock offering the right to damages against the issuing corporation and its directors, among others, for any material misrepresentation made in the registration statement filed in connection with the offering.⁴⁴ Because an alleged misrepresentation made in connection with a public stock offering affects all purchasers

36. *See id.* at 1067.

37. *See, e.g.*, Aggarwal et al., *supra* note 10, at 390–91; Michael Klausner et al., *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 BUS. LAW. 1769, 1771–74 (2020).

38. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. § 78a).

39. *See* 15 U.S.C. § 77p(b); *see also Cyan*, 138 S. Ct. at 1067 (explaining amendments made by SLUSA).

40. *Compare* Luther v. Countrywide Fin. Corp., 195 Cal. App. 4th 789, 797–798, (2011) (holding that state courts have jurisdiction over class actions alleging Securities Act claims), *with* Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) (holding that state courts lack jurisdiction over such actions).

41. 15 U.S.C. § 77v(a); *see also Cyan*, 138 S. Ct. at 1066.

42. *Cyan*, 138 S. Ct. at 1078 (“SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.”).

43. *See* Klausner et al., *supra* note 37, at 1769–70 (providing data showing that “[t]he vast majority of [Securities Act class actions] allege violations of section 11”).

44. *See* 15 U.S.C. § 77k(a).

in that offering, every purchaser is a potential plaintiff, making section 11 an ideal vehicle for class actions.⁴⁵

After *Cyan*, a plaintiff's attorney could choose to pursue a section 11 class action in state court, thereby avoiding the procedural reforms of the PSLRA.⁴⁶ While plaintiffs with stronger section 11 claims continued to file in federal courts,⁴⁷ the number of section 11 class actions filed in state courts sharply increased following *Cyan*,⁴⁸ including state court actions that had a parallel action in federal court.⁴⁹ Without a procedural mechanism to consolidate or coordinate parallel actions, corporate defendants faced essentially identical lawsuits in both federal and state courts alleging the same underlying Securities Act violation.⁵⁰

Cyan thus made Securities Act litigation substantially more complex and costly for corporate defendants.⁵¹ Beyond the costs and inefficiency, defendants also faced the possibility of inconsistent rulings in parallel actions.⁵² Importantly, the cost of duplicative Securities Act lawsuits came without any attendant benefit to investors,

45. See Klausner et al., *supra* note 37, at 1771 (“Section 11 provides a monetary remedy to shareholders who purchase shares directly in a public offering or traceable to a public offering. Typically, a section 11 suit is brought as a class action, with the class consisting of those shareholders.”).

46. See *id.* at 1770–74.

47. See *id.* at 1776–78, 1780–82 (explaining why weaker section 11 cases may be brought in state courts and providing data suggesting that stronger section 11 cases are brought in federal courts).

48. See *id.* at 1774–75 (providing data showing that the number of section 11 cases filed only in state courts increased from eleven in 2017 to forty-five in 2019).

49. See *id.* at 1774–75 (providing data showing that the portion of section 11 cases involving parallel state and federal court lawsuits increased from seventeen percent before *Cyan* to forty-nine percent after *Cyan*).

50. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 115 (Del. 2020) (en banc) (“When parallel state and federal actions are filed, no procedural mechanism is available to consolidate or coordinate multiple suits in state and federal court.”); Klausner et al., *supra* note 37, at 1774–75.

51. See *Salzberg*, 227 A.3d at 115 (“The costs and inefficiencies of multiple cases being litigated simultaneously in both state and federal courts are obvious.”); Klausner et al., *supra* note 37, at 1770 (“The *Cyan* decision has made section 11 litigation considerably more complicated and presumably more expensive for defendants; it has raised challenges for courts with respect to judicial efficiency; and it has enhanced opportunities for plaintiffs’ lawyers to profit from filing cases of questionable merit.”).

52. See *Salzberg*, 227 A.3d at 115 (explaining that when parallel section 11 cases are litigated simultaneously in both state and federal courts “[t]he possibility of inconsistent judgments and rulings on other matters, such as stays of discovery, also exists”).

the purported plaintiffs in a section 11 class action.⁵³ Instead, the only winners appeared to be plaintiff's attorneys, whose class action claims could be settled for nuisance value and a payout of lucrative attorney's fees.⁵⁴ Meanwhile, the losers were corporate defendants—and ultimately their shareholders—who bore the costs of settlement, the attorney's fees for both sides of the case, and higher premiums for directors and officers insurance.⁵⁵

To address the wasteful Securities Act litigation enabled by *Cyan*, Professor Joseph Grundfest proposed a novel response:⁵⁶ corporations could include in their corporate charters an FFP, stipulating that any shareholder lawsuit under the Securities Act must be brought in federal, not state, court. Using the corporate contract to bind current and former shareholders to a federal forum for any Securities Act claims offered an elegant state corporate law solution to the federal securities law problem of duplicative lawsuits. But at the time, the enforceability of Grundfest's proposed FFPs under state corporate law was uncertain.

2. *State corporate law*

Delaware law has long described a corporation's charter and bylaws as a “contract” between the corporation and its shareholders.⁵⁷ And

53. See Grundfest, *supra* note 10, at 1322, 1390.

54. See *id.* at 1390–92 (arguing that “working to keep Securities Act litigation in state court . . . [is] inimical to the best interests of . . . defendant corporations”).

55. See *id.* at 1322.

56. See *id.* at 1319, n.* (claiming authorship); see also Priya Cheria Huskins, *The State Court Section 11 Problem: 3 Solutions*, WOODRUFF-SAWYER & CO., <https://woodrufflaw.com/do-notebook/state-court-section-11-problem-3-solutions> [<https://perma.cc/JPG6-9SX7>] (crediting Grundfest).

57. See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013) (“In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”); *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. 1930) (“[I]t has been generally recognized in this country that the charter of a corporation is a contract both between the corporation and the state and the corporation and its stockholders. It is not necessary to cite authorities to support this proposition.”). Interestingly, although the Delaware courts have been asserting the contractual nature of corporate governing documents “as a self-evident truth” for nearly a century, the courts have never settled on who exactly the parties to the corporate contract are. See George Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 611 (2016).

At various points, the courts have described the corporate contract to be (1) between the state and the corporation, (2) between the corporation and its shareholders, (3) among the corporation's directors, officers, and shareholders, and

though commercial contracts commonly contain provisions regulating the litigation rights of contract parties, the use of the corporate contract to regulate the litigation rights of shareholders is a relatively recent development.⁵⁸

In the years before *Cyan* was decided, Delaware corporate law had witnessed a rapid evolution in the use and enforceability of litigation-related provisions in corporate governing documents.⁵⁹ That evolution had emerged to address the growing problem of meritless “deal litigation” targeting Delaware corporations that plaintiffs filed in courts outside of Delaware.⁶⁰ The resulting law left the validity of FFPs under state corporate law, at best, ambiguous.

(4) among the shareholders of the corporation. See Megan Wischmeier Shaner, *Interpreting Organizational “Contracts” and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 1005–09 (2019); see also, *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders”); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (“[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders The charter is also a contract among the shareholders themselves.”); *Hill Int’l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015) (“The bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers and stockholders formed within the statutory framework of the Delaware General Corporation Law.”).

The lack of clarity on this basic point is problematic because correctly identifying the parties to the corporate contract has important legal consequences. See, e.g., Geis, *supra*, at 637; Hershkoff & Kahan, *supra* note 23, at 277–80, 286–87. Most significantly, if the state is considered a party to the corporate contract, then a state law prohibition on mandatory arbitration of intra-corporate claims may not be preempted by the FAA. See Lipton, *supra* note 10, at 601 n.106.

58. See, e.g., Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 487 (2016).

59. See, e.g., Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 176–81 (Sean Griffith et al. eds., 2018); Hershkoff & Kahan, *supra* note 23, at 272–76; Winship, *supra* note 58, at 498–522.

60. See, e.g., John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1353–1380 (2012) (documenting the migration of lawsuits out of Delaware and offering reasons for the migration); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 475–486 (2015) (discussing the rise in and problems created by merger litigation); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 6–26 (2015) (describing the crisis in low value shareholder lawsuits targeting mergers); Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 373–78 (2012) (linking the migration of lawsuits out of Delaware to the spread of intra-corporate

On one hand, in 2013, the Delaware Chancery Court had confirmed the validity of a forum selection bylaw in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,⁶¹ an influential opinion by then-Chancellor Strine. But the forum selection bylaw at issue in *Boilermakers* was limited to shareholder claims made under Delaware corporate law; the bylaw did not purport to regulate lawsuits making other types of claims.⁶² In upholding the bylaw, Chancellor Strine stressed that the forum selection provision “only regulate[s] suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine.”⁶³ By contrast, the chancellor explained, a bylaw purporting to regulate “external matters”—that is matters beyond the internal affairs of the corporation and therefore beyond the reach of state corporate law—would be invalid.⁶⁴ As examples of “external matters,” the chancellor offered two: a tort claim brought against a corporation by a shareholder for a personal injury she suffered on the corporation’s premises or a contract claim brought against the corporation arising under a commercial contract to which a shareholder happened to be the counterparty.⁶⁵ Both claims were external, the chancellor reasoned, because they were not based on the shareholder’s legal status as a shareholder of the corporation.⁶⁶

Thus, *Boilermakers* strongly suggested that the scope of the corporate contract was limited to internal corporate affairs—affairs that are governed by state corporate law.⁶⁷ The clear implication of *Boilermakers*

forum selection provisions in Delaware corporations’ governing documents); Winship, *supra* note 58, at 500–04 (same).

61. 73 A.3d 934 (Del. Ch. 2013).

62. *See id.* at 950–51, 962 (concluding that “the forum selection bylaws plainly focus on claims governed by the internal affairs doctrine and thus the law of the state of incorporation”).

63. *See id.* at 939.

64. *See id.* at 952 (emphasis omitted) (explaining that a bylaw “regulating external matters” would be beyond the permissible scope the Delaware General Corporation Law (DGCL) because “the bylaws would not deal with the rights and powers of the plaintiff-stockholder as a stockholder”).

65. *See id.*

66. *See id.*

67. *See id.* at 962 (explaining that the forum selection bylaws at issue are valid in part because they do not “purport[] in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government. Rather, the forum selection bylaws plainly focus on claims governed by the internal affairs doctrine and thus the law of the state of incorporation”).

was that a corporate charter or bylaw provision purporting to govern claims arising under federal securities law would be invalid.⁶⁸

On the other hand, in 2014, the year after *Boilermakers* was decided, the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*⁶⁹ upheld the validity of another type of bylaw regulating shareholder litigation—one mandating a form of loser-pays fee-shifting.⁷⁰ Unlike the forum selection bylaw in *Boilermakers*, however, the fee-shifting bylaw in *ATP* was not confined to internal affairs claims brought under Delaware corporate law.⁷¹ Instead, the *ATP* bylaw purported to apply fee-shifting to “any” shareholder claim brought against the corporation.⁷² And, indeed, the losing plaintiff in *ATP* had brought claims under both federal antitrust law and state corporate law.⁷³ Nonetheless, the Delaware Supreme Court, in a unanimous opinion joined by then-Chief Justice Strine, characterized the bylaw as one that “shifts attorneys’ fees and costs to unsuccessful plaintiffs in *intra-corporate* litigation.”⁷⁴ As such, the court held that “[a] bylaw that allocates risk among parties in *intra-corporate* litigation” is within the permissible scope of the corporate contract between the corporation and its shareholders.⁷⁵ The *ATP* court, however, never explained what it meant by “intra-corporate” litigation and, specifically, whether a shareholder lawsuit asserting only claims arising outside of state corporate law—such as claims arising under federal securities law, for example—would still be considered “intra-

68. *See id.* (explaining that the forum selection bylaws at issue are valid in part because they “do not purport to regulate a stockholder’s ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter”).

69. 91 A.3d 554 (Del. 2014) (en banc).

70. *See id.* at 558. As others have noted, the type of loser-pays bylaw at issue in *ATP* was particularly one-sided in favor of the corporation. *See, e.g.*, William K. Sjostrom, Jr., *The Intersection of Fee-Shifting Bylaws and Securities Fraud Litigation*, 93 WASH. U. L. REV. 379, 385–86 (2015); Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 166 (2015).

71. *Compare Boilermakers*, 73 A.3d at 960 *with ATP*, 91 A.3d at 558.

72. *See ATP*, 91 A.3d at 556; *see also* Sjostrom, *supra* note 70, at 388–89. Although *ATP* involved a Delaware nonstock corporation, which has members rather than shareholders, it was widely assumed that the reasoning and holding of *ATP* would also apply to a Delaware stock corporation. *See, e.g.*, Sjostrom, *supra* note 70, at 385–86; Hamermesh, *supra* note 70, at 167.

73. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 824 (3d Cir. 2010) (describing the procedural history of the underlying litigation).

74. *See ATP*, 91 A.3d at 555–56 (emphasis added).

75. *See id.* at 558 (emphasis added).

corporate”.⁷⁶ Nor did the *ATP* court address *Boilermakers*’s critical internal/external distinction,⁷⁷ despite citing *Boilermakers*.⁷⁸

In response to *Boilermakers* and *ATP*, in 2015, the Delaware General Assembly enacted a set of consequential amendments to the Delaware General Corporation Law (DGCL), essentially codifying *Boilermakers* and reversing *ATP*.⁷⁹ But those amendments, authorizing forum selection and banning fee-shifting provisions in the corporate contract, applied only to shareholder lawsuits involving an “internal corporate claim.”⁸⁰ “Internal corporate claim” was, in turn, statutorily defined to mean a claim brought under Delaware state corporate law.⁸¹

Thus, the 2015 amendments confined themselves to state corporate law claims.⁸² The amendments did not address the validity (or invalidity) of a corporate charter or bylaw provision purporting to regulate claims arising outside of state corporate law, such as claims arising under federal securities law.⁸³

76. Cf. Lipton, *supra* note 10, at 599 (emphasis omitted) (describing *ATP*’s repeated use of the term “intra-corporate” as an “an oddity, to be sure, because the bylaw at issue purported to extend to any claim brought by a member”).

77. See *supra* notes 63–68 and accompanying text (describing the internal/external distinction made in *Boilermakers*).

78. See *ATP*, 91 A.3d at 560 n.38 (citing *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013)).

79. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116–18 (Del. 2020) (en banc) (describing the 2015 DGCL amendments).

80. See 2015 Del. Laws 40 § 2 (codified at DEL. CODE ANN. tit. 8, §§ 102(f), 109(b), 115 (2020)). In addition, the statutory amendments bar any corporate governance provision that would “prohibit bringing [an internal corporate claim] in the courts of [Delaware].” DEL. CODE ANN. tit. 8, § 115. Thus, although the legislative text does not expressly say so, it implicitly bars a provision that could compel arbitration of any internal corporate claim to the exclusion of litigation in Delaware courts. See *Winship*, *supra* note 58, at 521.

81. See DEL. CODE ANN. tit. 8, § 115 (“Internal corporate claims’ means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.”).

82. *Id.*

83. See, e.g., Stephen M. Bainbridge, *Fee-Shifting: Delaware’s Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 859 (2016) (noting that the 2015 DGCL amendments “do[] not preclude companies from adopting fee-shifting bylaws that apply to federal securities law claims”); Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L.J.F. 169, 176 (2018) (“[T]he Delaware legislation reaches only . . . state law corporate governance claims . . . [T]he state legislation was silent as to . . . non-state-law disputes, triggering debate over what that silence means for the arbitration of shareholders’ federal claims.”); John C. Coffee, Jr., “Loser Pays”: *The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class*

Some involved in the drafting of the 2015 amendments would later assert that this omission was no accident—that in drafting the statutory text their underlying assumption, based on *Boilermakers*, was that the corporate contract could not regulate matters beyond the internal affairs doctrine, which has traditionally marked the boundaries of state corporate law.⁸⁴ But nothing in the text of the 2015 amendments—or elsewhere in the DGCL—said so explicitly.⁸⁵ And, the extant caselaw, *Boilermakers* and *ATP*, left the question unclear. Consequently, prior to *Salzberg*, the validity of a charter- or bylaw-based FFPs governing federal securities law claims was in doubt as a state corporate law matter.⁸⁶

Action, 68 SMU L. REV. 689, 693–95 (2015) (noting that the 2015 DGCL amendments do not cover federal securities class actions and, when read literally, would not preclude charter or bylaw provisions relating to federal securities lawsuits); Sjostrom, *supra* note 70, at 387 (noting that 2015 DGCL amendments “do not expressly prohibit fee-shifting bylaws to extra-corporate claims, which, presumably, include those under the federal securities laws”); Winship, *supra* note 58, at 520 (noting that the 2015 DGCL amendments’ restrictions on provisions governing internal corporate claims “does not apply to provisions that purport to restrict other types of shareholder litigation, including securities claims”).

84. See Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INST. DEL. CORP. & BUS. L. (June 29, 2015), <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism> [<https://perma.cc/VX4J-QBEQ>]. By contrast, Professor Coffee has speculated that the omission of federal securities law claims from the definition of “internal corporate claims” under DGCL section 115 was an intentional attempt to preserve the viability of state corporate law litigation for the Delaware bar, without foreclosing Delaware corporations from regulating shareholder lawsuits brought under federal securities law, which largely occur outside of Delaware and do not involve the Delaware bar. Coffee, *supra* note 83, at 694–95.

85. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 119–20 (Del. 2020) (en banc) (recognizing that DGCL section 115, as modified by the 2015 DGCL amendments, is limited to “internal corporate claims” and “does not address the propriety of forum-selection provisions applicable to other types of claims”).

86. Some have interpreted *Salzberg* cautiously to authorize only *charter*-based provisions regulating rights arising under federal securities law, and not necessarily *bylaw*-based provisions that attempt to do the same. This would be an overly narrow interpretation of the decision. First, the relevant statutory provisions defining the permissible scope of charter- and bylaw-based provisions are nearly identical in substance. Compare DEL. CODE ANN. tit. 8, § 102(b)(1) (defining the permissible scope of a corporate charter), with *id.* § 109(b) (defining the permissible scope of corporate bylaws). Second, the *Salzberg* opinion at times speaks of charter- and bylaw-based provisions without making a distinction. See, e.g., *Salzberg*, 227 A.3d at 114 (stating, without explanation, that “a *bylaw* that seeks to regulate the forum in which . . . ‘intra-corporate’ litigation can occur is a provision that addresses the ‘management of the business’ and the ‘conduct of the affairs of the corporation,’ and is, thus, facially valid under [DGCL] Section 102(b)(1)” even though DGCL Section 102(b)(1) pertains

B. Salzberg v. Sciabacucchi

Despite the uncertain enforceability of FFPs, during the second half of 2017, three Delaware corporations, each in advance of an initial public stock offering, included in their corporate charters an FFP requiring any claims made by current or former shareholders under the Securities Act to be brought in federal court.⁸⁷ A plaintiff-shareholder challenged the facial validity of the FFPs in the Delaware Court of Chancery, where Vice Chancellor Laster ruled the FFPs to be “ineffective and invalid.”⁸⁸

To justify his ruling, the vice chancellor turned to the internal/external distinction made in *Boilermakers*,⁸⁹ observing that a corporation’s charter and bylaws may regulate only the internal affairs of a corporation.⁹⁰ Conversely, the corporate contract may *not* regulate external matters that lie beyond the internal affairs doctrine.⁹¹ Applying these principles to FFPs, the vice chancellor reasoned that because the rights of shareholders to bring Securities Act claims are rights that arise under federal securities law, not state corporate law, FFPs impermissibly attempt to regulate an external matter.⁹² “[A] federal claim under the 1933 Act is a clear example of an external claim,” the vice chancellor explained.⁹³ “The claim does not arise out

only to a corporate charter and not bylaws) (emphasis added). Third, to the extent *CA, Inc. v. AFSCME*, 953 A.2d 227, 235 (Del. 2008), limits corporate bylaws to procedural, rather than substantive matters, forum-selection and arbitration provisions are process-oriented and therefore a valid subject for bylaws. See Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 769–71 (2015). Finally, *Salzberg* characterizes the fee-shifting bylaw in *ATP* as an Outer Band provision, suggesting that an Outer Band provision may appear in either a corporate charter or bylaws. *Salzberg*, 227 A.3d at 113–14.

87. See *Salzberg*, 227 A.3d at 111–12 (describing Roku’s, Stitch Fix’s, and Blue Apron’s FFPs enacted in 2017).

88. *Sciabacucchi v. Salzberg*, No. 2017-0931, 2018 WL 6719718, at *3 (Del. Ch. Dec. 19, 2018), *rev’d*, 227 A.3d 102 (Del. 2020) (en banc).

89. See *supra* notes 63–65 and accompanying text.

90. See *Sciabacucchi*, 2018 WL 6719718, at *9–11.

91. See *id.* at *3, (“The constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware’s corporate law.”).

92. See *id.* at *1 (“The *Boilermakers* distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act. It cannot, because a 1933 Act claim is external to the corporation.”).

