

THE CORPORATE CONTRACT AND SHAREHOLDER ARBITRATION

MOHSEN MANESH†
JOSEPH A. GRUNDFEST‡

Longstanding U.S. Supreme Court precedents interpreting the Federal Arbitration Act (“FAA”) coupled with more recent corporate law decisions in Delaware have sparked concerns that public corporations may adopt arbitration provisions precluding shareholder lawsuits, particularly securities fraud class actions. In this Article, we show that these concerns are misplaced. It should be trivially easy for courts to conclude that an arbitration provision set forth in a corporate charter or bylaw is unenforceable against public company shareholders. Simply put, it is a matter of equity and the integral role that a state plays in chartering corporations.

Starting first with the corporate law of Delaware, where most public companies are incorporated, we explain that all corporate charter and bylaw provisions must be “twice tested”: they must be both legal and equitable to be enforceable. Applying the twice-tested framework, we then demonstrate that an arbitration provision precluding class actions would be inequitable because it would deny the vast majority of shareholders a remedy for violations of federal securities law, transfer wealth from smaller shareholders to the largest investors, insulate corporate managers and boards from accountability in a manner inconsistent with established state policy, and rupture the balance between federal and state regulation of public corporations.

Turning next to federal law, we demonstrate that Delaware’s ban on shareholder arbitration is not preempted, despite the Supreme Court’s expansive interpretation of the FAA. Here, our analysis starkly departs from prior scholarship. Rather than denying the contractual nature of a corporation’s governing documents, we embrace what the courts have repeatedly stated, that a corporation’s charter and bylaws are a binding contract between the corporation and its shareholders. However, we broaden the aperture to reveal another party to the corporate contract: the state that has chartered the corporation. This insight is critical with regard to interpretation of the FAA. The FAA applies only where there is an agreement to arbitrate, and there can be no such agreement where the chartering state has through its corporate law withheld its assent to arbitration. Thus, without state assent to shareholder arbitration, the essential precondition for application of the FAA is absent.

† Professor, University of Oregon School of Law.

‡ William A. Franke Professor of Law and Business (emeritus), Stanford Law School. The authors are immensely grateful for the comments provided to earlier drafts of this article by Ann Lipton, Elizabeth Pollman, Alex Platt, Albert Choi, and David Horton as well as the participants at the faculty workshop organized by the University of Oregon School of Law and the Ninth Annual Workshop for Corporate & Securities Litigation in Chicago, IL. All errors are the authors’ own. Copyright © 2023 by Mohsen Manesh & Joseph A. Grundfest.

INTRODUCTION	1107
I. FORUM PROVISIONS UNDER CORPORATE LAW	1116
A. Boilermakers	1117
B. Salzberg	1121
C. <i>From Forum Selection to Arbitration</i>	1126
II. SHAREHOLDER ARBITRATION UNDER CORPORATE LAW	1129
A. <i>Contractual Freedom Under Corporate Law and Its Limits</i>	1130
1. <i>Limits on Validity</i>	1131
2. <i>Limits on Enforceability</i>	1133
B. <i>Compelling Arbitration of State Corporate Law Claims</i>	1135
C. <i>Compelling Arbitration of Federal Securities Law Claims</i>	1137
1. <i>The Economics of Federal Securities Law Claims</i>	1137
2. <i>The Manifest Inequity of Arbitration</i>	1139
3. <i>The Narrowly Tailored Limits Created by Equity</i>	1146
III. CORPORATE LAW AND FAA PREEMPTION	1149
A. <i>The Preemptive Sweep of the FAA</i>	1149
B. <i>The Corporate Contract and the Chartering State</i> ...	1152
1. <i>The Chartering State's Assent Is Necessary</i>	1154
2. <i>The Chartering State May Withhold Assent to Arbitration</i>	1161
3. <i>Corporate Federalism Compels Federal Deference to the Chartering State</i>	1164
CONCLUSION	1167

INTRODUCTION

Longstanding decisions of the U.S. Supreme Court coupled with more recent developments in the corporate law of Delaware have sparked a renewed interest in the use of private arbitration as a mechanism to resolve, or perhaps discourage, shareholder lawsuits in public corporations.¹ Specifically, in an unbroken line of decisions spanning

¹ See, e.g., Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751 (2015); Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 L. & CONTEMP. PROBS. 107 (2012) [hereinafter Black, *Arbitration*]; Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L.J.F. 169, 170–71 (2018); Andrew K. Jennings, *Firm Value and Intracorporate Arbitration*, 38 REV. LITIG. 1 (2018); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate*

decades, the U.S. Supreme Court has steadily expanded the reach of the Federal Arbitration Act (FAA).² Section 2 of that statute mandates,

A written provision in . . . a 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.³

Applying the FAA, the Court has upheld contractual agreements compelling arbitration of claims made under both the Securities Act of 1933 (the “Securities Act”)⁴ and the Securities Exchange Act of 1934 (the “Exchange Act”),⁵ notwithstanding the anti-waiver provisions found in each of those statutes.⁶ Indeed, the Court has gone further, ruling that an agreement to arbitrate is enforceable even when made as part of an unnegotiated contract of adhesion,⁷ when pursuing claims through individualized, bilateral arbitration (rather than in a class proceeding) would make it uneconomical to vindicate those

Charters and Bylaws, 104 GEO. L.J. 583 (2016); Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223 (2021); Barbara Roper & Micah Hauptman, *A Settled Matter: Mandatory Shareholder Arbitration Is Against the Law and the Public Interest*, CONSUMER FED’N OF AM. 1 (Aug. 21, 2018), <https://consumerfed.org/reports/a-settled-matter-mandatory-shareholder-arbitration-is-against-the-law-and-the-public-interest> [<https://perma.cc/DJ2N-W2D4>]; Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873 (2019); 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); David H. Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201 (2015).

² 9 U.S.C. §§ 1–14.

³ 9 U.S.C. § 2.

⁴ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480, 484–85 (1989).

⁵ See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227–38 (1987).

⁶ 15 U.S.C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Securities Act] or of the rules and regulations of the Commission shall be void.”); 15 U.S.C. § 78cc(a) (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder . . . shall be void.”).

⁷ See, e.g., *McMahon*, 482 U.S. at 229–30, 238 (rejecting the argument that the FAA should not apply because a standard customer 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 v. Concepcion*, 563 U.S. 333, 336 (2011) (involving a standard customer agreement for cell phone service).

claims,⁸ and when applicable state law would otherwise hold the agreement to arbitrate to be unconscionable.⁹

Meanwhile, in Delaware, the state in which most publicly traded companies are incorporated, a pair of recent court decisions have expressly invoked contract law precepts to uphold the use in corporate charters and bylaws of forum selection provisions governing all shareholder litigation. First, in 2013, the Delaware Chancery Court in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*¹⁰ ruled that a forum selection bylaw may validly restrict the forum in which shareholders can bring state corporate law claims.¹¹ Building on that decision, in 2020, the Delaware Supreme Court in *Salzberg v. Sciabacucchi*¹² upheld a corporate charter provision restricting the forum in which shareholders may bring federal securities law claims.¹³ Thus, with *Boilermakers* and *Salzberg*, Delaware law today provides that the “corporate contract”—comprised of a corporation’s charter and bylaws—may stipulate the forum for all manner of shareholder lawsuits, whether those lawsuits arise under state corporate law or federal securities law.

Taken together, these twin Delaware precedents coupled with the U.S. Supreme Court’s FAA jurisprudence appear to lay the doctrinal foundation for using the corporate contract to waive shareholders’ right to bring class actions by imposing mandatory arbitration for all shareholder claims.¹⁴ After all, as the Court has explained, an arbitration provision is simply “a specialized kind of forum-selection clause”¹⁵ and, thus, readily akin to those that *Boilermakers* and *Salzberg* validated. And if a corporate charter and bylaws are a “contract” between the corporation and its shareholders, as *Boilermakers* and *Salzberg* insist, then the corporate contract, like all contracts, is subject to the FAA.¹⁶ Given the Court’s FAA jurisprudence, one

⁸ See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–38 (2013) (holding 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”).

⁹ See *Concepcion*, 563 U.S. at 341–44, 351 (ruling the FAA preempts the state law doctrine of unconscionability when that doctrine is applied in a manner that would “interfere[] with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”).

¹⁰ 73 A.3d 934 (Del. Ch. 2013).

¹¹ See *infra* Section I.A.

¹² 227 A.3d 102 (Del. 2020).

¹³ See *infra* Section I.B.

¹⁴ See Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 561–66 (2021) (explaining the relevance of recent Delaware law decisions on the question of shareholder arbitration).

¹⁵ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

¹⁶ See *infra* Section I.C.

might readily conclude that an arbitration provision set forth in the corporate contract would be “valid, irrevocable, and enforceable” against shareholders.¹⁷

The widespread use of arbitration provisions in the governing documents of public corporations would have profound implications for shareholder rights.¹⁸ Despite their flaws,¹⁹ shareholder class actions can serve vital deterrence and remedial functions in both corporate governance and capital markets.²⁰ Channeling this litigation into private arbitration that shareholders could only pursue on an individualized basis would largely neuter these functions and, thus, reshape the manner in which public corporations and securities mar-

¹⁷ 9 U.S.C. § 2.

¹⁸ See Lipton, *supra* note 1, at 632–36 (“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.”); Webber, *supra* note 1, at 266 (“[L]oss of the class action would mark a dramatic change to shareholder rights, to shareholder regulation more generally, and to the private attorney-general model that has served as a cornerstone of securities enforcement policy for decades.”); Jeff Mahoney, *Comment Letter Regarding Mandatory Arbitration Bylaw Proposal at Johnson & Johnson*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 1, 2019), <https://corp.gov.law.harvard.edu/2019/03/01/comment-letter-regarding-mandatory-arbitration-bylaw-proposal-at-johnson-johnson> [<https://perma.cc/R8QR-ZF6X>] (articulating the view of the Council of Institutional Investors that “shareowner arbitration clauses in public company governing documents represent a potential threat to principles of sound corporate governance that balance the rights of shareowners against the responsibility of corporate managers to run the business”).

¹⁹ To be sure, many academics have criticized shareholder class actions, arguing that in practice such suits do not compensate shareholders, but instead enrich plaintiffs’ attorneys. See, e.g., John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1538–47 (2006); A.C. Pritchard, *Halliburton II: A Loser’s History*, 10 DUKE J. CONST. L. & PUB. POL’Y 27, 37–38 (2015). But even these critics concede that shareholder class actions could potentially serve an important deterrence function. See Coffee, *supra*, at 1547–58; Pritchard, *supra*, at 51–52. Thus, whatever one believes about the compensatory role served by shareholder class actions, their wholesale elimination through forced arbitration would be an undesirable “nuclear option, eliminating both [their] deterrent value . . . and the waste they engender.” Pritchard, *supra*, at 53.

²⁰ See, e.g., Roper & Hauptman, *supra* note 1, at 41–46 (outlining the deterrence and remedial functions served by securities fraud class actions); Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 807–20 (2009) [hereinafter Black, *Eliminating*] (summarizing the debate over the compensatory and deterrence functions of securities fraud class actions and noting that “[a]cademic dismissal of the compensatory function sharply contrasts with the attitude of Congress and SEC”).

kets operate.²¹ In short, “[t]he future of shareholder rights may be at stake.”²²

This Article peers into that future and concludes that, with respect to shareholder arbitration at least, the future should be no different than today. It should be trivially easy for courts to conclude that an arbitration provision set forth in the charter or bylaws of a public corporation is unenforceable against shareholders. This conclusion is true notwithstanding *Salzberg, Boilermakers*, or the FAA. Simply put, it is a matter of equity and the integral role that a state plays in chartering corporations.

At root, every corporation is a creation of state law.²³ A corporation’s attributes and, indeed, its very existence, are dependent on the corporation law of the state that has chartered it. Thus, over two centuries of American jurisprudence has recognized that when a state

²¹ See, e.g., Black, *Eliminating*, *supra* note 20, at 832 (“Eliminating class arbitration would both seriously weaken investors’ ability to recover and reduce the deterrent effect of the private remedy.”); Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 635–37 (2018) (“While few . . . defend strike suits . . . , the danger of closing all the courthouse doors is that injustice go undetected and unpunished. . . . [E]liminating all forms of representative litigation would also eliminate valuable cases that generate compensation to injured shareholders and deter future managerial wrongdoing.”); Clopton & Winship, *supra* note 1, at 169–71 (“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”); Jessica Erickson, *Investing in Corporate Procedure*, 99 B.U. L. REV. 1367, 1405–06 (2019) (“[S]hrinking the number of potential claimants reduces the overall deterrent effects of shareholder litigation, hurting large and small shareholders alike. If corporate managers think that their potential liability has plummeted, they may be more likely to enrich themselves at shareholders’ expense.”); Raz, *supra* note 1, 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”); Roper & Hauptman, *supra* note 1, at 32 (“If investors were forced to resort to arbitration . . . [it] would necessarily translate to fewer frauds’ being investigated, as well as fewer recoveries by investors for lesser amounts. . . . [It] would also significantly weaken deterrence by dramatically limiting public accountability for misconduct.”); Shapira, *supra* note 1, at 876 (“[L]itigation is a key source of impactful media coverage of corporate behavior. Allowing mandatory arbitration will reduce these ‘law-as-source’ benefits, thereby severely limiting the media’s role in corporate governance.”); Webber, *supra* note 1, at 264–65 (“[L]oss of the class action [to mandatory arbitration] may eliminate any deterrent or compensatory tools for smaller actions. These losses will tend to disproportionately harm individual investors, who are less diversified and therefore less able to withstand them.”). *But see* Jennings, *supra* note 1, at 8 (arguing that shareholder arbitration provisions can be designed to “serve shareholders’ fundamental interest in increasing firm value”); Scott & Silverman, *supra* note 1, at 1190–91 (“Securities class actions are . . . a serious problem for the attractiveness of the U.S. public capital markets. . . . Arbitration . . . is a means of resolving stockholder disputes that does not present the same concerns of high cost and uncertain benefit inherent in securities class actions.”).

²² Clopton & Winship, *supra* note 1, at 170–71.

²³ See *infra* Section III.B.1.

grants a corporate charter, the state becomes a party to the corporate contract that governs the legal relationships between the corporation, its directors, and its shareholders. The state is a party to the corporate contract precisely because the state's assent was required to bring the corporation into existence. As a party to the corporate contract, the chartering state defines the terms of its assent through the corporate law under which a charter is granted. Consequently, where a chartering state, through its corporate law, bars the enforcement of an arbitration provision in the governing documents of the state's corporate creations, there is no agreement—no “contract”—to arbitrate.²⁴ There is no agreement to arbitrate because the chartering state has, through its corporate law, withheld its assent to arbitration.

Applying this analysis to the corporate law of Delaware, a mandatory individualized arbitration provision would be unenforceable in any situation involving the shareholders of a public corporation. Such a provision would be unenforceable because, under Delaware corporate law's “twice-tested” framework,²⁵ forcing public company shareholders into individualized, bilateral arbitration would be inequitable, even if it were lawful. And because Delaware's assent is necessary for the validity of every provision in every charter or bylaw of every corporation that the state charters, the governing documents of a Delaware corporation cannot compel any form of shareholder arbitration that Delaware law prohibits. The governing documents cannot compel arbitration because Delaware, as a party to the corporate contract, has, through its corporate law, withheld its consent to arbitration. This analysis applies not only to any provision compelling shareholder arbitration of state corporate law claims,²⁶ but to any provision compelling shareholder arbitration of federal securities law claims.²⁷

Moreover, this analysis applies notwithstanding the preemptive effect of the FAA. As made clear by the Supreme Court's arbitration decisions, the FAA preempts any conflicting state laws that would preclude or limit the enforceability of an arbitration agreement.²⁸ Mindful of these decisions, prior scholarship has attempted to place state corporate law outside of the preemptive reach of the FAA by reasoning that a corporation's governing documents are fundamentally different than an ordinary commercial agreement and, therefore, a corporation's charter and bylaws are not a “contract” within the

²⁴ See *infra* Section III.B.2.

²⁵ See *infra* Section II.A.2.

²⁶ See *infra* Section II.B.

²⁷ See *infra* Section II.C.

²⁸ See *infra* Section III.A.

meaning of the FAA.²⁹ Such reasoning, however, has been substantially undercut by decisions like *Salzberg* and *Boilermakers*.

By contrast, the analysis laid out in this Article is fundamentally different from prior scholarship. Rather than denying the contractual nature of a corporation's governing documents, this Article accepts what the corporate case law unequivocally says: A corporation's charter and bylaws *are a binding contract* between the corporation and its shareholders. Yet, by broadening the aperture to reveal the integral role of the chartering state as a party to the corporate contract, this Article shows that a state corporate law rule barring shareholder arbitration is not preempted by the FAA.

Such a state law rule would not run afoul of the FAA because the FAA applies only where there is an *agreement to arbitrate*.³⁰ Where there is no such agreement—where an integral contract party has withheld its consent to arbitration—the FAA “never enters the picture.”³¹ As applied to the corporate contract, where the chartering state has through its corporate law withheld its consent to shareholder arbitration, there is no agreement to arbitrate. To interpret the FAA any differently would be to coerce state assent to arbitration where the state has in fact objected to it. “Arbitration . . . is a matter of consent, not coercion,”³² and in the context of the corporate contract that principle is no different.

Notably the analysis of this Article also accords with the Supreme Court's most recent arbitration ruling, *Viking River Cruises v. Moriana*.³³ In *Viking River Cruises*, the Court held that the FAA preempts a state law permitting a private plaintiff to bring claims against her former employer that she had previously agreed to arbitrate.³⁴ Although the state law characterized the plaintiff's claims as a type of state enforcement action, with the plaintiff merely acting as the state's agent,³⁵ the Court in *Viking River Cruises* held that such claims are nonetheless subject to the arbitration agreement made

²⁹ See *infra* notes 259–60 and accompanying text.

³⁰ See 9 U.S.C. § 2 (requiring an arbitration provision “in . . . a contract”); see also *infra* notes 305–10 and accompanying text (noting that the FAA's rigorous enforcement of arbitration provisions is contingent upon party consent to arbitration).

³¹ See David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 673 (2020) [hereinafter Horton, *Infinite Arbitration Clauses*] (“Without assent to arbitrate, the FAA never enters the picture.”).

³² *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

³³ 142 S. Ct. 1906 (2022).

³⁴ See *id.* at 1924–25.

³⁵ See *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 149–52 (Cal. 2014) (holding that the FAA did not preempt claims brought under state labor law because claimant acted as an agent of the state).

between the plaintiff and her former employer.³⁶ As this Article explains, the corporate contract is fundamentally different from the employment contract at issue in *Viking River Cruises*.³⁷ Unlike a contract between an employee and employer, the state is a party to the corporate contract governing each corporation that the state charters. Thus, where a state, through its corporate law, prohibits provisions compelling shareholder arbitration, the state is not regulating a private contractual agreement made by others. Instead, the state is stipulating the terms of its assent to corporate existence. Consequently, where state corporate law prohibits a provision in the corporate contract compelling shareholder arbitration, the arbitration provision never comes into existence: The provision is void *ab initio* for lack of assent.

In sum, despite *Boilermakers*, *Salzberg*, and the Supreme Court's expansive interpretation of the FAA, any attempt to impose arbitration on the shareholders of a public corporation—in the vain hopes of insulating corporate officers or directors from liability—faces dim legal prospects, at least under the corporate law of Delaware. To be sure, other states may choose to go in a different direction. A state like Nevada,³⁸ for example, might through its statutory or judge-made law choose to authorize an intra-corporate arbitration provision in the governing documents of the corporations it charters.³⁹ The enforceability of such a provision would still raise significant questions under federal law,⁴⁰ which this Article does not address.

³⁶ See *Viking River Cruises*, 142 S. Ct. at 1924–25.

³⁷ See *infra* notes 318–23 and accompanying text.

