Nothing to Say for the FAA: Why Arbitration Does Not Offer Unparalleled and Mutual Benefits

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I. INTRODUCTION

Do any of the claimed benefits of arbitration withstand scrutiny? To be sure, many academic articles have presented arguments in favor of arbitration, and many empirical studies have attempted to measure whether arbitration is superior to litigation on a number of fronts. But if we accept, for the sake of argument, that proponents' claims about arbitration—that it is fast and inexpensive and that it offers finality and privacy, among other things—are empirically true, can we then comfortably conclude that arbitration is a positive phenomenon that should be maintained, if not further encouraged?

This Article argues that the answer is no. In fact, there are *no* legitimate benefits to arbitration, *even if proponents' claims about arbitration are true*. The discourse over arbitration's purported benefits

rest on two assumptions, which are rarely stated but crucial. The first assumption is that arbitration's benefits are *unparalleled*, that is, that litigation cannot offer similar benefits. The second is that arbitration's benefits are *mutual*, that is, that they benefit both parties to the case.

None of arbitration's claimed benefits are both unparalleled and mutual. Commentators often ignore the fact that parties in litigation have tremendous power to determine how quickly and simply their cases will be resolved. Parties are free to set tight schedules, confine discovery, stipulate to any facts they wish, forgo motion practice, and take other actions that cause litigation to mirror arbitration's claimed benefits. Thus, it would be a mistake to assume that many of arbitration's benefits cannot be replicated in court. Additionally, several of the benefits of arbitration are not mutual because they benefit only one party; these non-mutual benefits cannot validly be proffered in support of arbitration.

This Article begins by discussing the relevant provisions of the Federal Arbitration Act ("FAA").[1] It then proceeds in Part III to review Supreme Court caselaw, particularly since the 1980s, which has consistently expanded the bounds of the FAA to the point that arbitration clauses are now enforceable in all but the narrowest circumstances. Part IV summarizes the policy debate surrounding the FAA, both at the Supreme Court and in the academic literature. In particular, Section IV.C outlines the following purported benefits of arbitration: speed, cost, finality, informality, simplicity, customizability, privacy, expertise, and better substantive outcomes.

Part V takes each purported benefit in turn and shows that none are both unparalleled and mutual. Section V.B examines how many benefits—speed, cost, finality, informality, simplicity, customizability, and privacy—are available in litigation much as they are in arbitration. In short, civil procedure's extensive allowance for stipulations allows these benefits to accrue in litigation as well as in arbitration. Section V.C then shows that the purported benefits of expertise and better substantive outcomes are not mutual, and these non-mutual benefits should be disregarded in evaluating arbitration's benefits. This Section also

1. This Article discusses only the FAA. There also exists a body of law related to labor arbitration. The two fields have often stood aside one another and occasionally overlapped. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 298 n.6 (2010) (stating that the same standards apply for FAA and labor arbitration cases).

responds to the argument that non-mutual benefits should be permitted because the parties consent to them and agree to offsetting contract provisions in return.

Finally, Part VI provides an overview of proposals for legislative change that have been made in Congress, at the state level, and in the scholarly literature. It concludes that in seeking merely to weaken the FAA rather than eliminate it, these proposals do not go far enough. Instead of modifying the FAA, the statute should simply be repealed.

II. THE FEDERAL ARBITRATION ACT

The FAA, codified at 9 U.S.C. §§ 1–16, was enacted in 1925 and has not been substantially amended since.[2] Like other legislation of its era, it is concise; its key provisions for our purposes are only a few hundred words long.[3] Section 2 provides that arbitration clauses are generally valid:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

As arbitration agreements apply to contracts evidencing a transaction that involves commerce, Section 1 defines "commerce" as follows:

> "[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in

2. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 677 (2018); John Kagel, *Arbitration and Due Process: The Way We Were at the Time of* Gilmer, 11 EMP. RTS. & EMP. POL'Y J. 267, 271–72 (2007).

3. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 994 (2017) (calling the FAA a "barebones statute").

4. 9 U.S.C. § 2.

> any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.[5]

Sections 1 and 2 contain three important ambiguities that the Supreme Court would go on to interpret starting in the 1980s. First, arbitration agreements are "valid, irrevocable, and enforceable" in maritime transactions and in "contract[s] evidencing a transaction involving commerce,"[6] with "commerce" defined as provided in Section 1.[7] Does the FAA thereby apply to all contracts within the broad reach of Congress's power under the Commerce Clause, or only to some narrower class of contracts?

Second, the definition of commerce found in Section 1 contains an exception: The FAA *does not* apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[8] How broad is this exception, and in particular its catch-all language? Does it apply to all employment contracts within Congress's Commerce Clause power, only to contracts for transportation workers, or to some other class?

Third, Section 2 renders arbitration agreements "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[9] Under this "savings clause," when can a state law contract doctrine invalidate an arbitration agreement? The Supreme Court has confronted all three of these ambiguities and in each case has resolved the ambiguity to expand the scope of arbitration.[10]

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5. 9 U.S.C. § 1.
6. 9 U.S.C. § 2 (emphasis added).
7. 9 U.S.C. § 1.
8. *Id.*
9. 9 U.S.C. § 2 (emphasis added).
10. *See* discussion *infra* Section III.C.

Sections 3 and 4 empower courts to enforce arbitration agreements.[11] Section 3 requires the court to refer to arbitration any arbitrable issue that arises during a case.[12] For example, if two merchants sign a contract containing an arbitration agreement, and one merchant subsequently sues the other for breach of that contract, the court will refer that breach-of-contract dispute to arbitration. Section 4 allows parties to petition the court to compel arbitration.[13] In the above example, if one merchant refuses to arbitrate, the other may file a suit in federal court to force the dispute into arbitration.

When arbitration is completed, Sections 9, 10, and 11 require courts to confirm the arbitration award. Section 9 states that "any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."[14] Section 10 allows the court to vacate the award under these circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[15]

Section 11 permits the court to modify or correct the arbitration award under the following, admittedly limited, circumstances:

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11. 9 U.S.C. §§ 3–4. Section 3 discusses "the courts of the United States," and Section 4 discusses "United States district court[s]." As discussed below, state courts also must uphold arbitration agreements. *See* discussion *infra* Section III.B.

12. 9 U.S.C. § 3.

13. 9 U.S.C. § 4.

14. 9 U.S.C. § 9.

15. 9 U.S.C. § 10(a).

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.[16]

Section 10(a)(4) contains perhaps the largest opening for the judiciary to oversee arbitration, for it provides that an award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them . . . ."[17] The Supreme Court would examine the breadth of this provision and once again interpret the statute to expand arbitration's scope.[18]

A few provisions of this almost 100-year-old statute have laid the groundwork for the increasing dominance of arbitration in contract disputes. That dominance has been catalyzed by Supreme Court doctrine.

III. SUPREME COURT JURISPRUDENCE

Though the FAA was enacted in 1925, it would not attain its broad scope until decades later. Early cases interpreted the FAA as more limited in scope, in part because of *Erie Railroad Co. v. Tompkins'* landmark holding that state substantive law, rather than federal common law, applies in diversity cases.[19] Yet over time the Supreme Court "made arbitration agreements easier to enforce and arbitration proceedings harder to review."[20] Justice O'Connor, writing

16. 9 U.S.C. § 11.

17. 9 U.S.C. § 10(a)(4).

18. *See infra* Section III.D.

19. Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. 405, 406–07 (2013). In the 1967 *Prima Paint* decision, the Supreme Court confronted and rejected the notion that *Erie* bars enforcement of the FAA in diversity cases. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

20. *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1170 (2009).

specifically about the application of the FAA in state court, lamented that "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[21]

It is not easy to identify the first stone in the edifice. Justice O'Connor named *Southland Corp. v. Keating*—a 1984 decision holding that the FAA applies in state court[22]—when she wrote in 1995, "Today's decision [*Allied-Bruce Terminix Cos. v. Dobson*] caps this Court's effort to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation."[23] As will become clear, the Court did not "cap [its] effort to expand the Federal Arbitration Act" in 1995.[24] Nevertheless, several scholars have agreed with Justice O'Connor and identified *Southland* along with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[25] as the first cases in the Supreme Court's pro-arbitration turn.[26]

Others have identified the "initial building block" elsewhere.[27] Some scholars[28] point to the 1967 decision *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[29] It was *Prima Paint* that introduced the separability doctrine,[30] which holds that an arbitration agreement may be considered entirely separately from the contract containing it, as discussed in more detail below.[31] For others,[32] the Court's first serious

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21. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (citing Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) ("It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.")).

22. 465 U.S. 1, 11–12 (1984).

23. *Allied-Bruce*, 513 U.S. at 284 (O'Connor, J., concurring).

24. *Id.*

25. 460 U.S. 1 (1983).

26. Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 550 (2014) (arguing that these two cases "spawned a revolution in the arbitration field" and that thereafter "the use of arbitration clauses exploded").

27. *Allied-Bruce*, 513 U.S. at 284.

28. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 65–66 (2015).

29. 388 U.S. 395 (1967).

30. *Id.* at 403–04.

31. *See infra* Section III.A.

32. *See* Kagel, *supra* note 2, at 275.

move was the 1985 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* decision[33] in which the Court gave unabashed support for arbitration of federal statutory claims.[34]

Regardless of the given starting point, it is clear that the FAA now enjoys a much broader reading than it did fifty years ago.[35] Originally enacted[36] to overcome judicial hostility to arbitration,[37] the FAA now serves to compel arbitration in virtually all cases where a contract contains an arbitration clause.

Below, this Article traces some of the ways in which the Supreme Court has expanded the scope of the FAA over time. Rather than proceed purely chronologically, the following summary proceeds thematically, discussing different ways in which the scope of arbitration has grown.

A. The Separability Doctrine

Imagine that two parties enter a contract that contains an arbitration clause. Later, a dispute arises, and one of the parties seeks to

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33. 473 U.S. 614 (1985).

34. *Id.* at 626.

35. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 664 (1996).

36. *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985).

37. As Harding describes:

> Although arbitration was commonly practiced in the United States since the colonial period, federal and state courts, following common law inherited from England, refused to specifically enforce agreements to arbitrate, regardless of whether the agreement concerned arbitration of an existing controversy or of a dispute that arose after execution of the agreement to arbitrate. This meant that a party could revoke, up until the time of the decision by the arbitrator, his or her agreement to submit the controversy to arbitration. . . . Although American courts, like their English counterparts, would not order specific performance of the agreement to arbitrate, damages were available for breach of the arbitration agreement. However, such damages were usually nominal or ineffective to induce parties to perform their agreements to arbitrate.

Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 425–27 (1998) (footnotes omitted), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1481&context=nlr.

compel arbitration. The other party, however, claims that the contract as a whole is unenforceable because of fraud in the inducement. Should the court begin by adjudicating the fraud-in-the-inducement issue to determine the enforceability of the contract, compelling arbitration only if that contract defense fails? Or does the arbitration clause mean that issues of contract interpretation—including contract defenses like fraud in the inducement—are for the arbitrator to decide?

The Supreme Court confronted this question in *Prima Paint* in 1967.[38] To answer that question, the Court distinguished between contract defenses aimed specifically at the arbitration provision and those aimed at the contract as a whole.[39] A court may decide the issue of "fraud in the inducement of the arbitration clause itself" but not "fraud in the inducement of the contract generally."[40] Thus, an arbitration clause is "separable" (or "severable")[41] from the contract containing it; even if the contract as a whole is invalid due to fraud in the inducement or some other defense, a court must enforce the arbitration clause and address only *arguments as to whether that specific clause is enforceable*.[42]

Having blessed the separability doctrine in 1967, the Court would go on to apply it in state courts in *Buckeye Check Cashing, Inc. v. Cardegna*.[43] And in *Rent-A-Center, West, Inc. v. Jackson*, the Court held that the separability doctrine applies not only to run-of-the-mill arbitration clauses but also to provisions agreeing to arbitrate questions of arbitrability.[44] In other words, when a contract contains both a provision agreeing to arbitrate and a second provision agreeing to arbitrate the first provision (i.e., to arbitrate questions of arbitrability), a litigant must specifically dispute the second provision or else the first

38. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).

39. *Id.* at 403–04.

40. *Id.* (footnote omitted).

41. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

42. *Prima Paint*, 388 U.S. at 402–03 (discussing the circuit split on separability). As Justice Stevens later wrote in dissent in *Rent-A-Center*, "*Prima Paint* and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*." Rent-A-Center, W. Inc. v. Jackson, 561 U.S. 63, 85 (2010) (Stevens, J., dissenting).

43. 546 U.S. 440, 448–49 (2006).

44. 561 U.S. 63, 68–72 (2010).

provision's validity will be decided by an arbitrator.[45] Now firmly ensconced,[46] the separability doctrine severely limits the ability of an unwilling party to avoid arbitration on the grounds that the arbitration clause is part of an invalid contract. Even if a contract containing an arbitration clause is invalid, the contract's validity will be a question for the arbitrator.

B. Applicability of the FAA in State Court

The 1984 decision in *Southland Corp. v. Keating* was an early foray into the interaction between the FAA and state law.[47] Reiterating *Prima Paint*'s determination that the FAA is a substantive statute enacted under Congress's Commerce Clause power rather than a procedural statute applicable only in the federal courts,[48] the *Southland* court found that the FAA applies in state courts.[49]

Several Supreme Court justices, generally on the conservative side of the bench, have disagreed with *Southland*'s holding. Justice O'Connor, joined by Justice Rehnquist, dissented in the case.[50] Eleven years later in *Allied-Bruce Terminix Cos. v. Dobson*, Justice O'Connor reiterated her position that *Southland* was wrongly decided but accepted the holding under stare decisis.[51] Justice Scalia went a step further, writing, "I do not believe that proper application of stare decisis prevents correction of the mistake."[52] He then vowed, "I shall not in the future dissent from judgments that rest on *Southland.* I will, however, stand ready to join four other Justices in overruling it . . . ."[53] Not to be outdone, Justice Thomas wrote his own dissent in *Allied-Bruce* to

45. *See id.*

46. *See* Nitro-Lift Techs. v. Howard, 568 U.S. 17, 19–20 (2012) (per curiam) (rejecting Oklahoma Supreme Court's holding that the enforceability of non-competition agreements was for the court to decide).

47. 465 U.S. 1 (1984).

48. *Id.* at 11 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967)).

49. *Id.* at 16.

50. *Id.* at 21–36 (O'Connor, J., dissenting).

51. 513 U.S. 265, 283–84 (O'Connor, J., concurring).

52. *Id.* at 284 (Scalia, J., dissenting).

53. *Id.* at 285.

object to *Southland*[54] and continues to dissent in cases applying the FAA in state court.[55]

Southland has also found critics among legal scholars.[56] But despite scholarly critique and Justice Thomas's unrelenting insistence, the FAA's application in state court is firmly established.[57]

C. Scope of Agreements to Which the FAA Applies

As noted above,[58] the FAA provides for enforcing of arbitration clauses "in any maritime transaction or a contract evidencing a transaction involving commerce."[59] In the 1995 *Allied-Bruce Terminix Cos. v. Dobson* decision, the Court read "a transaction involving commerce" to encompass any transaction falling under Congress's Commerce Clause power.[60] As the Commerce Clause grants Congress an incredibly broad reign over economic and other matters,[61] the effect of *Allied-Bruce* has been to expand the FAA to virtually all contracts.[62]

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54. *Id.* at 285 (Thomas, J., dissenting).

55. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting).

Justice Thomas has not dissented from per curiam opinions in cases arising in state court. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012).

56. *See* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 314–15 (2015); Sternlight, *supra* note 35, at 664 ("Most commentators disagree with [Justice Burger's] assessment of the legislative history.").

57. *See, e.g.*, *Kindred Nursing Ctrs.*, 137 S. Ct. 1421 (unanimous decision, save for Justice Thomas's dissent and Justice Gorsuch's non-participation).

58. *See supra* Part II.

59. 9 U.S.C. § 2.

60. 513 U.S. 265, 277 (1995).

61. *See* U.S. v. Lopez, 514 U.S. 549, 556 (1995). Note, however, that *Lopez* and a subsequent Supreme Court case found limits to the Commerce Clause. *See id.* at 556–58, 567; U.S. v. Morrison, 529 U.S. 598, 617–19 (2000).

62. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003) (per curiam).

Notwithstanding Section 2's language that includes all "contract[s] evidencing a transaction involving commerce," Section 1 exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[63] While there is little interpretive difficulty in determining whether a contract is for the employment of seamen or railroad employees, the final catch-all phrase poses more problems. If "engaged in foreign or interstate commerce" means the same thing as "involving commerce"—the words interpreted in *Allied-Bruce*—then the FAA would exempt virtually all employment contracts from its purview. But the Supreme Court has not followed that reasoning. In a 5–4 decision, the Court in *Circuit City Stores, Inc. v. Adams* found that the exemption applies only to transportation workers.[64] The majority relied heavily on the *ejusdem generis* canon of construction, explaining that "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[65]

Like other decisions expanding the scope of the FAA, *Circuit City* has faced criticism. Justice Souter dissented in the case, arguing that the exception provided in Section 1 should be read with the same breadth as Section 2.[66] Justice Stevens, while joining Justice Souter's reasoning,[67] added that the legislative history supported exclusion of employment contracts from arbitration, among other arguments.[68]

Allied-Bruce and *Circuit City* have been criticized for misreading legislative history. Many scholars have argued that "Congress intended to allow arbitration for only a narrow set of legal claims: intermerchant contract disputes sounding in breach and maritime claims."[69] As such, contracts between employees and employers were beyond the

63. 9 U.S.C. §§ 1–2; *see also supra* Part II.

64. 532 U.S. 105, 109 (2001).

65. *Id.* at 114–15 (quoting 2A NORMAN J. SINGER ET AL., SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2014)).

66. *Id.* at 133–40 (Souter, J., dissenting).

67. *Id.* at 124 (Stevens, J., dissenting).

68. *Id.* at 124–29 (Stevens, J., dissenting).

69. Leslie, *supra* note 56, at 307; *accord* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 469 (1996); Harding, *supra* note 37, at 432; Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 400–01 (2012).

intended reach of the FAA.[70] On the other hand, Stephen Ware has argued that legislators' concerns around employment contracts are not reflected in the text of the FAA.[71] Part of the interpretive difficulty here lay in the fact that the FAA was enacted in 1925, before thorough judicial exploration into the scope of the Commerce Clause.[72] The drafters of the FAA may not have anticipated that Congress's Commerce Clause power would later be found to encompass virtually all of the national economy[73] and may not have intended the FAA to have that same expansive reach.

Together, *Allied-Bruce* and *Circuit City* have expanded the scope of the FAA to virtually all contracts, including most employment contracts, making the embrace of arbitration all the more impactful for millions of Americans.

D. Highly Deferential Review of Arbitrators' Decisions

As previously explained,[74] the FAA provides four grounds for vacating an arbitrator's award.[75] Of these four circumstances, only the last—"where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"—allows a court to vacate an award on substantive grounds, i.e., based on the award itself as opposed to the circumstances surrounding its issuance.[76] Section 10(a)(4) could therefore provide an opportunity for courts to monitor arbitration and ensure that the decisions arising from it are sound. But the Supreme Court has

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70. *See* Leslie, *supra* note 56, at 311–12.

71. *See* Stephen J. Ware, *A Short Defense of* Southland*,* Casarotto*, and Other Long-Controversial Arbitration Decisions*, 30 LOY. CONSUMER L. REV. 303, 318 (2018), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2012&context=lclr.

72. *See* Anjanette H. Raymond*, It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 667–68 (2013). In fact, despite *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*'s finding that Congress derived its authority for the FAA from its Commerce Clause power, 388 U.S. 395, 405 & n.13 (1967), it is not clear that Congress actually intended to do so. *See* Harding, *supra* note 37, at 452.

73. *See supra* notes 60–62 and accompanying text.

74. *See supra* Part II.

75. *See* 9 U.S.C. § 10(a).

76. *See id.* § 10(a)(4).

found that a party seeking to vacate an arbitrator's decision "must clear a high hurdle."[77] In *Stolt-Nielsen v. AnimalFeeds International Corp.*, the Court was convinced that the petitioners had cleared that hurdle because "what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration," rather than apply applicable law.[78]

By contrast, in the 2013 case *Oxford Health Plans, L.L.C. v. Sutter*, the Court refused to overturn an arbitrator's decision, explaining that "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[79] In other words, *Oxford Health Plans* illustrated the Court's willingness to accept any arbitration decision, as long as it conceivably interprets the contract rather than engage in a purely policy-driven analysis.[80]

Underlining the extreme deference given to an arbitrator's decision, the Court unanimously held in *Henry Schein, Inc. v. Archer and*

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77. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010). The Court had previously stated in dicta that judicial review of an arbitration award is limited. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995); Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008).

78. 559 U.S. at 671; *see also id*. at 673–74 ("Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."); *id.* at 676–77 ("[I]nstead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers."). Justice Ginsburg's dissent disagreed with the assessment that the arbitration relied on policy rather than law. *Id.* at 694 (Ginsburg, J., dissenting) ("The Court's characterization of the arbitration panel's decision as resting on 'policy,' not law, is hardly fair comment . . . .").

79. 569 U.S. 564, 569 (2013).

80. *Id.* Notably, and ironically, the *Oxford Health Plans* Court refused to overturn an arbitrator's decision regarding the availability of class arbitration that appeared to fly wholly in the face of Supreme Court precedent in *Stolt-Nielsen*. Concurring in *Oxford Health Plans*, Justice Alito (the author of the *Stolt-Nielsen* opinion) wrote, "If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685).

White Sales, Inc. that an agreement to delegate questions of arbitrability must be enforced, and it left the arbitrator to decide whether the underlying dispute is arbitrable, even if the argument in favor of arbitrating the underlying dispute is "wholly groundless."[81] In other words, the question of arbitrability must be sent to an arbitrator (where the contract has provided for so sending the question of arbitrability), even if the answer to that question is clear.[82] Though *Henry Schein* derives from Section 2 rather than Section 10(a)(4), it works to solidify the notion that questions designated by contract for an arbitrator must be resolved by the arbitrator.[83] A court has virtually no authority to meaningfully evaluate whether the arbitrator's decision is the correct one.

E. The FAA's Relationship to State Law

As noted above, the FAA was designed to counteract longstanding judicial hostility to arbitration.[84] Nevertheless, the FAA's "savings clause" provides space for state contract defenses: Arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[85] One of the most frequent issues to reach the Supreme Court in the past several decades is the breadth of that savings clause. Put a different way, when does the FAA preempt state contract doctrine, and when does state contract doctrine continue to govern an arbitration agreement? The Supreme Court has answered that question by holding that state law cannot single out arbitration (or, alternatively, that the FAA preempts state contract law that singles out arbitration), an idea that has been "slowly refined . . . over time."[86]

In 1987, the Court in *Perry v. Thomas* found that the FAA preempts a provision of the California Labor Code that provided, "actions for the collection of wages may be maintained 'without regard to the existence of any private agreement to arbitrate.'"[87] As the *Perry*

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81. 139 S. Ct. 524, 528 (2019).

82. *See id.*

83. *See id.* at 529.

84. *See supra* notes 36–37 and accompanying text; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967); Harding, *supra* note 37, at 409–16.

85. 9 U.S.C. § 2.

86. Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1139 (2019).

87. 482 U.S. 483, 484 (1987) (quoting CAL. LAB. CODE § 229 (West 2020)).

Court stated, "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [Section] 2."[88] In other words, a state-law contract doctrine that applies generally can be used to determine the validity of an arbitration agreement, but a doctrine that treats arbitration agreements differently from other contracts cannot.

By contrast, the Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* two years later allowed state law to impede arbitration.[89] To this day, *Volt* is one of the only cases to arrive at the Supreme Court and *not* be resolved in a way that expands the scope of arbitration.[90] That case dealt with a contract providing for arbitration of disputes under the laws of California, which allowed arbitration proceedings to be stayed while related litigation was pending.[91] The Supreme Court allowed the California law to apply and to stay arbitration proceedings,[92] both because enforcing such a stay would not "undermine the goals and policies of the FAA"[93] and because the parties had chosen to arbitrate under California law.[94]

But alas, *Volt* would not usher in a period of great respect for state law, nor would it encourage courts to strain to read state law and the FAA harmoniously. In the 1995 case *Mastrobuono v. Shearson Lehman Hutton, Inc*., the Supreme Court allowed an arbitrator to award punitive damages, even though the parties' agreement contained a choice-of-law provision for New York law, which only allowed *judges* to award punitive damages.[95] Over Justice Thomas's dissent,[96] *Mastrobuono* distinguished *Volt* because in *Volt* the Court had "deferred to the California court's construction of its own State's law," whereas "[i]n the present case . . . we review a *federal* court's interpretation of

88. *Id.* at 492 n.9 (citing *Prima Paint*, 388 U.S. at 404; and then citing Southland Corp. v. Keating, 465 U.S. 465 U.S. 1, 16–17 n. 11. (1984)).

89. 489 U.S. 468, 470 (1989).

90. *See supra* Section III.C.

91. *Volt*, 489 U.S. at 470.

92. *Id.*

93. *Id.* at 478.

94. *Id.* at 479.

95. 514 U.S. 52, 59–60 (1995).

96. *Id.* at 64 (Thomas, J., dissenting) ("Because the choice-of-law provision here cannot reasonably be distinguished from the one in *Volt*, I dissent.").

this contract"[97] The next year, the Court held in *Doctor's Associates, Inc. v. Casarotto* that the FAA preempted Montana state law that required arbitration clauses to be underlined, capitalized, and located on the first page of a contract.[98] The Montana law was preempted because it "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."[99] The Court distinguished *Volt* by explaining, "The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."[100] In *Preston v. Ferrer*, the FAA was held to preempt California law granting exclusive jurisdiction of certain disputes to the state Labor Commissioner.[101] And in *Marmet Health Care Center, Inc. v. Brown*, the Court made quick work of a West Virginia law holding unenforceable pre-dispute arbitration agreements for personal injury and wrongful death claims in nursing homes.[102]

The concept that state contract law cannot single out arbitration clauses for special treatment, seemingly innocuous enough, would come back with a vengeance in *AT&T Mobility L.L.C. v. Concepcion*, discussed below.[103]

F. The FAA's Relationship to Other Federal Statutes

As the above Section demonstrated, the Court has been fairly comfortable using the FAA to preempt state law. The FAA's ability to compel arbitration of federal statutory claims, though now largely taken for granted, was once less certain. In 1953, the Court held in *Wilko v. Swan* that Securities Act claims could not be subjected to arbitration.[104] Noting that the Securities Act declared void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the

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97. *Id.* at 60 n.4 (citing *Volt*, 489 U.S. at 474).
98. 517 U.S. 681, 683 (1996).
99. *Id.* at 687.
100. *Id.* at 688.
101. 552 U.S. 346, 356 (2008).
102. 565 U.S. 530, 533 (2012) (per curiam).
103. *See infra* Section III.H.
104. 346 U.S. 427, 438 (1953).

rules and regulations of the Commission,"[105] the *Wilko* court reasoned that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under [Section]14 of the Securities Act."[106] The Court pondered the conflict between the purposes of the FAA and the Securities Act and decided "that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."[107]

Despite *Wilko*, the Court concluded in the 1974 case of *Scherk v. Alberto-Culver Co.* that the Securities Exchange Act of 1934 (the "Exchange Act") did not bar arbitration of claims.[108] The Exchange Act contained language almost identical to the Securities Act.[109] Yet in *Scherk*, the Supreme Court found that the FAA *could* compel arbitration of Exchange Act claims given that the case involved a complex set of international actors and actions in a business dispute, and "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[110]

Nine years later, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* held that an agreement to arbitrate antitrust claims should be enforced.[111] Finding that the same international concerns raised in *Scherk* applied,[112] the *Mitsubishi Motors* Court compelled arbitration.[113] It also rejected arguments that antitrust claims were too complex[114] or too important[115] to be arbitrated, or that

105. *Id.* at 430 n.6.

106. *Id.* at 435.

107. *Id.* at 438.

108. 417 U.S. 506, 506 (1974).

109. *Id.* at 514 n.7 (declaring void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby." (quoting Securities Exchange Act of 1934 § 29(a), 15 U.S.C. § 78cc (a))).

110. *Id.* at 516.

111. 473 U.S. 614, 640 (1985).

112. *Id.* at 629–30.

113. *Id.* at 640.

114. Id. at 633–34.

115. *Id.* at 635–37.

arbitrators may be too biased towards business,[116] or that antitrust arbitration clauses may be attached to contracts of adhesion.[117]

In 1987, the Court again confronted the question of whether Exchange Act claims could be sent to arbitration, but unlike in *Scherk*, it focused on a purely domestic dispute.[118] In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court found that a contract can compel arbitration of Exchange Act claims.[119] In so doing, it asserted that arbitration provides merely a change in forum,[120] that such forum is adequate to resolve disputes,[121] and that *Wilk*o's suggestions to the contrary are misplaced.[122] *Shearson* was a 5–4 decision, with Justices Blackmun and Stevens both arguing in dissent that *Wilko*'s reasoning should extend to the Exchange Act in the domestic context.[123]

The Court finally overruled *Wilko* in 1989, casting doubt on the case's reasoning and its inconsistency with *Shearson*.[124] At that point, the floodgates had opened, and the Court lost its willingness—as it had expressed in *Wilko*—to read federal statutes as barring arbitration. The Supreme Court subsequently found that the FAA compelled enforcement of agreements to arbitrate claims under the Age Discrimination and Employment Act[125] and the Americans with Disabilities Act.[126] Thus in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, the Court

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116. *Id.* at 634.

117. *Id.* at 632.

118. *See* 482 U.S. 220, 232 (1987).

119. *Id.* at 238. The Court also held that an arbitration agreement can be enforced for claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* That portion of the Court's opinion was unanimous. *See id.* at 242–43 (Blackmun, J., concurring in part and dissenting in part); *id.* at 269 (Stevens, J., concurring in part and dissenting in part).

120. *Id.* at 229–30 (majority opinion).

121. *Id.* at 231–33.