93. *Id.* at *22.

of the corporate contract and does not implicate the internal affairs of the corporation.”⁹⁴

“Disagree[ing] with the trial court’s analysis in a number of respects,”⁹⁵ the Delaware Supreme Court reversed the Chancery Court and upheld the validity of FFPs.⁹⁶ While the Delaware Supreme Court agreed with the Chancery Court below that shareholder rights under the Securities Act lie beyond the internal affairs doctrine,⁹⁷ the high court ruled that the internal affairs doctrine did not limit the scope of the corporate contract and what it can regulate.⁹⁸

Instead, according to the supreme court, the only boundaries to the corporate contract appear in Delaware’s corporate statute.⁹⁹ In particular, the high court found DGCL section 102(b)(1) to be dispositive.¹⁰⁰ That section broadly permits a corporate charter to include “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders.”¹⁰¹ The Delaware Supreme Court concluded that FFPs “easily fall within” the language of DGCL section 102(b)(1)¹⁰² and the Chancery Court had erred by construing the statutory text to be confined to the boundaries of the internal affairs doctrine.¹⁰³

As to the critical internal/external distinction first made by then-Chancellor Strine in *Boilermakers* and built upon by Vice Chancellor Laster, the Delaware Supreme Court offered a novel interpretation of

94. *Id.* at *2.

95. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 120 (Del. 2020) (en banc).

96. *See id.* at 137–38.

97. *See id.* at 123 (observing that “Section 11 claims are [not] ‘internal affairs’ claims, because Section 11 claims are not governed by substantive Delaware law”); *id.* at 130–31 (confirming that FFPs regulate “matters that are not ‘internal affairs,’ but are, nevertheless, ‘internal’ or ‘intracorporate’ and still within the [permissible Outer Band] of [DGCL] Section 102(b)(1)”).

98. *See id.* at 125 (criticizing the chancery court for improperly “superimpos[ing] the ‘internal affairs’ doctrine onto and narrow[ing] the scope of [DGCL] Section 102(b)(1)—contrary to its plain language”).

99. *See id.* at 113 (“The analysis must begin with the text of [DGCL] Section 102, the provision . . . governing the matters contained in a corporation’s certificate of incorporation.”).

100. *See id.* at 113–14.

101. DEL. CODE ANN. tit. 8, § 102(b)(1) (2020).

102. *See Salzberg*, 227 A.3d at 114.

103. *See id.* at 125.

Boilermakers.¹⁰⁴ Specifically, the high court asserted that simply because shareholder claims arising under the Securities Act lie beyond the internal affairs doctrine does not mean such claims are “external” and, therefore, beyond the permissible reach of the corporate contract.¹⁰⁵ Instead, the high court continued, “[t]here is a category of matters that is situated on a continuum between the *Boilermakers* definition of ‘internal affairs’ and its description of purely ‘external’ claims.”¹⁰⁶ Dubbing this in-between category as the “Outer Band” of corporate affairs, the Delaware Supreme Court ruled that “FFPs are in this Outer Band, and are facially valid under Delaware law because they are within the statutory scope of [DGCL] Section 102(b)(1).”¹⁰⁷

C. Salzberg as Pragmatism

One might forgive Vice Chancellor Laster for having overlooked the “Outer Band” when he ruled FFPs to be invalid in his lower court opinion. Prior to the Delaware Supreme Court’s *Salzberg* decision, the “Outer Band”—sandwiched between internal corporate affairs and external matters—was unknown to the law of corporations. Neither *Boilermakers* nor *ATP* suggested the possibility of this in-between category.¹⁰⁸ Thus, when the Delaware Supreme Court reversed the Chancery Court and upheld the validity of FFPs, it did so on an entirely

104. *See id.* at 123–25.

105. *See id.* at 124–25 (criticizing the Chancery Court for improperly interpreting *Boilermakers* to mean that “everything other than an ‘internal affairs’ claim was ‘external’ and, therefore, not the proper subject of a bylaw or charter provision”).

106. *Id.*

107. *Id.* at 131.

108. Notably, the *Salzberg* court was unburdened with the institutional memory of those earlier decisions. By the time of *Salzberg*, the author of *Boilermakers*, then Chancellor Strine, who later served as chief justice of the Delaware Supreme Court when *ATP* was decided, had left the high court, having retired months earlier. *See Historical List of Delaware Supreme Court Justices*, DEL. CTS., <https://courts.delaware.gov/supreme/history/justicespast.aspx> [<https://perma.cc/C6BW-RP36>] (listing the previous and current justices who have served on the Delaware Supreme Court); *Court of Chancery, Judicial Officers*, DEL. CTS., <https://courts.delaware.gov/chancery/judges.aspx> [<https://perma.cc/P6YW-43GW>] (listing the previous and current chancellors who have served on the Delaware Court of Chancery). Indeed, beyond Strine, no member of the *ATP* court (comprised of Chief Justice Strine and Justices Holland, Berger, Jacobs, and Ridgley) was still on the Delaware Supreme Court bench when *Salzberg* was decided. *Historical List of Delaware Supreme Court Justices, supra*. In this respect, the members of the *Salzberg* court (comprised of Chief Justice Seitz, and Justices Valihura, Vaughn, and Traynor, and Judge Karsnitz) were naturally poised to revisit, rethink, and reshape those earlier precedents.

novel basis—one so unfamiliar to existing law that the high court felt it useful to offer a Venn diagram in its opinion, illustrating the Outer Band’s scope and relationship with the more-familiar categories of internal and external corporate affairs.¹⁰⁹

Still, despite its novelty, *Salzberg* might be regarded as a straightforward exercise in judicial pragmatism, catering to the interests of Delaware’s all important corporate constituency.¹¹⁰ It is well known that Delaware derives substantial profits from its status as a corporate haven.¹¹¹ And due to the state’s success in attracting corporate charters, Delaware judges enjoy significant power and a national reputation.¹¹² By regularly deciding high profile disputes and providing guidance on emergent legal issues, the state’s bench plays a central, agenda-setting role for corporate America.¹¹³ Thus, academic

109. See *Salzberg*, 227 A.3d at 131 fig. 1.

110. See, e.g., Peter Molk, *Delaware’s Dominance and the Future of Organizational Law*, 55 GA. L. REV. 1111, 1123–27, 1168–70 (2021) (citing *Salzberg* as an “[o]pinion[] . . . written with an eye towards inefficiencies that might result from alternative rulings”); Jeff Montgomery, *Delaware Federal Forum Ruling Could Open Door to Mischief*, LAW360 (Mar. 19, 2020), <https://www.law360.com/articles/1255189/del-federal-forum-ruling-could-open-door-to-mischief> (quoting various law professors’ interpretations of *Salzberg* as an instrumentally driven, pragmatic decision).

111. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 695–99 (2002); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1210–11 (2001).

112. See, e.g., Armour et al., *supra* note 60, at 1381 (“Delaware’s . . . judges are often characterized as an elite judicial corps that engages in principled lawmaking, thus enhancing Delaware’s legitimacy as a standard-setter for corporate law.”); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064, 1072–96 (2000) (describing the unusual characteristics of the Delaware courts and the unique role the courts play in Delaware’s success for corporate charters); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 217 (2011) (“Due to their experience and expertise, Delaware judges . . . have developed a national reputation for providing quality adjudication in corporate matters and, today, are among the most highly regarded corporate adjudicators in the country.”); William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 586–97 (2012) (describing, from a practitioner perspective, the “genius” of the Delaware judiciary in using “traditional common law methods to recreate and improve the policymaking toolbox of a regulatory agency”).

113. Scholars have frequently observed that in deciding cases the Delaware judiciary is motivated, in part, to protect the state’s corporate law dominance. See, e.g., Armour et al., *supra* note 60, at 1381–83; Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2142 (2018). Scholars also have recognized that Delaware judges have an even more self-interested motivation to maintain Delaware’s corporate law dominance, namely the “power and prestige [that] might wane if . . . Delaware state

literature has frequently noted that Delaware's reliance on corporate franchise taxes along with the aggrandized power enjoyed by its judiciary mean that Delaware and its courts are credibly committed to meeting the needs of the state's corporate constituency.¹¹⁴

Cyan created a problem for Delaware corporations. In the immediate wake of *Cyan*, the number of section 11 complaints filed in state courts multiplied, along with the wasteful cost and complexity for corporate defendants forced to defend duplicative lawsuits in multiple fora.¹¹⁵ And because section 11 claims target corporations engaged in public stock offerings, the problem was most acute for newly public corporations—the overwhelming majority of which are incorporated in Delaware¹¹⁶ and comprise a critical component of the state's corporate tax base.¹¹⁷

courts [c]ould not exercise jurisdiction over as many high-profile disputes . . .” Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 643 (2004).

114. See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 37–44 (1993); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 276–78 (1985); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1927 (1998); see also Molk, *supra* note 110, at 1123–27, 1168–70 (summarizing the credible commitment hypothesis and finding empirical support for the claim).

115. See CORNERSTONE RSCH., *SECURITIES CLASS ACTION FILINGS: 2020 YEAR IN REVIEW*, 5 fig. 4 [hereinafter CORNERSTONE 2020], <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review> [https://perma.cc/J4ES-T77D] (stating that in 2017, the year before the *Cyan* holding, there were twenty-seven federal section 11 and state 1933 Act filings, compared to sixty-six in 2019, the year after the *Cyan* holding); Alison Frankel, *The Sciabacucchi Effect: Delaware Ruling on Forum Provisions Is ‘Stabilizing’ D&O Insurance Market*, REUTERS (Mar. 16, 2021, 3:39 PM), <https://www.reuters.com/article/legal-us-otc-d-o/the-sciabacucchi-effect-delaware-ruling-on-forum-provisions-is-stabilizing-do-insurance-market-idUSKBN2B82S8> [https://perma.cc/5E9C-Q73K] (describing the number of section 11 filings and the complexities that *Cyan* cause).

116. See WILMERHALE, *IPO REPORT 2020* 8 (2020), https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/2020-wilmerhale-ipo-report.pdf [https://perma.cc/77FF-LQ8V] (reporting that eighty-eight percent of all U.S. initial public offerings (IPOs) from 2017 through 2019 involved a corporation chartered in Delaware).

117. See Mark J. Roe, *Delaware’s Shrinking Half-Life*, 62 STAN. L. REV. 125, 134, 140 (2009) (demonstrating that Delaware relies upon new corporate formations to replenish its persistently eroding tax base, as existing Delaware corporations merge, close, or restructure out of existence).

FFPs offered a simple state-law fix to the federal-law problem that *Cyan* created.¹¹⁸ Moreover, unlike many state corporate law issues that pit corporate managers against shareholders, both constituencies stood to benefit from FFPs.¹¹⁹ By channeling section 11 claims into federal court, FFPs enabled corporations, and ultimately their shareholders, to avoid the wasteful cost of defending parallel lawsuits in state courts, while still allowing meritorious claims to proceed in a federal forum.¹²⁰ Indeed, empirical evidence showed that immediately following the Delaware Chancery Court's *Salzberg* decision ruling FFPs to be invalid, the stock price of corporations with FFPs in their governing documents suffered significant declines, indicating that shareholders viewed FFPs to be value adding.¹²¹

Thus, a ruling invalidating FFPs would have made Delaware law an obstacle to something the state's corporate constituents valued and wanted.¹²² If Delaware's corporate law failed to accommodate FFPs, it risked another state construing its own corporate law differently in order to divert corporate charters away from Delaware.¹²³ Such a result would erode Delaware's tax base and status as the national arbiter of corporate governance.¹²⁴

One sees evidence of the Delaware Supreme Court's concern for these pragmatic considerations throughout its *Salzberg* opinion.¹²⁵ The

118. Indeed, following *Salzberg*, the number of state court and parallel state and federal court class actions asserting section 11 Securities Act claims dropped precipitously from 2019 to 2020. See CORNERSTONE 2020, *supra* note 115, at 4 fig. 3.

119. See Grundfest, *supra* note 10, at 1392 (arguing that “the Chancery’s [*Salzberg*] opinion did more to help the plaintiff’s counsel than the corporation or stockholders whose interests are theoretically paramount”).

120. See *id.*

121. See Aggarwal et al., *supra* note 10, at 409–10 (demonstrating significant declines in the stock price of corporations with FFPs after the Delaware Chancery Court ruled FFPs to be invalid and concluding the data “generally lend some support to the view that FFPs are desirable and do not undermine shareholders’ rights”).

122. See *id.* at 398 (“[I]t is easy to see why FFPs may be important for firms that are susceptible to Section 11 lawsuits FFPs may save substantial costs for firms, particularly those that wish to go public, and likewise, the [Chancery Court’s] decision that prohibited FFPs likely had the opposite effect.”). Indeed, even after the Chancery Court had invalidated FFPs, corporations continued to include FFPs in their corporate governing documents, hoping the state supreme court might reverse the lower court decision. See *id.* at 394, 400.

123. See Manesh, *supra* note 1, at 310–11.

124. See *id.* at 311.

125. See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) (en banc) (“FFPs . . . address the post-*Cyan* difficulties presented by multi-forum litigation of

high court discussed at length the increasing filings of section 11 lawsuits in state courts and the problem of duplicative, multi-forum litigation.¹²⁶ “The costs and inefficiencies of multiple cases being litigated simultaneously in both state and federal courts are obvious,” the court noted.¹²⁷ The court also commended FFPs for providing “certain efficiencies in managing the procedural aspects of securities litigation following *Cyan* . . . by directing [Securities] Act claims to federal courts whe[re] coordination and consolidation are possible.”¹²⁸

Given such language coupled with the instrumental consequences of the high court’s decision, one can readily interpret the holding in *Salzberg* as an unremarkable exercise in judicial pragmatism. Focusing too narrowly on pragmatism, however, risks overlooking the novelty of *Salzberg* and its Outer Band.

II. CORPORATE THEORY AND THE INTERNAL AFFAIRS DOCTRINE

Though judicial pragmatism may go far to explain *Salzberg*, it cannot explain everything. For one, pragmatism cannot explain the “Outer Band” that the *Salzberg* court uncovered in order to uphold FFPs. Rather than creating an entirely new category of corporate affairs, the court could have readily made room for FFPs within the existing framework of the internal affairs doctrine. After all, as many scholars have noted, the precise boundaries of the doctrine—separating internal corporate affairs from external matters—are inherently

Securities Act claims”); *id.* (expressing a desire “to ensure that the laws do not impose unnecessary costs on Delaware entities”); *id.* (“FFPs . . . allow for litigation of federal Securities Act claims in a federal court of plaintiff’s choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs.”).

126. *See id.* at 114–15.

127. *Id.* at 115.

128. *See id.* at 114–15.

indeterminate¹²⁹ and, therefore, subject to manipulation.¹³⁰ Accordingly, the *Salzberg* court could have simply ruled that even though shareholder claims made under section 11 of the Securities Act arise under federal law, rather than state corporate law, the nature of such claims is sufficiently intra-corporate to be considered an internal corporate affair.¹³¹ In fact, this argument was made independently by multiple law professors in draft articles in the months before the supreme court's *Salzberg* decision.¹³² Rather than make room for section 11 claims within the existing framework of the internal affairs doctrine, the Delaware Supreme Court chose to accommodate FFPs by inventing a new category of corporate affairs.¹³³

Indeed, it is the Delaware Supreme Court's treatment of the internal affairs doctrine, and its divergence from the Chancery Court on the doctrine's relevance, that points to another interpretation of the high court's *Salzberg* decision. For the Chancery Court, the internal affairs doctrine was dispositive.¹³⁴ According to Vice Chancellor Laster, the doctrine functioned not only as a choice-of-law principle; it also defined the boundaries of the corporate contract and what it can regulate.¹³⁵ By contrast, for the Delaware Supreme Court, the internal

129. See, e.g., Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 115, 134 (2008) (arguing that "the [internal affairs] doctrine's scope . . . remains contested"); Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL'Y REV. 381, 421 (2005) ("The [internal/external] . . . distinction [made by the internal affairs doctrine] is no different than the other famous distinctions around which legal debate centers: It is . . . debatable, contestable, and ultimately quite fragile."); Manesh, *supra* note 1, at 298 ("One cannot draw a neat line separating internal corporate affairs from external matters because the two inevitably bleed into one another."); James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. REV. 116, 131–33 (2017) ("While [the internal affairs doctrine] is well established, the line distinguishing internal and external affairs is difficult to precisely define, leaving it as a porous boundary between corporate and securities law . . . [T]he doctrine straddles both corporate and securities law."); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2538 (2005) ("The line dividing internal and external is surely not bright . . .").

130. See Manesh, *supra* note 1, at 296–312 (explaining that because the boundaries of the internal affairs doctrine are indeterminate, states retain the flexibility to interpret the doctrine as broadly or narrowly as they wish).

131. See *id.* at 301–03.

132. See *supra* note 10 (citing various professors who made the argument that the internal affairs doctrine could be broadly interpreted to encompass section 11 claims).

133. See *supra* notes 105–07 and accompanying text.

134. *Sciabacucchi v. Salzberg*, No. 2017-0931, 2018 WL 6719718, at *1, *2 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102 (Del. 2020) (en banc).

135. *Id.* at *2; see *supra* notes 89–94 and accompanying text.

affairs doctrine was irrelevant.¹³⁶ According to the high court, the doctrine operates solely as a choice-of-law principle; it does not limit the scope of the corporate contract or the nature of what the contract may regulate.¹³⁷ These divergent doctrinal perspectives rest on divergent theories of the corporation.¹³⁸

As Section A explains, the Delaware Supreme Court's view of the internal affairs doctrine—as a mere choice-of-law principle and nothing else—aligns neatly with the contractarian theory of corporations. Section B then describes Vice Chancellor Laster's competing perspective, embodying a contemporary version of the concession theory of corporations.

A. *Salzberg as Contractarianism*

Although Delaware Supreme Court's *Salzberg* decision does not expressly articulate a particular corporate law theory as the basis for its holding, the opinion is marbled with contractarianism.¹³⁹ This Section briefly describes contractarian theory and its implications for the internal affairs doctrine. It then explains how contractarian theory fits with the Delaware Supreme Court's take on the doctrine in *Salzberg*.

1. *Contractarian theory*

As a descriptive matter, contractarian theory posits that a corporation is a nexus of explicit and implicit contracts among various private actors.¹⁴⁰ Workers, shareholders, creditors, suppliers, and

136. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) (en banc).

137. *Id.*; see *supra* notes 95–103 and accompanying text.

138. Cf. Ann Lipton, *So the Salzberg v. Sciabacucchi Decision Is In!*, BUS. L. PROF. BLOG (Mar. 21, 2020), https://lawprofessors.typepad.com/business_law/2020/03/so-the-salzberg-v-sciabacucchi-decision-is-in.html [<https://perma.cc/877M-246U>] (noting that “the contrast between the Supreme Court and Chancery decisions [in *Salzberg*] as a matter of corporate *theory* are quite striking”).

139. See, e.g., *Salzberg*, 227 A.3d at 137 (“Our law strives to enhance flexibility in order to engage in private ordering . . . [O]ur DGCL was intended to provide directors and stockholders with flexibility and wide discretion for private ordering and adaptation to new situations.”).

140. See, e.g., Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 616 (1988) (“According to the contractual theory of the corporation, the corporation, like any firm—whether a sole proprietorship, partnership or corporation—is a nexus of contracts among many different parties involving mutually beneficial exchanges.”); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) (“The corporation is a complex set of explicit and implicit contracts, and corporate law

customers alike all voluntarily consent to provide the corporation with certain inputs in exchange for certain outputs of the business.¹⁴¹

Applied to shareholders specifically, contractarian theory views a corporation's governing documents—its charter and bylaws—as an explicit contract between the corporation and its shareholders.¹⁴² As a contract, a corporation's governing documents, as supplemented by the state's corporate statute, dictate the rights and obligations of shareholders vis-à-vis the corporation. Shareholders manifest their assent to the terms of the corporate contract when they choose to purchase shares of the corporation's stock.¹⁴³ And though, like other

enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy.”).

141. See, e.g., Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859 (1997) [hereinafter Bainbridge, *Community and Statism*] (“[C]ontractarians’ model the firm not as a single entity, but as an aggregate of various inputs acting together with the common goal of producing goods or services.”); Easterbrook & Fischel, *supra* note 140, at 1426 (explaining, from a contractarian perspective, that the “nexus of contracts” . . . is just a shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves”); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 933 (1984) (“The contract approach regards the corporation as a shell or form created by consenting individuals. A firm is a nexus of explicit and implicit contracts, facilitating the implementation of the contracting parties’ wishes.”). See generally Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9–10 (2002) [hereinafter Bainbridge, *The Board of Directors*] (outlining the standard contractarian theory of the corporation).

142. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 16 (1991) (explaining, from a contractarian perspective, that “[t]he corporate venture has many real contracts” including “the articles of incorporation” supplemented by “the fallback terms specified by law and not varied by the corporation”); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 377 (2018) (explaining that under contractarian theory “the governing documents of the corporation—the charter and bylaws—operate and bind both managers and shareholders as if they had negotiated their terms and signed them, like a common law contract”); Grant M. Hayden & Matthew T. Bodie, *Shareholder Voting and the Symbolic Politics of Corporation as Contract*, 53 WAKE FOREST L. REV. 511, 542 (2018) (describing, from an anti-contractarian perspective, the application of contractarian theory to a corporation’s charter and bylaws).

143. See, e.g., *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (employing contractarian theory to assert that “stockholders who invest in [a] corporation[] assent to be bound by [the corporation’s certificate and] bylaws when they buy stock”); *id.* at 958 (employing contractarian theory to assert that investors “contractually assent” to be bound to the corporate contract “when an investor buys stock in a . . . corporation”); Michael Klausner, *The Contractarian Theory*

contracts of adhesion, shareholders may not negotiate, understand, or even read the terms of a corporation's charter and bylaws, market discipline, imposed through stock prices and the competition for capital, ensures efficiency in the contract terms that corporations offer.¹⁴⁴

As a normative matter, contractarian theory has important implications for both the content of corporate law and the role of the internal affairs doctrine.¹⁴⁵ With respect to the former, according to contractarian theory, corporate law should be enabling rather than prescriptive; it should maximize the space for private ordering.¹⁴⁶ Because mandatory, one-size-fits-all rules of internal corporate

of Corporate Law: A Generation Later, 31 J. CORP. L. 779, 783 (2006) (explaining that under contractarian theory “[s]hareholders accept the [corporate] contract by buying shares in the company and implicitly pricing the quality of the firm’s governance commitments”).

144. See, e.g., Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 106 (1989) [hereinafter Butler, *The Contractual Theory*] (“The efficient markets hypothesis is important because it means that corporate contracts that harm investor interests will be recognized and punished by price reductions in the market.”); Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 42 (1990) [hereinafter Butler & Ribstein, *Opting out of Fiduciary Duties*] (“The average investor is, indeed, ‘rationally ignorant’ But this ignorance is of no importance . . . as long as the efficient market operates to discount information concerning expected agency costs into securities prices.”); Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 993–94 (1993) [hereinafter Ribstein, *The Mandatory Nature*] (“[P]ublic firms’ share prices are efficient in terms of reflecting publicly disclosed information, including information about the firms’ governance structures. Because efficient securities markets ensure that investors pay appropriate prices for the governance products they buy, small shareholders do not need to be protected merely because they are uninformed or cannot bargain aggressively.”); see also Fisch, *supra* note 142, at 377–78 (explaining the contractarian argument that “market discipline, imposed through stock prices, [will] lead to the adoption of optimal contract terms for shareholders or, at least, better terms than those imposed by regulation”).

145. See, e.g., Fisch, *supra* note 142, at 378–79 (summarizing the normative implications of contractarian theory).

146. See, e.g., Butler, *The Contractual Theory*, *supra* note 144, at 100 (“The contractual theory views the corporation as founded in private contract, where the role of the state is limited to enforcing contracts.”); Butler & Ribstein, *Opting out*, *supra* note 144, at 53–64 (making the contractarian argument against mandatory rules); see also Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1397 (1989) (“[T]he contractual view of the corporation implies that the parties involved should be totally free to shape their contractual arrangements.”).

governance will be inevitably inefficient for at least some businesses,¹⁴⁷ corporate law should provide a set of merely default rules, enabling individual businesses and their investors to customize those rules to meet their idiosyncratic preferences.¹⁴⁸ An enabling corporate law will thus maximize efficiency by leaving the parties to the corporate contract free to opt out of inefficient default rules through the express terms of the corporation's governing documents.¹⁴⁹

Contractarian theory also has important normative implications for the internal affairs doctrine. As a choice-of-law principle, the internal affairs doctrine plays a critical role in the contractarian framework in accommodating private ordering. The doctrine empowers the parties to the corporate contract—the corporation and its shareholders—to choose which state's corporate law will govern their contractual relationship.¹⁵⁰ In this respect, the internal affairs doctrine is no

147. See, e.g., EASTERBROOK & FISCHER, *supra* note 142, at 14 (“Just as there is no right amount of paint in a car, there is no right relation among managers, investors, and other corporate participants. The relation must be worked out one firm at a time.”); Ribstein, *The Mandatory Nature*, *supra* note 144, at 991–97 (presenting the contractarian argument against mandatory corporate law rules); see also Bebchuk, *supra* note 146, at 1397 (“The primary function of corporate law, [contractarians] suggest, should be to facilitate the private contracting process by providing a set of nonmandatory “standard-form” provisions, with private parties free to adopt charter provisions that opt out of any of these standard arrangements.”).

148. See, e.g., EASTERBROOK & FISCHER, *supra* note 142, at 15 (articulating a normative theory of corporate law as “a standard-form contract, supplying terms most venturers would have chosen but yielding to explicit terms”); Bainbridge, *Community and Statism*, *supra* note 141, at 860 (explaining that the normative implication of contractarianism is that corporate law should be “comprised of default rules, from which shareholders are free to depart, rather than mandatory rules”); Klausner, *supra* note 143, at 780 (“[C]ontractarian theory . . . implies [that] . . . corporate law should merely provide a set of default rules that managers may adopt on behalf of their firms, while leaving managers free to customize their companies’ charters with legally enforceable rights and obligations.”).

149. See, e.g., Butler, *The Contractual Theory*, *supra* 144, at 121 (“[O]nly the contracting parties can know the particular set of corporate law rules that is most appropriate to their circumstances. Freedom of contract allows the corporate transactors to contract for the optimal mix of market and legal restraints on agency costs.”).

150. See, e.g., ROMANO, *supra* note 114, at 1 (arguing, from a contractarian perspective, that the ability of corporations to choose “the state whose [corporate] code best matches their needs so as to minimize their cost of doing business” as the “genius of American corporate law”); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 116 (1995) (arguing, from a contractarian perspective, that “[t]he power to choose the applicable law makes even outwardly mandatory rules effectively contractual”); Buccola, *supra* note 1, at 349 (explaining that under contractarian theory “[w]hen investors choose to contribute capital in

different than ordinary choice-of-law provisions commonly found in other, commercial contracts.¹⁵¹ The doctrine facilitates choice and private autonomy.¹⁵² It precludes any one state from imposing inflexible, mandatory rules of internal governance into the corporate contract.¹⁵³ Instead, the doctrine forces states to compete to attract corporate charters by offering the most flexible, enabling, and, therefore, efficient law for corporations and their shareholders.¹⁵⁴

Thus, under the contractarian framework, the role of the internal affairs doctrine is critical but discrete. As a choice-of-law principle, the doctrine dictates which state's law will govern the corporate contract, thereby facilitating private choice and driving state competition. But

exchange for stock, they agree to the charter's rules, which are a function of the legislative power that creates them" and "[t]o substitute another state's law in disputes arising later would be to upset what are effectively contractual arrangements").

151. See, e.g., Ribstein, *supra* note 150, at 103 (arguing, from a contractarian perspective, the internal affairs doctrine is no different than a contractual choice-of-law provision); see also ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 107–31 (2009) (same); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661 (2008) (same).

152. See, e.g., Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 247–55 (1993) (arguing, from a contractarian perspective, that enforcement of choice-of-law clauses allows parties to avoid inefficient mandatory terms and promotes jurisdictional competition); Buccola, *supra* note 1, at 349 (explaining that under contractarian theory the internal affairs doctrine is “a species of freedom of contract”); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 57 (2013) (arguing that under the “nexus of contracts’ perspective” the justification for the internal affairs doctrine arises from “the voluntary choice-of-law made whenever an investor joins a corporation recognizing that the law of the state of incorporation will govern its internal affairs”).

153. See, e.g., O'HARA & RIBSTEIN, *supra* note 152, at 107–31; ROMANO, *supra* note 114, at 85–91 (“Because of the ease of reincorporation, a provision in one state's code will not be truly mandatory unless it is included in all other state codes For a corporate law to be truly mandatory, it must be adopted by all fifty states.”); Ribstein, *supra* note 150, at 117 (“[J]urisdictional choice . . . trivialize[s] attempted governmental impairments of contract because states are encouraged to compete for incorporation business . . .”).

154. See, e.g., LARRY E. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* 74 (2010) (explaining that the “ability to choose the applicable law” made possible by the internal affairs doctrine “provides the backbone of jurisdictional competition for corporate law”); Easterbrook & Fischel, *supra* note 140, at 1420 (“The states that select the best combination of rules will attract the most corporate investment (and therefore increase their tax collections). So states compete to offer . . . beneficial sets of legal rules.”); Klausner, *supra* note 143, at 780 (“In the contractarian view, states are seen as competing with one another to attract incorporations by providing corporate law that offers value-enhancing default rules.”).

under this framework, the doctrine says nothing about the scope of the corporate contract and what the parties—the corporation and its shareholders—may agree to address in it.¹⁵⁵ Like a choice-of-law provision in other contractual settings, the doctrine simply dictates what law applies to whatever provisions the contract parties included in their agreement.¹⁵⁶ To determine the scope of the corporate contract, one must instead look to the contract itself, that is the terms of the corporation’s charter and bylaws as supplemented by the corporate law statute of the chartering state.¹⁵⁷ Indeed, to the extent contractarian theory aims to maximize the space for private ordering, any interpretation of the internal affairs doctrine that limits the scope of the corporate contract would run counter to a fundamental contractarian precept.

Delaware corporate law has largely accepted contractarian theory,¹⁵⁸ The state’s corporate statute includes few mandatory rules governing the relationship between a corporation, its directors, and its shareholders.¹⁵⁹ Instead, much of the DGCL provides merely default rules, creating

155. See, e.g., Zachary J. Gubler, *Amending the Delaware Corporate Code by Going to Court: Some Thoughts on Sciabacucchi v. Salzberg*, 108 GEO. L.J. ONLINE 106, 110–11 (2020) (“The internal affairs doctrine is, at its root, a choice of law doctrine. It has little to say about the scope of the corporate contract.”).

156. See *id.* at 107 (criticizing the Delaware Chancery Court’s *Salzberg* decision for using “the internal affairs doctrine—the choice of law rule in question—as a means of determining what the corporation and stockholders are allowed to contract for, instead of its intended use: a means of determining what law applies to whatever the parties did, in fact, contract for”).

157. See *id.* at 111 (arguing that “one must look at the contract itself” because the internal affairs doctrine “has little to say about the scope of the corporate contract”).

158. See Fisch, *supra* note 142, at 379 (“By virtue of its largely enabling structure, Delaware corporate law is consistent with the private ordering approach.”); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1783 (2006) (“There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering.”).

159. See, e.g., *In re Matter of Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 976 (Del. Ch. 1997) (Allen, C.) (explaining that “unlike the corporation law of the nineteenth century, modern corporation law contains few mandatory terms; it is largely enabling in character”); Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 742 (2013) (“The structure of Delaware’s corporate law is largely enabling rather than mandatory The degree of individualized tailoring permitted by the Delaware statute is extensive.”); Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847 (2008) (explaining that “much of the DGCL creates statutory rules that are merely ‘defaults’ [that] apply only so long as the parties to the corporation choose not to deviate from them”).

broad contractual freedom for the parties to the corporate contract to tailor the terms of internal corporate governance to best meet the needs of the business, its owners, and its managers.¹⁶⁰

The state's bench has also become increasingly enamored with contractarian rhetoric.¹⁶¹ Although Delaware law has long described a corporation's charter and bylaws as a "contract" between the corporation and its shareholders,¹⁶² such judicial references were typically made to justify applying principles of contract interpretation to the provisions in a corporation's governing documents.¹⁶³ More

160. See, e.g., *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) (en banc) ("[O]ur DGCL was intended to provide directors and stockholders with flexibility and wide discretion for private ordering and adaptation to new situations."); *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227 (Del. 2005) (describing the DGCL as "an enabling statute that provides great flexibility for creating the capital structure of a Delaware corporation"); *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004) (Strine, V.C.) (noting that Delaware corporate law "is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints"); *id.* ("[DGCL] Sections 102(b)(1) and 141(a) are therefore logically read as important provisions that embody Delaware's commitment to private ordering in the charter. By their plain terms, they are sections of broad effect, which apply to a myriad of issues involving the exercise of corporate power."); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1078 (Del. Ch. 2004) (Strine, V.C.) ("[Delaware's corporation statute] is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation."); *Welch & Saunders*, *supra* note 159, at 847 ("The [Delaware corporation statute] gives incorporators enormous freedom to adopt the terms they believe are most appropriate for the organization, finance, and governance of their particular enterprise.").

161. See, e.g., *Geis*, *supra* note 57, at 611 ("[T]he influential Delaware courts seem to be taking a more permissive attitude, based in part on the parallels between contract law and the corporate relationship."); *Fisch*, *supra* note 142, at 380 ("Delaware courts have largely accepted the contractual theory of corporate law."); *Shaner*, *supra* note 57, at 1010 ("[I]n Delaware, the courts have embraced and endorsed the contract metaphor, holding that contract law presides over issues involving both the enforcement and interpretation of the charter and bylaws.").

162. See *supra* note 57.

163. See, e.g., *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) ("Certificates of incorporation are regarded as contracts between the shareholders and the corporation, and are judicially interpreted as such."); *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply."); *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) ("Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply."); *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983) ("[T]he

recently, however, particularly in *Boilermakers* and *ATP*, the Delaware courts have invoked the contract framework to justify the binding effect of terms set forth in a charter and bylaws on the rights of a corporation's shareholders.¹⁶⁴ Building on those precedents, the Delaware Supreme Court's *Salzberg* decision further elevates contractarian theory to confine the internal affairs doctrine and thus expand the scope of private ordering that the corporate contract permits.

2. Delaware Supreme Court's contractarianism

Throughout the opinion, the *Salzberg* court makes repeated references to the corporation's governing documents as a "contract" between the corporation and its shareholders.¹⁶⁵ For example, in describing the capaciousness of the DGCL to accommodate FFPs, the high court explained "Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the

rules which are used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws."); *see also* James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 274 (2015) (arguing that the application of contract interpretation principles in earlier cases "does not transform the bylaws, or for that matter the supporting articles of incorporation, into a contract" and "is not equivalent to the corporation itself being a contract or being solely made up of contractual relationships"); Geis, *supra* note 57, at 637 ("Courts will typically [describe corporate charters and bylaws as contracts] for one purpose only: when they want to adopt principles of contract interpretation to sort out ambiguous language But a judge could say that an ambiguous bylaw will be interpreted using methods from contract law without insisting that bylaws are contract."); Shaner, *supra* note 57, at 989–91 (arguing that "organizational documents and contracts are not mirror images" and critiquing the simplistic use of contract interpretation principles to interpret corporate governing documents).

164. *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (en banc) (ruling that "[b]ecause corporate bylaws are contracts among a corporation's shareholders[,] shareholders are bound to a 'validly-enacted [fee-shifting] bylaw' unilaterally adopted by the corporation's board of directors"); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (ruling that because "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders . . . stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations"); *see also* Shaner, *supra* note 57, at 1010 ("[T]he language used by the Delaware courts [in *ATP* and *Boilermakers*] appears to take the contract metaphor one step further, equating charters and bylaws with contracts.").

165. *See, e.g., Salzberg*, 227 A.3d at 116 ("[C]orporate charters are contracts among a corporation's stockholders"); *id.* at 135 ("[C]orporate charters are viewed as contracts among the corporation's stockholders").

corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review.”¹⁶⁶

The influence of contractarian theory is, however, most consequential in the court’s treatment of the internal affairs doctrine. On one hand, the supreme court opinion includes a discursive passage describing the inviolable role of the internal affairs doctrine as a choice-of-law principle and the purported underpinnings of that principle in the federal Constitution.¹⁶⁷ On the other hand, the high court treats the internal affairs doctrine as essentially irrelevant to the validity of FFPs. Instead, the court ruled that FFPs are within the permissible bounds of DGCL 102(b)(1) and that the internal affairs doctrine does nothing to limit the scope of that statutory provision.¹⁶⁸ Thus, by invoking the contractarian framework, the court was able to conclude that:

Although FFPs are somewhere in-between [internal corporate affairs and external matters], the rules for determining the validity of forum-selection provisions in the contractual context lend themselves well to the corporate charter context in Section 102(b)(1)’s Outer Band area. *This is because corporate charters are viewed as contracts among the corporation’s stockholders . . .*¹⁶⁹

Such reasoning is entirely consonant with contractarianism. The Delaware Supreme Court’s emphasis on the internal affairs doctrine as an inviolable and constitutionally mandated choice-of-law principle accords with the central role the doctrine plays in the contractarian framework, enabling private choice and contractual freedom.¹⁷⁰ At the same time, the court invoked the same contractarian framework to reduce the doctrine to a mere choice-of-law rule, and not a limitation on what the corporate contract may regulate. Rather than look to the internal affairs doctrine, the *Salzberg* court narrowly focused on the terms of the corporate contract itself—the express terms of the corporation’s charter as supplemented by Delaware’s corporate law statute—to determine the scope of the corporate contract.

166. *Id.* at 116.

167. *See id.* at 125–30.

168. *See supra* notes 97–103 and accompanying text.

169. *Id.* at 135 (emphasis added).

170. *See supra* Section II.A.1 (describing the role of the internal affairs doctrine in contractarian theory).

B. *The Concession Theory Alternative*

By embracing contractarianism to cabin the internal affairs doctrine, the Delaware Supreme Court implicitly rejected an alternative theory of the corporation espoused by the Chancery Court—a theory with very different implications for the internal affairs doctrine. This Section briefly describes concession theory and its doctrinal implications. It then revisits the Chancery Court’s decision to show how a modern form of concession theory framed Vice Chancellor Laster’s view of the internal affairs doctrine.

1. *Concession theory*

The concession theory of the corporation rejects the notion that a corporation is simply a nexus of contracts among private actors.¹⁷¹ Instead, concession theory broadens the aperture, revealing the integral role of the state in creating the corporation and facilitating the legal relationship between the corporation, its managers, and its shareholders.¹⁷²

Concession theory starts from the observation that corporations exist solely because of state action.¹⁷³ Each state has, through the power

171. See, e.g., Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1130 (2011) (“Corporations are not creatures of contract. One cannot contract to form a corporation. The individuals involved must apply to a state for permission to create such an entity.”).

172. The classic statement of concession theory appears in Chief Justice Marshall’s opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819): “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . .” This classic statement continues to be echoed in contemporary U.S. Supreme Court jurisprudence. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) (quoting *Dartmouth College* and explaining that “[i]t . . . is an accepted part of the business landscape in this country for States to create corporations”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting) (“Corporations are artificial entities created by law for the purpose of furthering certain economic goals.”).

173. See, e.g., Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 361–62 (2017) (“The government is at the heart of [the concession] conception of the corporate form because the corporation would not exist in the absence of a concession by the state, i.e., a government grant of specific rights and privileges.”); Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 757 (2013) (explaining that the “artificial entity theory” or concession theory “recognizes the state’s inextricable role in the chartering of corporations”); Hayden & Bodie, *supra* note 171, at 1141 (“The corporation is not simply a point at which myriad

of its state legislature, enacted a corporate law statute authorizing the formation and existence of corporations.¹⁷⁴ To be sure, the rise of general incorporation statutes, enabling any private individual to obtain a corporate charter without special legislative action, has largely masked the integral role of the state.¹⁷⁵ But that role still reveals itself in the legal attributes that the state bestows on its corporate creations.¹⁷⁶ A corporation's legal personhood, perpetual existence,

contracts intersect. It is instead a governmentally created organizational body that imposes specific constraints on participants.”).

174. See, e.g., *CTS Corp.*, 481 U.S. at 89–90 (“Every State in this country has enacted laws regulating corporate governance.”).

175. See, e.g., Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 443 (explaining that “the concession notion survives” in that “[c]orporations still are created only upon application to states”); Vincent S.J. Buccola, *States’ Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595, 611 (2016) (explaining that “liberal access to the corporate form, which is so familiar today, is the product of state legislative choice . . .”); Hayden & Bodie, *supra* note 171, at 1130 (“The individuals involved must apply to a state for permission to create such an entity. The fact that this permission is readily granted (as long as fees and taxes are paid) does not change the fact that permission is required.”); Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1146 (2012) (explaining that the “change in legal procedure for corporate formation [resulting from the spread of general incorporation statutes] had potentially profound negative implications for the public-serving character of corporations, even though apparently it was not disavowal of that character of corporateness . . .”); Padfield, *supra* note 18, at 347–48 (arguing that concession theory is still descriptively correct notwithstanding the rise of general incorporation statutes and labeling arguments to the contrary as “a straw man”); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1015 (2013) (noting that although corporations are “easily formed” under modern statutes, corporations “remain . . . entities that exist with the permission of the government” and “[i]n that sense, corporations have always been public”).