³⁸ See, e.g., Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 938–40 (2012) (describing how Nevada competes with Delaware for corporate charters by offering a legal regime that limits the liability of directors and officers).

³⁹ In fact, at least three court rulings have already determined that the bylaws of a publicly traded real estate investment trust, organized under the laws of Maryland, may validly compel shareholder arbitration. See Allen, *supra* note 1, at 782–88; Lipton, *supra* note 1, at 584–85.

⁴⁰ For example, some have argued that the Court's earlier precedents, upholding arbitration provisions notwithstanding the anti-waiver provision of the federal securities statutes, do not extend to a dispute between an issuer and an investor, where the relevant arbitration provision appears in the issuer's governing documents. See, e.g., Black, *Eliminating*, *supra* note 20, at 828–35; Roper & Hauptman, *supra* note 1, at 20–21. In addition, some have argued that the Private Securities Litigation Reform Act of 1995 (PSLRA) reflects Congress's intent that federal securities class actions should be litigated in federal courts. See, e.g., Black, *Arbitration*, *supra* note 1, at 128; Roper & Hauptman, *supra* note 1, at 24–25. *But 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/Z2X5-GWVC>] (arguing that “the PSLRA was intended to rein in abusive securities class actions, not to exalt them above all other forms of dispute resolution”);

But federal law issues aside, under the corporate law of Delaware, which charters the majority of public corporations,⁴¹ such a provision would not pass muster. That reality, combined with the fierce pushback that any public company would face from shareholders and policymakers⁴² and the dubious benefits that would be obtained from imposing arbitration on shareholders, should be enough to make almost any corporation chary to adopt an arbitration provision in its governing documents.⁴³

This Article proceeds in three parts. Part II lays out the law governing intra-corporate forum provisions that has emerged in recent years, specifically in the landmark Delaware court decisions *Boilermakers* and *Salzberg*. Given this emergent law, this Article then turns to consider its potential applicability to shareholder arbitration.

The enforceability of an arbitration provision governing shareholder claims raises issues of both state corporate law and federal arbitration law. Part III assesses the state law issues. Applying the corporate law of Delaware, this Part demonstrates that an arbitration provision governing intra-corporate disputes would be unenforceable, particularly as applied to public company shareholders.

Having established the unenforceability of arbitration under state corporate law, Part IV then turns to the federal law issues, specifically the interaction between state corporate law and the FAA. While the

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018) (“In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the [FAA] and other federal statutes. In fact, this Court has rejected *every* such effort to date . . .”).

⁴¹ See, e.g., Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2113 (2018) (citing data showing that 3,964 of 7,061 public companies are incorporated in Delaware); Lucian Arye Bebhuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 567 (2002) (finding similar results as of 1999).

⁴² See Manesh, *supra* note 14, at 570 (“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.”).

⁴³ See Allen, *supra* note 1, 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, *Arbitration*, *supra* note 1, at 109, 118–20 (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”); Jennifer J. Johnson & Edward Brunet, *Critiquing Arbitration of Shareholder Claims*, 36 SEC. REG. L.J. 1 (2008) (describing the “essentially lawless” nature of arbitration, which makes arbitration results “unpredictable and unprincipled”); Manesh, *supra* note 14, at 566–70 (outlining the pragmatic reasons why corporate managers may be skeptical of attempting to impose arbitration on shareholders and observing that “[e]very time in recent history when a shareholder has submitted a proposal to a public company to adopt mandatory shareholder arbitration, the company’s management has opposed it”).

FAA has broad preemptive effect against contrary state laws, this Part explains that the FAA's preemptive sweep does not reach a state corporate law rule barring shareholder arbitration. The FAA is inapplicable because the state's lack of assent prevents the formation of a binding agreement to arbitrate. The FAA thus becomes irrelevant because the statutory precondition of an agreement to arbitrate is not satisfied.

I

FORUM PROVISIONS UNDER CORPORATE LAW

Although commercial contracts have long included forum selection provisions that stipulate the forum in which parties must resolve any dispute arising from their agreement, such provisions were seldom found in the governing documents of corporations until recently.⁴⁴ But things changed in 2010.⁴⁵ That year, in the dicta of *In re Revlon*, the Delaware Chancery Court unsubtly encouraged corporations to make use of forum provisions to regulate shareholder litigation.⁴⁶

With the Chancery Court's imprimatur, forum provisions proliferated in corporate bylaws and charters.⁴⁷ Initially, these provisions purported to stipulate the forum in which shareholders must bring any *state corporate law* claims.⁴⁸ Soon thereafter, corporations began to use forum provisions to restrict the forum in which shareholders could bring *federal securities law* claims.⁴⁹ Both types of forum provisions

⁴⁴ See, e.g., Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 487 (2016) (noting that choice-of-forum clauses were historically deemed unnecessary).

⁴⁵ See Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 358–59 (2012) [hereinafter Grundfest, *History and Evolution*] (providing empirical evidence of the uptick in corporate forum provisions starting in 2010); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL L. STUD. 31, 50 (2017) (same).

⁴⁶ *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 n.8 (Del. Ch. 2010) (Laster, V.C.) (“[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”).

⁴⁷ See, e.g., Grundfest, *History and Evolution*, *supra* note 45, 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*.”); Romano & Sanga, *supra* note 45, at 50 (“The dicta of *Revlon* sparked a revolution in IPO charters.”).

⁴⁸ See Grundfest, *History and Evolution*, *supra* note 45, at 381–83 (describing the scope of the corporate forum provisions that proliferated immediately after the *Revlon* dicta).

⁴⁹ See Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, 75 BUS. LAW. 1319, 1322 (2020) [hereinafter Grundfest, *Limits of Delaware Corporate Law*] (describing the history and scope of the federal forum provisions).

were ultimately upheld by the Delaware courts in *Boilermakers* and *Salzberg*.

This Part lays out the corporate law governing forum provisions established by these two landmark decisions. Section I.A describes *Boilermakers*, and Section I.B describes *Salzberg*. Synthesizing these twin precedents, Section I.C explains how the emergent corporate law upholding forum provisions might be interpreted to provide a doctrinal basis for imposing mandatory arbitration of all shareholder claims.

A. Boilermakers

In the years leading up to the consequential *Revlon* dictum, Delaware courts had increasingly witnessed enterprising plaintiffs' lawyers bringing representative shareholder lawsuits targeting Delaware corporations and making Delaware state corporate law claims, but filed in courts outside of Delaware.⁵⁰ By bringing these lawsuits out-of-state, the plaintiffs' lawyers aimed to avoid the Delaware courts' perceived hostility toward plaintiffs' sometimes meritless claims.⁵¹ Filing the suit outside of Delaware, in a court untrained in the corporate law of Delaware, could increase leverage over corporate defendants to extract a nuisance value settlement.⁵² Making mat-

⁵⁰ See, e.g., John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1353–80 (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, 475–86 (2015) (discussing the rise in and problems created by merger litigation); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 480–83 (2014) (documenting the prevalence of lawsuits filed outside of Delaware); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 334–37 (2013) (summarizing data regarding out-of-state shareholder lawsuits brought against Delaware corporations).

⁵¹ See Armour et al., *supra* note 50, at 1367–70 (identifying “the Delaware courts’ increasingly skeptical view of the plaintiffs’ bar” as a primary cause of “the out-of-Delaware [litigation] trend”); Grundfest & Savelle, *supra* note 50, at 340–41 (describing the perceived hostility of Delaware courts against the plaintiff’s bar); Myers, *supra* note 50, at 494–95 (“Delaware courts have been accused of hostility toward shareholder claims, and pressing claims in courts that are more hospitable may make the claims more valuable . . .”); Andrew Holt, *Protecting Delaware Corporate Law: Section 115 and Its Underlying Ramifications*, 5 AM. U. BUS. L. REV. 209, 220 (2016) (“Plaintiffs’ lawyers know that a claim . . . that might otherwise be dismissed by the [Delaware] Court of Chancery may gain traction in a non-Delaware forum.”); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 143 (2011) (“The out-of-Delaware litigation strategy appears to be, first, an effort by plaintiffs’ counsel to skirt attempts by the Delaware judiciary to more closely monitor agency costs associated with shareholder lawsuits . . .”).

⁵² See Armour et al., *supra* note 50, at 1365 (quoting a practitioner’s perspective that “corporate lawsuits have ‘greater settlement value outside of Delaware’ due to greater variation in possible outcomes”); Grundfest & Savelle, *supra* note 50, at 342 (describing

ters worse, many corporate defendants faced multiple lawsuits making essentially identical allegations, but filed in different jurisdictions by competing plaintiffs' lawyers, each seeking to wrest control of the litigation and its likely settlement.⁵³ The resulting dynamic benefitted the plaintiff's bar, but at the expense of corporations and, ultimately, their shareholders, the plaintiff's bar's nominal clients.⁵⁴

Revlon's endorsement of forum selection provisions was aimed squarely at these out-of-state lawsuits targeting Delaware corporations.⁵⁵ Channeling these shareholder suits into the state courts of Delaware would avoid the inefficiencies of multi-forum litigation.⁵⁶ Moreover, it would ensure that the forum with the greatest interest and expertise in the substantive law would adjudicate the share-

the plaintiff's bar's "desire to secure a tactical advantage . . . by having a case resolved before a [non-Delaware] judge less familiar with the relevant law so as to generate increased delay or uncertainty that can be used to gain leverage in settlement negotiations"); Holt, *supra* note 51, at 220 ("[A] foreign court unfamiliar with Delaware law may permit a plaintiff's case to continue even though it would have been tossed out by an experienced corporate law judge in Delaware."); Myers, *supra* note 50, at 495 ("An inexperienced court . . . might . . . be more likely to approve a large a [sic] fee award or misapply incorporation state law. . . . These effects would increase the value of claims to a plaintiff's attorney."); Quinn, *supra* note 51, at 155 ("[T]he prospect that a state court judge unfamiliar with the application of Delaware's corporate code may fail to dismiss weak claims at an early stage of the litigation creates potential settlement value for plaintiff counsel.").

⁵³ See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 943–44 (Del. Ch. 2013) (describing the growing problem of multi-forum intra-corporate litigation); *In re Allion Healthcare Inc. S'holders Litig.*, No. 5022-CC, 2011 WL 1135016, at *4–5 (Del. Ch. Mar. 29, 2011) (same); Cain et al., *supra* note 21, at 620–21 (reporting frequency of multi-jurisdictional deal litigation); Myers, *supra* note 50, at 484–88 (documenting the prevalence of multi-jurisdictional litigation in both merger and option backdating cases); Grundfest & Savelle, *supra* note 50, at 341 ("[P]laintiffs' counsel may file multiple lawsuits as part of a rational business model designed 'to get a seat at the table . . . because it gives them a better shot at the action and better leverage in terms of fees.'"); Quinn, *supra* note 51, at 146 ("By controlling foreign litigation, plaintiffs' counsel place themselves in a position to assert leadership positions in settlement discussions and thus secure access to attorneys' fees . . .").

⁵⁴ See Grundfest & Savelle, *supra* note 50, at 346–47 ("[T]he trend toward litigating intra-corporate claims in foreign forums imposes clear costs on corporations and their stockholders. Only plaintiffs' counsel appear to benefit systematically from the complexities generated by foreign-filed intra-corporate litigation . . ."); Myers, *supra* note 50, at 471, 500 ("Multi-forum litigation promises shareholders no benefits and threatens them with considerable costs Plaintiffs' attorneys—not shareholders—select where to file fiduciary claims . . . and the interests of plaintiffs' attorneys can diverge substantially from the interests of shareholders.").

⁵⁵ See Grundfest, *History and Evolution*, *supra* note 45, at 373–78 (linking the migration of lawsuits out of Delaware to the spread of intra-corporate forum selection provisions in Delaware corporations' governing documents); Winship, *supra* note 44, at 500–02 (same).

⁵⁶ See Grundfest & Savelle, *supra* note 50, at 351–52 (describing intra-corporate forum selection provisions as "de facto certification provisions that automatically refer matters governed by laws of the chartering state to the courts of the chartering state").

holder's claims.⁵⁷ Finally, it would enable the Delaware courts to retain control over the interpretation, application, and development of the state's corporate law and, thus, regulatory oversight of the corporations that the state had chartered.⁵⁸

When these state-law forum selection provisions were first challenged in *Boilermakers*, the Delaware Chancery Court had little difficulty upholding them as a facial matter.⁵⁹ To arrive at this conclusion, the court relied heavily on contract law precepts. Reasoning that a corporation's charter, together with its bylaws, constitutes a "binding broader contract among the directors, officers, and stockholders," *Boilermakers* ruled that "a forum selection [bylaw] . . . is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses."⁶⁰

In one respect, it was unsurprising that the court in *Boilermakers* would invoke contractual rhetoric. Jurists have long described a corporation's charter and bylaws as a "contract" between the corporation and its shareholders.⁶¹ But such judicial references were typically made by Delaware courts to justify applying principles of contract interpretation to the provisions in a corporation's governing docu-

⁵⁷ See Grundfest & Savelle, *supra* note 50, at 352–54 (arguing that having intra-corporate disputes resolved by Delaware courts implements the relevant policies of Delaware as the state with the dominant interest); Holt, *supra* note 51, at 218 (noting Delaware's unique and sophisticated corporate jurisprudence and its interest in maintaining oversight over the application of its laws); Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1950–51 (2013) (noting several advantages to permitting charter or bylaw forum selection provisions including consistent interpretation of Delaware law by Delaware courts and greater certainty in outcomes of such cases).

⁵⁸ See Grundfest & Savelle, *supra* note 50, at 352–54 (arguing that having intra-corporate disputes resolved by Delaware courts promotes certainty, predictability, and uniformity of result); Holt, *supra* note 51, at 218 ("Delaware courts should be able to reel in corporate actors attempting to escape Delaware oversight for nefarious reasons."); Thomas, *supra* note 57, at 1951 ("[B]y limiting shareholder litigation to (mostly) Delaware, Delaware law will be consistently interpreted by the Delaware courts and not by judges from other states."); see also *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009) (Chandler, C.) ("This case . . . raises important issues regarding the standards governing directors and officers of Delaware corporations, and Delaware has an ongoing interest in applying our law to director conduct . . ."); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958 (Del. Ch. 2007) (Strine, V.C.) ("Venerable authority recognizes that a chartering state's interest in promoting an efficient and predictable corporation law can be undercut if other states do not show comity by deferring to the courts of the chartering state when a case is presented that involves the application of the chartering state's corporation law.").

⁵⁹ See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950–51 (Del. Ch. 2013) (ruling that, "[a]s a matter of easy linguistics," Delaware forum provisions for "internal affairs" lawsuits are permissible within DGCL 109(b)).

⁶⁰ *Id.* at 939–40.

⁶¹ See *infra* note 271 and accompanying text.

ments.⁶² *Boilermakers* took the contract rhetoric further in two respects.

First, *Boilermakers* invoked contract law principles not to interpret the text of the corporation's governing documents, but instead to justify the governing documents' binding effect on the corporation's shareholders.⁶³ Thus, the court reasoned that because of "the contractual nature of the stockholders' relationship with the corporation"⁶⁴ and "precisely because forum selection bylaws are part of a larger contract between the corporation and its stockholders,"⁶⁵ such provisions are "valid," "binding," and "enforceable" against the corporation's shareholders.⁶⁶

Second, to justify the enforceability of the corporate contract against shareholders, *Boilermakers* invoked a theory of implied shareholder assent.⁶⁷ Though shareholders may never directly interact with a corporation or read the terms of its governing documents, *Boilermakers* reasoned that shareholders manifest their assent to

⁶² 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.").

⁶³ See 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"); George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 636–37 (2016) ("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 contracts."); Megan Wischmeier Shaner, *Interpreting Organizational "Contracts" and the Private Ordering of Public Company Governance*, 60 WM. & MARY L. REV. 985, 989–91 (2019) (arguing that "[o]rganizational documents and contracts are not mirror images" and criticizing the simplistic use of contract interpretation principles to interpret corporate governing documents).

⁶⁴ *Boilermakers*, 73 A.3d at 954.

⁶⁵ *Id.* at 957.

⁶⁶ *Id.* at 939, 958.

⁶⁷ See Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 376, 380 (2018) (describing it as a "theory of implied consent"); Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 164–66 (2014) (describing it as "the doctrine of corporate consent"); see also Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate "Contracts"*, 93 WASH. L. REV. 265, 282–84 (2018) (criticizing the theory of shareholder assent articulated in *Boilermakers*); Lipton, *supra* note 1, at 616–26 (same).

those terms through the act of buying the corporation's stock.⁶⁸ Applying this theory, the court thus concluded it was irrelevant that the forum selection bylaw at issue was unilaterally adopted by the corporation's board without a vote of the shareholders.⁶⁹ In purchasing the corporation's stock, shareholders had already assented to a corporate contract that, from the outset, authorized the corporation's board to unilaterally adopt bylaws enforceable against shareholders.⁷⁰

With these two doctrinal moves, *Boilermakers* strongly suggested that the corporate contract is indistinguishable from an ordinary contract. The terms of the corporate contract are binding on shareholders because shareholders have assented to them. Building on this doctrinal foundation, the Delaware Supreme Court in *Salzberg* further elevated contractual rhetoric to affirm corporate forum selection provisions governing shareholder lawsuits making federal securities law claims.

B. Salzberg

Although the forum selection provisions affirmed by *Boilermakers* effectively dealt with the problem of Delaware state corporate law claims filed outside of Delaware,⁷¹ corporate defendants continued to face a similar issue with shareholder class action lawsuits making federal securities law claims.⁷² Such claims may be

⁶⁸ See *Boilermakers*, 73 A.3d at 940 (“[S]tockholders who invest in [a] corporation[] assent to be bound [to the corporation’s certificate and bylaws] when they buy stock . . .”); *id.* at 958 (ruling that investors “contractually assent” to be bound to the corporate contract “when an investor buys stock in a . . . corporation”).

⁶⁹ See *id.* at 954–56 (“[W]hen stockholders have authorized a board to unilaterally adopt bylaws, it follows that the bylaws are not contractually invalid simply because the board-adopted bylaw lacks the contemporaneous assent of the stockholders.”).

⁷⁰ See *id.* at 956–58 (“Where, as here, the certificate of incorporation has conferred on the board the power to adopt bylaws, and the board has adopted a bylaw . . . the stockholders have assented to that new bylaw being contractually binding.”).

⁷¹ See Cain et al., *supra* note 21, at 621 (providing empirical evidence of a decline in shareholder lawsuits filed outside of Delaware starting in 2013).

⁷² See *id.* at 632 (providing empirical evidence for the conclusion that a “significant number of merger lawsuits that . . . might once have [been] filed . . . in Delaware have instead been initiated in federal court . . . brought as [Exchange Act] Rule 14a-9 disclosure cases . . .”); Joseph A. Grundfest, *Federal Forum Provisions: Historical Development and Future Evolution* 3–4 (Rock Ctr. for Corp. Governance, Stanford L. Sch., Working Paper No. 242, 2019), <https://securities.stanford.edu/academic-articles/20191202-federal-forum-provisions-historical-development-and-future-evolution.pdf> [<https://perma.cc/9NY7-3AQN>] [hereinafter Grundfest, *Federal Forum Provisions*] (providing empirical evidence of the migration of shareholder Securities Act class actions from federal courts to state courts starting in 2015); Michael Klausner, Jason Hegland, Carin LeVine & Jessica Shin, *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 BUS. LAW. 1769, 1775 (2020) (same).

brought pursuant to the Securities Act or the Exchange Act.⁷³ Federal courts, however, enjoy exclusive jurisdiction over Exchange Act claims.⁷⁴ By contrast, the Securities Act provides concurrent jurisdiction to both state and federal courts to hear cases, with no right for defendants to remove state court actions to federal court.⁷⁵

In the 1990s, Congress twice enacted reforms aimed at addressing perceived abuses by the plaintiff's bar of securities class actions.⁷⁶ Those reforms sought to channel securities class actions to federal courts and impose more rigorous procedural rules at the federal level.⁷⁷ Despite these reforms, the Supreme Court ruled in *Cyan v. Beaver County* that state courts retained concurrent jurisdiction to hear Securities Act lawsuits.⁷⁸

As a consequence of *Cyan*, plaintiffs' attorneys could continue to file Securities Act class actions in state courts and, thereby, avoid the procedural reforms imposed at the federal level.⁷⁹ Predictably, the number of Securities Act class actions filed in state courts sharply increased,⁸⁰ including state court actions that had a parallel federal action.⁸¹ With no procedural mechanism to consolidate or coordinate these parallel actions, corporate defendants faced essentially identical lawsuits in both federal and state courts alleging the same underlying Securities Act violation.⁸² The resulting dynamic made Securities Act litigation more complex and costly for corporate defendants and, ulti-

⁷³ See *infra* notes 167–72 and accompanying text (describing the key liability provisions of federal securities law).