122. *Id.*

123. *Id.* at 243–57 (Blackmun, J., concurring in part and dissenting in part); *id.* at 268–69 (Stevens, J., concurring in part and dissenting in part). Justice Blackmun also made a number of arguments for why arbitration was an inferior forum for Exchange Act claims. *Id.* at 257–67 (Blackmun, J., concurring in part and dissenting in part).

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

125. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

126. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002).

upheld an arbitration clause despite the Carriage of Goods by Sea Act's voiding of "[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability . . . or lessening such liability otherwise than as provided in this chapter."[127] In *CompuCredit Corp. v. Greenwood*, the Court ordered arbitration even though the Credit Repair Organization Act barred "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter," including a purported "right to sue."[128]

Thus, though *Wilko* once appeared to raise the possibility that the FAA would not extend throughout the federal code, the Court is now quite willing to apply arbitration clauses to virtually any dispute arising under federal law. As the Court would later state, "In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected every such effort to date (save one temporary exception [*Wilko*] since overruled) . . . ."[129]

G. Arbitration and Class Actions

In the 2000s, the Supreme Court began exploring the interaction between arbitration and class actions, namely the issue of whether arbitration agreements necessarily allow or preclude classwide arbitration. The 2003 case of *Green Tree Financial Corp. v. Bazzle* raised the question of whether class arbitration is permissible if the arbitration clause does not explicitly speak to the availability of class arbitration, but the Court fractured and left no majority opinion.[130] The arbitration clause at issue read in part, "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you."[131] The four–Justice plurality opinion, written by Justice Breyer, found that the issue of whether

127. 515 U.S. 528, 532, 534 (1995) (citing Carriage of Goods by Sea Act, 46 U.S.C. § 30701(8)).

128. 565 U.S. 95, 99 (2012). Part of the issue in that case was that, according to the majority, the statute did not actually confer on consumers a right to sue, but merely a right to receive a disclosure informing them of a right to sue. *Id.*

129. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018).

130. 539 U.S. 444, 447 (2003).

131. *Id.* at 448 (emphasis omitted) (quoting contract language).

the arbitration clause provides for class arbitration is an issue of contract interpretation, and that issue is ultimately one for the arbitrator to decide.[132] Justice Stevens, concurring in the judgment and dissenting in part, deferred not to the arbitrator but to state law; he would have followed state law and found that class arbitration is permissible where not prohibited in the arbitration agreement.[133] Justice Rehnquist, joined by Justices O'Connor and Kennedy, found that the contract's use of the singular "you" and "this contract" ruled out class arbitration because it "make[s] quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer."[134] Justice Thomas maintained his longstanding position that the FAA does not apply in state court.[135]

The 2010 decision in *Stolt-Nielsen v. AnimalFeeds International Corp.* attempted to answer what *Bazzle* had left unresolved.[136] As before, the arbitration clause in *Stolt-Nielsen* did not unequivocally discuss classwide arbitration.[137] The Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."[138] Moreover, "it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[139] Here, the Court stated that "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" are particular to bilateral arbitration.[140] As such, there was "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration."[141] In short, the "fundamental changes brought about by the shift from bilateral

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132. *Id.* at 447, 451–52.

133. *Id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

134. *Id.* at 458–59 (Rehnquist, C.J., dissenting).

135. *Id.* at 460 (Thomas, J., dissenting).

136. 559 U.S. 662, 680–81 (2010) ("*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open, and we turn to it now." (footnote omitted)).

137. *Id.* at 667.

138. *Id.* at 684 (emphasis omitted).

139. *Id.* at 685.

140. *Id.*

141. *Id.* at 685–86.

arbitration to class-action arbitration" made a simple arbitration agreement insufficient to constitute the parties' consent to classwide arbitration.[142]

Liberal justices attempted to sand down the edges of *Stolt-Nielsen*. Dissenting in the case, Justice Ginsburg "note[d] some stopping points in the Court's decision":

> First, the Court does not insist on express consent to class arbitration. Class arbitration may be ordered if "there is a contractual basis for concluding that the part[ies] *agreed*" "to submit to class arbitration." Second, by observing that "the parties [here] are sophisticated business entities," and "that it is customary for the shipper to choose the charter party that is used for a particular shipment," the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis.[143]

Subsequently, in *Oxford Health Plans*, Justice Kagan (joined by all Justices save for Justices Alito and Thomas)[144] distinguished *Stolt-Nielsen* because in that case "the arbitral decision . . . lacked any contractual basis for ordering class procedures, [and t]he parties . . . had entered into an unusual stipulation that they had never reached an agreement on class arbitration."[145]

H. Major Recent Decisions

This Section reviews several major cases of the past decade. Unlike those in the preceding sections, the cases reviewed here are not arranged thematically because they resist neat categorization into one of the above themes. Rather, these recent cases draw on multiple lines of doctrine to arrive at decisions pushing arbitration even further.

These cases are also notable for their level of contention. In each of the cases below, five conservative justices joined to form a slim

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142. *Id.* at 686.

143. *Id.* at 699 (Ginsburg, J., dissenting) (citing *id.* at 684, 687) (alterations in original).

144. Oxford Health Plans L.L.C. v. Sutter, 569 U.S. 564, 565 (2013).

145. *Id.* at 571 (emphasis omitted).

majority, with all liberal justices dissenting.[146] The partisan tendency in the Court's recent arbitration decisions contrasts with earlier decisions.[147]

AT&T Mobility L.L.C. v. Concepcion both limited the ability of state courts to invalidate arbitration clauses and further weakened the availability of class arbitration.[148] At issue was a California contract doctrine established in *Discover Bank v. Superior Court*.[149] The "*Discover Bank* rule" made unconscionable (and thus unenforceable) class action waivers in consumer contracts of adhesion.[150]

Confronted with an arbitration agreement that forbade classwide arbitration, the Southern District of California and the Ninth Circuit followed the *Discover Bank* rule and refused to compel bilateral arbitration.[151] The lower courts found that the *Discover Bank* rule was an instance of "such grounds as exist at law or in equity for the revocation of any contract."[152] As the Ninth Circuit concluded, "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration."[153]

The Supreme Court reversed, finding that the FAA preempted the *Discover Bank* rule.[154] The Court began with the by now uncontroversial premise that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[155] However, "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is

146. Justice Sotomayor did not participate in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 239 (2013).

147. *See* Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 720–24 (2016) (contrasting the Supreme Court's post-2006 arbitration cases divided on conservative/liberal lines, as opposed to earlier cases with larger and more liberal majorities).

148. 563 U.S. 333, 352 (2011).

149. 113 P.3d 1100 (Cal. 2005).

150. *Concepcion*, 563 U.S. at 340 (citing *Discover Bank*, 113 P.3d at 1110).

151. *Id.* at 337–38.

152. *Id.*

153. *Id.* at 338 (quoting Laster v. AT&T Mobility L.L.C., 584 F.3d 849, 858 (9th Cir. 2009)).

154. *Id.* at 352.

155. *Id.* at 341.

alleged to have been applied in a fashion that disfavors arbitration."[156] The *Discover Bank* rule was such a rule, neutral in theory but not in practice.[157] The Court explained that bilateral adjudication is essential to the "fundamental attributes" of arbitration,[158] and for that reason the *Discover Bank* rule's preference for classwide adjudication "interferes with arbitration."[159]

The dissenting opinion, written by Justice Breyer, argued the *Discover Bank* rule placed arbitration agreements on the same footing as other contracts[160] and was consistent with the FAA's purpose of enforcing arbitration agreements.[161] After the *Concepcion* decision, many articles criticized it.[162] That being said, the Supreme Court's subsequent decision in *Kindred Nursing Centers Limited Partnership v. Clark* reaffirmed that the FAA preempts arbitration-unfriendly doctrines in disguise.[163]

In 2013, two years after *Concepcion*, the Supreme Court again ruled in favor of arbitration despite concerns over class action availability and conflicts with other federal statutes. *American Express Co. v. Italian Colors Restaurant* was a class action brought by merchants against American Express and others.[164] The merchants alleged that "American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately

156. *Id.*

157. *Id.* at 344.

158. *Id.* at 344.

159. *Id.* at 346.

160. *Id.* at 359 (Breyer, J., dissenting).

161. *Id.* at 359–62 (Breyer, J., dissenting).

162. *See, e.g.*, Bales & Gerano, *supra* note 19, at 431; Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 59–61 (2016); Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U.L. REV. 1121, 1139–43 (2019); Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 424–29 (2013); *see also* Colin P. Marks, *The Irony of* AT&T v. Concepcion, 87 IND. L.J. SUPPLEMENT 31, 48 (2012) (noting the practical impact of reducing ability of consumers to bring class actions).

163. 137 S. Ct. 1421, 1426 (2017) ("The Act [] displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."). The *Kindred Nursing* decision was unanimous, save for Justice Gorsuch's non-participation and Justice Thomas's long-standing disagreement with *Southland*. *See id.* at 1429–30.

164. 570 U.S. 228, 231 (2013).

30% higher than the fees for competing credit cards."[165] The contracts between the merchants and American Express, however, contained clauses requiring arbitration of all disputes.[166] Citing that clause, American Express moved to compel individual arbitration of the antitrust claims.[167] The merchants recruited an economist who estimated that the antitrust claims would cost "at least several hundred thousand dollars" to prove but would result in a maximum recovery of "$12,850, or $38,549 when trebled" for each individual plaintiff.[168]

The *Italian Colors* Court found that the case must be sent to bilateral arbitration.[169] It began by invoking the requirement to "'rigorously enforce' arbitration agreements according to their terms."[170] It then found that the "policies of the antitrust laws" do not compel a different conclusion.[171] Nor did the "effective vindication doctrine" save merchants from bilateral arbitration.[172] The Court explained the origins of that doctrine:

> The "effective vindication" exception . . . originated as dictum in Mitsubishi Motors, where we expressed a willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies." Dismissing concerns that the arbitral forum was inadequate, we said that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[173]

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* at 238–39.

170. *Id.* at 233 (citing Dean Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 221 (1985)).

171. *Id.* at 235.

172. *Id.* at 236.

173. *Id.* at 235 (emphasis and citations omitted). The dissent argued that "effective vindication" was not dicta but rather an essential condition to enforcing an arbitration agreement. *See id.* at 246–47 (Kagan, J., dissenting); *see also id.* at 235 n.2 (majority opinion) (responding to the dissent's argument).

The Court found that the effective vindication doctrine did not apply in cases like the one before it, drawing a distinction between the right to seek a remedy and the practical ability to do so. It stated, "[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[174]

Justice Kagan's blistering dissent attacked the distinction drawn by the majority.[175] She also excoriated the majority for interpreting the FAA so as to allow monopolistic players to escape liability under the antitrust laws, explaining that "[t]he owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws," but the contract itself "imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand."[176] In effect, according to Justice Kagan, "if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[177] Despite this problem, Justice Kagan explained, the majority's opinion responds, "Too darn bad."[178] Her dissent also encapsulated a central concern of today's arbitration critics: "The FAA conceived of arbitration as a 'method of *resolving* disputes . . . .' In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."[179]

After *American Express Co. v. Italian Colors*, the effective vindication doctrine has become a much less useful tool in preventing arbitration.[180] The case is also notable because it highlights a recent

174. *Id.* at 236 (citing Nat'l Supermarkets Ass'n v. Am. Express Travel Servs. Co., 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, C. J., dissenting from denial of rehearing en banc)).

175. *Id.* at 247–49.

176. *Id.* at 240.

177. *Id.*

178. *Id.*

179. *Id.* at 253.

180. *See* Thomas J. Lilly, Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After* American Express v. Italian Colors Restaurant?, 61 WAYNE L. REV. 301, 303 (2016);

(albeit unsuccessful) strategy of challenging arbitration's supremacy by pitting it against other legislation. That strategy would be attempted once more in *Epic Systems Corp. v. Lewis*.[181]

Epic Systems confronted the question of whether a class waiver in an arbitration agreement runs afoul of the National Labor Relations Act ("NLRA"), which provides workers with "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[182] The Court found that the FAA compels arbitration,[183] that the NLRA does not bar arbitration clauses, and that, even if it did, the NLRA unduly targets arbitration agreements.[184] In a lengthy dissent, Justice Ginsburg argued that collective employment litigation is exactly the type of action that the NLRA was designed to protect.[185] She also repeated the argument that the FAA was not intended to apply to employment contracts.[186]

Finally, in 2019, the Court in *Lamps Plus, Inc. v. Varela* dealt another blow to classwide arbitration.[187] In that case, the parties' agreement was ambiguous as to the availability of classwide arbitration.[188] The Court found that the contract's ambiguity was not enough to compel classwide arbitration.[189] The Court determined that it would be inappropriate in that situation to use the maxim of *contra proferentem*, "that ambiguity in a contract should be construed against the drafter."[190] Rather, the contract's ambiguity must be resolved against

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see also Rebecca Wolf, Comment, *"To A Hammer Everything Looks Like a Nail": The Supreme Court's Misapplication of the Vindication of Rights Doctrine*, 21 AM. U.J. GENDER SOC. POL'Y & L. 951, 982–92 (2013) (criticizing the *Italian Colors* decision as it pertains to the effective vindication doctrine).

181. 138 S. Ct. 1612 (2018).

182. *Id.* at 1619, 1624 (quoting 29 U.S.C. § 157).

183. *Id.* at 1623–29.

184. *Id.* at 1621–23.

185. *Id.* at 1633–38 (Ginsburg, J., dissenting).

186. *Id.* at 1642–43.

187. 139 S. Ct. 1407 (2019).

188. *Id.* at 1415.

189. *Id.*

190. *Id.* at 1417.

classwide arbitration.[191] Justice Thomas, while joining the majority,[192] filed a separate concurrence distancing himself from the *contra proferentem* piece of the Court's decision.[193]

Each of the four liberal justices filed a separate dissent.[194] Justice Ginsburg noted the disconnect between "'the first principle' that 'arbitration is strictly a matter of consent,'" with the reality that "submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter."[195] Justice Kagan criticized the majority for "federaliz[ing] basic contract law" and advocated for applying *contra proferentem*.[196] Justice Sotomayor likewise accused the majority of "invad[ing] California contract law without pausing to address whether its incursion is necessary."[197] She also argued that "[t]his Court went wrong years ago in concluding [in *Stolt-Neilsen*] that a 'shift from bilateral arbitration to class-action arbitration' imposes such 'fundamental changes'" to arrive at its result.[198] Justice Breyer argued as an additional point that the Court lacked jurisdiction.[199]

Thus, in recent years the Court has continued to push the FAA even further, compelling arbitration in more and more circumstances. As the Court has grown more ambitious, the policy debate surrounding arbitration has only intensified.

IV. THE POLICY DEBATE SURROUNDING THE FAA

As the Supreme Court and lower courts have continued to define the scope of the FAA, both proponents and opponents have argued about arbitration's benefits and drawbacks. These policy arguments, while occasionally presenting themselves in Supreme Court opinions,

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191. *Id.* at 1417–19.

192. *Id.* at 1409.

193. *Id.* at 1420 (Thomas, J., concurring).

194. *See id.* at 1420 (Ginsburg, J., dissenting); *id.* at 1422 (Breyer, J., dissenting), 1427 (Sotomayor, J., dissenting); *id.* at 1428 (Kagan, J., dissenting).

195. *Id.* at 1420–21 (Ginsburg, J., dissenting) (citations omitted).