176. See, e.g., Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2431 (2020) (“[T]here are some key features to modern corporations that cannot be reduced to contract. The most prominent of these is the signature feature of the corporate form: limited liability.”); Padfield, *supra* note 18, at 332 (“[T]he concession theory of the corporation . . . views the corporation as a tremendous capital accumulation device that was only made possible by the state conveying certain privileges to incorporators for which they could not otherwise privately contract.”); Stefan J. Padfield, *The Dodd-Frank Corporation: More than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 217 (2011) (“[T]he fact that we have since moved to an enabling act regime does not change the fact that individuals remain unable to recreate the totality of the plethora of essential corporate attributes without the state’s permission.”). The notion that state law confers certain beneficial traits onto the corporation has been commonly voiced in U.S. Supreme Court opinions. See, e.g., *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 658–59 (1990) (“State law grants corporations special advantages—such as limited

and limited liability for shareholders are all attributes that private actors could not achieve through a purely contractual arrangement.¹⁷⁷ Instead, these attributes, deriving from corporate law statutes, point to the indelible hand of the state.¹⁷⁸

Like contractarianism, concession theory has normative implications for both the content of corporate law and the internal affairs doctrine. With respect to the former, concession theory is historically associated with prescribing a less flexible and more regulatory corporate law regime, in order to bend the internal governance of corporations toward public aims.¹⁷⁹ For example, recent

liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments.”); Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 270 (1986) (Rehnquist, C.J., concurring in part) (describing limited liability as a “corporate shield which the State has granted to corporations as a form of quid pro quo for various regulation”); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting) (“States have provided corporations with [special] attributes in order to increase their economic viability and thus strengthen the economy generally.”).

177. See, e.g., Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 433 (explaining that under concession theory “[t]he state gives the corporation life and concedes to it the special privileges of entity status, perpetual existence, and limited liability”); Hayden & Bodie, *supra* note 176, at 2431 (“Limited liability cannot be replicated by contract, but is instead a concession granted by the state to corporations”); Hayden & Bodie, *supra* note 171, at 1137 (“The role of limited liability has long been a bête noire for contractarians, since it is clearly an aspect of the corporation that is not contractual.”); Johnson, *supra* note 175, at 1149 (explaining that the corporate “legal attributes of limited liability and perpetual duration do not arise simply by an agreement of private parties to form a corporation” but instead require “express legislative grants of corporate powers”); Padfield, *supra* note 18, at 332 (“In the case of corporations, the [government] grant . . . a bundle of rights including ‘immortality,’ free transferability of ownership rights, and limited liability.”).

178. See RIBSTEIN, *supra* note 154, at 75 (conceding, from a contractarian perspective, that “if firms want corporate features such as limited liability they must seek state authorization to be entities”). *But see* Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 873–74 (2000) (arguing that legislatively created corporate attributes could have been approximated by private contract and other common law devices).

179. See, e.g., Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 433 (explaining that under concession theory “corporate actors owe services to the public good” and that “[t]he state must regulate corporations to enforce this obligation to reciprocate”); Butler & Ribstein, *supra* note 140, at 619 (“An important implication of the concession theory is that it supports a much greater role for government interference in corporate affairs than would follow from other theories of the corporation.”); Dibadj, *supra* note 173, at 759 (“Conceptualizing the corporation as an artificial entity necessarily allows the government to place limits on its behavior. After

progressive corporate reforms proposed by Senator Elizabeth Warren and others have been characterized as attempts to revive concession theory in corporate law.¹⁸⁰

But intrusive regulation of internal corporate governance is not an inevitable implication of concession theory.¹⁸¹ Instead, concession theory simply recognizes what is left veiled in the contractarian perspective.¹⁸² The state plays in an inexorable role in creating corporations.¹⁸³ Therefore, in formulating corporate law, the state must make policy choices.¹⁸⁴ To be sure, contractual freedom and

all, if the corporation is a creature of the state, then the state can regulate it if it wishes.”); Millon, *supra* note 22, at 207 (explaining that “[t]he dependence of corporate status on state action was the vehicle through which 19th-century Americans pursued important public policy objectives”); Padfield, *supra* note 18, at 333 (“Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators.”); Romano, *supra* note 141, at 933 (“[T]he concession approach is perceived to support more extensive regulation of corporations than the contract position.”).

180. See Abdurrahman Kayıklık, *How Elizabeth Warren Is Reviving the Concession Theory of the Corporation*, CLS BLUE SKY BLOG (Nov. 1, 2019), <https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation> [<https://perma.cc/68Z9-2LSB>].

181. See Padfield, *supra* note 18, at 333 n.29 (distinguishing between “presumptive” and “directive” forms of concession theory and advocating for the former, which gives presumptive deference to government regulation of corporations); Romano, *supra* note 141, at 933 (acknowledging that concession theory does not necessarily “support more extensive regulation of corporations”).

182. See Hayden & Bodie, *supra* note 171, at 1131 (“[C]ontractarians often seek to minimize the role of the state to such a degree that it becomes vestigial.”); Johnson, *supra* note 175, at 1161 (explaining that “contractarian orthodoxy” fails to “come to grips with the state’s continuing (if slumbering) power to ‘construct’ corporate personhood by adding or withdrawing such attributes of corporateness as it wishes, without regard to shareholder or manager understandings, preferences, or expectations”).

183. Johnson, *supra* note 175, at 1135 (explaining that law, with the state’s sanction behind it, mandates compliance with specific standards of conduct).

184. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 637 (1819) (“The objects for which a corporation is created are universally such as the government wishes to promote.”); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 545 (1933) (Brandeis, J., dissenting) (“Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the state deems desirable.”); J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 972 (2001) (“Under this concession theory, public policy objectives could be pursued by state regulation of corporate activities and the relationship between the corporation and its owners.”); Chaffee, *supra* note 173, at 362 (explaining that under concession theory “the state has the power to determine the scope of

private ordering are important policies for the reasons contractarians have made clear. But those policies must be balanced against competing policies that corporate law may implicate.¹⁸⁵

Thus, concession theory views contractual freedom and private ordering in a broader context where other considerations may come into play. In this respect, concession theory can explain facets of contemporary corporate law that conflict with pure contractarianism.¹⁸⁶ These include corporate law's mandatory fiduciary duty of loyalty;¹⁸⁷ a statutory right of shareholders to inspect the corporation's books and records;¹⁸⁸ a statutory ban on fee-shifting provisions in corporate

corporate activity, to regulate corporate behavior, and to punish corporations that do not obey the state's mandates" in order to "achieve certain social goals"); Hayden & Bodie, *supra* note 171, at 1143 (arguing that in the context of all limited liability business entities "[t]he state looms large . . . and the relationships between the firm's many constituents are largely framed and directed by the exercise of government power"); Millon, *supra* note 22, at 211 ("[T]he idea of the corporation as an artificial creature of the state provided the theoretical basis for a body of corporate law that explicitly addressed the relationship between corporate activity and public welfare. In this way, extensive regulation indicated a conception of corporate law as public law").

185. By creating and preserving space for private ordering, the largely deregulatory form concession theory described herein may be recast as form of sovereign coercion theory described by Professor Bratton. Bratton, *The "Nexus of Contracts" Corporation*, *supra* note 22, at 439 (explaining that unlike classic concession theory "[s]overeign coercion theory recognizes a more complex reality [of corporations] and settles for considerably less sovereign involvement [because the theory] denies neither freedom of contract nor the obviously individual aspects of contractual arrangements categorically").

186. See, e.g., Bratton, *The "Nexus of Contracts" Corporation*, *supra* note 22, at 445 ("Traces of concession theory survive in the mundane corporate formalities mandated in law This sovereign presence . . . limits and conditions the freedom of contract in corporate relationships."); Hayden & Bodie, *supra* note 171, at 1141 ("[T]he corporation has many specific features that could be considered either mandatory or quasi-mandatory. These features distinguish the corporation . . . from the realm of contract . . ."); see also Welch & Saunders, *supra* note 159, at 857–60 (describing some mandatory features of Delaware corporate law).

187. See *Sutherland v. Sutherland*, No. 2399, 2009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) (ruling that a charter provision purporting to eliminate the fiduciary duty of loyalty is "expressly forbidden" by DGCL Section 102(b)(7)); Welch & Saunders, *supra* note 159, at 859 ("The clear, negative implication of [DGCL] section 102(b)(7) is that a provision in a certificate of incorporation that purported to exculpate directors for breaches of the duty of loyalty would be invalid and unenforceable.").

188. See DEL. CODE ANN. tit. 8, § 220; see also Welch & Saunders, *supra* note 159, at 858–59 ("The Delaware Court of Chancery has held that a stockholder's rights under section 220 cannot be limited by a provision in a corporation's certificate of incorporation or bylaws Scholars have concluded that the stockholders' right under section 220 to inspect books and records for a proper purpose is mandatory.").

charters and bylaws enacted as part of the 2015 DGCL amendments;¹⁸⁹ a similar ban on provisions mandating private arbitration of shareholder claims enacted as part of those same amendments;¹⁹⁰ and, perhaps most palpably, the statutory power of the courts “to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises.”¹⁹¹ In each case, corporate law limits the freedom of corporate actors in deference to other policy considerations, as concession theory would dictate.

These mandatory rules suggest that as a descriptive matter modern corporate law is consonant with concession theory, respecting contractual freedom, but within limits.¹⁹² Although a state like Delaware could through its corporate law choose to more intrusively regulate the internal governance of the corporations it charters,¹⁹³ Delaware instead chooses to offer a flexible and enabling corporate statute that largely devolves the state’s regulatory power to private actors—the corporation, through its board of directors, and

But see Juul Labs, Inc. v. Grove, 238 A.3d 904, 919-20 (Del. Ch. 2020) (noting that although Delaware case law has invalidated waivers of shareholder inspection rights set forth in a corporation’s governing documents, the enforceability of a waiver set forth in a private, bilateral agreement is unresolved).

189. See DEL. CODE ANN. tit. 8, § 102(f); see also *supra* notes 79–83 and accompanying text (explaining that the Delaware legislation prohibits fee-shifting provisions only for claims arising under Delaware state law).

190. See DEL. CODE ANN. tit. 8, § 115; see also *supra* note 80 (explaining that the DGCL implicitly prohibits provisions mandating private arbitration of shareholder claims).

191. See DEL. CODE ANN. tit. 8, § 284(a); see also *id.* §§ 510-511 (authorizing the state to revoke a corporate charter for failure to pay the state’s franchise tax).

192. See Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 445 (citations omitted) (“Even as corporate law lets the participants proceed, it in effect cautions them that they may act at will only if on good behavior. Corporate law facilitates and legitimates private behavior, but with a reservoir of suspicion and a threat of constraint.”).

193. See *id.* at 445 (“[T]he state clearly reserves the right to rewrite the ground rules and to constrain the freedom of corporate actors.”); Buccola, *supra* note 175, at 610 (“The states never lost their plenary authority [over domestic corporations] . . . ; they simply ceased to exercise it.”); Johnson, *supra* note 175, at 1151 (“Although having seemingly abandoned in the early-nineteenth century any insistence that corporations serve public welfare in some fashion, state governments today could easily reassert legal control over the structural make-up of corporations to make them more socially responsible.”); Sale, *supra* note 175, at 1032 (“Private ordering was always a privilege and that privilege is subject to erosion. Government was there from the beginning, allowing private ordering to exist. But what is given can be taken away.”).

shareholders—to determine the rules of internal corporate governance.¹⁹⁴

But even if one accepts contractual freedom and private ordering as paramount policies, as Delaware corporate law does, concession theory also has implications for the internal affairs doctrine. Under a concession framework, the internal affairs doctrine is an expression of state sovereignty.¹⁹⁵ The exclusive right of the chartering state to govern the internal affairs of a corporation derives from the chartering state's role in bringing the corporation into existence.¹⁹⁶ As a state-created entity, a corporation exists as an instrumentality or extension of its chartering state.¹⁹⁷ In this framework, the internal affairs doctrine

194. See Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 445–46 (“Even as corporate law imposes a positive law framework . . . , it tends to leave corporate actors self-regulated.”).

195. See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 47–48, 52, 66 (2006) (explaining, from a historical perspective, that “[g]iven the close relations between state governments and the corporations they created, sovereignty considerations necessitated that each state should enjoy exclusive authority over the internal affairs of its corporations” and that “[e]arly decisions enunciating the internal affairs doctrine echoed pre-industrial notions of states’ sovereignty over their domestic corporations”); see also P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 49–50 (1985) (explaining that internal affairs doctrine was historically “derived from the very concept of the corporation as an artificial entity created and perpetuated by the state of incorporation”); Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 439 (1968) (explaining that historically “[c]omity and respect for sovereignty” dictated that “governance of [a corporation’s] internal affairs would be determined either by the [corporate] charter itself or by the sovereign who granted [the charter]”).

196. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (“[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”); RIBSTEIN, *supra* note 154, at 74 (explaining, from a contractarian perspective, that “[t]he state-creation aspect of the corporate entity implies that the creating state’s law must control the creature’s internal governance. The [concession] theory therefore provides a conceptual basis for the *internal affairs* choice-of-law rule”); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 209 (2004) (explaining, from a contractarian perspective, that “the state-creation theory . . . smooths the way toward the internal affairs rule in choice of law [because it] ensures that a corporation’s internal governance is controlled by the incorporating, or creating, state regardless of where the corporation does business”).

197. See *McDermott Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987) (emphasis added) (quoting Kaplan, *supra* note 195, at 464) (describing the internal affairs doctrine as an “*umbilical tie*” connecting a corporation “to the state of its charter”); *CTS Corp.*, 481 U.S. at 91 (emphasis added) (explaining that each “State has an interest in promoting stable relationships among parties involved in the corporations *it charters*”); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D/* June 21, 2002, C.A. No. 12875, 2017 WL 3575712, at *7 (Del. Ch. Aug. 18, 2017) (Laster, V.C.) (“[A] claim to enforce

serves as the “umbilical tie” that connects the corporation to its chartering state.¹⁹⁸ The chartering state retains the exclusive legal authority to govern the internal affairs of its corporate creation, even if the corporation’s business or shareholders reside elsewhere.¹⁹⁹

However, a corollary to the doctrine’s expression of state sovereignty is the limits of that sovereignty to regulate external matters. The chartering state’s legal authority extends only to the internal affairs of the corporations it creates. Because the chartering state lacks the power to regulate external matters beyond the corporation’s internal affairs, it cannot devolve that power to its corporate creation.²⁰⁰

Thus, under a concession framework, the internal affairs doctrine is more than a choice-of-law principle. The doctrine also defines the boundaries of the corporate contract that state corporate law brings into existence. Because the chartering state cannot, through its state law, *directly* regulate external matters, the chartering state cannot *indirectly* regulate those matters through the corporations that it creates.

Contractarians have attacked concession theory on both normative and descriptive grounds,²⁰¹ dismissing it as a risible anachronism.²⁰²

the entity’s constitutive document necessarily implicates the special interest that a sovereign has in adjudicating cases involving the internal affairs of entities created under its laws.”).

198. *McDermott Inc.*, 531 A.2d at 216 (quoting Kaplan, *supra* note 195, at 464).

199. See Ribstein, *supra* note 150, at 99–101 (explaining, from a contractarian perspective, that “[b]y adopting the fiction of a state-created corporate entity [under concession theory], courts can hold that applying the law of the selected state is based on respect for the sovereignty and regulatory protection of that state”).

200. See *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 914 n.7 (Del. Ch. 2020) (Laster, V.C.) (explaining that the concept of the corporation as a state-created entity has “implications for the valid exercise of one state’s power in relation to other states, whether through action by the state itself or as a result of private parties exercising state power by proxy by inserting terms in the entity’s governing documents”); Hershkoff & Kahan, *supra* 23, at 287 (arguing that, in light of the state’s integral role in the corporate contract, a “state[] ought not to be able to achieve an arguably impermissible result through the intermediary of private ordering”).

201. See, e.g., Mahoney, *supra* note 178, at 874–75 (arguing that legislatively created corporate attributes could have been approximated by private contract and other common law devices); Butler & Ribstein, *Opting out*, *supra* note 144, at 9–10 (making the normative case against concession theory).

202. See, e.g., Butler & Ribstein, *supra* note 140, at 619–20 (arguing, from a contractarian perspective, that “concession theory ignores the contractual basis of the corporation” and that “a state corporate filing no more creates a corporation than a birth certificate creates a baby”); Hayden & Bodie, *supra* note 142, at 534 (“Contractarians have been particularly vicious and dismissive in their rejection of

And while contractarianism has been the dominant theoretical framework in corporate law and scholarship for the last forty years,²⁰³ concession theory has not enjoyed significant purchase in several decades.²⁰⁴ Indeed, two leading contractarians have baldly asserted that “it has been over half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously.”²⁰⁵ But in truth, concession theory never went away.²⁰⁶ Even if no longer a fashionable theoretical perspective, concession theory precepts

concession theory.”); Padfield, *supra* note 18, at 327 (“[C]oncession theory’s marginalization has become so extreme that advocating for it exposes one to mockery by some of the most esteemed experts in corporate law.”).

203. See, e.g., Bainbridge, *The Board of Directors*, *supra* note 141, at 9 (“The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory.”); Chaffee, *supra* note 173, at 367–68 (observing that the nexus of contracts “is now the dominant theory . . . of the corporation”); Hayden & Bodie, *Shareholder Voting*, *supra* note 142, at 531 (“The nexus of contracts theory has been extremely influential in shaping corporate law theory over the past four decades.”); Shaner, *supra* note 57, at 1010 (citations omitted) (“Today, conceptualizing the corporation and its organizational documents as contracts is well entrenched. The contractarian influence in shaping corporate law theory and doctrine can be easily seen.”).

204. See, e.g., Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 434–35 (recounting the decline of concession theory in its original form and explaining that “[i]n the United States, concession theory enjoyed vitality during the first half of the nineteenth century” but “lost its vitality as general incorporation laws proliferated”); Millon, *supra* note 22, at 211–16 (recounting the decline in the concession theory view of the corporation “as an artificial creature of the state” in favor a “natural entity theory emphasiz[ing] the initiative of the incorporators rather than state action as the key constitutive factor”); see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 432 (2010) (Stevens, J., concurring in part) (“[M]any legal scholars have long since rejected the concession theory of the corporation”).

205. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, *LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS* 68–69 (2016); see also Bainbridge, *Community and Statism*, *supra* note 141, at 859–60 (“As a matter of intellectual interest, the debate over the contractual nature of the firm is over [T]he contractarian model is now the ‘dominant legal academic view.’”).

206. See, e.g., Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 436, 443 (explaining that although concession theory fell out of favor, “[d]iscussions of sovereign involvement in corporate life continued after concession theory disappeared” and that “the concession notion survives in corporate doctrine”); Johnson, *supra* note 175, at 1148 (“It is important to . . . remember that the ‘artificial being’ and ‘mere creatures of law’ language from the 1819 decision in *Dartmouth College* has never been renounced.”); Padfield, *supra* note 18, at 327 (“[T]he reports of concession theory’s demise have been greatly exaggerated and that there remains a serious role for the theory in discussions concerning the place of corporations in society.”).

continue to echo in contemporary scholarship²⁰⁷ and judicial rhetoric,²⁰⁸ most notably in the lower court *Salzberg* opinion of Vice Chancellor Laster.²⁰⁹

2. *Chancery Court's concession theory*

While Delaware courts have broadly embraced contractarianism, Vice Chancellor Laster's jurisprudence has been a notable exception.²¹⁰ With *Salzberg* in particular, one sees the precepts of

207. See, e.g., Hayden & Bodie, *supra* note 142, at 534 (“[T]he basic premise [of concession theory] is sound: corporations are creatures of the state and cannot be formed purely through contract.”); Hershkoff & Kahan, *supra* note 23, at 277–78 (“Both formally and functionally, corporate law conceives of the state as an integral party to the corporate ‘contract,’ and assigns powers to the state that are not typical of parties to ordinary contracts.”); Lipton, *supra* note 10, at 601 (“Over time, states loosened their standards for the granting of charters Yet, despite this shift, corporations continue to be ‘entities whose very existence and attributes are a product of state law.’”); Sale, *supra* note 175, at 1015 (“Corporations, of course, are creatures of state government They were and still are defined by the state They remain . . . entities that exist with the permission of the government.”); Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 231 (2021) (explaining that the “building blocks” of corporate law, including “the corporation’s purpose, separate personhood, duty to obey positive law, equitable obligations to residual claimants, and fiduciary duties owed to the entity . . . are supplied by law, not contract”). See generally Padfield, *supra* note 18, at 342–59 (advocating concession theory); Dibadj, *supra* note 173, at 773–80 (same).