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

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

⁷⁶ See *Cyan*, 138 S. Ct. at 1067–68 (summarizing the legislative history).

⁷⁷ See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81–84 (2006) (describing the legislative policies behind the Private Securities Litigation Reform Act of 1995 and Securities Litigation Uniform Standards Act of 1998).

⁷⁸ *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.”).

⁷⁹ See Klausner et al., *supra* note 72, at 1770–74 (raising significant procedural differences between state and federal proceedings, including pleading standards governing motions to dismiss, timing of discovery in relation to motion to dismiss rulings, and the coordination of parallel state and federal cases).

⁸⁰ See *id.* at 1774–75 (providing data showing that the number of Section 11 cases filed only in state courts increased from 11 in 2017 to 45 in 2019); see also *Salzberg v. Sciabacucchi*, 227 A.3d 102, 114–15 (Del. 2020) (noting a similar uptick).

⁸¹ See Klausner et al., *supra* note 72, at 1774–75 (providing data showing that the portion of Section 11 cases involving parallel state and federal court lawsuits increased from 17% before *Cyan* to 49% after *Cyan*); see also *Salzberg*, 227 A.3d at 114–15 (noting a similar uptick).

⁸² See *Salzberg*, 227 A.3d at 115 (“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 72, at 1774–75 (noting the increase in parallel state and federal court lawsuits based on the same alleged misstatement or omission).

mately shareholders.⁸³ Again, the only beneficiary appeared to be the plaintiff's bar, whose class action suits could be settled for nuisance value and a payout of lucrative attorney's fees.⁸⁴

To address this familiar problem, corporations turned to a familiar solution: forum selection provisions.⁸⁵ In 2017, before undertaking an initial public stock offering, three corporations included in their corporate charter a provision stipulating that any shareholder suit making Securities Act claims must be brought in federal rather than state court.⁸⁶ Channeling Securities Act claims into a federal forum would avoid the wasteful costs that corporate defendants faced in defending parallel lawsuits in state courts, while still allowing meritorious claims to proceed in a federal forum.⁸⁷ Moreover, it assured that corporate defendants would not risk facing inconsistent rulings in parallel federal and state actions.⁸⁸

In upholding the enforceability of these federal forum provisions against shareholders, the Delaware Supreme Court in *Salzberg*, as in *Boilermakers* before, expressly invoked contract law rhetoric.⁸⁹ But

⁸³ 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 72, 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.”).

⁸⁴ See Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1390–92.

⁸⁵ See Grundfest, *Federal Forum Provisions*, *supra* note 72, at 16 (“[Federal forum provisions] would provide an easy mechanism to direct Securities Act litigation to federal court where the probability of dismissal is higher, and . . . would also eliminate the litigation costs associated with the jurisdictional jockeying that arises when plaintiffs file claims in federal and state court.”); Manesh, *supra* note 14, at 523 (“[Federal forum provisions] offered a simple state-law fix to the federal-law problem that *Cyan* created.”).

⁸⁶ See *Salzberg*, 227 A.3d at 111–12 (providing factual background to the litigation).

⁸⁷ See Grundfest, *Federal Forum Provisions*, *supra* note 72, at 13 (“Federal Forum Provisions provide that federal Securities Act claims . . . will . . . be litigated in federal court where the judiciary has a comparative advantage in resolving those claims.”); Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1322 (“[Federal forum provisions] redirect complex Securities Act claims to their traditional federal forum, which has a comparative advantage in resolving Securities Act claims. This efficient allocation of judicial responsibility is consistent with the neutral principle that litigation is best resolved by courts with the greatest expertise in addressing the underlying disputes.”); Manesh, *supra* note 14, at 523 (“By channeling section 11 claims into federal court, [federal forum provisions] 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.”).

⁸⁸ 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”).

⁸⁹ See, e.g., *id.* 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”).

the forum provisions at issue in *Salzberg* presented the court with an additional complication not present in *Boilermakers*.⁹⁰ Specifically, the forum provisions upheld in *Boilermakers* restricted the rights of shareholders to bring *state corporate law claims*—claims subject to the internal affairs doctrine and therefore governed by the corporate law of Delaware.⁹¹ By contrast, the federal forum provisions at issue in *Salzberg* purported to restrict the rights of shareholders to bring *federal securities law claims*.⁹² Because rights arising under federal securities law lie beyond the internal affairs doctrine, several leading scholars had argued that the corporate contract created by state corporate law could not validly regulate shareholders' rights to bring federal securities claims.⁹³ Indeed, the lower court ruling in *Salzberg* had come to that very conclusion.⁹⁴

⁹⁰ See Manesh, *supra* note 14, at 514–20 (describing the ambiguous implications of *Boilermakers* for the federal forum provision at issue in *Salzberg*). The internal affairs doctrine provides that “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders” are governed by the laws of the state in which the corporation is chartered. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); accord *Salzberg*, 227 A.3d at 125–26, 131 (noting the traditional definition of “internal affairs” advanced by the United States Supreme Court and Delaware Supreme Court).

⁹¹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950–51, 962 (Del. Ch. 2013) (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”).

⁹² See *Salzberg*, 227 A.3d at 123 (explaining that federal forum provisions cover claims that are not “‘internal affairs’ claims, because [Securities Act] claims are not governed by substantive Delaware law” but “[r]ather, they are governed by federal law”).

⁹³ Two separate white papers, each signed by over twenty law professors, advocated for this position. See Lawrence A. Hamermesh et al., *Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 29, 2018), <https://corpgov.law.harvard.edu/2018/11/29/delaware-law-status-of-bylaws-regulating-litigation-of-federal-securities-law-claims> [<https://perma.cc/F3MD-7WTV>] (white paper signed by twenty-one law professors arguing that Delaware 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 1–3* (Rock Ctr. for Corp. Governance, Stanford L. Sch., Working Paper No. 237, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332853 [<https://perma.cc/8B9V-CCGB>] (white paper signed by twenty-five law professors arguing that “bylaws may only regulate ‘internal affairs claims brought by stockholders qua stockholders’” and that “litigation under federal securities laws does not raise an ‘internal’ claim”); see also Lipton, *supra* note 1, at 597–600 (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 claims. See Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1359–60, 1364–65; Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 302–04 (2020).

⁹⁴ *Sciabacucchi v. Salzberg*, No. 2017-0931, 2018 WL 6719718, at *1 (Del. Ch. Dec. 19, 2018) (Laster, V.C.) (opining that a forum selection provision cannot govern federal securities claims because such claims are external to the corporation).

In overruling the Chancery Court, the Delaware Supreme Court in *Salzberg* leaned further into contract law precepts,⁹⁵ treating the internal affairs doctrine as a mere choice-of-law rule, no different than a choice-of-law provision commonly found in commercial contracts.⁹⁶ Under the high court's analysis, the internal affairs doctrine, like a contractual choice-of-law provision, merely stipulates which state's law will govern the relationship between the corporation, its directors, and shareholders.⁹⁷ The doctrine says nothing about the scope of the corporate contract and what the corporation and its shareholders may choose to address in it.⁹⁸ Thus, the *Salzberg* court concluded that, although federal forum provisions regulate a matter that is beyond the internal affairs doctrine, "the rules for determining the validity of forum-selection provisions in the contractual context lend themselves well to [federal forum provisions]. *This is because corporate charters are viewed as contracts among the corporation's stockholders . . .*"⁹⁹

In this respect, *Salzberg* reinforced the contractual framework invoked by *Boilermakers* to uphold the validity of corporate forum provisions. The common thread between the two rulings is that a corporation's charter and bylaws are fundamentally contractual instruments.¹⁰⁰ Unconstrained by the internal affairs doctrine, *Salzberg* affords broad contractual freedom for the corporate charter and bylaws to regulate matters beyond those that state corporate law directly regulates.¹⁰¹ And under *Boilermakers*, whatever matters the corporate contract might choose to regulate are binding on shareholders because shareholders have assented to the terms of the corporate contract through the voluntary act of purchasing the corporation's stock.¹⁰²

⁹⁵ See, e.g., *Salzberg*, 227 A.3d at 116 ("[C]orporate charters are contracts among a corporation's stockholders . . ."); *id.* ("Delaware's corporate statute 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 . . ."); *id.* at 136 ("[C]orporate charters are viewed as contracts among the corporation's stockholders . . .").

⁹⁶ See Manesh, *supra* note 14, at 529–34 (analyzing the contractarian subtext of *Salzberg*).

⁹⁷ See *id.*

⁹⁸ See *Salzberg*, 227 A.3d at 125 (overruling 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"); Manesh, *supra* note 14, at 529–34 (analyzing the role of the internal affairs doctrine in *Salzberg*).

⁹⁹ *Salzberg*, 227 A.3d at 134–35 (emphasis added).

¹⁰⁰ See *supra* notes 63–70, 95–99 and accompanying text.

¹⁰¹ See *supra* notes 95–99 and accompanying text.

¹⁰² See *supra* notes 63–70 and accompanying text.

C. From Forum Selection to Arbitration

Today, as a result of *Boilermakers*, forum selection provisions governing state corporate law claims are a common feature of corporate charters and bylaws.¹⁰³ Likewise, in the wake of *Salzberg*, federal forum provisions governing Securities Act claims have become standard.¹⁰⁴

All of that should be unsurprising. After all, as noted above, sound policy considerations support the use and enforcement of forum provisions to regulate shareholder litigation. Forum provisions avoid the wasteful inefficiencies faced by corporate defendants and the courts when plaintiffs file duplicative shareholder suits in multiple fora. By channeling these suits into a court that is likely to be the most expert in the substantive law underlying the dispute—Delaware courts in the case of Delaware corporate law claims and federal courts in the case of federal securities class actions—forum provisions make it more likely that meritorious claims prevail while unmeritorious claims are dismissed.¹⁰⁵ This result ultimately benefits shareholders¹⁰⁶ by focusing the energies of the plaintiff's bar on the merits of shareholder lawsuits, rather than on procedural maneuvers aimed at maximizing their attorney's fees.¹⁰⁷ Given these policy considerations, since *Boilermakers* and *Salzberg*, nearly every court that has confronted a

¹⁰³ See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1667 (2016) (“Since the *Boilermakers* decision, the popularity of exclusive forum bylaws has increased dramatically.”); Romano & Sanga, *supra* note 45, at 38, 44–46 (demonstrating that after *Boilermakers* “corporate adoptions of exclusive forum bylaws rapidly accelerated”).

¹⁰⁴ See, e.g., PRACTICAL LAW, PUBLIC COMPANY BY-LAWS (DELAWARE CORPORATION) § 7.06(b) (2023), Westlaw (including a federal forum provision in standard form bylaws).

¹⁰⁵ See Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1389–90 (“Just as Delaware courts have a comparative advantage in interpreting Delaware law . . . , federal courts have a comparative advantage in interpreting federal law. The fact that [corporate forum provisions] adhere to neutral principles designed not to advantage either plaintiffs or defendants reinforces their benefit to society, corporations, and stockholders.”); Grundfest & Savelle, *supra* note 50, at 352–54 (explaining that each state’s courts have a comparative advantage over other courts in the interpretation of its own state law and that this advantage is particularly pronounced for the expert and efficient state courts of Delaware).

¹⁰⁶ See Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 408–10 (2020) (demonstrating significant declines in the stock price of corporations with FFPs after the Delaware Chancery Court initially ruled federal forum provisions to be invalid and concluding the data “generally lend some support to the view that [federal forum provisions] are desirable and do not undermine shareholders’ rights”); Quinn, *supra* note 51, at 163 (“Because [a corporate forum] provision reduces the incentive for plaintiffs’ counsel to engage in forum shopping, it is likely a [shareholder] value-enhancing charter amendment.”).

¹⁰⁷ See Grundfest & Savelle, *supra* note 50, at 355–56.

corporate forum provision—in Delaware and beyond—has enforced the provision.¹⁰⁸

With the enforceability of corporate forum provisions in corporate law now firmly established upon the contractual framework of *Boilermakers* and *Salzberg*, interest has naturally turned to arbitration.¹⁰⁹ As the Supreme Court has noted, a contractual provision stipulating arbitration of any dispute is essentially a type of forum selection provision.¹¹⁰ By agreeing to an arbitration provision, contract parties are selecting a private, non-judicial forum for dispute resolution. Therefore, to the extent contract law principles dictate the enforcement of a forum provision against shareholders, the same principles would presumably dictate the same result for an arbitration provision—particularly in light of the FAA’s unyielding mandate to enforce arbitration agreements.¹¹¹

Unlike the forum provisions that have proliferated in the wake of *Boilermakers* and *Salzberg*, however, no public corporation has yet attempted to adopt a provision compelling shareholder arbitration.¹¹²

¹⁰⁸ For decisions upholding Delaware forum provisions following *Boilermakers*, see, for example, *In re Stamps.com Inc. S’holder Derivative Litig.*, No. 19-4272, 2020 WL 3866898, at *1 (C.D. Cal. July 8, 2020); *Drulias v. 1st Century Bancshares, Inc.*, 241 Cal. Rptr. 3d 843, 846 (Ct. App. 2018); *KBR Inc. v. Blount*, 106 F. Supp. 3d 833, 844 (S.D. Tex. 2015); *Petit-Frere v. Off. Depot, Inc.*, No. 502015CA001577, 2015 WL 10521805, at *6 (Fla. Cir. Ct. May 15, 2015); *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 338 (Or. 2015); *North v. McNamara*, 47 F. Supp. 3d 635, 648 (S.D. Ohio 2014); *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at *3 (N.Y. Sup. Ct. Nov. 4, 2013); *In re MetroPCS Commc’ns, Inc.*, 391 S.W.3d 329, 338–40 (Tex. Ct. App. 2013). For decisions upholding federal forum provisions following *Salzberg*, see, e.g., *Wong v. Restoration Robotics, Inc.*, 293 Cal. Rptr. 3d 226, 251 (Ct. App. 2022); *Simonton v. Dropbox, Inc.*, No. 19-CIV-05089, 2022 WL 1514619, at *1 (Cal. Ct. App. May 13, 2022); *Decision & Order on Motion to Dismiss at 5*, *Hook v. Casa Sys., Inc.*, No. 654548/2019 (N.Y. Sup. Ct. Sept. 12, 2021); *Order Granting Defendant’s Motion to Dismiss at 14*, *In re Uber Techs., Inc. Sec. Litig.*, No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020). Recently, a circuit split has emerged over whether a Delaware forum provision may effectively preclude shareholders from bringing a derivative lawsuit alleging federal securities law claims. *Compare Seafarers Pension Plan v. Bradway*, 23 F.4th 714, 717 (7th Cir. 2022), with *Lee v. Fisher*, 34 70 F.4th 1129, 1130 (9th Cir. 2022) (en banc). However, the question at the center of that circuit split—whether a provision may preclude derivative federal securities lawsuits—is entirely distinct from the question of whether a provision may require shareholders to file a lawsuit *in a particular forum*.

¹⁰⁹ See *supra* note 1.

¹¹⁰ See *supra* note 15.

¹¹¹ See *Manesh*, *supra* note 14, at 562–63 (considering the *Salzberg* result in light of U.S. Supreme Court precedent on the FAA).

¹¹² As noted above, however, at least one public REIT has adopted and enforced an arbitration provision against its shareholders. See *supra* note 39. In addition, several foreign issuers whose securities or depository receipts trade in the U.S. include arbitration provisions in their governing documents. See *Christos Ravanides, Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT’L ARB. 371, 389–407 (2007) (documenting the prevalence of

This is due, in part, to the SEC's longstanding refusal to allow a company to sell shares to public markets with a shareholder arbitration provision in its governing documents.¹¹³ But the SEC's grounds for opposing arbitration—namely that compelling arbitration of shareholder claims would violate the anti-waiver provisions of federal securities law¹¹⁴—have been subject to serious skepticism in light of contrary U.S. Supreme Court precedents.¹¹⁵ Perhaps recognizing this reality, SEC leadership has in recent years signaled a new openness to reconsidering its stance against shareholder arbitration.¹¹⁶

But whatever the agency might conclude, the SEC has less control over an already public corporation amending its charter or bylaws to adopt a shareholder arbitration provision.¹¹⁷ Indeed, the rulings in *Boilermakers* and *Salzberg* emboldened at least one activist shareholder to propose that the healthcare giant Johnson & Johnson adopt

arbitration provisions in the governing documents of foreign issuers with securities listed in the U.S.).

¹¹³ See Allen, *supra* note 1, at 775–76; Clopton & Winship, *supra* note 1, at 178.

¹¹⁴ See Allen, *supra* note 1, at 775–79; Clopton & Winship, *supra* note 1, at 178.

¹¹⁵ See, e.g., Allen, *supra* note 1, at 777 (“The [SEC] Staff’s position is at odds with United States Supreme Court precedent that an agreement to arbitrate is not a waiver of substantive rights.”); Black, *Arbitration*, *supra* note 1, at 116–18 (explaining that, given the 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 40 (observing that the SEC is “surely wrong to suggest . . . that the FAA is overridden by the anti-waiver provisions in the securities laws”); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 182–83 (2015) (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 1, 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 1, at 209 (coming to the same conclusion).

¹¹⁶ See Jay Clayton, Chairman, Sec. Exch. Comm’n, *Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 12, 2019), <https://corpgov.law.harvard.edu/2019/02/12/statement-on-shareholder-proposals-seeking-to-require-mandatory-arbitration-bylaw-provisions> [https://perma.cc/LR7W-HLGU] (statement by SEC commissioner declining to take a position on the validity of a shareholder arbitration provision); Hester M. Peirce, *Remarks Before the Council of Institutional Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 6, 2019), <https://corpgov.law.harvard.edu/2019/03/06/remarks-before-the-council-of-institutional-investors> [https://perma.cc/RUV6-HMP2] (statement by SEC commissioner expressing skepticism that shareholders are better served by class action litigation over arbitration); Alison Frankel, *Shareholder Alert: SEC Commissioner Floats Class-Action-Killing Proposal*, REUTERS (July 18, 2017), <https://www.reuters.com/article/us-otc-arbitration-idUSKBN1A326T> [https://perma.cc/S3X5-GNFV] (reporting on statements made by an SEC commissioner endorsing mandatory shareholder arbitration); see also Clopton & Winship, *supra* note 1, at 171–72 (noting “renewed signals from the SEC” that point to “a potential departure from [its] traditional rejection of mandatory arbitration”).

¹¹⁷ See Raz, *supra* note 1, at 250, 253–54 (speculating that corporate directors may unilaterally adopt a shareholder arbitration provision through a bylaw amendment or, alternatively, propose a charter amendment to shareholders).

a shareholder arbitration bylaw.¹¹⁸ Although the corporation's management resisted the shareholder's proposal,¹¹⁹ the suddenly shifted legal landscape and the resulting litigation over the shareholder-proposed bylaw has provided a renewed urgency to the question of shareholder arbitration and its enforceability under state and federal law.