196. *Id.* at 1428–35 (Kagan, J., dissenting).

197. *Id.* at 1428.

198. *Id.* at 1427 (citing Stolt-Nielsen. v. AnimalFeeds Int'l Corp., 559 U. S. 662, 686 (2010)).

199. *Id.* at 1425–27.

tend to exist largely outside of them in law journals and the popular press.

A. Policy Arguments at the Supreme Court

Supreme Court opinions interpreting the FAA have sometimes found occasion to either praise arbitration's benefits or impugn its deficiencies. Earlier opinions tended to take a negative view toward arbitration. For instance, the 1953 *Wilko v. Swan* case concluded that the "effectiveness in application [of the Securities Act] is lessened in arbitration as compared to judicial proceedings."[200] The *Wilko* Court was concerned that arbitration proceedings would lack "judicial instruction on the law," a substantive appeal, a written explanation of the decision, or a record of the proceedings.[201] In the 1956 case *Bernhardt v. Polygraphic Co. of America*, the Court added to these concerns a strong skepticism of arbitrators' ability—or willingness—to arrive at sound substantive decisions.[202] The Court reasoned that there was a wider margin for error in arbitration proceedings, which did not require the arbitrator to swear in witnesses, follow the rules of evidence, or ignore their personal experiences in making an award; the Court also expressed concern that the lack of judicial review meant an arbitrator's errors cannot be corrected.[203]

By the 1980s, the Court had grown much warmer to arbitration. In *Dean Witter Reynolds, Inc. v. Byrd*, the Court quoted the House Report accompanying the FAA, which noted "so much agitation against the costliness and delays of litigation," a problem that "can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."[204] That same year in *Mitsubishi Motors*, the Court quickly shrugged off the argument that arbitrators would not be "competent, conscientious, and impartial."[205] The Court would

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200. 346 U.S. 427, 435 (1953). For further discussion of the *Wilko* case, see *supra* Section III.F.

201. *Id.* at 436–37.

202. 350 U.S. 198, 202–03 (1956).

203. *Id.* at 203; *see also* 203 n.4 (citing cases).

204. 470 U.S. 213, 220 (1985) (quoting H.R. REP. NO. 68-96, at 1–2 (1924)).

205. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985); *see also id.* at 636 ("There is no reason to assume at the outset of the

continue to reject such arguments in the coming years. In 1991, the Court in *Gilmer v. Interstate/Johnson Lane Corp.* dismissed concerns about arbitrator bias, limitations on discovery, a lack of written opinions, or the thwarting of statutory purposes.[206] The Supreme Court would eventually explicitly reject its prior skepticism of arbitration, noting that "the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time."[207]

By the 2010s, the Court had begun making stronger policy arguments for arbitration. In *Stolt-Nielsen*,[208] for example, the Court wrote, "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[209] In *AT&T Mobility L.L.C. v. Concepcion*,[210] the Court explained, "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[211] *Concepcion* also identified "informality" as "the principal advantage of arbitration."[212] Even Justice Breyer's dissent claimed that classwide arbitration is faster than classwide litigation.[213] The notion that arbitration's main benefits are speed and efficiency was later echoed in *Lamps Plus*.[214]

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dispute that international arbitration will not provide an adequate mechanism."). For further discussion of *Mitsubishi Motors*, see *supra* Section III.F.

206. 500 U.S. 20, 30–32 (1991).

207. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987). Justice Blackmun, concurring in part and dissenting in part, argued that *Wilko*'s concerns remain. *Id.* at 257–61. For further discussion of *Shearson*, see *supra* Section III.F.

208. *Stolt-Nielsen. v. AnimalFeeds Int'l Corp* is discussed in greater detail at *supra* Section III.G.

209. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

210. This case is discussed in greater detail above. *See supra* Section III.H.

211. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 344 (2011).

212. *Id.* at 348.

213. *Id.* at 363 (Breyer, J., dissenting).

214. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019). For further discussion of *Lamps Plus*, see *supra* Section III.H.

However, it would be a mistake to conclude that policy arguments have greatly advanced the cause of arbitration before the Supreme Court.[215] Rather, the Court's recent jurisprudence has focused on the purported purpose of the FAA: to enforce arbitration agreements according to their terms.[216] The true debate over the benefits and downsides of arbitration has existed instead in the academic literature, to which we now turn.

B. Arbitration's Purported Deficiencies

The use of arbitration to resolve disputes—in particular when compelled by large companies against employees and consumers—has faced extensive criticism in academic literature.[217] The most common arguments against arbitration point to the lack of consent and unequal bargaining power, high cost, secrecy, and worse substantive outcomes, as explained below.

1. Lack of Consent and Unequal Bargaining Power

One set of criticisms focuses not on arbitration's substance but on the process by which arbitration agreements are consummated. Arbitration clauses are increasingly found in contracts between large companies and their employees and consumers.[218] The unequal

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215. To the contrary, in *Epic Systems*, the Court claimed to be applying the law rather than resolving policy disputes that should be adjudicated in the political branches. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

216. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 n.5 (2013) (citing *Concepcion*, 564 U.S. at 344); *see also* Malin, *supra* note 162, at 36–39 (identifying the Court's "new rationale" under *Concepcion* and *Italian Colors* as enforcing arbitration agreements according to their terms).

217. Some of this criticism has also been reported in the popular press. *See, e.g.*, Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

218. Frankel, *supra* note 26, at 550–51.

bargaining power between these entities makes compelling arbitration inherently unfair, according to some commentators.[219]

Moreover, the process by which many arbitration agreements are made casts serious doubt on the proposition that parties truly consent. Marsha Levinson notes that most employees do not read the arbitration clauses that are often buried inside form agreements, and those who do read them may not understand their import.[220] And arbitration clauses are often found in contracts of adhesion, presenting a take-it-or-leave-it choice to employees and consumers.[221]

This criticism opposes not only the Supreme Court's repeated statements that arbitration is a matter of consent[222] but also the broader view in contract law that signing an agreement establishes assent to its terms in all but the most unusual circumstances.[223] Moreover, while this critique says something about arbitration in particular—namely, that arbitration is such an objectionable process that parties likely will not (or should not be allowed to) consent to it—it also says something about contract law in general. Concerns about contracts of adhesion, proliferation of terms, and inscrutable language are not unique to arbitration clauses; they are general problems of contract law in the modern

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219. Marsha Levinson, Note, *Mandatory Arbitration: How the Current System Perpetuates Sexual Harassment Cultures in the Workplace*, 59 SANTA CLARA L. REV. 485, 493 (2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2880&context=lawreview; *see also* Bales & Gerano, *supra* note 19, at 405 (noting that arbitration works well in the context of knowledgeable parties with roughly equal bargaining power).

220. Levinson, *supra* note 219, at 492–93.

221. *Id.*

222. *See, e.g.*, Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quoting Volt v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)); EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (quoting *Volt*, 489 U.S. at 479).

223. For example, a contract will usually be deemed unconscionable only when it is both procedurally and substantively so. *See* Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?*, 25 B.U. PUB. INT. L.J. 143, 168 (2016) ("[M]any courts require a litigant to prove both procedural and substantive unconscionability before voiding or terminating an arbitration contract."). In other words, it is not enough that a party entering into a contract did so under circumstances that render the process unfair; the terms themselves must be unconscionable as well.

age.[224] That being said, one would be remiss to review major criticisms of the FAA yet ignore the prominent argument that it forces individuals into arbitration when they did not truly consent to it.

2. Cost

Many critics of arbitration contend that it is unduly costly to consumers and other individual litigants.[225] This line of reasoning has much in common with the vindication of rights doctrine explored above.[226] Fundamentally, it is a concern about whether aggrieved individuals will forgo relief because they are likely to pay more in fees and costs than their claims are worth.

The cost of arbitration is an empirical question, and several scholars and organizations have attempted to answer it. The various studies on the cost of arbitration to consumers have reached disparate conclusions.[227] David Horton and Andrea Cann Chandrasekher reviewed three such studies in a 2015 paper.[228] One of these concluded that consumers' share of arbitrator's fees are $2,256 on average, with a median of $870.[229] Another concluded that consumers paid an average

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224. For criticisms of these problems in contract law in general, see, for example, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 705–09 (2011); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); Allison Frankel, *State AGs Protest ALI Consumer Contract Restatement Ahead of May 21 Vote*, REUTERS (May 15, 2019, 8:13 AM), https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-22-vote-idUSKCN1SL2VB.

225. *See, e.g.*, Alex Brunino, Note, *A Modest Proposal: Review of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 583–84 (2017); Martha Nimmer, Note, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 208 (2010).

226. *See supra* Section III.H.

227. *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 471–72 (2011).

228. Horton & Chandrasekher, *supra* note 28, at 82–83.

229. *Id.* (summarizing CAL. DISP. RESOL. INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE (2004), https://www.mediate.com/cdri/cdri_print_aug_6.pdf).

of $1,346 in arbitrators' fees.[230] A third, by the Consumer Financial Protection Bureau, concluded that consumers paid a total of $206 on average in arbitrator's fees, with a median of $125.[231] Horton and Chandrasekher also conducted their own study, determining that the average consumer pays $247 in arbitrator's fees.[232] Note that arbitrator's fees are not the only cost to arbitration. For example, one study reviewed by Horton and Chandrasekher found that consumer-plaintiffs paid an average arbitrator's fee of $1,364 and an additional $129 on average in administrative costs.[233] Needless to say, the question of how costly arbitration is to consumers, employees, and other "little guys" is an important and unresolved question in the policy debate.

3. Secrecy

Critics also attack the fact that arbitration is often closed to public view. This feature of arbitration is deemed harmful for a number of reasons. Some claim that secrecy reduces the arbitrator's accountability to the law: "An arbitrator is not required to offer a written decision, consider legal precedent, or even follow state or federal law in issuing his or her decision. The only real requirement of an arbitrator is that he or she must not act in blatant disregard of the law."[234] Additionally, secrecy means that arbitration decisions create no legal precedent for future cases.[235]

Secrecy is also alleged to blunt the benefits to the public of litigation. As Marsha Levinson writes specifically in the context of sex discrimination cases, litigation "provides employers with guidelines for

230. *Id.* (summarizing SEARLE CIV. JUST. INST., CONSUMER ARBITRATION: BEFORE THE AMERICAN ARBITRATION ASSOCIATION (2009) [hereinafter SEARLE STUDY], https://www.adr.org/sites/default/files/document_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf).

231. *Id.* at 82–83, 102 (summarizing CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 5.6, at 32 (2015) [hereinafter CFPB STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

232. *Id.* at 101–02.

233. *Id.* at 83 (summarizing SEARLE STUDY, *supra* note 230).

234. Brunino, *supra* note 225, at 584.

235. *Id.*; *see also* RADIN, *supra* note 224, at 135 ("Information is widely thought to be a significant driver of efficient markets. Widespread unpublished ad hoc decision making may interfere with market functioning.").

appropriate conduct and reinforces cultural norms that disavow invidious discrimination," benefits that are eliminated in secret arbitration.[236]

4. Prevention of Classwide Adjudication

Arbitration opponents have also criticized the inclusion of class waivers in arbitration clauses.[237] They have likewise criticized Supreme Court cases like *Concepcion* for limiting classwide arbitration.[238]

There is much to be said for classwide resolution of disputes. As Richard Posner has famously stated, aggregating small claims is usually the only way to bring them.[239] Moreover, J. Maria Glover has argued that class action waivers are central to the goals of arbitration, writing, "[T]he true gambit of the arbitration agreements lies in that class-action prohibition—namely, the elimination of claiming, and therefore, the elimination of legal liability."[240] Nevertheless, the issue of class action waivers is conceptually distinct from the issue of arbitration. Attacking class action waivers in arbitration clauses is not a critique of arbitration per se; it is a critique of contract provisions preventing classwide adjudication, in arbitration or litigation. In fact, the arguments waged against class arbitration waivers would apply just as readily to provisions barring class actions in court.[241] Nevertheless, this critique is prominent in the case against arbitration.

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236. Levinson, *supra* note 219, at 495.

237. Brunino, *supra* note 225, at 582. *But see* Neal Troun, *The Problem with Class Arbitration*, 38 VT. L. REV. 419 (2013) (arguing that the FAA should bar class arbitration because unnamed class members do not consent to arbitration).

238. *See supra* note 162 and accompanying text.

239. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.").

240. J. Maria Glover, Abstract, *Mass Arbitration*, GEO. L. FAC. PUBLICATIONS & OTHER WORKS (April 14, 2020), https://scholarship.law.georgetown.edu/facpub/2252/.

241. *See, e.g.*, Brunino, *supra* note 225, at 582.

5. Worse Substantive Outcomes

Perhaps the most enduring and least esoteric critique of arbitration is that large and powerful companies—those who tend to insert arbitration clauses into contracts—are more successful in arbitration, while the individual consumers and employees confronting these entities do worse.[242]

The problem is often framed in terms of "repeat players." It is argued that repeat players, such as large companies facing a slew of consumer claims, win more often in arbitration and are forced to pay lower damage awards even when they lose.

Lisa Bingham was the first to study, empirically and seriously, the repeat player effect.[243] In several studies, Bingham found that repeat players (in her case employers) were more successful in arbitration than first-time parties.[244] In the years since, others have used empirical data to determine the existence of a repeat player effect with mixed results.[245] As with other areas of empirical inquiry, some have questioned the existing research for failing to control for certain variables,

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242. *See, e.g.*, *id.* at 583–84.

243. *See* Horton & Chandrasekher, *supra* note 28, at 83–84.

244. *See id.* (summarizing Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998)); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

245. *See* Horton & Chandrasekher, *supra* note 28, at 84–87 (summarizing CFPB STUDY, *supra* note 231 and SEARLE STUDY, *supra* note 230); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 814 (2003), https://kb.osu.edu/bitstream/handle/1811/77065/OSJDR_V18N3_0777.pdf?sequence=1&isAllowed=y; *see also* Horton & Chandrasekher, *supra* note 28, at 99–100, 104–10 (conducting their own study and finding consumers win in 35% of cases with a $5,145 median award among winners and finding a repeat player effect with respect to win rates but not award amount); Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 386–87 (2018), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2766&context=facpub; Frankel, *supra* note 26, at 551–52; Cole, *supra* note 227, at 471–76.

such as the underlying merit of the dispute.[246] The various empirical studies have been wielded by both sides of the arbitration debate,[247] while others contend that they are racked with methodological challenges that render derived conclusions suspect.[248]

If repeat players are in fact more successful in arbitration, then this clearly poses a serious problem, for it means that arbitration is not providing both parties a fair substantive outcome through arbitration; it is, in a phrase, "stacking the deck of justice."[249] Additionally, as David Noll has argued, an arbitration system tilted towards repeat players blunts private enforcement of the law, an interest that Congress has outside of the parties' desires.[250]

B. Arbitration's Purported Benefits

Although arbitration's critics are many, its proponents are numerous as well. Moreover, even harsh critics of arbitration have often found reason to extol, or at least concede, its benefits.[251] Below are some of the most commonly cited virtues of arbitration.[252]

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246. *See* Levinson, *supra* note 219, at 494.