208. See Butler & Ribstein, *supra* note 140, at 618 (conceding, from a contractarian perspective, that “[t]he concession theory . . . continues to influence the Supreme Court’s decisions affecting the corporation”); Johnson, *supra* note 175, at 1148 (citations omitted) (explaining that “160 years after the *Dartmouth College* decision, the Supreme Court expressly invoked [its concession theory] language in a landmark decision, *CTS Corp. v. Dynamics Corp. of America*” thus suggesting it is “premature” to assert concession theory’s demise). See generally Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 843–857 (2013) (surveying U.S. Supreme Court decisions echoing concession theory tenets).

209. See Lipton, *supra* note 138 (“The Chancery decision is a fairly stark example of the concession theory of the corporation: Laster makes very clear that Delaware, as sovereign, is intimately involved in establishing corporations, designing their operations, and articulating their limits.”).

210. A contemporary version of concession theory has been a leitmotif of Vice Chancellor Laster’s jurisprudence. Prior to *Salzberg*, the vice chancellor’s most provocative statement of concession theory came in *In re Carlisle Etcetera LLC*, decided in the LLC context, where the vice chancellor explained:

[T]he purely contractarian view discounts core attributes of the LLC that only the sovereign can authorize, such as its separate legal existence, potentially perpetual life, and limited liability for its members [W]hen a sovereign

concession theory—which the vice chancellor described as “first principles” of the law²¹¹—expressly animate his lower court opinion.

In his ruling, the vice chancellor first distinguished the corporate contract from an ordinary contract by recognizing the omnipresent role of the chartering state in the former context.²¹² Although he accepted the “contract” metaphor to describe a corporation’s governing documents,²¹³ Vice Chancellor Laster also explained that the corporate contract

differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations. When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign

makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity.

In re Carlisle Etcetera LLC, 114 A.3d 592, 605 (Del. Ch. 2015) (internal citations omitted). See generally Mohsen Manesh, *Equity in LLC Law?*, 44 FLA. ST. U. L. REV. 93, 111–113 (2016) (analyzing the radical implications of *Carlisle*). Beyond *Salzberg* and *Carlisle*, Vice Chancellor Laster has frequently sounded notes of concession theory in other decisions. See, e.g., *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 914 (Del. Ch. 2020) (emphasis added) (“[N]otwithstanding . . . the widely embraced view of the corporation as a nexus of contracts (which I too regard as a helpful metaphor), the DGCL rests on a concept of the corporation that is grounded in a *sovereign exercise of state authority*”); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D/* June 21, 2002, No. CV 12875, 2017 WL 3575712, at *7 (Del. Ch. Aug. 18, 2017) (emphasis added) (“[A] claim to enforce the entity’s constitutive document *necessarily implicates the special interest that a sovereign has in adjudicating cases involving the internal affairs of entities created under its laws.*”); *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960–61 n.8 (Del. Ch. 2010) (emphasis added) (observing that even if the governing documents of Delaware corporation stipulated an exclusive forum for intra-corporate litigation outside of Delaware, “Delaware courts would retain some measure of inherent residual authority so that *entities created under the authority of Delaware law* could not wholly exempt *themselves from Delaware oversight*”); see also *infra* notes 371–376 and accompanying text (discussing *Revlon*).

211. See *Sciabacucchi v. Salzberg*, No. 2017-0931, 2018 WL 6719718, at *19–23 (Del. Ch. Dec. 19, 2018), *rev’d*, 227 A.3d 102 (Del. 2020) (en banc).

212. See *id.* at *19 (“By virtue of Delaware’s exercise of its sovereign authority, a Delaware corporation comes into existence and gains the power to act in the world The contract that gives rise to the artificial entity and confers these powers is not an ordinary private contract among private actors. [It] is a multi-party contract that includes the State of Delaware.”).

213. See *id.* at *2. The vice chancellor’s opinion uses the expression “corporate contract” more than twenty times to describe a corporation’s governing documents. See generally *id.*

act of creating a “body corporate”—a legally separate entity. The State of Delaware is an ever-present party to the resulting corporate contract, and the terms of the corporate contract incorporate the provisions of the DGCL.²¹⁴

Turning to the internal affairs doctrine, the vice chancellor observed the choice-of-law rule derives directly from the integral role of the chartering state in bringing a corporation into existence:

Because the state of incorporation creates the corporation, the state has the power through its corporation law to regulate the corporation’s internal affairs The power of the state of incorporation to address these matters manifests itself through the internal-affairs doctrine. No matter where the corporation conducts its operations or locates its headquarters, the law of the state of incorporation governs the entity’s internal affairs. The corporation’s contacts with the forum state do not affect the choice-of-law analysis because the questions are internal to the corporation.²¹⁵

But in recognizing the internal affairs doctrine as an expression of the chartering state’s sovereignty over its corporate creations, the vice chancellor also recognized the doctrine to define the limits of what the corporate contract can regulate:²¹⁶

As the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation’s internal affairs When doing so, Delaware deploys the corporate law to determine the parameters of the property rights that the state has chosen to create. But Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships [Therefore,] [w]hen litigation arises out of those [external] relationships, the DGCL cannot provide the necessary authority to regulate the claims.²¹⁷

These “first principles” articulated in Vice Chancellor Laster’s lower court opinion all echo concession theory precepts. And from these precepts, the vice chancellor concluded FFPs to be invalid, notwithstanding the expansive scope of DGCL Section 102(b)(1).²¹⁸

214. *See id.*

215. *Id.* at *20 (internal citations omitted).

216. *See id.* (explaining that “the state of incorporation cannot use corporate law to regulate the corporation’s external relationships”).

217. *Id.* at *2.

218. *See id.* at *21–22 (“These first principles establish the framework within which Section 102 of the DGCL operates Consistent with the scope of what Delaware can regulate through the DGCL, Section 102(b)(1) only provides authority for the charter to govern internal claims.”).

Because the rights of shareholders arising under the Securities Act lie beyond the internal affairs doctrine, Delaware lacks the authority to regulate those rights.²¹⁹ And because Delaware lacks such authority, the state cannot devolve that authority to the corporations that the state creates.²²⁰ Thus, the vice chancellor concluded, “[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware’s corporate law.”²²¹

III. IMPLICATIONS OF *SALZBERG*’S CONTRACTARIANISM

By reversing the Chancery Court, the Delaware Supreme Court rejected concession theory and its implications for the corporate contract and the internal affairs doctrine. That choice has far-reaching ramifications that extend well beyond the relatively narrow issue of section 11 Securities Act litigation.²²²

The implications of *Salzberg*’s contractarianism are broad, affecting the role of the internal affairs doctrine, the reach of the corporate contract, and the rights of shareholders arising under both state corporate law and federal securities law. As Section A explains, by confining the internal affairs doctrine to a choice-of-law rule, *Salzberg* has ensured the doctrine continues to serve Delaware’s interests, protecting the state’s lucrative regulatory domain from interference by other states. But in upholding FFPs governing section 11 claims, *Salzberg* has also opened the door to other types of Outer Band provisions. Probing the boundaries of the Outer Band, Section B suggests that, under *Salzberg*, the corporate contract may be used to regulate a wide range of shareholder rights arising under federal

219. *Id.* at *19–20 (explaining that “the state of incorporation cannot use corporate law to regulate the corporation’s external relationships.”).

220. *See id.* (explaining that “[a] Delaware corporation only can wield the powers that the DGCL provides” and that “[w]hen a corporation purports to take an action that it lacks the . . . power to accomplish, that action is *ultra vires* and void”).

221. *See id.* at *3.

222. *See* CORNERSTONE 2020, *supra* note 118, at 11 fig. 10 (showing the markedly higher frequency of Exchange Act Rule 10b-5 litigation as compared to Securities Act litigation).

securities law, including Exchange Act section 10(b)²²³ and Rules 10b-5,²²⁴ 14a-9,²²⁵ and 14a-8.²²⁶

Section C then turns to a particular manner in which shareholder rights may be regulated: through a corporate charter or bylaw provision compelling arbitration of any shareholder claims. When coupled with U.S. Supreme Court precedent interpreting the FAA, *Salzberg* has strengthened the legal case for the enforceability of mandatory arbitration provisions covering all shareholder claims, whether those claims are made under state corporate law or federal securities law. Even so, as this Part explains, countervailing considerations suggests that corporations may not eagerly rush to embrace arbitration as a substitute for litigation.

Finally, Section D returns to the contract versus concession question and its implications for the enforceability of mandatory arbitration provisions in the corporate contract. Despite judicial rhetoric embracing contractarianism, the statutory framework of corporate law is rooted in concession theory tenets of state power. This divergence between the judge-made and statutory law governing corporations suggests that the applicability of the FAA to the corporate contract continues to be, at best, uncertain.

A. *The Impoverished Internal Affairs Doctrine*

Before *Salzberg*, many understood the critical internal/external distinction made in *Boilermakers*²²⁷—a decision that was itself codified by the 2015 DGCL amendments²²⁸—to mean that a corporation's charter and bylaws may only address matters within the internal affairs doctrine.²²⁹ The corporate contract cannot regulate external matters beyond the scope of the doctrine.

Salzberg proved that understanding to be incorrect. According to *Salzberg*, the internal affairs doctrine does nothing to limit the scope of

223. 15 U.S.C. § 78j(b).

224. 17 C.F.R. § 240.10b-5.

225. § 240.14a-9.

226. § 240.14a-8.

227. *See supra* notes 63–68 and accompanying text (describing the internal/external distinction made in *Boilermakers*).

228. *See supra* notes 79–80 and accompanying text (describing the 2015 DGCL amendments).

229. *See supra* note 10 (citing two white papers signed by over twenty law professors articulating this understanding of *Boilermakers*).

the corporate contract.²³⁰ Instead, the doctrine operates solely as a choice-of-law rule.

As a choice-of-law rule, the doctrine applies the laws of the chartering state to govern a corporation's internal affairs even when the corporation has few or no other ties to the chartering state and conducts its business entirely elsewhere.²³¹ Thus, the doctrine represents a significant exception to typical choice-of-law principles,²³² which provide that the laws of the state with the greatest interest in regulating the relevant parties or transactions govern.²³³ In contrast, the internal affairs doctrine looks to a single, decisive factor—a corporation's chartering state—to determine which state's law governs the internal affairs of a corporation.²³⁴

Perhaps uncoincidentally, it is in this role—as an unorthodox, but widely accepted choice-of-law rule—that the doctrine matters most to Delaware. As a choice-of-law rule, the doctrine secures for Delaware an outsized role among states.²³⁵ Although a majority of publicly traded corporations are chartered by Delaware,²³⁶ very few of those

230. See *supra* notes 97–103 and accompanying text (describing the Delaware Supreme Court ruling in *Salzberg*).

231. Manesh, *supra* note 1, at 260–61; accord Greenfield, *supra* note 1, at 136 (“[A] corporate charter is extremely easy to obtain, and there is no requirement of any meaningful contact whatsoever with the chartering state. Thus, corporations can, in effect, choose which corporate governance laws will apply to them, regardless of whether they have any other contact with the state whose laws they choose.”).

232. See Greenfield, *supra* note 1, at 137 (describing the internal affairs doctrine as a “special case” in the broader conflict-of-laws context); Greenwood, *supra* note 129, at 382 (describing the doctrine as an “anomaly” and “quite contrary to ordinary choice of law rules”).

233. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. f (AM. L. INST. 1971) (instructing courts to consider various factors, including “the relative interests of . . . states involved in the determination of the particular issue,” and commenting further that “[i]n general, it is fitting that the state whose interests are most deeply affected should have its local law applied”); Greenfield, *supra* note 1, at 137–38 (“Typical conflicts of laws principles are complex, but they generally suggest that the state with the greatest interest in regulating the behavior in question should provide the governing law for the behavior.”).

234. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (AM. L. INST. 1971) (instructing courts to apply “local law of the state of incorporation” to internal affairs), with *id.* § 6(2) (instructing courts to weigh various factors to ascertain which state has the most significant relationship to the parties and transaction at issue).

235. Manesh, *supra* note 1, at 254–55.

236. See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 567 (2002) (finding that Delaware represents more than half of the incorporations of public

corporations conduct significant business activities in or have other ties to the state.²³⁷ For instance, while two-thirds of the companies in the Fortune 500 are incorporated in Delaware,²³⁸ only two of those companies are actually headquartered in the state.²³⁹ Instead, practically all Delaware corporations conduct business almost entirely outside of the state's borders. Yet, despite its small size and economic stature, widespread adherence among states to the internal affairs doctrine has enabled Delaware to play a uniquely consequential role in regulating corporate America.²⁴⁰

The Delaware Supreme Court's past precedents reflect the state's singular dependence on the internal affairs doctrine as a choice-of-law rule that is broadly respected among states.²⁴¹ Most notably, in

companies as of 1999); LoPucki, *supra* note 113, at 2113 (citing recent data showing that 3964 of 7061 public companies are incorporated in Delaware).

237. See, e.g., Robert Anderson IV & Jeffrey Manns, *The Delaware Delusion*, 93 N.C. L. REV. 1049, 1054–55 (2015) (“Delaware charters a clear majority of publicly traded companies in the United States, even though almost all publicly traded companies are headquartered in other states.”); Greenfield, *supra* note 1, at 136 (“Of the thousands of corporations incorporated [in Delaware], only a few have significant numbers of employees or shareholders in the state The three hundred largest companies incorporated in Delaware employ over 15 million people, only an infinitesimal fraction of whom actually reside there.”).

238. See *Annual Report Statistics*, DEL. DIV. OF CORPS. (2020), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2020-Annual-Report.pdf> [<https://perma.cc/H25U-F7G6>] (noting that sixty-eight percent of the Fortune 500 are domiciled in Delaware).

239. See *Search Fortune 500*, FORTUNE, <https://fortune.com/fortune500/2021/search/?hqstate=DE> [<https://perma.cc/2LVB-LEH8>] (identifying where each of the Fortune 500 companies maintains its headquarters).

240. See Glynn, *supra* note 129, at 115 (“The internal affairs norm plays a critical role in Delaware’s domination . . . of American corporate law.”); Greenfield, *supra* note 1, at 135 (“Delaware’s ability to define the rules of corporate governance depends on the so-called ‘internal affairs’ doctrine”); Greenwood, *supra* note 129, at 382 (describing the doctrine as “the essential doctrinal underpinnings of Delaware’s success”); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1616 (2005) (“The continued applicability of the internal affairs rule is, of course, the life-blood of Delaware.”); Manesh, *supra* note 1, at 254 (“The internal affairs doctrine is what has enabled one small and economically insignificant state, Delaware, to play a unique and outsized role in regulating corporate America.”); Faith Stelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 60 (2009) (“Delaware’s preeminence in corporate law is vitally connected to the internal affairs doctrine”).

241. See Manesh, *supra* note 1, at 269–74.

*McDermott Inc. v. Lewis*²⁴² and *VantagePoint Venture Partners 1996 v. Examen, Inc.*,²⁴³ the state's supreme court espoused a particularly robust and unbending interpretation of the doctrine, exalting the choice-of-law rule in maximalist terms and asserting that the rule is mandated under the federal Constitution.²⁴⁴ In doing so, the state's supreme court has sought to aggrandize the boundaries and sacrosanct status of the internal affairs doctrine in order to protect Delaware's exclusive regulatory domain from potential interference by other states.²⁴⁵

In this respect, *Salzberg* aligns with earlier Delaware precedents.²⁴⁶ Like *McDermott* and *VantagePoint* before it, *Salzberg* aims to defend the choice-of-law rule and, thus, protect the regulatory domain that it secures for Delaware. This aim explains the *Salzberg* court's extended discussion of the internal affairs doctrine as an inviolable and constitutionally protected choice-of-law rule.²⁴⁷ Although the doctrine proved ultimately irrelevant to the validity of the FPPs before it,²⁴⁸ the high court also took the time to critique Vice Chancellor Laster's formulation of the doctrine, in his opinion below, as narrower than and inconsistent with "the exact words used" to describe the choice-of-law rule in *McDermott* and its U.S. Supreme Court antecedent, *Edgar v. MITE Corp.*²⁴⁹ The *Salzberg* court transparently explained its reason for this seemingly off-topic exegesis by stating that

It is potentially problematic for our State to have a definition of "internal affairs" that diverges from, and is narrower than, the long-established definition set forth in *Edgar/McDermott* and their progeny. [The Chancery Court's] narrower focus . . . could create confusion and erode the established borders of the internal affairs doctrine, inviting encroachment from other jurisdictions into matters traditionally governed by that doctrine.²⁵⁰

242. 531 A.2d 206 (Del. 1987).

243. 871 A.2d 1108 (Del. 2005).

244. See Manesh, *supra* note 1, at 269–74.

245. See *id.*

246. See Mark J. Loewenstein, *Pushing the Envelope: Salzberg v. Sciabacucchi and Delaware's Evolving View of the Internal Affairs Doctrine*, 48 SEC. REG. L.J. 182, 190 (2020) (describing the Outer Band announced in *Salzberg* as "a sort of backdoor extension of the internal affairs doctrine").

247. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 125–30 (Del. 2020) (en banc).

248. See *supra* notes 97–103 and accompanying text (discussing the role of the internal affairs doctrine in the Delaware Supreme Court's analysis in *Salzberg*).

249. *Salzberg*, 227 A.3d at 126; *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

250. *Id.* at 132.

Thus, like *McDermott* and *VantagePoint*, *Salzberg* represents another iteration of an enduring Delaware Supreme Court project to defend the “protective boundaries” of the internal affairs doctrine.²⁵¹ With the doctrine cast as a staunchly respected choice-of-law rule, Delaware gets exactly what it wants: a doctrinal moat guarding the state’s lucrative regulatory province from interference by other states.²⁵²

Indeed, in this respect, the Chancery Court’s application of the doctrine was an unusual outlier as compared to Delaware’s earlier internal affairs precedents.²⁵³ Rather than invoking the internal affairs doctrine as a shield protecting Delaware’s regulatory domain from potential incursions by other states, the Chancery Court deployed the doctrine *to limit* the regulatory reach of Delaware.²⁵⁴ But in framing the doctrine in concession theory tenets, the vice chancellor’s ruling also offered an interpretation of the choice-of-law rule that would prevent an incursion by Delaware corporate law into rights arising under federal securities law—rights that are the regulatory province of the federal government.²⁵⁵

By reversing the Chancery Court and unearthing the Outer Band, the Delaware Supreme Court rejected that interpretation in favor of one rooted in contractarian precepts of deference to private choice. Doing so has arguably weakened the justification for the internal affairs doctrine as an exception to traditional choice-of-law principles by delinking the doctrine from its historical rationale based in concession theory notions of comity and deference to the sovereignty of the chartering state.²⁵⁶ But even if contractarian precepts of private autonomy offer a more persuasive modern-day justification to respect the unorthodox choice-of-law rule,²⁵⁷ the high court’s interpretation of

251. *See id.* at 131–34 (describing the “protective boundaries” of the internal affairs doctrine established by *Edgar* and *McDermott*).

252. *See* Manesh, *supra* note 1, at 253–55.

253. *See id.* at 290–91.

254. *See id.*

255. *See id.* at 292–96.

256. *See, e.g.*, Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1203–04 (2000) (explaining, from a contractarian perspective, that “the courts’ early acceptance of the idea that the corporation is not an ordinary contract, but rather a legal ‘person’ created and endowed with certain attributes by the chartering state[,] . . . links the corporation to the state of creation” and thus “provides a stronger legal basis for enforcing the parties’ choice than a mere contractual designation”).

257. *See, e.g.*, Strine et al., *supra* note 152, at 57 (arguing that contractarian theory’s emphasis on “the voluntary choice of law made whenever an investor joins a

the doctrine has also removed any barrier that it might present to the regulatory reach of the corporate contract. In this respect, the Delaware Supreme Court's *Salzberg* decision sets into motion an inevitable collision between Delaware corporate law and federal law—a collision that will have uncertain consequences.²⁵⁸

At the same time, the Delaware Supreme Court's *Salzberg* decision has also introduced a wholly novel choice-of-law question with respect to other states: If the Outer Band concerns matters that are, by definition, beyond the internal affairs doctrine, then what choice-of-law rule applies to Outer Band matters addressed in the governing documents of a Delaware corporation?