II

SHAREHOLDER ARBITRATION UNDER CORPORATE LAW

Like a forum provision, an arbitration provision in the corporate contract might purport to compel shareholders to arbitrate their state corporate law claims or their federal securities law claims, or the provision might purport to compel arbitration of all shareholder claims, whether those claims arise under state corporate law or federal securities law. In either case, under relevant Supreme Court precedent, the mere existence of such a provision would relegate shareholders to individualized, bilateral arbitration—and thus operate as a waiver of shareholder class actions.¹²⁰

Such a provision would raise both enforceability issues under state corporate law and preemption issues under the FAA. Putting aside the FAA issues until Part III below, this Part evaluates the enforceability of a shareholder arbitration provision *strictly as a matter of state corporate law*. Focusing specifically on the corporate law of Delaware, this Part explains why a provision compelling arbitration would be unenforceable as applied to public company shareholders.

Section II.A first outlines the limits to contractual freedom in Delaware corporate law. Applying those limits, Section II.B tackles the validity of a provision purporting to compel shareholder arbitration of any state corporate law claims, and Section II.C addresses the validity of a provision purporting to compel shareholder arbitration of any federal securities law claims. In both cases, but for different reasons, a shareholder arbitration provision in a corporation's charter or bylaws would be unenforceable against public company shareholders.

¹¹⁸ See *id.* at 240–46 (describing the Johnson & Johnson arbitration shareholder proposal episode).

¹¹⁹ See Manesh, *supra* note 14, at 567–68.

¹²⁰ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–87 (2010) (holding that if an arbitration provision is silent as to the availability of class arbitration, then class arbitration is precluded); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) (holding that if an arbitration provision is ambiguous as to the availability of class arbitration, then class arbitration is precluded).

A. *Contractual Freedom Under Corporate Law and Its Limits*

Delaware corporate law reflects a policy strongly in favor of contractual freedom. Like the corporate statutes of other states, the Delaware General Corporation Law (“DGCL”) provides largely default rules of internal corporate governance, thus permitting corporations, their directors, and shareholders to tailor those rules through the terms of a corporation’s charter and bylaws.¹²¹ As the Delaware Supreme Court recently explained,

“At its core, the [DGCL] is a broad enabling act” that “allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise” “provided the statutory parameters and judicially imposed principles of fiduciary duty are honored.” “In fact, ‘Delaware’s corporate statute 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 relationships, subject to relatively loose statutory constraints and to the policing of director misconduct through equitable review.’”¹²²

Reflecting this general policy favoring contractual freedom, DGCL Section 102(b) permits a corporation’s charter to contain “[a]ny provision for the management of the business and . . . affairs of the corporation . . . and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are *not contrary to the laws of this State*.”¹²³ In similarly broad language, DGCL Section 109(b) permits a corporation’s bylaws to include “*any provision, not inconsistent with law . . . 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.*”¹²⁴

¹²¹ See Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847–55 (2008); Fisch, *Governance by Contract*, *supra* note 67, at 379–80.

¹²² *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1217 (Del. 2021) (footnote omitted) (quoting *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020)).

¹²³ DEL. CODE ANN. tit. 8, § 102(b)(1) (2023) (emphasis added); see also *Manti Holdings*, 261 A.3d at 1217 (“Th[e] public policy favoring private ordering is reflected in [DGCL] Section 102(b)(1), which allows a corporate charter to contain virtually any provision that is related to the corporation’s governance and not ‘contrary to the laws of this State.’” (quoting DEL. CODE ANN. tit. 8 § 102(b)(1) (2023))).

¹²⁴ DEL. CODE ANN. tit. 8, § 109(b) (2023); see also *Manti Holdings*, 261 A.3d at 1217 (explaining that, like the broad authority for freedom of contract under DGCL Section 102(b) for provisions in the corporate charter, “Section 109(b) provides similarly broad authorization for bylaws”).

Inarguably, a shareholder arbitration provision—much like the forum provisions upheld by *Boilermakers*¹²⁵ and *Salzberg*¹²⁶— would relate to the “business” and “affairs” of the corporation and regulate the “rights” or “powers” of its shareholders. Nonetheless, as the statutory language above indicates, there are limits to contractual freedom in Delaware corporate law. Specifically, a shareholder arbitration provision would be facially invalid if it is “contrary to” or “inconsistent with” the laws of Delaware.¹²⁷ And even a facially valid provision would be judicially unenforceable under corporate law’s “twice-tested” framework in any situation where it would be inequitable as applied to shareholders. This Section considers each of these limitations in turn.

1. *Limits on Validity*

As a facial matter, DGCL Sections 102(b) and 109(b), respectively, are explicit that a shareholder arbitration provision would be invalid if it were “contrary to” or “inconsistent with” the laws of Delaware.¹²⁸ The *Salzberg* court explained that these statutory limitations on contractual freedom bar any corporate charter or bylaw provisions that would “transgress a statutory enactment *or* a public policy settled by the common law or implicit in the [DGCL] itself.”¹²⁹ Thus, even if a particular provision is not expressly prohibited by statute, such a provision would still be facially invalid if it “vitiates or contravenes . . . a mandatory rule of [Delaware] common law,”¹³⁰ for example, a provision that required or enabled the directors of a corporation to violate their fiduciary duties.¹³¹ Although such duties are not prescribed by statute, but instead arise under well-settled principles of equity, Delaware courts have firmly established that the provisions of

¹²⁵ See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950–51 (Del. Ch. 2013) (ruling that “[a]s a matter of easy linguistics” a Delaware forum provision for “internal affairs” lawsuits is within the permissible scope of DGCL Section 109(b)).

¹²⁶ See *Salzberg*, 227 A.3d at 114–15 (ruling that federal forum provisions for federal securities lawsuits “classically fit” and “easily fall within” the permissible scope of DGCL Section 102(b)).

¹²⁷ See *supra* notes 123–24 and accompanying text.

¹²⁸ See *id.*

¹²⁹ *Salzberg*, 227 A.3d at 115–16 (emphasis added) (quoting *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118) (Del. 1952); accord *Manti Holdings*, 261 A.3d at 1217.

¹³⁰ *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 (Del. Ch. 2004) (Strine, V.C.).

¹³¹ See Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1782 n.150 (2006) (“By and large, the fiduciary duties of directors are nonwaivable, mandatory terms of the corporate contract.”).

the corporate contract cannot lawfully enable directors to breach their fiduciary obligations of loyalty and good faith.¹³²

To be sure, in deference to private ordering, Delaware courts “do[] not lightly find that [charter or bylaw] provisions are unlawful.”¹³³ Instead, the state’s courts “start with the presumption that [a charter or bylaw provision] is valid and, if possible, construe it in a manner consistent with the law.”¹³⁴ As a result, a Delaware court would not invalidate an otherwise valid provision *ab initio* based simply on some potential abuse or “hypothetical injuries” to shareholders that could result from the use of that provision at some future point.¹³⁵ After all, “every valid [bylaw or charter provision] is always susceptible to potential misuse.”¹³⁶ But, as recognized by both *Boilermakers* and *Salzberg*, if a provision “cannot operate lawfully or equitably *under any circumstances*,” the provision is facially invalid.¹³⁷

¹³² See, e.g., *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 238 (Del. 2008) (ruling a bylaw requiring directors to reimburse challengers in a proxy context is invalid to the extent it “would require a board to act or not act in such a fashion that would limit the exercise of their fiduciary duties”); *Totta v. CCSB Fin. Corp.*, No. 2021-0173, 2022 WL 1751741, at *13 (Del. Ch. May 31, 2022) (McCormick, C.) (rejecting the argument that “a corporate charter may alter the directors’ fiduciary obligations and the attendant equitable standards a court will apply when enforcing those obligations”); *Gorman v. Salamone*, No. 101832015 WL 4719681, at *6 (Del. Ch. July 31, 2015) (Noble, V.C.) (ruling a bylaw requiring directors to remove a corporate officer if shareholders voted for such removal is invalid to the extent it “could compel board action, potentially in conflict with its members’ fiduciary duties”); *Sutherland v. Sutherland*, No. 23992009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) (Lamb, V.C.) (holding that a charter provision that “would effectively eviscerate the duty of loyalty for corporate directors . . . is expressly forbidden by the DGCL”); see also *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) (“To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.”); *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007) (Strine, V.C.) (“If a contract with a third-party is premised upon a breach of fiduciary duty, the contract may be unenforceable on equitable grounds . . .”).

¹³³ *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845–46 (Del. Ch. 2004) (Strine, V.C.).

¹³⁴ *CA, Inc.*, 953 A.2d at 238; accord *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985).

¹³⁵ See *Stroud v. Grace*, 606 A.2d 75, 95–96 (Del. 1992) (holding that there is “no basis to invalidate [a challenged bylaw] upon some hypothetical abuse” because “[t]he validity of corporate action under [the challenged bylaw] must await its actual use”).

¹³⁶ *Id.* at 96.

¹³⁷ *Salzberg v. Sciabacucchi*, 227 A.2d 102, 113 (Del. 2020) (quoting *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, No. 2017-0785, 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018) (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 948 (Del. Ch. 2013))) (applied to a corporate charter provision); accord *Boilermakers*, 73 A.3d at 948 (applied to a corporate bylaws provision).

2. *Limits on Enforceability*

Even if a shareholder arbitration provision were deemed facially valid, that would not fully resolve the question of its enforceability as applied to a particular factual situation.¹³⁸ That is because all corporate acts must be “‘twice-tested’—once by the law and again in equity.”¹³⁹ The Delaware Supreme Court famously summed up the twice-tested framework in *Schnell v. Chris-Craft Industries* to mean that “inequitable action does not become permissible simply because it is legally possible.”¹⁴⁰ In doing so, *Schnell* “reaffirmed Delaware’s adherence to [the] ‘twice tested’ framework,”¹⁴¹ which has been described as “[o]ne of the most venerable precepts of Delaware’s . . . corporate jurisprudence.”¹⁴² As then Vice Chancellor Strine explained, the *Schnell* principle represents “[a]n essential aspect of [Delaware] corporate law,” namely, “the balance between law (in the form of statute and contract, including the contracts governing the internal affairs of corporations, such as charters and bylaws) and equity (in the form of concepts of fiduciary duty).”¹⁴³

Nearly half a century after *Schnell*, the *Salzberg* court alluded to the twice-tested framework when it explained that a bylaw or charter provision “that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.”¹⁴⁴ Consequently, shareholders remain free to challenge the enforceability of an otherwise facially valid bylaw or charter provision where it would be inequitable

¹³⁸ See Grundfest & Savelle, *supra* note 50, 363–66 (explaining the distinction made by Delaware law between the validity *ab initio* of a charter or bylaw provision and the enforceability of that same provision as applied to a particular situation).

¹³⁹ *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007) (Strine, V.C.) (quoting A.A. Berle Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931)); accord *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 97 (Del. 2021); *In re Invs. Bancorp, Inc. S’holder Litig.*, 177 A.3d 1208, 1222–23 (Del. 2017). As recently explained by Chancellor McCormick, under Delaware law’s twice-tested framework: “The first layer of analysis asks whether board action was legally authorized and looks to whether the conduct was permitted under positive law and the corporation’s constitutive documents. . . . The second layer of analysis asks whether board action was equitable” *Totta v. CCSB Fin. Corp.*, No. 2021-01732022 WL 1751741, at *11–12 (Del. Ch. May 31, 2022).

¹⁴⁰ *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

¹⁴¹ *Coster v. UIP Co.*, No. 2018-0440, 2022 WL 1299127, at *6 (Del. Ch. May 2, 2022) (McCormick, C.); accord *Totta*, 2022 WL 1751741, at *16 (McCormick, C.) (“There was some concern when Delaware adopted its corporate statute that it too broadly empowered management and too minimally restrained them . . . *Schnell* allayed these concerns, cementing Delaware’s adherence to [the] ‘twice tested’ framework.”).

¹⁴² *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003).

¹⁴³ *Sample*, 914 A.2d at 664.

¹⁴⁴ *Salzberg v. Sciabacucchi*, 227 A.2d 120, 135 (Del. 2020) (citing *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014)).

as applied to a specific factual situation.¹⁴⁵ “Such ‘as applied’ challenges,” the *Salzberg* court explained, “are an important safety valve in the enforcement context” to ensure that an otherwise lawful provision is not used inequitably against shareholders.¹⁴⁶

Delaware courts have most commonly invoked the *Schnell* principle to deny the enforceability of charter or bylaw provisions that would vitiate the voting rights of shareholders.¹⁴⁷ But *Schnell* also applies beyond the shareholder voting context.¹⁴⁸ Most importantly, Delaware courts have consistently ruled that the *Schnell* principle constrains the enforceability of any charter or bylaw provision regulating the litigation rights of shareholders.¹⁴⁹ Thus, for example, in *ATP*, where the Delaware Supreme Court upheld the facial validity of a fee-shifting bylaw—one which required a losing shareholder-plaintiff to pay the attorney’s fees of the prevailing defendants in any intra-corporate litigation¹⁵⁰—the court also emphasized that the enforceability of any such provision was still subject to *Schnell*’s equitable constraints.¹⁵¹ Likewise, both *Salzberg* and *Boilermakers* concurred that the *Schnell* principle also creates an important limitation on the enforceability of forum selection provisions.¹⁵²

In this respect, *Salzberg*, *Boilermakers*, and *ATP* all acknowledge that equity—that is, the judicial power “to do right and justice”¹⁵³—

¹⁴⁵ See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013) (“The answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries.*”).

¹⁴⁶ *Salzberg*, 227 A.2d at 135.

¹⁴⁷ *Stroud v. Grace*, 606 A.2d 75, 91 (Del. 1992) (“Almost all of the post-*Schnell* decisions involved situations where boards of directors deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote.”).

¹⁴⁸ E.g., *In re Invs. Bancorp, Inc. S’holder Litig.*, 177 A.3d 1208, 1222–23 (Del. 2017) (applying the twice-tested framework of *Schnell* to compensation awards that corporate directors granted to themselves pursuant to stockholder-approved equity plans).

¹⁴⁹ See *Salzberg*, 227 A.2d at 135; *ATP*, 91 A.3d at 558–59; *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 238, 242 (Del. Ch. 2014) (Bouchard, C.); *Boilermakers*, 73 A.3d at 949.

¹⁵⁰ *ATP*, 91 A.3d at 557–58.

¹⁵¹ *Id.* at 558 (“Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.”) (citing *Schnell v. Chris-Craft Indus.*, 285 A.2d 437, 437–40 (Del. 1971)).

¹⁵² *Salzberg*, 227 A.2d at 135 (“Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.”) (citing *ATP*, 91 A.3d at 558 and *Schnell*, 285 A.2d at 439); *Boilermakers*, 73 A.3d at 949 (“The answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries.*”).

¹⁵³ *Schoon v. Smith*, 953 A.2d 196, 205 (Del. 2008).

serves as an essential backstop to the broad contractual freedom that the DGCL affords corporations.¹⁵⁴ Even if not expressly barred by Delaware’s corporate law statute, a charter or bylaw provision cannot enable corporate directors and officers to sidestep their fiduciary obligations or otherwise pursue inequitable aims. As already noted above, such a provision would be facially invalid if it “cannot operate . . . equitably under any circumstances.”¹⁵⁵ And even a facially valid provision would be unenforceable as applied to a particular circumstance if it was “adopted or used for an inequitable purpose.”¹⁵⁶ Applying these principles to a shareholder arbitration provision, particularly a provision compelling individualized, bilateral arbitration and barring class actions, a court would have little difficulty concluding that such a provision is unenforceable as applied to any situation involving public company shareholders.

B. Compelling Arbitration of State Corporate Law Claims

From the perspective of Delaware law, the enforceability of a charter or bylaw provision purporting to require arbitration of any state corporate law claims is an easy legal issue because DGCL Section 115 flatly prohibits such a provision.¹⁵⁷

Notably, the text of DGCL Section 115 never specifically mentions arbitration. Instead, the statutory language, enacted in 2015, simply provides that “no provision of the certificate of incorporation or the bylaws may prohibit bringing [internal corporate claims] in the courts of this State.”¹⁵⁸ By barring any forum provision that would exclude the courts of Delaware, DGCL Section 115 ensures that the “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.”¹⁵⁹

¹⁵⁴ See Geis, *supra* note 63, at 644 (pointing to the *Schnell* principle as a limit on the contractual freedom to regulate shareholder litigation rights); Winship, *supra* note 44, at 541 (same).

¹⁵⁵ See *supra* note 137 and accompanying text.

¹⁵⁶ See *supra* note 144 and accompanying text.

¹⁵⁷ DEL. CODE ANN. tit. 8, § 115 (2023).

¹⁵⁸ *Id.*

¹⁵⁹ *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 961 n.8 (Del. Ch. 2010) (Laster, V.C.); see also William Chandler, David J. Berger, Tamika Montgomery-Reeves & Amy Simmerman, *Wilson Sonsini Discusses Proposed 2015 Amendments to the Delaware General Corporation Law*, COLUM. L. SCH.: THE CLS BLUE SKY BLOG (Mar. 18, 2015), <https://clsbluesky.law.columbia.edu/2015/03/18/wilson-sonsini-discusses-proposed-2015-amendments-to-the-delaware-general-corporation-law> [<https://perma.cc/J73W-4EZY>] (summarizing the statutory drafters’ views “that stockholders of Delaware corporations should not be denied access to the protection of the Delaware courts,” and that “the

Because a shareholder arbitration provision would compel shareholders to bring claims in a private, arbitral forum, and, thus, prohibit bringing those claims in the courts of Delaware, such a provision would be facially invalid, and therefore unenforceable, under DGCL Section 115.¹⁶⁰

Note two important aspects of the statutory language. First, the ban applies to a shareholder arbitration provision, irrespective of whether the provision requires individualized, bilateral arbitration or expressly contemplates class arbitration of shareholder claims. If a provision in the corporate contract mandates shareholder arbitration of any kind, to the exclusion of litigation in the courts of Delaware, the provision would be invalid under DGCL Section 115.

Second, the scope of DGCL Section 115 is limited to arbitration of “internal corporate claims.”¹⁶¹ That term is statutorily defined to mean “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.”¹⁶² As *Salzberg* explained, this definition is coterminous with the scope of the internal affairs doctrine.¹⁶³ Thus, if a shareholder lawsuit asserts a Delaware corporate law claim, DGCL Section 115 prohibits compelled arbitration of that claim.¹⁶⁴ If, however, a shareholder lawsuit asserts other types of claims—for example, federal securities law claims—then DGCL Section 115’s ban on arbitration is inapplicable.¹⁶⁵ Indeed,

Delaware courts are best situated to continue to oversee” the development of Delaware corporate law).

¹⁶⁰ See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 n.169 (Del. 2020) (observing that “forum provisions that require arbitration of internal corporate claims . . . , at least from our state law perspective, would violate [DGCL] Section 115”). Notably, even in the absence of the statutory ban on arbitration provisions governing state corporate law claims, such a provision would be enforceable in equity for many of the reasons discussed in Section II.C.2 *infra* regarding arbitration provisions governing federal securities law claims.

¹⁶¹ § 115.

¹⁶² *Id.*

¹⁶³ See *Salzberg*, 227 A.3d at 119–20, 120 n.79 (explaining that federal securities law 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”); *id.* at 131 (depicting graphically the scope of the internal affairs doctrine to be coterminous with “internal corporate claims” as that term is statutorily defined).

¹⁶⁴ See *id.* at 137 n.169 (noting that “forum provisions that require arbitration of internal corporate claims . . . would violate [DGCL] Section 115”).

¹⁶⁵ See *id.* at 119–20 (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”).

nothing in the DGCL expressly addresses the validity of such a provision.