247. *Compare* Janna Giesbrecht-McKee, Comment, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259, 269–70 (2014) (citing Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 737 (2001) for Lisa Bingham's research) (relying specifically on Bingham's research to argue for the existence of a repeat player bias), *with* Wesley R. Bulgarella, Comment, *A Better Forum for All: Addressing the Value of Arbitration Clauses in Nursing Home Contracts*, 86 MISS. L.J. 365, 390 (2017) (citing an Ernst and Young study to advocate for arbitration of nursing home disputes); *see also supra* note 244 and accompanying text.

248. *See* Horton & Chandrasekher, *supra* note 28, at 77–79.

249. *See* Silver-Greenberg & Gebeloff, *supra* note 217.

250. *See* Noll, *supra* note 3, at 994.

251. *See supra* Section V.A.

252. Several commentators have argued that parties to an arbitration clause have often not consented, in any real sense, to arbitrate claims. *See, e.g.*, Nimmer, *supra* note 225, at 203. But I exclude from my list the argument that arbitration clauses should be respected in order to honor "freedom of contract." First, as explained below, the stipulations in litigation that create many of the same benefits as arbitration are as much a matter of consent as the consent to an arbitration clause. In fact, because such stipulations occur post-dispute, one might argue that these agreements are more indicative of the parties' wishes than a pre-dispute arbitration agreement.

1. Speed

By far the most common claim in favor of arbitration is that it offers a faster and less expensive method for adjudicating disputes.[253] The speed of dispute resolution is often simply assumed to be positive, though Martha Nimmer has specifically claimed that shorter dispute-resolution time allows the parties to salvage their pre-existing relationships.[254]

While many have merely asserted that arbitration is speedier than litigation, others have attempted to determine empirically whether that is true. Many studies have found that arbitration is indeed speedier than litigation,[255] but this finding is not universal.[256] Some have argued that "arbitration may not be as big a savings in cost or time as proponents claim."[257] Others have criticized the existing empirical research for its failure to control for the complexity of cases and other

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Second, the argument for freedom of contract can obscure other issues. Any contract provision, after all, can be defended by arguing that the parties agreed to it. But that does not help us understand why someone would make such a choice, and if federal law should promote that choice.

Despite not listing "freedom of contract" among the arguments here, below I do confront the counterargument that arbitration's non-mutual benefits are acceptable because the parties' agreement implies that they find these non-mutual benefits "worth it." *See infra* Section V.C.3.

253. *See, e.g.*, Steven C. Bennett & Dean A. Calloway, *A Closer Look at the Raging Consumer Arbitration Debate*, 65 DISP. RESOL. J. 28, 31 (2010); Steven W. Feldman, *Expanded Merchant Tort Liability, Democratic Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part II)*, 63 CLEV. ST. L. REV. 163, 226 (2014); Frankel, *supra* note 26, at 551; *see also* Miles B. Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2354 (2012); Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L. REV. 391, 405 (2012) (identifying "efficient and speedy dispute resolution" as a secondary purpose of the FAA, according to *AT&T Mobility L.L.C. v. Concepcion*).

254. *See* Nimmer, *supra* note 225, at 201–02.

255. *See* Horton & Chandrasekher, *supra* note 28, at 101.

256. *See* Farmer, *supra* note 253, at 2354.

257. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 422 (2000).

variables.[258] As with other empirical questions surrounding arbitration, the battle rages on.

2. Cost

As stated above, arbitration's purported speed and cost are the most common points cited in its favor.[259] Often, the "faster" and "cheaper" arguments are made in the same breath.[260] But the virtues of speed and cost are often more than simple rhetorical roommates, for commentators have argued that faster dispute resolution causes cheaper dispute resolution. For example, the College of Commercial Arbitrators writes, "Attorneys' fees and expenses are by far the most significant cost of litigation, and they increase in direct proportion to the time to resolution of the case."[261] But the purported cost savings of arbitration have other claimed sources, as well. The less-elaborate discovery that arbitration often provides, for instance, supposedly results in cost savings.[262] As with the purported benefit of speed, there exists strong empirical disagreement as to whether arbitration is less costly than litigation.[263]

In addition to arguing that arbitration is more affordable in general than litigation, proponents have claimed that arbitration is specifically more affordable to consumers because "arbitration clauses

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258. *See* Estreicher et al., *supra* note 245, at 382; Farmer, *supra* note 253, at 2354–55.

259. *See supra* note 253 and accompanying text.

260. *See, e.g.*, Bennett & Calloway, *supra* note 253, at 31 ("As a general proposition, arbitration is quicker and cheaper than traditional litigation."); Feldman, *supra* note 253, at 226; Frankel, *supra* note 26, at 551.

261. *The Benefits of Arbitration for Commercial Disputes*, COLLEGE OF COMMERCIAL ARBITRATORS, https://www.ccarbitrators.org/why-arbitrate/#1484840072060-5e283d74-2e9e (last visited Nov. 14, 2020). *But see* Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 71 n.2 (2012), http://wakeforestlawreview.com/2012/04/when-staying-discovery-stays-justice-analyzing-motions-to-stay-discovery-when-a-motion-to-dismiss-is-pending/ ("Estimates for litigation costs associated with discovery vary, yet the estimates typically assert that more than half of all litigation costs are due to discovery.").

262. *See* Bennett & Calloway, *supra* note 253, at 31; Bulgarella, *supra* note 247, at 382.

263. *See* Farmer, *supra* note 253, at 2454–55.

typically . . . reliev[e] consumers of the obligation to pay for the proceeding."[264] In response, opponents claim that even if arbitration clauses can sometimes make the process less expensive for individual consumers and employees, they can also do the opposite, running up costs for employees and consumers.[265]

3. Finality

Arbitration proponents often argue that finality is a primary benefit to arbitration. In other words, the limited availability of appeal, both within the arbitration system itself[266] and by the courts,[267] greatly reduces the chances that an arbitrator's decision will be overturned.[268]

Unlike many of the other purported benefits of arbitration, commentators have not heavily questioned the empirical truth of arbitration's finality; as interpreted, the FAA makes clear that a court may reverse an arbitration decision on only very narrow grounds.[269] Yet Nico Gurian, for one, argues that the unavailability of a substantive appeal right does not greatly increase efficiency because an appeal with a deferential standard of review nevertheless prolongs a case.[270] He adds that it is wrong to "assume that efficiency is the only interest of parties who have agreed to settle disputes through arbitration."[271]

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264. *See* Bennett & Calloway, *supra* note 253, at 32; *see also* Bruce Wardaugh, *Unveiling Fairness for the Consumer: The Law, Economics and Justice of Expanded Arbitration*, 26 LOY. CONSUMER L. REV. 426, 451–52 (2014).

265. Brunino, *supra* note 225, at 583–84.

266. Amanda R. James, Comment, *Because Arbitration Can Be Beneficial, It Should Never Have To Be Mandatory: Making a Case Against Compelled Arbitration Based Upon Pre-Dispute Agreements To Arbitrate in Consumer and Employee Adhesion Contracts*, 62 LOY. L. REV. 531, 540 (2016) (noting, though, that parties may stipulate to internal appeals).

267. *See supra* Section III.D (reviewing Supreme Court caselaw on the very high standard required to vacate an arbitration award).

268. James, *supra* note 266, at 540; Bulgarella, *supra* note 247, at 383–84; Feldman, *supra* note 253, at 227–28; Sternlight, *supra* note 35, at 678.

269. *See supra* Section III.D.

270. Nico Gurian, *Rethinking Judicial Review of Arbitration*, 50 COLUM. J. L. & SOC. PROBS. 507, 524 (2017).

271. *Id.* at 525.

4. Informality, Simplicity, and Customizability

Another of the touted virtues of arbitration is that its procedures are more informal, simple, and customizable than in litigation. Arbitration is supposedly less formal because there is "no mandated legal pleading structure,"[272] the rules of evidence are not strictly observed,[273] litigants can communicate directly (and on an *ex parte* basis) with arbitration staff,[274] and proceedings can be held telephonically or only in writing.[275]

In line with arbitration's lack of rigid procedures, arbitration is also supposed to allow for procedures that are customized to the parties and the dispute: "In an ad hoc proceeding, the parties can, presumably, create their own rules and procedures for the entirety of the arbitration."[276]

These features—informality, simplicity, and customizability—are claimed to make arbitration superior to litigation. For instance, it is argued that informality benefits litigants who need not concern themselves with the finer points of litigation procedure and can instead focus on the substance of the dispute.[277] The simplicity of arbitration, it is argued, often renders counsel unnecessary.[278] Simplicity is also supposed to make the adjudication process faster.[279] And at least one scholar has argued that the lack of need for a written opinion "reduces the risk of disagreement over reasons by parties otherwise satisfied with the result."[280]

These arguments have not gone without criticism. Hiro Aragaki claims that the purported benefits that arbitration provides in terms of

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272. Bennett & Calloway, *supra* note 253, at 31.

273. Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 159–60 (2016).

274. *See* Bennett & Calloway, *supra* note 253, at 31.

275. *See id.*

276. James, *supra* note 266, at 540.

277. Bulgarella, *supra* note 247, at 387.

278. Bennett & Calloway, *supra* note 253, at 31.

279. *See* Horton & Chandrasekher, *supra* note 28, at 101; James, *supra* note 266, at 537–38.

280. Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISP. RESOL. 157, 161 (1989).

informality may be overstated or even illusory.[281] As he illustrates, the formality of a procedure is not necessarily determinative of the justice of its outcome.[282] He also argues that evidentiary rules are often used as a reference in arbitration, and may even be substantively deployed although not formally observed.[283]

5. Privacy

An above section noted that critics of arbitration tend to argue that its secrecy is a detriment.[284] Proponents of arbitration have agreed that arbitration is less open to public view but have argued that this provides the benefit of *privacy* (or confidentiality) rather than the detriment of *secrecy*. [285] One commentator has argued that arbitration allows parties to "avoid[] the . . . embarrassment of the entire [court] process."[286] Thus, the sin of secrecy is converted into the virtue of privacy.

6. Expertise

Another touted benefit of arbitration is the expertise of the arbitrators. Arbitrators often have experience in the particular business sector in which the parties litigate.[287] Moreover, the parties choose the arbitrator and will presumably make that choice based in part on

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281. Aragaki, *supra* note 273, at 143–47.

282. *Id.* at 145.

283. *Id.* at 161–62. It is worth noting that parties to arbitration sometimes choose to formally adopt the Federal Rules of Evidence. *See* Richard T. Seymour, *Discovery and Evidence in Arbitration*, AM. L. INST. CONTINUING LEGAL EDUC. COURSE MATERIALS (July 28–30, 2016). This could be interpreted to mean that the differences in evidentiary standards in arbitration and litigation are not so different, weakening the theory that arbitration is superior due to its simplicity. On the other hand, this fact helps to illustrate the customizability of arbitration, bolstering the point that one of arbitration's benefits is its ability to be tailored to the parties' needs.

284. *See supra* Section IV.B.3.

285. Bulgarella, *supra* note 247, at 388; Speidel, *supra* note 280, at 161; Nimmer, *supra* note 225, at 204.

286. Travis M. Pfannenstiel, Comment, *The Entitlement to Avoid Litigation—Denied: How the Fifth Circuit's Rejuvenated Hostility Toward Arbitration Agreements Deprives Parties of Their Bargained-For Benefits*, 52 WASHBURN L.J. 177, 200 (2012).

287. *See* Speidel, *supra* note 280, at 161.

expertise.[288] Several commentators have argued that the increased acumen of arbitrators is a benefit to the parties.[289]

7. Better Substantive Outcomes

As explained above, one of the primary criticisms of arbitration is that repeat players are more successful than individual employees, consumers, and other non-repeat players.[290] The prior Section explained that this question—whether the substantive outcomes of arbitration tend to benefit certain groups—is heavily contested as an empirical matter.[291] Many proponents of arbitration have therefore argued that the proverbial Davids achieve substantive outcomes in arbitration as good as, if not better than, they do in litigation.[292]

Yet other proponents of arbitration have taken a different route, arguing that arbitration is superior to litigation *precisely because* defendants—which tend to be the large repeat players defending themselves against claims by aggrieved employees and consumers—are more successful in arbitration.[293] These commentators tend to bemoan the "verdict lottery" that provides inconsistent awards,[294] as well as "runaway juries" that award excessive damages.[295] Arbitrators, it is argued, appropriately reduce these damage figures to the correct level.[296]

Thus, arbitration is sometimes cast as pro-David, sometimes as pro-Goliath, and both are sometimes proffered as benefits.[297]

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288. *See* Stephen Douglas Bonney, *Arbitration Is Here To Stay: Know How To Prepare and Present Your Best Case*, MO. BAR (Aug. 1, 2019), https://news.mobar.org/arbitration-is-here-to-stay-know-how-to-prepare-and-present-your-best-case/.

289. Bulgarella, *supra* note 247, at 385.

290. *See supra* Section IV.B.5.

291. *See supra* Section IV.B.5.

292. *See supra* Section IV.B.5.

293. *See* Bulgarella, *supra* note 247, at 386.

294. Bennett & Calloway, *supra* note 253, at 32.

295. Bulgarella, *supra* note 247, at 386.

296. *See id.* at 386.

297. Some, in fact, have made both points at the same time. *Compare* Bulgarella, *supra* note 247, at 386 (citing the "runaway jury" problem), *with id.* at 390 (citing an Ernst and Young study showing that consumers usually win in arbitration).

V. THE ILLUSORY BENEFITS OF ARBITRATION

A. The Assumptions Underlying Pro-Arbitration Arguments: Unparalleled and Mutual Benefits

Much of the policy dispute has focused on empirical questions about arbitration: How much does arbitration really cost? How fast is it? This Article will not resolve these empirical disputes. Instead, this Article will demonstrate that arbitration is not a superior method of dispute resolution, *even if its advocates are empirically correct about the nature of arbitration*.

The idea that arbitration can offer parties a superior dispute-resolution depends on two assumptions. The first is that arbitration's advantages are unparalleled. In other words, arbitration's supposed benefits are significant only if they cannot be matched in litigation. For if the benefits of arbitration can be realized in a traditional courtroom, arbitration is not offering any benefit as an alternative. While both Supreme Court justices[298] and some scholars[299] have explicitly stated the importance of comparing arbitration's benefits to those available in litigation, much of the commentary has focused only on what arbitration can offer while ignoring what litigation already offers.[300]

The second assumption is that arbitration's advantages are mutual to the two parties in dispute. Arbitration is a dispute resolution process; as its proponents argue, arbitration is merely a different way

298. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 363 (2011) (Breyer, J., dissenting) (describing in the context of class actions that "the relevant comparison is not 'arbitration with arbitration' but a comparison between class arbitration and judicial class actions").

299. *See, e.g.*, Horton & Chandrasekher, *supra* note 28, at 77; Ramona L. Lampley, *The Price of Justice: An Analysis of the Costs That Are Appropriately Considered in a Cost-Based Vindication of Statutory Rights Defense to an Arbitration Agreement*, 2013 BYU L. REV. 825, 872–74 (2013).