As the *Salzberg* court recognized, when the terms of the corporate contract stray beyond the internal affairs doctrine and into the Outer Band, courts in other jurisdictions are not bound to defer to Delaware law as to the enforceability of such terms.²⁵⁹ If courts elsewhere were to apply their own state law, rather than Delaware law, it is unclear they would arrive at the same conclusions as Delaware courts about the contractual nature of a corporation's governing documents or the enforceability of Outer Band provisions. Mindful of that possibility, the *Salzberg* court, in dicta, provided courts elsewhere with both legal and policy reasons to enforce FFPs that appear in the corporate contract of a Delaware corporation.²⁶⁰ Perhaps influenced by this dicta, initial decisions from jurisdictions elsewhere have largely deferred to Delaware law on the enforceability of FFPs.²⁶¹

corporation recognizing that the law of the state of incorporation will govern its internal affairs creates a far more significant tie to the state of incorporation than th[e] notion of the corporation as a 'concession' or 'creature' of the incorporating state").

258. See *Montgomery*, *supra* note 110 (quoting Professor Hamermesh's observation that "the door has opened up into very uncertain challenges and positions" implicating "very complicated issues of federal-state relations, federalism, [and] the appropriateness of state versus federal law").

259. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 133–34 (Del. 2020) (en banc) (recognizing that courts in other states may not respect and enforce charter and bylaw provisions addressing matters outside of the "protective boundaries" of the internal affairs doctrine); Klausner et al., *supra* note 37, at 1770 ("[T]here is no assurance that other states will accept the validity of FFPs in the charters of Delaware corporations . . .").

260. See *Salzberg*, 227 A.3d at 134–37.

261. See, e.g., Kevin LaCroix, *Third California State Court Upholds Enforceability of Federal Forum Provision*, D&O DIARY (Dec. 10, 2020), <https://www.dandodiary.com/2020/12/articles/securities-litigation/third-california-state-court-upholds-enforceability-of-federal-forum-provision> [<https://perma.cc/JG4K-ERBW>].

But even if courts elsewhere follow *Salzberg's* lead and enforce FFPs governing Securities Act claims, as discussed below, FFPs are only one example of what the Outer Band may permit the corporate contract to regulate. And whether courts will tolerate other, more controversial Outer Band provisions is unclear.²⁶²

B. *The Outer Band's Reach*

If FFPs governing Securities Act claims are valid, then what else does the Outer Band encompass? What other rights arising outside of state corporate law may the corporate contract regulate? Could a corporate charter, for example, bar shareholders from competing with the corporation's business?

The precise scope of the Outer Band is among the most perplexing questions that *Salzberg* raises.²⁶³ *Salzberg* itself defined the Outer Band in a circuitous fashion to encompass "matters that are not 'internal affairs,' but are, nevertheless, 'internal' or 'intracorporate' and still within the scope of [DGCL] Section 102(b)(1)"²⁶⁴ Thus, *Salzberg* suggests that the Outer Band includes any matter that is not governed by state corporate law, but is nonetheless within the statutory language of DGCL Section 102(b)(1) because it concerns "the management of the business and . . . affairs of the corporation" or "the powers of the corporation, the directors, and the stockholders."²⁶⁵

In elaborating as to what falls into the Outer Band category, *Salzberg* offers two concrete examples. First, the *Salzberg* court pointed to *ATP* and, specifically, the federal antitrust claims brought by shareholders in that case against the defendant corporation.²⁶⁶ Those federal law

262. Cf. Lipton, *supra* note 59, at 183–84 ("Forum selection . . . represents the most mild of litigation limits, in that it preserves shareholders' access to the courts The more onerous burdens imposed by arbitration and feeshifting raise even larger concerns.").

263. See Montgomery, *supra* note 110 (quoting one law professor's confusion as to the boundaries of internal affairs and the Outer Band); Lipton, *supra* note 138 (observing that the Delaware Supreme Court's circular definition of the Outer Band "is not helpful").

264. See *Salzberg*, 227 A.3d at 131.

265. See DEL. CODE ANN. tit. 8, § 102(b)(1) (2021) (defining the permissible scope of a corporate charter; cf. *id.* § 109(b) (2021) (defining the scope of corporate bylaws in similar terms to permit "any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees").

266. See *Salzberg*, 227 A.3d at 121–23, 125 (citing *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) (en banc)) ("FFPs involve intra-corporate claims. *ATP*

claims, though seemingly distant from the corporation-shareholder relationship that state corporate law governs, qualified as “intra-corporate,” the *Salzberg* court noted in passing, because they “relate[d] to the business of the corporation.”²⁶⁷ Second, *Salzberg* itself ruled that shareholder claims made under section 11 of the Securities Act are within the Outer Band.²⁶⁸ The court reasoned, “Section 11 claims are ‘internal’ in the sense that they arise from internal corporate conduct on the part of the Board.”²⁶⁹

At the same time, *Salzberg* recognizes some limits to the scope of the Outer Band. As the court explained, some matters are “purely external” and, therefore, beyond the reach of the corporate contract.²⁷⁰ The court cited *Boilermakers* for examples of this “purely external” category:

The two examples of external claims given in *Boilermakers* do not relate to the “affairs” of the corporation or the “powers” of its constituents (a tort claim for personal injury suffered by the plaintiff on the premises of the company or a contract claim involving a commercial contract). As for these types of claims, no Board action is present as it necessarily is in Section 11 claims, and those claims are unrelated to the corporation-stockholder relationship.²⁷¹

Thus, according to *Salzberg*, the scope of the Outer Band includes all matters that have some nexus to the internal affairs of the

concerned intra-corporate claims *ATP* suggests that certificate of incorporation provisions governing certain types of ‘intra-corporate’ claims that are not strictly within . . . ‘internal affairs,’ can be within the boundaries of the DGCL”).

267. *See id.* at 119; *see also id.* at 122 (explaining that the *ATP* “fee-shifting bylaw fell within both broad prongs of [DGCL] Section 102(b)(1)—namely, that it relates (i) to the ‘business of the corporation’ and the ‘conduct of its affairs,’ and (ii) to the powers of the corporation or ‘the rights or powers of its stockholders, directors, officers or employees’”).

268. *See id.* at 114 (concluding that the FFP at issue “seeks to regulate the forum in which such ‘intra-corporate’ litigation can occur is a provision that addresses the ‘management of the business’ and the ‘conduct of the affairs of the corporation,’ and is, thus, facially valid under [DGCL] Section 102(b)(1)”).

269. *Id.* at 123; *see also id.* at 114 (explaining that section 11 claims “aris[e] out of the Board’s disclosures to current and prospective stockholders in connection with an IPO or secondary offering” and that “[t]he drafting, reviewing, and filing of registration statements by a corporation and its directors is an important aspect of a corporation’s management of its business and affairs and of its relationship with its stockholders”).

270. *See id.* at 131 (internal quotations omitted) (“[T]here are purely ‘external’ claims, *e.g.*, tort and commercial contract, which are clearly outside the bounds of Section 102(b)(1).”).

271. *Id.* at 124 (internal quotations omitted).

corporation—that is, the relationships among or between the corporation and its officers, directors, and shareholders²⁷²—but that do not arise under the legal relationships created by state corporate law.²⁷³ Although Outer Band matters do not arise under state corporate law, such matters may still be regulated by the corporate contract authorized by state corporate law. By contrast, “purely external” matters, unconnected to the internal affairs of the corporation, cannot be regulated under the authority of state corporate law even when the parties involved happen to be the corporation and a shareholder of the corporation.

Applying this framework, the Outer Band would arguably encompass provisions restricting the rights of a corporation’s employees to the extent such employees are compensated with shares of the corporation.²⁷⁴ Although a corporation’s relationship with its employees is beyond the internal affairs doctrine,²⁷⁵ the DGCL expressly authorizes a corporation’s charter and bylaws to include “any provision . . . relating to the business of the corporation . . . [and] the rights or powers of . . . employees.”²⁷⁶ Thus, a provision binding a corporation’s employee-shareholders in their capacity *as employees*, and *not as shareholders*, would fall within the Outer Band.²⁷⁷

The use of the corporate contract to regulate the employer-employee relationship, for example by restricting an employee-

272. See *supra* notes 2–4 and accompanying text (defining the scope of “internal affairs”).

273. See *supra* notes 264–65 and accompanying text (analyzing *Salzberg*’s description of the Outer Band).

274. By accepting shares of corporate stock as compensation, employees, like other shareholders, implicitly assent and therefore become bound to the corporate contract. See *supra* note 143 and accompanying text (discussing the contractarian doctrine of implicit consent in corporate law).

275. See *Salzberg*, 227 A.3d at 134 (quoting Manesh, *supra* note 1, at 256–60) (“Typical choice-of-law analysis [rather than the internal affairs doctrine] . . . appl[ies] to determine the law governing the corporation’s *external* business activities, such as the corporation’s relationships with its employees . . .”).

276. DEL. CODE ANN. tit. 8, § 109(b) (2021) (defining the permissible scope of corporate bylaws); see also *id.* § 102(b)(1) (2021) (“Any provision which is required or permitted . . . to be stated in the bylaws may instead be stated in the certificate of incorporation . . .”).

277. The analogy to *Salzberg* is straightforward. Like an FFP that regulates a shareholder’s rights *in their capacity as a purchaser of securities in a registered public offering*, an employment-related provision in the corporate contract (for example a restrictive non-compete covenant) would regulate a shareholder’s rights *in their capacity as an employee of the corporation*.

shareholder's right to compete against the corporation's business, would represent a paradigm shift in the reach of corporate law. Moreover, it would create an insoluble conflict between Delaware law and the law of other jurisdictions that strictly limit the scope and enforceability of non-compete covenants (most notably California, where many Delaware corporations are headquartered).²⁷⁸ If Delaware courts were to enforce such employment-related provisions in the corporate contract against employee-shareholders, despite the conflict it would pose to the laws of other states, it could prompt a regulatory turf war among states that might ultimately undermine the "protective boundaries" of the internal affairs doctrine.²⁷⁹ Delaware courts, however, could avoid such conflicts. Because employment-related provisions lie within the Outer Band and beyond the internal affairs doctrine,²⁸⁰ Delaware courts, deploying traditional choice-of-law analysis, could defer to the laws of other states when evaluating employment-related provisions.²⁸¹ Doing so would effectively limit the scope of the Outer Band as it applies to employee matters and avoid a heedless clash with the laws of other states.

Coming back closer to the issue involved in *Salzberg*, the scope of the Outer Band would also likely encompass a range of shareholder rights

278. See, e.g., *Focus Fin. Partners, LLC v. Holsopple*, 241 A.3d 784, 792, 802 (Del. Ch. 2020) (observing the conflict between Delaware and California law in connection with an employment agreement containing a non-compete clause).

279. See *Manesh*, *supra* note 1, at 304–11 (explaining that other states may challenge the boundaries of the internal affairs doctrine and thereby erode the scope of Delaware's regulatory power); see also *Focus Fin. Partners, LLC*, 241 A.3d at 803 n.4 ("Because Delaware's role as a chartering jurisdiction depends on other states deferring to the application of Delaware law to the internal affairs of entities, the increasing frequency with which parties use Delaware law to create conflicts with the substantive law of other jurisdictions raises significant public policy issues for this state.").

280. See *supra* note 259 and accompanying text (explaining that the Outer Band terms of a corporate contract are not subject to the internal affairs doctrine but are instead subject to typical choice of law principles).

281. Cf. *Focus Fin. Partners, LLC*, 241 A.3d at 811–22 (applying traditional choice-of-law principles and concluding that California law governs non-competition and other employment-related provisions set forth in an agreement granting employee membership units in a Delaware LLC). *But cf.* *AG Res. Holdings, LLC v. Terral*, No. 2020-0850, 2021 WL 486831, at *6 (Del. Ch. Feb. 10, 2021) (applying the internal affairs doctrine and concluding that Delaware law governs non-competition and other employment-related provisions set forth in an operating agreement of a Delaware LLC).

arising under state and federal securities law.²⁸² Such rights tend to concern the processes by which the corporation-shareholder relationship is created and ended (namely, the purchase or sale of a corporation's stock)²⁸³ and the processes by which shareholders exercise their state corporate law voting rights (namely by proxy voting).²⁸⁴ In the language of *Salzberg*, such processes quite clearly implicate the "affairs' of the corporation or the 'powers' of its constituents" and "the corporation-stockholder relationship."²⁸⁵ Thus, for example, the corporate contract might be used to regulate the rights of shareholders to bring a private cause of action against the corporation or its directors or officers for fraud under section 10(b) or Rule 10b-5 of the Exchange Act, in connection with the purchase or sale of the corporation's stock,²⁸⁶ or under section 14(a) or Rule 14a-9 of the same statute, in connection with a shareholder vote.²⁸⁷ Likewise, the corporate contract might be used to regulate the rights of shareholders to submit a proposal for a shareholder vote under Exchange Act Rule 14a-8.²⁸⁸

282. Cf. Grundfest, *supra* note 10, at 1396 (concluding that an analysis of the rights arising under Securities Act sections 12(a)(1), 12(a)(2), and 15 "supports a conclusion identical to the analysis under section 11").

283. Recognizing that "it is clear that various provisions of our DGCL regulate certain transactions by which one can become a stockholder," *Salzberg* strongly implies that matters connected to the purchase or sale of stock are sufficiently intra-corporate to be within the Outer Band. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 129–30 (Del. 2020) (en banc).

284. See, e.g., Park, *supra* note 129, at 137–47, 155–58 (classifying rights arising from the purchase or sale of a security as federal securities law and rights arising in connection with proxy voting as federal corporate law).

285. See *supra* notes 270–71 and accompanying text (discussing the scope of the Outer Band as defined in *Salzberg*).

286. See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Professor Park has argued that Exchange Act section 10(b) and Rule 10b-5, like Securities Act section 11, should be understood as a securities law, as opposed to corporate law, because their provisions aim to protect investors engaged in the purchase or sale of a security, rather than investors in their capacity as owners of a security. See, e.g., Park, *supra* note 129, at 137–44. However, to the extent *Salzberg* rules that Securities Act section 11 claims are within the Outer Band, the same logic would seem to apply to Exchange Act section 10(b) and Rule 10b-5.

287. See 17 C.F.R. § 240.14a-9; see also Hershkoff & Kahan, *supra* note 23, at 295–96 ("[C]laims that a company violated Section 14(a) of the Securities Exchange Act by making misleading disclosures to shareholders in a proxy statement often are intertwined with claims for breach of fiduciary duty"); Park, *supra* note 129, at 156–58 (arguing that federal proxy regulation "relates to governance matters mainly of concern to" shareholder-owners and therefore "is best classified as [federal] corporate law").

288. See 17 C.F.R. § 240.14a-8; see also Park, *supra* note 129, at 156–58 (arguing that the shareholder proposal rule is "a corporate law mechanism by which shareholder-

One could imagine all sorts of corporate contract provisions regulating the securities law rights of shareholders that might comfortably fit within the Outer Band.²⁸⁹ The closest parallel to the FFPs at issue in *Salzberg*, however, would be a forum selection provision governing shareholder claims brought under the Exchange Act.²⁹⁰ Unlike the Securities Act, the Exchange Act provides exclusive jurisdiction to federal courts.²⁹¹ But a corporation may nonetheless wish to limit the rights of its current or former shareholders to bring an Exchange Act claim within a particular federal district.²⁹² Indeed, since *Salzberg*, at least two courts have enforced forum selection provisions against plaintiffs asserting claims under section 14(a) of the Exchange Act.²⁹³

owners can raise concerns about the governance of the corporation” and therefore is conceptually a form of federal corporate law). *But see* Stephen Bainbridge, *Can a Corporation Opt out of Rule 14a-8?*, PROFESSORBAINBRIDGE.COM (May 24, 2020), <https://www.professorbainbridge.com/professorbainbridgecom/2020/05/can-a-corporation-opt-out-of-rule-14a-8.html> [<https://perma.cc/4986-4QF8>] (summarizing the debate over whether corporate bylaws may be used to restrict shareholders right to make a proposal under Rule 14a-8).

289. *See, e.g.*, Jessica Erickson, *Investing in Corporate Procedure*, 99 B.U. L. REV. 1367, 1390–1406 (2019) (proposing different types of charter and bylaw provisions to regulate shareholder litigation); A.C. Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta: The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 248 (2008) (proposing a corporate charter provision that “change[s] the damage[s] measure in Rule 10b-5 securities fraud class actions” by waiving the fraud-on-the-market presumption of reliance and stipulating a disgorgement measure of damages).

290. *See* Aggarwal et al., *supra* note 10, at 415 n.127 (noting that shareholder claims arising under the Exchange Act may be considered intra-corporate under *Salzberg*).

291. *See* 15 U.S.C. § 78aa(b); *see also* *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018).

292. *But see* Kevin LaCroix, *Guest Post: Section 11 Cases in State Court Post-Cyan – Is the Tide Turning?*, D&O DIARY (May 18, 2020), <https://www.dandodiary.com/2020/05/articles/securities-litigation/guest-post-section-11-cases-in-state-court-post-cyan-is-the-tide-turning> [<https://perma.cc/L5LL-Q9FW>] (expressing doubt that the reasoning of *Salzberg* could be extended to validate a forum selection provision stipulating a specific federal court for securities law claims).

293. *See, e.g.*, *Lee v. Fisher*, No. 20-CV-06163, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021) (dismissing derivative action brought under Exchange Act Section 14(a)); *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, No. 19-C-8095, 2020 WL 3246326 (N.D. Ill. June 8, 2020) (same). In both cases, the forum selection clauses at issue required all derivative actions to be filed in the Delaware Chancery Court. As Professor Lipton has highlighted, because the Chancery Court lacks jurisdiction to hear Exchange Act lawsuits, enforcing the forum selection clauses in these cases was tantamount to holding the plaintiffs had waived their right to bring a derivative claim

More controversially, a corporation might seek to impose a loser-pays-fee-shifting provision—like the type affirmed by *ATP*—but covering shareholder suits asserting federal securities law claims.²⁹⁴ Although the 2015 DGCL amendments reversing *ATP* would prohibit such a provision covering any “internal corporate claim,”²⁹⁵ *Salzberg* makes clear that that statutory prohibition does not apply to Outer Band claims arising outside Delaware corporate law.²⁹⁶ And in *ATP*, the Delaware Supreme Court already upheld the validity of a fee-shifting provision as applied to an Outer Band claim.²⁹⁷

If enforceable, a fee-shifting provision covering federal securities law claims would be a potent deterrent against Rule 10b-5 class actions.²⁹⁸ Class actions are the primary vehicle through which that rule—“the most commonly invoked liability provision” of federal securities law²⁹⁹—is enforced and have been a longtime nuisance for corporate

under the Exchange Act. Ann Lipton, *Bylaws and Securities Claims - Mayday!*, BUS. L. PROF BLOG (May 1, 2021), https://lawprofessors.typepad.com/business_law/2021/05/bylaws-and-securities-fraud-claims.html [<https://perma.cc/8BU2-25MF>].

294. See Aggarwal et al., *supra* note 10, at 414–15 (interpreting *Salzberg* to suggest “[a] fee-shifting provision . . . is also a possibility”); Lipton, *supra* note 138 (observing that, as a result of *Salzberg*, “there is now apparently no barrier to inserting a loser-pays provision in corporate constitutive documents for federal securities claims”).

295. See, e.g., DEL. CODE ANN. tit. 8, §§ 102(f), 115 (2021) (defining “internal corporate claims” under Delaware law and limiting liability for such claims in a company’s certificate of incorporation); see also *supra* notes 79–83 and accompanying text (discussing the scope of the 2015 DGCL amendments).

296. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 120 n.79 (Del. 2020) (en banc) (explaining that section 11 claims are not “internal corporate claims” as that term is statutorily defined and that “internal corporate claims” address “claims requiring the application of Delaware corporate law as opposed to federal law”); see also *supra* note 83 (supporting the conclusion that “internal corporate claims” does not include federal securities law claims).

297. See *supra* notes 70–78 and accompanying text (summarizing *ATP*); see also *supra* notes 266–67 and accompanying text (summarizing *Salzberg*’s characterization of *ATP* as an Outer Band case).

298. See, e.g., Sjostrom, *supra* note 70, at 414 (“[A] typical fee-shifting bylaw deters all securities fraud class actions, regardless of merit . . .”); David H. Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201, 212 (2015) (explaining that fee-shifting provisions “would expose plaintiffs to substantial litigation costs” and might cause plaintiff’s attorneys to “rationally abandon securities class actions”).

299. See, e.g., Sjostrom, *supra* note 70, at 394 (explaining that Rule 10b-5 is “the most commonly invoked liability provision” of federal securities law); CORNERSTONE 2020, *supra* note 118, at 11 fig. 10 (showing that in recent years eighty-five percent or more of all federal securities class actions bring claims under Rule 10b-5).

defendants.³⁰⁰ A fee-shifting provision would drastically alter the cost-benefit analysis of any plaintiff's attorney or potential lead plaintiff to bring a Rule 10b-5 class action, regardless of its merits.³⁰¹ Indeed, the deterrent effect on class actions would be so great that some have concluded that fee-shifting may be invalid under the anti-waiver provisions of the Securities Act and Exchange Act³⁰² or, otherwise, preempted by the federal securities statutes.³⁰³ But even if a fee-shifting provision in the corporate contract proves unenforceable under federal securities law, as discussed below, there is another type of Outer Band provision that may not have the same frailty: mandatory arbitration.