C. *Compelling Arbitration of Federal Securities Law Claims*

In the absence of an express statutory prohibition like the one set forth in DGCL Section 115, the enforceability of a shareholder arbitration provision governing federal securities law claims presents a more complex inquiry—one which turns on the equitable *Schnell* principles described above in Section II.A.2. Applying those principles, this Section explains why it should be trivially easy for a court to conclude that a provision compelling arbitration of federal securities claims would be inequitable, and therefore unenforceable, in any situation involving the shareholders of a public corporation.¹⁶⁶

As explained below, given the economics of shareholder claims made under the federal securities law, a provision compelling individualized, bilateral arbitration and waiving class actions would, for the vast majority of public company shareholders, operate as a waiver of their federal legal rights. In doing so, such a provision would also insulate corporate fiduciaries from personal liability for their unlawful actions. In these respects, an arbitration provision stands apart from other types of intra-corporate dispute resolution provisions as uniquely inequitable.

1. *The Economics of Federal Securities Law Claims*

In the context of public corporations, the typical federal securities lawsuit alleges a violation of Section 11¹⁶⁷ or 12(a)(2)¹⁶⁸ of the Securities Act or, more commonly, Section 10(b)¹⁶⁹ or Rule 10b-5¹⁷⁰ of the Exchange Act.¹⁷¹ While each of these liability provisions has its

¹⁶⁶ The discussion that follows focuses solely on direct class actions arising under federal securities law. However, in some instances, shareholders may bring *derivative* actions under federal securities law. *See, e.g., J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (recognizing that an Exchange Act claim may be brought as a derivative action). A circuit split has recently emerged over whether a corporate forum provision may effectively *preclude* shareholders from bringing derivative federal securities law claims. *Compare Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022), *with Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023) (en banc). In a separate, contemporaneous article, we address the issue of derivative actions making federal securities law claims. *See Mohsen Manesh & Joseph A. Grundfest, Abandoned and Split But Never Reversed: Borak and Federal Derivative Litigation*, 78 BUS. LAW. (forthcoming fall 2023).

¹⁶⁷ 15 U.S.C. § 77k.

¹⁶⁸ 15 U.S.C. § 77l.

¹⁶⁹ 15 U.S.C. § 78j(b).

¹⁷⁰ 17 C.F.R. § 240.10b-5 (2023).

¹⁷¹ *See* CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2021 YEAR IN REVIEW, 13 fig. 12 (2022), <https://www.cornerstone.com/wp-content/uploads/2022/02/>

own elements,¹⁷² the core of a claim made under any of these provisions is that a corporation, its directors, or officers has made a material misrepresentation to the public that artificially inflated the value of the corporation's stock.¹⁷³ Once the truth is revealed, the corporation's stock drops in value, and those shareholders who purchased shares at the inflated price suffer a loss. It is this loss that typically gives rise to a federal securities law claim.¹⁷⁴

However, the vast majority of the affected shareholders will have negative-value claims, meaning the cost of vindicating their claim will exceed the damages they could expect to recover in a successful lawsuit. Consider this simplified example:

Say you bought 100,000 shares of Acme Inc. on the New York Stock Exchange for \$40 per share, or \$4 million in the aggregate. As it turns out, the quarterly report Acme filed with the SEC the week before your purchase contained a material misstatement. Specifically, the report overstated Acme's earnings per share for the quarter. When this misstatement came to light three weeks later, Acme's stock dropped \$3.00 per share as a result, meaning you suffered \$300,000 in damages. In other words, if you litigated your claim to final judgment and prevailed, you would be awarded \$300,000 in damages. Securities fraud claims, however, are expensive and time consuming to litigate, and thus litigating your claim to final judgment would undoubtedly cost more than \$300,000. As a result, it is senseless for you to pursue the claim or for a plaintiffs' attorney to take it on a contingency fee basis.¹⁷⁵

To be sure, some number of shareholders may have positive-value claims, for which it would be economically rational to pursue a lawsuit. The greater the number of shares held, or the greater the

Securities-Class-Action-Filings-2021-Year-in-Review.pdf [<https://perma.cc/6QBF-CJQC>] (showing the type and frequency of each securities law claim made in class action lawsuits).

¹⁷² See Practical Law Litig., *Practice Note, Securities Act and Securities Exchange Act Liability Provisions: Overview*, THOMSON REUTERS PRACTICAL L., <https://us.practicallaw.thomsonreuters.com/w-000-8585> [<https://perma.cc/EZS4-C2MA>] (detailing the elements of securities liability provisions).

¹⁷³ See 15 U.S.C. § 77k(a) (creating liability for any misstatement or omission material of fact in a registration statement); *id.* § 77l(a) (creating liability for any misstatement or omission of material fact in any prospectus or oral communication); *id.* § 78j(b) (prohibiting any misstatement or omission of material fact in connection with the purchase or sale of any security); 17 C.F.R. § 240.10b-5 (same).

¹⁷⁴ See Black, *Eliminating*, *supra* note 20, at 807 (“In the typical secondary market securities fraud claim, the corporation introduces intentional misstatements into the market . . . , so that purchasers of the stock . . . pay an inflated price . . . [, thus causing] injury to purchasers when the corrective information reaches the market and the stock price drops.”).

¹⁷⁵ William K. Sjoström, Jr., *The Intersection of Fee-Shifting Bylaws and Securities Fraud Litigation*, 93 WASH. U. L. REV. 379, 399–400 (2015).

price drop, the greater a shareholder's losses will be. At some point, those losses will exceed the shareholder's cost of pursuing a claim, flipping the shareholder's claim from negative to positive value.¹⁷⁶ But given the substantial cost of pursuing a federal securities lawsuit, a shareholder would likely need to suffer losses in the millions of dollars to have a positive-value claim.¹⁷⁷ Only the very largest shareholders will have losses that exceed this threshold.¹⁷⁸ The vast majority of shareholders will instead hold negative-value claims.

For negative-value claimants, it would be economically irrational to pursue their claims individually. Instead, a class action represents the only viable option.¹⁷⁹ By litigating their claims collectively, as a class, the affected shareholders can band together to share the costs of pursuing their claims. And because the same corporate misrepresentation similarly injured all shareholders who purchased stock at inflated prices, a class action is the ideal vehicle for the affected shareholders to vindicate their rights and obtain a remedy.

2. *The Manifest Inequity of Arbitration*

With the economics of federal securities claims in mind, one can readily appreciate the fundamental unfairness created by a provision in the corporate contract compelling arbitration and banning class actions. Such a provision would bar injured shareholders from pursuing their federal securities law claims collectively, forcing them instead into individualized, one-on-one arbitration. Though the cost of arbitrating a federal securities claim could be potentially less than the cost of litigating that same claim in a judicial forum, arbitration costs are still significant.¹⁸⁰ Those costs mean that the vast majority of shareholders will have negative-value claims that cannot be pursued economically in arbitration.¹⁸¹ For these injured shareholders, an arbi-

¹⁷⁶ See *id.* at 400.

¹⁷⁷ See Sjostrom, *supra* note 175, at 400; Webber, *supra* note 1, at 238–39.

¹⁷⁸ See Sjostrom, *supra* note 175, at 401; Webber, *supra* note 1, at 238–39.

¹⁷⁹ See Sjostrom, *supra* note 175, at 403; Webber, *supra* note 1, at 224–25.

¹⁸⁰ See, e.g., Erickson, *supra* note 21, 1403–04 (explaining that discovery may be more expensive in arbitration as compared to traditional litigation); Johnson & Brunet, *supra* note 43, at Section IV.F (explaining that modern arbitration procedure may be costly as compared to traditional litigation); Webber, *supra* note 1, at 240–41 (explaining that the costs of arbitration may be more than traditional litigation).

¹⁸¹ See Black, *Arbitration*, *supra* note 1, at 125 (“For . . . small retail investors, . . . [t]heir claims will not be sufficiently large to make it economically feasible to bring individual arbitration claims.”); Erickson, *supra* note 21, at 1405 (“[L]arge shareholders with positive value claims[] would be fine in a regime that does not permit class actions. Smaller shareholders, however, would find it cost prohibitive to bring their claims on an individual basis.”); Webber, *supra* note 1, at 224–25 (“Because [securities fraud] cases are expensive to litigate or arbitrate, most claims by individual investors would become economically

tration provision would thus operate as a *waiver* of their legal right arising under federal securities law.¹⁸² Contrary to basic equitable precepts,¹⁸³ these shareholders “will have no remedy for their wrong.”¹⁸⁴ It is precisely this situation—where corporate law is used to deprive shareholders of their legal rights—that the equitable principle of *Schnell* is designed to police against.¹⁸⁵

In this respect, an arbitration provision in the corporate contract would be fundamentally different from the federal forum provisions upheld in *Salzberg*. The provisions upheld in *Salzberg* do not deprive shareholders of the ability to bring class actions to vindicate their federal securities claims.¹⁸⁶ Instead, federal forum provisions merely channel those claims into federal courts, which are more likely to be familiar with the substantive federal law at issue.¹⁸⁷ Thus, the net effect of the federal forum provisions upheld in *Salzberg* is to make it more likely that meritorious claims will prevail while unmeritorious claims will be dismissed.¹⁸⁸

unviable, as would most claims by institutional investors that have low stakes in particular companies.”).

¹⁸² See Black, *Arbitration*, *supra* note 1, at 127 (“The high costs of pursuing federal securities claims means that, unless a class-wide remedy is available, there is, as a practical matter, no remedy for investors with small holdings. A class action waiver in this context is the equivalent of a waiver of investor protections [under federal securities law.]”); Erickson, *supra* note 21, at 1405 (explaining that because of the high costs of pursuing securities claims on an individualized basis, “[s]maller shareholders . . . would be effectively barred” from seeking redress); Webber, *supra* note 1, at 224–25 (same).

¹⁸³ See *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004) (Chandler, C.) (“[E]quity will not suffer a wrong without a remedy”); *accord* *Fischer v. Fischer*, No. C.A. 16864, 1999 WL 1032768, at *4 (Del. Ch. Nov. 4, 1999) (Steele, V.C.); *In re WeWork Litig.*, C.A. No. 2020-0258, 2020 WL 7343021, at *9 (Del. Ch. Dec. 14, 2020) (Bouchard, C.).

¹⁸⁴ Webber, *supra* note 1, at 259 (“[M]any smaller institutional investors—and most, if not all, individual investors—will have negative-value claims. Consequently, they will have no remedy for their wrong.”).

¹⁸⁵ See *Ala. By-Prods. Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991) (explaining that *Schnell* “should be reserved for those instances that . . . by an improper manipulation of the law . . . would deprive a person of a clear right”); *Coster v. UIP Cos.*, C.A. No. 2018-0440, WL 1299127, at *6 (Del. Ch. May 2, 2022) (McCormick, C.) (“*Schnell* . . . may be employed by a court of equity to rectify inequitable conduct violating a clear right.”).

¹⁸⁶ See *Salzberg v. Sciacacucci*, 227 A.3d 102, 136 (Del. 2020) (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 951–52 (Del. Ch. 2013)) (observing federal forum provisions “regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation”).

¹⁸⁷ See *Salzberg*, 227 A.3d at 120 (observing federal forum provisions “direct Section 11 claims to federal courts . . . which are most experienced in adjudicating them”); Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1390 (“Just as Delaware courts [with] Delaware law . . . , federal courts have a comparative advantage in interpreting federal law. The fact that [federal forum provisions are] . . . designed not to advantage either plaintiffs or defendants reinforces their benefit to society, corporations, and stockholders.”).

¹⁸⁸ See Grundfest, *Limits of Delaware Corporate Law*, *supra* note 49, at 1389–90.

By contrast, an arbitration provision would channel the same type of claims into a forum that bars class actions, making it uneconomical to pursue even meritorious claims against the corporation or its fiduciaries.¹⁸⁹ Admittedly, the fact that it would be cost-prohibitive for shareholders to vindicate their low-dollar claims through arbitration may be irrelevant from the perspective of the FAA.¹⁹⁰ But that fact is surely relevant when viewed through the state corporate law lens of equity.¹⁹¹

The equitable distinction between the federal forum provisions upheld in *Salzberg* and an arbitration provision is only reinforced by broader considerations of public policy and fiduciary duty. As a matter of policy, Delaware courts have long recognized that the state's corporate law exists in equilibrium with federal securities law—in a relationship that the Delaware Supreme Court has described as “symbiotic,” “compatible,” and “complementary.”¹⁹² Mindful of this equilibrium, Delaware courts have assiduously sought to apply the state's law in a manner that avoids any tension with the federal regime.¹⁹³

¹⁸⁹ See *supra* notes 180–84 and accompanying text.

¹⁹⁰ See *infra* notes 255–56 and accompanying text.

¹⁹¹ See *supra* notes 180–85 and accompanying text.

¹⁹² See *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998); *accord Salzberg*, 227 A.2d at 1114; see also *Pfeiffer v. Toll*, 989 A.2d 683, 707 (Del. Ch. 2010) (Laster, V.C.) (“Delaware is of course mindful of the fact that our national and state governments share jurisdiction over corporations.”). As discussed below, the Supreme Court has also been keen to preserve the existing equilibrium between state and federal law in the regulation of corporations. See *infra* notes 324–31 and accompanying text.

¹⁹³ See *Salzberg*, 227 A.3d at 132 (upholding federal forum provisions, in part, because such provisions “do not violate federal law or policy”); *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) (refusing to recognize a state law cause of action that “would replicate . . . the provisions of section 14 of the [Exchange] Act”); *Rivest v. Hauppauge Digit., Inc.*, C.A. No. 2019-0848, 2022 WL 3973101, at *26 (Del. Ch. Sept. 1, 2022) (“Delaware law should strive to maintain its historically symbiotic relationship with the federal securities laws To that end, this court has taken the federal securities law into account when making determinations under Delaware law.”); *In re F. Mobile, Inc.*, C.A. No. 2020-0346, 2021 WL 1040978, at *5 (Del. Ch. Mar. 18, 2021) (“Delaware authorities . . . reflect a consistent Delaware public policy against allowing capital-markets entrepreneurs to deploy Delaware law to bypass the federal securities laws . . . based on this court’s understanding of the federal securities laws and the SEC’s priorities.”); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 918 (Del. Ch. 2002) (refusing to order annual shareholder meeting pursuant to DGCL Section 211(c) where doing so would allow Delaware corporation to be used as part of a “plan to circumvent important registration and disclosure elements of the federal securities laws”), *aff’d*, 846 A.2d 237 (Del. 2003); see also *Manesh*, *supra* note 93, at 292 (“Congress and the SEC have before exercised their lawmaking authority to preempt various aspects of corporate governance that were once the subject of state corporate law. Mindful of this reality, Delaware’s legislature and judiciary have in the past moved proactively to forestall further federal incursions.”); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*,

Considered in light of this state policy, the contrast between the federal forum provisions upheld in *Salzberg* and an arbitration provision is striking. Federal forum provisions preserve and reinforce the state-federal equilibrium by leveraging a tool of state corporate law to *promote* the efficient and expert enforcement of federal securities law in federal courts.¹⁹⁴ By contrast, an arbitration provision would *undercut* federal securities law by precluding most shareholders from seeking its enforcement through a class action.¹⁹⁵ Both Congress and the Supreme Court have “recognized that meritorious private actions to enforce federal . . . securities laws are an essential supplement” to the criminal and civil enforcement actions brought by the government.¹⁹⁶ By hobbling this “essential supplement” to the federal regime, an arbitration provision would undermine both the compensatory and deterrence functions of federal securities law, to the detriment of large and small shareholders alike.¹⁹⁷ Thus, unlike the federal forum provisions upheld in *Salzberg*, an arbitration provision would rupture, rather than reinforce, the equilibrium between state and federal law.¹⁹⁸ Such a rupture would be particularly hazardous for Delaware should it prompt federal policymakers to reassess the carefully crafted division between state and federal regulatory authority.¹⁹⁹

Admittedly, one might interpret the Supreme Court’s decisions to the contrary. In particular, one might argue the Court has signaled that compelled arbitration does not operate as a waiver of shareholder rights and, therefore, does not undermine the federal securities regime.²⁰⁰ If so, then the enforcement of an arbitration provision

58 VAND. L. REV. 1573, 1619–22 (2005) (describing the “significant symbiotic element to the relationship between federal law and Delaware law”).

¹⁹⁴ See *supra* note 87 and accompanying text.

¹⁹⁵ See *supra* note 182 and accompanying text.

¹⁹⁶ *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013); see also Black, *Eliminating*, *supra* note 20, at 808 (“Congress, the Court and the SEC have long recognized that the securities fraud class action is ‘an indispensable tool’ that allows defrauded investors to recover at least some portion of their losses . . . [and] a necessary supplement to the SEC’s enforcement efforts.”).

¹⁹⁷ See *supra* note 21 and accompanying text.

¹⁹⁸ See *Ala. By-Prod. Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991) (cautioning that the application of *Schnell* “should be reserved for those instances that *threaten the fabric of the law*” (emphasis added)).

¹⁹⁹ See Manesh, *supra* note 93, at 293–94 (arguing that a Delaware court ruling upholding a shareholder arbitration provision “may stoke a populist backlash in Washington, D.C.” where “[a]dvocates across political lines may push Congress or the SEC to clampdown on Delaware’s regulatory power in the name of protecting investors and the capital markets”).

²⁰⁰ See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–84 (1989) (ruling that an arbitration agreement does not waive substantive rights under the

against public company shareholders should not implicate Delaware's cautious deference toward federal policy.

But even assuming that to be true, enforcement of an arbitration provision would still raise entirely distinct problems under Delaware law-based principles of equity and fiduciary duty. In particular, Delaware law has long understood that fiduciary decisionmaking is necessarily tainted by self-interest when the decision concerns a fiduciary's personal liability.²⁰¹ Where a corporate director or officer is a named defendant in a shareholder class action, that fiduciary's decision to compel arbitration would have the effect of insulating the fiduciary from the risk of personal liability.²⁰² Thus, the decision to compel arbitration would represent a form of self-dealing and a potential breach of the fiduciary's duty of loyalty.²⁰³

But even if a fiduciary's decision to force arbitration of shareholder claims could somehow meet the test of entire fairness²⁰⁴—and thus survive a legal challenge on the basis of fiduciary loyalty²⁰⁵—the decision may still fail the more basic test of equity. This is because, as the Delaware Supreme Court recently affirmed in *Coster v. UIP Companies*, the equitable scrutiny of *Schnell* stands separate and apart from entire fairness scrutiny.²⁰⁶ And the equitable scrutiny should be particularly acute where the underlying securities law claims brought by shareholders are based on fraud committed by the corpo-

Securities Act); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–34 (1987) (ruling that an arbitration agreement does not waive substantive rights under the Exchange Act).

²⁰¹ See, e.g., *United Food & Com. Workers Union v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021) (holding that whether a board of directors may “impartially” consider litigation demand made by shareholders turns in part on whether the directors face a “substantial likelihood of liability” from the shareholder claims).

²⁰² See *Lipton*, *supra* note 1, at 627.

²⁰³ See *id.* at 627–28.

²⁰⁴ See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (“The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”); *Venhill Ltd. P’ship v. Hillman*, C.A. No. 1866, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008) (“The entire fairness test is, at its core, an inquiry designed to assess whether a self-dealing transaction should be respected or set aside in equity.”).

²⁰⁵ See, e.g., *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013) (“Entire fairness . . . applies when the board labors under actual conflicts of interest. Once entire fairness applies, the defendants must establish . . . that the transaction was the product of both fair dealing *and* fair price . . . independent of the board’s beliefs.” (internal quotations and citations omitted)).