300. That is not to say that a comparison has never been broached. Speidel, for instance, argues that parties have little control over the speed of court proceedings. Speidel, *supra* note 280, at 160. Brett Stavin, to the contrary, explains that many of arbitration's purported benefits, such as efficiencies in speed and cost, have been mirrored in "customized litigation." Brett J. Stavin, *The Rise of Customized Litigation and Its Effect on Employment Arbitration*, 32 QUINNIPIAC L. REV. 791, 802–03 (2015).

of deciding disputes.[301] But if arbitration is to be judged in these terms, it is only natural to ask whether such a process is fair in the sense of evenhandedness between the parties. If arbitration offers a benefit to one party at the other's expense, we may come to seriously doubt its fairness and, fundamentally, its suitability as a valid method of dispute resolution. Moreover, if the benefits of arbitration incur to one party, that casts serious doubt on whether the other party can be said to have truly consented to it.

The arbitration policy debate has largely ignored the validity of these two assumptions. Arbitration's proponents have simply assumed that they hold, while its detractors have often ignored these issues entirely. Perhaps the most pernicious effect of our collective failure to examine these two assumptions is that it has left almost everyone with the idea that arbitration must have some benefits worth preserving. We have been left with a gauzy view of arbitration wherein even its most ardent critics find it necessary to acknowledge its purported benefits.[302] For example, the arbitration policy debate has been framed as "stem[ming] from the essential conflict between legitimate and illegitimate motives for its use."[303] Public opinion survey data, no less, has revealed a "perception in the U.S. . . . that arbitration or ADR is not per

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301. *See, e.g.*, Bennett & Calloway, *supra* note 253, at 31; *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806 (2015) ("Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a 'dispute resolution' (DR) spectrum."). Note that the Supreme Court's view on this question is more muddled. *Compare* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 229–30 (1987) ("Ordinarily, '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))), *with* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce.").

302. To cite just one example, in a Note critical of mandatory arbitration for propagating "sexual harassment cultures in the workplace," Marsha Levinson devotes a short section to arbitration's benefits. Levinson, *supra* note 219, at 290–92.

303. *Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, *supra* note 20, at 1170–71.

se bad and detrimental to consumers[,] subject[] to a few qualifications."[304]

Moreover, the general failure to examine these assumptions has led to tepid suggestions for reform.[305] Proposals to change arbitration law frequently concede arbitration's benefits. As a result, reform proposals often attempt to preserve arbitration's benefits while trimming its excesses.[306] The sentiment espoused by Miles Farmer is typical: He seeks to avoid changes to the law that "would undermine the central efficiency advantages that mandatory arbitration provides."[307] He then proposes a solution that attempts to "offer[] a viable option for retaining the benefits of mandatory arbitration while at the same time addressing the fundamental lack of accountability and potential bias in arbitral decisionmaking."[308]

Rarely if ever has wholesale repeal of the FAA been suggested. Several pieces of legislation have been introduced to restrict arbitration, though none have passed.[309] Most—including the Arbitration Fairness Act—have sought to preserve the enforceability of arbitration agreements made after a dispute arises.[310] One might be tempted to conclude that these moderate proposals have been offered in a spirit of pragmatism; in other words, legislative proposals may offer "half a loaf" out of a recognition that anything more extreme would never pass. But the piecemeal nature of reform proposals is equally common in the scholarly literature, where such pragmatism is less useful. Scholars have proposed a number of changes to the FAA, many of which are listed below.[311] None, to the best of the author's knowledge, has ever proposed outright repeal. One commentator described "[t]he [v]ery [p]rogressive [p]osition" as advocating only for refusal to enforce pre-

304. Cătălin Gabriel Stănescu, *Arbitrability of Disputes Pertaining to Abusive Debt Collection Practices in the US: Striking the Balance Between Efficiency and Fairness*, 33 OHIO ST. J. ON DISP. RESOL. 233, 241 (2018).

305. *See infra* Section VI.A.

306. *See infra* Section VI.A.

307. Farmer, *supra* note 253, at 2361.

308. *Id.* at 2369.

309. *See infra* Section VI.A.

310. *See infra* notes 411–14 and accompanying text (summarizing the Arbitration Fairness Act).

311. *See infra* notes 420–33 and accompanying text (summarizing scholarly reform proposals).

dispute agreements.[312] Remarkably, even the very progressive position has been swept up in the idea that arbitration offers certain benefits and ought not be disturbed too much.

This phenomenon might be the result of a scholarly penchant for nuance. Nevertheless, it is odd that the legal literature contains so many stinging criticisms of the FAA and its interpretation by the Supreme Court yet contains virtually no calls for simple repeal.[313] Why such hesitancy? The most logical answer is that even the sharpest critics of the FAA often concede that arbitration's speed, efficiency, and other benefits cannot be found in litigation and are beneficial to both parties to a dispute.[314] By attacking those assumptions head-on, this Article aims to enable more adventurous proposals for reform.

B. Non-Unparalleled Advantages

Several of the most frequently touted benefits of arbitration are not, as is assumed, without rival. Many of these purported benefits can be obtained from litigation.[315] Civil procedure in federal court and arbitration rules have come to increasingly resemble each other as federal courts have adapted some of the practices that make arbitration flexible.[316] In the other direction, arbitration has also taken on some of the telltale attributes of litigation; for instance, the *Concepcion* Court noted that "[t]he AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation."[317] One consequence of this development is that many attributes of arbitration—including the benefits cited by its proponents—are often available in litigation.

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312. Ware, *supra* note 147, at 732.

313. The most ambitious proposal of which this author is aware would allow states to hold consumer arbitration clauses unconscionable, but even this proposal would not do away with the FAA wholesale. *See* Jeremy McManus, Note, *A Motion to Compel Changes to Federal Arbitration Law: How To Remedy the Abuses Consumers Face When Arbitrating Disputes*, 37 B.C. J. L. & SOC. JUST. 177, 207 (2017).

314. *See supra* note 302 and accompanying text.

315. This Article examines litigation in federal court. A comparison of arbitration to state court litigation is a task for another day.

316. *See* Stavin, *supra* note 300.

317. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 349 (2011) (first citing SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf; then citing FED. R. CIV. P. 23).

Importantly, civil procedure is incredibly welcoming to (and arguably dependent on) stipulations between the parties. Thus, just as parties can agree to certain arbitration procedures to tailor the process to their needs, so too can they make stipulations to tailor litigation.[318] Brett Stavin, in particular, has written about the phenomenon of "customized litigation."[319] This capacity to tailor litigation means that parties to a dispute can choose procedures facilitating fast and inexpensive dispute resolution in court.[320]

In this Section, I discuss several of the purported benefits of arbitration discussed above and show how these benefits are similarly available inside the courthouse.

1. Speed

Richard Speidel summarizes the often-unspoken assumption that parties in arbitration can choose a speedy affair while those in litigation cannot: "In arbitration, the arbitrator and the parties control the timing, duration, and complexity of the hearings. In judicial proceedings, these matters may be beyond the parties' control."[321]

But is it really true that litigation deprives parties of control over the speed of proceedings, in slowing down resolution of disputes? Let us imagine a stylized lawsuit between two parties. It begins when the plaintiff files a complaint[322] and subsequently serves the defendant with the complaint and a summons.[323] Once the complaint is filed, the defendant may move to dismiss[324] (or move in some other fashion[325]) or file an answer to the complaint.[326] The parties then conduct a discovery

318. *See supra* note 300.

319. Stavin, *supra* note 300, at 796–802.

320. *See* Speidel, *supra* note 280, at 160.

321. *Id.* at 160.

322. FED. R. CIV. P. 3.

323. FED. R. CIV. P. 4(c)(1).

324. FED. R. CIV. P. 12(d).

325. *See, e.g.*, FED. R. CIV. P. 12(e) (motion for a more definite statement), (f) (motion to strike).

326. FED. R. CIV. P. 12(a)(1)(A).

conference[327] and therein create a discovery plan.[328] The parties also conduct a pretrial conference (a "Rule 16" conference)[329] where a scheduling order is set.[330] The parties engage in discovery in accordance with the schedule.[331] At the close of discovery, one or both parties typically moves for summary judgment.[332] After summary judgment comes trial.[333] And finally, the parties will file post-trial motions, most notably motions for judgment as a matter of law[334] and for a new trial.[335]

How long does each step take? The Federal Rules of Civil Procedure provide several deadlines in this regard.[336] If the parties stand

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327. FED. R. CIV. P. 26(f).

328. FED. R. CIV. P. 26(f)(2); *see also* FED. R. CIV. P. 26(f)(3) (discussing the contents of a discovery plan).

329. FED. R. CIV. P. 16(a).

330. FED. R. CIV. P. 16(b).

331. FED. R. CIV. P. 16(b)(3)(A); 26(f)(3)(A), (B).

332. FED. R. CIV. P. 56.

333. *See* FED. R. CIV. P. 39–52.

334. FED. R. CIV. P. 50(b).

335. FED. R. CIV. P. 59.

336. As a general rule, the defendant must be served within ninety days of the complaint being filed. FED. R. CIV. P. 4(m). However, the defendant (when situated within the United States) is required to waive service, or else pay the costs associated with service. FED. R. CIV. P. 4(d)(2). The defendant must be given at least thirty days to waive service. Fed. R. Civ. P. 4(d)(1)(F). A defendant then has twenty-one days to file its motion to dismiss or answer but is given sixty days (if located in the United States) if it agreed to waive service. FED. R. CIV. P. 12(a)(1)(a). The discovery conference occurs "as soon as practicable and in any event at least twenty-one days before" the scheduling conference. FED. R. CIV. P. 26(f)(1). The parties have fourteen days after the conference to submit a proposed discovery plan. FED. R. CIV. P. 26(f)(2). The scheduling order must be entered "as soon as practicable" but no later than ninety days after service, or sixty days after the defendant's appearance. FED. R. CIV. P. 16(b)(2). The scheduling order then sets deadlines for joinder, amendment of the pleadings, discovery, and motion practice. FED. R. CIV. P. 16(b)(3)(A). A party must move for summary judgment within thirty days after the close of discovery. FED. R. CIV. P. 56(b). The Federal Rules defer to district courts to "provide by rule for scheduling trials." FED. R. CIV. P. 40. Typically, the local rules call for a final pretrial conference to set the trial date or include a trial date in the Rule 16 scheduling order. *See, e.g.*, E.D. Mich. R. 16.2; N.D. ILL. CIV. R. 16-1(6); FED. R. CIV. P. 16(b)(3)(vi). After trial, the deadline for post-trial motions is twenty-eight days. FED. R. CIV. P. 50(b), 59(b). As for motions, where not otherwise specified, the Federal Rules require at least fourteen days between a motion being filed and the hearing on that motion,

by these deadlines, the entire scope of litigation is not long. Assuming that a plaintiff takes thirty days to obtain waiver of service, the maximum time between the complaint and the scheduling order is 150 days. From the close of discovery to a summary judgment hearing, forty-four days will pass. Trial to a hearing on post-trial motions takes another forty-four. That is a total of 238 days, or roughly eight months, plus time for discovery and trial. If we assume three months for discovery and one month for trial, the Federal Rules provide a complete case, from complaint to final judgment, in about a year.

Moreover, these Rule-created deadlines contain significant flexibility that could make a case run even faster. The Rules explicitly provide for an "[e]xpedited [s]chedule" to accommodate the interplay between the Rule 16 scheduling conference and the Rule 26(f) discovery conference.[337] The deadline for filing motions to dismiss and answers,[338] and motions for summary judgment[339] may be modified by a court order, and parties may (and often do) file a joint motion seeking such an order. The briefing and hearing schedule for motions in general may also be modified by a court order.[340]

Granted, discovery often takes more than 3 months, but that is a choice made by the parties and allowed by the court. The parties take part in setting the schedule through scheduling and discovery conferences.[341] And discovery can begin very early in the case; it need not wait for motions to dismiss to be decided, though it is common practice for defendants to ask that it does.[342] The parties may also stipulate to limit discovery,[343] and both Rule 16 and Rule 26 allow the court to limit the scope of discovery by order.[344]

One potential variable outside the parties' control is the amount of time the court will take to decide motions, in particular the motion to dismiss, the motion for summary judgment, and post-trial motions.

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though local rules often provide more detailed briefing schedules. FED. R. CIV. P. 6(c)(1); *see, e.g.*, D. HAW. L.R. 7.2; D.N.J. CIV. R. 7.1; W.D. LA. CIV. R. 7.5.

337. FED. R. CIV. P. 26(f)(4).

338. FED. R. CIV. P. 12(a)(1).

339. FED. R. CIV. P. 56(b).

340. FED. R. CIV. P. 6(c)(1)(C).

341. FED. R. CIV. P. 16(b)(3)(A); FED. R. CIV. P. 26(f)(3)(A)–(B).

342. *See* Lynch, *supra* note 261, at 76.

343. FED. R. CIV. P. 26(f)(3)(A), (B), (F); FED. R. CIV. P. 29(b).

344. FED. R. CIV. P. 16(b)(3)(B); FED. R. CIV. P. 26(b)(1)–(2).

While litigators often file these motions as a matter of course, they have no obligation to do so. A party is of course free to file an answer rather than move to dismiss,[345] and no party is compelled to move for summary judgment or for post-trial relief.[346] In fact, if the parties opt for a bench trial, the judge will, in effect, decide these issues at trial.[347] And, as just stated, the parties may proceed with discovery while a motion to dismiss is pending.[348]

Thus, the Federal Rules give the parties tremendous latitude to determine the speed of litigation. Parties who agree to move quickly can easily conclude a case within eight months. If this appears too rosy, consider the fact that the *average* case in the Eastern District of Virginia concludes in 12.1 months.[349] This is not to say that litigation is necessarily speedy, for common experience demonstrates that it is not. It is to say, however, that litigation can be speedy, should the parties choose to make it so.

Procedures for arbitration are not as uniform as they are for civil litigation. In arbitration, the parties have significant latitude in determining what procedures they will follow.[350] For that reason, a detailed description of the procedural steps in arbitration is not feasible. Nevertheless, the average length of arbitration proceedings is eight months, a time frame comparable to what can be achieved in civil litigation.[351]

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345. FED. R. CIV. P. 12(b) ("A party *may* assert the following defenses by motion . . . .") (emphasis added).

346. FED. R. CIV. P. 56(a) ("A party *may* move for summary judgment . . . .") (emphasis added).

347. Motions to dismiss, for summary judgment, and for post-trial relief all ask the court to rule on legal questions only if material factual disputes are absent. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57, 570 (2007)) (motion to dismiss); FED. R. CIV. P. 56(a) (summary judgment); FED. R. CIV. P. 50(a)(1) (judgment as a matter of law). In other words, these motions seek court rulings on legal issues while fact questions are reserved for the factfinder at trial. In a bench trial, the court makes both factual and legal decisions, combining these motions' legal queries with factual ones. FED. R. CIV. P. 52(a)(1).

348. *See supra* note 261 and accompanying text.

349. *Rocket Docket*, DIMURO GINSBERG PC, https://www.dimuro.com/about-our-firm/rocket-docket/ (last visited Nov. 14, 2020).

350. *See* Bonney, *supra* note 288, at 177.

351. *See* Horton & Chandrasekher, *supra* note 28, at 101; *see also* Bulgarella, *supra* note 247, at 379 (claiming an average time of seven months).

2. Cost

Just as the parties may tailor litigation to make it faster, they may also work together to make it less expensive. As arbitration proponents have noted, cost is often a variable of time, so a shorter case will also be a cheaper one.[352] Therefore, the same tools that allow parties to agree to a shorter case also allow them to agree to a less expensive one.