C. *The Corporate Contract and Mandatory Arbitration*

Perhaps no aspect of *Salzberg* may be more consequential, and therefore more closely scrutinized, than the decision's implications for mandatory arbitration of shareholder claims.³⁰⁴ Like fee-shifting, a provision compelling bilateral arbitration (and thus banning class arbitrations) would have a powerful deterrent effect on shareholder claims, regardless of the merit of those claims.³⁰⁵ Unlike fee-shifting, however, an arbitration provision enjoys privileged status in the law due to the U.S. Supreme Court's interpretation of the FAA.³⁰⁶

300. See, e.g., Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1202–09 (2013); see also Bainbridge, *supra* note 83, at 860–65.

301. See Coffee, *supra* note 83, at 699–700; Erickson, *supra* note 289, at 1403; Lipton, *supra* note 59, at 184; Sjostrom, *supra* note 70, at 396–97; Webber, *supra* note 298, at 212.

302. See Sjostrom, *supra* note 70, at 401–05.

303. See *id.* at 405–414; Coffee, *supra* note 83, at 698–701; see also Bainbridge, *supra* note 83, at 859 (concluding that there is a “substantial likelihood” of preemption).

304. See generally Raz, *supra* note 207, at 251–52, 254 (linking *Salzberg* to the potential enforceability of intra-corporate mandatory arbitration provisions under the FAA); Montgomery, *supra* note 110 (quoting Professor Myers's observation that *Salzberg* “has gotten a lot of attention not because anyone is all that focused on section 11 Securities Act cases but because how it might bear on attempts to push securities cases or corporate cases into arbitration”).

305. See, e.g., Lipton, *supra* note 59, at 184 (“Because [shareholder-]plaintiffs have little information about the claim without access to discovery, and often rely on the economies of scale of class litigation, the flexibility of arbitration can tilt the playing field in favor of defendants to the point of barring meritorious claims.”).

306. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623–24 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)) (explaining that any argument that another federal statute overrides the FAA “faces a

Applying the FAA, the U.S. Supreme Court has ruled that a contract mandating arbitration of a federal securities law claim does not violate the anti-waiver provisions of either the Securities Act³⁰⁷ or the Exchange Act.³⁰⁸ Moreover, the Court has ruled that the FAA compels enforcement of a contractual arbitration provision even if it would be economically unviable to pursue the underlying claim in arbitration.³⁰⁹ And those FAA decisions involved unnegotiated contracts of adhesion,³¹⁰ much like the corporate contract that binds shareholders upon their purchase of a corporation's stock.³¹¹

stout uphill climb” and “bears the heavy burden of showing ‘a clearly expressed congressional intention’”). Summarizing the U.S. Supreme Court’s FAA jurisprudence, *Epic* explains:

In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.

Id. at 1627; *see also* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 173 (2015) (interpreting Supreme Court jurisprudence to suggest the “FAA is no ordinary statute; rather, it is some sort of super-statute that is treated differently than its counterparts in the U.S. Code”).

307. *See* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480, 484–85 (1989).

308. *See* *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

309. *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (ruling the FAA compels enforcement of an agreement to arbitrate on an individualized basis even where “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system”); *see also* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–38 (2013) (ruling the FAA compels enforcement of an agreement to arbitrate on an individualized basis and rejecting the argument that without a class proceeding plaintiffs would “have no economic incentive to pursue their antitrust claims individually in arbitration”).

310. *See* *Shearson/Am. Express, Inc.*, 482 U.S. at 229–30, 238 (concerning a standard customer agreement with a securities broker and rejecting the argument that the FAA should not apply because the agreement was “not freely negotiated” and involved an “inequality of bargaining power” because “voluntariness of the agreement is irrelevant” to the applicability of the FAA); *Rodriguez de Quijas*, 490 U.S. at 478 (concerning “a standard customer agreement with” a securities broker); *AT&T Mobility LLC*, 563 U.S. at 336 (involving a standard customer agreement for cell phone service).

311. *See* Robert Hessen, *A New Concept of Corporations: A New Contractual and Private Property Model*, 30 HASTINGS L.J. 1327, 1349 (1979) (explaining how shareholders’ share purchases are contracts of adhesion).

Thus, with *Salzberg* upholding the validity a forum selection provision governing a federal securities law claim, the Delaware Supreme Court has blazed a path to using the corporate contract to impose arbitration on shareholders.³¹² As the U.S. Supreme Court has observed, arbitration is simply another type of forum selection provision³¹³ and, thus, readily akin to the FFPs that *Salzberg* validated. To the extent a corporate charter and bylaws are truly a contract between the corporation and its shareholders, as *Salzberg* insists,³¹⁴ then a mandatory arbitration provision set forth in the corporate contract would be enforceable against shareholders under the U.S. Supreme Court's FAA jurisprudence.³¹⁵

Such reasoning would apply not only to a mandatory arbitration provision covering federal securities law claims. It would apply equally to an arbitration provision covering state corporate law claims. Mindful of this fact, the *Salzberg* court observed that Delaware corporate law statutorily bans arbitration provisions covering state corporate law claims.³¹⁶ Yet, in making this footnoted remark, the Delaware justices must have been aware that under the U.S. Supreme Court precedent, “[w]hen state law prohibits outright the arbitration of a particular type of claim, . . . [t]he conflicting rule is displaced by the FAA.”³¹⁷ Thus, if the FAA applies to the corporate contract, as *Salzberg*'s contractarianism would suggest, then Delaware's statutory ban on arbitration of internal corporate claims could be preempted, and

312. See Aggarwal et al., *supra* note 10, at 414 (noting that “it follows fairly naturally [from *Salzberg*] that Delaware corporations may . . . attempt to adopt a mandatory, individual arbitration”); Raz, *supra* note 207, at 251–56 (describing the path from *Salzberg* to mandatory arbitration of shareholder claims).

313. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause . . .”).

314. See *supra* Section II.A.2 (explaining that the Delaware Supreme Court's ruling in *Salzberg* is premised on the notion that a corporation's governing documents are a contract between the corporation and its shareholders).

315. See, e.g., *Clopton & Winship*, *supra* note 83, at 177 (explaining that the presumptive validity of an arbitration provision under the FAA “is triggered . . . only if corporate governing documents count as ‘contracts’ under the FAA”).

316. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 n.169 (Del. 2020) (en banc) (noting that “forum provisions that require arbitration of internal corporate claims . . . would violate [DGCL] Section 115”).

317. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (citation omitted); see also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis added) (“Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”).

Delaware corporations would be free to adopt such provisions in their governing documents.³¹⁸

The widespread use of arbitration provisions in the governing documents of public corporations would have profound implications for shareholder rights.³¹⁹ Despite its many imperfections, representative shareholder litigation can serve vital deterrence and

318. See Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 113 (2012) ("If a publicly traded issuer's governance documents constitute a 'contract evidencing a transaction involving commerce' under FAA § 2, then courts must enforce an arbitration provision in those documents notwithstanding contrary state law."); Lipton, *supra* note 10, at 588 ("Delaware recently amended [the DGCL] to ban the use of exclusive arbitration provisions in corporate charters and bylaws—but if the FAA applies, that legislation is likely preempted."); LoPucki, *supra* note 113, at 2160–61 ("[DGCL] section 115 is in apparent conflict with section 2 of the Federal Arbitration Act (FAA), [which] provides that written agreements to arbitrate are 'valid, irrevocable and enforceable.'"); Manesh, *supra* note 1, at 296 ("A federal court ruling under the FAA that enforces an arbitration provision covering federal securities law claims would mean a similar provision covering state corporate law claims must be likewise enforceable under the FAA. Delaware's statutory ban would be preempted, and Delaware corporations would be free to adopt such provisions."); Raz, *supra* note 207, at 254 (explaining that if "a federal court . . . would find corporate charters and bylaws to be 'contracts' under the FAA" then "[DGCL] Section 115 is preempted by the FAA, and is therefore invalid for arbitration-related purposes"). Critically, this conclusion would not necessarily follow if Delaware law resolved existing uncertainty and clarified that the state of Delaware is a party to the corporate contract. See *supra* note 57 (citing inconsistency in how Delaware case law has described the parties to the corporate contract). As Professor Lipton has observed, if Delaware is considered a party to the corporate contract, then that fact alone "might be sufficient to prevent the application of the FAA, because a contracting party can select its own contract terms, including the decision not to arbitrate." See Lipton, *supra* note 10, at 601 n.106.

319. See Clopton & Winship, *supra* note 83, at 170–71 ("Private litigation, especially private aggregate litigation, is one of the main tools for enforcing securities and corporate law A shift to arbitration likely would dramatically reduce the number of claims filed The future of shareholder rights may be at stake."); Lipton, *supra* note 10, at 632 ("Intracorporate litigation, concerning the scope of directors' governance powers, necessarily implicates the rights of all stockholders in the corporation. These disputes concern a single res—the corporation—in which all stockholders have stakes, and are thus incompatible with the procedural informality and default confidentiality of arbitral proceedings."); Raz, *supra* note 207, at 257–60 (arguing that "the insertion of a mandatory arbitration clause . . . into a corporation's charter or bylaws, is functionally equivalent to a waiver of equitable and fiduciary duties, which Delaware law has long prohibited"); see also Webber, *supra* note 298, at 258–59 (explaining that mandatory bilateral arbitration barring class actions would replace "the circularity problem with a semi-circularity problem" that benefits large investors with positive-value claims at the expense of smaller investors with negative-value claims).

remedial functions in both corporate governance and capital markets.³²⁰ Channeling that litigation into private arbitration—which shareholders might only pursue on an individualized, rather than class, basis—would largely neuter these functions and, thus, reshape the manner in which public corporations and securities markets operate.³²¹

Such a change would be particularly damaging to Delaware. A broad migration of shareholder disputes into private arbitration would strip Delaware courts of their regulatory authority and inhibit the development of the state’s corporate law.³²² Thus, arbitration has been

320. See, e.g., BARBARA ROPER & MICAH HAUPTMAN, CONSUMER FED’N OF AM., A SETTLED MATTER: MANDATORY SHAREHOLDER ARBITRATION IS AGAINST THE LAW AND THE PUBLIC INTEREST, (2018) 1, 4–10 (outlining the deterrence and remedial functions served by securities fraud class actions and concluding that “Congress, the courts, and the Securities and Exchange Commission have all long recognized the ‘essential’ and ‘necessary’ role that private shareholder lawsuits play in deterring fraud in our capital markets and compensating the victims of fraud”); Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 807–20 (2009) (summarizing the debate over the compensatory and deterrence functions of securities fraud class actions).

321. See, e.g., ROPER & HAUPTMAN, *supra* note 320, at 1, 28–46 (describing how arbitration could undermine the deterrence and remedial functions that shareholder litigation plays corporate governance and capital markets); Webber, *supra* note 298, at 224–30 (“[N]egative-value claimants would be left with no recourse for fraud, and the overall damages claims in securities-fraud cases would drop substantially. . . . [Mandatory bilateral arbitration] would also substantially reduce, and possibly eliminate, actions and remedies that are only rationally pursued in the class action context, even by investors with positive-value claims.”); Erickson, *supra* note 289, at 1405–06 (explaining that because mandatory bilateral arbitration would be “cost prohibitive” for negative-value claimants, the effect would be to “shrink[] the number of potential claimants” which would “reduce[] the overall deterrent effects of shareholder litigation, hurting large and small shareholders alike”); see also Raz, *supra* note 207, at 253 (“If mandatory arbitration sweeps across the U.S. securities law landscape, we might see a large swath of the securities acts become practically unenforceable, specifically through class actions . . .”). But see Andrew K. Jennings, *Firm Value and Intracorporate Arbitration*, 38 REV. LITIG. 1, 8 (2018) (arguing that intracorporate arbitration provisions can be designed to “serve shareholders’ fundamental interest in increasing firm value”).

322. See, e.g., Lipton, *supra* note 10, at 637–38; LoPucki, *supra* note 113, at 2156–58; Manesh, *supra* note 1, at 294–95; Brian JM Quinn, *Arbitration and the Future of Delaware’s Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 868–69 (2013); Raz, *supra* note 207 at 254–55; cf. Armour et al., *supra* note 60, at 1380–84 (predicting the same consequences if corporate cases are diverted away from Delaware courts to other states’ courts); Cain & Solomon, *supra* note 60, at 471–74 (highlighting the importance of Delaware courts retaining corporate cases). Like state corporate law, the creation of new federal securities precedents would also be impeded by the widespread use of

described as an “existential threat” to Delaware corporate law and the state’s lucrative regulatory domain.³²³

Still, even if the legal case for the enforceability of arbitration provisions has been strengthened by *Salzberg*, it is too soon to know whether such provisions will proliferate in the governing documents of public corporations, as some have feared.³²⁴ Indeed, there are reasons to be skeptical that a widespread move to arbitration will occur in the near term.

First, it is unclear that public investors will tolerate arbitration provisions.³²⁵ Although shareholders in public corporations are not in a position to negotiate the terms of a corporation’s charter or bylaws, basic economic analysis suggests that capital market prices will reflect investors’ sentiment toward those terms.³²⁶ And institutional investors along with proxy advisors in particular appear to strongly disfavor mandatory arbitration of shareholder claims.³²⁷ Thus, corporations

private arbitration, leaving the existing case law in a frozen state “unable to adjust and evolve” to new practices or developments. See Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 1 (2008).

323. See Lipton, *supra* note 10, at 588 (“[I]f corporate governance arrangements are deemed ‘contractual’ for FAA purposes . . . it could represent an existential threat to an entire substantive field of law, and states—particularly Delaware . . . —would be powerless to do anything about it.”); LoPucki, *supra* note 113, at 2157 (“Arbitration bylaws present an existential threat to Delaware.”); Manesh, *supra* note 1, at 295–96 (“The widespread use of arbitration to resolve state corporate law disputes would strip Delaware courts of their regulatory authority and, thus, retard the development of the state’s corporate law For now, Delaware’s statutory ban against arbitration provisions covering state corporate law claims has forestalled this existential threat.”); *cf.* Raz, *supra* note 207, at 256 (explaining that if “Delaware’s Section 115 is preempted by the FAA, . . . opening the floodgates for widespread adoption of such clauses among corporations,” then “[t]he stage would . . . be set for what might become ‘Delaware’s fall’”).

324. See generally Raz, *supra* note 207, at 247–59; Fitzpatrick, *supra* note 306, at 190–93.

325. See Allen, *supra* note 86, at 788–94.

326. See, e.g., Easterbrook, *supra* note 140, at 1430–34.

327. See, e.g., Lipton, *supra* note 10, at 638 (“[M]any corporations might not choose arbitration, and institutional investors might exert enough pressure to prevent directors from adopting policies with which they disagree.”); Raz, *supra* note 207, at 256–57 (“The rise of institutional investor stewardship and proxy advisor oversight, . . . make it plausible that mandatory arbitration is less likely to materialize in corporations with higher levels of corporate governance.”); Webber, *supra* note 298, at 211 (explaining the opposition of institutional investors is noteworthy because institutional investors “comprise the set of investors that is most likely to have positive-value claims and therefore most likely to be able to continue to pursue those claims in arbitration”); see also Alison Frankel, *New Battleground in the Fight over Mandatory*

that seek to impose arbitration on shareholders may face a higher cost of capital that outstrips any perceived benefit to be gained from imposing arbitration.³²⁸

Second, like investors, it is unclear that corporate managers desire mandatory arbitration—or at least desire it badly enough to overcome investor opposition.³²⁹ Indeed, when a shareholder of the healthcare conglomerate Johnson & Johnson recently submitted a proposal to amend the company’s bylaws to compel arbitration for all federal securities law claims, the company’s management mounted a sustained opposition to it.³³⁰ The company’s management first rejected including the proposal on the company’s proxy ballot³³¹ and, only after the *Salzberg* decision undercut the management’s legal position,³³² the company’s management conceded to allow the proposal—largely because they recognized that its shareholders would overwhelmingly vote against it.³³³ The Johnson & Johnson episode is not an atypical or isolated incident. Every time in recent history when a shareholder has submitted a proposal to a public company to adopt mandatory

Shareholder Arbitration: Intuit’s Annual Meeting, REUTERS (Jan. 16, 2020), <https://www.reuters.com/article/us-otc-arbitration/new-battleground-in-the-fight-over-mandatory-shareholder-arbitration-intuits-annual-meeting-idUSKBN1ZF2VQ> [<https://perma.cc/U5Y2-XJKQ>] (describing “a tsunami of opposition” by institutional investors and proxy advisors against a shareholder proposal at Intuit to mandate arbitration of securities law claims).

328. See Andrew Rhys Davies, *The Legality of Mandatory Arbitration Bylaws*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 13, 2018), <https://corpgov.law.harvard.edu/2018/09/13/the-legality-of-mandatory-arbitration-bylaws> [<https://perma.cc/VF4Z-N599>] (“[I]f investors truly value the right to litigate in a federal class action, then the market should be willing to pay more for shares that include that right, thereby incentivizing registrants to keep offering them.”). *But see* Lipton, *supra* note 59, at 185 (expressing skepticism that the market can appropriately price arbitration and other litigation limits in corporate governance documents).

329. See Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws*, 2013 BYU L. REV. 65, 91 (2013) (explaining that corporate managers are largely apathetic to mandatory arbitration of shareholder claims as an alternative to litigation because managers are seldom personally liable in securities fraud class actions).

330. See Raz, *supra* note 207, at 247–59 (describing the Johnson & Johnson arbitration shareholder proposal episode).

331. See *id.* at 22.

332. See *id.* at 27 (explaining that *Salzberg* undercut Johnson & Johnson’s argument that a provision concerning federal securities law was not a proper subject for the corporate charter or bylaws).

333. See *id.* at 28–29.

shareholder arbitration, the company's management has opposed it.³³⁴ Experience thus suggests that managers, perhaps reflecting investor sentiment, are not eager to impose arbitration on shareholders.³³⁵

Third, it is telling that there has been no noticeable movement or effort among corporations to adopt mandatory arbitration provisions, either before or after *Salzberg*, despite the absence of any obvious legal impediments.³³⁶ Notwithstanding the historic opposition of the Securities and Exchange Commission (SEC), the enforceability of mandatory arbitration provisions governing federal securities law claims has not been in serious doubt for many years under U.S. Supreme Court precedent.³³⁷ And prior to the 2015 DGCL amendments at least, there was no express legal prohibition against the corporate contract mandating arbitration for state corporate law claims.³³⁸ Yet, attempts to impose mandatory arbitration on investors

334. See Frankel, *supra* note 327 (describing management opposition at Intuit to a shareholder proposal in 2020 to impose mandatory shareholder arbitration); Google Inc., *Schedule 14A Proxy Statement* (May 9, 2012), at 103–104 (explaining management opposition at Google to a shareholder proposal in 2012 to impose mandatory shareholder arbitration); ROPER & HAUPTMAN, *supra* note 320, at 17 (describing management opposition at Alaska Air in 2008 and each of Gannet and Pfizer in 2012 to shareholder proposals to impose mandatory shareholder arbitration).

335. But see Lipton, *supra* note 10, at 638 (“[D]irectors who believe that arbitration would be more favorable to their interests may be willing to risk investor condemnation by hastily enacting such bylaws in order to gain an advantage in an anticipated lawsuit.”); Raz, *supra* note 207, at 250 (interpreting the Johnson & Johnson episode to provide a template by which directors could impose mandatory arbitration on shareholder through a board-adopted bylaw).

336. See Black, *supra* note 318, at 118 (concluding that despite the absence of any legal obstacles corporations “have not seriously pursued any of the proposals that [would impose mandatory shareholder arbitration] because they were not persuaded that there would be significant benefits to outweigh the considerable costs”).

337. See, e.g., *id.* at 116–18 (explaining that, given the U.S. Supreme Court’s FAA precedents, shareholders’ federal securities fraud claims may be subject to arbitration and that a “determined campaign by a motivated issuer” could overcome SEC opposition); Davies, *supra* note 328 (observing that the SEC is “surely wrong to suggest . . . that the FAA is overridden by the anti-waiver provisions in the securities laws”); Fitzpatrick, *supra* note 306, at 181–83 (explaining that, given the Supreme Court’s FAA precedents, it is all but certain that shareholders’ federal securities fraud claims may be subject to arbitration); Scott & Silverman, *supra* note 300, at 1219–23 (“[T]he Supreme Court’s [FAA] decisions . . . make the legality of arbitration under the federal securities laws abundantly clear.”); Webber, *supra* note 298, at 209 (coming to the same conclusion).