²⁰⁶ *Coster v. UIP Cos., Inc.*, 255 A.3d 952, 959–64 (Del. 2021) (holding that the equitable scrutiny of *Schnell* applies even when challenged corporate actions meet the test of entire fairness).

ration's fiduciaries.²⁰⁷ Delaware law abhors fraud.²⁰⁸ Consequently, it would be inconceivable that equity would permit the judicial enforcement of an arbitration provision that would insulate corporate fiduciaries from liability arising from their own deceit.²⁰⁹

Indeed, to the extent an arbitration provision would effectively insulate fiduciaries from liability for their own wrongdoing, such a provision would be akin to the intra-corporate fee-shifting provisions that were statutorily banned in Delaware after the state's supreme court decision in *ATP*.²¹⁰ Recall that in *ATP*, the Delaware Supreme Court upheld a bylaw requiring a losing shareholder-plaintiff in any intra-corporate lawsuit to pay the attorney's fees of the prevailing defendants.²¹¹ In response to that ruling, the Delaware General Assembly promptly amended the DGCL to bar fee-shifting in intra-corporate disputes in order to "preserve the efficacy of the enforcement of fiduciary duties in . . . corporations."²¹² The concern motivating the legislation was that the specter of fee-shifting would deter even meritorious shareholder lawsuits, insulate fiduciaries from liability for their own wrongdoing, and, thus, vitiate an essential mechanism of intra-corporate accountability.²¹³ An arbitration provision would operate no differently. Like fee-shifting, an arbitration provision would quash most meritorious federal securities claims, alongside

²⁰⁷ See, e.g., *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 97 (Del. 2021) ("Delaware courts have used their equitable powers on numerous occasions to invalidate otherwise lawful board actions tainted by inequitable deception."); *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014) (citing *Schnell* for the proposition that "[o]ur courts do not approve the use of deception as a means by which to conduct a Delaware corporation's affairs").

²⁰⁸ See *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1035, 1058 (Del. Ch. 2006) ("The public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong. . . . [T]his court consistently has respected the law's traditional abhorrence of fraud . . .").

²⁰⁹ See, e.g., *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1226 (Del. 2021) ("[Certain] stockholder rights . . . are so fundamental to the corporate form that they cannot be waived *ex ante*, such as certain rights designed to police corporate misconduct or to preserve the ability of stockholders to participate in corporate governance."); *Abry Partners*, 891 A.2d at 1061–62 (noting that "prior Delaware decisions have . . . condemn[ed] contractual limitations on a party's exposure to a fraud claim" and that "it is understandable that courts would find it distasteful to enforce contracts excusing liars for responsibility for the harm their lies caused").

²¹⁰ Act of June 24, 2015, 2015 Del. Laws 40 §§ 2–3 (codified at DEL. CODE ANN. Tit. 8, §§ 102(f), 109(b)).

²¹¹ *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014).

²¹² Act of June 24, 2015, 2015 Del. Laws 40 Synopsis.

²¹³ See DEL. STATE BAR ASS'N CORP. L. COUNCIL, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL 3–6 (2015), <https://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf> [<https://perma.cc/RE46-YMEC>] (expressing concern that "[f]ee-[s]hifting [p]rovisions [w]ill [m]ake [s]tockholder [l]itigation, [e]ven [i]f [m]eritorious, [u]ntenable").

meritless claims. Consequently, an arbitration provision would undermine the same “public policy . . . implicit in the [DGCL]”²¹⁴ ban on fee-shifting: Namely, the terms of the corporate contract should not insulate the corporation and its fiduciaries from accountability by deterring otherwise meritorious shareholder lawsuits.²¹⁵

But the inequity inflicted by an arbitration provision would go beyond depriving the vast majority of shareholders of a remedy for violations of federal securities law. While arbitration would quash all negative-value claims, the very largest shareholders may have positive-value claims that could be rationally pursued in an individualized arbitration.²¹⁶ Consequently, the very largest shareholders would still be able to recover for their losses, while the rest of the shareholders, holding negative-value claims, would be excluded from recovery.²¹⁷ Yet, to the extent the negative-value claimants remain invested as shareholders in the defendant corporation, they will indirectly contribute to any amounts paid by the corporation to those few large shareholders whose claims have positive value.²¹⁸ The net effect is to transfer wealth from the pockets of smaller shareholders to the pockets of the very largest.²¹⁹ This forced subsidy would be unfair in the “most basic sense” in that the corporation’s largest shareholders would be compensated for an injury by the other shareholders who suffered the very same injury but go uncompensated.²²⁰

²¹⁴ *Manti Holdings*, 261 A.3d at 1218; see *supra* note 129 and accompanying text.

²¹⁵ To be sure, the legislative ban on fee-shifting enacted in response to *ATP* applies only to shareholder lawsuits asserting state corporate law claims—“internal corporate claims” in the statutory language—and not shareholder lawsuits asserting violations of federal securities law. See *supra* notes 161–65 and accompanying text. Even so, a central holding of *Salzberg* is that shareholders’ rights under federal securities laws are still intra-corporate and, therefore, relevant from a state corporate law perspective. See *Salzberg v. Sciacacucchi*, 227 A.3d 102, 123 (Del. 2020).

²¹⁶ See Black, *Arbitration*, *supra* note 1, at 125 (“Institutional investors would likely not experience a serious diminishment of their remedies, since they would be able to bring individual securities actions in the arbitration forum so long as their losses were large enough to make it cost-effective.”); Webber, *supra* note 1, at 259 (“Only investors with positive-value claims can sue and recover their damages. Thus, for the most part, this group will be composed of large institutional investors.” (footnote omitted)).

²¹⁷ See Black, *Arbitration*, *supra* note 1, at 125 (“[S]mall retail investors['] . . . claims will not be sufficiently large to make it economically feasible to bring individual arbitration claims. . . . In instances where a regulator does not pursue actions against issuers, small investors will not be compensated for their losses.”); Webber, *supra* note 1, at 259 (“[M]any smaller institutional investors—and most, if not all, individual investors—will have negative-value claims. Consequently, they will have no remedy for their wrong.”).

²¹⁸ See Webber, *supra* note 1, at 259–63 (describing this as a “semi-circularity” problem created when class action securities litigation is barred).

²¹⁹ See *id.* at 259.

²²⁰ See *id.*

A basic tenet of equity is that “equity will not suffer a wrong without a remedy.”²²¹ Given the cumulative wrongs that an arbitration provision would inflict on the vast majority of public company shareholders, it is difficult to envision any circumstances in which such a provision could be equitably enforced. And nothing in *Salzberg* or *Boilermakers* suggests otherwise. Unlike the forum provisions upheld in those cases, a provision compelling individualized arbitration and waiving class actions would deny the vast majority of a corporation’s shareholders a remedy for losses arising from an unlawful misrepresentation.²²² It would transfer wealth from those injured shareholders to compensate the corporation’s largest shareholders for losses arising from the very same misrepresentation.²²³ And it would insulate the corporation and its fiduciaries from full accountability for violations of federal securities law.²²⁴ Moreover, it would rupture the symbiotic equilibrium between state and federal law governing public corporations.²²⁵ In light of these consequences, the board of a public corporation could not equitably, consistent with its fiduciary obligations of good faith and loyalty,²²⁶ seek to adopt or enforce an arbitration provision against its shareholders.²²⁷

3. *The Narrowly Tailored Limits Created by Equity*

In concluding that an arbitration provision would be unenforceable against public company shareholders, it is also useful to note the modesty of that conclusion. For one, the analysis above says nothing as to the enforceability of an arbitration provision set forth in the gov-

²²¹ See *supra* note 183.

²²² See *supra* notes 180–92 and accompanying text.

²²³ See *supra* notes 216–20 and accompanying text.

²²⁴ See *supra* notes 202–15 and accompanying text.

²²⁵ See *supra* notes 192–99 and accompanying text.

²²⁶ See *Coster v. UIP Cos., Inc.*, No. 2018-0440, 2022 WL 1299127, at *9 (Del. Ch. May 2, 2022) (interpreting an “inequitable purpose” under *Schnell* to mean, “when considered in the category of stockholder-franchise challenges, as applicable in the limited scenario wherein the directors have no good faith basis for approving the disenfranchising action”).

²²⁷ Admittedly, in the context of fee-shifting provisions, the Delaware Supreme Court in *ATP* ruled that “[t]he intent to deter litigation, however, is not invariably an improper purpose.” *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 560 (Del. 2014). But an arbitration provision would deter *all meritorious litigation*, so long as the litigation involves negative-value claims. In any case, the holding in *ATP* was overruled with the statutory enactment barring fee-shifting, calling into question the continued validity of this language from *ATP*. See DEL. STATE BAR ASS’N CORP. L. COUNCIL, *supra* note 213, at 12 (explaining that the 2015 DGCL amendments “would limit *ATP* to its facts” and “preserve the tradition and status quo that preceded *ATP*, in which the courts, and not charter and bylaw provisions, control stockholder litigation and the allocation of litigation costs among the parties”).

erning documents of a close, or privately held, corporation.²²⁸ Given the typically distinctive circumstances of close corporations, it may well be that an arbitration provision would not have the same inequitable consequences.²²⁹ It could be, for example, that the relative size of individual shareholders' ownership stakes, or the relative simplicity of proving a federal securities law violation, would not necessarily preclude a shareholder in the close corporation context from vindicating a meritorious federal securities claim in an individualized, bilateral arbitration. Moreover, the fact that shareholders in a close corporation could readily agree to an arbitration provision in a separate shareholders' agreement²³⁰ suggests that there may be nothing inequitable in including that same provision instead in the corporation's charter or bylaws.²³¹

Likewise, even in the context of a *public* corporation, the foregoing analysis says nothing as to the enforceability of an arbitration provision that expressly and unambiguously permits class arbitration of federal securities law claims.²³² Where the shareholders of a public corporation are not forced into individualized, bilateral arbitration, but are instead expressly permitted to arbitrate collectively as a class,

²²⁸ See *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1922 n.7 (2022) (“[C]lose corporations have included arbitration clauses in negotiated shareholder agreements for many decades.”); G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 525–26 (1989) (“Although arbitration of shareholder claims is a novelty for the public corporation, this dispute resolution system is well established in the context of another class of corporate entities, that of the privately held or ‘close’ corporation.” (footnote omitted)).

²²⁹ See Shell, *supra* note 228, at 525–28 (describing the fundamental differences between close and public corporations); cf. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1225 (Del. 2021) (explaining that although “sophisticated and informed investors” in a close corporation may contractually waive statutory appraisal rights, “concerns about information asymmetry might justify excusing enforcement” in circumstances involving “a retail investor that was not involved in negotiating the [waiver] or against outsiders that lack material knowledge of [the company’s] corporate governance dynamics”).

²³⁰ See Act of June 24, 2015, 40 Del. Laws 16 (2015) (“[DGCL] Section 115 is not intended . . . to prevent the application of [an arbitration] provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.”). Notably, Delaware LLC law already permits LLC participants to agree to arbitration in the terms of an LLC agreement. See DEL. CODE ANN. Tit. 6, § 18-109(d) (2015); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 292–93 (Del. 1999).

²³¹ See Black, *Eliminating*, *supra* note 20, at 843 (“To extend the concept of an agreement under FAA § 2 [beyond a signed shareholder agreement] to include the certificate of incorporation of a corporation with a small number of shareholders, all of whom are actively engaged in the business, may not stretch . . .”).

²³² See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684–87 (2010) (holding that if an arbitration provision is silent as to the availability of class arbitration, then class arbitration is precluded); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) (holding that if an arbitration provision is ambiguous as to the availability of class arbitration, then class arbitration is precluded).

then the arbitration provision would not have the same inequitable effect of quashing meritorious, negative-value claims. To be sure, even a provision permitting class arbitration may be inequitable for other reasons. For example, a provision may be unenforceable if it prescribed an arbitral procedure that drastically restricted shareholders' access to discovery, imposed burdensome fees or costs, or had other features that made it difficult or impossible for shareholders to vindicate meritorious claims against the corporation and its fiduciaries.

In sum, nothing in the foregoing analysis suggests shareholder arbitration of federal securities law claims is inherently inequitable or unfair in all circumstances. Instead, the nature of equity necessitates case-by-case scrutiny.²³³ Therefore, in denying the enforceability of a provision relegating public company shareholders to individualized, bilateral arbitration, there would be no need for a court to speculate or rule more broadly on the enforceability of other types of arbitration provisions.²³⁴ It may well be that a provision compelling arbitration of federal securities law claims could be enforceable under Delaware law in at least some contexts, which stands in contrast to the outright bar that DGCL Section 115 places on arbitration of state corporate law claims.²³⁵ But a provision in the corporate contract compelling individualized, bilateral arbitration of federal securities law claims would be manifestly inequitable and therefore unenforceable when applied to the specific context of *public* company shareholders.

Given the narrow breadth of this conclusion, it could be readily stated in terms of either facial validity or as-applied enforceability. Facially, because a provision compelling individualized arbitration "cannot operate . . . equitably under any circumstances"²³⁶ involving public company shareholders, such a provision would be invalid in all such cases. And for the same reason, such a provision would be unen-

²³³ See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 962 (Del. Ch. 2013) ("[T]he strength of . . . situational fiduciary duty review is that any such argument is presented in an actual case with concrete facts."); *Sample v. Morgan*, 914 A.2d 647, 672–73 (Del. Ch. 2007) ("If a contract with a third-party is premised upon a breach of fiduciary duty, the contract may be unenforceable on equitable grounds But the basis for that determination is the fact-intensive one demanded by equity, not a bright-line ruling"); Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 883 (2005) ("Fidelity to [*Schnell*] requires the judiciary to eschew the formulation of per se rules in equity.").

²³⁴ Nor would there be any need for the court to speculate on the merits of the shareholder-plaintiff's underlying federal securities law claim because the equitable issue concerns the effect that forced arbitration would have on the feasibility of *all* shareholder claims, *regardless of merit*.

²³⁵ See *supra* Section II.B.

²³⁶ See *supra* note 137 and accompanying text.

forceable in any as-applied challenge involving public company shareholders. However stated, the ultimate conclusion under Delaware corporate law would be the same: A provision compelling bilateral arbitration of federal securities law claims would be unenforceable against the shareholders of a public corporation.

III.

CORPORATE LAW AND FAA PREEMPTION

Having established the unenforceability of an arbitration provision under Delaware law, this Part turns to consideration of the FAA. As Section III.A explains, the FAA preempts any state law that interferes with the federal mandate to enforce arbitration agreements. Given this precedent, Section III.B then demonstrates why a state corporate law rule barring shareholder arbitration is different. Unlike other contractual contexts where the FAA preempts state law, the state is a party to the corporate contract governing every corporation that the state charters. Thus, when the state, through its corporate law, prohibits shareholder arbitration, the issue becomes one of assent, rather than preemption.

A. *The Preemptive Sweep of the FAA*

Under the Supremacy Clause of the U.S. Constitution, federal law supersedes contrary state law.²³⁷ As applied to the FAA, the Supremacy Clause means that where a state law conflicts or otherwise interferes with the FAA's Section 2 mandate to enforce arbitration agreements, the state law is preempted.²³⁸ The FAA's preemptive effect raises obvious questions about the viability of any statutory or judge-made rule arising under state corporate law, like those described above in Part II, that would limit the enforceability of a shareholder arbitration provision.

Consider DGCL Section 115's ban on any charter or bylaw provision compelling shareholder arbitration of state corporate law claims.²³⁹ As the U.S. Supreme Court has plainly explained, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced

²³⁷ U.S. CONST. art. VI, cl. 2.

²³⁸ See *Volt Info. Scis., Inc. v. Bd. Tr. Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" (citation omitted)).

²³⁹ See *supra* Section II.B.

by the FAA.”²⁴⁰ Arguably, DGCL Section 115 does not “prohibit outright” an agreement to arbitrate state corporate law claims—it simply bars such agreements from a corporation’s governing documents.²⁴¹ A corporation and its shareholders could still agree to arbitrate any state corporate law claims pursuant to a separate contractual agreement, outside of the corporation’s charter and bylaws.²⁴² Nonetheless, the Supreme Court’s FAA decisions make clear that any “state laws applicable *only* to arbitration provisions,”²⁴³ that thus “singl[e] out arbitration provisions for suspect status,”²⁴⁴ necessarily conflict with the FAA’s enforcement mandate.²⁴⁵ That is because the FAA “establishes an equal-treatment principle,”²⁴⁶ requiring state law to place an agreement to arbitrate “on equal footing with all other contracts.”²⁴⁷ Thus, the Court’s precedents would suggest that because DGCL Section 115 “singles out arbitration agreements [governing state corporate law claims] for disfavored treatment,” the state statute is preempted by the FAA.²⁴⁸

A judge-made rule denying the enforceability of an arbitration provision on equitable grounds²⁴⁹ would likely fare no better. To be sure, a judicial decision relying upon the *Schnell* principles of equity would not necessarily “single out” arbitration provisions for disparate treatment. After all, such principles are facially neutral and could be applied to deny the enforceability of *any provision* in the corporate contract that would have an inequitable effect on shareholders. Accordingly, one might reason, a judge-made ruling based on facially

²⁴⁰ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (citation omitted).

²⁴¹ See DEL. CODE ANN. tit. 8, § 115 (“[N]o provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.” (emphasis added)).

²⁴² See Act of June 24, 2015, 2015 Del. Laws 40 Synopsis (“Section 115 is not intended . . . to prevent the application of [a forum provision selecting the courts of a different state, or an arbitral forum, in addition to Delaware courts] in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.”).

²⁴³ Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (“Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”).

²⁴⁴ *Id.*; accord Kindred Nursing Ctrs. Ltd. Partnership v. Clark, 581 U.S. 246, 250 (2017).

²⁴⁵ See *Kindred Nursing*, 581 U.S. at 251 (“The FAA . . . preempts any state rule discriminating on its face against arbitration The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.”).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 248 (quoting DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015)); accord AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (“[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” (citations omitted)).

²⁴⁸ *Kindred Nursing*, 581 U.S. at 248.

²⁴⁹ See *supra* Section II.C.

neutral state corporate law principles of equity and fiduciary obligation would be protected from preemption by the saving clause of Section 2 of the FAA, which permits courts to decline the enforcement of an arbitration agreement “upon such grounds as exist at law or in equity for the revocation of *any contract*.”²⁵⁰

But such reasoning would run headfirst into contrary Supreme Court precedents, most importantly *AT&T v. Concepcion*.²⁵¹ In *Concepcion*, the Court ruled that FAA Section 2’s saving clause does not protect from preemption a facially neutral state law that, when applied to an arbitration provision, would “interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.”²⁵² Employing this logic, *Concepcion* reversed a line of judicial decisions that relied upon the state law doctrine of unconscionability to deny enforcement of class action waivers in certain consumer contracts of adhesion.²⁵³ Although the judge-made rule emerging from those decisions applied neutrally, invalidating *both* waivers of class litigation *and* waivers of class arbitration in consumer contracts,²⁵⁴ the *Concepcion* court explained that the rule was preempted with respect to arbitration because “[r]equiring the availability of class arbitration” would frustrate “[t]he overarching purpose of the FAA,” namely “the enforcement of arbitration agreements

²⁵⁰ 9 U.S.C. § 2 (emphasis added); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (“[T]he saving clause recognizes only defenses that apply to ‘any’ contract. In this way the clause establishes a sort of ‘equal-treatment’ rule for arbitration contracts.”); *Concepcion*, 563 U.S. at 339 (“This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”); *Dr.’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (“[T]he text of §2 declares that state law may be applied ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’ Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2.” (citations omitted)).

²⁵¹ 563 U.S. 333 (2011).

²⁵² *Id.* at 344; *accord* *Epic Sys. Corp.*, 138 S. Ct. at 1622 (“[T]he [saving] clause offers no refuge for ‘defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’ . . . [this includes] defenses that target arbitration either by name or by more subtle methods, such as by ‘interfering with fundamental attributes of arbitration.’” (citations omitted)); *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917–18 (2022) (explaining that “even rules [of state law] that are generally applicable . . . are not immune to preemption by the FAA” to the extent such state law rules “transform ‘traditional individualized arbitration’ into the ‘litigation it was meant to displace’ through the imposition of procedures at odds with arbitration’s informal nature” (citations omitted)).