In addition to agreeing to a shorter schedule, the parties can also agree to narrow the scope of issues in dispute. Rule 36 allows one party to "request to admit, for purposes of the pending action only, the truth of any matters within the scope" of discovery,[353] including "facts, the application of law to fact, or opinions about either."[354] The opposing party may then admit the fact, "conclusively establish[ing it]."[355] A party need not worry that its admission will handicap it in another case, for "[a]n admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."[356]

Consider how the use of requests for admission can drastically simplify a contract case, for example, the famous "chicken case" of *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*[357] Plaintiff and Defendant entered into two contracts for the sale of "U.S. Fresh Frozen Chicken, Grade A, Government Inspected."[358] When the shipments arrived, however, the plaintiff was dismayed to find "the . . . birds were not young chicken suitable for broiling and frying but stewing chicken or 'fowl.'"[359] Judge Friendly memorably described the subsequent dispute as follows: "The issue is, what is chicken? Plaintiff says 'chicken' means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls

352. *See* Bennett & Calloway, *supra* note 253.
353. FED. R. CIV. P. 36(a)(1).
354. FED. R. CIV. P. 36(a)(1)(A).
355. FED. R. CIV. P. 36(b).
356. *Id.*
357. 190 F. Supp. 116 (1960).
358. *Id.* at 117.
359. *Id.*

'stewing chicken' and plaintiff pejoratively terms 'fowl.'"[360] The parties presented their arguments based on their pre-contract correspondence, prevailing trade usage, a regulatory definition, market prices, and post-contract behavior. [361]

The parties in the "chicken case" could have stipulated the fact that they entered into contracts, the language of those contracts, the contents of their pre- and post-contract correspondence, the shipments that were made, the quality of chicken in those shipments, and the relevant market prices, through requests for admission. Once that uncontroversial brush was cleared, the parties' dispute would have focused on witnesses who could testify as to trade usage and the legal arguments surrounding contract interpretation. If the parties had wished to simplify even further, they could have agreed to forgo witnesses as to trade usage, instead referring the court to written documents on that question. In this case, the central issue was, "what is chicken?"[362] The parties could have used stipulations to focus their resources on that central issue. Parties in other cases could do likewise.

Additionally, while proponents of arbitration often argue that limited discovery helps to control costs in arbitration,[363] parties to litigation have incredible control over the amount of discovery they wish to permit. These limits on discovery are not merely theoretical; "[a]vailable empirical evidence suggests that [discovery] is not used at all in more than half of the civil cases pending in the federal courts."[364] Moreover, arbitration proceedings have become more likely to involve discovery, showing that the contrast between arbitration and litigation as it pertains to the scope of discovery is not as stark as often supposed.[365]

Finally, we should briefly address the argument that arbitration is not just less costly on the whole, but specifically less costly for the individual employee or consumer.[366] Regardless of whether that argument holds water, the parties are entirely free to contract to reduce costs

360. *Id.* at 116.
361. *Id.* at 118–21.
362. *Id.* at 116.
363. *See supra* note 262 and accompanying text.
364. Aragaki, *supra* note 273, at 156.
365. *Id.* at 156–57.
366. *See supra* notes 264–265 and accompanying text.

for the plaintiff. For instance, nothing prevents parties from agreeing, either pre- or post-dispute, that the defendant will pay the filing fee.

3. Finality

At first glance, arbitration appears to offer a serious benefit in terms of finality, as substantive review of an arbitrator's decision is effectively unavailable.[367] But, as with other purported benefits of arbitration, this benefit is available in litigation as well.

An issue that sometimes arises in litigation is whether a party agreeing to a consent judgment presumptively waives the right to appeal.[368] In such a case, it is clear that a party has the power to waive that right.[369] A rarer occurrence is the parties' agreement not to appeal a judgment that has not yet been entered. An analogous case recently arose in the Third Circuit. In *In re Odyssey Contracting Corp.*, the parties had agreed that if the bankruptcy court made a particular determination on a matter before it, the parties would "'dispose[] of in their entirety with prejudice' pending claims, and that the proceeding shall be deemed to be finally concluded in all respects."[370] The Third Circuit interpreted this agreement as an enforceable waiver of the right to appeal.[371] In a case less controversial than *In re Odyssey*—that is, a case where the parties explicitly agree not to appeal the judgment of the district court—there is little doubt that the appellate waiver will be upheld.[372] Just as in arbitration, then, the right to appeal may be effectively waived.

4. Informality, Simplicity, and Customizability (With a Focus on Evidence Rules)

The sections on speed and cost both demonstrated how the parties may tailor litigation to suit their needs.[373] For example, parties can

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367. *See supra* Sections III.D and IV.C.3.

368. *See, e.g.*, Anderson v. White, 888 F.2d 985 (1989); Clapp v. Comm'r, 875 F.2d 1396 (1989).

369. *See id.*

370. 944 F.3d 483, 487–88 (3d Cir. 2019).

371. *See id.* at 490.

372. *See* Stavin, *supra* note 300, at 802.

373. *See supra* Sections IV.C.1, IV.C.2.

reduce motion practice,[374] agree to narrow the scope of discovery,[375] and stipulate to facts in order to thereby narrow the dispute to one or two key issues.[376] Thus the benefits of informality, simplicity, and customizability claimed by arbitration proponents are also available in litigation.

In fact, even the minefield of evidence law does not prevent litigation from matching the informality and simplicity that arbitration can provide. The rules of evidence, such as the hearsay rule and its many exceptions,[377] often appear esoteric and complex. Thus, it is sometimes argued that arbitration is friendlier to the parties because it ignores these burdensome provisions.[378] But this ignores the parallel features of litigation. Parties may, at least in certain circumstances, stipulate to allow evidence that is not otherwise admissible. The Supreme Court has called such stipulations "a valuable and integral part of everyday [criminal] trial practice."[379]

In the civil context,[380] the Federal Rules of Civil Procedure allow requests for admission as to "the genuineness of any described documents."[381] Parties can likewise stipulate to allow hearsay evidence that otherwise would be admissible.[382] The power of stipulations, simply put, works just as strongly in terms of the evidentiary rules as it does in pretrial civil procedure.

It is important to note here that courts have occasionally asserted the power to exclude evidence in the face of parties' arguments as to its admissibility.[383] It is unclear, however, how frequently such a thing

374. *See supra* Section IV.C.1.

375. *See supra* Section IV.C.1.

376. *See supra* Section IV.C.2.

377. FED. R. EVID. 801–04.

378. *See, e.g.*, Bulgarella, *supra* note 247, at 387.

379. U.S. v. Mezzanatto, 513 U.S. 196, 202–03 (1995); *see also* Hawkins v. Hannigan, 185 F.3d 1146, 1154 (10th Cir. 1999) (citing Brookhart v. Janis, 384 U.S. 1, 4 (1966)) (noting that a criminal defendant may waive his right under the Confrontation Clause).

380. Stavin believes that *Mezzanatto*'s reasoning is readily applicable to the civil context, particular to employment litigation. *See* Stavin *supra* note 300, at 801.

381. FED. R. CIV. P. 36(a)(1)(B).

382. Pittman by Hamilton v. City of Madison, 863 F.3d 734, 736 (7th Cir. 2017).

383. Pickett v. Lindsay, 56 F. App'x 718, 723 (7th Cir. 2002) (citing Noel Shows, Inc. v. United States, 721 F.2d 327, 330 (11th Cir.1983)).

occurs and, if it does occur, whether it seriously complicates proceedings for the litigants.

Leaving aside the fact that parties can stipulate around the Federal Rules of Evidence, it is not evident that informality in evidence rules makes arbitration superior to litigation. Aragaki argues that, just as with discovery, the differences in practice between arbitration and litigation in terms of evidence rules are not as significant as they may appear:

> Consider what happens in arbitration when a party introduces hearsay testimony or a document that is alleged to bear the signature of a particular individual. Does the fact that there are no governing rules of evidence mean that the other side will be prevented from raising an objection or that the arbitrator will admit the evidence without batting an eyelid? Unlikely. Nor does it necessarily mean that the other side will fail to raise an objection, since it does not take legal training to appreciate the reliability problems inherent in hearsay testimony and unauthenticated documents. To be sure, there is no guarantee that the objection will actually be raised by a party or properly considered by the arbitrator in these circumstances. But the same is true in court, since evidentiary objections can be (and often are) waived. And even when the objection is made, any error in admitting or rejecting the evidence is typically reviewable only if it had a demonstrable, non-harmless effect on the outcome.[384]

As this and previous sections have demonstrated, the benefits of informality, simplicity, and customizability present are available in litigation just as much as in arbitration.

5. Privacy

As a preliminary note, the purported benefit of privacy (or, cast in another light, secrecy) could easily be discussed under the subsequent Section, for it is not clear that privacy presents a mutual advantage to parties. While individuals might benefit from privacy in

384. Aragaki, *supra* note 273, at 162.

dispute resolution,[385] several commentators have noted that the privacy of arbitration inures largely to the benefit of large corporate defendants, who often use privacy protections to hide their misbehavior.[386]

That being said, privacy is not unique to arbitration. As traditionally understood, the public has a right of access to court proceedings.[387] But a series of procedural changes in the past several decades—including expanded use of protective orders, sealed filings, and other measures—has allowed parties to effectively close off sensitive information from public view.[388] Judith Resnick explains that changes to Federal Rules mean that discovery materials and settlements are generally not disclosed.[389] In addition to these procedural changes, "the growing use of settlement as a legitimate means of resolving disputes" means that "a large percentage of court cases do not become part of the public record as settlements generally go unreported."[390] These developments have been sharply criticized on a number of fronts.[391] But right or wrong, the reality is that arbitration is no longer the only venue in which privacy can be attained.[392]

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385. Karen A. Lorang, Comment*, Mitigating Arbitration's Externalities: A Call for Tailored Judicial Review*, 59 U.C.L.A. L. REV. 218, 235 (2011).

386. *See e.g.*, Deborah R. Hensler & Damira Khatam*, Reinventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 422 (2018); Levinson, *supra* note 219, at 515–16; Imre S. Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127, 141 (2018).

387. *See* Shira Poliak, Comment, *The Logic of Experience: The Role of History in Recognizing Public Rights of Access Under the First Amendment*, 167 U. PA. L. REV. 1561 (2019).

388. Michelle Conlin et al., *Why Big Business Can Count on Courts to Keep Its Deadly Secrets*, REUTERS (Dec. 19, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lobbyist/.

389. *See* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 631 (2018).

390. Raymond, *supra* note 72, at 688.

391. *See* Resnik, *supra* note 389, at 675–76; Conlin et al., *supra* note 388.

392. Thus, Stavin does not go quite far enough by stating that parties have a limited ability to close off proceedings to the public. Stavin, *supra* note 300, at 804.

C. Non-Mutual Advantages

This Article has just reviewed many of the cited benefits of arbitration, finding that they are equally achievable in litigation. Two purported benefits of arbitration remain to be discussed: expertise and substantive outcomes. As this Section will demonstrate, these benefits do not offer mutual benefits to the parties. Instead, they tend to favor one party or another.

1. Expertise

On its face, expertise appears to offer a serious benefit for both parties to litigation. It is well known that judges are generalists with no particular knowledge of the specialized areas of law that come before them. To cite just one example, in 2014 Rebecca Cohen published an article in *Mother Jones* cataloguing the Supreme Court's ignorance on technological issues.[393] The humorous anecdotes are many, including Justice Breyer "say[ing] that he wasn't sure if he owned an iPhone, 'because I can never get into it because of the password.'"[394] Chief Justice Roberts remarked that coding "looks pretty complicated. There are a lot of arrows."[395] Surely it would be better for an adjudicator to be knowledgeable in the specific factual and legal area in which the case arises. How could it not be?

As convincing as the argument for expertise appears, expertise is not necessarily a benefit to both parties to a case, particularly in the types of cases most frequently subject to arbitration (and most controversial in the arbitration debate). This is because expertise can be correlated with bias. Where two parties are in the same social category, it is likely that an arbitrator in that same category will provide beneficial expertise without being biased towards one party or the other. For example, in a patent infringement case between two technology behemoths, a judge or arbitrator with previous experience in the technology industry can provide useful expertise that inures to the benefit of both parties.

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393. Rebecca Cohen, *Sexting, Email, and Other Tech Basics that Mystify the Supreme Court*, MOTHER JONES (June 25, 2014), https://www.motherjones.com/politics/2014/06/supreme-court-tech-fails-sexting-aereo/.

394. *Id.*

395. *Id.*

But in a case where the parties come from different groups, experience may come with bias. Take, for example, a case brought by a consumer who claims to be deceived by a "100% pure and natural" label on a container of orange juice.[396] What kind of person would have the expertise to adjudicate this kind of case? A person who has worked in the area of product labeling. What kind of person would have such experience? Someone who had worked in a food-product company just like the defendant. While an arbitrator in that case is likely more experienced than a generalist judge, the consumer will rightly be concerned that the arbitrator tends to see the issues from one perspective. Expert arbitrators are most likely infected with bias in the kinds of cases where the parties come from different groups: producers and consumers, employers and employees. It is exactly these areas where arbitration clauses are pervasive[397] and where commentators have been most concerned with unequal bargaining power in the formation of arbitration agreements in the first place.[398]

Admittedly, cases involving parties in the same social category do not raise quite the same concerns about bias. In these cases, the concern is not so much a conflict between the interests of one party versus those of another but rather between the interests of the parties versus the public interest in accurate enforcement of the laws. To cite one example, a musician might accuse another of infringing on a copyrighted song, while the other musician might claim to have permissibly sampled the original.[399] Musicians, aided by an arbitrator with a background in the field, may have a particular view about what degree of sampling is appropriate, and that view might contrast with the public's view of copyright law as enacted by the people's representatives in Congress. Another example comes in the form of religious arbitration, where the arbitrator resolves a dispute according to religious principles.[400] Even if both parties to the dispute agree that religious

396. This was the dispute at issue in *In re Tropicana Orange Juice Mktg. and Sales Practices Litig.*, 2019 WL 2521958, No. 2:11-07382, at *1 (D.N.J. June 18, 2019).

397. *See* Cole, *supra* note 227, at 458 n.2.

398. *See supra* Section IV.B.1.

399. *See, e.g.*, TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 593–95 (S.D.N.Y. 2013).

400. *See* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3014–22 (2005).

doctrine should govern the dispute, religious doctrine clearly conflicts with the law established by the public, and some public value is being lost. [401]

2. Better Substantive Outcomes

Finally, arbitration cannot be justified on the grounds that it favors one party over another. The law of federal judicial recusal provides an apt analogy here. Parties to a case may waive a conflict created by the fact that a judge's "impartiality might reasonably be questioned," but not in other circumstances—such as where the judge has an actual personal bias; personal knowledge of the facts of the case; a financial stake in the litigation; or a family relationship to a party, attorney, or witness.[402] In other words, the parties may agree to an adjudicator who *appears* biased, but not to one who is *actually* biased or whose circumstances strongly suggest bias.