338. See JEFFREY R. WOLTERS & JAMES D. HONAKER, ANALYSIS OF THE 2015 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW, 1, 1–6 (2015) (detailing the various amendments made to the DGCL in 2015).

have been the rare exception among publicly traded businesses.³³⁹ And things have not changed in the months since the *Salzberg* decision. That represents a stark contrast with the months following *ATP*, in which dozens of corporation's adopted fee-shifting provisions³⁴⁰—a response that ultimately prompted the 2015 DGCL ban on such provisions.³⁴¹

Fourth, unlike other commercial contexts, arbitration may be less advantageous to corporations in the context of shareholder litigation.³⁴² With respect to state corporate law claims, whatever gains in efficiency and expertise that corporations may hope to obtain in arbitration may already be provided by Delaware's peculiar, nimble, and expert judicial system,³⁴³ which one leading scholar has described as a form of "quasi-arbitrator."³⁴⁴ The same may hold true with respect

339. In recent decades, only two companies engaged an initial public offering of stock have attempted to include a mandatory arbitration provision in their governing documents. See ROPER & HAUPTMAN, *supra* note 320, at 14–16 (describing failed attempts by Franklin First Financial in 1988 and The Carlyle Group in 2012). And "[s]ince 2012, no operational company seeking to make a public offering" or already considered "public" has attempted to impose a "mandatory shareholder arbitration." *Id.* at 18.

340. See, e.g., Sjostrom, *supra* note 70, at 387 (observing that in the thirteen months following *ATP*, fifty-one corporations adopted fee-shifting bylaws).

341. See *supra* note 79–83 and accompanying text (describing the 2015 DGCL amendments).

342. See, e.g., Allen, *supra* note 86, at 795–98, 809 (explaining that corporations may be ambivalent about arbitration "due, in part, to the difficulty in determining whether there are real advantages to mandatory arbitration that outweigh the unpredictability of arbitration, particularly in 'bet the company' situations"); Black, *supra* note 318, at 109, 118–20 (making the same argument); Johnson & Brunet, *supra* note 322 (describing the "essentially lawless" nature of arbitration creates for "uncertainty and potential unfairness" that coupled with a "lack of meaningful judicial review" makes arbitration results "unpredictable and unprincipled").

343. See, e.g., Fisch, *supra* note 112, at 1074–81 (describing the unusual characteristics of the Delaware courts that enable them to adjudicate corporate disputes efficiently and with expertise); Manesh, *supra* note 112, at 217 ("In the corporate context, Delaware benefits from the reputation of its judges, who are widely considered to be experts in resolving business disputes in a quick and efficient fashion. This expertise is a result of the long history and frequent exposure of the Delaware courts—particularly, the Delaware Court of Chancery—in adjudicating corporate disputes."); Savitt, *supra* note 112, at 571–72, 586–97 (describing, from a practitioner perspective, the "genius" of the Delaware Chancery Court in developing "an innovative form of corporate transactional jurisprudence" that enables it to "supervise the market for corporate control and clarify the competing rights and obligations of corporate stakeholders with efficiency uncommon for a common law court").

344. See Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1163 (2008) ("The special

to federal securities law claims after the important reforms ushered in by the PSLRA and SLUSA³⁴⁵—with the *Cyan* problem presented in *Salzberg* being the notable exception. Indeed, precisely because arbitration is not subject to the same evidentiary rules, procedural safeguards, and judicial oversight that apply to litigation, corporate defendants may *prefer* litigation over arbitration to adjudicate shareholder claims.³⁴⁶

Finally, all corporations are aware that the privileged status of arbitration under U.S. Supreme Court precedent is ultimately subject to the political whims of Congress. The FAA is an act of Congress, and Congress may at any time elect to reform or repeal it. Investors represent a monied and bipartisan interest group with the political muscle to potentially undo any attempts by corporate managers to impose arbitration. Given its uncertain political prospects, any effort to force arbitration on unwilling shareholders may not be worth the backlash.

Thus, surveying the broader landscape, it is far from clear that *Salzberg* will usher in a new era of compelled arbitration for shareholder claims. Still, *Salzberg* has undeniably strengthened the legal case for the enforceability of mandatory arbitration provisions in corporate governing documents.

D. *The Divergence Between Judge-Made and Statutory Corporate Law*

Ultimately, whether the FAA applies to a corporation's governing documents—and thus dictates the enforceability of a compelled arbitration provision against shareholder claims—turns on the same fundamental question that divided Vice Chancellor Laster and the Delaware Supreme Court in *Salzberg*: Is the corporation merely a

attributes of the Court of Chancery's adjudication are its speed and expertise, which require experience. In a sense, the Chancery Court functions as a quasi-arbitrator . . .").

345. See Black, *supra* note 318, at 109 (arguing that "because the PSLRA imposes significant obstacles on plaintiffs, it was hard to see how relocating securities class actions from a court to a more flexible, less law-oriented arbitration forum would provide any advantages to corporate defendants"); Davies, *supra* note 328 (noting that "securities litigation is not quite as vexatious as in years past. Together, the [PSLRA] and [SLUSA] direct all class claims to federal court, where cases filed around the country can be consolidated for efficient pretrial management, and where entirely meritless claims should not survive long").

346. See *supra* note 342 (citing sources explaining that corporations may be hesitant to use arbitration instead of litigation).

contractual relationship among private actors or a legal entity indelibly linked to its chartering state?³⁴⁷

On the one hand, it is easy to read decisions like *Salzberg* and conclude that the “contract” rhetoric used by courts is literal, not figurative.³⁴⁸ When the Delaware Supreme Court speaks of the “corporate contract,” it uses those words not merely as a metaphor to draw normative conclusions. Instead, it uses those words as a positive description of a corporation’s governing documents.³⁴⁹ Thus, when the Delaware Supreme Court asserts unequivocally that “[c]orporate charters and bylaws are contracts among a corporation’s shareholders,”³⁵⁰ it is because Delaware’s judge-made law has fully accepted contractarianism.³⁵¹

On the other hand, the corporation is not a creature of judge-made law. It is a legislative creation. Corporations exist only because state legislatures have enacted statutes to enable their existence. And upon reading those corporate law statutes, it is difficult to conclude that a

347. Cf. Raz, *supra* note 207, at 228–29 (“[T]he highly practical, litigation-vs.-arbitration controversy actually hinges on a theoretical question: is corporate law a branch of contract law, and by extension, are corporate charters and bylaws contracts? . . . If corporate law lies outside of contract law, then arbitration proponents’ efforts should fail . . .”).

348. See *supra* Section II.A.2 (explaining that the Delaware Supreme Court’s ruling in *Salzberg* is premised on the notion that a corporation’s governing documents are a contract between the corporation and its shareholders).

349. See Shaner, *supra* note 57, at 1010–11 (“[T]he language used by the Delaware courts [in *ATP* and *Boilermakers*] appears to take the contract metaphor one step further, equating charters and bylaws with contracts.”). But see Raz, *supra* note 207, at 277–78 (arguing the recurring contract rhetoric in judge-made corporate law “can only be construed as a metaphor”).

350. See, e.g., *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders . . .”); accord *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (stating the same); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (“As our Supreme Court has made clear, the bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL.”).

351. See LoPucki, *supra* note 113, at 2157 (citing *Boilermakers*, 73 A.3d at 939) (“The Delaware courts are irretrievably committed to the view that charters and bylaws are contracts between the corporation and its shareholders, leaving Delaware little room to insist that arbitration bylaws are not arbitration contracts protected by [the FAA].”).

corporation is simply a “nexus of contracts” or that its governing documents are a “contract” in any ordinary sense.³⁵²

To be sure, modern general incorporation statutes, like Delaware’s, enable private actors to wield state power to form corporations with only nominal state involvement.³⁵³ And those statutes further devolve state power to a corporation’s directors and shareholders to privately order most aspects of internal corporate governance without state interference.³⁵⁴ Fixating on these facets of modern corporate law, one might readily mistake a corporation’s governing documents for a contract among private actors.

But these facets of modern corporate law simply reflect the value that state legislatures have placed on private ordering and freedom of contract in their corporate creations.³⁵⁵ A more searching read of corporate statutes confirms that corporations exist apart from private contracts, distinctive in the legal attributes and framework that legislatures have imposed upon them.³⁵⁶

352. See, e.g., Hershkoff & Kahan, *supra* note 23, at 267, 277–86 (arguing that “the state’s role as a party to the corporate ‘contract’ cuts against having a court treat a charter or bylaw forum-term as an ordinary contract”); Lipton, *supra* note 10, at 600–26 (distinguishing the corporate contract from ordinary contracts); see also Raz, *supra* note 207, at 277 (observing that “corporate charters and bylaws are never described as ‘contracts’ in the Delaware [statute]”); cf. Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 393–99 (2018) (distinguishing LLC agreements from ordinary contracts due to the “pervasive role [judges and legislatures] play in defining the rights and obligations of the participants within [an LLC]”).

353. See *supra* notes 175–78 and accompanying text.

354. See *supra* note 186–94 and accompanying text.

355. See Johnson, *supra* note 175, at 1149–50 (“[A]s a matter of widespread convention and practice, modern legislatures confer (and occasionally withdraw) very broad powers and other attributes of legal personhood on corporations—and doing so greatly facilitates doing business in the corporate form.”).

356. See Bratton, *The “Nexus of Contracts” Corporation*, *supra* note 22, at 445 (“[Corporate law] reminds actors that corporate contracting rights have a lesser magnitude than the contracting rights attending most other business relationships.”); Johnson, *supra* note 175, at 1151 (“We should not confuse a longstanding custom or competitive ‘race’ among states to craft attractive, business-friendly laws with legal or historical necessity Rather, . . . corporations have been permitted to advance private interests and corporate law itself has been deregulatory, but only because that particular approach was thought to be socially beneficial.”); Padfield, *supra* note 18, at 348 (“[T]he legislative choice to move away from special charters and loosen other restrictions on corporations should not be equated with the demise of concession theory.”).

This broader perspective suggests that a legislative policy favoring private ordering and contractual freedom in state-created entities should not be conflated with the notion that a corporation's governing documents are merely a contract among private actors.³⁵⁷ Although "contract" is a useful metaphor, it obscures a more complex reality.³⁵⁸ It fails to provide a complete picture of corporations and the statutory framework in which they operate.³⁵⁹ Notwithstanding judicial rhetoric to the contrary, that statutory framework reveals the indelible imprint of the state.³⁶⁰

357. See, e.g., Shaner, *supra* note 57, at 1009 (noting that the DGCL's "emphasis on private ordering reinforces and perpetuates the idea that the charter and bylaws are 'contracts' that allow for parties to customize their provisions").

358. See, e.g., Hayden & Bodie *supra* note 142, at 546 ("[T]he corporate contract between shareholders and the corporation is a system of governance, not a contract. The metaphor of contract blurs the picture, rather than illuminating it."); Cox, *supra* note 163, at 264 ("[T]he shareholder's relationship to the corporation . . . is richer and potentially more fluid than a contract because of a set of governance arrangements and procedures that permeate corporate statutes and thereby define corporate organizations."); Shaner, *supra* note 57, at 1014 ("[U]sing the [contract] metaphor to apply contract doctrine to questions of charter and bylaw interpretation can lead courts to skip over the 'messy reality' (in other words, nuances) of organizational documents in favor of the ease of decision-making").

359. See *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 913 n.7 (Del. Ch. 2020) (Laster, V.C.) ("[N]otwithstanding . . . the widely embraced view of the corporation as a nexus of contracts (which I too regard as a helpful metaphor), the DGCL rests on a concept of the corporation that is grounded in a sovereign exercise of state authority."); Cox, *supra* note 163, at 264–65 ("The pervasive presence of mandatory rules and fiduciary duties that are applied ex post . . . erodes the descriptive power of the contract metaphor. No consent is present for a mandatory rule or fiduciary duty to apply."); Hershkoff & Kahan, *supra* note 23, at 280 ("[T]he state plays an unusual and large role in the 'contractual' regime constituted by charters, bylaws, and state law. State law, in particular statutory law, extensively regulates the permitted content of charters and bylaws . . . This degree of state involvement . . . cannot be reconciled with the ordinary principles of contract law . . .").

360. See Bratton, *The "Nexus of Contracts" Corporation*, *supra* note 22, at 442–43 (explaining that neither contract nor concession theory is "wholly accurate", that "both make legitimate observations" and that "[c]orporate doctrine accommodates both individual and sovereign roles of firms with much less apparent strain than the theoretical discourse suggests"); Hershkoff & Kahan, *supra* note 23, at 268 ("[A] corporation's charter and bylaws are no ordinary contracts. Rather, they are hybrid legal structures that provide a mechanism for collective choice in the context of substantial state regulation and straddle the public-private divide in ways that make them quite dissimilar from ordinary contracts."); see also Buccola, *supra* note 175, at 598 (emphasizing that the state plays a "central role not only in regulating shareholder-manager relations, but also in defining the nature of the corporate form itself"); Cox, *supra* note 163, at 279–81 (arguing that corporate law is public law because of the

In this respect, *Salzberg* reflects a growing divergence in corporate law between a judicial rhetoric committed to contractarianism and a legislative framework that reflects concessionary hallmarks of state power.³⁶¹ This divergence points to an irony as it applies to the FAA. As the U.S. Supreme Court has frequently explained, Congress enacted the FAA specifically to combat an ancient judicial hostility toward private arbitration.³⁶² Yet, in the case of the corporate contract, the positions of the judiciary and legislature have switched. The Delaware Supreme Court has with *Salzberg*, and its embrace of contractarianism, opened the door to the use of mandatory arbitration provisions in corporate governing documents.³⁶³ Meanwhile, the Delaware legislature has, through its statutory ban on arbitration, revealed its hostility toward that private procedure.³⁶⁴

Therefore, it would be unsurprising to see the Delaware legislature act again in order to reverse *Salzberg* or strictly narrow its Outer Band.³⁶⁵ To be sure, the state legislature does not face the same urgency as it

state's central role in configuring the features of the corporate form); Lipton, *supra* note 10, at 601 ("In many formulations, the state is understood to be a party to the corporate 'contract,' either explicitly or implicitly. This is because the states are heavily intertwined with corporations as a definitional matter.").

361. Cf. Manesh, *supra* note 352, at 393–98 (describing a similar divergence in LLC law between judicial rhetoric insisting "that LLCs are 'creatures of contract'" and a legal reality in which "LLCs embody a complex interaction of contract terms, statutory rules, and judicial doctrine").

362. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) ("Congress adopted the [FAA] in 1925 in response to a perception that courts were unduly hostile to arbitration Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (explaining that the FAA was intended to "revers[e] centuries of judicial hostility to arbitration agreements").

363. See *supra* notes 312–18 and accompanying text (explaining how *Salzberg* may be interpreted to permit a mandatory arbitration provision governing shareholder claims).

364. See *supra* notes 80 and 190 and accompanying text (explaining that the Delaware legislature's 2015 DGCL amendments statutorily prohibit corporations from compelling arbitration for any internal corporate claim).

365. Lest Delaware loses corporate charters to other states, the Delaware General Assembly may be reluctant to statutorily ban FFPs for section 11 Securities Act claims. See Manesh, *supra* note 1, at 310–11. The state legislature, however, may be more comfortable banning other kinds of provisions that restrict shareholder rights arising under federal securities law, betting that such provisions (e.g., fee-shifting) would likely be invalid under federal law anyhow. See *supra* notes 302–03 and accompanying text (explaining that federal securities laws' anti-waiver provisions could invalidate fee-shifting provisions).

did after *ATP*, when fee-shifting provisions proliferated.³⁶⁶ But even if corporations have not yet sought to adopt mandatory arbitration provisions for federal securities law claims, eventually some will. By amending the DGCL, the state's general assembly could statutorily confine the corporate contract to the bounds of the internal affairs doctrine and, thus, attempt to close the door that *Salzberg* has opened.³⁶⁷ In enacting such an amendment, the Delaware legislature would also provide another reminder that the corporate contract is unlike any ordinary contract.³⁶⁸ The corporate contract is the statutorily prescribed governing instrument of a state-created entity³⁶⁹ and, for that reason, beyond the grim orbit of the FAA.

CONCLUSION

Almost a decade before *Salzberg*, in *In re Revlon*,³⁷⁰ Vice Chancellor Laster indulged in dicta to encourage the use of the corporate contract to regulate the rights of shareholders to bring intra-corporate

366. See *supra* notes 336–41 and accompanying text (noting that arbitration provisions have not proliferated after *Salzberg* in the same way that fee-shifting provisions proliferated after *ATP*).

367. Consistent with the 2015 DGCL amendments, legislative intervention to reverse or limit *Salzberg* would be in Delaware's self-interest by ensuring that corporate law cases continue to be litigated in Delaware courts rather than private arbitration. Cf. David Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1, 23–26 (2016–2017) (explaining that the 2015 DGCL amendments “further[ed] Delaware's interest by ensuring that cases come to Delaware rather than elsewhere”); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1679 (2016) (explaining that 2015 DGCL amendments “preserve[d] the judicial component of Delaware corporate law”).

368. Cf. Lipton, *supra* note 59, at 19 (“Ironically, in amending its corporate law [in 2015] to circumscribe the use of litigation limits, Delaware itself has implicitly recognized the public character of corporate litigation.”).

369. See Hayden & Bodie, *supra* note 142, at 543 (“[C]harters and bylaws are instruments of governance. There is no need to layer the additional metaphor of “contract” on top of what are clearly mechanisms for managing relations between the parties.”); Hershkoff & Kahan, *supra* note 23, at 277 (“A corporation's charter and bylaws . . . are no ordinary contracts. They are instead a hybrid between an ordinary contract and state law—they are highly regulated constitutive documents that order collective decision-making.”); cf. Manesh, *supra* note 352, at 396 (arguing in the LLC context that “when courts enforce an LLC agreement, they are not enforcing an ordinary bargained-for agreement; they are instead enforcing the governing instrument of a statutory business entity, crafted in the shadow of statutory and judge-made rules”).

370. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010).

lawsuits.³⁷¹ That dicta, aimed squarely at the then-growing problem of deal litigation,³⁷² was widely credited for the proliferation of forum selection provisions governing internal affairs claims³⁷³—provisions that *Boilermakers* and the state legislature ultimately validated.³⁷⁴ Thus, in reversing the Chancery Court in *Salzberg*, the Delaware Supreme Court reversed the jurist who was responsible for the emergent use of the corporate contract to regulate the litigation rights of shareholders.

But even in that influential dicta from years earlier, Vice Chancellor Laster sounded notes of concession theory that the high court in *Salzberg* would ultimately disregard. Suggesting limits to the corporate contract, the vice chancellor observed in *Revlon* that even if the governing documents of a Delaware corporation stipulated an exclusive forum for intra-corporate litigation outside of Delaware, “Delaware courts would retain some measure of inherent residual authority so that *entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight.*”³⁷⁵ Linking the state’s authority to regulate internal corporate affairs to the state’s role in creating the corporation, the vice chancellor’s dicta in *Revlon* previewed the principles that would animate his *Salzberg* decision.³⁷⁶

In rejecting concession theory’s implications for the corporate contract and the internal affairs doctrine, the Delaware Supreme Court has in *Salzberg* blazed an uncertain path ahead. A range of shareholder rights arising outside of state corporate law may now be

371. *Id.* at 960 (observing that “corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes”).

372. *See id.* (noting that “greater judicial oversight of [plaintiff’s attorneys] will accelerate their efforts to populate their portfolios by filing in other jurisdictions”); *supra* note 60 and accompanying text (noting the trend of shareholder lawsuits filed outside of Delaware).

373. *See, e.g.,* Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multifirm Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31, 50 (2017) (“The dicta of *Revlon* sparked a revolution in IPO charters.”); Grundfest, *supra* note 60, at 358 (“The data clearly indicate that the rate at which publicly traded entities have been adopting forum selection clauses in organic documents increased significantly following *Revlon*.”).

374. *See supra* notes 61–68 and accompanying text (describing *Boilermakers*).

375. *Revlon*, 990 A.2d at 961 n.8 (emphasis added).

376. *See supra* Section II.B.2. Notably, this limit on freedom of contract suggested in *Revlon* was eventually codified as a part of the 2015 DGCL amendments, which bar a corporation’s governing documents from stipulating a forum for internal corporate claims that excludes the courts of Delaware. *See supra* note 80 (quoting DEL. CODE ANN. tit. 8, § 115) (noting that the 2015 DGCL amendments bar any corporate governance provision that would “prohibit bringing [an internal corporate claim] in the courts of [Delaware]”).

regulated by the corporate contract, and the applicability of the FAA to a corporation's governing documents may soon be tested. Where this path leads may ultimately depend on how the courts—and perhaps the U.S. Supreme Court—resolve the tension in state corporate law between contractarian judicial rhetoric and a legislative framework that reflects concession theory precepts.