²⁵³ *See* *Concepcion*, 563 U.S. at 340, 352 (describing and overruling California’s *Discover Bank* rule).

²⁵⁴ *See id.* at 341–44.

according to their terms so as to facilitate streamlined proceedings.”²⁵⁵ Importantly, in holding the state law rule to be preempted by the FAA, the Court specifically rejected the argument “that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.”²⁵⁶ Just two years later, the Court would double down on this conclusion, explaining that *Concepcion* “established . . . that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”²⁵⁷ Thus, *Concepcion* and its progeny suggest that the FAA would preempt any state law principle denying the enforceability of an arbitration provision premised on that provision’s inequitable effect on shareholders with negative-value claims.²⁵⁸

B. *The Corporate Contract and the Chartering State*

At first blush, the Supreme Court’s FAA precedents paint a grim picture for the viability of any state corporate law rule that would limit the enforceability of a shareholder arbitration provision. Recognizing this, some corporate law scholars have attempted to resist the preemptive sweep of the FAA by denying the contractual essence of a corporation’s charter and bylaws.²⁵⁹ Because corporate law is fundamentally distinct from contract law, the theory goes, a cor-

²⁵⁵ *Id.* at 344; *accord* *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (ruling that a generally applicable, facially neutral contract law doctrine of *contra proferentum* is preempted by the FAA if it would “target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration.’” (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1622)); *see also* Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 *BERKELEY J. EMP. & LAB. L.* 153, 162–64 (2014) (explicating the Court’s reasoning in *Concepcion*).

²⁵⁶ *Concepcion*, 563 U.S. at 351.

²⁵⁷ *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 n.5 (2013).

²⁵⁸ *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622–23 (2018) (explaining that, because “the individualized nature of . . . arbitration proceedings” is one of arbitration’s “fundamental attributes,” an argument that a contract is unenforceable just because it requires bilateral arbitration “is one that impermissibly disfavors arbitration”); *id.* at 1631 (“Our precedent clearly teaches that a contract defense ‘conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures’ is inconsistent with the [FAA] and its saving clause.” (quoting *Concepcion*, 563 U.S. at 336)).

²⁵⁹ *See, e.g.*, Lipton, *supra* note 1, at 587 (“[C]orporate governance arrangements are not contractual. Contract law is organized around a theory of consent Corporations, by contrast, are organized around principles more akin to trust law”); Raz, *supra* note 1, at 226 (“Corporate law is not contract law, and corporate charters and bylaws are not contracts [C]orporate law . . . actually is . . . a distinct legal framework, having its own defining structure, and residing on the same level as contract, property, or tort in the hierarchy of private law.” (footnote omitted)).

porate charter and bylaws are unlike ordinary, commercial contracts and therefore not subject to the FAA.²⁶⁰

Yet, judicial precedents like *Boilermakers* and *Salzberg* make it increasingly problematic to sustain this claim.²⁶¹ As described above, both decisions explicitly and repeatedly label a corporation's charter and bylaws as a "contract" without qualification.²⁶² And both decisions invoke contract law precepts to uphold the enforceability of forum provisions against shareholders. Given these precedents, any theory that disclaims the contractual nature of a corporation's governing documents, whatever its normative salience, is difficult to reconcile with the law as a descriptive matter.

Moreover, it is not clear that such a theory would even save a state corporate law rule limiting arbitration from FAA preemption. Under the Supreme Court's precedents, the applicability of the FAA depends not on whether an arbitration provision appears in a "contract" *per se*.²⁶³ Instead, it depends on the narrower question of whether the relevant parties have *agreed to arbitration*.²⁶⁴ Thus, for a state corporate law rule limiting arbitration to avoid FAA preemption, it is not enough to reject the contractual nature of a corporation's governing documents.²⁶⁵ What is required is to show that there was, in fact, no agreement to arbitrate.

This Section does just that. Rather than denying the contractual nature of the relationship created by a corporation's charter and bylaws, this Section accepts what the corporate case law unequivocally says: A corporation's charter and bylaws *are a binding contract*

²⁶⁰ See Lipton, *supra* note 1, at 587 ("These differences [between corporate law and contract law] render the FAA—which is predicated on principles of contract law, not trust law—unsuited for application to corporate governance documents."); Raz, *supra* note 1, at 229 ("If corporate law lies outside of contract law, then arbitration proponents' efforts should fail . . .").

²⁶¹ See, e.g., *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) ("The FAA requires courts to 'enforce arbitration agreements according to their terms.' . . . [C]ourts may ordinarily accomplish that end by relying on state contract principles" (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1621)); *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987))); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

²⁶² See *supra* notes 64–66, 89, 95–99 and accompanying text.

²⁶³ See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1054–58 (2012) [hereinafter Horton, *Testamentary Instruments*].

²⁶⁴ See *id.* at 1058–60.

²⁶⁵ See *supra* notes 67–70, 89, 95 (describing the theory of implied shareholder assent articulated in *Boilermakers* and embraced by *Salzberg*).

between the corporation and its shareholders. This Section, however, broadens the aperture to reveal another party to the corporate contract: the state that has chartered the corporation. As a party to the corporate contract, where the chartering state has withheld its assent to arbitration, there can be no agreement to arbitrate. And with no agreement to arbitrate, the FAA becomes irrelevant.

1. *The Chartering State's Assent Is Necessary*

The creation of a typical contract is a private act. All that is required is mutual assent between two (or more) private parties and an exchange of consideration.²⁶⁶ It involves no action or assent on the part of the state. Rather, the state's role in the typical contract arises only if one contract party seeks its enforcement against another.

The corporate contract is fundamentally different.²⁶⁷ Individuals cannot form a corporation through private action.²⁶⁸ Rather, state action—through the grant of a corporate charter—is needed to bring a corporation into existence.²⁶⁹ Thus, since Chief Justice Marshall's celebrated *Dartmouth College* decision,²⁷⁰ both state and federal

²⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) (“[T]he formation of a contract [generally] requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”); *accord* *Ramone v. Lang*, No. Civ.A. 1592-N, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006) (Strine, V.C.) (citing *Wood v. State*, 815 A.2d 350 (Del. 2003)).

²⁶⁷ See Hershkoff & Kahan, *supra* note 67, at 286 (“A charter or bylaw is not an ordinary contract. . . . [T]he state’s role in corporate charters and bylaws is of a different order.”); Manesh, *supra* note 14, at 571–72 (“[U]pon reading [state] corporate law statutes, it is difficult to conclude that a corporation[’s] . . . governing documents are a ‘contract’ in any ordinary sense.”).

²⁶⁸ 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.” (footnote omitted)).

²⁶⁹ See Lipton, *supra* note 1, 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.’” (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987))); Manesh, *supra* note 14, at 571 (“Corporations exist only because state legislatures have enacted statutes to enable their existence.”); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1015 (2013) (“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.”); see also *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 913 n.7 (Del. Ch. 2020) (Laster, V.C.) (“[T]he DGCL rests on a concept of the corporation that is grounded in a sovereign exercise of state authority: the chartering of a ‘body corporate’ that comes into existence on the date on which a certificate of incorporation becomes effective.” (quoting DEL. CODE ANN. tit. 8, § 106 (2023))).

²⁷⁰ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 643–44 (1819) (“[The corporate charter] is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties.”); *id.* at

courts have recognized that the state chartering a corporation is a party to the contract that is represented by the corporation's charter.²⁷¹ The state is a party to the corporate contract because the state's assent was required to create the corporation.²⁷²

In the early history of the United States, state assent to the grant of a corporate charter came infrequently, through special acts of legislation.²⁷³ Today, state assent to incorporation is more readily

651 (“By this contract the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.”).

²⁷¹ See, e.g., *Helvering v. Nw. Steel Rolling Mills, Inc.*, 311 U.S. 46, 50–51 (1940) (“[A] charter has been judicially considered to be a contract . . . [I]t has been said that an Act of Incorporation is a contract between the state and the stockholders.” (citing *Dartmouth College*, 17 U.S. (4 Wheat.) 518)); *Del. R.R. Tax*, 85 U.S. (18 Wall.) 206, 225 (1873) (“That the charter of a private corporation is a contract between the State and the corporators . . . has been the settled law of this court since the decision in the *Dartmouth College* case.”); *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.”); *Lawson v. Household Fin. Corp.*, 152 A. 723, 727 (Del. 1930) (“Ever since the decision in the *Dartmouth College* Case . . . it 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 [for] support . . .”); *State ex rel Humphrey v. Delano Cmty. Dev. Corp.*, 571 N.W.2d 233, 236 (Minn. 1997) (“A corporation[]’s articles of incorporation embody a contract between the state and the corporation, as well as among the shareholders.”); *Opdyke v. Sec. Sav. & Loan Co.*, 105 N.E.2d 9, 16 (Ohio 1952) (“[T]he charter of a corporation constitutes a contract between the state and the corporation, between the corporation and the stockholders, and between the stockholders *inter se* . . .”); *Sutter v. Sutter Ranching Corp.*, 14 P.3d 58, 64 n.25 (Okla. 2000) (“Recognized principles governing interpretation of a certificate of incorporation include [that] a certificate of incorporation constitutes a contract between the state and the corporation and among the shareholders . . .”); *Dentel v. Fid. Sav. & Loan Ass’n*, 539 P.2d 649, 651 (Or. 1975) (“The articles of incorporation constitute ‘a contract between the corporation and the state, between the corporation and its owners, and between the owners themselves.’” (quoting NORMAN D. LATTIN, *THE LAW OF CORPORATIONS* 570 (2d ed. 1971))); *Jacobson v. Backman*, 401 P.2d 181, 183 (Utah 1965) (“[A] corporate charter is a dual contract—one between the state and the corporation and its stockholders, and the other between the corporation and its stockholders—and under its reserved power the state may alter or amend the former but not the latter.”); *McMurray v. Sec. Bank of Lynnwood*, 393 P.2d 960, 962 (Wash. 1964) (“The articles of incorporation constitute a part of [the corporation’s] contract with the state which chartered it.”); *Ferrill v. N. Am. Hunting Retriever Ass’n, Inc.*, 795 A.2d 1208, 1211 (Vt. 2002) (“A corporation’s articles of incorporation are a contract between the state and the corporation and among its shareholders or members.”).

²⁷² See *Dartmouth College*, 17 U.S. (4 Wheat.) at 657–58 (Washington, J., concurring) (“A corporation is defined by Mr. Justice Blackstone to be a franchise. . . . To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The *assent of both* is necessary.” (emphasis added) (footnote omitted)).

²⁷³ See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 120 (Routledge 2017) (1932) (describing the evolution of special incorporation statutes); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 52 (2006) (same).

granted.²⁷⁴ Modern general incorporation statutes enable any private individual to obtain a corporate charter without special legislative action,²⁷⁵ thus largely masking the essential role the state plays in bringing a corporation into existence.²⁷⁶ But the fact that nowadays state assent to incorporation is readily granted does not alter the fact that state assent is still needed.²⁷⁷

Indeed, the essential role the chartering state plays in bringing a corporation into existence reveals itself in the legal attributes that the state bestows on its corporate creation.²⁷⁸ Legal personhood, perpetual existence, and limited liability for shareholders are all corporate attributes that private actors alone could not achieve through a contractual agreement.²⁷⁹ Instead, these attributes derive from state law and, thus, point to the indelible hand of the state.²⁸⁰

When a state grants a corporate charter, the state law pursuant to which that charter was granted dictates the terms of the state's assent

²⁷⁴ See BERLE & MEANS, *supra* note 273, at 126–27 (describing the evolution of general incorporation statutes); Tung, *supra* note 273, at 60–63 (same).

²⁷⁵ See, e.g., DEL. CODE ANN. tit. 8, § 101 (2023).

²⁷⁶ Manesh, *supra* note 14, at 536, 572.

²⁷⁷ Hayden & Bodie, *supra* note 268, 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.”); see also Vincent S.J. Buccola, *States’ Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595, 611 (2017) (“[L]iberal access to the corporate form, which is so familiar today, is the product of state legislative choice”); Sale, *supra* note 269, at 1015 (“Today [corporations] are easily formed . . . by filing papers with the state’s secretary of state. They remain, however, entities that exist with the permission of the government.”).

²⁷⁸ Manesh, *supra* note 14, at 536–37.

²⁷⁹ *Id.*, at 537; see also Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2431 (2020) (“Limited liability cannot be replicated by contract, but is instead a concession granted by the state to corporations”); 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 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 likely require “express legislative grants of corporate powers”); Saule T. Omarova, *The “Franchise” View of the Corporation: Purpose, Personality, Public Policy*, in RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 201 (Elizabeth Pollman & Robert B. Thompson eds., (2021) (“[T]he core characteristics of the corporate form—separate and perpetual firm existence, asset segregation in general, and limited liability in particular—cannot be derived from private individuals’ exercise of traditional property or contractual rights. These are extraordinary privileges that can only be bestowed on a business entity by law.” (footnote omitted)).

²⁸⁰ Manesh, *supra* note 14, at 537; see also 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.” (footnote omitted)).

and, therefore, the terms of the corporation's existence.²⁸¹ Those terms are implied into the corporation's charter,²⁸² and the state becomes a party to the resulting contract that governs the relationships among the corporation, its directors, and its shareholders.²⁸³

At one time, state corporate law intrusively regulated these intracorporate relationships.²⁸⁴ Under today's corporate statutes, however, the state's role has receded.²⁸⁵ As already noted, modern corporate law is enabling: A corporation, its directors, and its shareholders enjoy broad contractual freedom to tailor their relationships in the terms of the corporation's governing documents.²⁸⁶ But as with corporate formation, the fact that modern corporate law affords broad contractual freedom in internal corporate governance does not alter the fact that contractual freedom is a legislative choice the state has made.²⁸⁷ No

²⁸¹ See, e.g., *Chi. Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124–25 (1937) (“[A] private corporation in this country can exist only under the express law of the state or sovereignty by which it was created.”); 18 AM. JUR. 2D *Corporations* § 79 (2023) (“Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes.”).

²⁸² See, e.g., DEL. CODE ANN. tit. 8, § 394 (2023) (“This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.”); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991) (“[I]t is a basic concept that the [DGCL] is a part of the certificate of incorporation of every Delaware company.”); *State ex rel. Starkey v. Alaska Airlines, Inc.*, 413 P.2d 352, 358 (Wash. 1966) (“It is axiomatic that the provisions of the statute under which a corporate charter is granted is an integral part of the charter and binds all parties to the contract, the state, the corporation, and the shareholders.”).

²⁸³ The widely accepted internal affairs doctrine is itself a manifestation of the chartering state's role as a party to the corporate contract. Internal corporate affairs are governed by the chartering state's law precisely because it was the chartering state's law that brought the corporation into existence. See *Manesh*, *supra* note 14, at 541–42; see also *Tung*, *supra* note 273, at 47 (“Given 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.”).

²⁸⁴ See BERLE & MEANS, *supra* note 273, at 120–24 (describing the regulations embedded in early incorporation statutes); *Tung*, *supra* note 273, at 61 (same).

²⁸⁵ See BERLE & MEANS, *supra* note 273, at 126–28 (observing that the permissive structure of modern incorporation statutes “eliminat[es] . . . the [state] legislature from negotiations attending the formation of the corporate contract”); *Omarova*, *supra* note 279, at 208 (observing that “[t]he mass adoption of modern ‘free incorporation’ statutes in the late nineteenth century” resulted in “the systematic retreat of the state, and hence of the public, as the sovereign franchisor of the ‘hybrid’ corporate form”).

²⁸⁶ See *supra* notes 121–24 and accompanying text.

²⁸⁷ See *Johnson*, *supra* note 279, at 1151 (“[F]or a long stretch of history, corporate law itself has been deregulatory, but only because that particular approach was thought to be socially beneficial.”); *Manesh*, *supra* note 14, at 573 (“[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.”); Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 348

one doubts that a state could revert back to a more prescriptive corporate law to govern the internal affairs of its corporate creations.²⁸⁸

In fact, even today's enabling state corporate law imposes a number of terms into the corporate contract—mandatory terms that cannot be tailored²⁸⁹ and that the state may at any time unilaterally amend.²⁹⁰ Moreover, the state empowers its courts to police the pri-

(2014) (describing the “move[ment] away from special charters and loosen[ing of] other restrictions on corporations” as a “legislative choice”).

²⁸⁸ See William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 445 (1989) (“[T]he state clearly reserves the right to rewrite the ground rules and to constrain the freedom of corporate actors.”); Buccola, *supra* note 277, at 610 (“The states never lost their plenary authority [over domestic corporations] . . . they simply ceased to exercise it.”); Johnson, *supra* note 279, 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”); Manesh, *supra* note 14, at 540–41 (“Although a state like Delaware could . . . choose to more intrusively regulate the internal governance of the corporations it charters, Delaware instead chooses to . . . largely devolve[] the state’s regulatory power to private actors—the corporation, through its board of directors, and shareholders—to determine the rules of internal corporate governance.”); Sale, *supra* note 269, 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” (footnote omitted)).

²⁸⁹ See, e.g., *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1217 (Del. 2021) (“Although the DGCL is a broad and enabling statute, “[i]t is not . . . bereft of mandatory terms.” (quoting *In re The Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 976 (Del. Ch. 1997)); Hershkoff & Kahan, *supra* note 67, at 278–79 (identifying “significant constraints” imposed by state corporate law on the terms of the corporate contract); Manesh, *supra* note 14, at 539–40 (identifying various “mandatory” facets of state corporate law, including the “fiduciary duty of loyalty[,] a statutory right of shareholders to inspect the corporation’s books and records[,] a statutory ban on fee-shifting provisions in corporate charters and bylaws . . . [, and] a similar ban on provisions mandating private arbitration of shareholder claims enacted as part of those same amendments” (footnotes omitted)); Welch & Saunders, *supra* note 121, at 855–60 (identifying mandatory rules of Delaware corporate law concerning the election of directors, inspection rights of shareholders, and the fiduciary duty of loyalty).

²⁹⁰ See DEL. CODE ANN. tit. 8, § 394 (2023) (“This chapter may be amended or repealed, at the pleasure of the General Assembly This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation”). The persistence of reserved power clauses in present-day state statutes and constitutions highlights both the chartering state’s enduring status as a party to the corporate contract *and* the peculiar role the state plays with respect to each corporation that it charters. Reserved power clauses reserve for the state the power to amend, alter, or repeal the terms under which a corporate charter is granted. See, e.g., *id.* Such clauses would be unnecessary *but for* the holding in *Dartmouth College* that, as a contract party, the state is bound to the charter of each corporation that the state creates, and, therefore, the state may not unilaterally alter the charter without the corporation’s consent. See 7A WILLIAM MEADE FLETCHER & STEPHEN M. FLANAGAN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3668 (perm. ed., rev. vol. 1997); 18 AM. JUR. 2D CORPORATIONS § 79 (2023). Per Justice Story’s concurrence in *Dartmouth College*, when a state grants a corporate charter pursuant to a reserved power clause, that clause becomes a

vate misuse of the state's corporate creations through ongoing equitable oversight,²⁹¹ the enforcement of fiduciary duties,²⁹² and the ultimate authority to revoke a corporate charter.²⁹³

Thus, to say the chartering state is a party to the corporate contract is not to say that a corporation's governing documents are exactly like contracts made in other commercial contexts. Quite the opposite.²⁹⁴ It would be absurd, for example, to assert that the state,

part of the corporate contract and, thus, empowers the state to unilaterally alter the terms of a corporation's existence. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 712 (1819) (Story, J., concurring) (“[A]ny act of a legislature which takes away any powers or franchises vested by its charter in a private corporation . . . without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant.”). Reserved power clauses make the chartering state an atypical contract party in that the state enjoys the right to unilaterally alter the terms of the corporate contract and, therefore, the legal rights of intra-corporate relationships. *See* Hershkoff & Kahan, *supra* note 67, at 280 (“[T]he state plays an unusual and large role in the ‘contractual’ regime constituted by charters, bylaws, and state law. . . . [M]ost tellingly, the state reserves the right to change charter and bylaw terms *ex post*—by adopting laws making such terms invalid—without running afoul of the Contracts Clause.” (footnote omitted)); *see also* 18 AM. JUR. 2D CORPORATIONS § 82 (2023) (“A reserved power to alter and amend charters may be exercised to almost any extent to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators”); 7A WILLIAM MEADE FLETCHER & STEPHEN M. FLANAGAN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3679 (perm. ed., rev. vol. 1997) (“While this reserved right is in the interest of the state to modify or repeal its own contract with the corporation, it is in reality a continuing power of regulation and control in the interests of the public.” (footnote omitted)).