The federal law on judicial recusal is a sensible one, resting on a sensible idea: that parties cannot consent to a clearly biased adjudicator. If we accept that principle, even in its weakest form, then it is a detriment, not a benefit, that arbitration favors one side over the other.

3. A Possible Objection

The assumption of this Section has been that arbitration's benefits should be disregarded if they are not mutual. In other words, if an attribute of arbitration benefits only one party, then that attribute makes a poor argument for arbitration.

One objection to this argument should be noted, and it proceeds as follows: arbitration is a matter of contract, and parties to a contract are entirely free to bargain away certain advantages in exchange for other things they might want. [403] Take, for example, a simple employment contract where a worker agrees to come to work and perform

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401. *See* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 2680 (2015). For two works that, read together, suggest the opposite conclusion, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) and MARK OSIEL, THE RIGHT TO DO WRONG: MORALITY AND THE LIMITS OF LAW (2019).

402. 28 U.S.C. § 455(a), (b), (e).

403. Margaret Jane Radin calls this the "contract-as-product" view. For a longer discussion, and rebuttal to this point, see RADIN, *supra* note 224, at 99–109.

certain tasks from 9:00 to 5:00 each weekday, in exchange for pay at an hourly rate. Now it is true that the provision wherein the worker agrees to show up at work every day is beneficial to the employer but not the worker. Conversely, the provision where the worker gets paid clearly benefits the worker over the employer. Different provisions of this contract benefit one party but not the other, yet courts will readily enforce the contract in the absence of some exceptional circumstance, like mistake or duress.[404] And courts will do so *precisely because* the parties have both consented to give up something for something else (here, time and labor for money).[405] Each party must have believed that the trade-off was "worth it" to them; otherwise, they would not have consented. An arbitration clause is no different from any other clause in this respect. Sure, arbitration might benefit one party over another, but the party who loses out on the arbitration front will agree to the contract only if he gains other benefits elsewhere in the contract sufficient to compensate for that loss.

To this serious objection I offer two responses, one empirical and the other theoretical. On the empirical side, we may seriously question to what degree individuals are consenting to arbitration clauses. These clauses often arise in contracts of adhesion, making negotiation over terms impossible.[406] While consumers, employees, and others can "vote with their feet" by working with another company, it is unlikely that anyone is actually doing so, especially given the small numbers of people who actually read and understand what they sign.[407] And in industries where all major players require arbitration, it is unlikely that individuals have any meaningful choice over whether or not to arbitrate their claims.[408]

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404. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (AM. LAW INST. 2019) ("Valuation [of the things exchanged] is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions.").

405. The requirement that contracts have consideration ensures that some trade-off occurred. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 2019).

406. *See supra* note 221.

407. *See supra* note 220; *see also* RADIN, *supra* note 224, at 104–05.

408. For example, "[e]very major cell phone and internet service provider in the country includes a mandatory arbitration clause in its standard Terms and Conditions for service." John C. Ferrell, Comment, *Reopening the Courtroom Doors: A Proposal*

Moreover, if parties were actually choosing to make themselves worse off by agreeing to arbitration in exchange for some other contractual benefit, that outcome should appear empirically. To cite an analogous case, there is empirical evidence that workers in dangerous jobs are paid more than those in otherwise similar but less dangerous jobs.[409] These findings suggest that workers are trading off safety for monetary compensation. But the I am aware of no scholarship attempting to argue that the same is true for arbitration. For example, no study compares consumer contracts with and without arbitration clauses, finding that those with arbitration clauses offer consumers lower prices, better warranties, or any other benefit.

Aside from the empirical response to this objection, there are theoretical grounds for treating arbitration clauses differently from other contractual provisions. An agreement to arbitrate is simply an agreement to bring disputes before a particular forum; it is not, in theory, an agreement to waive or weaken rights provided by statute.[410] Imagine that an employment agreement contained a provision reading "all disputes shall be decided in employer's favor." That provision should not be enforceable, even if the contract otherwise provides very generous terms to the employee. Similarly, imagine that the employment contract said, "no case shall be brought against employer under Title VII." Again, this provision would be objectionable.[411] An agreement to forfeit one's legally established remedies is qualitatively different from an agreement to, say, obtain a better price for services. One reason for this difference may be the existence of a public interest in

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for an FCC Prohibition of Mandatory Arbitration Clauses, 36 CAP. U. L. REV. 159, 163–64 (2018).

409. *See* Robert C. Hughes, *Paying People to Risk Life or Limb*, 29 BUS. ETHICS Q. 295, 302 (2019) ("There is evidence that dangerous jobs do tend to pay more than physically safe jobs when skill level and other factors that affect wages are taken into account . . . .").

410. *See supra* note 301 and accompanying text.

411. *Cf.* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 241 (2013) (Kagan, J., dissenting) ("Start with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability—say, 'Merchants may bring no Sherman Act claims'—even if that clause were contained in an arbitration agreement."); RADIN, *supra* note 224, at 230 ("[A] purported contract that excluded all recourse to legal remedy [would not] be a contract, because the concept of contract implies legal enforceability; that is what distinguishes contract from mere extralegal promising.").

upholding the law, outside of private parties' wishes to enforce it or not.[412] This interest was cited by Justice Kagan in her *American Express Co. v. Italian Colors* dissent, specifically in the context of antitrust law.[413] The principle arguably extends to other areas of law as well.

To be sure, the theoretical response outlined here requires more exploration. For example, one would need to explain why its logic would not serve to invalidate forum-selection clauses or settlement agreements (or, perhaps, why it would). While the theoretical rebuttal has not been fully built here, it (combined with the empirical rebuttal above) should at least cast doubt on whether the argument for consent trumps concerns about non-mutual benefits.

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As these last several pages have demonstrated, there are no benefits to arbitration that are both unparalleled and mutual. In short, no sturdy argument supports the often-cited "strong federal policy favoring arbitration."[414]

VI. WHAT IS TO BE DONE?

"Congressional correction of the Court's elevation of the FAA over the rights of employees and consumers to act in concert remains urgently in order."[415]

If arbitration offers no genuine and mutual benefits, what is to be done with the FAA and the jurisprudence surrounding it?

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412. *See* Noll, *supra* note 3, at 1030–31; *see also* RADIN, *supra* note 224, at 166–67 (connecting the right of redress to the rule of law).

413. 570 U.S. 228, 241 (2013) (Kagan, J., dissenting) ("Congress created the Sherman Act's private cause of action not solely to compensate individuals, but to promote 'the public interest in vigilant enforcement of the antitrust laws.' (quoting Lawlor v. National Screen Service Corp., 349 U.S. 322, 329 (1955))).

414. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 290 (2002); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("a liberal federal policy favoring arbitration agreements"); Cole, *supra* note 69, at 469 (noting, and disputing, the Court's frequent evocation of a "'congressional policy' requiring courts to construe liberally the scope of arbitration agreements covered by the FAA").

415. Epic Sys. Corp. v. Lewis, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

Unfortunately, it does not appear that the Supreme Court will tighten its expansive readings of the FAA. As described above, the Supreme Court has expanded the reach of this statute tremendously over the years, almost never moving in the opposite direction.[416] If reform through the judiciary is unavailable, then legislative (or regulatory)[417] change must be sought. Existing proposals for legislation are many, though in light of this Article's earlier findings, inadequate.

A. Proposals for Reform

Members of Congress have introduced a slew of bills that would modify the FAA.[418] Perhaps the most notable is the Arbitration Fairness Act, a version of which has been introduced in many sessions of Congress,[419] and which passed in the House of Representatives in 2019.[420] That bill would prevent enforcement of pre-dispute arbitration clauses in employment, consumer, franchise, or civil rights cases.[421]

Other federal legislation has also been introduced. The Mandatory Arbitration Transparency Act specifically targets confidentiality clauses in arbitration agreements.[422] The Restoring Statutory Rights

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416. *See supra* note 129 and accompanying text. *See generally supra* Section III.

417. *See* Noll, *supra* note 3, at 684–86.

418. *See* Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 386 (2010) (noting that nine bills addressing the FAA were introduced in the 107th Congress); *see also* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1349 (2011) (providing an appendix of proposed legislation); Noll, *Arbitration Conflicts*, *supra* note 2, at 740–42 (appendix of passed statutes).

419. *See, e.g.*, Arbitration Fairness Act of 2018, S. 2591, 115th Cong.; *see also* Igor M. Brin, The Arbitration Fairness Act of 2009, 25 OHIO ST. J. ON DISP. RESOL. 821, 834–38 (2010); M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need To Be Implemented for #Metoo Victims,* 43 SETON HALL LEGIS. J. 215, 238–39 (2019) (discussing 2018 reintroduction).

420. Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.

421. *Id.*

422. Mandatory Transparency Arbitration Act of 2017, S. 647, 115th Cong.; *see also* Chaudry, *supra* note 419, at 239–40.

and Interests of the States Act would prevent enforcement of pre-dispute arbitration agreements, "allow federal and state courts to apply their respective jurisdictional laws concerning contract interpretation to find arbitration provisions unconscionable or unenforceable," and "give to the courts, not arbitrators, the essential task of determining whether an arbitration agreement is enforceable in the first place."[423]

The Ending Forced Arbitration of Sexual Harassment Act would invalidate predispute agreements to arbitrate sex discrimination claims (not just sexual harassment claims).[424] The Arbitration Fairness for Consumers Act would invalidate predispute agreements, as well as predispute class and joint action waivers, for cases related to a consumer financial product or service.[425]

State-level legislation has also been proposed, though the FAA would likely preempt it in large part.[426] The National Consumer Law Center propounds a Model State Consumer and Employee Justice Enforcement Act for states, which would require clear notice for arbitration clauses, expand the scope of unconscionability, void forced arbitration clauses outside the scope of the FAA, and require arbitration providers to disclose various information, among other provisions. [427]

Legislation has also been proposed in the academic literature. Amy Schmitz proposes regulations for disclosure of arbitration clauses in order to increase consumer awareness and choice.[428] Farmer suggests, among other things, selective government enforcement actions to prevent bias in arbitration.[429] Levinson suggests both an exemption

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423. Restoring Statutory Rights and Interests of the States Act of 2016, S. 2505, 114th Cong. Note that there is also the Restoring Statutory Rights and Interests of the States Act of 2019, S. 635, 116th Cong., which would make arbitration agreements in certain commercial contracts unenforceable where an individual or a small business, in a claim arising subsequent to the agreement, alleges a violation of a federal or state statute or constitution. *See also* Chaudry, *supra* note 419, at 242.

424. Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong.; *see also* Chaudry, *supra* note 419, at 243–46.

425. Arbitration Fairness for Consumers Act of 2019, S. 630, 116th Cong.

426. *See* Brunino, *supra* note 225, at 591.

427. DAVID SELIGMAN, MODEL STATE CONSUMER AND EMPLOYEE JUSTICE ENFORCEMENT ACT 39–40 (2015), https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf; *see also* Brunino, *supra* note 225, at 591–606.

428. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reform*s, 15 HARV. NEGOT. L. REV. 115, 165–72 (2010).

429. *See* Farmer, *supra* note 253, at 2369.

for certain statutory claims and state regulation of employment arbitration to increase procedural protections. [430] Sarah Cole proposes a ban on class action waivers in consumer cases.[431] Nimmer would ban mandatory arbitration but allow voluntary arbitration.[432] Jean Sternlight calls for greater court scrutiny towards arbitration decisions, among other proposals.[433] Thomas Burch offers a laundry list of changes, including the ability of some parties to opt out of arbitration for small claims,[434] disclosures by arbitrators,[435] required data collection by arbitration providers,[436] a ban on certain unconscionable provisions (including class action waivers),[437] and expanded judicial review.[438] Imre Szalai offers attorney ethics rules as a means of curbing arbitration's abuses.[439] Jeremy McManus suggests amending the FAA to allow states to find forced arbitration clauses in consumer contracts unconscionable.[440]

While the proposals for legislative change are numerous, they share many common features. Many distinguish between pre-dispute and post-dispute arbitration agreements and seek to eliminate or seriously limit enforcement of only the former.[441] Some single out arbitration clauses in particular types of contracts, notably employment and consumer contracts.[442]

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430. *See* Levinson, *supra* note 219, at 522–23.

431. *See* Cole, *supra* note 227, at 498.

432. *See* Nimmer, *supra* note 225, at 210.

433. *See* Sternlight, *supra* note 35, at 710–11.

434. *See* Burch, *supra* note 418, at 1349.

435. *See id.* at 1350–51.

436. *See id.* at 1351–52.

437. *See id.* at 1352.

438. *See id.* at 1353–54.

439. Szalai, *supra* note 386, at 162–83.

440. McManus, *supra* note 313, at 207 (proposing "an amendment to the FAA expressly stating that nothing found within the FAA should prevent states from being able to declare forced consumer arbitration clauses unconscionable").

441. McGill, *supra* note 4188, at 398.

442. *See* McManus, *supra* note 313, at 207.

B. The Need to Reach Further

As suggested earlier,[443] existing proposals are too tepid. The arguments that have been made on behalf of arbitration are simply not convincing; every benefit that arbitration supposedly offers is either available in litigation or not mutual to the parties. In light of arbitration's lack of benefits, its detriments still remain. Why, then, should arbitration agreements be countenanced at all? Certainly, why should there remain a "strong federal policy favoring arbitration?"[444]

It is worth dwelling, at least for a moment, on the oft-suggested approach of allowing arbitration agreements made post-dispute while forbidding or curtailing those made pre-dispute. At first, this approach appears promising, for it diminishes concerns about contracts of adhesion and questionable consent in consumer and employment contracts.[445] But closer inspection reveals that this proposal simply sidesteps the main concerns raised by this Article. If arbitration's benefits are in fact illusory, there is no purpose in encouraging it at all, either pre- or post-dispute.

In the absence of any convincing argument in favor of arbitration and in light of its downsides, the FAA should simply be repealed. From there, individual states would likely decide whether to honor arbitration agreements. But if arbitration offers costs without benefits, states should refuse to enforce such agreements as well.

Wholesale repeal of the FAA and state-level hostility to arbitration would not spell Armageddon. The law would simply return to its previous state. Before the FAA, courts were incredibly skeptical of arbitration clauses.[446] It is time for us to admit that they were right.

VII. CONCLUSION

The FAA has created a long string of judicial precedent and engendered serious disagreement in the academic literature. Opponents of arbitration have attacked it on many policy grounds. On the other side of the debate, proponents have made a number of arguments for arbitration: that it is speedier, less costly, and final; that it is informal,

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443. For a discussion of existing proposals, see *supra* Section V.

444. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 290 (2002).

445. For a discussion of these concerns, see *supra* Section IV.B.1.

446. *See* Harding, *supra* note 37 and accompanying text.

simple, and customizable; and that it offers privacy, expertise, and better substantive outcomes.

Whether or not the benefits of arbitration can be found to exist empirically, none of these benefits are both unparalleled and mutual. Several of arbitration's touted benefits—speed, cost, finality, informality, simplicity, and customizability, and privacy—can be matched in litigation. Other benefits—expertise and substantive outcomes—tend to benefit one party over another and are thus inadequate justifications for arbitration.

Because arbitration has significant detriments and lacks any unparalleled and mutual benefits, the FAA should be repealed. The traditional judicial skepticism toward arbitration was well-founded. It is well past time to renew that skepticism and enshrine it in law.

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