²⁹¹ *See* Lipton, *supra* note 1, at 611–16; *id.* at 612 (“The judiciary’s role in policing corporate governance reflects that corporations are ultimately state creations; the state still reserves the right to continually reexamine directors’ exercise of their powers for compliance with state-imposed norms of appropriate behavior.”).

²⁹² *See* Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 187 (Sean Griffith et al. eds., 2018) (“The fiduciary duties imposed by states on corporate managers are a form of government regulation. The purpose of that regulation is to protect investors, reduce agency costs, and ultimately encourage investment, with the resulting economic benefits shared across society.”); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1449 (2021) (explaining that judicial enforcement of fiduciary duties in contemporary corporate law serves a public function protecting society’s interests).

²⁹³ *See* DEL. CODE ANN. tit. 8, § 284 (2023) (authorizing the state attorney general to petition the Delaware Chancery Court “to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises”); *see also id.* §§ 510–11 (authorizing the secretary of state to revoke a corporate charter for failure to pay the state’s franchise tax).

²⁹⁴ *See* Hershkoff & Kahan, *supra* note 67, at 286 (“[T]he state’s unusual role as a party to the [corporate] ‘contract’ with revisionary and authorizing power . . . is not typically granted in the ordinary contractual setting. The observation is not . . . one of legal realism that the state is implicated in all private deals; the state’s role . . . is of a different order.”); Manesh, *supra* note 14, at 571–72 (“[U]pon reading [state] corporate law statutes, it is difficult to conclude that a corporation[’s] . . . governing documents are a ‘contract’ in any ordinary sense.”).

as a contract party, may be sued or impleaded in any dispute among a corporation, its directors, or shareholders. Nor does it mean that because a corporation is state-chartered it is a state actor subject to constitutional restraints.²⁹⁵ The corporate contract is an atypical contract—one that relies on the state for its formation²⁹⁶ and, once formed, places the state in a unique regulatory position.²⁹⁷ But those facts do not make a corporation a state actor.²⁹⁸ Instead, they reflect a basic truth of corporate law: Because state assent is necessary for incorporation, the state may, through its corporate law, dictate the terms of a corporation's existence and, thus, the terms of intra-corporate relationships.

From its earliest precedents, the Supreme Court has recognized this basic truth. Thus, in *Dartmouth College*, Chief Justice Marshall famously stated that the 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”²⁹⁹ A century later, the Court would reaffirm this essential principle, explaining that “[h]ow long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power” and that “[t]he circumstances under which th[at] power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legis-

²⁹⁵ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543–44 (1987) (“[T]hat Congress granted . . . a corporate charter does not render [corporations] . . . Government agent[s]. All corporations act under charters granted by a government They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.”); *Banks v. Vio Software*, 275 F. App'x 800, 802 (10th Cir. 2008) (rejecting the argument that a corporation is a state actor because it is state-chartered as “simply incorrect and frivolous” and noting that “[e]ven a minimal research effort would have made this evident”).

²⁹⁶ See *supra* notes 267–72 and accompanying text.

²⁹⁷ See *Hershkoff & Kahan, supra* note 67, at 280 (explaining that “[t]he state plays an unusual and large role in the ‘contractual’ regime constituted by charters [and] bylaws” and that the “degree of state involvement, and the state’s retention of the power to revise charter terms *ex post*, cannot be reconciled with the ordinary principles of contract law”).

²⁹⁸ See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (“In cases involving extensive state regulation of private activity, we have consistently held that ‘[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State’” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974))). Compare *S.F. Arts & Athletics, Inc.*, 483 U.S. at 542–44 (holding that a federally chartered, regulated, and subsidized corporation whose directors are not government-appointed is not a state actor), with *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 51–54 (2015) (holding that a federally chartered, regulated, and subsidized corporation is a state actor in light of a “combination of . . . unique features and . . . significant ties to the Government” including government control of the corporation’s stock, its board of directors, its mission and day-to-day operations, as well as its annual budget).

²⁹⁹ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

lature.”³⁰⁰ More contemporary Court decisions have carried forward this basic corporate law tenet, recognizing that “[c]orporations are creatures of state law.”³⁰¹ “States . . . create corporations, . . . prescribe their powers, and . . . define the rights that are acquired by purchasing their shares.”³⁰² Thus, “state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.”³⁰³ In fact, “[n]o principle of corporation law and practice is more firmly established than a [s]tate’s authority to regulate [the] corporations” that the state has chartered.³⁰⁴

2. *The Chartering State May Withhold Assent to Arbitration*

Recognizing the chartering state as an integral party to the corporate contract reframes the interaction between state corporate law and the FAA. The relevant question is no longer whether the FAA preempts state corporate law. Instead, the relevant question becomes one of state assent to arbitration.

As the U.S. Supreme Court recently explained,

[T]he first principle that underscores all of our arbitration decisions” is that “[a]rbitration is strictly a matter of consent.” Consent is essential under the FAA because arbitrators wield only the authority they are given. That is, they derive their “powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.”³⁰⁵

In other words, consent legitimates the enforcement mandate of the FAA.³⁰⁶ The FAA compels courts to “rigorously enforce” an arbitration agreement *because* the contract parties themselves have agreed to it.³⁰⁷

³⁰⁰ *Chi. Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127–28 (1937); *accord* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) (“Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation . . .”).

³⁰¹ *Cort v. Ash*, 422 U.S. 66, 84 (1975); *accord* *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (“Corporations are creatures of state law, . . . and it is state law which is the font of corporate directors’ powers.” (quoting *Cort*, 422 U.S. at 84)).

³⁰² *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987).

³⁰³ *Id.* at 89.

³⁰⁴ *Id.*

³⁰⁵ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415–16 (2019) (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010)).

³⁰⁶ *See* *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923 (2022) (describing consent to arbitration as “the fundamental principle” of the FAA); *Stolt-Nielsen*, 559 U.S. at 684 (describing consent to arbitration as “the foundational FAA principle”).

³⁰⁷ *See* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“By permitting the courts to ‘rigorously enforce’ [arbitration] agreements

A “basic corollary” to this foundational FAA principle,³⁰⁸ however, is that “a party cannot be required to submit to arbitration any dispute which [that party] has not agreed so to submit.”³⁰⁹ Thus, while the FAA compels rigorous enforcement of arbitration agreements, it cannot manufacture assent to arbitration.³¹⁰

Applying these principles to the corporate contract, two centuries of American law have established that because state assent is essential to incorporation, the state is a party to the corporate contract that governs each corporation that the state charters. And because state assent is essential, the state may dictate the terms of that contract and, therefore, the terms of a corporation’s existence. Where the state corporate law under which a charter was granted prohibits shareholder arbitration, the state has withheld its assent to arbitration. Absent that assent, there is no agreement to arbitrate.

Consequently, a rule of state corporate law limiting or precluding the enforceability of an arbitration provision in a corporation’s governing documents is not subject to FAA preemption.³¹¹ When state corporate law limits the enforceability of an arbitration provision, the state acts not as a regulator of a private agreement made by others, but instead as an essential party to the contract in which the arbitration provision would appear. As a party to the corporate contract, if the state, through its corporate law, has withheld its assent to arbitration, then the FAA never enters the picture.³¹²

Thus, it would make no difference whether the state corporate law came in the form of a statutory prohibition on provisions compel-

according to their terms, . . . we give effect to the contractual rights and expectations of the parties” (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate”))).

³⁰⁸ See *Viking River Cruises*, 142 S. Ct. at 1923 (“The most basic corollary of the principle that arbitration is a matter of consent is that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.”).

³⁰⁹ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

³¹⁰ See *Viking River Cruises*, 142 S. Ct. at 1923 (“[P]arties cannot be coerced into arbitrating a claim, issue, or dispute ‘absent an affirmative “contractual basis for concluding that the party *agreed* to do so.’” (quoting *Lamps Plus*, 139 S. Ct. at 1416)); *Volt Info. Scis.*, 489 U.S. at 478 (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”).

³¹¹ See *Drahozal*, *supra* note 255, at 172 (“[T]he scope of the FAA itself establishes an outside limit on FAA preemption: if the FAA does not apply, it cannot preempt state law.”).

³¹² See *Horton*, *Infinite Arbitration Clauses*, *supra* note 31, at 673 (“Without assent to arbitrate, the FAA never enters the picture.”).

ling arbitration of state corporate law claims³¹³ or a judge-made rule, based on principles of equity, denying the enforceability of an arbitration provision that bars federal securities law class actions.³¹⁴ In either case, because the state is an essential party to the corporate contract, the effect of the state's corporate law, whether statutory or judge-made, is to deny the state's assent to arbitration.

Likewise, the rationale behind any state corporate law limit on arbitration would make no difference. Whether motivated by the state's desire to retain judicial oversight of its corporate creations³¹⁵ or by equitable concerns that a specific arbitral procedure might quash meritorious shareholder claims,³¹⁶ the state has broad freedom through its corporate law to define the terms of corporate existence, including whether shareholder claims may be subject to arbitration.³¹⁷

In this respect, state *corporate* law is fundamentally different from other state laws that might limit the enforceability of an arbitration agreement. Consider for example the most recent state-law victim of FAA preemption, California's Private Attorneys General Act ("PAGA").³¹⁸ PAGA empowers an aggrieved employee to bring a representative action on behalf of themselves and other similarly situated employees against a private employer for violations of California's state labor code.³¹⁹ Because PAGA suits are a type of state enforcement action, with the dispute involving the employer and the state and the aggrieved employee merely acting as the state's agent, California courts concluded PAGA suits were not subject to any arbitration agreement that might exist between an aggrieved employee and a defendant employer.³²⁰ In *Viking River Cruises v.*

³¹³ See *supra* Section II.B (describing Delaware's statutory ban on compelled arbitration of internal corporate claims).

³¹⁴ See *supra* Section II.C (describing the equitable principles prohibiting compelled arbitration of federal securities law claims).

³¹⁵ See *supra* note 159 and accompanying text (describing the rationale behind Delaware's statutory ban on compelled arbitration of internal corporate claims).

³¹⁶ See *supra* Section II.C.2 (describing the equitable rationale against compelled arbitration of federal securities law claims).

³¹⁷ See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) ("A State has an interest in promoting stable relationships among parties involved in the corporations it charters . . ."); *id.* at 94 (recognizing "the State's interests in defining the attributes of shares in its corporations and in protecting shareholders").

³¹⁸ See *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923–24 (2022) (ruling that PAGA is preempted to the extent it conflicts with the FAA).

³¹⁹ See *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 149–52 (Cal. 2014).

³²⁰ The California Supreme Court reasoned that the FAA does not govern a PAGA claim "because it is not a [contractual] dispute between an employer and an employee It is a dispute between an employer and the *state*, which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the [California] Labor Code." *Id.* at 151.

Moriana, however, the Supreme Court rejected that conclusion, ruling that PAGA is preempted by the FAA to the extent the state law denies the enforcement of a private agreement between an employee and employer requiring individualized arbitration.³²¹

Now compare PAGA to a state corporate law rule prohibiting shareholder arbitration. Where PAGA denied the enforceability of an arbitration provision contained in a private agreement between an employee and employer,³²² a state corporate law rule barring arbitration would concern a contract to which the state is a party and to which the state must assent.³²³ Consequently, where the state has through its corporate law withheld its assent to a shareholder arbitration provision, that provision is void *ab initio* for the simple fact that an essential contract party has refused to agree to it.

3. *Corporate Federalism Compels Federal Deference to the Chartering State*

Understanding state corporate law in this manner—as exempt from FAA preemption—accords with not only the Court’s arbitration precedents and those precedents’ emphasis on party assent to arbitration. It also accords with the Court’s longstanding deference to state corporate law and values of federalism. In decision after decision, the Court has interpreted other federal laws cautiously in order to avoid federal intrusion into matters that state corporate law has traditionally governed.

Consider *Cort v. Ash*, in which the Court ruled that a federal criminal statute does not create an implied private right of action for shareholders against corporate directors.³²⁴ The *Cort* Court reasoned that in the absence of clear congressional intent, a federal statute should not be interpreted to “intrude into an area traditionally committed to state law.”³²⁵ As the Court explained, “[c]orporations are creatures of state law, and . . . except where federal law expressly requires certain responsibilities of directors with respect to stock-

³²¹ See *Viking River Cruises*, 142 S. Ct. at 1924 (“We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.”).

³²² *Id.* (“If the parties agree to arbitrate ‘individual’ PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties.”).

³²³ See *supra* notes 267–72 and accompanying text.

³²⁴ See *Cort v. Ash*, 422 U.S. 66, 82–85 (1975).

³²⁵ *Id.* at 85

holders, state law will govern the internal affairs of the corporation.”³²⁶

Similarly, in both *Burks v. Lasker* and *Kamen v. Kemper Financial Services*, the Court ruled that where shareholders bring a derivative suit against corporate directors making federal law claims, federal law does not displace the rules of state corporate law governing derivative actions.³²⁷ Although the federal statute at issue in *Burks* and *Kamen* did not explicitly reference state corporate law rules governing derivative actions, the *Burks* Court reasoned that “such silence was to be expected” because, in the specific context of corporations, “[federal] legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff’s cause of action is based upon a federal statute.”³²⁸ Elaborating on this reasoning, the *Kamen* Court explained that “[c]orporation law is [an] area” where “[t]he presumption that state law should be incorporated into federal common law is particularly strong” because “private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.”³²⁹

More explicitly, in both *Santa Fe Industries v. Green* and *CTS Corp. v. Dynamics Corp.*, the Court refused to interpret provisions of federal securities law broadly in a manner that “would overlap and quite possibly interfere with state corporate law.”³³⁰ Deferring to the primacy of state law in governing intra-corporate relationships within the corporations that a state charters,³³¹ the *Santa Fe* Court explained that “[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations . . .

³²⁶ *Id.* at 84.

³²⁷ See *Burks v. Lasker*, 441 U.S. 471, 479, 486 (1979); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991).

³²⁸ *Burks*, 441 U.S. at 478; see *Kamen*, 500 U.S. at 108 (“*Burks* [teaches that] where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law unless [it] is inconsistent with the policies underlying the federal statute.”).

³²⁹ *Kamen*, 500 U.S. at 98.

³³⁰ *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); accord *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 85–86 (1987) (refusing to interpret a federal securities statute to “pre-empt a variety of state corporate laws of hitherto unquestioned validity”).

³³¹ See *Santa Fe*, 430 U.S. at 479 (“Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.” (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975))).

particularly where established state policies of corporate regulation would be overridden.”³³² The *CTS* Court similarly reasoned that in light of the “longstanding prevalence of state regulation in this area . . . if Congress had intended to pre-empt all state [corporate] laws . . . it would have said so explicitly.”³³³

Thus, a central thread of the Supreme Court’s jurisprudence, running through *Cort*, *Burks*, *Kamen*, *Santa Fe*, and *CTS*, is that federal law does not preempt rules of state corporate law in the absence of clearly expressed congressional intent. Applying this interpretive principle to the FAA, nothing in the statutory text, its legislative history, or the Court’s prior decisions suggests that in enacting the federal statute in 1925 Congress intended to strip states of their historical powers to create corporations and define the terms of their existence.³³⁴ No one doubts that a state could today choose to cease granting corporate charters altogether. Surely then, a state may, through its corporate law, choose the terms on which its assent to incorporation will be granted. While a state cannot condition its assent on the forfeiture of constitutional rights,³³⁵ there is no constitutional or even statutory right to arbitration.³³⁶ The FAA only compels enforcement of agreements to arbitrate.³³⁷ Where state assent is lacking, there can be no agreement to arbitrate.

To interpret the FAA differently—to interpret the federal statute to preempt a state corporate law rule limiting the enforceability of a shareholder arbitration provision—would be ahistorical and stand the FAA on its head.³³⁸ Such an interpretation would coerce state assent

³³² *Santa Fe*, 430 U.S. at 479.

³³³ *CTS Corp.*, 481 U.S. at 85–86.

³³⁴ See Horton, *Testamentary Instruments*, *supra* note 263, at 1051 (“[T]he words ‘merchant’ or ‘businessman’ appear on nearly every page of the congressional record, reinforcing the fact that the FAA was designed primarily to govern commercial contracts.”); Shell, *supra* note 228, at 543 n.170 (citing the legislative history to conclude that “the drafters of the FAA were considering primarily conventional commercial contracts when they wrote § 2”).

³³⁵ See *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (“Those individuals who form . . . a corporation are, to be sure, given special advantages . . . that the State is under no obligation to confer. . . . It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”).

³³⁶ *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–75 (1989) (“[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed in the manner provided for in [the parties’] agreement.’” (quoting 9 U.S.C. § 4)).

³³⁷ *Id.*

³³⁸ See *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (“The federal policy [espoused by the FAA] is about treating arbitration contracts like all others, not about fostering arbitration.”).

to shareholder arbitration where the state has in fact objected to it. It would compel the state to grant corporate charters on terms to which the state has not assented.

The Supreme Court has repeatedly explained that “[a]rbitration . . . is a matter of consent, not coercion.”³³⁹ Where a party has not assented to arbitration, the party is not compelled to submit to it by the FAA.³⁴⁰ Applying these basic precepts of arbitration law to the corporate contract—a unique contract to which the state is a party—state assent is needed to any provision compelling shareholder arbitration. Where the state has, through its corporate law, withheld its assent, there is no agreement to arbitrate. Nothing in the FAA compels a different conclusion.

CONCLUSION

A cardinal difference between Delaware corporate law and the U.S. Supreme Court’s FAA jurisprudence is that under Delaware corporate law, equity matters. Thus, Delaware corporate law may aim “to do right and justice”³⁴¹ in instances where the FAA would otherwise dictate rigorous enforcement.³⁴²

This Article has made two basic claims. First, notwithstanding *Boilermakers* and *Salzberg*, a provision in the corporate contract compelling arbitration and waiving class actions for shareholder claims would be unenforceable under Delaware corporate law. Second, any state corporate law denying the enforceability of a shareholder arbitration provision in the corporate contract is not subject to FAA preemption.

In this regard, the corporate contract—embodied by the corporation’s charter and bylaws—is distinct from other contracts to which the FAA applies. Over two centuries of American law have established that because state assent is needed to charter a corporation, the state is a party to the corporate contract and may through its corporate law dictate the terms governing the relationships among a corporation, its directors, and shareholders. The FAA compels enforcement of agreements to arbitrate. But the FAA cannot coerce the chartering

³³⁹ *Volt*, 489 U.S. at 479.

³⁴⁰ See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (“From these principles, it follows that a party may not be compelled under the FAA to submit to . . . arbitration unless there is a contractual basis for concluding that the party agreed to do so.”).

³⁴¹ *Schoon v. Smith*, 953 A.2d 196, 205 (Del. 2008) (quoting 1 POMEROY’S EQUITY JURISPRUDENCE § 60, at 80 (5th ed. 1941)); see *supra* notes 153–56 and accompanying text (discussing equity in corporate law).

³⁴² See *supra* notes 305–07 and accompanying text (discussing the FAA).

state to assent to a provision in the corporate contract compelling shareholder arbitration.